ENVIRONMENTAL RIGHTS AND BRAZIL'S OBLIGATIONS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

DINAH SHELTON*

INTRODUCTION

In the four decades since the United Nations convened its first environmental conference,[1] nearly all global and regional human rights bodies have considered the links between environmental degradation and internationally guaranteed human rights.[2] International human rights petition procedures allow those whose rights have been negatively affected by environmental conditions to bring international pressure to bear when governments lack the will to prevent or halt severe pollution that threatens human well-being.[3] Using these procedures, individuals and groups have invoked rights to life, health, property, information, privacy, and home life to complain of pollution, deforestation, water pollution, and other types of environmental harm.[4] In many instances, petitioners have been afforded redress and governments have taken measures to remedy the violation.[5] Petition procedures may also

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* Manatt/Ahn Professor of International Law, The George Washington University Law School. J.D. 1970, University of California, Berkeley; B.A. 1967, University of California, Berkeley. I would like to express my gratitude to Inyoung Hwang for her editing assistance on this Article.

1. The U.N. General Assembly convened the U.N. Conference on the Human Environment by G.A. Res. 2398 (XXIII) of December 3, 1968. The Conference took place in Stockholm from June 5 to 16 1972. *See* United Nations Conference on the Human Environment, June 5-16, 1972, *Report of the United Nations Conference on the Human Environment*, U.N. Doc A/CONF.48/14/Rev.1 (1973) [hereinafter *U.N. Human Environment Report*].

2. *See* ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW ch. 15 (4th ed. 2005).

3. Human rights procedures are generally unavailing to prevent or remedy environmental harm to other species or ecosystems unless there is also demonstrable harm to humans. *See* Metropolitan Nature Preserve v. Panama, Case 11.533, Inter-Am. C.H.R., Report No. 88/03, ¶ 3, OEA/Ser.L/V/II.118, doc. 70 rev. 2, 524 (2003) [hereinafter Metropolitan Nature Preserve Case].

For a critique of the anthropocentrism consequent to pursuing environmental protection through human rights law, see Catherine Redgwell, *Life, the Universe and Everything: A Critique of Anthropocentric Rights*, *in* HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 71-89 (Alan Boyle & Michael Anderson eds., 1996).

4. *See* cases discussed *infra* notes 98-267.

5. *See* cases discussed *infra* notes 98-267.

help to identify problems and encourage a dialogue to resolve them, including through the provision of technical assistance.

The linkages between human rights and environmental protection were apparent to the states, international organizations, and representatives of civil society who met in Stockholm in 1972.[6] At the Stockholm concluding session, the relationship was expressed in the preamble of the final declaration, wherein the participants proclaimed that

> Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. . . . Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.[7]

Principle 1 of the Stockholm Declaration further established a foundation for linking human rights and environmental protection, in declaring 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."[8] The formulation of Principle 1 stops short of declaring a right to a healthy environment, but instead implicitly refers to existing civil, political, and economic rights grouped under the headings of "freedom, equality and adequate conditions of life."[9] Environmental health is seen as a precondition to the enjoyment of these rights.[10]

Since the Stockholm Conference, international legal instruments and decisions have reformulated and elaborated the links that were articulated in the final Stockholm Declaration. Such instruments and decisions often reflect a rights-based perspective, albeit with different emphases. The approach expressed in the Stockholm Declaration understands environmental protection as a precondition to the enjoyment of a host of internationally guaran-

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6. *See U.N. Human Environment Report*, *supra* note 1.

7. United Nations Conference on the Human Environment, June 5-16, 1972, *Stockholm Declaration on the Human Environment*, pmbl., U.N. Doc. A/.CONF.48/14/Rev.1 (1973).

8. *Id.* princ. 1.

9. *Id.*

10. For a discussion of the drafting history of the Stockholm Declaration and efforts to have a right to a safe and healthy environment included, see Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 Harv. Int'l L.J. 423 (1973). In Resolution 45/94, the U.N. General Assembly recalled the language of the Stockholm Declaration, stating that all individuals are entitled to live in an environment adequate for their health and well-being. The resolution called for enhanced efforts to ensure a better and healthier environment.

teed human rights.[11] Environmental protection is thus an essential instrument subsumed in the effort to secure the effective enjoyment of human rights.

An alternative rights-based approach, more common in international environmental agreements adopted since 1992, is also instrumentalist, but instead views the exercise of certain human rights as an essential means to achieve the goal of environmental protection.[12] The Rio Declaration on Environment and Development,[13] adopted at the conclusion of the 1992 Conference of Rio de Janeiro on Environment and Development, reflects this approach. It formulates a link between human rights and environmental protection in largely procedural terms, declaring in Principle 10 that access to information, public participation, and access to effective judicial and administrative proceedings, including redress and remedy, should be guaranteed because "environmental issues are best handled with the participation of all concerned citizens, at the relevant level."[14] These procedural rights, also contained in human rights instruments, are thus adopted in environmental texts in order to achieve better environmental decision making, which in turn may enhance compliance with environmental norms.[15]

The Organization of American States (OAS) General Assembly has taken an approach similar to that of Rio Principle 10.[16] In 2001 it adopted its first, rather cautious resolution on human rights and the environment.[17] The resolution first underscored the importance of studying the link that "may exist" between the envi-

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11. *See* Neil Popovic, *Pursuing Environmental Justice with International Human Rights and State Constitutions*, 15 STAN. ENVTL. L.J. 338, 340 (1996) ("The rights-based approach starts from the premise that every person has certain inalienable rights. Environmental degradation may violate those rights when it interferes with their exercise.").

12. *See, e.g.*, 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 (1999); Helsinki Convention on the Transboundary Effects of Industrial Accidents art. 9, March 17, 1992, 31 I.L.M. 1330 (1992) (recognizing "the importance and urgency of preventing serious adverse effects of industrial accidents on human beings and the environment," and requiring that states parties provide adequate information to the public and, whenever possible and appropriate, give them the opportunity to participate in relevant procedures and afford them access to justice).

13. United Nations Conference on Environment and Development, June 14, 1992, Rio Declaration on Environment and Development, princ. 10, U.N. Doc. A/CONF.151/26/Rev.1 (1992) [hereinafter Rio Declaration].

14. *Id.*

15. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 7-9, 24 (1995).

16. *See* Human Rights and the Environment, OEA/Ser.G, AG/RES.1819 (XXXI-O/01) (2001).

17. *Id.*

ronment and human rights, then addressed the need to promote environmental protection and the effective enjoyment of all human rights.[18] It asked the General Secretariat to conduct a study of the "possible interrelationship of environmental protection and the effective enjoyment of human rights."[19] The resolution clearly viewed human rights as instrumental to better environmental protection, stating the following:

> [T]he effective enjoyment of all human rights, including the right to education and the rights of assembly and freedom of expression, as well as full enjoyment of economic, social, and cultural rights, could foster better environmental protection by creating conditions conducive to modification of behavior patterns that lead to environmental degradation, reduction of the environmental impact of poverty and of patterns of unsustainable development, more effective dissemination of information on this issue, and more active participation in political processes by groups affected by the problem . . . .[20]

More broadly, the framework of international and national environmental law that has emerged over the past four decades has come to include a wide variety of legal approaches and techniques aimed at conserving natural resources and protecting the environmental processes on which life depends.[21] Common techniques, often emerging from the experience of a single state, include setting quality, product, or emission standards,[22] licensing and otherwise regulating hazardous activities,[23] providing economic incentives and disincentives,[24] sanctioning particularly detrimental activities through criminal law,[25] and creating private liability regimes to deter and redress environmental harm.[26] Among the

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18. *Id.*

19. *Id.*

20. *Id.*

21. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 29 I.L.M. 1541 (1987); Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 18 I.L.M. 1441 (1979) (with Protocols).

22. *See, e.g.*, Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 29 I. .L.M. 1541 (1987); Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 18 I.L.M. 1441 (1979) (with Protocols).

23. *See, e.g.*, Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 30 I.L.M. 1455 (1991); Christopher H. Schroeder, *Lost in Translation: What Environmental Regulation Does that Tort Cannot Duplicate*, 41 WASHBURN L.J. 583 (2002).

24. *See generally*, ENVIRONMENTAL JUSTICE AND MARKET MECHANISMS: KEY CHALLENGES FOR ENVIRONMENTAL LAW AND POLICY (Klaus Bosselmann & Benjamin Richardson, eds., 1999).

25. *See e.g.*, Convention on the Protection of the Environment through Criminal Law, Nov. 4, 1998, E.T.S. No. 172.

26. *See, e.g.*, International Convention on Civil Liability for Oil Pollution, Nov. 29, 1969, 9 I.L.M. 45 (1970); Convention on Carriage of Hazardous and Noxious Substances,

panoply of options, rights-based approaches have become increasingly important. Since 1972, more than one-half of all U.N. member states have added constitutional guarantees concerning the environment,[27] many by declaring or adding an explicit right to a specified quality of the environment.[28] Such formulations qualify the right to environment by words such as "healthy," "safe," "secure," or "clean."[29]

May 3, 1996, 35 I.L.M. 1415 (1996). For discussion of international civil liability, see T. Scovazzi, *State Responsibility for Environmental Harm*, 12 Y.B. INT'L ENVTL. L. 43 (2001); Johan G. Lammers, *International Responsibility and Liability for Damage Caused by Environmental Interferences*, 31 ENVTL. POL'Y & LAW 42, 99 (2001); TRANSBOUNDARY HARM IN INTERNATIONAL LAW; LESSONS FROM THE TRAIL SMELTER ARBITRATION (R. Bratspies & R. Miller, eds., 2006); G. Handl, *Transboundary Impacts*, *in* OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (D. Bodansky, J. Brunnee & E. Hey eds., 2007); and A. Boyle, *State Responsibility and International Liability For Injurious Consequences of Acts Not Prohibited By International Law: A Necessary Distinction*, 39 INT'L & COMP. L.Q. 1 (1990).

27. EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2007: HUMAN RIGHTS AND THE ENVIRONMENT app. (2007), *available at* http://www.earthjustice.org/news/press/007/earthjustice-presents-2007-environmental-rights-report-to-un.html (containing constitutional provisions concerning the environment from 118 countries).

28. The component units of federal states have joined this trend. For example, in the United States in 1968, the same year the government of Sweden proposed to the United Nations that it convene its first international conference on the human environment, U.S. Senator Gaylord Nelson introduced a draft constitutional amendment that would have recognized in the federal Bill of Rights that "[e]very person has the inalienable right to a decent environment." H.R. Res. 1321, 90th Cong. (2d Sess. 1968). This effort failed, as did similar subsequent proposals. In contrast, state constitutions revised or amended from 1970 to the present have included environmental protection among their provisions. *See* Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day 1970 to the Present*, 9 FORDHAM ENVTL. L.J. 107 (1997). For a listing of all environmental provisions in state constitutions, see Bret Adams et al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73 (2002). The authors take a broad reading of the topic, including all provisions that touch on natural resources. They come to a total of 207 state constitutional provisions in 46 state constitutions. For those states that expressly recognize some formulation of the right to safe or healthy environment, see CAL. CONST. art. X, § 2; FLA. CONST. art. II, § 7; HAW. CONST. art. XI; ILL. CONST. art. XI; LA. CONST. art. IX; MASS. CONST. § 179; MICH. CONST. art. IV, § 52; MONT. CONST. art. IX, § 1; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV; N.C. CONST. art. XIV, § 5; OHIO CONST. art. II, § 36; PA. CONST. art. I, § 27; R.I. CONST. art. 1, § 17; TEX. CONST. art. XVI, § 59; UTAH CONST. art. XVIII; VA. CONST. art. XI, § 1. For discussions of these provisions, see A. E. Dick Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 229 (1972); Roland M. Frye, Jr., *Environmental Provisions in State Constitutions*, [1975] 5 ENVTL. L. REP. (Envtl. Law Inst.) 50,028-29 (1975); Stewart G. Pollock, *State Constitutions, Land Use, and Public Resources: The Gift Outright*, 1984 ANN. SURV. AM. L. 13, 28-29; and Robert A. McLaren, Comment, *Environmental Protection Based on State Constitutional Law: A Call for Reinterpretation*, 12 U. HAW. L. REV. 123, 126-27 (1990).

