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Enforcing Environmental Human Rights: Selected Strategies of US NGOs

Jennifer Cassel*

INTRODUCTION

¶1 The connection between environmental damage and human rights would seem to be self-apparent. When air is polluted by toxic fumes, people who breathe those fumes are injured, perhaps even killed. When water becomes contaminated, people who drink that water may become sick, and pregnant women who drink it may pass the contaminants on to their unborn babies. When climate change leads to the melting of the polar caps at previously unheard of rates, peoples that, for millennia, have built their cultures atop that polar ice are left to sink, along with the seals, penguins, and polar bears that have nourished them for generations. In sum, anytime the natural environment is seriously harmed, people that depend on that harmed environment are inevitably harmed as well.

¶2 In spite of the clear link between environmental harm and human rights violations, international human rights law which contemplates environmental destruction as a violation of human rights has only recently begun to emerge, and clear definitions of environmental human rights have yet to be formulated.¹ Scholars in the field have proposed at least three different concepts of environmental rights: first, environmental rights as new, separate human rights;² second, environmental rights as encompassed within previously established human rights;³ and third, environmental rights as rights of the environment in and of itself, regardless of its effects on people.⁴

¶3 The first formulation conceives of environmental rights as separate human rights, independent of and additional to previously established human rights.⁵ One example of this conception is found in Article 11 of the San Salvador Protocol to the American Convention on Human Rights, which was adopted in 1988 and entered into force in November 1999.⁶ Article 11(1) states that “[e]veryone shall have the right to live in a healthy environment and to have

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¹ See Betsy Apple, *Commentary*, HUMAN RIGHTS *DIALOGUE* spring 2004, at 34; Barry Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 *GEO. INT’L ENVTL. L. REV.* 359, at 361.

² See Jeffrey Atik, *Commentary*, HUMAN RIGHTS *DIALOGUE* spring 2004 at 26; Hill, Barry et al., *supra* note 1, at 374.

³ See Jorge Daniel Taillant, *A Nascent Agenda for the Americas*, HUMAN RIGHTS *DIALOGUE* spring 2004, at 29.

⁴ See Jeffrey Atik, *supra* note 2.

⁵ See Jeffrey Atik, *supra* note 2 and Barry Hill et al, *supra* note 1.

⁶ Organization of American States, Additional Protocol to the American Convention On Human Rights in the Area Of Economic, Social And Cultural Rights "Protocol Of San Salvador," Nov. 17, 1988, O.A.S.T.S. No. 69, *available at* <http://www.cidh.org/Basicos/basic5.htm> [hereinafter San Salvador Protocol].

access to basic public services.”⁷ Other examples of this conception are contained in the Constitutions of numerous countries worldwide.⁸ In the Americas alone, the Constitutions of Argentina, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Honduras, Nicaragua and Paraguay all provide their nationals some formulation of the right to live in a healthy environment, independent of any other rights they may enjoy.⁹ Finally, Article XXIV of the African Charter on Human and People’s Rights declares that “all peoples shall have the right to a general satisfactory environment favorable to their development.”¹⁰

14 The second formulation of environmental rights conceives of such rights as embedded in existing human rights, such as the right to life, the right to health or the right to property.¹¹ This conception has enjoyed limited, but growing, support from human rights bodies, particularly at the regional level. The rights to life and health, for example, have been found to be violated by means of environmental harm in at least two cases considered by the Inter-American Commission for Human Rights (IACHR), *the Yanomami Case*¹² and *Maya Indigenous Communities of the Toledo District v. Belize*.¹³ In *the Yanomami Case*, the IACHR found that petitioners’ rights to life and to the preservation of health and well-being, among other rights, were violated when a highway constructed through Yanomami territory in Brazil brought disease to the Yanomami people.¹⁴ In *Maya Indigenous Communities of the Toledo District v. Belize*, the IACHR found Belize in violation of the petitioners’ rights to life and health due to “[T]he failure of the State to engage in meaningful consultation with the Maya people in connection with the logging and oil concessions in the Toledo District, and the negative environmental effects arising from those concessions”¹⁵ Another regional body, the African Commission on Human Rights, found Nigeria in violation of the Ogoni peoples’ rights to life and health when it permitted unhindered environmental destruction to take place, devastating the Ogonis’ health.¹⁶

15 The right to property, enshrined in Article XXIII of the American Declaration of the Rights and Duties of Man (“American Declaration”),¹⁷ is another established human right which

⁷ *Id.*

⁸ See EARTHJUSTICE, “ENVIRONMENTAL RIGHTS REPORT : HUMAN RIGHTS AND THE ENVIRONMENT : MATERIALS FOR THE 61ST SESSION OF THE UN COMMISSION ON HUMAN RIGHTS, GENEVA, MARCH 14-APRIL 22, 2005,” (Environmental Rights Report 2005) p. 37, *available at* http://www.earthjustice.org/library/references/2005_ENVIRONMENTAL_RIGHTS_REPORTrev.pdf.

⁹ *Id.*

¹⁰ African [Banjul] Charter on Human and Peoples' Rights, art. XXIV, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter African Charter], *available at* <http://www1.umn.edu/humanrts/instreet/z1afchar.htm>

¹¹ See Jeffrey Atik, *supra* note 2 and Jorge Daniel Taillant, *supra* note 3.

¹² Resolution No. 12/85, Case No. 7615 (Brazil), March 5, 1985, printed in Annual Report of the IACHR 1984-85, OEA/Ser.L/V/II.66, doc. 10 rev. 1, Oct. 1, 1985, at 24, 31 (YANOMAMI CASE), *available at* <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>.

¹³ *Maya Indigenous Communities of the Toledo District v. Belize*, Case 12.053, Inter-Am. C.H.R., Report No. 40/04, OEA/Ser. L/V/II.122, doc. 5, rev. 1 (2005) [hereinafter *Maya Indigenous Communities v. Belize*].

¹⁴ *The Yanomami Case*, *supra* note 12.

¹⁵ *Maya Indigenous Communities of the Toledo District v. Belize*, *supra* note 13 at para. 154.

¹⁶ The African Commission on Human Rights found Nigeria in violation of the right to life for permitting oil production in Ogoniland to “[take] place with complete disregard for the environment or health of the local inhabitants . . . ,” resulting in daily discharges of toxic waste into rivers and nearby areas which, “. . . together with constant spillages from petroleum installations, resulted in water, land, and air pollution (environmental degradation) and seriously impaired the health of the inhabitants of that area, causing skin infections, and gastrointestinal and respiratory diseases, as well as increasing the risk of cancer and reproductive and neurological disorders.” Communication N° 155/96, African Comm. Hum. & Peoples’ Rights, Done at the 30th Ordinary Session, held in Banjul, The Gambia from 1327 October 2001.

¹⁷ Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36,

activists have claimed – with some success – encompasses within it environmental rights. In the watershed case of *Maya (Sumo) v. Nicaragua*, decided by the Inter-American Court of Human Rights (Inter-American Court) in 2001, the Inter-American Court found that Nicaragua violated the Maya (Sumo)’s right to property by failing to effectively demarcate and title their property and by “[G]ranting concessions to third parties to utilize the property and resources located in an area which could correspond, fully or in part, to the lands which must be delimited, demarcated, and titled”¹⁸ Similarly, in *Maya Indigenous Communities of the Toledo District v. Belize*, the IACHR found that Belize’s failure to effectively demarcate, title or otherwise protect the Maya petitioners’ communal lands, as well as its granting of oil and logging concessions on those unprotected communal lands “without effective consultations with and the informed consent of the Maya people and with the resulting environmental damage” constituted a violation of the Maya’s right to property.¹⁹

¶6 The third conception of environmental rights treats such rights as belonging to the environment itself, not to people affected by the environment.²⁰ In this “ecocentric” view, environmental rights are human rights only in the sense that they require humans to enforce them; however, people would do so as “stewards of the environment” rather than as “victims of environmental harm”²¹ As this formulation of environmental rights has no precedent in either codified or customary international law or in common law, judges have not yet ruled on its applicability, nor are they likely to do so.²² Because courts are often reticent to enforce rights which they have little experience adjudicating,²³ and may be even less inclined to enforce rights which have yet to be firmly established as law,²⁴ commentators have suggested that this concept of environmental rights as rights belonging to the environment itself has little hope of enforcement by means of litigation.²⁵

¶7 This comment centers on the strategic use of the first two conceptions of environmental rights by selected US non-governmental organizations (NGOs) in their pursuit of enforcing environmental human rights. While the “ecocentric” approach to environmental rights would theoretically provide an even broader basis for environmental protection than either of the first two conceptions, insofar as states’ duty to protect the environment would extend even to areas so far from human habitation that linking environmental damage in those areas to human rights would be tenuous,²⁶ for reasons explained above its success is so unlikely that no NGO has even attempted to advance this approach in trying to enforce environmental human rights. Since the goal of this comment is to scrutinize strategies of enforcing environmental human rights to determine which strategy might achieve the most success, debating the pros and cons of a currently futile formulation of environmental rights is not this author’s priority and will not be included in the comment.

1144 U.N.T.S. 123, available at <http://www.cidh.org/Basicos/basic3.htm>

¹⁸ Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am Ct. H.R. (ser. C) No. 79, at para. 153 (August 31, 2001).

¹⁹ *Maya Indigenous Communities of the Toledo District v. Belize*, *supra* note 13, at paras. 152 and 153.

²⁰ See Jeffrey Atik, *supra* note 2, at 26.

²¹ *Id.*

²² See Betsy Apple, *supra* note 1; Jorge Daniel Taillant, *supra* note 3.

²³ See Jorge Daniel Taillant, *supra* note 3.

²⁴ See Betsy Apple, *supra* note 1.

²⁵ *Id.*; see also Jorge Daniel Taillant, *supra* note 3 and Barry Hill et al., *supra* note 1, at 391 (suggesting that, in the US, judicial hesitance to enforce environmental rights may derive from judges’ reluctance to “decide policy issues involving the complex calculus of sometimes competing economic, social, and environmental values”).

²⁶ See Jeffrey Atik, *supra* note 2, at 26.

