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Maura Mullen De Bolívar

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A COMPARISON OF PROTECTING THE ENVIRONMENTAL INTERESTS OF LATIN-AMERICAN INDIGENOUS COMMUNITIES FROM TRANSNATIONAL CORPORATIONS UNDER INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW

MAURA MULLEN DE BOLÍVAR*

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I. INTRODUCTION

> Every part of this country is sacred to my people. Every hill-side, every valley, every plain and grove has been hallowed by some fond memory or some sad experience of my tribe. Even the rocks that seem to lie dumb as they swelter in the sun along the silent seashore in solemn grandeur thrill with memories of past events connected with the fate of my people . . . .[1]

Mythology in some form has always been present in human history.[2] Mythology serves the cosmological function of relating

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1. Paul S. Wilson, *Historical Perspective: What Chief Seattle Said*, 22 ENVTL. L. 1451, 1467 (1992). Words attributed to Chief Seattle, a late nineteenth century American Indian leader, on the theme of differences between indigenous peoples and Western society's relationships to nature are often quoted.

2. The word is derived from *mythos* (word, speech, story, or legend) and has the following dictionary definition:

humans to nature and the natural world. Myths satisfy spiritual needs and often attempt to relate how the same powers creating human life generated all other life forms. Mythology also has a sociological function, linking humans to a particular society's customs and institutions. Socially-oriented mythology systems were generally developed by nomadic peoples whose lifestyle required identification with the group, whereas nature-oriented mythologies were often developed by groups that cultivated the land.[3] In modern times, nature-oriented mythologies are still often held by indigenous peoples.

The concept of national sovereignty developed in Western legal thought exemplifies an intense adherence to identification with a group inhabiting a particular geographical space. The Judeo-Christian tradition, seen as a form of mythology as defined above, is also an integral part of Western thought and its legal institutions. Such a mythology is more socially- than nature-oriented and has been criticized as being in conflict with nature.[4] In this tradition, the creator instructed the first human, who initially lived in harmony with other life forms in the Garden of Eden, to dominate and subjugate the rest of nature.[5]

The conquest and colonization of most of the world that was carried out by the European nation states beginning in the fifteenth century extended domination and subjugation of nature to other human societies that had developed different mythologies and were generally more nature-oriented.[6] Indigenous groups in some parts of Latin America were able to avoid contact with European colonists and many of their traditional economic and mythological systems thus remained relatively intact. Lately, contact with even the most insular indigenous groups in remote areas such as the Amazonian regions has been more frequent. This article attempts to chart a particular point of intersection or contact between the two different relationships to nature: the use of contemporary Western

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> A traditional story of unknown authorship, ostensibly with a historical basis, but serving usually to explain some phenomenon of nature, the origin of man, or the customs, institutions, religious rites, etc., of a people . . . .

WEBSTER'S UNABRIDGED DICTIONARY 1190 (2d ed. 1983).

3. *See* JOSEPH CAMPBELL, THE POWER OF MYTH 23 (Betty Sue Flowers ed., 1988).

4. *See id.* at 24.

5. *See id.*, citing *Genesis*.

6. A letter purportedly written in 1852 by Chief Seattle responding to a request by the U.S. government to purchase tribal land is commonly cited as an expression of such a cosmology:

> This we know: the earth does not belong to man, man belongs to the earth. All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.

Id. at 34.

international human rights and environmental law principles by indigenous peoples to protect the natural environment they inhabit from damage created by hazardous activities conducted by transnational corporations.

II. TRANSNATIONAL CORPORATIONS

The industrial revolution and European colonization were accompanied by a long era of economic dominance by large corporations. These corporations were chartered in the colonizing nation and encouraged to expand business into the colonies.[7] One commentator on the role of transnational corporations (TNCs) has written that "[t]he scope of operations and extent of the territory over which some multinational corporations range are more expansive geographically than any empire that has ever existed."[8]

There were approximately 37,000 transnational corporations in the world by the early 1990s.[9] The growth in the number, size, and influence of TNCs has been a matter of international concern, particularly to developing countries, for over twenty years.[10] Ethical questions arising from TNC activities include corruption, labor and marketing practices, impact on development patterns of host countries, and environmental degradation.[11] The global trend of structural adjustment that emerged in the 1980s favored privatization and deregulation in developing countries in return for lessening of the debt burden, and produced favorable conditions for foreign investment by TNCs.[12] There has also been a shift away from proposals to regulate TNC activity, as evidenced by the current stagnation of a fifteen year United Nations project to draft a Code of Conduct for Transnational Corporations.[13]

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7. *See generally* James Mill, "Colony" in 3 ENCYCLOPEDIA BRITANNICA 257-73 (5th ed. 1997 Supp.).

8. ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 231-32 (1987).

9. *See* U.N. CONFERENCE ON TRADE AND DEV., PROGRAMME ON TRANSNATIONAL CORPORATIONS, WORLD INVESTMENT REPORT 1993, at 19, 21, U.N. Doc. ST/CTC/15b, U.N. Sales No. E.93.II.A.14 (1993) [hereinafter WIR]. A transnational corporation has been defined as "a national company in two or more countries operating in association, with one controlling the other in whole or in part." J. Coates, *Towards a Code of Conduct for Multinationals*, 10 PERSONNEL MGMT. 41 (1978).

10. For a dramatic and controversial perspective on the role of TNCs, *see* RICHARD J. BARNET & ROBERT MÜLLER, GLOBAL REACH: THE POWER OF THE MULTINATIONAL CORPORATIONS (1974).

11. *See* Deborah C. Poff, *Reconciling the Irreconcilable: The Global Economy and the Environment*, 13 J. BUS. ETHICS 439, 442 (1994).

12. *See* WIR, *supra* note 9, at 33-34.

13. *See id.*; *see also* U.N. CONFERENCE ON AN INT'L CODE OF CONDUCT ON THE TRANSFER OF TECH., DRAFT OF MAY 6, 1980, *reprinted in* 19 I.L.M. 773 (1980). The principle objective of the Code is to improve the standard of living in developing countries by improving the flow of

A notable exception to this trend is increased concern over the environmental impact of TNCs in host countries and widespread agreement that standards are needed to shape TNC behavior.[14] Such agreement has been evident in trade negotiations, where reaching the global agreement at the Uruguay Round of GATT and the regional North American Free Trade Agreement required discussion of specific measures concerning the environment, health, and safety.[15]

The most disastrous accident involving TNC industrial operations occurred in Bhopal, India, at a pesticide manufacturing plant owned by a subsidiary of Union Carbide.[16] Pesticide gas leaked from the plant and exploded in a densely populated area, killing an estimated 2,100 people and injuring some 200,000 more.[17] The litigation that resulted exposed poor environmental and safety standards on the part of Union Carbide and the Indian government and subjected Union Carbide to potential liability as the parent company of the Bhopal facility.[18]

While Bhopal drew attention to the health consequences of industrial accidents involving TNCs, one author has noted that "slow-motion Bhopals are continually occurring in developing countries as a result of foreign investment projects."[19] Many TNCs expanded accident-prevention practices after Bhopal to include environmental concerns, and although environmental audits of activities that could produce transnational pollution are relatively well established as a requirement under customary international

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technology and technological information to third world nations. For a detailed discussion of the Code of Conduct, *see* William C. Burns, *The Report of the Secretary General on Transnational Corporations and Industrial Process Safety: A Critical Appraisal*, 3 GEO. INT'L ENVTL. L. REV. 55 (1990).

14. The WIR notes that, in setting standards and principles for TNCs, "the emphasis is on developing preventive measures, mostly by way of requirements on information-disclosure and auditing. Attempts to lay down standards for the full range of TNC activities have been less successful." WIR, *supra* note 9, at 35.

15. *See* Steve Charnovitz, *The World Trade Organization and Environmental Supervision*, 17 INT'L ENV'T REP. (BNA) 89 (Jan. 26, 1994).

16. *See* Ved P. Nanda & Bruce C. Bailey, *Export of Hazardous Waste and Hazardous Technology: A Challenge for International Environmental Law*, 17 DENV. J. INT'L L. & POL'Y 155, 165-70 (1988).

17. *See* Stuart Diamond, *The Bhopal Disaster: How It Happened*, N.Y. TIMES, Jan. 28, 1985, at A1.

18. *See generally* Allin C. Seward III, *After Bhopal: Implications for Parent Company Liability*, 21 INT'L LAW. 695 (1987).

19. Robert J. Fowler, *International Environmental Standards for Transnational Corporations*, 25 J. ENVTL. L. 1, 15 (1995) [hereinafter Fowler].

law,[20] the extent to which such audits are required for TNC operations conducted only within one nation's sovereign jurisdiction is unclear.[21]

This article will discuss one of the major areas of environmental concern surrounding TNC activities in developing countries—the establishment of pollution-intensive industries,[22] with emphasis on oil extraction in the Oriente region of the Ecuadorean Amazon. First, it will address the factual allegations and course of a recent federal class action involving Ecuadorean plaintiffs seeking redress against Texaco for environmental degradation resulting from oil extraction. Second, it will discuss the prospects of obtaining relief under international law. Last, it will briefly review current efforts by the Organization of American States to develop a body of uniform regional environmental regulations.

III. LITIGATION OF INTERNATIONAL ENVIRONMENTAL CLAIMS IN U.S. COURTS

When corporations engage in activities abroad, jurisdictional issues can be problematic, and the continuing breakdown of economic borders will undoubtedly lead to more difficult jurisdictional problems in the future.[23] Enforcement of penalties for transnational environmental violations is difficult even when environmental regulations exist in the foreign state, due to such jurisdictional concerns.[24] Moreover, as discussed below, when U.S. federal courts accept jurisdiction over such claims, application of the forum non conveniens doctrine has created a legal environment in which U.S.-based TNCs receive little or no penalty for damages occurring on the site of overseas operations.[25]

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20. *See* Carole Klein-Chesivoir, *Note, Avoiding Environmental Injury: The Case for Widespread Use of Environmental Impact Assessments in International Development Projects*, 30 VA. J. INT'L L. 517, 527 (1990).

21. *See id.* at 528. However, some commentators believe that in the last 20 years the duty to inform regarding importation of hazardous waste has evolved into a norm of customary international law. *See* Daniel Parten, *The "Duty to Inform" in International Environmental Law*, 6 B.U. INT'L L.J. 43, 44 (1988).

22. *See* Fowler, *supra* note 19, at 8.

23. *See generally* Jennifer K. Rankin, *U.S. Laws in the Rainforest: Can A U.S. Court Find Liability for Extraterritorial Pollution Caused By A U.S. Corporation? An Analysis of Aguinda v. Texaco, Inc.*, 18 B.C. INT'L & COMP. L. REV. 221, 228 (1995).

24. *See, e.g.*, Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 670-72 (S.D.N.Y. 1991) (after British court dismissed action seeking removal of toxins for lack of jurisdiction because they originated in the United States, the federal court denied jurisdiction because the toxin was physically located in Great Britain).

25. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 251-52 (1981). The central focus of the forum non conveniens inquiry is that convenience dismissal will ordinarily be appropriate where trial in the plaintiff's chosen forum imposes a heavy burden on the defendant or the

A recent example of the trend to apply the forum non conveniens doctrine in state courts is found in a decision that will affect the number of international civil suits filed in Florida state courts. In *Kinney System, Inc. v. Continental Insurance Co.*,[26] the Florida Supreme Court voted unanimously to adopt the federal standard for forum non conveniens, receding from its former, more open, policy.[27] Chief Justice Kogan wrote that "[t]he use of Florida courts to police activities even in the remotest parts of the globe is not a purpose for which our judiciary was created. Florida courts exist to judge matters with significant impact upon Florida's interests . . . ."[28] The court also acknowledged the need for a forum to address grievances against U.S. multinational corporations doing business abroad: "We certainly do not imply that Florida courts will never serve such a role, but we do believe that the general regulation of foreign activities of multinational corporations more properly is a concern of the federal government . . . ."[29]

The problem with the Florida Supreme Court's preference for routing such cases to the federal courts, particularly when the claim involves serious claims of environmental degradation caused by a TNC, is that the federal courts will also invoke forum non conveniens and comity concerns as grounds for dismissal. The case history discussed below illustrates this point.

A well-known human rights case was recently dismissed due to application of forum non conveniens in federal court. *Aguinda v. Texaco, Inc.*[30] is a class action representing over 30,000 individuals seeking damages and equitable relief to remedy environmental destruction caused by oil exploration and extraction practices carried out by both Texaco and Ecuador's state-owned oil company, Petroecuador, in the Oriente region of the Ecuadorean Amazon over a period of twenty-five years.[31]

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court, and where the plaintiff is unable to offer any specific reasons of convenience supporting his choice. *See id.*

26. *See* Kinney System Inc. v. Continental Ins. Co., 674 So. 2d 86 (Fla. 1996).

27. *See id.* at 88. The court expressed concern over a tendency of private international litigants to file suit in Florida courts for injuries sustained overseas as permitted by the state's forum non conveniens doctrine set forth in *Houston v. Caldwell*, 359 So. 2d 858 (Fla. 1978), which was less stringent than the federal standard.

28. *Id.* at 93 (adopting federal standard consisting of four step analysis established in Pain v. United Techs. Corp., 637 F.2d 775 (D.C. Cir. 1980)).

29. *Id.* at 89; *but see* Chiquita Int'l Ltd. v. Fresh Del Monte Produce, 690 So. 2d 698, 699 (Fla. Dist. Ct. App. 1997) (reversing trial court's dismissal of breach of contract suit under *Kinney* and remanding for trial in Florida).

30. *See* Aguinda v. Texaco, Inc., 945 F. Supp. 625, 626 (S.D.N.Y. 1996) (dismissing the action on the "grounds of international comity and forum non conveniens"). *See id.*

31. The named plaintiff, Maria Aguinda, is a widow living in a small indigenous farming community. *See* Jack Epstein, *Ecuadoreans Wage Legal Battle Against U.S. Oil Company in*

Texaco acquired a concession agreement from Ecuador to search for oil in 1964 and discovered oil in 1973.[32] As minority partner in Petroecuador, Texaco drilled from 1972 to 1992.[33] By the end of its contract with Ecuador, Texaco had built more than 300 oil wells and a 300-mile trans-Ecuadorean pipeline that shipped 1.4 billion barrels of oil between 1972 and 1990.[34] The plaintiffs allege that extensive environmental damage resulted from Texaco's improper handling of waste, several oil spills,[35] and ruptured pipelines.[36] Texaco's only response to the oil spills was to shut off the flow of oil through the damaged portion of the pipeline, and no clean-up took place.[37] Such a response is in sharp contrast to standard industry practice in the U.S. and Europe, and has added fuel to accusations that TNCs have double standards for pollution clean-up practices in developing countries.[38]

As a result of what plaintiffs allege was a conscious decision by Texaco not to follow another standard industry practice, that of reinjecting toxic by-products known as production waters deep below the surface, the ground water in the area is now polluted with

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Country's Oil Rich Oriente Region, CHRISTIAN SCI. MONITOR, Sept. 12, 1995, at 10. She believed that road construction conducted by Texaco would enable her to quickly bring her crops to market, but later realized that the toxic effects of oil exploitation in the region far outweighed the benefits of infrastructure improvements. "The widow says contaminated water from nearby oil wells has caused her to have stomach and skin disorders, and lose scores of pigs and chickens. She no longer bathes, washes, or fishes in nearby rivers that are blackened with oil." *Id.*

32. *See* Plaintiffs' Complaint at 7-8, Aguinda v. Texaco, Inc., No. 93 Civ. 7257 (S.D.N.Y. Nov. 3, 1993) [hereinafter Aguinda Complaint].

33. *See Ecuadorean Indians Sue Texaco for Damage to Rivers, Land in Amazon Basin*, INT'L ENVTL. DAILY (BNA), Nov. 5, 1993, available in LEXIS, Intlaw Library, Intenv File. Texaco held a 37.5% share in Petroecuador and ran the oil drilling operations until June 1990. *See id.*; Aguinda Complaint at 4.

34. *See* Aguinda Complaint, *supra* note 32, at 7-8.

35. The San Francisco-based Rainforest Action Network produced a study showing that Texaco spilled 17 million gallons of crude oil into the Oriente environment. *See* Jack Epstein, *Toxic Legacy in Ecuador*, S.F. CHRON., Aug. 29, 1995, at A1. In contrast, the 1989 Exxon Valdez incident involved a spill of approximately 10.8 million gallons into Alaska's Prince William Sound. *See* JUDITH KIMERLING, AMAZON CRUDE 69 (1991); Judith Kimerling, *Rights, Responsibilities and Realities: Environmental Protection Law in Ecuador's Amazon Oil Fields*, 2 SW. J. L. & TRADE AM. 293 (1995) [hereinafter *Rights and Responsibilities*].

