

**THE INTERNATIONAL HUMAN RIGHT TO THE ENVIRONMENT: THE AARHUS CONVENTION AND  
BEYOND.**

*by*

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**A. INTRODUCTION AND BACKGROUND**

The rising danger of environmental degradation and the affect it has on human life and health has empowered a movement over the last half-century to acknowledge some form of enforceable environmental rights. This movement however has experience a variety of problems including a lack of international recognition and a lack of uniformity, which has prevented the international community from taking a common, unified approach to recognizing such a right. Nevertheless there have been certain regional initiatives such as the Aarhus Convention on Access to information, Public Participation, and Access to Justice as well as many national movements, which have contributed to the creation of a human right to the environment.

An important question, which still remains, is the question of just how to characterize environmental rights. There are at least four, not necessarily exclusive, views. The first, and perhaps the most prevalent is the approach that views environmental rights as a necessary pre-condition to the attainment of other fundamental human rights such as the right to life and

health.<sup>1</sup> This approach has been one of the most instrumental to environmental preservation because it has allowed many court systems to protect the environment through vindication of established fundamental human rights. However, there are limits to this approach. Where there aren't direct affects to human well-being, this approach is powerless to protect the environment.<sup>2</sup>

In contrast, the second approach avoids the problem of anthropocentrism because it takes the view that the environment is intrinsically valuable.<sup>3</sup> Therefore, even when environmental degradation does not affect human health, it still merits protection. Nevertheless, this view is not separate from the human element because protection of the environment is only justified because humans have a right to enjoy the environment in a manner comparable to other social and economic rights. Therefore the environmental protection is still subject to tradeoffs of competing socio-economic rights such as economic development.<sup>4</sup>

While the first two views focus more on the individual, the third view takes the approach that a right to the environment is a collective right due to communities of people. This approach empowers local communities to decide how to value and manage their own environmental resources.<sup>5</sup> It differs from the first two approaches because, while the first two purport to create a global, objective baseline of the value of the environment, this third view allows communities to subjectively decide the value of environmental protection in a manner that is relevant to local conditions. The problem with this approach is that values differ across populations, and since the environment is a cross-boundary issue, the practices of one community can have a negative impact on nearby communities that have different needs from the environment.

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<sup>1</sup> Alan Boyle, Human Rights or Environmental Rights? A reassessment, *18 Fordham Envt'l Law Rev.* 471, 472 (2007).

<sup>2</sup> Dinah Shelton, Human Rights and the Environment: What specific Environmental Rights have Been Recognized?, *35 Denv. J. Int'l L. & Pol'y* 129, 131 (2006).

<sup>3</sup> Boyle, *supra* note 1, at 472.

<sup>4</sup> *Id.* at 471.

<sup>5</sup> *Id.* at 472.

The fourth view stands in contrast from the other three human rights centered approaches. Rather than focusing on the human right to the environment, this view suggests that the environment should have its own set of rights because it has a right to exist in and of itself.<sup>6</sup> In certain respects, this view recognizes the environment as a quasi-person, entitled to protection from harm. From an ethical point of view, it is the responsibility of humanity to take into account the rights of nature when exercising human rights.<sup>7</sup> The problem with this point of view is that it would be difficult for the international community to ascertain exactly what level of protection should be afforded to the environment and especially when it comes into competition with human rights.

Different environmental rights documents have taken different and sometimes overlapping approaches, with the human rights approach – environmental protection for the sake of safeguarding other human rights – appearing to be the most successful. Nevertheless there is no evidence that the international community has recognized a substantive right to the environment as of yet, regardless of the approach.<sup>8</sup> There are various national and regional developments, especially in Europe, which have made great headway in the development of substantive international environmental rights. However, the majority of progress has been made through the creation of procedural rights, which are enshrined in the Aarhus Convention, such as access to information, public participation, and access to justice in matters relating to the environment.<sup>9</sup>

In order to understand the current state of environmental rights, this paper will begin by discussing the historical development of these rights starting with their origin in human rights

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<sup>6</sup> Shelton, *supra* note 2, at 132.

<sup>7</sup> *Id.*

<sup>8</sup> Ole W. Pedersen, European Environmental Human Rights and Environmental Rights: A long time Coming?, 21 *Geo. Int'l Envtl. L. Rev.* 73, 74 (2008).

<sup>9</sup> *Id.* at 75.

law. This historical overview will reveal the substantive environmental rights that both regional and international communities have accepted. Subsequently, this paper will discuss the extent and limitations of procedural rights that the international community has recognized, with a special focus on the Aarhus Convention. Moreover, this paper will examine how procedural rights have aided in democratizing international environmental law, and how this more democratic system has consequently paved the way for more substantive environmental rights.

## B. DEVELOPMENT OF ENVIRONMENTAL RIGHTS IN INTERNATIONAL LAW

Although the Universal Declaration of Human Rights does not mention environmental rights directly, it is a vital document because it creates a baseline of fundamental human rights that the international community must enforce.<sup>10</sup> The environmental community in turn has been able to use the rights guaranteed under the declaration to enforce environmental concerns. Article 3 of the declaration states that “everyone has a right to life, liberty and security of person.”<sup>11</sup> However, without an adequate environment, the right to life is difficult to exercise. In fact, Chris Weeramantry, the vice-president of the International Court of Justice, from 1997 – 2000, noted that protection of the environment is indispensable for the exercise of many fundamental rights such as the right to life.<sup>12</sup>

The Universal Declaration also recognized certain rights that are relevant for the discussion of public participation and access to justice. Article 21 for example affirms the right of everyone to take part in the governance of his or her country.<sup>13</sup> Article 19 includes the right to receive and impart information, while Article 8 asserts that individuals have a right to seek redress in a competent court when governments or individuals violate rights guaranteed by

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<sup>10</sup> United Nations, Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (Dec. 12, 1948).

