A PROPOSAL TO INTRODUCE THE RIGHT TO A HEALTHY ENVIRONMENT INTO THE EUROPEAN CONVENTION REGIME

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I. INTRODUCTION

The notion that human beings have a right to a healthy environment is far more controversial in Europe than it ought to be. Fundamental human rights, those recognized in the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention or Convention)[1] as well as in other leading international texts on human rights, have long protected the essence of the right to a healthy environment. Nevertheless, resistance to acknowledging a fundamental human right to a healthy environment remains strong. This Article will show that the emerging concept of a human right to a healthy environment fits within the established European comprehension of human rights and should be incorporated into the European Convention.[2]

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[1] Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 (entered into force, Sept. 3, 1953) [hereinafter European Convention]. The Convention was drafted by the member states of the Council of Europe in November, 1950, and an additional Protocol was signed in 1952. First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, 213 U.N.T.S. 261 (entered into force, May 18, 1954) [hereinafter First Protocol]. Today the Convention is considered by many to be "the most effective international system for the protection of human rights." Andrew Z. Drzemczewski, European Human Rights Convention in Domestic Law 17-18 (1983).

[2] The Council of Europe was created to further the political integration of Europe. The European Convention regime, a component of the Council of Europe, was designed to

Furthermore, this Article will demonstrate that traditional notions of humans rights embrace a right to a healthy environment and that such a right is justiciable.

The next part of this Article will discuss the common ground that exists between traditional conceptions of human rights and the emerging conception of environmental rights. Part II will look to the common ground between these two concepts in order to define the human right to a healthy environment.

Part III will explore and explode the resistance in the international human rights community to placing the right to a healthy environment within the catalogue of fundamental human rights. In particular, this part will undermine the argument that it is impossible to prove a causal link between specific acts by an identified actor or group of actors and the violation of a claimant's right to a healthy environment. In addition, this part will refute the proposition that the human right to a healthy environment cannot be defined with sufficient precision as to make it justiciable. Finally, this part demonstrates that the human right to a healthy environment is a "civil and political" right rather than an "economic and social" right and that, therefore, the right to a healthy environment belongs in the European Convention rather than the European Social Charter.

Part IV will advocate petitioning the European Commission of Human Rights (Commission) and the European Court of Human Rights (Court) in Strasbourg[3] as a means by which to overcome the resistance to accepting the right to a healthy environment. This part will provide a detailed analysis of a hypothetical case that implicates both the human right to a healthy environment and an existing Convention right: the right to life. The purpose of the exercise will be to demonstrate that the Strasbourg Organs are capable of adjudicating cases in which environmental degradation implicates a human right, despite difficult issues of causation and delimitation. This part will close by arguing that proponents of the human right to a healthy environment should bring a series of similar cases in response to the objections that this important human right is nonjusticiable.

promote and protect human rights throughout Europe by providing a judicial structure to settle matters raised under the European Convention on Human Rights. Charges of Convention violations may be brought first to the European Commission on Human Rights, in which case a settlement is sought. If the parties are unable to reach an agreement, the claim may under the appropriate circumstances be brought to the European Court of Human Rights. For a full discussion of the regime, its constituent parts and processes, see *infra* part IV.A.

As of January 3, 1994, the Council of Europe consisted of 32 Member States who were signatories to the Statute of the Council. Directorate of Legal Affairs, Council of Europe, Chart of Signatures and Ratifications of Conventions and Agreements, Europ. T.S. No. 1 (bound volume updated as at Nov. 5, 1993, supplement updated as at Jan. 3, 1994). All 32 Member States are signatories to the European Convention, *id.* at Europ. T.S. No. 5. Twenty-eight Member States have made declarations under article 25 recognizing the competence of the Commission to receive individual petitions, *id.* at *Reservations and Declarations*, Europ. T.S. No. 5, and the same Member States have all made declarations under article 46 recognizing the compulsory jurisdiction of the Court. *Id.* These declarations are revocable and may be made for either a fixed, renewable or an indefinite period.

[3] The Commission and the Court will hereinafter be referred to collectively as the "Strasbourg Organs."

It is important that Europe recognize the human right to a healthy environment among the few, most cherished, fundamental human rights. Today's post-industrial Europe not only must contend with acts of violence but also confronts less obvious threats to life and health. Threats presented by environmental degradation are no less real than more direct physical assaults, yet those responsible are often able to evade the existing sanctions provided by human rights law. Thus, it is necessary to recognize a right to ensure traditional levels of protection to life and health against unacceptable abuses resulting from environmental degradation. Protection of life and health command moral force sufficient to warrant engaging the extraordinary protection afforded to Europe's other cherished human rights.

II. Establishing a Link between Human and Environmental Rights

A. *Defining Human Rights and Environmental Rights*

Debates over the philosophical foundation of the definition of human rights engender a great deal of controversy. None of the many competing schools of thought command universal or even general consensus. Each perception of human rights has its flaws.[4] If one is willing to begin the inquiry with a less analytic, more hermeneutic approach, however, one can examine the array of presently recognized human rights to glean a sense of the topography of this field. From the European Convention and other international human rights texts widely recognized in Europe, such as the United Nations Charter, the conventions on "civil and political" and "economic, social and cultural" rights, and the European Social Charter, one finds a general consensus on the scope of inter-

[4] *See* Stanley Hoffmann, Duties Beyond Borders 97-99 (1981).

ests to be protected as human rights. These interests may be classified according to the following themes:

(1) the right to an inviolable integrity of the person, including: the person's physical being, the person's ideas and beliefs, the person's property and the person's personality;
(2) the right to a guarantee to the essential requirements to support life, health and well-being; and
(3) the right to equal treatment by society, except for reasons relevant to capabilities.[5]

One must take a slightly different approach to give a definite shape to the emerging consensus of a human right to a healthy environment. Because serious focus on environmental protection by the international community is a recent phenomenon,[6] it will not suffice merely to examine the principal international texts on environmental protection, because they do not yet exhaustively cover the entire range of environmental concerns. Indeed, the general perception is that because environmental protection falls within the domain of national competence, international texts are an inappropriate means to address these issues. Thus, in order to survey the full range of issues raised by those concerned with environmental protection, it is necessary to look not only to international agreements and declarations, but also to the writings of specialists in the field and to national legal treatments of the subject. We can categorize environmental interests as follows:

[5] *See* Alexandre Kiss, *Définition et nature juridique d'un droit de l'homme à l'environnement in* Environnement et droits de l'homme 14 (Pascale Kromarek ed., 1987).

[6] Many authorities claim that international concern for environmental protection began as recently as 1972 in principle one of the Declaration of the U.N. Conference on the Human Environment, U.N. Doc. A/Conf.48/14/Rev. 1, 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration]. *See, e.g.*, E.H.P. v. Canada, Communication No. 67/1980, *reprinted in* 2 Selected Decisions of the Human Rights Committee under the Optional Protocol at 20, U.N. Doc. CCPR/C/OP/2, U.N. Sales No. E.89.XIV.1 (1990) [hereinafter Selected Decisions]; Maguelonne Déjeant-Pons, *Incorporation of the human right to the environment into regional human rights protection systems*, *in* Human Rights in the Twenty-First Century: A Global Challenge 595, 596 (Kathleen E. Mahoney & Paul Mahoney eds., 1992) (noting Stockholm Declaration as first affirmation by the international community of "importance of the human right to the environment"). *But see* W. Paul Gormley, Human Rights and Environment: The Need for International Co-operation 74 (1976) (noting that Council of Europe made even earlier progress in this field beginning in 1950's with its "Man in a European Society" program).

(A) the right to an inviolable integrity of the person, including: the person's physical being[7] and the person's property;[8]
(B) the aesthetic sensibilities and recreational interests of human beings;[9]
(C) the two preceding interests in the name of future generations;[10] and
(D) the well-being of all living creatures.[11]

Having adopted a general definition of human rights as recognized in Europe and outlined the scope of the burgeoning concept of environmental rights, we find commonality in the right to protection of the integrity of the person.

B. The Link between Human Rights and Environmental Concerns

This Article now turns to mapping the common ground between human rights and environmental protections. This section will discuss the four categories of interests of environmental protection set forth above to show the commonality that exists between environmental concerns and human rights. It will show that only the first category of interests—the right to protection of the integrity of the person—falls within the scope of protection of traditional, European notions of human rights, while the latter three categories—the rights of future generations and non-human living beings and the aesthetic and recreational interests of humans—do not fit within the accepted rationale for protecting human rights.

There are areas of overlap between interests that implicate environmental protection and those that fall under the protection of

[7] *See, e.g.*, Stockholm Declaration, *supra* note 6, at pt. 1 para. 1 (Preamble); E.H.P. v. Canada, Communication No. 67/1980, *reprinted in* 2 Selected Decisions, *supra* note 6, at 20.

[8] *See, e.g.*, Convention for Settlement of Difficulties Arising From Operations of Smelter at Trail, B.C., Apr. 15, 1935, U.S.-Can., T.S. No. 893; E.A. Arrondelle v. The United Kingdom, App. No. 7889/77, 26 Eur. Comm'n H.R. Dec. & Rep. 5 (1983); Case of Powell & Rayner v. United Kingdom, 172 Eur. Ct. H.R. (ser. A) (1990).

[9] *See, e.g.*, Convention for the Protection of the World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37; Sierra Club v. Morton, 405 U.S. 727, 734 (1972) (dismissed for lack of standing); World Charter for Nature, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51 (1982).

[10] *See, e.g.*, E. Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity 17-18 (1989).

[11] *See, e.g.*, Convention on the Conservation of European Wildlife and Natural Habitats, Sept. 19, 1979, Europ. T.S. No. 104, 1979 Gr. Brit. T.S. No. 56 (Cmnd. 8738) [hereinafter Bonn Convention]; Simon Lyster, International Wildlife Law (1985); Peter Singer, Animal Liberation 257-58 (1975); Christopher D. Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450 (1972).

human rights. The most obvious overlap concerns the commitment to protect human life, physical well-being and personal property. Article two of the European Convention protects the right to life,[12] and although there is no provision that offers blanket protection to physical integrity, articles three, four, five and eight all protect different aspects of physical integrity. Article one of the First Protocol to the Convention also protects the right to the "peaceful enjoyment" of private property.[13] As the following sections will explain, the European Commission and Court of Human Rights[14] have already recognized that environmental degradation can implicate Convention rights that protect personal property; a parallel institution in the United Nations system has acknowledged the link to the right to life.

1. *Property Rights and Environmental Rights*

E.A. Arrondelle v. United Kingdom[15] shows the inextricable link between environmental and human rights claims. The applicant in *Arrondelle* owned a home near Heathrow Airport.[16] She instituted a proceeding before the European Commission of Human Rights complaining of damages caused her when noise pollution associated with the airport decreased the value of her property.[17] Her claim was declared to be admissible[18] under both article one of the

[12] "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." European Convention, *supra* note 1, art. 2.

[13] The relevant portion of the protocol states:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

First Protocol, *supra* note 1, art. 1.

[14] The rulings of both organs are sources of international human rights law in Europe. For a more detailed discussion of the mechanics of adjudication under the European Convention regime, see *infra* part IV.A.

[15] 26 Eur. Comm'n H.R. Dec. & Rep. 5 (1982).

[16] *Id.* at 6.

[17] *Id.* at 7.

[18] Standards of admissability set out various procedural requirements which must be met for the Commission to hear the case. Articles 26 and 27 of the Convention require the exhaustion of all domestic remedies, with a statute of limitations running from the final domestic decision; furthermore, a form of *res judicata* applies. Article 27(2) provides that the Commission will declare a claim inadmissible if it is "incompatible with the provisions

First Protocol (right to property) and article eight of the Convention (right to respect for private life and home).[19] Although the matter was eventually settled, the Commission's decision on admissibility recognizes that environmental degradation arguably can violate recognized human rights.[20]

Similarly, in the consolidated *Case of Powell & Rayner*[21] the reasoning of both the Commission and the Court linked environmental damage to a Convention violation.[22] In that case, two applicants owned residences near Heathrow Airport where they were subjected to a great deal of air traffic noise.[23] The first applicant, Richard J. Powell, lived in a house situated in a low "noise annoyance" area, along with the homes of approximately one-half million other people in the vicinity of Heathrow Airport.[24] The second applicant, Michael A. Rayner, like approximately 6,500 others, lived in an area near Heathrow Airport that experienced a high level of noise annoyance.[25] The complaint alleged violations under section one of article six (right to hearing in determination of civil rights), article eight (respect for private life and home) and article one of the First Protocol (right to property), and also asserted that, by failing to provide an effective remedy before a national authority for these violations, the United Kindom contravened article thirteen (right to effective remedy before national authority for violations of Convention rights).[26]

With respect to admissibility, the Commission determined that the claims under article one of the First Protocol and article eight of the Convention were "manifestly ill-founded" as provided under article twenty-seven and therefore inadmissible.[27] However, the Commission also found that the facts of the case sufficiently impli-

of the present Convention, manifestly ill-founded, or an abuse of the rights of petition." European Convention, *supra* note 1, art. 27(2). Essentially, Article 27(2) requires the Commission to reject a claim if its subject matter is outside the scope of competence of the Convention, if a preliminary examination reveals that the claim does not fall within the purview of the Convention, or if it is "impossible to envisage a violation of the Convention." Donna Gomien, Short Guide to the European Convention on Human Rights 133-38 (1991).