36. *See* Aguinda Complaint, *supra* note 32, at 4-5. Texaco, which is represented by several law firms including the Atlanta office of former U.S. Attorney General Griffin Bell, responded to these allegations by stating that the operation used state-of-the-art technology and observed standards that exceeded local requirements. Texaco further asserted that the majority of the oil spills were the result of natural disasters, such as floods and landslides, that destroyed nearly 25 miles of the pipeline. Aguinda v. Texaco, Memorandum of Law in Support of Texaco's Motion to Dismiss at 24-28.

37. *See* AMAZON CRUDE, *supra* note 35, at 111 n.2.

38. *See generally* Raissa Lerner & Tina Meldrum, *Debt, Oil and Indigenous Peoples: The Effect of United States Development Policies in Ecuador's Amazon Basin*, 5 HARV. HUM. RTS. J. 174, 178-79 (1992).

carcinogenic toxins.[39] Many individuals have developed tumors and the local water is unsuitable for bathing or consumption.[40] The population's only water supply consists of collected rainwater that when tested was found to contain toxins.[41]

Residents of the Oriente first filed a class action suit against Texaco in state court in Harlan County, Texas, in August 1993.[42] The case was removed to federal court and dismissed less than five months later on grounds of international comity and forum non conveniens.[43] A second class action was filed shortly thereafter in the federal court of the Southern District of New York, where Texaco's White Plains, New York, headquarters are located, alleging federal jurisdiction under the Alien Tort Claims Act.[44] This case was also dismissed, with the admonishment that "plaintiffs' imaginative view of this Court's power must face the reality that the United States district courts are courts of limited jurisdiction. While their power

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39. *See* Aguinda Complaint, *supra* note 32, at 5.

40. *See id.* at 5, 6-18. *See also* Javed A. Malik, *Ecuador Asks Damages From Texaco Over Oil Pollution*, OPECNA NEWS SERVICE, 1997 WL 7228988 (reporting that local inhabitants examined by U.S. medical doctors "suffer from pre-cancerous skin lesions, lung ailments and other diseases caused by exposure to Texaco's oil pollution").

41. *See* Malik, *supra* note 40, at 12.

42. *See* Sequihua v. Texaco, Inc., 847 F. Supp. 61, 62 (S.D. Tex. 1994).

43. *See id.* at 63. The court initially accepted jurisdiction due to important foreign policy concerns and "upon the international legal principle that each country has the right to control its own natural resources," but later provided the following justification for declining to exercise its jurisdiction:

> The challenged activity and the alleged harm occurred entirely in Ecuador; Plaintiffs are all residents of Ecuador; Defendants are not residents of Texas; enforcement in Ecuador of any judgment issued by the Court is questionable at best; the challenged conduct is regulated by the Republic of Ecuador and exercise of jurisdiction by this Court would interfere with Ecuador's sovereign right to control its own environment and resources; and the Republic of Ecuador has expressed its strenuous objection . . . .
>
> [I]t is clear from the affidavits of two former Ecuadorean Supreme Court justices that an adequate forum is available in Ecuador . . . . Ecuador provides private remedies for tortious conduct and maintains an independent judicial system with adequate procedural safeguards . . . . Access to all evidence . . . would be present in Ecuador . . . . A view of the premises, likely in a pollution case such as this, would be possible only in Ecuador . . . .

Id. at 63, 64.

44. 28 U.S.C. § 1350 (1988). The case survived Texaco's initial motion to dismiss and discovery was authorized to determine the merits of the equitable relief claims. *See* 1994 U.S. Dist. LEXIS 4718.

However, the presiding judge, Vincent Broderick, died suddenly of a heart attack in March 1995. The case was reassigned in March 1996 to Judge Jed Rakoff. *See* Thomas Goetz, *Judging Texaco*, THE VILLAGE VOICE, Feb. 4, 1997, at 48. Prior to his appointment to the bench, Judge Rakoff practiced corporate law with the New York law firm of Fried, Frank, Harris, Shriver & Jacobsen. *Id.* He wrote an essay in 1991 on the topic of corporate pollution and environmental law, questioning prosecution of executives of corporate polluters. *See* Jed S. Rakoff, *Moral Qualms About Environmental Prosecutions*, 206 N.Y.L.J. 3 (1991).

within those limits is substantial, it does not include a general writ to right the world's wrongs."[45]

Thus, it appears that future plaintiffs who desire to bring similar claims have only two options: (1) filing suit in their country of origin,[46] or (2) bringing the issue before an international human rights commission at the United Nations or a regional forum such as the Inter-American Commission for Human Rights, where the issue would be considered under international law.[47]

IV. INTERNATIONAL LAW

Prior to analyzing whether such claims constitute violations of international law and whether relief may be available in international fora, a brief discussion of international human rights and environmental law is required. This section will introduce the general sources of international law, discuss the development of international human rights law and international environmental law, and analyze the applicability of such law to the claims raised regarding environmental degradation in the Ecuadorean Amazon.

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45. Aguinda v. Texaco, Inc., 945 F.Supp. 625, 628 (S.D.N.Y. 1996)

46. It is beyond the scope of this paper to make a thorough inquiry into whether the judicial system of Ecuador is properly equipped to provide indigenous plaintiffs with a fair and impartial hearing. Judith Kimerling, a Yale-educated attorney, environmental activist, and longtime resident of Ecuador, has studied this topic and concluded "Ecuador does not have a constitutional provision or other law to protect indigenous cultures." *Rights and Responsibilities, supra* note 35, at 300. Kimerling also states that the judiciary lacks the requisite independence to fairly consider the merits. *See id.* For an opposing viewpoint by a Florida court *see* Ciba-Geigy Ltd. v. Fish Peddler, 691 So. 2d 1111 (Fla. Dist. Ct. App. 1997).

47. An important development in this case is the Ecuadorian government's reversal of opposition to the litigation. The government has appeared in the New York federal court protesting dismissal of the case and requesting permission to intervene on plaintiffs' behalf. *See* Malik, *supra* note 40.

Henry Dahl, a Dallas attorney representing the Ecuadorean government stated the government's position: "Texaco must be held accountable for its reckless oil drilling practices in the Ecuadorean Amazon. Ecuador is prepared to do all that is necessary to ensure that the people of the Amazon receive a fair opportunity to present their case against Texaco in a U.S. court." *Id.* This is the first instance of a foreign sovereign seeking to pursue claims against an U.S. oil company for environmental destruction. One explanation for Ecuador's unprecedented move may be the fact that Texaco has pending a number of law suits in Ecuadorean courts alleging breach of contract and seeking damages totalling over 500 million dollars. *See* James Brooke, *Pollution of Water Tied to Oil in Ecuador*, N.Y. TIMES, Mar. 22, 1994, at C11. Alternatively, it could be the result of political repercussions caused by a petition filed with the Inter-American Commission on Human Rights protesting Ecuador's decision to allow oil drilling on indigenous land. This petition is discussed in detail below. *See generally* Thomas O'Connor, *We Are Part of Nature: Indigenous Environmental Issues in the Amazon Basin*, 5 COLO. J. INT'L L. & POL'Y 193, 206 (1994).

A. Sources of International Law

International law prescribes the rights and duties of sovereign states. Unlike domestic law it has no single legislative body or leader to prescribe the law. Instead, international law has been historically formed by treaties and custom. These sources were viewed favorably under the positivist legal theory that provides that states can only be bound by a manifest expression of consent. Article 38 of the Statute of the International Court of Justice (ICJ) expanded these sources to include general principles of law and secondary sources, such as judicial decisions and the teachings of eminent publicists.[48] The four traditional sources of international law are:

> (i) international conventions, whether general or particular, establishing rules expressly recognized (by the contesting states);
>
> (ii) international custom, as evidence of a general practice accepted as law;
>
> (iii) the general principles of law recognized by civilized nations; and
>
> (iv) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of law.[49]

These categories and a fifth source advanced by certain commentators are discussed below.

1. International Agreements and Treaties

Treaties and other written agreements between two or more states are the means by which states most directly and expressly agree to be bound by certain rules.[50] Interpretation of treaties concluded after 1980 is generally governed by the 1969 Vienna Convention on the Law of Treaties.[51] First, the ordinary meaning of the words must be sought within the broad context of the treaty.[52] Such an interpretation must be compatible with the objectives and purposes of the treaty, thus a preferred interpretation is one that will

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48. Art. 38(1), Statute of the International Court of Justice, 59 Stat. 1031, T.S. No. 993 (1945) [hereinafter Article 38].

49. *See id.*

50. *See generally* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 3 (4th ed. 1990); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1987) [hereinafter RESTATEMENT].

51. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

52. *See id.* art. 31(1).

make the treaty effective. Preparatory documents may be consulted in a case of ambiguity.[53]

2. Customary International Law

This concept refers to general practice by states which becomes binding as customary international law through its repetition and acceptance as law.[54] Article 38(1) states that the Court must apply "international custom, as evidence of a general practice accepted as law." The ICJ has observed that it is "axiomatic that the material of customary international law is to be looked for primarily in the actual practice and *opinio juris* of states."[55] In determining whether or not a particular practice has become a legal custom, evidence of two criteria must be present: an objective element and a subjective (sometimes referred to as psychological) element.[56] The objective element requirement can be shown by evidence of frequent repetition of the specific international practice among the general community of states. The subjective element concerns the transition from common use of a practice into a recognized and mutually accepted international legal norm.[57] Interstate practice that has been accepted by a majority of states acquires *opinio juris* status,[58] and recognition of such status is an indicator of whether a practice is in fact international custom.[59]

The most essential factor required for a norm to become binding as customary international law is the belief by states that the practice in question is required by international law.[60] Once created through custom, such a norm becomes international law and is binding on all states. The only exception to this rule is that states that clearly and consistently object to the practice being recognized as law are not bound thereby.[61] The concept that a "persistent objector" is not

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53. *See id.* art. 32.

54. *See id.* art. 38(1)(b); *see also* Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT'L. & COMP. L. REV. 411, 417 (1989) [herinafter Parker & Neylon].

55. Continental Shelf Case (Libya v. Malta), 1985 I.C.J. 4, 29-30.

56. *See* PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 16 (1992) [hereinafter BIRNIE & BOYLE].

57. *See id.*

58. *See id.* at 15-16 (*opinio juris* is evidenced by the "conviction that conduct is motivated by a sense of legal obligation, not merely of comity"). *Id.*

59. *See id.* at 39.

60. There must be a "sense of legal obligation, as opposed to motives of courtesy, fairness, or morality." BROWNLIE, *supra* note 50, at 7.

61. *See generally*, David A. Colson, *How Persistent Must the Objector Be?*, 61 WASH. L. REV. 957 (1986).

bound by a particular norm follows from the consensual nature of international law.[62]

The Vienna Convention recognizes the concept that certain basic norms of international law, known as *jus cogens*, represent such fundamental values that no state can be exempt from their observance.[63] Jus cogens means "cogent law"[64] and is defined as "rules which derive from principles that the legal conscience of mankind deem absolutely essential to coexistence in the international community."[65] Norms of customary international law attain the status of jus cogens because of their important and profound nature.[66] For example, the prohibitions on piracy and slavery are the oldest jus cogens norms.[67] Other rules of law achieving jus cogens status include the right to life and protection against arbitrary deprivation of life,[68] and the prohibitions against genocide,[69] war crimes and crimes against humanity,[70] the use of force,[71] torture,[72] and apartheid.[73]

The existence of jus cogens norms increases claimant access to human rights institutions and greatly influences remedies available

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62. *See id.* at 957-58.

63. Vienna Convention, *supra* note 48, art. 64. If a new peremptory norm of general international law emerges, any existing treaty becomes void and terminates. *See id.*

64. *See* WEBSTER'S UNABRIDGED DICTIONARY 352 (2d ed. 1983) ("urgent, compelling, convincing, having a powerful appeal to the mind").

65. BURNS H. WESTON, ET. AL, INTERNATIONAL LAW AND WORLD ORDER 127 (1990).

66. *See* Parker & Neylon, *supra* note 54, at 428.

67. *See* BROWNLIE, *supra* note 50, at 513; *see also* Parker & Neylon, *supra* note 53, at 429.

68. *See* Parker & Neylon, *supra* note 54, at 429.

69. *See id.* at 430.

70. War crimes and crimes against humanity are among the gravest of crimes in international law. *See* Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, art. 1(a), Nov. 11, 1970, 754 U.N.T.S. 73, *reprinted in* 8 I.L.M. 68 (1969).

71. The International Court of Justice stated:

> further confirmation of the validity as customary international law of the principle of the prohibition of the use of force . . . may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens . . . .

Military and Paramilitary Activities (Nicar. v. U.S), 1986 I.C.J. 100-01.

72. A 1986 report on torture for the U.N. Commission on Human Rights stated that "the prohibition of torture can be considered to belong to the rules of jus cogens. If ever a phenomenon was outlawed unreservedly and unequivocally it is torture." U.N. ESCOR, 42d Sess., Agenda Item 10(a), at 1, U.N. Doc. E/CN.4/1986/15 (1986). *See also* Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (seminal case).

73. *See* Parker & Neylon, *supra* note 54, at 439.

in suits filed in U.S. federal court under the Alien Tort Claims Act.[74] One of the most important effects of a jus cogens norm is that any treaty (or clause) which contravenes a norm of jus cogens is void.[75] The Vienna Convention on the Law of Treaties states:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of the states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[76]

In addition, as a newly formed jus cogens norm emerges, any existing treaty that is in conflict also becomes void.[77] Interestingly, these principles in the Vienna Convention bind states that were not parties to the Vienna Convention because the rule regarding the effect of a jus cogens norm is itself customary international law, and therefore binding on all states that have not objected to it.[78]

3. General Principles of Law Recognized by Civilized Nations

The third main source of international law is what Article 38 describes as "general principles of law recognized by civilized nations."[79] This refers to common principles of national law which are used to provide the rule of international law when no treaty or principle of customary international law exists.[80] Examples include the concepts of res judicata, good faith, and burden of proof.[81]

4. Judicial Decisions and the Writings of Publicists

The fourth traditional source of international law consists of judicial decisions and scholarly publications by experts.[82] As Article 38 states, these can be used as "subsidiary means for the determination of law."[83] Judicial decisions include opinions of international

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74. *See* Beth Stephens, *Litigating Customary Human Rights Norms in U.S. Courts*, 25 GA. J. INT'L & COMP. L. 191, 192-93 (1996).

75. Professor Brownlie describes jus cogens norms as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." BROWNLIE, *supra* note 50, at 513.

76. Vienna Convention, *supra* note 48, art. 64.

77. *See id.*; *see also* RESTATEMENT § 331(f).

78. *See* RESTATEMENT § 331(2)(b) cmts. e, f, g; § 102 cmt. k.

79. *Supra* note 48, art. 38(1)(c).

80. BROWNLIE, *supra* note 50, at 15-18.

81. WESTON, *supra* note 65, at 118-119.

82. *See supra* note 48, art. 38(1)(d).

83. *Id.*

tribunals, such as the International Court of Justice, and ad hoc international tribunals, such as the International Military Tribunal at Nuremberg.[84] Other judicial decisions which may consititute evidence of international law are decisions from national courts.[85] Scholarly writing by "the most qualified publicists of various nations"[86] also indicates the state of international law on various issues.[87]

5. "Soft Law"

The traditional sources doctrine in international law has been criticized by commentators who find it does not account for many modern forms of rulemaking.[88] The cumbersome procedure and political nature of the process required to secure agreements from international bodies has led to increased use of intermediate stages in the law-making process. Such stages include codes of practice, recommendations, guidelines, resolutions, declarations of principles, standards and the like which clearly do not fit within any of the categories set forth in Article 38 of the ICJ statute.

However, such instruments do not lack authority.[89] U.N. declarations and General Assembly resolutions provide an example. States may vote in favor of a resolution because they realize no changes in state practice will actually be required, or they may do so for political reasons unconnected to the subject matter of the resolution.[90] This discretionary aspect makes soft law attractive to states, leading some commentators to state that United Nations

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84. *See* BROWNLIE, *supra* note 50, at 19-24.

85. *See id.* at 23.

86. Art. 38(1)(d).

87. *See* BROWNLIE, *supra* note 50, at 24-25.

88. *See, e.g.*, Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420 (1991). Professor Dupuy states that:

> In the context of "soft" instruments, one could say, using the classical wording of legal theory in regard to the creation of custom, that the cumulative enunciation of the same guideline by numerous nonbinding texts helps to express the opinio juris of the world community.

Id. at 428. *See also* Hiram E. Chodosh, *Neither Treaty Nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87 (1991). The area is the subject of some controversy and no reference is made to it in many standard public international law textbooks. *See* BIRNIE & BOYLE, *supra* note 56, at 26.