¶8 Another strategy for linking environmental harm and human rights which will not be examined in this comment, but which nonetheless merits acknowledgement, is the effort by various NGOs to uphold the human rights of environmental activists whose activities have led to persecution by the governments of their respective homelands.²⁷ This strategy does not aim to articulate environmental damage in human rights terms by claiming that environmental damage in itself violates human rights, but rather strives to protect the environment by upholding the more well-established human rights of individuals who fight to protect it.²⁸ While this strategy provides a useful point of contact between environmental degradation and human rights and thus may lead to further appreciation of the overlap of environmental harms and human rights violations,²⁹ it does not fall within the purview of this comment.

¶9 I have chosen to examine the work of non-governmental organizations (“NGOs”) for several reasons. First and foremost, NGOs are principal actors in enforcing human rights throughout the world.³⁰ One manner in which NGOs contribute to the enforcement of human rights is by assisting victims in obtaining legal remedies for violations of their human rights.³¹ Although victims of human rights violations frequently have the right to obtain legal redress, often they lack the knowledge and resources to pursue such redress.³² By assisting them, NGOs expand access to legal systems and thereby advance human rights in two ways: first, by seeking enforcement of environmental human rights, and second, by facilitating access to legal mechanisms that can provide redress for grievances – thus advancing the goal of access to courts enunciated in Article XVIII of the American Declaration³³ and Article II of the International Covenant on Civil and Political Rights (“ICCPR”).³⁴

¶10 NGOs are also crucial instruments of human rights enforcement precisely because they are not government entities: they are not obligated to defend the human rights policies of any state, and they often bring to the table viewpoints which differ entirely from those of governments.³⁵ NGOs “bring out the facts . . . [and] provoke and energize” people and entities to recognize and

²⁷ See Stephen Mills and Olagbaju Folabi, “Defending Environmental Defenders: Two leading American grassroots organizations – Amnesty International USA and Sierra Club – recently joined hands to protect those who advocate for the environment,” *HUMAN RIGHTS DIALOGUE* spring 2004, Carnegie Foundation, p. 32; see also Betsy Apple, *supra* note 1, at 35; EARTHJUSTICE, “CASE STUDY: PROTECTING THE RIGHTS OF ENVIRONMENTAL DEFENDERS TO PROTEST LOGGING NEAR COPPER CANYON,” http://www.earthjustice.org/our_work/issues/international/human_rights/protecting_the_rights_of_environmental_defenders_to_protest_illegal_logging_near_copper_canyon.html (last visited 11-27-06) and EARTHRIGHTS INTERNATIONAL, “LEGAL PROGRAMS: BOWOTO V. CHEVRONTEXACO,” <http://www.earthrights.org/legal/chevron/> (last visited 12-1-06).

²⁸ *Id.*

²⁹ Betsy Apple, *supra* note 1, at 35.

³⁰ See HENRY J. STEINER AND PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 938 (2d ed. 2000) [hereinafter Steiner & Alston]; see also Amy Hardberger, *Life, Liberty and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 *NW. J. INT’L HUM. RTS.* 350 (2005).

³¹ Hardberger, *supra* note 30.

³² *Id.*

³³ Organization of American States, American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, 1948, available at <http://www.cidh.org/Basicos/basic2.htm> (last visited 1-3-07). Article XVIII of the American Declaration states: “Every person may resort to the courts to ensure respect for his legal rights....”

³⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 993 U.N.T.S. 3, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited 1-3-07). Article 2(3)(b) of the ICCPR states: “Each State Party to the present Covenant undertakes to ensure that any person claiming [a remedy to violations of the ICCPR] shall have his right thereto determined by competent judicial, administrative or legislative authorities....”

³⁵ See Steiner & Alston, *supra* note 30, at 350.

respond to situations that they might otherwise ignore.³⁶ This provocative, energizing characteristic of NGOs has been especially true with regard to environmental issues: actions such as Greenpeace's protest of whaling ships from its boat, the "Rainbow Warrior," in the late 1970s and early 1980s³⁷ and the National Resources Defense Council (NRDC)'s federal lawsuit against the US Navy to halt the use of undersea sonar that was causing injury to marine animals³⁸ have drawn attention to environmental issues where it was otherwise scant. Given NGOs' essential role in enforcing human rights and promoting environmental protection, gaining a greater understanding of their strategies will provide important insight into how the human rights and environmental movements can successfully meld together.

¶11 In this comment, I will examine strategies for enforcing environmental human rights used by three US NGOs: Earthjustice, the Center for International Environmental Law (CIEL), and Earthrights International. I chose these three NGOs because they have been at the forefront of the effort to establish and enforce environmental human rights. Although each of these NGOs employs a variety of strategies to promote environmental human rights, I have chosen in this comment to link one specific strategy with each NGO, either because the NGO has worked more extensively with that strategy than any other,³⁹ or because the highlighted strategy is one less frequently or effectively utilized by other NGOs.⁴⁰ While the three highlighted strategies only represent a sample of the actions which have been and might be used to promote environmental human rights, they have been among the most utilized, and are thus ripe for evaluation.

¶12 In Part I of this comment, I focus on Earthjustice's international approach to enforcing environmental human rights, specifically its strategy of working through the United Nations ("UN") system toward establishing environmental rights as enforceable law.⁴¹ In Part II, I examine CIEL's efforts to enforce environmental rights on a regional level, namely its submission of petitions to the Inter-American Commission of Human Rights.⁴² Part III describes Earthrights International's strategy of enforcing environmental human rights by means of submitting amicus briefs in litigation in US federal courts under the Alien Torts Claims Act ("ATCA").⁴³ Finally, Part IV concludes the comment with an analysis of the strategies for enforcing environmental rights that have proven most successful thus far, and offers my predictions as to which strategies are most likely to advance the environmental human rights movement in the years to come.

³⁶ *Id.*

³⁷ See "A Short History of the Rainbow Warrior," <http://archive.greenpeace.org/comms/rw/pkhist.html> (last visited 11-26-06).

³⁸ "Protecting Whales from Dangerous Sonar: Following a historic victory, NRDC steps up the campaign at home and abroad to regulate active sonar systems that harm marine mammals," <http://www.nrdc.org/wildlife/marine/sonar.asp> (last visited 11-26-06).

³⁹ For example, Earthrights International has worked extensively with ATCA claims, as CIEL has with petitions before the IACHR.

⁴⁰ For example, Earthjustice is one of few US NGOs submitting reports on environmental rights to the UN Human Rights Commission (now Council).

⁴¹ EARTHJUSTICE, "HUMAN RIGHTS AND THE ENVIRONMENT," http://www.earthjustice.org/our_work/issues/international/human_rights/ (last visited 11-26-06).

⁴² CIEL, "HUMAN RIGHTS AND ENVIRONMENT: ADVOCACY AND FACT-SPECIFIC INVESTIGATIONS," <http://www.ciel.org/Hre/hrecomponent2.html> (last visited 11-26-06).

⁴³ EARTHRIGHTS, "LEGAL PROGRAMS," <http://www.earthrights.org/legal/> (last visited 11-26-06).

PART I. THE INTERNATIONAL APPROACH: EARTHJUSTICE

¶13 Earthjustice is a non-profit public interest law organization founded in 1971.⁴⁴ The mission of Earthjustice is to “[protect] the magnificent places, natural resources, and wildlife of this earth and to [defend] the right of all people to a healthy environment”⁴⁵ Earthjustice focuses on eight program areas, each of which has various subdivisions. The International program area, based in Oakland, California, directs Earthjustice’s human rights work.

¶14 One of Earthjustice’s principal strategies for enforcing environmental human rights is to engage in advocacy before UN human rights bodies to establish environmental rights as enforceable international law. As an NGO holding “consultative status” with the UN Economic and Social Council (“ECOSOC”),⁴⁶ Earthjustice has the privileged position of being able to contribute to the dialogue within the UN regarding human rights and the environment. It has done so by submitting annual “Environmental Rights Reports” to the UN Human Rights Commission (now Council) from 2001 until 2005, and then again in 2007.⁴⁷

¶15 The Environmental Rights Reports inform the UN Human Rights Commission about the status of environmental rights as they have been legislated, adjudicated and practiced throughout the world during the year preceding the report. Each of the reports contains essentially the same introduction, pointing out that there is growing recognition throughout the world that human rights and the environment are interconnected, and providing background on the creation of a Special Rapporteur for Human Rights and the Environment under the auspices of the UN Commission on Human Rights.⁴⁸ Next, the reports discuss international, regional and domestic

⁴⁴ Earthjustice was originally called the Sierra Club Legal Defense Fund, but changed its name to Earthjustice in 1997 to reflect that it provided representation not only to the Sierra Club, but to other organizations as well. EARTHJUSTICE, “ABOUT US: OUR HISTORY,” http://www.earthjustice.org/about_us/our_history/index.html (last visited 11-27-06).

⁴⁵ EARTHJUSTICE “ABOUT US: OUR MISSION,” http://www.earthjustice.org/about_us/index.html (last visited 11-26-06).

⁴⁶ ECOSOC, established by the UN Charter to coordinate the social, economic and other related work of numerous UN agencies and commissions, “serves as the central forum for discussing international economic and social issues, and for formulating policy recommendations addressed to Member States and the United Nations system. It is responsible for promoting higher standards of living, full employment, and economic and social progress; identifying solutions to international economic, social and health problems; facilitating international cultural and educational cooperation; and encouraging universal respect for human rights and fundamental freedoms. . . .” In carrying out its mandate, ECOSOC currently consults with over 2,100 registered NGOs, as well as with academics and representatives of the business sector. http://www.un.org/docs/ecosoc/ecosoc_background.html (last visited 11-27-06).

⁴⁷ EARTHJUSTICE, “HUMAN RIGHTS AND THE ENVIRONMENT: THE FULL REPORT,” http://www.earthjustice.org/our_work/issues/international/human_rights/human-rights-report/international_human_rights_full_report.html (last visited 10-12-07).

