10

Human rights and the environment

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10.1 Introduction

Environmental protection and human rights law have influenced each other in many ways. The main prism through which this complex relationship has been analysed and understood is that of 'synergies'. One underlying condition for the full respect of at least some human rights is an environment of sufficient quality to avoid significant impacts on human health and living standards. One obvious illustration of this point concerns the devastating impact that water or air pollution can have on health or even on the lifespan of humans in many regions of the world.[1] From a legal standpoint, this has resulted in an expansion of human rights provisions to account for some measure of environmental protection, thus bringing human rights (provided in treaties but also in domestic constitutions) and their institutional arsenal (regional courts, committees, domestic adjudication) to bear on questions of environmental regulation.

This basic observation suffices to introduce the two main questions that will be analysed in this chapter, namely (i) which human rights can be mobilised as a tool for environmental protection, and (ii) to what extent. The answer to these questions has kept commentators, advocacy groups and policy-makers busy for several decades, and it has raised many other questions relating to 'human rights approaches to environmental protection', such as the formulation of a right to an environment of a certain quality or the connection between human rights and climate change. It is noteworthy, however, that in more than twenty years of debates, little attention has been paid to a third question discussed in this chapter, i.e. (iii) the potential conflicts between human rights and environmental protection. One conspicuous illustration of this omission is provided by the absence of any clear reference to such conflicts in the *Analytical Study on the Relationship between Human Rights and the Environment* commissioned by the Office of the High Commissioner for

[1] Pollution in China has been estimated to reduce life expectancy by an average of 5.5 years. See Yuyu Chen, A. Ebenstein, M. Greenstone and Hongbin Li, 'Evidence on the Impact of Sustained Exposure to Air Pollution on Life Expectancy from China's Huai River Policy' (2009) 110 *Proceedings of the National Academy of Sciences* 12936.

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Human Rights, following the initiative of the UN Human Rights Council.[2] Such omission may be the result of simple inadvertence or of a policy stance, but it must be highlighted because such conflicts do exist[3] and they may further develop as environmental policies become increasingly demanding.[4]

The first section of the chapter explores the conceptual relationship between human rights and environmental protection (10.2). The observations made in this section provide some analytical distance to undertake the analysis of synergies (10.3) and conflicts (10.4) between values as well as norms formulated to protect them.

10.2 The relationship between human rights and environmental protection

The roots of the modern understanding of the relationship between human rights and environmental protection as purely synergistic can be found in the 1972 Stockholm Conference on the Human Environment.[5] The Stockholm Declaration emphasised the deep synergies between these two bodies of international law. Principle 1 provides indeed that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'.[6] This synergistic conception has deeply influenced international practice ever since, not only in the adoption of new international instruments but also in the context of adjudicatory and quasi-adjudicatory proceedings. This is understandable given that the values protected by these bodies of international law are closely interconnected. But this is not a reason to disregard the possibility of conflicts, particularly if one takes into account that, before Stockholm, the 'conservation

[2] Office of the High Commissioner for Human Rights (OHCHR), *Analytical Study on the Relationship between Human Rights and the Environment*, 16 December 2011, UN Doc. A//HRC/19/34 ('OHCHR Analytical Study').

[3] Such conflicts have received significant attention in other disciplines. See e.g. R. P. Neumann, *Imposing Wilderness: Struggles over Livelihood and Nature Preservation in Africa* (Berkeley: University of California Press, 1998); M. Dowie, *Conservation Refugees: The Hundred Years Conflict between Global Conservation and Native Peoples* (Cambridge MA: MIT Press, 2009); A. Agrawal and K. Redford, 'Conservation and Displacement: An Overview' (2009) 7 *Conservation & Society* 1. For a legal perspective, see D. Shelton, 'Resolving Conflicts between Human Rights and Environmental Protection: Is There a Hierarchy?', in E. de Wet and J. Vidmar (eds.), *Hierarchy in International Law: the Place of Human Rights* (Oxford University Press, 2012), pp. 206–35.

[4] An indication of the potential for conflicts is provided by the increasing clashes between investment disciplines (many of which – non-discrimination, due process, guarantee of private property – have a content similar to human rights) and environmental protection. On this point see J. E. Viñuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press, 2012).

[5] See *supra* Chapter 1.

[6] 'Declaration of the United Nations Conference on the Human Environment', Stockholm, 16 June 1972, UN Doc. A/CONF 48/14/Rev.1, pp. 2ff ('Stockholm Declaration'). On this principle, see L. Sohn, 'The Stockholm Declaration on the Human Environment' (1972) 14 *Harvard International Law Journal* 423, 451–5.

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of nature' sometimes ran foul of the use of spaces and resources to satisfy human needs. Tensions between the creation of natural preserves and the rights of indigenous or tribal peoples living in the protected area offer a clear illustration of this point.[7] We will come back to this issue in Section 10.3. Here, it will suffice to note that reference to conflicts was progressively excluded from diplomatic language from the Stockholm Conference onwards, which, by reorienting the terminology from 'nature' to the 'environment', highlighted the synergies between humans and their milieu.[8]

Nowadays, the synergistic view is deeply rooted in international practice. The OHCHR Analytical Study, published in 2011,[9] reflects this intellectual prism when it identifies the three 'major approaches' (all synergistic) to the relations between human rights and environmental protection.

First, and following the Stockholm Declaration, a satisfactory environment is seen as a necessary condition for the enjoyment of human rights.[10] This stance could imply that, from a human rights perspective, environmental protection has only an instrumental value in that it is but a contribution to the respect of such rights. Conversely, the protection of the environment *per se* (irrespective of whether this is useful or not for the protection of human rights) remains open.

This ambiguity has significant implications for the second approach identified by the Analytical Study, namely the instrumental use of human rights as a legal technique to ensure a certain level of environmental protection.[11] This approach is based upon three main considerations. One is that the holders of human rights are numerous and can be specifically identified (individuals) whereas the protection of the environment does not have a clear 'right-holder'.[12] The second is that such numerous and specifically identified right-holders can bring a claim before a growing number of adjudicatory and quasi-adjudicatory bodies (regional courts, committees, etc.) which are more sophisticated than those available in international environmental law.[13] Finally, human rights are perceived, at least for the time being, as a higher value and, as a result, they have a stronger social and political pull than pure environmental considerations.[14] But because of the nature of such drivers, the

[7] See *supra* n. 3.

[8] See P.-M. Dupuy, 'International Environmental Law: Looking at the Past to Shape the Future', in P.-M. Dupuy and J. E. Viñuales (eds.), *Harnessing Foreign Investment to Promote Environmental Protection: Incentives and Safeguards* (Cambridge University Press, 2013), p. 9.

[9] OHCHR Analytical Study, *supra* n. 2 [10] *Ibid*., para. 7. [11] *Ibid*., para. 8.

[12] This is why the Institut de Droit International has proposed the creation of a 'High Commissioner for the Environment' that would act for the 'international community' in the context of responsibility and liability claims. See 'Responsibility and Liability under International Law for Environmental Damage' (1997) *Annuaire de l'IDI* (Session of Strasbourg), Art. 28.

[13] See A. Boyle and M. Anderson (eds.), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996).

[14] See D. Shelton, 'Substantive Rights', in M. Fitzmaurice, D. Ong and P. Merkouris (eds.), *Research Handbook on International Environmental Law* (Cheltenham: Edward Elgar, 2010), pp. 265–83, particularly pp. 265–6.

level of environmental protection that can be achieved through human rights has significant limitations.[15] Specifically, environmental degradation is only a violation of human rights when a direct link between such degradation and a serious impairment of a protected human right can be established. In the absence of such a link, human rights instruments would have little to say about cases of environmental degradation.

The third approach identified by the Analytical Study is perhaps the most ambiguous of the three.[16] It states that human rights must be seen as an integral component of the concept of sustainable development. One could translate this statement into the terms in use in international environmental law and speak of the 'social pillar' of sustainable development (the other two pillars are 'environmental protection' and 'economic development').[17] This is, of course, uncontroversial. The real difficulty lies in going beyond the article of faith according to which the three pillars of sustainable development interact harmoniously and looking at the many situations, such as the extraction of mineral resources, where economic, social and environmental considerations are not necessarily aligned. Thus reformulated, the third approach is no longer purely synergistic (hence the ambiguity) and paves the way for a more nuanced understanding of the relationship between human rights and environmental protection, where conflicts are a possibility.[18]

These three approaches are useful to understand what is at stake in choosing one conceptual view rather than another. In this light, the questions identified in the introduction can be better spelled out. On the one hand, we will assess the extent to which environmental considerations can be brought within human rights provisions and the ensuing consequences for the use of human rights adjudicatory and quasi-adjudicatory bodies to protect the environment. The term 'extent' is important in this context. It largely summarises the core issue at stake in the debate over synergies. On the other hand, the possibility of conflicts must also be taken into account, sometimes lying beneath approaches or concepts, such as sustainable development, which apparently exclude any friction or collision. Figure 10.1 summarises the main conceptual issues arising from the relationship between human rights and environmental protection.

The field opened by these six issues is vast and complex both theoretically and policy-wise. Legal commentators and international instruments focus mostly on issue 1 and refer only marginally to the other issues.[19] Within this context, Section 10.3 of this chapter concentrates on the two main questions

[15] See F. Francioni, 'International Human Rights in the Environmental Horizon' (2010) 21 *European Journal of International Law* 41.

[16] OHCHR Analytical Study, *supra* n. 2, para. 9. [17] See *supra* Chapter 1.

[18] See J. E. Viñuales, 'The Rise and Fall of Sustainable Development' (2013) 22 *Review of European Comparative and International Environmental Law* 3.

[19] On these other issues, see e.g. S. Chuffart and J. E. Viñuales, 'From the Other Shore: Economic, Social and Cultural Rights from an International Environmental Law Perspective', in E. Reidel, G. Giacca and C. Golay (eds.), *Economic, Social and Cultural Rights: Current Issues and Challenges* (Oxford University Press, 2014), pp. 286–307 (focusing on issue 2 and reviewing

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Synergies			Conflicts		
Issue 1	Issue 2	Issue 3	Issue 4	Issue 5	Issue 6
Using human rights to protect the environment	Using environmental law to protect human rights	Doctrine of mutual supportiveness between the 'pillars' of sustainable development (environmental, economic, social)	Tensions between the 'pillars' of sustainable development	Tensions between conservation and the rights of indigenous and tribal peoples	Tensions between environmental interventionism and human rights

Figure 10.1: Relations between human rights and environmental protection

raised by issue 1 (which human rights provisions can contribute to environmental protection and to what extent) but, in doing so, our discussion touches upon issues 2 and 3. As for the remaining issues, they will be briefly discussed in Section 10.4.

10.3 Synergies

10.3.1 Two key questions

The importance of environmental parameters for human life and health has been acutely perceived since the beginning of Western medicine. Already in the fifth century BC, Hippocrates, the father of medical sciences, wrote that:

> [w]hoever wishes to investigate medicine properly, should proceed thus: . . . one ought to consider most attentively, and concerning the waters which the inhabitants use, whether they be marshy and soft, or hard, and running from elevated and rocky situations, and then if saltish and unfit for cooking; and the ground, whether it be naked and deficient in water, or wooded and well watered, and whether it lies in a hollow, confined situation, or is elevated and cold.[20]

Later came the first measures of public health and sanitation pursued in Roman times and the discoveries of Avicena and Maimonides, those of Lavoisier in the eighteenth century, and the attempts by Jeremy Bentham at having sanitation laws adopted by the English parliament. But it was not until

the relevant literature); K. Murphy, 'The Social Pillar of Sustainable Development: A Literature Review and Framework for Policy Analysis' (2012) 8 *Sustainability: Science, Practice, & Policy* 5 (analysing the body of literature on issues 3 and 4, within which specifically legal contributions are rare); the studies mentioned *supra* n. 3 (focusing on issue 5, although most of them come from disciplines other than law); T. Hayward, *Political Theory and Ecological Values* (London: Polity Press, 1998) (analysing issue 6 from the perspective of political theory) and Viñuales, *supra* n. 4 (analysing issue 6 from the perspective of how to structure environmental policies to minimise conflicts with investment disciplines).

