Victims of environmental pollution in the slipstream of globalization

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Abstract	The globalization of the world economy has as one of its side-effects the rapid proliferation of pollution around the globe. Developing countries are especially vulnerable to polluting activities that, predominantly because of market incentives, are still transferred from the north to the south.

Chapter 6
Victims of Environmental Pollution in the Slipstream of Globalization

Jonathan Verschuuren and Steve Kuchta

6.1 Introduction

The globalization of the world economy has as one of its side-effects the rapid proliferation of pollution around the globe. Developing countries are especially vulnerable to polluting activities that, predominantly because of market incentives, are still transferred from the north to the south.[1] In theory, international law should prevent this from happening. However, cases like the 2006 Abidjan waste scandal show that there still are flaws in the effectiveness of international environmental law. Despite the fact that the shipment of waste is highly regulated, both under international, regional, and national law, and despite the fact that both international law and EU law prohibit the transfer of hazardous waste to developing countries in Africa, hazardous waste was transported from Europe to Africa, dumped in a densely populated area in Ivory coast, killing ten local inhabitants and injuring thousands more. The disproportionately high risk to become exposed to wastes still suffered by the developing world falls under the heading of environmental injustice, and recent research shows that "environmental injustice on economic terms is happening globally.''[2]

In this contribution, we will focus on the position of the victims. Is a transnational legal response to relieve the need of victims of transnational environmental damage required, and if so, what response? This question will be dealt with primarily through an in-depth case study of the Abidjan waste case. We examine the various procedures that can be and are followed by the victims in this case. They range from criminal procedures and procedures to claim damages in the various countries involved and elsewhere, to procedures at the international level. Both national

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[1] Pellow, David Naguib. (2007). *Resisting Global Toxics: Transnational Movements for Environmental Justice,* The MIT Press.

[2] Jim Puckett, the executive director of the Basel Action Network, quoted in Pellow, D. N. supra n. 1, p. 80.

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and international law is applied in the various procedures that are being pursued in this case.

The approach will be as follows. First we will describe the facts of the case as well as the legal procedures that are being followed by the victims and the authorities involved.[3] Second, all relevant laws and regulations are analyzed from the point of view of the victims' opportunities to get relief for any damage inflicted. Main attention will be focused on international agreements and EU law. Third, conclusions will be drawn as to the effectiveness of the existing opportunities. Since we conclude that the existing opportunities are not effective, despite the existence of a large body of international law on international shipments of waste, including international liability law, we will then turn to human rights law to see if human rights law, in cases like these, offers a way out of the legal complexity and the weakness of international environmental law. Finally, we will answer our main research question: Is a transnational legal response to relieve the need of victims of transnational environmental damage required, and if so, what response?

6.2 The Facts of the Case[4]

6.2.1 The Multinational Actors Involved

The multinational trading company Trafigura, which is physically based in the Netherlands but has its headquarters in London and operates 55 additional trading companies at locations in a wide range of countries on all continents, charters the

[3]Since many international organizations, as well as NGOs are closely following the case, much information is available through the internet. We also interviewed a few persons involved in the case.

[4]The description of the facts is based upon a wide variety of sources, mostly reports by investigating commissions that were instituted after the incident, including the report by the Commission Internationale d'enquête sur les déchets toxiques dans le District d'Abidjan (CIEDT/DA). Feb. 2007, available at the Dechetcom website at <http://www.dechetcom.com/comptes/jcamille/rapport_abidjan_probo_koala.doc> (last visited 17 July 2009); the report by the UN mission in Ivory Coast (ONUCI): Situation des droits de l'homme en Côte d'Ivoire, Rapport No. 7, Sept. 2007, available at the ONUCI website at http://www.onuci.org/spip.php?rubrique/ 55 (last visited 17 July 2009); the Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal on its eight meeting, Distr. Gen. 5 January 2007, UNEP/CHW.8/16, pp. 6–9; the report by the Secretariat of the Basel Convention: Report on actions taken by the Secretariat in response to the incident of dumping of toxic wastes in Abidjan, Côte d'Ivoire, Distr. Gen. 13 Nov. 2007, UNEP/CHW.8/INF/7; the report by the Dutch Hulshof Commission: Rapport van bevindingen naar aanleiding van het onderzoek naar de gang van zaken rond aankomst, verblijf en vertrek van de Probo Koala in juli 2006 te Amsterdam, Nov. 2006 (this report is available though the city of Amsterdam's website at: http://amsterdam.nl/aspx/download.aspx?file=/contents/pages/21670/rapportcommissiehulshof.pdf/ (last visited 17 July 2009)); the report by the law firm De Brauw Blackstone Westbroek, which was reprinted in the Dutch Parliamentary Documents on 9 Feb. 2007, Parl. Docs. 2006–2007, 22 343, No. 161. Although these sources sometimes are somewhat contradictory on some of the facts, the below description is thought to be as accurate as possible.

tanker vessel Probo Koala to transport oil products. This Korean built carrier is owned by a Norwegian company, but operated by a Greek company, and it sails under Panamanian flag. In June 2006, Trafigura contacts the waste disposal company Amsterdam Port Services (APS) in the Netherlands to take a chemical waste product called slops, which is regular waste from oil tankers. APS agrees to do so, charging Trafigura €12,000. During the transfer of this waste in Amsterdam (July 2), APS notes an abnormal smell and finds that the waste is 250 times as polluted as normal slops. The company then refuses to take the rest of the waste and informs Trafigura to contact another Dutch company that is suited to receive this kind of toxic waste. Trafigura refuses to do so because of the costs involved (apparently this would have cost €500,000) and wants to take all the waste back.

6.2.2 The Various National Authorities in Europe Involved

In the meanwhile, various Dutch environmental authorities have been notified. Prior to the arrival of the ship, the ship's agent reports to the Amsterdam Port authorities, that the Probo Koala will discharge slops in Amsterdam. After having noticed the abnormal smell, APS immediately notifies the municipal environmental authorities, and they request the port authorities to allow them to return the slops into the ship to be transferred to a facility that is suited to take this kind of polluted waste. The municipal environmental authorities are hesitant about what to do: let the ship go or hold it in Amsterdam for further investigations? They get in touch with the national environmental inspectorate for advice, mainly to find a financial solution for the additional costs involved. Meanwhile, the port authorities, after having consulted with Port State Control of the National Transport and Water Management Inspectorate, allow APS to return the slops into the tanker. Port State Control reports to the Amsterdam Port authorities that there is no legal basis, as far as international maritime law is concerned (i.e. the MARPOL convention), to prohibit the return of the slops into the ship. However, the municipal environmental authorities decide to prohibit APS to return the waste because they suspect offenses against national environmental law. Consequently, they report this to the criminal authorities. The Public Prosecutor's Office starts an investigation against the Probo Koala and takes a sample of the slops. It does not chain up the vessel, although it has the power to do so. All of this happens in the span of only 3 days. On July 5, while the municipal and national environmental authorities are still discussing the situation and the Public Prosecutor's Office is still investigating the case, the slops are pumped back by APS following the permission granted by the Amsterdam Port authorities. Immediately after, the vessel departs to open sea, heading for Estonia where it takes additional cargo.

The Dutch police, through the Dutch Transport and Water Management Inspectorate, then request the Estonian Port State Control to inspect the ship. No irregularities are found, and the vessel is allowed to take on board gas oil as new cargo. On July 9, the vessel leaves Estonia. Some unconfirmed sources report that the ship on its way from Estonia to Africa, stopped in Spain at the port of Algeciras.

It is unclear if this was the case and, if so, what had been the role of Spanish authorities.

6.2.3 From Europe to Africa

After leaving European waters, the Probo Koala sails to Nigeria to discharge the cargo that was taken on board in Estonia. Then, the vessel sails to Abidjan in Ivory Coast, where it arrives on August 19. That day, the slops are discharged at a local waste disposal company, called Compagnie Tommy. This company is only in the possession of a permit to take waste from ships for 1 month. It charges Trafigura only about €1,200. Both the company and the authorities were notified by the Dutch authorities on the toxicity of the slops, apparently before the dumping took place. Local authorities start an investigation, but they permit the ship to leave for Estonia.

6.2.4 Pollution in Ivory Coast

During the following night, a total amount of 500 tons of chemical waste is dumped at ten locations near the Ivory Coast capital of Abidjan, with 5 million inhabitants, within short distances of each other, allegedly leading to the death of eight or ten people, including two 16 year old girls.[5] It is reported that 44,000 people have sought medical assistance, while 9,000 are accounted for as actually being sick from the waste disposal. These figures probably are low estimates as a Resolution by the European Parliament speaks of 85,000 people treated in hospitals because of nose bleeding, diarrhea, nausea, irritated eyes, and breathing problems.[6] According to UNICEF, between 9,000 and 23,000 children need medical assistance and health care. The victims suffer from respiratory problems, burns and irritation of skin and eyes, nausea, dizziness, vomiting (including throwing up blood).

6.2.5 The Aftermath

Soon after the waste has been dumped, Ivorian authorities arrest the directors of both the waste disposal company Compagnie Tommy, and the vessel's agent in Abidjan, as well as the director of a company that is 100% owned by Trafigura and that

[5] Reports on the number of causalities differ, probably because some of the injured died later. Some reports state that on September 26, the number of death had risen to ten. Sometimes higher figures are mentioned (11, 16, 17). Later reports question such severe health effects of the pollution. See below.