⁴⁸ EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2005, *supra* note 8, at 1-5; EARTHJUSTICE, “ISSUE PAPER: HUMAN RIGHTS AND THE ENVIRONMENT: MATERIALS FOR THE 60TH SESSION OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, GENEVA, 15 MARCH – 23 APRIL 2004” (ENVIRONMENTAL RIGHTS REPORT 2004), pp. 1-5, *available at* <http://www.earthjustice.org/library/references/2004UNreport.pdf> (last visited 11-27-06); EARTHJUSTICE, “ISSUE PAPER: HUMAN RIGHTS AND THE ENVIRONMENT: MATERIALS FOR THE FIFTY-NINTH SESSION OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, GENEVA, 17 MARCH – 25 APRIL 2003” (ENVIRONMENTAL RIGHTS REPORT 2003), pp. 1-5, *available at* <http://www.earthjustice.org/library/references/HRE-Report-2003.pdf> (last visited 11-27-06); EARTHJUSTICE, “ISSUE PAPER: HUMAN RIGHTS AND THE ENVIRONMENT-DEVELOPMENTS MATERIALS FOR THE FIFTY-EIGHTH SESSION OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, GENEVA, 18 MARCH – 26 APRIL 2002” (ENVIRONMENTAL RIGHTS REPORT 2002), pp. 1-5, *available at* http://www.earthjustice.org/library/references/2002_UN_ISSUE_PAPER.pdf (last visited 11-27-06); EARTHJUSTICE, “ISSUE PAPER: HUMAN RIGHTS AND THE ENVIRONMENT: MATERIALS FOR THE FIFTY-SEVENTH SESSION OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, GENEVA, 19 MARCH – 27 APRIL 2001 (UPDATED DECEMBER 2001)” (ENVIRONMENTAL RIGHTS REPORT 2001), pp. 1-5, *available at*

developments in treaty-making and interpretation, legislation and judicial decisions which contain connections between human rights and the environment.⁴⁹ Finally, all reports except the 2002 report contain case studies which involve the interconnection of human rights and the environment in countries all around the globe.⁵⁰ The cases include those in which degradation of the environment was itself considered a human rights violation,⁵¹ as well as situations in which such degradation led individuals to protest, as a result of which they were persecuted.⁵²

¶16 Earthjustice submits these reports as part of a broader strategy to “establish and promote the relationship between human rights and the environment.”⁵³ Its theoretical conception of environmental rights mirrors that broad strategy: instead of advocating for the recognition of one specific model of environmental rights, such as that of environmental rights as independent human rights or, alternatively, as embedded in established human rights like the rights to life or health, Earthjustice takes the position that both concepts of environmental rights reflect current international law.⁵⁴

¶17 As a strategy for enforcing environmental rights, submitting annual Environmental Rights Reports advancing the concept of environmental rights both as independent human rights and as embedded in existing rights has numerous advantages. First, the reports present a barrage of evidence demonstrating that the link between human rights and the environment is recognized by many competent legal authorities in many countries, which puts pressure on the UN to formally recognize that connection via resolution or other mechanism. Earthjustice’s meticulously documented reports also provide guidance to other lawyers, NGOs and activists interested in enforcing environmental rights as to which strategies have enjoyed success, thus encouraging continued use of those methods. By making the reports available on the web, Earthjustice facilitates lawyers’ and activists’ use of the information it has gathered.

¶18 Next, by submitting the Environmental Rights Reports annually, Earthjustice continuously reminds the international community, via the UN, that the connection between environmental and human rights is a strong one; the reports keep this connection present in the minds of international leaders. Finally, Earthjustice’s broad perspective as to how environmental rights should be conceived is advantageous in the context of the Environmental Rights Reports because, unlike in litigation, Earthjustice is not bound by any particular judge’s interpretation of which rights constitute international law. In their reports, Earthjustice can and does take into account jurisprudence and legislation from throughout the world in declaring that environmental rights must be recognized as international law. As such, they set the stage for the recognition of multiple interpretations of environmental rights which, if accepted as law, would represent a major breakthrough for activists seeking to enforce environmental human rights.

¶19 Together with its many advantages, the strategy of submitting Environmental Rights Reports to the UN Human Rights Commission also has several limitations. First, even if the

http://www.earthjustice.org/library/references/2001_human_rights_issue_paper.pdf (last visited 11-27-06).

⁴⁹ EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2005, *supra* note 8, at 6-45; EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2004, *supra* note 48, at 6-36; EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2003, *supra* note 48, at 6-29; EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2002, *supra* note 48, at 6-27; EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2001, *supra* note 48, at 6-49.

⁵⁰ EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2005, *supra* note 8, at 46-85; EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2004, *supra* note 48, at 37-56; EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2003, *supra* note 48, at 30-47; EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2001, *supra* note 48, at 50-66.

⁵¹ See, e.g., EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2005, *supra* note 8, at 76-77.

⁵² See, e.g., *id.* at 73.

⁵³ Email from Martin Wagner, Managing Attorney of the International Office, Earthjustice (Nov. 27, 2006).

⁵⁴ *Id.*

Reports achieved their goal of advancing recognition of the connection between human rights and the environment, the Reports themselves would not produce concrete, immediate benefits for any specific parties, as a lawsuit might do. As such, the Reports' impact would likely be limited until litigation was used to enforce the rights that the Reports worked to establish.

¶20

A further limitation is that consideration of the reports depends on the political whims of the member governments of the Human Rights Council, and those whims may stifle progress toward the goal of establishing environmental rights as enforceable international law. In fact, the experience of Earthjustice has been that the UN Human Rights Commission

is so politically influenced that progress has been slow and . . . we have had to spend [much] time fighting efforts by certain governments to weaken the Commission (now Council) and particularly to weaken its recognition of the relationship between human rights and the environment.⁵⁵

¶21

While it is difficult to determine precisely the extent to which the Environmental Rights Reports alone have led to additional recognition of environmental rights as international law, that recognition has increased since Earthjustice began submitting the reports in 2001,⁵⁶ and Earthjustice's reports have been acknowledged in at least one UN report on the connection of human rights and the environment.⁵⁷ Although the Human Rights Council has not passed resolutions or requested reports on human rights and the environment since that 2005 UN report, it continues to examine the connection between human rights and the environment in its ongoing work.⁵⁸ Thus, it is likely that Earthjustice's Environmental Rights Reports have contributed to a growing awareness within the UN Human Rights Council of the link between human rights and the environment, and may have contributed to the specific articulation of environmental rights in a recent UN Declaration on the Rights of Indigenous Peoples.⁵⁹

¶22

Noting the possible influence of the reports in establishing environmental rights as law, Earthjustice decided to submit another report in 2007.⁶⁰ Martin Wagner, the managing attorney of Earthjustice's International Office, explained that the organization did not submit a report in 2006 because "the Council has been so focused on its processes that we felt it would not have

⁵⁵ *Id.*

⁵⁶ The Secretary-General, *Report of the Secretary General on Human Rights and the Environment as Part of Sustainable Development*, U.N. CHR, 61st Sess., at 15, U.N. Doc. E/CN.4/2005/96 (2005), available at <http://www.ohchr.org/english/bodies/chr/docs/61chr/E.CN.4.2005.96.doc>.

⁵⁷ *Id.* at 10.

⁵⁸ For example, the UN Declaration on the Rights of Indigenous Peoples, adopted by the Human Rights Council by Resolution 1/2 of 29 June 2006, includes one article specifically linking the environment to the human rights of indigenous peoples. Article 29 states that: "1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination. 2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent. 3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented." *Resolution 1/2*, U.N. CHR, 1st Session, at 14, U.N. Doc. A/HRC/1/L.3 (2006), available at <http://ap.ohchr.org/documents/E/HRC/resolutions/A-HRC-RES-1-2.doc>. The Human Rights Council also currently has a working group on the right to development, a right which incorporates connections between human rights and the environment. See Jorge Daniel Taillant, *supra* note 3.

⁵⁹ See the United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 58.

⁶⁰ See EARTHJUSTICE, "ENVIRONMENTAL RIGHTS REPORT 2007: HUMAN RIGHTS AND THE ENVIRONMENT," available at <http://www.earthjustice.org/library/references/2007-environmental-rights-report.pdf>.

been useful to submit substantive reports during 2006. We hope that this situation changes in the next couple of Council sessions.”⁶¹

PART II. THE REGIONAL APPROACH: CIEL

¶23 Founded in 1989 in Washington, D.C., the non-profit Center for International Environmental Law (CIEL) works “to use international law and institutions to protect the environment, promote human health, and ensure a just and sustainable society.”⁶² CIEL aims to

solve environmental problems and promote sustainable societies through the use of law, to incorporate fundamental principles of ecology and justice into international law, to strengthen national environmental law systems and support public interest movements around the world, and to educate and train public-interest-minded environmental lawyers.⁶³

In addition to serving as legal counsel, CIEL also engages in training, capacity building, policy research, analysis and education, which it offers by directing a “joint research and teaching program with American University Washington College of Law.”⁶⁴ Like Earthjustice, CIEL has eight program areas, one of which is Human Rights and the Environment.

¶24 Although CIEL promotes the connection of human rights and the environment in many ways, one of its principal strategies to enforce environmental rights is the submission of petitions to the Inter-American Commission on Human Rights (“IACHR”).⁶⁵

¶25 The IACHR, together with the Inter-American Court on Human Rights (“Inter-American Court”), constitutes the regional system of human rights enforcement in the Americas.⁶⁶ The IACHR is an autonomous organ of the Organization of American States (OAS) which has jurisdiction over all OAS member states.⁶⁷ Its functions include the investigation and completion of country reports on human rights, as well as the examination and review of petitions concerning specific cases of human rights violations.⁶⁸ It derives its mandate from the OAS Charter and the American Convention on Human Rights, which was adopted in 1969 and entered into force in 1978.⁶⁹

¶26 CIEL’s practice is to petition the IACHR, either by representing parties to the litigation⁷⁰ or by submitting *amicus curiae*⁷¹ (“friend of the court”) briefs, to provide remedies for human rights violations resulting from environmental damage. CIEL generally utilizes the second

⁶¹ *Id.*

⁶² CIEL, “ABOUT CIEL,” <http://www.ciel.org/reciel.html> (visited 11-20-06)

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See CIEL, “HUMAN RIGHTS AND ENVIRONMENT: ADVOCACY AND FACT-SPECIFIC INVESTIGATIONS,” <http://www.ciel.org/Hre/hrecomponent2.html> (last visited 11-29-06).

