The European Journal of International Law Vol. 23 no. 3

Human Rights and the Environment: Where Next?

Alan Boyle*

Abstract

The relationship between human rights and environmental protection in international law is far from simple or straightforward. A new attempt to codify and develop international law on this subject was initiated by the UNHRC in 2011. What can it say that is new or that develops the existing corpus of human rights law? Three obvious possibilities are explored in this article. First, procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account. Secondly, a declaration or protocol could be an appropriate mechanism for articulating in some form the still controversial notion of a right to a decent environment. Thirdly, the difficult issue of extra-territorial application of existing human rights treaties to transboundary pollution and global climate change remains unresolved. The article concludes that the response of human rights law – if it is to have one – needs to be in global terms, treating the global environment and climate as the common concern of humanity.

1 Is the Environment a Human Rights Issue?

Why should environmental protection be treated as a human rights issue? There are several possible answers. Most obviously, and in contrast to the rest of international environmental law, a human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general. It may serve to secure higher standards of environmental quality, based on the obligation of states to take measures to control pollution affecting health and private life. Above all it helps to promote the rule of law in this context: governments become directly accountable for their failure to regulate and control environmental nuisances, including those caused by corporations, and for facilitating access to justice and enforcing environmental laws and judicial

* Professor of Public International Law, School of Law, University of Edinburgh, and barrister, Essex Court Chambers, London. The text formed the basis of an Amnesty International lecture delivered at Oxford University in May 2012. Email: aeb1953@msn.com.

decisions. Lastly, the broadening of economic and social rights to embrace elements of the public interest in environmental protection has given new life to the idea that there is, or should be, in some form, a right to a decent environment.

Remarkably, the environmental dimensions are rarely discussed in general academic treatments of human rights law, where there is almost no debate on the relationship between human rights and the environment.[1] Thus the literature is mainly written by environmentalists or generalist international lawyers.[2] But the growing environmental caseload of human rights courts and treaty bodies nevertheless indicates the importance of the topic in mainstream human rights law. It is self-evident that insofar as we are concerned with the environmental dimensions of rights found in avowedly human rights treaties – the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the American Convention on Human Rights (AmCHR), and the African Convention on Human and Peoples' Rights (AfCHPR) – then we are necessarily talking about a 'greening' of existing human rights law rather than the addition of new rights to existing treaties. The main focus of the case law has thus been the rights to life, private life, health, water, and property. Some of the main human rights treaties also have specifically environmental provisions,[3] usually phrased in relatively narrow terms focused on human health,[4] but others, including the ECHR and the ICCPR, do not. The greening of human rights law is not only a European phenomenon, but extends across the IACHR, AfCHPR, and ICCPR. Judge Higgins has drawn attention to the way human rights courts 'work consciously to co-ordinate their approaches.'[5] There is certainly evidence of convergence in the environmental case law and a cross-fertilization of ideas between the different human rights systems.[6]

1 P. Alston, H. Steiner, and R. Goodman, *International Human Rights in Context* (3rd edn, 2008) and O. De Schutter, *International Human Rights Law* (2010) refer to some of the precedents and list 'environment' in their indexes but there is no significant discussion of the precedents from an environmental perspective. Compare Loucaides, 'Environmental Protection through the Jurisprudence of the ECHR', 75 *BYBIL* (2004) 249 and Desgagné, 'Integrating Environmental Values into the ECHR', 89 *AJIL* (1995) 263.

2 See in particular D. Anton and D. Shelton, *Environmental Protection and Human Rights* (2011); Francioni, 'International Human Rights in an Environmental Horizon', 21 *EJIL* (2010) 41; D. Bodansky, J. Brunnée, and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (2007), at chs 28 and 29; Boyle, 'Human Rights or Environmental Rights? A Reassessment', 18 *Fordham Environmental L Rev* (2007) 471; A.E. Boyle and M.R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996). Even environmental lawyers can be blind to the human rights perspectives: there is no reference to them in C. Streck *et al.*, *Climate Change and Forests, Emerging Policy and Market Opportunities* (2010).

3 The most important is Art. 24, 1981 AfCHPR, on which see *Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria ('SERAC v. Nigeria* – the *Ogoniland Case')*, AfCHPR, Communication 155/96 (2002), at paras. 52–53.

4 E.g., ICESCR 1966, Art. 12; European Social Charter 1961, Art. 11; Additional Protocol to the AmCHR 1988, Art. 11; Convention on the Rights of the Child 1989, Art. 24(2)(c). See Churchill, 'Environmental Rights in Existing Human Rights Treaties', in Boyle and Anderson (eds), *supra* note 2, at 89.

5 Higgins, 'A Babel of Judicial Voices?', 55 *ICLQ* (2006) 791, at 798. See also *Diallo Case (Guinea v. Democratic Republic of Congo)* [2010] ICJ Rep, at paras 64–68.

6 See Judge Trindade in *Caesar v. Trinidad and Tobago* (2005) IACHR Sers. C, No. 123, at paras 6–12: '[t]he converging case-law to this effect has generated the common understanding, in the regional (European and inter-American) systems of human rights protection' (at para. 7).

The rapid development of environmental jurisprudence in Europe has resulted in the consistent rejection of proposals for an environmental protocol to be added to the ECHR.[7] However, a *Manual on Human Rights and the Environment* adopted by the Council of Europe in 2005 reviews the Court's decisions and sets out some general principles.[8] In summary, cases such as *Guerra*, *Lopez Ostra, Öneryildiz, Taskin*, *Fadeyeva, Budayeva,* and *Tatar* show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws, or disclose environmental information.[9] Both the right to life and the right to respect for private life and property entail more than a simple prohibition on government interference: governments additionally have a positive duty to take appropriate action to secure these rights.[10] That is why some of the environmental cases concern the failure of government to regulate or enforce the law (*Lopez Ostra, Guerra*, *Fadeyeva*) while others focus especially on the procedure of decision-making (*Taskin*).[11] However, although protection of the environment is a legitimate objective that can justify governments limiting certain rights, including the right to possessions and property, human rights law does not protect the environment *per se*.[12]

Early in 2011 the UN Human Rights Council initiated a study of the relationship between human rights and the environment.[13] This led in March 2012 to the appointment of an independent expert who was asked to make recommendations on human rights obligations relating to the enjoyment of a 'safe, clean, healthy and sustainable environment'.[14] We will look at the work of the UNHRC in section 2. UNEP has also considered much the same question, and an expert working group produced a draft declaration and commentary in 2009–2010.[15] An earlier UNHRC project to adopt a declaration on human rights and the environment terminated in 1994 with a report and the text of a declaration that failed to secure the backing of states.[16] With

7 On 16 June 2010 the Committee of Ministers again decided not to add a right to a healthy and viable environment to the ECHR.

8 See Council of Europe: *Final Activity Report on Human Rights and the Environment*, DH-DEV (2005) 006 rev, 10 Nov. 2005, App. II ('Council of Europe Report').

9 *Lopez Ostra v. Spain,* 20 EHRR (1994) 277; *Guerra v. Italy,* 26 EHRR (1998) 357; *Fadeyeva v. Russia,* 45 EHRR (2007) 10; *Öneryildiz v. Turkey,* 41 EHRR (2005) 20; *Taskin v. Turkey,* 42 EHRR (2006) 50, at paras 113–119; *Tatar v. Romania* [2009] ECtHR, at para. 88; *Budayeva v. Russia* [2008] ECtHR.

10 See *ibid.*, at paras 129–133; *Öneryildiz v. Turkey*, *supra* note 9, at paras 89–90. See also UNHRC, General Comment No. 6 on Article 6 of the ICCPR, 16th Session, 1982; *Villagram Morales et al. v. Guatemala* (1999) IACHR Sers. C, No. 63, at para. 144.

11 See *infra*, section 3.

12 See *infra*, section 4.

13 UN Human Rights Council (UN HRC) res. 16/11, 'Human Rights and the Environment', 24 Mar. 2011.

14 UNHRC res. 19/12, 'Human Rights and the Environment', 20 Mar. 2012.

15 UNEP, High Level Expert Meeting on the New Future of Human Rights and Environment, Nairobi 2009. This draft declaration was completed in 2010 but has not been published. The author was co-rapporteur together with Prof. Dinah Shelton.

16 Draft Declaration of Principles on Human Rights and the Environment, ECOSOC, *Human Rights and the Environment*, Final Report (1994) UN Doc E/CN 4/Sub 2/1994/9. The text of the draft declaration is reproduced in Boyle and Anderson, *supra* note 2, at 67–69. See Popovic, 'In Pursuit of Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment', 27 *Columbia Human Rts L Rev* (1996) 487.

hindsight it can be seen that this early work was premature and overly ambitious, and it made no headway in the UN. However, the relationship between human rights and environmental protection in international law is far from simple or straightforward. The topic is challenging for the agenda of human rights institutions, and for UNEP, partly because it straddles two competing bureaucratic hegemonies, but it also poses some difficult questions about basic principles of human rights law. We will explore these in later sections of this article.

The merits of any proposal for a declaration or protocol on this subject thus depend on how far it deals with fundamental problems or merely window dresses what we already know. There is little to be said in favour of simply codifying the application of the rights to life, private life and property in an environmental context. Making explicit in a declaration or protocol the greening of existing human rights that has already taken place would add nothing and clarify little. As Lauterpacht noted in 1949, '[c]odification which constitutes a record of the past rather than a creative use of the existing materials – legal and others – for the purpose of regulating the life of the community is a brake upon progress'.[17] If useful codification necessarily contains significant elements of progressive development and law reform, the real question is how far it is politic or prudent to go.[18] The question therefore is not whether a declaration or protocol on human rights and the environment should deal with existing civil and political rights, but how much more it should add. What can it say that is new or that develops the existing corpus of human rights law? There are three obvious possibilities.

First, procedural rights are the most important environmental addition to human rights law since the 1992 Rio Declaration on Environment and Development. Any attempt to codify the law on human rights and the environment would necessarily have to take this development into account. Doing so would build on existing law, would endorse the value of procedural rights in an environmental context, and would clarify their precise content at a global level. In section 3 we consider whether it could also go further by developing a public interest model of accountability, more appropriate to the environmental context, and drawing in this respect on the 1998 Aarhus Convention.

Secondly, a declaration or protocol could be an appropriate mechanism for articulating in some form the still controversial notion of a right to a decent environment. Such a right would recognize the link between a satisfactory environment and the achievement of other civil, political, economic, and social rights. It would make more explicit the relationship between the environment, human rights, and sustainable development and address the conservation and sustainable use of nature and natural resources. Most importantly, it would offer some means of balancing environmental objectives against economic development. In section 4 we consider including such a right within the corpus of economic, social, and cultural rights.