[6] Resolution of 26 October 2006, OJ C 313 E/432. The UN mission in Ivory Coast (ONUCI) even reports that between 100.000 and 150.000 people have been treated in hospitals in Abidjan following the dumping of the waste, see ONUCI, Situation des droits de l'homme en Côte d'Ivoire, Rapport No. 7, Sept. 2007, p. 24. This report is available from the ONUCI website at http://www.onuci.org

has a local office in Abidjan. Two weeks later, on September 7, the Ivory Coast government resigns following massive public protests against the dumping of this toxic waste in Abidjan.

People are displaced, schools in affected areas are closed, industries are closed and hundreds of workers are laid off, fishing activities, vegetable and small livestock farming are stopped. In addition, water sources as well as food chains are contaminated, resulting in contaminated food products. The city's household waste treatment center has to be closed down for 2 months.

After the return of the Probo Koala in Estonia, the authorities there chain up the ship upon request of the Ivory Coast authorities. Two weeks later, however, after completion of the investigations, the ship is allowed to sail again. The criminal investigations in the Netherlands against Trafigura are intensified and additional investigations are started against the various authorities involved, as well as against APS, after Greenpeace files charges against Trafigura, APS and officials of the municipal environmental authorities. In February 2007, two directors of the Dutch waste disposal service APS are arrested. Furthermore, the Dutch criminal authorities order the arrest of the captain of the Probo Koala. In May 2007, the same authorities decide to prosecute Trafigura as well (under Dutch law). The investigations are progressing slowly because of the complexity of the case and because of the fact that relevant information rests with a series of different companies and authorities in several countries. In February 2008, the Dutch prosecutors report that Trafigura, APS, the captain of the Probo Koala and the Amsterdam municipal authorities have been informed that these four parties will all be charged shortly. In June 2008, a Dutch court rules that the CEO of Trafigura should be acquitted because there is no link between his personal actions and the dumping of the waste. Although a higher court reaffirmed this ruling in December 2008, the Dutch prosecutors currently try to have this decision reversed by the Dutch Supreme Court. The case against the other defendants is being dealt with in a criminal court at the time of writing (April 2010).

Political debates on the issue are held in Dutch Parliament as well as in the European Parliament. The European Parliament adopts a Resolution in which it calls on the European Commission, the Netherlands and Ivory Coast to "bring to justice those responsible for this environmental crime and to ensure full remediation of the environmental contamination, as well as compensation for the victims."[7] The European Commission starts an inquiry into the implementation of the *EU Regulation on the Shipment of Waste* and states that as of July 2007, stricter rules are in place on inspections of shipments of waste by the national authorities in the EU.[8]

France sends a clean-up team to Abidjan to clean up the waste, under coordination of UNDAC (UN Disaster Assessment and Coordination).[9] The World Health

[7] Resolution of 26 October 2006, OJ C 313 E/432.

[8] Answer of commissioner Dimas to questions E-4345/06, E-4365/06 by the European Parliament, 11 Dec. 2006.

[9] Outside of the UNDAC, there is also significant current pressure on First World nations to retrieve their toxics from the Third World. Such pressure has prompted action from the United States, Japan, and several countries in Europe. See Pellow, supra n. 1, p. 123.

Organization sends an investigating mission to the site, as does the Secretariat of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes (part of UNEP). The remains of the waste are transported to France in October and November 2006 where they are disposed of. One year later, however, in October 2007, the media report that about one third of the toxic waste is still present at the various locations in Abidjan, waiting to be cleaned up. According to the authorities, they are waiting for funds to be able to clean up the remainder. A visit to the site by the UN Special Rapporteur on the dumping of toxic waste in August 2008 shows that the site still has not been fully decontaminated.

The United Nations Environment Program coordinates relief efforts for the victims in Abidjan. They collect money for the victims; however, apparently with insufficient results. In January 2007, UNEP reports that it needs 30 million dollars to clean up the pollution, restore the food chain and the water system, and give aid to farmers and to people that still suffer physically from the pollution.[10]

In May 2009, the London High Court starts the proceedings in the biggest class action ever brought before British courts: a claim of 30,000 victims against Trafigura. British courts accept jurisdiction in this case because of Trafigura's headquarters in the UK.[11] Around the same time, BBC's Newsnight and a Dutch newspaper disclose a confidential report by the Netherlands Forensic Institute which shows that an analysis of the samples that were taken from the vessel in Amsterdam in 2006 proves that the Probo Koala at that time was shipping 2,600 l of a substance containing high levels of the extremely toxic sulphur hydrogen. This report contradicts Trafigura's statements that the Probo Koala was not carrying substances with serious health implications.[12] Following the disclosure of the report, the proceedings in London, that started that same week, are immediately adjourned until October 2009, when the full case will start. Trafigura responds to the BBC report by suing BBC's Newsnight program for libel.

In September 2009, a settlement is reached: Trafigura pays £ 1,000 to each of the 30,000 claimants. In a joint statement, Trafigura and the law firm representing the Ivorians, state that independent experts so far have been unable to identify a link between exposure to the chemicals and severe health problems. A few weeks later, the law firm representing Trafigura attempts to prevent the UK newspaper the Guardian from reporting a parliamentary question by an MP about the case. Following an outcry among MPs about the apparent threat to parliamentary privilege, the attempt is dropped the next day. In January 2010, an Ivorian court ruled that the settlement money should be paid out to a local activist who claims to be the

[10] Supra n. 4.

[11] Wouters, J & Ryngaert, C. (2009). 'Litigation for Overseas Corporate Human Rights Abuses in the European Union: The challenge of jurisdiction', Institute for International Law Working Paper No. 124, Leuven, p. 11, available at: http://www.law.kuleuven.ac.be/iir/nl/onderzoek/wp/WP124e.pdf (last visited 17 July 2009).

[12] See pres statement by Trafigura, available at the BBC's website at: http://news.bbc.co.uk/2/hi/programmes/newsnight/8049024.stm (last visited 17 July 2009).

representative of the victims. The law firm representing the claimants fears that, as a consequence, the claimants will not see a penny of it.

6.3 The Legal Situation

The shipment of dangerous substances is a highly regulated topic at all levels of regulation. At the international level there are conventions on transboundary shipments of hazardous waste (Basel Convention),[13] on the environmental aspects of shipping in general (Marpol 73/78),[14] and on the export of dangerous chemicals (Rotterdam Convention).[15] On all of these topics, EU legislation exists as well, in addition to national law in the EU Member States. First, we will briefly discuss whether these laws protect potential victims in Africa against pollution by waste that is transported there from other continents. Then, we will turn to the case again to check why these laws were ineffective. In order not to overcomplicate this already complicated topic, we will only focus on the Basel Convention and on Marpol 73/78 and all connected laws. As the Rotterdam Convention does not apply to the case, we will not discuss it, although it certainly intends to protect developing countries against hazardous chemicals from other parts of the world.[16]

6.3.1 Laws Protecting Potential Victims of Pollution by Transboundary Shipments of Waste

6.3.1.1 Waste Legislation

The basic rule protecting people in developing countries against the shipment of hazardous waste is the prohibition of transportation of hazardous waste. This rule has, to some extent, been laid down in the Basel Convention, in an OECD decision, and in the *EU Regulation on Shipments of Waste*.[17] Generally speaking, the transportation of hazardous waste and waste that is not being recovered (recycled) to non-OECD countries is prohibited. This covers most developing countries.[18] We

[13] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989. For the text of the Convention, see the Convention's website at http://www.basel.int

[14] International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978, in short: Marpol 73/78. The many Annexes to this convention are regularly amended. For the latest version, see the website of the International Maritime Organization, http://www.imo.org

[15] Rotterdam Convention on the Prior Informed Consent Procedure for certain Hazardous Chemicals and Pesticides in International Trade, 1998. For the latest version of the Convention and its Annexes, see the Convention's website at: http://www.pic.int

[16] See for instance Articles 6 and 16.

[17] Regulation 1013/2006/EC, OJ L 190, replacing similar provisions that are in place since 1993 (Regulation 259/93).

[18] Since 2007, negotiations on accession to the OECD with such countries as China, India, Indonesia, Chile, and South Africa are being held.

use the words "generally speaking," because it is not easy to give clear statements on the law regulating shipments of waste. This body of international law is quite complex as it is constantly balancing between protecting the environment on the one side, and not disturbing trade on the other.

Even from the side of environmental protection, things are complicated. It may be very well possible that a certain waste can be reused or recovered in another country, thus producing an overall benefit to the environment as a whole. Rules protecting the environment should not complicate shipments that are aimed at doing just that. The result of all this is that we have complicated rules that not only differ between types of waste, but also between the goals the owner may have (disposal or recovery). Further complicating the issue is the fact that the various sets of rules, i.e. the Basel Convention, the OECD Decision and the EU Regulation, all differ from each other. It is obvious that jurists have a hard time getting a grip on these rules.

As all of this has been regulated at the EU level in a Regulation, and thus directly applies in all EU Member States, there is no additional national legislation with regard to the shipment of waste. Additionally, the EU Waste Directive regulates that it is not allowed to deliver waste to people or companies that have not been licensed according to the provisions of this Directive.[19] In all EU countries, this duty has been transposed into national environmental law.

