Learning from Environmental Justice: A New Model for International Environmental Rights

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* Assistant Professor and Director, Center for International Law, Whittier Law School; J.D., Yale Law School, 1998. This article was prepared through a fellowship project entitled *Learning from Environmental Justice: A New Model for Environmental Rights* with the Carnegie Council on Ethics and International Affairs. I would like to thank Joanne Bauer, Morgan Stoffregnan, Evan O'Neil, and Betsy Apple, as well as the other Carnegie Council Fellows, for their tremendous assistance with this project and its conceptualization throughout the fellowship year. I very much appreciate the invaluable guidance and support provided by Harold Hongju Koh, Daniel Esty, and Paul Kahn for my initial efforts in this area. My work with the Center for Law in the Public Interest on domestic environmental justice issues provided the inspiration for the model in this piece; I am immensely grateful to colleagues, clients, and co-counsel with whom I had the pleasure of interacting during my time there. I also would like to thank Rebecca Bratspies, Matthew Parlow, Radha Pathak, Marcy Peek, Christopher Stone, and Robert Tsai for their insightful feedback; Helen Carranza, Jamie Ewing, Margaret Jenkins, Lisa Mariotti, and Miji Vellakkatel for their able research assistance; Lynn Dow of the Vermont Law School Library for her generous and patient loan of books; and Joshua Gitelson for his tremendous support and assistance. Finally, I very much appreciate the excellent editorial assistance provided by members of the *Stanford Environmental Law Journal*, especially Jia Liu, Susan Ostermann, and Nicole Janisiewicz.

I. INTRODUCTION

Ogoni! Ogoni!
Ogoni is the land
The people, Ogoni
The agony of trees dying
In ancestral farmlands
Streams polluted weeping
Filth into murky rivers
It is the poisoned air

Coursing the luckless lungs
Of dying children
Ogoni is the dream
Breaking the looping chain
Around the drooping neck
of a shell-shocked land.
— *Ken Saro-Wiwa*[1]

Imagine a developing country with oil resources located beneath the ancestral lands of indigenous peoples. While the country has well-developed environmental regulations, enforcement of them is minimal. Oil companies take advantage of this lax enforcement to employ less expensive but environmentally unsound practices. They create open waste pits, flare huge quantities of natural gas, and abate spills slowly. Unsurprisingly, severe land pollution results—drinking water becomes unsafe, domesticated animals die, and community members experience a variety of health problems. Beyond these direct physical impacts, the environmental harms have a massive impact on local communities, who traditionally live off the land and regard it as sacred. Its destruction fundamentally undermines their culture and way of life.

This scenario, which unfortunately is not at all hypothetical—indigenous peoples from Brazil, Canada, Finland, Indonesia, Nigeria, Nicaragua, Papua New Guinea, and the United States, among other places, have brought claims describing the devastation they have suffered due to resource extraction on their lands[2]—provides an extreme example of the effect that environmental harm can have on humans. The environmental damage is widespread and severe. The victims are people whose lives are deeply intertwined with the land, and its destruction compromises their rights to health, land, livelihood, and culture.

Unpacking this seemingly straightforward scenario, however, reveals the complexity of legally characterizing environmental harm to

1. *Nigeria: Campaign for Human Rights Reform*, *at* http://www.amnesty.org/ailib/intcam/nigeria/ (last viewed Oct. 19, 2004) (on file with author). Ken Saro-Wiwa, a lawyer and poet who advocated on behalf of the Ogoni people, was executed along with eight other Ogoni activists in November 1995. *See* Jacques Pinto, *Ken Saro-Wiwa, Executed Champion of Ogoni Rights*, AGENCE FR.-PRESSE, Nov. 10, 1995, *available at* 1995 WL 11469059.

2. These cases are all discussed in this Article and detailed in its Appendix. They represent only a handful of the situations in which indigenous peoples have suffered harm due to resource extraction. For example, in *Aguina v. Texaco*, a case not covered in the case studies because it was resolved on *forum non conveniens* rather than substantive grounds, indigenous peoples in Ecuador made similar factual claims. *See* Aguinda v. Texaco, Inc., 303 F.3d 470 (2d. Cir. 2002).

humans. When environmental damage negatively impacts people, a question arises about whether the hardship it imposes violates their rights. Although only the strongest naysayer would claim that this terrible harm to indigenous peoples did not impinge upon their rights,[3] most situations provide less dramatic factual scenarios. For example, in *Lopez Ostra v. Spain*, a case before the European Court of Human Rights, a waste treatment plant operating without a license emitted fumes and odors that resulted in health problems for local residents.[4]

To complicate matters further, environmental damage frequently occurs as part of a process that confers some benefits in addition to the harms, but the set of people helped overlaps incompletely with the set of people harmed. For example, the oil industry in many developing countries creates an inflow of financial resources, and often provides jobs and other resources that local communities previously lacked. The people and governments receiving these benefits may argue for the existence of a right to development and characterize environmental damage as an unfortunate but necessary byproduct of economic growth.[5]

Furthermore, these potential invocations of human rights arise in an extremely complicated geopolitical context. The legacy of colonialism and the ongoing North-South power imbalances hang over the use of the

3. The international community has repeatedly recognized the protected status of indigenous peoples' resource use. *See generally* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2d ed. 2000) (discussing the status of indigenous peoples in international law); Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 1 (1994) (analyzing indigenous environmental rights); José Paulo Kastrup, *The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective*, 32 TEX. INT'L L.J. 97 (1997) (discussing international law protections for indigenous peoples' environmental rights); Hari M. Osofsky, *Environmental Human Rights under the Alien Tort Claims Act: Redress for Indigenous Victims of Multinational Corporations*, 20 SUFFOLK TRANSNAT'L L. REV. 335 (1997) (arguing that customary international law had developed sufficiently for indigenous peoples to bring environmental rights claims under the Alien Tort Statute); Maria Stavroupoulou, *Indigenous Peoples Displaced from Their Environment: Is There Adequate Protection?*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 105 (1994) (exploring international law protections for indigenous environmental rights); Lawrence Watters, *Indigenous Peoples and the Environment: Convergence from a Nordic Perspective*, 20 U.C.L.A. J. ENVTL. L. & POL'Y 237 (2001/2002) (same); William Andrew Shutkin, Note, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479 (1991) (same).

4. 20 Eur. Ct. H.R. 277 (1995), at paras. 7–9.

5. For a discussion of the right to development, see LOUIS HENKIN ET AL., HUMAN RIGHTS 68–72 (1999) (considering the relationship between the concepts of human rights and development); ANJA LINDROOS, THE RIGHT TO DEVELOPMENT (1999) (analyzing the right to development from a legal and political perspective); THE RIGHT TO DEVELOPMENT IN INTERNATIONAL LAW (Subrata Roy Chowdhury et al. eds., 1992) (providing a compilation of papers on various topics relating to the right to development).

terms "development" and "rights."[6] Formal legal constructions of states' sovereignty and obedience to international norms largely fail to reflect the actual dynamics that exist among states.[7] Moreover, the most severe environmental damage often occurs within dictatorial regimes that mistreat their people in numerous other ways.[8] For example, in *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* before the African Commission on Human and Peoples' Rights, the Ogoni people suffered not only extreme environmental impacts, but also attacks on their homes and villages in response to their opposition to the oil exploration.[9]

The international legal regime governing environmental harm to humans is not a unified one; the problems caused by environmental harms lie at a complicated legal intersection that poses several problems of characterization. First, none of the potentially applicable areas of international law—environmental, human rights, anti-discrimination—fully captures the situation. Each one focuses on a particular dimension of the problem. Second, international environmental law and human rights law each treats state sovereignty differently. If environmental damage is characterized as purely environmental, states have unbreachable sovereignty except in cases of transboundary or global impacts.[10] If, on the other hand, the environmental damage is viewed as impacting human rights, the internal behavior may be of international concern.[11] Finally, to the extent that sovereignty concerns dictate a human rights approach to these problems, further confusion results because only two binding instruments include the right to a healthy

6. *See* sources cited *supra* note 5 and *infra* note 7.

7. *See* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (analyzing the reasons that nations obey international law). *See also* Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002) (discussing the extent to which nations comply with international human rights treaties and those treaties impact human rights practices).

8. Two of the case studies reflect this dynamic. *See* Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Commission on Human and Peoples' Rights (2001) (discussing environmental degradation in the context of other human rights violations in Nigeria); Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116 (C.D. Cal. 2002) (discussing environmental degradation in the context of a civil war and racial discrimination in Papua New Guinea).

9. Communication No. 155/96, African Commission on Human And Peoples' Rights (2001), at paras. 1–10.

10. *See infra* Part II.B.1. In addition, specific treaties carve out limitations even to some internal behaviors. *See id*.

11. *See infra* Part II.B.2. The human rights regime, on the other hand, does not provide remedies for all abuses. Many human rights treaties are nonbinding, with no clear mechanisms for enforcement. Standing for non-state actors in international tribunals is quite limited. *See id*.

environment.[12] Most human rights approaches to environmental harm thus must choose among a myriad of potentially applicable general rights.

The scholarly literature to date has not addressed this characterization dilemma. While numerous pieces discuss the emerging international environmental human rights regime and analyze various aspects of the legal developments within it,[13] none of them has proposed a systematic structure for approaching environmental harm to humans. This Article attempts to fill that gap.

In an effort to understand current characterization approaches and propose future directions for advocacy, this Article draws from United States environmental justice litigation approaches to create a model for deconstructing environmental harm to humans, and then applies this model to sixteen case studies. This analysis of representative cases from international, regional, and United States tribunals provides a basis for understanding how advocates and courts have addressed the rights implications of environmental harm, and, in so doing, for engaging these problems more effectively in the future. The Article also provides a starting point for grappling with the complicated legal intersections at the heart of achieving greater environmental justice at an international

12. *See infra* notes 184 & 185 and accompanying text.

13. *See, e.g.*, SANTIAGO FELGUERAS, DERECHOS HUMANOS Y MEDIO AMBIENTE (1996) (providing an overview of environmental problems, a discussion of a right to a healthy environment, and an analysis of emerging rights); HUMAN RIGHTS AND THE ENVIRONMENT: CONFLICTS AND NORMS IN A GLOBALIZING WORLD (Lyuba Zarsky ed., 2002) (providing a series of pieces on indigenous rights and corporate accountability, and on specific instances of environmental rights violations); HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996) (discussing environmental rights conceptually, and then focusing on international developments and national case studies); LIFE AND DEATH MATTERS: HUMAN RIGHTS AND THE ENVIRONMENT AT THE END OF THE MILLENNIUM (Barbara Rose Johnston ed., 1997) (providing a collection of articles on various aspects of environmental rights); LINKING HUMAN RIGHTS AND THE ENVIRONMENT (Romina Picolotti & Jorge Daniel Taillant eds., 2003) (same); IKE OKONTA & ORONTO DOUGLAS, WHERE VULTURES FEAST: SHELL, HUMAN RIGHTS, AND OIL IN THE NIGER DELTA (2001) (discussing environmental rights problems posed by Shell in Nigeria); THE RIGHT OF THE CHILD TO A CLEAN ENVIRONMENT (Agata Fijalkowski & Malgosia Fitzmaurice eds., 2000) (discussing children's environmental rights); Sumudu Atapattu, *The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law*, 16 TUL. ENVTL. L.J. 65 (2002) (surveying the development of environmental rights from the Stockholm Conference to the present); Natalie L. Bridgeman, *Human Rights Litigation Under the ATCA as a Proxy for Environmental Claims*, 6 YALE HUM. RTS. & DEV. L.J. 1 (2003) (analyzing the Alien Tort Statute as a mechanism for redressing environmental claims against multinational corporations); Linda A. Malone & Scott Pasternack, *Exercising Environmental Human Rights and Remedies in the United Nations System*, 27 WM. & MARY ENVTL. L. & POL'Y REV. 365 (2002) (detailing how environmental claims could be made within the United Nations system). For a discussion of indigenous environmental rights in particular, see sources cited *supra* note 3.

level.[14]

Part II explores the characterization problem that stymies international law solutions to environmental harm to humans. Part III uses United States environmental justice litigation strategies as the basis for a model that assesses the human rights implications of environmental harm. Part IV examines the application of the model to sixteen case studies and suggests lessons for future advocacy efforts. The Article concludes in Part V with a call for greater coordination of environmental rights advocacy. The individual cases are catalogued in detail in the Appendix.

II. PROBLEMS OF LEGAL CHARACTERIZATION

Characterization dilemmas are not unique to the intersection of environmental damage and human rights. Whenever transnational problems lie at legal intersections, available legal solutions tend to be incomplete.[15] What further distinguishes this particular intersection, however, are the differential sovereignty regimes of the applicable law. Because international human rights law provides a basis for intervention when harm occurs solely within another state's borders while international environmental law generally does not, victims of environmental harm are forced to turn to human rights approaches. These approaches, however, pose their own characterization problem, as multiple human rights theories could be applied to each set of facts. The sections that follow address the substantive limitations of applicable international law, the varying approaches to state sovereignty taken by international environmental law and international human rights law, and the complications imposed by applying general human rights law to environmental harm.

14. This Article is the first in a series of pieces exploring international environmental intersections. In future pieces, I intend to explore other legal intersections that impact international environmental justice problems, such as environment and energy, environment and armed conflict, and environment and trade.

15. For a discussion of difficulties at other legal intersections, see, for example, John H. Knox, *The Judicial Resolution of Conflicts Between Trade and the Environment*, 28 HARV. ENVTL. L. REV. 1 (2004) (analyzing the WTO Appellate Body's resolution of trade and environment conflicts); Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280 (1982) (discussing how the Restatements should address issues at the intersection of public and private international law); Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of United States Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT'L & COMP. L.J. 27 (2002) (analyzing the difficulties battered immigrant women face due to the intersection of criminal and immigration law).

A. *Limitations of Applicable International Law*

Advocacates seeking to address environmental harm to humans at an international level must contend with the inherently multifaceted nature of such harms. Although the various negative impacts implicate several areas of law, they do not fit neatly into any one of those areas. No matter how the problems are characterized—as violations of international environmental law, human rights law, or anti-discrimination law—the description of them will be incomplete.

International environmental law primarily focuses on environmental damage, rather than on its impact on human beings. Its ultimate end is certainly to serve human purposes; both treaty and customary international environmental law aim to solve problems that matter to people, and our species' survival may depend on our ability to find more sustainable approaches.[16] But the focus of environmental treaties is primarily on constraining environmentally deleterious behavior, rather than on preventing injuries to people. The Montreal Protocol, for instance, creates a structure for limiting ozone depleting emissions, rather than for minimizing the injuries that might result from the pollution.[17] Similarly, the principles of international environmental law primarily address prevention of environmental damage and responsibility for remediation;[18] even the obligation not to cause environmental harm centers on a state's broad obligation not to use its territory in a way that causes damage in another state—as encapsulated in the *Trail Smelter* arbitration[19]—rather than on a more specific duty to avoid human impact.[20]

In contrast, international human rights law focuses entirely upon human impacts, with little concern for the environmental dimension of the problem. Only two binding human rights treaties contain a right to a

16. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1–165 (2d ed. 2002) (analyzing international environmental problems and their root causes).

17. Montreal Protocol on Substances that Deplete the Ozone Layer, arts. 2-8, Sept. 16, 1987, 1522 U.N.T.S. 3 (entered into force Jan. 1, 1989). *See also* HUNTER ET AL., *supra* note 16, at 542–54.

18. HUNTER ET AL., *supra* note 16, at 371–438 (analyzing the principles of state sovereignty, right to development, common heritage of humankind, common concern of human kind, intergenerational equity, common but differentiated responsibilities, prevention, precaution, polluter and user pays, subsidiarity, obligation not to cause environmental harm, state responsibility, good neighborliness and duty to cooperate, providing prior notification and good faith consultation, duty to assess environmental impact, and public participation).

19. Trail Smelter Arbitration (U.S. v. Can.) (1941), 3 R.I.A.A. 1938 (1949) (holding that a trail smelter in Canada must cease causing damage in the United States).

20. *See* HUNTER ET AL., *supra* note 16, at 419–24.

healthy environment—the African Charter on Human and Peoples' Rights and the San Salvador Protocol—so most human rights litigation brought to address environmental harm involves an application of general rights, such as rights to life and health, to the environmental harm.[21] In fifteen of the sixteen case studies, for example, the claimed rights violations included the environment as part of the factual situation causing the harm; the rights themselves had no specific connection to the environment.[22]

The international law preventing discrimination, which can be viewed as a subset of the human rights regime, has a similarly limited focus. Environmental harm is relevant to a claim under the International Convention on the Elimination of All Forms of Racial Discrimination, the anti-discrimination provisions of other binding international agreements, or the customary international law prohibiting racial discrimination only to the extent that the harm constitutes discrimination.[23] Nondiscriminatory harm falls outside of the parameters of concern, and thus a large portion of environmental harm to humans is not within the ambit of this area of law.

B. *Varying Sovereignty Regimes*

States' sovereignty and equality serve as foundations for international law.[24] These principles emerged from the classical Westphalian conception of the state's absolute authority over its people and territory.[25] Although both international environmental and human rights law provide exceptions to the Westphalian concept of sovereignty, they differ fundamentally in the extent to which they interfere with state sovereignty when acts have no direct transnational consequences. The human rights regime allows greater intrusion upon states' internal affairs and thus reaches situations that international environmental law cannot.

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21. *See infra* Part IV.A.1.

22. *See id*.

23. *See* International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 19, 1966, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352; Theodor Meron, *The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination*, 79 AM. J. INT'L L. 283 (1985) (providing an overview of the Convention's reach).

24. *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 289–90 (5th ed. 1998).

25. For a discussion of the Westphalian model and its evolution, see Antonio F. Perez, Review Essay, *Who Killed Sovereignty? Or: Changing Norms Concerning Sovereignty in International Law*, 14 WIS. INT'L L.J. 463 (1996).

1. *International environmental law.*

The international community began to put limits on environmental sovereignty well before the modern treaty regime emerged following the Stockholm Conference in 1972.[26] In addition to the early conventions on migratory wildlife and shared watercourses,[27] the 1941 *Trail Smelter* arbitration reinforced the notion that compensation must accompany state behavior that produces environmental damage beyond its borders.[28] The international environmental treaty regime that exploded following the 1972 conference at Stockholm addresses problems ranging from regulating the use of Antarctica[29] and outer space[30] to controlling marine,[31] river, [32] and air pollution[33] to protecting endangered species.[34] By the 1980s a "second generation" of environmental treaties had emerged to address more complex global issues such as ozone depletion,[35] climate change,[36] shared use of the ocean,[37] movement and

26. *See* HUNTER ET AL., *supra* note 16, at 166–216 (providing a history of international environmental law). For a broader discussion of some of the wide-ranging environmental concerns and their policy solutions, see THE INTERNATIONAL POLITICS OF THE ENVIRONMENT: ACTORS, INTERESTS, AND INSTITUTIONS (Andrew Hurrell & Benedict Kingsbury eds., 1992) (discussing standards, institutions, and power in international environmental policy); PRESERVING THE GLOBAL ENVIRONMENT: THE CHALLENGE OF SHARED LEADERSHIP (Jessica Tuchman Mathews ed., 1991) (discussing population, deforestation, ozone, climate change, and economic and regulatory policy regimes for addressing them); CHRISTOPHER D. STONE, THE GNAT IS OLDER THAN MAN: GLOBAL ENVIRONMENT AND THE HUMAN AGENDA (1993) (discussing the transboundary and global nature of environmental problems and various policy approaches to them).

27. *See, e.g.*, General Convention Relating Hydraulic Power Affecting More, Dec. 9, 1923, 36 L.N.T.S. 76; Treaty for the Preservation and Protection of Fur Seals, Dec. 14, 1911, 37 Stat. 1542.

28. *See* Trail Smelter Arbitration (U.S. v. Can.) (1941), 3 R.I.A.A. 1938 (1949). *See also* Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

29. *See* Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71.

30. *See* Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, 610 U.N.T.S. 205.

31. *See* Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Dec. 29, 1972, 26 U.S.T. 2403, 1046 U.N.T.S. 120.

32. *See* Convention on the Protection of the Rhine River Against Pollution by Chemical Pollution, Dec. 3, 1976, 1124 U.N.T.S. 375; Convention on the Protection of the Rhine River Against Pollution by Chlorides, Dec. 3, 1976, 16 I.L.M. 265.

33. *See* Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, T.I.A.S. No. 10541, *reprinted in* 18 I.L.M. 1442.

34. *See* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243.

35. *See* Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1550 (entered into force Jan. 1, 1989); Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, UNEP Doc. 1G.53/5/Rev.1, *reprinted in* 26 I.L.M. 1529.