29. Brazil's Constitution stipulates that "[e]verybody has a right to an ecologically balanced environment as it is a good for common use by the people, and as it is essential to a healthy quality of life." Constituição Federal [C.F.] art. 225 (Braz.). The Constitution of Ecuador, article 19, provides "the right to live in an environment free from contamination." Constitutión Política de la República de Ecuador art. 19. The Constitution invests the state with responsibility for ensuring the enjoyment of this right and "for establishing

This Article examines the norms and jurisprudence on environmental rights and state obligations as they have emerged in the inter-American human rights system. The Article finds that, despite a lack of references to the environment in nearly all inter-American normative instruments, the Inter-American Commission on Human Rights and Court of Human Rights have articulated a broad range of state obligations to maintain the environment at a quality that permits the enjoyment of other guaranteed rights. In addition, OAS bodies have echoed the global insistence on procedural rights of information, public participation, and access to justice. While many inter-American cases have arisen in the context of disputes between national governments and indigenous peoples over land and natural resources, other cases have made clear some of the broader contours of a rights-based approach to environmental protection in the inter-American system. In the end, it seems evident that OAS member states cannot ignore deteriorating environmental conditions and still fulfill their regional human rights obligations.

The Inter-American Human Rights System

In 1948, Brazil joined other states of the western hemisphere in transforming the conferences of the American States, held periodically for nearly a century,[30] into the Organization of American States (OAS). The earlier conferences had been marked by attention to human rights issues of regional concern.[31] The practice of addressing human rights matters, combined with increasing con-

by law such restrictions on other rights and freedoms as are necessary to protect the environment." *Id.* For the text of many constitutional provisions on the right to environment, see Edith Brown Weiss, In Fairness To Future Generations 297-327 (1989).

30. For a history of the inter-American system, see T. Buergenthal & D. Shelton, Protecting Human Rights in the Americas 37-44 (4th ed. 1995); A. Cançado Trindade, *The Evolution of the Organization of American States (OAS) System of Human Rights Protection: An Appraisal*, 26 German Y.B. Int'l L. 498, 498-514 (1982).

31. The American States manifested their concern with the protection of human rights from the very origin of the inter-American system. Simon Bolivar's proposed Treaty of Perpetual Union, League and Confederation (Panama, 1826), arts. 23 and 27, recognized the principle of juridical equality of nationals of a state and foreigners; in addition, the Contracting Parties pledged themselves to cooperate in the abolition of the slave trade. Subsequent agreements concluded at Inter-American conferences took up the rights of aliens (e.g., Convention Relative to the Rights of Aliens (1902), Convention on the Status of Aliens (1928)), nationality and asylum (Convention Establishing the Status of Naturalized Citizens who Again take up Residence in the Country of Origin (1906), Convention on Asylum (1928), Convention on Nationality (1933), Convention on Political Asylum (1933)), and the rights of women (Convention on the Nationality of Women (1933), Inter-American Convention on the Granting of Political Rights to Women (1948), Inter-American Convention on the Granting of Civil Rights to Women (1948)).

cern for international guarantees of human rights in the aftermath of World War II,[32] led the OAS to proclaim the "fundamental rights of the individual" in its new constitutional text, the OAS Charter.[33] Elaborating on the Charter's references to human rights,[34] the OAS has adopted other legal instruments addressing human rights, most importantly the American Declaration of the Rights and Duties of Man (American Declaration)[35] and the American Convention on Human Rights (American Convention or Convention).[36] The Convention was supplemented by the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (ESC Protocol)[37] and the Protocol to the American Convention on Human Rights to Abolish the Death Penalty.[38]

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32. On the emergence of global concern for human rights after the Second World War, see L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS (1973); J. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE (1984); L. HENKIN, THE AGE OF RIGHTS (1990); T. BUERGENTHAL, D. SHELTON & D. STEWART, HUMAN RIGHTS IN A NUTSHELL (4th. ed. 2005).

33. *See* Charter of the Organization of American States art. 3(1), Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3 [hereinafter OAS Charter]. The Charter has been amended by the Protocol of Buenos Aires (1967), the Protocol of Caragena de Indias (1985), the Protocol of Washington (1992), and the Protocol of Managua (1993).

34. In addition to Article 3(l), the OAS Charter contains provisions specifically devoted to representative democracy, human rights and equality, economic rights, and the right to education. The Inter-American Commission on Human Rights has expressed the view that OAS member states have international obligations deriving from Article 3(l) and other Charter references to human rights. *See* Inter-Am. Comm'n on Human Rights, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.46, doc. 23, rev. 1, 48 (1978).

35. Organization of American States, American Declaration of the Rights and Duties of Man [hereinafter American Declaration], O.A.S. Res. XXX, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 rev. 12, 15 (2007) [hereinafter *Basic Documents*].

36. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 9 I.L.M. 99, *reprinted in Basic Documents*, *supra* note 35, at 25 [hereinafter American Convention].

37. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 17 1988, O.A.S.T.S. No. 69, 28 I.L.M. 161, *reprinted in Basic Documents*, *supra* note 35, at 63 [hereinafter ESC Protocol].

38. Organization of American States, Protocol to the American Convention on Human Rights to Abolish the Death Penalty, June 8, 1990, O.A.S.T.S. No. 73 (entered into force Aug. 28, 1991), *reprinted in Basic Documents*, *supra* note 35, at 77.

A. *The OAS's Normative Human Rights Instruments*[39]

The Ninth International Conference of American States, which concluded the OAS Charter, adopted the American Declaration as a nonbinding conference resolution in 1948.[40] Over time, the legal status of the Declaration evolved and today it is generally held to set forth the "fundamental rights of the individual" referred to in Article 3(l) of the OAS Charter.[41] The Inter-American Court of Human Rights (Court) has found that "for the member states of the [OAS], the Declaration is the text that defines the human rights referred to in the Charter" and is thus a source of legal obligation.[42] The Declaration addresses civil, political, economic, social, and cultural rights.[43] While there is no reference to the environment—not surprising in a text adopted in 1948—the rights set forth include the right to life, equality before the law, residence and movement, access to justice and due process, privacy, property, work, and health, each of which has links to environmental conditions.[44]

The American Convention on Human Rights, adopted in 1969, entered into force in 1978.[45] The Convention protects primarily civil and political rights, defining in more detail some of the rights contained in the American Declaration.[46] Article 26 of the Convention, however, calls for progressive measures by states parties to

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39. Besides the Declaration and Convention discussed herein, the OAS member states have concluded the Inter-American Convention to Prevent and Punish Torture, Dec. 9, 1985, O.A.S.T.S. No. 67, 25 I.L.M. 519, *reprinted in Basic Documents*, *supra* note 35, at 81; Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, June 9, 1994, 27 U.S.T. 3301, 33 I.L.M. 1534, *reprinted in Basic Documents*, *supra* note 35, at 97; Inter-American Convention on Forced Disappearance of Persons, June 9, 1994, O.A.S.T.S. No. 68, 33 I.L.M. 1429, *reprinted in Basic Documents, supra* note 35, at 89; Inter-American Convention on the Elimination of all Forms of Discrimination Against Persons with Disabilities, June 7, 1999, AG/RES. 1608 (XXIX-0/99), *reprinted in Basic Documents, supra* note 35, at 107 [hereinafter Disabilities Convention].

40. American Declaration, *supra* note 35.

41. *See also*, James Terry Roach & Jay Pinkerton v. United States, Case 9647, Inter-Am. C.H.R., Res. No. 3/87, ¶¶ 46-49 (1987); Maya Indigenous Communities of the Toledo District v. Belize, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, ¶ 85 (2004) [hereinafter Toledo Maya Case].

42. Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am. Ct. H.R. (ser. A) No. 10, at 43, 45, 47 (July 14, 1989), *reprinted in Annual Report 1989*, O.A.S. Doc. OEA/Ser.L/V/III, doc. 14, at 109, ¶¶ 35-45 (1989) [hereinafter Advisory Opinion OC-10/89].

43. *See* American Declaration, *supra* note 35.

44. *Id.*

45. American Convention, *supra* note 36.

46. *Id.*

achieve "full realization of the rights implicit in the economic, social, education, scientific, and cultural standards set forth in the Charter."[47] Further amplification of these rights occurred with the adoption in 1988 of the ESC Protocol.[48] The Protocol, to which Brazil acceded on August 8, 1996, is notable for its inclusion of a "right to a healthy environment."[49] Article 11 reads as follows:

> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
> 2. The States Parties shall promote the protection, preservation and improvement of the environment.[50]

Finally, like the United Nations,[51] the OAS has been working for many years to draft a declaration on the rights of indigenous peoples.[52] The Permanent Council of the OAS, through its Committee on Juridical and Political Affairs, has appointed a working group to prepare the Draft American Declaration on the Rights of Indigenous Peoples.[53] It held its tenth meeting of negotiations in La Paz, Bolivia, from April 23 to April 27, 2007.[54] There remains considerable controversy over the text, including in respect to environmental rights, where numerous words and phrases remain bracketed to indicate a lack of consensus.[55] The draft as of the end of 2007 reads as follows:

> Article XVIII. [Right to] protection of a healthy environment
> 1. [Indigenous peoples have the right to live in harmony with nature and to a healthy and safe environment, which are essential conditions for enjoyment of the right to life, to their spirituality, and to collective well-being.]
> 2. Indigenous peoples have the right to conserve, restore, recover, manage, use, and protect the environment, and to the sustainable management of their lands [, territories,] [and resources].[a]

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47. American Convention, *supra* note 36, art. 26.

48. ESC Protocol, *supra* note 37.

49. ESC Protocol, *supra* note 37, art. 11.

50. ESC Protocol, *supra* note 37, art. 11.

51. The U.N. General Assembly adopted the U.N. Declaration on the Rights of Indigenous Peoples on September 13, 2007, by a vote of 143 to 4, with 11 abstentions, after several decades of negotiations.

52. *See* Proposed American Declaration on the Rights of Indigenous People, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 (1997).

53. The working group's most recent report to the Permanent Council covers its activities in 2007–2008. *See* Actividades de I Grupo de Trabajo durante el periodo 2007–2008, OAS Doc. OEA/Ser.K/XVI, GT/DADIN/doc.340/08 (May 12, 2008).

54. For the documents and results of the negotiations, see Tenth Meeting of Negotiations in the Quest for Points of Consensus, OEA/Ser.K/XVI, GT/DADIN/doc.301/07 (Apr. 27, 2007).

55. *Id.*

3. Indigenous peoples have a right to [prior information and consultation on] [their free, prior and informed consent on] measures and actions which may [significantly] affect the environment in indigenous lands [and territories].[b]
4. Indigenous peoples have the right to participate fully and effectively in the formulation, planning, organization and implementation of measures, programs, laws, policies, and any other public [or private] activity that could affect the environment, for the conservation, use and management of their [the] lands [, territories] [and resources].[c]
5. Indigenous peoples have the right to technical and financial assistance from their States and from International Organizations for the purpose of protecting the environment [, in keeping with the procedures established in the national legislations].

[6. States shall prohibit and punish, with the full and effective participation of indigenous peoples [and their consent], the introduction, abandonment, dispersion, transit, use, or deposit of any harmful substance, including persistent organic contaminants; nuclear, radioactive, chemical, and biological materials, and [genetically modified organisms] that can directly or indirectly affect indigenous communities, lands [, territories] and resources.]