⁶⁶ INTER-AM. C.H.R., “WHAT IS THE IACHR?” <http://www.cidh.org/what.htm> (last visited 11-20-06).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* For more information on the IACHR, please visit <http://www.cidh.org/>

⁷⁰ See *Admissibility: Community Of San Mateo De Huanchor And Its Members v. Peru*, Petition 504/03, Inter-Am. C.H.R., Report No. 69/04 (October 15, 2004) [hereinafter *San Mateo v. Peru*], available at <http://www.cidh.org/annualrep/2004eng/Peru.504.03eng.htm> and *Friendly Settlement: Mercedes Julia Huenteao Beroiza et. al. v. Chile*, Petition 4617/02, Inter-Am. C.H.R., Report No. 30/04 (March 11, 2004) [hereinafter *BíoBío River*], available at <http://www.cidh.org/annualrep/2004eng/Chile.4617.02eng.htm>.

⁷¹ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 18.

conception of environmental rights: it argues that environmental rights are embedded in certain firmly established human rights.⁷² CIEL has successfully argued in a petition to the IACHR that environmental rights are encompassed within the right to life and the right to health,⁷³ and has enjoyed even wider success in arguing that property rights, particularly those of indigenous peoples, encompass environmental rights.⁷⁴

¶27 One very important case regarding indigenous property rights that CIEL contributed to was *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*,⁷⁵ decided by the Inter-American Court in 2001 and described *supra* in the Introduction.⁷⁶ In finding that Nicaragua had violated the Mayagna peoples' right to property under Article XXI of the American Convention on Human Rights, the Court noted that, for indigenous groups, the right to property implies more than simply the right to own real estate:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.⁷⁷

With this interpretation, the Court “[wove] together indigenous, environmental, and broader human rights issues . . . [which] created a precedent supporting such linkages in the jurisprudence of the Inter-American Court of Human Rights.”⁷⁸

¶28 Two other IACHR cases in which CIEL advanced the idea that traditional human rights can be violated by environmental damage are *BíoBío River*, submitted to the IACHR in 2002, and *San Mateo v. Peru*, submitted in 2003.⁷⁹ In *BíoBío River*, CIEL claimed that Chile violated the property rights of the indigenous Pehuenche people by forcibly displacing them from their traditional lands in order to build dams on the BíoBío River.⁸⁰ This petition led to a friendly

⁷² See *Id.* (claiming that Nicaragua violated the Mayagna (Sumo)'s indigenous property rights); see also *San Mateo v. Peru*, *supra* note 70 (claiming that Peru violated the complainants' right to life, right to health and right to property, among other rights) and *BíoBío River Case*, *supra* note 70 (claiming that Chile violated the complainants' indigenous rights).

⁷³ See *San Mateo v. Peru*, *supra* note 70. CIEL also claims those rights have been violated in a pending IACHR petition it submitted on behalf of the Inuit Circumpolar Conference in Alaska. See CIEL & EARTHJUSTICE, “PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS SEEKING RELIEF FROM VIOLATIONS RESULTING FROM GLOBAL WARMING CAUSED BY ACTS AND OMISSIONS OF THE UNITED STATES,” available at http://www.earthjustice.org/library/reports/summary_ICC_petition.pdf.

⁷⁴ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 18; *San Mateo v. Peru*, *supra* note 70 and *BíoBío River Case*, *supra* note 70.

⁷⁵ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 18.

⁷⁶ Although CIEL submitted its petition to the IACHR, the case was ultimately decided by the Inter-American Court. The IACHR may refer a case to the Inter-American Court if: 1) the State accused in the case is a Party to the American Convention on Human Rights (ACHR) and has accepted the jurisdiction of the Inter-American Court, and 2) the IACHR has sent its report on the case to the State Party. See STEINER & ALSTON, *supra* note 30, at 874.

⁷⁷ *Id.* at para. 149.

⁷⁸ CIEL, “HUMAN RIGHTS AND ENVIRONMENT: ADVOCACY AND FACT-SPECIFIC INVESTIGATIONS, AWAS TINGNI AMICUS BRIEF, INTER-AMERICAN COURT OF HUMAN RIGHTS,” <http://www.ciel.org/Hre/hrecomponent2.html> (last visited 11-29-06).

⁷⁹ *Supra* note 70.

⁸⁰ *BíoBío River Case*, *supra* note 70.

settlement between the Pehuenche and the Chilean government in 2003, in which the Pehuenche peoples agreed to cease pursuing legal action and renounce their legal rights to their soon-to-be-flooded traditional lands and the natural resources on those lands, in exchange for various reparations.⁸¹

¶29 In the petition it submitted to the IACHR in the case of *San Mateo v. Peru*, CIEL claimed that Peru had violated the people of San Mateo's right to life, right to health, right to property and right to organize by permitting mining companies to pollute their land, water and air, thereby poisoning children and creating many health problems among the affected population.⁸² Although the IACHR has not reported on the merits of the case as of publication, in August 2004 it adopted CIEL's request for precautionary measures to protect the rights to life, health and personal security of the people exposed to toxic sludge in San Mateo de Huanchor.⁸³ The IACHR requested that Peru provide health assistance and care for the petitioners in order to identify those persons sickened by the pollution; create and implement an environmental impact assessment, and subsequently initiate work needed to move the toxic sludge to a safe site; formulate a timetable of activities to be completed to comply with the IACHR's precautionary measures; and take into account the opinions of the affected community, as well as other relevant information, in complying with the measures.⁸⁴ Peru did not agree to comply in full with the measures, but in September 2004 it reported that it had hired a consultant to study removal of the sludge from the community and established a Technical Commission to investigate the best final disposition for the sludge.⁸⁵

¶30 In December 2005, CIEL and Earthjustice submitted an innovative petition to the IACHR on behalf of the Inuit Circumpolar Conference (ICC), claiming that the United States' refusal to regulate its emission of greenhouse gases violates Inuit peoples' rights in the American Declaration of Rights and Duties of Man, including: the right to life (Art. I), to residence and movement (Art. VIII), to inviolability of the home (Art. IX), to preservation of health and to well-being (Art. XI), to benefits of culture (Art. XIII), and to work and fair remuneration (Art. XIV).⁸⁶ The outcome of this petition, however, remains unknown, as the IACHR has not ruled on its admissibility as of publication, much less issued a report on the merits of the case.

¶31 CIEL has chosen the strategy of petitioning the IACHR to enforce environmental rights – as embedded in well-established human rights – for many reasons. First, CIEL has chosen to petition the IACHR because it provides a viable forum when the rights that a complainant seeks to enforce do not exist in his or her State's domestic law, or when those rights do exist, but the complainant cannot obtain an adequate remedy for their violation in domestic courts.⁸⁷

⁸¹ The reparations granted to the Pehuenche included "rights over lands, technical support to promote agricultural productivity, educational scholarships, and monetary compensation in the order of US\$300,000 per family." CIEL, "CIEL HELPS PROTECT THE RIGHTS OF INDIGENOUS COMMUNITIES DISPLACED BY THE RALCO DAM ALONG THE UPPER *BíoBío* RIVER IN SOUTHERN CHILE," http://www.ciel.org/Tae/Ralco_Aug04.html (last visited 11-29-06).

⁸² <http://www.ciel.org/Hre/hrecomponent2.html> (last visited 11-20-06).

⁸³ *San Mateo v. Peru*, *supra* note 70, at paras. 8, 12.

⁸⁴ *Id.* at para. 12.

⁸⁵ *Id.* at para. 13.

⁸⁶ See CIEL & EARTHJUSTICE, "PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS SEEKING RELIEF FROM VIOLATIONS RESULTING FROM GLOBAL WARMING CAUSED BY ACTS AND OMISSIONS OF THE UNITED STATES," *supra* note 73.

⁸⁷ Telephone Interview with Donald Goldberg, Senior Attorney, CIEL (Nov. 30, 2006). This scenario is played out in CIEL's petition charging the US with violating the human rights of Inuit peoples. Since "the customary international law of human rights has an uncertain status, influence or even relevance in US courts, particularly... when it is relied on to challenge legislation or action by branches, agencies, or officials of the US government..." STEINER & ALSTON, *supra* note 30 at 1068, it is highly likely that the Inuit people would not be able to obtain a

¶32

Second, CIEL opted to petition the IACHR because the IACHR is a forum where petitioners seeking to enforce environmental rights have a relatively high likelihood of success.⁸⁸ This high likelihood of success derives, in large part, from the fact that the IACHR has been open to a flexible jurisprudence on international human rights law.⁸⁹ The IACHR's declaration in 2003 that "human rights instruments, in accordance with their object and purpose, must be interpreted and applied so as to ensure the highest level of protection for the individual"⁹⁰ evinces this willingness to interpret rights broadly. Addressing directly the issue of interpreting human rights in the context of environmental degradation, the IACHR noted in 2002:

the experience of the Commission . . . indicates that the norms of the inter-American human rights system were designed to be living instruments and to apply to current living conditions. As such, the Commission has in recent years been called upon to apply such basic rights as the rights to life and personal integrity, and the related rights to information, participation and effective judicial remedies, in situations involving the relation of individuals to their environment.⁹¹

The IACHR's flexible jurisprudence led to its recognition in the Yanomami case and in several subsequent cases that firmly established human rights may be violated in cases of environmental degradation.⁹² Thus, the IACHR's own precedent, coupled with its flexible jurisprudence, will likely lead it to expand its recognition and enforcement of environmental rights.

¶33

Another reason why petitioners have a reasonably strong chance of obtaining redress for violations of environmental rights from the IACHR is that the IACHR has become quite interested in exploring the link between human rights and the environment. According to Argentine environmental rights attorney Jorge Daniel Taillant,

the Commission has not only embraced the concept and linkage [of human rights and the environment], but has unofficially assigned an attorney to oversee human rights and environment cases. In addition, it has officially participated in advocacy of the human rights and environment linkage agenda, publishing articles

remedy in US court for the violations they allege. Indeed, in the petition, CIEL and Earthjustice state that "[b]ecause there are no domestic remedies suitable to address the violations, the requirement that domestic remedies be exhausted does not apply in this case." EARTHJUSTICE, "PETITION TO THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS SEEKING RELIEF FROM VIOLATIONS RESULTING FROM GLOBAL WARMING CAUSED BY ACTS AND OMISSIONS OF THE UNITED STATES," *available at* http://www.earthjustice.org/library/reports/summary_ICC_petition.pdf.

⁸⁸ Telephone Interview with Donald Goldberg, Senior Attorney, CIEL (Nov. 30, 2006).