[20] Hippocrates, 'On Airs, Waters and Places', in *The Genuine Works of Hippocrates*, translated by Francis Adams (Whitefish, MT: Kessinger Legacy Reprints, 2010), part I. See P.-M. Dupuy, 'Le droit à la santé et la protection de l'environnement', in R.-J. Dupuy (ed.), *Le droit à la santé en tant que droit de l'homme* (The Hague: Sijthoff, 1978), pp. 340–427.

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the Industrial Revolution had left its scar, with its smokestacks, its miserable dwellings, the polluted air and rivers, and more recently the flood of chemical substances in all areas of human activity that the Western world started to take seriously into account the consequences of environmental degradation on human living conditions. In Africa or Asia, the impact of the Industrial Revolution was less visible than that of naturally occurring catastrophes or great epidemics, and it was not until the twentieth century that the consequences of pollution started to be felt in these regions. Yet, the belief in progress and the quest for profit delayed the adoption of measures until the second half of the twentieth century, when environmental degradation was identified as a major global concern. Even today, although the relations between the environment and human subsistence are far better understood, the relevant regulatory frameworks remain lacunary and often shy. An example is offered by China where coal-fired power plants are polluting the air and the water to such an extent that the government now sees environmental protection as a priority worth paying for.

If human life and health depend upon appropriate environmental conditions, it is then necessary to clarify the connection between environmental degradation and human rights. This connection has been recognised several times at the international level, particularly since the early 1990s.[21] The OHCHR Analytical Study surveys a number of environmental threats to human rights, including atmospheric pollution (e.g. air pollution, ozone depletion, climate change), land degradation (e.g. deforestation and desertification), pollution of water-bodies, pollution arising from the release of chemicals and hazardous waste into the environment, biodiversity loss or human-induced aggravation of natural catastrophes (e.g. through the human contribution to climate change).[22] Despite the essentially descriptive nature of this list, one can draw from it an important analytical conclusion: the impact of the environment on the realisation of human rights is predominantly (although not exclusively) understood in terms of actual or potential impairments to human health. Of course, environmental threats can also encroach on other human values, particularly cultural or aesthetic, but the main reason why an environment of a certain quality must be preserved from a human rights perspective is the protection of human health broadly defined.

The latter point has two additional analytical consequences. On the one hand, the types of human rights provisions that can be mobilised to protect the environment are essentially those relating to human health and integrity in general (e.g. the right to health, but also the rights to private and family life, life, water, food, a decent living standard or environmental information and

[21] See, in particular, Human Rights and the Environment. Final report presented by Mrs Fatma Zohra Ksentini, Special Rapporteur, 6 July 1994, UN Doc. E/CN.4/Sub.2/1994/9 ('Ksentini Report'), paras. 161–234 (discussing the impact of environmental degradation on the enjoyment of ten specific human rights).

[22] OHCHR Analytical Study, *supra* n. 2, para. 15–22.

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participation) and, to some extent, also those relating to cultural considerations (cultural rights, the right to property and the rights to environmental information and participation). On the other hand, depending on the protected value (health, culture) and the tolerated level of impairment of such value, the required link between environmental degradation and the realisation of a human right will be more or less demanding. Such a link determines, in turn, the scope of protection that human rights provisions, as a legal tool, may provide for environmental considerations. These analytical consequences provide the conceptual basis of the following discussion.

10.3.2 Identifying human rights provisions with environmental content

10.3.2.1 Some analytical distinctions

Throughout the years, the progressive ('teleological') interpretation normally applied to human rights provisions has allowed for the recognition of some environmental contents within several rights. As already noted, it is mostly human health considerations that have become a bridge between environmental degradation and the realisation of human rights, although other considerations (mostly cultural) have also played a significant role. To find one's way within the dense forest of environment-related human rights a number of classifications have been suggested. We will introduce here some of them, which are useful for subsequent discussions.

The first classification concerns the elementary structure underpinning all human rights, irrespective of whether they are characterised as 'civil and political' or as 'economic, social and cultural rights'. Every human right imposes on its obligor or debtor (normally the State) three types of correlative obligations:[23] (i) an obligation to respect the content of the human right; (ii) an obligation to protect this right from encroachments by third parties (e.g. other individuals or non-State actors, including multinational corporations); and (iii) an obligation to progressively fulfil the necessary conditions for the full enjoyment of the right. The environmental content of a human right can be found within each obligation, and it is therefore not limited, as a superficial understanding of this distinction could suggest, to the third type of obligation.

The second classification relates to the 'substantive' or 'procedural' nature of a given right.[24] There is some overlap between these two types of rights to the

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[23] On this influential conceptualisation, see H. Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (Princeton NJ: Princeton University Press, 1980); *Report on the Right to Adequate Food as a Human Right. Final Report presented by the Special Rapporteur Asbjørn Eide*, 7 July 1987, UN Doc. E/CN.4/Sub.2/1987/23 (1987), paras. 66–9; Committee on Economic, Social and Cultural Rights, *General comment No. 12: The Right to Adequate Food (Art. 11)*, 12 May 1999, UN Doc. E/C.12/1999/5 (1999), para. 15; Human Rights Committee, *General Comment No. 6: Article 6 (Right to life)*, 30 April 1982, UN Doc. HRI/GEN/1/Rev.9 (Vol. I), paras. 3–5; I. E. Koch, 'Dichotomies, Trichotomies or Waves of Duties?' (2005) 5 *Human Rights Law Review* 81.

[24] See e.g. the distinction made in Fitzmaurice *et al., supra* n. 14, Chapters 13 and 14.

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extent that a substantive right may carry some procedural obligations. But the distinction remains useful as a tool for the examination of the relevant literature and practice. Specifically, it helps capture the significant development of procedural environmental rights over the last twenty years and their regional epicentre, the Aarhus Convention concluded under the aegis of the UNECE.[25]

The third classification concerns the importance of the environmental dimension within a given human right. From this standpoint, a distinction can be made between 'general' rights, i.e. human rights that only have an indirect connection with environmental protection, and 'specifically environmental' rights, such as the right to a clean environment, the right to water or the rights to environmental information, participation and access to justice.

In what follows, the latter classification will be used to organise the overall discussion, whereas the two other classifications will help us analyse the particular features of different 'general' and 'specifically environmental' rights.

10.3.2.2 General rights

10.3.2.2.1 Overall context

The defining feature of 'general' rights is that they were not formulated with the specific purpose of protecting the environment. Their environmental dimension has been subsequently introduced by means of progressive interpretation, whether by a regional human rights court or commission or by a quasi-adjudicatory committee entitled to hear individual complaints. As a result, the list of the relevant 'general' rights with an environmental dimension, such as cultural rights or the rights to health, private and family life, life, property, food or an adequate living standard, is in constant evolution as it may incorporate new environmental components within one of the abovementioned rights or even within other rights that had previously not been associated with the environment.

There is a wealth of legal commentary on most of these rights.[26] Our intention here is not to summarise this literature but, more generally, to

[25] Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 25 June 1998, 2161 UNTS 447 ('Aarhus Convention'). See also the policy basis of this instrument, namely principle 10 of the Rio Declaration on Environment and Development, 13 June 1992, UN Doc. A/CONF.151/26.Rev.1, ('Rio Declaration').

[26] See e.g. D. K. Anton and D. Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011); Francioni, *supra* n. 15; D. Shelton, 'Human Rights and the Environment: Jurisprudence of Human Rights Bodies' (2002) 32 *Environmental Policy and Law* 158; F. Francioni and M. Scheinin (eds.), *Cultural Human Rights* (Leiden: Martinus Nijhoff, 2008); S. Joseph, J. Schultz and M. Castan, *The International Covenant on Civil and Political Rights. Cases, Materials and Commentary* (Oxford University Press, 2nd edn, 2004); D. J. Harris, M. O'Boyle, E. P. Bates and C. M. Buckley, *Law of the European Convention on Human Rights* (Oxford University Press, 2nd edn, 2009); L. Burgorgue-Larsen and A. Ubeda de Torres, *The Inter-American Court of Human Rights. Case Law and Commentary* (Oxford University Press, 2011); M. Evans and R. Murray (eds.), *The African Charter on Human and Peoples' Rights. The System in Practice, 1986–2006* (Cambridge University Press, 2nd edn, 2008).

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highlight the conditions under which a number of adjudicatory and quasi-adjudicatory bodies have been led to identify the environmental dimensions of certain rights and specify their contours. In this regard, a useful starting point is a brief reference to interpretation methods normally applied to human rights provisions and the institutional context where this interpretive exercise takes place. Such methods are themselves an application of the general rules on treaty interpretation emphasising a progressive and teleological reading of human rights norms in order to adapt to social change.[27] The impact of this method must be assessed in the light of the strong level of institutionalisation characterising human rights protection. Major institutions in this regard include the European Court of Human Rights ('ECtHR'), the Inter-American Commission and Court of Human Rights ('ICommHR' and 'ICtHR'), the African Commission and Court on Human and Peoples' Rights ('African Commission' and 'African Court')[28] as well as several bodies created under the aegis of the UN, such as the Human Rights Committee ('HRC') and the Committee on Economic, Social and Cultural Rights ('ESCR Committee').

It is also worth noting that several human rights treaties, such as the European Human Rights Convention (1950),[29] the International Covenants on Civil and Political Rights[30] and on Economic, Social and Cultural Rights (1966)[31] or the American Convention on Human Rights (1969),[32] were all concluded before the Stockholm Conference on the Human Environment in 1972. Thus, the integration of environmental considerations in these treaties could be expected to proceed through progressive interpretation, with the exception of the San Salvador Protocol to the American Convention (1988),[33] which explicitly takes into account environmental protection.

[27] See *Loizidou* v. *Turkey* (Preliminary objections), Judgment of 23 May 1995, ECtHR Application No. 15318/89, para. 72; *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, ICtHR Advisory Opinion OC-16/99, 1 October 1, 1999, Ser. A, No. 16 (1999), paras. 114–15; Human Rights Committee, *General Comment 24: General Comment on Issues Relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994) ('General Comment No. 24').

[28] So far, the African Court has only dealt with environmental considerations once, within the context of a pending case: *African Commission on Human and Peoples' Rights* v. *Kenya*, Order on Provisional Measures, 15 March 2013, African Court Application No. 006/2012 (regarding an eviction decree issued against the Ogiek indigenous community to force them to leave the Mau forest, a protected area).

[29] Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221.

[30] International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171 ('ICCPR').

[31] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 UNTS 3 ('ICESCR').

[32] American Convention on Human Rights, 22 November 1969, 1144 UNTS 123 ('ACHR' or 'American Convention').

[33] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 16 November 1988, OAS Treaty Series No. 69, Art. 11.

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10.3.2.2.2 A possible starting-point: the Human Rights Committee

The first interpretive openings in this regard took place during the 1980s, particularly in the jurisprudence of the HRC. The environmental dimension of the ICCPR was first tested by reference to the right to life and the risks presented by nuclear tests or waste.[34] But such complaints were rejected by the Committee at the admissibility stage.

It was not until the early 1990s that the environmental dimension of human rights found a way of expression within the ICCPR. Quite unexpectedly, the entry point was mainly Article 27 of the Covenant, i.e. the right to the enjoyment of one's culture. The cultural ties linking certain groups to their traditional land, resources and activities (and thereby to their natural environment) was recognised by the HRC as an object capable of protection,[35] although in most cases the complaint was eventually considered inadmissible or rejected on the merits.[36] In spite of its limitations, the jurisprudence of the HRC is useful to identify the two main access points for environmental considerations that have been explored in other institutional settings, namely the impact of environmental degradation on human health broadly defined and this same impact from the perspective of cultural rights.

