

The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa

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Summary

The South African Constitutional Court has not yet had sufficient opportunity to clarify the meaning of positive obligations of the state imposed by the environmental right contained in section 24 of the Constitution of the Republic of South Africa, 1996. The contribution attempts to determine some of the positive obligations of a substantive nature implied by this section. It does so by drawing inspiration from the way in which international (both universal and regional) human rights bodies have interpreted and applied relevant provisions of different human rights instruments within their respective jurisdictions. In addition, it illuminates the extent to which these obligations may have already been given effect to in domestic law. The human rights instruments that are considered for the purposes of this article include the International Covenant on Civil and Political Rights; the African Charter of Human and Peoples' Rights; the European Convention of Human Rights and Fundamental Freedoms; the American Declaration of the Rights and Duties of Man; and the American Convention of Human Rights.

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1 Introduction¹

Environmental rights contained in domestic bills of rights and international human rights instruments often consist of a complex combination of legal obligations. Their interpretation tends to be a particularly challenging task.² Arguably, this also holds true for the environmental right in section 24 of the Constitution of the Republic of South Africa Act, 1996 (Constitution).³ Fortunately, however, there is a growing body of public international law, as well as foreign domestic law, on which one may draw to render the abstract language of section 24 more concrete for judicial application.⁴

In light of the fact that the South African Constitutional Court has not yet had sufficient opportunity to clarify the meaning of section 24 of the Constitution,⁵ this contribution attempts to determine some of the positive obligations with specific reference to substantive duties, implied by this section.⁶ In doing so, it draws inspiration from the way in which international human rights bodies (both universal and regional) have interpreted and applied the relevant provisions of the respective human rights instruments within their jurisdiction.

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² D Garcia San José *Enforcing the human right to environment in Europe: A critical overview of the European Court of Human Rights case law* (2004) 15.

³ Constitution of the Republic of South Africa Act 108 of 1996, assented to on 16 December 1996, <http://www.constitutionalcourt.org.za/site/theconstitution/english-09.pdf> (accessed 13 July 2010).

⁴ The Constitutional Court's willingness to draw on international and foreign domestic law in its application of the Constitution has been shown in several of its judgments over the last couple of years. Two examples include *S v Zuma & Others* 1995 2 SA 642 (CC) paras 14-15 and *Sanderson v Attorney, Eastern Cape* 1998 2 SA 38 (CC) para 26.

⁵ Although *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province & Others* 2007 6 SA 4 (CC) (*Fuel Retailers* case) was decided by the Constitutional Court and based on parts of sec 24 of the Constitution (n 3 above), the case merely focused on the need to create a balance between sustainability considerations in public environmental decision making. In addressing the most recent case of environmental significance, *Mazibuko v The City of Johannesburg & Others* 2010 3 BCLR 239 (CC), the Constitutional Court primarily relied on the right to access to sufficient water provided for in sec 27 of the Constitution.

⁶ The need for such a determination is clear from *inter alia* Feris's assessment as quoted by LJ Kotzé & AR Paterson 'South Africa' in LJ Kotzé & AR Paterson (eds) *The role of the judiciary in environmental governance: Comparative perspectives* (2009) 579.

In addition, it illuminates the extent to which these obligations may already have been given effect to in domestic law.

An investigation of this kind seems particularly relevant to South Africa, given that section 39(1)(b) of the Constitution obliges courts to consider international law when interpreting the Bill of Rights, while sections 239(1) and 233 of the Constitution oblige courts to interpret legislation in conformity with international law. In relation to environmental protection these obligations find additional resonance in the National Environmental Management Act 107 of 1998 (NEMA),⁷ which, as a framework statute, provides that global and international responsibilities relating to the environment must be discharged in the national interest.⁸

According to the Constitutional Court, section 39(1)(b) embraces both binding and non-binding instruments of international law.⁹ Binding instruments include treaties to which South Africa is a party (or binding obligations resulting from such a treaty, such as United Nations (UN) Security Council resolutions) and customary international law. Non-binding instruments include those which are not open to ratification (such as declarations of the UN General Assembly), instruments which are only open to ratification within a particular region (such as the European Convention of Human Rights and Fundamental Freedoms (European Convention),¹⁰ as well as decisions by international bodies that interpret and apply human rights and which are either not binding in themselves (such as decisions of the UN Human Rights Committee (HRC)), or which are only binding on the parties to the case (such as those handed down by the European Court of Human Rights (European Court) or the International Court of Justice (ICJ)).¹¹

As will come to light in subsequent paragraphs, the human rights instruments that are of particular relevance for the purposes of this article include the African Charter on Human and Peoples' Rights (African Charter);¹² the American Declaration of the Rights and Duties of Man (American Declaration);¹³ the American Convention of Human

⁷ National Environmental Management Act 107 of 1998 (NEMA), assented to on 19 November 1998, <http://www.info.gov.za/view/DownloadFileAction?id=70641> (accessed 13 July 2010).