<sup>11</sup> *Id.* at art. 3.

<sup>12</sup> Pederson, *supra* note 8, at 75.

<sup>13</sup> Universal Declaration, *supra* note 10, at art. 21.

constitutions or laws.<sup>14</sup> These articles, ensemble, form the foundation for the procedural rights taken up by the Aarhus convention and other multilateral environmental agreements (MEAs).

The first international instrument to recognize the right to a healthy environment, albeit as a derivative right of the human right to life, was the United Nations Stockholm Declaration of 1972.<sup>15</sup> The declaration states that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”<sup>16</sup> This declaration not only recognizes the environment as necessary for human life, but also hints at sustainability, therefore superseding the focus on individual rights and treating the environment as a collective right. This can also be a limitation however, since under this collective approach, individuals might not be able to claim violations of personal environmental rights. Moreover, the declaration is limited in that it recognizes environmental rights only as derivative of the right to life. Thus, unless degradation of the environment seriously threatens human life, the environmental community cannot invoke the Stockholm language to protect the environment.<sup>17</sup>

The language of principle 1 of the 1987 World Commission on Environment and Development (WCED), while still referring to the environment as a derivative right, contains less stringent language. The WCED recognizes that “all human beings have a fundamental right to an environment adequate for their health and well being.”<sup>18</sup> Arguably the threshold for a

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<sup>14</sup> *Id.* at art. 8 and 19.

<sup>15</sup> Barry E. Hill, Steve Wolfson, and Nicholas Targ, Human Rights and the Environment: A Synopsis and Some Predictions, *16 Geo. Int'l Envtl. L. Rev.* 359, 375 (2004).

<sup>16</sup> Stockholm Dec'n on the Human Env't, Princ. 1, U.N. Doc. A/CoNF.48/14/Rev. 1 (June 16, 1972); see Boyle, *supra* note 1, at 473.

<sup>17</sup> Hill, *supra* note 15, at 375.

<sup>18</sup> World Comm'n on Env't and Dev., *Our Common Future Report of the WCED*, P 1, U.N. Doc. A/42/427 (Mar. 20, 1987); see Pederson, *supra* note 8, at 77.

violation of the right recognized in the WCED is lower than in the Stockholm Declaration since it recognizes the right in relation to human health rather than human life. Although this seems like a positive step forward, the language remained in its draft format and thus created no legal right.<sup>19</sup>

In the negotiations of the 1992 Rio Declaration, the environmental community attempted to include language similar to that found in the WCED, which would have recognized a human right to the environment. Although the Rio Declaration provides a nexus between the environment and human health, it specifically avoids using any rights language.<sup>20</sup> Instead the declaration simply notes that “human beings are...entitled to a healthy and productive life in harmony with nature.”<sup>21</sup> Although weak on a substantive right to the environment, in principle 10, the Rio Declaration recalls the procedural rights from the Universal Declaration of Human Rights and places them in an environmental context. According to the Rio Declaration, individuals have the right to access information about the environment, especially in hazardous circumstances, and to participate in decisions affecting the environment. Furthermore, States are obligated to provide access to justice.<sup>22</sup>

While silence on substantive rights in the Rio Declaration was a blow to the environmental rights movement, the 1994 UN Draft Declaration of Principles on Human Rights and the Environment inspired further progress. The declaration not only acknowledged that there was a growing universal trend to recognize environmental rights, but also stated that “all persons

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<sup>19</sup> Pederson, *supra* note 8, at 77.

<sup>20</sup> Hill, *supra* note 15, at 376.

<sup>21</sup> U.N Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc. A/CONF. 151/5/Rev. 1 (June 3-14, 1992), 31 *I.L.M.* 874.

<sup>22</sup> Shelton, *supra* note 2, at 133.

have the right to a secure, healthy and ecologically sound environment.”<sup>23</sup> Just as with the WCED draft language, the language in this declaration was never made legally binding, perhaps because of the intrinsic difficulty of applying such language throughout different cultures and environments.<sup>24</sup> Nevertheless, the language was a sign that a human right to the environment was a principle at the forefront of international dialogue.

### C. REGIONAL DEVELOPMENTS

Although the international community has made progress towards recognizing a human right to the environment, much of this work has been done through various regional instruments. One such instrument is the 1981 African Charter on Human and People’s Rights, which states that “all peoples shall have the right to a general satisfactory environment favorable to their development.”<sup>25</sup> While the African Charter seems to establish a clear substantive human right to the environment, it is limited in some respects by its language. The charter states that the right is owed to “all peoples,” which suggests that it is a collective rather than individual right.<sup>26</sup> Thus, disproportionate impact amongst individuals goes unresolved. Arguably, as long as the environment is satisfactory per the community as a whole, an individual does not have a cause of action for personal grievances due to environmental degradation. Furthermore, the language of the charter couches environmental rights within the context of development. Accordingly, the charter appears to restrict environmental claims to situations where degradation negatively impacts development.<sup>27</sup>

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<sup>23</sup> Draft Declaration of Principles on Human Rights and the Environment, U.N. Hum. Rts. Comm. (May 16, 1994); see Pedersen, *supra* note 8, at 78.

<sup>24</sup> Hill, *supra* note 15, at 376.

<sup>25</sup> African Charter on Human and Peoples’ Rights, art. 21, OAU Doc. CAB/LEG/67/3 Rev. 5, 21 *I.L.M.*58 (June 27, 1981); See Pederson, *supra* note 8 at 79.

<sup>26</sup> Hill, *supra* note 15, at 379.

