

Spring 2012

Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted

Svitlana Kravchenko

Follow this and additional works at: <http://commons.law.famu.edu/famulawreview>

 Part of the [Environmental Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Svitlana Kravchenko, *Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted*, 7 Fla. A&M U. L. Rev. (2015).

Available at: <http://commons.law.famu.edu/famulawreview/vol7/iss2/4>

This Article is brought to you for free and open access by Scholarly Commons @ FAMU Law. It has been accepted for inclusion in Florida A & M University Law Review by an authorized editor of Scholarly Commons @ FAMU Law. For more information, please contact linda.barrette@famu.edu.

ENVIRONMENTAL RIGHTS IN INTERNATIONAL LAW: EXPLICITLY RECOGNIZED OR CREATIVELY INTERPRETED?

*Prof. Svitlana Kravchenko**

I.	EXPLICIT SUBSTANTIVE ENVIRONMENTAL RIGHTS	165
	A. <i>Right to a Healthy Environment</i>	165
	B. <i>Right to Water</i>	168
II.	ENVIRONMENTAL RIGHTS THROUGH CREATIVE JUDICIAL INTERPRETATION	170
	A. <i>Right to Life</i>	171
	B. <i>Right to Private and Family Life</i>	172
	C. <i>Right to Property</i>	174
III.	PROCEDURAL RIGHTS	175
	A. <i>Right to Information</i>	176
	B. <i>Right to Participate</i>	177
	C. <i>Right of Access to Justice</i>	177
	D. <i>The Aarhus Convention Compliance Committee and Its Jurisprudence</i>	178
IV.	CONCLUSION	179

INTRODUCTION

Environmental rights over the past four decades have moved from the realm of theory to actual implementation. A jurisprudence of environmental rights is developing around the world. This essay seeks to sketch a picture of that movement. It also asks the reader to think

* Professor Svitlana Kravchenko of the University of Oregon suddenly passed from this world on February 10, 2012. She had completed drafting this essay on February 4, as an elaboration of a presentation she made to the FAMU symposium, Green Justice for All: International and Comparative Dimensions of Environmental Justice. Her husband, Professor John Bonine, has lightly edited the essay with the assistance of two of Professor Kravchenko's former students: Kevin Bonin, 2011 graduate of the Oregon LL.M. Program, and Elizabeth Brown, 2013 Oregon J.D. candidate. Although Professor Kravchenko is gone from this Earth, she planted "many seeds" while she was here and left "deep footprints across many continents," as lawyers in Thailand and South Africa wrote about her. Some of those "seeds" are the new ideas planted in her students and those who have been inspired by her presentations at symposia like the FAMU event. Some of those "deep footprints" have been followed by the young lawyers she influenced, who are now also making their own pathways to achievement and protection of environmental rights.

about whether it is worth continuing to argue about whether environmental rights *should* exist¹ when it is increasingly clear that they *do* exist. In many instances, what we find are not explicitly labeled as “environmental rights” by the courts or bodies recognizing them. Instead, creative interpretation of other broadly accepted rights has often been the mechanism by which environmental rights have come into existence.

Environmental rights consist of substantive and procedural rights. The right to a healthy environment and the right to water are substantive rights. The right to information, the right to participate in environmental decision-making, and the right of access to justice are procedural rights. Procedural rights help to achieve substantive rights because without access to information or participation in decision-making, it is difficult to defend the right to a healthy environment.² Procedural rights also help build the rule of law and reduce arbitrariness in government decision-making. These are, of course, also goals worth achieving on their own merits.

Part I of this article will explore *explicit* substantive environmental rights. Part II will summarize some creative *interpretations* in the jurisprudence of regional human rights courts of rights that are not, on their face, environmental—namely, the rights to life, family and private life, and property. Courts have resorted to creative interpretation of other rights when faced with intractable problems and serious dangers, which often arise from or are exacerbated by the lack of explicit recognition of environmental rights in human rights treaties. In Part III, this article will explore the recognition of *procedural* environmental rights in international law. This essay does not aim to provide a complete exploration of any of these topics, but rather seeks to provide an easy entrance into a fascinating area of modern jurisprudence. For those who might think that the areas of human rights and environmental protection are quite separate, this essay offers a different point of view. For young lawyers who might think that it is difficult to seek remedies unless someone else has already blazed the path, several of the cases cited here are the result of a lawyer’s or judge’s own creative mind, not what courts have done in the past. Remember this: Nothing Is Impossible.

1. Arguments for and against an environmental right are canvassed in an article by Justice Susan Glazebrook, *Human Rights and the Environment*, 40 VIC. U. WELLINGTON L. REV. 293 (2009).