7. Indigenous Peoples have the right to create their own protected areas or areas of conservation on their lands [and territories] that shall be recognized, respected and protected by the State. States shall not create protected areas or areas of conservation of any sort on lands [or territories] that Indigenous Peoples have historically or traditionally used, possessed or occupied or have otherwise acquired, without the free, prior and informed consent of the Indigenous Peoples affected. In the creation of said areas, States shall not [under any circumstances / except under the circumstances set out in Article 25 of this Declaration] require the forced transfer or relocation of indigenous peoples' communities, impose restrictions or inhibit the traditional uses of the land, their way of life or their means of subsistence.[56]

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a. Since there is no consensus on this paragraph, the Chair has recorded proposals made by Member States and by the Indigenous Caucus. Various delegations of Member States have requested the insertion of brackets around the words "territo-

56. *Id.* (brackets appearing in original) (footnotes renumbered and appearing below quoted text).

> ries" and "resources." In addition, a part of this paragraph will be considered when reviewing the chapter on General Provisions.
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> b. Since there is no consensus on this paragraph, the Chair has recorded proposals made by Member States and by the Indigenous Caucus. The terms "significantly" and "prior, free and informed consent" were the object of special consideration by the Working Group. This paragraph will be considered when reviewing the chapter on General Provisions.
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> c. This paragraph will be considered when reviewing article XX (2) and the indigenous caucus' proposal with respect to article XXII.

The regional human rights treaties are binding only on those OAS member states that have accepted them, while the OAS Charter and the American Declaration establish human rights standards for all OAS member states.[57] States parties to the Convention cannot ignore the Declaration because Convention Article 29 explicitly precludes any interpretation of Convention rights and obligations that would limit the effect of the American Declaration.[58]

In general, for the human rights instruments to which they are party, states are obliged not only to respect the observance of rights and freedoms but also to guarantee their existence and free exercise against violations by private and state actors.[59] Thus any act or omission by a public authority that impairs guaranteed rights may

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57. Article 1 of the Statute of the Inter-American Commission sets forth the mandate of the Commission in this respect:

> 1. The Inter-American Commission on Human Rights is an organ of the Organization of the American States, created to promote the observance and defense of human rights and to serve as consultative organ of the Organization in this matter.
> 2. For the purposes of the present Statute, human rights are understood to be:
> a. The rights set forth in the American Convention on Human Rights, in relation to the States Parties thereto;
> b. The rights set forth in the American Declaration of the Rights and Duties of Man, in relation to the other member states.

Statute of the Inter-American Commission on Human Rights art. 1(1), O.A.S. Res. 447 (IX-0/79), 9th Sess., O.A.S. Off. Rec. OEA/Ser.P/IX.0.2/80, vol. 1, 88 (1979) [hereinafter Inter-Am. C.H.R. Statute].

58. American Convention, *supra* note 36, art. 29(d) specifies that "no provision of this Convention shall be interpreted as . . . excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have." *See also* Advisory Opinion OC-10/89, *supra* note 42, ¶ 46.

59. Velasquez Rodriguez Case, 1998 Inter-Am. Ct. H.R. (ser. C) No. 4, at 155 (July 29, 1988) (finding Honduras responsible for the disappearance of civilians when actions were perpetrated by the Honduran army or by private parties with the acquiescence of the Honduran government).

violate a state's obligations.[60] This is particularly important in respect to the environment, where most activities causing harm are undertaken by the private sector. As a result, human rights complaints usually assert state responsibility based on failure to regulate or enforce laws rather than on pollution stemming directly from state conduct.[61]

The emergence of international environmental law in the period since the American Declaration and the Convention were concluded is significant because neither the Commission nor the Court adheres to a static or "originalist" interpretation of the texts. Instead, both institutions have held that the provisions of regional human rights instruments must be interpreted and applied by taking into account "developments in the field of international human rights law since those instruments were first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged."[62] The jurisprudence of the system reveals that relevant developments in the corpus of international human rights law may be drawn from the provisions of other international and regional human rights instruments.[63] According to the Commission, this allows the Declaration to be interpreted in conjunction with the American Convention, "which, in many instances, may be considered to represent an authoritative expression of the fundamental principles set forth in the American Declaration."[64]

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60. *Id.*; Godinez Cruz Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 5, ¶¶ 152-52 (Jan. 20, 1989).

61. *See, e.g.*, Yanomami Case, Case 7615, Inter-Am. C.H.R. Res. No. 12/85, OEA/Ser.L/V/II.66, doc. 10, rev. 1, 24 (1985) [hereinafter Yanomami Case].

62. *See* Advisory Opinion OC-10/89, *supra* note 42, ¶ 37; The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, Advisory Opinion, 1999 Inter-Am. Ct. H.R. (ser. A) No. 16 (Oct. 1, 1999), ¶ 114 (endorsing an interpretation of international human rights instruments that takes into account developments in the *corpus juris gentium* of international human rights law over time and in present-day conditions) [hereinafter Advisory Opinion OC-16/99]; Ramon Martinez Villareal v. United States, Case 11.753, Inter-Am. C.H.R., Report No. 52/02, OEA/Ser.L./II.117, doc. 1 rev. ¶ 60 (1997) [hereinafter Martinez Villareal Case]; s*ee also* American Convention, *supra* note 36, art. 29(b) ("No provision of this Convention shall be interpreted as . . . restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party").

63. *See* Advisory Opinion OC-10/89, *supra* note 42, ¶ 37; Advisory Opinion OC-16/99, *supra* note 62, ¶ 115; Juan Raul Garza v. United States, Case 12.243, Inter-Am. C.H.R., Report No. 52/01, OEA/Ser./L/V/II.111, doc. 20, ¶ 89 (2001) [hereinafter Garza Case].

64. *See* Inter-Am C.H.R., *Report of the Situation of Human Rights of Asylum Seekers within the Canadian Refugee Determination System*, OEA/Ser.L/V/II.106, doc. 40 rev. ¶ 38 (2000);

The Court and Commission have referred to several multilateral treaties in their decisions and judgments, including the Geneva Conventions of 1949,[65] the United Nations Convention on the Rights of the Child,[66] the Vienna Convention on Consular Relations,[67] and various binding and nonbinding instruments concerning indigenous peoples, including International Labour Organisation (ILO) Convention Number 169 concerning Indigenous and Tribal Peoples in Independent Countries.[68] The Commission has explicitly stated that the provisions of ILO Convention Number 169 "provide evidence of contemporary international opinion concerning matters relating to indigenous peoples, and therefore that certain provisions are properly considered in interpreting and applying the articles of the American Declaration in the context of indigenous communities."[69] This is a somewhat surprising assertion, given the small number of states that have ratified the Convention,[70] opposition to the U.N. Declaration on Indigenous Peoples,[71] which reiterates much of Convention Number 169, and the lack of adoption thus far of a similar OAS Draft Declaration. Despite the seeming confusion of *lege ferenda* with *lex lata*, the Commission and Court have made clear in the cases cited above that the American Declaration and Convention will be interpreted and applied in light of current developments in the field of

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Garza Case, *supra*, note 63, ¶¶ 88-89 (confirming that while the Commission clearly does not apply the American Convention in relation to member states that have yet to ratify that treaty, its provisions may well be relevant in informing an interpretation of the principles of the Declaration).

65. *See, e.g.*, Juan Carlos Abella v. Argentina, Case 11.137, Inter-Am. C.H.R., Report No. 55/97, OEA/Ser.L./V./II95, doc. 7 rev. 271, ¶¶ 157-71 (1997).

66. *See, e.g.*, Villagrán Morales Case, 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 188 (Nov. 19, 1999); Michael Domingues v. United States, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L./V/II.117, doc. 1 rev. 1, ¶ 56 (2002) (filed May 1, 2000).

67. *See, e.g.*, Advisory Opinion OC-16/99, *supra* note 62, ¶ 137; Martinez Villareal Case, *supra* note 62, ¶ 77.

68. *See, e.g.*, Mary and Carrie Dann v. United States, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Serv.L./V/II.117, doc. 1 rev. 1, ¶ 127 (2002) [hereinafter Dann Case].

69. Toledo Maya Case, *supra* note 41, ¶ 123; *see also* Dann Case, *supra* note 68, ¶¶ 127-31.

70. As of February 11, 2008, the Convention has been ratified by only 17 states. International Labour Organization, Conventions and Other Relevant Instruments, *available at* http://www.oit.org/public/english/indigenous/standard/index.htm (last visited July 30, 2008).

71. Four of the major states with indigenous peoples (Australia, Canada, New Zealand and the United States) voted against the Declaration. Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Doc. GA/10612 (Sept. 13, 2008).

international law as evidenced by treaties, custom, and other relevant sources of international law, especially in cases involving human rights law.[72]

B. *OAS Human Rights Institutions*

The Inter-American Commission on Human Rights is the principal organ of the OAS with a mandate to promote the observance and protection of human rights and serve as a consultant to the OAS on human rights matters.[73] In 1965, the Commission's competence was expanded to accept communications, request information from governments, and make recommendations to bring about more effective observance of human rights.[74] With the adoption of the Convention and other human rights treaties, the Commission's mandate has continued to expand.

The Commission has specific competence over matters relating to the fulfillment of obligations undertaken by states parties to all regional human rights conventions, with the exception of the Convention on Persons with Disabilities, which creates a separate supervisory committee.[75] The Commission also has unusually broad authority to prepare reports on its own initiative about the human rights situation in any OAS member state.[76] Information on widespread human rights violations in a particular country, whether in the form of a well-documented NGO report or a series of individual cases, often forms the basis of the Commission's deci-

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72. *See* Toledo Maya Case, *supra* note 41, ¶ 123; Dann Case, *supra* note 68, ¶¶ 127-31.

73. The original Statute of the Commission described the body as an autonomous entity of the OAS having the function to promote respect for human rights. Statute of the Inter-American Commission on Human Rights art. 1, OEA/Ser.L/V/II (Sept. 26, 1960). In 1967, the Protocol of Buenos Aires amended the OAS Charter to make the Commission a principal organ of the OAS. The Commission consists of seven independent experts elected to four-year terms by the OAS General Assembly. It is based in Washington, DC, and is assisted by a Secretariat headed by an Executive Secretary. Commission sessions are normally held in Washington, DC, but they also may be held in cities in other member states. During its sessions, the Commission holds hearings where, upon request, it hears from individuals and representatives of human rights organizations and states. *See* Statute of the Commission, *reprinted in Basic Documents*, *supra* note 35 at 163; Rules of Procedure of the Inter-American Commission on Human Rights (2000) [hereinafter Rules of Procedure], *reprinted in Basic Documents*, *supra* note 35 at 171.

74. The Second Special Inter-American Conference, held in Rio de Janeiro, Brazil in November 1965, resolved to amend the Statute and broaden the Commission's functions and authorities. Organization of American States, Official Records, OEA/Ser.C/I.13 32-34 (1965).

75. Disabilities Convention, *supra* note 39, art. VI.

76. Inter-Am. C.H.R. Statute, *supra* note 57, art. 18(c); Rules of Procedure, *supra* note 73, arts. 56, 58.

sion to prepare a country study.[77] The Commission submits to the OAS General Assembly an annual report, which includes resolutions on individual cases, reports on the human rights situation in various states, and a discussion of areas in which further action is needed to promote and protect human rights, such as further codification of human rights standards.[78]

The American Convention also directed the creation of the Inter-American Court of Human Rights to supervise state compliance with the Convention's rights and obligations.[79] The Court has adjudicatory and advisory jurisdiction.[80] For the former, states parties to the Convention must separately accept the Court's jurisdiction.[81] Once a state has done so, either the state or the Commission may present a case to the Court after the Commission has completed its consideration of the matter.[82] The Court's judgment may direct the payment of compensation or afford other remedies if it finds the state in question has violated guaranteed rights.[83]

The advisory jurisdiction of the Court is governed by Article 64 of the Convention, which provides that any OAS member state or the Commission may consult the Court on the interpretation of the Convention or of other treaties on the protection of human rights in the American States.[84] At the request of a member state, the Court may also advise on the compatibility of any of the state's domestic laws with human rights instruments.[85]

C. *Complaints and Cases*

Individuals and groups, after exhausting all available and effective local remedies, may file petitions with the Commission against states alleged to have violated the rights guaranteed by the American Declaration, the American Convention, or other regional

77. *See* Inter-Am. C.H.R. Statute, *supra* note 57.