<sup>27</sup> *Id.*

Regardless of these limitations, the African Commission on Human and Peoples Rights has interpreted the African Charter in a manner that imposes positive obligations on regional governments. States are required to employ reasonable efforts to reduce environmental degradation, encourage conservations, foster sustainable development, and facilitate access to natural resources. According to the commission, governments are also required to promote impact studies and allow people to access information and participate in environmental decisions, especially when such persons will be exposed to hazardous environment.<sup>28</sup> Thus, the African Charter not only purports to create substantial rights, but through the decisions of the commission, has also evolved a procedural component.

Another regional instrument that has addressed the human right to the environment is the San Salvador Protocol to the American Convention on Human Rights. The protocol asserts that “everyone shall have the right to live in a healthy environment and to have access to basic public services.”<sup>29</sup> The protocol also obliges the parties to “promote the protection, preservation, and improvement of the environment.”<sup>30</sup> Unlike the African Charter, this protocol focuses on individual rights to the environment rather than community rights. Furthermore, the protocol avoids language that restricts its application to situations implicating development.<sup>31</sup> The potential reach of the San Salvador Protocol is thus broader than the African Charter and presumably prevents disproportionate impact since every individual has a right to the environment independent of community rights. It is also worth it to note that the language of the protocol appears to supersede the view that environmental rights are only invoked when they harm human health or life. Although the focus is still on environmental rights as they relate to

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<sup>28</sup> Boyle, *supra* note 1, at 474.

<sup>29</sup> Additional Protocol to the American Convention on Human Rights, Nov. 17, 1988, art. 11, 28 *I.L.M.* 156.

<sup>30</sup> *Id.*

<sup>31</sup> Hill, *supra* note 15, at 379.

human rights, the language recalls the view that the environment is intrinsically valuable as a social and political right. All things considered, the San Salvador Protocol has greatly contributed to international efforts to create a substantive right to the environment.

Even though regional developments in Africa and the Americas have been of great importance for international human and environmental rights, European efforts come second to none. In 1950, the European community set up the European Convention on Human Rights (ECHR) in order to ensure respect of certain fundamental human rights and freedoms. Consequently, the European community set up the European Court of Human Rights in 1959 as the adjudicating body for these rights.<sup>32</sup> While the convention is silent on the issue of environmental rights, and was not intended to protect or preserve the environment, in effect, the court has employed various articles of the convention to emphasize the importance of environmental protection in the exercise of fundamental rights guaranteed by the convention.<sup>33</sup>

Of the many articles found in the ECHR, articles 6, 8, and 10 have been the most instrumental in European dialogue on environmental rights. Article 10 asserts that individuals have the “freedom to... hold opinions, and to receive... information without interference by public authority.”<sup>34</sup> However, the court and language of the ECHR has limited Article 10 in a number of ways. First, governments do not have a positive obligation to ensure that individuals receive the relevant information. States merely have to abstain from interfering with acquisition of information that is freely disseminated.<sup>35</sup> Second, the right to receive such information is restricted to people whose rights are personally affected by state or third party actions.<sup>36</sup>

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<sup>32</sup> Pederson, *supra* note 8, at 84.

<sup>33</sup> *Id.*

<sup>34</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

<sup>35</sup> Shelton, *supra* note 2, at 138.

<sup>36</sup> Boyle, *supra* note 1, at 489.

Furthermore, governments can circumscribe the freedom to access information because the ECHR makes article 10 subject national law and other state interests, such as national security.<sup>37</sup> As a result of these limitations, the courts have often relied on other ECHR articles to promote environmental preservation.

Article 6 of the ECHR is one such article. It deals with access to justice and, as such, guarantees access to public tribunals for the assessment of rights and obligations. However, article 6 is not available to individuals who wish to overrule legislative enactments.<sup>38</sup> Thus, challenges against a sovereign because of environmental degradation are prohibited, unless the sovereign has created a substantive right to the environment.

Article 8 of the ECHR, unlike the procedural rights focus of article 6 and 10, gives individuals a substantive right to private and family life. It is also the article that the court has relied on most consistently for the protection of the environment. The language of the article 8 states that “[e]veryone has the right to respect for his private and family life, his home and correspondence.”<sup>39</sup> The court has recognized that the environment is frequently a precondition to the enjoyment of this right, and has found adverse environmental conditions a sufficient cause of article 8 violations.<sup>40</sup> Although it is a great instrument for environmental protection, this article is limited because environmental protection only comes into focus when the state or third parties interfere with family life. Furthermore, article 8 provides that the state may interfere with the right to family life to the extent that such interference is proportionately balanced with the common well being of society.<sup>41</sup>

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<sup>37</sup> ECHR, *supra* note 34, at art. 10.

<sup>38</sup> Shelton, *supra* note 15, at 142.

<sup>39</sup> ECHR, *supra* note 34, at art. 8.

<sup>40</sup> Pederson, *supra* note 8, at 87.

<sup>41</sup> ECHR, *supra* note 34, at art. 8.

The scope and reach of these articles is best understood within the context of the court's developing case law. In *Powell v. United Kingdom*, the court dealt with having to balance environmental concerns with the economic benefit of the community at large.<sup>42</sup> In this case, the applicants claimed that the government had violated article 8 of the ECHR because the noise pollution emanated by overhead airplane routes amounted to interference with private and family life.<sup>43</sup> The court found that while the applicants had been adversely affected by the noise, the U.K. government had correctly balanced the interest of the applicants with the economic benefit to the country. Furthermore, the U.K. had taken adequate steps to ensure that the applicants did not experience an unreasonable burden by mitigating the effects of the noise pollution and allowing the residents of the area to relocate.<sup>44</sup> The court also noted that the United Kingdom was entitled to deference of its policy decision regarding how best to balance the applicants concerns and the country's economy.<sup>45</sup> This case highlights the weakness of article 8 to address individual environmental concerns since it is relative to national policy concerns.