[19] *Arrondelle*, 26 Eur. Comm'n H.R. Dec. & Rep. at 7.

[20] *See id.*

[21] 172 Eur. Ct. H.R. (ser. A) at 5 (1990).

[22] *Id.*

[23] *Id.* at 7.

[24] *Id.*

[25] *Id.* The noise levels are derived from the United Kingdom's own Noise and Number Index. *Id.*

[26] *Id.* at 13.

[27] *Id.*

cated article eight so as to render the case admissible for the purpose of determining if the article eight claims were "arguable," and therefore, that applicants' rights to a domestic remedy as required by article thirteen had been violated.[28] Thus the applicants' article thirteen claims were declared admissible, even though their article eight claims (upon which the article thirteen claims rested) were not.

In its report on the merits, the Commission found that Mr. Powell's petition did not give rise to an arguable claim for a breach of article eight and that therefore he was not entitled to a remedy under article thirteen.[29] In so holding, the Commission maintained that, under paragraph two of article eight, it was reasonable for the State to foreclose domestic remedies to Powell.[30] The Commission did, however, find that the noise constituted a "clear interference" with the Mr. Rayner's article eight right to respect for his private life and home.[31] In light of the close proximity of Rayner's home to one of Heathrow's busy runways, its location in an area prohibited from further development and classified as a high noise-annoyance area, and the fact that he had purchased the home prior to the airport's major expansion, the Commission determined that Rayner had an arguable claim for a breach of article eight, which meant that his rights under article thirteen had been violated.[32]

The Commission transmitted its report to the Court.[33] The judges noted, as a preliminary matter, that the applicants were not entitled to compensation for the loss of value to their property under British statutory law, and that the applicants were impeded by the United Kingdom's Noise Abatement Act and the Civil Aviation Act in their ability to bring a common law nuisance claim against the airport.[34] Ultimately, the Court found for both applicants that the limitations in paragraph two of article eight justified

[28] Under the Convention jurisprudence, a claim can be both "manifestly ill-founded" and sufficiently "arguable" to give rise to an article thirteen right to a remedy before a national authority. This is so because "some serious claims might give rise to a prima facie issue but, after 'full examination' at the admissibility stage, ultimately be rejected as manifestly ill-founded notwithstanding their arguable character." *Id.* at 14.

[29] *Id.* at 17.

[30] *Id.* Paragraph two of article eight reads in part, "[t]here shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of . . . the economic well-being of the country . . . ." European Convention, *supra* note 1, art. 8.

[31] *Case of Powell & Rayner*, 172 Eur.Ct. H.R. (Ser. A) at 17.

[32] *Id.* at 17-18.

[33] *Id.* at 13.

[34] *Id.* at 9.

the closing off of domestic remedies to the extent that they had been closed off. As the Court stated,

> [i]n forming a judgment as to the proper scope of the noise abatement measures for aircraft arriving and departing from Heathrow Airport, the United Kingdom Government cannot arguably be said to have exceeded the margin of appreciation afforded to them or upset the fair balance required to be struck under Article 8.[35]

Nevertheless, this case demonstrates that a Convention right can be threatened by environmental degradation. Indeed, the Court began its assessment of the case from this perspective, stating:

> [i]n each case, albeit to greatly differing degrees, the quality of the applicant's private life and the scope for enjoying the amenities of his home have been adversely affected by the noise generated by aircraft using Heathrow Airport. Article 8 is therefore a material provision in relation to both Mr. Powell and Mr. Rayner.[36]

These cases demonstrate that the Strasbourg Organs acknowledge the legitimacy of environmental claims grounded in Convention rights.

2. *Right to Life and Environmental Rights*

Just as an application to the Strasbourg Organs can invoke article one of the First Protocol, it could also raise an article two (right to life) violation to challenge environmental degradation. No case has been brought before the European Convention Regime to assert a connection between environmental protection and the most fundamental of human rights, the right to life. However, such a claim has been raised[37] under the Optional Protocol procedure for bringing petitions before the Human Rights Committee (Committee) established under the International Covenant on Civil and Political Rights (Civil and Political Covenant or Covenant).[38] It is worthwhile to examine the Committee's disposition of this claim, because the Civil and Political Covenant includes a provision pro-

[35] *Id.* at 19-20.

[36] *Id.* at 18 (references omitted).

[37] E.H.P. v. Canada, Communication No. 67/1980, *reprinted in* 2 Selected Decisions, *supra* note 6, at 20.

[38] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, G.A. Res. 2200(XXI), U.N. GAOR 3d Comm., 21st Sess., Supp. No. 16 at 53, U.N. Doc. A/6316 (1966) (adopted Dec. 16, 1966, entered into force March 23, 1976).

tecting the right to life—section one of article six—that mirrors article two of the European Convention.[39]

The petitioner, a resident of Port Hope, Ontario, submitted the "communication" on her own behalf and as a representative member of the Port Hope Environmental Group.[40] The communication charged that the dumping of nuclear wastes by a federal crown corporation in Port Hope was placing the lives of present and future residents of the town in jeopardy.[41] The Committee found that the petitioner had failed to exhaust all available domestic remedies and declared the communication inadmissible.[42] The Committee did recognize, however, that the petition implicated Canada's responsibility to protect human life under section one of article six of the Civil and Political Covenant.[43] A similar claim brought before the Strasbourg Organs should likewise implicate the State's responsibility to protect life under article two of the European Convention.

3. *Protection of Physical Well-Being and Environmental Rights*

The European Convention lacks a provision addressing a person's right to health or to healthy living conditions. Therefore, there has been no attempt by the Strasbourg Organs to link this right with environmental rights. However, a great overlap between the right to health and the right to a healthy environment clearly exists. Indeed, this convergence highlights a major source of resistance to the right to a healthy environment. The close link between environmental rights and the right to health has led many observers to conclude that environmental rights belong in the category of economic, social and cultural rights and, therefore, have no place in the European Convention regime. This Article will discuss the error in this position in part III.C.

C. *The Divergence of Environmental Concerns from Human Rights*

The common interests of human and environmental rights in Europe in protecting life, physical well-being and property are clear. However, human rights do not extend to protecting personal

[39] *Id.* at Article 6(1) ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

[40] E.H.P. v. Canada, Communication No. 67/1980, *reprinted in* 2 Selected Decisions, *supra* note 6, at 20.

[41] *Id.*

[42] *Id.* at 22.

[43] *Id.*

aesthetics or enjoyment; they cannot, by definition, extend to interests or claims of nonhuman lifeforms. Further, Europe has not yet recognized the human rights of future generations. Thus, as will be demonstrated in the following two subsections, the overlap between human and environmental rights is confined, at present, to protection of life, health and property.

1. *Concerning the Rights of Future Generations*

Although it is possible to agree with the abstract position that environmental degradation can implicate the human right to life, health or personal property, it becomes more difficult to try to determine whether these rights extend to future generations. Many commentators find the notion that future generations might be the holders of human rights compelling.[44] Until now, however, such a right has not been recognized in any international regime designed to protect the environment or human rights.[45]

In the Port Hope communication discussed earlier[46], the Human Rights Committee avoided the issue as to whether the petitioner could bring a claim on behalf of future generations. Because the petitioner had already established her standing, the Committee claimed that there was no cause to address the issue.[47] However, the failure to treat both standing questions individually may have materially prejudiced the claim on behalf of the future generations. It is probable that Canadian courts do not grant standing to claimants acting on behalf of future generations. Therefore, the failure to exhaust local remedies most likely applied only to the petitioner's own claim and not to the claim she espoused for future generations.

Moreover, given that the damage caused by environmental degradation is often cumulative, and given that the question of when

[44] *See generally* Lothar Gündling, *Our Responsibility to Future Generations*, 84 Am. J. Int'l L. 207 (1990); Weiss, *supra* note 10. *But see* Anthony D'Amato, *Do We Owe a Duty to Future Generations to Preserve the Global Environment?*, 84 Am. J. Int'l L. 190 (1990). The author of this Article would agree with those commentators who support recognizing the rights of future generations.

[45] The rights of future generations to enjoy the resources of the earth have been asserted in treaties and scholarly works. *See, e.g.*, Bonn Convention, *supra* note 11, at pmbl.; Dinah Shelton, *The Right to Environment*, *in* The Future of Human Rights Protection in a Changing World, 197, 208-09 (Asbjorn Eide & Jan Helgesen eds., 1991); Weiss, *supra* note 10, at 30 (noting that creation of present duties to future generations has not been fully achieved).

[46] *See supra* notes 40-43 and accompanying text.

[47] E.H.P. v. Canada, Communication No. 67/1980, *reprinted in* 2 Selected Documents, *supra* note 6, at 22.

environmental degradation threatens human rights is a matter of degree, it is possible that the petitioner's claim on behalf of future generations could have prevailed on the merits even if her claim for the rights of present generations did not. The Committee's position risked totally conflating the two claims such that a decision on the merits of the petitioner's individual claim would incorrectly have been held to have disposed of the claim asserted by future generations.

The creation of standing for designated representatives of future generations is not an unreasonable idea. One can imagine a hybrid between court-appointed representation for incompetents and class-actions as an effective method. Such a regime might recognize certain interest groups as competent to receive petitions and bring environmental claims in the name of future generations. The International Labor Organization's enforcement mechanism is an obvious model: it provides for the participation of representatives of nongovernmental interest groups.[48]

2. *Concerning Aesthetic, Recreational and Nonhuman Interests*

There is no overlap between traditional concepts of human rights and the last two categories of interests safeguarded by environmental laws: aesthetic or recreational and nonhuman interests. Concern for the well-being of nonhuman creatures is easy to exclude from the rubric of human rights. Although such concerns implicate the moral responsibilities of the human race, they clearly do not implicate any human rights. This position in no way comments upon the validity of the claim that these concerns justify placing restrictions on human behavior. Neither does it place these concerns in a hierarchically higher or lower position vis-a-vis those environmental interests that do implicate human rights. It merely acknowledges a categorical difference and refrains from using the various regimes established to respond to human rights violations to address the full panoply of environmental concerns, absent an appropriate modification of the mandate of the human rights regimes.

Similarly, concerns for aesthetic sensibilities and recreational interests fail to fit within prevailing conceptions of human rights, because these concerns are properly considered to be qualitatively

[48] Elizabeth P. Barratt-Brown, *Building a Monitoring and Compliance Regime Under the Montreal Protocol*, 16 Yale J. Int'l L. 519, 560 (1991).

inferior to human rights claims.[49] For an interest to rise to the level of a human right it must invoke "'fundamental' as distinct from 'nonessential' claims or goods."[50] Indeed, human rights claims do not embrace every wrongdoing that can be perpetrated by a State. A State's practices may be harmful or offensive and may even give rise to legitimate outrage without necessarily violating any human rights.[51]

Two other regional human rights conventions, the African and American Conventions on Human Rights, bolster the recognition of the absence of any overlap between human rights and aesthetic or recreational interests. These conventions explicitly recognize environmental concerns, but their provisions protecting the right to a healthy environment acknowledge neither a right to protection of the aesthetic quality of one's surroundings nor a right to preservation of the possibility to enjoy recreational activities.[52]

This is not to say that at times aesthetic claims might not correspond to human rights claims. For instance, health concerns give rise to the need to convert carbon dioxide into oxygen. Therefore, the demand to preserve sufficient areas of vegetation serves health

[49] It is true that the noise at Heathrow Airport arguably violated article eight for what sounded like aesthetic reasons. The Court expressed concern over the fact that "the quality of the applicant's private life and the scope for enjoying the amenities of his home ha[d] been adversely affected." Case of Powell & Rayner, 172 Eur. Ct. H.R. (ser. A) at 18 (1990). Perhaps, then, this Article unduly restricts the scope of environmental human rights, but this cautiousness is born out of a desire to identify only those rights that would be accepted without hesitation.

[50] Burns H. Weston, Human Rights in the World Community 16 (Richard Pierre Claude & Burns H. Weston eds., 1989).

[51] Michel Melchior, *Notions «vagues» ou «indéterminées» et «lacunes» dans la Convention Europeéne des Droits de l'Homme*, *in* Protecting Human Rights: The European Dimension 411, 412-13 (Franz Matscher & Herbert Petzold eds., 1988). *See also* Mohammed Ali Mekouar, *Le droit à l'environnement dans ses rapports avec les autres droits de l'homme*, *in* Environnement et droits de l'homme, 91, 93 & n.8 (Pascale Kromarek ed., 1987) (noting that including environmental concerns in the traditional catalogue of human rights will dilute status of "real" human rights).