78. Inter-Am. C.H.R. Statute, *supra* note 57, art. 18(f); Rules of Procedure, *supra* note 73, art. 57.

79. American Convention, *supra* note 36, art. 33. The Court consists of seven judges, nominated and elected for six-year terms by the parties to the American Convention. Judges may be re-elected once. *Id.* art. 52. The Court's functions and procedures are set forth in the American Convention, its Statute, and the Rules of Procedure. *See also* Rules of Procedure, *supra* note 73. The Court's permanent seat is in San Jose, Costa Rica.

80. American Convention, *supra* note 36, arts. 61, 64.

81. *Id.* art 62.

82. *Id.* art. 61.

83. *Id.* art. 63(1).

84. *Id.* art. 64(1)

85. *Id.* art. 64(2).

human rights treaties.[86] Implementation of the ESC Protocol, however, is supervised primarily through a system of state reports, and only two rights in the Protocol were explicitly made subject to the complaint process.[87] Nonetheless, the Inter-American Commission has declared admissible cases invoking the economic and social rights set forth in the Declaration, even with respect to states parties to the Convention.[88]

The procedures set forth in the Commission's Statute and Regulations are identical for all petitions, including criteria for admissibility, procedural stages, fact-finding, and decision making, until the Commission completes its consideration of the matter.[89] In processing petitions, the Commission is directed to attempt a friendly settlement[90] and may undertake a mission on site[91] or hold hearings[92] if it deems it necessary and appropriate. The petition process may result in a Commission decision on the merits, together with specific recommendations to the state concerned.[93] The Commission may call for the state to pay "appropriate" compensation when it finds a violation has occurred, but the Commission does not set the amount of compensation.[94]

For the Court to have jurisdiction over an individual case, the state concerned must be a party to the American Convention and have accepted the optional jurisdiction of the Court.[95] Proceedings before the Commission must be completed,[96] and the case must be referred by the Commission or the state concerned within three months after the Commission's preliminary report on the matter is transmitted to the parties.[97] An individual petitioner cannot invoke the Court's jurisdiction.[98] Individuals have no standing

86. Rules of Procedure, *supra* note 73, arts. 23, 31.

87. The right to form trade unions (art. 8a) and the right to education (art. 13) are singled out as justiciable. *See* ESC Protocol, *supra* note 37, art. 8a, 13.

88. The Commission referred to American Convention art. 26, however, not to the Declaration rights cited by the applicants.

89. *See* Rules of Procedure, *supra* note 73, arts. 22-50.

90. *Id.* art. 41.

91. *Id.* art. 40.

92. *Id.* art. 62.

93. *Id.* arts. 42-43.

94. *See, e.g.*, Manuel Garcia Franco v. Ecuador, Case 10.258, Inter-Am. C.H.R., Report No. 1/97, OEA/Ser.L/V/ll.98, doc. 7, rev. ¶ 85(c) (1997); William Andrews v. United States, Case 11.1139, Inter-Am. C.H.R., Report No. 57/96, OEA/L/V/11.98, doc. 7, rev. ¶ 188 (1998).

95. American Convention, *supra* note 36, art. 62.

96. *Id.* art. 61(2).

97. *Id.* art. 51.

98. *Id.* art. 61(1).

to bring cases to the Court, but they are expected to be represented during all contentious proceedings and to participate fully in all stages of Court proceedings.[99] If the Court finds a violation of the Convention, it may order that the situation be remedied and may award compensation to the injured party.[100] Compensation includes indemnification for actual damage, including emotional or moral injury, but does not include punitive damages.[101] Specific orders for nonmonetary relief also may be and often are awarded.[102] States are legally obliged to comply with a judgment of the Court, and a remedial order may be enforced in the appropriate domestic courts.[103]

Inter-American Jurisprudence on Human Rights and the Environment

The Inter-American Commission and Court have heard cases, and the Commission has issued human rights country reports, addressing environmental conditions in OAS member states as those conditions have affected rights guaranteed by the American Declaration or the Convention.[104] Most commonly, applicants have asserted violations of the rights to life, health, property, culture, and access to justice, but some of them have also cited to guarantees of freedom of religion and respect for culture.[105] Many of the cases have concerned resource exploitation on lands traditionally owned or used by indigenous peoples.[106]

The Commission's general approach to environmental protection has been to recognize that a basic level of environmental health is required by the very nature and purpose of human rights law:

> The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of

99. American Convention, *supra* note 36, art. 61(1); *see* Rules of Procedure of the Inter-American Court, art. 23, *reprinted in Basic Documents*, *supra* note 35, at 183.

100. American Convention, *supra* note 36, art. 63(1).

101. *See, e.g.*, Myrna Mack-Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003).

102. *Id.*

103. American Convention, *supra* note 36, art. 67, 68(2).

104. *See, e.g.*, The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter Awas Tingi Case]; Toledo Maya Case, *supra* note 41.

105. *See, e.g.*, Awas Tingni Case, *supra* note 104.

106. *Id.*; Toledo Maya Case, *supra* note 41.

> the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment, and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.[107]

A. *The Rights to Life and to Health*

The Commission's 1997 country report on Ecuador (Report on Ecuador) noted specifically that enjoyment of the rights to life and health depends on environmental conditions:

> The realization of the right to life, and to physical security and integrity is necessarily related to and in some ways dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the foregoing rights are implicated.[108]

Positive obligations for the state to act derive from Convention Article 4, which guarantees an individual's right to have his or her life respected and protected by law.[109] Thus, the Commission added:

> States Parties are required to take certain positive measures to safeguard life and physical integrity. Severe environmental pollution may pose a threat to human life and health, and in the appropriate case give rise to an obligation on the part of a state to take reasonable measures to prevent such risk, or the necessary measures to respond when persons have suffered injury.[110]

As early as 1983, in its seventh report on human rights in Cuba,[111] the Commission recommended that the state take specific action and adopt environmental measures to comply with its obligation to ensure the right to health.[112] The Commission called an environment conducive to a healthy population "essential" and noted that factors such as water supply, sanitation, and waste disposal have a significant impact in this respect.[113] The Commission pointed to the negative conditions in Cuba, including water

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107. Inter-Am. Comm'n on Human Rights, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10 rev. 1, 92 (1997) [hereinafter *Ecuador Report*]

108. *Id.* at 88.

109. Article 4(1) reads: "Every person has the right to have his life respected. This right shall be protected by law . . . . No one shall be arbitrarily deprived of his life." American Convention, *supra* note 36, art. 4(1).

110. *Ecuador Report*, *supra* note 107, at 88.

111. Inter-Am. Comm'n on Human Rights, *The Situation of Human Rights in Cuba*, OEA /Ser.L/V/II.61, doc. 29 rev. 1, ch. XIII (1983) (regarding the Right to Health).

112. *Id.* ¶¶ 1, 2, 60, 61.

113. *Id.* ¶ 41.

shortages and industrial pollution of the rivers, bays, and coastal waters, at such a level that it had created dead zones.[114] The Commission found "the sewerage system is in such a deplorable condition that it frequently affects the country adversely."[115] Lack of garbage collection was also seen as a serious problem.[116] The Commission concluded that environmental and industrial health practices required a great deal more attention from the government, with housing, sewerage, and water supply requiring radical improvement to combat increasing pollution of the soil, air, and water.[117]

In the Ecuador report—which followed the Commission's Cuban report—the Commission similarly insisted on the need for positive measures to protect life and health from contamination.[118] It referred to the obligation of the state to respect and ensure the rights of those within its territory and the responsibility of the government to implement measures to remedy existing pollution and to prevent future contamination—like that posed by hazardous development activities such as mining—which would threaten the lives and health of its people.[119]

The government is responsible not only for state action in violation of human rights, but also if it fails to take measures to prevent other actors from degrading the environment.[120] In the case of *Yanomami v. Brazil*,[121] the petition alleged that the government violated the American Declaration by its own actions in constructing a highway through Yanomani territory and by authorizing private exploitation of the territory's resources.[122] The state's actions led to an influx of nonindigenous persons who brought contagious diseases that remained untreated due to lack of medical care.[123] The Commission found that the government had violated the Yanomanis' rights to life, liberty, and personal security guaranteed by Article 1 of the Declaration, as well as their rights of residence and movement (Article VIII) and their right to the preservation of health and well-being (Article XI).[124] The violations were tied spe-

114. *Id.* ¶ 46
115. *Id.* ¶ 50.
116. *Id.* ¶ 51.
117. *Id.* ¶¶ 60-61.
118. *Ecuador Report*, *supra* note 107.
119. *Id.* at 94.
120. *See, e.g.*, Yanomami Case, *supra* note 61, 24.
121. *Id.*
122. *Id.* at 29-30.
123. *Id.*
124. *Id.* at 33.

cifically to the government's failure to implement measures of "prior and adequate protection for the safety and health of the Yanomami Indians."[125]

The *Yanomami* case did not go into detail about the conduct required of a government or the standard of care expected by the Commission.[126] Other cases and country studies have helped to clarify some issues in this respect, specifying that governments must enact appropriate laws and regulations and then fully enforce them.[127] The Commission and Court have said, in particular, that governments must regulate industrial and other activities that potentially could result in environmental conditions so detrimental that they create risks to health or life.[128] In its country report on human rights in Ecuador, the Commission responded to claims that oil-exploitation activities were contaminating the water, air, and soil, thereby causing the people of the region to become sick and to have a greatly increased risk of serious illness.[129] After an on-site visit, the Commission found that both the government and inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic byproducts in their drinking and bathing water, in the air, and in the soil.[130] Many inhabitants of the affected region suffered skin diseases, rashes, chronic infections, and gastrointestinal problems.[131] In addition, they claimed that pollution of local waters contaminated fish and drove away wildlife, threatening food supplies.[132] While these activities were carried out by domestic and foreign oil companies, the inhabitants asserted that the government was responsible because it failed to regulate and supervise the activities of both the state-owned oil company and its licensees.[133] The companies, in turn, had taken few if any measures to protect the affected population, and they refused to implement environmental controls or to utilize existing technologies employed in other countries.[134]

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125. *Id.* at 32.

126. *See id.*

127. *See, e.g.*, *Ecuador Report*, *supra* note 107, at 92.

128. *Id.*

129. *Id.* at 79. The Commission first became aware of problems in this region of the country when a petition was filed on behalf of the indigenous Huaorani people in 1990. The Commission decided that the situation was not restricted to the Huaorani and thus should be treated within the framework of the general country report. *Id.* at 77.

130. *Id.* at 79-80.

131. *Id.*

132. *Id.* at 80.

133. *Id.*

134. *Id.*

The government asserted that it had taken the measures required by regional human rights law.[135] It had established an Environmental Advisory Commission, which led the president of Ecuador to issue Executive Decree 1802, entitled "Basic Environmental Policies of Ecuador" in June 1994.[136] Decree 1802 required that companies prepare an Environmental Impact Study and a Program of Environmental Mitigation and seek authorization prior to the initiation of activities that could degrade or contaminate the environment.[137] An Ecuadorean Development Plan further required foreign companies to apply the highest standards and requirements of their home country to their operations in Ecuador and to comply with Ecuadorean law,[138] which contained additional measures against environmental pollution.[139] These measures were indeed positive ones that might have withstood scrutiny had they been adequately enforced, but they were not.

The government must enforce the laws that it enacts as well as any constitutional guarantee of a particular quality of environment.[140] In the Ecuador report, the Commission heard allegations that the government had failed to ensure that oil-exploitation activities were conducted in compliance with existing legal and policy requirements.[141] The Commission's on-site delegation received claims, in particular, that the Government of Ecuador had failed to enforce the inhabitants' constitutionally protected rights to life and to live in an environment free from contamination.[142] The

135. *Id.* at 84.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* The laws cited included the Law for the Protection and Control of Environmental Contamination, ch. 1, ¶ 1, R.O. No. 97 (May 31, 1976), which prohibited contamination harmful to human life, health, and well-being, harmful to the flora and fauna, or which degrades air, water, or soil quality. In addition, the 1981 Law of Forestry and Conservation of Natural Areas and Wildlife designated national parks or natural reserves. Other legislation applied specifically to oil-exploitation operations and to water resources.