Since 1999, a liability protocol has been added to the Basel Convention.[20] This protocol, however, has not entered into force because to date it has only been ratified by nine parties instead of the twenty that are needed.[21] The protocol introduces strict liability for the exporter of waste, i.e. the person who notifies the shipment of waste. After the disposer has taken possession of the wastes, liability switches to the disposer.[22] Interestingly, fault based liability rests on all other persons that contributed to the damage "by his lack of compliance with the provisions implementing the Convention or by his wrongful intentional, reckless or negligent acts or omissions".[23] Damages that can be claimed include costs involved in the loss of life or personal injury, loss of or damage to property, loss of income, the costs of measures of reinstatement of the impaired environment, and the costs of preventive measures.[24] This would, therefore, cover most of the costs of the victims in the Abidjan case (health care, damage to crops, to the food chain, to water supply, costs involved with the halting of various kinds of economic activities) (see Section 6.2.5).

[19] Article 9 of Directive 2006/12/EC, OJ L 114 on waste, replacing similar provisions that are in place since 1975 (Directive 75/442/EEC).

[20] Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, 1999. For the text of the protocol, see the Basel Convention's website at http://www.basel.int/pub/protocol.html (last visited 17 July 2009).

[21] See the status of ratifications at the Basel Convention website at: http://www.basel.int/ratif/protocol.htm (last visited 17 July 2009).

[22] Article.4 of the Liability Protocol.

[23] Article 5 of the Liability Protocol.

[24] Article 2(c) of the Liability Protocol.

The *EU Regulation on Shipments of Waste* does not have such a wide-ranging instrument to claim victims' costs. It only regulates that costs for recovery and disposal of an illegal shipment of waste are to be charged to the notified or the competent authority of dispatch in cases where the illegal shipment is their responsibility, or to the consignee, or the competent authority of destination, in cases where it is their responsibility.[25] In addition, there is an *EU Directive on Environmental Liability* that applies to environmental damage caused by transboundary shipment of waste within, into, or out of the EU.[26] As a consequence, any natural or legal, private or public person who controls the shipment has to bear the costs to remove the contaminants and to take the necessary remedial actions.[27] Again, this does not go as far as the Liability Protocol to the Basel Convention as it does not create strict liability, nor does it focus specifically on the victim's costs, but (just) on reparation costs with regard to the natural environment.

6.3.1.2 Environmental Maritime Legislation

The Marpol Convention comprises an elaborate set of rules aiming at the prevention of maritime pollution. These include rules on the discharge of waste from ships, both at sea and in ports. Annex II to the Convention provides that remains from slop tanks have to be discharged at a port reception facility, provided that Category A or B substances, i.e. the most dangerous and noxious substances, are present in the slops.[28] This, however, does not apply to oil or oily mixtures, as these substances are regulated under Annex I. They have to be either kept on board, or discharged at a port reception facility.

In the EU, some of these rules have been further defined, for instance with the *Directive on port reception facilities for ship-generated waste and cargo residues*.[29] This Directive aims at reducing the discharges of ship-generated waste and cargo residues into the sea, especially illegal discharges, from ships using ports in the EU, by improving the availability and use of port reception facilities for ship-generated waste and cargo residues. Both ship-generated waste and cargo residues have to be delivered at a port reception facility when ships call at an EU port.[30] However, there are exemptions to this rule. Ship-generated waste may be kept on board when the ship has sufficient storage capacity and there is no risk that the waste will be discharged at sea.[31] For cargo residues, the Directive mainly refers to the Marpol

[25] Article 25 of Regulation 1013/2006/EC.

[26] Directive 2004/35/EC on environmental liability with regard to the prevention and remedying of environmental damage, OJ L 143. See Annex III No. 12.

[27] Article 6 and Article 7 of the Directive.

[28] Regulation 8(9) of Annex II.

[29] Directive 2000/59/EC, OJ L 322.

[30] Article 7 and Article 10 respectively.

[31] Article 7.

Convention.[32] As a consequence, oil or oily mixtures may be kept on board as well (see above).

In addition to the Directive on port reception facilities, the Directive on port state control sets rules on inspection and international cooperation.[33] The latter Directive refers to the *Paris Memorandum of Understanding (MoU) on Port State Control*,[34] thus incorporating this international law instrument in EU law. With the Paris MoU, the maritime authorities of twenty-six countries in Europe and Canada concluded detailed arrangements on cooperation with regard to inspections and enforcement of environmental standards in European and North American waters.

As both the Marpol convention and the EU Directives (in most cases) are not directly legally binding, these sets of rules have been transposed into national law in all of the EU Member States.

6.3.2 Inherent Ineffectiveness of the Applicable Laws: Back to the Case

6.3.2.1 Waste Legislation

In this case, the slops were first discharged at APS, and then pumped back into the ship. This action had important legal consequences, as it triggered the *EU Regulation on Shipments of Waste* to apply to the case. Slops inside a ship, that simply stay in the ship while visiting an EU port, do not fall under the scope of the Regulation. Once they are offloaded to be disposed of, the Regulation applies.[35] In this case, however, the competent authorities did not draw this conclusion. They allowed the ship to leave with the slops, thus permitting the shipment of waste without the application of the *EU Regulation on Shipments of Waste*.[36] The Netherlands Environmental Management Act was also infringed upon, because it is not allowed to deliver waste to someone who does not have a permit pursuant to which he is allowed to handle waste. Obviously, the captain of the Probo Koala did not have such a permit, and thus APS should not have returned the waste to the ship.[37]

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[32] Article 10.

[33] Directive 95/21/EC, OJ L 157, as amended by Directive 2001/106/EC.

[34] Paris MoU of January 1982, amended regularly since. For the latest version, see the Paris MoU website at: http://www.parismou.org

[35] Article 1(3)(b) of Regulation (EC) 1013/2006. According to Article 1(3)(a). waste that is generated by the normal operation of ships does not fall under the scope of the Regulation at all. The level of toxicity of these slops indicates that these slops should be regarded under letter b, rather than under a of Article 1(3). This was also concluded by the Commission Hulshof, that investigated the role of the Dutch authorities on behalf of the Amsterdam municipal authorities, 'Rapport van Bevindingen', Amsterdam, 2006, p. 12 (supra n. 4).

[36] Parliamentary Docs. (Netherlands). 2006–2007, 22 343, No. 161, pp. 19–20.

[37] Parliamentary Docs. (Netherlands). 2006–2007, 22 343, No. 161, p. 30.

6.3.2.2 Environmental Maritime Legislation

The above description of the Marpol Convention and EU Directive 2000/59/EC shows that the qualification of the substances is decisive to answer the question whether the captain of the ship had to discharge the slops at the Amsterdam port reception facility or not. Most investigations into the case conclude that the slops consisted of a mixture of oil and oily substances and noxious substances, thus qualifying both under Annex I and Annex II of the Marpol Convention.[38] However, there is uncertainty as to the most appropriate Category (A/B or C/D). Only when the slops qualified under Category A or B, the captain had the obligation to discharge at the port reception facility. In the other case, it is legally allowed to discharge the slops at any other port reception facility, for instance one in Ivory Coast, which country is a party to the Marpol Convention as well.

Once the slops had been discharged at the Amsterdam reception facility, Marpol 73/78 no longer applied. As concluded above, at that moment waste legislation took over. It appears, however, that the authorities, by transferring the slops back into the ship without the application of waste law, continued to apply the environmental maritime legislation.

Because of the transposition process, national law can differ from international and EU law. In the Netherlands, it was concluded in several of the investigations into this case, that on some crucial points Dutch legislation differs from the terminology used in Marpol 73/78 and the relevant EU Directive. One of the reports concludes that the Dutch legislature has not only created an unclear situation, but also one that is in conflict with the Marpol Convention.[39] Additionally, it must be concluded that the Dutch legal situation is extremely complex because of the many layers of regulation that exist. Rules on the reception and treatment of waste from ships have been laid down in national Acts, in national Regulations (Orders in Council and Ministerial Regulations) and in local regulations of the municipality of Amsterdam and of the Amsterdam Port authorities. As a consequence, there are several authorities that have inspection competences.[40]

6.3.2.3 Conclusions

– Interplay between the various fields of environmental law makes things complicated; some of the reports conclude that there exists a grey area between the regulation of ships under Marpol 73/78 and of the shipment of waste under the Basel Convention.[41]

[38] For instance the report by the law firm De Brauw Blackstone Westbroek, reprinted in: Parliamentary Docs. (Netherlands). 2006–2007, 22 343, No. 161, at pp. 25–26. Regulation 2(3) of Annex I to Marpol 73/78 refers to the possibility that oil tanks also hold noxious substances.

[39] Commission Hulshof (supra n. 4). pp. 20–22.

[40] For an overview, see the two most important Dutch investigations into the case by the Commission Hulshof (supra n. 33). and by De Brauw Blackstone Westbroek (supra n. 38).