[52] Article 24 of the African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 59 (1982), states: "All peoples shall have the right to a general satisfactory environment favourable to their development." *See* Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms: Judicial Colloquium in Bangalore 24-26 February 1988, 195, 202 (1988). Article 16 provides: "Every individual shall have the right to enjoy the best attainable state of physical and mental health." African Charter, *supra*. Article 11 of the San Salvador Additional Protocol [to the American Convention on Human Rights] on Economic, Social and Cultural Rights, Nov. 17, 1988, 28 I.L.M. 161 (1989), reads: "Everyone shall have the right to live in a healthy environment and to have access to basic public services." Article 10 states: "Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being." *Id.*

as well as aesthetic and recreational purposes. The need to maintain genetic diversity provides another example of such convergence. This correspondence will be even greater should the rights of future generations ever achieve their proper recognition. In sum, however, using concern for aesthetic and recreational interests to justify an environmental human right would stretch the scope of such a right beyond its traditional boundaries.

D. The Definition of the Right to a Healthy Environment

Having illustrated the areas of convergence and divergence between human rights and environmental protection concerns, it is now necessary to construct a definition of a right to a healthy environment before inserting such protection into the European Convention. In the Stockholm Declaration of 1972, the United Nations was the first to link human rights to a human right to a healthy environment: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being."[53] The problem in using this formulation to draft a right to a healthy environment for use by judicial bodies in protecting the human right to a healthy environment is the formulation's lack of precision.

The first arguably vague term in the Declaration's definition is the word "environment" itself. Although it may seem obvious that, given the context of this Article, the word roughly means the state of nature, the term is also used to refer to one's immediate area or to the conditions of one's life. References to the concepts of one's "family environment" or one's "working environment" are not always preceded by the qualifiers "family" or "working."

The second and more indeterminate concept incorporated in the Declaration's definition is the notion of a "life of dignity and well-being." Arguably, this phrase could be interpreted as requiring the State to provide almost any degree of quality of life. Certainly, this phrase embraces aesthetic, and possibly even recreational, claims that have just been shown not to rise to the level of a human rights demand.

The definition of a right to a healthy environment must be precise enough so that courts will restrict their interpretation of the scope of that right to the domain of human rights. Drawing heavily upon a previous attempt by the German Federal Minister of the

[53] Stockholm Declaration, *supra* note 6, pt. 2, prin. 1.

Interior,[54] this author proposes the following formulation (Proposed Amendment):

Article 1

> No one should be exposed to intolerable damage or threats to one's life or physical integrity or to intolerable impairment of one's well-being as a result of past or present, man-induced, adverse changes in one's environment.
>
> An impairment of well-being may, however, be deemed to be tolerable if it is necessary for the maintenance and development of the economic conditions of the community, and if there is no alternative way of making it possible to avoid this impairment.
>
> Additionally, what constitutes "intolerable damage to or threats to one's life or physical integrity" and "intolerable impairment of one's well-being" will be determined on the basis of standards established by applicable legal instruments on environmental protection.

Article 2

> If adverse changes in one's environment are likely to occur in one's vital sphere as a result of the action of other parties, any individual is entitled to: (1) receive adequate and timely information about the projected changes; (2) make objections to the implementation of these changes; and (3) demand that the competent public authority remedy such situation in all cases where Article 1 applies.

[54] *See* Heinhard Steiger and the Working Group for Environmental Law, *The Right to a Humane Environment: Proposal for an Additional Protocol to the European Human Rights Convention*, 27 Beiträge zur Umweltgestaltung, Erich Schmidt Verlag, Heft A 13, Berlin (1973). The substantive portion of that proposal contained two articles. The first, which outlined a right to health, read:

> (1) No one should be exposed to intolerable damage or threats to his health or to intolerable impairment of his well-being as a result of adverse changes in the natural conditions of life.
>
> (2) An impairment of well-being may, however, be deemed to be tolerable if it is necessary for the maintenance and development of the economic conditions of the community and if there is no alternative way of making it possible to avoid this impairment.

The second article of the proposal provided protection against the acts of private persons:

> (1) If adverse changes in the natural conditions of life are likely to occur in his vital sphere as a result of the action of other parties, any individual is entitled to demand that the competent agencies examine the situation, and that they remedy such situation in all cases where article 1 applies.
>
> (2) Any individual acting under paragraphe [sic] 1 shall, within reasonable time, receive detailed information stating what measures—if any—have been taken to prevent those adverse changes.

Id. (English version in original).

> Any individual demanding a remedy under the previous paragraph shall, within a reasonable time, receive detailed and accurate information stating what measures—if any—have been taken to prevent those adverse changes.[55]

1. The Procedural Aspect

The formulation includes, in the second Article (Amendment Article Two), a procedural right to information and participation in environmental decision making. This principle was most conspicuously embraced by the United Nations General Assembly through the adoption of the World Charter for Nature, which declares: "All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation."[56]

The procedural element of environmental protection, alone, is insufficient to ensure respect for environmental rights, but it is a necessary component of the total protection package. Environmental rights are somewhat unique in that their enforcement requires proactive protection. That is, violations must be prevented and not merely penalized. One cannot remedy certain injuries to the environment simply by arresting the injurious behavior. The effects of pollution are often felt for years, or, as in the case of radioactive wastes for centuries after the polluting activity has ceased. Consequently, protecting environmental rights requires the institution of preventive measures. For these preventive measures to be effective, they must comprise, at least, the following elements:

(1) Interested parties must have access to the information necessary to analyze the potential effects of a proposed action that will substantially impact the environment.[57] This condition requires that the State abandon, at least with respect to information concerning these potential activities, the principle of administrative secrecy,[58] and

[55] The 1973 text has been altered by the author, who would like to thank Professor Alexandre Kiss, Ms. Maguelonne Déjeant-Pons and Professor Susan Rose-Ackerman for their suggestions. Any mistakes and omissions are solely the responsibility of the author.

[56] World Charter for Nature, *supra* note 9, art. 3, para. 23.

[57] *See* Kiss, *supra* note 5, at 25; Benoît Jadot, *Les procédures garantissant le droit à l'environnement*, *in* Environnement et droits de l'homme (Pascale Kromarel ed., 1987) 51, 52.

[58] *See* Jadot, *supra* note 57, at 52.

> provide recourse to a judicial or quasi-judicial review in cases where the State invokes this principle.[59]
>
> (2) Interested parties must have sufficient time to perform an adequate analysis before the authorities make any decision concerning the proposed action.[60]
>
> (3) Interested parties must have the right to participate in any decisionmaking processes of the government concerning the proposed action.[61]

2. The Substantive Aspect

The procedural rights provided in Amendment Article Two are useful but are insufficient to guarantee an individual's right to a healthy environment. Governments can be faithful to such procedural requirements and still adopt a law or policy that will permit activities which seriously degrade the environment. Thus, it is essential to give the right to a healthy environment a substantive as well as a procedural content. Article One of the proposed definition (Amendment Article One) provides the right to enjoy a certain level of environmental quality.

The most important feature of Amendment Article One is that it links the proposed right to some of the interests that environmental protection shares with human rights, namely, the right to life and physical integrity. Thus, the Article justifies amending the European Convention.[62]

[59] This is already the case in a few European countries. *See id.* at 52-53. Furthermore, on June 7, 1990, the Council of the European Community passed a Directive on the freedom of access to information on the environment. Council Directive 90/313, 1990 O.J. (L 158) 56. Compliance with this Directive was set for December 31, 1992. *See also* Council Directive 85/337, 1985 O.J. (L 175) 40 (allowing participation of interested parties in environmental impact assessment and decisions affecting environment).

[60] *See* Kiss, *supra* note 5, at 25.

[61] *Id.*; Jadot, *supra* note 57, at 54-55. The American provision for public intervention and participation in government agency action is an analogous right granted by the Administrative Procedure Act. "[S]o far as the orderly conduct of public business permits, an interested person may appear before an agency . . . for the presentation, adjustment or determination of an issue, request, or controversy in a proceeding . . . in connection with an agency function." Administrative Procedure Act, § 5(b), 5 U.S.C. § 555(b) (1988). *See* Richard J. Pierce, Jr. et al., Administrative Law and Process § 5.51 (2d ed. 1992).

[62] Amendment Article One does not assert property interests or the interests of future generations. The proposed definition could be expanded to embrace these rights. Property rights, however, are already adequately protected by the Convention. First Protocol, *supra* note 1, art. 1. Future generational interests are not addressed in the Proposed Amendment because the complexity of this issue merits separate attention in a separate article. Nevertheless, the absence of these two interests in the Amendment should not suggest any negative connotation about their validity.

It is potentially controversial that the standards incorporated by reference in Amendment Article One are not enforceable against those directly responsible for degrading the environment; rather, the Article makes the State responsible for its failure to implement measures to prevent third party violations. Human rights are usually enforced against States,[63] since one usually thinks of the State as the primary offender that committed an offense directly against the applicant. In situations giving rise to a complaint under Amendment Article One, prosecution against the primary violator will take place only in a domestic forum.

Some may find such indirect protection objectionable. Under the Proposed Amendment, the Convention would not actually guarantee the right to a healthy environment. Nevertheless, it is clear that empowering individuals to require the State to enforce certain standards of environmental cleanliness will enable individuals to protect their right to life. Moreover, this kind of indirect enforcement is not unknown in the Convention jurisprudence.

Consider Professor Kiss' characterization of the right to "liberty and security of person."[64] This right is protected by procedures, organized by the State to ensure its respect, such as the right to be brought promptly before a court of law in the case of one's arrest or detention. Thus, as Professor Kiss explains, to be precise one must admit that

> ce que le droit peut garantir n'est pas réelement la liberté et la sécurité de l'individu—cela serait difficile à réaliser—, mais l'existence et le bon fonctionnement de certaines procédures garantissant une protection contre l'arbitraire lorsque les organes de l'État portent atteinte à la liberté et à la sécurité de citoyens.
> [that which the right guarantees is not really the liberty and security of the individual—that would be difficult to realize—but the existence and proper functioning of certain procedures guaranteeing protection against arbitrariness when governmental organs endanger the liberty and security of citizens.][65]

Similarly, the right to life, one aspect of the right to a healthy environment, has already been interpreted by the organs of the European Convention to be endowed with an indirect guarantee. Article two of the European Convention holds that: "Everyone's right to life *shall be protected by law*."[66] The Commission has interpreted article two to require "the State not only to refrain from taking life '*intentionally*' but, further, to take appropriate steps to safeguard life."[67] The appropriate steps refer to the mechanisms that the State must establish to safeguard this right for citizens vis-a-vis non-State actors. Here, again, the European Convention does not guarantee the lives of its citizens; rather it mandates that the State will make a reasonable effort to protect those lives.

The Commission's treatment of the petitioner in *Mrs. W. v. United Kingdom*[68] provides an example of the indirect approach to enforcing article two. This complaint "raise[d] the question of State responsibility for the protection of the right to life in accordance with Article 2 of the Convention."[69] In response, the Commission held that the "complaint cannot be declared inadmissible, under Article 27, paragraph 2, as being incompatible with the Convention *ratione personae*, on the ground that it is directed against acts of private persons."[70]

Accordingly, the right that the proposed definition would recognize is not actually a right to a healthy environment. A healthy environment is not guaranteed. Instead, the right to demand that the State make reasonable efforts to provide and to protect a healthy environment is assured. Defining the right in this manner, it is easy to diffuse the charge, often raised, that the right to a healthy environment should not be placed in a human rights convention because it cannot be realized through judicial action.

Finally, the Proposed Amendment incorporates existing standards into the definition of the protected right.[71] This Article will

[63] In fact, under the Convention, an application against an individual will be declared inadmissable *ratione personae*. *See, e.g.*, X. v. United Kingdom, App. No. 6956/75, 8 Eur. Comm'n H.R. Dec. & Rep. 103, 104 (1976). *Ratione personae* requires the "right" people to appear as plaintiff and respondent. Plaintiffs must have suffered an injury. Francis H. Jacobs, The European Convention on Human Rights 229 (1975). Furthermore, cases may be brought against the State only when it is somehow responsible for the alleged breach. *Id.* at 226. Finally, the State must have ratified the Convention and recognized the competence of the European Commission on Human Rights as a judicial body. *Id.* at 225, 226.

[64] Kiss, *supra* note 5, at 24, 25. This right can be found in Article 5 of the European Convention, or, as Professor Kiss has noted, in Article 9 of the Civil and Political Covenant. *Id.* at 24.

[65] *Id.* at 24-25 (translation by author).

[66] European Convention, *supra* note 1, art. 2 (emphasis added).