36. *See* United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M.

disposal of hazardous waste,[38] and biodiversity.[39] Additional declarations reinforced the principles that undergird these agreements and the customary international law that emerged from them.[40] The limitations created by these agreements attempt to address not only transboundary but also global commons harms.[41]

Despite these incursions upon traditional sovereignty, international environmental law constrains international intervention when behavior lacks transboundary or global commons impacts. This principle has been enunciated in both the Stockholm and Rio Declarations[42] and throughout the scholarly literature.[43] Although the international community

849 (1992), *available at* http://www.unfccc.de/ (last visited Nov. 3, 2004). The Kyoto Protocol, Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32 (not yet in force). For the status of its ratification, see http://unfccc.int/resource/kpstats.pdf (last visited Nov. 3, 2004) (on file with author).

37. *See* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3.

38. *See* Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657; Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa, Jan. 29, 1991, 30 I.L.M. 775.

39. *See* United Nations Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, 151.

40. *See, e.g.*, *Report of the World Summit on Sustainable Development, Res. 1, Annex: Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF.199/20 (2002); *Rio Declaration on Environment and Development*, U.N. GAOR, 46th Sess., U.N. Doc. A/CONF. 151/5/Rev. 1, June 13, 1992, 31 I.L.M. 874 (1992); *Final Report of the Experts Group on Environmental Law on Legal Principles for Environmental Protection and Sustainable Development*, *reprinted in* ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT 25 (1985); *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, at 21, U.N. Doc. A/37/L.4 and Add.1 (1982); *Report of the World Commission on Environment and Development*, U.N. GAOR, 42d Sess., U.N.Doc. A/42/427 (1987); *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/Conf. 48/14 (Stockholm 1972), 11 I.L.M. 1416 (1972). For a discussion of general principles of international environmental law, see sources *supra* note 26 and *infra* notes 41, 42.

41. For a discussion of global commons management, see STONE, *supra* note 26, at 71–95.

42. This principle is stated in the Rio and Stockholm Declarations as follows:

> States have, in accordance with the Charter of the United Nations and principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental *and developmental* policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or other areas beyond the limits of national jurisdiction.

Stockholm Declaration of the United Nations Conference on the Human Environment, Principle 21, G.A. Res. 2997, U.N. GAOR, 27th Sess., U.N. Doc. A/ Conf.48/14/Rev/1, 11 I.L.M. 1416 (1972); *Rio Declaration on Environment and Development*, Principle 2, U.N. GAOR, 46th Sess., U.N. Doc. A/CONF. 151/5/Rev. 1, June 13, 1992, 31 I.L.M. 874 (1992) (the italicized language was added in the Rio Declaration's version of the principle and did not appear in the Stockholm Declaration's version).

43. *See, e.g.*, GEORGE ELIAN, THE PRINCIPLE OF SOVEREIGNTY OVER NATURAL RESOURCES (1979) (providing analysis of the international environmental law principle of state

certainly would prefer that states follow good internal environmental practices, international environmental law provides no basis for external intervention when the harm is purely domestic.[44]

2. *International human rights law.*

International human rights law, including its protections against discrimination, challenges traditional notions of sovereignty by viewing a state's treatment of its citizens as of international rather than merely domestic concern.[45] Universal jurisdiction provides the formal legal basis for intervention into another state's serious human rights violations when other jurisdictional ties, such as territoriality or nationality, do not exist, on the theory that some behaviors are so unacceptable that they are every nation's concern regardless of where they occur or who they involve.[46]

sovereignty over natural resources); NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES (1997) (same); Alexander Kiss, *The Rio Declaration on Environment and Development*, *in* THE ENVIRONMENT AFTER RIO: INTERNATIONAL LAW AND ECONOMICS 55, 55-57 (Luigi Campiglio et al. eds., 1994) (same); Franz Xaver Perrez, *The Relationship Between "Permanent Sovereignty" and the Obligation Not To Cause Transboundary Environmental Damage*, 26 ENVTL. L. 1187 (1996) (same); Philippe Sands, *International Environmental Law: An Introductory Overview*, *in* GREENING INTERNATIONAL LAW xv, xxi–xxii (Philippe Sands ed., 1994) (same); A. Dan Tarlock, *Exclusive Sovereignty Versus Sustainable Development of a Shared Resource: The Dilemma of Latin American Rainforest Management*, 32 TEX. INT'L L.J. 37 (1997) (same).

44. *See supra* notes 42 & 43 and accompanying text.

45. *See* HENKIN ET AL., *supra* note 5, at 73.

46. For an analysis of universal jurisdiction, see Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, 45 HARV. INT'L L.J. 183 (2004) (analyzing modern approaches to universal jurisdiction); Kenneth Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988) (same); Henry J. Steiner, *Three Cheers for Universal Jurisdiction—Or Is It Only Two?*, 5 THEORETICAL INQUIRIES L. 199 (2004)(same); Hari M. Osofsky, Note, *Domesticating International Criminal Law: Bringing Human Rights Violators to Justice*, 107 YALE L.J. 191, 193–98 (1997) (same). There are five bases upon which a nation can exercise jurisdiction: 1) territorial—wrongs occurred within the nation's territory; 2) nationality—offender is a national of the state taking jurisdiction; 3) passive personality—victim is a national of the state taking jurisdiction; 4) protective—acts impinge upon important state/national security interest; and 5) universal—acts are of universal concern. For an analysis of these bases, see BROWNLIE, *supra* note 24, at 303–09; LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 1088–1177 (4th ed. 2001); and Ved P. Nanda, *International Human Rights and International Criminal Law and Procedure: Judicial Remedies in United States Courts for Breaches of Internationally Protected Human Rights*, *in* INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE 483, 490–93 (Ved P. Nanda & M. Cherif Bassiouni eds., 1987). Universal jurisdiction has long been recognized as part of the law of nations. It was originally used in the context of piracy; because pirates acted on the high seas and moved between territories, the only effective way for nations to fight this scourge was to have a tacit agreement that any nation could capture and prosecute a pirate. *See* BROWNLIE, *supra* note 24, at 234–46 (describing the jurisdictional regime used to maintain order on the high seas).

In the aftermath of World War II's genocidal atrocities, a number of states recognized genocide, war crimes, crimes against peace, and crimes against humanity as crimes of an international nature and created a structure for international and national prosecutions of such violations.[47] Following these trials and the creation of the United Nations, whose charter explicitly promotes human rights,[48] members of the international community adopted numerous human rights documents and treaties covering an ever-widening range of rights.[49]

Some of these human rights treaties have created international[50] and regional tribunals[51] to hear claims of human rights abuses suffered within state parties' borders. In addition, treaties addressing violations of slavery,[52] apartheid,[53] terrorism,[54] and torture[55] have contained

47. *See* Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277. *See also* BROWNLIE, *supra* note 24, at 565–68; Osofsky, *supra* note 46, at 194–96. The trials at Nuremberg and Tokyo raised complex questions about the appropriate role of the international community in addressing human rights violations.

48. *See* U.N. CHARTER art. 1 ("The purposes of the United Nations are . . . .3. To achieve international co-operation in . . . promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.").

49. Following the non-binding *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Supp. No. 13, at 71, U.N. Doc. A/810 at 71 (1948), the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 and International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 provided binding commitments to protect human rights.

50. *See, e.g.*, International Covenant on Civil and Political Rights, *supra* note 49 (establishing Human Rights Committee); Optional Protocol to the International Covenant on Civil and Political Rights, Dec.16, 1966, 999 U.N.T.S. 171 (establishing powers of the Human Rights Committee); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 17, G.A. Res. 46, U.N. GAOR, 39th Sess., Annex, U.N. Doc. E/CN.4/1984/72, 23 I.L.M. 1027, *revised by* 24 I.L.M. 535 (1985) (creating the Committee Against Torture).

51. *See, e.g.*, European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S 221, E.T.S. 5 (establishing the European Commission of Human Rights and European Court of Human Rights); American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 101 (establishing the Inter-American Commission on Human Rights and Inter-American Court of Human Rights); African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58 (establishing the African Commission on Human and Peoples' Rights).

52. *See* Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 (entered into force Apr. 30, 1957).

53. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 244.

54. *See* Convention for the Suppression of Unlawful Seizure of Aircraft, *opened for signature* Dec. 16, 1970, 10 I.L.M. 133, 134; Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *opened for signature* Sept. 23, 1971, 10 I.L.M. 1151, 1154; International Convention Against the Taking of Hostages, *opened for signature* Dec. 18, 1979,

increasingly explicit international criminalization and universal jurisdiction provisions. Some nations' courts—particularly those of the United States and other common law countries, have adjudicated human rights claims—based mainly on customary international law, on universal jurisdictional grounds.[56]

These various mechanisms have not provided certain redress for victims of human rights violations. Only states—and not individuals—have standing to bring claims before the International Court of Justice.[57] The existing international and regional human rights tribunals do accept petitions from private parties, but have limited enforcement mechanisms.[58] Similarly, United States courts have had difficulty collecting the large judgments awarded for human rights violations abroad.[59]

Moreover, prior to the establishment of the International Criminal Court, international prosecutions of human rights violations were entirely ad hoc, arising out of a desire to address the atrocities committed during the conflicts of World War II,[60] the former

U.N.T.S. 205.

55. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 23 I.L.M. 1027, *revised by* 24 I.L.M. 535 (1985).

56. Under the Alien Tort Statute, 28 U.S.C.A. § 1350 (2000), United States courts have found a cause of action for: torture, *see* Filartiga v. Pena-Irala, 630 F.2d 876, 881–85 (2d Cir. 1980); prolonged arbitrary detention and summary execution, *see* Forti v. Suarez-Mason, 672 F. Supp. 1531, 1541–42 (N.D. Cal. 1987); disappearances, *see* Forti v. Suarez-Mason, 694 F. Supp. 707, 709 (N.D. Cal. 1988) (on rehearing); cruel, inhuman, or degrading treatment (when constitutionally proscribed), *see* Xuncax v. Gramajo, 886 F. Supp. 162, 184–89 (D. Mass. 1995); genocide and war crimes, *see* Kadic v. Karadzic, 70 F.3d 232, 242–43 (2d Cir. 1995) (committed abroad by foreign nationals against foreign nationals). The United Kingdom has followed the United States jurisprudence in finding torture to be a *jus cogens* norm, before denying relief on sovereign immunity grounds. *See* Al-Adsani v. Government of Kuwait, 107 I.L.R. 536 (Eng. C.A. 1996). New Zealand's Court of Appeal has indicated that extreme human rights abuses may provide an exception to sovereign immunity at common law. *See* Controller & Auditor-General v. Davison, [1996] 2 N.Z.L.R. 278. In a controversial trial, Israel prosecuted Adolph Eichman for genocide. *See* DAMROSCH ET AL., *supra* note 46, at 1318. For a discussion of Belgium's controversial universal jurisdiction law, see Malvina Halberstam, *Belgium's Universal Jurisdiction Law: Vindication of International Justice or Pursuit of Politics?*, 25 CARDOZO L. REV. 247 (2003). Most recently, on November 20, 2004, the Center for the Constitutional Rights and four former Iraqi prisoners filed a suit under Germany's new law providing for universal jurisdiction against George W. Bush's administration and senior military officials for torture and other human rights violations at Iraq's Abu Ghraib prison. *See* Jeffrey Fleishman, *German Suit Accuses U.S. of Condoning Iraq Torture*, L.A. TIMES, Dec. 1, 2004, at A10.

57. *See* Statute of the International Court of Justice, art. 34, para. 1, 59 Stat. 1055, 1059 (1945).

58. *See supra* notes 50 and 51.

59. *See* BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 218–24 (1996).

60. For a discussion of the World War II tribunals at Nuremberg and Tokyo, see *supra* note

Yugoslavia, and Rwanda.[61] These ad hoc tribunals, like the fledgling International Criminal Court, have focused primarily on the prosecution of international criminals rather than on the redress of victims' grievances.[62] That prosecutorial focus has limited their utility as forums in which victims can address environmental harms.

Despite these limitations, international human rights law provides a potential avenue of redress for victims of environmental damage. As detailed in Part IV and the Appendix, victims of environmental abuse have been able to obtain positive judgments from international and regional human rights tribunals. Nations retain permanent sovereignty over their natural resources, but face checks on how they treat the people who are affected by resource use.[63] If environmental damage constitutes a human rights violation, grounds exist for a claim under international law, even when the harm occurs solely within a state's territorial jurisdiction. The international human rights regime thus provides a mechanism for limiting state sovereignty when environmental harm impacts human beings.

C. *Divergent Applications of General Rights*

Advocates have used human rights law to bring actions before various tribunals on behalf of victims of environmental harm when other legal options would have led to sovereignty roadblocks. Their efforts and the resultant decisions have been inconsistent, however, with different claims made on similar facts. For instance, in United States federal courts, when plaintiffs brought claims for severe environmental harm caused by resource-extractive industries, grounds ranged from the right to life and health in some cases[64] to international environmental

46 and accompanying text.

61. For a comparison of the Yugoslav and Rwandan tribunals, which were developed through U.N. Security Council Resolutions, see Symposium, *Critical Perspectives on the Nuremberg Trials and State Accountability: Panel III: Identifying and Prosecuting War Crimes: Two Case Studies–the Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. 631, 654–55 (1996); Mark R. Von Sternberg, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity,* 22 BROOK. J. INT'L L. 111 (1996).

62. *See* CARTER ET AL., INTERNATIONAL LAW 1094–1106 (4th ed. 2003). *See generally* Robert T. Alter, *International Criminal Law: A Bittersweet Year for Supporters and Critics of the International Criminal Court*, 37 INT'L L. 541 (2003) (discussing the entry into force of the Rome Statute).

63. International human rights law represents a "derogation" from traditional state sovereignty over internal matters. Louis Henkin, *Human Rights and State "Sovereignty,"* 25 GA. J. INT'L & COMP. L. 31, 31–32 (1995–96).

64. *See, e.g.*, Flores v. Southern Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003) (claiming

law, cultural genocide, and genocide in another.[65]

Although a combination of opportunism and litigation strategy may at least partially explain the lack of coordinated approaches, these inconsistencies may also result from the lack of a coherent legal regime. Because of the dearth of treaties that contain a binding right to a healthy environment, most claims of environmental rights violations apply general rights—those with no specific connection to the environment—to the particular factual contexts.[66] Moreover, the range of arguments made in the regional and international forums, which reflect differences in the treaties upon which they depend, present an unclear path for future claimants .

These divergent approaches are not only confusing but also potentially damaging to plaintiffs. In the United States Alien Tort Statute context, for example, the Second Circuit used the Fifth Circuit's rejection of genocide and cultural genocide claims in *Beanal v. Freeport-McMoran* as persuasive authority to undermine claims based on the rights to life and health in *Flores v. Southern Peru Copper Corporation*.[67]

As discussed in the Introduction, scholarship on environmental rights has not yet attempted to develop a more systematic approach to these problems by analyzing past decisions of tribunals.[68] The next two Parts attempt to develop such an approach by proposing a model for deconstructing situations of environmental harm to humans and analyzing its application to a series of case studies.

III. A MODEL FOR CATEGORIZING ENVIRONMENTAL RIGHTS VIOLATIONS

Environmental harms to humans occur in a diverse set of factual situations. Abusers might include states, corporations, individuals, or some amalgam of the three. Victims similarly vary, from indigenous peoples whose very survival is tied to the land, to people who lack any special connection to the land but happen to live close to the pollution source. The causes of environmental injuries range from accident to

violations of the rights to life and health); Aguinda v. Texaco, 303 F.3d 470 (2d Cir. 2002) (same); Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116 (C.D. Cal. 2002) (same).

65. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (claiming violations of international environmental law, cultural genocide, and genocide).

66. *See supra* Part II.A.

67. *See, e.g.*, *Flores*, 343 F.3d at 146 (referencing the precedent from *Beanal*, 197 F.3d at 161). The U.S. Alien Tort Statute states, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C.A. § 1350 (2000).

68. *See supra* note 13 and accompanying text.

repression to revenge,[69] and the scope of abuse varies with respect to the amount of damage[70] and frequency of occurrence. The environmental impact may be an isolated harm or may occur in the context of other abuses. For instance, the facts of *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, in which the government committed additional human rights violations, exemplify the reality that governments that show a disregard for their citizens' basic rights often protect the environment poorly as well.[71]

As discussed in Part II, the sovereignty limitations in international environmental law dictate a human rights approach to these problems. The limited number of treaties containing a right to a healthy environment, however, forces advocates to apply general rights to environmental harms. The sections that follow develop a model for unpacking the factual complexities these situations pose and comparing the various rights theories that might be used to obtain redress. This deconstruction of how advocates and courts translate environmental impacts into breaches of rights provides a basis for approaching international environmental justice problems more systematically.

The schema draws from United States environmental justice litigation approaches to define factors relevant to determining when the harm constitutes a human rights violation: the nature of the environmental harm to victims, the relationship between the polluters and victims, and evidence of discrimination. As discussed in more detail in Part III.A, each component of the model targets a specific aspect of international environmental justice problems.

A. *Learning from Environmental Justice*

Since the advent of the environmental justice movement in the early 1980s, United States advocates, decisonmakers, and tribunals have struggled with how to address disproportionate environmental harm to humans. The cross-cutting nature of these issues has resulted in multiple legal strategies; advocates have drawn from environmental law,[72] torts

69. *See* Appendix.

70. In addition to more easily measurable injuries to persons and property, damage might take the form of increased risk of disease or death.

71. Communication No. 155/96, African Commission on Human And Peoples' Rights (2001), at paras. 1–10. *See also infra* note 88 and accompanying text.

72. *See, e.g.*, Blue Legs v. EPA, 668 F. Supp. 1329, 1342 (D.S.D. 1987) (Resource Conservation and Recovery Act action based on open waste dumps on Native American land); Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd en banc sub nom*, Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975) (National Environmental Policy Act of 1969 action enjoining further work on freeway); Environmental

law,[73] and civil rights law[74] in formulating their claims.[75] The applicable domestic law, however, is far more developed than its international counterpart.

Although international law lacks a true analog for any of these domestic forms, this tripartite division serves as a useful tool for analyzing the dimensions of potential environmental rights claims. Domestic environmental law provides a lens for examining the harm as a violation of universally applicable environmental standards. The tort law perspective, with its emphases on harm, duty of care, and causation, provides a mechanism for examining the complex relationships that underlie international problems. Finally, civil rights law challenges the unfairness inherent in the current distribution of environmental harm; the problem may not be simply that environmental harm occurred, but rather that it disproportionately affects a particular individual or group or

Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970) (Federal Insecticide, Fungicide, and Rodentcide Act action by environmental organizations to challenge the Secretary of the Department of Agriculture's failure to cancel DDT).

73. *See, e.g.*, Anderson v. W.R. Grace, 628 F. Supp. 1219 (D. Mass. 1986) (nuisance action for leukemia allegedly arising from contamination of groundwater in Woburn, Massachusetts). This case was featured in a book and later movie. *See* Jonathan Harr, A CIVIL ACTION (1996).

74. *See, e.g.*, Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979) (§ 1983 suit for discriminatory siting of municipal waste facility); Hawkins v. Town of Shaw, Miss., 437 F.2d 1286 (1971) (§ 1983 suit for inequitable provision of municipal services). The intent requirement has been a formidable hurdle for Equal Protection Clause suits brought to prevent discriminatory siting of environmental harms. *See* Luke W. Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L.J. 523, 538-41 (1994). The decision in *Alexander v. Sandoval*, 532 U.S. 275 (2001), holding that a private right of action exists under Title VI only for suits alleging intentional discrimination, has served as an additional barrier for civil rights approaches to environmental justice advocacy. *See infra* note 132 and accompanying text.

75. *See* Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1 (2002) (arguing that the conflicting paradigms in environmental and civil rights law have served as barriers to environmental justice advocacy). *See also* Nicholas Targ, Essay, *A Third Policy Avenue to Address Environmental Justice: Civil Rights and Environmental Quality and the Relevance of Social Capital Policy*, 16 TUL. ENVTL. L.J. 167 (2002) (arguing for the use of social capital policy to promote environmental justice). *See generally* THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard ed., 1999) (providing an overview of United States environmental justice advocacy); CLIFFORD RECHTSCHAFFEN & EILEEN GAUNA, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (2002) (same). In the domestic setting, like the international one discussed above in Part II.A, each of the legal formulations provides an incomplete map of the problem. Moreover, the distinction between environmental justice, which focuses on the disproportionate nature of the harm, and environmental rights, which focus on the environmental standards that apply to all people, often becomes blurred in both domestic and international law approaches. *See* Jeffrey Atik, Commentary, *in* HUMAN RIGHTS DIALOGUE: ENVIRONMENTAL RIGHTS 26–27 (Spr. 2004), *available at* http://www.carnegiecouncil.org/viewMedia.php/prmTemplateID/8/prmID/4460 (last visited Dec. 4, 2004) (on file with author).

constitutes part of a broader pattern of discrimination. Table 1 outlines the model and its relationship to United States environmental justice litigation advocacy approaches.