Nevertheless, the court has successfully applied Article 8 to cases dealing with environmental degradation when governments have failed to give adequate weight to an individual's right to private and family life. *Lopez Ostra v. Spain* was the first case where the court found that a state had violated the ECHR as a result of environmental degradation.<sup>46</sup> In this case, the applicant and her family lived near a leather tannery treating plant. The plant had not obtained the proper licenses, and during its operations, had malfunctioned and allowed noxious fumes to pollute the air. As result, the applicant and her daughter had experience serious health

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<sup>42</sup> See *Powell v. United Kingdom*, 172 Eur. Ct. H.R. (ser A.) para. 41 (1990).

<sup>43</sup> Pederson, supra, note 8, at 84.

<sup>44</sup> *Powell*, supra note 42, at para. 44.

<sup>45</sup> *Id.*

<sup>46</sup> Pederson, supra note 8, at 86.

problems.<sup>47</sup> The government paid for residents of the area to relocate, but allowed the plant to continue operating.<sup>48</sup> The court applied the same “margin of appreciation” balancing test that the court had applied in *Powell*.<sup>49</sup> The court found that in while Spain was due a certain level of deference to make policy decisions, in this case the government had not struck a fair balance between the applicant’s right to private and family life, and the town’s economic welfare.<sup>50</sup> More importantly, the court noted that a state could violate article 8 by polluting the environment in a manner that interferes with enjoyment of the home and family life, even in the absence of a serious threat to the applicant’s health.<sup>51</sup> As such, the court acknowledges that, in some instances, it is impossible to ignore environmental preservation because it is often a precondition to the exercise of ECHR guarantees.

As noted earlier, the court has also employed article 6 of the ECHR to prevent environmental degradation. In *Zander v. Sweden*,<sup>52</sup> the government denied review of a decision that allowed a waste treatment plant to continue operations despite protests by residents that the pollution levels in the local well water were toxic.<sup>53</sup> The residents pointed to Swedish legislation, which required persons engaged in hazardous environmental activity to mitigate its effects on local communities.<sup>54</sup> The court ruled that the Swedish law in question was directly applicable. Thus Sweden had violated article 6 of the ECHR by denying review of the administrative decision that licensed the unlawful activity.<sup>55</sup> Since Sweden had created a substantive right

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<sup>47</sup> *Lopez Ostra v. Spain*, 303 Eur. Ct. H.R. (ser. A) at paras. 6-9 (1995).

<sup>48</sup> *Id.*

<sup>49</sup> Shelton, supra note 2, at 158.

<sup>50</sup> *Lopez Ostra*, supra note 47, at para. 58.

<sup>51</sup> *Id.* at para. 51

<sup>52</sup> *Zander v. Sweden*, 279 Eur. Ct. H.R. (ser. A) 33 (1994).

<sup>53</sup> Shelton, supra note 2, at 142.

<sup>54</sup> *Zander*, supra note 52, at para. 12.

<sup>55</sup> *Id.* at paras. 24, 29.

regarding the environment, it was also bound to provide applicants with access to justice under article 6.

In *Guerra and Others v. Italy*,<sup>56</sup> the court considered the freedom of access to information in article 10 of the ECHR as discussed supra. In that instance, the applicant complained that the authorities had failed to inform the residents of the area about the risks to health and life resulting from operations of a nearby chemical plant, which had, on previous occasions, exploded and caused health problems.<sup>57</sup> The court in that case found that the duty to disclose the information did not come from article 10 of the ECHR since the article did not impose positive obligations. Instead the duty to provide information relating to environmental hazards stemmed from the risk of violating the right to health, life, and from article 8's right to privacy and family life.<sup>58</sup> Thus, the duty imposed by article 8 is often more extensive than article 10's right to access information since article 8 requires governments to inform individuals that might be affected by environmental hazards.<sup>59</sup>

In addition to using article 8 as a vehicle for access to information, the court has also used the right to privacy and family life as a means to create a limited right to participate in decisions regarding the environment.<sup>60</sup> The court, in *Taskin v Turkey*,<sup>61</sup> found that Turkey had violated article 8 of the ECHR by allowing gold mine operations to continue after a domestic court had ruled that such operations were against domestic law because they interfered with health and life. Thus, Turkey officials had not struck a fair balance between individual rights and the country's

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<sup>56</sup> *Guerra and Others v. Italy*, 26 Eur. Ct. H.R. 212 (1999).

<sup>57</sup> Shelton, supra note 2, at 137.

<sup>58</sup> *Guerra*, supra note 56, at paras. 41, 46.

<sup>59</sup> Boyle, supra note 1, at 491.

<sup>60</sup> Pederson, supra note 8, at 88.

<sup>61</sup> *Taskin v. Turkey*, 2004-X Eur. Ct. H.R. 145 (2005).

economic well-being as dictated by article 8.<sup>62</sup> The court found that individuals affected by environmental decisions must be able to appeal decisions when it is clear that their interests and comments have not been taken into account.<sup>63</sup> Accordingly, in some instances, public participation will be required for adherence with the right to family and private life under article 8 of the ECHR.<sup>64</sup> While the court continues to avoid setting precedent that would create a substantive right to the environment, the court often relies on procedural rights to achieve the same goal.