[67] Association X. v. United Kingdom, App. No. 7154/75, 14 Eur. Comm'n H.R. Dec. & Rep. 31, 32 (1979) (emphasis in original) (concerning fatalities arising out of a government vaccination program).

[68] App. No. 9348/81, 32 Eur. Comm'n H.R. Dec. & Rep. 190 (1983).

[69] *Id.* at 198.

[70] *Id.*

[71] Maguelonne Déjeant-Pons, *The Right to Environment in Regional Human Rights Systems*, *in* Human Rights in the Twenty-First Century: A Global Challenge 595 (Kathleen E.

discuss below in greater detail the specific role that existing standards can play in aiding the judicial organs charged with resolving environmental cases. However, it is first necessary to make a few observations concerning the dangers of and limits to judicial reliance on existing standards and legislation.

Existing standards are articulated in various legal instruments, including laws, regulations and treaties. Amendment Article One directs the Strasbourg Organs to use existing standards as aids in determining when a person's right to a healthy environment has been breached. Legal instruments, however, are not a substitute for judicial determination.

First, because legal instruments might be more stringent than necessary to prevent human rights violations, the Strasbourg Organs still must make the final judgment as to when the danger posed by a given activity to human life and physical well-being becomes grave enough to implicate human rights. Various considerations may have influenced the drafting and passing of a particular law, regulation or treaty. Generally, these considerations are not made explicit, and even where they are, no note is taken of which standards are responsive to which concerns. Thus a court adjudicating human rights must determine whether the violation of a legal standard on environmental protection rises to the level of a violation of the human right to a healthy environment.

In certain areas of environmental protection and with respect to many international instruments, the safety standards imposed by the relevant legal instruments are so basic and fundamental that they may be readily adopted as the relevant human rights standard. For instance, the safety standards governing the operations of nuclear power plants or the transportation of hazardous wastes are directly linked to human physical safety. It is difficult to imagine, however, where aesthetic or recreational interest would have played a dominant role in their determination. Furthermore, the injury caused by an accident arising out of these operations would likely be severe enough to implicate human rights.

Possibly, once standards embodied in legal instruments protecting the environment have become part of commissioners' and judges' analyses of environmental rights, drafters will be more specific about linking provisions in these legal documents to factual

Mahoney & Paul Mahoney eds., 1993). The author would like to acknowledge Ms. Déjeant-Pons' idea of using the standards in existing international environmental treaties, etc., to quantify the right to a healthy environment.

and value determinations about the environmental risks of certain human activities. Unless and until this happens, however, the Convention must continue to protect judicial discretion.

The second reason that the Strasbourg Organs cannot blindly adopt existing standards is that they may be too permissive. A standard might be out of date. Moreover, by passively accepting standards imposed by State governments whose commitment to environmental quality may be diluted by other concerns, the Strasbourg Organs would be derelict in their duty to conduct meaningful judicial review. The role of an impartial judiciary in the protection of human rights is of paramount importance. Human rights are rights that individuals hold, at least in part, against the State. Human rights operate to protect individuals and especially minorities from oppression by the majority or the politically more powerful. Of course, even recognized rights can be eliminated from existing legal systems; however, political considerations usually make it extremely difficult to rescind recognition of a human right. Furthermore, unless a right has been rejected, the judiciary must uphold the principles embodied by the right in the face of any particular concrete, contrary act of the people.[72]

It is imperative, therefore, that the Strasbourg Organs, being the judicial branch of the European Convention regime, perform meaningful review of the acts of State legislatures and ensure that those laws do not violate the proposed right to a healthy environment. Judicial review is particularly important here where the largest polluters are often industries that can unite their lobbying efforts and thereby exert disproportionately strong political influence. Moreover, the deleterious effects of pollution are usually felt more intensely by the poor, disempowered members of a democracy.[73] Consequently, while the proposed judgment of "intolerability" would be based on existing legal standards, these standards would not be binding.

Reference to existing standards was incorporated into the Proposed Amendment to eliminate charges that the right to a healthy environment is not justiciable because the terms are too indetermi-

[72] Consider the *Dudgeon* case in which the Court considered the prevailing moral condemnation of homosexuality in Northern Ireland to provide insufficient justification to warrant State intrusion into the private lives of its citizens. Dudgeon Case of 22 October 1981, 45 Eur. Court H.R. (ser. A) (1982).

[73] *See generally* Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 Va. Envtl. L.J. 495 (1992) (addressing the historical, political and sociological problems of environmental inequity).

nate. In 1973, the German Federal Minister of the Interior proposed a protocol for the European Convention. This draft protocol (upon which the proposed definition is based) was aimed at providing a right to a humane environment.[74] Ostensibly, this proposal was rejected because its provisions were not sufficiently precise to make it justiciable; it failed to provide adequate guidance to apply the right in specific situations. We need to consider the question of justiciability in order to determine whether the formulation of the Proposed Amendment has created a right that is justiciable.

III. The Justiciability of the Right to a Healthy Environment

In determining the justiciability of a right, judges on the Court find it necessary to identify four components. First, the right must benefit recognizable individuals (i.e. right-holders). Second, the right must impose duties on an identifiable group of actors for the benefit of the right-holders. Third, there must be a causal link between the duties and the securing of the right. Finally, the duties must be of a kind that a court can identify and enforce.[75] Opposition to adopting the right to a healthy environment as one of the mainstream European human rights is usually based on an alleged failure to meet the latter two requirements.

A. The Causation Requirement

It cannot be denied that environmental cases are especially difficult to adjudicate. In particular, it is difficult to establish a causal link between the act complained of and the violation of the human right. Scientific evidence on cause and effect typically is measured in levels of risk rather than directly observed results. Thus, providing judicially cognizable factual proof—that is, establishing the effects of environmental degradation on human health and linking different human actions and activities to specific environmental degradation—is difficult. In addition, it is impossible to prove objectively that the level of risk to human health has risen to the point at which it implicates a human right. Such a decision requires an evaluation on the part of the commissioners and judges.

Fortunately, the causal connection between many types of environmental degradation and harm to human health and life, while

[74] *See supra* note 54 (quoting the substantive portion of the proposed protocol).

[75] Interview with Judge Louis-Edmond Pettiti, European Court of Human Rights, in Strasbourg, France, Feb. 1992.

not established to a certainty, have been acknowledged as sufficiently probable to be treated as a fact. Such determinations can be found through information networks established by government and intergovernmental agencies dealing with very specific areas of environmental protection.[76] Both international and national technical studies can, thus, provide a wealth of information upon which the judicial authorities charged with interpreting the proposed right to a healthy environment can draw. Of course, the petitioner and respondent will also bring in a plethora of environmental evidence. To aid in sifting through the mass of scientific and technical data, it would be extremely useful to place at the disposal of the commissioners and judges a cadre of scientific and technical experts.[77] These experts must be independent of any political pressures for the same reasons that apply to commissioners and judges.

Despite guidance from experts and from the vast array of legal instruments governing environmental protection, occasions will arise when causation cannot be determined. This difficulty does not make the right to a healthy environment nonjusticiable, however. It simply means that there will be judgments which will, in retrospect, be viewed as incorrect because of subsequent increases in scientific knowledge. If at any point a factual causal link cannot be established with sufficient certainty, the claimant will have failed to prove that the State inadequately protected her environmental rights. Indeed, the same holds for any right. Someone's right may well be violated, but a court will rule otherwise unless the victim proves causation.

B. Establishing Limits to the Right to a Healthy Environment

Determining causation in fact will not help the Strasbourg Organs evaluate the level of risk to human health that an activity must pose before it is held to violate a person's fundamental rights. Moreover, the evaluation is difficult to make because there are no

[76] *See, e.g.*, Council Directive 67/548, 1967 O.J. (L 167/1) 234 (establishing EEC's regime for regulating toxic chemicals and determining how to establish toxicity and ecotoxicity of chemical products) (discussed in Alexandre Kiss & Dinah Shelton, International Environmental Law 310 (1991)); U.N. Env't Programme, International Register of Potentially Toxic Chemicals, IRPTC Legal File 1986, U.N. Sales No. E.87.III.D.5 (1987) (cataloguing "national and international recommendations and legal mechanisms related to [various environmental hazards]"); Council Directive 82/501, 1982 O.J. (L 230) 1 (instituting appropriate safety measures in enterprises engaging in potentially hazardous activities); Council Directive 78/319, 1978 O.J. (L 84) 43 (encouraging use reduction and safe disposal for twenty-seven listed substances).

[77] *See generally* Déjeant-Pons, *supra* note 71.

intrinsic boundaries to a right to a healthy environment. No principled rationale exists to determine the level of impingement on the rights of people that environmental degradation may cause before the impingement gives rise to a human rights violation. Sometimes a polluting activity causes an immediate danger to the lives of others, but more commonly it causes an increased risk of this danger over time.[78] The definition of the right does not distinguish between permissible and impermissible degrees of risk. As a result, critics argue, environmental rights are not rights that judges can easily identify and enforce, making them non-justiciable. Vagueness, however, is a feature that the right to a healthy environment shares with many rights found in the European Convention.

There are, for example, recognized limitations on the freedoms guaranteed in the European Convention under articles eight (respect for private and family life), nine (thought, conscience and religion), ten (expression) and eleven (peaceable assembly and association). Surely the following provisos, found among these four fundamental articles, provide courts with as much, if not more, leeway to expand or contract the rights than exists in the Proposed Amendment: a right is to be guaranteed except such as in accordance with the law and is necessary in a democratic society

> —in the interest of national security,
> —in the interest of public safety,
> —in the interest of the economic well-being of the country and
> —in the interest of territorial integrity;
> —for the prevention of disorder or crime;
> —for the protection of health or morals and
> —for the protection of the rights and freedoms of others.

As one authority has commented on the European Convention:

[78] An unusual aspect of the right to a healthy environment lies in the fact that because the degree of risk will often depend upon how intensely the local community engages in the injurious activity, the legal status of a potential defendant's actions could change depending upon how many other people are engaging in the same behavior. The court, however, is fully capable of dealing with this variable. There are situations in which judges have already faced similar issues. For instance, a speech which is delivered to a small group of people might be perfectly legal, while the same speech delivered to an angry mob, with greater intensity, could well cross outside the boundary of constitutionally protected speech and become actionable at law. *See, e.g.*, *Schenck v. United States*, 249 U.S. 47, 52 (1919) (Holmes, J.) ("[T]he character of every act depends upon the circumstances in which it is done.") (citations omitted); *Whitney v. California*, 274 U.S. 357, 373 (1927) (Brandeis, J., concurring) ("[T]hough the rights of free speech . . . are fundamental, they are not absolute.").

> elle abonde en notions vagues, concepts indétérmines ou imprécis. Les droits garantis sont le plus souvent simplement cités, énumérés; il ne sont pas définis dans leurs éléments constitutifs
> [it is replete with vague notions and indeterminate or imprecise concepts. The rights that are guaranteed are most often simply cited, enumerated; their constitutive elements are left undefined].[79]

Furthermore, this commentator continues, the proper interpretation of these articles requires a pragmatism on the part of the commissioners and judges that embraces both prudence and progressivity, and one cannot accomplish the task relying solely upon abstract judicial principles.[80] This is the case with all human rights; they do not call for the implementation of traffic rules, but of general principles.

As the interpretation of every substantive Convention article requires the Strasbourg Organs to posit and rely upon value judgments, it is not surprising that the commissioners and judges have developed jurisprudential rules to guide them. One such rule requires the commissioners and judges to evaluate a State's conduct in light of its "reasonableness."[81] For instance, the Commission decided that it would be unreasonable to interpret article two as requiring the State to provide a citizen whose life is in danger with a permanent bodyguard.[82] Similarly, the Strasbourg Organs have defined the borders of the right to privacy guaranteed in article eight by considering the "reasonableness" of the actions of the defendant State. The Strasbourg Organs can also apply a reasonableness standard to cases in which environmental concerns are implicated. Environmental issues do not render judges suddenly incompetent to perform the task of balancing interests.

Other provisions of the European Convention include terms that are no less vague. Much as the right to freedom of expression, for example, is bounded by the interests of national security, Amendment Article One limits the right to a healthy environment to pro-

[79] Melchior, *supra* note 51, at 411 (translation by author).

[80] *Id.* at 412.

[81] A variation of a "reasonable" or "not unreasonable" standard permeates the Court's jurisprudence. *See* P. van Dijk & G.J.H. van Hoof, Theory and Practice of the European Convention on Human Rights, § 8 at 187 (2d ed. 1990). This article points out its use with respect to Articles 2 and 8 because these are provisions where there is likely to be an intersection with environmental concerns.