TABLE 1: A MODEL FOR CATEGORIZING ENVIRONMENTAL HARM TO HUMANS

Source from United States Environmental Justice Litigation	*Factors for Analysis*
Nature of Environmental Harm: United States Environmental Law	▪ Geographic scope of environmental damage ▪ Severity of environmental damage ▪ Duration of environmental damage ▪ Types of rights violations claimed[76]
Relationship Between Polluters and Victims: United States Tort Law	▪ Duty of care owed by the polluter ▪ Causation of environmental damage ▪ International law status of the polluter[77]
Evidence of Discrimination: United States Civil Rights Law	▪ Protected status of the victim ▪ Historical context of harm ▪ Current context of harm ▪ Decisonmaking process resulting in the production of environmental damage ▪ Disparate impact

B. *Nature of Environmental Harm to Victims*

United States environmental law focuses on a wide range of concerns, from clean air and water to regulation and management of toxic substances and waste. The United States environmental statutory regime, which is layered upon common law approaches to environmental protection, has developed over the last thirty years.[78] Most statutes establish broad regulatory goals and then leave detailed regulation to administrative agencies.[79] The statutory regime and its accompanying regulations, together with tort law and land use regulation, try to prevent, limit, and ameliorate environmental damage. With the exception of the Executive Order on environmental justice with which federal agencies must comply,[80] domestic environmental law—at least in principle—is structured to apply equally to all environmental

76. This factor is not derived from United States environmental law, but supplements the analysis of this prong of the model.

77. This factor is not derived from United States environmental law, but supplements the analysis of this prong of the model.

78. *See* ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 59-100 (4th ed. 2003).

79. *Id.* at 141.

80. *See* RECHTSCHAFFEN & GAUNA, *supra* note 75, at 391–404 (discussing Executive Order 12898 on environmental justice).

problems and their prevention, regardless of who is affected.[81]

Although United States environmental law focuses primarily on environmental damage rather than on its human rights implications, its uniform approach to constraining behavior in a variety of contexts is instructive. It highlights the wide range of environmental harms that might have rights implications. The model thus first draws from environmental law to explore the nature of the environmental damage, which can be examined by assessing its three major component parts—geographic scope, severity, and duration. As discussed below, these three components are necessary to evaluate whether environmental harm constitutes a human rights violation. The last factor—the type of rights violation claimed by plaintiffs—compares the facts with the way in which advocates chose to characterize them.

1. *Geographic scope.*

Environmental damage varies greatly in its geographic reach. The larger the scope of the environmental damage, the higher the likelihood of it having deleterious impacts on human beings. For example, in *Beanal v. Freeport McMoran*, Freeport-McMoran's mining operations in the Irian Jaya region of Indonesia destroyed 15.4 square miles of rainforest, poisoned a lake, and noticeably impacted people living within three hundred kilometers of the mine.[82] The probability that a swath of destruction such as this one will have important human repercussions is much greater than for a very small or localized disturbance.

Geographic scope also encompasses the placement of the harm. A major part of the concern regarding Three Mile Island's near nuclear disaster was its proximity to New York City.[83] Chernobyl's location near Kiev played a role in that accident's terrible human toll.[84] When environmentally dangerous activities occur close to population centers,

81. Despite their supposedly equal application, advocates have claimed that federal environmental laws are enforced in a discriminatory manner. *Id.* at 76–78.

82. *See* Kourtney Twenhafel, *Freeport McMoRan's Midas Touch: Testing the Application of the National Environmental Policy Act to Federal Agency Action Governing Multinational Corporations*, 4 TUL J. INT'L & COMP. L. 303, 324–26 (1996). This case was one of the 16 case studies. *See* Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

83. *See* Edmund Faltermayer, *Nuclear Power After Three Mile Island*, FORTUNE, May 7, 1979, at 114. *See generally Major Accident Occurs At Three Mile Island Nuclear Plant: Radiation Released*, FACTS ON FILE WORLD NEWS DIGEST, Apr. 7. 1979, at 241 (describing the accident and its impact).

84. *See Accident's "Grim Reality for Hundreds of Thousands,"* BBC SUMMARY OF WORLD BROADCASTS, Apr. 27, 1987 (excerpts from *Ukraine Today*); Celestine Bohlen, *Radiation from Chernobyl Is Dimming Life in Kiev*, RECORD, June 12, 1986, at A01.

the likelihood of harming humans is higher. If those humans are members of an indigenous community whose entire way of life is intertwined with the land, mere disruption of that geographic area may be enough to cause significant harm.[85]

2. *Severity.*

The severity of harm is central to the question of whether the human impact constitutes a human rights violation. A single waste treatment plant operating at modern standards generally produces a less severe impact than open waste pits and oil spills, which in turn produce a minimal impact in comparison to a nuclear accident. The more hazardous the activity and the fewer the appropriate precautions, the greater the likelihood is of harm to human beings. Low-level environmental damage, which has little impact on the surrounding community, probably will not injure any basic rights.

The pattern of the damage also should inform the severity assessment. The existence of many simultaneous types of environmentally damaging behavior connotes a greater sense of a rights violation. When oil spills, toxic waste stored in open pits, and gas flaring near homes all occur together, as they did in *Social Rights Action Center for Economic and Social Rights v. Nigeria*,[86] a stronger claim for a violation of environmental obligations or an intentioned pattern of abuse exists. Or in a less extreme illustration, when a waste treatment plant is built in a town that already has a high concentration of leather tanneries as was the case in *Lopez Ostra v. Spain*, [87] the environmental impact is often cumulative.

Moreover, as mentioned previously, if environmental harm occurs in the context of torture, intimidation, or other abusive behavior, it may form part of a larger pattern of human rights violations. For example, in Nigeria, the environmentally destructive oil practices described above coincided with brutal, Shell Oil-initiated attacks by the military police, and with the company's failure to intervene in execution of a local environmental and political leader.[88] This context informs and strengthens a claim that the environmental damage constitutes a human

85. *See, e.g.*, Case No. 7615, Inter-Am C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985) (discussing the harm of such intrusion on the Yanomami living in Brazil).

86. This pattern occurred in Nigeria. *See* OKONTA & DOUGLAS, *supra* note 13; Videotape: Delta Force (1995) (on file with author) (produced by Catma Films, distributed by Jane Balfour Films Ltd. 1995).

87. 20 Eur. Ct. H.R. 277 (1995), at paras. 7–9.

88. *See* Videotape: Delta Force, *supra* note 86.

rights violation.

3. *Duration.*

The longer an environmental incident lasts, the greater the likelihood that it will cause severe damage and harm people. For the purposes of a human rights assessment, duration refers not simply to the timespan of the environmental damage, but also to the length of the negative impact on people. Some problems, such as the destruction of forest and farmlands through persistent acid rain, have minimal immediate impacts, but massive long term ones.[89] Other problems may constitute both a short term nuisance and have long term health impacts. Flaring gas and improper toxic waste storage, such as occurred as part of Shell's oil production process in Nigeria, produce air and water pollution that not only impacts people at the time of exposure, but also poses health risks over time.[90]

Certainly, catastrophic incidents have a massive immediate impact. Consider the notorious incident in Bhopal, India, in which a gas leak caused deaths and massive health problems.[91] Ultimately, however, many more people may be injured by the toxic waste that remains at the Bhopal site and the resultant groundwater contamination.[92] The overall effect is greater when the results of the environmental damage do not dissipate with the cessation of the harmful behavior, or the offender does not take appropriate steps to mitigate the damage.

4. *Type of rights violation claimed.*

Environmental damage can harm humans in a wide variety of ways. It can undermine their present health or increase their risk of future health problems. It can destroy a resource upon which they rely for their livelihood. It can invade the privacy of their persons or their homes, or take away their property. In the case of an indigenous community with a deep connection to traditional lands, it can destroy their culture and way

89. For a general discussion of environmental problems, see HUNTER ET AL., *supra* note 16, at 1–165.

90. For a discussion of the environmental impacts of various stages of the oil production process in Nigeria, see David Moffat & Olaf Linden, *Perception and Reality: Assessing Priorities for Sustainable Development in the Niger River Delta*, 24 AMBIO 527, 533 (1995).

91. For a discussion of Bhopal and its aftermath, see sources *infra* note 109.

92. *See* Mark Williams, *A Hollow Victory*, SOUTH CHINA MORNING POST (Aug. 12, 2004) (detailing ongoing health problems of survivors and environmental impacts from lack of clean-up of the site); *Bhopal Residents Seek Drinking Water Supply*, THE HINDHU (July 21, 2004) (discussing the groundwater contamination near the site).

of life.[93] The Yanomami people, for example, claimed that mining and the development that accompanied it undermined their social organization, caused displacement, introduced diseases, and lead to disappearances and deaths.[94] All of these impacts, from the individual to the social, potentially violate rights protected by binding regional and international human rights treaties.

As discussed in Part II.C above, however, these rights can be applied to similar facts in a range of ways, creating inconsistencies in environmental rights jurisprudence. In order to understand how advocates and courts are construing the connections between environmental harm and protected rights, this part of the model considers the claims being made before tribunals applying international human rights law. A comparison of these claims with the facts of the cases provides insight into the characterization process.

C. *Relationship Between Polluters and Victims*

In the classic common law tort model, one person causes harm to another person, thereby violating a duty of care.[95] Although in the United States legal context, cases of environmental harm to humans often are actionable under tort law—in fact, nuisance law was the primary means of addressing such harm prior to modern environmental statutes[96] and continues to be an important avenue of redress[97]—these suits are often stymied by the complexities of causation. Because injured parties frequently suffer from multiple sources and diverse types of pollution, proving that a specific source caused the harm may be impossible.[98]

International law contains no equivalent of the common law tort action. The problems that form the basis for environmental rights suits

93. These various harms and the claims arising from environmental damage are explored in the case studies. *See infra* Part IV & Appendix.

94. Case No. 7615*,* Inter-Am. C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985), at paras 2–3.

95. *See generally* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (8th ed. 2004) (providing an introduction to torts).

96. *See* PERCIVAL, *supra* note 78 at 61-84.

97. *See, e.g.*, Anderson v. W.R. Grace & Co., 628 F. Supp. 1219 (D. Mass. 1986) (nuisance action for leukemia allegedly arising from contamination of groundwater in Woburn, Massachusetts). *Cf.* Tseming Yang, *Environmental Regulation, Tort Law and Environmental Justice: What Could Have Been*, 41 WASHBURN L.J. 607 (2002) (analyzing the extent to which environmental justice advocates might have been better off had environmental statutory law not been created and had they therefore focused solely on torts law).

98. *See* PERCIVAL, *supra* note 78 at 73–79; *see also* HARR, *supra* note 73.

do, however, contain the elements of an action in tort. For example, in *Hatton v. United Kingdom*, petitioners living near Heathrow Airport experienced health impacts and annoyance from night aircraft noise.[99] Such a situation represents a classic nuisance problem; the operation of the airport caused severe enough impacts on surrounding residents that it likely violated a duty of care. Similarly, while United States federal courts have rejected right to life and health claims based on environmental harm under the Alien Tort Statute, the question of whether torts had occurred was not in dispute.[100] The relevant companies in both *Flores v. Southern Peru Copper Corporation* and *Sarei v. Rio Tinto PLC* were clearly causing harm, and their environmental practices were sufficiently poor that they were violating basic duties of care.[101]

Because the first prong of the model—discussed in Part III.B.—already addresses the issue of injury, this part of the model focuses on the other elements of a tort, duty of care and causation. In addition, international human rights law has limited reach with respect to non-state actors.[102] The model thus adds an element not generally included in a torts analysis, the legal status of the polluter.

1. *Duty of care.*

Domestic and international law, as well as industry norms, establish the duties of governments and private parties. National constitutions and statutes detail environmental standards, as well as special protections or status for indigenous peoples. Activities with a significant environmental impact often violate these domestic laws. For example, Canada has legally recognized the right of the Lubicon Lake Band to the continuation of its traditional way of life. Companies engaging in oil and gas exploration and the government entities supervising them have a duty to respect that right under Canadian law.[103]

International and regional human rights agreements and customary international law create obligations for the governments that are parties to them. Not only must governments refrain from violations of those

99. 37 Eur. Ct. H.R. 28 (2003), at paras. 11–28.

100. *See, e.g.*, Flores v. Southern Peru Copper Corp., 343 F.3d 140 (2d Cir. 2003) (including no discussion of whether claimed behavior would constitute a tort); Sarei v. Rio Tinto PLC., 221 F.Supp.2d 1116, 1131 (C.D. Cal. 2002) (same).

101. *See Flores*, 343 F.3d at 144; *Sarei*, 221 F. Supp.2d at 1120–27.

102. *See infra* Part IV.C.3.

103. *See* Lubicon Lake Band v. Canada, Communication No. 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), at para 2.3.

rights, but they also have a duty to prevent such violations from occurring within their borders. In *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, the African Commission on Human and Peoples' Rights found that Nigeria had violated that obligation by failing to constrain Shell's behavior.[104] The international commitments of governments thus can translate into limitations on non-state corporate actors operating within their borders, even when those corporations are not directly bound by applicable international law.

In determinations of how well they meet international standards and when they violate a duty of care, governments and corporations tend to be evaluated comparatively. Despite theoretical notions that human rights law provides an objective standard, what constitutes governmental compliance with human rights norms is generally determined relative to how other states are behaving. Human rights litigation tends to target the worst offenders.[105] Similarly, non-state corporate actors can be judged by industry standards. If they are engaging in environmentally damaging practices that are out of step with other companies in their industry or with their own behavior elsewhere, they are more likely to be found in violation of norms.[106]

Finally, the environmental approach and its impact must be compared to their alternatives. If a company substituted another substance for a chemical known to be damaging, the final result might be more or less toxic. If it moved its operations farther from people, the injury level might actually increase in some instances, as in the case of a move from a nearby downstream location to a more remote upstream one. If a company constructed better waste storage facilities, it might have to create more roads to transport waste materials to the site. In short, environmental impact decisions generally involve tradeoffs,[107] and the extent to which polluters have violated duties of care depends on how they approached these decisions.

104. Communication No. 155/96, African Commission on Human and Peoples' Rights, (2001), at paras. 44–48.

105. *See generally* Koh, *supra* note 7 (discussing why nations comply with international law).

106. For a discussion of transnational corporate responsibility, see *infra* notes 109–110 and accompanying text.

107. *See* John D. Graham & Jonathan B. Wiener, *Confronting Risk Tradeoffs*, *in* RISK VERSUS RISK: TRADEOFFS IN PROTECTING HEALTH AND THE ENVIRONMENT 1 (John D. Graham & Jonathan B. Wiener eds., 1995) (analyzing a variety of tradeoffs that arise when attempting to protect the environment).

2. *Causation.*

Although sometimes a single entity, such as a waste treatment plant, causes the harm,[108] more often the damage emerges from a complex mix of corporate and governmental behavior. The obvious culprit is generally the company under whose oversight the damage occurred. But the "company" may actually be multiple companies banded together in a joint venture, or the subsidiary of a parent corporation incorporated in another country. The host government could be involved through ownership or significant investment in the enterprise. In addition, the harm may be caused by individual negligence rather than problematic company policy, raising issues of *respondeat superior*.[109] These structural issues not only limit corporate liability, as discussed Part III.C.3, but also complicate proof of causation.[110]

Similarly, the government may be responsible in a variety of different ways. It may not have been enforcing its laws. For example, in the case the Awas Tingni Community brought before the Inter-American Court of Human Rights, the government of Nicaragua granted logging concessions that impacted Community land despite the fact that the Nicaraguan Constitution granted the Community protected status,.[111] At

108. *See, e.g.*, Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1995); Zander v. Sweden, 18 Eur. Ct. H.R. 175 (1994).

109. In the Bhopal case, for instance, a critical question was whether the accident was caused by a design defect or worker negligence. *Cf.* Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: the Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235 (1994) (analyzing the Bhopal incident and proposing recommendations for achieving greater multinational corporate responsibility); Tim Covell, *The Bhopal Disaster Litigation: Its Not Over Yet*, 16 N.C. J. INT'L L. & COM. REG. 279 (1991) (discussing the litigation and settlement, and drawing lessons for faster compensation of victims in the future); Hanson Hosein, *Unsettling: Bhopal and the Resolution of International Disputes Involving an Environmental Disaster*, 16 B.C. INT'L & COMP. L. REV. 285 (1993) (assessing approaches to dispute resolution in instances like Bhopal).

110. For a discussion of multinational enterprise, particularly in developing countries, see HENRY J. STEINER ET AL., TRANSNATIONAL LEGAL PROBLEMS: MATERIALS AND TEXT 81–84 (4th ed. 1994); DETLEV F. VAGTS ET AL., TRANSNATIONAL BUSINESS PROBLEMS, 184-224 (3rd ed. 2003). *See also* 20 UNITED NATIONS LIBRARY ON TRANSNATIONAL CORPORATIONS: TRANSNATIONAL CORPORATIONS: THE INTERNATIONAL LEGAL FRAMEWORK, (A.A. Fatouros ed., 1994) (providing an analysis of the legal framework governing multinational corporations); 19 UNITED NATIONS LIBRARY ON TRANSNATIONAL CORPORATIONS: TRANSNATIONAL CORPORATIONS AND NATIONAL LAW (Seymour J. Rubin & Don Wallace, Jr. eds., 1994) (same). For an exploration of the application of international human rights law to multinational corporations, see Surya Deva, *Human Rights Violations by Multinational Corporations and International Law: Where From Here?*, 19 CONN. J. INT'L L. 1 (2003); David Weissbrodt & Muria Kruger, Current Development, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 97 AM. J. INT'L L. 901 (2003).

111. *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am Ct. H.R. (2001), at

the very least, the government likely has provided the company with some form of permission to operate.[112] It also may have been providing economic support to the venture, either directly or through laws which favor corporations.[113]

Moreover, the victims may have contributed to the corporation's being allowed to operate there, even if their agreement was based on incorrect assumptions. Often, indigenous peoples have signed contracts ceding land and receiving benefits without fully understanding their implications.[114] In other cases, designated representatives may have represented only part of the group. For instance, in *Apirana Mahuika v. New Zealand*, petitioners claimed that the Maori negotiators did not have the authority to represent individual tribes and sub-tribes.[115]

Finally, each step in the decisonmaking process that caused the harm has the potential to complicate the causation analysis. The choices that resulted in the harm could have occurred at a variety of stages in the process or levels of the government or corporation.[116] Once the damage to the environment has occurred, its human impact may vary greatly.[117] The customs and needs of the people using the affected resources also influence how much the environmental damage matters in human

paras. 103, 152–53.

112. Even if a company is not incorporated in the host country, it generally needs some sort of permission to operate. *See* VAGTS ET AL., *supra* note 110, at 197-200.

113. If the state owns the company, foreign sovereign immunity issues also may arise. For a discussion of foreign sovereign immunity in the corporate context, see STEINER ET AL., *supra* note 110, at 753–820.

114. In Ecuador for instance, the Huaorani signed an agreement with an employee of Maxus regarding its planned oil operations. *See* Supplemental Report to the Petition Submitted to the Inter-American Commission on Human Rights by CONFENIAE, at 6 (Jan. 1993).

115. Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000), at paras. 5.8.

116. *See* VAGTS ET AL., *supra* note 110, at 201–03 (describing the internal organization of multinational enterprise). Relevant decisions could relate directly to the damage, i.e., a memo explaining how waste disposal should occur, or indirectly cause it, i.e., by ambiguous disposal techniques. The choice of where to site the waste pit, flare the gas, lay the pipelines, etc. may determine how much damage to the environment occurs, and what kind of impact the damage will have on people. The individual conscientiousness of those implementing policy may also greatly affect the degree to which potentially damaging elements are mitigated. For a discussion of environmental impact assessment as a tool of environmental management, see PERCIVAL, ET AL., *supra* note 78, at 821–50.

117. Two chemicals or processes might be equally damaging to the environment, but differ in how they affect people. Similarly, two disposal sites may be constructed in precisely the same way, but due to the surrounding environment, including the way in which people inhabit it, spread harm differently. The dilemma is fundamental to risk analysis and environmental regulatory approaches. Ultimately, these processes involve value judgments about what kinds of risks are acceptable. For an overview of the problems of risk, see PERCIVAL, ET AL., *supra* note 78, at 343–490.

terms.[118] The many actors involved and the nature of processes themselves thus makes causal links difficult to establish.

3. *International law status of the polluter.*

Determining the international law status of relevant actors is critical to assessing whether those injured have any possibility of redress. Environmental rights violations generally involve not only governments, but also non-state actors that fall through the interstices of international law. Binding international law has a limited ability to regulate the multinational corporations (MNCs) involved in environmentally harmful operations.[119] While some international human rights norms apply to MNCs and these companies sometimes work closely enough with governments to be characterized as acting under the color of state action, holding them accountable under international law is always difficult.[120] These limitations are compounded by MNC structures, which allow MNC parent corporations, generally based in developed countries, to claim they are not responsible for their subsidiaries' behavior in developing countries.[121] Thus, even under national law, it is often challenging to hold deep pockets liable.

