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# International Human Rights in an Environmental Horizon

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## Abstract

*This paper argues that, in spite of recent judicial practice contributing to the integration of environmental considerations in human rights adjudication, progress in this field remains limited. This is so because of the prevailing 'individualistic' perspective in which human rights courts place the environmental dimension of human rights. This results in a reductionist approach which is not consistent with the inherent nature of the environment as a public good indispensable for the life and welfare of society as a whole. The article, rather than advocating the recognition of an independent right to a clean environment, presents a plea for a more imaginative approach based on the consideration of the collective-social dimension of human rights affected by environmental degradation.*

## 1 Introduction

No title could have better captured the essence of the contribution of Antonio ('Nino') Cassese to international law scholarship than '[t]he human dimension of international law: progress or stagnation?'. Though his work is firmly anchored in the Italian tradition of legal positivism, he has always striven to overcome the purely inter-state structure of international law and to achieve a progressive reform of the system based on the centrality of human beings and on control of brute force.<sup>1</sup> In this context, I would like to highlight two salient aspects of Nino's personality and of his approach to international law. The first is his keen interest in the past and his attention to the history of ideas which have influenced the origin and evolution of international law. His work never relies only on the sterile materials which constitute tools of legal

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<sup>1</sup> See, in particular, the following books by A. Cassese: *I diritti umani nel mondo contemporaneo* (1994); *Self-determination of Peoples: a Legal Reappraisal* (1995); *The Current Legal Regulation of the Use of Force* (1986).

research; he always reminds us whence we came and how historical events have shaped contemporary norms and institutions of international law. This is especially evident in his book *Il diritto internazionale nel mondo contemporaneo*,<sup>2</sup> where analytical rigour is accompanied by a refreshing historical approach to the reconstruction of the dynamic evolution of international law. This is rather unusual in Italian international law scholarship.

The second aspect peculiar to Nino's work is his projection toward the future and his constant interest in the potential of international law for self-renewal and its instantiation of the interests of humanity rather than *raison d'état*. In this respect, he has somehow broken the positive law taboo according to which legal scholars can be only detached observers of the law and of its change by the recognized authority, the state. He has not simply 'looked at' the changing structure of the law as a spectator to a story told by an external narrator. He has added his voice to the narrative of the progressive development of the law. This is particularly evident with respect to his role as an international judge, his contribution to the development of international criminal law, and the impact this field is having on general international law, including the law of state responsibility.

It is with these two distinct aspects of Nino's personality in mind that I can give my small contribution to the aspect of this symposium on 'progress or stagnation'. I will focus on one problematic aspect of the contemporary development of international law, that is whether our established conception of human rights – as rights of the individual – is suitable to face the challenge posed to human rights by environmental degradation, which affects us as a society, not merely as individuals.

## 2 The Challenge of Environmental Justice

In our search for progress in this field, we ought to ask whether we need to fashion new rights – I will avoid the pedantic and useless schematization of 'generation rights' – inherently related to the environment and new technology related risks, or alternatively whether we can 'adapt' the conceptual and normative framework of international human rights to new situations so as to extend the scope of protection to novel risks and to the impact of environmental degradation on human rights.

The question whether human rights are the proper legal tools for dealing with the increasing degradation of the environment has now become more timely than ever for at least two reasons. First, contemporary developments at the level of treaty law have tended to fashion the entitlement of individuals, communities, and groups to take part in environmental decisions affecting their lives, and to access justice with respect to adverse impacts caused to their environment in terms of 'human rights'. We may call this phenomenon the 'proceduralization of environmental rights' in the sense of an individual and social empowerment to participate in the deliberative process leading

<sup>2</sup> *Il diritto internazionale nel mondo contemporaneo* (1984).

to environmental decisions and in the activation of remedies against environmental harm.<sup>3</sup> Evidence of this trend can be found in the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters,<sup>4</sup> as well as in the 1993 NAFTA side agreement on Environmental Cooperation.<sup>5</sup> The importance of these developments cannot be underestimated if we consider that, in matters of environmental law, the international system remains disabled by the lack of a compulsory dispute settlement mechanism, which reduces its effectiveness as compared to the system of international economic law – with compulsory investment arbitration and binding WTO dispute settlement procedures.