[41] The parties to the Basel Convention respond to this in COP8 by deciding to start a cooperation between the Basel Convention and the International Maritime Organization, Report of the

– A similar grey area appears to exist in the countries involved, most notably in the Netherlands, where the various authorities involved seem to point at each other for being responsible; each act on the basis of their portion of the applicable law. No single authority has a good overview of the whole situation.
– Enforcement is lacking. This is not specific to the case. In 2006, the EU IMPEL-network[42] published a report on waste shipments under the *EU Regulation on Shipments of Waste*, showing that 51% of the inspected shipments were illegal, i.e. the Regulation had not been applied at all. Of the shipments that were reported under the Regulation, 43% showed infractions like missing or incomplete information.[43] Both in the EU and at the level of the Basel Convention the lack of enforcement is considered to be a major problem that is currently being addressed by such initiatives as the formulation of inspection criteria and minimum sanctions.[44]

6.4 What Are the Existing Legal Remedies for Victims of Transnational Pollution?

The above case description shows that victims are likely to be more vulnerable from a legal point of view, where multiple layers of regulations overlap with multiple authorities and countries. We see this complex regulatory situation as a consequence of the slipstream of globalization. There are various foreign authorities involved that do not cooperate very well, as well as international organizations, and a multinational company that operates around the globe.

The question arises what legal remedies they have at their disposal to relieve their needs in such a complex legal situation. The various procedures that can be and are followed by the victims in this case range from criminal procedures and procedures to claim damages in the various countries involved and elsewhere (for instance in London) to procedures at the international level (EU, UN, Basel Convention, and others). International organizations, such as UNEP, play a big role in aiding the victims, as do private law firms that start procedures for groups of victims.

Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their disposal on its eight meeting, Distr. Gen. 5 January 2007, UNEP/CHW.8/16, p. 9.

[42] IMPEL is an informal network of the environmental authorities in the EU member states. For more information, see the network's website at: http://ec.europa.eu/environment/impel/

[43] IMPEL-TFS seaport project II, International cooperation in enforcement hitting illegal waste shipments, project report September 2004 – May 2006, Brussels, June 2006, p. 10.

[44] The April 2008 document on the programme budget for 2009–2010 of the Basel Convention (for COP9) pays considerable attention to enforcement, see the Basel Convention's website at: http://www.basel.int/meetings/cop/cop9/docs/advance%20-%2035e.pdf (last visited 17 July 2009). See also the European Commission's proposal for a Directive on the protection of the environment through criminal law, COM (2007)51, that also applies to illegal shipments of waste (cf. Article 3(e)).

As far as we know, the following procedures have already been initiated. In *the Netherlands*, Greenpeace filed charges in September 2006, but the Dutch Public Prosecutions Department had already started its own investigations before that. As already stated above, criminal investigations are still being carried out in 2009 against Trafigura, APS, the captain of the Probo Koala, and the Amsterdam municipal authorities. The case is scheduled to go to trial in 2010. The slowness of these investigations shows that many problems are encountered, mainly because of the complexity of the case and because of the fact that relevant information rests with a series of different companies and authorities in several countries. In addition, under Dutch law it is difficult to prosecute public authorities, because usually they are deemed to have criminal immunity.

On behalf of more than 1,000 of the Ivorian victims, the Dutch law firm Van der Goen initiated tort proceedings in the Netherlands against Trafigura, the city of Amsterdam, and the Dutch state. Independent from that, Dutch national and municipal (Amsterdam) authorities already offered 1 million euro to the UNEP trust fund to relieve the needs of the victims. In 2008, however, the law firm ceased all activities because of financial constraints: the Ivorian claimants could not apply for legal aid because most of them did not have a passport[45]; hence the Dutch Ministry of Justice was unwilling to grant them free legal aid.[46] Since, under Dutch law, it is not allowed for a law firm to negotiate with the client to transfer a part of the award of the case, there were no funds to cover the huge costs involved in a complicated case like this.

In *Ivory Coast*, the criminal and civil law cases against Abidjan based officials of Trafigura that had been initiated were not pursued after Trafigura and the Ivorian authorities reached a settlement of the case for €152 million in 2007. The deal absolves the Ivorian government and Trafigura of any liability and prohibits future prosecutions or claims by the Ivory Cost government on Trafigura. Although the deal was heavily criticized,[47] the Ivorian Court of Appeal ruled, in March 2008, that criminal charges could not be pursued against Trafigura.

The 152 million is meant to cover clean-up costs and compensate the victims. In June 2007, the President of the Republic of Ivory Coast announced that 101,313 residents of Abidjan will each receive around €260. Families of victims who died are entitled to €130,000. Payment started almost immediately after this announcement was made. However, 3 weeks later, the payments were stopped because large numbers of people showed false IDs try to collect the money (as many as 95% of the IDs that were used to collect the money were reported to be false).

[45] A typical situation caused by the past civil war in Ivory Coast.

[46] Information obtained in an interview with the director of the law firm, Bob van der Goen (interview by phone, May 7, 2008).

[47] This part of the deal is heavily criticized in the media. Some newspaper reports described it as "a dirty deal", for instance on 14 Feb. 2007 by Deutsche Presse Agentur.

The settlement did not include the local waste disposal company Compagnie Tommy. In October 2008, the owner of Tommy was sentenced to 20 years imprisonment, and his shipping agent to 5 years.

The most important case that directly involves the victims is currently being pursued in the *United Kingdom*. Some 30,000 Abidjan residents are represented by the Leigh Day & Co law firm in a legal suit for damages against Trafigura in London. As stated above, this group action, issued by the High Court, has been settled, awarding each of the claimants a compensation of £ 1,000. Contrary to the, now abandoned, Dutch tort case, this case was only brought against Trafigura, and not against any of the authorities involved. Also, the UK law firm chose to represent only those victims who had a clear case.[48] Unlike the Netherlands, in the UK it is possible to claim all the costs that a law firm makes in a case like this.

In *France*, ninety-four people filed murder charges against the crew of the Probo Koala in July 2007, upon which the authorities started criminal proceedings. As far as we know, these had not lead to any clear results by July 2009.

6.5 How Effective Are These Existing Legal Remedies?

The above proceedings are slow and full of legal complexities. There are many obstacles in the various paths that are being pursued at the moment. First of all, international law with regard to tort remedies is hopelessly weak.[49] Although the Liability Protocol to the Basel Convention seems to offer the victims good opportunities to hold both the companies and the authorities involved liable, either under strict liability rules or fault-based liability rules, this protocol simply has not yet entered into force, and it is unlikely that it ever will, given the extremely slow ratification process. The *EU Environmental Liability Directive* is of no use either, because it is aimed at the authorities carrying out the cleaning up and restoration, after which they have to try and be reimbursed by the polluters. Under the Directive, remediation costs do not include financial compensation to the victims.[50] More or less the same goes for the *EU Regulation on the Shipments of Waste*. The Regulation only regulates that the costs of recovery can be claimed by the authority that does the recovery and the take back. There is no mention of victims or the damage that they suffer as a consequence of an illegal shipment.

More in general, tort proceedings are difficult because of the distance between the various European authorities and the African victims, data are spread everywhere since the company has offices around the globe and the Ivorian authorities are not likely to cooperate because of their settlement with Trafigura. In addition,

[48] Supra n. 46.

[49] Sachs, Noah (2008). 'Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law', *UCLA Law Review*, 55, 4, 837–904 (forthcoming). also available at: http://works.bepress.com/noah_sachs/1/ (last visited 17 July 2009).

[50] See Annex II under (1) and (1.1.3) of the Directive.

cases like these are very costly because they need a lot of research before they can be brought to court. Data on the damages of each of the claimants have to be gathered in Africa. And there are considerable limitations to the access to justice of the victims, as is shown by the fact that no tort case can be pursued by the victims in the Netherlands against the Dutch authorities or against the Trafigura head office in the Netherlands.

In the British class action against Trafigura, some of these hurdles were successfully taken, for instance by allowing that only twenty-two "lead claimants" fly over from Ivory Coast to London, and to allow doctors involved in the treatment of the victims to testify from Amsterdam, Tunisia and Norway (where some of the victims were treated). Still, the outcome of the case remained uncertain. During one of the hearings, the judge said that the case would be a battle of scientific experts about the cause of the alleged poisoning. Both sides assembled rival teams of toxicologists, chemists, tropical medicine experts and even psychiatrists, while teams of lawyers and barristers were shuttling back and forth to the Ivory Coast.[51] The trial had to start in October 2009 and was due to last at least 3 months. As a consequence of the settlement, the case never went to trial.

Criminal procedures are difficult as well. At the EU level, a heavily discussed proposal for a Directive on the protection of the environment through criminal law[52] does include illegal shipments of waste,[53] regulating that participation in such an illegal shipment constitutes a criminal offense that has to be severely punished, with high fines being imposed on legal persons involved. There is, however, not a single provision dealing with the position of victims here. In addition, this being a proposal only, for the moment it is all national law that is applied here.

Under the national legal systems involved, there are several shortcomings in the field of criminal environmental law. In the Netherlands, for instance, public authorities enjoy criminal immunity. More in general, it is hard to show that one of the authorities committed a crime or tort. As was shown above, it is the lack of cooperation in the implementation of the various laws that caused the problem. It will be very difficult to demonstrate that it was a single action or omission by one of the authorities or officials involved that caused the incident.

Therefore, it is unlikely that all of the proceedings that have been initiated will lead to great results, although we have to wait and see in this particular case, as some cases are still pending.

Meanwhile, we wondered whether the overarching concept of the protection of human rights offers a way out of the legal complexities that are involved in a case like this. Can the victims rely on human rights documents – rather than on the complex and ineffective body of environmental law – to get justice?