In the international and regional forums which have heard environmental rights claims, action can only be taken against states that

118. Beyond the obvious divide of differential resource dependency, urban populations versus indigenous peoples, for instance, people may use water from a particular place in a way that they ingest more or less of it. They may treat it to purify it in a way that may or may not eliminate specific contaminants. What makes many indigenous peoples so susceptible to harm from environmental degradation is that not only their life and livelihood, but also their religion and culture, are tied up in the land. *See* ANAYA, *supra* note 3, at 104–07. For discussion of the various types of water pollution in the United States, see PERCIVAL ET AL., *supra* note 78, at 570–76.

119. *See supra* note 110 and accompanying text.

120. *See* David Kinley & Junko Tadaki, *From Walk to Talk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT'L L. 931 (2004) (discussing limitations on corporate responsibility and proposing ways of strengthening it); Sarah M. Hall, Note, *Multinational Corporations' Post-Unocal Liabilities for Violations of International Law*, 34 GEO. WASH. INT'L L. REV. 401 (2002) (exploring corporate liability under the Alien Tort Statute).

121. *See* JOSEPH M LOOKOFSKY, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION: A COMPARATIVE ANALYSIS OF AMERICAN, EUROPEAN, AND INTERNATIONAL LAW 268–88 (1992) (providing a comparative analysis of approaches to corporate veil piercing); Carsten Alting, *Piercing the Corporate Veil in American and German Law—Liability of Individuals and Entities: A Comparative View*, 2 TULSA J. COMP. & INT'L L. 187, 191 (1995) (same); Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German, and U.K. Veil Piercing Approaches*, 36 AM. BUS. L.J. 73 (1998) (same).

are parties to the appropriate governing treaty.[122] This structural limitation prevents petitions against states that are not parties, and effectively prevents any direct accountability for non-state actors at an international level.

Domestic forums also offer limited redress, even when behavior clearly violates national law or international law that the country has incorporated. When state actors are directly involved in the violations, for instance, the doctrines of sovereign immunity and act of state limit governmental accountability in domestic legal systems.[123] If the parties include non-state actors, jurisdiction, venue, and forum choice may pose difficulties . *Forum non conveniens*, for instance, has served as a significant barrier to Alien Tort Statute cases.[124] Moreover, because many human rights apply only to state actors, petitioners often must contend that the private entity was operating under the color of state law.[125] For example, in *Sarei v. Rio Tinto PLC*, plaintiffs had to allege that Rio Tinto was acting as a state in order to successfully plead racial discrimination claims against it.[126] This combination of legal and institutional barriers significantly constrains environmental rights suits,

122. Only states who have become party to the Optional Protocol to the International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 1, 999 U.N.T.S. 171, recognize "the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any rights set forth in the Covenant," and provide that "[n]o communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol." *Id.* Similarly, the European Court of Human Rights "may receive applications from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto." European Convention for the Protection of Human Rights and Fundamental Freedoms as Amended By Protocol 11, Nov. 4, 1950, art. 34, 213 U.N.T.S 221. Likewise, "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the [Inter-American Commission on Human Rights] containing denunciations or complaints of violation of this Convention by a State Party." American Convention on Human Rights, Nov. 22, 1969, art. 44, 9 I.L.M. 99, 113. The African Commission on Human and Peoples' Rights was "established within the Organization of African Unity to promote human and peoples' rights and ensure their protection in Africa." African Charter on Human and Peoples' Rights (Banjul Charter), July 17-20, 1979, art. 30, OAU Doc. CAB/LEG/67/3/Rev. 5. The language on its applicability is a little more ambiguous—"[b]efore each Session, the Secretary of the Commission shall make a list of the communications other than those of State parties to the present Charter and transmit them to members of the Commission, who shall indicate which communication should be considered by the Commission"—but given the Commission's general mandate, the focus of such communications will likely be on situations occurring in Africa. *Id.* art. 55.

123. For a discussion of these doctrines, see CARTER ET AL., *supra* note 62, at 547–646.

124. *See, e.g.*, Aguinda v. Texaco, 303 F.3d 470 (2d Cir. 2002) (dismissing this environmental rights case on *forum non conveniens* grounds).

125. *See infra* note 248 and accompanying text.

126.221 F. Supp. 2d 1116, 1151–55 (C.D. Cal. 2002).

and makes a determination of the international law status of the parties in these cases critical.

D. *Evidence of Discrimination*

The third prong of the model considers evidence of discrimination. Although most of the cases this Article examines did not focus on issues of discrimination, the victims were often members of minority groups or indigenous peoples.[127] Because customary international law and the conventions establishing the tribunals that have heard environmental rights cases provide special protections against discrimination for minority and indigenous individuals or groups,[128] discussions of environmental harm to humans should include an exploration of discrimination claims.

Compared with United States civil rights law, the international law governing racial discrimination contains significant procedural barriers but arguably provides broader substantive protections. The Committee on the Elimination of Racial Discrimination, like other regional and international human rights tribunals,[129] is only competent to hear claims from individuals or groups if the violating state makes a declaration to that effect.[130] In addition, although the facts of a violation may implicate corporate actors, claims can only be brought against states.[131]

Substantively, however, international law protections may reach discrimination in situations in which United States federal courts no longer recognize a private right of action.[132] Both the definition of racial

127. For an analysis of how each tribunal approached discrimination claims arising out of environmental harm, see *infra* Part IV.A.3.

128. *See* International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 27, 993 U.N.T.S. 3; European Convention for the Protection of Human Rights and Fundamental Freedoms as Amended By Protocol 11, Nov. 4, 1950, art. 14, 213 U.N.T.S 221; American Convention on Human Rights, Nov. 22, 1969, art 1, 9 I.L.M. 99, 101; African Charter on Human and Peoples' Rights (Banjul Charter), July 17-20, 1979, arts. 2, 20 & 22, OAU Doc. CAB/LEG/67/3/Rev. 5.

129. *See supra* notes 50 and 51.

130. The International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 14, 660 U.N.T.S. 195, states:

> A State Party may at any time declare that it recognizes the competence of the Committee to receive and consider communications from individuals or groups of individuals within its jurisdiction claiming to be victims of a violation by that State Party of any rights set forth in this Convention. No communication shall be received by the Committee if it concerns a State Party which has not made such a declaration.

131. *See id*.

132. Alexander v. Sandoval, 532 U.S. 275, 293 (2001). *See also* Michael D. Mattheisen, *The Effect of* Alexander v. Sandoval *on Federal Environmental Civil Rights (Environmental Justice) Policy*, 13 GEO. MASON U. CIV. RTS. L.J. 35 (2003) (discussing the impact of the *Sandoval* decision on efforts to bring civil rights claims in environmental justice suits).

discrimination in Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the requirements for State Parties in Article 2 appear to extend the prohibitions of the convention to laws, regulations, and conduct that have a discriminatory effect.[133] General Recommendation XIV of the Committee on the Elimination of Racial Discrimination, as well as scholarly analysis, reinforces the argument that this language includes actions which produce unintentionally discriminatory effects.[134]

Therefore, the model considers evidence of both intentional discrimination and disparate impact,[135] using the approach of the United States Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*. While *Arlington Heights* confines its discussion of disparate impact to an intentional discrimination analysis,[136]; disparate impact serves a broader purpose here. It functions not only an element of an intentional discrimination claim, but also as an independent basis for a claim.

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133. Article 1 defines racial discrimination as:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin that has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the human rights and fundamental freedoms in the political, economic, social, cultural or any other field of life.

International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 1, 660 U.N.T.S. 195. Article 2 requires an "elimination of racial discrimination in all its forms" and, in particular, mandates that State Parties change laws that "have the effect of creating or perpetuating racial discrimination wherever it exists."

134. *See General Recommendation XIV, Definition of Discrimination*, art. 1, para.1, U.N. Committee on the Elimination of Racial Discrimination, 42nd Sess, 1993, U.N. Doc. A/48/18, *available at* http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/d7bd5d2bf71258aac12563ee004b639e?Opendocument (last visited Nov. 9, 2004) (on file with author); Meron, *supra* note 23, at 286–91; Ved P. Nanda, *Access to Justice in the United States*, 46 AM. J. COMP. L. 46, 528–29 (1998). The United States has made significant reservations to its implementation of the International Convention on the Elimination of All Forms of Racial Discrimination. For a discussion of United States implementation, see Gay J. McDougall, *Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination*, 40 HOW. L.J. 571 (1997); Nkechi Taifa, *Codification or Castration? The Applicability of the International Convention to Eliminate All Forms of Racial Discrimination to the U.S. Criminal Justice System*, 40 HOWARD L.J. 641 (1997).

135. The case provides a test for determining whether evidence of intentional discrimination exists. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977). In the *Arlington Heights* context, disparate impact is considered as part of an intentional discrimination claim. *See id*.

136. After the decision in *Alexander v. Sandoval*, petitioners still can bring disparate impact claims through administrative actions or state law, but lack a private right of action to bring them in federal court. 532 U.S. 275, 281–82 (2001).

1. *Protected status of the victim.*

In the context of a United States Equal Protection Clause claim, a court would first determine whether plaintiffs were members of a discrete and insular minority.[137] The international analysis used in this model broadens that approach by focusing on whether petitioners fall into any categories that receive special protection under the law applicable to their claim.

Many countries with significant indigenous or minority populations provide constitutional or statutory protections for them. These protections not only help to establish the government's duty of care, discussed in Part III.C.1 above, but also form part of that state's compliance with its international obligations to protect minority and indigenous groups.[138] In addition, many states prohibit discriminatory treatment of their citizens, which provides claimants with another basis upon which to assess their government's compliance with international law.

In regional and international tribunals, applicable treaties provide for equality of treatment and/or protection of minority or indigenous peoples' culture and traditions.[139] To the extent that claimants can be categorized as minorities or as members of indigenous peoples, they will receive heightened protection. Even if they do not qualify, they still are entitled to equality of treatment and thus as citizens will receive protection against discrimination.

2. *Historical context.*

Indigenous and minority groups around the world have suffered from discrimination due to a combination of colonialism and racism. This unfortunate historical context, particularly if the present claims involve the same decisonmaking entity that engaged in the past discriminatory behavior, helps provide a basis for inferring

137. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). *See also* Edward J. Erler, *Equal Protection and Personal Rights: The Regime of the "Discrete and Insular Minority,"* 16 GA. L. REV. 407 (1982).

138. *See, e.g.*, Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Commission on Human and Peoples' Rights (2001), at paras. 44–48 (explaining that Nigeria has an obligation to refrain from interfering with rights, to ensure that others respect rights, and to fulfill its obligations under human rights regimes to protect rights and freedoms).

139. For a discussion of how international and regional human rights conventions and tribunals have addressed minority and indigenous rights, see *infra* Part IV.A.3.

discriminatory intent.[140] In the United States, for example, the local governmental entities charged with discrimination today often have a long history of enacting laws reinforcing segregation or zoning minority areas in ways that encouraged the siting of environmental hazards.[141]

Particularly because so many of the instances of transnational environmental harm to humans involve indigenous or minority victims, an understanding of the historical treatment of these groups can help to establish why they experience poor environmental conditions now. Although traditional lands sometimes simply happen to be resource-rich, the communities have often been displaced or have lacked the power to fight discriminatory siting decisions. For example, in the case study involving the Awas Tingni Community, Nicaragua granted a logging concession on indigenous land despite constitutional protections for the resident indigenous people.[142] This historical background to the concession grant informs an assessment of whether the logging on the Awas Tingni Community's land is discriminatory.

3. *Current context.*

Severe environmental harm to humans often occurs in a broader context of discriminatory treatment. As discussed in Part III.B.2, when a group is simultaneously suffering from other types of harms, disproportionate environmental impacts become more suspect. For example, in *Sarei v. Rio Tinto PLC*, which involved mining in Papua New Guinea, plaintiffs claimed that Rio Tinto PLC's destruction of the environment, villages, sacred sites, and local culture, and its support of a blockade of Bougainville, were part of a pattern or policy of international human rights violations.[143] The court's finding that plaintiffs had adequately pled the elements of a racial discrimination claim was based in part on this broader context of abuse.

The context need not include such extreme rights violations in order

140. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–68 (1977). *Cf.* RECHTSCHAFFEN & GAUNA, *supra* note 75, at 49–53 (discussing racism as a cause of environmental justice problems).

141. *See* RECHTSCHAFFEN & GAUNA, *supra* note 75, at 27–33 (discussing the role of land use policies in environmental justice problems).

142. *See* Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case 79, Inter-Am. Ct. H.R. (2001), at paras. 103, 152–53. The problem of discriminatory siting that follows historical patterns is also a transnational phenomenon, with developed countries dumping environmentally undesirable industry and products in developing countries. *See, e.g.*, Gustavo Capdevila, *Environment: Scrapping Toxic Tankers Called a Health Threat*, Inter Press Serv., Dec. 12, 2002, *available at* 2002 WL 103557653.

143. 221 F. Supp. 2d 1116, 1151–55 (C.D. Cal. 2002).

to suggest discriminatory intent. In the United States, concerns are often raised when new environmental hazards are sited in a location that already has many other toxic sites. Although the new environmental harm may not be so terrible on its own, its presence is more problematic where it adds to an already unhealthy environment.[144] In such cases, scholars, policymakers, and advocates debate whether direct racism, or the market-driven declines in property values and market power, caused such disparate concentrations of unwanted land uses.[145]

The problem of environmentally damaged areas attracting yet more harmful activities is not unique to the United States. In *Lopez Ostra v. Spain*, a case before the European Court of Human Rights that involved no discrimination claims, a waste treatment plant was located near the petitioner's home in a town that already had a high concentration of leather tanneries.[146] Although not discussed in the opinion, preexisting air pollution from the tanneries may have exacerbated the petitioner's severe reaction to the fumes and odors from the new waste treatment plant. Thus, the existence of these other hazards might serve as evidence that the decision to site a new plant was discriminatory.

4. *Decisonmaking process.*

The decisonmaking process can reveal discriminatory intent through biased comments of decisonmakers or through substantive and procedural irregularities. At both a United States domestic level and at an international one, "smoking guns"—such as explicitly discriminatory comments—are rare. When they exist, however, clear evidence of discriminatory intent likely exists as well, providing a good basis for domestic or international law claims.[147]

More common, however, are substantive or procedural departures which conceivably could be explained through nondiscriminatory intent. If decisions leading to an environmental harm are made through unusual procedures, particularly ones that deny victims access to the decisonmaking process, the decision becomes more suspect.[148] For instance, in the case brought by representatives of the Yanomami, opposition from those focused on economic development resulted in a

144. *See* RECHTSCHAFFEN & GAUNA, *supra* note 75, at 27–33.

145. *See id*. at 27–54 (discussing competing theories of causation).

146. 20 Eur. Ct. H.R. 277 (1995).

147. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1977).

148. *See id.*

lack of protection of the Yanomami's land.[149] The influence of pro-development forces on the decisonmaking process, particularly if it had been asserted inappropriately, could bolster a Yanomami discrimination claim challenging the mining.

5. *Disparate impact.*

Discrimination claims generally begin with some sort of disparate impact. All of the case studies, for example, involve a distinct set of people who claim to be suffering the harm. For example, as discussed in more detail in Part IV.A, many cases involved expropriation of or damage to victims' land due to resource extraction activities.[150] In each instance, the people living on that land prior to, and sometimes during, the resource extraction bore the brunt of the harm.

In the context of a discrimination claim, however, disparate impact generally requires that those injured be distinguishable in some way that goes beyond simply suffering the harm—whether by race, class, gender, age, ethnicity, or some other status or characteristic.[151] A collection of people living near Heathrow Airport suffered from noise pollution, for instance, but they did not claim that this disparate treatment was discriminatory.[152] The analysis of disparate impact in the case studies thus focuses on whether the environmental harm disproportionately impacted a distinguishable group.

IV. LESSONS FROM THE CASE STUDIES

Environmental harm to humans with potential rights implications is unfortunately very common. The news contains almost daily references

149. Case No. 7615, Inter-Am C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985),) at paras. 2–3.

150. *See, e.g.*, Lubicon Lake Band v. Canada, Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990) (oil and gas exploration in Canada); Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Commission on Human And Peoples' Rights (2001) (oil exploration in Nigeria); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79, Inter-Am. Ct. H.R., Ser. C (2001) (logging in Nicaragua); Dann v. United States, Case No. 11.140, Inter-Am C.H.R. 75/02 (2001) (gold prospecting in the United States); Case No. 7615, Inter-Am. C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985) (mining in Brazil); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996) (logging in Finland); Flores v. S. Peru Copper Corp., 343 F.3d 140 (2nd Cir. 2003) (copper mining in Peru); Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999) (copper mining in Indonesia); Sarei v. Rio Tinto PLC, 221 F.Supp. 2d 1116 (C.D. Cal. 2002) (copper and gold mining in Papua New Guinea).

151. *See supra* note 137 and accompanying text (discussing discrete and insular minorities).

152. *See* Hatton v. United Kingdom, 37 Eur. Ct. H.R. 28 (2003).

to such problems.[153] Numerous environmental and human rights organizations are engaged in international environmental rights advocacy that attempts to address some small fraction of the worst violations.[154] Most of the current efforts have not reached final resolution, judicial or otherwise, and so any assessment of the appropriateness and effectiveness of their characterization is necessarily incomplete.

In selecting case studies, I focused on choosing a representative sample of situations in which an adjudicative decision had been reached in a tribunal applying international human rights law.[155] I surveyed the jurisprudence from the major bodies that have relied upon international human rights law in situations in which people suffered environment-related harm. At an international level, the primary tribunal that has issued decisions in this area is the United Nations Human Rights Committee.[156] The main regional human rights bodies—the European

153. An ALLNEWS search on Westlaw using the search terms "ti(environment***) & ti(right*)" and including only the year to date revealed 177 documents, many of which were relevant (search done on June 14, 2004).

154. For example, Earthjustice is involved in advocacy to address toxic pollution from a United States company's metal smelter in the town of La Oroya in Peru, *at* http://www.earthjustice.org/urgent/display.html?ID=59 (last visited Dec. 4, 2004) (on file with author). Amazon Watch is focused on the impacts on indigenous communities of several gas pipelines in Bolivia and Brazil; an oil spill, an oil project, and a massacre by a private security company employed by an oil company in Colombia; oil development projects in Ecuador, and gas and oil operations in Peru, *at http://*www.amazonwatch.org (last visited Dec. 4, 2004) (on file with author). Sierra Club and Amnesty International are involved in a joint campaign to stop the persecution of environmental human rights advocates in Chad, Cameroon, Ecuador, India, Indonesia, Mexico, and Russia, *at* http://www.defendtheearth.org/ (last visited Dec. 4, 2004) (on file with author). The International Rivers Network is challenging water projects with significant negative impacts on surrounding communities in Botswana, China, Ghana, India, Kenya, Laos, Malaysia, Mozambique, Namibia, Nepal, the Philippines, Senegal, South Africa, Sudan, Tanzania, Thailand, Uganda, and Vietnam, *at* http://www.irn.org (last visited Dec. 4, 2004) (on file with author).

155. I chose international human rights cases, rather than ones focusing on international environmental law, because of the sovereignty barriers to international environmental claims discussed in detail *supra* Part II.B.

156. For the U.N. Human Rights Committee, I did a search in the University of Minnesota Human Rights Library database with the search term "environment," *at* http://www1.umn.edu/humanrts/google/localsearch.htm (last visited Dec. 4, 2004). I also examined the work of Committee on the Elimination of All Forms of Racial Discrimination and the Committee on the Rights of the Child, but found that they both primarily dealt with environmental harm in their country reports. *See* University of Minnesota Human Rights Library, *at* http://www1.umn.edu/humanrts/google/localsearch.htm (last visited Dec. 4, 2004) (searched the databases on the work of both Committees under the keyword "environment"). A review of all of the Communications of the Committee on the Elimination of All Forms of Racial Discrimination revealed no cases in which environmental harm was at issue. *See* Office of the High Commissioner for Human Rights, Jurisprudence of Committee on the Elimination of All Forms of Racial Discrimination,

Court of Human Rights,[157] the Inter-American Court and Commission on Human Rights, and the African Commission on Human and Peoples' Rights[158]—have all ruled on environmental rights cases. Finally, at a national level, United States Alien Tort Statute jurisprudence has resulted in opinions by federal courts on the applicability of customary international human rights law to extreme environmental harms caused by oil and mining companies.[159]

I have selected sixteen of these cases to present as case studies: nine in which the court ruled in favor of petitioners, and seven in which the court ruled against them. In choosing case studies, I strove for both geographic and substantive diversity, with the aim of accurately representing the current state of environmental rights jurisprudence. I thus included decisions from each of the above tribunals with varying degrees of environmental harm in their facts and a range of substantive and procedural claims. When a tribunal ruled more than once on almost identical facts—for instance, the European Court of Human Rights has considered more than one case on airport noise and on the effects of radioactive testing on service personnel and their progeny—I included only one of the decisions. For tribunals with many decisions that related in some way to environmental rights,[160] I focused on those in which environmental harm to humans was a primary element of the human rights claim.