[17] UN, *Survey of International Law in Relation to the Work of the ILC*, GAOR A/CN.4/Rev. 1 (1949), at paras 3–14 (hereafter 'UN Survey').

[18] *Ibid.*, at para 13.

Thirdly, in section 5 we consider the difficult issue of the extra-territorial application of existing human rights treaties. This is relevant to transboundary pollution and global environmental problems, such as climate change, because if human rights law does not have extraterritorial scope in environmental cases then we cannot easily use it to help protect the global environment. Even if we cross this hurdle, however, the problems remain considerable.

2 Environmental Rights and the UN Human Rights Institutions

Unlike human rights courts, it has not been clear until now how far the UN human rights community takes environmental issues seriously. There is no doubt that the UN institutions realize that civil, political, economic, and social rights have environmental implications that could help to guarantee some of the indispensable attributes of a decent environment. A 2009 report for the Office of the High Commissioner on Human Rights (OHCHR) emphasizes the key point that '[w]hile the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing'.[19]

The 2011 OHCHR Report notes that '[h]uman rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection and promoting policy coherence, legitimacy and sustainable outcomes',[20] but it does not attempt to set out any new vision for the relationship between human rights and the environment. It summarizes developments in the UN treaty bodies and human rights courts, and records what the UNHCR has already done in this field. Three theoretical approaches to the relationship between human rights and the environment are identified.[21] The first sees the environment as a 'precondition to the enjoyment of human rights'. The second views human rights as 'tools to address environmental issues, both procedurally and substantively'. The third integrates human rights and the environment under the concept of sustainable development. It identifies also 'the call from some quarters for the recognition of a human right to a healthy environment' and notes the alternative view that such a right in effect already exists.[22] The report recognizes that many forms of environmental damage are transnational in character, and that the extraterritorial application of human rights law in this context remains unsettled. It concludes that

[19] UN HRC, *Report of the OHCHR on the Relationship Between Climate Change and Human Rights* (hereafter 'OHCHR 2009 Report'), UN Doc. A/HRC/10/61, 15 Jan. 2009, at para. 18.

[20] OHCHR, *Analytical Study on the Relationship Between Human Rights and the Environment* (hereafter 'OHCHR 2011 Report'), UN Doc. A/HRC/19/34, 16 Dec. 2011, at para. 2.

[21] *Ibid.*, at paras 6–9.

[22] *Ibid.*, at para. 12.

'further guidance is needed to inform options for further development of the law in this area'.[23]

UNHRC Resolution 2005/60 (2005) also recognized the link between human rights, environmental protection, and sustainable development. *Inter alia*, it '[e]ncourages all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, inter alia, to effective access to judicial and administrative proceedings, including redress and remedy'. Implementation of Rio Principle 10 is the most significant element here because, like the Aarhus Convention, it acknowledges the importance of public participation in environmental decision-making, access to information, and access to justice.

> The Council has made the connection between human rights and climate change:[24]
>
> *Noting* that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.

It is worth noting here that climate change is already regarded in international law as a 'common concern of humanity',[25] and thus as an issue in respect of which all states have legitimate concerns. The Human Rights Council is therefore right to take an interest in the matter. Nevertheless, before concluding that human rights law may provide answers to the problem of climate change, two observations in the 2009 OHCHR report are worth highlighting. First, '[w]hile climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense'.[26] The report goes on to note how the multiplicity of causes for environmental degradation and the difficulty of relating specific effects to historic emissions in particular countries make attributing responsibility to any one state problematic. Secondly, 'human rights litigation is not well-suited to promote precautionary measures based on risk assessments, unless such risks pose an imminent threat to the human rights of specific individuals. Yet, by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasizes the need to avoid unnecessary delay in taking action to contain the threat of global warming'.[27] On the view set out here, a human rights perspective on climate change essentially serves to reinforce political pressure coming

[23] *Ibid.*, at paras 64–73.

[24] UNHRC res. 10/4 (2009) on Human Rights and Climate Change. See generally S. Humphreys (ed.), *Human Rights and Climate Change* (2009).

[25] See UN GA Res. 43/53 on Global Climate Change (1988); 1992 Convention on Climate Change, Preamble.

[26] OHCHR 2009 Report, *supra* note 19, at para. 70.

[27] *Ibid.*, at para. 91.

from the more vulnerable developing states. Its utility is rhetorical rather than juridical. We will return to this question later.

A final but important point is that the UNHRC has appointed special *rapporteurs* to report on various environmental issues.[28] A number of these independent reports have covered environmental conditions in specific countries,[29] but the most significant is the longstanding appointment of a special *rapporteur* on the illicit movement and dumping of toxic and dangerous products and wastes. The activity of the special *rapporteur* is confined to country visits and annual reports. The present incumbent does not paint an encouraging picture:

> The Special Rapporteur remains discouraged by the lack of attention paid to the mandate. During consultations with Member States, the Special Rapporteur is often confronted with arguments that issues of toxic waste management are more appropriately discussed in environmental forums than at the Human Rights Council. … He calls on the Human Rights Council to take this issue more seriously. He is discouraged by the limited number of States willing to engage in constructive dialogue with him on the mandate during the interactive sessions at the Human Rights Council.[30]

This report is revealing for what it says about the lack of priority given to the subject and sense that it is not really perceived as a human rights issue at all.

One possible explanation for the reluctance of UN human rights institutions to engage more directly with human rights and the environment is their long-standing project on corporate responsibility for human rights abuses. While the primary responsibility for promoting and protecting human rights lies with the state,[31] it has long been recognized that businesses and transnational corporations have contributed to or been complicit in the violation of human rights in various ways. Developing countries, especially, may lack the capacity to control foreign companies extracting minerals, oil, or other natural resources in a manner that harms both the local population and the environment. Weak government, poor regulation, lax enforcement, corruption, or simply a too-close relationship between business and government underlies the problem. Classic examples are Shell's impact on the environment, natural resources, health, and living standards of the Ogoni people in Nigeria,[32] or the health effects of toxic waste disposed of in Abidjan by a ship under charter to Trafigura, an oil trading company based in the EU.[33]

[28] For a full summary see OHCHR 2011 Report, *supra* note 20, at paras 41–55.

[29] See, e.g., UN HRC, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation in Costa Rica*, UN Doc. A/HRC/12/24/Add. 1, 23 June 2009; UN HRC, *Report of the Special Rapporteur on the Situation of Human Rights in the Democratic People's Republic of Korea*, UN Doc. A/HRC/10/18, 24 Feb. 2009.

[30] UN HRC, *Report of the 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,* UN Doc. A/HRC/9/22, 13 Aug. 2008, at para. 34.

[31] See, e.g., UN HRC Res. 17/4, 'Human rights and transnational corporations and other business enterprises', 6 July 2011.

[32] *SERAC v. Nigeria*, *supra note 3*.

[33] UNEP, *Report of 1st meeting of the Expanded Bureau of the 8th meeting of the Conference of the Parties to the Basel Convention* (2007) UNEP/SBC/BUREAU/8/1/7, sect. III.

In 2005, at the request of the UN Commission on Human Rights, the UN Secretary-General appointed Professor John Ruggie of Harvard University as his special representative on the issue of human rights and transnational corporations and other business enterprises. The 'Protect, Respect and Remedy Framework' adopted by the UN Human Rights Council[34] does not require us to presuppose that international human rights obligations apply to corporations directly. It focuses instead on the adverse impact of corporate activity on human rights and corporate complicity in breaches of human rights law by government.[35] There are three pillars: first the state's continuing duty to protect human rights against abuses by business;[36] secondly, the responsibility of corporations to respect human rights through the use of due diligence;[37] thirdly, individual access to remedy: governments must ensure that where human rights are harmed by business activities there is adequate accountability and effective redress, whether judicial or non-judicial.[38]

What should we make of this 'framework' for business and human rights when considering the current law on human rights and the environment? There is no doubt that states have a responsibility to protect human rights from environmental harm caused by business and industry. It is irrelevant that the state itself does not own or operate the plant or industry in question. As the ECtHR said in *Fadeyeva*, the state's responsibility in environmental cases 'may arise from a failure to regulate private industry'.[39] The state thus has a duty 'to take reasonable and appropriate measures' to secure rights under human rights conventions.[40] In *Öneryildiz* the ECtHR emphasized that '[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life'.[41] The Court held that this obligation covered the licensing, setting up, operation, security, and supervision of dangerous activities, and required all those concerned to take 'practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks'.[42]

Nor is this view of human rights law uniquely European. The *Ogoniland Case* is a reminder that unregulated foreign investment which contributes little to the welfare

[34] UNHRC, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, UN Doc. A/HRC/8/5, 7 Apr. 2008. *Guiding Principles on Business and Human Rights*, UN Doc. A/HRC/17/31, 21 Mar. 2011, are intended to provide guidance on implementation of the framework.

[35] UNHRC, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, Annex: 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (21 March 2011), at paras 73–74, 77.

[36] *Ibid.*, at paras 27–50.

[37] *Ibid.*, at paras 50–72.

[38] *Ibid.*, at paras 81–102.

[39] 45 EHRR (2007) 10, at para. 89.

[40] *Ibid.*

[41] 41 EHRR (2005) 20, at para. 89.

[42] *Ibid.*, at para. 90.

of the local population but instead harms its health, livelihood, property, and natural resources may amount to a denial of human rights for which the host government is responsible in international law.[43] As Shelton has observed, 'The result offers a blueprint for merging environmental protection, economic development, and guarantees of human rights'.[44] It also shows how empowering national NGOs can provide the key to successful legal action.[45]

These examples do not in any sense invalidate the UN Framework's focus on the need for business to respect human rights, but they do serve to emphasize again that failure by states to respect their human rights obligations is the core of the problem, not the periphery. Even if we endorse the UN Framework on Business and Human Rights, it is still necessary to identify the relationship between human rights obligations and environmental protection in order to determine what environmental responsibilities we expect corporations to respect.

Overall, therefore, the record of the UNHRC and OHCHR on human rights and environment has been somewhat understated until now: human rights courts have contributed a great deal more to the subject than interstate environmental negotiations or the specialists of the UN human rights community. It is not immediately clear why this should be so, but of course it also begs the question what more the UN could contribute to the development of human rights approaches to environmental protection. To answer that question requires us to stand back and review the three difficult questions identified in section 1. These questions will form the subject of the rest of this article.