As discussed next, the jurisprudence of the ECtHR has predominantly (but not exclusively[37]) followed the first access point, whereas those of the ICommHR and the ICtHR have emphasised the second one. As for the African Commission, its jurisprudence has explored both entry points probably because of its focus not only on individual but also on peoples' rights. These broad observations must of course be nuanced, as no adjudicatory body has focused exclusively on one single issue. Yet, schematically, it is useful to identify the issues that each body has emphasised in its jurisprudential practice. Figure 10.2 introduces this point graphically.

[34] See *E.H.P.* v. *Canada*, HRC Communication no. 67/1980 (27 October 1982); *Bordes et Temeharo* v. *France*, HRC Communication No. 645/1995 (22 July 1996). See also *Brun* v. *France*, HRC Communication No. 1453/2006 (18 October 2006) (relating to GMOs).

[35] See HRC, *General Comment No. 23: Protection of Minorities (Art. 27)*, 4 August 1994, CCPR/C/21/Rev.1/Add.5, para. 3.2. By way of illustration, see *Kitok* v. *Sweden*, HRC Communication 197/1985 (27 July 1988); *Bernard Ominayak and the Lubicon Lake Band* v. *Canada*, HRC Communication No. 167/1984 (26 March 1990); *Ilmari Länsman and others* v. *Finland*, HRC Communication No. 511/1992 (8 November 1995); *Jouni E. Länsman and others* v. *Finland*, HRC Communication No. 671/1995 (30 October 1996); *Apirana Mahuika and others* v. *New Zealand*, HRC Communication No. 547/93 (27 October 2000); *Diergaardt* v. *Namibia*, HRC Communication No. 760/1997 (6 September 2000); *Poma Poma* v. *Peru*, HRC Communication No. 1457/2006 (27 March 2009) (concluding to a violation of Art. 27).

[36] See D. Shelton, 'The Human Rights Committee's Decisions', *Carnegie Council for Ethics in International Affairs*, 22 April 2005, available at: www.carnegiecouncil.org (last visited on 15 January 2014).

[37] See e.g. T. Koivurova, 'Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects' (2011) 18 *International Journal on Minority and Group Rights* 1.

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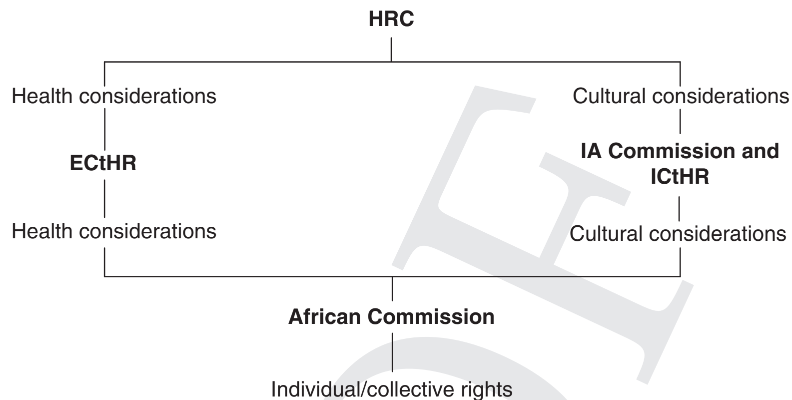

Figure 10.2: Environmental dimensions of general rights

10.3.2.2.3 The European Court of Human Rights

The environmental jurisprudence of the ECtHR has mainly been concerned with human rights relating to various aspects of human health and integrity broadly understood, particularly the right to private and family life provided in Article 8 of the European Convention.

The leading case, *Lopez Ostra* v. *Spain*,[38] was decided in the early 1990s. The Court had already considered, in earlier cases, encroachments of an environmental nature (e.g. nuisances caused by the operation of an airport) but it had concluded that the social usefulness of the activities concerned prevailed over the private interests of the applicants.[39] In *Lopez Ostra*, the Court reached the opposite conclusion, finding that the nuisance caused to the Lopez Ostra family by a facility built to treat the waste of a number of local tanneries amounted to a violation of the right to private and family life (Article 8). It noted, specifically, that:

> [n]aturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.[40]

It thus distinguished the right to health narrowly defined from other impairments to human integrity broadly conceived, such as the right to private and family life. In addition, the Court laid the foundations for the understanding of States' obligations in this context:

[38] *Lopez Ostra* v. *Spain*, ECtHR Application No. 16798/90, Judgment (9 December 1994).

[39] See e.g. *Powell and Rayner* v. *United Kingdom*, ECtHR Application No. 9310/81, Judgment (21 February 1990). Later, in *Hatton and others* v. *United Kingdom*, ECtHR Application No. 36022/97, Judgment (8 July 2003), the Court had rejected the claim for breach of Article 8.

[40] *Lopez Ostra, supra* n. 38, para. 51.

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> Whether the question is analysed in terms of a positive duty on the State – to take reasonable and appropriate measures to secure the applicant's rights under paragraph 1 of Article 8 (art. 8–1) –, as the applicant wishes in her case, or in terms of an 'interference by a public authority' to be justified in accordance with paragraph 2 (art. 8–2), the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, and in any case the State enjoys a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph of Article 8 (art. 8–1), in striking the required balance the aims mentioned in the second paragraph (art. 8–2) may be of a certain relevance.[41]

The Court has further specified this approach in three main respects. First, the environmental content of general rights has been expanded, most notably through (i) the recognition of supplementary procedural obligations,[42] (ii) the use of the right to a fair process (Article 6)[43] and the right to life (Article 2) as entry points of environmental considerations,[44] and (iii) the spelling out of the 'positive' obligation of States to protect individuals from deprivation of their human rights by third parties[45] or natural catastrophes.[46] Second, the Court has further expanded environmental protection by recognising it as an objective that can justify restrictions to certain human rights, particularly the right to property.[47] Third, the scope of the environmental protection afforded by the European Convention has been conditioned on the existence of a direct link between environmental degradation and an impairment of an individual right.[48]

All in all, the European Convention has provided the basis for the development of an environmental jurisprudence focusing not only on State discipline but also (indirectly) on the conduct of third (non-State) parties. This said, the emphasis on human health and integrity broadly understood entails significant limitations in the scope for environmental protection afforded by the Convention. Indeed, the Convention remains a personal-injury-based legal

[41] *Ibid*., para. 51.

[42] See *Guerra and others* v. *Italy*, ECtHR Application No. 116/1996/735/932, Judgment (19 February 1998), para. 60; *Oneryildiz* v. *Turkey*, ECtHR Application No. 48939/99, Judgment (30 November 2004), paras. 91–96; *Taskin and others* v. *Turkey*, ECtHR Application No. 46117/99, Judgment (30 March 2005), paras. 118–25; *Tatar* v. *Romania*, ECtHR Application No. 67021/01, Judgment (6 July 2009), paras. 96–7 and 116–25; *Ivan Atanasov* v. *Bulgaria*, ECtHR Application No. 12853/03, Judgment (11 April 2011), para. 78 (concluding there was an absence of breach).

[43] *Okyay and others* v. *Turkey*, ECtHR Application No. 36220/97, Judgment (12 October 2005), paras. 61–9 (on the applicability *in casu* of Art. 6.1).

[44] *Oneryildiz, supra* n. 42, paras. 89–90.

[45] *Tatar* v. *Romania, supra* n. 42, paras. 85–8.

[46] *Budayeva and others* v. *Russia*, ECtHR Applications No. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, Judgment (29 September 2008), paras. 128–37.

[47] *Turgut* v. *Turkey*, ECtHR Application No. 1411/03, Judgment (merits) (8 July 2008), para. 90.

[48] *Fadeyeva* v. *Russia*, ECtHR Application No. 55723/00, Judgment (30 November 2005), paras. 68–70.

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system and, as a result, instances of environmental degradation that are only indirectly linked to a personal injury or impairment are, at least for the time being, beyond its scope.

10.3.2.2.4 The Inter-American Court of Human Rights

The environmental jurisprudence of the ICtHR as well as some reports adopted by the ICommHR have followed a quite different path. The focus of this body of decisions is on cultural considerations, and the legal vehicle used for their protection is the right to property enshrined in Article 21 of the American Convention. Conceptually, the link between environmental degradation and this right lies in the integrity of the ancestral land which indigenous and tribal groups have traditionally inhabited, which has therefore become an indispensable part of their way of life.

The leading case in this connection, *Awas Tingni* v. *Nicaragua*, was decided by the ICtHR in 2001,[49] although a similar approach can be found in some previous decisions rendered by the ICommHR.[50] In this case, the Nicaraguan government had granted a logging concession to a Korean investor, which included the possibility of extracting wood from a forest located in the traditional land of the Awas Tingni community. Through an 'evolutionary interpretation' of Article 21 of the American Convention, the Court reasoned that:

> the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[51]

On this basis, it concluded that, by not recognising such entitlement, Nicaragua had breached Article 21 of the Convention.[52] The stance taken by the ICtHR in the *Awas Tingni* case was subsequently confirmed and further refined. The entire trajectory followed by this body of decisions is summarised in the *Sarayaku* v. *Ecuador* case.[53]

Here, our discussion will be limited to four main observations useful for the assessment of the scope for environmental protection allowed by the ICtHR case law. First, the Court has extended the protection afforded under Article 21 also to 'tribal' peoples (even if they cannot be considered

[49] *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua*, ICtHR Series C No. 79, Judgment (31 August 2001) ('*Awas Tingni* v. *Nicaragua*'), paras. 145–55.

[50] See *Yanomani Indians* v. *Brazil*, ICommHR case 7615 (decision of 5 March 1985), subsequently confirmed most notably in *Maya Indigenous Community of the Toledo District* v. *Belize*, ICommHR case 12.053 (report of 12 October 2004).

[51] *Awas Tingni* v. *Nicaragua, supra* n. 49, para. 149. [52] *Ibid*., para. 155.

[53] See *Indigenous People Kichwa of Sarayaku* v. *Ecuador*, ICtHR Series C No. 245, Judgment (merits and compensation) (27 June 2012), paras. 145–7 (right to property) and 159–68 (participatory rights).

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'indigenous').[54] Second, it has specified that the protection granted in this context also covers the natural resources located in these lands that have been traditionally used by indigenous and tribal peoples.[55] Third, the Court has also specified that the right to property (even that recognised to indigenous and tribal peoples) is not absolute and can be restricted under certain conditions, namely (i) a sufficient degree of participation from the community concerned, (ii) the sharing of the benefits of the activity in question with the relevant community and (iii) the prior conduct of an environmental and social assessment.[56] Fourth, in case of conflict between the protection of the right to property of an indigenous or tribal people and that of a private owner, the Court has suggested (implicitly[57]) that the former would prevail, at least to the extent that the State could be required to expropriate the land (paying compensation to the owner) in order to give it to the relevant people.[58]

10.3.2.2.5 The African Commission

As for the jurisprudence of the African Commission, it has focused on both health and cultural considerations. Despite some formulation problems that have been singled out in the text of the African Charter,[59] the approach conveyed by this instrument combines an individual dimension (which, in the context of this chapter, one could link to health considerations broadly understood) with a group dimension (peoples' rights) based on cultural considerations. Generally speaking, these two dimensions can be illustrated by reference to two main cases.