This Part provides an analysis of these sixteen cases, with the aim of evaluating past efforts at characterizing environmental harm to humans and providing a map for more systematic future advocacy. The following sections discuss the cases collectively, summarizing the results and deriving lessons for future advocacy. An application of the model to each individual case can be found in the Appendix at the end of this article.

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http://www.unhchr.ch/tbs/doc.nsf/FramePage/TypeJurisprudence?OpenDocument&Start=1&Count=15&Expand=2 (last visited Nov. 7, 2004).

157. An EHR-RPTS search on Westlaw *at* http://www.westlaw.com using the search phrase "environment*** & right" revealed 288 cases, all of which I reviewed for their relevance (as of June 14, 2004).

158. For each of these bodies, I did a search in the University of Minnesota Human Rights Library database with a search term "environment," *at* http://www1.umn.edu/humanrts/google/localsearch.htm (last visited Dec. 4, 2004), as well as a case by case review of all of the decisions on the merits made by the Inter-American Commission Human Rights and Inter-American Court of Human Rights.

159. An ALLFEDS query on Westlaw *at* http://www.westlaw.com, with search phrase "alien tort & environment***" resulted in 38 cases (as of Nov. 7, 2003).

160. This was primarily an issue in the European Court of Human Rights, which had the most decisions in the area.

A. *Summary of Results*

1. *Applying the model: nature of environmental harm to victims.*

The problems addressed in the sixteen cases, with one exception,[161] fall into three main overlapping categories: Category One—environmental damage caused by resource extraction; Category Two—harm to indigenous peoples from development; and Category Three—small-scale nuisance due to development in industrialized countries.[162] Unsurprisingly, the Category One and Two claims generally involved the broadest geographic scope, most severe harms, and longest durations. For example, *Lubicon Lake Band v. Canada*, a case which falls into Categories One and Two, involved the expropriation for oil and gas exploration of approximately 10,000 square kilometers upon which Lubicon Lake Band—an indigenous group that has historically suffered inequities—relied.[163] In contrast, *Zander v. Sweden*, a Category Three case, involved cyanide in the drinking water of a single municipality in which a waste treatment company's dump was located.[164]

The choice of forum seemed to correlate with the type of harm only in that the European Court of Human Rights was the sole tribunal which had Category 3 claims.[165] The grouping likely stems from the fact that the European Court of Human Rights is the only forum covering predominantly industrialized countries. Each of the other forums had a mix of Category One and Two cases.[166] Table 2 summarizes the specific

161. *See* LCB v. United Kingdom, 27 Eur. Ct. H.R. 212 (1998) (regarding the impact of radiation exposure on Christmas Island service personnel and their offspring).

162. Of the cases in which petitioners prevailed, five of them fell into both Category One and Category Two, and four of them fell into Category Three. Of the cases in which the petitioners' claims failed, two fell into both Categories One and Two, two fell into only Category One, one fell into only Category Two, one fell into Category Three, and one fell into none of the categories.

163. Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), at paras. 2–4.

164. 18 Eur. Ct. H.R. 175 (1994), at paras. 7–11.

165. *See* Hatton v. United Kingdom, 37 Eur. Ct. H.R. 28 (2003); Athanassoglou v. Switzerland, 31 Eur. Ct. H.R. 13 (2001); Guerra and Others v. Italy, 26 Eur. Ct. H.R. 357 (1998); LCB v. United Kingdom, 27 Eur. Ct. H.R. 212 (1998); Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1995); Zander v. Sweden, 18 Eur. Ct. H.R. 175 (1994).

166. The U.N. Human Rights Committee cases, for example, included two that were both Category One and Category Two, see Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996); Lubicon Lake Band v. Canada, Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), and one that was just Category Two, *see* Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000).

harms claimed by petitioners.

TABLE 2: TYPES OF HARMS CLAIMED BY PETITIONERS

Cases in Which Tribunal Ruled in Favor of Petitioners	*Cases in Which Tribunal Ruled Against Petitioners*
▪ Expropriation of indigenous land for oil and gas exploration in Canada that resulted in harms to the economic base, social institutions, and to the health of the Lubicon Lake Band (United Nations Human Rights Committee [UNHRC]) (Categories One & Two)[167] ▪ Oil exploration in Nigeria that harmed the health of the indigenous Ogoni people through contamination of water, soil, and air and which occurred in the context of attacks on homes and villages of those who protested the oil exploration (African Commission on Human and Peoples' Rights [ACHPR]) (Categories One & Two)[168] ▪ Night noise from aircraft in the United Kingdom that caused health impacts and annoyance (European Court of Human Rights [ECHR]) (Category Three)[169] ▪ Emissions and an explosion from a chemical factory in Italy that caused harms to life and health (ECHR) (Category Three)[170] ▪ Fumes and odors from an unlicensed waste treatment plant, which caused health problems for residents, in a town in Spain that has a high concentration of leather tanneries (ECHR) (Category Three)[171] ▪ Water pollution from a waste treatment plant in Sweden that was licensed without adequate judicial review (ECHR) (Category Three)[172] ▪ Government grant of logging concessions in Nicaragua that threatened the indigenous Awas Tingni Community's right to its traditional land (Inter-American Court on Human	▪ Extinguishing of indigenous fishing rights of the Maori people in New Zealand by representatives who exchanged these rights for a stake in a large fishing corporation (UNHCR) (Category Two) [176] ▪ Logging and construction of roads on land of the indigenous Sami people in Finland that is expected to harm traditional reindeer herding (UNHCR) (Categories One & Two)[177] ▪ Re-licensing of a nuclear power plant in Switzerland that petitioners claim poses a greater than usual risk of an accident (ECHR) (Category Three)[178] ▪ Intentional exposure of service personnel to radiation in the United Kingdom without warning of possible effects on offspring (ECHR) (No Category)[179] ▪ Emissions from copper mining in Peru that have caused respiratory illnesses (United States) (Category One)[180] ▪ Copper, gold, and silver mining operations in the context of other human rights violations in Indonesia that harmed the environment and culture of the indigenous Amungme people and caused them to relocate (United States) (Categories One & Two)[181] ▪ Mining operations in Papua New Guinea that harmed people's environment and health, including that of indigenous peoples, and incited a civil war (United States) (Categories One & Two)[182]

167. Lubicon Lake Band v. Canada, Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

168. Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Commission on Human And Peoples' Rights (2001).

169. Hatton v. United Kingdom, 37 Eur. Ct. H.R. 28 (2003).

170. Guerra and Others v. Italy, 26 Eur. Ct. H.R. 357 (1998).

171. Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1995).

172. Zander v. Sweden, 18 Eur. Ct. H.R. 175 (1994).

Cases in Which Tribunal Ruled in Favor of Petitioners	*Cases in Which Tribunal Ruled Against Petitioners*
Rights [IACHR1]) (Categories One & Two)[173] ▪ Appropriation of ancestral lands of the indigenous Western Shoshone people in the United States, including removal and threatened removal of livestock and permission for gold prospecting (Inter-American Commission on Human Rights [IACHR2]) (Categories One & Two)[174] ▪ Mining operations, combined with agricultural development projects, on lands of the indigenous Yanomami people in Brazil that resulted in harm to social organization, introduction of diseases, displacement, disappearances, and deaths (IACHR2) (Categories One & Two)[175]	

Petitioners brought a mix of substantive and procedural claims. With the exception of the case before the African Commission on Human and Peoples' Rights,[183] the substantive claims consisted of derived environmental rights—general rights applied to the environmental problem—rather than a specific right to a healthy environment. Until 1999, when the San Salvador Protocol came into force and added a right to a healthy environment in the Inter-American system,[184] the African Charter on Human and Peoples' Rights was the only binding human rights treaty with an explicit right to a healthy environment. Derived

173. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79, Inter-Am. Ct. H.R., Ser. C (2001).

174. Dann v. United States, Case 11.140, Inter-Am C.H.R., 75/02 (2001).

175. Case No. 7615, Inter-Am. C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985).

176. Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000).

177. Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996).

178. Athanassoglou v. Switzerland, 31 Eur. Ct. H.R. 13 (2001).

179. LCB v. United Kingdom, 27 Eur. Ct. H.R. 212 (1998).

180. Flores v. S. Peru Copper Corp., 343 F.3d 140 (2nd Cir. 2003).

181. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

182. Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116 (C.D. Cal. 2002).

183. *See* Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Commission on Human and Peoples' Rights (2001).

184. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Nov. 17, 1988, art. 11, O.A.S. Treaty Series No. 69 (entered into force Nov. 16, 1999). Article 11 provides: "1. Everyone shall have the right to live in a healthy environment and to have access to basic public services. 2. The States Parties shall promote the protection, preservation, and improvement of the environment."

rights were thus the sole option open to petitioners in most instances.[185] For example, in *Guerra and Others v. Italy*, petitioners prevailed before the European Court of Human Rights on a claim that a chemical factory's gas emissions and explosion violated their right to respect for private and family life.[186]

The procedural claims in all of the tribunals focused on issues of judicial access and recourse. For instance, in *Zander v. Sweden*, the European Court of Human Rights found that the process by which a waste treatment plant's license was renewed violated petitioners' right to a fair and public hearing.[187] Similarly, in *The Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Court on Human Rights found a violation of the procedural right to judicial protection, as well as a violation of the substantive right to property.[188]

The types of environmental human rights claims petitioners brought appear to be more closely related to the tribunal in which they were being raised than to the specifics of the harm. Because each of the international and regional tribunals relies upon a specific convention, the formulation of claims before them depended on the particular rights listed in the convention, as well as prior jurisprudence. For instance, the U.N. Human Rights Committee cases all included claims of a violation of the right of minorities to culture, religion, and language,[189] and all but one of the European Court of Human Rights cases involved claims of a violation of the right to respect for private and family life.[190] Table 3 details the environmental rights claims and judicial responses for cases in which petitioners won, and Table 4 does the same for the cases in which petitioners lost.

185. Organization of African Unity: Banjul Charter on Human and Peoples' Rights, June 27, 1981, art. 24, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (entered into force Oct. 21, 1986). Article 24 provides: "All peoples shall have the right to a general satisfactory environment favorable to their development."

186. 26 Eur. Ct. H.R. 357 (1998).

187. 18 Eur. Ct. H.R. 175 (1994).

188. Case No. 79 Inter-Am. C.H.R. (2001).

189. *See* Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996); Lubicon Lake Band v. Canada, Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

190. *See* Hatton v. United Kingdom, 37 Eur. Ct. H.R. 28 (2003); Athanassoglou v. Switzerland, 31 Eur. Ct. H.R. 13 (2001); Guerra and Others v. Italy, 26 Eur. Ct. H.R. 357 (1998); LCB v. United Kingdom, 27 Eur. Ct. H.R. 212 (1998); Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1995).

TABLE 3: JUDICIAL RESPONSES TO CLAIMS IN CASES IN WHICH PETITIONERS WON

Environmental Rights Claims Made by Petitioners	*Tribunal Holding*
(UNHRC): Violation of right of peoples to self determination and to dispose freely of their natural wealth and resources[191]	(UNHRC): Committee instead found a violation of right of minorities to culture, religion, and language.[192]
(ACHPR): Violations of rights to life and integrity of person, property, health, free disposal of wealth and natural resources, and general satisfactory environment favorable to peoples' development, as well as of the guarantees of the right and freedoms in the Charter for all individuals and of the protection of family, women, children, aged, and disabled[193]	(ACHPR): Commission found violations of all rights claimed by petitioners.[194]
(ECHR): Violations of rights to respect for private and family life and to an effective remedy[195]	(ECHR): Court found a violation of the right to an effective remedy, but no violation of the right to respect for private and family life.[196]
(ECHR): Violations of rights to life, respect for private and family life, and freedom of expression[197]	(ECHR): Court found a violation of the right to respect for private and family life, but concluded that the right to freedom of expression was not applicable to this case and that it did not need to reach the right to life claim.[198]
(ECHR): Violations of prohibition of torture and of right to respect for private and family life[199]	(ECHR): Court found a violation of the right to respect for private and family life, but not of the prohibition on torture.[200]
(ECHR): Violation of right to a fair and public hearing[201]	(ECHR): Court found a violation of right to a fair and public hearing.[202]
(IACHR1): Commission asked the Court to resolve whether Nicaragua violated the obligation to respect rights and to give those rights domestic effect, and the rights to property and to judicial protection.[203]	(IACHR1): Court found violations of rights to property and to judicial protection, and ordered Nicaragua to take specific steps to give those rights domestic effect.[204]

191. Lubicon Lake Band v. Canada, Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), at para 2.1.

192. *Id.* at paras. 32-33.

193. Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Commission on Human And Peoples' Rights (2001), at para 10.

194. *Id.* at Commission Holding.

195. Hatton v. United Kingdom, 37 Eur. Ct. H.R. 28 (2003), at paras. 84, 131.

196. *Id.* at paras. 130, 142 & Court Holding.

197. Guerra and Others v. Italy, 26 Eur. Ct. H.R. 357 (1998), at paras. 47, 56 & 61.

198. *Id.* at paras. 54, 60 & 62.

199. Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1995), at paras. 44, 59.

200. *Id.* at paras. 58, 60.

201. Zander v. Sweden, 18 Eur. Ct. H.R. 175 (1994), at para. 22.

202. *Id.* at para. 29.

203. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79, Inter-Am. Ct. H.R.,

(IACHR2): Violations of rights to equality before law, religious freedom and worship, establishment and protection of family, work freely and receive remuneration, judicial recourse, and property[205]	(IACHR2): Commission found violations of rights to equality before law, judicial recourse, and property.[206]
(IACHR2): Violations of right to life, liberty, personal security, equality before law, religious freedom and worship, preservation of health and to well-being, education, recognition of juridical personality and of civil rights, and property[207]	(IACHR2): Commission found violations of rights to life, liberty, personal security, residence, movement, and preservation of health and to well-being.[208]

TABLE 4: JUDICIAL RESPONSES TO CLAIMS IN CASES IN WHICH PETITIONERS LOST

Environmental Rights Claims Made by Petitioners	*Tribunal Holding*
(UNHCR): Violations of right of peoples to self-determination; of protection of rights in Convention; of rights to recognition as a person before law, to freedom of thought, conscience, and religion, to equality before law and to the equal protection of law; and of right of minorities to culture, religion, and language[209]	(UNHCR): Committee found that the facts did not reveal of breach of any of the claimed rights.[210]
(UNHCR): Violation of right of minorities to culture, religion, and language[211]	(UNHCR): Committee found that the facts did not reveal a breach of the right of minorities to culture, religion, and language.[212]
(ECHR): Violations of rights to life, to a fair and public hearing, to respect for private and family life, and to an effective remedy[213]	(ECHR): Court found claims of violations of rights to life and to respect for private and family life too remote, and claims of violations of rights to a fair and public hearing and to an effective remedy inapplicable.[214]

Ser. C (2001), at para. 2.

204. *Id.* at para. 173.

205. Dann v. United States, Case 11.140, Inter-Am C.H.R., 75/02 (2001), at para. 35.

206. *Id.* at para. 172.

207. Case No. 7615*,* Inter-Am. C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985), at para. 1.

208. *Id.* at Commission Resolution, para. 1.

209. Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000), at paras. 2-3.

210. *Id.* at para. 10.

211. Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996), at para. 3.1.

212. *Id.* at para. 11.

213. Athanassoglou v. Switzerland, 31 Eur. Ct. H.R. 13 (2001), at paras. 35, 56–60.

214. *Id.* at paras. 55, 59-60.

(ECHR): Violations of rights to life, to respect for private and family life, and to an effective remedy, as well as of the prohibition on torture[215]	(ECHR): Court found insufficient facts for violations of right to life and of the prohibition on torture, and that claims of violations of the rights to respect for private and family life and to an effective remedy were not raised early enough in the proceedings.[216]
(United States): Violations of rights to life and health[217]	(United States): Court found the rights to life and health insufficiently definite to constitute rules of customary international law.[218]
(United States): Violations of genocide and cultural genocide.[219]	(United States): Court found insufficient facts to support claims of cultural genocide and genocide.[220]
(United States): Racial discrimination and violations of right to life and health.[221]	(United States): Court found sufficient factual pleadings to support the claim of racial discrimination, but held that the rights to life and health are insufficiently specific, universal, and obligatory to provide a basis for a customary international law claim.[222]

Petitioner's likelihood of prevailing rested on different factors in the international and regional tribunals than in the United States courts. In the international and regional tribunals, success or failure appeared to hinge on the court's application of the law to the facts rather than on whether environmental harm could implicate the rights claimed. In *Länsman v. Finland*, for example, the U.N. Human Rights Committee found insufficient facts to constitute a violation of the International Covenant on Civil and Political Rights, especially given the Canadian

215. LCB v. United Kingdom, 27 Eur. Ct. H.R. 212 (1998), at paras. 21, 41.

216. *Id.* at para. 45.

217. Flores v. S. Peru Copper Corp., 343 F.3d 140, 144 (2nd Cir. 2003). Plaintiffs also claimed violation of the right to sustainable development in their original pleadings, but did not pursue that claim on appeal. *Id.*

218. *Id.* at 160. The court also found that plaintiffs did not submit sufficient evidence to establish intranational pollution as a customary international law violation. *Id.* at 172.

219. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 165 (5th Cir. 1999). Plaintiffs also made claims of human rights violations unrelated to environmental harm and of international environmental law violations. *Id.*

220. *Id.* at 168. The court also ruled against the general human rights claims and the international environmental law claims. *Id.* at 165, 167,

221. Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116, 1120, 1155–60 (C.D. Cal. 2002). In addition to their environmental rights allegations, plaintiffs also claim war crimes and crimes against humanity separate from the environmental harm, *id.* at 1120, and violations of international environmental law—sustainable development and the U.N. Convention on the Law of the Sea, *id.* at 1160–63.

222. *Id.* at 1160, 1208–09. The court also found sufficient factual pleadings to support the claims of war crimes, crimes against humanity, and violations of the United Nations Convention on the Law of the Sea. *Id.* The court ultimately dismissed all claims on various justiciability grounds, including political question, act of state, and international comity doctrines. *Id.* at 1208–09.

Supreme Court's specific consideration of those rights, but did not question that other facts—such as plans for future larger-scale logging or more severe impacts than anticipated—would be sufficient.[223] As analyzed in more detail in Part IV.B below, each international and regional tribunal was amenable to particular substantive environmental rights theories—for example, minority rights in the U.N. Human Rights Committee cases versus right to respect for private and family life in the European Court of Human Rights cases—which future petitioners should take into account in order to maximize their opportunities for achieving redress.

In the United States, however, the courts questioned not only the sufficiency of facts, but also the connection between the derived rights and the environment. In two of the cases, courts rejected the customary international law protections of life and health claims as not specific enough to apply to the environmental claims.[224] In *Sarei v. Rio Tinto PLC*, for instance, the court acknowledged that many multilateral agreements contain the rights to life and health, but indicated that it lacked sufficient information on the rights' parameters and the specific conduct that violates them.[225] In the third case, *Beanal v. Freeport McMoran, Inc.*, the court found the facts to be insufficiently pled to support a claim of genocide or cultural genocide, and deemed inadequate the evidence on universal acceptance of an international norm against cultural genocide.[226] Thus, as discussed in more detail in Part IV.B below, successful cases in international and regional tribunals relied upon consistent rights theories with well-developed factual connections.[227] But, except in the context of a racial discrimination claim, petitioners have failed to convince United States courts of the existence of customary international law environmental rights, as discussed in Part IV.A.3.

2. *Applying the model: relationships between polluters and victims.*

Three main issues regarding the relationship between the polluters and victims arose in the case studies, paralleling the structure of the model: (1) how the victim's status impacted the nature of the polluter's

223. Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996), at paras. 10.5–10.7.

224. Flores v. S. Peru Copper Corp, 343 F.3d 140 (2d Cir. 2003); Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116 (D.C. Cal. 2002).

225. 221 F. Supp. 2d at 1158.

226. 197 F.3d 161 (5th Cir. 1999).

227. *See infra* Part IV.B.

duties; (2) whether the polluter was causing harm that constituted a human rights violation; and (3) which entity was the relevant responsible actor.