⁸ Sec 2(4)(n) and ch 6 of NEMA (n 7 above).

⁹ For a brief overview of the relevance of international human rights instruments and South African law, see J Dugard *International law A South African perspective* (2005) 336-340.

¹⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms 4 November 1950, 213 UNTS 221.

¹¹ See extensively E de Wet 'The "friendly but cautious" reception of international law in the jurisprudence of the South African Constitutional Court: Some critical remarks' (2005) 28 *Fordham International Law Review* 1529.

¹² African (Banjul) Charter on Human and Peoples' Rights, 27 June 1981, 1520 UNTS 217.

¹³ American Declaration on the Rights and Duties of Man, April 1948, reprinted in OAS/SerL/V/I4 Rev 9 (2003).

Rights (American Convention);¹⁴ the European Convention; and the International Covenant on Civil and Political Rights (ICCPR).¹⁵ In relation to these instruments, the 'potentially environmental friendly' provisions have, to some extent, been concretised by the respective treaty-monitoring bodies. These include the African Commission on Human and Peoples' Rights (African Commission), the Inter-American Commission and the Inter-American Court of Human Rights (Inter-American Court), the European Court and the HRC.¹⁶

In accordance with section 39(1)(c) of the Constitution, the benchmarks developed by the aforementioned bodies may prove to be a useful tool in clarifying the scope of the positive obligations contained in section 24 of the Constitution. Moreover, one should keep in mind that – even in the absence of section 39(1)(c) – South Africa would be bound under international law to give effect to all obligations flowing from the African Charter and ICCPR, given that it has been a party to these instruments since 1996 and 1998 respectively.¹⁷

The Constitutional Court's liberal approach, adopted at its creation in 1996, marked a change of direction by the highest court of a country that has historically struggled to embrace international law – in particular during the apartheid era.¹⁸ The change of direction attests to the fact that South Africa is a member of an increasingly interdependent international community in which international law constitutes a common denominator in the search for solutions to global challenges.¹⁹ This common denominator can also be described as a minimum threshold of protection to which states are obliged to give effect within the domestic legal order.²⁰ This also holds true for environmental protection, the importance of which has gained recognition with the

¹⁴ American Convention on Human Rights, 21 November 1969, 1144 UNTS 123.

¹⁵ International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

¹⁶ D Shelton 'The environmental jurisprudence of the international human rights tribunals' in R Picoletti & JD Taillant (eds) *Linking human rights and the environment* (2005) 12.

¹⁷ In the absence of an international supervisory body that renders authoritative decisions on the scope of treaty obligations, it is up to the state parties themselves to determine the scope of the obligations. See F Viljoen *International human rights law in Africa* (2007) 28-30.

¹⁸ See Dugard (n 9 above) 16-26. For comments on international law and the South African Constitution from an environmental law perspective, see also J Glazewski *Environmental law in South Africa* (2005) 29-30.

¹⁹ See K O'Regan 'Human rights and democracy – A new global debate: Reflections on the first ten years of South Africa's Constitutional Court' (2004) 32 *International Journal of Legal Information* 207.

²⁰ P Birnie & AE Boyle *International law and the environment* (2002) 259. The importance of international developments in domestic sustainable development policy is also recognised in the South African context in the (as it was called at the time) Department of Environmental Affairs and Tourism (DEAT) *People-planet-prosperity: Draft strategic framework development strategy for sustainable development in South Africa* (2006) 22.

adoption of environmental clauses in the domestic bills of rights of many countries.²¹ As these clauses are sometimes ill-defined, international decisions that concretise the operation of the legal obligation in practice can constitute a useful source of information in order to identify their core content.²²

The subsequent analysis focuses on the positive obligations flowing from the provisions in the aforementioned international instruments, which have thus far been identified as relevant for environmental protection. By now, it is well established that international human rights instruments, including those that have consequences for environmental protection, impose positive and negative obligations on member states.²³ Negative obligations pertain to the obligation to respect the right in question, such as authorities refraining from interference with the enjoyment of a fundamental right. Positive obligations consist of two layers, namely, the obligation to protect a right through regulatory (legislative) measures against interference by others, as well as the obligation to fulfil rights, which concerns their realisation through, *inter alia*, financial and infrastructural support.²⁴

In addition, the analysis focuses specifically on (potential) substantive obligations that have been identified by international human rights bodies. It does not elaborate on procedural obligations that rest on governments in situations that (may) result in environmental degradation, notably guaranteeing access to information,²⁵ access

²¹ Birnie & Boyle (n 20 above) 257.