The first, *SERAC* v. *Nigeria*,[60] concerns the effects on the Ogoni people of the severe environmental degradation caused by oil exploration and extraction activities undertaken by the Nigerian national oil company and a foreign investor. Such encroachments on the rights of the Ogoni people were further compounded by the brutal repression unleashed by the Nigerian authorities against the attempts by the Ogoni people to oppose the oil extraction activities. The case was brought before the African Commission by a Spanish NGO, SERAC, claiming the

[54] See *Saramaka People* v. *Suriname*, ICtHR Series C No. 172, Judgment (28 November 2007), paras. 80–6 (regarding black communities descending from the slave trade of the seventeenth century).

[55] See *Indigenous community Yakye Axa* v. *Paraguay*, ICtHR Series C No. 125 (17 June 2005), para. 137; *Sawhoyamaxa Indigenous Community* v. *Paraguay*, ICtHR Series C No. 146 (29 March 2006), para. 118.

[56] See *Saramaka* v. *Suriname, supra* n. 54, paras. 125–30.

[57] See *Sawhoyamaxa* v. *Paraguay, supra* n. 55, para. 136 (the Court noted that it did not intend to settle the question of hierarchy between the two forms of protected property, although it thereafter gave some indications on how to address it).

[58] *Ibid*., para. 210; *Yakye Axa v. Paraguay, supra* n. 55, para. 148.

[59] African Charter on Human and Peoples' Rights, 27 June 1981, 21 ILM 58 (1982) ('African Charter'). See F. Ouguergouz, *La Charte africaine des droits de l'homme et des peuples* (Paris: Presses Universitaire de France, 1995); Evans and Murray, *supra* n. 26.

[60] *Social and Economic Rights Action Center (SERAC) and others* v. *Nigeria*, African Commission Application no. 155/96 (2001–2002) ('*Ogoni*').

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violation of several provisions of the African Charter. The Commission considered, among others, the impact of the environmental degradation generated by the companies on the individual right to health (Article 16) and the collective right to a generally satisfactory environment (Article 24) and concluded that Nigeria had failed to respect the human rights of the Ogoni people as well as to protect them from deprivation by the action of third parties.[61] In addition, it identified some procedural obligations stemming from these rights, particularly in connection with environmental impact assessment and participation.[62]

The *Ogoni* case also has a cultural dimension, but this point is better illustrated by reference to the *Endorois* case, which involved measures taken by Kenya to the detriment of a tribal minority.[63] The Kenyan authorities had forcefully evicted the Endorois minority from their traditional land in order to create a protected area. The *Endorois* case is interesting among others because it relies on the jurisprudence of the ICtHR on indigenous and tribal property[64] in order to assert the existence of a cultural link between such a minority and its natural environment (a link protected by Articles 14 – individual right to property – and 21 – collective right to free disposal of wealth and natural resources)[65] as well as to derive specific obligations of consultation, impact evaluation and reparation.[66] Moreover, the Commission also referred to the HRC's General Comment on Article 27 of the ICCPR to conclude that Kenya had violated the cultural rights (Article 17) of the Endorois people.[67]

Thus, the jurisprudence of the African Commission not only brings together the two main avenues through which regional human rights courts have made some room for environmental protection but it also illustrates the operation of specifically environmental rights, discussed next.

10.3.2.3 Specifically environmental rights

In addition to the general human rights with environmental components discussed in the foregoing section, some specifically environmental rights, both substantive and procedural, have been recognised at the international level. Figure 10.3 gives an overview of the main legal sources.

10.3.2.3.1 A right to an environment of a certain quality

From a substantive perspective, the main development has been the increasing recognition of a right to an environment of a certain quality.[68] The adjective

[61] *Ibid*., para. 52. [62] *Ibid*., para. 53.

[63] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v. *Kenya*, African Commission Application no. 276/2003 ('*Endorois*').

[64] *Ibid*., paras. 190–8, 205–8, 257–66. [65] *Ibid*., para. 209. [66] *Ibid*., paras. 225–38, 266–8.

[67] *Ibid*., paras. 250–1.

[68] See P. Kromarek, *Le droit à un environnement équilibré et sain, considéré comme un droit de l'homme: sa mise en oeuvre nationale, européenne et internationale*, Introductory report, European Conference on the Environment and Human Rights, Strasbourg, 19–20 January 1979; P. Cullet, 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 *Netherlands Quarterly of Human Rights* 25; M. Paellemarts, 'The Human Right to a Healthy

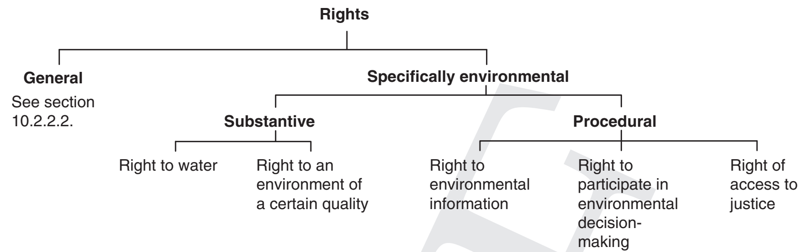

Figure 10.3: Overview of specifically environmental rights

used to characterise this quality (e.g. 'healthy' or 'satisfactory') has been often neglected by commentators. Yet, as we will see in Section 10.2.3, such characterisation can be important from a strategic point of view. Here, we will limit our discussion to some of the main milestones in the recognition of such a right domestically and internationally.

At the domestic level, the Stockholm (1972) and Rio (1992) Conferences had a significant impact on the adoption on domestic constitutional provisions recognising this right. According to the OHCHR Analytical Study:

> In 2010, the number of constitutions including explicit references to environmental rights and/or responsibilities had increased to 140, meaning that more than 70 per cent of the world's national constitutions include such provisions.[69]

According to another estimate, the overwhelming majority of constitutions adopted after 1992 recognise the right to a healthy environment.[70] This study also refers to a number of domestic judicial decisions considering this right as justiciable.[71] At the international level, the connection between the enjoyment of human rights and an environment of a certain quality had already been recognised by Principle 1 of the Stockholm Declaration.

Such connection was subsequently confirmed and developed by a number of international instruments. A first illustration is the African Charter, which provides in Article 24 that '[a]ll peoples shall have the right to a general satisfactory environment favourable to their development'. This provision was discussed and applied in the aforementioned *Ogoni* case, where the Commission noted that this right:

> imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.[72]

Environment as a Substantive Right', in M. Dejeant-Pons and M. Paellemarts (eds.), *Human Rights and the Environment* (Strasbourg: Council of Europe, 2002), pp. 11ff.

[69] OHCHR Analytical Study, *supra* n. 2, para. 30. [70] Shelton, *supra* n. 14, p. 267.

[71] *Ibid*., pp. 267–8. [72] *Ogoni, supra* n. 60, para. 52.

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Moreover, the Commission highlighted the close ties between this collective right and some individual rights recognised by the ICESCR, particularly the right to health (Article 12 of the Covenant and Article 16 of the African Charter).[73] It is also noteworthy that the Commission derived procedural obligations from this right, namely the obligation to conduct an environmental and social impact assessment of industrial projects, monitor such impact and provide access to environmental information and meaningful opportunities for participation in the relevant decision-making process.[74] In the Inter-American context, Article 11(1) of the San Salvador Protocol provides that '[e]veryone shall have the right to live in a healthy environment and to have access to basic public services'.[75] The possibility of bringing an individual claim for breach of this provision seems excluded by the terms of Article 19(6) of the Protocol but this right has been used to interpret other provisions of the American Convention.[76] Another illustration is provided by Article 24(2)(c) of the Convention on the Rights of the Child (1989), which expressly refers to 'the dangers and risks of environmental pollution' in connection with the implementation of the right to the highest attainable standard of health recognised by this instrument.[77] Finally, the 2012 ASEAN Human Rights Declaration provides in Article 28(f) the right of 'every person . . . to an adequate standard of living . . . including . . . (e) The right to a safe, clean and sustainable environment'.[78]

The reception of this right within international human rights law has been supported by a number of codification efforts undertaken by different UN bodies, particularly the Human Rights Council and its predecessor the Human Rights Commission. The latter commissioned a study on the link between environmental degradation and human rights as early as August 1989. This study, often called the 'Ksentini Report' (after the Special Rapporteur, Mrs Fatma Zohra Ksentini), was presented in 1994.[79] It appended, in an Annex, an ambitious project of principles on human rights and the environment where environmental protection is spelled out as a series of rights (and duties) both individual and collective. Unfortunately, this project had limited practical impact at the time. A similar initiative has been recently undertaken under the aegis of the Human Rights Council in order to have 'the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment' examined by 'an independent expert'.[80] It must be

[73] *Ogoni, supra* n. 60, para. 52. [74] *Ibid*., para. 53.
[75] Protocol of San Salvador, *supra* n. 33, Art. 11(1).
[76] See *Kawas-Fernandez* v. *Honduras*, ICtHR Series C No. 196, Judgment (merits, reparation and costs) (3 April 2009), para. 148.
[77] Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3 ('CRC').
[78] ASEAN Human Rights Declaration, 19 November 2012, available at: www.asean.org (last visited on 3 February 2014).
[79] Ksentini Report, *supra* n. 21.
[80] Human Rights Council, Resolution 19/10: 'Human Rights and the Environment', 19 April 2012, A/HRC/RES/19/10, para. 2.

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noted that the terms of the mandate entrusted to the expert, Professor John Knox, are sufficiently pragmatic to avoid reaching conclusions which would be unpracticable. Indeed, the mandate focuses on the assessment of the environmental dimension of existing human rights rather than on the analysis of the contours of a human right to an environment of a certain quality.

10.3.2.3.2 The right to water and sanitation

Another right that is often considered as having a specifically environmental nature is the right to water and sanitation.[81] This right has been recognised to a varying degree in domestic and international instruments, although most often as a derivative of other general human rights.[82]

The main example is provided by Articles 11 (right to an adequate standard of living as well as adequate food and housing) and 12 (right to health) of the ICESCR, which have been considered as the basis for the recognition of a right to water by the Committee on Economic, Social and Cultural Rights in its General Comment 15 ('GC 15').[83] In GC 15, the Committee defines the right to water as follows: 'The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses'.[84] In some other instruments, a right to water is explicitly recognised, although in respect of a narrow category of right-holders, such as children,[85] women,[86] war prisoners or civilian populations during armed conflict.[87] By way of illustration, the CEDAW provides in Article 14(2)(h) that:

> States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right: . . . (h) To enjoy adequate living

[81] See P. Thielboerger, *The Human Right(s) to Water* (Ph.D. dissertation, European University Institute, 2011); I. T. Winkler, *The Human Right to Water* (Oxford: Hart, 2012); M.-C. Petersmann, *Les sources du droit à l'eau en droit international* (Paris: Johanet, 2013).

[82] On the extent of this recognition, see Petersmann, *supra* n. 81.

[83] Committee on Economic, Social and Cultural Rights, *General Comment No. 15 (2002), The Right to Water (Arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 26 November 2002, UN ESCOR Doc. E/C.12/2002/11 ('GC 15').

[84] *Ibid*., para. 2. [85] CRC, *supra* n. 77.

[86] Convention on the Elimination of All Forms of Discriminationa Against Women, 18 December 1979, 1249 UNTS 13 ('CEDAW').

[87] See e.g. Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 31, Arts. 20, 26, 29 and 46; Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Arts. 85, 89 and 127; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), 8 June 1977, 1125 UNTS 3, Arts. 54 and 55; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, Arts. 5 and 14.