In all of the cases, petitioners claimed a breach of a duty of care—although they rarely used such phraseology—but the contours of that duty varied primarily based on whether the victims were indigenous peoples. The European Court of Human Rights cases studied—none of which involved indigenous petitioners—simply relied upon the duties provided by the European Convention for the Protection of Human Rights and Fundamental Freedoms and analyzed whether the facts were sufficient to constitute a violation by the government in question.[228] In *LCB v. United Kingdom*, for instance, the petitioner claimed that her father had been intentionally exposed to radiation and that her parents had not been warned of the possible risks of that exposure to his offspring.[229] The court concluded that "given the information available to the State at the relevant time concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health," the State did not have a duty to warn the petitioner's parents or take special action with respect to her.[230]

In contrast, the U.N. Human Rights Committee cases all involved indigenous peoples who had protected status under international law that was often reflected in relevant domestic law.[231] For example, in *Lubicon Lake Band v. Canada*, the Committee noted that Canada has legally recognized the right of the Lubicon Lake Band to the continuation of its traditional way of life.[232] Similarly, in *Apirana Majuika et al. v. New Zealand*, which involved Maori claims to fishing rights, an earlier Fisheries Act gave the Maori protected status under New Zealand Law.[233] The rights determinations in these cases thus rested not only on

228. *See* Hatton v. United Kingdom, 37 Eur. Ct. H.R. 28 (2003); Athanassoglou v. Switzerland, 31 Eur. Ct. H.R. 13 (2001); Guerra and Others v. Italy, 26 Eur. Ct. H.R. 357 (1998); LCB v. United Kingdom, 27 Eur. Ct. H.R. 212 (1998); Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1995); Zander v. Sweden, 18 Eur. Ct. H.R. 175 (1994).

229. 27 Eur. Ct. H.R. 212 (1998), at paras. 10–18.

230. *Id.* at para 41.

231. *See* Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996); Lubicon Lake Band v. Canada, Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

232. Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), at para. 2.3.

233. Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993

the general application of rights to environmental harm, but also on the specific obligations the relevant governments had to the impacted indigenous peoples.

Causation became an issue with respect to whether the harms to petitioners rose to the level of a human rights violation. In the cases in which petitioners succeeded, the harm was sufficiently distinct that the court easily found a causal link between the polluter and victim. For instance, in *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, the African Commission on Human and Peoples' Rights found that Nigeria had been directly involved in the oil exploration consortium that had provided inadequate toxic waste disposal and spill prevention.[234]

Of the cases in which the tribunal ruled against petitioners, causation only played a significant role in European Court of Human Rights cases. In *LCB v. United Kingdom*, the petitioner lost in large part because the Court found the causal chain—from intentional radiation exposure of the father to failure to warn of possible impacts on offspring, to inadequate pre and post-natal monitoring of petitioner, to delayed diagnosis and treatment of petitioner's leukemia—weak.[235] Similarly, in *Athanassoglou v. Switzerland*, the Court found the risks to petitioners from the nuclear power plant to be too remote, based on the evidence, to constitute a rights violation.[236]

Both of the U.N. Human Rights Committee cases in which petitioners lost relied primarily upon the fact that the State had already considered the indigenous peoples' rights in the decisonmaking process.[237] In *Apirana Mahuika et al. v. New Zealand*, efforts were made to include the Maori in the extensive settlement process and consider the cultural and religious significant of fishing to them.[238] Similarly, in *Jouni E. Länsman et al. v. Finland*, the Committee explained that the Finnish courts had considered the minority rights claims and found no

(2000), at para. 5.3.

234. Communication No. 155/96, African Commission on Human And Peoples' Rights (2001), at paras. 1–10.

235. 27 Eur. Ct. H.R. 212 (1998), at paras. 10–18, 41.

236. 31 Eur. Ct. H.R. 13 (2001), at paras. 49–55, 60.

237. *See* Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000), at para. 9; Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996), at paras. 2.8-2.9.

238. Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000), at para. 9.

violation.[239] In the United States cases, the courts never reached issues of causation because they ruled against plaintiffs on other grounds.[240]

In each case, the structure of relief offered by the tribunal determined what types of claimants and respondents appeared before it and thus what entities were directly held responsible for the harm. Petitioners all were private parties who claimed a rights violation. Indigenous peoples were victims in five of the cases in which petitioners succeeded[241] and four of the cases in which petitioners failed.[242]

With respect to the polluters, claims in the international and regional tribunals were brought against governments, since claims were not allowed against private parties. In ten of the thirteen cases studied, however, a private entity regulated by the government was the direct cause of the harm,[243] and in another two of those cases, corporations appeared to play some role in the harm.[244] The tribunals held the governments responsible for inadequately constraining the behavior of the corporations, but had no power to reach the corporations directly.[245] For example, in *Lubicon Lake Band v. Canada*, the U.N. Human Rights

239. Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996), at paras. 2, 10.

240. Flores v. S. Peru Copper Corp, 343 F.3d 140 (2d Cir. 2003); Beanal v. Freeport McMoran, Inc., 197 F.3d 161 (5th Cir. 1999); Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116 (D.C. Cal. 2002).

241. Lubicon Lake Band v. Canada, Communication No. 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990); Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Comm'n on Human and Peoples' Rights (2001); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79, Inter-Am. C.H.R., Ser. C. (2001); Dann v. United States, Case No 11.140, Inter-Am. C.H.R. 113/01 (2001); Case No. 7615, Inter-Am C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985).

242. Mahuika v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996); Beanal v. Freeport McMoran, Inc., 197 F.3d 161 (5th 1999); Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116 (D.C. Cal. 2002).

243. Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990); Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Comm'n on Human and Peoples' Rights (2001); Hatton v. United Kingdom, 37 Eur. Ct. H.R. 28; Guerra v. Italy, 26 Eur. C.H.R. 357 (1994); Lopez Ostra v. Spain, 20 Eur. Ct. H.R. 277 (1998); Zander v. Sweden, 18 Eur. Ct. H.R. 175 (1994); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79 Inter-Am. C.H.R. (2001); Apirana Mahuika v. New Zealand, U.N. Human Rights Comm., Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996); Athanassoglou v. Switzerland, 31 Eur. Ct. H.R. 13 (2000).

244. Dann v. United States, Case No 11.140 , Inter-Am. C.H.R. 113/01 (2001); Case No. 7615, Inter-Am C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985).

245. For a discussion of the constraints on bringing actions against non-state actors in international and regional tribunals, see *supra* Part III.C.3.

Committee found that Canada had violated the Lubicon Lake Band's rights by allowing the oil and gas companies to operate on the land and cause damage to it.[246]

In contrast, in the United States, the Supreme Court has interpreted the Foreign Sovereign Immunity Act exceptions narrowly; except in very specific instances, plaintiffs cannot sue states directly under the Alien Tort Statute.[247] Suits against non-state actors are also constrained, however, because few human rights apply to purely private actors. Alien Tort Statute suits against private actors often allege color of state action, trying to portray defendants as enough like a state for the rights obligations to apply to them, but not so state-like that sovereign immunity will block the action.[248] All three of the Alien Tort Statute case studies involve suits against private actors, but only *Sarei v. Rio Tinto PLC* finds some of the environmental rights claims—those involving discrimination—well enough supported by law and fact to analyze whether the private entity can be viewed as a state actor with respect to those claims.[249] As a result of these constraints, in all of the tribunals, petitioners were only able reach some of those responsible for the pollution.

3. *Applying the model: evidence of discrimination.*

The evidence of discrimination in the case studies correlates to whether the claims involved indigenous peoples. Each of nine cases involving indigenous peoples—but none of the other cases—had facts that provided some basis for a discrimination claim.[250] Despite this

246. Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), at paras. 2.3, 32-33.

247. *See* Elizabeth Defeis, *The Foreign Sovereign Immunities Act and the Human Rights Violations*, 8 ILSA J. INT'L & COMP. L. 363 (2002).

248. *Cf.* Paul E. Hagen & Anthony L. Michaels, *The Alien Tort Claims Act: A Primer for Liability of Multinational Corporations*, SJ509 ALI-ABA 319, 326–32 (2004) (discussing liability of private parties under the Alien Tort Statute); Gregory G.A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUM. RTS. L. REV. 359, 387–405 (1999) (discussing the application of the Alien Tort Statute to corporations).

249. 221 F. Supp.2d, 1116, 1153–55 (C.D. Cal. 2002). The court also analyzes other human rights claims that were not directly related to environmental harm and finds adequate evidence to allow the corporation to be treated as a state. *Id*. at 1142–49.

250. The cases involving indigenous peoples in which petitioners succeeded are: Lubicon Lake Band v. Canada, Communication No. 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990); Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Comm'n on Human and Peoples' Rights (2001); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79, Inter-Am. C.H.R., Ser. C. (2001); Dann v. United States, Case No 11.140, Inter-Am. C.H.R. 113/01 (2001); Case No. 7615, Inter-Am

evidence, however, very few of these cases included explicit discrimination claims. Because treatment of discrimination claims varied significantly by tribunal, this section separately considers each tribunal's handling of the cases involving indigenous peoples.[251]

All three cases before the U.N. Human Rights Committee contained allegations of violations of the right of minorities to culture, religion, and language, as protected by Article 27 of the International Covenant on Civil and Political Rights.[252] The petitioners in *Apirana Mahuika et al. v. New Zealand*, however, were the only ones to bring a claim under Article 26 of the Covenant, which prohibits discrimination,[253] and the Committee declared that claim inadmissible.[254] Although the Committee itself did not provide any analysis as to why the facts provided by petitioners were inadequate for a discrimination claim,[255] the State argued, based on prior Committee jurisprudence, that claims involving indigenous peoples should be considered under the protections of minority rights rather than under the protections against discrimination.[256] Thus, the Committee's current jurisprudence suggests that petitioners who are indigenous peoples are unlikely to succeed with an environmental rights claim under Article 26.

The case study before the African Commission on Human and Peoples' Rights was also limited in its consideration of the environmental harm as discrimination. In *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, petitioners included a claim that Article 2 of the African Charter on Human and People's Rights, which provides that the rights in the Charter will apply

C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985). The cases involving indigenous peoples in which petitioners lost are: Apirana Mahuika v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996); Beanal v. Freeport McMoran, Inc., 197 F.3d 161 (5th 1999); Sarei v. Rio Tinto PLC, 221 F. Supp.2d 1116 (D.C. Cal. 2002).

251. Because none of the European Court of Human Rights cases studied involved evidence of discrimination, that court is not included in this analysis.

252. *See* Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000); Jouni E. Länsman et al. v. Finland, Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996); Lubicon Lake Band v. Canada, Communication No 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

253. Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000), at para. 1.

254. *Id. at* Admissibility.

255. *Id.* at para. 15.7.

256. *Id.* at para. 5.6.

to all people without distinction, was violated.[257] Petitioners did not, however, include claims under Article 3 (equality before law) or Article 19 (equal rights of people with no domination of one people by another).[258] Although the Commission found a violation of Article 2, among others, the opinion did not directly address the violations as discriminatory behavior or explain why Article 2 was specifically violated.[259]

All three Inter-American Court and Commission of Human Rights cases involved some invocation of equality, but only one of them dealt directly with discrimination. In *Dann v. United States*, the Commission's opinion provided extensive analysis of the violation of the Danns' right to equality before law as enshrined in Article II of the American Declaration of the Rights and Duties of Man (American Declaration).[260] The Commission ultimately concluded that the United States failed "to ensure the Danns' right to property under conditions of equality" through the process by which it appropriated Western Shoshone ancestral lands.[261]

The other two Inter-American cases did not address discrimination issues. Although the petitioners in the case brought by the Yanomami against Brazil included a claim that Article II of the American Declaration had been violated,[262] the Commission's analysis focused on the special protections for indigenous peoples under international law,[263] and its holding did not include a finding of an Article II violation.[264] In *Case of Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, petitioners claimed a violation of Article 1 of the American Convention on Human Rights, which provides an obligation to respect rights without discrimination, but did not invoke Article 24, which protects equality before law.[265] The Court's opinion considered the petitioners' status as

257. Communication No. 155/96, African Commission on Human And Peoples' Rights (2001), at para. 10.

258. *Id.* African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58, at arts. 3, 19.

259. Soc. and Econ. Rights Action Ctr. for Econ. and Soc. Rights v. Nigeria, Communication No. 155/96, African Commission on Human And Peoples' Rights (2001), at Commission Holding.

260. Case No 11.140 , Inter-Am. C.H.R. 113/01 (2001), at paras. 133–45.

261. *Id.* at para. 172.

262. Case No. 7615, Inter-Am C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985), at para. 1.

263. *Id.* at paras. 7–9.

264. *Id.* at Commission Holding.

265. Case No. 79 Inter-Am. C.H.R. (2001), at para. 2. *See* American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 101, at arts. 1, 24.

indigenous peoples throughout its analysis, but did not discuss discrimination issues in the discussion or holding.[266]

The two cases in United States courts brought under the Alien Tort Statute that involved indigenous peoples both included discrimination as an element of the claims brought. Only in *Sarei v. Rio Tinto PLC*, however, did plaintiffs make a distinct intentional discrimination claim. They argued that Rio Tinto PLC has a history of racial discrimination around the world, and intentionally violated their rights because they are a racial minority.[267] The court held that discrimination in violation of international law had occurred, but then dismissed the claim on the basis of non-substantive justiciablity grounds.[268] *Beanal v. Freeport McMoran, Inc.* addressed discrimination indirectly through the claims of genocide and cultural genocide, which include intentional discrimination as an element, but the opinion did not discuss issues of discrimination directly.[269]

Thus, despite evidence of discrimination in over half of the cases studied, various barriers prevented discrimination claims—as distinct from indigenous rights claims—from playing a significant role in petitioners' attempts at redress. The *Dann v. United States* and *Sarei v. Rio Tinto PLC* cases were the only ones in which tribunals explicitly acknowledged the environmental harm as discriminatory.

B. *Proposals for Advocacy*

The case study analysis above provides a basis for constructing more effective advocacy under current international human rights law, as well as a guide to areas where the law might further develop. This section explores advocates' options under current international law and lays out a map for future legal development.

1. *Strategies under current international law.*

Although the structural constraints discussed in Part II make the diversity of claims in the case studies unsurprising, application of the model reveals the extent to which each tribunal approaches environmental rights analysis uniquely. The rights theories applied by tribunals varied widely, even on similar facts. In crafting rights claims

266. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Case No. 79 Inter-Am. C.H.R. (2001), at paras. 106–39, 142–55 & 157.

267. 221 F. Supp.2d 1116, 1151–55 (C.D. Cal. 2002).

268. *Id.* at 1208–09.

269. 197 F.3d 161, 165 (5th Cir. 1999).

and choosing among applicable forums, advocates should consider how well their facts provide a basis for the types of claims that have previously succeeded in the various tribunals.

Beyond the substantive differences among the forums, however, application of the model also reveals a consistent gap; the discriminatory aspects of environmental harms are underrepresented in the case studies. This lack of focus on discrimination seems like a mistake, given the strength of the evidence in the cases involving indigenous peoples. The following analysis thus engages not only the particular environmental rights approaches that have succeeded in each forum, but also the potential viability of discrimination claims.

All of the U.N. Human Rights Committee cases included in the study involved environmental harm to indigenous peoples. Its jurisprudence with respect to these cases suggests that it is most amenable to claims in that context based on a violation of Article 27 of the International Covenant on Civil and Political Rights, which protects minority rights to culture, religion, and language.[270] Success of the minority rights claims hinged upon both the extent of the violation and the government's efforts to address the problem.[271] Future cases are most likely to succeed in situations in which indigenous peoples have suffered severe environmental harm and the relevant State party has given them only minimal consideration in domestic decisonmaking processes or court decisions.

Given the Committee's rejection of efforts to bring a discrimination claim under Article 26 when indigenous peoples were involved, advocates wishing to test such a claim should first bring a case with facts that strongly support a claim of discrimination and with victims who are not indigenous peoples but members of some other differentiable group.[272] In such a case, in which evidence of discrimination is clear but Article 27 does not apply, the Committee would be forced to consider relying upon Article 26. A positive outcome in that test case might then be expanded in later cases to address harm to indigenous peoples.

The African Commission on Human and Peoples' Rights accepted a

270. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, at art. 27.

271. *See supra* note 223 and accompanying text.

272. For a discussion of the Committee's rejection of Article 26 claims involving indigenous peoples as petitioners, see *supra* notes 252–256. Petitioners have, however, been able to successfully invoke Article 26 in other contexts. *See, e.g.*, Broeks v. Netherlands, Communication No. 172/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/42/40) at 139 (1987) (finding a violation of Article 26 based on gender discrimination).

wide range of derived environmental rights claims, as well as a claim based on a "right to a general satisfactory environment favorable to [peoples'] development," as provided for in Article 24 of the African Charter on Human and Peoples' Rights.[273] Given its amenability to many different approaches to environmental rights, it might be an ideal forum in which to test a discrimination claim based on Articles 2, 3, and 19 of the African Charter, which together provide substantial protections against discrimination.[274] Such a test case should involve environmental harm disproportionately impacting a minority group, particularly if the group is targeted in other ways or has attempted unsuccessfully to obtain relief through a domestic process in which irregularities occurred.

In the European Court of Human Rights, advocates characterized environmental harm as violating several articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Claims succeeded most often on substantive arguments that the Article 8 right to respect for private and family life had been violated, or procedural arguments based on Article 6(1) or Article 13 regarding inadequate judicial recourse.[275]

None of the European Court of Human Rights cases studied contained the factual basis for a discrimination claim. Should such facts arise, advocates should consider adding a claim under Article 14 of the European Convention, which prohibits discrimination in the securing of the rights and freedoms protected by the Convention. Although the European Court of Human Rights often fails to reach Article 14 claims when it finds a substantive rights violation,[276] the Court's general receptiveness to environmental rights theories might make it a good test forum for using discrimination claims to address disproportionate environmental harm.

273. *See supra* note 185 and accompanying text.

274. African Charter on Human and Peoples' Rights (Banjul Charter), June 27, 1981, 21 I.L.M. 58, at arts 2, 3 & 19.

275. Tables 3 and 4, *supra* Part IV.A.1, summarize the claims brought in the European Court of Human rights and the judicial responses to them.

276. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S 221, E.T.S. 5, at art. 14. For examples of the Court failing to reach the Article 14 claims when it finds a substantive rights violation, see Smith & Grady v. United Kingdom, 29 Eur. C.H.R. 493 (1999), at para. 116; X & Y v. The Netherlands, 8 Eur. C.H.R. 235 (1985), at para. 32. *See also* Sameera Dalvi, *Homosexuality and the European Court of Human Rights: Recent Judgments Against the United Kingdom and Their Impact on Other Signatories to the European Convention on Human Rights*, 15 U. FLA. J.L. & PUB. POL'Y 467, 487 (2004); Gerda Kleijkamp, *Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 307, 325–28 (2002).

The Inter-American Court and Commission on Human Rights was amenable to claims regarding a wide range of substantive arguments—though the most recent cases that have reached substantive resolution have focused on the right to property—as well as procedural claims about inadequate judicial recourse and protection.[277] With the explicit right to a healthy environment now embodied in the San Salvador Protocol,[278] future decisions regarding environmental harm to humans will likely rely at least in part upon this right, just as the African Commission on Human and Peoples' Rights did in *Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*.[279]

The Inter-American Commission's opinion in *Dann v. United States* serves as a model for how a successful environmental rights discrimination claim might be brought.[280] The Commission's finding that the United States' inadequate consideration of petitioners' property interest in Western Shoshone ancestral lands constituted a violation of equal treatment[281] demonstrates how a derived rights claim and discrimination claim might be interwoven. The Commission held that appropriation of land without adequate consideration of the property rights violated both the right to property and the right to equal treatment under law.[282] The outcome in *Dann* suggests the amenability of the Inter-American human rights tribunals to future cases using theories of environmental harm constituting discriminatory treatment.

Finally, in United States Alien Tort Statute jurisprudence, derived rights claims based on the rights to life and health in two of the case studies, and on the prohibition against genocide and cultural genocide in the other, all failed.[283] Given that precedent and the Supreme Court's recent decision in *Sosa v. Alvarez-Machain* narrowly defining the "law of nations" prong of the Alien Tort Statute,[284] claims on any of these

277. Tables 3 and 4, *supra* Part IV.A.1, summarize the claims brought before the Inter-American Court and Commission of Human Rights and the tribunals' responses to them.

278. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Nov. 17, 1988, art. 11, O.A.S. Treaty Series No. 69 (entered into force Nov. 16, 1999).

279. Communication No. 155/96, African Commission on Human And Peoples' Rights (2001), at Commission Holding.

280. Case No 11.140 , Inter-Am. C.H.R. 113/01 (2001), at paras. 133–45.

281. *Id.* at para. 145.

282. *Id.* at para. 172.

283. Tables 3 and 4, *supra* Part IV.A.1, summarize the claims brought in the United States courts under the Alien Tort Statute and the judicial responses to them.

284. 123 S.Ct. 2739, 2765 (Jun. 29, 2004) The Court stated:

> Whatever the ultimate criteria for accepting a cause of action subject to jurisdiction under § 1350, we are persuaded that federal courts should not recognized private claims

grounds under the Alien Tort Statute are unlikely to succeed until new developments in customary international law occur.

The United States courts did show less hostility, however, to a theory that environmental harm could constitute part of a pattern of discrimination. Although the plaintiffs in *Sarei v. Rio Tinto PLC* ultimately lost on procedural grounds, the court substantively accepted the plaintiffs' discrimination claims.[285] This small victory suggests a possible avenue for future Alien Tort Statute claims involving environmental harm.