2. Svitlana Kravchenko & John E. Bonine, HUMAN RIGHTS AND THE ENVIRONMENT 219-310 (2008).

I. EXPLICIT SUBSTANTIVE ENVIRONMENTAL RIGHTS

Environmental rights have sometimes been called the “third generation” of rights because they emerged later than other human rights—civil and political (first generation) and economic, social, and cultural rights (second generation)—and because they are said to be rights held by groups rather than by individuals. One cannot find explicit environmental rights in the 1948 Universal Declaration of Human Rights,³ the 1966 International Covenant on Civil and Political Rights,⁴ or the International Covenant on Economic, Social and Cultural Rights.⁵ At the time of the adoption of those instruments, environmental problems were not yet on the international human rights agenda or even very high on most national agendas. For the same reasons, explicit environmental rights were included in neither the 1950 European Convention on Human Rights⁶ nor the 1969 American Convention on Human Rights.⁷ Explicit environmental rights have, however, appeared in a number of more recent legal instruments.

A. *Right to a Healthy Environment*

The explicit right to a satisfactory, safe, or healthy environment has appeared over the years in international declarations, in regional treaties or conventions, and in more than one hundred national constitutions.

The first attempt to articulate a right to a safe environment in international law was made in the Stockholm Declaration adopted at the United Nations Conference of the Human Environment in 1972.⁸ Its Principle 1 stated, “Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a qual-

3. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/>.

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, available at <http://www2.ohchr.org/english/law/ccpr.htm>.

5. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360, available at <http://www2.ohchr.org/english/law/cescr.htm>.

6. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.hri.org/docs/ECHR50.html>.

7. American Convention on Human Rights, Nov. 22, 1969, OAS Treaty Ser. No. 36, 1144 U.N.T.S. 123 (1978), available at http://www.hrcr.org/docs/American_Convention/oashr.html.

8. Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), U.N. Doc. A/Conf.48/14 2, 3 (1972), available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=97&articleid=1503>.

ity which permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁹

Twenty years later, the Rio Declaration, adopted by the United Nations Conference on Environment and Development in 1992, characterized the right as an “entitlement.”¹⁰ Principle 1 of the Rio Declaration states, “Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”¹¹ International declarations approved by governments do not automatically gain binding force as a matter of law. Despite lacking an initial force of legal authority, however, such non-binding statements can be influential and are known as “soft law.”

Explicit recognition of an environmental human right in a binding international instrument occurred for the first time in 1981 with the adoption of the African Charter on Human and Peoples’ Rights,¹² which has been ratified by most of the countries in Africa. Article 24 provides: “All peoples have the right to a generally satisfactory environment favorable for their development.”¹³ Although this is stated as a collective right rather than an individual right, the African Commission of Human Rights has applied the right to a satisfactory environment in one case, *Social and Economic Rights Action Center v. Nigeria*.¹⁴ Widespread pollution from oil extraction had degraded the environment of the Ogoni people of southern Nigeria. The Commission held:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the State to take reasonable and other measures to prevent pollution and ecological degradation,

9. *Id.* Principle 1.

10. Rio Declaration on Environment and Development, U.N. Doc. A/Conf.151/26, 31 I.L.M. 874 (1992), available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

11. *Id.* Principle 1.

12. African [Banjul] Charter on Human and Peoples’ Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, available at http://www.africa-union.org/official_documents/treaties_%20conventions_%20protocols/banjul%20charter.pdf.

13. *Id.* art. 24.

14. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 155/96 (2001), available at <http://www1.umn.edu/humanrts/africa/comcases/155-96.html>.

to promote conservation, and to secure an ecologically sustainable development and use of natural resources.¹⁵

The African Commission found the Federal Republic of Nigeria to be in violation of Article 24 of the African Charter on Human and Peoples' Rights. It recommended that the government "ensure protection of the environment, health, and livelihood of the people of Ogoniland" by *inter alia* "ensuring adequate compensation to victims of the human rights violations . . . and undertaking a comprehensive cleanup of lands and rivers damaged by oil operations."¹⁶

The African right to a satisfactory environment was also enforced in 2005 by one national court in Nigeria. The Federal High Court of Nigeria at Benin issued a judgment that Shell Petroleum's use of "gas flaring" in its production activities was in violation of fundamental right to life, including a healthy environment.¹⁷ In doing so, the court relied in part on Article 24, as well as other articles of the African Charter on Human and Peoples' Rights. The court ordered the respondents to take immediate steps to stop the further flaring of gas in the applicant's community.¹⁸

In the Americas, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights¹⁹ is as explicit as the African Charter. In this "Protocol of San Salvador," Article 11 states: "Everyone shall have the right to live in a healthy environment and to have access to basic public services."²⁰ Despite the strong language, the Protocol has no provision allowing individuals to bring claims of violation of Article 11's right to a healthy environment to the Inter-American Commission on Human Rights. This leaves only the process of annual reporting requirements and Commission commentary on such reports as a means to address human rights violations. These do not have the same legal or precedential value as jurisprudence of the Commission or of the Inter-American Court of Human Rights in individual cases.