The second reason for revisiting the issue of the nature and scope of environmental rights is substantive. Recent practice shows that the protection of the natural environment in special socio-cultural contexts is a *sine qua non* for the enjoyment of human rights by members of the relevant group or community. The high-water mark of this trend can be found in the recent UN Declaration on the Rights of Indigenous Peoples,<sup>6</sup> and in the previous Banjul Charter on Human and Peoples Rights, which proclaims in Article 24 the right of African peoples to ‘a general satisfactory environment favourable to their development’.<sup>7</sup>

But does this practice indicate that a human right to a healthy and sustainable environment has emerged in international law? As the following discussion will show, the extensive case law developed by human rights courts and supervisory bodies at regional and universal levels tends to indicate that indeed an environmental dimension of human rights has been recognized as implied in the commitments undertaken by the relevant human rights treaties and conventions. But, with the exception of the Banjul Charter and its implementing jurisprudence, environmentally related ‘rights’ have essentially been conceived as ‘individual rights’ developed as an extension, by way of interpretation, of other expressly recognized human rights – such as the rights

<sup>3</sup> See Redgwell, ‘Access to Environmental Justice’, in F. Francioni (ed.), *Access to Justice as a Human Right* (2007), at 153ff; Cameron and Mackenzie, ‘Access to Environmental Justice and Procedural Rights in International Institutions’, in A. Boyle and M. Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996), at 129ff.

<sup>4</sup> Done 25 June 1998, entered into force 30 Oct. 2001, 2161 UNTS 447.

<sup>5</sup> Adopted 8 Sept. 1993 and entered into force 1 Jan. 1994, 32 ILM (1993) 1482.

<sup>6</sup> Adopted by GA Res 61/295 of 13 Sept. 2007. Art. 29 of the Declaration expressly addresses environmental rights and reads as follows:

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

<sup>7</sup> African Charter on Human and Peoples’ Rights, adopted 27 June 1981, entered into force 21 Oct. 1986.

to life, health, private and family life – and not as a collective right of the community affected by the disputed environmental impact. The argument put forward here is that this approach, although acceptable as a provisional solution in the face of extreme environmental abuses which directly affect individuals, is ill-suited to addressing environmental degradation as such and the diffused effects that such degradation has on society as a whole. In my opinion, the rigid maintenance of this approach contributes to the ‘stagnation’ of international law, and more particularly to the confinement of the idea of ‘human rights’ within an individualistic horizon, which remains blind to the intrinsic linkage between the individual and the collective interests of society. The plea is therefore for more advanced jurisprudence in the field of human rights which recognizes the collective dimension of the right to a decent and sustainable environment as an indispensable condition of human security and human welfare. The following analysis will try to identify what potential exists for achieving progress toward this goal within the present legal framework of human rights.

### 3 The Human Dimension of Environmental Law

The first important statement on the link between human rights and protection of environmental quality can be found in the 1972 Stockholm Declaration on the Human Environment. Principle 1 of the Declaration, issued from the first UN conference on the environment, proclaimed that ‘Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations’. In its simplicity, this statement contained all the elements for the combination of ecological and human rights approaches to the question of environmental protection. It recognized that the enjoyment of freedom and equality among human beings is inseparable from the preservation of an environmental quality which permits human dignity and human welfare. It was couched in the terms of a solemn ‘covenant’, i.e., a commitment *erga omnes* to the protection of an international public good, rather than a reciprocal obligation between states, thus echoing the language of human rights treaties.<sup>8</sup> It introduced the concept of inter-generational responsibility to protect and improve the environment.

If we look at this statement through the lens of today’s impending environmental disasters, in particular, the aggravating effects of climate change, which is now reaching the level of a threat to human security, it is easy to see that Principle 1 of the Stockholm Declaration contained an innovative, even revolutionary, approach to the safeguarding of human rights and human dignity through environmental protection.<sup>9</sup> Unfortunately,

<sup>8</sup> It is not by chance that only 6 years before the UN had adopted the two most important human rights treaties on Civil and Political Rights, and on Economic, Social and Cultural rights, under the name of ‘Covenants’ thus underscoring, at least at a political and moral level, their character of a solemn commitment toward the international community as a whole rather than a mere contractual instrument.

<sup>9</sup> This potential of Art. 1 was clearly perceived by some forward looking commentators of the time. See particularly Sohn, ‘The Stockholm Declaration on the Human Environment’, 14 *Harvard Int’l LJ* (1973) 451.

subsequent environmental diplomacy at the UN level has not fulfilled that promise. Twenty years after the Stockholm Declaration, the Rio Conference on environment and development ended up with a Declaration which substantially departed from the idea of a link between human rights and environmental protection. Principle 1 of the Rio Declaration limited itself to proclaiming that human beings are 'the central concern of sustainable development' and are 'entitled to a healthy and productive life in harmony with nature'. This is hardly human rights language. The main concern of the Declaration was the conjugation of environmental protection with economic development, not the safeguarding of human rights through enhanced environmental protection. The conciliation of economic growth with environmental protection remains the focus of environmental diplomacy even in the post-Kyoto negotiations on global warming.<sup>10</sup>