Although the court has used article 8 to enforce both substantive and procedural rights in what seems like a broad manner, the court has found limitations in article 8's application. In *Kyrtatos v. Greece*,<sup>65</sup> the applicant alleged that the erection of a building on a swamp near her property would deteriorate the scenic beauty and cause a lot of noise and light pollution, thus violating her article 8 right to private and family life.<sup>66</sup> However, the court concluded that while deterioration of the environment could violate article 8 rights in some instances, such degradation wasn't enough. The court required harmful effects to the applicant's private or family sphere in order to reach the conclusion that the environmental conditions had severely affected article 8 rights.<sup>67</sup>

An example of such severe interference with ECHR guarantees occurred in *Oneriyildiz v. Turkey*,<sup>68</sup> the first environmental case in the European Court of Human Rights dealing with loss of life.<sup>69</sup> In this case, the applicants claimed that turkey had violated their right to life and

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<sup>62</sup> Boyle, supra note 1, at 497.

<sup>63</sup> Taskin, supra note 61, at para. 115.

<sup>64</sup> Boyle, supra note 1, at 496

<sup>65</sup> *Kyrtatos v. Greece*, 40 Eur. H.R. Rep. 390 (2005).

<sup>66</sup> Pederson, supra note 8, at 89.

<sup>67</sup> *Kyrtatos*, supra note 65, at para. 52.

<sup>68</sup> *Oneriyildiz v. Turkey*, 2004-XII Eur. Ct. H.R. 657 (2004).

<sup>69</sup> Shelton, supra, note 2, at 148.

property by permitting the operation of a waste treatment plant that had been deemed a major health risk by local authorities. The applicants claimed that the plant's methane explosion had caused the death of close relatives and the destruction of familial property.<sup>70</sup> The court found Turkey liable, and noted that the right to life provisions of the ECHR not only creates a negative obligation preventing the state from taking lives, but also imposes a positive obligation to take necessary steps to prevent loss of life. Furthermore, violations of the right to life can stem from environmental conditions that seriously threaten life.<sup>71</sup>

While the above ECHR case law is encouraging in that it shows the willingness of European courts to make findings of law that greatly effect environmental preservation, the court's approach is not so far reaching as to create substantive environmental rights. In these cases, the courts have simply been willing to acknowledge that environmental conditions are preconditions to the exercise of existing fundamental rights. This approach has consequently led the court to recognize various procedural environmental rights for the sole purpose of protecting established human rights. Nevertheless, as ECHR case law continues to develop, a substantive right to the environment might develop from customary procedural rights.

Similarly, in the United States, the federal government has not yet created a substantive right to the environment, but through the Environmental Protection Agency (EPA), it has contributed to the environmental rights movement by acknowledging that procedural rights are a vital component of environmental justice. The EPA states that Environmental justice requires fair treatment and meaningful involvement of all peoples in relation to matters concerning environmental policy.<sup>72</sup> Accordingly, fair treatment requires that no member of the community

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<sup>70</sup> *Id.*

<sup>71</sup> Oneryildiz, *supra* note 68, at paras. 62, 64.

<sup>72</sup> U.S. Environmental Protection Agency, Toolkit for Assessing Potential Allegations of Environmental Injustice 9, *available at* [www.epa.gov/compliance/ej/resources/policy/ej-toolkit.pdf](http://www.epa.gov/compliance/ej/resources/policy/ej-toolkit.pdf), (Nov. 3, 2004).

bear a disproportionate impact from environmental policy decisions.<sup>73</sup> Furthermore, meaningful involvement requires not only that those potentially affected by environmental degradation are heard, but that officials actively seek out and consider the concerns of these people in the decision making process.<sup>74</sup> Unfortunately, these statements do little to guarantee a specific outcome regarding the environment policy decisions. The EPA toolkit only acknowledges a right for all peoples to be heard and to bear an equal burden of environmental degradation.

As such, while there are laws regarding the environment in the US, such as the Clean Air Act and the Safe Drinking Water Act, these laws have more to do with policy decisions rather than respect for substantive environmental rights.<sup>75</sup> Consequently, as of yet, there hasn't been any environmental justice litigation at the federal level.<sup>76</sup> Nevertheless, the EPA is a vital instrument for two reasons. In the US, the EPA may be the most obvious vehicle through which environmental rights might be vindicated since the agency has been, through federal executive orders, charged with incorporating environmental justice as part of its environmental protection mission.<sup>77</sup> Since the EPA has such an instrumental role in the US environmental policy, and since the US has such far-reaching influence on the international community, the activities of the EPA have the potential to affect international customary law regarding environmental rights.

#### D. THE AARHUS CONVENTION AND THE PROTOCOL ON PRTRs.

While both regional and international communities have created various multilateral environmental agreements (MEAs) to address the human right to the environment, one of the most innovative has been the Aarhus Convention on Access to Information, Public Participation

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *See* Hill, *supra* note 15, at 367-73.

<sup>76</sup> *Id.* at 371.

<sup>77</sup> *Id.*

and Access to Justice.<sup>78</sup> The treaty was signed in Aarhus, Denmark on June 25, 1998 under the auspices of the United Nations Economic Commission for Europe (UNECE) by thirty-five states and the European Community.<sup>79</sup> The convention entered into force on October 30, 2001 when the Depository received the sixteenth ratification. As of August 19, 2010, there are 44 parties to the Aarhus Convention including the European Union.<sup>80</sup>

The Aarhus Convention is not only remarkable for recognizing individual procedural rights, but is also well known for incorporating these rights in all aspects of the convention. For example, in the spirit of public participation, state participants to the convention agreed to incorporate civil society in the negotiation process. As such, nongovernmental organizations (NGOs) were allowed to sit at the negotiating table and were given their own identification “flag.”<sup>81</sup> Furthermore, the delegates to the convention gave NGOs the right to request the floor and share the opinions of the public during the entire negotiation process. NGOs even offered some draft language, which several delegates accepted as part of the convention.<sup>82</sup> This level of public participation in the negotiation process was an important indication of the seriousness of the rights that the parties to the convention were willing to bestow on individuals.