89. *See* BIRNIE & BOYLE, *supra* note 56, at 27 ("[Soft law's] great advantage over hard law is that . . . it can either enable states to take on obligations . . . because these are expressed in vaguer terms . . . or to formulate the obligations in a precise and restrictive form that would not be acceptable in a binding treaty.").

90. *See* Dupuy, *supra* note 88, at 421. *See also* Sir Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM J. INT'L L. 259, 269 (1992) (stating states may be open to making and accepting "soft law" because customary law "takes time and often a lot of state practice before it hardens into a legally enforceable rule").

declarations are merely a step in the process of creating customary international law.[91] Soft law is not considered legally binding, but is persuasive evidence of the existence of law.[92] As one leading proponent of this approach stated:

> If soft law is negotiated with the same care as treaties, it raises the question of whether we need to argue at all for the "binding" nature of rules as the distinguishing line between "legal" and "non-legal" obligations. If major functions of law are to authoritatively enunciate norms, identify areas of societal concern, and to provide language in which to describe and negotiate targets for improvement, then whether or not the obligation is legally binding is unimportant . . . . The real question is whether the behavior of states changes as a result of taking on these obligations.[93]

Such a source of international law is meant to be understood as "not merely a new term for an old (customary) process" but as "both a sign and a product of the permanent state of multilateral cooperation," the existence of which "compels us to re-evaluate the general international law-making process and illuminates the difficulty of explaining this phenomenon by referring solely to the classical theory of formal sources of public international law."[94]

One of the most frequently cited examples of soft law is the 1972 Stockholm Declaration of the United Nations Conference on the Human Environment.[95] Although this resolution is technically non-binding, many of the principles it contains, most notably Principle 21, have been relied upon by governments to justify legal rights and duties, and it has begun to influence state and TNC practice. However, the tangible benefits of relying on Principle 21 and its progeny in cases involving indigenous peoples and environmental damage are minimal, at least at the current time, as discussed below.

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91. "Soft law solutions change the political thinking on an issue . . . . These changes can be a very important catalyst in securing an agreement with a harder edge later. Soft law is where international law and international politics combine to build new norms." Palmer, *supra* note 90, at 169. *See also* ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 109-13 (1992) for a thorough discussion of this topic.

92. *See* Dupuy, *supra* note 88, at 421.

93. Naomi Roht-Arriaza, *Precautionary Legal Duties and Principles of Modern International Law*, 21 COLUM. J. ENVTL. L. 183, 192 (1996).

94. *See* Dupuy, *supra* note 88, at 435.

95. See discussion below at pages 127-30.

B. International Human Rights Law

1. United Nations System

International human rights law grew dramatically after World War II.[96] International law was originally concerned primarily with the rights and duties of sovereign states and governed the interaction of such states.[97] Following World War II, international law began to recognize and protect the rights of individuals, which had up to that point been subject to the whim of the sovereign.[98]

Ironically, the atrocities committed during World War II led to a positive change in the reach of international human rights law.[99] The Nuremberg and Tokyo war crimes prosecutions intensified the focus of human rights law on the individual.[100] The chief U.S. prosecutor at Nuremberg, Robert Jackson, recognized that the trials constituted an unprecedented opportunity to strengthen the rule of law in the world.[101] Nuremberg was the cradle for the now widely accepted principle that international law "imposes duties and liabilities upon individuals as well as upon states."[102] Notably, individuals accused of war crimes were not allowed to invoke the defense of acting on behalf of the state.[103]

Development and codification of human rights law proceeded in what have been described as the four law-building stages of human rights:

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96. RICHARD B. LILLICH & HURST HANNUM, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW, POLICY AND PRACTICE 5, 36 (1995) [hereinafter LILLICH & HANNUM].

97. *See, e.g.*, Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 9 (1982).

98. *See id.*

99. *See id.* at 9-11.

100. The International Military Tribunal at Nuremberg tried many Nazi leaders for crimes committed on civilian populations during World War II, including conspiracy to wage a war of aggression, crimes against peace, war crimes, and crimes against humanity. *See* LILLICH & HANNUM, *supra* note 96, at 936-37.

101. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions come rarely and quickly pass. We are put under a heavy responsibility to see that our behavior during the unsettled period will direct the world's thought towards a firmer enforcement of the law of international conduct.

Id. at 944.

102. The Nuremberg Trial, 6 F.R.D. 69, 110 (1946).

103. *See* Sohn, *supra* note 97, at 10. The Nuremberg court stated that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." The Nuremberg Trial, 6 F.R.D. at 110.

(i) assertion of international concern about human rights in the Charter of the United Nations (U.N. Charter);[104]

(ii) listing of such human rights in the Universal Declaration of Human Rights (Universal Declaration);[105]

(iii) elaboration on human rights in the International Covenant on Civil and Political Rights,[106] and the International Covenant on Economic, Social, and Cultural Rights;[107] and

(iv) adoption of over fifty additional human rights declarations and conventions on regional and specific human rights issues.[108]

(i) U.N. Charter

The 1945 U.N. Charter created and provided the basic structure of the United Nations.[109] It unequivocally sought "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small."[110] The U.N. Charter lays the foundation for human rights via broad principles to be strived for and respected, and obligates the United Nations to promote "universal respect for, and observance of, human rights and fundamental freedoms."[111] The drafters of the Charter recognized that a more particularized declaration on international human rights was necessary, but had insufficient time to create one[112]. Preparation of such a document, the Universal Declaration, began soon thereafter.

(ii) Universal Declaration of Human Rights

The Universal Declaration was adopted unanimously by the U.N. General Assembly in 1948.[113] The Universal Declaration gives more

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104. *See* Charter of the United Nations, 59 Stat. 1031, T.S. No. 993 [hereinafter U.N. Charter].

105. *See* Universal Declaration of Human Rights, G.A. Res. 217 A (III), at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

106. *See* International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368 (1967).

107. *See* International Covenant on Economic, Social, and Cultural Rights, Dec. 19, 1966, 6 I.L.M. 360 (1967).

108. *See* Sohn, *supra* note 97, at 11-12 (listing instruments).

109. Professor Sohn calls the U.N. Charter the "constitution of the world, the highest instrument in the intertwined hierarchy of international and domestic documents [and says it] prevails expressly over all other treaties, and implicitly over all laws, anywhere in the world." *Id.* at 13.

110. U.N. CHARTER preamble.

111. *Id.* art. 55(c).

112. *See* LILLICH & HANNUM, *supra* note 96, at 6.

113. *See id.* at 7.

specific meaning to the broad declarations in the U.N. Charter. Although some commentators have stated that the Universal Declaration is not a binding treaty, others find that it expresses rules that were already recognized as binding customary international law at the time it was drafted.[114] The Universal Declaration is now considered the most authoritative interpretation of the meaning of the U.N. Charter and has been invoked by nations that initially doubted its validity. The Soviet Union, which originally protested that the Universal Declaration impermissibly intruded into a state's internal affairs, later charged South Africa with violations of the Universal Declaration.[115] The United States has recognized the validity and force of the Universal Declaration. For example, it invoked the Universal Declaration in a 1949 case challenging the authority of the Soviet Union to prevent the wives of non-Soviet husbands from leaving the Soviet Union.[116]

(iii) The International Covenants

The third stage in the law-building process involved formulating and defining the human rights contained in the Universal Declaration in a more precise manner. This was done primarily through two covenants, the International Covenant on Civil and Political Rights[117], and the International Covenant on Economic, Social, and Cultural Rights. These two covenants provided greater detail regarding international human rights. For example, the International Covenant on Civil and Political Rights specifically contains the rights of self-determination[118] and due process.[119] It also prohibits discrimination,[120] torture,[121] and slavery.[122]

(iv) Regional and Specific Issue Human Rights Agreements

Finally, the fourth stage in the process of developing human rights law has resulted in the adoption of many regional and specific

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114. *See* Sohn, *supra* note 97, at 15.

115. *See id.* at 16. *See also* Letter From U.S. Ambassador to U.N. Security Council, 24 U.N. SCOR Supp. (Jan.-Mar. 1969) at 65, U.N. Doc. S/8987 (1969) (arguing human rights clauses of the U.N. Charter impose international legal obligations upon member states) *reprinted in* LILLICH & HANNUM, *supra* note 96, at 46-47.

116. In this case, the General Assembly declared that Soviet attempts to keep Russian wives from leaving the Soviet Union violated the U.N. Charter. *See* G.A. Res. 285, U.N. GAOR, 3d Sess., U.N. Doc. A/900 (1949).

117. *See* note 106 *supra*.

118. *See id.* art. 1.

119. *See id.* art. 14.

120. *See id.* art. 2.

121. *See id.* art. 7.

122. *See id.* art. 8.

issue human rights agreements.[123] These regional agreements include (1) the African Charter on Human and Peoples' Rights (African Charter),[124] (2) the American Convention on Human Rights (American Convention),[125] and (3) the European Convention on Human Rights (European Convention).[126]

The American and European systems established regional commissions or courts to hear complaints of human rights violations. The American petition procedure before the Inter-American Commission on Human Rights is discussed in further detail below.

C. *International Environmental Law*

There is a growing movement in the international human rights community to link environmental issues with human rights and call for recognition of a number of rights violations due to the human impact of environmental destruction.[127] This section addresses the most pertinent features of contemporary international environmental law to claims such as those alleged regarding environmental degradation in the Amazon.

Early international environmental law had a specific focus. Agreements and treaties were reached to prevent the discharge of a particular pollutant, protect a particular water body, or preserve an individual species. One of the areas of original concern was the pressure of human population on natural resource availability.[128] This concern led to a series of environmental agreements regulating

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123. *See* Sohn, *supra* note 97, at 12 (citing Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief).

124. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59 (1982) [hereinafter African Charter].

125. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970) [hereinafter American Convention].

126. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

127. *See, e.g.*, Human Rights and the Environment, U.N. ESCOR, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., U.N. Doc. E/CN.4/Sub.2/1993/7 (1993); Judith Kimerling, *Recent Development: The Environmental Audit of Texaco's Amazon Oil Fields: Environmental Justice or Business As Usual?*, 7 HARV. HUM. RTS. J. 199, 200 (1994).

128. *See* Bo R. Döös, *Environmental Issues Requiring International Action*, *in* ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 1, 3 (1991):

> Since 1950 the population has increased from 2.5 billion to about 5 billion people, and it is expected to double again before the middle of the next century. . . . The technological and socio-economic developments, with their increasing use of chemicals in industry and agriculture, resulting in extensive environmental degradation and toxification of air and water resources.

natural resources and shaped early legal approaches to environmental law.[129]

A second area of concern in the evolving body of environmental law involved the expansion of industry[130] and the problems of human and industrial waste and pollution.[131] Such concerns led to a shift of focus toward prevention of environmental pollution.[132] Particular polluting agents, such as petroleum, nuclear waste and other toxic chemicals, were targeted due to their considerable effect on the environment.[133] Other resources, such as the oceans, were also the focus of efforts to prevent serious contamination.[134]

Finally, the issue of providing legal remedies to states for injuries resulting from environmental damage came under consideration.[135] Commercial transboundary transportation of hazardous materials was recognized as a potential source of serious injury.[136] In the United States, the 1960s brought increased awareness that natural systems are connected, cohesive units (and the desire to protect them).[137]

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129. *See, e.g.*, BIRNIE & BOYLE, *supra* note 56, at 39 (stating that "[b]y 1970 various aspects of atmospheric pollution were already within the ambit" of such entities as the World Health Organization, the Food and Agriculture Organization and NATO's Committee on the Challenges of Modern Society); *see also id.* at xviii-xxvii (Table of Major Treaties and Instruments), attached hereto as Appendix A. For a thorough discussion of these issues *see* LYNTON KEITH CALDWELL, INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS 63-64 (2d ed. 1990)

130. *See* BIRNIE & BOYLE, *supra* note 56, at 39.

131. *See* Winfred Lang, *The International Waste Regime, in* ENVIRONMENTAL PROTECTION AND INTERNATIONAL LAW 148-49 (Winfred Lang et al. eds., 1991) ("waste, in particular hazardous waste, is a by-product of economic development").

132. *See id.* at 149.

133. *See* BIRNIE & BOYLE, *supra* note 56, at 105. The European Convention on Environmental Impact Assessment in A Transboundary Context applies to a range of activities such as petroleum extraction and nuclear power, and "is the first multilateral agreement to make detailed provision for transboundary procedural obligations in cases of environmental risk." *Id.*

134. *See* Gunther Handl, *Environmental Security and Global Change: The Challenge to International Law*, in ENVIRONMENTAL IMPACT ASSESSMENT 59, 68 ("international marine pollution legislation establishes clear international procedures for authoritative standard-setting that preempt unilateralism").

135. *See* KISS & SHELTON, *supra* note 127, at 348 ("states may be held liable to private parties or other states for pollution that causes demonstrable damage to persons or property").

136. *See* BIRNIE & BOYLE, *supra* note 56, at 301.

137. Recognition of the need to protect ecosystems was also evident at the state level, as shown by enactment in 1969 of the U.S. National Environmental Policy Act, the first comprehensive federal environmental legislation. This statute recognized the need to provide for social, economic and environmental concerns:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment . . . [such as] industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government . . . to use all practicable means and measures . . . to create and maintain conditions under which man and

The use of treaties to create binding rules addressing international environmental concerns has been criticized on the grounds that the process is slow and subject to frequent delays.[138] As discussed above, a treaty will only bind nonsignatory states when the norms it contains become part of customary international law. The ICJ has held that such provisions must "be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law."[139]

Some scholars consider that the obligation to preserve the environment is a *jus cogens* norm, due to its enunciation in numerous treaties, declarations, and resolutions of the U.N. General Assembly and other international organizations, and that the right to a clean and healthy environment has also achieved *jus cogens* status.[140] However, such arguments are weakened by a lack of evidence of acceptance by states and at best litigation in this area can only produce evidence of emerging norms.[141]

1. *Definition of Pollution in International Law*

The following definition of pollution was adopted in 1974:

> [T]he introduction by man, directly or indirectly, of substances or energy into the environment resulting in deleterious effects of such a nature as to endanger human health, harm living resources and ecosystems, and impair or interfere with amenities and other legitimate uses of the environment.[142]

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nature can exist in productive harmony, and fulfill the social, economic and other requirements of present and future generations of Americans.

42 U.S.C. § 4331 (1998).

138. *See* Krista Singleton-Cambage, *International Legal Sources and Global Environmental Crises: The Inadequacy of Principles, Treaties, and Custom*, 2 ILSA J. INT'L & COMP. L. 171, 180 (1995).

> The design and implementation of international treaties and agreements within the current framework of international law also appear to be inadequate to tackle the global crises of environmental degradation. The treaty-making procedure is too slow and ineffectual to serve as an effective remedy for the world's rapidly increasing array of environmental problems. The states' traditional diplomatic approach, currently used as a context for the creation of global environmental solutions, is itself a nonconducive framework to effectively develop international environmental law. *Id.*

139. North Sea Continental Shelf Cases (F.G.R. v. Den., Neth.), 1969 I.C.J. 3.

140. *See, e.g.*, Dinah Shelton, *Human Rights, Environmental Rights, and the Right to the Environment*, 28 STAN. J. INT'L L. 103 (1991).

141. *See* BIRNIE & BOYLE, *supra* note 56, at 56 (stating that despite the fact that global environmental preservation represents an essential interest of all members of international society, sufficient time has not yet passed to enable environmental issues to evolve to this status of international law).

142. *OECD Council Recommendation on Principles Concerning Transfrontier Pollution*, OECD Doc. C(74)224 of Nov. 21, 1974.

Customary international law imposes responsibilities for environmental harm upon states in their relations with other states. Such responsibilities were set forth in the landmark cases involving transboundary air and water pollution discussed below.

All states have a basic duty not to act so as to harm the rights of other states. In the 1939 *Trail Smelter Arbitration*,[143] involving complaints by the United States regarding environmental damage caused by pollution from a Canadian iron ore smelter, the arbitral tribunal expressed:

> Under principles of international law . . . no state has the right to use or permit the use of territory in such a manner as to cause injury by fumes in or to the territory of another . . . when the cause is of serious consequence and the injury established.[144]

While state sovereignty provides a certain license to permit or create pollution, this is limited by its international legal obligations, as recognized in the *Island of Palmas* arbitration: "Territorial sovereignty involves the exclusive right to display the activities of states. This right has as corollary a duty: the obligation to protect within the territory the rights of other states . . . ."[145]

2. *Environmental Protection for Indigenous Peoples*

The environmental concerns of the world's indigenous populations were largely ignored during the development of international environmental law. Indigenous peoples have only occasionally (and perhaps accidentally) obtained any benefits from the various global efforts to protect the environment.[146] This has been very devastating for the reasons discussed in the introduction: for many indigenous peoples, the land, air, and water have spiritual value that goes far beyond economic utility.