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[51] The Guardian, 10 July 2009, also available at: http://www.guardian.co.uk (last visited 17 July 2009).

[52] Proposal for a Directive on the protection of the environment through criminal law, COM (2007) 51 final.

[53] Article 3, Section (e).

6.6 The Human Rights Dimension

In recent years, human rights instruments have truly become a viable path toward rectifying environmental harms, especially relative to the complexities illustrated above. The connection between pollution and human safety, health, and rights to a protected private sphere has been recognized most strongly by the European Court of Human Rights and this section aims to elucidate both the grounding and jurisprudence for this, as well as to frame the human rights dimension of the Probo Koala tragedy. In this way, we separate from other discussions on criminal prosecution or international law remedies for human rights violations and instead focus on human rights solutions to human rights problems.[54] Although those discussions are admittedly more grounded in practice than this theoretical section, expanding presence of the human rights' discourse within the same legal dicussions warrants its inclusion here.

As the preceding discussion highlights, this accident happened in the shadow of standing regulations meant to prevent just such an occurrence. The regulatory failure is, unfortunately, not wholly unexpected. An expectation of bilateral regulatory failure is indeed what drives much commentary on tort litigation as a control method.[55] While such litigation can bring needed monetary remuneration to victims, it is far less clear what lasting effect it can have for victims or what general steps towards prevention it can muster. Notably, the monetary remuneration is necessary to offset upfront legal costs of bringing the action – often a significant hurdle for the victims of human rights violations. Criminal law proceedings, either brought at the location of the accident or at the home of the corporation responsible, can level the cost profile, but this is a legal route more untested than tort litigation.[56] Even with successful personal outcomes, questions remain about how, if at all, such legal attention will address the underlying failures in policy and regulation. It is certainly unclear a priori that a judgment will bring about lasting change.

That is one of the large benefits of pursuing a human rights action against transnational pollution problems; when one starts from the top, there is a strong pressure brought to bear on all legal levels below.[57] The literature on environmental human

[54] For an introduction to the former discussions see Wouters, J. and Ryngaert (2009). C., 'Litigation for Ooverseas Ccorporate Hhuman Rrights Aabuses in the European Union: Tthe challenge of jurisdiction', Institute for International Law Working Paper No. 124, Leuven, supra at n. 11.

[55] Anderson, R. Michael. (2002). 'Transnational Corporations and Environmental Damage: Is Tort Law the Answer?', *Washburn Law Journal*, 41, 399.

[56] See Wouters & Ryngaert, supra n.11, for the relevant discussion on jurisdiction and standing.

[57] Among other more specific examples, this top-down pressure derives in the European situation from the principles of solidarity and subsidiarity, the former declaring that signatory countries to the European Convention on Human Rights will take active steps to secure the rights contained therein, and the latter declaring that action at the lowest levels should be taken toward those goals. See Ovey, Clare & White, Robin (2006). *The European Convention on Human Rights*, Oxford University Press, p. 18.

rights comes to bear here,[58] but this discussion is bounded by the Trafigura case at hand and the desire to point out specific and arguably practicable approaches. While there are many human rights instruments to examine, the fact that the problem of nonfunctional regulation here resides within Europe pulls our attention to their own regional instruments, as does the success of the European Convention on Human Rights as a whole.

The success of the European system of human rights protection most importantly promises that monetary sums would not be the only outcome if the dumping had occurred within the Council of Europe. Given the European Court on Human Rights' (ECtHR's) recent jurisprudence, victims could claim violations of a number of Convention rights in response to such an environmental catastrophe. We discuss some of those possibilities herein but note first that the simple possibility of claiming human rights violations stemming from environmental problems is both new and expansible; the outcomes of human rights decisions have notably further reaching effects than the outcomes of individual criminal and civil actions.

The derivation of environmental protection placing both substantive and procedural duties on the state from ostensibly non-environmental human rights has become a powerful topic in rights theory, and especially relevant to the European Convention on Human Rights (ECHR).[59] In recent history, the ECtHR has heard claims of violations of the right to life,[60] the right to respect for the home and private life,[61] the right to effective domestic remedies,[62] and the right to a fair trial[63] in relation to environmental problems. That is to say, harm to the environment has been found to share a common nexus with harms to established human protections. As the nexus expands in step with social-environmental consciousness, there is no evidence suggesting that states would not change their legislation to reflect the Court's negative rulings and prevent future cases, in addition to civil law and criminal law analogues

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[58] Notably the venerable Boyle, Alan & Anderson, Michael (eds.) (1996). *Human Rights Approaches to Environmental Protection*, Clarendon Press; and, inter alia, recent additions Turner, J. Stephen (2009). *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers Toward the Environment*, Kluwer; Kravchenko, Svitlana & Bonnie, E. John (2008). *Human Rights and The Environment: Cases, Law, and Policy*, Carolina Academic Press; Hayward, Tim (2005). *Constitutional Environmental Rights*, Oxford University Press.

[59] Inter alia Gomien, Donna (2005). *Short Guide to the European Convention on Human Rights*, Council of Europe; DeMerieux, Margaret (2001). 'Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms', *Oxford Journal of Legal Studies,* 21, 3, 521–561.

[60] Article 2 of the Convention, e.g. Öneryildiz v. Turkey, application no. 48939/99, Grand Chamber judgment of 30 November 2004.

[61] Article 8 of the Convention, e.g. Hatton and Others v. the United Kingdom, application no. 36022/97, Grand Chamber judgment of 8 July 2003; Guerra and Others v. Italy, application no 116 /1996/735/932, Grand Chamber judgment of 19 February 1998.

[62] Article 13 of the Convention, e.g. Powell & Rayner v. the United Kingdom, application no. 9310/81, judgment of 21 February 1990.

[63] Article 6, e.g. Taskin v. Turkey, application no. 46117/99, judgment of 10 November 2004; specifically 6(1)

of monetary rewards to the victim. The human rights pathway thus becomes a more inclusive and dynamic solution.

Despite acknowledgement of a linkage between human rights and environmental protection there is no explicit right to the environment espoused in the ECHR. Such pathways are as yet only derived and therefore less certain than the criminal and tort paths. Furthermore, establishing an explicit environmental right does not yet have consensus support either.[64] Nevertheless, at this juncture it behooves both the Trafigura situation and the general discussion on environmental oversight in the slipstream of globalization to note how well, in fact, the derived environmental protections of the ECHR work.

6.6.1 Derived Protections

Negative environmental impacts like the Trafigura environmental case have helped shape the European view of what is a "derived right" to an environmental quality. Importantly, both situations where a State Party has violated an established right via their environmental actions *and* inactions have been explored. That is, the European Court has shown a willingness to interpret the Convention as imposing both negative and limited *positive* obligations on states to secure the rights guaranteed via environmental choices. The development of positive obligations on the state has been as important as the negative duties of states not to interfere in expanding the derived-rights jurisprudence.[65]

Such positive obligations are especially helpful to environmental advocates. Positive obligations create a regulatory milieu in which states must not only refrain from infringing on citizens' rights but also actively pursue measures that assure citizens the ability to enjoy their rights. The following paragraphs lay out the human rights dimension of the Probo Koala dumping as seen from this European human rights landscape. Although there is nothing that would prevent the victims in Abidjan from lodging a complaint with the Court directly,[66] there are jurisdictional issues that complicate the legal picture. As such, given the limited scope of this contribution, we deal with those briefly and separately later in the article. The primary focus is instead on the power available in the ECHR itself, and we can illustrate this by positing a simpler situation, that the dumping occurred within the territory of a party to the Convention.

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[64] Inter alia G. Handl, Human Rights and the Protection of the Environment, in: A. Eide, C. Krause, A. Rosas (eds.). *Economic, Social, and Cultural Rights*, Kluwer 2001, pp. 303–328; Also Anderson & Boyle, supra n. 58.

[65] Mowbray, Alistair (2004). *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human* Rights, Hart Publishing.

[66] Noted simply on the ECHR website as a frequently asked question for applicants: "You do not need to be a national of one of the States bound by the Convention. The violation you are complaining of must simply have been committed by one of those States within its 'jurisdiction', which usually means within its territory." See: http://echr.coe.int/ (last visited 17 July 2009).

6.6.2 The Right to Life

Should the Probo Koala case have taken place inside one of the states party to the ECHR, the most powerful human rights article available to victims would have been a claim against Article 2, which safeguards the right to life. The Court has recognized that it is the duty of states to not only protect citizens from actions of agents of the state which could result in the taking of life,[67] but also to take appropriate forward-looking, positive actions to safeguard life.[68]

Article 2 issues emerge in a pollution context when actors engage in regulation involving the use of the environment that can have dangerous and foreseeable effects on human life. The most notable case in this regard is *Öneryildiz v. Turkey*.[69] The Öneryildiz case involved the death of family members of the applicant following an explosion at a garbage dump near their family's home. The Court found that the state knew and tolerated the housing, although the development was technically illegal. Through the toleration, the state did not fulfill its positive obligations under Article 2 to safeguard the lives of its citizens within the known probability of exactly such an explosion. The question before the Court was not whether the citizens involved had a right to a certain environment, but whether the state's failure to regulate the housing on the basis of the dangerous environmental conditions violated the positive to safeguard human life. In that sense, Article 2 created a derived obligation for the state to proactively regulate dangerous environmental scenarios.