[82] X. v. Ireland, App. No. 6040/73, 1973 Y.B. Eur. Conv. on H.R. 388, 392 (Commission's decision on admissability).

tection from "intolerable damage or threats . . . [or] impairment."[83] Arguably, then, the Strasbourg Organs could establish the limits to the environmental right by relying upon the same reasonableness standard invoked to fashion the boundaries to the other rights enumerated in the Convention. Nevertheless, the Proposed Amendment imposes more specific restrictions on the discretion of the commissioners and judges. It requires that the Strasbourg Organs base their definition of intolerable damage or threats or impairment on the basis of standards established by applicable legal instruments on environmental protection.[84]

One might argue that, because the "reasonableness" standard would provide the same level of precision to the right to a healthy environment as to other Convention rights, the invocation by the proposed Amendment Article One of existing "standards established by applicable legal instruments" is unnecessary. Furthermore, the "reasonableness" jurisprudence surely dictates consideration of existing standards, since it would not be reasonable to ignore requirements enumerated in relevant legal instruments. Although these arguments are valid, Amendment Article One ensures that the Strasbourg Organs will consider national and international standards in their evaluation of a claim.

The internal reference to standards of applicable legal texts, therefore, helps to dispel fears that commissioners and judges will impose upon Europe wholly judge-made requirements for environmental protection. Should a commissioner or a judge choose to depart from standards embodied in relevant legal instruments, Amendment Article One compels her to justify her decision to do so—and to justify her decision on human rights grounds. The commissioner or judge must show existing standards to be so inadequate that they fail to prevent environmental degradation of a severity that violates the petitioner's human right to a healthy environment.

The appeal to existing standards in Amendment Article One is intended to be a means to ground the Strasbourg Organs' discretion to define the right to a healthy environment by means of external guidelines. The commissioners and judges will often defer to decisions made through political channels. Many national and international environmental laws, regulations and treaties reflect the level of environmental quality that society finds desirable.

[83] *See supra* text accompanying note 55 (text of Proposed Amendment).

[84] *Id.*

Consequently, the Proposed Amendment does not leave the Strasbourg Organs free easily to overrule existing standards,[85] yet neither does it prohibit them from ever doing so. Amendment Article One reflects the assumption that complicated cost-benefit decisions are political in nature and are better left to be sorted out in the political arena. When political channels fail to protect an individual's fundamental human rights, however, the judiciary must be able to intervene. Thus, although the effectiveness of Amendment Article One is, to a substantial degree, dependent upon the adequacy of existing national and international legislation, the proposal allows for some flexibility.

C. Finding the Right Neither "Civil and Political" nor "Social"

The interesting question, given the foregoing considerations, is why the right to a healthy environment is considered nonjusticiable. Political expediency certainly accounts for some of the charges of nonjusticiability. It is easier to use legal arguments to oppose the creation of another forum competent to review environmental issues than it is to develop and present controversial, political rationales. Anti-"green" sentiments alone do not explain the ubiquitous perception of nonjusticiability, however. A full explanation must take into account an almost kneejerk reaction against the inclusion of what are referred to as "economic, social and cultural rights" (hereinafter "social rights") in the European Convention.

The perception of the nonjusticiability of environmental rights is arguably related to the similarly widespread conviction that a difference exists between "civil and political" and "social" rights. In short, the former are believed to be justiciable, the latter are not. Exploring this distinction will shed some light on how best to alter the perception that environmental rights are not justiciable.

The European Convention did not undertake to protect all the rights then understood as human rights. For instance, it contains no provisions relative to many of the rights enumerated in the Universal Declaration of Human Rights of 1948.[86] Instead, the European Convention "covers mainly those rights which were to be referred to, in the later elaboration of the Universal Declaration in the two Covenants, as 'civil and political rights,' and not even all of

[85] For instance, the Strasbourg Organs could not impose the commissioner's or judge's preference for ambient air quality standards over standards that mandate the use of certain scrubbing technology, despite the judge's opinion that ambient quality standards would both be more economically efficient and lead to greater air pollution reduction.

[86] van Dijk & van Hoof, *supra* note 81, at 213.

those."[87] The rationale for the inclusion of certain rights and the exclusion of others was expressed by the rapporteur of the Legal Committee that drafted the first version of the Convention for the Consultative Assembly of the Council of Europe:

> [The Committee] considered that, for the moment, it is preferable to limit the collective guarantee to those rights and essential freedoms which are practised, after long usage and experience, in all the democratic countries. While they are the first triumph of democratic regimes, they are also the necessary condition under which they operate.
>
> Certainly, professional freedoms and social rights, which have themselves an intrinsic value, must also, in the future, be defined and protected. Everyone will, however, understand that it is necessary to begin at the beginning and to guarantee political democracy in the European Union and then to coordinate our economies, before undertaking the generalization of social democracy.[88]

The rapporteur's statement reveals two criteria used in choosing those rights included in the European Convention. The drafters included: (1) those rights already honored by the common practices of the member States and (2) those rights identifying conditions necessary to the maintenance of a political democracy. Such rights belong in the category of "civil and political" rights. The Council of Europe has also created a regime, through the European Social Charter, to protect "social" rights. This regime has a completely different and far less effective enforcement mechanism.[89] Thus the notion of a difference has become further entrenched in the framework of the Council of Europe.

Despite the purported distinction betwen "civil and political" and "social" rights, the differences between the two categories are neither clear nor strictly maintained. The putative distinction between the two categories of rights is set forth as follows:

> The first category of rights was considered to concern the sphere of freedom of the individual *vis-a-vis* the government. These rights and liberties and their limitations would lend themselves to a detailed regulation, while the implementation or the resulting duty on the part of the government to abstain from interference could be reviewed by a national and/or international body. The second category, on the other hand, was considered to consist not of legal rights but of programmatic rights, whose formulation necessarily is much vaguer and for whose realization the States must pursue a given policy, an obligation which does not lend itself to incidental review of government action for its lawfulness.[90]

[87] *Id.*

[88] *Id.* at 214.

[89] *See* European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89; Karel Vasak, *The Council of Europe*, *in* 2 The International Dimensions of Human Rights, 457, 539 (Karel Vasak & Philip Alston eds., 1982); Jacques Ballaloud, Droits de l'Homme et Organizations Internationales 110 (1984) (describing the enforcement mechanisms).

Significantly, two very different assertions are made here. A separate understanding of both assertions is crucial to ensuring that agreement on the truthfulness of one does not draw an unreflected acceptance of the second in its wake.

The first assertion is that civil and political rights "concern the sphere of freedom of the individual *vis-a-vis* the government;" while social rights "consist not of legal rights but of programmatic rights . . . for whose realization the States must pursue a given policy."[91] The counterargument to this assertion is that the action/abstention distinction is not clear. As Stanley Hoffman has noted:

> The separation between the two kinds of rights has been considerably exaggerated; the distinction is much less deep than many of the arguments in the literature suggest. Both categories of rights . . . require from the state a mix of abstention and action . . . . To take the case of one of the supposedly archetypical personal or political rights, the right to a fair trial requires that the state set up positive institutions. And, to take an almost archetypically economic right, the right to join unions, it requires that the state abstain from. . . interfer[ing] in the labor field so as to prevent the organized expression of grievances.[92]

It is interesting to consider other archetypical civil and political rights. The right to the enjoyment of private property requires a tremendous degree of State action. The very object of the right—property—depends upon the State for its very existence. Private property exists because the State defines and protects it. State involvement in the realization of this right is absolutely necessary. Another prototypical civil and political right which invites State action to secure its enjoyment is the right to life. The European Convention explicitly states that the right to life must be protected by law. How else could one interpret this command other than to

[90] van Dijk & van Hoof, *supra* note 81, at 214; *see also* Hoffman, *supra* note 4, at 100 (discussing the debate over the moral supremacy of rights based on limiting government action over rights granting economic equality).

[91] Hoffman, *supra* note 4, at 100.

[92] *Id.* at 100-01; *see* Kiss, *supra* note 5, at 14-15.

require "the State not only to refrain from taking life 'intentionally' but, further, to take appropriate steps to safeguard life."[93] Obviously, the abstention/action distinction lacks precision.[94]

More probing consideration of the issue has provided a much finer (although still imperfect) distinction between "civil and political" and "social" rights: "[M]any of the rights (particularly the political and civil ones) require the state to do things which will limit its powers, whereas many of the other rights, and particularly the economic and social ones, actually build up the state."[95] Environmental rights require of the State something that falls in between these two extremes. Enforcement of environmental rights requires the State to regulate third parties, and this kind of regulation will, of course, add to the State's bureaucracy. However, these enforcement bureaucracies are similar to those traditionally employed in implementing the limiting rights (i.e., courts and police); they are very different from the bureaucracies required to carry out rights which create a role for the State in transforming the social status of individuals (i.e. administrative agencies operating entitlement programs).

A second assertion is implicit in the definition of the two classes of rights. The implementation of civil and political rights, it is argued, is better suited for review by a national or international judiciary than is the implementation of social rights. This is because civil and political rights typically require the government to abstain from interference in private activity, while social rights are vague and generally require decisions of economic, social and

[93] Association X. v. United Kingdom, App. No. 7154/75, 14 Eur. Comm'n H.R. Dec. & Rep. 31, 32-33 (1979) (concerning fatalities arising out of government vaccination program).

[94] There is another way to view these counter examples. Arguably, the right to the enjoyment of private property and the right to life are "civil and political" rights only in so far as these rights are protected against State infringement. To the extent that the State has been called upon to protect these rights for citizens as against infringement by third parties, these "civil and political" rights have been "socialized." The validity of this view, however, does not affect the relevance of the distinction between "civil and political" and "social and economic" for the environmental rights debate. The two categories signify, on the one hand, rights that Western Europeans expect to be secure and, on the other hand, rights that Western Europeans support but with greater and lesser reservation. The fit, however, is imperfect. Western Europeans expect the State to take active measures to secure their lives and their property against infringement by third parties every bit as much as they expect due process of law—perhaps even more. Thus, if "civil and political" rights necessarily require State abstention, then it cannot be said that only this category of rights deserves a privileged position in the enforcement regimes established to protect human rights.

[95] Hoffman, *supra* note 4, at 104.

cultural policy.[96] In other words, social rights cannot meet the fourth criterion of justiciability—they impose duties on the state that a judicial body cannot identify and enforce.

The second assertion is flawed because it is inaccurate necessarily to associate a right's susceptability to judicial review with the distinction between "civil and political" and "social" rights. Consider, for example, the right to medical care, a canonical social right. The right could be implemented through detailed regulation, and, thereafter, subject to review by judicial organs, as easily as the right to due process. It is important to recognize the fact that the detailed regulations devised to ensure protection of civil and political rights are not set out in the Convention. The Convention requires only that the State develop necessary regulations, and, in each particular case, that the Strasbourg Organs review both the implementation of that legislation and the legislation itself to determine the adequacy of each in protecting the corresponding right. There is no principled difference between civil and political and social rights in this regard:

> [A]ll human rights entail three correlative duties from the state: first, the duty to forbear from depriving people of those rights; second, the duty to protect the holders of those rights against deprivation (and these duties can be seen as universal); third, the duty to aid persons to obtain the rights of which they are deprived; this one is less universal simply because the conditions for fulfilling it are not always met. But this does not mean that social and economic rights are not human rights—only that . . . the duty of governments is to go as far as it can toward the goal of full achievement, instead of being an immediate obligation as in the case of the covenant on civil and political rights.[97]

It may be unclear how to achieve rights traditionally labelled as "social". Perhaps—although the claim is by no means self-evident—the means to achieve these rights should be left solely within the control of the political branches of the government, which arguably have the time, resources and political legitimacy necessary to fashion socially acceptable programs and timetables for the realization of societal goals that engender tremendous controversy. On the other hand, if social rights truly are human rights, prag-

[96] *See* van Dijk & van Hoof, *supra* note 81, at 15.

[97] Hoffman, *supra* note 4, at 101 (citing Henry Shue, *Rights in the Light of Duties in* Human Rights and U.S. Foreign Policy 65, 75-78 (Peter G. Brown & Douglas MacLean eds., 1979).

matic considerations should not legitimize a lack of commitment to ensure their realization.

A full-scale analysis of the legitimate place of social rights in the catalogue of human rights is unnecessary for the purposes of this Article. Environmental rights of the kind that fall under the rubric of human rights can be protected through detailed regulatory schemes. In fact, it is difficult to imagine a better means of achieving them. Moreover, such regulatory schemes easily lend themselves to judicial review. The dispute over the feasibility of providing judicial review for social rights has no bearing on the issue of the feasibility of providing judicial review for the right to a healthy environment.

Another cause for the presumption of justiciability of civil and political rights and of nonjusticiability of social rights may be the persistent belief that the civil and political rights are inherent, inalienable and absolute. As such, it is believed that they can be defined a priori, and that their definition will remain unaffected by changes in social mores. Social rights, conversely, are believed to be socially created. Accordingly, their definition will depend upon the level—especially the economic level—to which the society has evolved. Yet, an evolution in the conception of all human rights is to be expected, and is not confined merely to social rights. Rights evolve because society is continually deepening its comprehension of the implications of the principles embodied in these rights.