A similar lack of progress characterizes the human rights diplomacy with respect to the development of a set of specific environmental rights. The work undertaken to this end in 1992 by the now defunct UN Sub-Commission on the Prevention of Discrimination and Human Rights, although limited to the adoption of a soft law instrument (a 'Declaration') on a set of principles on human rights and the environment, received little support from the Human Rights Commission and no progress has since been made at the inter-state level toward the elaboration of a normative instrument of this kind.<sup>11</sup>

More recently, some progress towards the integration of environmental considerations into the existing law and practice of human rights has been made at the regional level. In 2005, the Council of Europe adopted a 'Manual on Human Rights and the Environment'<sup>12</sup> which takes stock of the growing jurisprudence of the Strasbourg Court on the subject and lays down a set of general principles which have a direct impact on the adjudication of environmental claims which are based on specific Convention rights such as the rights to life, property, a fair hearing, as well as private and family life. According to these principles, (i) states are always obliged to take and implement measures to control environmental problems which affect the enjoyment of human rights recognized in the Convention; (ii) states have an obligation to provide information relating to serious environmental risks, to ensure public participation in environmental decision-making and access to environmental justice; (iii) environmental protection can be a legitimate aim in a democratic society for the purpose of

<sup>10</sup> The UN Climate Conference was convened in Copenhagen on 7 Dec. 2009 and ended with no binding commitment on mandatory greenhouse gases reduction within predetermined time schedules.

<sup>11</sup> The Draft Declaration of Principles on Human Rights and the Environment, with the report of Special Rapporteur F. Z. Ksentini, Annex 1, can be seen as an elaboration of Principle 1 of the Stockholm Declaration: it declared in para. 2 that '[a]ll persons have the right to a secure, healthy and ecologically sound environment' and in para. 4 the right to 'an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs': UN Doc E/CN.4/Sub.2/1992/7.

<sup>12</sup> Council of Europe Committee of Experts for the Development of Human Rights, 'Final Activity Report on Human Rights and the Environment', 10 Nov. 2005, DH-DEV(2005)06 rev.

limiting certain Convention rights, in particular the right to private and family life and the right to property; (iv) national authorities enjoy a margin of appreciation in the balancing of individual rights and environmental concerns.<sup>13</sup>

In spite of the unquestionable importance of these principles in opening up an environmental perspective for the implementation of the European Convention on Human Rights, the Council of Europe Manual remains quite conservative with regard to the progressive development of an independent set of environmental human rights. Very pointedly, it clarifies that the 'Convention is not designed to provide general protection of the environment as such and does not expressly guarantee a right to a sound, quiet and healthy environment'.<sup>14</sup> This statement is certainly correct if one takes into account only the original intention of the drafters of the European Convention. But it becomes problematic when we take into consideration the profound impact which environmental degradation has on international law, the vast environmental jurisprudence of European Court over the past two decades,<sup>15</sup> and, more important still, the express recognition in the set of principles of the Manual of environmental values as a legitimate aim capable of limiting the applicable scope of the Convention rights. It is hard to understand how such a legitimate aim can work effectively without accepting a certain degree of internalization of environmental values within the system of human rights of the Convention.

In a more specialized context, some progress can be detected with regard to the recognition of the right to water as a specific entitlement to environmental quality and resources. In its General Comment No 15, the UN Committee on Economic, Social and Cultural Rights has recognized that states are under an obligation to ensure an adequate and accessible supply of water for drinking, sanitation, and nutrition in accordance with Articles 11 and 12 of the 1966 UN Covenant on Economic, Social and Cultural Rights.<sup>16</sup> Besides, the Economic Commission of Europe has promoted the adoption of a Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes.<sup>17</sup> The formulation in the Protocol of access to water in terms of basic human needs has the effect, as a minimum, of requiring a human rights approach to the interpretation of the relevant international instruments on the use of transboundary watercourses.<sup>18</sup> This could thus provide a criterion for the review of the legitimacy of state policies which authorize the unsustainable use of water resources in such a way as to deprive affected people of their access to safe drinking and sanitation. It is interesting to note that such an argument underlies the claim submitted by Argentine local authorities before the

<sup>13</sup> *Ibid.*, at 10.

<sup>14</sup> *Ibid.*

<sup>15</sup> See below section 3.

<sup>16</sup> General Comment No. 15: the right to Water (Arts 11 and 12), 26 Nov. 2002, ESCOR, 2003, Supp. 2, 120.

<sup>17</sup> Adopted 17 June 1999, UN Doc MP. WAT/2000/1.

<sup>18</sup> In this sense see Boyle, 'Environment and Human Rights', in *Max Planck Encyclopaedia of Public International Law* (2009), at para. 14.