The use of treaties and the development of a body of international environmental law that primarily addresses state to state problems necessarily would not include the world's indigenous peoples who are not recognized as states. Lacking standing, indigenous peoples' needs could only be taken into account under international environmental agreements through actions of their home state, but

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143. Trail Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

144. *Id.* at 1906.

145. Island of Palmas Arbitration (Neth. v. U.S.), 2 R.I.A.A. 829, 845 (1928).

146. For example, the U.S. Oil Pollution Act of 1994 requires that any party responsible for a vessel from which oil is discharged to be liable for removal costs and damages. *See* 33 U.S.C. §§ 2701-2761 (1995). Thus Native Americans who live in Alaska would be protected from environmental harm caused by petroleum extraction and transportation under this statute.

most states have been unconcerned about the environmental needs and interests of their indigenous inhabitants.

3. Stockholm Declaration

Therefore, it is not surprising that indigenous peoples' interests were not addressed by the United Nations Conference on the Human Environment, the world's first multilateral environmental conference, held in Stockholm in 1972. However, in Stockholm, the international community did broaden the scope of environmental law by adopting the Declaration of the United Nations Conference on the Human Environment.[147] The Stockholm Declaration was the first global acknowledgment of the need to establish new principles to guide state action with respect to the environment.[148] It called for environmental preservation and safeguarding of natural resources through careful planning and management, the halting of harmful toxic waste disposal, and the promotion of scientific research to facilitate finding solutions to environmental problems.[149] The declaration, in its calls for aid to underdeveloped countries in the form of financial and technological assistance and for the ending of policies of apartheid and colonial domination, demonstrated the political priorities of the era without expressly addressing indigenous peoples.[150]

The Stockholm Declaration has been acclaimed as a major achievement and the first step toward recognition of the need to merge the policies and goals of environmental protection, economic development, and human rights, but the fact that most of its principles were never implemented has been lamented.[151] The Stockholm Declaration did utilize the concept of "global commons" by providing that "international matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries . . . on an equal footing."[152] This global commons theme was followed up ten years later in the 1982 U.N. Conference on the Law of the Sea, which laid down principles taking

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147. *See* Stockholm Declaration of the United Nations Conference on the Human Environment, 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

148. *See* Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 423, 432 (1973).

149. *See* Stockholm Declaration, *supra* note 147, at princs. 2-7, 17-20.

150. *See id.* at princs. 8-11.

151. *See* Ranee Khooshie Lal Panjabi, *From Stockholm to Rio: A Comparison of The Declaratory Principles of International Environmental Law*, 21 DENV. J. INT'L L. & POL'Y 215, 217 (1993) [hereinafter *From Stockholm to Rio*].

152. Stockholm Declaration, *supra* note 147, at princ. 24.

into account "the common heritage of mankind" and the "benefit of mankind as a whole."[153]

The next major development of international law is found in the work of the World Commission on Environment and Development Commission.[154] U.N. General Assembly Resolution 38/161 created the World Commission on Environment and Development in 1983 to investigate pressing global environmental problems and propose solutions.[155] The work of this Commission demonstrates the slow progress achieved by international bodies when addressing global environmental problems. In 1987, five years after its creation, the Commission recommended that the General Assembly make a commitment to preparing a universal declaration and called for a convention on environmental protection and sustainable development.[156] Five more years passed before the United Nations held the Conference on Environment and Development in Rio de Janeiro.[157]

4. Earth Summit

The report of the World Commission on Environment and Development led to what has been called "the largest diplomatic gathering the world has ever seen."[158] This conference, which took place twenty years after the Stockholm Declaration, was officially called the United Nations Conference on Environment and Development (UNCED), but it is popularly known as the Earth Summit.

The Earth Summit coincided with the International Year for the World's Indigenous Peoples and was more sensitive to the environmental needs and interests of the world's indigenous peoples than its predecessor. A number of important instruments in international environmental law were produced at the Earth Summit, including three non-binding documents: (1) the Rio Declaration (which the World Commission on Environment and Development

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153 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261, 1271 (1982).

154. Also known as the Brundtland Commission Report, after Norwegian Prime Minister Go Brundtland, who chaired the Commission. *See generally* GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 306-12 (1994) [hereinafter INTERNATIONAL ENVIRONMENTAL LAW].

155. *See id.*

156. *See* United Nations Conference on Environment and Development, G.A. Res. 44/228, U.N. GAOR, 44th Sess., Supp. No. 49, at 151 (1989).

157. *See* Sir Geoffrey Palmer, *The Earth Summit: What Went Wrong at Rio?*, 70 WASH. U. L.Q. 1005 (1992).

158. INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 154, at 315.

had specifically recommended);[159] (2) the Statement of Principles for a Global Consensus on the Management, Conservation, and Sustainable Development of all Types of Forests;[160] and (3) the Agenda 21, a far-reaching framework for global action,[161] as well as two treaties: (1) the Framework Convention on Climate Change[162] and (2) the Convention on Biological Diversity.[163]

The Declaration adopted by the conference dealt with the rights of indigenous peoples in Principle 22, which states:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[164]

The importance of participation by indigenous people in implementing the objectives of the Earth Summit was addressed in Agenda 21. Section three of Agenda 21 states that the commitment and involvement of indigenous people is critical to the success of the programs.[165]

The future evolution of international environmental law, particularly in the area of sustainable development,[166] will be based on the principles and guidelines contained in the Rio Declaration and Agenda 21. The Rio Declaration is a statement of twenty-seven principles and goals that seek to balance the requirements of

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159. 1992 U.N.Y.B. 670, U.N. Sales No. E.93.I.1 [hereinafter Rio Declaration].

160. *See* Palmer, *supra* note 157, at 1010.

161. *See id.*

162. Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 851.

163. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

164. Rio Declaration, *supra* note 159, at princ. 22.

165. *Id.*

166. Sustainable development is not well defined in the Earth Summit instruments. It was initially seen as

> a point on which everybody agrees. . . . In principle, this idea is clear enough: development, not merely economic growth, should be the target, and it should lead to enduring improvements in welfare. But whether a particular road or plantation represents sustainable development or yet another environmental affront is a source of endless argument.

See The Greening of Giving, ECONOMIST, Dec. 25, 1993, at 53. The difficulties of defining the concept were anticipated well by an Earth Summit participant:

> The problem is that rhetoric about the environment is far easier to produce than action, and international forums tend on occasion to degenerate into 'rhetoric-fests,' where world leaders spout all the proper phrases but then go home and often fail to implement their internationally-formulated promises . . . ."

From Stockholm to Rio, *supra* note 151, at 216.

development with the need for environmental protection.[167] Like the Stockholm Declaration, it contains general language and touches on many topics including the need for states to enact municipal law to ensure that environmental considerations are integrated into decision making processes.[168] Thus, the effect of the Earth Summit on the future development of international environmental law is not yet clear. Even if its basic objective, integration of development with environmental protection, is achieved, issues dealing with the rights of indigenous peoples may not be given sufficient attention at the international level because the focus of this body of law continues to be on extraterritorial effects of environmental damage.

5. Effect on Transnational Corporate Conduct

A number of other environmental principles have recently emerged in international environmental law. Transnational corporations are increasingly taking environmental principles into account in their business operations. Through repetition and state practice, including incorporation into domestic legal systems, such principles or standards at some point may emerge as customary law.

Coincidentally, at the same time global leaders, environmental activists, and non-governmental organizations gathered for the Earth Summit, a leading international law firm, Baker & McKenzie, held a conference attended by over 100 corporate clients and legal experts from thirteen countries to discuss the future of global environmental regulation.[169] The primary issue of concern for the corporate attorneys and their clients was the development of strategies allowing firms to avoid fines, clean-up liability, and criminal charges

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167. *See* Jeffrey D. Kovar, *A Short Guide to the Rio Declaration*, 4 COLO. J. INT'L ENVTL. L. & POL'Y 119 (1993).

168. The Declaration requires states:

> to develop national law regarding liability and compensation for the victims of pollution and other environmental damage. Rio Declaration, *supra* note 157, at princ. 13.
>
> to cooperate to discourage or prevent the relocation and transfer of substances and activities that cause environmental degradation. *Id.* at princ. 14.
>
> to act cautiously when there is risk of serious or irreversible environmental damage. Lack of scientific certainty is not a reason for postponing cost-effective measures. *Id.* at princ. 15.
>
> to assess the environmental impact of activities, similar to the approach taken by the United States' National Environmental Protection Act. *Id.* at princ. 17.

169. *See* Marianne Lavelle, *Firm Hosts Its Own Summit: A Rare Look at Baker & McKenzie's Confab*, NAT'L L.J., June 22, 1992, at 1 (col. 4).

for environmental problems resulting from operations at transnational facilities.[170]

A recent publication[171] designed for TNC corporate counsel and clients addresses such concerns as follows:

> An earlier version of this chapter suggested that there was no such thing as "international" environmental law, because "international" environmental law, the laws among nations, have little direct impact on individuals and companies operating across national borders. . . . This statement may no longer be valid. . . . As the agreements reached at the [Earth Summit] are implemented, a body of international environmental law, including a common law of environmental protection, will continue to develop.[172]

(i) The Polluter Pays Principle

One of the emerging tenets of environmental protection regulations that has drawn the attention of TNCs is the "polluter pays principle." This requires the polluter to bear the cost of carrying out pollution prevention measures or paying for damage caused by pollution. In most European states, application of the polluter pays principle generally imposes liability on the generator of a hazardous substance; but when the generator is incapable of performing a clean up, the principle has been applied to justify imposing liability on entire industrial sectors.[173] The principle has also been extended from traditional notions of liability for the release of hazardous waste to imposing the responsibility on producers to take back

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170. One of the reasons the firm decided to hold annual conferences on international environmental law is that some U.S. corporations were unaware of how quickly environmental concerns have spread around the world.

> One thing that has struck us over the past couple of years, in dealing with problems after acquisitions is that people were not aware that there were liabilities outside the United States that could affect them. We can point to far too many examples where people bought a company [outside the United States], and two years later, the environmental liabilities are greater than the purchase price. . . . Americans make assumptions that what we have is necessarily more sophisticated than what others have—and this is not always the case [citing Germany and other Northern European countries where recycling, packaging and waste handling laws are being put into place that will be more stringent than U.S. laws].

Id. Joseph S. Moran, assistant general counsel-environment for American National Can Company in Chicago, said the company was closely following developments in the European Community, but added, "Our experience has been that the apparatus for actual compliance monitoring and enforcement is still nascent . . . although everyone is expecting it." *Id.*

171. *See* Michael J. Quinn, *International Environmental Law*, *in* GOING INTERNATIONAL: FUNDAMENTALS OF INTERNATIONAL BUSINESS TRANSACTIONS 371 (1996) [hereinafter GOING INTERNATIONAL].

172. *Id.*

173. *See id.* at 374.

packaging waste, used automobiles, electronic equipment, and other products.[174]

Originally recommended by the OECD Council in May 1972,[175] the polluter pays principle has been explicitly adopted in several bilateral and multilateral resolutions and declarations.[176] Its most recent inclusion is found in Principle 16 of the Rio Declaration, which provides:

> National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.[177]

(ii) The Precautionary and Proximity Principles

These two emerging legal axioms are also drawing the attention of corporate actors, particularly due to the emphasis placed on them by European environmental regulation agencies. The precautionary principle states that environmental damage should be avoided, not merely remedied, to the maximum extent possible.[178] The European Union has used this principle to stress the use of auditing and environmental management systems to find and correct environmental problems before damage occurs. This emphasis has led to global efforts to establish standards for environmental management systems.[179] The proximity principle, which is less developed

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174. *See id.*

175. *See id.*

176. *See, e.g.*, OECD Council Recommendation on Guiding Principles Concerning International Economic Aspects of Environmental Policies, May 26, 1972, C(72)128 (1972); European Charter on the Environment and Health, Principles for Public Policy, art. 11, Dec. 8, 1989, WHO Doc. ICP/RUD 113/Conf.Doc./1, *reprinted in* 20 ENVTL. POL. & LAW 57 (1990).

177. Kovar, *supra* note 167, at 131.

178. *See* GOING INTERNATIONAL, *supra* note 171, at 375.

179. *See id. See also* Stephen L. Kass & Jean M. McCarroll, *ISO 14000: Standards Present New Challenges*, NAT'L L.J., May 15, 1995, at S1 (col. 1).

> Perhaps the fastest growing part of international environmental "law" is a development that is not law at all and that few clients, and even fewer lawyers, have even heard of the pending adoption by the International Organization for Standardization (ISO) of universal standards (known as ISO 14000) for corporate environmental audits and environmental management practices.
>
> ISO, an international organization known only to a handful of U.S. lawyers, has had considerable success with its 9000 series of standards for quality management by international corporations and is now well advanced in an even more ambitious undertaking: the development of accepted standards and procedures for corporations to audit the environmental consequences of their operations. . . .
>
> The ISO 14000 standards, even if adopted on schedule in mid-1996, will not have the force of law and will not, by themselves, be binding on any private or public

conceptually and in practice, states that pollution should be eliminated close to the source.[180]

Despite these developments in international environmental law, the use of international human rights law is a better device for protecting indigenous peoples' rights. Unlike sovereign-focused environmental law, human rights law is specifically designed to limit a state's exclusive claim to territorial sovereignty.[181] The concept that environmental damage directly effects fundamental human rights of indigenous peoples enables international monitoring of domestic environmental issues via the procedures and institutions discussed below. The most effective international human rights instruments include the Universal Declaration of Human Rights,[182] the International Covenant on Civil and Political Rights,[183] and the American Convention.

6. *Draft Declarations on Rights of Indigenous Peoples*

The most important human rights instrument for protecting the environment of indigenous peoples in the future may be the Draft Universal Declaration on the Rights of Indigenous Peoples.[184] Several of its articles specifically relate to the environment[185] and one

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party. Nevertheless, they are likely, once approved, to have a significant impact on both U.S. and foreign firms and to affect both corporate practices and international trade around the world. This is so because ISO's corporate supporters, representing major manufacturers and distributors of goods in both the United States and Europe, are likely to adopt the 14000 standards as their own and to insist that suppliers and others with whom they do business comply with such standards as well.

Id.

180. *See* GOING INTERNATIONAL, *supra* note 169, at 375.

181. *See* MYRES S. MCDOUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 792-93 (1989).

182. Article 2 of the Universal Declaration states "no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty." Universal Declaration, *supra* note 105.

183. Article 1 of the International Covenant on Civil and Political provides for the right of self-determination; Article 2 provides the right to not be discriminated against on the basis of "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"; Article 3 "ensure(s) the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant"; and other articles protect citizens from torture and slavery; provide for freedom of movement, as well as the right to life and liberty, and equality under the law. International Covenant on Civil and Political, *supra* note 105.

184. United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities: Draft United Nations Declaration on the Rights of Indigenous Peoples, Oct. 28, 1994, 34 I.L.M. 541 (Aug. 26, 1994) [hereinafter Draft Declaration].

185. *Id.* at 548-53. Article 7 states:

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for: (b) Any

creates obligations for states in which indigenous people are located.[186]

The Organization of American States (OAS) has recently concluded a regional homologue to the Draft Declaration.[187] This instrument was reviewed by OAS member states and NGOs, and based on this review the Inter-American Commission revised the draft and presented its proposed Declaration to the OAS General Assembly in 1997 at Lima, Peru.[188]

V. HUMAN RIGHTS PETITIONS IN INTERNATIONAL FORA

This section examines the various options available to indigenous plaintiffs for filing a petition protesting environmental degradation with an international human rights body. This section will discuss (1) treaty based procedures established within the U.N. to allege violations of specific treaties; (2) nontreaty procedures within the U.N. system; and (3) procedures under the regional system established by the Organization of American States.

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action which has the aim or effect of dispossessing them of their lands, territories or resources.

Article 13 provides:

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected.

Article 25 mandates:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.

Article 26 states:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea- ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used.

Article 28 provides:

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from states and through international cooperation.

Article 30 dictates:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources.

186. Paragraph 2 of Article 28 provides that "[s]tates shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples."

187. Draft of the Inter-American Declaration on the Rights of Indigenous Peoples, art. XVIII(2), (3), (4), (8), approved by the IACHR at the 1278th session held on Sept. 18, 1995, OEA/Ser/L/V/II.90, Doc. 9 rev. 1 (1995) [hereinafter IACHR Draft Declaration].

188. *See* Osvaldo Kreimer, *The Beginnings of the Inter-American Declaration on the Rights of Indigenous Peoples*, 9 ST. THOMAS L. REV. 271, 274 (1996).