> Certes, les droits de l'homme sont inhérents et inaliénables, mais leur lecture à un moment donné et dans un cas précis ne peut être faite qu'en fonction de la conscience collective de la société et du système de valeurs qui y prédomine—il en est de même, du reste, des grands préceptes religieux ou philosophiques.
>
> [Certainly human rights are inherent and inalienable, but their definition at any given moment and in any precise case is merely a function of the society's collective conscience and predominant value system—it is the same for all great religious and philosophical precepts.][98]

The Court already has expressed agreement with an evolutionary perception of human rights. For example, in determining whether the practice of caning juvenile offenders constituted "degrading treatment or punishment" as prohibited in article three, the Court recalled:

[98] Kiss, *supra* note 5, at 20 (translation by author).

> the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards . . . of the member States of the Council of Europe in this field.[99]

Thus, rights that have long been deemed justiciable in the European Convention regime may be flexible or expandable in their definition. Environmental rights are no different.

The attempts to dismiss the right to a clean environment as social and therefore nonjusticiable fails in the end because, in this context, the distinction between civil and political rights on the one hand and social rights on the other simply breaks down. Moreover, an environmental human right is justiciable because it benefits recognizable individuals and imposes corresponding duties on identifiable actors. Further, the right is as well defined as any in the catalogue of rights enumerated in the European Convention.

IV. Hypothetical Application to the European Convention Regime

The foregoing discussion demonstrated that the right to a healthy environment is justiciable. Those who deliberated in 1973 over whether to adopt an environmental protocol for the European Convention could have produced an amendment to the text as precise as existing articles. Yet, at present, many authoritative actors in the international political arena do not perceive the right as being justiciable. Opponents of environmental rights have been able to capitalize on this perception to block adoption of an environmental protocol. It is relevant, therefore, to inquire into how this perception might be changed. It would be extremely useful to strip the environmental rights opponents of one of their most politically powerful, albeit groundless, objections. The solution might lie in the opportunities provided by the European Convention itself.

Because environmental and human rights overlap in their scope, it is not surprising that provisions of the European Convention already allow the Strasbourg Organs to entertain a range of cases claiming protection from environmental degradation in the name

[99] *Tyrer Case*, 26 Eur. Ct. H.R. (ser. A) at 15-16 (1978).

of human rights.[100] For instance, the overlap between article two's formulation of the right to life and the right to a healthy environment make it possible to submit a petition demanding that a Member State enforce an existing law that aims to prevent environmental disasters having a direct and potentially fatal effect on human life. Regulations concerning nuclear power production and the transportation of hazardous wastes are obvious examples.

This part discusses how a hypothetical case might be brought before the Strasbourg Organs under article two of the European Convention to secure environmental protection. First, the part describes the process by which an application to the Convention Regime is reviewed. It then presents a hypothetical scenario presenting facts that should give rise to an article two cause of action. A discussion of the admissability of such a claim then follows. Finally, this part analyzes the probability of success on the merits. Should a case like the hypothetical described in this part succeed, there will finally be precedent demonstrating that the right to a healthy environment is justiciable. Opponents to an environmental protocol to the Covention would no longer be able to claim that judicial bodies are incapable of providing the requisite precision to the boundaries of this right.

A. The European Convention Enforcement Process

Submitting an application to the Commission engages the enforcement mechanism of the Convention regime. In the first stage of the enforcement process, the Commission reviews the application for admissability. At its discretion, the Commission may request information from either the State or the petitioner or both; it may even decide to hold a hearing on the merits. There are seven conditions that an application must fulfill to overcome the threshold of admissibility:

(1) The petitioner must have exhausted all available domestic remedies (articles 26 & 27(3)).
(2) The application must have been submitted within a period of six months from the date on which the final national decision was taken (article 26).
(3) The application may not be anonymous (article 27(1)(a)).
(4) The application may not concern a matter substantially the same as one which has already been submitted to the European Convention regime or to another international procedure if it contains no relevant new information (article 27(1)(b)).
(5) The application may not be incompatible with the provisions of the Convention (article 27(2)).
(6) The application may not be manifestly ill-founded (same).
(7) The application may not constitute an abuse of the right to petition (same).

The Commission must justify its decision on admissibility. Nevertheless, its final determination on the issue is not subject to appeal.[101]

After an application has been declared admissible, the Commission proceeds to an examination on the merits, operating, at the same time, "with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in th[e] Convention."[102] The examination on the merits may include active fact-finding by members of the Commission, as well as requests to the parties for written and oral submissions. Eventually, if no friendly settlement has been achieved, the Commission votes on whether the State has violated any Convention right.

Before disposing of the application, the Commission writes a Report setting out either the terms of a settlement or its opinion as to the existence of Convention violations. The Report may also include separate opinions of individual commissioners. Responsibility for the application then transfers to the Committee of Ministers of the Council of Europe (Committee). If the application is not thereafter referred to the Court, article thirty-two dictates that the Committee must make the final analysis as to whether there has been a Convention violation.[103] The Committee processes the application in a quasi-judicial manner, in accordance with internal rules it has established, and its determination is binding on the parties. However, the Convention affords a party found in violation by the Committee greater autonomy in fashioning a "satisfactory"

[100] See the discussion of the Heathrow Airport cases, *supra* notes 15-36 and accompanying text.

[101] Many considerations that arise with respect to a determination on admissability are, however, revisited by the Court when it considers whether it has jurisdiction over a case. See van Dijk & van Hoof, *supra* note 81, at 142-146.

[102] European Convention, *supra* note 1, art. 28(1)(b).

[103] As a result of applicants' inability to petition the Court on their own behalf, our hypothetical case very possibly may never reach the Court and would, therefore, be left ultimately to the mercy of the Committee. Given the explicitly political nature of that institution and the highly political impact of our hypothetical application, the final resolution of the application is not likely to impose any harsh penalities or conditions on the defendant State.

response to the ruling of the Committee than it would to a final ruling of the Court.[104]

As an alternative to leaving an application in the hands of the Committee, the Commission or any Member State directly involved in the conflict can, within three months after its transfer to the Committee, refer the application to the Court.[105] Applicants themselves may not appeal a decision of the Commission to the Court.[106] Furthermore, once the Court begins processing an application, the petitioners lose all control over the presentation of their claims. Article forty-four of the European Convention states that "[o]nly the High Contracting Parties and the Commission shall have the right to bring a case before the Court." Essentially, the petitioners must rely upon the Commission to adequately represent them before the Court.[107] Consequently, the Commission tries to present both its own and the applicant's position. The Court reviews the Report of the Commission and any written submissions presented by the Commission and/or by a Member State that is involved in the case. The Court also listens to testimony of witnesses (which may include the applicant) and of experts and to oral arguments presented by the involved State(s) and the Commission. Finally, the Court may conduct its own investigation. After deliberating, the Court renders its judgment, which must include a reasoned opinion.

Once the Court has decided a case, the application moves back under the aegis of the Committee of Ministers. In these circumstances, article fifty-four of the European Convention directs the Committee to supervise the execution of the Court's decision by the parties.

B. Setting up a Case

Our hypothetical applicant's argument will, of course, be very fact-specific, and is beyond the scope of this article. Nevertheless, the framework upon which our petitioner's case would be built can be constructed and examined for structural weaknesses.

[104] European Convention, *supra* note 1, art. 32(3).

[105] *See id.*, art. 31(1), 47 & 48.

[106] This will change once ten Member States have expressed their consent to be bound (as defined by article 6) by the Ninth Protocol to the European Convention. The Ninth Protocol allows persons, nongovernmental organizations or groups of individuals to refer their case to the Court subject to certain procedural prerequisites. *See* Ninth Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 6, 1990, Europ. T.S. No. 140, art. 5(1)(e).

[107] *See* van Dijk & van Hoof, *supra* note 81, at 164-171.

Article two has been chosen over other potential articles, such as article eight or article one of the First Protocol, because of the moral force that the right to life carries with it. It is one of the very few, uncontested peremptory rights.[108] Furthermore, article two concerns highlight the difficulty posed by the lack of a principled rationale to determine when environmental degradation is severe enough to implicate human rights. Clearly, the more immediate, deadly and certain the potential threat, the stronger the probability that the Strasbourg Organs will find a violation of article two.

Imagine Petitioner *X*, who lives near a site where businesses from Member State *Z* are illegally dumping toxic waste. Member State *Z* has failed, even in the face of requests from Petitioner *X*, to enforce its national laws and/or the internationally recognized standards of environmental protection governing the transboundary movement of hazardous wastes. The actual transgressors of those laws and standards would be the businesses or corporations under the jurisdiction of State *Z*, but State *Z* would be responsible for its failure to enforce the relevant environmental standards. Petitioner *X* risks suffering potentially life-threatening injuries as a result of State *Z*'s tolerance of the illegal dumping. Under these circumstances, Petitioner *X* could lodge a complaint with the Secretariat of the Commission against State *Z*.[109]

Petitioner *X* does not have to be a citizen of a Member State to demand redress in Strasbourg.[110] As the Commission has noted, "in becoming a Party to the Convention, a State . . . undertakes to secure these rights and freedoms not only to its own nationals and those of other High Contracting Parties, but also to nationals of

[108] Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int'l L. 1, 4, 11 (1986); *see also* European Convention, *supra* note 1, art. 15(2) (stipulating that no derogation of article 2, "except in respect of deaths from lawful acts of war," shall be made under the Convention).

[109] The petitioner will have to exhaust her available domestic remedies before she can approach the European Convention judicial organs. However, it is likely that State *Z* will not have legislation enabling citizens to challenge their government for its failure to enforce domestic legislation. The courts of some countries, like the Netherlands, will directly apply Convention law as part of their national law. In these countries the first step of our hypothetical case would be to bring the claim before the national judiciary, asserting causes of action under the Convention. In any case, for the purposes of this Article, we can assume that all available domestic remedies have been exhausted. *See generally* Drzemczewski, *supra* note 1 (concluding that a domestic exhaustion requirement makes sense).

[110] *See* J.E.S. Fawcett, The Application of the European Convention on Human Rights 21 (2d ed. 1987).

States not parties to the Convention and to stateless persons."[111] Article two obligates Member States to protect by law, within their jurisdiction, everyone's right to life. Under the European Convention, a petitioner need only prove that she is "the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention,"[112] and that the acts or omissions giving rise to the violation were "within [the] jurisdiction"[113] of the respondent State. The phrase "within their jurisdiction"

> is not equivalent to or limited to the national territory of the High Contracting Party concerned. It emerges from the language, in particular of the French text, and object of this article, and from the purpose of the Convention as a whole, that the High Contracting Parties are bound to secure the said rights and freedoms to all persons under their actual authority and responsibility, not only when the authority is exercised within their own territory but also when it is exercise[d] abroad.[114]

For example, under the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention),[115] a person living in a country into which European companies have been illegally trafficking[116] hazardous wastes could demand that the originating State enforce the Convention as well as any relevant domestic law against those traffickers.

C. The Threshold Requirements

1. Standing

Every application must meet three threshold requirements. First, article twenty-five of the European Convention requires that the petitioner be personally affected by the alleged violation, thus

[111] Austria v. Italy, App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 116, 138, 140 (Eur. Comm'n on H.R.).

[112] European Convention, *supra* note 1, art. 25.

[113] *Id.* at art. 1.

[114] Mrs. W. v. Ireland, App. No. 9360/81, 32 Eur. Comm'n H.R. Dec. & Rep. 211, 214-15 (1983) (involving a woman who sought redress against Republic of Ireland for failing to prevent terrorism after her husband and brother were murdered in Northern Ireland and in the Republic, respectively).

[115] Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 23, 1989, 28 I.L.M. 657 [hereinafter Basel Convention].

[116] See the definition of trafficking in article 9 of the Basel Convention, *id.* at art. 9.

barring an *actio popularis*.[117] For the purpose of this hypothetical, it will be assumed that a causal connection between the toxic dumping and the petitioner's health can be established. This would demonstrate that the petitioner has been directly affected by the alleged violation. To establish article twenty-five standing, causation need not be established with the same degree of certainty required at the merits stage. Petitioners need only "run the risk of being directly affected by the particular matter which they wish to bring before [the Strasbourg Organs]."[118]

In addition, the petitioner does not lack standing to pursue an article two claim simply because her life has not yet been extinguished by the putative violation. The Convention requires Member States affirmatively to protect by law the right to life—that is, not only to refrain from taking life intentionally but also to take appropriate steps to safeguard life.[119] Article two, then, allows our petitioner to allege that her right to life is not being adequately protected by the State. She need not base her standing to sue on the fact that she would be a victim of a violation of article two if the potential environmental disaster occured. She may simply claim that she is a victim of an article two violation because the State has placed her life in jeopardy by failing to enforce its own laws. In this respect, she resembles the petitioner in *Mrs. W. v. United Kingdom*.[120]

In that case, the petitioner complained that the United Kingdom failed to afford her sufficient protection against threats to her life from terrorist attacks in Northern Ireland. Although the Commission held the complaint to be "manifestly ill-founded,"[121] it did not find that the petitioner had failed to establish standing under article twenty-five. Her standing to bring that claim was accepted by the Commission.