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> conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.[88]

In a similar vein, Article 24(2)(c) of the CRC requires States to take measures in order to:

> combat disease and malnutrition, including within the framework of primary health care, through, inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water.[89]

More recently, the UN General Assembly and the Human Rights Council explicitly recognised (albeit in non-binding resolutions) the right to water and sanitation as a human right.[90] The Special Rapporteur appointed by the Human Rights Council on this right, Catarina de Albuquerque, has elaborated on the sanitation dimension, which is increasingly recognised as either a component of the right to water or as a distinct, albeit related, right.[91]

Properly understood, this right is half way between human rights law and environmental law, particularly if considered from the perspective of instruments such as the Protocol on Water and Health to the Helsinki Convention,[92] where the fulfilment of this right is structured in terms of States' obligations to ensure 'access' to water. This point is also useful to highlight the conceptual relationship between provisions formulated in terms of 'individual rights' (whether negative or positive liberties) and those formulated in terms of 'obligations' pertaining essentially to States.[93] As already noted, each individual right carries three types of correlative State obligations, namely to respect the right (negative obligation of non-interference), to protect the enjoyment of a right from deprivation by third parties (positive obligation to prevent encroachments by other entities) and to progressively fulfil the necessary conditions for the full enjoyment of the right (positive obligation). The content of these obligations must be specified not only by looking at the components of human rights provisions (the GC 15 takes this approach) but also by reference to instruments that clarify correlative State obligations without specifically providing for an individual right (e.g. the Protocol on Water and Health as well as most other environmental treaties). In other words, to understand the legal framework governing access to water as a human need one must look

[88] CEDAW, *supra* n. 86, Art. 14(2)(h). [89] CRC, *supra* n. 77, Art. 24(2)(c).

[90] Resolution A/64/292, 'The Human Right to Water and Sanitation', 28 July 2010, UN Doc. A/64/L.63/Rev.1; Resolution 15/9: 'Human Rights and Access to Safe Drinking Water and Sanitation', 24 September 2010, A/HRC/15/L.14.

[91] See 'Human Rights Obligations related to Access to Sanitation', 1 July 2009, UN Doc. A/HRC/12/24.

[92] Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 June 1999, 2331 UNTS 202 ('Protocol on Water and Health').

[93] See e.g. the international humanitarian law instruments mentioned *supra* n. 87.

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both at human rights provisions and at norms formulated in terms of State obligations or duties.[94]

10.3.2.3.3 Procedural environmental rights

Moving on now to procedural rights, we have seen that some international adjudicatory bodies have identified procedural components (evaluation, monitoring, participation, etc.) within a number of substantive general rights. But there are also some procedural rights that are specifically environmental. Such rights, initially outlined in Principle 10 of the Rio Declaration,[95] have been spelled out in detail in the Aarhus Convention.[96] Although this Convention is a regional instrument (adopted under the aegis of the UNECE), it is open to accession by other countries,[97] a feature that in practice has extended its geographical scope far beyond Europe. The main purpose of the Aarhus Convention is 'to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and wellbeing'.[98] With this aim, the Convention requires States parties to implement three clusters of environmental procedural rights.

The first cluster concerns the right to access environmental information (Articles 4 and 5). The term 'environmental information' is broadly defined in Article 2(3) by reference to three categories of what that information could concern, namely '[t]he state of elements of the environment' (letter (a)), '[f]actors, such as substances, energy, noise and radiation, and activities or measures' (letter (b)) and:

> [t]he state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above [letter (c)].

The link formulated in the latter paragraph between, on one hand, 'human health and safety' or 'conditions of human life' and, on the other hand, the environment highlights the interest in broadening the scope of human rights to include environmental components. Through such broadening, this link could become increasingly explicit, extending the right to have access to environmental information to measures and policies relating to economic, social and cultural rights (e.g. measures and policies concerning standards of water quality, the use of communal lands by third parties, health-related zoning requirements). This link is further clarified by the Implementation Guide of the Aarhus Convention, which refers, for instance, to the fact that:

[94] See Chuffart and Viñuales, *supra* n. 19. [95] See *supra* Chapter 3.
[96] Aarhus Convention, *supra* n. 25. The following presentation draws upon Chuffart and Viñuales, *supra* n. 19.
[97] Aarhus Convention, *supra* n. 25, Art. 19(2)–(3). [98] *Ibid*., Art. 1.

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> human health may include a wide range of diseases and health conditions that are directly or indirectly attributable to or affected by changes in environmental conditions.[99]

For present purposes, the link between environmental information and human rights conditions provides an illustration of what has been referred to above as 'issue 2', namely how the implementation of human rights could be fostered by the use of environmental instruments. However, the broadening of the concept of 'environmental information' has limits. Although the Implementation Guide states that the three categories of 'environmental information' identified are non-exhaustive,[100] it would be difficult to argue that measures presenting no discernible link to the environment are encompassed. Thus, information relating to measures concerning the right to education or the right to work would not be covered by the term 'environmental information' unless a sufficient link with the 'state of elements of the environment' or with '[f]actors, such as substances, energy, noise and radiation, and activities or measures' can be established.

The second cluster of environmental procedural rights concerns public participation in decisions regarding specific activities (Article 6), plans, programmes and policies relating to the environment (Article 7), as well as public participation during the preparation of executive regulations and/or legally binding instruments of general application (Article 8). These rights can be seen as specific applications of a broader right to participate in public affairs provided, most notably, in Article 25(a) of the ICCPR,[101] which applies also to economic, social and cultural rights.[102] Among the many questions raised by this cluster,[103] a particularly relevant one is the identification of the types of activities that require public participation under the Aarhus Convention. Two basic standards are used in this regard. Articles 6(1) and 8 (chapeau) refer to those activities or generally binding rules that 'may have a significant effect on the environment'. This expression is not defined in the Convention, but the Implementation Guide[104] defines it by reference to paragraph I of Appendix III to the Espoo Convention on Environmental Impact Assessment in a

[99] The Aarhus Convention: An Implementation Guide, available at: www.unece.org/env/pp/implementation%20guide/english/part2.pdf (last visited 24 January 2014) ('Implementation Guide'), p. 38.

[100] *Ibid.*, p. 35. [101] ICCPR, *supra* n. 30, Art. 25(a).

[102] On the scope of Article 25 of the ICCPR, see HRC, *General Comment No. 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25)*, 12 July 1996, CCPR/C/21/Rev.1/Add.7, paras. 5–8 (referring to applications of the Art. 25(a)).

[103] One important question concerns the scope of public participation. This is discussed in detail in the Implementation Guide (Implementation Guide, *supra* n. 99, pp. 85–122). For our purpose, it will suffice to note that the requirement of public participation does not mean that the public has a veto on activities, measures or plans (See Aarhus Convention, *supra* n. 25, Arts. 6(8), 7, and 8 *in fine*; Implementation Guide, *supra* n. 99, pp. 109–10).

[104] Implementation Guide, *supra* n. 99, p. 94.

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Transboundary Context.[105] The Espoo Convention refers to several criteria that must be considered to assess 'significance'. Generally speaking, these include size, location and effects. More specifically, the Convention mentions 'proposed activities in locations where the characteristics of proposed development would be likely to have significant effects on the population'[106] or those 'giving rise to serious effects on humans'.[107] Article 7 uses a somewhat lower standard by referring to plans and programmes 'relating to the environment'. According to the Implementation Guide such connection must be 'determined with reference to the implied definition of "environment" found in the definition of "environmental information" (Article 2, paragraph 3)'.[108] Thus, in both cases, there is some room for activities, measures and regulations affecting the situation of human beings and their human rights to be included among those requiring public participation. Indeed, the activities and measures targeted are those with potentially serious consequences for the environment, a category that overlaps, to a significant degree, with those affecting human health and culture broadly understood (e.g. through the safety and quality of water, food production, the safety of the working environment, etc.). Thus, the public participation requirements laid out in the Aarhus Convention could operate as an additional layer of protection based on which measures relating to the implementation of human rights could be further scrutinised by the public.

The third cluster of environmental procedural rights concerns access to justice in connection with access to environmental information and public participation in environmental decision-making (Article 9). Interestingly, this right is further extended by Article 9, paragraph 3, to empower members of the public 'to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment'. In the language of human rights, this extension can be seen as an expression of States' obligations 'to protect from deprivation' by third parties.

For all three clusters of rights, the public concerned encompasses 'the public affected or likely to be affected by, or having an interest in, the environmental decision-making ... and meeting any requirements under national law'.[109] Moreover, Article 9(b) expressly states that:

> the interest of any non-governmental organization meeting the requirements referred to in article 2, paragraph 5, shall be deemed sufficient for the purpose of subparagraph (a) above [sufficient interest by members of the public]. Such

[105] Convention on Environmental Impact Assessment in a Transboundary Context, 25 February 1991, 1989 UNTS 309 ('Espoo Convention').

[106] *Ibid.*, Appendix III, para. 1(b) *in fine.* [107] *Ibid.*, Appendix III, para. 1(c).

[108] Implementation Guide, *supra* n. 99, p. 115. According to the guide, this would include 'land-use and regional development strategies, and sectoral planning in transport, tourism, energy, heavy and light industry, water resources, health and sanitation, etc., at all levels of government'.

[109] Aarhus Convention, *supra* n. 25, Art. 2(5).

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> organizations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above [maintaining impairment of its own right].

The application of the Aarhus framework is thus facilitated, making the Convention a powerful tool for the enforcement of States' obligations. In addition, as discussed in Chapter 9, when a State Party fails to implement the obligations arising from the Convention within its domestic system, the affected individuals or groups may resort to the non-compliance procedure established by the Convention. Thus, overall, the Convention epitomises the close ties between the objectives pursued by human rights and environmental law instruments.

10.3.3 The 'extent' of environmental protection afforded by human rights instruments

10.3.3.1 Overview

As discussed earlier in this chapter, the protection afforded by human rights instruments to the environment is conditioned on the existence of a link between environmental degradation and an impairment of a protected human value (typically health and integrity broadly understood or cultural considerations). This is because human rights law – much as tort law – is based on a personal-injury-based approach to legal protection. Within such an approach there is little room, if any, for pure – 'ecocentric'[110] – environmental protection or perhaps even for integrating the rights of unborn generations.[111] Thus, the overlap in the scope of protection of human rights norms and environmental norms is not total.

Human rights approaches to environmental protection, albeit very useful, have some important limitations. This difficulty is aptly summarised by Professor Francesco Francioni when he notes that:

> In our search for progress in this field [environmental justice], we ought to ask whether we need to fashion new rights – I will avoid the pedantic and useless schematization of 'generation rights' – inherently related to the environment and new technology related risks, or alternatively whether we can 'adapt' the conceptual and normative framework of international human rights to new situations so as to extend the scope of protection to novel risks and to the impact of environmental degradation on human rights.[112]

[110] On the distinction between 'anthropocentric' and 'ecocentric' approaches, see C. Stone, 'Ethics and International Environmental Law', in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007), pp. 291–312.

[111] See *E.H.P.* v. *Canada*, *supra* n. 34, para. 8(a), where the reference to future generations was seen as a mere 'expression of concern'.

[112] Francioni, *supra* n. 15, p. 42.

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The discussion in the following paragraphs focuses on the second approach identified by Francioni, namely the adaptation of the existing conceptual and normative framework to adjust – without distorting – the logic underpinning human rights. We will do so by discussing the limitations and turning then to some possible solutions and their implications for two issues, i.e. collective claims and the connection between human rights and climate change.