The positive obligations to safeguard life vis-à-vis the environment arise not only in situations where a death has occurred either. The Court has also found that the positive duty arises in situations where there was a danger of loss of life.[70] The danger itself touches on the state's promise to enforce the Convention. Therefore, victims of a Probo Koala-type dumping who became sick have a claim against the state for potentially failing to protect their Article 2 rights. Given the actual loss of life and the toxicology reports from the actual case, the fact that they are still alive is more an act of providence than of proper human conduct.

Where the Probo Koala case differs, however, from other environmental cases brought as violations of Article 2 is in the level of possible foresight by state authorities. In the Öneryildiz case, it was clear that the state authorities knew of the danger posed to the houses and occupants surrounding the rubbish tip and still did nothing.[71] It is far less clear what an applicant could claim regarding the Dutch national authorities' foreknowledge of the possibility of an unsafe disposal as they inspected the Probo Koala's slops in the actual case.

The situation can be further muddied by any hypothetical regulatory situation where multiple agencies must act in concert. But unlike a criminal situation where

[67] Which was the primary purpose in composing Article 2. Ibid., p. 25.

[68] Öneryildiz, supra n. 60, para. 71.

[69] Ibid.

[70] See Markaratzis v. Greece, judgment of 20 December 2004 (Grand Chamber).

[71] Öneryildiz, supra n. 60, para. 101

fault cannot be established when a multitude of minor actors all met their duty of care, the human rights body can rule against the state here for failing to sufficiently protect despite the many overlapping but ultimately futile regulations.

Furthermore and related to this protection is the expressed procedural aspect of positive obligations under Article 2. As shown in the Öneryildiz case, in the event of an environmental tragedy there should be domestic procedures in place capable of determining the chain of command which failed, and hence, to find who is responsible. The history of the Probo Koala case shows that this procedure is something quite convoluted and difficult, and we have yet to see whether the methods available will indeed reveal the culprits. Placing a situation like this under the human rights spotlight though, places the burden on the state to show that they met positive obligations to safeguard life and to investigate lapses in that protection in the event of failures.

6.6.3 Right to Respect for Private Life and the Home

The original dumping is only part of the problem in Abidjan. The local residents report that in several places the waste is still present. If such was the case inside Europe, the citizens in the area would have access to Article 8 of the Convention: a right to respect for private and family life. Here, as with rights protected in Article 2, the Court has found positive obligations to safeguard the quality of private life and the amenities enjoyable in a home setting by properly regulating the external environment.[72] Signatory states must put procedures in place to balance the use of the environment with often the unavoidable detriment to personal life that utilizing environmental resources causes. The Court has already heard cases where sounds,[73] smells,[74] emissions,[75] and industrial processes[76] have encroached on the positive obligation to safeguard the home.[77] While the state enjoys a wide margin of appreciation in determining how to strike this balance, the citizens enjoy a narrowing of that margin as the danger they are exposed to increases.[78]

That is important, as a defendant state will likely argue that the environmentally damaging activity is in the economic interest of the community. That may be so, but the state's allowance of the damage must be proportional to the level of benefit to the community. Larger damage necessitates greater offsetting benefits, bounded

[72] Powell & Raynor v. the United Kingdom, judgment of 21 February 1990.

[73] Hatton & Others v. the United Kingdom, judgment of 8 July 2003 (Grand Chamber); Powell & Rayner v. the United Kingdom, judgment of 21 February 1990; Moreno Gómez v. Spain, judgment of 16 November 2004.

[74] López Ostra v. Spain, judgment of 9 December 1994.

[75] Guerra & Others v. Italy, judgment of 19 February 1998.

[76] Fadeyeva v. Russia, judgment of 9 June 2005.

[77] Article 1 of Protocol 1 also serves to protect property and possessions.

[78] Fadeyeva v. Russia, para. 69.

of course by other Convention rights such as the right to protection of life. As the shipment of hazardous waste is highly regulated, largely because of its potential consequences for human life, the state in this situation would have limited recourse to such economic justifications. Even if permitted, the activity would have to conform to local regulations and permitting, as well conforming to the positive obligations put on the state to allow access to information concerning dangerous activities that potentially infringe on Article 2 and 8 rights.[79]

This last point deserves greater explanation. Article 10 of the Convention safeguards the right to receive and impart information. While this does not impose a positive duty on the state to collect and disseminate information[80] it does secure a right to access information, especially information relevant in a citizen's decision to bear risks. Insofar as the citizen has a positive right to access information, the state has an obligation to provide access to it, and this positive obligation again grows proportionally with the risks involved.[81] This Convention-based – and in some respects, derived – right is now backed-up by the United Nations' Aarhus Convention.[82]

The Aarhus Convention focuses on access to justice via granting the rights of all citizens to first *receive* environmental information and second t*o participate* in environmental decision making. Although a self-standing UN instrument wholly separate from the ECHR, its goals of protecting the human environment through information sharing and participation serve to reinforce Convention jurisprudence and national legislation. The combined effect is to enable enforcement via access to information held by public authorities engaging in health/environment tradeoffs. The forward focus of both Convention-derived information rights and the Aarhus Convention speak to increasing positive obligations on states above protections to life and property. And in the case of a convoluted clean up, or difficulties in receiving medical information from national healthcare providers, it becomes less likely that the state is meeting their positive obligations to those continuing to live in an affected area. Therefore, situations similar to the Probo Koala dumping become the likely environmental problems to trigger claims alleging failure of rights guaranteed under one or both instruments.

6.6.4 Rights to Process and Remedy

Difficulties in managing the aftermath of environmental pollution can trigger Convention rights above and beyond the derived rights to information. Convoluted, excessively long, or ineffective legal process may also call into question a state's

[79] Council of Europe, p. 17.

[80] Guerra v. Italy, para. 53.

[81] Council of Europe, p. 53.

[82] Formally, United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

ability to provide access to justice, and thereby raise issues under Article 6.[83] Article 6 provides a right to a fair trial, which has been expanded by the Court's jurisprudence to include a right to access the court system.[84] The basic dynamic desired is for national authorities to provide a domestic forum to dispute and define civil rights and obligations. If the requisite dynamic does not exist to the extent a plaintiff believes it should, they can appeal to the Convention alleging that the lacuna affects the determination of their civil rights under domestic law. In the environmental context, the relation between the civil right and the environmental damage must be quite direct.[85] While some national constitutions clearly establish a constitutional right to a certain quality of environment,[86] this is still the exception, not the rule.[87] Furthermore, it is difficult to claim Article 6 infractions before an environmental problem occurs, limiting access to claims against Article 6 as ex post options. Nevertheless, the protection provided by Article 6 serves as a motivation for national authorities to have and maintain just and effective domestic procedures for all types of possibilities. This reinforces the foundations of positive obligations under the ECHR.

In addition to Article 6, Article 13 provides more flexibility in its application to environmental situations. Article 13 guarantees that where a possible violation of Convention rights exists, there is also an effective remedy should the applicant succeed in their argument.[88] Notably for the applicant, a violation of the claimed Convention right need not be found in order to succeed in a claim alleging a missing remedy.[89] Article 13 can be viewed as empowering victims in situations such as those that the Aarhus Convention also tackles. Like the powers of Article 6, the rights secured under Article 13 are a motivation for a state to create and maintain a well-functioning judicial system, and, where necessary, to take up legislation that would more effectively secure the rights under the Convention.

As we saw with outcomes from obligations to secure right to life, this is the key difference relative to criminal and tort proceedings. One can quickly see that

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[83] Procedural environmental rights are the form of an environmental right most supported by Alan Boyle. See Boyle (2007). 'Human Rights or Environmental Rights – A reassessment', *Fordham Environmental Law Review,* 18, 471.

[84] Golder v. the United Kingdom. Judgment of 21 February 1975.

[85] Balmer-Schafroth and Others v. Switzerland, case no. 67/1996/686/876, Grand Chamber judgment of 26 August 1997.

[86] E.g. Zander v. Sweden, application 14282/88, judgment of 25 November 1993; Taskin, supra n. 54 para. 117. Also see Hayward (2005) supra n. 58.

[87] Bothe, M. (1998). 'The Right to a Healthy Environment in the European Union and Comparative Constitutional Law', in: *Développements récents du droit européen de l'environment*, Antwerpen, pp. 1–9.

[88] Leander v. Sweden, para. 77.

[89] Klass & Others v. Germany, application no. 5029/71, judgment of 6 September 1978, para. 64; Silver and Others v. the United Kingdom, judgment of 25 March 1983, para. 113. Also note Hatton & Others v. the United Kingdom, supra n. 73 where a violation of Article 13 was found in spite of no violation of Article 8 being found.

although there is no explicit Convention right targeting or preventing environmental tragedies, the rights-based pathways that do exist, however indirect they may be, add real and significant pressure to the existing legal pathways. It is beyond the scope of this article too, to show exactly the forms that national legislation would expand into should they take the growing jurisprudence of derived environmental rights most seriously. Rather, here we simply point out, in light of the known shortcomings of the criminal and tort proceedings, how the rights approach changes the legal terrain in ways untouched by traditional legal action.[90] And above the financial rewards for victims and punishment of those responsible, the ECHR-based mechanism will bring pressure to national legal systems to put laws and processes into place that would act to prevent future environmental problems and provides effective remedies for victims.[91]

6.7 Extraterritorial Application of the Convention

The preceding discussion, however, operates purely in the realm of introduction. The facts behind the failures that caused the Abidjan pollution would test the boundaries of the ECHR jurisprudence. It is, nevertheless, an interesting question, especially given that it was largely the outcome of a lack of effective compliance with international and European law governing international movements of waste. As the first sections of this paper reveal, the legislative was there, but spread over areas of competence and regulatory bodies. Thus, the failure to effectively coordinate the different actors created the eventual failure.