140. *Ecuador Report, supra* note 107, at 87.

141. *Id.*

142. *Id.* The domestic law of Ecuador recognizes the relationship between the rights to life, physical security, and integrity, and the physical environment in which the individual lives. The first protection accorded under Article 19 of the Constitution of Ecuador, the section which establishes the rights of persons, is of the right to life and personal integrity. The second protection establishes "the right to live in an environment free from contamination." *Id.* Accordingly, the Constitution invests the State with responsibility for ensuring the enjoyment of this right, and for establishing by law such restrictions on other rights and freedoms as are necessary to protect the environment. Thus, the Constitution establishes a hierarchy according to which protections that safeguard the right to a safe environment may have priority over other entitlements.

Commission was clear: "Where the right to life, to health and to live in a healthy environment is already protected by law, the Convention requires that the law be effectively applied and enforced."[143]

The state must also comply with and enforce the international agreements to which it is a signatory, whether these are human rights instruments or agreements related to environmental protection.[144] In the Ecuador report, the Commission noted that Ecuador is party to or has supported a number of instruments "which recognize the critical connection between the sustenance of human life and the environment,"[145] including the ESC Protocol,[146] the International Covenant on Civil and Political Rights (ICCPR)[147] and the International Covenant on Economic, Social and Cultural Rights (ICESCR),[148] the Stockholm Declaration,[149] the Treaty for Amazonian Cooperation,[150] the Amazon Declaration,[151] the World Charter for Nature,[152] the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,[153] the Rio Declaration on Environment and Development,[154] and the Convention on Biological Diversity.[155]

In the case of Ecuador, the Commission agreed that, notwithstanding the existence of an emerging corpus of environmental regulation, little implementation or enforcement action had been taken.[156] The Commission noted that Ecuador's Decree 1802 acknowledged inadequate compliance with environmental law and regulations.[157] After the fact, the government did contract for an environmental audit to assess the situation resulting from the petroleum operations and signed a series of agreements in late

143. *Id.* at 92.
144. *Id.* at 87-92.
145. *Id.* at 87-88
146. ESC Protocol, *supra* note 37.
147. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR].
148. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].
149. Stockholm Declaration, *supra* note 7.
150. Treaty for Amazonian Cooperation, July, 3, 1978, 17 I.L.M. 1045.
151. Amazon Declaration, May 6, 1989, 28 I.L.M. 1303.
152. World Charter for Nature, G.A. Res. 35/7, U.N. Doc. A/RES/37/7 (Oct. 28, 1982).
153. Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, Oct. 12, 1940, 56 Stat. 1354, 161 U.N.T.S. 229.
154. Rio Declaration, *supra* note 13.
155. Convention on Biological Diversity, 31 I.L.M. 818 (1992).
156. *Ecuador Report, supra* note 107, at 85.
157. *Id.* at 85 & n.22.

1994 and 1995 obliging the oil company to undertake certain activities to remedy the environmental consequences of its operations in the Oriente region.[158] The communities involved objected that they were excluded from direct participation in the process, that the agreement did not adequately repair the damages suffered, and that the process failed to provide for any independent review or evaluation of the results.[159] These claims linked the issue of state enforcement to the right of public participation and access to justice for those affected.

The Commission has indicated that certain results are expected from the standard-setting and enforcement process. Ecuador was thus "to take the measures necessary to ensure that the acts of its agents, through the State-owned oil company, conform to its domestic and inter-American legal obligations."[160] In addition, the state was "encouraged . . . to take steps to prevent harm to affected individuals through the conduct of its licensees and private actors."[161] This meant ensuring "that measures are in place to prevent and protect against the occurrence of environmental contamination which threatens the lives of the inhabitants of development sectors."[162] Finally, "[w]here the right to life . . . has been infringed upon by environmental contamination, the Government is obliged to respond with appropriate measures of investigation and redress."[163]

B. *Human Rights, Environment, and Development*

Anticipating state objections that economic development is a priority matter, the Commission has recognized the existence of a "right to development" and agreed that such a right implies that each state has the freedom to exploit its natural resources, including through the granting of concessions and acceptance of international investment.[164] Noting that the norms of the inter-American human rights system "neither prevent nor discourage development," the Commission specified that regional human rights norms do "require that development take place under conditions that respect and ensure the human rights of the individuals

158. *Id.* at 86.
159. *Id.*
160. *Id.* at 92
161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* at 89.

affected."[165] States thus are not exempt from human rights and environmental obligations in their development projects, with the Commission noting that "the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights protected by the American Convention."[166]

The Commission has expressed its conviction that development must be sustainable and that this demands environmental protection.[167] It quoted from the Declaration of Principles of the Summit of the Americas as follows: "Social progress and economic prosperity can be sustained only if our people live in a healthy environment and our ecosystems and natural resources are managed carefully and responsibly."[168] In a 2001 country study of Paraguay,[169] the Inter-American Commission suggested that the government adopt strategies to fight poverty, including protecting environmental resources and the social capital of poor communities, noting that these are resources people can draw upon to escape poverty.[170]

C. *Indigenous Land and Resource Rights*

Where indigenous lands and resources are concerned, development projects must respect collective ownership rights. In the *Toledo Maya* case, the Commission again acknowledged the importance of economic development for the prosperity of the populations of the western hemisphere, but insisted that "development activities must be accompanied by appropriate and effective measures to ensure that they do not proceed at the expense of the fundamental rights of persons who may be particularly and negatively affected, including indigenous communities and the environment upon which they depend for their physical, cultural and spiritual well-being."[171]

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165. *Id.*

166. *Id.*

167. *See id.*

168. *Id.* at 94.

169. Inter-Am. Comm'n on Human Rights, *Third Report on the Situation of Human Rights in Paraguay*, OEA/Ser.L/V/II.110, doc. 52 (Mar. 9, 2001) [hereinafter *Third Report on Paraguay*].

170. *Id.* ch. V, ¶ 48.

171. Toledo Maya Case, *supra* note 41.

In a 1997 country report on Brazil,[172] the Commission reported on the obstacles that undermine application of Brazilian constitutional and legal precepts regarding indigenous lands. The creation of new municipalities partly within indigenous lands was seen as a tool for dividing the local indigenous peoples, since their creation provides a means of attracting or bribing some local leaders to take part in the municipal government and provoking the exclusion and excision of the indigenous government from the process.[173] At the same time, the municipality's structure and its power relations tend to favor the settlement of nonindigenous persons—along with public services and authorities that compete with the ones already provided by or accepted by the indigenous authorities—in those areas.[174] The second problem involved squatters moving into most of the indigenous areas, with the support and connivance of the local civil authorities.[175] Third, the entry and passage of local, national, and international roadways in indigenous areas brought disease into the region and made it easier for intruders to move into indigenous areas.[176] The Commission also reported that in some areas, forced evictions had taken place.[177]

Evaluating the complaints and information gained during an on-site visit, the Commission concluded that the cultural and physical integrity of Brazil's indigenous peoples, as well as the integrity of their lands, is under constant threat and attack by both individuals and private groups who disrupt their lives and usurp their possessions.[178] The authorities of several states have sought to erode indigenous peoples' political, civil, and economic rights.[179] Positive measures to combat this situation have not yet been implemented to any significant extent.[180] Security guarantees that each state should provide for its inhabitants and, as in the case of the Indian peoples of Brazil, those guarantees that require special protective measures are insufficient in terms of preventing and finding a solution to the ever-continuing usurpation of their possessions

172. Inter-Am. Comm'n on Human Rights, *Report on the Situation of Human Rights in Brazil*, OEA/Ser.L/V/II.97, doc. 29 rev. 1, ch. VI (Sept. 29, 1997).

173. *Id.* ¶¶ 42-43.

174. *Id.*

175. *Id.* ¶ 44.

176. *Id.* ¶ 47.

177. *Id.* ¶ 48.

178. *Id.* ¶ 82.

179. *Id.*

180. *Id.*

and rights.[181] The Commission recommended that the state expedite and reinforce achievement of the short- and medium-term objectives established in the National Human Rights Plan, with the full participation and control of the Indian peoples concerned, in accordance with their own traditions and leadership.[182] The Commission also recommended that the state provide the appropriate state agencies with the resources to enable them to complete their functions of demarcating lands and providing advisory services and legal advice to the Indian peoples.[183]

In the Paraguay report,[184] Chapter IX, which addressed the rights of indigenous peoples, the Commission referred to deforestation and ecological degradation contrary to the provisions of Article 64 of the Paraguayan Constitution. According to complaints received, "[t]he environment is being destroyed by ranching, farming, and logging concerns, who reduce the [indigenous people's] traditional capacities and strategies for food and economic activity."[185] In addition to pointing to the deforestation, the Commission noted water pollution and the construction of hydroelectric projects that flooded traditional lands and destroyed invaluable biodiversity.[186] The Commission recommended that Paraguay adopt the necessary measures to protect the habitat of the indigenous communities from environmental degradation, with special emphasis on protecting the forests and waters, "which are fundamental for the[ ] health and survival [of indigenous communities] as communities."[187]

Indigenous peoples may assert a right to property to protect their traditional lands and resources from exploitation and environmental degradation.[188] The Commission has called on states to take the measures aimed at restoring, protecting, and preserving the rights of indigenous peoples to their ancestral territories,[189] on the basis that respect for the collective rights of property and possession of indigenous people to the ancestral lands and territories constitutes an obligation of OAS member states, and that the fail-

181. *Id.*
182. *Id.*
183. *Id.*
184. *Third Report on Paraguay, supra* note 169.
185. *Id.* ch. IX, ¶ 38.
186. *Id.* ch. IX, ¶ 42.
187. *Id.* ch. IX ¶, 50(8).
188. *See, e.g.*, Yanomami Case, *supra* note 61; Dann Case, *supra* note 68.
189. *See, e.g.*, Yanomami Case, *supra* note 61; Dann Case, *supra* note 68.

ure to fulfill this obligation engages the international responsibility of the states.[190]

The Inter-American Court has also given a broad interpretation to the notion of "property," extending it to communally owned lands and even to lands occupied and used by indigenous peoples that are not considered by them to be "owned."[191] The landmark case that discusses this principle is that of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (Awas Tingni Case).[192] The case originated as an action against government-sponsored logging of timber on indigenous lands by Sol del Caribe, S.A. (SOLCARSA), a subsidiary of the Korean company Kumkyung Co. Ltd. The government granted SOLCARSA a logging concession without consulting the Awas Tingni community, although the government had agreed to consult them after the community protested an earlier logging concession awarded by the government. The Awas Tingnis' complaint to the Inter-American Commission alleged that the government violated their rights to cultural integrity, religion, equal protection, and participation in government.

In 1998, the Inter-American Human Rights Commission found in favor of the Awas Tingni and submitted the case to the Inter-American Court.[193] On August 31, 2001, the Court issued its judgment on the merits and reparations.[194] The Court, by seven votes to one, declared that the government's actions violated the right to judicial protection guaranteed by Article 25 of the American Convention and the right to property set forth in Article 21.[195]

The most significant aspect of the case was the Court's mandate to the government and its decision on reparations. The Court unanimously declared that the state must adopt domestic laws, administrative regulations, and other necessary means to create effective surveying, demarcating, and title mechanisms for the properties of the indigenous communities, in accordance with customary law and indigenous values, uses, and customs.[196] Pending the demarcation of the indigenous lands, the state must abstain from realizing acts or allowing the realization of acts by its agents or third parties that could affect the existence, value, use, or enjoy-

190. *See, e.g.*, Dann Case, *supra* note 68.

191. Awas Tingni Case, *supra* note 104. For relevant facts and events prior to the Inter-American Court's adjudication of the matter, see *id.* ¶ 103.