10.3.3.2 The 'link' requirement

The scope for environmental protection in all existing human rights, as interpreted by their respective adjudicatory bodies, is conditioned upon the establishment of a 'link' between environmental degradation and the impairment of a protected right. Depending on the legal context, this link is narrowly or more broadly understood. Although the expression 'legal context' should normally refer here to the treaty in question (e.g. the European, American or African Conventions), a more detailed analytical grid is required to capture the limitations arising from the 'link' requirement. Indeed, the adjudicatory bodies of each 'treaty context' have taken different stances depending not only on the particular 'human right' at stake (e.g. Articles 6 or 8 of the European Convention) but also on the 'circumstances' of the case. Thus, it is difficult to set a level sufficiently detailed to capture the nuances of the case law while at the same time broad enough to draw general conclusions. In what follows, we set a rather broad level in order to highlight the pervasive need for a 'link'. More detail can be found in the specialised literature.[113]

The most developed regional human rights adjudication systems have recognised the need for a link with more or less precision depending on the context. By way of illustration, the ECtHR noted, in *Kyrtatos* v. *Greece* (in the context of Article 8 of the ECHR) that:

> [n]either Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent.[114]

The same point was made in the context of Article 6 of the ECHR in *Athanassoglou* v. *Switzerland*:

> [t]he applicants in their pleadings . . . were alleging not so much a specific and imminent danger in their personal regard as a general danger in relation to all

[113] See Francioni, *supra* n. 15; C. Schall, 'Public Interest Litigation Concerning Environmental Matters before the Human Rights Courts: A Promising Future Concept?' (2008) 20 *Journal of Environmental Law* 417; ICommHR, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 30 December 2009, Doc OEA/Ser.L/V/II, Doc. 56/09,; R. Pavoni, *Interesse pubblico e diritti individuali nella giurisprudenza ambientale della Corte europea dei diritti umani* (Naples: Editoriale scientifica, 2013).

[114] *Kyrtatos* v. *Greece*, ECtHR Application No. 41666/98, Judgment (22 May 2003), para. 52.

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> nuclear power plants; and many of the grounds they relied on related to safety, environmental and technical features inherent in the use of nuclear energy.[115]

In the American context, the ICommHR made a similar point in connection with a petition against the construction of a road running through a natural reserve in Panama:

> The Commission ... holds the present complaint to be inadmissible since it concerns abstract victims represented in an actio popularis rather than specifically identified and defined individuals. The Commission does recognize that given the nature of the complaint, the petition could hardly pinpoint a group of victims with particularity since all the citizens of Panama are described as property owners of the Metropolitan Nature Reserve. The petition is inadmissible, further, because the environmental, civic, and scientific groups considered most harmed by the alleged violations are legal entities and not natural persons, as the Convention stipulates. The Commission therefore rules that it has not the requisite competence ratione personae to adjudicate the present matter in accordance with jurisprudence establishing the standard of interpretation for Article 44 of the Convention as applied in the aforementioned cases.[116]

Even the more generous jurisprudence of the ICtHR with respect to the rights of indigenous and tribal peoples maintains the need for a link without which environmental protection would not be required. In *Saramaka People* v. *Suriname*, the Court spelled out the reason why the environment is to be protected under Article 21 of the Convention (right to property):

> [t]he aim and purpose of the special measures required on behalf of the members of indigenous and tribal communities is to guarantee that they may continue living their traditional way of life, and that their distinct cultural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected by States.[117]

As for the African Commission, despite the explicit recognition of a peoples' right to a generally satisfactory environment in Article 24 of the African Charter, pure environmental degradation does not (so far) appear sufficient to conclude to an impairment of a human or a people's right. Indeed, in the *Ogoni* case,[118] the African Commission interpreted Article 24 in the light of Article 16 (right to health) and spoke of a 'right to a healthy environment'. Although it characterised the obligations arising from Article 24 in a general manner,[119] it grounded its conclusion that the Charter had been violated on

[115] *Athanassoglou and others* v. *Switzerland*, ECtHR Application No. 27644/95, Judgment (6 April 2000), para. 52.

[116] *Metropolitan Nature Reserve* v. *Panama*, Case 11.533, Report No. 88/03, ICommHR, OEA/Ser. L/V/II.118 Doc. 70 rev. 2 at 524 (2003), para. 34.

[117] *Saramaka* v. *Suriname, supra* n. 54, para. 121. [118] *Ogoni, supra* n. 60.

[119] According to the Commission, this right requires the State 'to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources', *Ibid*., para. 52.

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the effects of the activities in question on the Ogoni community and its members:

> Undoubtedly and admittedly, the Government of Nigeria, through NNPC has the right to produce oil, the income from which will be used to fulfil the economic and social rights of Nigerians. But the care that should have been taken as outlined in the preceding paragraph and which would have protected the rights of the victims of the violations complained of was not taken. To exacerbate the situation, the security forces of the government engaged in conduct in violation of the rights of the Ogonis by attacking, burning and destroying several Ogoni villages and homes.[120]

The 'link' requirement has been characterised in different ways depending on the legal context. The ECtHR refers, in the context of Article 8, to a 'direct' link between environmental degradation and an encroachment on a human right of a 'certain minimum level of severity'.[121] The degree of the interference must be assessed in the light of a variety of factors:

> The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account. There would be no arguable claim under Article 8 if the detriment complained of was negligible in comparison to the environmental hazards inherent to life in every modern city.[122]

In *Fägerskiöld* v. *Sweden*, the ECtHR rejected the claim that the nuisance caused by noise and light reflections arising from wind turbines located near the applicant's home were serious enough to constitute a breach of Article 8. The Court noted in this context that such nuisance was not 'so serious as to reach the high threshold established in cases dealing with environmental issues'.[123] As for the 'directness' of the link, the ECtHR follows a rather ambiguous test, as suggested by a much – commented – on paragraph in *Kyrtatos* v. *Greece*:

> [E]ven assuming that the environment has been severely damaged by the urban development of the area, the applicants have not brought forward any convincing arguments showing that the alleged damage to the birds and other protected species living in the swamp was of such a nature as to directly affect their own rights under Article 8 § 1 of the Convention. It might have been otherwise if, for instance, the environmental deterioration complained of had consisted in the destruction of a forest area in the vicinity of the applicants' house, a situation which could have affected more directly the applicants' own well-being.[124]

[120] *Ibid*., para. 54. [121] *Fadeyeva* v. *Russia*, *supra* n. 48, paras. 68–70. [122] *Ibid*., para. 69.

[123] *Fägerskiöld* v. *Sweden*, ECtHR Application No. 37664/04, Decision as to admissibility (26 February 2008).

[124] *Kyrtatos* v. *Greece*, *supra* n. 114, para. 53.

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Still in the European context, the 'link' requirement seems even more demanding in connection with claims under Article 6 of the Convention. In *Balmer-Schafroth* v. *Switzerland*, the ECtHR characterised this requirement as entailing both the existence of a 'dispute' over a 'civil right' recognised domestically and that the outcome of the allegedly flawed proceedings be 'directly decisive for the right in question'.[125] *In casu*, the applicants had opposed the extension of the operation permit of a nuclear power plant arguing that such operation threatened their life and health. The domestic authorities (the Swiss Federal Council) rejected their claim and the applicants challenged this proceeding before the ECtHR. The Court declared the application inadmissible. After noting that 'mere tenuous connections or remote consequences are not sufficient to bring Article 6 §1 into play',[126] it concluded indeed that the applicants had failed:

> to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent. In the absence of such a finding, the effects on the population of the measures which the Federal Council could have ordered to be taken in the instant case therefore remained hypothetical.[127]

In the American and African contexts, the 'link' requirement has been characterised more loosely. This is largely a consequence of the more progressive approach adopted by the case law of the ICtHR in connection with indigenous and tribal peoples and the explicit formulation of peoples' rights in the African Charter. However, the understanding of the 'link' requirement remains demanding when no such collective rights are at stake. The ICommHR made this distinction in the abovementioned *Metropolitan Nature Reserve*, where it noted that:

> petitions filed as actions for the common good are deemed inadmissible [but that] does not imply that the petitioner must always be able to identify with particularity each and every victim on whose behalf the petition is brought . . . the Commission has considered admissible certain petitions submitted on behalf of groups of victims when the group itself was specifically defined, and when the respective rights of identifiable individual members were directly impaired by the situation giving rise to a stated complaint. Such is the case of members of a specific community.[128]

The Commission referred to two examples of 'specific communities'. One reference is to indigenous groups, which have increasingly been treated as a collective human rights subject[129] and for which the 'link' requirement is more lenient. The other reference is to a group of victims of a Colombian

[125] *Balmer-Schafroth and others* v. *Switzerland*, ECtHR Application No. 22110/93, Judgment (26 August 1997), para. 32.
[126] *Ibid.* [127] *Ibid.*, para. 40. [128] *Metropolitan Nature Reserve*, *supra* n. 116, para. 32.
[129] See *Sarayaku* v. *Ecuador, supra* n. 53, para. 231.

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paramilitary group that share no indigenous or tribal identity. Yet, the circumstances of the case (particularly the fact that the corpses of most of the victims had been thrown into the river and lost) justified their treatment as a group of petitioners despite the lack of individual identification. Thus, it would be difficult (albeit not impossible) to make an analogy between this (non-indigenous and non-tribal) group and a 'class' of people affected by some form of environmental degradation.

The latter point raises the question of what has been referred to in the literature as 'mass claims' brought before human rights bodies[130] and their potential use in the context of environmental protection.

10.3.3.3 Mass human rights claims: who speaks for the environment?

One significant development that has carved out some additional room for environmental protection within human rights has been the loosening of the link requirement in two main respects, namely the determination of those whose rights have been violated and of the entity that may bring the claim. These two issues are important to assess the room for bringing mass or collective claims, which require the identification of a class (by contrast to that of specific individuals) as well as of an entity representing such class (by contrast to a multitude of individual claims).

In turn, mass or collective claims may be a key instrument of environmental protection because: (i) environmental degradation tends to affect many people; (ii) the individuals within such a group differ as to their position (whether with respect to location, vulnerability or impact) and their ability to bring a claim (including in their available resources); and (iii) granting individual relief (even to a number of different people) is a very reductive way of redressing widespread environmental harm. Thus, loosening the 'link' requirement to facilitate collective claims may help expand the room for environmental protection within human rights.

In this regard, there is a noticeable difference between, on the one hand, the European context and, on the other hand, the American and African contexts. Whereas in the former significant restrictions have been placed on the ability to bring a mass claim, in the latter such claims are made admissible either as a result of an explicit legal basis (in the African Charter) or of jurisprudential developments (in the American context). This broad picture must, however, be nuanced, as even in the European context there is some room for collective claims and, conversely, it remains unclear to what extent such claims could be brought in the American context when indigenous and tribal peoples are not concerned. Let us look at this question in some more detail.

The ECtHR's overall position regarding environment-related mass claims is restrictive. A useful starting point to analyse this question is the ECtHR's decision in *Atanasov* v. *Bulgaria*.[131] This case is interesting not only for the

[130] Pavoni, *supra* n. 113, pp. 37–47. [131] *Atanasov* v. *Bulgaria, supra* n. 42.

overview of the relevant ECtHR's environmental jurisprudence that it provides[132] but also because the deficient environmental reclamation scheme at stake in the case threatened both the applicant and a class (i.e. the local community living in the surroundings of the reclaimed mining pond). Indeed, the Bulgarian courts had found that the applicant and other people living in the area had a sufficient interest to bring proceedings under domestic law. Yet, the Court distanced itself from this finding and simply applied the basic test under Article 8 of the Convention requiring a direct link between environmental degradation and a serious individual impairment of a human right.[133] On this basis, it rejected the claim for breach of Article 8. Another – perhaps clearer – example is the decision of the Court in *Aydin* v. *Turkey*,[134] where a group of owners challenged a dam and hydroelectricity development project affecting a natural park. The applicants invoked Articles 6 and 8 of the ECHR and claimed also a right to a healthy environment. The Court rejected both grounds and noted, in connection with Article 8, that, in truth, the applicants were trying to protect the environment rather than their rights:

> The applicants complain about the impact of the project on the ecosystem of the Munzur valley; they do not establish the repercussions of the construction of the dam on their way of life or their property or the existence of a precise and direct threat against one of them.[135]

In a subsequent case, *Di Sarno* v. *Italy*,[136] the Court slightly softened its approach. The applicants argued that the Italian authorities had failed to establish a satisfactory waste collection and management system thus encroaching on the rights of the entire population of the Campania region. The Court did not accept this argument as such but, instead, it implicitly lowered the requirement for the establishment of a direct and serious impact by admitting that the population of a specific municipality (Soma Vesuviana), including the applicants, had been affected by the 'waste crisis'.[137] However, all in all, the ECtHR has yet to admit collective environmental claims as such, and it conditions their admissibility upon their conversion into an individual claim subject to a demanding 'link' requirement. In other words, while individuals affected by environmental degradation may bring a claim and seek specific relief, the environment as such still has no voice in this legal context.