A. United Nations System

1. Complaints Under the Optional Protocol to the International Covenant on Civil and Political Rights

This option is available for individual complaints based on a violation of a human right found in the International Covenant on Civil and Political Rights. Ecuador is a party to the Optional Protocol and thus one could bring a complaint against the country for permitting environmental degradation of the type existing in the Amazon Oriente.

Complaints under the Optional Protocol are filed with and heard by the U.N. Human Rights Committee, which was created by article 28 of the Covenant.[189] The Human Rights Committee is composed of eighteen human rights experts who act independently from the instruction of their respective governments.[190]

A complaint, called a "communication," may be filed with the Human Rights Committee by "individuals subject to [the State party's] jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."[191] The communication must allege a violation of a right contained in the International Covenant on Civil and Political Rights. Indigenous groups who suffer from the effects of environmental degradation caused by TNC activities that have been sanctioned by their home state could allege violations of the right to life[192] and the right to health,[193] which are rights guaranteed by the Covenant.

The Human Rights Committee cannot consider a communication if the same matter is being considered under another international procedure.[194] Once a communication is declared admissible, the state to which the complaint is directed has six months to submit a written explanation or clarification of the matter to the Human Rights Committee.[195] The Human Rights Committee decides the matter and communicates its opinion to both parties.[196] The

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189. International Covenant on Civil and Political Rights, *supra* note 106, art. 28.

190. "The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience." *Id.*

191. Optional Protocol, Dec. 19, 1966, art. 1, 999 U.N.T.S. 302 [hereinafter Optional Protocol].

192. *See* International Covenant on Civil and Political Rights, *supra* note 106, art. 6.

193. *See id.* art. 7.

194. *See* Optional Protocol, *supra* note 190, art. 5, at 303.

195. *See id.* art. 4, at 303.

196. *See id.*

Committee's views are not legally binding, but the attention focused on the offending state can be a catalyst for a change in practice.

2. Non-Treaty Based Procedures Within the United Nations System

A number of non-treaty based procedures exist to hear human rights complaints based on violations of customary international law. Complaints submitted under these procedures are heard by the U.N. Human Rights Commission. The Human Rights Commission consists of fifty-three members who are elected by the Economic and Social Council of the United Nations (ECOSOC).[197] The members and their delegations operate on behalf of the state they represent.[198] The branch of the Human Rights Commission which hears human rights complaints is the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, which is composed of twenty-six human rights experts elected by the Commission.[199]

Initially, the Human Rights Commission lacked the authority to act on human rights complaints. In 1967, however, the Human Rights Commission requested this authority from ECOSOC.[200] The Economic and Social Council granted the Human Rights Commission's request in resolution 1235.[201] This resolution established the authority of the Human Rights Commission and its Sub-Commission to examine information about situations which "appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."[202]

The so-called "1235 procedure" allows complaints to be made during sessions of the Commission and the Sub-Commission regarding significant patterns of human rights violations.[203] These presentations are termed "interventions" and have resulted in lively public debate in the Commission and Sub-Commission on various human rights situations.

While the 1235 procedure does not result in a binding order, several positive developments can result. A well-written and

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197. Nigel S. Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations, in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 60 (1992).

198. *See id.* at 60-61.

199. *See id.* at 61.

200. *See* C.H.R. res. 8 (XXIII), at 131, U.N. Doc. E/CN.4/940 (1967) (*reprinted in* GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE at 70).

201. *See* E.S.C. res. 1235 (XLII), U.N. ESCOR 42d Sess., Supp. No. 1, at 17, U.N. Doc. E/4393 (1967).

202. INDIAN LAW RESOURCE CENTER, INDIAN RIGHTS, HUMAN RIGHTS: HANDBOOK FOR INDIANS ON INTERNATIONAL HUMAN RIGHTS COMPLAINT PROCEDURES 27 (1984) [hereinafter INDIAN RIGHTS HANDBOOK].

203. *See id.*

documented statement before the Commission or Sub-Commission can effectively focus public attention on the violations.[204] Meetings of the Commission and Sub-Commission are open to the public and involve debate, and complaints before these bodies are often covered by the international media.[205] Resolutions regarding the allegations can be effective as political catalysts for further action by the Commission, and as documentation when a record of the situation is created at the request of the Secretary-General.[206]

The Sub-Commission has demonstrated that it understands the link between environmental degradation and human rights in the following cases involving environmentally-related human rights violations.[207]

In a report presented to the Sub-Commission in August 1989, the Sierra Club Legal Defense Fund challenged joint US-Guatemalan aerial fumigation programs in Guatemala.[208] The report alleges that the fumigation constituted a human rights violation on the grounds that pesticides banned by the EPA were used, and that use in Guatemala had led to severe environmental harm and human injury.[209] The report documented contamination of "local ecosystems, including groundwater sources, rivers and estuaries, fish and wildlife, nearby villages, food crops, and farm animals."[210] Such acts were alleged to violate the right to life and security of the person, right to health and well-being, and the right to safe working conditions.[211]

A complaint based on the same facts as the *Aguinda* allegations was brought on behalf of the Ecuadorean Huaorani indigenous people. This complaint challenged Ecuador's approval of a proposal by Conoco Oil Company to build an access road dividing their territory. The Huaorani Petition claimed this would lead to destruction of their culture.[212] The proposed road construction was challenged as a violation of the Huaorani people's right to self-determination, the right to be protected from genocide, the individual right to life and security of person, and the right to health.[213]

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204. *See id.* at 28.

205. *See id.* at 27-28.

206. *See id.*

207. *See generally,* Melissa Thorme, *Establishing Environment as a Human Right,* 19 DEN. J. INT'L L. & POL'Y 301, 305-08 (1991).

208. *See id.* at 307.

209. *See id.*

210. *Id.* at 314. The injuries included deaths of villagers, crops and livestock.

211. *See id.*

212. *See* Karen Parker & Melissa Thorme, OIL ROAD CONSTRUCTION THROUGH ECUADOR'S YASUNI NATIONAL PARK 1-4 (1989) [hereinafter OIL ROAD CONSTRUCTION].

213. *See id.* at 13-19.

After reviewing the information submitted, Sub-Commission members decided to study the relation between environmental problems and human rights and requested the Secretary-General to invite interested governments and organizations to submit information.[214] In 1990, the project was reviewed and a resolution adopted which approved the Sub-Commission's acceptance of the concept of environment as a human right and encouraged the Sub-Commission to continue its work in this area.[215] In July 1994, the Sub-Commmission's Special Rapporteur released a final report which examines and explicitly recognizes the link between environmental degradation and the threat to human rights.[216]

B. Organization of American States System

The OAS is a regional, intergovernmental organization which includes most of the sovereign states of the Americas.[217] The origins of the Inter-American system are found in the 1826 Congress of Panama and the treaty of Perpetual Union, League and Confederation proposed by Simon Bolívar.[218] The 1948 Charter of the OAS contained two provisions on human rights and also adopted the American Declaration of the Rights and Duties of Man.[219] The OAS adopted the American Convention on Human Rights in 1969 to strengthen regional human rights protections; its drafters drew upon the American Declaration, the European Convention and the International Covenant on Civil and Political Rights.[220] The Convention entered into force in 1978 and created the Inter-American Court of Human Rights as a forum for proceedings brought to safeguard the rights it set forth.[221] The Inter-American Commission on Human Rights was created in 1959[222] but lacked the ability to receive and process individual petitions until 1965.[223]

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214. *See id.*

215. *See* Thorme, *supra* note 208, at 307-08.

216. *See* Human Rights And The Environment, Final Report, U.N. ESCOR 46th Sess., Agenda Item 4, U.N. Doc. No. E/CN.4/Sub.2/1994/9 (1994) [hereinafter Human Rights And The Environment].

217. *See* Inter-American Commission on Human Rights, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, OEA/Ser.L.V/II.82, doc. 6, rev. 1 at 1-2 (1992) [hereinafter BASIC DOCUMENTS].

218. *See* Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. J. INT'L L. & POL'Y 333, 334 n.3 (1993).

219. American Declaration of the Rights and Duties of Man (1948), *reprinted in* BASIC DOCUMENTS at 17 [hereinafter American Declaration].

220. *See* Shelton, *supra* note 218, at 335.

221. *See* American Convention, *supra* note 125, art. 33, at 155.

222. *See* David J. Padilla, *Inter-American Commission on Human Rights: A Case Study*, 9 AM. U. J. INT'L L. & POL'Y 95 (1993).

223. *See id.* at 96.

Widespread recourse to the Inter-American Commission began during the 1970's, a period of wide-scale repression practiced by Latin American military dictatorships. At approximately the same time, many human rights NGOs were created or grew in strength, some of which had a Latin American focus. These NGOs assisted individuals in the process of placing petitions before the Inter-American Commission.

The Inter-American Commission has established a procedure for hearing human rights complaints. Such complaints must allege a violation of a right guaranteed under either the American Declaration or the American Convention. The American Convention has been ratified by twenty-five of the thirty-five OAS member states.[224] The Convention requires an individual petition to the Inter-American Commission on Human Rights, after which either the Commission or a member state can bring alleged human rights violations before the Inter-American Court.[225]

The Inter-American Commission may also consider and act on complaints alleging a human rights violation protected by customary international law.[226] Once the Inter-American Commission finds a complaint admissible, it requests the government to which the complaint is directed to respond, and the author of the complaint may then reply to the government's position. The Inter-American Commission holds private hearings on the complaint, and sends members or representatives to make on-site investigations, including victim and witness interviews.[227]

The Inter-American Commission prefers to work out friendly settlements between the parties and thus negotiations between the parties are confidential.[228] When a settlement is not realized, the Commission will prepare a report, which may include proposals and recommendations to remedy the situation. If the government does not act on the report, it may then be made public.[229]

In 1990, the Confederacion de Nacionalidades Indigenas de la Amazonia Ecuadoriana (CONFENIAE) petitioned the Inter-

224. *See id.* at 99.

225. *See id.*

226. *See* American Convention, *supra* note 126, art. 44, at 157.

227. *See* Padilla, *supra* note 222, at 102-03.

228. *See generally,* American Convention, *supra* note 125, art. 48.1.f (establishing, that when the Commission receives a petition or communication alleging violation of any of the rights protected by the Convention it shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter).

229. *See* Padilla, *supra* note 222, at 123.

American Commission on behalf of the Huaorani people.[230] The petition is based on substantially the same facts as the *Aguinda* allegations, and claims that the government of Ecuador has violated the Huaorani peoples' human rights by allowing road construction and large-scale oil development within their traditional Amazon homeland.[231]

A 500,000 acre tract of rain forest in the Ecuadorean Oriente region, known as Block 16, became the site of proposed oil exploration and drilling activities in the late 1980's.[232] Three factors made Block 16 controversial: (1) part of it is located within a national park; (2) it is within the traditional lands of the indigenous Huaorani; and (3) it involved a prominent TNC oil company.[233]

Between 1983 and 1985 the Ecuadorean government created several 500,000 acre "blocks" in the Oriente for development by foreign oil companies. The government did not inform the foreign oil companies about existing land uses during the bidding process. Block 16 has been called "one of the most visible cases of this disregard for existing land uses, as it includes land from both Yasuni National Park, Ecuador's largest tract of undeveloped rain forest, and a reserve set aside for the indigenous Huaorani."[234] A current estimate of the Huaorani's population is 1580 individuals, and they are considered the least assimilated of any of Ecuador's indigenous peoples.[235]

Indigenous peoples in the Amazon had been critical of U.S. and European environmental groups for ignoring their problems in the environmentalists' efforts to save the Amazon. For example, at a October 1989 meeting in Washington D.C., indigenous peoples stressed that many environmentalists concentrate only on saving the rain forest itself without recognizing that indigenous peoples are part of the Amazon rain forest as well.[236] The following year,

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230. Petition by the Confederacion De Nacionalidades Indigenas de la Amazonia Ecuadoriana and the Sierra Club Legal Defense Fund on Behalf of the Huaorani People Against Ecuador (June 1, 1990) [hereinafter Huaorani Petition].

231. *See id.* at 1.

232. *See* Thomas S. O'Connor, *"We Are Part of Nature": Indigenous Peoples' Rights as a Basis for Environmental Protection in the Amazon Basin*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 193, 199 (1994).

233. *See id.* at 200.

234. *See id.* at 201-02. "Block 16 is located in the upper reaches of the Amazon Basin in one of the world's richest ecosystems, with high levels of biological diversity. . . . scientists have identified more than 4,000 species of flowering plants, 600 species of birds, 500 species of fish, and 120 species of mammals." *Id.* According to one tropical ecologist, this area is "the richest biotic zone on earth" and "deserves to rank as a kind of global epicenter of biodiversity." *Id.*

235. Huaorani Petition, *supra* note 230, at 7.

236. *See* Roger Atwood, *Amazon Indians and Ecolologists Debate Saving the Jungle*, Reuter Library Report (Lima), May 8, 1990.

indigenous leaders from five countries met in Lima, Peru, to discuss their environmental concerns regarding the Amazon Basin with activists and environmental experts.[237] As a result of a relationship established at this meeting, the Sierra Club Legal Defense Fund and CONFENIAE filed a petition to the Inter-American Commission protesting Ecuador's decision to allow petroleum development in the Huaorani's traditional lands.[238]

The petition charges the Ecuadorean government with "endangering the lives and culture of Ecuador's Huaorani people by encouraging oil development within the Huaorani traditional lands."[239] It recognizes that Ecuador ratified the American Convention in 1977 and is bound by the American Declaration as an OAS member.[240] In addition, the petition alleges that the Ecuadorean government, through the oil extracting corporations, is violating the following legally recognized human rights of the Huaorani people: (1) the right to life and security of the person,[241] (2) the right to preservation of health and of well-being,[242] (3) the right to humane treatment,[243] (4) the right to protection of the family,[244] (5) the right to residence and movement,[245] (6) the right to inviolability of home,[246] (7) the right to religious freedom and worship,[247] (8) the right to property,[248] and (9) the right to privacy.[249] The petition requests that precautionary measures be taken to "avoid irreparable damage to persons" pursuant to Article 29 of the regulations of the Inter-American Commission.[250]

The petition notes that the right to life and security of the person is nonderogable and emphasizes that governments must "take affirmative steps to protect life by assuring environmental integrity and by promoting policies to ensure basic survival of persons subject

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237. *See* O'Connor, *supra* note 232, at 202.
238. *See id.*
239. Huaorani Petition, *supra* note 230, at 1.
240. *See id.*
241. *See* American Declaration, *supra* note 219, art. 1, ; American Convention, *supra* note 125, art. 4.
242. *See* American Declaration, *supra* note 219, art. 11.
243. *See* American Convention, *supra* note 125, art. 5.
244. *See* American Declaration, *supra* note 219, art. 6.
245. *See id.* art. 8; American Convention, *supra* note 125, art. 22.
246. *See* American Declaration, *supra* note 219, art. 9, American Convention, *supra* note 125, art. 11.
247. *See* American Declaration, *supra* note 219, art. 3, American Convention, *supra* note 125, art. 12.
248. *See* American Declaration, *supra* note 219, art. 23; American Convention, *supra* note 125, art. 21.
249. *See* American Convention, *supra* note 125, art. 11.
250. *See* Huaorani Petition, *supra* note 230, at 2.

to a state's jurisdiction," and that the Inter-American Commission has adopted a resolution stating that "special protection for indigenous populations constitutes a sacred commitment of the states."[251]

The petition is still pending before the Inter-American Commission, and the course it has followed is not a matter of public record due to the above-mentioned policy favoring friendly settlement. However, like the U.N. Human Rights Commission, the Inter-American Commission has proved to be an effective forum in the past for addressing similar human rights violations arising from environmental degradation, as discussed below.

1. *Yanomani Case*

The Inter-American Commission linked environmental quality to the right to life when it examined a petition brought on behalf of the Yanomani people of Brazil. The petitioners alleged that the Brazilian government breached the American Declaration by constructing a highway through territory where the Yanomani lived, authorizing exploitation of the area's resources, and permitting colonization and open access to the region, which resulted in transmission of contagious diseases and failure to provide necessary medical treatment.[252]

The Commission declared:

> By reason of the failure of the government of Brazil to take timely and effective measures on behalf of the Yanomani Indians, a situation has been produced that has resulted in the violation, injury to them, of the following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, personal security (Art. I); the right of residence and movement (Art. VIII); and the right to the preservation of health and to well-being (Art. XI).

VI. ANALYSIS OF HUAORANI PETITION

This section consists of an exercise in applying the human rights law of the Inter-American system to two counts alleged in the Huaorani petition: violation of the rights to life and health. This section discusses both the source and content of each of these rights and then analyzes how these rights have been violated by the environmental degradation.