Moreover, article five's "victim" requirement will not prevent our applicant from expanding her claim from the particular to the

[117] Kersten Rogge, *The "Victim" Requirement in Article 25 of the European Convention on Human Rights*, *in* Protecting Human Rights: The European Dimension, 539, 539 (Franz Matscher & Herbert Petzold eds., 1988) (citing X. Association v. Sweden, App. No. 9297/81, 28 Eur. Comm'n H.R. Dec. & Rep. 204, 206 (1982)); van Dijk & van Hoof, *supra* note 81, at 39.

[118] Case of Campbell & Cosans, 42 Eur. Ct. H.R. (ser. B) at 42 (1980) (mothers arguing on behalf of their children that existence of policy of corporal punishment in school violated childrens' Convention rights despite absence of actual punishment inflicted on child).

[119] *See supra* notes 66-70 and accompanying text.

[120] App. No. 9348/81, 32 Eur. Comm'n H.R. Dec. & Rep. 190 (1983).

[121] *Id.* at 200.

abstract. Although the victim requirement has been interpreted as barring a petitioner from bringing an *actio popularis*, once a petitioner has established herself as a direct victim of a Member State's Convention violation, article twenty-five does not prevent her from charging the State with a general pattern of such violations. There is precedent in the European Convention regime's jurisprudence to support a petitioner's broadening her claim to include a pattern of violations. In the *Donnelly* case, the petitioners objected not only to the torture to which they personally were subjected, but also to the British government's pattern of permitting and encouraging brutality. The Commission responded that

> neither Article 25, nor any other provisions in the Convention, *inter alia* Article 27(1)(b), prevent an individual applicant from raising before the Commission a complaint in respect of an alleged administrative practice in breach of the Convention provided that he brings *prima facie* evidence of such a practice and of his being a victim of it.[122]

In concrete terms, this means that our applicant might be able to complain about State *Z*'s general failure to prosecute the illegal dumping activities of those subject to its jurisdiction. Proving such an allegation should enhance our petitioner's chance of prevailing.

2. *Drittwirkung: Applicability to Third Party Actions*

Our petitioner must next establish that the violation she alleges is a breach of the Convention. The hypothetical violation is State *Z*'s failure to prevent environmental degradation that threatens the life of Petitioner *X*. The fact that the State is not threatening to the petitioner's life directly will not render her claim outside the scope of protection provided by article two.

The Commission has already endorsed the opinion that article two requires member States to secure the right to life against threats by third parties.[123] For example, in *Mrs. W. v. United Kingdom*,[124] the applicant argued that it was within the jurisdiction of the Convention Regime "to consider whether the United Kingdom

[122] van Dijk & van Hoof, *supra* note 81, at 39-40 (quoting Donnelly v. United Kingdom, 1973 Y.B. Eur. Conv. on H.R. 212, 260 (Eur. Comm'n on H.R.)).

[123] Many legal scholars have also expressed this view. *See* Evert Albert Alkema, *The Third Party Applicability or "Drittwirkung" of the European Convention on Human Rights*, *in* Protecting Human Rights: The European Dimension 36-37 (Franz Matscher & Herbert Petzold eds., 1988) (citing authorities presenting this view); Fawcett, *supra* note 110, at 37; van Dijk & van Hoof, *supra* note 81, at 217 n.17 (citing Evert Albert Alkema, Studies on European Basic Rights 31-31 (1978) and Jacobs, *supra* note 63, at 21).

[124] 32 Eur. Comm'n H.R. Dec. & Rep. at 198.

ha[d] taken adequate action against terrorist groups to ensure, subject to a margin of appreciation, that the rights of persons within its jurisdiction [were] protected against infringement by third parties."[125] In response, the Commission held

> that the applicant's complaint, concerning the killing of her husband by terrorists, raises the question of State responsibility for the protection of the right to life in accordance with Article 2 of the Convention. It follows that this complaint cannot be declared inadmissible under Article 27, paragraph 2, as being incompatible with the Convention *ratione personae*, on the ground that it is directed against acts of private persons.[126]

Our hypothetical petitioner will argue that State *Z* can only effectively protect her life by enforcing safety legislation against third parties engaging in the illegal dumping.

3. *Propriety of Relief Requested*

Finally, our hypothetical petitioner must show that the relief she seeks is of a kind that the Court would be willing to grant. Case law indicates, although not conclusively, that the Strasbourg Organs would require a Member State to enforce national and international standards that had been adopted in order to protect a Convention right.

The Court has interpreted the Convention to require a State to amend its laws to allow an individual to enforce Convention rights against a third party. *X & Y v. Netherlands*[127] involved a mentally handicapped woman who was barred by law from instituting proceedings against her offender because of her disability. Dutch law had not provided a guardian to engage the relevant legal machinery on her behalf. As a result the Court found a violation of article eight, reasoning:

> [A]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life in the sphere of

[125] *Id.* at 194

[126] *Id.* at 198.

[127] 91 Eur. Ct. H.R. (ser. A) (1985).

> the relations of individuals between themselves. . . . This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal-law provisions; indeed, it is by such provisions that the matter is normally regulated.[128]

As one commentator has noted, this case

> is remarkable in itself for the precision of the State's obligation: the State has to adapt its criminal law.[129] It also demonstrates again that the decisive reason for assuming *Drittwirkung* [third party applicability] is the *effective* respect for a right. Further, it connects the *Drittwirkung* with the positive obligations inherent in a provision such as article eight.[130]

It seems probable that the judicial organs of the Convention regime would require a Member State to modify its laws to ensure adequate protection of the right to life. For similar reasons, it is quite likely that the Strasbourg Organs would be willing to require a State to protect life by enforcing existing national legislation or international legal agreements. However, there is an important distinction between the *Netherlands* case and our hypothetical case. Although each case asks the Strasbourg Organs to embrace the principle of *Drittwirkung*, our hypothetical case seeks a slightly different form of relief. It does not ask that the Strasbourg Organs require a Member State to amend national legislation to protect a Convention right. It asks the Organs to demand that a Member State enforce its existing laws in particular circumstances. Politically, this may prove to be a more sensitive undertaking.

In the *Belgian Linguistic Cases*,[131] the Commission noted its willingness to tackle politically sensitive issues. In requiring a Member State to amend its legislation to provide greater protection to a

[128] *Id.* at 11, 13.

[129] The Strasbourg Organs have not always been willing to require a government to refashion its laws in order to afford the best protection possible to a Convention right. *See, e.g.*, Rees Case, 106 Eur. Ct. H.R. (ser. A) (1986). However, this does not diminish the theoretical importance of the *Netherlands* decision. In *Rees*, the Court held that the margin of appreciation to be afforded the government to some extent determined "the positive obligations arising from Article 8." *Id.* at 14. Thus, it was not an unwillingness *in theory* to demand legislative reform; indeed, the Court considered this to be an option. It was rather the appropriateness of the remedy under the particular circumstances of the case that prompted the judges' restraint in *Rees* (footnote added by author).

[130] Alkema, *The Third Party Applicability or "Drittwirkung" of the European Convention on Human Rights*, *supra* note 123, at 44-45.

[131] 6 Eur. Ct. H.R. (ser. A) (1968); 5 Eur. Ct. H.R. (ser. A) (1966).

Convention right, the Commission expressed its unwillingness "to accept the principle that any interpretation of the Convention which would cause an unforeseen disturbance of the traditions governing important political and legal matters in one of the signatory States should be rejected."[132] In this case, as in the *Netherlands* case, the Commission required a Member State to enact a legislative remedy—in this case, to restructure its school system—but there is no reason that its rationale should not apply to an executive branch's decision not to enforce existing laws. It would be absurd to require States to pass laws which would guarantee the rights and freedoms of the Convention, but never to require that the States actually enforce those laws. Indeed, this outcome is contrary to the purpose of the Convention and arguably violates article thirteen.

As one authority has noted:

> Omission on the part of the authorities to trace and prosecute the offender in case of an unlawful deprivation of life is, therefore, in principle subjected to review by the Strasbourg organs . . . . Of course, a certain discretion will have to be allowed to the national authorities as regards the prosecution policy, but the fundamental character of the right to life stringently restricts that scope.[133]

On the other hand, any claim that asks the Strasbourg Organs to review the discretionary acts of a State's public prosecution will have to overcome the margin of appreciation that both the Commission and the Court will accord to the State officer.[134] Prevailing against the rather strong presumption supporting the stated decision against prosecution will not be easy.[135] Nevertheless, an applicant with a strong claim should prevail.

As a counterbalance against the margin of appreciation doctrine, the applicant can appeal to the effectiveness principle, another tool

[132] Report of the Commission, *reprinted in* Belgian Linguistic Case, [3] Eur. Ct. H.R. (ser. B) ch. 3, at 275 (1967) (opinion of the Commission).

[133] van Dijk & van Hoof, *supra* note 81, at 217 & n. 21 (citing Report of the Committee of Experts to the Committee of Ministers of the Council of Europe, Sept. 1970, H(70)23, at 23).

[134] For a discussion of the margin of appreciation doctrine, see *infra* part IV.D.2.

[135] The Commission has refused to impose upon a Member State the duty to prosecute a putative violation of the Convention where the public prosecutor had decided that there was no merit in the claim. Unnamed Applicant v. F.R.G., Eur. Comm'n on Human Rights, July 16, 1962 (unpublished opinion on file with the clerk of the Eur. Ct. of Human Rights). The Commission decided in that case that a failure to prosecute under such circumstances cannot be made the ground of an individual application.

of interpretation employed by the Strasbourg Organs.[136] The effectiveness principle reflects a decision by the Strasbourg Organs to factor into their interpretation of the Convention the fact that "the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective."[137] Clearly, if Member States are allowed to pass laws to fufill their Convention obligations that they then refuse to enforce, the rights under the Convention are provided in theory only, and are ineffective in reality. Thus, if an applicant can demonstrate that a Member State is engaging in just such a practice, the Strasbourg Organs should require corrective action.

Undoubtedly, the interference with a State's prosecutorial discretion is an extremely invasive remedy. There are many considerations involved in the making of the decision to prosecute. One could argue that although the Strasbourg Organs might demand that a State place protective laws on the books to ensure that, in general, the right to life will be protected, the Convention regime cannot control the enforcement decisions of the State. This concern should alert anyone bringing such a test case to the desirability of finding a situation which involves a consistent pattern of laxity in enforcement. In this way the applicants can argue that the Organs are not being asked to micro-manage any particular executive decision, but to respond to an established pattern and practice of violations of article two.

To summarize, it is unclear how the Strasbourg Organs will assess the requested relief in the hypothetical case here under the Convention. On the one hand, to protect a guaranteed right, the Court has been willing to demand that a Member State change specific legislation, and the Commission has been willing to inquire into the adequacy of a State's protection efforts. On the other hand, the Commission has, on at least one occasion, been unwilling to require a State to enforce a particular law against a particular violator, and this is the relief our hypothetical petitioner would be seeking.

Nevertheless, it is difficult to imagine that if the Strasbourg Organs found that the lives of people were jeopardized by the failure of Member States to enforce existing legal instruments, they would interpret the Convention as being ineffective to respond. As was expressed by the Court in the *Golder Case*, "both the Commission and the Court, wherever they have expressed an opinion on this general point, have stated that the provisions of the Convention should not be interpreted restrictively so as to prevent its aims and objects being achieved."[138] Certainly, protecting human life is among the Convention's clear goals. Thus, the fact that the complainant would be asking the Strasbourg Organs to require enforcement—or creation and enforcement—of legislation against third parties by the State should not bar the application from being heard on its merits.

[136] For a detailed discussion of the effectiveness principle, see James G. Merrills, The Development of International Law by the European Court of Human Rights, ch. 5 (1988).

[137] Case of Artico, 37 Eur. Ct. H.R. (ser. A) at 16 (1980).

D. The Merits

Having established that our hypothetical petitioner can meet the threshold requirements of the European Convention, we now turn to the merits of the hypothetical case to determine the probability of its success. Our applicant will have to convince the Strasbourg Organs of two points. First, she must establish a causal link between the particular complainant's mortality and the unlawful dumping. Second, the applicant must present a persuasive legal argument that the threat to her life is sufficiently grave and immediate to violate her right to life as protected by the Convention. Here, the influence of existing legal instruments on the deliberations of the Strasbourg Organs could play a crucial role. The decisions of the commissioners and judges cannot be predicted with certainty, but we shall attempt to devine our hypothetical case's likelihood of prevailing on the merits.