2. A map for future legal development.

The gaps in existing jurisprudence suggest where future legal development would be most effective. With respect to treaties, the most helpful development for victims of environmental harms would be a binding environmental rights treaty that creates a corresponding judicial forum with enforcement authority. That forum would have jurisdiction over not only state parties, but also non-state petitioners and defendants.

Given that binding acknowledgement of environmental rights exists only in two regional human rights treaties and that none of the human rights tribunals studied allows for non-state actors as defendants, however, scant hope exists for such a development in the near future. The Draft Principles on Human Rights and the Environment, published in 1994 in conjunction with Fatma Zohra Ksentini's report to the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, represent the beginnings of such an approach, but they are nonbinding and therefore have no enforcement mechanism.[286]

More realistically, with respect to existing treaties, advocates could work to build the jurisprudence linking human rights to environmental harm by carefully bringing cases that (1) incrementally expand the existing jurisprudence in forums that have ruled positively on environmental rights claims and (2) begin to create precedent—or at least positive persuasive authority for those tribunals that do not

> under federal common law for violations of any international norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when § 1350 was enacted.

Id.

285. 221 F. Supp. 2d 1116, 1151–55 (C.D. Cal. 2002).

286. Draft Principles on Human Rights and the Environment, in Human Rights and the Environment: Final Report Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), annex 1, *available at* http://www1.umn.edu/humanrts/instree/1994-dec.htm.

recognize precedent—in each human rights forum that has not yet considered such claims.[287] As additional treaties are negotiated, advocates can work to strengthen links between those rights that have been successfully relied upon in the case studies and environmental harm, as well as to seek inclusion of an explicit right to a healthy environment. Given the important role of non-state corporate actors in most of these situations, strengthening international governance of MNCs is also critical; negotiators should work with governments, corporations, and nongovernmental organizations to create binding obligations and accountability in tribunals for non-state corporate actors.[288]

Regarding customary international law, the concern of the United States federal courts—the only tribunals in the case studies that focused on claims based on customary international human rights law—was the lack of specificity of the rights to life and health. The various treaty advocacy strategies proposed above would help to address that issue, particularly if they focused on more specific language linking environmental harm to rights to life and health violations. Such an approach may be of only limited effectiveness, however, since recognition of environmental rights by a number of the regional and international forums was insufficient for United States federal courts' that have considered the issue.[289] Alien Tort Statute suits on environmental rights grounds, with the possible exception of discrimination claims, may simply have to wait for new developments sufficient to allow advocates to distinguish the substantial negative precedent more effectively.

V. CONCLUDING REFLECTIONS

In the final analysis, the biggest lesson from the application of the model to these case studies may not be any of the substantive ones articulated above, but rather the critical need for more coordination of

287. For example, Betsy Apple, the Director of Women's Rights Project, EarthRights International. suggests bringing claims before the Committee on the Elimination of Discrimination Against Women, which was created by the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981). *See* Betsy Apple, Discussant, Carnegie Council on Ethics and International Affairs (June 17, 2004).

288. Voluntary international agreements currently regulate corporations, but their effectiveness in preventing environmental harm to humans or in creating accountability when violations occur is limited. *See* HENKIN ET AL., *supra* note 5, at 421–425; HUNTER ET AL., *supra* note 16, at 1405–33.

289. *See* Flores v. S. Peru Copper Corp., 343 F.3d 140, 160–72 (2nd Cir. 2003).

advocacy. So long as environmental rights cases are brought individually, the ability to develop a systematic jurisprudence will be limited. A better international network is needed to provide additional connections among advocacy efforts occurring around the world. A number of nongovernmental organizations have already begun this process. For example, the Environmental Law Alliance Worldwide ("E-LAW") now connects over 300 grassroots lawyers in 60 countries.[290] But the diversity of legal approaches in the case studies suggests that further cooperative efforts are needed.

Even when the barriers of time, money, language, and differences of opinion prevent actual collaboration among advocates, comparative examination of the existing jurisprudence in human rights forums may enable some *de facto* coordination. By looking at how the facts in the new cases compare to those that have been argued in applicable forums and at which legal claims on similar facts have been most effective, advocates can more effectively structure their litigation strategy to give victims of environmental harm their greatest chance of human rights redress. Similarly, in encouraging treaty and customary international law development, advocates can build from the derived rights linkages that have been most effective in the jurisprudence to date. The model and case studies presented here provide the beginnings of such a road map, but more systematic analysis and networking are still needed.

VI. APPENDIX: APPLICATION OF THE MODEL TO CASE STUDIES

A. Successful Environmental Rights Claims

1. U.N. Human Rights Committee.

Case One	*Lubicon Lake Band v. Canada,* Communication No. 167/1984, U.N. H.R.C., U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).
Nature of Environmental Harm to Victims	*Geographic scope:* Approximately 10,000 km² on which Lubicon Lake Band relies. Para. 2.2. *Severity:* Expropriation of this land for oil and gas exploration. Lubicon Lake Band claims that the land was destroyed, but government claims that no irreparable harm has occurred. Paras. 2.3, 29.1–29.2. *Duration:* Ongoing at time of decision. Had begun several years prior to decision. Paras. 3.3–4. *Type of rights claim:* Lubicon Lake Band claims loss of "its economic base and the breakdown of its social institutions," para 23.2, as well as threats

290. For a description of E-Law, see http://www.elaw.org/about/ (visited Nov. 28, 2004) (on file with author).

	to lives of members of band (including massive increase in miscarriage and stillbirth rates), para 16.2, in violation of Article 1 (right of peoples to self-determination and to dispose freely of their natural wealth and resources) of the International Covenant on Civil and Political Rights, para 2.1.
Relationship Between Polluters and Victims	*Duty of care:* Canada has legally recognized the right of the Lubicon Lake Band to the continuation of its traditional way of life. Para. 2.3. *Causation:* Canada has allowed the oil and gas companies to operate on the land. The oil and gas companies have caused the damage to the land. Para. 2.3. *International law status of the polluter:* Canada is a state, and the oil and gas companies are non-state corporate actors
Evidence of Discrimination	*Protected status of the victim:* Lubicon Lake Band has protected status under Canadian law, which recognizes its right to the continuation of its traditional way of life. Para. 2.3. *Historical context:* State party acknowledges historical inequities for which Lubicon Lake Band deserves a "'reserve and related entitlements.'" Para. 24.1. *Current context:* Claim of irreparable harm in violation of the right to continue its traditional way of life, but not of the intent to discriminate. Paras. 1–4. *Decisonmaking process:* No claim of discrimination. *Disparate impact:* Complaint focuses on development that impacts Lubicon Lake Band uniquely.
Judicial Resolution	Although the claims were formulated in terms of Article 1, the Committee found a violation of Article 27 (Right of minorities to culture, religion, and language). Para. 32.2. Committee holds that: "[The] [h]istorical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant." Para. 33.

2. African Commission on Human and Peoples' Rights

Case One	*Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria,* Communication No. 155/96, African Commission on Human and Peoples' Rights (2001), *available at* http://www1.umn.edu/humanrts/africa/comcases/155-96b.html.
Nature of Environmental Harm to Victims	*Geographic scope:* Ogoniland (a region of the Niger Delta in which the Ogoni people live). Paras. 1–2. *Severity:* Complaint alleges oil exploration that included inadequate disposal of toxic waste and spill prevention, which resulted in contamination of water, soil, and air, and caused short and long-term health impacts. Also, alleges that supporters of the Movement of the Survival of Ogoni People suffered attacks on their homes and villages in response to their opposition to the oil

	exploration and resulting harms. Paras. 1–10. *Duration:* Ongoing at time of decision. Had begun several years prior to decision. Paras. 1–10. *Type of rights claim:* Complaint alleges violations of Articles 2 (guarantees rights and freedoms in Charter to all individuals), 4 (right to life and integrity of person), 14 (right to property), 16 (right to health), 18 (protection of family, women, children, aged, and disabled), 21 (right to free disposal of wealth and natural resources), and 24 (right to general satisfactory environment favorable to peoples' development) of the African Charter on Human and Peoples' Rights.
Relationship Between Polluters and Victims	*Duty of care:* Nigeria has an obligation to refrain from interfering with rights, to ensure that others respect rights, and to fulfill its obligations under human rights regimes to protect rights and freedoms. Paras. 44–48. *Causation:* Nigeria been directly involved in the oil consortium through the Nigerian National Petroleum Company (NNPC), which was in a consortium with the private actor Shell Petroleum Development Corporation (SPDC). Para. 1. *International law status of the polluter:* Nigeria is a state, NNPC has state actor status, and SPDC is a non-state corporate actor.
Evidence of Discrimination	*Protected status of the victim:* The Ogoni are an indigenous people and thus have protected status under international law. The case, however, focuses on the Ogoni's rights as citizens of Nigeria. Para. 66. *Historical context:* The opinion does not reference historical inequities. *Current context:* The environmental harms occurred in the context of broader abuses by the military regime. Paras. 1–10. *Decisonmaking process:* The decisonmaking process had many irregularities due to the involvement of the military regime. Paras. 1–10. *Disparate impact:* Complaint focuses on abuses that impact the Ogoni people in particular.
Judicial Resolution	Commission "[f]inds the Federal Republic of Nigeria in violation of Articles 2, 4, 14, 16, 18, 21 and 24 of the African Charter on Human and Peoples' Rights." Commission Holding

3. European Court of Human Rights

Case One	*Hatton v. United Kingdom*, 37 Eur. Ct. H.R. 28 (2003).
Nature of Environmental Harm to Victims	*Geographic scope:* Land near Heathrow Airport in United Kingdom. Paras. 11–28. *Severity:* Night noise from aircraft caused annoyance and health impacts. Paras. 11–28. *Duration:* Ongoing at time of decision. Current regime of night noise regulation began in 1993. Paras. 28–83. *Type of rights claim:* Petitioners allege violations of Articles 8 (right to respect for private and family life) and 13 (right to an effective remedy) of the European Convention for the Protection of Human Rights

	and Fundamental Freedoms. Paras. 84, 131
Relationship Between Polluters and Victims	*Duty of care:* English government had duty to provide petitioners with protections of the European Convention. *Causation:* England regulated the private companies operating the flights. *International law status of the polluter:* England is a state, but the companies operating the flights are non-state corporate actors.
Evidence of Discrimination	*Protected status of the victim:* Hatton and other petitioners have the protections of the European Convention. *Historical context:* No history of discrimination against petitioners claimed, but ongoing problem of noise from airport. *Current context:* No claim of discrimination, but claim of procedural inadequacy. *Decisonmaking process:* No claim of discrimination and England provided Hatton and others with adequate judicial access, but an overly narrow scope of review made the remedy available to them ineffective. Paras. 140–42. *Disparate impact:* Not directly claimed, but complaint focuses on impact of those who are specially situated because they live near the airport.
Judicial Resolution	Court concluded that Article 8 was not violated; Article 13 was violated; and that the finding of the Article 13 violation "constitutes in itself just satisfaction for any damage sustained by the applicants." Court Holding.

Case Two	*Guerra v. Italy*, 26 Eur. Ct. H.R. 357 (1998).
Nature of Environmental Harm to Victims	*Geographic scope:* Town of Manfredonia, Italy, which is located approximately 1 km from a chemical factory. Para. 12. *Severity:* Claim that nonflammable gas emissions and a 1976 explosion caused severe pollution that has resulted in harms to life and health (150 people were hospitalized with acute arsenic poisoning after the 1976 explosion). Paras. 13–15. *Duration:* Ongoing at time of decision, though production of fertilizers ceased in 1994. After 1994, only a thermoelectric power station and feed and waste water treatment plant remained. Residents of Manfredonia first began judicial proceedings in 1985. The factory was designated as high risk in 1988. Paras. 13, 17–19. *Type of rights claim:* Petitioners allege violations of Articles 2 (right to life), 8 (right to respect for private and family life), and 10 (freedom of expression) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Paras. 47, 56 & 61.
Relationship Between Polluters and Victims	*Duty of care:* Italian government had duty to provide petitioners with protections of Convention. *Causation:* Italy regulated the polluting factory. *International law status of the polluter:* Italy is a state, but the polluting factory is a non-state corporate actor.
Evidence of Discrimination	*Protected status of the victim:* Petitioners have the protections of the European Convention.

	Historical context: No history of discrimination against petitioners claimed. *Current context:* No claim of discrimination, but claim of inadequate provision of information, and protection of right to life and of right to respect for private and family life. *Decisonmaking process:* No claim of discrimination, but national authorities, in their decisonmaking process, did not take adequate steps to protect petitioners from violations of right to private and family life by the severe pollution. Para. 60. *Disparate impact:* Complaint focuses on impact on those who are specially situated only the basis on geography; they live near the chemical factory.
Judicial Resolution	Court concluded that Article 10 was not applicable; that Article 8 was violated and that it was therefore unnecessary to consider Article 2 violations; and awarded damages. Court Holding.

Case Three	*Lopez Ostra v. Spain*, 20 Eur. Ct. H.R. 277 (1995).
Nature of Environmental Harm to Victims	*Geographic scope:* Applicant's home is located in the town of Lorca, which has a high concentration of leather tanneries. A waste-treatment plant was built near applicant's home. Paras. 7–9. *Severity:* Claim that the waste-treatment plant operated without a license, and released fumes and odors that resulted in health problems for local residents. Paras. 7–9. *Duration:* Plant began to operate in 1988, and was partially shut down later that year. Paras. 7–9. The plant was temporarily closed in 1993. Para. 22. *Type of rights claim:* Petitioners allege violations of Articles 3 (prohibition of torture) and 8 (right to respect for private and family life) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Paras. 44, 59.
Relationship Between Polluters and Victims	*Duty of care:* Spanish government had duty to provide petitioners with protections of Convention. *Causation:* Spain regulated the waste-treatment plant. *International law status of the polluter:* Spain is a state, but the waste-treatment plant is a non-state corporate actor.
Evidence of Discrimination	*Protected status of the victim:* Petitioners have the protections of the European Convention. *Historical context:* No history of discrimination against petitioners claimed. *Current context:* No claim of discrimination, but Court found inadequate protection of right to respect for private and family life. Para. 58. *Decisonmaking process:* No claim of discrimination, but national authorities did not strike fair balance between the applicant's right to respect for private and family life and the town's economic interests. Para. 58. *Disparate impact:* Complaint focuses on impact on those who are specially situated only on the basis of geography; they live near the waste-treatment plant.
Judicial Resolution	Court concluded that Article 3 was not violated; Article 8 was

	violated; and awarded damages. Court Holding.

Case Four	*Zander v. Sweden*, 18 Eur. Ct. H.R. 175 (1994).
Nature of Environmental Harm to Victims	*Geographic scope:* Municipality of Västerås, Sweden. Para. 6. *Severity:* Claim that waste treatment company's dump containing cyanide resulted in excessive levels of cyanide in drinking water, and that the petitioners were unable to have judicial review of the Government's 1988 decision to uphold the Licensing Board's 1987 decision to renew the waste treatment plant's permit and allow it to expand its activities at the dump. Paras. 7–11. *Duration:* Ongoing at the time of the decision. The waste treatment plant has been authorized since 1983. Paras. 7–11. *Type of rights claim:* Petitioners allege violations of Article 6(1) (right to a fair and public hearing) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Para. 22.
Relationship Between Polluters and Victims	*Duty of care:* Swedish government had duty to provide petitioners with protections of the European Convention. Domestic law prohibits use of land that causes water pollution and allows affected persons to apply for compensation. Paras. 12–16. *Causation:* Sweden regulated the polluting waste treatment company. *International law status of the polluter:* Sweden is a state, but the polluting waste treatment plant is a non-state corporate actor.
Evidence of Discrimination	*Protected status of the victim:* Petitioners have the protections of the European Convention, and of Swedish environmental law. *Historical context:* No history of discrimination against petitioners claimed. *Current context:* No claim of discrimination, but claim of inadequate procedural protection of their right to a hearing. *Decisonmaking process:* No claim of discrimination, but national authorities, in their decisonmaking process, did not allow for a court hearing of the government's denial of applicant's appeal of Licensing Board's decision. Para. 29. *Disparate impact:* Complaint focuses on impact of those who are specially situated only on the basis of geography; they live near the dump and have elevated levels of cyanide in their drinking water.
Judicial Resolution	Court concluded that Article 6(1) was violated and awarded damages. Court Holding.

4. Inter-American Human Rights System.

a. Inter-American Court on Human Rights.

Case One	*Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Case No. 79, Inter-Am. Ct. H.R., Ser. C. (2001), *available at http*://www1.umn.edu/humanrts/iachr/AwasTingnicase.html.
Nature of Environmental Harm to Victims	*Geographic scope:* Awas Tingni Community in the Northern Atlantic Autonomous Region of the Atlantic Coast of Nicaragua. Para. 103.a.

	Severity: State granted logging concession to the SOLCARSA corporation, which threatens the indigenous community's right to its traditional land. Paras. 103.j, 152–53. *Duration:* Ongoing at the time of the decision. Concession granted to SOLCARSA in 1996. Para. 103.k. *Type of rights claim:* Commission asked court to resolve "whether the State violated articles 1 (obligation to respect rights), 2 (domestic legal effects), 21 (right to property), and 25 (right to judicial protection)" of the American Convention on Human Rights. Para. 2.
Relationship Between Polluters and Victims	*Duty of care:* Nicaraguan Constitution gives these communities protected status. Para. 103.t. *Causation:* Nicaragua granted the logging concession, para. 103.k, and did not provide adequate mechanisms for the community to protect its property rights or gain judicial redress, para. 173. *International law status of the polluter:* Nicaragua is a state and SOLCARSA is a non-state corporate actor.
Evidence of Discrimination	*Protected status of the victim:* The Awas Tingni Community is an indigenous community which has a protected status under Nicaraguan and international law. Para. 103.t, 151. *Historical context:* Despite recognizing communal property rights of indigenous peoples, Nicaragua lacks a procedure to "materialize that recognition" and had not granted title deeds to indigenous communities since 1990. Para. 152. *Current context:* Lack of mechanisms for community to protect its property rights. Para. 152. *Decisonmaking process:* The decisonmaking process lacked protection for the indigenous property rights despite their constitutional protection. Para. 152. *Disparate impact:* Complaint focuses on concession that impacts the Awas Tingni Community in particular.
Judicial Resolution	Court found violations of Articles 25 and 21 of the American Convention on Human Rights, and ordered Nicaragua to adopt domestic law mechanisms pursuant to Article 2 of the Convention that would "create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities," carry out such protections for the Awas Tingni Community and refrain from prejudicial acts until doing so, and provide the community with monetary reparations as well as court expenses and costs. Para. 173.

b. Inter-American Commission on Human Rights

Case One	*Dann v. United States*, Case No 11.140, Inter-Am. C.H.R. 75/02 (2001), *available at* http://www1.umn.edu/humanrts/cases/113-01.html.
	Geographic scope: Land in rural Nevada, United States, that is part of the land that the Western Shoshone claim as ancestral territory. Para. 2. *Severity:* Appropriation of ancestral lands; removing and threatening to

	remove livestock from those lands; and allowing gold prospecting activities on those lands. Para. 2. *Duration:* Ongoing at time of decision. Petitioners claim that expropriation began in 1863, but that the use by the Danns and other Western Shoshone was unchallenged until the early 1970s. Para. 29. *Type of rights claim:* Petitioners allege violations of Articles II (right to equality before the law); III (right to religious freedom and worship); VI (right to establish and protect family); XIV (right to work freely and receive remuneration); XVIII (right to judicial recourse); and XXIII (right to property) of the American Declaration of the Rights and Duties of Man. Para. 35.
Relationship Between Polluters and Victims	*Duty of care*: Western Shoshone claim their property rights are protected by United States common law recognition of traditional patterns of use and occupancy, para. 45, and by international law safeguarding land and resource use of indigenous peoples, paras. 46–47; their right to equality before law includes United States constitutional protections against improper takings, para. 55; and their right to cultural integrity is protected by international treaty and customary international law, para. 61. *Causation:* Danns claim that the United States has taken possession of the disputed land. Para. 2. *International law status of the polluter:* The United States is a state.
Evidence of Discrimination	*Protected status of the victim:* The Danns and other Western Shoshone are members of an indigenous people, and have the right to access to courts for adjudication of their property rights and the right to full and informed participation in the determination of their claims under the American Declaration. Para. 171. *Historical context:* Petitioners claim that expropriation began in 1863. Para. 29. *Current context:* United States provided Danns with an inadequate remedy through its existing statutory and judicial protections. Paras. 171–72. *Decisonmaking process:* Danns were unable to fully participate in the adjudication of their claims. Paras. 171–72. *Disparate impact:* Complaint focuses on taking of land that impacts the Danns and other Western Shoshone uniquely.
Judicial Resolution	Commission "concludes that the State has failed to ensure the Danns' right to property under conditions of equality contrary to Articles II, XVIII and XXIII of the American Declaration in connection with their claims to property right in the Western Shoshone ancestral lands." Para. 172.