15. *Id.* ¶ 52.

16. *Id.* at "Appeals to" paragraph at end of decision.

17. *Jonah Gbemre v. Shell Petroleum (Nigeria)*, Federal High Court of Nigeria. Benin Judicial Division, Suit No. FHC/B/CS/153/05 (Nov. 14, 2005), AHRLR 151 (NgHC 2005), available at <http://www.chr.up.ac.za/index.php/browse-by-subject/418-nigeria-gbemre-v-shell-petroleum-development-company-nigeria-limited-and-others-2005-ahr-lr-151-nghc-2005.html>.

18. *Id.* at "Final Orders" of court, ¶ 5.

19. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, art. 10, Nov. 17, 1988, 28 I.L.M. 161, available at <http://www.oas.org/juridico/english/treaties/a-52.html>.

20. *Id.* art. 11.

Another regional international treaty that has entered into force is the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters ("Aarhus Convention").²¹ Its Preamble and Article 1 both state that "every person" has the "right" to live in an "environment adequate to his or her health and well-being." Some scholars argue, however, that the lack of any additional specific obligations of a substantive nature in the convention means that this environmental right exists only as a general objective or policy recommendation and not as a substantive obligation for the nations that are parties to the convention. Given that the rest of the Aarhus Convention involves procedural matters, Dr. Marc Pallemmaerts of Belgium has written, "It is striking that the fundamental right to live in a healthy environment, at the very moment of its legal recognition, finds itself, as it were, immediately reduced to its mere procedural dimension."²² Nonetheless, it is possible that the legal recognition itself will, at some point, count for something in a substantive enforcement matter.

B. *Right to Water*

The right to water is not yet recognized in jurisprudence under international human rights treaty bodies,²³ but a number of experts believe that this right is coming into existence and that it has an explicit basis. In 2002, the United Nations Committee on Economic, Social and Cultural Rights ("UNCESCR") declared in a General Comment that a right to water exists as an independent right by implication from Articles 11 and 12 of the International Covenant on Economic, Social, and Cultural Rights ("ICESCR").²⁴ This authoritative interpretation was not itself legally binding, even for the parties of

21. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), June 25, 1998, 2161 U.N.T.S. 447, available at <http://www.unece.org/environmental-policy/treaties/public-participation/aarhus-convention.html>.

22. Marc Pallemmaerts, *The Human Right to a Healthy Environment as a Substantive Right*, in HUMAN RIGHTS AND THE ENVIRONMENT 18 (Maguelonne Déjeant-Pons & Marc Pallemmaerts (2002)).

23. It is beyond the scope of this essay to evaluate the jurisprudence of national courts.

24. United Nations Committee on Economic, Social and Cultural Rights, General Comment 15: The Right to Water, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003), available at [http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/\\$FILE/G0340229.pdf](http://www.unhcr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf). Mention of a right to water can also be found in the Convention on the Rights of the Child, art. 24, GA Res. 44/25, annex, 44 UN GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2, 1990, available at <http://www2.ohchr.org/english/law/crc.htm>, and the Convention on the Elimination of All Forms of Discrimination against Women, art. 14, GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 (1979),

the ICESCR, but one scholar has suggested that “it is entirely possible, perhaps even probable, that the action of the ESC Committee in adopting General Comment 15 will attract sufficient State practice over time that a customary norm will be formed on the basis of that practice.”²⁵ The General Comment states, “The right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.”²⁶ The General Comment provides the following definition of the right, “The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses.”²⁷

Further steps in developing and promoting the existence of a human right to water began in 2006, when the United Nations Human Rights Council (which replaced the previous United Nations Human Rights Commission) requested the Office of the United Nations High Commissioner for Human Rights (“OHCHR”) to conduct a study on obligations related to equitable access to safe drinking water and sanitation under international human rights instruments. The OHCHR submitted its report in 2007.²⁸ In 2008, the Human Rights Council asserted that various legal instruments “entail obligations in relation to access to safe drinking water and sanitation,” and appointed an independent expert “to identify, promote and exchange views on best practices related to access to safe drinking water and sanitation.”²⁹ The expert was tasked to undertake a study leading to “further clarification of the content of human rights obligations, including non-discrimination obligations, in relation to access to safe drinking water and sanitation.”³⁰ Thereafter, international law continued to evolve with the adoption by the United Nations General Assembly in 2010 of Resolution 64/292, on “The human right to water

entered into force Sept. 3, 1981, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>.