The ICtHR has followed a different approach, although so far only in connection with indigenous and tribal peoples. As discussed earlier in this chapter, the ICtHR has expanded the scope of Article 21 (the right to property) to protect the relationship between such peoples or communities and their traditional lands. This amounts not only to giving a voice to such entities as a

[132] *Ibid*., paras. 66–75. [133] *Ibid*., paras. 76–9.
[134] *Aydin and others* v. *Turkey*, ECtHR Application No. 40806/07), Decision (15 May 2012).
[135] *Ibid*., para. 28 (our translation from the French text).
[136] *Di Sarno and others* v. *Italy*, ECtHR Application No. 30765/08, Judgment (10 January 2012).
[137] *Ibid*., para. 81.

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distinct subject of human rights but also to extending the scope of environmental protection to the entire area potentially affecting such peoples, which is of course far broader than the one affecting a specific individual. In addition, the centre of gravity of the protection thus offered is not human health and integrity broadly conceived but the general state of the environment, at least to the extent that such environment must be preserved to ensure the traditional way of life of indigenous and tribal peoples. Environment-related collective claims thus become possible because there are criteria to identify a class (cultural criteria defining indigenous and tribal peoples) and there is a class representative (the authorities of the indigenous or tribal people). The rights protected are not merely those of a particular individual but those of a collective subject. As noted by the ICtHR in *Sarayaku* v. *Ecuador*:

> On previous occasions, in cases concerning indigenous and tribal communities or peoples, the Court has declared violations to the detriment of members of indigenous or tribal communities and peoples. However, international legislation concerning indigenous or tribal communities and peoples recognizes their rights as collective subjects of International Law and not only as individuals [reference to the UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169 and the African Charter]. Given that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise certain rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or issued in this Judgment should be understood from that collective perspective.[138]

And these collective subjects are in a better position than any individual member to speak for the environment and to claim general environmental redress because they are more broadly concerned with the state of the environment than any particular person or family living in a specific location. As noted in the United Nations Declaration on the Rights of Indigenous Peoples: '[i]ndigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources'.[139] Moreover, the ability to bring environment-related collective claims is further strengthened by the existence of a procedural basis in Article 44 of the American Convention, according to which any:

> group of persons, or any non governmental entity legally recognized in one or more member states of the Organization [the OAS], may lodge petitions with the Commission [ICommHR] containing denunciations or complaints of violation of this Convention by a State Party.

Thus, in the American context, the environment benefits from a collective voice both at the substantive and the procedural level.

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[138] *Sarayaku* v. *Ecuador, supr*a n. 53, para. 231.

[139] United Nations Declaration on the Rights of Indigenous Peoples, 13 September 2007, UN Doc. A/RES/61/295, para. 29(1).

As for the African context, the need for jurisprudential elaboration of collective claims is less acute because the African Charter explicitly provides for collective rights and representation. This can be illustrated by the already mentioned *Ogoni* case,[140] which was brought before the African Commission by two European NGOs and concerned both individual (e.g. Article 16) and collective (e.g. Articles 21 and 24) rights.

Despite the potential of collective claims for environmental protection, the recognition of collective rights and *jus standi* is still limited by the application of the link requirement to such rights. For environmental degradation to be brought under human rights instruments, a link must be established between acts or omissions of a State, environmental degradation and an impairment of a collective right. This may be particularly challenging in some contexts, such as climate change, where the obstacles to prove such a link are formidable.

10.3.3.4 Human rights and climate change[141]

In the previous sections we have seen that human rights approaches to environmental protection require a link between environmental degradation and an impairment of a human right. Such link can be understood at different levels. One is the type of considerations (health or culture related) that have been used so far to argue that environmental degradation violates human rights. The other is the legal characterisation of the link (seventy and directness). Both vary according to the legal context (treaty, specific provision, circumstances) but, generally speaking, the ECtHR has emphasised health considerations broadly understood whereas the ICtHR has concentrated on cultural considerations. The African Commission, because of the particular contents of the African Charter, has focused on both.

This overall picture is useful to understand the issue we now turn to, namely the 'adjective' used to characterise the right to an environment of a certain quality. Commentators and adjudicatory bodies seem to pay little attention to this adjective assuming, perhaps justifiably, that using one or the other adjective will not change the content and operation of such a right. Yet, wording is often important in facilitating legal breakthroughs. Speaking of a right to a 'healthy' environment may capture questions that go beyond health and into human integrity more broadly understood but it may not easily encompass the protection of a traditional economic activity (e.g. tobacco production, fishing or animal husbandry[142]) or of aesthetic considerations. Similar limitations

[140] *Ogoni, supra* n. 60.

[141] This section draws partly upon J. E. Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment', in N. Bhuta (ed.), *Human Rights as Cosmopolitan Law? Extraterritorial Human Rights Obligations in International Law* (Oxford University Press, forthcoming 2015).

[142] Tobacco production was claimed to be protected investments by reference to chapter eleven of the NAFTA interpreted in the light of certain instruments on indigenous peoples' rights. See *Grand River Enterprises Six Nations, Ltd, and others* v. *United States of America*, NAFTA Arbitration (UNCITRAL Rules), Award (12 January 2011), paras. 66–7, 190. More generally, activities such as fishing or animal husbandry are protected as part of the traditional livelihood

may apply to a right to a 'safe' (and perhaps also to a 'sound') environment, although this characterisation may be easier to use for a 'collective' subject, to the extent that 'health' is an individual interest and can only be used for groups by analogy. Conversely, a right to a 'decent' or 'generally satisfactory' environment does not place the centre of gravity of the right on health and integrity considerations and it may more easily encompass cultural and even aesthetic considerations. Similarly, such right is better suited for a collective subject.

These observations about wording may appear purely academic at first sight, but they are not. At present, human rights approaches are being explored to tackle environmental questions, including climate change and its effects (particularly through the so-called 'slow onset events') that are very difficult to capture.[143] In order to use a personal-injury based system such as human rights law to prompt States to take mitigation and adaptation measures the wording of a potential right to an environment of a certain quality must be carefully set. It is particularly challenging to bring climate change under the 'link' requirement discussed in the previous section because the applicant must establish that acts or omissions of the State have resulted in interference with the climatic system that has triggered a specific extreme (or slow onset) weather event, which, in turn, has affected his/her rights. This complex configuration normally takes place in a global context, which human rights law can only address through the assertion of extraterritorial human rights obligations.[144] Conceptually, establishing causality in such circumstances requires three steps: (i) the State (through acts or omissions) interferes with the climatic system; (ii) such interference causes an extreme weather event (e.g. a drought, a heat wave, a hurricane, etc.) or a slow onset event (e.g. melting of polar icecaps or rise of the sea level); and (iii) such extreme or slow onset event results in a specific and sufficiently severe impairment of a human right.

The practice of human rights courts has only addressed some portions of this complex configuration. Instead of extreme or slow onset environmental phenomena, the practice so far looks at more localised environmental threats or degradation. There are two causality inquiries to be conducted in this context: one between State action or inaction and such threats or degradation and the other between the latter and an individual impairment of a human right. Figure 10.4 summarises this point.

Although the proof of these connections may be challenging, it is far from impossible in the usual context where environmental cases have arisen, as suggested by the many decisions where human rights courts have found a violation of the relevant treaties. In the context of climate change, these two

of some minorities for cultural reasons. See *Ominayak* v. *Canada, supra* n. 35; *Ilmari Länsman* v. *Finland, supra* n. 35.

[143] See OHCHR, *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, 15 January 2009, UN Doc. A/HRC/10/61.

[144] See A. Boyle, 'Human Rights and the Environment: Where Next?' (2012) 23 *European Journal of International Law* 613, 636–41.

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Figure 10.4: Basic causality inquiries

inquiries are far more complex. Whereas it is now well established that emissions of greenhouse gases are the main driver of climate change in the twentieth century (first causal inquiry),[145] the attribution of a specific weather event to climatic change is still too difficult to establish. This difficulty interrupts the causality flow. It is well known that climatic change causes an increase in the frequency of extreme weather events and drives slow onset events. It is even possible to identify which types of events (e.g. heat waves, droughts, hurricanes, ice-melting, sea level rise, redistribution of some diseases, etc.) can be triggered by climate change. What is missing is the link with a specific event affecting a specific area on a specific date. That is precisely what the second causality inquiry seeks to establish.

Such difficulties can be illustrated by reference to the Inuit petition before the Inter-American Commission on Human Rights.[146] The petition was brought by the Inuit Circumpolar Conference on behalf of sixty-three named individuals and the Inuit people against the United States for breach of the American Declaration on Human Rights. According to the petition, through its acts and omissions, the United States, as the (then) world's major emitter of greenhouse gases, had contributed to climate change leading to a severe modification of the Arctic environment where the Inuit live and, thereby, to a violation of the human rights of the petitioners. The petition faced major obstacles in connection with both causality inquiries. With respect to the first inquiry, the petition referred to the correlation between the United States, estimated historical emissions (Section IV.D), resulting from its lack of regulatory action (Section V.D), and 30 per cent of the observed increase in temperature of approximately 0.6° Celsius in the period from 1850 and

[145] See Intergovernmental Panel for Climate Change (IPCC), *Climate Change 2013: The Physical Science Basis, Summary for Policymakers*, section B, p. 2, and section D.3, p. 15 stating that 'Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia . . . It is extremely likely that human influence has been the dominant cause of the observed warming since the mid-20th century' (the term 'extremely likely' indicates, in the language of the IPCC, a probability of no less than 95 per cent).

[146] See Inuit Circumpolar Conference, *Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States* (2005), available at: www.inuitcircumpolar.com/files/uploads/icc-files/FINALPetitionICC.pdf (last visited in January 2014). On this case see D. Shelton, 'Human Rights Violations and Climate Change: The Last Days of the Inuit People' (2010) 37 *Rutgers Law Record* 182.

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2000.[147] The petitioners acknowledged, however, that 'the actual correlation between cumulated emissions and temperature increase is subject to some uncertainty'.[148] And even if it were not, the causation theories used in general international law are not well adapted to substitute correlation for causation. Regarding the second causality inquiry, the petition identified in its Section IV.C several effects on the Arctic environment attributable to climate change, including changes in ice and snow conditions, thawing permafrost, species redistribution and increasingly unpredictable weather conditions. But no specific link between climate change, a specific weather event and a specific impairment of a human right could be established (or between an instance of regulatory deficiency and these other steps). The Inter-American Commission did not take position on the merits of the Inuit Petition.[149] It is therefore unclear whether the scientific evidence currently available on the impact of climate change on the Arctic environment would be sufficient for litigation purposes before an international human rights body. This said, the approach followed by the petition to formulate its claim provides a good illustration of the types of challenges faced by international human rights litigation in connection with climate change. Of note is the fact that whereas the first causality inquiry could be addressed scientifically (albeit through 'correlation'), the second one seemed far more difficult to bridge explicitly.

There are different ways to overcome this important obstacle. The first way is of a scientific nature. Instead of changing the legal requirements, one would have to wait until it is scientifically possible to attribute a specific weather event to climatic change. The Inter-Governmental Panel on Climate Change ('IPCC') has tried to gather scientific evidence in the last several years to do precisely this type of specific attribution[150] but, whereas this link may eventually become well established for some high profile weather events, it is unlikely that such will be the case for any extreme weather event that may arise in litigation.