⁸⁹ *Id.*

⁹⁰ INTER-AM. C.H.R., DOCUMENT PREPARED BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN CONNECTION WITH OPERATIVE PARAGRAPH 4 OF RESOLUTION AG/RES. 1926 (XXXIII-O/03), 'HUMAN RIGHTS AND THE ENVIRONMENT IN THE AMERICAS: THE ACTIVITIES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS IN THE FIELD OF HUMAN RIGHTS AND THE ENVIRONMENT', *available at* http://scm.oas.org/doc_public/ENGLISH/HIST_03/CP12010E05.doc.

⁹¹ INTER-AM. C.H.R., OEA/SER.G/ CP/CAJP-1996/02/, PRESENTATION BY THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS PURSUANT TO RESOLUTION AG/RES. 1896 (XXXII-O/02) 'HUMAN RIGHTS AND THE ENVIRONMENT IN THE AMERICAS,' *available at* <http://www.oas.org/consejo/CAJP/docs/cp10480e04.doc>.

⁹² The rights found to be violated in the Yanomami case were the right to life, liberty and personal security, the right of residence and movement, and the right to preservation of health and well-being. See ORGANIZATION OF AMERICAN STATES, COMMITTEE ON JURIDICAL AND POLITICAL AFFAIRS, "REPORT OF GENERAL SECRETARIAT PURSUANT TO AG/RES. 1819 (XXXI-O/01), HUMAN RIGHTS AND THE ENVIRONMENT," *available at* <http://www.oas.org/consejo/CAJP/docs/cp09486e04.doc>.

on issues such as the right to water, and it has participated in educational trainings on human rights and environment in NGO capacity building workshops.⁹³

¶34 The IACHR's continuing interest in the link between human rights and the environment is reflected in its reports on the merits of two recent cases concerning indigenous peoples: *Maya Indigenous Communities of the Toledo District v. Belize*,⁹⁴ discussed *supra*, and *Dann v. US* ("Dann Case").⁹⁵ In its 2002 report on the Dann Case, the IACHR stated that traditional control and use of territory "are in many instances essential to the individual and collective well-being . . . of indigenous peoples"⁹⁶ and control over the land should be understood to refer to "its capacity for providing the resources which sustain life" in addition to other meanings.⁹⁷

¶35 Success in the IACHR may also be likely because the OAS – which, as noted, the IACHR is part of – has also embraced the conceptual linkage of human rights and the environment. It first demonstrated receptivity to that linkage by adopting, in 2001, the Center for Human Rights and Environment ("CEDHA")'s "Draft Resolution on Human Rights and Environment" over serious opposition by some member states.⁹⁸ Since then, it has adopted two additional resolutions on Human Rights and the Environment in the Americas.⁹⁹ The OAS' acceptance of the link between human rights and the environment reflects the particular interest of Caribbean states, which face the consequences of global warming on their coastal villages, towns and cities.¹⁰⁰

¶36 Yet another reason CIEL has chosen to petition the IACHR for enforcement of environmental rights is that, if its claims are successful, they will result in increased regional jurisprudence recognizing environmental rights in the Americas. CIEL believes such jurisprudence would encourage OAS member states such as the United States ("US") to recognize those rights domestically, and act to enforce them.¹⁰¹ Specifically, CIEL believes that a favorable report on the merits from the IACHR would be persuasive in US courts, thus strengthening the arguments raised by environmental rights petitioners in domestic cases.¹⁰²

¶37 A further reason why CIEL has chosen to petition the IACHR is that CIEL believes that such petitions can create publicity – and therefore increased awareness – of the link between human rights and the environment. Publicity was an important goal in the Inuit case, as the ICC wanted to "shift the debate" on climate change, making global warming a human story and not

⁹³ See Jorge Daniel Taillant, *supra* note 3, at 29.

⁹⁴ *Maya Indigenous Communities v. Belize*, *supra* note 13.

⁹⁵ Mary and Carrie Dann v. US, Case 11.140, Inter-Am. C.H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1, rev. 1 (2003), available at <http://www.cidh.org/annualrep/2002eng/USA.11140.htm>

⁹⁶ *Id.* at para. 128.

⁹⁷ *Id.*

⁹⁸ Jorge Daniel Taillant, *supra* note 3, at 29.

⁹⁹ AG/RES 1819 (XXXII-O/02), available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/juridico/english/regeneas.html>, and AG/RES. 1926 (XXXIII-O/03), available at <http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/juridico/english/regeneas.html>; see also AG/RES/ 2349 (XXXVII-O/07), available at http://www.oas.org/juridico/spanish/ag07/AG-DOC_4771-07_rev1_spa.doc#_Toc169928015.

¹⁰⁰ Jorge Daniel Taillant, *supra* note 3, at 29.

¹⁰¹ Sheila Watt-Cloutier writes that the Inuit Circumpolar Conference (ICC)'s aim in bringing a petition against the US to the IACHR is "to inform and convince governments (particularly the United States) and NGOs of the need for concerted and coordinated global action to pre-empt [devastating climate change in the arctic]." *Climate Change and Human Rights: the Inuit in the Arctic are seeking to hold governments accountable for the human rights effects of global warming*, HUMAN RIGHTS DIALOGUE spring 2004, at 10.

¹⁰² Telephone Interview with Donald Goldberg, Senior Attorney, CIEL (Nov. 30, 2006).

just a dry scientific dialogue.¹⁰³ The case ended up generating much more publicity than CIEL or the ICC ever expected.¹⁰⁴

¶38 CIEL has also chosen to submit petitions to the IACHR taking into account the possibility that IACHR petitions can sometimes lead to a remedy without further litigation, as in *BíoBío River*.¹⁰⁵ While the degree to which a state will follow the recommendations of the IACHR is highly dependent on the government in power at a given time and the facts of the petition,¹⁰⁶ remedies such as settlements do sometimes come out of IACHR petitions.¹⁰⁷

¶39 Finally, CIEL has chosen to focus on the conception of environmental rights as embedded in well-established human rights in its advocacy before the IACHR because CIEL believes that doing so makes it easier to obtain a favorable ruling than advocating for enforcement of new, independent environmental rights such as the right to a healthy environment.¹⁰⁸ The IACHR currently has considerable precedent finding violations of traditional human rights resulting from environmental harm; it would have to “take a giant step” jurisprudentially in order to enforce independent environmental rights.¹⁰⁹

¶40 In addition to the reasons CIEL cites for choosing to bring petitions to the IACHR as a strategy for enforcing environmental rights, there is at least one additional advantage to utilizing that strategy. Petitioning the IACHR may lead to increased recognition by the OAS, in the form of resolutions, decisions, or other measures, of the connection between human rights and the environment.¹¹⁰ Such resolutions might, in turn, serve as persuasive authority in domestic courts or lead to greater acceptance of the link between human rights and the environment, possibly resulting in domestic legislation which formally recognizes environmental rights.¹¹¹

¶41 Although there are numerous advantages in utilizing the strategy of submitting petitions to the IACHR as a means for enforcing environmental rights, the strategy does have some drawbacks. One limitation is problems with enforcement. The IACHR’s recommendations have, on occasion, been ignored by recalcitrant governments. Moreover, “[m]any of the governments with which the Inter-American Commission . . . [has] had to work have been ambivalent towards [it] at best and hostile at worst.”¹¹² Although the now-democratic governments of much of Latin America may embrace the IACHR more than their authoritarian predecessors did, they have proven more adversarial than one might hope.¹¹³

¶42 Another drawback of CIEL’s strategy of petitioning the IACHR to enforce the concept of environmental rights solely as embedded within traditional human rights, and not as independent human rights, is that enforcement of environmental rights might then be limited to situations in which environmental harm becomes so grave that it violates firmly established human rights.¹¹⁴

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *BíoBío River*, *supra* note 70.

¹⁰⁸ Telephone Interview with Donald Goldberg, Senior Attorney, CIEL (Nov. 30, 2006).

¹⁰⁹ *Id.*

¹¹⁰ According to Jorge Daniel Taillant, “continued advocacy of civil society before the OAS” has likely been a factor in OAS passing resolutions in 2001, 2002 and 2003 linking human rights and environment.” Jorge Daniel Taillant, *supra* note 3, at 29-29.

¹¹¹ See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184, 204 (1996).

¹¹² STEINER & ALSTON, *supra* note 30, at 869.

¹¹³ See Tom Farer, *The Rise of the Inter-American Human Rights Regime: No Longer a Unicorn, Not Yet an Ox*, in Steiner & Alston, *supra* note 10, at 880.

¹¹⁴ See James Boeving, *Half full...or completely empty?: Environmental Alien Tort Claims Post Sosa v. Alvarez*

That interpretation would likely impede litigation to enforce violations of environmental rights which have not yet led to serious harm, but which could lead to such harm in the future. In contrast, working to enforce the concept of environmental rights as independent human rights might permit such preventative litigation to be successful. Indeed, the IACHR might be the best forum in which to advocate for an independent right to a healthy environment because that right is specifically articulated in the San Salvador Protocol to the American Convention on Human Rights.¹¹⁵ Forgoing such a strategy could be a missed opportunity to expand environmental rights in the Americas.

PART III: THE DOMESTIC APPROACH: EARTHRIGHTS INTERNATIONAL (ERI)

¶43 Earthrights International (“ERI”), founded in 1995, is a non-profit organization with offices in Washington, D.C., and Chaing Mai, Thailand.¹¹⁶ It is made up of lawyers, activists and organizers specializing in human rights, the environment, and government and corporate accountability.¹¹⁷ ERI’s activities include documenting human rights and environmental abuses in remote areas and publicizing those abuses in reports and campaigns; organizing human rights and environmental activists regarding “earth rights”¹¹⁸ concerns, including corporate accountability; training and educating people about earth rights and remedies for violations of those rights; advocacy for improved respect of earth rights; and litigation in US courts on behalf of people whose earth rights have been violated.¹¹⁹ Through its multiple activities, ERI aims to “end earth rights abuses and to promote and protect earth rights.”¹²⁰

¶44 Although, like the other NGOs discussed in this comment, ERI employs many strategies in its efforts to enforce environmental rights, the strategy ERI uses which will be examined in this comment is its submission of *amicus curiae* briefs in environmental rights cases brought under the Alien Tort Claims Act (“ATCA”) in US federal courts. The Alien Tort Claims Act, 28 U.S.C. §1350, was passed in 1789 by the first Congress of the United States.¹²¹ It provides that “[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”¹²² The law of nations, for the purposes of ATCA, has generally been interpreted to mean customary international law.¹²³

¶45 For just short of 200 years, the ATCA lay nearly dormant; only two cases were successfully filed under it before 1980.¹²⁴ In 1980, Paraguayan nationals Dolly and Joel Filartiga filed suit under ATCA against fellow countryman Americo Pena-Irala,¹²⁵ reviving the statute and sparking a flurry of ATCA litigation over the next two-and-a-half decades. These cases tested the limits of ATCA, arguing that many rights set forth in contemporary international law fall

Machain, 18 GEO INT’L ENVTL. L. REV. 109, 115 (2005).