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251. *See id.* at 21.

252. *See* Case No. 7615, INTER-AM. C.H.R. 24, 1984-85 ANNUAL REPORT, OAS/Ser.L/V/II.66, doc. 10, rev.1 (1985).

A. The Right to Life

The right to life has been called the most fundamental of all the human rights recognized in international law.[253] Kurt Herndl, when Assistant Secretary-General for Human Rights of the United Nations, stated "[o]f all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, from which the latter obtain their raison d'etre and must take their lead."[254] Another commentator has remarked that:

> [t]he right to life must certainly be the most basic and elementary of the human rights. Emphasis on human rights would be quite meaningless, without the survival of living subjects to be the carriers of those rights. And its primacy is reflected in a pride of place accorded to it in human rights instruments, and in the restraint on its derogation even in times of [emergency].[255]

The right to life is prominently featured in every major human rights treaty and covenant. It is expressly provided for in the Universal Declaration,[256] the International Covenant on Civil and Political Rights,[257] the European Convention,[258] the American Convention,[259] and the African Charter.[260] In addition to express provisions in the major human rights treaties, the right to life arises from customary international law. The right to life is so compelling, fundamental, and widely accepted as law that it has achieved the status of *jus cogens*.[261]

The substantive scope of the right to life, as expressed in the Universal Declaration and the International Covenant on Civil and

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253. *See, e.g.*, F. Menghistu, *The Satisfaction of Survival Requirements, in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 63 (1985).

254. *Id.* at 11.

255. Leo Kuper, *Genocide and Mass Killings: Illusion And Reality, in* THE RIGHT TO LIFE IN INTERNATIONAL LAW 114 (1985).

256. "Everyone has the right to life, liberty and the security of person." Universal Declaration, *supra* note 105, art. 3.

257. "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, *supra* note 106, art. 6(1).

258. "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." European Convention, *supra* note 126, art. 2(1).

259. "Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception." American Convention, *supra* note 125, art. 4(1).

260. "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." African Charter, *supra* note 124, art.4, at 60.

261. *See* Parker & Neylon, *supra* note 54, at 431-32.

Political Rights, was originally given a restrictive reading.[262] This interpretation held that the right to life protected individuals only against arbitrary deprivations of life such as homicide. Some commentators have argued that the right to life encompasses only the right to be protected against arbitrary killing.[263] Under such a reading, the right to life is limited to situations in which an individual may be deprived of the right to life and would only cover such areas as establishing the conditions under which the death penalty may be applied.

Later, the right to life in international law evolved to include more than the right to be free from arbitrary killing. Its nature as a prerequisite for exercise of all other human rights is recognized by the international community.[264] Further, international human rights institutions have in practice acknowledged that various situations in the world today not considered when the Universal Declaration or the International Covenants were drafted may threaten the right to life. The Human Rights Committee has recognized that high rates of infant mortality, malnutrition, disease, genocide, war, and missing or "disappeared" persons all implicate the right to life.[265] The realization that situations other than homicide affect the right to life has expanded the scope of this right.[266]

Thus, the right to life can be held to encompass protection of the basic elements of survival, such as food and water. One commentator has noted that there are two means of depriving an individual of the right to life: (1) direct killing through execution or torture, and (2) starvation and deprivation of basic needs, such as food and health

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262. *See* B.G. Ramcharan, *The Concept And Dimensions Of The Right To Life, in* THE RIGHT TO LIFE IN INTERNATIONAL LAW at 3.

263. *See* Yoram Dintstein, *The Right to Life, Physical Integrity and Liberty, in* THE INTERNATIONAL BILL OF HUMAN RIGHTS 114, 115 (1980).

264. Various resolutions by the Commission on Human Rights have affirmed and declared the importance of the right to life. *See, e.g.*, a 1982 resolution stating that the right to life is inherent, enjoyed by all individuals, and protecting this right is a prerequisite for enjoyment of all other rights. *See* Ramcharan, *supra* note 262, at 4-5 (citing Res. 1982/7, Feb. 19, 1982). In a 1983 report, the Commission stated "for people in the world today there is no more important question than that of preserving peace and ensuring the cardinal right of every human being, namely, the right to life." *Id.* at 5 (quoting Res. 1983/43, Mar. 9, 1983).

265. *See id.* at 4-5.

266. *See id.* at 5. The Human Rights Committee stated:

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

Id.

care.[267] The right to life always encompassed the former and now embraces the latter.

The Inter-American Commission has also held that the right to life encompasses more than a prohibition against homicide. It has declared that with regard to the right to life, any government is obligated "to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition, and education."[268] The European Commission on Human Rights has held that the right to life in the European Covenant requires states to take measures to safeguard life, and thus goes beyond the intentional taking of life itself.[269]

Environmental degradation may also violate the right to life of individuals killed through poisoning or causation of terminal disease. Pollution may violate the right to life by contaminating food and water supplies so as to destroy necessary requirements for survival. By destroying the means to live, the right to life is violated.

B. The Right to Health

The right to health, along with the right to life, is "at the basis of the ratio legis of international human rights law and environmental law."[270] The right to health, although "inextricably interwoven with the right to life,"[271] is indeed a separate right from the right to life.

The right to health is expressly provided for in several human rights treaties. For example, the International Covenant on Economic, Social and Cultural Rights recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and state parties agree to take steps necessary for "[t]he improvement of all aspects of environmental and industrial hygiene" and for the "prevention, treatment and control of epidemic, endemic, occupational and other diseases."[272] The Universal Declaration guarantees the right to "life, liberty, and the security of

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267. *See* Menghistu, *in* THE RIGHT TO LIFE IN INTERNATIONAL LAW, *supra* note 253, at 63.

268. INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, TEN YEARS OF ACTIVITIES 1971-1981 322 (1982).

269. *See* Association X. v. United Kingdom, App. No. 7154/75, 14 Eur. Comm'n H.R. Dec. & Rep. 31, 32 (1979).

270. Human Rights And The Environment, *supra* note 216, at 146.

271. A.A. Cancado Trindade, *The Contribution of International Human Rights Law to Environmental Protection, with special reference to Global Environmental Change*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 280 (1992) ("The right to life implies the negative obligation not to practice any act that can endanger one's health, thus linking this basic right to the right to physical and mental integrity and to the prohibition of torture and of cruel, inhuman, or degrading treatment. . . ."). *Id.*

272. International Covenant on Economic, Social and Cultural Rights, *supra* note 107, art. 12.

person,"[273] as well as the individual's "right to a standard of living adequate for the health and well-being of himself and his family."[274]

The American Convention guarantees that "[e]very person has the right to have his physical, mental, and moral integrity respected."[275] The 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights recognizes a right to health, stating, "[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being."[276] The European Social Charter recognizes the human right to health protection, including an agreement by State parties "to remove as far as possible the causes of ill health."[277] The African Charter provides that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development"[278] and also asserts an individual's right "to enjoy the best attainable state of physical and mental health" and a corresponding duty on the state to "protect the health of their people."[279]

The component of the right to health that is threatened by pollution and environmental degradation is the right to be protected from external threats to health. An argument can be made that while it is not clear whether the right to health encompasses such features as the right to medical treatment or minimum levels of nutrition, it must include the right to be free from poisoning from toxic chemicals introduced into the environment.

As with the right to life, the connection between environmental degradation and the right to health is clear. In a report examining the link between human rights and the environment, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities found that "in the environmental context, the right to health essentially implies . . . freedom from pollution, . . . such as the continuous discharge of toxic and hazardous substances into air, soil and water."[280] Environmental conditions which contaminate the air, water, and food people rely on clearly affect human health. As one

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273. Universal Declaration, *supra* note 105, art. 3.

274. *Id.* art. 25.

275. American Convention, *supra* note 125, art. 5.

276. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), art. 10(1), 28 I.L.M. 161, 164 (1988).

277. European Social Charter, Oct. 18, 1961, art. 11, 529 U.N.T.S. 89, 104. The European Social Charter also includes the right to safe and healthy working conditions. *Id.* art. 3, 529 U.N.T.S. at 96.

278. African Charter, *supra* note 124, art. 24, at 63.

279. *Id.* art. 16.

280. Human Rights and the Environment, *supra* note 216, at 46.

commentator stated, "[d]esirable standards of health and welfare will be impossible to sustain in an atmosphere depleted of life-giving and life-sustaining elements."[281] Pollutants that humans come in contact with inevitably threaten the right to health, and the question becomes only to what degree their health is affected.

VII. CONCLUSION—EFFORTS TO STRENGTHEN OAS MEMBER STATES ENVIRONMENTAL REGULATORY REGIMES

The issues discussed above demonstrate that at the present time the Inter-American human rights system is a viable forum for Latin American indigenous peoples to obtain a fair hearing of complaints about environmental damage caused by TNC operations in indigenous territory. However, the Inter-American system has a very poor record of providing any real monetary compensation for victims of human rights violations. Thus, although the analysis above demonstrates that the Huaorani petition is likely to obtain a favorable hearing by the Inter-American Commission, the petitioners will most likely obtain no more than a moral victory which will not solve their immediate problems. Development of the environmental protection regulatory regime in each of the OAS member states is required before injured parties can expect to obtain damages as a result of injuries suffered due to TNC environmental degradation.

Recent policy pronouncements by the OAS in this respect are not very encouraging.[282] A call for the organization to highlight environmental protection in the American continent has been made and the OAS plans to create an Environmental and Sustainable Development Unit as part of its current vision of transforming the organization into a more influential continental forum. A proposed task for this unit is the drafting of environmental regulations that would be applicable throughout the American continent.[283]

The potential influence of the Stockholm and Earth Summit 'soft law' on state practice is notable in the OAS proposal outlining a program for development of regional environmental law. The proposal refers to both the Stockholm Declaration and Agenda 21 as authority for the need to strengthen and harmonize the existing

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281. R.S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law*, *in* ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW 211 (1992).

282. *See* ORGANIZATION OF AMERICAN STATES, PROGRAM FOR THE DEVELOPMENT OF LAW ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT IN THE AMERICAS (Sept. 13, 1996) (visited Nov. 20, 1998) <http://www.oas.org/EN/PROG/BOLIVIA/1env-law.htm> (attached hereto) [hereinafter Appendix].

283. *See id.* at 49.

regimes.[284] The proposal claims that it proceeds from the assumption that environmental problems of international scope require collective action, and that:

> [i]t is more and more widely recognized that while relations between states are the chief focus of international public environmental law, they are not its only focus, and that the rules of international law also impose obligations of varying kinds on other members of the international community, such as international organizations . . . and private enterprise.[285]

However, the proposal's concrete objectives do not actually reflect this assumption and are highly state-focused. A major area of concern is that the existing body of international environmental law in the region is "decentralized and fragmented."[286] The proposal states that while laudable, the development of environmental regulations by OAS member states over the past twenty years "has not always been based on . . . exploration of the best policy options."[287]

Five basic programs are proposed to ameliorate this situation:

> 1. An information service [data bank] on national and international law;
>
> 2. Support and assistance for the modernization and strengthening of national environmental institutions;
>
> 3. The development and consolidation of international environmental law in the Americas;
>
> 4. The harmonization of sectoral legislation that has an effect on the environment; [and]
>
> 5. The regulation of shared natural resources and border-area ecosystems.[288]

Included within the third category are two areas of interest to this article.

The OAS is proposing a regional code of environmental criminal law governing "transnational offenses."[289] The creation of an additional regional court to adjudicate such offenses has been proposed. However, there is no mention of environmental pollution resulting from TNC operations. The main concern in this area is the increase

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284. *See id.* at 47, 53.
285. *See id.* at 51.
286. *See id.*
287. *See id.* at 52.
288. *Id.* at 55.
289. *See id.* at 62.

in international trade in hazardous wastes occurring in the region.[290] The proposal also explores the possibility of utilizing tax and insurance laws to prevent and control pollution and environmental degradation, but makes no explicit mention of TNC activity.[291]

Similarly, despite the fact that the OAS is concurrently reviewing the Draft Declaration on the Rights of Indigenous Peoples, which contains strong language useful for protecting the environment of the region's indigenous communities, this proposal does not demonstrate the same attitude or priorities. The only mention of indigenous peoples is found in a short section entitled "Drafting of a legal system to regulate the use of renewable natural resources by border indigenous communities."[292] Although claiming to recognize the need to consider the "traditional subsistence and production skills"[293] of such communities, its overall tone is one of top-down control and gives the impression that indigenous communities are actually causing environmental harm and avoids addressing the effect of TNC operations on indigenous people. The proposal completely fails to discuss the concept that regional human rights institutions could be helpful in efforts to protect the environment.

On balance, it appears that efforts to protect the environment and take into consideration the needs and priorities of indigenous peoples remain primarily in the hands of human rights activists and institutions. The endeavor to place indigenous concerns into the mainstream of judicial, governmental, and corporate affairs should not be abandoned, of course, but its effects will not be seen in the near future.

290. *See id.* at 63.
291. *See id.* at 65-66.
292. *See id.* at 69.
293. *See id.*

APPENDIX

SUMMIT CONFERENCE ON SUSTAINABLE DEVELOPMENT SANTA CRUZ, BOLIVIA, 1996

PROGRAM FOR THE DEVELOPMENT OF LAW ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT IN THE AMERICAS

Technical Document September 13, 1996

SUMMARY

1. Introduction

In this century a large body of international environmental law has been established, based on treaties and other legally binding instruments, common law, and various decisions of international organizations, together with declarations, guidelines, and recommendations. The need to address environmental problems collectively is evidenced by the fact that, at present, there are approximately 960 legal instruments, both binding and nonbinding, including those that mainly deal with the environment and those that concern other subjects with environmental implications.

Although throughout this century, until 1972, various bilateral and multilateral environmental treaties were signed, most modern environmental legislation dates roughly from that time, when the Stockholm Conference on the Human Environment was held. This conference was a milestone in ientifying global and cross-border environmental problems, and it led to the drafting of a large number of international treaties.

Twenty years later, the Rio Conference marked a new stage in the drfting of treaties and action programs, because certain worldwide problems (for example, biodiversity and climate change) had become more evident and the relationship between the environment and development had been more clearly recognized. These global treaties, and many of those preceding and following Stockholm, have been ratified by a large number of countries in the Americas and are consequently an essential part of the region's international environmental law.

The origins, characteristics, and scope of international environmental law in the Americas vary widely. Subregional and bilateral instruments predominate; those covering the hemisphere are less numerous. The law is highly fragmented. It is also decentralized in terms of the

organizations responsible for implementing and monitoring it, if such organizations even exist, which is not always the case. There are no systematic studies that would make it possible to compare the effectiveness of the various instruments and identify gaps or the need for updates.

A great process of environmental law-making has also been going on at the national level, especially in the past two decades. This creation of environmental law whether national or international has not always been based on the exchange of information and experiences among the countries of the region, or on a collective exploration of the best policy options for solving common environmental problems. Often no effort has been made to properly coordinate national with international laws in the Americas or these with global international law, nor has there been a systematic identification of the principal legal instruments that the countries would need at the hemispheric or subregional level in order to cope with their collective environmental problems.

The many intergovernmental and nongovernmental institutions in the region and the world must develop programs that will help countries to consolidate national law and harmonize it, where this is advisable, and will help to create the conditions for updating and enforcing existing international legal instruments and drafting new ones where gaps are found.

2. Background

In the Americas, there is a large body of international environmental law—hemispheric, subregional, bilateral, etc.—both binding and non-binding. The only hemisphere-wide treaty is the Western Hemisphere Convention (1940), drafted by the Pan American Union, which, under the authority of the OAS, has remained relatively inactive. There are, indeed, declarations and action plans in varying stages of development. Among them are the Inter-American Program of Action for Environmental Protection (1989), adopted by the General Assembly of the OAS, the Trinidad Action Plan (1990), the Tlatelolco Declaration (1991), signed at the regional preparatory meeting for the United Nations Conference on Environment and Development, and the Declaration and Action Plan to which the countries committed themselves at the Summit of the Americas (1994).

The same pattern exists at the subregional level: very few instruments that are binding and a great many that are not. There are a great many bilateral instruments, whose proliferation might well be explained by the limited number of binding treaties or instruments at the hemispheric and subregional levels. Bilateral arrangements have a long

history, as evidenced by the fact that in 1909 the United States and Canada signed the Treaty on Boundary Waters, which called for the creation of a permanent Joint International Commission.

Chapter 39 of Agenda 21, recognizes the need to strengthen the development of international environmental law as a tool for attaining sustainable development. It points out the need to review and develop international environmental law "to promote the efficacy of that law and to promote the integration of environment and development policies through international agreements or instruments, taking into account both universal principles and the particular and differentiated concerns of all the countries."