While public participation in the negotiation process was a unique feature amongst other MEAs, the most groundbreaking component of the convention is that it is the first multilateral

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<sup>78</sup> Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, June 25, 1998, 38 *I.L.M.* 517 (entered into force Oct. 30, 2001) [hereinafter Aarhus Convention].

<sup>79</sup> Shelton, *supra* note 2, at 133.

<sup>80</sup> See U.N. Economic Commission for Europe, Aarhus Convention, Status of Ratification, <http://www.unece.org/env/pp/ratification.htm> (last visited Nov. 15, 2010).

<sup>81</sup> Svitlana Kravchenko, The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements, 18 *Colo. J. Int'l Envtl. L. & Pol'y* 1, 7 (2007).

<sup>82</sup> *Id.* at 8.

instrument to recognize a human right to the environment.<sup>83</sup> The convention recognizes that “every person has a right to live in an environment adequate to his health and well-being.”<sup>84</sup> In order to achieve this goal, and to ensure the right of future and present generations to an adequate environment, the parties to the convention are required to provide the rights of access to information, public participation in the decision-making process, and access to justice.<sup>85</sup> Thus, the convention not only equips individuals with the tools to enforce environmental protection, but also creates reciprocal obligations on contracting states to facilitate such efforts. In this respect, the convention is also unique since it is the first multilateral instrument to focus exclusively on the obligations that nations have with respect to their citizens.<sup>86</sup> In order ensure compliance with these obligations, the Aarhus convention also contains an innovative compliance mechanism that attempts to dilute political interests so that guaranteed rights under the convention are not eroded.

The guaranteed rights under the Aarhus Convention are grouped into the three distinct, yet intertwined principles of article 1: the right of access to information, public participation, and access to justice. The first of these rights – access to information – is laid out in articles 4 and 5 of the convention.<sup>87</sup> Article 4 obliges public officials to release information regarding the environment, upon request from its citizens, without the person having to state an interest.<sup>88</sup> This article applies to requests by the public in general, which according to article 2, includes both

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<sup>83</sup> Jacqueline Peel, Giving the Public a Voice in the Protection of the Global Environment: Avenues for Participation by NGOs in Dispute Resolution at the European Court of Justice and World Trade Organization, *12 Colo. J. Int'l Envtl. L. & Pol'y* 47, 55 (2001).

<sup>84</sup> Aarhus Convention, *supra* note 78, at preamble.

<sup>85</sup> *Id.* at art. 1.

<sup>86</sup> Pederson, *supra* note 8, at 93.

<sup>87</sup> *Id.* at 94.

<sup>88</sup> Aarhus Convention, *supra* note 78, at art. 4.

individuals and NGOs in accordance with national legislation.<sup>89</sup> The public authority must make information available to the individual in a timely manner, which usually means within a month or two after the request. The convention does allow withholding of information, but only in circumstances where national security or confidentiality of information is protected by law. Such denials of information, as allowed under the convention, are interpreted restrictively and should be done so in a manner that permits the dissemination of remaining non-protected environmental information.<sup>90</sup>

Article 5 requires states to collect and release environmental information. Not only do public authorities have to possess and update this information, but they also have to disseminate the information to the public in circumstances where there is a threat to human health or the environment.<sup>91</sup> The idea is that in these cases, the public should have all the required knowledge necessary to make judgments that will affect their safety. As such, the convention also requires that officials make environmental information available in a transparent manner and that such information eventually is available online. Along the same lines, each party is required to publish and release a report on the state of the environment at least once every three or four years, which is to include information on the quality of the environment and any potential threats.<sup>92</sup>

While the first set of rights found in the Aarhus convention focuses on the right of individuals to be educated on environmental matters, the second set of rights – public participation - enables citizens to affect changes in environmental policy. Article 6, 7, and 8 of

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<sup>89</sup> *Id.* at art. 2.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at art. 5.

<sup>92</sup> *Id.*

the convention guarantees both the right to be heard, and right to affect change.<sup>93</sup> Article 6 provides for public participation in the decision-making process of specific activities including, but not limited to, mineral oil and gas refineries, mineral industries, chemical productions, and waste management projects.<sup>94</sup> Unlike the rights afforded in articles 4 and 5, article 6 is limited to the public concerned. According to article 2(5), the public concerned includes those that are affected or likely to be impacted by the environmental decision. This includes NGOs that work to promote environmental protection.<sup>95</sup> Public participation under article 6 includes the right to receive notice of the activity in a timely matter, to be informed of the possible effects of the activity, to submit opinions and comments, and to be informed of the decision. Furthermore, each party is required to give due regard to the outcome of the public participation.<sup>96</sup>

Article 7 has many of the same requirements as article 6, except that it applies specifically to public participation in plans, programs, and policies that require a balancing of environmental matters. However, the obligations under article 7 are less strict in that they allow the relevant public officials to decide who can participate in this type of activity, albeit, while taking into account the spirit of public participation and transparency that is central to the convention.<sup>97</sup> Article 8 of the convention is even less effective than article 7.<sup>98</sup> Article 8 only requires public authorities to “strive to promote effective public participation...during the preparation... of executive regulations...that have a significant effect on the environment.”<sup>99</sup> The authorities are only encouraged, not obliged, to make drafts available and to incorporate public opinions into executive and legislative regulations.

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<sup>93</sup> Pederson, *supra* note 8 at 93.

<sup>94</sup> Aarhus Convention, *supra* note 78, at art. 6.

<sup>95</sup> Pederson, *supra* note 8, at 95.

<sup>96</sup> Aarhus Convention, *supra* note 78, at art. 6.