3 The Development of Procedural Rights in an Environmental Context

Not all 'environmental' rights are found in mainstream human rights treaties. Any consideration of human rights in an environmental context has to take into account the development of specifically environmental rights in other treaties, and it may be necessary to interpret and apply human rights treaties with that in mind.[46] The most obvious example is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters adopted by the UN Economic Commission for Europe.[47] As Kofi Annan, formerly Secretary-General of the UN, observed, 'Although regional in scope, the significance

[43] *SERAC v. Nigeria*, *supra* note 3.

[44] Shelton, 'Decision Regarding case 155/96', 96 *AJIL* (2002) 937, at 942.

[45] *SERAC v. Nigeria*, *supra* note 3, at para. 49.

[46] 1969 Vienna Convention on the Law of Treaties (VCLT), Art. 31(3)(c); *Demir v. Turkey* [2008] ECtHR 1345. As 'living instruments' human rights treaties must be interpreted by reference to current conditions: see *Soering v. UK*, 11 EHRR (1989) 439, at para. 102; *Öcalan v. Turkey*, 37 EHRR (2003) 10; *Advisory Opinion on the Right to Information on Consular Assistance* (1999) IACHR Series A, No.16, at paras 114–115; *Advisory Opinion on the Interpretation of the American Declaration on the Rights and Duties of Man* (1989) IACHR Series A, No. 10, at para. 43; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001) IACHR Ser. C, No. 20, at paras 146–148.

[47] See UNECE, *The Aarhus Convention – An Implementation Guide* (2000).

of the Aarhus Convention is global. . . [I]t is the most ambitious venture in the area of "environmental democracy" so far undertaken under the auspices of the United Nations.'[48] In his view the Convention has the 'potential to serve as a global framework for strengthening citizens' environmental rights'.[49] Its preamble not only recalls Principle 1 of the 1972 Stockholm Declaration on the Human Environment and recognizes that 'adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself', but it also asserts that 'every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'.

However, these broad assertions of rights are somewhat misleading. The focus of the Aarhus Convention is in reality strictly procedural in content, limited to public participation in environmental decision-making and access to justice and information. It draws inspiration from Principle 10 of the 1992 Rio Declaration on Environment and Development, which gives explicit support in mandatory language to the same category of procedural rights.[50] Public participation is a central element in sustainable development, and the incorporation of Aarhus-style procedural rights into general human rights law significantly advances this objective.[51] In this context the emphasis on procedural rights in Articles 6–8 of Aarhus can be seen as a means of legitimizing decisions about sustainable development, rather than simply an exercise in extending participatory democracy or improving environmental governance.[52]

Aarhus is also significant insofar as Article 9 reinforces access to justice and the obligation of public authorities to enforce existing law. Under Article 9(3) applicants entitled to participate in decision-making will also have the right to seek administrative or judicial review of the legality of the resulting decision. A general failure to enforce environmental law will also violate Article 9(3).[53] Article 9(4) requires that adequate, fair, and effective remedies are provided. This reflects the decisions in *Lopez Ostra* and *Guerra* under Article 8 of the ECHR.[54]

Anyone who doubts that Aarhus is a human rights treaty should bear in mind three points. First, it builds upon the long-established human right of access to justice and

[48] *Ibid.*, 'Foreword', at p.v.

[49] *Ibid.*

[50] Principle 10 provides: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

[51] See 1992 UN Conference on Environment and Development, Agenda 21, ch. 23, especially at para. 23.2.

[52] OHCHR 2011 Report, *supra* note 20, at paras 2, 7–9.

[53] *Gatina, Gatin, Konyushkova – Findings and Recommendation with Regard to Compliance by Kazakhstan*, Compliance Committee, UNECE/MP.PP/C.1/2006/4/Add. 1 (2006), at paras 30–31.

[54] *Lopez Ostra v. Spain*, 20 EHRR (1994) 277; *Guerra v. Italy*, 26 EHRR (1998) 357.

on procedural elements that serve to protect the rights to life, health, and family life.[55] Secondly, it confers rights directly on individuals and not simply on states. Unusually for an environmental treaty the most innovative features of the 'non-confrontational, non-judicial and consultative' procedure established under Article 15 of the Convention are that members of the public and NGOs may bring complaints before a non-compliance committee the members of which are not only independent of the parties but may be nominated by NGOs.[56] The committee has given rulings which interpret and clarify provisions of the convention and a body of case law is emerging.[57] In all these respects it is closer to human rights treaty monitoring bodies than to the non-compliance procedures typically found in other multilateral environmental agreements.[58] Kravchenko concludes that 'independence, transparency, and NGO involvement in the Convention's novel compliance mechanism represent an ambitious effort to bring democracy and participation to the very heart of compliance itself.[59] Thirdly, the essential elements of the convention – access to information, public participation in environmental decision-making, and access to justice – have all been incorporated into European human rights law through the jurisprudence of the ECtHR.[60] In substance, the Aarhus Convention rights are also ECHR rights, enforceable in national law and through the Strasbourg Court like any other human rights. To some extent the same has happened under other human rights treaties, so the point is not simply a European one. For example, the right to 'meaningful consultation'

[55] See D. Zillman, A. Lucas, and G. Pring (eds), *Human Rights in Natural Resource Development* (2002), especially chs 1 and 4; Ebbesson, 'Public Participation', in Bodansky, Brunnée, and Hey, *supra* note 2, at Ch. 29; F. Francioni (ed.), *Access to Justice as a Human Right* (2007), at chs 1 and 5; Lee and Abbott, 'Usual Suspects? Public Participation Under the Aarhus Convention', 66 *MLR* (2003) 80; Ebbesson, 'The Notion of Public Participation in International Environmental Law', 8 *Yrbk Int'l Environmental L* (1997) 51.

[56] Aarhus Convention, Decision 1/7: Review of Compliance, *Report of 1st Mtg of Parties*, UN Doc ECE/MP.PP/2/Add. 8 (2004). See also Report of the Compliance Committee, UN Doc. ECE/MP.PP/2005/13 (2005) and generally Kravchenko, 'The Aarhus Convention and Innovations in Compliance with MEAs', 18 *Colorado J Int'l Environmental L & Policy* (2007) 1; Koester, 'The Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters', in G. Ulfstein, T. Marauhn, and A. Zimmermann (eds), *Making Treaties Work: Human Rights, Environment and Arms Control* (2007), at 179; Pitea, 'Procedures and Mechanisms for Review of Compliance under the 1999 Protocol on Water and Health to the 1982 Convention on the Protection and Use of Transboundary Watercourses and International Lakes', in T. Treves *et al.* (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (2009), at ch.14. The compliance procedure adopted in 2007 under the 1999 UNECE Protocol on Water and Health is modelled directly on the Aarhus procedure.

[57] See, e.g., *Bond Beter Leefmilieu Vlaanderen VZW*, Compliance Committee, UNECE/MP PP/C 1/2006/4/Add 2 (2006), at paras 33–36; *Bystre Deep-water Navigation Canal – Findings and Recommendation with Regard to Compliance by Ukraine*, Compliance Committee, UNECE/MP PP/C 1/2005/2/Add 3 (2005), at paras 26–28; *Gatina, Gatin, Konyushkova: Findings and Recommendation with Regard to Compliance by Kazakhstan*, Compliance Committee, UNECE/MP PP/C 1/2006/4/Add 1 (2006), at paras 30–31.

[58] Contrast the Montreal Protocol NCP and the Kyoto Protocol NCP and see UNEP, *Compliance Mechanisms Under Selected MEAs* (UNEP, 2007). On human rights treaty bodies see P. Alston and J. Crawford (eds), *The Future of UN Human Rights Treaty Monitoring* (2000), and on MEA non-compliance procedures see Treves *et al.* (eds), *supra* note 56.

[59] Kravchenko, *supra* note 56, at 49.

[60] *Taskin v. Turkey*, 42 EHRR (2006) 50; *Tatar v. Romania* [2009] ECtHR; *Öneryildiz v. Turkey*, 41 EHRR (2005) 20; *Lopez Ostra v. Spain*, 20 EHRR (1994) 277; *Guerra v. Italy*, 26 EHRR (1998) 357.

is upheld by the Inter-American Commission in the *Maya Indigenous Community of Toledo Case*,[61] and by the African Commission in the *Ogoniland Case*.[62]

The Aarhus Convention thus represents an important extension of environmental rights and of the corpus of human rights law. How important can best be explained by recalling the most important case, *Taskin v. Turkey*.[63] Turkey, it should be noted, is not a party to the Aarhus Convention. That did not stop the Strasbourg Court from reading Aarhus rights into the ECHR in a particularly extensive form. Two points stand out. First, participation in the decision-making process by those likely to be affected by environmental nuisances will be essential for compliance with Article 8 of the ECHR and Article 6 of the Aarhus Convention. The Court in *Taskin v. Turkey* held that 'whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect to the interests of the individual as safeguarded by Article 8'.[64] The interests of those affected must on this view be taken into account and given appropriate weight when balancing them against the benefits of economic development.[65] Secondly, *Taskin* also envisages an informed process. The Court held that '[w]here a State must determine complex issues of environmental and economic policy, the decision-making process must firstly involve appropriate investigations and studies in order to allow them to predict and evaluate in advance the effects of those activities which might damage the environment and infringe individuals' rights and to enable them to strike a fair balance between the various conflicting interests at stake'.[66] The words 'environmental impact assessment' are not used here, but in many cases an EIA will be necessary to give effect to the evaluation process envisaged by the Court. Article 6 of Aarhus also has detailed provisions on the information to be made available.[67] As a comparison with Annex II to the 1991 Espoo Convention on EIA in a Transboundary Context shows, the matters listed in Article 6 of Aarhus are normally included in an EIA.[68]

[61] *Maya Indigenous Community of the Toledo District v. Belize* [2004] IACHR Case 12.053, Report No. 40/04, OEA/Ser.L/V/II.122 Doc. 5 rev. 1, at 727, paras 154–155. The Commission relies *inter alia* on the right to life and the right to private life, in addition to finding consultation a 'fundamental component of the State's obligations in giving effect to the communal property right of the Maya people in the lands that they have traditionally used and occupied'. See also ILO Convention No. 169 Concerning Indigenous and Tribal Peoples and the UNHRC decision in *Ilmari Lansman et al. v. Finland* (1996) ICCPR Communication No. 511/1992, at para. 9.5, which stresses the need 'to ensure the effective participation of members of minority communities in decisions which affect them'.