In late 1995, the General Secretariat of the Organization of American States drew up a proposal aimed at the creation of a program to strengthen international environmental law in the Americas. This proposal sets forth the priority programs that the OAS, in collaboration with other organizations of the Hemisphere, should undertake over the short, medium, and long terms. The document was submitted to the Special Session of the Committee on the Environment of the OAS Permanent Council, which met in Washington, D.C., on April 11 and 12, 1996, with the participation of government experts. The Committee noted the urgency of taking actions to put it into effect. The initiative presented below has been adapted from that document, which served as its technical support.

3. Initiative

It is proposed that the Governments of the Americas agree to create a program oriented toward strengthening the development of international environmental law, with the following long-term objectives:

> To promote participation in the design and adoption of worldwide, subregional, and regional legal instruments; make recommendations on how to adapt national environmental law to the commitments embodied in those instruments; and cooperate in the creation of the conditions necessary for their fulfillment.
>
> To promote the creation and consolidation of legal principles and instruments that foster sustainable development.
>
> To maintain an up-to-date data bank on the countries' environmental legislation and on the most important international treaties and nonbinding regional and subregional agreements.
>
> To offer assistance to the governments for strengthening their domestic legislation.

To support the countries in strengthening the legal instruments that foster harmonious management of their cross-border natural resources and border ecosystems.

To contribute to the creation of the conditions necessary to enable legislation on critical economic sectors that have a significant impact on the environment to evolve harmoniously and foster sustainable development in the countries of the Americas.

To offer a body of instruments and mechanisms to support the countries in preventing and resolving international environmental disputes.

To achieve these objectives, it is proposed that the Governments of the Americas work on the following subprograms:

An information service on national and international legislation dealing with sustainable development and the environment. Support and assistance for the modernization and strengthening of national environmental institutions. The development and consolidation of international environmental law in the Americas.

The harmonization of sectoral legislation that has an effect on the environment. The regulation of shared natural resources and border-area ecosystems.

PROGRAM FOR THE DEVELOPMENT OF LAW ON ENVIRONMENT AND SUSTAINABLE DEVELOPMENT IN THE AMERICAS.

I. BACKGROUND

1. Basic Assumptions

As we approach the end of the 20th century, environmental impacts of human origin (or anthropogenic) are becoming alarmingly worse. In the short and medium terms, it is highly probable that the situation will deteriorate under the pressure of population growth and development.

There is a close relationship between environment and development, conceptualized in the term "sustainable development," which is gradually being incorporated into new international legislation. This concept, endorsed by at the United Nations Conference on Environment and Development in Rio de Janeiro, is currently subject to uneven processes: It has taken on a pronounced environmental tilt. Many governments, the United Nations, and other international intergovernmental and nongovernmental organizations have adopted it as a guiding concept in their planning and programming. It is frequently used rhetorically, and its various definitions and

interpretations often make it sound vague and ambiguous. However, serious efforts are being made to make it more precise and, in particular, to make it functional, such as the efforts of the United Nations to redefine national accounts and of the World Bank to establish sustainable development indicators.

Environmental problems of international scope, which by their very nature require collective action, exist and are increasing. These problems stem from the interdependence among countries resulting from the use of natural resources of common interest (international commons), the use of natural resources in border areas, cross-border externalities, complex intersectoral linkages (environment vs. international trade, vs. increased fossil-fuel consumption, etc.), and the existence of local phenomena that have global implications. In response, numerous international organizations have been created to help solve these problems by four basic functions, with varying degrees emphases and interrelationships: (1) to serve as a forum for the formulation of environmental policies; 2) to provide information; (3) to strengthen the countries' management capabilities; and (4) to contribute to the development and enforcement of international environmental legislation. In recent decades, international intergovernmental organizations have become the main sources of global and regional environmental law.

It is more and more widely recognized that while relations between states are the chief focus of international public environmental law, they are not its only focus, and that the rules of international law also impose obligations of varying kinds on other members of the international community, such as international organizations, nongovernmental organizations, individuals, and private enterprise. A large body of international environmental law has been established, based on treaties and other legally binding instruments, common law, and various decisions of international organizations, together with declarations, guidelines, and recommendations directly or indirectly related to protection of the environment. This has occurred without the action of a central legislative authority, and the drafting is decentralized and fragmented. Consequently, the resulting principles and rules of international environmental law comprise a complex network of bilateral and multilateral relations (which is not to ignore the fact that an embryonic international governmental system is taking shape).

There are no common rules of play to hold all governments to the same standards. To the extent that the treaties apply different standards, the rules applicable to a given state depend on the treaties it has signed and the decisions of international organizations and the common law

by which it is bound. Furthermore, there are great disparities between regions, subregions, and countries in the development of environmental law.

2. Environmental Legislation in the Past Two Decades

The need to address environmental problems collectively is evidenced by the fact that, at present, there are approximately 960 legal instruments, both binding and nonbinding, including those that mainly deal with the environment and those that concern other subjects with environmental implications.

Although throughout this century until 1972, various bilateral and multilateral environmental treaties were signed, most modern environmental legislation dates roughly from that time, when the Stockholm Conference on the Human Environment was held. Since then, the scope of international agreements has broadened significantly: from agreements on cross-border pollution to agreements on worldwide pollution; from the preservation of certain species to the conservation of ecosystems; from the control of direct dumping into bodies of water to comprehensive watershed management systems; from agreements covering only national borders to agreements that restrict activities and the use of resources within national borders, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Biodiversity Convention, and the World Heritage Convention; from agreements calling only for research, the exchange of information, and monitoring to agreements requiring the reduction of pollutants with quantitative goals and specific deadlines.

3. The Development of Environmental Law in the Americas

In the Americas, a great process of environmental law-making, both national and international, has been going on, especially in the last two decades. It has not always been based on the exchange of information and experiences among the countries of the region, or on a collective exploration of the best policy options for solving common environmental problems. Often no effort has been made to properly coordinate national with international laws in the Americas, or these with global international law, nor has there been a systematic identification of the principal legal instruments that the countries would need at the hemispheric or subregional level. The various intergovernmental and nongovernmental institutions in the region and the world must develop programs to help countries consolidate their national laws and harmonize them where advisable, and help to create the conditions for updating and enforcing existing international legal instruments and drafting new ones where gaps are found.

3.1. Strengthening National Environmental Institutions

As a result of the Stockholm Conference many countries in the Americas-like most countries in the world-took steps to create or strengthen the public agencies responsible for managing renewable natural resources and the environment. There was also a major push to update the laws on renewable natural resources, many of the which placed greater emphasis on their exploitation than on their proper use and protection. The legislation enacted by the various countries-much of it in the form of comprehensive legal codes-was based on the command-and-control paradigm, which predominates in the industrial countries.

The United Nations Environment Programme (UNEP), the agency created to promote the implementation of the Stockholm Declaration, has played an important role in the dynamic progress on this front observed in the Americas. In turn, the Rio Conference prompted most of the American countries to make a new qualitative leap in terms of public agencies responsible for environmental management and domestic environmental legislation. Many of the countries (Argentina, Brazil, Colombia, Mexico) placed their environmental authorities at the top of the political structure by creating environmental ministries. Others (Chile, Ecuador) assigned authority for environmental issues to national environmental commissions. Some strengthened their existing organizations. Bolivia, the host of the summit, created a Ministry of Sustainable Development. There is a similar trend in the area of national environmental law: most of the countries are updating it and seeking to adapt it in accordance with the Rio agreements. In many cases, efforts are being made to supplement traditional command-and-control mechanisms with economic instruments for environmental management, to incorporate environmental considerations into various sectoral planning processes so as to explore avenues toward so-called sustainable development; and to create new forms of public participation.

But this dynamic process of domestic institutional reform, unfolded in a somewhat isolated manner in the countries of the region. Those responsible for designing and carrying out the reform often did not find information and assistance they needed concerning the experiences of other countries in the region. The new institutions have often had to be created without examining the successes and failures of other countries that chose different organizational models and different laws. It may well be therefore, that well-intentioned reforms are simply covering the same ground as previous, unsuccessful efforts. This isolation is explained in part by the insufficient number of fora in which to

clarify environmental problems and policies and exchange experiences, by the nonexistence of comprehensive data banks, and by the lack of effective technical assistance programs. Although UNEP has made significant efforts in Latin America and the Caribbean, updated and energized after the Rio Conference, its resources have been inadequate.

3.2. The Progress of International Environmental Law in the Americas

As was mentioned above, the Stockholm Conference was a milestone in terms of identifying global and cross-border environmental problems, and it led to the drafting of a large number of international treaties. Twenty years later, the Rio Conference marked a new stage in the drafting of treaties and action programs, because certain worldwide problems (for example, biodiversity and climate change) had become more evident and the relationship between the environment and development had been more clearly recognized. These global treaties, and many of those preceding and following Stockholm, have been ratified by a large number of countries in the Americas and are consequently an essential part of the region's international environmental law.

The same pattern exists at the subregional level: very few instruments that are binding and a great many that are not. There are a great many bilateral instruments, whose proliferation might well be explained by the limited number of binding treaties or instruments at the hemispheric and subregional levels. Bilateral arrangements have a long history, as evidenced by the fact that in 1909 the United States and Canada signed the Treaty on Boundary Waters, which called for the creation of a permanent Joint International Commission.

The origins, characteristics, and scope of international environmental law in the Americas vary widely. It is highly fragmented. It is also decentralized in terms of the organizations responsible for implementing and monitoring it, if such organizations even exist, which is not always the case. There are no systematic studies that would make it possible to compare the effectiveness of the various instruments and identify gaps or the need for updates.

II. THE INITIATIVE

To carry out an initiative aimed at developing and consolidating national and international environmental law in the Americas. In this connection, it is proposed that a working committee be established to present recommendations on priority programs and possible sources of funding; intergovernmental and nongovernmental organizations to execute them; and an interagency coordination system for the participating organizations.

The committee should take this document as one of its inputs for the formulation of its recommendations. Its members should be the principal governmental and nongovernmental organizations, both national and international, that have worked in this field in the Americas.

III. PROGRAMS

Five basic programs are described below:

1. An information service on national and international law.

2. Support and assistance for the modernization and strengthening of national environmental institutions.

3. They development and consolidation of international environmental law in the Americas.

4. The harmonization of sectoral legislation that has an effect on the environment.

5. The regulation of shared natural resources and border-area ecosystems.

The idea is that each program will need its own internal set of priorities. UNEP has recently stepped up its work in Latin America and the Caribbean. Similarly, the World Conservation Union (IUCN) is compiling systematic information on environmental law in Latin America and the Caribbean. The ideal situation would be to agree with these and other institutions to create and maintain a single data bank, with specific responsibilities for each and procedures for coordination and follow-up.

1. Information Service on National and International Law

1.1. Justification

The governments of the region need sources of information on the laws and regulations of the different countries, as a useful point of reference for evaluating the development of their domestic environmental law and improving it in accordance with their own economic and political conditions; on treaties and other binding and nonbinding instruments of a global, regional, or subregional nature, as a point of reference for updating them or adopting new ones; and on how various countries have adjusted their domestic law to comply with the commitments made in these international instruments. International governmental and nongovernmental organizations also need this information.

1.2. Objectives

To maintain a systematic data bank on national environmental laws. To maintain a data bank on international treaties and other binding and nonbinding instruments concerning the environment that are

relevant to solving the collective problems of the Hemisphere or any of its subregions. To maintain a data bank of information that will assist in the promotion or conduct of studies on the effectiveness of pertinent national and international law and in the formulation of policy recommendations.

1.3. Activities

To accomplish these objectives, it is proposed:

1.3.1. That systematic information be compiled on the legislation related to the environment and sustainable development in the Americas.

Laws in force in the countries concerning government environmental management agencies. The substantive environmental law pertaining to direct regulatory mechanisms (command and control), economic instruments for environmental management, and mechanisms for citizen participation. Worldwide treaties and other binding legal instruments, the American countries that have signed or ratified them, and the most important domestic legislation to enforce them. Treaties and other legal instruments from other parts of the world that are relevant to the countries of the Americas. Treaties and other binding multilateral instruments signed among the countries of the Americas. Declarations, action plans, etc., of worldwide scope. Declarations, action plans, etc., concluded among countries of the Americas.

1.3.2. That an electronic consultation system be developed to provide users of the data bank with quick responses.

1.3.3. That the creation and maintenance together with other organizations of a single data bank on environmental law in the Americas be promoted, with the responsibilities of each and the means of coordination specified.

2. Support and Assistance for the Modernization and Strengthening of National Environmental Institutions

2.1. Justification

The effective fulfillment of the growing environmental commitments and responsibilities of governments toward their citizens and the international community requires that the national environmental authorities have a high rank and board representation within the state structure that will give them the political and legal power to issue comprehensive regulations and guidelines and take decisions on actions of national consequence.

In most countries, the process of institutional modernization is very new, which makes it urgent to assist the governments so as to ensure that the change is consolidated and produces the desired results. In countries with outmoded administrative structures that do not meet the current requirements for environmental management, it is essential to recommend institutional changes appropriate to the specific characteristics of each country.

The task of modernizing and strengthening government environmental agencies must be combined with support for complementary processes to ensure coherent environmental management, e.g., incorporating environmental concerns into national, regional, and local development plans; establishing bodies responsible for intersectoral coordination; and making room for citizens to be consulted and become involved.

2.2. Objectives

To promote the formation and strengthening of effective institutional frameworks that will contribute to the proper performance of the government's environmental obligations on the basis of recognition of their trans-sectoral nature.

To encourage the modernization of the countries' environmental authorities, stressing the creation of high-level directing agencies within the government structure.

To increase the responsiveness of national environmental management agencies by adopting other mechanisms of government intervention such as direct regulation and economic instruments.

2.3. Activities

2.3.1. Support and technical legal assistance to countries currently engaged in the reorganization or strengthening of their environmental institutions through the development of legal advisory assistance programs.

2.3.2. Comparative studies and recommendations on approaches to administrative structure of government environmental management structures in the various countries, to identify the most successful models and the factors that have contributed to positive results, and the formulation of specific recommendations that will encourage countries to adopt administrative approaches that have proved successful and warn them away from those that have failed repeatedly.

Such evaluations are as essential in the institutional as in the legal area. The following are recommended as possible fields to begin with:

a. A comparison of the environment ministry and national environmental commission models, which are two of the most common types of administrative structure in the Hemisphere.

b. A comparative review of the various approaches to decentralization at the national, regional, and local levels.

c. An assessment of the results of delegating the functions of public authorities to nongovernmental organizations.

2.3.3. The drafting of recommendations on harmonizing mechanisms of direct regulation and economic instruments in the light of evaluations of their effectiveness.

The strengthening of environmental authorities involves, besides the pertinent institutional changes, providing them with effective intervention in environmental problems. Direct regulation and mechanisms for the use of economic instruments are the most important methods of intervention available to the state for environmental management and monitoring purposes. Direct regulation includes the setting of standards of technological and environmental quality and the determination of permissible levels of dumping, emissions, and concentrations of residues. The economic instruments are designed to encourage users of natural resources to adopt behavior consistent with the proper use and protection of natural resources, such as incentives to invest in clean technologies and avoid using goods produced by environmentally harmful processes.

Studies should be carried out to assess the effectiveness of these instruments so as to determine the feasibility of harmonizing certain specific aspects of these instruments in the Hemisphere. Environmental permits, forestry taxes, and tax incentives for conservation are possible harmonization priorities.

3. Development and Strengthening of International Environmental Law in the Hemisphere

3.1. Justification

A considerable number of American countries have ratified most of the global treaties and other binding instruments and have signed declarations, action plans, and other instruments setting forth obligations that are not legally binding. But the evaluation of various global agreements before the Rio Conference indicated, as Agenda 21 says, "problems of compliance in this respect, and the need for improved national implementation, and, where appropriate, related technical assistance."

In these circumstances, there is a need for a catalytic role in the strengthening of worldwide international law through the provision of information and technical assistance that will enable governments in the region that have not yet done so to decide whether to adopt them or not and to adapt their domestic law and practices to the commitments they make in the agreements they sign or ratify,

Almost no evaluations have been made of the effectiveness of the profusion of binding and nonbinding bilateral and subregional instruments, which is the most salient feature of the development of international environmental law in the Americas, but it is safe to say that many have rarely been enforced, that they are out of step with qualitative changes in views on the environment and development, and that some may overlap or even contradict each other.

Therefore, the most important agreements should be systematically analyzed with a view to updating them, identifying major deficiencies, and drafting new agreements at the hemispheric or subregional level or at the level of other groupings of American countries.

3.2. Objectives

To contribute to the creation of inter-American environmental law in areas of special relevance to the region.

To make recommendations concerning updates of domestic environmental law to adapt them to the commitments made.