<sup>97</sup> *Id.* at art. 7.

<sup>98</sup> Pederson, *supra* note 8, at 96.

<sup>99</sup> Aarhus Convention, *supra* note 78, at art. 8.

The right to access information, the third set of rights guaranteed under the Aarhus Convention, is set out in article 9. This article gives individuals the right to review procedures by a court of law or other impartial body, within the framework of a party's national law, for violation of access to information, public participation, or environmental regulations in general.<sup>100</sup> Article 9(1), which allows individuals to seek review of denials of access to information, applies to any person who thinks that his or her right was violated.<sup>101</sup> On the other hand, article 9(2), which deals with review of public participation, is more limited in that it applies only to members of the public who have a sufficient interest in the matter or whose rights under national procedural law have been violated. Moreover, applicable national law is what determines sufficient interest and impairment of rights.<sup>102</sup> This qualification has the potential to weaken the right of access to justice because recognition of standing is in the hands of the violating party.

Nevertheless, the convention states that members to the convention must keep in mind the convention's focus on public participation when providing access to justice.<sup>103</sup> It is for this reason that NGOs also have standing to bring claims of article 6 violations. However, this standing is also contingent on national law requirements imposed on NGOs.<sup>104</sup> The same criteria apply to claims under article 9(3), which relates to the review of violations of national environmental laws. Only members that qualify under national law may bring about such claims.<sup>105</sup> While the application of the Aarhus convention is in some respects limited by national law requirements under article 9, the right of access to justice, coupled with the right of access to

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<sup>100</sup> *Id.* at art. 9.

<sup>101</sup> *Id.* at art. 9(2).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at art. 9(3).

information and public participation, is a powerful tool that individuals may use to protect environmental interests.

To ensure that public participation remains at the forefront of the environmental protection movement, the Meeting of the Parties to the Aarhus Convention set up a unique compliance mechanism to protect the rights enshrined in the body of the convention. Unlike other MEAs the compliance committee is made up of eight members of the public serving in their individual capacity. These persons are members of the community, with high moral character, who are considered competent in the field to which the convention relates.<sup>106</sup> Amongst other benefits, the fact that the members of the committee aren't affiliated with a particular state helps ensure that the workings of the committee and enforcement of the convention remain free from political state interests. To further this goal, the convention allows NGOs, in addition to state parties, to nominate the experts that are to sit on the committee.<sup>107</sup> In this manner the Aarhus Convention encourages public participation to such an extent that the public has both a partnership and supervisory role in the enforcement of the convention's procedural rights.

While the compliance committee cannot guarantee substantive environmental rights and does not stand as a court of final review on such matters, the compliance committee is equipped with various tools to enforce procedural rights under the convention. First of all, the committee can receive communications from both parties to the convention and members of the public regarding another party's noncompliance.<sup>108</sup> This unique feature has ensured that violations of the convention do not go unreported. As of November 2010, fifty-three communications have

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<sup>106</sup> Kravchenko, *supra* note 81, at 10-12.

<sup>107</sup> *Id.* at 10, 16.

<sup>108</sup> *Id.* at 16.

come from the public, while only one has come from a party to the convention.<sup>109</sup> Upon a finding of violation of the convention rights, the committee, in consortium with the party involved, may assist the violating party in meeting the convention requirements by making recommendations and requesting compliance strategy reports. For more serious matters, the compliance committee refers matters to the Meeting of the Parties who can then, amongst other measures, issue declarations of non-compliance or suspend the rights and privileges under the convention.<sup>110</sup> The purpose of the compliance mechanism is not only to ensure compliance with public procedural rights, but also to create a community, which includes both states and individuals, that will aid and incentivize one another to protect the environment.

In order to further the goals of the convention regarding public participation, and to ease compliance with the reporting requirements of the same, the parties to the convention convened at an extraordinary meeting of the parties in 2003 to adopt the Protocol on Pollutant Release and Transfer Registers (PRTR). The Protocol, which came into force 2009, currently has 26 members.<sup>111</sup> The purpose of the protocol is “to enhance public access to information through the establishment of coherent, nationwide pollutant release and transfer registers.”<sup>112</sup> The convention recognizes that the transparent environmental information is vital to the exercise of the procedural rights under the Aarhus convention.<sup>113</sup> The protocol ensures that each government creates and maintains a pollutant release and transfer register that is accessible to the public

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<sup>109</sup> See U.N. Economic Commission for Europe, Aarhus Convention, Compliance Committee, <http://www.unece.org/env/pp/pubcom.htm> (last visited Nov. 17, 2010).

<sup>110</sup> Kravchenko, *supra* note 81, at 30.

<sup>111</sup> See U.N. Economic Commission for Europe, *supra* note 80.

<sup>112</sup> Protocol on Pollutant Release and Transfer Registers, May 23, 2003 1998, *available at* [http://www.unece.org/evn/pp/prtr/docs/PRTR\\_Protocol\\_e.pdf](http://www.unece.org/evn/pp/prtr/docs/PRTR_Protocol_e.pdf) (entered into force Oct. 8, 2009) [hereinafter PRTR].

<sup>113</sup> *Id.* at 1.

without members of the public having to state a reason for wanting to access the register.<sup>114</sup> Furthermore, the register must have a quality control measure that ensures completeness, consistency, and credibility.<sup>115</sup> Recalling the principles of the Aarhus convention, the protocol requires parties to ensure that the public has the opportunity to participate in the development of the registers.<sup>116</sup> The public must also have access to justice in cases where their right to access the register has been denied.<sup>117</sup>

Although the protocol focuses entirely on the regulation of the pollutant registers, the protocol purports to place some pressure on states and private companies to decrease their pollution by placing their reputation on the line. The idea is that no state or company will want the public to view its entity as one of the biggest pollutants.<sup>118</sup> The incentive is especially strong since unlike the Aarhus convention, the Protocol is open to all states worldwide, including those that haven't ratified the treaty. Presumably, an internationally compatible register should increase dissemination of data in a manner that will impact environmental practices.