[62] *SERAC v. Nigeria*, *supra* note 3, at para. 53: 'providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities'.

[63] 42 EHRR (2006) 50.

[64] *Taskin*, *supra* note 60, at para. 118. See also *Tatar v. Romania* [2009] ECtHR, at para. 88.

[65] See in particular *Hatton v. UK* [2003] ECtHR (Grand Chamber).

[66] *Taskin*, *supra* note 60, at para. 119.

[67] Aarhus Convention, Art. 6(6) requires, *inter alia*, a description of the site, the effects of the activity, preventive measures, and an outline of alternatives.

[68] Annex II to the Espoo Convention additionally includes an indication of predictive methods, underlying assumptions, relevant data, gaps in knowledge and uncertainties, as well as an outline of monitoring plans.

Like the *Ogoniland* and *Maya Indigenous Community* cases, *Taskin* thus suggests that the most important contribution existing human rights law has to offer with regard to environmental protection and sustainable development is the empowerment of individuals and groups affected by environmental problems, and for whom the opportunity to participate in decisions is the most useful and direct means of influencing the balance of environmental, social, and economic interests.[69] From this perspective the ICCPR and IACHR case law, which espouses participatory rights for indigenous peoples. appears simply as a particular manifestation of the broader principle. The key point is that these participatory rights represent the direction in which human rights law with regard to the environment has evolved since 1994.[70]

The Aarhus Convention is also important because, unlike human rights treaties, it provides for public interest activism by NGOs,[71] insofar as claimants with a 'sufficient interest' are empowered to engage in public interest litigation even when their own rights or the rights of victims of a violation are not in issue. Article 9 of Aarhus thus appears to go beyond the requirements of the ECHR. So does Article 6, which extends public participation rights to anyone having an 'interest' in the decision, including NGOs.[72] 'Sufficient interest' is not defined by the Convention but, in its first ruling, the Aarhus Compliance Committee held that, '[a]lthough what constitutes a sufficient interest and impairment of a right shall be determined in accordance with national law, it must be decided "with the objective of giving the public concerned wide access to justice" within the scope of the Convention'.[73] Governments are not required to develop an *actio popularis*, but they must not use national law 'as an excuse for introducing or maintaining so strict criteria that they effectively bar all or almost all environmental organizations from challenging acts or omissions that contravene national law relating to the environment'.[74] Access to such procedures 'should thus be the presumption, not the exception'.[75]

The contrast between the broader public interest approach of the Aarhus Convention and the narrower ECHR/ICCPR/AmCHR focus on the rights of victims of

[69] A point recognized by the OHCHR: see UN, *Claiming the Millennium Development Goals: A Human Rights Approach* (NY and Geneva, 2008), at VIII, Goal 7: 'a human rights approach to sustainable development emphasizes improving and implementing accountability systems, [and] access to information on environmental issues'.

[70] The present author gives a fuller account of the Convention in P. Birnie, A.E. Boyle, and C. Redgwell, *International Law and the Environment* (3rd edn, 2009), at 288–298.

[71] Arts 4(1)(a), 6, and 9. See Pedersen, 'European Environmental Human Rights', 21 *Georgetown Int'l Environmental L Rev* (2008) 73.

[72] Art. 6 participation rights are available to 'the public concerned', defined by Art. 2(5) as 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest'.

[73] See UNECE, Compliance Committee, *Bond Beter Leefmilieu Vlaanderen VZW – Findings and Recommendation with Regard to Compliance by Belgium* (Comm. ACCC/C/2005/11) ECE/MP.PP/C.1/2006/4/Add. 2 (28 July 2006), at paras 33–36.

[74] *Ibid.*

[75] *Ibid*, at para 36. See also Art. 9(3).

a violation is evident in the case law.[76] This is a significant difference, with important implications for any debate about an autonomous right to a decent or satisfactory environment. Not only do environmental NGOs use access to information and lobbying to raise awareness of environmental concerns, but research has shown that they tend to have high success rates in enforcement actions and public interest litigation.[77] Moreover, the broader approach taken by Aarhus is followed in later European agreements. Thus, Article 8(1) of the 2003 UNECE Protocol on Strategic Environmental Assessment provides that '[e]ach party shall ensure early, timely and effective opportunities for public participation, when all options are open, in the strategic environmental assessment of plans and programmes'. The public for this purpose includes relevant NGOs.[78]

The question therefore arises: should the ECtHR case law follow the public interest precedent set by Aarhus, as it has in so many other respects?[79] What purpose would public interest environmental litigation serve in a human rights context? NGOs are already entitled to protect the human rights of victims of violations, and there is no need to extend their standing for that purpose. Extending their standing in environmental matters makes sense only if the public interest in the environment itself is to be protected – that is the point of Aarhus. Answering the question in the negative would merely affirm the existing position that human rights law does not have anything to say about protection of the environment as such. Answering it in the affirmative would go some way towards opening the door for a right to a decent environment. That brings us to the question of greatest substance: do we want such a right? Do we want to expand rather than simply interpret the existing corpus of international human rights law? This is not simply a matter of European concern. Rather, it potentially affects all of the principal human rights treaties, given the way human rights courts 'work consciously to co-ordinate their approaches'.[80]

4 A Right to a Decent Environment?

What constitutes a decent environment is a value judgement, on which reasonable people will differ. Policy choices abound in this context: what weight should be given to natural resource exploitation over nature protection, to industrial development over air and water quality, to land-use development over conservation of forests and wetlands, to energy consumption over the risks of climate change, and so on? These

[76] See *Kyrtatos v. Greece* [2003] ECtHR 242, at para. 52; *Metropolitan Nature Reserve v. Panama* [2003] IACHR, Case 11.533, Report No. 88/03, OEA/Ser.L/V/II.118 Doc. 70 rev. 2, at 524, para. 34; *Brun v. France* [2006] ICCPR Communication No. 1453/2006, at para. 6.3. See sect. 4 below where these cases are further considered.

[77] See de Sadeleer, Roller, and Dross, *Access to Justice in Environmental Matters*, Final Report, Doc. ENVA.3/ETU/2002/0030, Part I, at sect. 3.

[78] UNECE Protocol on Strategic Environmental Assessment Art. 2(8).

[79] See Schall, 'Public Interest Litigation Concerning Environmental Matters before Human Rights Courts', 20 *J Environmental L* (2008) 417.

[80] *Supra* notes 5 and 6.

choices may result in wide diversities of policy and interpretation, as different governments and international organizations pursue their own priorities and make their own value judgements, moderated only to some extent by international agreements on such matters as climate change and the conservation of biological diversity. The virtue of looking at environmental protection through the impact of harmful activities on other human rights, such as life, private life, or property, is that it focuses attention on what matters most to individuals: the detriment to important, internationally protected values from uncontrolled environmental harm. This approach avoids the need to define such notions as a satisfactory or decent environment. Instead, it allows a court to balance respect for convention rights and economic development. The Strasbourg Court makes the point very cogently: 'national authorities are best placed to make decisions on environmental issues, which often have difficult social and technical aspects. Therefore in reaching its judgments, the Court affords the national authorities in principle a wide discretion'.[81]

When I first wrote on this subject in 1996 I shared the scepticism of others towards the idea of a right to a decent environment.[82] Fundamentally it looked like an attempt to turn an essentially political question into a legal one. It would take power away from democratically accountable politicians and give it to courts or treaty bodies. Predictably, Western governments ensured that the idea was stillborn within the UN system. My own scepticism has not disappeared, but it has perhaps been tempered by an awareness of the significant value of such a right in countries whose environmental problems are more extreme than those affecting Western Europe.[83] Moreover, in many respects the basic elements of such a right already exist. There may therefore be some merit in revisiting the question, particularly in the context of climate change, where some vision of a decent environment has global implications.

Despite their evolutionary character, human rights treaties (with the exception of the African Convention) still do not guarantee a right to a decent or satisfactory environment if that *concept* is understood in qualitative terms unrelated to impacts on the rights of specific humans. As the ECtHR reiterated in *Kyrtatos*, 'neither Article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such'.[84] This case involved the illegal draining of a wetland. The European Court could find no violation of the applicants' right to private life or enjoyment of property arising out of the destruction of the area in question. Although they lived nearby, the applicants' rights were not affected. They were not entitled to live in any particular environment, or to have the surrounding environment indefinitely preserved. The applicants succeeded only insofar as the state's non-enforcement of a court judgment violated their Convention rights.

The Inter-American Commission on Human Rights has similarly rejected as inadmissible a claim on behalf of all the citizens of Panama to protect a nature reserve

[81] 2005 Council of Europe Report, *supra* note 8, App. II, 10, at para. [13].

[82] Boyle and Anderson, *supra* note 2, at ch. 3.

[83] Notably the *Ogoniland Case*, *supra* note 3, and the *Maya Indigenous Community Case*, *supra* note 61.

[84] *Kyrtatos v. Greece*, *supra* note 56, at para. 52.

from development.[85] Nor does the practice of the UN Human Rights Committee differ. In a case about genetically modified crops it held that 'no person may, in theoretical terms and by *actio popularis*, object to a law or practice which he holds to be at variance with the Covenant'.[86] None of these cases lends support to any conception of a free-standing individual right to a decent environment.

Should we then go the whole way and create a right to a decent environment in international human rights law? There are obvious problems of definition and anthropocentricity, well rehearsed in the literature.[87] But there are also deeper issues of legal architecture to be resolved. At the substantive level a decent or satisfactory environment should not be confused with the procedural innovations of the Aarhus Convention, or with the case law on the right to life, health, or private life. To do so would make it little more than a portmanteau for the greening of existing civil and political rights. The ample jurisprudence shows clearly that this is unnecessary and misconceived.[88] To be meaningful, a right to a decent environment has to address the environment as a public good, in which form it bears little resemblance to the accepted catalogue of civil and political rights, a catalogue which for good reasons there is great reluctance to expand.[89] A right to a decent environment is best envisaged, not as a civil and political right, but within the context of economic and social rights, where to some extent it already finds expression through the right to water, food, and environmental hygiene.

The UN Committee on Economic, Social and Cultural Rights has adopted various General Comments relevant to the environment and sustainable development, notably General Comments 14 and 15, which interpret Articles 11 and 12 of the ICESCR to include access to sufficient, safe, and affordable water for domestic uses and sanitation.[90] They also cover the prevention and reduction of exposure to harmful substances including radiation and chemicals, or other detrimental environmental conditions that directly or indirectly impact upon human health. These are useful and important interpretations that have also had some impact on related areas of international law, including Article 10 of the 1997 UN Watercourses Convention, which gives priority to 'vital human needs' when allocating scarce water resources.[91] On this

[85] *Metropolitan Nature Reserve v. Panama* [2003] IACHR Case 11.533, at para. 34.