192. *Id.*

193. *Id.* ¶¶ 25-29.

194. *See* Awas Tingni Case, *supra* note 104.

195. *Id.* ¶¶ 173(1)-(2).

196. *Id.* ¶ 173(3).

ment of those properties located in the Awas Tingni lands.[197] By a vote of 7 to 1, the Court also declared that the state must invest $50,000 in public works and services of collective benefit to the Awas Tingni as a form of reparations for nonmaterial injury and $30,000 for legal fees and expenses.[198]

In the case *Maya Indigenous Communities of the Toledo District v. Belize*,[199] the Commission followed but expanded on the Court's judgment in the *Awas Tingni* case and held Belize responsible for violating the rights guaranteed by Articles II (equality), XIII (property), and XVIII (judicial protection) of the American Declaration, by granting logging and oil concessions in and failing to protect indigenous lands, failing to recognize and secure the territorial rights of the Maya people in those lands, and failing to afford the Maya people judicial protection of their rights by allowing delays in court proceedings instituted by the Maya.[200] It also upheld petitioners' assertions that the state's contraventions negatively affected the natural environment upon which the Maya people depend for subsistence, despite the state's claim that the petitioners failed to provide sufficient evidence of adverse environmental impacts.[201]

The Commission recommended that the state provide the Maya people with an effective remedy by recognizing their communal-property right to the lands that they have traditionally occupied

197. *Id.* ¶ 173(4).

198. *Id.* ¶¶ 173(6)-(7).

199. Toledo Maya Case, *supra* note 41.

200. *Id.* ¶¶ 192-96. The Commission declined to decide the complaints arising under other rights in the Declaration, i.e., Articles I (right to life), III (right to religious liberty), VI (right to a family and to its protection), XVIII (right to a fair trial), and XX (right to participate in government). It found that "in light of its analysis of the nature and content of the right to property in the context of indigenous peoples . . . the additional claims raised by the Petitioners are subsumed within the broad violations of Article XXIII of the American Declaration determined by the Commission in this case and therefore need not be determined." *Id.* ¶ 156. The Commission's approach fails to take account of the fact that the right to property is subject to limitations in the general interest, while the right to religious liberty is a non-derogable right.

201. The petitioners claimed that international instruments, including the U.N. and Inter-American draft declarations on indigenous peoples and the Rio Declaration, acknowledge the need for states to protect the natural environments on which indigenous peoples depend and that such an obligation is "implicit in the provisions of the American Declaration in the context of indigenous land claim issues." *Id.* ¶ 53. The Commission did not expressly address this point, but considered that environmental damage had occurred and had a negative impact on indigenous property rights. The Commission found that the damage resulted in part from the fact that the state failed to put into place adequate safeguards and mechanisms, to supervise, monitor, and ensure that it had sufficient staff to oversee that the execution of the logging concessions would not cause further environmental damage to Maya lands and communities. *Id.* ¶ 47.

and used, without detriment to other indigenous communities, and delimiting, demarcating, and granting title to the territory in which the communal property right exists.[202] All this was to be done in accordance with the customary land use practices of the Maya people.[203] The Commission also recommended that the state not act in a way—or allow third parties to act in a way—that might affect the existence, value, use, or enjoyment of the property located in the geographic area occupied and used by the Maya people until their territory is properly delimited, demarcated, and titled.[204] Finally, the Commission called on the state to repair the environmental damage resulting from the logging concessions granted by the state in the territory traditionally occupied and used by the Maya people.[205]

In reaching its decision, the Commission reviewed pertinent treaties, legislation, and jurisprudence, which revealed the emergence of consensus on the need for "special measures" by states to compensate indigenous peoples for exploitation and discrimination.[206] The Commission claimed that it had "long recognized and promoted respect for the rights of indigenous peoples of this Hemisphere."[207] It also noted that special measures for securing indigenous human rights had been recognized and applied by other international and domestic bodies as well,[208] including the Inter-American Court of Human Rights, the International Labour Organisation,[209] the United Nations' Human Rights Committee,[210]

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202. *Id.* ¶ 197(1).

203. *Id.*

204. *Id.* ¶ 197(2).

205. *Id.* ¶ 197(3).

206. *Id.* ¶ 95 (citing Inter-Am. Comm'n on Human Rights, *The Human Rights Situation of the Indigenous People in the Americas*, OEA/Ser.L/V/II.108, doc. 62, 21-25 (Oct. 20, 2000)).

207. *Id.* ¶ 96 (quoting the Commission's 1972 resolution on the problem of "Special Protection for Indigenous Populations—Action to Combat Racism and Racial Discrimination," in which the Commission proclaimed that "for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states.").

208. *Id.* ¶ 97.

209. International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 17, 1989, 28 I.L.M. 1348 (entered into force Sept. 5, 1991), *available at* http://www.unhchr.ch/html/menu3/b/62.htm [hereinafter ILO Convention (No. 169)].

210. *See, e.g.*, U.N. Human Rights Council, *International Covenant on Civil and Political Rights General Comment No. 23*, art. 27, ¶ 7, U.N. Doc. HRI/GEN/1/Rev.1 (1994) [hereinafter *Gen. Cmt. 23*].

the United Nations' Committee to Eradicate All Forms of Racial Discrimination,[211] and the domestic legal systems of states.[212]

The Commission saw the advancement of indigenous human rights in the recognition of collective property rights, among other developments.[213] For their part, the organs of the inter-American human rights system have acknowledged that indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them. These lands and resources are considered to be owned and enjoyed by the indigenous community as a whole[214] as integral components of their physical and cultural survival and of the effective realization of their human rights more broadly.[215] Based on this acknowledgement and given that international human rights law defines the right to property in a manner distinct from and going beyond property rights recognized or defined in domestic law, the Commission determined that the application of the American Declaration to the situation of indigenous peoples requires

> the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully

211. *See e.g.*, U.N. Comm. on the Elimination of Racial Discrimination, *General Recommendation XXIII Concerning Indigenous Peoples*, UN Doc. CERC/C/51/Misc.13/Rev.4 (1997) [hereinafter *Gen. Rec. XXIII*].

212. For a compilation of domestic legislation governing the rights of indigenous peoples in numerous OAS member states, see Inter-Am. Comm'n on Human Rights, *Authorities and Precedents in International and Domestic Law for the Proposed American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.L/V/II.110 Doc. 22 (2001).

213. *See* Dann Case, *supra*, note 68, ¶ 128 (citing Inter-Am. Comm'n on Human Rights, *The Human Rights Situation of Indigenous Peoples in the Americas 2000*, OEA/Ser.L/VII.108, doc. 62, para 125 (2000)); Yanomami Case, *supra* note 120; *see also* ILO Convention (No. 169), *supra*, note 209, art. 13 (providing that "[i]n applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.").

214. *See, e.g.*, Awas Tingni Case, *supra* note 104, ¶ 149 (observing that "[a]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community").

215. The Commission has observed, for example, that continued utilization of traditional collective systems for the control and use of territory are in many instances essential to the individual and collective well-being, and indeed the survival, of indigenous peoples, and that control over the land refers both to its capacity for providing the resources that sustain life, and to the geographic space necessary for the cultural and social reproduction of the group. *Ecuador Report*, *supra* note 107, at 115.

> informed consent, under conditions of equality, and with fair compensation.[216]

The right to property under the American Declaration thus must be interpreted and applied in the context of indigenous communities with due consideration of principles that protect traditional forms of ownership and cultural survival and rights to land, territories and resources. These have been held to include the right of indigenous peoples to legal recognition of their varied and specific forms and modalities of control, ownership, use, and enjoyment of territories and property, and the recognition of their property and ownership rights with respect to lands, territories, and resources they have historically occupied.[217]

For the organs of the inter-American system, the protection of the right to property of the indigenous peoples to their ancestral territories is a matter of particular importance because the effective protection of ancestral territories implies not only the protection of an economic unit but the protection of the human rights of a collective that bases its economic, social, and cultural development upon their relationship with the land. The Commission has long viewed the protection of the culture of indigenous peoples as encompassing the preservation of ancestral and communal lands.[218] It has found that the right to use and enjoy property may be impeded when the state itself, or third parties acting with the acquiescence or tolerance of the state, affect the existence, value,

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216. Dann Case, *supra* note 68, ¶ 131. The Inter-American Court has similarly recognized that "[i]ndigenous peoples' customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration." Awas Tingni Case, *supra* note 104, ¶ 151.

217. *See* Dann Case, *supra* note 68, ¶¶ 129-31; *Report on Ecuador*, *supra* note 107; Awas Tingni Case, *supra* note 104, ¶¶ 134-39; ICCPR, *supra* note 147, art. 27; *Gen. Cmt. 23*, *supra*, note 210, ¶ 7; *Gen. Rec. XXIII*, *supra* note 211 (calling upon states parties to the Race Convention to "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources."); ILO Convention (No. 169), *supra* note 209, art. 14(1) (providing that "[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect."), art. 15(1) (stating that "[t]he rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.").

218. *See* Yanomami *Case*, *supra* note 61, at 24, 431; *Report on Ecuador*, *supra* note 107, at 103-04.

use, or enjoyment of that property without due consideration of and informed consultations with those having rights in the property.[219] In this regard, the Commission has noted that other human rights bodies have found that states contravene the rights of indigenous communities when they issue natural-resource concessions to third parties in respect of the ancestral territory of those indigenous communities.[220]

In another case on indigenous-property rights, on March 29, 2006, the Court unanimously found Paraguay in violation of rights of property, life, and judicial protection in the *Sawhoyamaxa Indigenous Community* case.[221] The applicants asserted that the state should be held responsible for failing to ensure the ancestral rights of the community and making the community vulnerable to deprivations of food, health, and sanitation.[222] The Court called on the state to demarcate the indigenous lands and provide a development fund, among other remedies.[223]

Finally, the Court significantly extended the property guarantees afforded indigenous peoples in its 2007 judgment in the case of the *Saramaka People v. Suriname*.[224] Like the prior cases, this one concerned land and resource claims stemming from concessions granted by the state for the exploration and extraction of natural resources.[225] In this case, a major dispute arose over whether or not the Saramaka could be considered a tribal community entitled to the same special measures afforded indigenous peoples.[226] The Saramaka are not indigenous peoples, but instead are descendants of African slaves brought to Suriname during the seventeenth century.[227] Their ancestors escaped to the interior regions of the country where they established autonomous communities organized by matrilineal clans.[228]

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219. Awas Tingni Case, *supra* note 104, ¶ 153.

220. *Id.* (citing Lubicon Lake Band v. Canada, Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984 (Mar. 26, 1990)).

221. Sawhoyamaxa Indigenous Community v. Paraguay Case, 2006 Inter-Am. C.H.R. (ser. C) No. 146, ¶¶ 248(1)-(3) (Mar. 29, 2006) [hereinafter Sawhoyamaxa Indigenous Community Case].

222. *Id.* ¶ 2.

223. *Id.* ¶¶ 239-41.

224. Case of the Saramaka People v. Suriname, 2007 Inter-Am. C.H.R. (ser. C) No. 172 (Nov. 28, 2007) [hereinafter Saramaka Case].

225. *Id.*

226. *Id.* ¶ 78.

227. *Id.* ¶ 80.

228. *Id.* ¶ 80.