Although the Aarhus Convention, including its protocol, does have certain limitations, it is nonetheless a very progressive document, especially since it recognizes a human right to the environment. Nevertheless, critics argue that the right is aspirational in nature since the convention neither explains where the right comes from, nor that it inherently exists in nature.<sup>119</sup> However, the convention remains relevant because it creates procedural rights that allow individuals to play a role in their governments' environmental policy agenda.<sup>120</sup> These

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<sup>114</sup> *Id.* at art. 7, 11.

<sup>115</sup> *Id.* at art. 10.

<sup>116</sup> *Id.* at art. 13.

<sup>117</sup> *Id.* at art. 14.

<sup>118</sup> See U.N. Economic Commission for Europe, Aarhus Convention, Kiev Protocol on Pollutant Release and Transfer Registers, <http://www.unece.org/env/pp/pubcom.htm> (last visited Nov. 17, 2010).

<sup>119</sup> Pederson, *supra* note 8, at 99.

<sup>120</sup> Kravchenko, *supra* note 81, at 50.

procedural rights are instrumental to the environmental rights movement because in the exercise of these rights nations will see that individuals are concerned about environmental protection, thus encouraging the formation of substantive environmental rights. All in all, the Aarhus convention is a big step forward for democratic accountability regarding environmental policy.<sup>121</sup>

#### E. BEYOND AARHUS

While the Aarhus Convention is a milestone in the development of environmental rights, its success goes beyond its application. The convention has pushed beyond its own boundaries and has led to additional transnational legislation and shifts in national environmental policy. For Example, in 2003, the European Community adopted the Directive on Public Access to Environmental information, which implemented many of the principles of the Aarhus Convention.<sup>122</sup> To a certain extent, the directive goes beyond the Aarhus Convention. For example, the directive includes contamination of the food chain under the kinds of environmental information that the public has a right to access.<sup>123</sup> Furthermore in 2006 the European Council adopted Regulation No. 1367/2006 which applies Aarhus Convention participation principles to environmental policy decisions of European bodies and institutions. This same regulation has the potential to extend standing for NGOs before the ECJ when European bodies deny the right to receive environmental information.<sup>124</sup>

Although the focus on human rights to the environment, especially in Europe, has been on procedural rights, the pressures of the international and regional communities on individual nations has led many states to recognize certain environmental rights. In 2005, France amended its constitution to include the right of all citizens to live in a balanced environment that promotes

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<sup>121</sup> See Elizabeth Burleson and Diana Pei Wu, Non-State Actor Access and Influence in International Legal and Policy Negotiations, *available at* <http://ssrn.com/abstract=1591990>.

<sup>122</sup> Pederson, *supra* note 8, at 106.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 108.

human health.<sup>125</sup> Other countries have extended the right to life provisions in their constitution to protect environmental rights. In India for example, the courts have found that the right to life includes the right to enjoy an environment that is free from pollution. In order to protect this right, the Indian courts have relaxed standing so as to allow individuals to bring suits to vindicate the public interest to a healthy environment.<sup>126</sup> The courts of Colombia have taken a similar approach, and have found that the right to a healthy environment is enforceable through the right to life. Moreover, according to the courts of Colombia, the right to life not only includes a substantive right to the environment, but also necessarily includes a procedural right to participate in policy decisions that affect the environment.<sup>127</sup> Although different countries around the world have taken different approaches to include environmental rights within their political agenda, each country's acknowledgment of such rights is an indication that an international custom regarding a human right to the environment is developing.

## F. CONCLUSION

Although a substantive human right to the environment does not yet exist at the international level, the movement aimed at recognizing such a right has gained much momentum. Contributions towards recognizing this right to the environment have come from national legislation as well as from regional documents such as the Aarhus Convention. The most successful approach has been the creation of procedural rights that allow individuals to participate in the decision making process in matters relating to the environment. However, should the international community continue to take the procedural rights approach, or should the focus be on substantive environmental rights?

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<sup>125</sup> *Id.* at 109.

<sup>126</sup> Hill, *supra* note 15, at 383.

<sup>127</sup> *Id.* at 386.

One thing is clear though; if we are to effectively protect the environment so that present and future generations can live in an environment that is adequate for human health, a shift from the current market based approach to a universal rights based approach is necessary.<sup>128</sup> Since the impacts of environmental degradation are trans-boundary, a global approach, whether substantive or procedural, is the only solution. Furthermore, the focus needs to continue to be on public participation, since individuals, rather than alienated politicians, are both willing and better able to ensure environmental protection.

Nevertheless, there is an obstacle to a global solution to environmental degradation. An approach that might work for certain countries may not necessarily be functional or even possible for others, especially when one throws developmental issues into the mix. It is for this reason that an agreement on one set of international substantive rights to the environment has proven to be a difficult task. The Aarhus Convention model, which ensures that the voice of local communities is heard and has an affect on regional policy decisions, might be the most pragmatic approach. While the international community should continue to work on a baseline of substantive environmental rights, it should negotiate an international equivalent to the Aarhus Convention, with the exception that access to justice and public participation should not be subject to national law. The international version of the Aarhus Convention should at least require that access to information, public participation, and access to justice provisions meet the standards of the ECHR court and take into account general democratic values. Only in this manner, can the international community expect environmental rights to truly have an affect on environmental protection.

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<sup>128</sup> See *Id.* at 374.