To collaborate in the creation of better conditions for national compliance with the agreements through the establishment of legal and other mechanisms.

To promote the creation and adoption of global, regional, and subregional legal instruments, where needed.

3.3. Activities

3.3.1. The conduct of studies on the effectiveness of international law in specific areas of the region.

The ultimate aim of evaluating treaties and other instruments of international environmental law should be to answer the question: Do they protect the environment?

There is no easy or simple answer: so we learn from the studies of global and regional treaties. In some cases the measures adopted are too limited in scope or too difficult to enforce, while in others some measure of success can be seen.

In any event, the measurement of effectiveness should be directed toward the making of specific recommendations to update or develop environmental legislation.

As a first phase it is proposed that the effectiveness of international environmental law in selected areas be evaluated and that recommendations be made on increasing it. Possible areas of action suggested are (1) the Biodiversity Convention, and (2) selected subregional treaties.

1. With the American Hemisphere, and in particular the neotropical subregion, encompassing the most biologically diverse countries in the world, specific areas for legal work should be chosen, there since the Conference of the Parties is responsible for following up of the convention itself through mechanisms established for that purpose. Recommended as priority areas for exploration are conservation in situ, especially protected areas; conditions of access to the national biodiversity heritage; and the rights of indigenous communities with respect to their ancestral knowledge about biodiversity.

An attempt would be made to determine how effective those laws are in achieving their goal of conserving biodiversity and how they fit in with global instruments, like the Biodiversity Convention and the Convention on the Law of the Sea. Much can be done in this area, since there is a big distance between the laws on protected areas and their enforcement—the result of having modeled them on the legislation of developed countries.

2. Some subregional instruments (from treaties to action plans), selected with the assistance of the member countries, should be selected for evaluation from among the many binational, trinational, and multilateral instruments in a given subregion; or from among those drawn up between two or more countries based on other grouping criteria (e.g., Rio Group, Group of Three).

One of the aims of the evaluation studies should be to identify the obstacles and difficulties in developing instruments, in order to make specific recommendations for overcoming them or even updating these instruments. Similarly, studies should identify successes so that they can be used as a point of reference in other areas.

3.3.2. The drafting and updating of treaties and other instruments. As has been said, the evaluation of treaties, plans of action, etc., may lead to recommendations for updating them or, in some cases, for developing new ones and the mechanisms necessary. Naturally, the drafting and updating stage need not be preceded by a formal evaluation study, but could come out of other processes, such as a request or mandate from the countries concerned.

In a formal sense, international treaties (conventions, protocols, etc.) are the highest-ranking instruments ("hard law") and are the product of relatively complex negotiation processes. Thus, their updating drafting would be one of the main results of the program, but that can only be done if the responsible international organizations designated by the governments acquire the necessary credibility and legitimacy by engaging in the two activities described above.

All this is not to say that we should overlook the great importance nonbinding instruments ("soft law"), such as action plans and declarations, has assumed, becoming in some cases have become more important than the treaties themselves. For example, the declarations of Stockholm and Rio have greatly influenced the conduct of the American states; hence the need to pay special attention to this type of instrument as well.

3.3.3. Support to countries for participation in international negotiations.

During drafting of international treaties and other instruments, particularly those of worldwide scope, many of the Latin American and Caribbean countries have often lacked the bargaining power and knowledge needed to participate effectively. As a result, they find themselves unable to weigh national interests against collective interests and even on occasion, end up accepting provisions without fully understanding their scope.

As part of this activity, forums, seminars, and other events should be held and recommendations produced to explain the potential political, social, and economic impact of measures to solve certain environmental problems.

3.3.4. Prevention and peaceful settlement of environmental disputes.

Environmental disputes between states have been increasing in recent decades. In the Americas, since the beginning of the century, problems have arisen concerning the management of river basins in border areas. More recently, disputes have arisen regarding illegal traffic in species of flora and fauna, transboundary transport of hazardous waste, marine pollution, and trade. A trade dispute in point is the US-Mexico dolphin/tuna case, which had to be resolved by the GATT.

To help the countries prevent and peacefully settle international environmental disputes, there is a need for:

a. Systematic studies to identify potential disputes and recommend instruments and mechanisms to minimize or neutralize them.

b. The establishment of a warning system on environmental hazards, accidents, and emergencies, with the required coordination mechanisms for a timely collective response.

c. A channel of information on any activity in one country that might have a transboundary environmental impact and that by its nature requires other countries to take preventive or mitigation measures.

d. Initiating a process to establish formal mechanisms for the settlement of environmental disputes.

3.3.5. Regional development of some areas of environmental legislation.

There are some issues involving law and the environment, that demand legislative treatment that is beyond the capacity of individual states. It is therefore proposed that an inter-American Environmental Law be established through the identification and selection of areas that by their nature cannot be fully covered by domestic legislation.

The term "inter-American environmental law" is used here not to mean, as some authors do, the sum of international instruments on the environment signed by the countries of the Americas, but rather that certain specific areas of the law should be developed to be regionally applicable and fill gaps not covered by national environmental legislation. The following priority actions in this field are suggested:

a. Propose a regional code of criminal law governing transnational offenses.

Minimum standards of punishment for transboundary criminal behavior should be developed and negotiations should be started to make them binding throughout the region. Consideration should also be given to the feasibility of an organization representing the American countries—the OAS, for example—acting as a regional criminal court to try the crimes so identified or, alternatively, the creation of another regional judicial body should be proposed to the countries.

In addition, the consolidation of a regional criminal law could be assisted by strengthening regional and international cooperation in the fight against transnational crime to provide channels for the exchange of evidence and for reciprocal legal assistance among the countries.

It is essential that activities in this area be coordinated with ICPO-INTERPOL, which is working on setting up an international network of police contact points to store and analyze information on environmental crime.

b. Propose a regional system to regulate areas related to the transport, use, and disposal of hazardous waste.

According to information from Greenpeace, international trade in hazardous waste is becoming increasingly concentrated in Central and South America. The dealers present to the Latin American governments shipments of this waste in the form of development projects for electricity generation, with their proposals for the construction of infrastructure, technological processes, etc.

Even through there are global international instruments that cover some aspects of transboundary trade and shipment of hazardous waste, a binding legal framework for the Hemisphere in this area is considered essential. The feasibility of proposing the prohibition under the regional system of exports of this kind of waste by the North to Latin American countries should be looked into (the Basel Convention of 1989 only prohibits export to Antarctica). A useful reference would be the Bamako Convention of 1991 on the prohibition of imports, control of transboundary movements, and management of hazardous waste within the African continent, which was signed under the auspices of the Organization of African Unity (OAU).

In taking legal action in this area, coordination with ECLAC should be considered, since Resolution A/44/226 of the UN General Assembly (1989) asked the regional commissions to contribute to the prevention of illicit traffic in hazardous products and waste and assess their impact on the environment.

4. Harmonization of Sectoral Law with the Environmental Implications

4.1. Justification

The experience of a number of countries has shown that environmental policies and rules are not sufficient in and of themselves to solve problems such as industrial pollution or deforestation. There area a number of reasons for this. On the one hand, the laws have traditionally emphasized regulatory and enforcement measures, which alone cannot control people's behavior or change the entrenched consumption patterns of societies; they must be accompanied by other mechanisms of intervention such as economic instruments, and by public awareness and citizen education programs. Furthermore, the environment can no longer be treated in isolation. The goal of sustainable development calls for integrating environmental considerations into all other productive processes. It is essential to the effectiveness of environmental law per se that it be coordinated with other legislation with which it interacts and has a reciprocal relationship.

4.2. Objectives

To create the conditions to ensure that national law pertaining to critical sectors of the economy and having significant impact on the environment evolves in harmony with the promotion of sustainable development.

To promote the harmonization and, where possible, the unification of some aspects of nonenvironmental law that could provide tools for environmental protection.

To reorient the management of productive sectors by adopting economic instruments that encourage the use of environmentally sound technologies, increase energy efficiency, and maximize production efficiency.

To promote the development of legal mechanisms to ensure coverage of contingencies or damage to renewable natural resources caused by economic activities.

4.3. Activities

In view of the large number of activities that could arise out the proposed objectives and the wide range of sectors and therefore of national bodies of law with environmental implications, it would be helpful to suggest some priority actions. Three areas of legislation were selected in which harmonization is considered essential:

4.3.1. Legislation on crimes and violations.

In any civilized society, other avenues of social control should be exhausted before resorting to criminal law and punitive rules. All the same, these cannot be avoided, given the vast unawareness and unconcern that still exist among governments, business people, and citizens about the need for environmental protection and the adoption of basic strategies to build a sustainable society.

The measures adopted by the countries to punish those who commit crimes against natural resources and the environment are various: defining a group of such crimes in the national criminal codes (Colombia, Panama), including a chapter on these crimes in the country's General Environmental Law, promulgating special legislation on environmental crimes (Venezuela, Bolivia), or simply scattering penalties among the various environmental regulations to which they relate (United States, Canada). But while almost all the countries have provided in their legislation for crimes against the environment, it is also true that the development of those provisions is uneven; hence the importance of moving forward with harmonizing the national legislations.

One of the main reasons for seeking this harmonization is to prevent the current differences among punishment systems in the countries, and the laxity and complacency of the criminal law in some of them, from encouraging social elements injurious to the environment to settle in the latter, given their "comparative advantages" (which can amount to absolute impunity) over others that have stricter and more serious punishments.

Moreover, it is known that there are branches of organized crime, with complex networks for carrying out their activities, (illicit exploitation of forest, animal, plant, hydrobiological, and other resources). That use the strategy of periodically shifting the location of their operations to evade the national authorities of the different countries. To counter this practice, it is essential that the countries adopt uniform categories of crimes and uniform penalties so that lawbreakers can be punished in any country in which they are caught with more or less consistent penalties.

Additionally, in the process of harmonization, the countries' national criminal legislation should be developed and modernized by incorporating new models that replace or supplement imprisonment, which continues to be the usual punishment for environmental crimes. The possibility must be studied of including in the legislation of the American countries other forms of punishment used by European systems, such as the publication of sentences in major newspapers at the culprit's expense. This has proved highly effective as setting an example, especially when the violator is a corporation, which is generally very concerned about its image, and can also be used as an administrative sanction.

4.3.2. Tax law.

Another form of government intervention to prevent and control pollution and harmful impacts on natural resources and the environment is economic instruments, which seek to use market forces to prompt measures for the control, conservation and wise use of natural resources.

Traditionally, the countries of the Hemisphere have considered renewable natural resources to be inexhaustible and freely accessible, which has led to their being undervalued and, as a result, to shifting the cost of environmental damage to other sectors of society, other countries, and even future generations. It thus becomes necessary, among other policies and strategies to review and harmonize the countries' tax laws so that they will contribute to the proper use of natural resources and

the environment within their borders and so throughout the Hemisphere.

The need for harmonization is also evident from the unequal development of the different economic instruments used by the countries to control pollution and foster rational use of natural resource. These differences and the gaps in some national tax laws may be generating negative internal effects for countries whose legislation suffers from these shortcomings, such as the presence in them of enterprises that engage in polluting and degrading practices.

Since the economic instruments span a wide range of possibilities—taxes, charges, exemptions, incentives, subsidies, returnable deposits, etc.—it is recommended that priority be given to incentives, recovery fees, and fees for the use of renewable natural resources.

4.3.3. Insurance law.

A largely unexplored field in most national legislation is the development of insurance law in the area of environmental protection. Requiring insurance policies, bank guarantees, or performance bonds to cover environmental contingencies or damage is considered a priority topic for review and harmonization in the national laws of the Americas.

In general, the provisions requiring holders of permits to extract nonrenewable natural resources (e.g., mining and oil companies) to provide some form of coverage for environmental contingencies are scattered in special regulations in which such eventualities have been anticipated but independent regulatory bodies to deal with them have been established.

It is considered that work could be done to integrate and harmonize the existing provisions and, in particular, to promote the creation or consolidation of a special branch of insurance law specifically on coverage of environmental contingencies and damage.

5. Regulation of Transboundary Natural Resources and Border Ecosystems

5.1. Justification

Natural resources do not recognize borders. The complex processes by which the states of the Hemisphere were shaped and the long history of armed and political conflicts that produced their present boundaries took no account of conservation and environmental management considerations. Paradoxically, natural resources have frequently been used by states to draw the lines that separate them. This has typically been the case with rivers, which have historically been used for demarcating frontiers.

Usually, natural resources and ecosystems disregard the artificial divisions between countries and extend beyond the range of action of any one state. Legal measures are therefore needed to accommodate the requirements for management and conservation of shared natural resources and border ecosystems. Although there are precedents in the form of international declarations and bilateral and multilateral treaties on transboundary natural resources, specific hemisphere-wide juridical measures and programs are vital.

5.2. Objectives

To encourage the formulation in the countries of joint legal instruments that will facilitate the harmonious management of transboundary natural resources and border ecosystems.

To promote the harmonization of the regulations in the national environmental laws on the conservation of transboundary natural resources and border ecosystems.

To contribute to the definition and establishment of policies among countries for the protection, management, and sustainable use of transboundary natural resources and border ecosystems.

5.3. Activities

5.3.1. Harmonization of standards and unification of criteria for the management of border watersheds.

Steps should be taken to harmonize the rules on water quality and permissible levels of discharges in all countries with jurisdiction in a border watershed, so as to ensure a uniform commitment against their pollution. General prohibitions, binding on all the countries involved, should also be sought against certain polluting discharges and specified engineering projects and other activities injurious to the environment.

Efforts should also be made to induce contiguous countries to draft joint land-use plans providing for unified, management of the land, water, flora, fauna, and hydrobiological resources throughout their shared watershed. These plans should provide for the standardization of criteria for the issuance of national permits for the use of the natural resources there. It is recommended that special attention be given to permits for the extraction of deposits such as stone, sand, and gravel.

5.3.2. Development of legislation for the establishment and management of areas protected by two or more states. The Declaration of Caracas, adopted in 1992 at the Fourth World Congress of National Parks and Protected Areas, urged the governments and international agencies to, among other things, participate actively in legal

instruments and action programs for the promotion of world and regional protected areas, and to cooperate in the safeguarding of species, ecosystems and landscapes that cross national boundaries.

Though there are examples in the Hemisphere of coordination between states for work in protected areas (as between Argentina and Brazil in the Iguazú and Foz do Iguacu parks; between Colombia and Panama in the Katios and Darien Parks; and between Costa Rica and Panama in the La Amistad National Park), almost all the contacts between the countries involved are of an informal nature. The programs are not institutionalized, much less supported by binding laws. For this reason, in a program to develop legislation to provide standards and tools for the creation, consolidation, and coordinated management of protected border areas, especially national parks.

In parallel with the development of this legislation, there should be a study of the need to harmonize certain aspects of contiguous countries, domestic legislation on protected areas, such as the standardization of management categories and permitted and prohibited activities, to facilitate the adoption of the legal system to be proposed by Organization for border areas.

In executing this program, account should be taken of the work being done by the International Union for the Conservation of Nature through its Secretariat and its National Parks and Protected Areas Commission, to put the Caracas Action Plan and other, more detailed plans for each region of the world into effect.

5.3.3. Drafting of a legal system to regulate the use of renewable natural resources by border indigenous communities.

In the American Hemisphere many indigenous communities often belonging to the same ethnic group live in the border zone of two or more contiguous countries. These communities do not allow the boundaries between the countries to interfere with their daily lives; they base their social, political, economic, and cultural relations on values that transcend the political and administrative divisions between states. This situation is common in the Amazonian region. It would therefore be desirable to promote the creation of a legal system to regulate the use of renewable natural resources by these indigenous communities, starting with a recognition of their traditional subsistence and production skills, under the same rules.

This program will be developed in coordination with the ILO, since in 1989, when Convention 169 on Indigenous and Tribal Peoples in Independent Countries was approved, a resolution was adopted on action by the Organization to support national measures and facilitate the

work of international organizations that contribute to the achievement of the objectives of the Convention.

5.3.4. Development of legislation for the protection of migratory wildlife species and the harmonization of closed seasons.

To help protect natural resources shared by noncontiguous countries, a program must be undertaken toward enacting hemisphere-wide legislation on the region's migratory wildlife, a subject on which there is conspicuous gap.

The migration of such species as marine mammals and birds that travel all over the Hemisphere should be protected by legislation that recognizes the parts of their life cycles that these species spend in each country (nesting, pairing, breeding, etc.). This legislation should be complemented by provisions to ensure the preservation of the habitats and stopovers of migratory species in the different countries (not all of which have been declared protected areas at the national level). For this, it is proposed that a network of transit reserves be set up in the Hemisphere for the protection of these species during their stay at each stopover. At the same time, strenuous efforts should be made to harmonize and standardize the rules on closed seasons for hunting wildlife in contiguous countries.