¹¹⁵ San Salvador Protocol, *supra* note 6, at Art. XI.

¹¹⁶ EARTHRIGHTS INTERNATIONAL, “ABOUT US: WHO WE ARE,” http://www.earthrights.org/about_us.html (last visited 11-29-06).

¹¹⁷ *Id.*

¹¹⁸ ERI defines “earthrights” as the intersection of human rights and the environment. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ James Boerving, *supra* note 114, at 109-10.

¹²² *Id.* at 110.

¹²³ Hari Osofski, *Environmental Rights Enforcement in US Courts*, HUMAN RIGHTS DIALOGUE spring 2004 at 30.

¹²⁴ James Boerving, *supra* note 114, at n. 5.

¹²⁵ *Filartiga v. Pena-Irala*, 630 F.2d. 876 (2d Cir. 1980).

within the “law of nations,” and thus should be adjudicated by the federal courts. Because exactly what constitutes the “law of nations” has been and remains somewhat hazy, courts have rendered divergent opinions on which claims are cognizable, as well as on the application of the “political question” and “act of State” doctrines barring adjudication of ATCA claims.¹²⁶

¶46 In 2004, when the Supreme Court granted *certiorari* in the ATCA case of *Sosa v. Alvarez-Machain*,¹²⁷ practitioners hoped that the Court would clarify ATCA’s scope without gutting the statute.¹²⁸ The Supreme Court did provide some guidance on ATCA’s scope in its decision, stating that judges in ATCA cases must require “any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized.”¹²⁹ However, even the Supreme Court acknowledges that this interpretation “leaves the door ‘ajar subject to vigilant doorkeeping’ by the lower federal courts,”¹³⁰ so the potential for success in establishing subject matter jurisdiction in future ATCA litigation remains rather unclear.¹³¹

¶47 ERI submitted several *amicus curiae* briefs in ATCA cases concerning environmental rights before the decision in *Sosa*, with each brief alleging violations of several different rights, many of which do not yet have a firm basis in international law. In these briefs ERI employed both the concept of environmental rights as independent human rights as well as that of environmental rights as embedded in well-established human rights. In a 2002 brief, ERI argued that the D.C. Circuit Court of Appeals should rule that environmental degradation violated both well-established human rights as well as the right to a healthy environment.¹³² The following paragraphs will list several cases in which ERI submitted *amicus curiae* briefs, describe the rights ERI demanded redress for in those cases, and provide the outcome of those cases.

¶48 In *Aguinda v. Texaco*,¹³³ the Ecuadorian plaintiffs alleged that, by “[releasing] massive quantities of highly toxic petroleum wastes into waters people used for bathing, fishing, drinking and cooking, and . . . [spraying] these wastes onto local roads,” thereby poisoning many local people, Texaco violated their human rights under international law.¹³⁴ When the case was dismissed on *forum non conveniens* grounds,¹³⁵ the plaintiffs appealed to the Second Circuit Court of Appeals. At that time, ERI filed an *amicus* brief in support of the plaintiffs’ claims, reiterating that “environmental harms of the magnitude alleged by plaintiffs violate international law.”¹³⁶ The Second Circuit later upheld the district judge’s dismissal of the case, based not on

¹²⁶ See Hari Osofsky, *supra* note 123, at 31.

¹²⁷ 542 U.S. 692 (2004).

¹²⁸ James Boerving, *supra* note 114, at 111.

¹²⁹ *Sosa v. Alvarez Machain*, 542 U.S. 692, 749. Those eighteenth-century paradigms were the “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” *Id.* at 132.

¹³⁰ *Id.*

¹³¹ See *id.* at 130.

¹³² EARTHRIGHTS INTERNATIONAL, “AMICUS BRIEFS: ARIAS ET. AL V. DYNACORP,” http://www.earthrights.org/legaldocs/arias_et.al._v._dyncorp.html (visited 12-1-06).

¹³³ 303 F.3d. 470 (2nd Cir. 2002).

¹³⁴ EARTHRIGHTS INTERNATIONAL, “AMICUS BRIEFS: JOTA V. TEXACO AND AGUIDA [SIC] V. TEXACO,” http://www.earthrights.org/legaldocs/jota_v._texaco_and_aguida_v._texaco.html (last visited 12-1-06).

¹³⁵ James Boerving, *supra* note 114, at 122.

¹³⁶ EARTHRIGHTS INTERNATIONAL, “AMICUS BRIEFS: JOTA V. TEXACO AND AGUIDA [SIC] V. TEXACO,” *supra* note 135.

the insufficiency of the claims themselves but due to other “public and private interest factors” weighing in favor of dismissal.¹³⁷

¶49 In *Beanal v. Freeport-McMoran*,¹³⁸ the Indonesian plaintiffs argued that the mining company Freeport-McMoran violated their right to a healthy environment and committed cultural genocide by perpetrating grave environmental damage in and around a mine it operated. The plaintiffs argued that Freeport-McMoran had caused them to (1) experience serious health problems, (2) lose many of the resources they depended on for subsistence, and (3) suffer from having their cultural heritage – in the form of the topography of their land – irreparably damaged.¹³⁹ The district court found that the principles on which the plaintiffs relied lacked “universal consensus in the international community,” and dismissed the claims for failure to state a cause of action.¹⁴⁰ The plaintiffs appealed to the Fifth Circuit Court of Appeals, and ERI submitted an amicus brief in support of their claims, arguing that “there is a minimum right to a healthy environment actionable under the Alien Torts Claims Act.” The Fifth Circuit found that the right to a healthy environment did not include “sufficiently discernable” standards to constitute international law which falls into ATCA’s jurisdiction, and affirmed the lower court’s decision to dismiss.¹⁴¹

¶50 In *Flores v. Southern Peru Copper*,¹⁴² the Peruvian plaintiffs claimed that the pollution from Southern Peru Copper’s mining and smelting operations caused the petitioners to develop lung disease, infringing on their rights to life, health, and sustainable development.¹⁴³ The district court dismissed the case for lack of jurisdiction and failure to state a claim,¹⁴⁴ and the plaintiffs appealed the case to the Second Circuit. ERI then submitted an *amicus curiae* brief on behalf of nine scholars of international environmental and human rights law supporting the plaintiffs’ claims. Despite ERI’s effort, the Second Circuit held that the principles on which the plaintiffs based their claim on were “boundless and indeterminate,”¹⁴⁵ and that they did not form part of customary international law, and thus affirmed the dismissal.¹⁴⁶

¶51 Finally, in *Arias et. al. v. DynCorp*,¹⁴⁷ the Ecuadorian plaintiffs argue that Dyncorp violated their right to a healthy environment by spraying toxic herbicides along the Colombia/Ecuador border as part of the United States’ and Colombia’s “Plan Colombia,” which led to massive health problems among the plaintiffs and to the loss of resources they depend on for subsistence.¹⁴⁸ After DynCorp filed a motion to dismiss the case, ERI filed an *amicus curiae*

¹³⁷ The private and public interest factors the court lists as favoring Ecuador as a forum include: ease of access to sources of proof such as medical and property records; the fact that the plaintiffs all reside, and sustained their injuries, in Ecuador or Peru; the difficulty for New York to translate documents for 55,000 putative class members of several distinct indigenous groups; and the aim to avoid problems in application of foreign law or conflict of laws. See *Aguinda v. Texaco*, 303 F.3d 470 at 479-80.

¹³⁸ 197 F.3d 161 (5th Cir. 1999).

¹³⁹ EARTHRIGHTS INTERNATIONAL, “AMICUS BRIEFS: BEANAL V. FREEPORT -MCMORAN,” http://www.earthrights.org/legaldocs/beanal_v._freeport_mcmoran.html (last visited 12-1-06); Abigail Abrash Walton, *Mining a Sacred Land*, HUMAN RIGHTS *DIALOGUE* Spring 2004, at 25.

¹⁴⁰ *Beanal v. Freeport-McMoran*, 197 F.3d 161, 167.

¹⁴¹ *Id.*

¹⁴² 414 F.3d 233 (2nd Cir. 2003).

¹⁴³ *Id.* at 238.

¹⁴⁴ *Id.* at 237.

¹⁴⁵ *Id.* at 255.

¹⁴⁶ *Id.* at 266.

¹⁴⁷ Slip Copy, 2007 WL 1521044 (D.D.C. May 21, 2007).

¹⁴⁸ EARTHRIGHTS INTERNATIONAL, “AMICUS BRIEFS: ARIAS ET. AL V. DYNACORP,” http://www.earthrights.org/legaldocs/arias_et.al._v._dyncorp.html (last visited 12-1-06).

brief supporting the plaintiffs in which it argued that violations of the right to a healthy environment should be recognized when environmental harms are “long-term, widespread and severe, they violated the rights to life, security of the person and health on a mass scale or they deprive substantial numbers of people of their means of subsistence.”¹⁴⁹

¶52 On May 21, 2007, a District of Columbia district court denied Dyncorp’s motion to dismiss plaintiffs’ ATCA claims.¹⁵⁰ The judge explained that the plaintiffs claimed numerous violations of international law and treaties to which the US is a party, and that Dyncorp failed to show that Congress intended to override those provisions of treaty law in the statute authorizing Plan Colombia.¹⁵¹ Thus, he implied, those treaties remained in effect when Plan Colombia was authorized, and violation of their provisions sufficed to establish subject matter jurisdiction under ATCA.¹⁵² The judge did not specify which provisions of the treaties or the cited international law sufficed to establish jurisdiction.