1. The Causal Link

To establish a factual link,[139] the applicant can and should draw upon the scientific information available to the international community from sources such as the United Nations Environment Programme's IRPTC (International Register of Potentially Toxic Chemicals) or the CIS (Chemical Information Service). For example, the IRPTC is a compilation of information regarding the risks related to and the laws for managing and disposing of thousands of chemicals. CIS is an American organization that provides a service similar to the IRPTC on five continents. It consists of an on-line database containing information on the toxic and carcinogenic effects of a wide range of substances. Either IRPTC or CIS, there-

[138] Golder Case, 16 Eur. Ct. H.R. (ser. B) at 34 (1973); *see also* Case of Klass & Others, 28 Eur. Ct. H.R. (ser. A) at 16-20 (1978) (showing liberal view of standing requirement).

[139] See *supra* part III.A for a discussion of problems of proving causation in fact in legal actions to halt environmental threats to human health and well-being.

fore, can serve as a source of information on the causal link between various illnesses and concentrations of hazardous materials. Another resource is INFOTERRA, a UNEP-sponsored environmental information database which provides bibliographies and contact lists of experts who offer free or reduced rate consultative services on domestic environmental policy and guidelines and information retrieval. INFOTERRA can provide Strasbourg Organs in locating studies that should be useful in evaluating causal claims.

2. *The Legal Argument*

Along with demonstrating cause-in-fact, our petitioner must present a legal argument to persuade the Strasbourg Organs that the environmental degradation at issue is sufficiently severe to have violated her right to life. Moreover, her argument will have to overcome a jurisprudential bias that operates in the State's favor. In judging whether a State's actions have fulfilled its obligations under the Convention, both the Commission and the Court employ the "margin of appreciation" doctrine. This doctrine allows the commissioners and judges to provide the Member States an extra measure of deference. It has become a keystone of Strasbourg jurisprudence. As one commentator has noted: "The margin of appreciation is at the heart of virtually all major cases that come before the Court, whether the judgements refer to it explicitly or not."[140]

Whenever the Strasbourg Organs undertake to determine whether a member State has violated or has failed to fulfill its obligations under the Convention, they employ an informal balancing test that incorporates the margin of appreciation principle:

> Whether the present case be analyzed in terms of a positive duty on the State to take reasonable and appropriate measures . . . or in terms of an interference by a public authority, . . . the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation in determining the steps to be taken to ensure compliance with the Convention.[141]

[140] van Dijk & van Hoof, *supra* note 81, at 586 (internal quotations omitted).

[141] Case of Powell & Rayner, 172 Eur. Ct. H.R. (ser. A) at 18 (1990) (citing Rees Case, 106 Eur. Ct. H.R. (ser. A) at 15 (1986)) (internal quotations omitted).

The Strasbourg Organ's use of the margin of appreciation doctrine is evident in *Mrs. W. v. United Kingdom*.[142] The applicant in *Mrs. W.* argued

> that Article 2, first sentence, interpreted in the light of . . . Article 1 of the Convention, requires the United Kingdom, in the emergency situation prevailing in Northern Ireland, to protect the right to life not only by criminal prosecution of offenders but also by such preventive control . . . as appears necessary to protect persons who are considered to be exposed to the threat of terrorist attacks.[143]

Although the Commission rejected the applicant's contention that the United Kingdom had violated article two, it carefully avoided rejecting the basis for her argument, stating, instead, that "Article 2 . . . *may*, as other Convention articles, *indeed* give rise to positive obligations on the part of the State."[144] Nevertheless, the Commission was reluctant to review the appropriateness and efficiency of the measures taken by the United Kingdom to combat terrorism in Northern Ireland. In conjunction with this statement, the Commission noted that the United Kingdom had been exerting great efforts to combat terrorism, and that it had lost several hundred lives in the process.[145]

Mrs. W. demonstrates that although the State may have positive obligations to protect life, the Commission is not eager to second guess the appropriateness of a State's efforts to secure the rights guaranteed by the Convention, at least not where those efforts are within the traditional mode of State protective action. However, the Strasbourg Organs might be more willing to upbraid a Member State if that State has failed to implement its own measures of protection.

Arguably, one way for our petitioner to overcome the bias in favor of the State provided by the margin of appreciation is to show that the State is acting inconsistently with its own law, with the laws of the other member States and/or with international standards.[146] A look at Strasbourg case law provides us with an idea of what role the Convention regime envisions existing legislation and

[142] App. No. 9348/81, 32 Eur. Comm'n H.R. Dec. & Rep. 190 (1983).

[143] *Id.* at 199-200.

[144] *Id.* at 200 (emphasis supplied) (citations omitted).

[145] *Id.*

[146] *See* van Dijk & van Hoof, *supra* note 81 at 592 ("the case-law seems to indicate that the width of the margin allotted to the national authorities may depend on . . . to what extent can a European standard be deduced from the national legal systems of Member States").

international standards to play in determining the proper margin of appreciation to be afforded to a State in any particular case. Sections of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal might, therefore, be relevant to support our hypothetical applicant's case.[147] Our applicant may want to invoke article four (specifying general obligations), eight (establishing the duty to re-import) and nine (defining illegal trafficking in hazardous wastes and enumerating States' responsibilities for its consequences) to show that State *Z* has failed to enforce the standards established in international law.

As previously discussed in connection with *Case of Powell & Rayner*, the Court used national laws and international standards to aid it in determining "the fair balance that has to be struck between the competing interests of the individual and of the community as a whole."[148] Recall that this case involved two applicants complaining about the noise pollution emanating from Heathrow Airport.[149] By the time the case found its way to the Court, the only claim left was the one that invoked the right under article thirteen to a remedy before a national authority for an "arguable" violation of rights under article eight.[150]

In its judgment, the Court recognized the necessity of large international airports to "the interests of a country's economic well-being."[151] The Court had earlier referred to the relevant standards promulgated by the international Civil Aviation Organization concerning the noise pollution from aircraft, and noted that both the United Kingdom and Heathrow Airport had incorporated these standards, as well as the recommendations of the European Civil Aviation Conference into their noise abatement regulations and policies.[152] The Court also took note of the correspondence between a relevant portion of a United Kingdom Civil Aviation Act and article one of the Rome Convention of 1952 on Damage Caused by Foreign Aircraft to Third Parties on the Surface.[153]

In concluding that the petitioners had not suffered any violation of the Convention, the Court referred approvingly to the fact that the United Kingdom and Heathrow Airport had "taken due

147 *See supra* note 115 and accompanying text.

148 Case of Powell & Rayner, 172 Eur. Ct. H.R. (ser. A) at 18 (1990) (quoting Rees Case, 106 Eur. Ct. H.R. (ser. A) at 15 (1986)).

149 *See supra* notes 21-36 and accompanying text.

150 *See supra* note 35 and accompanying text.

151 172 Eur. Ct. H.R. (ser. A) at 18 (1990).

152 *Id.* at 10-11.

153 *Id.* at 9.

account of international standards established, developments in aircraft technology, and the varying levels of disturbance suffered by those living around Heathrow Airport."[154] Later the Court added:

> It is certainly not for the Commission or the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this difficult social and technical sphere. This is an area where the Contracting States are to be recognized as enjoying a wide margin of appreciation. It is not without significance that the provisions of [a governing United Kingdom law] are comparable to those of the Rome Convention of 1952 on Damage Caused by Foreign Aircraft to Third Parties on the Surface.[155]

The Court in the *Case of Powell & Rayner* held that the government's means of ensuring a Convention right were adequate to fulfill its responsibility under the Convention, because its means met relevant international standards. Moreover, the Court more generally established the relevance of international standards as a benchmark in balancing the competing interests of the individual and of the community.

The *De Becker* case compared the defendant State's laws and the laws of other Member States to find that the defendant State's actions had violated the Convention.[156] In our hypothetical case, a similar comparison between the responsibility taken by State *Z* and other Member States should help persuade the Court that State *Z*'s failure to enforce environmental standards generally accepted in Europe places its actions outside the margin of appreciation. "The scope of this margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States."[157]

154 *Id.* at 19.

155 *Id. Accord* Case of van der Mussele, 70 Eur. Ct. H.R. (ser. A) at 16 (1983) (relying on International Labor Organization conventions to interpret meaning of "forced or compulsory labor" under article 4).

156 2 Eur. Ct. H.R. (ser. B) at 128 (1960).

157 Case of Rasmussen, 87 Eur. Ct. H.R. (ser. A) at 15 (1984) (citing Case of Sunday Times, 30 Eur. Ct. H.R. (ser. A) at 35-37 (1979)); *see also* Case of Marckx, 31 Eur. Ct. H.R. (ser. A) (1979) at 19, 25-26 (noting the disparity between Belgian family law and the Convention requirement of treating illegitimate and legitimate children equally); Case of van der Mussele, 70 Eur. Ct. H.R. (ser. A) at 20 (1983) (noting that Belgian law recently had been modified to reflect trend of Europe toward paying lawyers appointed by State to defend indigents).

It is altogether probable that international standards will strongly influence the Strasbourg Organs in determining whether a State, by failing to enforce these standards, has neglected to uphold its obligations under the Convention.[158]

V. Conclusion

A petitioner alleging the facts similar to our hypothetical case has an excellent chance of success on the merits. The importance of such a victory obviously would extend far beyond the favorable judgment for our particular applicant. Having established precedent in a case containing the most egregious facts,[159] future petitioners would then be able to test the limits to the Convention's usefulness as a tool for environmental protection by bringing cases in which the causal link with a threat to human life is more tenuous.[160]

The primary purpose of bringing cases involving environmental degradation under the provisions of the European Convention is to prove that environmental claims in a human rights context are justiciable. Success in a string of these cases would demonstrate that the commissioners and judges are competent to make the necessary cause-in-fact determinations (although additional assistance from scientific and technical experts may prove to be necessary). The resolution of such cases will also demonstrate that the Strasbourg Organs can, on a case-by-case basis, establish the boundary within which environmental degradation threatens life with sufficient immediacy and certainty to implicate article two. Adjudication under the Proposed Amendment would establish an additional boundary; decisions would also focus on when environmental degradation threatens human health and well-being with enough immediacy and certainty to implicate Amendment article one. However, the line-drawing process would be identical. If the commissioners and judges can set the boundaries for article two environmental claims, they are capable of doing so for claims under the Proposed Amendment. Thus, bringing human rights claims that involve environmental degradation before the Strasbourg Organs under the existing Convention provisions will demonstrate—better than any argument—that the right to a healthy environment is justiciable.

Proof of the justiciability of environmental claims might prompt the Council of Europe to adopt some version of the Proposed Amendment. One might wonder why the Convention needs an amendment, if it already provides recourse to the Strasbourg Organs for environmental degradation that is extreme enough to threaten the right to life. The Proposed Amendment, however, recognizes that environmental degradation need not pose an immediate threat to one's life to violate fundamental human rights. Severe threats to one's health and well being are also intolerable violations of the integrity of the person and should be classified as human rights violations.

The European Convention regime may provide an excellent vehicle for broadening the universe of actors that are competent to enforce environmental protection in Europe, an area of the world that is responsible for more than its share of worldwide environmental degradation. The American experience demonstrates that once enforcement is no longer the exclusive privilege of sovereign States, and citizens are given an enforcement role, the level of protection improves dramatically.[161] The European Convention regime is clearly capable of having an impact on Europe's environmental practices. Although the Council of Europe has no mechanism by which to enforce its rulings, save the drastic measure of expulsion, the Member States have an excellent record of voluntary compliance with the rulings of the Strasbourg Organs. Enforcement of environmental standards is crucial. Without it, compliance is out of the question. Since environmental degradation seriously threatens one of the most fundamental of human rights, justice demands the empowerment of individuals in this area.

158 Habitual recourse by the Commission and Court to national and international environmental standards meshes perfectly with the Proposed Amendment advocated in this Article. Amendment article one contains a provision directing the Strasbourg Organs to guide their decisions under the Amendment by reference to "standards established by applicable legal instruments on environmental protection." *See supra* note 55 and accompanying text.

159 As is the practice in most national courts of Europe, the Strasbourg Organs are not bound by precedent; however, as a matter of fact, the commissioners and judges do look to past decisions for guidance.

160 Petitioners could also bring cases under article eight and article one of the First Protocol.

161 *See, e.g.*, National Resources Defense Council v. EPA, 484 F.2d 1331, 1334 (1st Cir. 1973) ("[O]nly the public—certainly not the polluter—has the incentive to complain if the EPA falls short . . . ."); Z.J.B. Plater et al., Environmental Law and Policy: A Coursebook on Nature, Law, and Society 856-58 (1992) (discussing citizen suits under the Clean Water Act and noting that use of the citizen suit provision by the NRDC coincided with improved EPA enforcement).