American Commission of Human Rights in the context of the pending dispute before the International Court of Justice (ICJ) between Argentina and Uruguay on the legality of the latter's authorization in its territory of large pulp mills which Argentina fears will damage the downstream ecosystem of the Uruguay river.<sup>19</sup> It remains to be seen how international adjudicatory bodies will balance the collective claim of the local population to access safe drinking and sanitation water with the competing claim of the host state of the investment to proceed with an economic development project, especially when the project has the support of the majority of the population. Certainly, one cannot ignore that, in this context, the progressive implementation of economic and social rights weighs heavily against the justiciability of the right to clean water. Like all economic and social rights, this hypothetical right would still remain a right of progressive implementation contingent on available resources of the state concerned, and thus subject to democratic processes of majoritarian deliberation. Further, even in the unlikely event that the right to water were to trump the competing claim to economic development, the result would remain extremely limited and would imply the overriding importance of access to water for human health and sanitation but not of environmental quality as a broader issue of human rights.

#### 4 Economic Rights and Environmental Rights

Given the modest progress achieved at the level of standard setting, it is now necessary to ask whether more substantial progress towards the merging of human rights and environmental protection has been achieved at the level of judicial implementation of human rights courts and international supervisory bodies. The examination of this practice is important for two reasons: first, since, as we have pointed out, the European Court and other human rights bodies have developed a rich jurisprudence on the role of human rights in adjudicating the legality of certain environmental impacts on the life, property, and the people affected. Secondly, the case law of adjudicatory bodies in the field of international economic law – notably, investment arbitration – shows that the internationalization of investors' rights and trade freedoms entails corresponding limitations on state regulatory powers, with the risk that certain measures taken with a view to ensuring environmental quality and environmental rights of the local population may be attacked for their inconsistency with investors' rights or trade freedom. A case recently adjudicated within NAFTA Chapter 11, concerning the protection of investments, is indicative of this risk. In *Glamis Gold v. US*,<sup>20</sup> a Canadian

<sup>19</sup> *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, filed with the International Court of Justice on 4 May 2006, still pending at the time of writing (1 Sept. 2009). The complaint before the Inter-American Commission on Human Rights was initiated by the Governor of the Argentine Province of Entre Rios on the basis of the alleged violation by Uruguay of a number of Arts of the American Convention, its Protocol on Economic, Social and Cultural Rights, and the American Declaration. For a comment see Piscitello and Andrés, 'The Conflict Between Argentina and Uruguay Concerning the Installation and Commissioning of Pulp Mills before the International Court of Justice and Mercosur', 67 *ZaoRV* (2007) 159, at 181.

<sup>20</sup> *Glamis Gold Ltd. v. Government of the United States of America*, available at: [www.state.gov/documents/organization/](http://www.state.gov/documents/organization/).

mining company complained that its investment in the United States had been injured by the American authority's denial, allegedly in violation of NAFTA commitments, of the authorization to proceed with mining in a sensitive area of environmental and cultural importance in Northern California. The arbitral decision issued in June 2009 recognized that the conservation of environmental quality and of the cultural values attached to the specific area – which was of great importance as ancestral land of the local native American tribes – were legitimate aims of the United States justifying the limitation of property rights and other economic interests of the investor. Other cases have been decided in recent years where human rights – such as the right to water – have been invoked to counter the investor's claim that local regulations have caused an adverse impact on its internationally protected interests.<sup>21</sup> This jurisprudential trend is important for the purpose of taking into account human needs and conceptions of sustainable development in the enforcement of economic rights and freedoms relating to investments and trade. However, so far, this jurisprudence has played a purely 'negative' role, in the sense of using environmental considerations not so much as constitutive elements of 'human rights' but simply as legitimate aims of the host state capable of legally justifying restrictions on the economic rights guaranteed to investors in *ad hoc* treaties and under customary international law. This approach has its limits. While it is true that it may result in an arbitral decision recognizing the host state's conduct as legitimate and justifiable on the basis of the consideration that the economic interest of the investor are subject to the regulatory powers of the host state, especially when such powers are democratically exercised,<sup>22</sup> at the same time it may result in an award of damages to the investor on the basis of the argument that environmental goals, however legitimate and internationally recognized, do not exclude compensation for the loss caused to the investor and do not even justify discounted compensation.<sup>23</sup>

## 5 Environmental Values in the European Convention on Human Rights

Let us now turn to the jurisprudence of human rights courts and human rights treaty bodies. Even a brief overview of pertinent case law reveals a considerable degree of progress towards the development of an environmental dimension of human rights, but also a degree of ambiguity and significant divergence of approaches in treating such dimension as connected either to 'individual' rights or to the 'collective' interests of the society.