The Court found that, like other tribal peoples, the Saramaka maintain "a strong spiritual relationship" with their traditional lands, which constitute a source of life and cultural identity for the people.[229] Based on this finding and its prior case law,[230] the Court declared that the members of the Saramaka people are to be considered a tribal community subject to the jurisprudence regarding indigenous land and resource rights, and that they are entitled to special measures under international human rights law to protect their physical and cultural existence.[231] Thus, the Court had to determine which natural resources found on the traditional territory were essential for the survival of the Saramaka way of life and thereby protected under Article 21 of the Convention.[232]

The Commission and the applicants alleged that forestry and mining concessions granted by the state fell within the protected resource category and thus violated the Saramaka's rights because the concessions were granted without the full and prior consent of the Saramaka.[233] The state asserted, in contrast, that all land ownership vests in the state, and that it therefore could grant logging and mining concessions.[234] Moreover, the state claimed that only resources traditionally used for subsistence, cultural, and religious activities needed to be respected.[235]

The Court easily concluded that resources related to agricultural, hunting, and fishing activities are protected as subsistence activities, but it also considered the impact on subsistence resources of other activities.[236] The Court attempted to strike a balance. It noted that clean water is essential to the subsistence activity of fishing and that water quality is likely to be affected by extraction of resources not traditionally used or essential for the survival of the Saramaka.[237] In fact, all extraction activities are likely to affect the use and enjoyment of other resources necessary to the people. The Court held that the protection of the right to property is not absolute and cannot be read to preclude all concessions for exploration and extraction in the Saramaka territory.[238]

229. *Id.* ¶ 82.
230. *Id.* ¶ 85; In particular, the Court cited the Case of the Moiwana Community v. Suriname, 2004 Inter-Am. C.H.R. (ser. C) No. 124, ¶¶ 132-33 (June 15, 2004).
231. Saramaka Case, *supra* note 224, ¶ 86.
232. *Id.* ¶ 123.
233. *Id.* ¶ 124.
234. *Id.*
235. *Id.* ¶ 125.
236. *Id.* ¶ 126.
237. *Id.*
238. *Id.* ¶¶ 125-27.

Article 21 itself provides for the limitation of property rights under certain circumstances. But even where the state complies with the conditions set forth in the Article, the Court will assess and give crucial weight to the question of "whether the restriction amounts to a denial of the [indigenous and tribal peoples'] traditions and customs in a way that endangers the very survival of the group and its members."[239]

The Court set forth three safeguards it deemed essential: (1) the state must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration, or extraction plan within Saramaka territory; (2) the state must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory; and (3) the state must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the state's supervision, perform a prior environmental and social impact assessment.[240] It is notable that these requirements parallel the Bonn Guidelines on Access and Equitable Benefit-Sharing, adopted pursuant to the Convention on Biological Diversity, although the Court does not cite them, referring instead to views of the U.N. Human Rights Committee,[241] ILO Convention Number 169,[242] and World Bank policies,[243] and the 2007 U.N. Declaration on the Rights of Indigenous Peoples.[244] The Court viewed benefit sharing as inherent to the right of compensation recognized under Article 21(2) of the Convention.[245] This right to compensation extends to any deprivation of the regular use and enjoyment of property.[246]

The first duty requires the state both to compile and to disseminate information, and entails constant good faith consultations

239. *Id.* ¶ 128.

240. *Id.* ¶ 129.

241. *Id.* ¶ 130 & n.128; *see* U.N. Human Rights Comm., *CCPR General Comment No. 23: Article 27 (The Rights of Minorities)*, U.N. Doc. CCPR/C/21/Rev1/Add.5 (Apr. 8, 1994); Apirana Mahuika v. New Zealand, Communication No. 547/1993, U.N. doc CCPR/C/70/D/47/1993 (Nov. 15, 2000).

242. Saramaka Case, *supra* note 224, n.128.

243. *Id.*; *see Operation Directive 4.10: Indigenous Peoples*, *in* WORLD BANK, THE WORLD BANK OPERATIONAL MANUAL (2005).

244. Saramaka Case, *supra* note 224, ¶ 131; *see* United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/61/L.67/Annex (Sept. 12, 2007).

245. Saramaka Case, *supra* note 224, ¶¶ 138-40 (providing that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law").

246. *Id.* ¶ 139.

through culturally appropriate procedures and with the objective of reaching an agreement. As the Court stated: "[t]he state must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily."[247] Most importantly, the Court added an obligation of result to the preexisting requirement of obligation of process. It held that large-scale development or investment projects that would have a major impact within Saramaka territory can only proceed with the free, prior, and informed consent of the people, according to their customs and traditions.[248]

Applying its tests to the facts, the Court found that the concessions granted by the state failed to comply with the necessary safeguards and hence violated the right to property of the Saramaka people.[249] The Court found that the logging concessions interfered with a traditional economic activity of the Saramaka and thus threatened the resources necessary for their survival as a people.[250] Furthermore, none of the three safeguards had been applied, and as a result, the environment had been damaged.[251] Goldmining was not a traditional activity of the Saramaka, but the Court found mining affected other natural resources, again requiring application of the safeguards.[252]

The Court ordered demarcation of Saramaka lands to begin within three months and to be completed within three years, and abstention from use of the territory until that was done, unless all of the following conditions were met: the Saramaka gave free, informed, and prior consent; there was review of all concessions already granted; environmental impact assessments (EIAs) were undertaken prior to any further concessions being granted; and the state adopted legislative, administrative, and other measures necessary to ensure consultation with the Saramakas and effective redress for them.[253] The Court awarded compensation for the resources already removed in the amount of $75,000.[254] More importantly, it awarded $600,000 for the environmental damage and destruction of resources that had occurred, to be paid into a

247. *Id.* ¶ 133.
248. *Id.* ¶ 134.
249. *Id.* ¶ 158.
250. *Id.* ¶ 146.
251. *Id.* ¶¶ 146-54.
252. *Id.* ¶¶ 155-57.
253. *Id.* ¶ 194.
254. *Id.* ¶ 199.

community development fund created and established by Suriname for the benefit of the Saramaka.[255]

D. *Procedural Rights: Information, Participation, and Access to Justice*

In the Ecuador report, the Commission considered that the protection of the right to life and physical integrity "may best be advanced through measures to support and enhance the ability of individuals to safeguard and vindicate those rights."[256] In this respect, efforts to guard against environmental conditions that threaten human health "require[ ] that individuals have access to: information, participation in relevant decision-making processes, and judicial recourse."[257]

In the Ecuador report, the Commission noted that access to information is a prerequisite for public participation in decision making and for individuals to be able to monitor and respond to public and private sector action.[258] The Commission cited Convention Article 13 as granting individuals a right to seek, receive, and impart information and ideas of all kinds.[259] The Commission recommended that the government ensure that information that the law requires to be submitted is readily accessible to potentially affected individuals.[260] The Commission recommended that Ecuador take measures to improve the systems used to disseminate information about the issues that affect individuals, and to enhance the transparency of and opportunities for public input into processes affecting the inhabitants of development sectors.[261]

The Commission and the Court also addressed the right to environmental information in the case of *Claude-Reyes et al v. Chile*.[262] The applicants—NGOs and individuals including Chilean legislative representatives—alleged that the state of Chile violated the right to freedom of expression and free access to state-held infor-

255. *Id.* ¶ 201.
256. *Ecuador Report*, *supra* note 107, at 93.
257. *Id.*
258. *Id.*
259. *Id.*
260. *Id.*
261. *Id.*
262. On October 10, 2003, the Inter-American Commission adopted Report No. 60/03 declaring the case admissible. On March 7, 2005, the Inter-American Commission adopted Report No. 31/05, in which it found Chile in violation of Articles 13 and 25 of the American Convention in relation to Articles 1(1) and 2. On July 8, 2005, the Commission submitted the case to the Inter-American Court. Case of Claude-Reyes, et al. v. Chile, 2006 Inter-Am. C.H.R. (ser. C) No. 151, ¶¶ 6-15 (Sept. 19, 2006) [hereinafter Claude-Reyes Judgment].

mation required by Article 13 of the Convention when the Chilean Committee on Foreign Investment did not release information about a deforestation project the applicants wanted to evaluate.[263] Also, the domestic courts' refusal to admit the subsequent case against the state allegedly constituted a violation of the right to judicial protection required by Convention Article 25.[264] The state argued that the requested information must be considered confidential because "reservation of information in this type of company constitutes a cornerstone of constitutional economic guarantees and Chilean foreign investment policy."[265] The state also asserted that the release of the information would constitute arbitrary discrimination against the investors.[266] The Commission declared the case admissible[267] and ultimately submitted it to the Court,[268] which decided it on September 19, 2006.

In its judgment finding violations of the right to information and the right to judicial remedies, the Court cited a wide range of documents, including not only OAS declarations on democratic governance and its own jurisprudence, but also Principle 10 of the Rio Declaration on Environment and Development, resolutions of the Committee of Ministers and Parliamentary Assembly of the Council of Europe, and the Aarhus Convention on Information, Public Participation and Access to Justice.[269] The Court directed the government to devise means to ensure access to information and provide the information sought by the applicants.[270]

Once the information is provided, public participation in decision making allows those whose interests are at stake to have a say in the projects and activities that affect them. Public participation is linked to Article 23 of the American Convention, which provides that every citizen shall enjoy the right "to take part in the conduct of public affairs, directly or through freely chosen representatives," as well as to the right to receive and impart information.[271] Affected individuals should be able to be informed about and have input into the decisions that affect them. In its Ecuador report, the

263. Marcel Claude-Reyes, et al. v. Chile, Case No. 12.108, Inter-Am. C.H.R., Report No. 60/03, OEA/Ser.L/V/II.118, doc. 70 rev. 2, ¶¶ 2, 31-33 (2003).

264. *Id.*

265. *Id.* ¶ 39.

266. *Id.*

267. *Id.*

268. *Id.*

269. Claude-Reyes Judgment, *supra* note 262.

270. *Id.* ¶¶ 156-165.

271. ICCPR, *supra* note 147, art. 25.

Commission recommended that the government implement the measures to ensure that all persons have the right to participate, individually and jointly, in the formulation of decisions that directly concern their environment.[272] The Commission specifically encouraged Ecuador to enhance its efforts to promote the inclusion of all social sectors in the decision-making processes that affect them.[273]

In the *Maya Toledo* case, the Commission observed that one of the central elements of the protection of indigenous-property rights is the requirement that governments undertake effective and fully-informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories.[274] Any determination that delineates the extent to which indigenous claimants maintain interests in the lands that they have traditionally held title to and have occupied and used, or any decisions by the government that will have an impact upon indigenous lands and their communities—such as the granting of concessions to exploit the natural resources of indigenous territories—must be based upon a process of fully informed consent of the indigenous community as a whole.[275] This requires, at a minimum, that all of the members of the indigenous community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as a collective.[276] In the *Saramaka People* case, the Court went further, indicating that large-scale development or investment projects that could have a major impact on indigenous and tribal territories require not only consultation, but also prior, freely-given informed consent obtained in accordance with the peoples' customs and traditions.[277]

Finally, the right to access judicial remedies is deemed the fundamental guarantor of rights at the national level.[278] Article 25 of the American Convention provides that "[e]veryone has the right to simple and prompt recourse, or any other effective recourse, to

272. *Ecuador Report*, *supra* note 107, at 94.
273. *Id.*
274. Toledo Maya Case, *supra* note 41, ¶ 142.
275. *Id.* ¶ 142
276. *Id.* ¶ 142.
277. Saramaka Case, *supra* note 224, at ¶ 134. The Court cited in support the similar conclusion of the U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people. Rudolfo Stavenhagen, *Report of the U.N. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc. E/CN.4/2003/90, 2, ¶ 66 (Jan. 21, 2003).
278. *Report on Ecuador, supra* note 107, at 93.

a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention . . . ."[279] This means that individuals must have access to judicial recourse to vindicate the rights to life, physical integrity, and a safe environment, especially when these rights are expressly protected in a state's constitution.[280] Indigenous and local communities must have access to justice to ensure effective judicial protection respecting claims on ancestral lands.[281]

In its admissibility decision in the case of *Community of San Mateo De Huanchora and its Members v. Peru*,[282] the Commission focused on the nature of remedies that the government must provide when severe pollution occurs. It also indicated the circumstances in which the Commission will issue precautionary measures to address environmental emergencies.[283] In this case, a coalition of communities affected by mining claimed that Peru violated the fundamental individual and collective rights of its members because of the effects of pollution produced by a field of toxic-waste sludge belonging to the Lizandro Proaño S.A. mining company.[284] The applicants claimed that the government should be held responsible for violations of the Convention-guaranteed rights to life, humane treatment, personal liberty, a fair trial, protection of honor and dignity, freedom of association, protection of the family, rights of the child, property, freedom of movement and residence, participation in government, equal protection before the law, judicial protection, and progressive development of economic, social, and cultural rights enshrined in Convention Articles 4, 5, 7, 8, 11, 16, 17, 19, 21, 22, 23, 24, 25, and 26.[285] According to the

279. American Convention, *supra* note 36, art. 25.

280. *Ecuador Report*, *supra* note 107, at 93.