There has been active debate in the Court as to when and where failures in State Parties' ability to regulate trigger responsibilities under the Convention. This has most often occurred in situations where a state, or an actor associated with the state, is acting outside their own territory.[92] Article I of the Convention confines the obligations of contracting parties to persons "within their jurisdiction." The question then becomes what constitutes jurisdiction? Clearly, jurisdiction is something other than territorial boundaries. Jurisdiction in international law is defined as the area of competence of a State or regulatory body to make and carry out rules of conduct

[90] That rights-language changes the game was pointed out early by: Stone, D. Christopher (1972). 'Should Trees Have Standing – Toward Legal Righs for Natural Objects', *Southern California Law Review,* 45, 450–501.

[91] See also Birnie, Boyle & Redgewell (2009). *International Law the Environment*, Oxford University Press, p. 270. As further anecdotal evidence of how international instruments can put pressure on national legislatures, note the pressure Principle 10 of the Rio Declaration has exerted on national legislatures to facilitate effective access to justice has undoubtedly led to developments in protection of the environment "Environmental issues are best handled with the participation of all concerned citizens, at the relevant level.'' Principle 10 para. 1 of the Rio Declaration on Environment and Development.

[92] A recent panel discussion touches on many of the debated issues. See Roberts, Anthea et al. (2006). 'The Extraterritorial Application of Human Rights. Panel Discussion', in: *American Society of International Law Proceedings*, 100, pp. 85–102.

on people.[93] There is no question that persons within the contracting parties' borders are considered to enjoy the protections of the Convention, as the state has clear jurisdiction over those who could act against domestic citizens. But there are also actions in which states can take part where their jurisdiction seems to creep outside of its own territorial borders.

The clearest example is during military conflicts. The Court's leading case in the matter of extraterritorial jurisdiction, *Banković v. Belgium,* took place amid the NATO missions into Serbia.[94] That highly politicized case was ruled inadmissible because the situation was not characterized by the states' having "effective control" over the situation or territory; that is, their lack of control was a sign of lack of jurisdiction.[95] In the eyes of the Court, the Member States' extraterritorial responsibilities to the Convention are not absolute, but are proportional to the amount of control possessed.

This doctrine of effective control has been outlined in other extraterritorial cases, but predominately in the question of the use of state-sponsored force outside its borders.[96]

Although the ECtHR has been arguably more conservative here than in their expansion toward environmental rights, the jurisprudence does outline a degree of legal certainty to states in assessing the potential consequences of their extraterritorial actions. In addition, there is international precedent for state's obligations to exercise control over private entities; an idea that goes quite far back in international law[97] and includes situations where a state may have failed to take necessary precautions to prevent effects caused by a corporate entity.[98]

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[93]Lowe, V. (2003). 'Jurisdiction', in: M.D. Evans (ed.), *International Law*, Oxford University Press, p. 329.

[94]Banković & Others v. Belgium and 16 Other Contracting States, Grand Chamber Decision as to the Admissibility of Application no. 52207/99, judgment of 14 November 2000. (inadmissible).

[95]Id., para. 84. Notably, a similar finding would be likely interpreting the issue under the umbrella of the UN's Human Rights Covenants as well. See M. Dennis, M. (2006). 'Application of Human Rights Treaties Extraterritorially During Times of Armed Conflict and Military Occupation, ASIL Proceedings', *American Society of International Law Proceedings,* 86, 100, 90.

[96]Esp. Loizidou v. Turkey, application no. 15318/89, Chamber judgment of 18 December 1996; Cyprus v. Turkey, judgment of 10 May 2001; Öcalan v. Turkey, application no. 46221/99, Grand Chamber judgment of 12 May 2005. Notably, the admissibility of the Loizidou case also enunciated that "registered ships and aircraft" are partly within the State's jurisdiction wherever they might be. See Admissibility of Application Nos 15299/89, 15300/89, 15318/89, decision of 3 April 1991 at para. 32. Cf. M. Kearney, Extraterritorial Jurisdiction of the European Convention on Human Rights (2002) 5 *Trinity College Law Review.* 126, 137

[97]Trial Smelter Case (U.S. v. Canada) 3 R.I.A.A. 1905 (1938 & 1941); discussing trans-boundary environmental burdens.

[98]See Robert McCorquodale in The Extraterritorial Application of Human Rights, Panel Discussion in supra n. 82, citing Case Concerning United States Diplomatic Consular Staff in Tehran (U.S. v. Iran). Judgment 1980 ICJ Rep. 3, paras. 57, 69–71. A State can also share responsibility when they aid or abet a corporate national operating internationally. Acts that can be attributed to the state fall within the ambit of the International Law Commission's (ILC) Articles

Combined with the positive substantive rights, states are therefore well aware that they have "objective obligations" under international law that can extend their liability beyond their borders.[99] Flowing from these precedents, the case can be made for the application of the ECHR to situations where a state fails to properly regulate a third-party and thereby effects a human rights violation, situations like the Probo Koala dumping. While there is still elbowroom in which a violation could take place, the multitude of established and growing human rights components have the potential to be a far more inclusive control structure than anything under civil or criminal law.

6.7.1 Extraterritoriality and the Dutch Role in the Probo Koala Case

The Probo Koala case is clearly not a question of state-sponsored action outside its borders.[100] It is, however, a case that finds a member to the ECHR acting at home where its operations are supposed to effectively control a prohibited action.[101] The action that should have been prevented by that effective control was then carried out outside the jurisdiction of the contracting state. Thus, the new question arises of whether the actions of a state over a private entity within its borders failed to provide human rights guarantees.[102] The answer is on an important level dispositive of whether or not the Netherlands secured the positive rights of any citizens delineated by the ECtHR's jurisprudence, irrespective of where they are located. As

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on the Responsibility of States for Internationally Wrongful Acts. (2001) UN GAOR. 56th Ses. Supp No 10, UN Doc A/56/10(SUPP).

[99] See Kearney, supra n. 96 at p. 131; noting the addition of the adjective, 'primarily', in the wording of (1999) Appl. No. 25781/94, Eur Comm HR at para. 71, suggesting that those within their jurisdiction are not the only set of individuals receiving rights from the Convention.

[100] Arguments to limit the reach of the Convention, besides the limits set by the doctrine of effective control, are legitimate. Notably, and similar to the arguments of NATO in the Banković case, one could argue that if the framers of the Convention had wanted to secure rights in all situations, they would have worded the Convention similar to the Geneva Conventions. See Banković, para. 25, 40, 75, 80; Also T. Abdel-Monem, How Far Do the Lawless Areas of Europe Extend? Extraterritorial Application of the European Convention on Human Rights (2005) *J. Transnational Law & Policy* 14, 159 at 185. Further, compare: Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) under which contracting parties take obligations to people "within its territory and subject to its jurisdiction"; also a more restrictive wording.

[101] See id. establishing that the ECHR does apply to members' actions abroad if their operations can be said to fall within the member state's sphere of effective control. Also Report of the Committee on Legal Affairs and Human Rights, Areas where the European Convention on Human Rights cannot be implemented, Eur. Parl. Doc. 9730, \S V para. 41 (11 March 2003).

[102] The Court has also established that acts or omissions on the part of the State which affect persons outside of jurisdiction, the responsibility of that State can be engaged by the Convention. See Stocké v. Germany, case no 28/1989/188/248, judgment of 18 February 1991, where potential unlawful collusion between German police authorities and a private investigator were acknowledged to potentially involve violation of Convention rights. The rights claimed were later found not to be violated.

such, the answer will indicate whether the country at hand must change its national legal oversight.

In the instant case, it is clear that the omission of effective control over the Probo Koala in the Port of Amsterdam was decisive for the rights of the effected individuals. The location of the individuals is immaterial to those facts, as the Convention is very clear that the applicants must not be nationals of a state bound by the Convention.[103] What matters, however, is whether there is a foreseeable causality chain between the omissions and the eventual pollution. The Dutch actions were decisive for the human rights violations, if not necessarily foreseeable in specifics. The failure to act may not be extreme enough, given the ambiguity of the relevant regulations, to find violations in criminal or tort law, but as noted above it is less likely that the failure to act would hold up against positive, human rights-based requirements.

It was clear from the actions of the port authority that they were concerned as to what would become of the abnormal waste should they allow the ship to take the slops already pumped onshore back into their cargo hold. The level of concern can be quantified if one deduces whether they failed to chain up the Probo Koala because they were unsure of their jurisdictional powers, or whether they were unphased by the abnormal slops. If the reason was the former, there is a clear failure of the regulatory structure to effect the provisions preventing the shipment of hazardous waste, and thus questions the state's positive obligations.