25. Stephen C. McCaffrey, *The Human Right to Water*, in *FRESH WATER AND INTERNATIONAL ECONOMIC LAW* (E. B. Weiss, L. B. DeChazournes & N. Bernasconi-Osterwalder, eds., 2005)

26. UNCESCR, General Comment 15, *supra* note 25, at ¶ 3.

27. *Id.* ¶ 2.

28. United Nations High Commissioner for Human Rights, Annual Report, U.N. Doc. A/HRC/6/3 (Aug. 16, 2007), available at http://www2.ohchr.org/english/issues/water/iexpert/docs/A-CHR-6-3_August07.pdf.

29. United Nations Human Rights Council Res. 7/22, Human rights and access to safe drinking water and sanitation (Mar. 28, 2008), available at http://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf.

30. *Id.*

and sanitation.”³¹ The General Assembly stated that it “[r]ecognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.”³² Subsequently, the U.N. Human Rights Council stated in a 2010 resolution that the human right to safe drinking water is “derived from the right to an adequate standard of living” and is “inextricably related” to the right to life.³³ According to the U.N.’s Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, Dr. Catarina de Albuquerque, “This means that for the U.N., the right to water and sanitation is contained in existing human rights treaties and is therefore legally binding.”³⁴ The right to an adequate standard of living is contained in Article 12 of the International Covenant on Economic Social and Cultural Rights.³⁵ That is the basis for the Special Rapporteur’s statement that the right to water is now also a legally binding right at the international level. It is too early to know whether this will blossom into state practice, but it is clear that the right to water is evolving in the direction of an explicit substantive environmental right.³⁶

II. ENVIRONMENTAL RIGHTS THROUGH CREATIVE JUDICIAL INTERPRETATION

Even more dramatic than the progress toward recognition of explicit environmental rights in international law has been the creative interpretation of *existing* fundamental rights in order to achieve environmental goals. Starting in the 1990s, the European Court on Human Rights began deriving environmental rights from other, more traditional fundamental rights, such as the right to respect for private and family life, the right to information, and the right to life. In partic-

31. United Nations General Assembly Res. 64/191, U.N. Doc. A/RES/64/292 (Aug. 3, 2010), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N09/479/35/PDF/N0947935.pdf?OpenElement>.

32. *Id.* ¶ 1.

33. United Nations Human Rights Council Res. 15/9, “Human rights and access to safe drinking water and sanitation,” U.N. Doc. A/HRC/RES/15/9 (Sept. 24, 2010), available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/15/L.14.

34. Quoted in press release, “A landmark decision to make the right to water and sanitation legally binding,” available at <http://www.ohchr.org/EN/NewsEvents/Pages/RightToWaterAndSanitation.aspx>.

35. International Covenant on Economic, Social and Cultural Rights, art. 11, *supra* note 6.

36. Extensive legal resources can be found in a recently released book, WASH United, Freshwater Action Network, & WaterLex, *THE HUMAN RIGHT TO SAFE DRINKING WATER AND SANITATION IN LAW AND POLICY – A SOURCEBOOK* (2012), available at <http://www.freshwateraction.net/sites/freshwateraction.net/files/RTWS-sourcebook.pdf>.

ular, the Court's jurisprudence has recognized violations of Articles 2 and 8 of the European Convention on Human Rights — the right to life and the right to respect for private and family life, respectively. Similarly, the Inter-American Court of Human Rights has made a creative interpretation of the word "property" in order to assist indigenous people. A brief glance at a variety of creative court interpretations will demonstrate how the absence of explicit substantive environmental rights in a treaty is no barrier to a judiciary that is willing to deliver justice in environmental matters in the modern era.