[86] *Brun v. France, supra* note 76, at para. 6.3.

[87] See, e.g., Handl, 'Human Rights and the Protection of the Environment: A Mildly Revisionist View', in A.C. Trindade (ed.), *Human Rights, Sustainable Development and the Environment* (1992), at 117; id, 'Human Rights Protection and the Environment', in A. Eide, C. Krause, and A. Rosas (eds), *Economic, Social and Cultural Rights* (2001), at 303–328; Boyle and Anderson, *supra* note 2, at chs 2–4. Contrast Shelton, 'Human Rights, Environmental Rights and the Right to the Environment', 28 *Stanford J Int'l L* (1991) 103.

[88] *Supra*, section 1.

[89] Alston, 'Conjuring up New Human Rights: A Proposal for Quality Control', 78 *AJIL* (1984) 607.

[90] UNCESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, UN Doc.E/C.12/2000/4 (2000); General Comment No. 15: The Right to Water, UN Doc.E/C.12/2002/11 (2003). The ICJ has held that 'great weight' should be attributed to interpretations adopted by independent treaty supervisory bodies: see *Diallo Case (Guinea v. DRC), supra* note 5, at paras 66–67.

[91] See *Report of the 6th Committee Working Group*, GAOR A/51/869 (1997).

view, existing economic and social rights help to guarantee some of the indispensable attributes of a decent environment. What more would the explicit recognition of a right to a decent environment add?

Arguably, it would add what is currently lacking from the corpus of UN economic and social rights, namely a broader and more explicit focus on environmental quality which could be balanced directly against the covenant's economic and developmental priorities. Article 1 of the ICESCR reiterates the right of peoples 'freely [to] pursue their economic, social and cultural development' and 'freely [to] dispose of their natural wealth and resources', but other than to 'the improvement of all aspects of environmental and industrial hygiene' (Article 12), the Covenant makes no specific reference to protection of the environment. Despite the efforts of the treaty organs to invest the Covenant with greater environmental relevance, it still falls short of giving a decent environment recognition as a significant public interest. Lacking the status of a right means that the environment can be trumped by those values which have that status, including economic development and natural resource exploitation.[92] This is an omission which needs to be addressed if the environment as a public good is to receive the weight it deserves in the balance of economic, social, and cultural rights. That could be one way of using human rights law to address the impact of the greenhouse gas emitting activities which are causing climate change and adversely affecting the global environment.

The key question therefore is what values we think a covenant on economic and social rights should recognize in the modern world. Is the environment – or the global environment – a sufficiently important public good to merit economic and social rights status comparable to economic development? The answer endorsed repeatedly by the UN over the past 40 years is obviously yes: at Stockholm in 1972, at Rio in 1992, and at Johannesburg in 2002, the consensus of states has favoured sustainable development as the leading concept of international environmental policy. Although 'sustainable development' is used throughout the Rio Declaration, it was not until the 2002 World Summit on Sustainable Development that anything approaching a definition of the concept could be attempted by the UN. Three 'interdependent and mutually reinforcing pillars of sustainable development' were identified in the Johannesburg Declaration – economic development, social development, and environmental protection.[93] This seems tailor-made for a reformulation of the rights guaranteed in the ICESCR.

The challenge posed by sustainable development is to ensure that environmental protection is fully integrated into economic policy. Acknowledging that the environment is part of this equation, the 1992 Rio Declaration (Principle 3) and the 1993 Vienna Declaration on Human Rights (paragraph11) both emphasize that '[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations'. The ICJ has repeatedly referred

[92] Merrills, 'Environmental Rights', in Bodansky, Brunnée, and Hey, *supra* note 2, at 666.

[93] UN, *Report of the WSSD*, UN Doc. A/CONF.199/20 (2002), Res. 1, at para. 5.

to 'the need to reconcile economic development with protection of the environment [which] is aptly expressed in the concept of sustainable development'.[94] In the *Pulp Mills Case* the Court again noted the 'interconnectedness between equitable and reasonable utilization of a shared resource and the balance between economic development and environmental protection *that is the essence of sustainable development*'.[95] The essential point of these examples is that, while recognizing that the right to pursue economic development is an attribute of a state's sovereignty over its own natural resources and territory, it cannot lawfully be exercised without regard for the detrimental impact on the environment or on human rights. In *Pulp Mills* the Court's very limited focus was on whether Uruguay had complied with its international obligations when deciding to build the plant, and its references to integrating economic development and environmental protection have to be seen in that context. It did not attempt to decide whether a policy of building pulp mills was sustainable development in any other sense. In effect, the process of decision-making and compliance with environmental and human rights obligations, rather than the nature of the development itself, constitute the key legal tests of sustainable development in current international law.[96]

If the ICJ can handle questions of this kind then it might be said that it should not be beyond the capability of human rights courts also to do so. In a sense they already have: *Hatton*,[97] the case concerning night flights at Heathrow airport, is self-evidently a case about sustainable development as understood by the ICJ, albeit one in which the terms of the discussion are limited to balancing the direct impact on the health and family life of the applicants against the benefits to the community at large. Various decisions of the Inter-American Commission of Human Rights[98] and the UN Human Rights Committee[99] in cases concerning logging, oil extraction, and mining on land belonging to indigenous peoples can be viewed from the same perspective. The African Commission's decision in *Ogoniland* is by far the most important case to address the public interest in protecting the environment as such,[100] but it does so in

94 *Gabcikovo Nagymaros Dam Case* [1997] ICJ Rep 7, at para. 140. See also *Iron Rhine Case* [2005] PCA and Higgins, 'Natural Resources in the Case Law of the International Court', in A.E. Boyle and D. Freestone (eds), *International Law and Sustainable Development* (1999), at ch. 5.

95 *Pulp Mills on the River Uruguay Case*, [2010] ICJ Rep, at para. 177.

96 See Birnie, Boyle, and Redgwell, *supra* note 70, at 125–127.

97 *Hatton v. UK* [2003] ECtHR (Grand Chamber). See also *Fägerskjöld v. Sweden* [2008] ECtHR (admissibility).

98 See *Maya Indigenous Community v. Belize, supra* note 61, at para. 150.

99 In *Ilmari Lansman et al. v. Finland, supra* note 61, at para. 9.4, the Committee concluded that Finland had taken adequate measures to minimize the impact on reindeer herding (at para. 9.7). Compare *Lubicon Lake Band v. Canada* (1990) ICCPR Comm. No. 167/1984, at para. 32.2, where the UNHRC found that the impact of oil and gas extraction on the applicants' traditional subsistence economy constituted a violation of Art. 27.

100 *SERAC v. Nigeria*, *supra* note 3, and Shelton, *supra* note 44; Ebeku, 'The Right to a Satisfactory Environment and the African Commission', 3 *African Human Rts LJ* (2003) 149, at 163; Nwobike, 'The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter', 1 *African J Legal Studies* (2005) 129, at 139; Coomans, 'The Ogoni Case Before the ACHPR', 52 *ICLQ* (2003) 749.

a setting where environmental destruction had caused serious harm to the affected communities.

The decision in *Ogoniland* can be seen as a challenge to the sustainability of oil extraction in that part of Nigeria. Given the degree of environmental harm and a lack of material benefits for the Ogoni people, it is not surprising that the African Commission does not see this case simply as a failure to maintain a fair balance between public good and private rights. The decision gives some indication of how a right to a decent or satisfactory environment could be used, but its exceptional basis in Articles 21 and 24 of the African Convention has to be recalled. It is unique in adjudicating for the first time on the right of peoples to dispose freely of their own natural resources and in ordering extensive environmental clean-up measures to be taken.[101] Moreover, the rights created by the African Convention are peoples' rights, not individual rights, so the recognition of a public interest in environmental protection and sustainable development is less of an innovation. The African Convention is the only regional human rights treaty to combine economic, social, civil, and political rights and make them all justiciable before an international court.

Clearly there can be different views on what constitutes a fair balance between economic interests and individual or group rights in such cases, and any judgment is inevitably subjective. Moreover, neither environmental protection nor human rights necessarily trumps the right to economic development. In *Hatton*, the Grand Chamber's approach affords considerably greater deference towards government economic policy than at first instance, and leaves little room for the Court to substitute its own view of the extent to which the environment should be protected from development:[102] '[a]t the same time, the Court re-iterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions.'[103] On this basis, decisions about where the public interest lies are mainly for politicians, not for courts, save in the most extreme cases where judicial review is easy to justify. That conclusion is not inconsistent with the *Ogoniland Case*, where the problems were undoubtedly of a more extreme kind. But *Ogoniland* shows that the right to a decent environment can be useful at the extremes,[104] which is why the debate becomes relevant to climate change.

Any comparison between *Hatton* and the *Ogoniland Case* will inevitably point to the more conservative approach of European law. But would we want other human rights courts deciding where the appropriate balance between economic and environmental objectives should lie? Should we let judges determine whether to allow the construction of coal-fired power stations instead of extending schemes for generating

[101] Although Art. 1(2) of the 1966 ICCPR also recognizes the right of peoples 'freely [to] dispose of their natural wealth and resources', it is not justiciable by the HRC under the procedure for individual complaints laid down in the Optional Protocol: see *Lubicon Lake Band v. Canada, supra* note 99, at para. 32.1.

[102] [2003] ECtHR (Grand Chamber), at paras 97–104.

[103] *Ibid.*, at para. 97.

[104] *Supra* note 100.

renewable energy? *Hatton* may suggest that, except at the extremes, human rights courts are not usually the best bodies to perform this balancing task, rather than national or international political institutions. Even if European human rights law did endorse the right to a decent environment, in whatever form, it seems unlikely that the outcome of *Hatton* would differ. On any view the balance would in principle be for governments to determine, and on the facts of that case any court or tribunal would probably have upheld the government's approach. This does not provide a good basis for tackling government policy on climate change from a human rights perspective.

As I have argued elsewhere,[105] the distinction between *Hatton* and *Taskin* is important in this context. *Hatton* shows understandable reluctance to allow the European Court of Human Rights to become a forum for appeals against the policy judgements of governments, provided they do not disproportionately affect individual rights. *Taskin* shows greater willingness to insist that decisions made by public authorities follow proper procedures involving adequate information, public participation, and access to judicial review. This remains a tenable and democratically defensible distinction. One would expect most judges of the European Court of Human Rights to be comfortable with it.