<sup>21</sup> For a systematic analysis of this practice see P.M. Dupuy, F. Francioni, and E.U. Petersmann (eds), *Human Rights in International Investment Law and Arbitration* (2009).

<sup>22</sup> See *Methanex Corp v. United States*, Final Award, 3 Aug. 2005 44 ILM (2005) 1345; *Parkerings-Compagniet AS v. Republic of Lithuania*, Case No. ARB/05/08/, Award of 11 Sept. 2007, available at: [icsid.worldbank.org/ICSID/Index.jsp](http://icsid.worldbank.org/ICSID/Index.jsp).

<sup>23</sup> *Compania del Desarrollo de Santa Elena, SA v. Republic of Costa Rica*, Case No. ARB/96/1, Final Award, 17 Feb. 2000, 5 ICSID Rep 157, 39 ILM (2000) 1317.

Let us begin with the European Convention on Human Rights (ECHR). We have already pointed out that in the past 25 years the Strasbourg Court has made a positive contribution to the construction of an environmental dimension of several rights enshrined in the Convention. This has led to the adoption of the Council of Europe's Manual on Human Rights and the Environment.<sup>24</sup> The Strasbourg case law has contributed to the development of certain 'environmental obligations' incumbent upon states parties by virtue of the Convention. These include: (i) the positive obligation to regulate activities of an industrial or technological nature which might adversely affect the sphere of protected rights, such as the right to life (Article 2) and the right to private and family life (Article 8); (ii) the positive obligation effectively to enforce legal, administrative, or judicial measures designed to prevent or remedy the unlawful interference with such rights; (iii) the positive obligation to provide information and engage in consultation with affected individuals and people with regard to the actual risk and danger of the environmental impact in issue. Starting with the early cases of *Lopez Ostra v. Spain*<sup>25</sup> and *Guerra v. Italy*,<sup>26</sup> the Court has contributed to the jurisprudential development of a concept of environmental obligations covering not only activities carried out by the state but also those conducted by private parties. In *Fadayeva v. Russia*,<sup>27</sup> the Court found that industrial activities with a heavy environmental impact gave rise to the respondent state's responsibility for 'failure to regulate private industry' when such failure resulted in a form of environmental degradation such as a failure to secure human rights under the Convention. With regard to the right to life, the Court has emphasized in *Oneriyildiz v. Turkey* that the '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'. In addition, it is incumbent on the state to take all 'practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks'.<sup>28</sup> But the duty does not stop at the adoption of the appropriate environmental measures of protection. These measures must be enforced effectively. As stated in *Taskin v. Turkey*:

The Court would emphasise that the administrative authorities form an element of a State subject to the rule of law, and that their interest coincide with the need for the proper administration of justice. Where administrative authorities refuse or fail to comply, or even delay doing so, the guarantees enjoyed by a litigant during the judicial phase of the proceedings are rendered devoid of purpose.<sup>29</sup>

*Taskin* is noteworthy also for the emphasis the Court places on the procedural duties concerning provision of information and consultation with affected parties as a condition

<sup>24</sup> See *supra* note 12.

<sup>25</sup> ECtHR Series A, No. 303 C.

<sup>26</sup> ECtHR Rep (1998-I) 210.

<sup>27</sup> ECtHR Rep (2005-IV) 255.

<sup>28</sup> *Ibid.*, at paras 89 and 90.

<sup>29</sup> 2004-X Eur. Ct HR 1149, at paras 124–125.

for the fulfilment of the obligations inherent in Article 8 of the Convention (private and family life) and for the proper balancing of economic development goals and human rights. The case concerned the environmentally noxious operation of a mine. The Court held that:

whilst Article 8 contains no explicit procedural requirement, 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.<sup>30</sup>

As has been keenly observed,<sup>31</sup> this pronouncement by the Court has the effect of introducing, by way of interpretation, a requirement of informed process and consultation borrowed from environmental treaties, in particular the 1998 Aarhus Convention<sup>32</sup> and the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context.<sup>33</sup>

We can add to this observation that the Court has taken a remarkable step, again by way of an evolving interpretation, toward the extension of the obligation to avoid ‘interference’ from the category of ‘public authority’, as literally provided by the text of Article 8, to the conduct of private parties. This has important implications for the ‘horizontal’ implementation of the procedural obligation concerning information and participation in environmental decisions to the extent that it permits full consideration, and a fair balancing, of the competing interests – economic and ecological – involved in the environmental case.