A. *Right to Life*

A right to "life" is found in many human rights documents, such as the Universal Declaration of Human Rights,³⁷ the Rio Declaration,³⁸ the International Covenant on Civil and Political Rights,³⁹ and regional human rights treaties.⁴⁰ In 1993, the European Court of Human Rights, in the case *Öneryildiz v. Turkey*, applied Article 2, right to life, of the European Convention on Human Rights in an environmental case involving a clear loss of life.⁴¹ The applicant complained that an explosion of methane gas at an improperly designed and maintained solid waste dump, in which nine members of his family died, occurred as a result of negligence of the relevant authorities.⁴² The explosion buried ten houses, including the home of the applicant along with his family.⁴³ A report prepared by a committee of experts indicated that the waste-collection site in question breached Turkey's Environment Act and the Regulation on Solid-Waste Control, and posed a health hazard to humans and animals.⁴⁴ The report observed that no measures had been taken to prevent a possible explosion of methane gas from the dump and, subsequently, such an explosion occurred.⁴⁵ The European Court of Human Rights held that this constituted a violation of Article 2's right to life.⁴⁶

37. Universal Declaration of Human Rights, art. 25, *supra* note 4.

38. Rio Declaration, *supra* note 11.

39. International Covenant on Civil and Political Rights, art. 6, *supra* note 5.

40. African [Banjul] Charter on Human and Peoples' Rights, art. 4, *supra* note 12; American Convention on Human Rights, art. 4, *supra* note 8; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 2, *supra* note 7.

41. *Öneryildiz v. Turkey*, 2004-XII Eur. Ct. H.R. 79.

42. *Id.* ¶¶ 2, 3, 22, 39.

43. *Id.* ¶ 18.

44. *Id.* ¶¶ 13, 15.

45. *Id.* ¶¶ 13, 18.

46. *Id.* ¶¶ 4, 110 (violation of Article 2 in its substantive aspect), ¶ 118 (violation of Article 2 in its procedural aspect).

The Inter-American Commission on Human Rights similarly found a violation of the right to life due to pollution and other environmental harm in its *Report on the Situation of Human Rights in Ecuador* in 1997.⁴⁷ The commission stated,

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.⁴⁸

In Resolution 12/85 (*Yanomami Case*), the Inter-American Commission reported that the construction of a highway on territory traditionally occupied by the Yanomami Indians had led to "a considerable number of deaths caused by epidemics of influenza, tuberculosis, measles, venereal diseases, and others."⁴⁹ The commission concluded that, "due to "the failure of the Government of Brazil to take timely and effective measures [o]n behalf of the Yanomami Indians, a situation . . . has resulted in the violation, injury to them, of the following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security."⁵⁰

Clearly the right to life in international treaties and conventions is taking on an environmental dimension.

B. *Right to Private and Family Life*

The European Court of Human Rights has recognized environmental violations of Article 8 of the European Convention (the right to respect for private and family life) in several cases, including *López Ostra v. Spain*, *Fadeyeva v. Russia*, and *Taşkin v. Turkey*. In *López Ostra v. Spain*, the first, and landmark, environmental case of the Court, decided in 1994, the applicant, Gregoria López Ostra, lived in Lorca, a town with a heavy concentration of leather industries belonging to a company named SACURSA.⁵¹ Due to a malfunction, the

47. Inter-Am. Comm'n H.R., *Report on the Situation of Human Rights in Ecuador*, O.E.A. Doc. OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997), available at <http://www.cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm>.

48. *Id.* at 88.

49. *Yanomami v. Brazil*, Resolution 12/85, Case 7615, Inter-Am. Comm'n H. R., Resolution Report No. 24, O.E.A. Doc. OEA/Ser.L/V/II.66, "Considering" ¶ 10(b) (1985), available at <http://www.cidh.org/annualrep/84.85eng/brazil7615.htm>.

50. *Id.* at "Resolves" ¶ 4; see also American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogotá, Colombia (1948).

51. *López Ostra v. Spain*, 303 Eur. Ct. H.R. 41, ¶¶ 6, 7 (1994).

company released gas fumes, pestilential smells, and contamination into the atmosphere.⁵² These caused health problems and nuisance to many residents of Lorca, particularly those living in Mrs. López Os-tra's district.⁵³ Applicant argued that the municipality had a duty to prevent such harm.⁵⁴ The Court held that there had, indeed, been a breach of Article 8 of the Convention and ordered the respondent government of Spain to pay compensation to the applicant for damages.⁵⁵

Similarly, in *Fadeyeva v. Russia*, the applicant lived approximately 450 meters from the Severstal steel plant, the largest iron smelter in Russia, which was responsible for 96 percent of all emissions in the town.⁵⁶ The concentration of toxic substances in the air was twenty to fifty times higher than the government's maximum permissible limits.⁵⁷ According to a governmental decree, "the environmental situation in the city [had] resulted in a continuing deterioration in public health."⁵⁸ The plant planned to resettle people who were living within a so-called "sanitary security zone" to outside of the zone, but it failed to do so.⁵⁹ The Court ruled that "the respondent State . . . has failed to strike a fair balance between the interests of the community and the applicant's effective enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Article 8."⁶⁰

In *Taşkin v. Turkey*, the Turkish government had persisted in authorizing a mining process using sodium cyanide after numerous national court decisions ruled that such authorizations were illegal.⁶¹ The European Court on Human Rights ruled that mining for gold using sodium cyanide violated the right to respect for private and family life, in breach of Article 8.⁶² The Court also ruled that the government's refusal to abide by the decisions of its own courts deprived the citizens of the right to effective judicial protection in the determination of their "civil rights."⁶³ The particular civil right at issue was the right

52. *Id.* ¶ 8.