However, if we do take the view that judges are not the right people to decide what constitutes a decent or satisfactory environment, is there then no role for international human rights law in this debate? The obvious alternative would be to follow the logic of the ICESCR and revert to the UN human rights institutions and treaty bodies and allow them, rather than courts, to oversee the expansion of the corpus of economic and social rights to include a right to a decent environment. That would give the UN Committee on Economic, Social and Cultural Rights a mandate to review the scope of the Covenant in relation to the environment.[106] It would allow the balance between environmental protection and economic development to be argued in an inter-governmental forum, through a 'constructive dialogue' with states parties. Although the current UN monitoring process has 'built-in defects', including poor reporting and excessive deference to states,[107] two additional mechanisms now exist through which compliance can be scrutinized. First, as we noted earlier, the High Commissioner for Human Rights has power to appoint special *rapporteurs* to report on environmental conditions in individual countries or on specific topics.[108] Secondly, in 2009 an optional protocol for individual complaints under the Covenant was opened for signature.[109] Sceptics often question the value of all these monitoring processes, but if they do have value then the environment should be a larger part of the process.

[105] Birnie, Boyle and Redgwell, *supra* note 70, at 296.

[106] The Committee is composed of independent experts and was established by ECOSOC Res. 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to it in Part IV of the Covenant. See M. Craven, *The International Covenant on Economic, Social and Cultural Rights* (1998), at ch. 2.

[107] Leckie, 'The Committee on Economic, Social and Cultural Rights: Catalyst for Change in a System Needing Reform', in Alston and Crawford, *supra* note 58, at 129.

[108] *Supra* notes 29–30.

[109] UNGA Res. A/RES/63/117, 10 Dec. 2008.

Potentially, therefore, the ICESCR model could provide a mechanism for balancing environmental claims against competing economic objectives if the Covenant were to be amended in appropriate terms. While this would not expand the role of courts, it would expand the corpus of human rights law in a manner that fits comfortably into the existing system. It would modernize the Covenant, while also giving it greater coherence and consistency with contemporary international environmental law and policy. In that form it could give human rights law and the UN Committee on Economic and Social Rights something to contribute to the global challenge of climate change, and might help to counteract the evident inaction of states revealed by the Copenhagen and Cancun negotiations. It is this conclusion which most forcefully undermines the argument that a right to a decent environment is redundant and that general international environmental law is better placed to regulate global environmental problems.[110] What may have been persuasive in 1996 now looks increasingly threadbare, given the unimpressive record of too many states parties to the UN Convention on Climate Change.[111] Unrestrained carbon emissions are not a recipe for a decent environment of any kind.[112]

Incorporating a right to a decent environment in the ICESCR will not save the global climate by itself, but it may add to political pressure on governments to move further and faster towards goals already enshrined in the UN Framework Convention on Climate Change (UNFCCC) and in the commitments undertaken at Cancun in 2011. In common with the UNFCCC, this kind of human rights approach to climate change would recognize that the only viable perspective is a global one, focused not on the rights of individuals, or peoples, or states, but of humanity as whole. It would reconceptualize in the language of economic and social rights the idea of the environment as a common good or common concern of humanity. That would indeed mark '*[l]e passage d'un droit international de bon voisinage plutôt bilateral, territorial et fondé sur la reciprocité des droits et obligations, à un droit international plutôt multilateral, global, dans le cadre duquel les obligations sont souscrites au nom d'un intérêt commun*'.[113]

5 Human Rights, Transboundary Pollution and Climate Change

Does existing human rights law have any role in tackling transboundary pollution or global climate change? The simple, sceptical, answer is no, but only if we choose to locate the *lex specialis* in the customary international law on prevention and control

[110] Contrast the arguments I advanced in Boyle and Anderson, *supra* note 2, at ch. 3.

[111] See Boyle, 'The Challenge of Climate Change: International Law Perspectives', in S. Kingston (ed.), *European Perspectives on Environmental Law and Governance* (2012).

[112] See IPCC, *Special Report on Managing the Risks of Extreme Events and Disasters to Advance Climate Change Adaptation: Summary* (Geneva, 2011). The full report will be published in 2012.

[113] Y. Kerbrat, S. Maljean-Dubois, and R. Mehdi (eds), *Le Droit International Face aux Enjeux Environnementaux* (2010), at 17 (footnotes omitted).

of transboundary harm,[114] or in global regulatory agreements such as the UNFCCC, with its associated protocols, non-binding accords, and decisions of the parties.[115] On this view the problem is properly addressed by international law at an interstate level, not at the level of human rights law. However, a more nuanced approach to such arguments is evident in the case law, and it is far from clear that the *lex specialis* principle operates in this way.[116] A mutually exclusive relationship between human rights law and general international law on transboundary and global environmental protection is consistent neither with the evolution of international environmental law as a whole nor with contemporary developments in international human rights law.

First, it harks back to the classical era when humans, whether at home or abroad, were still viewed as objects of international law, not as subjects meriting their own rights. It is unnecessary here to recall this debate, save only to remember that even today only governments can bring claims against another state for violations of general international law.[117] If human rights law has no application to environmentally harmful activities in one state that directly impact on humans in other states, then whatever right they may have to be protected from transboundary harm will be exercisable only by the state acting on their behalf. But, regardless of legal theory, real-world problems of pollution and the unsustainable use of renewable resources that are the core of most environmental problems do not suddenly stop at national borders, nor do they have any less impact on those who live beyond the border. Some of these problems may indeed be only transboundary in scale, like localized air pollution, affecting only two or three states or a particular region. But the climate system, forests and terrestrial ecosystems, and the marine environment are inevitably shared elements of a global ecological system – a fact recognized by the development of global environmental agreements and the evolution of concepts such as the sustainable use of natural resources, inter-generational equity, and common concern of humankind.[118] In the terminology of the law of state responsibility, much of the law relating to these global environmental problems – like climate change – falls squarely

[114] 1992 Rio Declaration on Environment and Development, Principle 2; 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Report of the ILC 53rd Session*, GAOR, A/56/10 (2001); 1982 UN Convention on the Law of the Sea, Arts 192–222; *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226, at para. 29; *Pulp Mills, supra* note 95, at paras 101, 187–197; *Advisory Opinion on Responsibilities and Obligations of States with Respect to Activities in the Area* [2011] ITLOS, at paras 111–131.

[115] In particular the 1997 Kyoto Protocol, the 2001 Marrakesh Accords, the 2010 Copenhagen Accords, the 2011 Cancun Agreements, and decisions adopted by the conference of the parties at Durban in 2011, on all of which see UNFCCC website, available at: http://unfccc.int.

[116] See *Nuclear Weapons Advisory Opinion*, *supra* note 114, at paras 25–34; I. Sinclair, *Vienna Convention on the Law of Treaties* (1982), 96; J. Pauwelyn, *Conflict of Norms in International Law* (2003), at 385–416; ILC, *Report of the Study Group on Fragmentation of International Law*, A/CN.4/L.682 (2006), at paras 56–122.

[117] See ILC Draft Articles on Diplomatic Protection, with Commentaries, 2006 II *Yrbk ILC*, Part Two, commentary to Art. 1. See also Gaja, 'The Position of Individuals in International Law: An ILC Perspective', 21 *EJIL* (2010) 11; Clapham, 'The Role of the Individual in International Law', 21 *EJIL* (2010) 25.

[118] See 1992 Rio Declaration on Environment and Development, and Birnie, Boyle and Redgwell, *supra* note 2, at ch. 3.

into the category of obligations owed to the international community as a whole.[119] So, of course, does international human rights law.[120]

Secondly, one significant trend of international environmental policy over the past 30 years, pursued initially in isolation from international human rights law but now in essence derived from it, has been the attempt to ensure non-discriminatory treatment, including access to justice and effective remedies, for those individuals or communities who are directly affected by transboundary pollution and environmental problems.[121] If nuisances do not stop at borders it makes little sense to treat the victims differently depending on where they happen to live. Making national remedies available to transboundary victims in these circumstances is consistent with the view that there are significant advantages in avoiding resort to interstate remedies for the resolution of transboundary environmental disputes wherever possible.[122] In this broader sense, transboundary claimants can be empowered to act as part of the enforcement structure of international environmental law by giving them access to the same information, decision-making processes, and legal procedures as nationals. The Aarhus Convention represents one element of this development, an element now firmly established within the pantheon of human rights law by the ECHR.[123] This development shows how victims of transboundary pollution already have rights in international law which they can exercise within the legal system of the polluting state; what remains uncertain is whether they also have human rights exercisable against the polluting state.

How far a state must respect the human rights of persons in other countries thus becomes an important question once we start to ask whether we can view climate change and transboundary pollution in human rights terms. That is the debate initiated by the UNHRC's characterization of climate change as a human rights issue.[124] It is also posed by the *Aerial Spraying Case*, initiated by Ecuador in 2007 following alleged cross-border spraying of herbicides by Colombian aircraft during anti-narcotic operations.[125] Ecuador argued, *inter alia*, that the resulting pollution violated the

[119] ILC, 2001 Articles on State Responsibility, Arts 42 and 48, and commentary in J. Crawford (ed.), *The ILC's Articles on State Responsibility* (2002), at 254–260, 276–280.

[120] *Barcelona Traction Light and Power Company Limited (Belgium v. Spain)* [1970] ICJ Rep 3, at paras 33–34.

[121] Elaborated in OECD Council Recommendations C (74) 224 (1974); C(76) 55(1976); C (77) 28 (1977); C (78) 77 (1978); C (79) 116 (1979), reproduced in OECD, *OECD and the Environment* (1986). See generally OECD, *Legal Aspects of Transfrontier Pollution* (1977); Smets, 'Le principe de non-discrimination en matière de protection de l'environnement', *Revue Européenne de l'Environnement* (2000), 1; Birnie, Boyle, and Redgwell, *supra* note 2, at 304–311.

[122] A. Levin, *Protecting the Human Environment* (1977), at 31–38; Sand, 'The Settlement of Disputes in the Field of the International Law of the Environment', in OECD, *supra* note 121, at146; Bilder, 'The Settlement of Disputes in the Field of the International Law of the Environment', 144 *Recueil des Cours* (1975) 139, at 224. Handl, 'Environmental Security and Global Change: The Challenge to International Law', 1 *Yrbk Int'l Environmental L* (1990), 18ff.; Boyle, 'Globalising Environmental Liability: the Interplay of National and International Law', 17 *J Environmental L* (2005) 3.

[123] *Supra*, sect. 3.