The second way would be to establish a compensation fund based on the contributions of States and companies that emit large amounts of greenhouse gases. This solution consists, in fact, in overcoming the aforementioned obstacle in a legal manner by setting up a system that treats the emission of greenhouse gases on the same footing with some hazardous but tolerated activities, as is the case with nuclear energy production or the transportation of oil.[151] Such a question could potentially fall under the remit of the 'loss and damage'

[147] Inuit petition, *supra* n. 146, pp. 68–9. [148] *Ibid*., p. 69.

[149] A. C. Revkin, 'Inuit Climate Change Petition Rejected', *New York Times*, 16 December 2006, www.nytimes.com/2006/12/16/world/americas/16briefs-inuitcomplaint.html. But see HRC Res. 10/4, UN Doc. A/HRC/RES/10/4 (31 March 2009) (adopting a position on the issue); HRC Res. 7/23, UN Doc. A/HRC/RES/7/23 (28 March 2008) (deciding to study the issue).

[150] IPCC, *Managing the Risks of Extreme Weather Events and Disasters to Advance Climate Change Adaptation* (2011) (so-called 'SREX').

[151] See Chapter 8.

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negotiations conducted under the UNFCCC, although developed countries have strongly opposed attempts at framing this negotiation agenda from a 'compensation' perspective.[152]

A third possibility would be to overcome this obstacle legally by recognising a right to an 'ecologically balanced' or 'generally satisfactory' environment with the understanding that significant interference with the climatic system (first causality inquiry) may as such amount to a breach of such a right. This possibility has not been explored yet, and it may well remain unexplored until the implications of choosing the appropriate 'adjective' to characterise the right to an environment of a certain quality are well understood. Whereas such an approach would still pose several causality difficulties (e.g. what would amount to 'significant' interference with the climate? What is the meaning of 'ecologically balanced' or 'generally satisfactory' as an adjective?), they would arise at the level of the first causality inquiry, which is currently more manageable than the second one. Moreover, granting such a right to a collective human rights subject, such as an indigenous or tribal people, another minority or perhaps even an entire population, would facilitate the proof that the environment is not 'ecologically balanced' or 'generally satisfactory' for a group that has traditionally lived in a now melting area (such as the Inuit[153]) or in a low-lying island that may disappear as a result of sea level rise.[154] In the context of this book, this question can only be asked in the hope that it will nurture careful reflection as to the potential of adjusting such a right.

10.4 Conflicts

As noted in the introduction to this chapter, the conflicting dimension between human rights law and environmental law has been largely neglected by legal commentators and in international debates. The focus on synergies contrasts with the way the interactions between environmental norms and other bodies of law (e.g. trade law or investment law) have been studied, paying attention both to synergies and conflicts.[155] There is perhaps a larger scope for synergies between human rights and environmental protection than between

[152] See Warsaw international mechanism for loss and damage associated with climate change (Decision –/CP.19), which carefully avoids framing this issue from a compensation perspective.

[153] Inuit petition, *supra* n. 146, p. 70.

[154] See e.g. Kalinga Seneviratne, *Tuvalu Steps up Threat to Sue Australia, US*, 8 September 2002, available at: www.tuvaluislands.com/news/archived/2002/2002–09-10.htm (describing the efforts of Tuvalu to initiate a lawsuit against the United States and Australia. In this case, the lawsuit envisioned was of an inter-State nature, but the population of Tuvalu could be considered as a collective subject in a human rights context). The Maldives has also been very active in linking climate change to human rights. See J. Knox, 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477.

[155] See e.g. J. Pauwelyn, *Conflict of Norms in Public International Law* (Cambridge University Press, 2003); Viñuales, *supra* n. 4.

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such other bodies of law, but it is important not to take such synergies for granted. Our purpose here is to illustrate the types of conflicts that may arise and the analytical level at which they should be addressed to strike an appropriate balance between different interests.

In Chapters 1 and 3 of this book, we studied the historical emergence and evolution of international environmental law and the limited legal content of the concept of sustainable development. Sustainable development is said to consist of three mutually reinforcing pillars, namely environmental protection, economic development and social development. Yet, there is ample evidence that such pillars do not necessarily interact harmoniously. The tension between, on the one hand, economic growth and development (which has so far been largely driven by fossil fuels-based energy) and, on the other hand, environmental protection is a prominent feature of many environmental negotiations. The environment-development equation is perhaps the main source of tension underpinning the climate negotiations, to mention one example. There is, however, much more to development than mere economic considerations. The outcome document of the 2012 Rio Summit stressed indeed that 'poverty eradication is the greatest global challenge facing the world today and an indispensable requirement for sustainable development'.[156] It is difficult to disagree with this statement. One may at best note that environmental protection is also a need and, particularly, that protecting the environment is important among others to foster social inclusion and combat poverty. But the question of what to do when a policy to combat poverty (e.g. increasing access to energy in poor regions) has adverse environmental repercussions (e.g. emissions of greenhouse gases) is unlikely to vanish away. Our own view on this issue is that such questions cannot be answered in the abstract, i.e. at the level of the sustainable development concept, but only *in concreto*, whether for a specific policy or in a specific case. In what follows, we provide a few illustrations of this point.

In many cases, tensions between an environmental policy and social development considerations have been solved specifically through narrow and manageable exceptions. One illustration is provided by Annex B of the Stockholm Convention on Persistent Organic Pollutants[157] discussed in Chapter 7. The POP Convention banned the production and use of several substances, including the so-called 'dirty dozen', including the pesticide DDT the environmental effects of which had been targeted by Rachel Carson in her 1962 book *Silent Spring*.[158] However, DDT is not entirely banned. It is only restricted, which means that it can still be produced and used for one specific

[156] See 'The Future We Want', 11 September 2012, UN Doc. A/Res/66/288, para. 2. The eradication of poverty has been singled out as the first sustainable development goal ('SDG') of the post-2015 agenda.

[157] Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, 2256 UNTS 119 ('Stockholm Convention' or 'POP Convention').

[158] R. Carson, *Silent Spring* (Boston: Houghton Mifflin, 1962).

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purpose, namely to combat the vectors of malaria in accordance with the recommendations of the World Health Organisation. Indeed, Annex B Part I identifies as an 'acceptable purpose' for the production and use of DDT '[d]isease vector control in accordance with Part II of this Annex'. Annex B, Part II, states in turn that:

> Each Party that produces and/or uses DDT shall restrict such production and/or use for disease vector control in accordance with the World Health Organization recommendations and guidelines on the use of DDT and when locally safe, effective and affordable alternatives are not available to the Party in question.[159]

The WHO recommends such use only for 'indoor residual spraying' and 'until locally appropriate and cost-effective alternatives are available for a sustainable transition from DDT'.[160] Thus circumscribed, the negative environmental impact of DDT is tolerated in some areas for pragmatic human health reasons. A similar approach has been followed in the context of the Minamata Convention on Mercury[161] in connection with the use of thiomersal, a mercury-containing substance that is used to extend the lifespan of certain vaccines without the need for refrigeration, which facilitates their use in remote areas. During the negotiation of the Minamata Convention, the WHO supported such exclusion in accordance with its recommendations on the use of thiomersal, whereas the Coalition for Mercury-Free Drugs advocated for a phase-out.[162] Eventually, the delegates aligned with the WHO position. Thus, Annex A of the Convention explicitly excludes from control measures 'vaccines containing thiomersal as preservatives'.[163]

In other cases, potential tensions are not addressed in the text of the treaty and, as with other areas of international law, the adjudicatory bodies seized of the matter must balance different considerations and take a case-specific stance. There are several examples of this approach. In a case before the African Court of Human and Peoples' Rights, the Court granted provisional measures against the eviction decree issued by Kenyan authorities to force the Ogiek indigenous community to leave the Mau forest for environmental protection reasons.[164] A similar case arose before the African Commission in connection with an eviction order adopted by Kenya against the Endorois people to create a natural preserve. The Commission concluded that Kenya's actions amounted to a breach of the African Charter.[165] In an earlier case against Sweden, an individual excluded from the Sami community claimed

[159] POP Convention, *supra* n. 157, Annex B, Part II, para. 2.

[160] World Health Organization, *The Use of DDT in Malaria Vector Control. WHO Position Statement* (Geneva: WHO, 2011).

[161] Minamata Convention on Mercury, 10 October 2013, available at: www.mercuryconvention.org (last visited on 10 March 2014).

[162] See H. Selin, 'Global Environmental Law and Treaty-Making on Hazardous Substances: The Minamata Convention and Mercury Abatement' (2014) 14 *Global Environmental Politics* 1, 10.

[163] Minamata Convention, *supra* n. 161, Annex A, chapeau, letter (e).

[164] *African Commission* v. *Kenya, supra* n. 28. [165] *Endorois, supra* n. 63.

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that the State had violated his right to enjoy aspects of his culture (Article 27 of the ICCPR) by reason of a statute that deprived him from the right to conduct reindeer husbandry.[166] Sweden argued that the regulation of this activity was based, among other things, on ecological reasons.[167] The HRC sided with Sweden finding that the requirements imposed by the statute were overall reasonable and consistent with Article 27. Conflicts between conservation measures and the rights of indigenous and tribal peoples are a frequent occurrence in practice, although they seldom reach international courts and tribunals.[168]

Other courts have also addressed conflicts between human rights and environmental policy. In fact, part of our discussion of synergies also addressed tensions, particularly as regards the margin of appreciation left to States to restrict human rights for environmental policy purposes or to favour certain dimensions of a right (the right of indigenous or tribal peoples to their traditional land) over others (the private property right of the owner) in connection with the appropriate remedy (expropriation of the latter to restitute the land to the former). By way of illustration, in *Turgut* v. *Turkey*, the ECtHR recognised that 'economic imperatives and even some fundamental rights, such as the right to property, should not be accorded primacy against considerations of environmental protection'.[169] The Court concluded that when such is the case fair compensation must be paid but, in practice, this has meant less than the full value of the property.[170] Similarly, the ICtHR reasoned in *Sawhoyamaxa* v. *Paraguay* that '[t]he restitution of traditional lands . . . is the reparation measure that best complies with the *restitutio in integrum* principle'.[171] The stances taken by permanent human rights courts with respect to conflicts between environmental protection and human rights are also important for the growing body of investment cases where frictions between environmental policies and investment disciplines arise.[172] Indeed, investment disciplines and human rights have a common origin and share some of their content.[173] As a result, tensions between environmental protection and foreign investment protection can also be seen as a manifestation of the conflicting dimension between human rights and environmental law.

These examples suggest that there is a significant amount of material falling under what we referred to, in Section 10.3 above, as issues 4 to 6, relating to

166 *Kitok* v. *Sweden, supra* n. 35. 167 *Ibid*., para. 9.5. 168 See *supra* n. 3.
169 *Turgut* v. *Turkey, supra* n. 47, para. 90 (unofficial translation of the French text).
170 *Ibid*., Judgment – Just Satisfaction (13 October 2009), para 14. On the wider implications of this case, see Viñuales, *supra* n. 4, p. 297.
171 *Sawhoyamaxa* v. *Paraguay, supra* n. 55, para 210; *Yakye Axa* v. *Paraguay, supra* n. 55, para. 148.
172 See *infra* Chapter 12.
173 See P.-M. Dupuy and J. E. Viñuales, 'Human Rights and Investment Disciplines: Integration in Progress', in M. Bungenberg, J. Griebel, S. Hobe and A. Reinisch (eds.), *International Investment Law* (Munich/London: C.H. Beck/Hart/Nomos, forthcoming 2015), Chapter 77.

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tensions between human rights and environmental protection. This topic would call for sustained analysis not only to assess its overall importance but also to understand how such tensions can be addressed. In the context of this book, we can only flag this need in the hope it will steer further research.

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