53. *Id.* ¶ 8.

54. *Id.* ¶¶ 10, 12, 15, 44, 54.

55. *Id.* ¶ 58, 65.

56. *Fadeyeva v. Russian Federation*, 2005-IV Eur. Ct. H.R. 257, ¶¶ 10, 11, 15.

57. *Id.* ¶ 15.

58. *Id.* (internal quotation marks omitted).

59. *Id.* ¶ 11.

60. *Id.* ¶ 134.

61. *Taşkin v. Turkey*, 2004-X Eur. Ct. H.R. 179.

62. *Id.* ¶ 126.

63. *Id.* ¶¶ 133, 138.

to live in a healthy and balanced environment under Article 56 of the Turkish Constitution.⁶⁴

These are some of the growing number of cases in which the right to private and family life has become a primary vehicle for recognition of environmental rights in Europe.

C. *Right to Property*

The right to property is sometimes thought of as being in opposition to environmental protection. But this does not need to be so. In 2001, the Inter-American Court of Human Rights explicitly recognized the link between the human right to "property" and protection of the environment in the *Awas Tingni* case.⁶⁵ The Court ruled that Nicaragua violated an indigenous community's rights to "property" under Article 21 of the American Convention on Human Rights, even though the community did not have formal title.⁶⁶ The government had granted concessions to a Korean logging company to cut trees on the land traditionally used by the community, without first obtaining the community's consent.⁶⁷ The court interpreted the term "property" to go beyond Western conceptions in order to take account of the special connection of indigenous people with the land.⁶⁸ The court said,

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 elements which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.⁶⁹

The Court held that the Government of Nicaragua had "to carry out the delimitation, demarcation, and titling of the territory belonging to the Community,"⁷⁰ and before that had to abstain from actions that

64. *Id.* ¶ 132.

65. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of Inter-Am. Ct. H.R. (Aug. 31, 2001), available at <http://www.law.arizona.edu/depts/iplp/international/awastingni/documents/IACtHR-ATJudgmentAug3101.pdf>.

66. *Id.* ¶¶ 153, 155.

67. *Id.* ¶¶ 25, 103(o).

68. *Id.* ¶¶ 148, 149.

69. *Id.* at "Considerations of the Court," ¶ 149.

70. *Id.* ¶ 153(a).

may “affect the existence, value, use or enjoyment of the property.”⁷¹ On December 14, 2008, the Government of Nicaragua handed over to the Awas Tingni community the title to its traditional territory.⁷²

The lawyers for the Awas Tingni indigenous people proved that creative thinking about a single word in an international agreement can have life-changing significance for their clients. A path forward in the development of the right to property as a tool for the protection of environmental rights can be seen from this example.

III. PROCEDURAL RIGHTS

While the right to a healthy environment is what people commonly think about when considering environmental rights, environmental *procedural* rights—to information, participation, and access to justice—have been increasingly recognized in international soft law, as well as in the “hard law” of treaties and conventions. They were most notably stated in Principle 10 of the Rio Declaration in 1992,

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.⁷³

Procedural environmental rights have been included in many Multilateral Environmental Agreements (“MEAs”) adopted after 1992. These include the Convention on the Transboundary Effects of Industrial Accidents (1992),⁷⁴ the United Nations Framework Convention on Climate Change (1992),⁷⁵ the Rotterdam Convention on the Prior In-

71. *Id.* ¶ 153(b).

72. U.N. News Centre, *Nicaragua’s titling of native lands marks crucial step for indigenous rights – UN expert* (Dec. 17, 2008), <http://www.un.org/apps/news/story.asp?NewsID=29336>.

73. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, Rio Declaration on Environment and Development, Principle 5, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992).

74. Convention on the Transboundary Effects of Industrial Accidents, Mar. 17, 1992, U.N. Doc. UN/E/ECE/1268 (1992), *reprinted in* 31 I.L.M. 1330.