[124] UNHRC res. 10/4 (2009, *supra* note 14, sect. 2.

[125] The case will be heard by the ICJ in 2013. The author is counsel for Ecuador, but the views expressed here are entirely his own.

human rights of indigenous people in Ecuador whose health, crops, and livestock had suffered.[126]

The extra-territorial application of human rights law is not itself novel, but it has normally arisen in the context of occupied territory or cross-border activities by state agents.[127] Although the ICCPR requires a state party only to secure the relevant rights and freedoms for everyone within its territory or subject to its jurisdiction,[128] in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* the ICJ noted that:

> while the jurisdiction of States is primarily territorial, it may sometimes be exercised outside the national territory. Considering the object and purpose of the International Covenant on Civil and Political Rights, it would seem natural that, even when such is the case, State parties to the Covenant should be bound to comply with its provisions.[129]

The ICESCR makes no reference to territory or jurisdiction, but it too was interpreted by the Court as applying extraterritorially to occupied territory.[130]

The IACHR has followed the ICJ's fairly broad interpretation of 'jurisdiction' in its reading of Article 1 of the American Convention,[131] and in cases concerning the American Declaration of Human Rights.[132] The case law on Article 1 of the European Convention is more cautiously worded, and extra-territorial application is ostensibly exceptional,[133]

[126] See Ecuador's ICJ application and UNHRC, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (Rodolfo Stavenhagen): Mission to Ecuador, 25 April–4 May 2006*, UN Doc A/HRC/4/32/Add.2, 28 Dec. 2006; UNHRC, *Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health (Paul Hunt): Preliminary Note on Mission to Ecuador and Colombia, Addendum*, UN Doc A/HRC/7/11/Add.3, 4 Mar. 2007.

[127] See Meron, 'Extraterritoriality of Human Rights', 89 *AJIL* (1995) 78; Scheinin, 'Extraterritorial Effect of the International Covenant on Civil and Political Rights', in F. Coomans and M. Kamminga (eds), *Extraterritorial Application of Human Rights Treaties* (2004), at 73; Cerna, 'Out of Bounds? The Approach of the Inter-American System for the Promotion and Protection of Human Rights to the Extraterritorial Application of Human Rights Law' (WP No. 6, Center for Human Rights and Global Justice, 2006); Loucaides, 'Determining the Extra-territorial Effect of the European Convention: Facts, Jurisprudence and the *Bankovic* Case' [2006] *European Human Rts L Rev* 391; Wilde, 'The "Legal Space" or "Espace Juridique" of the ECHR: Is it Relevant to Extraterritorial State Action?', *European Human Rts L Rev* (2005) 115; Gondek, 'Extraterritorial Application of the ECHR: Territorial Focus in an Age of Globalisation', 52 *Netherlands Int'l L Rev* (2005) 349; King, 'The Extraterritorial Human Rights Obligations of States', 9 *Human Rs L Rev* (2009) 521; M. Milanovic, *Extraterritorial Application of Human Rights Treaties* (2011).

[128] 1966 ICCPR, Art. 2. Art. 1 of the AmCHR and Art. 1 of the ECHR make no reference to territory, but require parties to ensure to everyone 'subject to' or 'within' their jurisdiction the rights set out therein. See generally O. De Schutter, *International Human Rights Law* (2010), at 142–179.

[129] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion ('Palestine Wall Case')* [2004] ICJ Rep 136, at para. 109. See also General Comment No. 31 adopted by the UN Committee for Human Rights, UN Doc. HRI/GEN/1/Rev. 7, 192, at 194 ff, para. 10.

[130] *Palestine Wall Case*, *supra* note 129, at para. 112. See also the *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures Order* [2008] ICJ Rep 386, at para. 109.

[131] *Ecuador v. Colombia (Admissibility)* [2010] IACHR Report No. 112/10, at paras 89–100.

[132] *Alejandre, Costa, de la Pena y Morales v. Republica de Cuba* [1999] IACHR Report No. 86/99, at para. 23; *Coard v. United States* [1999] IACHR Report 109/99, at para. 37.

[133] See *Bankovic v Belgium and Ors* [2001] ECtHR 333, at paras 59–82 where the Court found that aerial bombardment did not bring the applicants within the jurisdiction or control of the respondent states.

but it has nevertheless been applied in cases involving foreign arrests, military operations abroad, and occupation of foreign territory.[134]

The ratio of these and other similar cases is that where a state exercises control over territory or persons abroad, human rights obligations will follow. As the IACHR explained in a case involving the shooting down of civilian aircraft over the high seas:

> In fact, the Commission would point out that, in certain cases, the exercise of its jurisdiction over extraterritorial events is not only consistent with but required by the applicable rules. The essential rights of the individual are proclaimed in the Americas on the basis of equality and nondiscrimination, 'without distinction as to race, nationality, creed, or sex.' Because individual rights are inherent to the human being, all the American states are obligated to respect the protected rights of any person subject to their jurisdiction. Although this usually refers to persons who are within the territory of a state, in certain instances it can refer to extraterritorial actions, when the person is present in the territory of a state but subject to the control of another state, generally through the actions of that state's agents abroad. In principle, the investigation refers not to the nationality of the alleged victim or his presence in a particular geographic area, but to whether, in those specific circumstances, the state observed the rights of a person subject to its authority and control.[135]

In *Al-Skeini* the European Court reiterated that '[t]he Court does not consider that jurisdiction in the above cases arose solely from the control exercised by the Contracting State over the buildings, aircraft or ship in which the individuals were held. What is decisive in such cases is the exercise of physical power and control over the person in question.'[136] It held the Convention applicable to deaths caused by the British Army during its occupation of Iraq.

None of these cases is environmental, but they give a good indication of the way international courts have approached the extra-territorial application of all the main human rights treaties. We also know from the human rights case law reviewed earlier in this article that a failure by the state to regulate or control environmental nuisances within its own territory may interfere with human rights.[137] How then should we answer the question whether the obligation to protect human rights from such environmental nuisances also applies extraterritorially? Can we conclude that the transboundary victims of nuisances with extraterritorial effects are within the 'jurisdiction' of the respondent state when the enjoyment of their human rights is affected? There are no precedents directly in point, but a good case can nevertheless be made for the extraterritorial application of human rights treaties to environmental nuisances. Given the failure of much of the literature to deal with this question in any depth (or even to ask it), it is worth doing so here.

[134] See *Al-Skeini v. United Kingdom* [2011] ECtHR, at paras 130–142; *Öcalan v. Turkey,* 41 EHRR (2005) 985, at para. 91; *Ilascu v. Moldova and Russia,* 40 EHRR (2005) 46, at paras 310–319, 376–394; *Issa et al. v. Turkey,* 41 EHRR (2004) 567, at para. 71; *Cyprus v. Turkey,* 35 EHRR (2002) 30, at para. 78.

[135] *Alejandre, Costa, de la Pena y Morales v. Republica de Cuba* [1999] IACHR Report No. 86/99, at para. 23 (footnotes omitted).

[136] *Al-Skeini v. United Kingdom* [2011] ECtHR, at para. 136.

[137] See the cases cited *supra*, in note 9.

First, the human rights case law is not consistent in its treatment of extra-territorial harm. At one extreme, the UN Human Rights Committee observed in *Delia Saldias de López v. Uruguay,* 'It would be *unconscionable* to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.'[138] On this view any harmful effect on human rights anywhere is potentially within the 'jurisdiction' of the respondent state, insofar as courts have emphasized authority or control over the person rather than simply focusing on control of territory.[139] Nevertheless, that view was rejected in *Bankovic*, where the ECHR held that '[t]he Court considers that the applicants' submission is tantamount to arguing that anyone adversely affected by an act imputable to a Contracting State, wherever in the world that act may have been committed or its consequences felt, is thereby brought within the jurisdiction of that State for the purpose of Article 1 of the Convention. … The Court is inclined to agree with the Governments' submission that the text of Article 1 does not accommodate such an approach to "jurisdiction".'[140] However, *Bankovic* has not been followed in later cases,[141] nor is it supported by case law under other human rights treaties,[142] and it appears to be a decision particular to its own unusual circumstances.[143] Moreover, it is far removed on its facts from transboundary pollution cases.

Secondly, while it is less plausible to say that the polluting state 'controls' the territory of the state affected by pollution,[144] it is entirely plausible to conclude that the victims of transboundary pollution fall within the 'jurisdiction' of the polluting state – in the most straightforward sense of legal jurisdiction. The jurisdiction of national courts to hear cases involving transboundary harm to extraterritorial plaintiffs is recognized in private international law and in environmental liability conventions.[145] As we

[138] (1981) ICCPR Comm. No. 52/1979, at para. 12.3, referring to Art. 2 of the ICCPR. See also *Lilian Celiberti de Casariego v. Uruguay*, ICCPR Comm. No. 56/1979 (1981).

[139] See in particular King, 'The Extraterritorial Human Rights Obligations of States', 9 *Human Rts L Rev* (2009) 521; Gondek, 'Extraterritorial Application of the European Convention on Human Rights: Territorial Focus in the Age of Globalization?',52 *Netherlands Int'l L Rev* (2005) 349, at 375.

[140] *Bankovic v. Belgium, supra* note 133, at para. 75.

[141] *Supra* note 134.

[142] *Supra* notes 131–132.

[143] See in particular Gondek, *supra* note 139, at 377; Wilde, 'The "Legal Space" or "Espace Juridique" of the European Convention on Human Rights: Is It Relevant to Extraterritorial State Action? [2005] *European Human Rts L Rev* 115, at 120–124.

[144] Significant transboundary pollution is arguably a violation of the permanent sovereignty of a state (and its people) over its own natural resources, and in a serious case might amount to a *de facto* expropriation: see the preamble to the 2001 ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, *Report of the ILC on its 53rd Session*, GAOR, A/56/10 (2001), and *SERAC v. Nigeria, supra* note 3, at para. 55.