But in spite of the undeniable progress marked by these judgments toward the opening up of an environmental horizon of human rights, they still fail to achieve the objective of the recognition of an independent right to a decent environment. This is prevented, first, at a substantive level by the purely individualistic conception of human rights still pervading the jurisprudence of the Strasbourg Court. Negative impacts on the environment, even where severe, are relevant only in that they produce an interference with the sphere of rights guaranteed by the convention to ‘individuals’. Thus, environmental integrity is not seen as a value *per se* for the community affected or society as a whole, but only as a criterion to measure the negative impact on a given individual’s life, property, private and family life. Secondly, at the procedural level, the individualistic approach followed by the Court excludes the admissibility of public interest proceedings to defend the environment, unless the applicants can show a direct impact of the activities complained of on the sphere of their individual rights. Both these limits are well exemplified by the 2003 judgment of the European Court in *Kyrtatos v. Greece*.<sup>34</sup> The case concerned the contested draining of a wetland.

<sup>30</sup> *Ibid.* Art. 8 of the ECHR states: ‘Everyone has the right to respect for his private and family life, his home and his correspondence. . . . There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law.’

<sup>31</sup> A. Boyle, ‘Human Rights or Environmental Rights? A Reassessment’, XVIII *Fordham Environmental L Rev* (2007) 471, at 497.

<sup>32</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, 38 ILM (1999) 517.

<sup>33</sup> Adopted at Espoo, Finland, 25 Feb. 1991, 30 ILM (1991) 800.

<sup>34</sup> ECtHR Rep (2003-VI) 257.

Although the drainage and consequent destruction of the wetland resulted in a violation of the law, the Court reaffirmed that 'neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such'<sup>35</sup> and concluded that the applicants, although they lived in the vicinity of the site, could not prove that their right to private and home life was affected. The paradoxical result of this decision is that the preservation of the environment from the attack caused by illegal activities depends on the interference that such illegal activities produce in the private life of individuals. A different approach would have been preferable. The Court could have given more weight to the illegal character of the environmental destruction and interpreted Article 8 more liberally so as to consider the applicants legitimate stakeholders in the management of natural resources which were not only part of their extended home and private life<sup>36</sup> but, more importantly, constituted a public environmental good affecting the collective life of the people living in and around the area.<sup>37</sup>

## 6 The African Charter and the American Convention on Human Rights

A somewhat more progressive attitude with respect to the conceptualization of environmental rights as 'collective' rather than purely individual entitlements can be found in the case law stemming from the African Charter on Human and Peoples' Rights and under the Inter-American System. As for the first, this comes as no surprise since the whole philosophy of the Charter is informed by the collective dimension of human rights as Peoples' Rights, as can be seen from the Charter's title. In the well-known *Ogoniland* case,<sup>38</sup> where the local population complained of the environmental devastation caused by the oil extraction industry in Nigeria, the African Commission on Human and Peoples' Rights construed the generic language of Article 24 of the Charter<sup>39</sup> in strict environmental terms and declared that:

an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecological equilibria is harmful to physical and moral health.<sup>40</sup>

<sup>35</sup> *Ibid.*, at para. 52.

<sup>36</sup> This argument has also been proposed by Judge Loucaides on the basis of an expansive reading of the notions 'home' and 'private life' used in Art. 8. But his proposal remains confined within an individualistic horizon of rights protection. See Loucaides, 'Environmental Protection through the Jurisprudence of the ECHR', 75 *British Yrbk Int'l L* (2004) 249.

<sup>37</sup> This approach would have been consistent with the approach followed a year later by the Court in *Taskin*. See *supra* note 29.

<sup>38</sup> *Soc. and Econ. Rights Action Centre v. Nigeria*, Case No. ACHPR/COMM/A044/1, OAU Doc. CAB/LEG/67/3 rev 5, at para. 51.

<sup>39</sup> Art. 24 reads: 'All peoples shall have the right to a general satisfactory environment favourable to their development'.

<sup>40</sup> *Supra* note 38.