¶53 ERI has chosen to submit *amicus curiae* briefs in ATCA cases concerning environmental rights for a variety of reasons. First, ERI believes that the ATCA provides important opportunities for persons to demand enforcement of their rights, and tries to support plaintiffs who litigate under ATCA to strengthen human rights throughout the world. It sees ATCA as a crucial option for people wanting redress for human rights violations when other options for redress are limited.¹⁵³ For example, when ERI filed suit under ATCA in *John Doe v. Unocal*,¹⁵⁴ it did not have the option of suing Unocal in Burma, as the country is currently ruled by the same military dictatorship that permits Unocal to violate Burmese peoples’ rights and violates those rights itself, nor could it petition any regional human rights body because there is no regional human rights system in Asia.¹⁵⁵ As such, suing under ATCA was an attractive option.¹⁵⁶

¶54 ERI also supports ATCA litigation because utilizing ATCA as a strategy for enforcing environmental rights leads to increased publicity linking human rights and the environment, as well as negative publicity for defendant companies that violate human rights, which may lead such companies to settle the claims.¹⁵⁷ ERI’s experience is that publicity may sometimes be better than money damages in providing rights victims redress for the violations they were forced to endure.¹⁵⁸

¶55 ERI also considers ATCA an important litigation option for environmental rights cases because, due in large part to ERI’s own work in *Doe v. Unocal*,¹⁵⁹ federal courts are now more

¹⁴⁹ EARTHRIGHTS INTERNATIONAL, “AMICUS BRIEFS: ARIAS ET. AL V. DYNACORP,” http://www.earthrights.org/legaldocs/arias_et.al._v._dyncorp.html (visited 12-1-06).

¹⁵⁰ *Arias v. Dyncorp*, *supra* note 147, at *5.

¹⁵¹ *Id.* at *5.

¹⁵² *Id.*

¹⁵³ Telephone Interview with Tyler Giannini, formerly of ERI (Dec. 1, 2006).

¹⁵⁴ See EARTHRIGHTS INTERNATIONAL, “LEGAL PROGRAMS: DOE V. UNOCAL,” <http://www.earthrights.org/legal/unocal/> (last visited 12-1-06).

¹⁵⁵ Telephone Interview with Tyler Giannini, *supra* note 153.

¹⁵⁶ *Id.*

¹⁵⁷ A settlement was in fact the outcome of *Doe v. Unocal* after substantial negative publicity for the company regarding its complicity in the violation of Burmese people’s human rights. See EARTHRIGHTS INTERNATIONAL, “HISTORIC ADVANCE FOR UNIVERSAL HUMAN RIGHTS: UNOCAL TO COMPENSATE BURMESE VILLAGERS – FEATURE,” http://www.earthrights.org/legalfeature/historic_advance_for_universal_human_rights_unocal_to_compensate_burmese_villagers.html (last visited 12-1-06).

¹⁵⁸ One plaintiff in *Doe v. Unocal*, John Doe IX, said after the case’s settlement, “‘I don’t care about the money. Most of all I wanted the world to know what Unocal did. Now you know.’” *Id.*

¹⁵⁹ The Court of Appeals for the Ninth Circuit held that Unocal could be held liable for violating several well-

hospitable to ATCA suits holding corporations accountable for humans rights violations they aided and abetted.¹⁶⁰ In fact, in *Arias v. Dyncorp*, the district court judge noted that “[i]t is clear that the ATCA may be used against corporations acting under “color of [state] law”¹⁶¹ Because environmental rights violations are often perpetrated by corporations, a judicial determination under ATCA that corporations can be held liable for human rights violations may deter corporations from engaging in activities that are not currently considered to be violations of the law of nations, but might someday be.

¶56 One reason why ERI chooses to prepare *amicus curiae* briefs in ATCA cases concerning environmental rights is because *amicus curiae* briefs are useful when trying to set new legal precedents enforcing innovative legal concepts, such as environmental rights.¹⁶² Persons or organizations who submit *amicus curiae* briefs can advocate for more novel principles and interpretations of law than the lawyers who directly represent a client in the case are likely to be free to do, given that they must zealously advocate for their client and, as such, will probably feel obliged to argue that the case involves violations of established legal principles with precedent judges can rely on in making their decisions.¹⁶³

¶57 A second reason why ERI chooses to write *amicus curiae* briefs for environmental rights cases in which it does not serve as counsel stems from its limited resources and its goal of working to uphold “earthrights” on as many fronts as possible.¹⁶⁴ Because submitting *amicus curiae* briefs requires fewer resources and less time than representing a client throughout an entire case, doing so allows ERI to free up its scant resources to participate in other activities.¹⁶⁵

¶58 Other advantages of using the ATCA as a mechanism to enforce environmental rights is that, although it very rarely occurs, ATCA claims can lead to an actual remedy of money damages for victims.¹⁶⁶ Moreover, if a case can get beyond the hurdle of establishing jurisdiction, then the case will be heard by a judge who may be more objective and fair-minded than judges in the victims’ home countries might be. Finally, as with the Environmental Rights Reports, bringing environmental rights cases under ATCA may be worthwhile if only because, however unlikely obtaining a ruling designating an environmental right as constituting part of the “law of nations” is, such a ruling would provide a powerful basis for the enforcement of environmental rights worldwide.

¶59 In addition to these advantages, ATCA suits – like the other strategies for enforcing environmental rights discussed in this comment – also have drawbacks. A first, obvious limitation is that only persons who are not US citizens (aliens) can act as plaintiffs in such cases. Another major drawback is the wide array of bases on which US judges can decline to adjudicate an ATCA claim. The act of state doctrine, the foreign sovereign immunity doctrine,¹⁶⁷ the

established human rights of Burmese citizens, including forced labor, rape, torture and murder, when it hired the Burmese military to provide security for its oil pipeline knowing that the Burmese military had a history of violating human rights. See http://www.earthrights.org/site_blurbs/doe_v._unocal_case_history.html (last visited 1-1-07).

¹⁶⁰ Telephone Interview with Tyler Giannini, *supra* note 153.

¹⁶¹ *Arias v. Dyncorp*, 2007 WL 1521044, at *4.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ ATCA cases are often undefended throughout and end in default judgments which are never collected. STEINER & ALSTON, *supra* note 30, at 1056.

¹⁶⁷ For explanations of the act of state and sovereign immunity doctrines, see STEINER & ALSTON, *supra* note 30, at 1058-61.

political question doctrine and the procedural escape route of *forum non conveniens* all permit US judges to deny victims their day in court.

¶60 Another impediment to enforcing environmental rights via ATCA litigation is the strict interpretation of the law of nations which stands as precedent in ATCA cases. This strict interpretation – under which even environmental rights cases alleging violations of firmly established human rights have failed to pass muster¹⁶⁸ - erects a barrier which will be difficult for parties attempting to enforce less-established rights, such as the right to a healthy environment, to surmount. The barrier is largely a result of the “tremendous discretion” that US judges have had in determining whether a law constitutes an international norm sufficiently universal to fall within ATCA jurisdiction.¹⁶⁹ Although many judges after *Filartiga* purported to base their decisions on which laws qualify as the law of nations on the requirement that a law be “definite, universally accepted, and viewed by states as obligatory,”¹⁷⁰ few of them gave detailed explanations as to why any particular human rights violation met that standard.¹⁷¹ As *Sosa v. Alvarez-Machain* left judges with only a somewhat narrower standard, it is likely that judges will continue to vary in their determinations of what constitutes the law of nations. As such, redress through ATCA will remain uncertain even for violations which seem to clearly contravene international law.

¶61 Notwithstanding these many limitations, ERI will likely continue to both file ATCA suits itself and submit *amicus curiae* briefs in other environmental rights-related ATCA cases.¹⁷² ERI believes in using all possible tools to enforce environmental rights, and even if success via ATCA is only slow and incremental, or even if it is most effective as a method of fostering publicity, ERI still sees it as valuable.¹⁷³

PART IV. CONCLUSION

¶62 Of the three strategies discussed in this comment, the regional one, that of petitioning the IACHR to recognize the violation of well-established human rights by means of environmental degradation, has clearly been most successful in enforcing environmental rights claims thus far. The IACHR has been much more responsive than US courts in ATCA cases in finding violations of those rights, and in *BíoBío River*, the submission of the petition to the IACHR led to concrete benefits – in the form of a settlement - for the complainants.¹⁷⁴

¶63 While the IACHR has already recognized environmental rights as embedded in the rights to life, health and property, its future rulings on those rights – as well as the rulings of US judges in future ATCA cases - may be influenced by the growing body of jurisprudence in other regional, international and domestic courts regarding the violation, by environmental means, of those well-established rights. For example, the use of the right to life to protect environmental rights is starting to achieve success in both European and African regional human rights systems.¹⁷⁵ In contrast, the rights to health and property are just beginning to gain ground as mechanisms for the protection of environmental rights in those areas.

¹⁶⁸ Hari Osofsky, *supra* note 123, at 31.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² Telephone Interview with Tyler Giannini, *supra* note 153.

¹⁷³ *Id.*

¹⁷⁴ See *BíoBío River Case*, *supra* note 70.

¹⁷⁵ See *Öneryıldız v. Turkey*, 41 Eur. Ct. H.R. 20 (2005) and *SERAC v. Nigeria*, *supra* note 16.