75. United Nations Conference on Environment and Development, Framework Convention on Climate Change, May 9, 1992, U.N. Doc. A/AC.237/18 (Part II)/Add.1, 1771 U.N.T.S. 107, *reprinted in* 31 I.L.M. 849.

formed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998),⁷⁶ and the Stockholm Convention on Persistent Organic Pollutants (2001),⁷⁷ among others.

The most comprehensive such treaty is the Aarhus Convention, signed in 1998.⁷⁸ Former United Nations Secretary-General Kofi Annan called it “by far the most impressive elaboration of Principle 10 of the Rio Declaration, which stresses the need for citizen’s participation in environmental issues and for access to information on the environment held by public authorities.”⁷⁹ The convention guarantees rights of access to information, public participation in decision-making, and access to justice for 45 nations of Europe, Caucasus, and Central Asia.⁸⁰

A. *Right to Information*

The idea of a right of freedom of information began at the national level. Such a right was enacted in Sweden over 200 years ago.⁸¹ Over 100 years ago, similar laws were adopted in U.S. states.⁸² In recent years, many other countries have also adopted national legislation guaranteeing “access to information” or “freedom of information.”⁸³

The Aarhus Convention requires the 45 countries who have ratified it to reform their national legislation and practices in a number of ways. They must provide a right to obtain environmental information without the requester needing to have a particular interest or reason for the request. Government bodies must respond and provide infor-

76. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, U.N. Doc. UNEP/FAO/PIC/CONF/5 (1998), *reprinted in* 38 I.L.M. 1.

77. Stockholm Convention on Persistent Organic Pollutants, *opened for signature* May 22, 2001, UN Doc. UNEP/POPS/CONF/4, App. II (2001), *reprinted in* 40 I.L.M. 532.

78. Aarhus Convention, *supra* note 22.

79. United Nations Environment Programme, INFOTERRA 2000 – Global Conference on Access to Environmental Information, Discussion Paper, U.N. Doc. UNEP/INF2000/WP/5 (Sept. 11, 2000), *available at* <http://www.unep.org/infoterra/infoterra2000/Wates-rev.pdf>.

80. As of June 1, 2012, 45 countries had ratified the Convention. *See* United Nations Economic Commission for Europe, *Status of Ratification*, <http://www.unece.org/env/pp/ratification.html> (last visited June 1, 2012).

81. DAVID BANISAR, FREEDOM OF INFORMATION AND ACCESS TO GOVERNMENT RECORD LAWS AROUND THE WORLD 141 (2006), *available at* http://www.freedominfo.org/documents/global_survey2006.pdf (referring to the world’s first freedom of information act, named the Freedom of the Press Act, which required that official documents be made immediately available upon request for no charge).

82. *See* HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW: LEGAL ACCESS TO PUBLIC RECORDS AND PROCEEDINGS (1953).

83. *See* Banisar, *supra* note 82.

mation within one month. The grounds for refusal are limited to specific, narrow categories, such as adverse effects on international relations, national defense or public security, some commercial information, certain internal communications of government bodies, and a few other grounds.⁸⁴ Public authorities must also affirmatively collect and disseminate environmental information.⁸⁵

B. Right to Participate

The Aarhus Convention also guarantees the right of the public to participate in many decisions with potential environmental consequences. Members of the public who are likely to be affected or otherwise have some "interest" must be informed, "either by public notice or individually . . . early in an environmental decision-making procedure, and in an adequate, timely and effective manner."⁸⁶ In addition, nongovernmental environmental organizations must be notified without needing to prove any special interest or adverse effects.⁸⁷ After notification, all members of the public must be given the right to participate (for example, through a public comment period) and to have their opinion "taken into account."⁸⁸ Furthermore, final decisions must be made publicly available.⁸⁹ Public authorities "shall provide for early public participation, when all options are open and effective public participation can take place."⁹⁰ The convention provides opportunities for public participation not only in projects but also in plans, programs, policies, and executive regulations.⁹¹

C. Right of Access to Justice

The Aarhus Convention guarantees enforcement of the rights to information and participation by ensuring the right to seek review procedures in a court or other independent and impartial body. Any person "who considers that his or her request for information . . . has been ignored, wrongfully refused, [or] . . . inadequately answered"

84. Aarhus Convention, *supra* note 22, art. 4, ¶¶ 3, 4.

85. *Id.* art. 5.

86. Aarhus Convention, *supra* note 22, art. 6, ¶ 2.

87. *Id.* art. 2, ¶ 5.

88. *Id.* art. 6, ¶¶ 7, 8.

89. *Id.* art. 6, ¶ 9.

90. *Id.* art. 6, ¶ 4.