[145] See EC Council Reg, 44/2001 on Jurisdiction and Judgments, OJ (2001)L12/1, Art. 5; 2004 Kiev Protocol on Civil Liability and Compensation, Art. 13; 1993 Convention on Civil Liability for Damage to the Environment, Art. 19; 1997 Protocol to the Vienna Convention on Civil Liability for Nuclear Damage, Art. XI; 2004 Protocol to the Paris Convention on Third Party Liability in the Field of Nuclear Energy, Art. 13. See generally C. McLachlan and P. Nygh (eds), *Transnational Tort Litigation* (1996), especially chs 1, 4, and 12.

noted at the beginning of this section, in such cases the Aarhus Convention and earlier OECD practice require the polluting state to make provision for non-discriminatory access to justice in its own legal system. Aarhus applies in general terms to the 'the public' or 'the public concerned', without distinguishing between those inside the state and others beyond its borders.[146] Article 3(9), the non-discrimination Article, requires that 'the public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination as to citizenship, nationality or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.' The principle of non-discrimination has also been adopted by the International Law Commission in its articles on transboundary harm,[147] by the UNECE in its environmental conventions,[148] and by MERCOSUR.[149] The IACtHR has held that 'the fundamental principle of equality and non-discrimination constitute a part of general international law'.[150] There is little point in requiring that national remedies be made available to transboundary claimants if they cannot also resort to international or regional human rights law when necessary to compel the polluting state to enforce its own court orders or laws or to assess and take adequate account of the harmful effects of activities which it authorizes and regulates. That is exactly how domestic claimants have successfully used human rights law in environmental cases.[151]

Moreover, where it is possible to take effective measures to prevent or mitigate transboundary harm to human rights then the argument that the state has no obligation to do so merely because the harm is extra-territorial is not a compelling one. On the contrary, the non-discrimination principle requires the polluting state to treat

[146] Art. 2(5). See UNECE, Compliance Committee, *Bystre Deep-water Navigation Canal – Findings and Recommendation with Regard to Compliance by Ukraine* (Comms. ACCC/C/2004/01 & 03) ECE/MP.PP/C.1/2005/2/Add. 3 (14 Mar. 2005), at paras 26–28; UNECE, *The Aarhus Convention – An Implementation Guide* (2000), at 41.

[147] *Supra* note 144. Art. 15 prohibits discrimination based on nationality, residence, or place of injury in granting access to judicial or other procedures, or compensation, in cases of significant transboundary harm: see *ILC Report* (2001) GAOR A/56/10, at 427–429. See to the same effect the ILC's 2006 Principles on Allocation of Loss, Principle 8(2), and the 1997 UN Convention on International Watercourses, Art. 32.

[148] In addition to the Aarhus Convention, it is listed in the preamble to the 1992 Convention on the Transboundary Effects of Industrial Accidents among 'principles of international law and custom'. See also 1991 Convention on Environmental Impact Assessment in a Transboundary Context, Art. 2(6); 1992 Convention on the Transboundary Effects of Industrial Accidents, Art. 9.

[149] 1992 Las Leñas Protocol on Jurisdictional Cooperation and Assistance, ch III, Art. 3. The position in NAFTA is less clear. Transboundary plaintiffs appear to have equality of standing under some US environmental statutes: see Trans Alaska Pipeline Authorisation Act, 43 USC, § 1635(c)(1) of which allows 'any person or entity, public or private, *including those resident in Canada*' to invoke the Act's liability provisions. Art. 6 of the 1993 North American Agreement on Environmental Co-operation, which provides for 'interested persons' to have access to legal remedies for violation of environmental laws, may also apply to transboundary litigants. See generally Hsu and Parrish, 'Litigating Canada–U.S. Transboundary Harm', 48 *Virginia J Int'l L* (2007) 1.

[150] See *Juridical Situation and Rights of Undocumented Migrants* (17 Sept. 2003), IACtHR, OC-18/03, at para. 83.

[151] *Supra*, section 1.

extra-territorial nuisances no differently from domestic nuisances.[152] To deny transboundary pollution victims the protection afforded by human rights treaties when otherwise appropriate would for all these reasons be hard to reconcile with standards of equality of access to justice and non-discriminatory treatment required by these precedents.

On that basis a state which fails to control harmful activities within its own territory which cause or risk causing foreseeable environmental harm extraterritorially does owe certain human rights obligations to those affected, because they are within its jurisdiction and control, even if they are not within its territory. It is most likely to violate the human rights of those affected extra-territorially if it does not permit them equal access to environmental information and participation in EIA permitting procedures, or if it denies access to adequate and effective remedies within its own legal system.[153] Moreover, in keeping with the principle of non-discrimination, the environmental impact of activities in one country on the right to life, private life, or property in other countries should be taken into account and given due weight in the decision-making process.[154] There is no principled basis for suggesting that the outcome of cases such as *Hatton* should depend on whether those affected by excessive noise or any other environmental problem are in the same country or in other countries.[155] It seems entirely consistent with the case law and the 'living instrument' conception of human rights treaties to conclude that a state party must balance the rights of persons in other states against its own economic benefit, and must adopt and enforce environmental protection laws for their benefit, as well as for the protection of its own population. The same proposition applies just as much to other human rights treaties as to the European Convention.

However, even if this reasoning is correct in cases of transboundary pollution affecting individuals in a neighbouring state, it does not follow that it will be equally valid in cases of global environmental harm, such as climate change. Here the obvious problems are the multiplicity of states contributing to the problem and the difficulty of showing any direct connection to the victims. The inhabitants of sinking islands in the South Seas may justifiably complain of human rights violations, but who is responsible? Those states like the UK, US, and Germany whose historic emissions have unforeseeably caused the problem? Those states like China and India whose current

[152] See OECD Council Recommendations and the authors cited *supra*, in note 120, and Knox, 'Myth and Reality of Transboundary Environmental Impact Assessment', 96 *AJIL* (2002) 291.

[153] See ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, *Report of the ILC 2006*, GAOR A/61/10, at paras 51–67. Principle 6(1) sets out the core obligation: '[s]tates shall provide their domestic judicial and administrative bodies with the necessary jurisdiction and competence and ensure that these bodies have prompt, adequate and effective remedies available in the event of transboundary damage caused by hazardous activities located within their territory or otherwise under their jurisdiction or control'. See also Arts 3(9) and 9(4), 1998 Aarhus Convention.

[154] As they would have to be in transboundary environmental impact assessments: see 1991 Espoo Convention on EIA in a Transboundary Context, Art. 3(8).

[155] ILA, Committee on Transnational Enforcement of Environmental Law, Final Report, Rule 2, and commentary, *Report of 72nd Conference* (2006).

emissions are foreseeably making matters worse? Or those states like the US or Canada which have opted out of Kyoto and failed to take adequate measures to limit further emissions so as to stabilize global temperatures at 1990 levels? Or the governments of the Association of Small Island States, which may have conceded far too much when ratifying the Kyoto Protocol or in subsequent climate negotiations? It is much harder to frame such a problem in terms of jurisdiction or control over persons or territory as required by the human rights case law. It is also harder to contend that any of these governments have failed to strike the right balance between their own state's economic development and the right to life or private life in other states when they have either complied with or are exempt from greenhouse gas emissions reduction targets established by Kyoto and agreed by the international community as a whole.[156] Inadequately controlled transboundary pollution is clearly a breach of general international law,[157] and as I have argued here may also be a breach of human rights law. However, given the terms of the Kyoto Protocol and subsequent voluntary agreements it is far from clear that inadequately controlled climate change violates any treaty obligations or general international law.[158] In those circumstances the argument that it nevertheless violates existing human rights law is far harder to make.

At this point it may be better to accept, as the UNHRC appears to have done, that existing human rights law is not the right medium for addressing the shared problem of climate change and that further negotiations through the UNFCCC process are the only realistic answer, however unsatisfactory that might be. If it wants to take climate change seriously then it must find a better way of giving human rights concerns greater weight within the UNFCCC negotiating process, and, as we saw in the previous section, that can best be achieved by using the ICESCR and the notion of a right to a decent environment to pressurize governments.

6 Conclusions

Articulating a right to a decent or healthy environment within the context of economic, social, and cultural rights is not inherently problematic. Clarifying the existence of such a right would entail giving greater weight to the global public interest in protecting the environment and promoting sustainable development, but this could be achieved without doing damage to the fabric of human rights law, and in a manner which fully respects the wide margin of appreciation that states are entitled to exercise when balancing economic, environmental, and social policy objectives. It would build on existing precedents under the ICESCR, and reflect international policy on sustainable development endorsed at Rio in 1992 and in subsequent international conferences. The further elaboration of procedural rights, based on the Aarhus Convention,

[156] Greenhouse gas emissions reduction targets under Kyoto apply only to Annex I developed state parties, not to developing countries, including China, India, and Brazil. Compare 1997 Kyoto Protocol, Arts 2–9, which apply to annex I parties, and Art. 10, which applies to all parties.

[157] *Pulp Mills Case*, *supra* note 95, at paras 101, 187.

[158] *Supra*, note 111.

would facilitate the implementation of such a right, and give greater prominence globally to the role of NGOs in public interest litigation and advocacy. These two developments go hand in hand. They are not a necessary part of any declaration or protocol on human rights and the environment, but they do represent a logical extension of existing policies and would represent a real exercise in progressive development of the law. A declaration or protocol on human rights and the environment thus makes sense provided it brings together existing civil, political, economic, and social rights in one coherent whole, while at the same time reconceptualizing in the language of economic and social rights the idea of the environment as a common good. It would, in other words, recognize the global environment as a public interest that states have a responsibility to protect, even if they only implement that responsibility progressively and insofar as resources allow.

Using existing human rights law to grapple with climate change is more challenging. Giving human rights extraterritorial scope in environmental cases is not the problematic issue, however. As we have seen, the argument that transboundary victims come within the jurisdiction or control of the polluting state can be made, is consistent with existing human rights law, and is supported by developments in international environmental law. If that is correct then a state does have to take account of transboundary environmental impacts on human rights and it is obliged to facilitate access to remedies and other procedures. But climate change is a global problem. It cannot easily be addressed by the simple process of giving existing human rights law transboundary effect. It affects many states and much of humanity. Its causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims. Moreover, much of the economic policy which drives greenhouse gas emissions worldwide is presently lawful and consistent with the terms of the UNFCCC and the Kyoto Protocol. It is no more likely to be derailed by human rights litigation based on ICCPR rights than the UK's policy on Heathrow airport in the *Hatton Case*. The response of human rights law – if it is to have one – needs to be in global terms, treating the global environment and climate as the common concern of humanity. That is why locating the right to a decent environment within the corpus and institutional structures of economic, social, and cultural rights makes more sense. In that context the policies of individual states on energy use, reduction of greenhouse gas emissions, land use, and deforestation could be scrutinized and balanced against the evidence of their global impact on human rights and the environment. This is not a panacea for deadlock in the UNFCCC negotiations, but it would give the rights of humanity as a whole a voice that at present is scarcely heard. Whether the UNHRC wishes to travel down this road is another question, for politicians to answer rather than lawyers, but that is where it must go if it wishes to do more than posture on climate change.