281. *See* Sawhoyamaxa Indigenous Community Case, *supra* note 221; Awas Tingni *Case*, *supra* note 104; Indigenous Community Yakye Axa v. Paraguay, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

282. San Mateo de Hanchor v. Peru, Petition No. 504/03, Inter-Am. C.H.R., Report No. 69/04, OEA/Ser.L/V/II.122, doc. 5 rev. 1, 487 (2004) [hereinafter San Mateo de Hanchor Case].

283. *See id.*

284. *Id.* ¶¶ 5, 14.

285. *Id.* ¶¶ 2, 14. The petitioners also asserted that the mining company violated Peruvian law. The petitioners claimed that the mining concession infringed legal provisions for the mining sector, especially Law 27015 on mining concessions in urban areas and urban expansion, because it was granted in a zone of urban expansion, did not observe the provisions requiring submittal of an environmental impact assessment (EIA) study on the effects of the mining, and was not authorized by the respective municipal permit from the office of the mayor. *Id.* ¶ 17.

applicants, most of the people living in the community of San Mateo de Huanchor identified themselves as indigenous and had close spiritual ties to their ancestral lands, which aggravated the harm in San Mateo de Huanchor because the pollution was affecting not only material values and health, but also the spiritual values associated with the land and environment.[286]

The petitioners requested precautionary measures, claiming that the severity of the environmental pollution had triggered a public health crisis and that every day the risk associated with exposure to the metals in the sludge was increasing.[287] The applicants added that those who were most severely affected were the children who risked irreparable neurological and psychological damage because of their exposure to lead and other mineral waste.[288] On August 17, 2004, the Commission adopted precautionary measures, requesting that Peru report, within fifteen days, that it was: (1) starting up a health assistance and care program for the population of the community in order to identify those persons who might have been affected by the pollution so that they could be given relevant medical care; (2) drawing up as quickly as possible an environmental impact assessment study required for removing the sludge containing the toxic waste; (3) starting the work required to treat and transfer the sludge to a safe site, where it will not produce pollution, in line with the technical conditions set forth in the impact study, once the study was completed; (4) drawing up a timetable of activities to monitor compliance with the measure adopted by IACHR; and (5) taking due account of the community and its representatives.[289]

Peru insisted that local remedies existed that had not been exhausted,[290] pointing out that the government had instituted criminal proceedings against the director of the mining company, for alleged crimes against the environment and natural resources.[291] It claimed that, in the domestic system, there were regulations for punishment, prosecution, and prevention, as well as administrative and judicial remedies that provide legal protec-

286. *Id.* ¶ 16.

287. *Id.* ¶ 11.

288. *Id.* ¶ 11.

289. *Id.* ¶ 12.

290. *Id.* ¶¶ 32-41. Article 46(1)(a) of the American Convention provides that, for a petition to be admissible, it must be subject to the following requirement: "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." *Id.*

291. *Id.* ¶ 44.

tion for the rights whose violation was being alleged.[292] An administrative proceeding underway was aimed at stopping the activities of the mining company and removing the toxic-sludge dump in order to halt the environmental pollution affecting the population.[293] Nonetheless, even though the government claimed that it had ordered the definitive shutdown of the toxic-waste dump in Mayoc and sought a plan to remove the pollutants, the Commission observed that the pollutants had not been removed.[294]

The Commission recalled that remedies must be adequate and effective, and only those remedies that will cure the alleged violations must be exhausted.[295] "Adequate" means that the functioning of these remedies, within domestic law, must be suitable to protect the legal situation that was infringed.[296] An "effective" remedy is one that is capable of producing the outcome for which it was established.[297] The state is bound to provide the persons under its jurisdiction adequate remedies to effectively protect their situation and produce the outcome for which the remedies were established.[298] If the remedies afforded by the state do not meet these requirements, then the exceptions denoted in Article 46(2) of the Convention apply.[299]

Applying this test, the Commission found that the remedies utilized by the applicants were not effective, as they did not provide the juridical protection from the mining activity's pollution that the applicants required.[300] The administrative decisions were ignored, more than three years had elapsed, and the toxic-waste sludge of the Mayoc field continued to cause damage to the health of the population of the community, with its effects becoming more acute over time.[301] The Commission wrote:

> In view of the repeated failure to comply with the administrative order, only administrative sanctions of pecuniary nature have been imposed, which has not made it possible to remedy the events on which the petition is based. As for the summary criminal proceedings aimed at punishing the crimes committed

292. *Id.* ¶ 44.
293. *Id.* ¶ 47.
294. *Id.* ¶ 50.
295. *Id.* ¶ 56.
296. *Id.* ¶ 56.
297. *Id.* ¶ 56; Velásquez Rodríguez Case, *supra* note 59, ¶¶ 63-64; Godínez Cruz Case, *supra* note 60, ¶ 66-67; Fairén Garbi and Solís Corrales Case, 1989 Inter-Am. Ct. H.R. (ser. C) No. 6, ¶¶ 87-88 (Mar. 15, 1989).
298. San Mateo de Hanchor Case, *supra* note 282, ¶ 57.
299. *Id.* ¶ 57.
300. *Id.* ¶ 59.
301. *Id.* ¶ 59.

> against the environment, more than three years have elapsed since they were filed, and as yet no definitive verdict has been pronounced.[302]

The Commission thus concluded that the remedies were ineffective.[303] In addition, because of the unjustified delay in complying with the administrative resolutions that were issued to remove the sludge from Mayoc and the unjustified delay in processing the criminal proceedings, the Commission ruled that the requirements set forth in the Convention that remedies under domestic law must be exhausted were not applicable in this specific case, and in light of the facts, the Commission found that that an exception under Article 46(2)(c) was valid.[304] The application was therefore admissible.[305]

In late 2007, the Commission issued a report on access to justice in which it compiled the hemispheric norms and standards on this issue.[306] The standards make clear the positive duty of states to remove any regulatory, social, or economic[307] obstacles that prevent or hinder the possibility of access to justice,[308] as well as their duty to provide a fair trial within a reasonable time[309] and a reasoned decision on the merits of a matter.[310] Judicial remedies should be simple, urgent, informal, accessible, and the decisions should be rendered by independent bodies.[311]

E. *Limits on Jurisdiction*

While the Commission and Court have scrutinized environmental conditions and state actions for conformity with inter-American human rights guarantees, they have been less willing to hear cases where the environmental issues go beyond immediate human well-being. In 2003, the Commission declared inadmissible a petition from a Panamanian national concerning the Metropolitan Nature

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302. *Id.* ¶ 59.
303. *Id.* ¶ 61.
304. *Id.* ¶ 63.
305. *Id.* ¶ 68.
306. Inter-Am. Comm'n on Human Rights, *Access to Justice as a Guarantee of Economic, Social and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights,* OEA/Ser.L/V/II.129 doc. 4 (Sept. 7, 2007) [hereinafter *Access to Justice Report*].
307. *See* Exceptions to the Exhaustion of Domestic Remedies (Arts. 46(1), 46(2)(a) and 46(2)(b) of the American Convention on Human Rights), Advisory Opinion OC-11/90, 1990 Inter-Am. C. H.R. (ser. A) No. 10 (Aug. 10, 1990).
308. *Access to Justice Report, supra* note 307, at 1, 8-20
309. *Id.* at 54-64.
310. *Id.* at 54-57.
311. *Id.* at 65-83.

Reserve in Panama, on the ground that the petition failed to identify individual victims and was overly broad.[312] The petitioner asserted that the government had violated the right to property of all Panamanians by authorizing construction of a public roadway through a protected nature reserve.[313] He contended that the status of the nature reserve made it the property of all citizens and not that of the state.[314] After eight years of proceedings, the Commission finally determined that the petition failed to identify any specific victims and that thus the claim was inadmissible.[315] It characterized the case as an *actio popularis*, while noting the problem this created for the petitioner: "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."[316] Unfortunately, the Commission's analysis suggests that the more widespread the violations—which can occur in many contexts where environmental harm is the origin of the complaint—the less likely the Commission will find the complaint admissible.

Conclusion

The rights-based approach discussed above offers significant advantages over other legal mechanisms that aim to achieve environmental protection. Firstly, human rights are maximum claims on society, elevating concern for the environment above a mere policy choice that may be modified or discarded at will. Rights are inherent attributes that must be respected in any well-ordered society. The moral weight this concept affords exercises an important compliance pull. Secondly, where a right to environment is expressed as a constitutional guarantee, it will usually be at the apex in the national legal hierarchy and "trump" any conflicting norm of lower value, giving it precedence over other legal norms that are not constitutionally based. Third, at the international level, enforcement of human rights law is more developed than the enforcement of international environmental law. The availability of individual complaints procedures has given rise to extensive

312. Metropolitan Nature Preserve Case, *supra* note 3, at 524.
313. *Id.* ¶ 1.
314. *Id.* ¶ 1.
315. *Id.* ¶ 3.
316. *Id.* ¶ 34.

jurisprudence from which the specific obligations of states to protect and preserve the environment are detailed.

The decisions and judgments issued by the Inter-American Commission and Court reflect all three of the approaches identified in the introduction to this Article. First, they have acknowledged that a degraded environment can result in violations of the rights to life, health, property, and culture. Secondly, they have emphasized the importance of rights to information, public participation in decision making (including the prior informed consent of property-holders who might be negatively impacted by development projects), and the right of access to justice and effective remedies to ensure that other rights can be protected. Thirdly, the human rights bodies have insisted that constitutional guarantees of the right to a safe and healthy or ecologically sound environment must be implemented and enforceable.

The articulation of state obligations corresponding to the regional human rights guarantees involves incorporating a considerable body of international and national environmental law. States must legislate and regulate to prevent environmental harm that would infringe on human rights. They no longer have complete discretion to set their level of environmental protection or to decide freely on the quantity and quality of development projects they would approve. Human rights guarantees serve to impose a minimum standard of environmental quality that must be ensured against state and nonstate activities. States must also provide information about environmental conditions and ensure that all individuals and groups potentially affected by a proposed project or activity have a means to participate in the decision-making process. Once a project or activity is approved, states must fully enforce the relevant laws and regulations they have adopted. Finally, the state must provide mechanisms of enforcement and redress.

The decisions of the Inter-American Commission and Court have brought together the fundamental values of the international community, acknowledging the importance of economic development in the hemisphere while ensuring that human rights and environmental protection are respected. The term "sustainable development" adopted by the Rio Declaration on Environment and Development[317] well reflects this triad of interests that must be taken into account by governments and international organizations. Not one of the three goals—environmental protection, eco-

317. Rio Declaration, *supra* note 13, princ. 16.

nomic development, and respect for human rights—can be achieved without consideration of the other two. At the Johannesburg Summit on Sustainable Development, the global community reaffirmed this reality, recasting the social, ecological, and economic dimensions of sustainable development as three pillars that all must stand firm over the long term.[318] Each state's obligation is to ensure that the pillars are reflected in its domestic laws and policies.

318. United Nations, Johannesburg Summit of 2002: Preparatory Process, http://www.un.org/jsummit/html/prep_process/prep_process.html (last visited June 22, 2009). For a short overview and discussion of the results of the WSSD, see generally, Franz Xaver Perrez, *The World Summit on Sustainable Development: Environment, Precaution and Trade - A Potential for Success and/or Failure*, 12 REV. EUR. & INT'L ENVTL. L. 12-22 (2003).