This language transcends the purely individualistic approach to environmental rights as seen in the jurisprudence of the European Court, and construes human rights guarantees in broad collective terms as legitimate claims of the community to have the quality of its environment preserved against the devastation wrought by unsustainable exploitation of mineral resources. Also, the Commission's decision does not stop at the finding of a violation of the Charter, but goes on to order remedial action to clean up and rehabilitate the lands and rivers damaged by oil operations, and to require the preparation of environmental impact assessments as well as the provision of information and guarantees of public participation in decision-making bodies.<sup>41</sup> This case may be unique in its use of environmental consideration to challenge the sustainability of unbridled oil extraction and in its focus on the collective right to a healthy and satisfactory environment for the local population, which, in the end, may even draw no material benefit from the harmful exploitation of local resources. Certainly, this outcome was facilitated by the express reference to peoples' rights in the African Charter. However, a similar communitarian approach to the use of human rights in environmental disputes can be detected also in a number of cases decided under the American Convention on Human Rights. In its ground-breaking judgment in *Mayagna Sumo Awas Tigni Community v. Nicaragua*,<sup>42</sup> the Inter-American Court held that logging concessions awarded by Nicaragua to private investors in an area claimed by a tribal community constituted a violation of the petitioners' property rights guaranteed by Article 21 of the American Convention. In spite of the lack of any express reference to communal property in the text of Article 21, the Court interpreted the 'right to property' as inclusive of the customary community entitlement of the indigenous people to use their ancestral land for agriculture and hunting, and to have it respected against the environmentally and culturally destructive project of commercial logging. In similar circumstances, the Inter-American Commission has used the Convention provisions on the right to life to extend human rights protection to communities threatened by some form of environmental destruction. So in the case of the *Yanomani Indians* the Commission held that the construction of a highway by Brazil through a wild area in the ancestral lands of the petitioners amounted to a violation of their right to life and physical integrity.<sup>43</sup> In the more recent case of the *Maya Indigenous Community of Toledo*, the same Commission, relying on the aforementioned case of *Awas Tigni* and citing the African precedent of *Ogoniland*, held that a logging project authorized by Belize posed such a threat to the natural environment of the Mayan community as to endanger the whole economic and life support on which the community depended. While recognizing the importance of economic development, the Commission concluded that Belize had infringed the petitioners' right to property in their ancestral lands.

<sup>41</sup> *Ibid.*, at paras 54–69.

<sup>42</sup> IACtHR Series C No. 79, 31 Aug. 2001.

<sup>43</sup> Case 7615, IACommHR Report No. 12/85 OEA/ Ser L/V/IL.66 doc. 10 Rev 1.

## 7 The UN Covenants

At the universal level, the development of an environmental dimension in the human rights provisions of the two UN Covenants has been rather modest, also because of the limited number of cases involving environmental claims. Most of these cases have been brought before the UN Human Rights Committee under the minority protection clause of Article 27 of the Covenant on Civil and Political Rights. This is a cultural provision which expressly refers to the rights of 'persons belonging to such minorities', rather than to the collective rights of the group as such. Consistently with this wording, the UN Human Rights Committee has addressed environmental impacts on traditional life of minorities in the perspective of the 'individual' rights of minority members rather than of the community. So, in *Ilmari Lansman*, a case involving the impact of stone quarrying on the claimant's right to pursue reindeer herding in an undisturbed habitat, the Committee observed that 'Article 27 requires that a member of a minority shall not be denied his right to enjoy his culture'. But ultimately it concluded that 'measures that have a limited impact on the way of life of persons belonging to a minority will not necessarily amount to a denial of the right under Article 27', and found that Finland had adopted sufficient measures to minimize the impact on reindeer herding.<sup>44</sup> A similarly restrictive view of the role of environmental protection in human rights adjudication emerges in relation to citizens' claim to have an environment free from genetically modified crops,<sup>45</sup> from nuclear waste,<sup>46</sup> and from the harmful radiological contamination following nuclear tests.<sup>47</sup> At the same time, the case law of the Human Rights Committee reveals instances of bold adherence to a public interest approach in the construction of human rights in light of environmental considerations. In *Lubicon Lake Band v. Canada*, the Committee found that the adverse environmental impacts caused by oil and gas extraction on the traditional lands of an indigenous community constituted a violation of Article 27. In spite of the restrictive language of Article 27, this decision goes beyond the purely individualistic conception of indigenous rights; the finding of the violation relates to the overall environmental impact of the oil operation on the subsistence system of the indigenous community as a whole, and not on individual members of the group. A similar community-oriented approach can be found in *Francis Hopu and Tepoaitu Bessert v. France*, where the Committee upheld the petitioners' contention that a tourist development project in Polynesia involved an unacceptable impact on traditional tribal lands, including sacred

<sup>44</sup> UN Human Rights Committee, Communication No. 511/92, CCPR/C/52/511/1/1992 (1994), at para. 9.

<sup>45</sup> *Brun v. France*, where the Human Rights Committee declared that 'no person may, in theoretical terms and by *action popularis*, object to a law or practice which he hold at variance with the Covenant': Communication No. 1453/2006, UN Doc. CCPR/C/88/D/1453 (2006), at para. 6.

<sup>46</sup> *EHP v. Canada*, where the Committee dismissed a claim of local residents based on the protection of the right to life and private life against the opening up of a nuclear waste dumping site. The application was dismissed for failure to exhaust local remedies, but the Committee recognized that the dumping of such waste might have raised a serious threat to life for the local population: Communication No. 67/1980, 27 Oct. 1982, *UN Selected Decisions of the Human Rights Committee under the Optional Protocol* (1990), ii, at 20.