¶64 In Europe, the recognition that environmental degradation can violate the right to life is becoming more explicit. In cases it adjudicated in 1998 and 2004, the European Court of Human Rights (“the European Court”) received complaints which argued that the petitioners’ right to life had been violated as a result of environmental contamination.¹⁷⁶ Although the court did find violations of the right to respect for family and private life, embodied in Article VIII of the European Convention on Human Rights (“ECHR”), in both those cases, it determined that it was unnecessary to consider if the right to life had been violated as a result of the same facts.¹⁷⁷

¶65 However, in its 2005 ruling in *Oneryildiz v. Turkey*,¹⁷⁸ the European Court finally ruled on a right to life violation in the context of environmental rights, finding that failure to maintain a healthy environment violated the right to life. Specifically, it found that Turkey’s failure to take measures to prevent an explosion at a waste dump, which caused a landslide that destroyed the petitioner’s home and killed nine of his relatives, violated the right to life as protected in Article II of the ECHR.¹⁷⁹ The Court also stated that its decisions to decline to consider whether Article II had been violated in *Guerra v. Italy* and *Taskin v. Turkey* did not mean that it had not been violated in those cases, and it implied that, had the court considered the claims, it likely would have found that they violated the right to life.¹⁸⁰ Finally, the court explained what it considered to be states’ duties under Article II.¹⁸¹ This decision and its dicta open the door for further findings by the European Court that environmental damage can violate the right to life. Such findings would reinforce the IACHR’s rulings that environmental rights are embedded in the right to life, and might also serve as persuasive authority in domestic courts as to the enforceability of environmental rights.¹⁸²

¶66 In contrast to its findings with regard to the right to life, the European Court has not ruled specifically on whether environmental rights are embedded in the right to health. This is because it only has the authority to adjudicate violations of the ECHR, and no specific right to health is guaranteed in that document. However, in several cases, injury to the petitioners’ health caused by environmental degradation factored heavily into the court’s decisions that environmental problems violated the right to respect for private and family life (Article VIII).¹⁸³ Thus, the European Court’s reasoning offers strong arguments that environmental degradation violates the right to health, even if that court has not specifically ruled as much.

¶67 Finally, the prospect of finding environmental rights embedded in the right to property may have just found a beginning in Europe, a trend also evident in the *Oneryildiz v. Turkey* case.¹⁸⁴ In addition to finding Turkey in violation of Article II of the ECHR, the European Court also found that Turkey had violated Article I of Protocol I to the ECHR, which guarantees the right to possessions.¹⁸⁵ The court considered that Oneryildiz’s home was one of his possessions, and that Turkey’s failure to take measures to safeguard that home from the dangers posed by the nearby trash dump constituted a violation of that right.¹⁸⁶ If the European Court continues to

¹⁷⁶ *Guerra v. Italy*, 26 Eur. Ct. H.R. 357 (1998) and *Taskin v. Turkey*, 42 Eur. Ct. H.R.50 (2006).

¹⁷⁷ *Id.*

¹⁷⁸ *Öneryıldız v. Turkey*, 41 Eur. Ct. H.R. 20 (2005).

¹⁷⁹ *Id.* at 368.

¹⁸⁰ *Id.* at 355.

¹⁸¹ *Id.* at 359.

¹⁸² See, e.g., Harold Hongju Koh, *supra* note 111.

¹⁸³ See, e.g., *Guerra v. Italy*, *supra* note 176 and *Lopez-Ostra v. Spain*, 20 Eur. Ct. H.R. 277 (1995).

¹⁸⁴ Telephone Interview with Giannini, *supra* note 172.

¹⁸⁵ *Id.* at 373.

¹⁸⁶ *Id.* at 372.

interpret homes as possessions and thus as protected under Protocol I, that will permit future claimants to base environmental rights complaints on that right, thus possibly leading to jurisprudence similar to that of the IACHR. Such jurisprudence of both the American and European regional human rights bodies might prove persuasive in domestic courts, thus creating more options for redress for victims of environmental rights violations.¹⁸⁷

¶168 Although it is in its infancy relative to the IACHR and the European Court, the African Commission on Human and Peoples' Rights ("African Commission") also has begun to recognize that environmental rights are embedded in other human rights, including the rights to life, health, and property, all of which are protected under the African Charter on Human and Peoples' Rights ("African Charter").¹⁸⁸ In its 2001 decision in *Social and Economic Rights Action Center (SERAC) v. Nigeria*, the African Commission ruled that Nigeria's participation in, and failure to put an end to, the environmental devastation of Ogoniland in the form of oil spills and water contamination violated the Ogoni peoples' rights to life, health and property, in addition to other rights.¹⁸⁹ Should similar cases be brought in front of the African Commission in the future, it seems likely that it would continue to find environmental rights embedded in the rights it found violated in *SERAC v. Nigeria*. The African Commission's expansion of its jurisprudence in this area would bolster the IACHR's continued upholding of environmental rights as embedded in well-established human rights, and might begin to persuade US judges in ATCA cases that environmental rights embedded in the rights to life, health and property are cognizable claims under the statute.¹⁹⁰

¶169 Jurisprudence in the International Court of Justice ("ICJ") and domestic courts also give credence to the argument that the rights to life, health and property encompass environmental rights. In his separate opinion to the *Gabcikovo-Nagymaros* ruling in 1997, Judge Weeramantry stated that "[t]he protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself."¹⁹¹ A case currently pending in the ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,¹⁹² involves issues of potential environmental damage to communities and thus may create an opportunity for Judge Weeramantry's views to be elaborated in an ICJ ruling. Findings in domestic courts, such as a ruling by a Brazilian court that basic access to water forms part of the right to health,¹⁹³ may also prove persuasive in other domestic courts or regional courts and help to establish environmental rights as customary international law.

¶170 Given the wide acceptance of well-established human rights as international law and the increasing jurisprudence on environmental rights as embedded within them, it seems likely that using the embedded conception of environmental rights would be more successful than attempting to enforce independent environmental rights. Without doubt, the embedded model currently offers the only chance for success in US courts adjudicating ATCA claims. Nonetheless, now may be the time to attempt to expand recognition of environmental rights as independent human rights in tribunals such as the IACHR and the European Court, which

¹⁸⁷ See Harold Hongju Koh, *supra* note 111.

¹⁸⁸ African Charter, *supra* note 10.

¹⁸⁹ *SERAC v. Nigeria*, *supra* note 16.

¹⁹⁰ See Harold Hongju Koh, *supra* note 111.

¹⁹¹ Case concerning the Gabcikovo-Nagymoros Project (Hungary v. Slovakia), 1997 I.C.J. 88 (Sept. 25) (Separate opinion of Vice President Weeramantry).

¹⁹² *Pulp Mills on the River Uruguay*, International Court of Justice, Press Release 2006/44, available at <http://www.icj-cij.org/icjwww/idocket/iau/iauframe.html>.

¹⁹³ EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2003, *supra* note 48 at 27.

espouse the flexible interpretation of human rights law in order to strengthen its relevance in situations which its originators may not have foreseen.¹⁹⁴

¶71 As mentioned *supra*, Article XI of the San Salvador Protocol to the ACHR specifically declares the right to a healthy environment.¹⁹⁵ That right is only meaningful if it is enforceable, and the IACHR is the body charged with upholding its enforcement. Moreover, precedent from other regional and domestic courts offer suggestions of how that right might be interpreted. The African Commission's finding in *SERAC v. Nigeria* that Nigeria violated Article XXIV of the African Charter,¹⁹⁶ the peoples' right to a "general satisfactory environment favourable [*sic*] to their development,"¹⁹⁷ provides precedent in a regional tribunal. Further, a joint dissenting opinion by five judges of the European Court in *Hatton v. United Kingdom* suggests that that Court also may soon be willing to recognize the right to a healthy environment, even though that right is not specifically enumerated in the ECHR or its protocols.¹⁹⁸ The judges state, "[i]n the field of environmental human rights . . . the . . . Court [has] increasingly taken the view that Article VIII embraces the right to a healthy environment"¹⁹⁹

¶72 Several domestic court findings, including two in Latin America, provide additional foundation for interpretation of the right to a healthy environment. In 2003, a Superior Administrative Court in Colombia found that aerial spraying of herbicides conducted as part of Plan Colombia violated the constitutionally-protected right to a healthy environment.²⁰⁰ In May 2004, the Supreme Court of Costa Rica held that the Costa Rican Customs Office violated the Constitutional right to a healthy and balanced environment by permitting the unloading of tons of shark fins at private docks without inspectors present, and by unnecessarily delaying its response to a request by an NGO that it take additional measures to prevent the unloading of shark fins in that country.²⁰¹ These findings reveal that, in spite of the broad language of the right to a healthy environment, domestic judiciaries have found a way to interpret it, and the IACHR could do so as well.

¶73 IACHR could also look to a suggestion by ERI as to what the right to a healthy environment should consist of. ERI took up the challenge of defining that right in its *amicus curiae* brief submitted in *Arias et. al. v. Dynacorp*, in which it argued that violations of the right to a healthy environment occur when environmental harms are "long-term, widespread and severe, [such that they] violate the rights to life, security of the person and health on a mass scale or deprive substantial numbers of people of the means of subsistence."²⁰² However, since this definition depends in large part on the recognition that environmental degradation can violate the rights to health and life, it may not be very useful, much less accepted, until it is more widely recognized that those well-established rights encompass environmental rights.

¶74 If further recognition of the independent right to a healthy environment were achieved in multiple regional tribunals, the opinion of the Fifth Circuit in *Beanal v. Freeport-McMoran*

¹⁹⁴ See IACHR, *supra* note 91 and *Hatton v. United Kingdom*, 37 Eur. Ct. H.R. 28, 648 (2003) (Costa, Ress, Termen, Zupancic and Steiner, dissenting).

¹⁹⁵ San Salvador Protocol, *supra* note 6.

¹⁹⁶ See *SERAC v. Nigeria*, *supra* note 16.

¹⁹⁷ See *STEINER & ALSTON*, *supra* note 30, at 1453.

¹⁹⁸ *Hatton v. United Kingdom*, 37 Eur. Ct. H.R. 28, 648 (2003) (Costa, Ress, Termen, Zupancic and Steiner, dissenting).

¹⁹⁹ *Id.* at 650.

²⁰⁰ EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2004, *supra* note 48, at 53.

²⁰¹ EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2005, *supra* note 8, at 41.

²⁰² Earthrights International, *supra* note 148.

offers some hope that US judges might recognize that right as cognizable under ATCA. In that case, the court stated that the right to a healthy environment did not include “sufficiently discernable” standards to constitute a claim cognizable under ATCA.²⁰³ Were those standards further refined by regional courts or perhaps in a UN Declaration, there is a small possibility that the right might become enforceable in the US.

¶75

As usual in the field of international law, a win on the merits of any environmental rights claim will very much depend on the forum in which it is brought, and enforcement of such a win is by no means guaranteed. However, by petitioning the more flexible regional tribunals to enforce both the embedded and independent models of environmental rights, as well as pressing international bodies to recognize such rights, little by little, international law may finally come to recognize the inextricable relationship between human rights and the environment.

²⁰³ *Beanal v. Freeport-McMoran*, *supra* note 138, at 167.