91. *See id.* arts. 7, 8.

must be allowed to seek review.⁹² There are also broad rights of access to justice for violations of public participation rights.⁹³

D. The Aarhus Convention Compliance Committee and Its Jurisprudence

The terms of the Aarhus Convention are ambitious. They would have had little effect if they remained just nice words on paper. Unlike some international treaties and conventions, whose words are rarely interpreted by an authoritative body, the Aarhus Convention provides for a Compliance Committee whose decisions (along with those of the regular Meetings of the Parties (“MOPs”)) constitute a growing body of international law. The Aarhus Compliance Committee is a new and unique model. The “compliance mechanism,” adopted as decision I/7 of the First Meeting of the Parties of the Convention, provides that nongovernmental organizations (“NGOs”) can nominate members to the Committee.⁹⁴ Furthermore, the mechanism provides that communications from the public can act as a trigger for the procedure.⁹⁵ The Committee consists of nine independent experts,⁹⁶ and its meetings are open for the public. All these aspects have led to an assertiveness that is rare in international environmental bodies. The Committee enforces environmental procedural rights, providing guidance through authoritative interpretations of the Convention in its jurisprudence. It also facilitates improvement of laws and practices on the national level.

Committee decisions—called findings and recommendations—may be adopted in agreement with the country concerned or submitted to the Meeting of the Parties for adoption.⁹⁷ Submissions by the Committee to the MOP may be divided into three groups: (1) findings of “no non-compliance” made by the Committee in the inter-sessional period; (2) findings of non-compliance along with recommendations made by

92. *Id.* art. 9, ¶ 1.

93. *See id.* art. 9, ¶ 2.

94. Svitlana Kravchenko, *Environment*, in 1 ENCYCLOPEDIA OF HUMAN RIGHTS 139, 144–145 (David P. Forsythe, et al. eds., 2009).

95. Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*, 18 COLO. J. INT’L ENVTL. L. & POL’Y 1, 34–37 (2007), available at <http://ssrn.com/abstract=1076746>.

96. The author served as the elected Vice Chair of the Aarhus Convention Compliance Committee from its inception in 2002 until 2012.

97. Decision I/7, U.N. Doc. ECE/MP.PP/2/Add.8, ¶¶ 35–37 (Apr. 2, 2004), available at <http://www.unece.org/fileadmin/DAM/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf> (The decision consists of a few operative provisions, while the annex to the decision contains the main body of provisions relating to the compliance mechanism.)

the Committee in the inter-sessional period; and (3) findings and recommendations related to implementation of decisions by previous MOPs on non-compliance.⁹⁸ Up to the present time, all findings and recommendations made by the Committee have been approved by the MOPs. The Compliance Committee's duty to report on its activities and to make appropriate recommendations to the MOP also includes reporting on Parties' implementation of recommendations contained in previous MOP decisions on non-compliance. Between MOPs, the Compliance Committee also monitors the implementation of recommendations made in agreement with the Party concerned during the same inter-sessional period.⁹⁹

The "jurisprudence" of the Committee and of the MOP decisions offers a rich vein that few scholars have begun to mine—yet it constitutes the largest deposit of international decisions on procedural matters in existence. Scholars, law students, and lawyers would be well advised to become acquainted with this remarkable new source of international jurisprudence.

IV. CONCLUSION

The world has moved from an era in which some academics believed that environmental rights are nonexistent to a new era, in which other academics, diplomats, commissions, and courts are finding that such rights do exist. Various environmental human rights are recognized in international soft and hard law, in the constitutions of more than one hundred nations, and in the jurisprudence of international tribunals and domestic courts, as well as in some compliance mechanisms of multilateral environmental agreements. Even when legal instruments do not explicitly state environmental human rights, courts have nonetheless found them through creative interpretations of existing human rights. Environmental rights have clearly become part of the ocean of human rights law. The growing streams of law—from written constitutions and conventions to judicial rulings of regional human rights courts and domestic courts to international compliance committees—have gathered force as more and more countries and institutions recognize environmental rights.

Surely it is time to recognize and celebrate the immense burst of creativity that has brought the words "environment" and "human rights" close together. Some of that creativity has occurred in the

98. See Veit Koester, *The Compliance Mechanism – Outcomes and Stocktaking*, 41 ENVTL. POL'Y & L. 196 (2011).

99. *Id.*

minds of drafters of such innovations as the Aarhus Convention. Other creativity has come from advocates and judges willing to stretch old words to fit new conditions. Creativity will be needed in the difficult years ahead if we are to solve environmental problems and protect human rights. We must recognize that both constitute a single task.