Case Two	Case No. 7615, Inter-Am C.H.R. 12/85, OAS/Ser.L/V/II.66, doc. 10 rev 1 (1985), available at http://www.cidh.org/annualrep/84.85eng/brazil7615.htm (last visited, Nov. 30, 2004).
Nature of Environmental Harm to Victims	*Geographic scope:* Amazon region of Brazil. Para. 2.a. *Severity:* Mining and accompanying agricultural development projects in the Amazon region have impacted social organization,

	introduced diseases, displaced member of the Yanomani tribe, and led to disappearances and deaths. Paras. 2.d–2.g, 3. *Duration:* Ongoing at time of decision. Began in the 1960s. Paras. 2–3. *Type of rights claim:* Petitioners allege violations of "the following articles of the American Declaration of the Rights and Duties of Man: Article I (right to life, liberty, and personal security); Article II (right to equality before the law); Article III (right to religious freedom and worship); Article XI (right to the preservation of health and to well-being); Article XII (right to education); Article XVII (right to recognition of juridical personality and of civil rights); and Article XXIII (right to property)." Para. 1.
Relationship Between Polluters and Victims	*Duty of care:* Brazilian constitutional and statutory law provides for protection of "Indian" territory and traditional uses of it. Paras. l.b.–l.e. *Causation:* Brazil approved the plan for exploitation of natural resources in the Amazon region, including the construction of a highway through the territory of the Yanomami. Para. 1.f. *International law status of the polluter:* Brazil is a state, and its actions were the focus of the petition.
Evidence of Discrimination	*Protected status of the victim:* The Yanomami have protected status under Brazilian constitutional and statutory law, particularly with respect to their land rights. Paras. l.b–l.e. *Historical context:* The exploitation that began in the 1960s displaced the Yanomami. Paras. 2–3. *Current context:* Brazil has not yet implemented proposals to create protected areas for the Yanomami. Paras. 2.j., 3.f. *Decisonmaking process:* Opposition from those focused on economic development has resulted in lack of protection of Yanomami land. Para. 3.f. *Disparate impact:* Complaint focuses on development that threatens Yanomami uniquely.
Judicial Resolution	Commission declares that: "there is sufficient background information and evidence to conclude that, by reason of failure of the Government of Brazil to take timely and effective measures in behalf of the Yanomami Indians, a situation has been produced that has resulted in the violation, injury to them, of the following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI)." Commission Resolution, Para. 1.

B. Rejection Of Environmental Rights Claims

1. U.N. Human Rights Committee

Case One	*Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, U.N. H.R.C., U.N. Doc. CCPR/C/70/D/547/1993 (2000).
Nature of Environmental Harm to Victims	*Geographic scope:* Maori fisheries in New Zealand. Paras. 5.1–5.13. *Severity:*

	"Treaty of Waitangi (Fisheries Claims) Settlement Act confiscates [Maori] fishing resources," para. 6.1, and government's approach to fishing threatens traditional way of life and culture, para. 6.2. This Act documents an agreement between Maori representatives and New Zealand allowing the Maori to extinguish claims to fishing rights in exchange for a 50% stake in Sealords, the largest fishing company in Australia and New Zealand, which owned 26% of the fishing quota. Paras. 5.1–5.13. *Duration:* Ongoing at time of decision. Began with growth of fishing industry in the 1960s, and New Zealand's revised approach to regulation in the 1980s. Paras. 5.1–5.13. *Type of rights claim:* Petitioners "claim to be the victims of violations by New Zealand of articles 1, 2, 16, 18, 26 and 27 of the International Covenant on Civil and Political Rights." Para. 1. Because the U.N. Human Rights Committee declared the claims under Articles 16, 18, and 26 inadmissible, the opinion focuses on the claims under Articles 14(1) (equality before courts and tribunals) and 27 (right of minorities to culture, religion, and language) in conjunction with Article 1 (right of peoples to self-determination and to dispose freely of their natural wealth and resources). Paras. 2–3.
Relationship Between Polluters and Victims	*Duty of care:* Earlier Fisheries Act protects Maori fishing rights, Para. 5.3, and "[i]t is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant; it is further undisputed that the use and control of the fisheries is an essential element of their culture." Para. 9.3. *Causation:* New Zealand government's Act and actions set the current fisheries policy; private companies are harvesting the fish. *International law status of the polluter:* New Zealand is a state, and the commercial fishing companies are non-state corporate actors.
Evidence of Discrimination	*Protected status of the victim:* The Maori have protected status under the earlier Fisheries Act, para. 5.3, and Article 27 of the Covenant, para. 9.3. *Historical context:* The exploitation of the fisheries that began in the 1960s impacted the Maori's traditional fishing grounds. Para. 5.3. *Current context:* The current Act limits Maori fishing rights in exchange for a 50% stake in the major New Zealand fishing company, Sealords, which owned 26% of the available quota. Paras.5.1–5.13. *Decisonmaking process:* Petitioners claim that the contents of the Memorandum of Understanding were not adequately disclosed and maintained, and that the Maori negotiators did not have the authority to represent individual tribes and sub-tribes. Para. 5.8. *Disparate impact:* Complaint focuses on unique impacts on the Maori.
Judicial Resolution	Due to the efforts to include the Maori in the extensive settlement process, para. 9.6, and the "special attention . . . paid to the cultural and religious significance of fishing for the Maori," para. 9.8, the Committee found "that the facts before it do not reveal a breach of any of the articles of the Covenant," para. 10.

Case Two	*Jouni E. Länsman v. Finland,* Communication No. 671/1995, U.N. H.R.C., U.N. Doc. CCPR/C/58/D/671/1995 (1996).
Nature of	*Geographic scope:*

Environmental Harm to Victims	3,000 hectares of the 255,000 hectares occupied by the Muotkatunturi Herdsmen's Committee in Northern Finland. Para. 2.1. *Severity:* Logging and construction of roads in the disputed land, where 40% of the Committee's reindeer feed in the winter and female reindeer give birth in the spring, will harm traditional Sami reindeer herding, particularly in conjunction with the past and present logging and quarrying and the future mining in their territory. Paras. 2.1–2.9. *Duration:* Logging began in November 1995 when injunction expired. Para. 4.2. *Type of rights claim:* Petitioners claim a violation of Article 27 (right of minorities to culture, religion, and language) of the International Covenant on Civil and Political Rights. Para. 3.1
Relationship Between Polluters and Victims	*Duty of care:* "It is undisputed that the authors are members of a minority within the meaning of article 27 of the Covenant and as such have the right to enjoy their own culture. It is also undisputed that reindeer husbandry is an essential element of their culture." Para. 10.2. *Causation:* The Finnish government is authorizing the logging (the Finnish Central Forestry Board provided the approval), and private companies are carrying it out. Para. 2.1. *International law status of the polluter:* Finland is a state, and the commercial logging companies are non-state corporate actors.
Evidence of Discrimination	*Protected status of the victim:* The Sami have protected status as minorities under Article 27 of the Covenant. Para. 10.2 *Historical context:* The current logging adds to other activities that impact the territory of the Finnish Sami reindeer herdsmen. Para.2.6. *Current context:* The logging was ongoing at the time of the decision after a court injunction expired in November 1995. Para. 4.2. *Decisonmaking process:* The Finnish courts considered whether the logging plan violated Article 27 and concluded that it did not. Paras. 2.8–2.9. *Disparate impact:* Complaint focuses on unique impacts on the Finnish Sami reindeer herdsmen.
Judicial Resolution	The Committee is not in a position to conclude, based on the evidence before it, that the impact of the logging plans would be such as to amount to a denial of the authors' rights under article 27 or that the finding of the Court of Appeal affirmed by the Supreme Court, misinterpreted and/or misapplied article 27 of the Covenant in the light of the facts before it. . .Even though in the present communication the Committee has reached the conclusion that the facts of the case do not reveal a violation of the rights of the authors, the Committee deems it important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that although different activities in themselves may not constitute a violation of this article, such activities, taken together may erode the rights of the Sami people to enjoy their own culture. Paras. 10.5-10.7

2. European Court of Human Rights

Case One	*Athanassoglou v. Switzerland*, 31 Eur. Ct. H.R. 13 (2001).
Nature of Environmental Harm to Victims	*Geographic scope:* "[V]illages of Villegen, Würenlingen, Böttstein, and Kleindöttingen, situated in zone 1 in the vicinity of unit II of a nuclear power plant in Beznau (Canton of Aargau)," Switzerland. Para 9. *Severity:* According to petitioners, "the nuclear power plan did not meet current safety standards on account of serious and irremediable construction defects and, owing to its condition, the risk of an accident occurring was greater than usual." Para. 12. *Duration:* Ongoing. Nordostschweizerische Kraftwerke AG, a private company, had operated the plant since 1971, and applied to the Swiss Federal Council in 1991 for an extension of its license. Despite the objections, in 1994, the Federal Council issued a limited operating license expiring in 2004. Paras. 10–15. *Type of rights claim:* Petitioners claim violations of Articles 2 (right to life), 6(1) (right to a fair and public hearing), 8 (right to respect for private and family life), and 13 (right to an effective remedy) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Paras. 35, 56-60.
Relationship Between Polluters and Victims	*Duty of care:* Swiss federal law protects petitioners and their property and rights from dangerous conditions at nuclear facilities. Paras. 20–32. *Causation:* The Swiss government is the entity granting the license to the private company. Para. 24. *International law status of the polluter:* Switzerland is a state, and the private company operating the plant is a non-state corporate actor.
Evidence of Discrimination	*Protected status of the victim:* Petitioners have the protections of the European Convention. *Historical context:* Petitioners do not claim there was a history of discrimination against them, but that the plant did not meet safety standards. Para. 12. *Current context:* No claim of discrimination, but claim of current risk of plant. Paras. 12 & 38. *Decisonmaking process:* Petitioners complain that they lack access to a court to protect their rights, para. 38, and lack an effective remedy, para. 56. *Disparate impact:* Complaint focuses on impact of those who are specially situated only on the basis of geography; they live near the nuclear power plant.
Judicial Resolution	Court concluded that the Articles 2 and 8 claims were too remote, and therefore that "the outcome of the procedure before the Federal Council was decisive for the general question whether the operating license of the power plant should be extended, but not for the 'determination' of any 'civil right', such as the rights to life, to physical integrity and of property, which Swiss law conferred on the applicants in their individual capacity. Article 6(1) is consequently not applicable in the

	present case." Para. 55. It rejected the Article 13 claim on similar grounds. Paras. 59–60.

Case Two	*LCB v. United Kingdom,* 27 Eur. Ct. H.R. 212 (1999).
Nature of Environmental Harm to Victims	*Geographic scope:* Christmas Island in the Pacific Ocean. *Severity:* Petitioner claims that her father was intentionally exposed to radiation during nuclear tests near Christmas Island and the clean-up program in 1957 and 1958. She complains that her leukemia could have been diagnosed and treated earlier if her parents had been warned of her father's radiation exposure and engaged in pre- and post-natal monitoring. Paras. 10–18. *Duration:* Father's alleged exposure was in 1957 and 1958. Applicant received chemotherapy from her diagnosis in 1970 until she was 10 years old. Para 14. "She still has regular medical check-ups and is afraid to have children of her own in case they are born with a genetic predisposition to leukemia." Para 16. *Type of rights claim:* Petitioner alleges violations of Articles 2 (right to life), 3 (prohibition of torture), 8 (right to respect for private and family life), and 13 (right to an effective remedy) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Para. 21 & 44.
Relationship Between Polluters and Victims	*Duty of care:* United Kingdom's government had duty to warn petitioner of risks to life and health if sufficient evidence of such risks existed. Paras. 36–41. *Causation:* Her father served in England's Royal Air Force, and the alleged exposure took place during his duties. Petitioner claims that father's alleged exposure caused her leukemia. Paras. 10–18. *International law status of the polluter:* United Kingdom is a state.
Evidence of Discrimination	*Protected status of the victim:* Petitioner has the protections of the European Convention. *Historical context:* Petitioner does not claim there was a history of discrimination against her. She claims intentional exposure of service personnel on Easter Island: "During the Christmas Island tests, service personnel were ordered to line up in the open and to face away from the explosions with their eyes closed and covered until 20 seconds after the blast. The applicant alleged that the purpose of this procedure was to deliberately expose servicemen to radiation for experimental purposes." Para. 11. *Current context:* Petitioner does not allege discrimination, but claims failure to adequately warn servicemen of the exposure and the risks for their offspring. *Decisonmaking process:* Petitioner did not make her claim of lack of effective remedy before the Commission, so the Court had no jurisdiction over them. *Disparate impact:* Complaint focuses on impact on a group that is specially situated only on the basis of the particulars of their military service: servicemen who were on Christmas Island in 1957 and 1958 and the offspring of those servicemen.
Judicial Resolution	The Court concluded that it "does not find it established that,

	given the information available to the State at the relevant time concerning the likelihood of the applicant's father having been exposed to dangerous levels of radiation and of this having created a risk to her health, it could have been expected to act of its own motion to notify her parents of these matters or to take any other special action in relation to her." Para. 41. The Court therefore found no violation of Articles 2 and 3. Paras. 41–46. Because the Articles 8 and 13 complaints were not raised before the Commission, the Court found that it had no jurisdiction to consider them. Para. 45.

3. United States federal courts' Alien Tort Statute jurisprudence

Case One	*Flores v. Southern Peru Copper Corp.,* 343 F.3d 140 (2nd Cir. 2003).
Nature of Environmental Harm to Victims	*Geographic scope:* Ilo, Peru. Pp. 143–44. *Severity:* Plaintiffs claim that SPCC's copper mining operations "emit large quantities of sulfur dioxide and very fine particles of heavy metals into the local air and water. Plaintiffs claim that these emissions have caused their respiratory illnesses." P. 144. *Duration:* Ongoing. SPCC began operation in 1960 and commissions have consistently found that "SPCC's activities have inflicted environmental damage affecting agriculture in the Ilo Valley." P. 144. *Type of rights claim:* "Plaintiffs claim. . .that this 'egregious and deadly' local pollution constitutes a customary law offense because it violated the 'right to life,' 'right to health,' and right to 'sustainable development.'" On appeal, the plaintiffs are only pursuing the first two claims. P. 144.
Relationship Between Polluters and Victims	*Duty of care:* SPCC has a duty to comply with Peruvian environmental law, which it was violating. P. 144. The court found that plaintiffs did not establish the right to life and health as sufficiently definite to create binding rules of customary international law in this case. Pp. 160–61. *Causation:* SPCC caused the pollution that plaintiffs claim harmed them. P. 144. *International law status of the polluter:* SPCC is a non-state corporate actor. The court did not address the issue of whether SPCC was acting under the color of state authority.
Evidence of Discrimination	*Protected status of the victim:* Plaintiffs have no protected status beyond being citizens of Peru. *Historical context:* No history of discrimination claimed, but SPCC has been causing environmental damage since 1960. P. 144. *Current context:* No claim of discrimination, but claim of ongoing harm to life and health. P. 144. *Decisonmaking process:* The government of Peru has made efforts to regulate SPCC. P. 144. Plaintiffs do not claim discrimination in the decisonmaking process of Peru or SPCC, but rather focus on the harm SPCC is causing them. P. 144. *Disparate impact:*

	Complaint focuses on impact of those who are specially situated only on the basis of geography; they live in Ilo, Peru, where SPCC operates.
Judicial Resolution	Court concluded that the "'right to life' and 'right to health' are insufficiently definite to constitute rules of customary international law," p. 160, and that "plaintiffs have failed to submit evidence sufficient to establish that intranational pollution violates customary international law," p. 172.

Case Two	*Beanal v. Freeport McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999).
Nature of Environmental Harm to Victims	*Geographic scope:* Area surrounding Freeport McMoran's "open pit copper, gold, and silver mine situated in the Jayawijaya Mountain in Irian Jaya, Indonesia." P. 163. *Severity:* Plaintiff claims that "Freeport mining operations. . .caused harm and injury to the Amungme's environment and habitat," destroyed their religious symbols, and forced them to relocate. P. 163. He also claims that "Freeport's private security force acted in concert with the Republic [of Indonesia] to violate international human rights." P. 163. *Duration:* Ongoing. *Type of rights claim:* Plaintiff claims violations of human rights (surveillance, mental torture, death threats, and house arrest), international environmental law, and genocide and cultural genocide. P. 165.
Relationship Between Polluters and Victims	*Duty of care:* Plaintiff claimed that Freeport McMoran has a duty to comply with customary international law. The court, however, did not find violations of customary international law. P. 169. *Causation:* Freeport McMoran caused the pollution, and participated in the other human rights violations, that plaintiff claims harmed him. P. 144. *International law status of the polluter:* Freeport McMoran is a non-state corporate actor. The court did not address the issue of whether Freeport McMoran was acting under the color of state authority.
Evidence of Discrimination	*Protected status of the victim:* Plaintiff is a member of the indigenous Amungme people, but his status was not addressed directly in the opinion beyond references to the destruction of the group's habitat and religious symbols. P. 163. *Historical context:* No history of discrimination claimed. *Current context:* Plaintiff "alleged that Freeport's mining operations caused the Amungme to be displaced and relocate to other areas of the country. He also alleged that Freeport's mining activities destroyed the Amungme's habitat. As such, [plaintiff] Beanal asserted that Freeport purposely engaged in activity to destroy the Amungme's cultural and social framework." P. 167. *Decisonmaking process:* The opinion did not focus on the decisonmaking process. *Disparate impact:* Complaint focuses on impact of the Amungme, who are uniquely impacted by Freeport McMoran's mining activities in Irian Jaya.
Judicial Resolution	Court concluded that plaintiff failed to make a definite enough statement of his human rights claims, p. 165, "failed to show in

	his pleadings that Freeport's mining activities constitute environmental torts or abuses under international law," p. 167, and failed "to allege facts to support sufficiently his claim of genocide," p. 168.

Case Three	*Sarei v. Rio Tinto PLC,* 221 F.Supp. 2d 1116 (C.D. Cal. 2002).
Nature of Environmental Harm to Victims	*Geographic scope:* The island of Bougainville in Papua New Guinea. P. 1120. *Severity:* "Plaintiffs allege that defendants' mining operations on Bougainville destroyed the island's environment, harmed the health of its people, and incited a ten-year civil war, during which thousands of civilians were injured." P. 1120. *Duration:* Mining operations began in 1966 and the mine was forced to close after attacks on it in the late 1980s. The civil war that followed lasted until 1999. Pp.1121–27. *Type of rights claim:* Plaintiffs claim "that defendants are guilty of war crimes and crimes against humanity, as well as racial discrimination and environmental harm that violates international law." P. 1120.
Relationship Between Polluters and Victims	*Duty of care:* Plaintiffs claimed that Rio Tinto PLC has a duty to comply with customary international law and violated that duty. P. 1120. *Causation:* Rio Tinto PLC caused the pollution that plaintiffs claim harmed them. P. 1120. *International law status of the polluter:* Rio Tinto PLC is a non-state corporate actor. In the context of this case, however, the court found a close enough nexus with the Papua New Guinea government to view Rio Tinto PLC's actions as occurring under the color of state authority for the purposes of the war crimes, pp. 1144–49, and racial discrimination, pp. 1153–55.
Evidence of Discrimination	*Protected status of the victim:* Plaintiffs are a racial minority and members of indigenous peoples, and the court found that plaintiffs pleaded the facts adequately for a racial discrimination claim. Pp. 1151–55. *Historical context:* Plaintiffs claim that Rio Tinto PLC has history of racial discrimination in its operations around the world. P. 1151. *Current context:* Plaintiffs claim that Rio Tinto PLC intentionally violated their rights as a policy matter, and that "this policy, was, in part, the reason Rio destroyed the villages, the environment, the sacred sites and local culture, and is one of the reasons behind Rio's support of the blockade." P. 1151. *Decisonmaking process:* Plaintiffs claim Rio Tinto PLC had a policy of discrimination in its actions in Bougainville and around the world. Pp.1151–55. *Disparate impact:* Plaintiffs claim intentional targeting of the minority and indigenous peoples here, and the complaint focuses on impact of those who are specially situated because they live in Bougainville, where the mine operated and the civil war took place. Pp. 1151–55.
Judicial Resolution	Court found sufficient factual pleadings to support the war crimes, crimes against humanity, racial discrimination, and United Nations Convention on the Law of the Sea violations, but that neither the right to life nor right to health provides a

	"'specific, universal and obligatory norm of international law.'" Pp. 1160, 1208–09. The Court then dismissed all of the claims on justiciability grounds; it found that the political question doctrine barred all the claims, and that act of state and international comity doctrines provided the basis for dismissing the environmental tort and racial discrimination claims. Pp. 1208-09.