<sup>47</sup> *Bordes et al. v. France*, Communication No. 645/1995, 22 July 1996.

burial grounds of the indigenous community.<sup>48</sup> The case was decided pursuant to a broad interpretation of Article 17, which provides for protection for private and family life. The Committee accepted the applicants' argument that the term 'family' ought to be interpreted in light of the customary traditions of the island's autochthonous population to include the entire indigenous community whose life was affected by the construction project.<sup>49</sup>

## 8 Progress of Stagnation?

Progress or stagnation? Reverting to the theme of this symposium we can note, based on the practice examined in this brief survey, that some progress has been made toward the integration of environmental considerations in the process of human rights adjudication. At the substantive level, progress has been achieved by an evolutionary interpretation of established human rights provisions – notably, the right to life, family and private life, and minority rights. So, these provisions have yielded a certain amount of environmental protection to the benefit of individual applicants. At the procedural level, the human rights jurisprudence, especially that of the European Court, has read into the applicable human rights treaties a state obligation to guarantee information, meaningful participation, and access to justice to persons directly affected by an environmental impact. This progress however is limited; not so much because it falls short of establishing an independent 'right' to a clean environment, which is neither necessary nor useful, given its indeterminacy; but rather because it is still hampered by what I consider the main obstacle: the persistent and prevailing individualist perspective in which human rights are conceived and often implemented by international courts and supervisory bodies. Legal scholarship has contributed to this obstacle; especially the doctrinal current often referred as *human rightism*,<sup>50</sup> which conceives of human rights as a self-concluded discipline inscribed within the horizon of formal international standards informed by the traditional canon of human rights as rights of the individual.<sup>51</sup> At the same time, human rights scholarship has argued on theoretical grounds against stretching human rights beyond the individual dimension, for fear that the empowerment of the community may result in new threats to

<sup>48</sup> *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, UN Doc.CCPR/C/60D/549/1993/Rev/1, 29 Dec. 1997.

<sup>49</sup> *Ibid.*, at paras 2.2–10.3.

<sup>50</sup> *Human rightism* is the approximate translation of the picturesque phrase popularized by A. Pellet in his scathing critique of human rights scholarship as an independent and self-sufficient discipline separate from international law. See Pellet, '“Human Rightism” and International Law', *X Italian Yrbk Int'l L* (2001) 3.

<sup>51</sup> Alston, '“Core Labour Standards” and the Transformation of the International Labour Rights Regime', *15 EJIL* (2004) 457.

human rights.<sup>52</sup> These concerns are understandable, because of the ever-present danger of diluting the strength of human rights guarantees and of subjecting the individual to the tyranny of the community. Yet, one wonders whether the whole idea of international human rights as originated in the UN Charter and developed through the Universal Declaration and later normative instruments were ever meant to be one of purely individual rights isolated from the society. The first paragraph of Article 29 of the Universal Declaration, in stating that '[e]veryone has duties to the community in which alone the free and full development of his personality is possible', points in a different direction. But it is especially in the context of the contemporary debate on the interaction of human rights with environmental protection that a purely individualistic human rights approach appears inadequate and even outdated.

As we have seen in the survey of human rights jurisprudence in environmental cases, it does not make much sense to engage human rights language to combat environmental degradation only when such degradation affects the rights to life, property, and the privacy of certain directly affected individuals. This reductionist use of human rights may even be counter-productive in that it tends to reduce environmental values to the very limited sphere of individual interest, thus adulterating their inherent nature of public goods indispensable for the life and welfare of society as a whole. This does not mean that the human rights approach to environmental protection considered above should be discontinued. On the contrary, my plea is for a more imaginative and courageous jurisprudence which takes into consideration the collective dimension of human rights affected by environmental degradation and adapts the language and technique of human right discourse to the enhanced risk posed by global environmental crises to society and, indeed, to humanity as a whole.

Human rights and environmental law occupy a very special place in the field of public international law. Both have developed as branches of the law where states undertake commitments to respect, not another state's rights, but the objective value of human dignity and environmental quality. Both have been used by human rights advocates and environmental activists as emancipatory projects to enhance and augment human freedom, and to guarantee the sustainability of the environments that host human life. More intimate compenetration should result in progress towards generally accepted international standards on the sustainable use of natural resources.

<sup>52</sup> Donnelly, 'Third Generation Rights', in C. Broelmann *et al.* (eds), *Peoples and Minorities in International Law* (1993), at 119ff; and by the same author 'Human Rights, Individual Rights and Collective Rights', in J. Berting *et al.* (eds), *Human Rights in a Pluralistic World, Individuals and Collectivities* (1990), at 39.