The legal question then is whether one could establish a link between failures to act or regulate in a way that would guarantee the rights in the Convention at the port which parallels the jurisprudence of positive obligations in environmental matters. The benefit would be both satisfaction for the victim, and an overhaul of the regulatory structure in place necessitated by the attention of a powerful human rights court.

Was there a violation of the state's positive obligation to safeguard life or a private and amendable home atmosphere though? This is not a simple question to answer. A defendant state in a similar situation would naturally argue that these rights were not within their power to guarantee to the foreign nationals, nor are they under Convention obligations to do so. But, as the port authorities can never know where a ship with dangerous pollutants will be headed or what they will do once they leave the port, there is precious little besides speculation that the waste would not end up within their own borders, or the borders of other Convention members.

The foresight dilemma here would make for an interesting litigation within the Court. The judgment would certainly render a new interpretation, and, potentially, a new boundary to the Convention's applications. Above the specifics discussed here, the general "effectiveness principle" employed by the Court in their interpretation of the Convention leads to the conclusion that it should indeed cover the damage to human rights in the Abidjan case. The Court has held that the responsibilities inherent to the Convention must be practical and effective in the pursuit of human

[103] Supra n. 66.

rights.[104] The Court must step in where "the domestic legal system. . . fails to provide practical and effective protection of the rights guaranteed."[105] To the extent that port authorities throughout Convention countries can never know where ships carrying waste may go once they leave their ports, the domestic legal systems must take this into account to actively guarantee the human rights already known to be impacted through environmental wastes. It may still be too early to hope that the Court would be amenable to reading this deeply into the situation, especially in the wake of the Banković case.[106] Nevertheless, the fact that it could have once been entertained leaves open the door for it to once again become a reality, and indeed necessitates that legal scholars seriously discuss the possibility, lest we continue to cast doubt on the effectiveness of our carefully crafted national regulatory bulwarks in the storm of globalization.

6.8 Human Rights and Corporate Responsibility

When one steps away from the theoretical field of applying the ECHR to the Abidjan case, and the larger calls for an environmental right amidst the existing human rights canon, one can glimpse one more new field of legal inquiry: corporate social responsibility. Even if the nexus of responsibility in the instant case is not wide enough to bind such corporate entities of Contracting Parties under the ECHR, are there other international instruments that bind the corporations directly?

The European Parliament has acknowledged a potential loophole in prevailing oversight long before the Probo Koala pollution. The Parliament called on the European Commission to develop a framework to bind their corporate arms to a European level of conduct outside the Community.[107] Such a framework might include instruments like the Alien Tort Claims Act in the United States, which afford foreign citizens access to domestic courts in the event of an accident.[108] Europe has been less amenable to such claims, but there is a slow change in the global picture that is promising for the individual arrayed against a transnational corporation. The willingness of national and international courts to involve themselves in the interaction of third parties and citizens of different countries is reflected in global human rights and national law; the United States has opened up their national law to foreigners via the Alien Tort Claims Act, while Europe has opened up its human rights

[104] Artico v. Italy, application no. 6694/74, judgment of 13 May 1980, at 33.

[105] A v. the United Kingdom, application no. 15599/94, judgment of 18 September 1997 at para. 48.

[106] DeSchutter, O. (2005). 'The Accountability of Multinationals for Human Rights Violations in European Law', in: *Non-state Actors and Human Rights*, Oxford University Press, pp. 491–512.

[107] Resolution on EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104). Also note UN Norms on Responsibilities of Transnational Corporations, UN Doc. E/CN.4/Sub2/2003/12/rev 2 (2003).

[108] 28 U.S.C. §1350. See Steinhard, R.G. (2005). 'Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria', *Non-State Actors and Human Rights,* Oxford University Press, pp.177–226, at 198–202. Also Wouter and Ryngaert, supra n. 11.

system. The overarching picture then is that courts globally have embraced a consensus that "the state's tolerance of a private human rights abuse actually violates the state's duty to protect the right through legislation, preventative measures, or provision of a remedy."[109]

The potential is there, but there remain concerns. The most pressing in the present climate of expanding jurisprudence is to coordinate legal efforts. The goal is the protection of the environment, and first priority therein is the securing of human rights from increasing environmental burdens. Globalization certainly is not poised to reduce its burden, and until legal theory gets together and reaches a consensus on how best to protect what is important, courts will continue to create ad hoc solutions. The unplanned and arguably haphazard expansion of multiple areas of rights and obligations under national and international law might well turn into a thicket of overlapping requirements, all as prone to error as those in the Probo Koala case. The desired coverage may be there, but it might emerge as far less efficient or even effective as a unified protection.[110] Forcing the jurisprudence to develop in a single direction by comparing the environmental problem to the environmental right appears, in light of the success of the ECtHR, to be the foremost guiding light for academics. And all of this is motivated by the less than stellar performance from utilizing existing non-human rights methods. Ratner[111] summarizes the situation that "[w]ithout some international legal standards, we will likely continue to witness both excessive claims made against actors for their responsibility and counterclaims by corporate actors against such accountability." It is cases like the Probo Koala that bring these issues to the forefront.

6.9 Conclusions

In this contribution we set out to answer the question whether a transnational response to relieve the need of victims of transnational environmental pollution is required, and if so, what response would be in order. The first part of the question should be answered with a firm "yes." It is clear from the Trafigura case that the victims and the people that try to represent them meet a range of obstacles when trying to hold both the polluters and government agencies which did not correctly apply existing law accountable for their (in)action(s). The case study shows that, entirely within itself, there exist plenty of legal rules designed to protect the environment in developing countries from shipments of waste from the developed parts of the world. The problem is all about the lack of enforcement and the lack of possibilities for the

[109] Ratner, S. (2002). 'Corporations and Human Rights: A Theory of Legal Responsibility', *Yale Law. Journal, 111,* 443, 470.

[110] "So long as environmental rights cases are brought individually, the ability to develop a systematic jurisprudence will be limited'' Osofsky, Hari. M. (2005). 'Learning from Environmental Justice: A New Model for International Environmental Rights', *Stanford Environmental Law Journal,* 24, 71–147.

[111] Ratner, supra n. 109, at 448.

victims to access various countries' judicial systems in order to get compensation for their loss.

In our view, the current legal system, both nationally and internationally, is not well-equipped to handle cases of transnational pollution, especially when developing countries are involved. We have shown that within Europe, both EU law and the European Convention of Human Rights do offer some possibilities, but for African victims these are difficult, if not impossible, to effectuate.

There are several pathways that should be explored to improve the rights of victims in cases of transnational pollution in the trail of globalization. We touched upon several here. First of all, the access to justice for victims from developing countries for actions that took place in the developed world should be improved. This is in line with the expanding notions of "jurisdiction'' and could be done by amending the Aarhus Convention to specifically include cases brought forward by non-nationals against government bodies that are responsible for wrongly (or not at all) applying the relevant legal provisions that caused damage outside their jurisdiction, or even outside the jurisdiction of any of the parties of the Aarhus Convention. As shown above, it is not unthinkable that African victims can successfully pursue a claim against a European state before the European Court of Human Rights. However, on the basis of current jurisprudence, such a claim is surrounded by legal questions. We therefore also suggest the idea of testing the boundaries of the Court with an experimental case, like the one here, so that case law on this issue can be further developed and defined.

Second, international liability law has not yet been developed well enough to accommodate victims of transnational pollution. The only instrument that does seem to cover the needs of the victims is the Liability Protocol to the Basel Convention. This protocol, however, still is a long way from entering into force. Firm international action is needed to have the protocol ratified by more states. The EU instruments with regard to liability for damage caused by transboundary shipments of waste are not aimed at the victims at all, which is a severe shortcoming. The EU is sadly lacking any follow-up to the 1999 Resolution of the European Parliament to develop a framework to hold multinational corporations accountable for their actions in developing countries, for instance by introducing an instrument that allows victims of actions by multinationals with offices in the EU to start a tort procedure against that multinational before an EU court. The Alien Tort Claims Act in the US may offer an inspiration when studying a new and revolutionary instrument like this.

Third, we think that some practical arrangements have to be made, in order to relieve the needs of the developing countries' victims of transnational pollution. One of these practicalities would have to include the creation of a flexible and easy to access system of legal aid. Also, a fund to cover immediate costs, in anticipation of the outcome of the legal procedure, is necessary. The case shows that it can easily take many years before courts reach a decision. In the meantime victims will need clean water and food or even a basic income, in case they lost their jobs as a consequence of the pollution, such as the Abidjan farmers and fishermen. These basic needs are the first to be damaged by an environmental problem such as this, and

often the last to be rectified after years of investigation, litigation, judgments, and finally, settlements making their way to the victims.

Despite the blatant failure of international law to prevent a tragedy that it was put in place to prevent, there is hope for a progressive outcome here. The members of the various European treaties have shown themselves – both in national legislation and international courts – to be quite proactive in their defense of the human environment. They, above other areas in the world, have shown a willingness to expand their concept of human rights to include the difficult-to-circumscribe relations between humans, fundamental freedoms, and the environment. There has even been excellent forward motion toward establishing rights to information as a necessary support to the guarantees of rights. Seen as a whole, the momentum clearly exists for changes and expansions of existing documents such as we suggest here.

Chapter 6

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