²² D Bodansky 'The use of international sources in constitutional opinion' (2004) 32 *Georgia Journal of International and Comparative Law* 425; see also O Tshosa *National law and international human rights law cases of Botswana, Namibia and Zimbabwe* (2001) 10; J Verschuuren *De zorg van de overheid en het recht van de burger* (1994) 79.

²³ See in particular A Ulvsbäck *Standardising individual environmental protection* (2004) 1-2 15-16. See also AR Mowbray *The development of positive obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004) 183.

²⁴ See in particular *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) (SERAC case) paras 44-46. The African Commission also identified a fourth type of obligation, namely, that of promoting human rights; sec 7(2) of the Constitution similarly refers to the promotion of rights. However, this category, which concerns actions that promote tolerance or develop infrastructure, would also be adequately covered by the obligation of fulfilment; see also D Shelton 'International decisions' (2002) 96 *American Journal of International Law* 938-939.

²⁵ Inter-American Court *Marcel Claude-Reyes & Others v Chile* (Merits, Reparations and Costs) judgment of 19 September 2006, Case 12.108, Report 60/03, <http://www.corteidh.or.cr/casos.cfm> (accessed 13 July 2010); see Inter-American Commission *Report on the Situation of Human Rights in Ecuador* (Ecuador Report) OEA/serL/V/II66 Doc 10 Rev 1, (1997), <http://www.cidh.oas.org/countryrep/ecuador-eng/index%20-%20ecuador.htm> (accessed 13 July 2010); European Court *Anna Maria Guerra & 39 Others v Italy*, judgment of 19 February 1998 (*Guerra* case) (1998) I Reports of Judgments and Decisions 64; European Court *Öneryildiz v Turkey* (GC) (*Öneryildiz* case) judgment of 30 November 2004 (2004-XII) Reports of Judgments and Decisions 657; European Court *Tătar v Romania* (*Tătar* case) judgment of 27 January 2009 (unreported), Case 67021/01.

to participation in decision making²⁶ and judicial protection.²⁷ At present these obligations are well-established in the jurisprudence of international and regional human rights bodies in relation to situations affecting the environment in a manner that simultaneously impacts human rights, notably the right to life, the right to private life, home and family life, as well as the right to a fair trial and remedy.²⁸ Similarly, the South African courts have dealt with a number of environmental cases that concerned procedural rights and obligations.²⁹

The choice to focus on the substantive rather than the procedural is not intended to deny the added value of procedural obligations for environmental protection, nor their potential for strengthening the democratic process and environmental governance as a whole.³⁰ However, as these procedural obligations have thus far been fairly well-covered by constitutional, administrative and environmental law scholars and the South African courts, it seems appropriate to focus the attention on the more elusive substantive positive obligations flowing from the aforementioned human rights instruments.

2 Substantive environmental protection mandated by international human rights instruments

Most international human rights instruments were drafted before the emergence of environmental protection as a common concern and, as a result, do not mention the environment.³¹ Of the international instruments mentioned above, the African Charter is the only instrument that explicitly recognises a human right to a satisfactory environment, namely, in article 24.³² This right has also constituted the object of

²⁶ SERAC case (n 24 above) para 53; HRC *Apirana Mahuika & Others v New Zealand*, decision of 16 November 2000, Comm 547/1993, UN Doc CCPR/C/70/D/547/1993 (*Mahuika* case); HRC *Länsman & Others v Finland* (No 2) (*Länsman* case) decision of 22 November 1996, Comm 671/1995, UN Doc CCPR/C/58/D/671/1995; Inter-American Court *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (*Awas Tingni* case) judgment of 31 August 2001 (Ser C) No 79 (2001).

²⁷ See SERAC case (n 24 above) para 53; *Claude-Reyes* case (n 25 above); European Court *Hatton v United Kingdom* (GC) (*Hatton* GC case) judgment of 8 July 2003 (2003) 37 EHRR 28, paras 113-116.

²⁸ See *inter alia* cases cited in nn 25-27 above.

²⁹ See Kotzé & Paterson (n 6 above) 579-586 for an overview of some environmental cases in South Africa that concerned issues of administrative justice, access to information and *locus standi*.

³⁰ On this point, see D Shelton 'Human rights and the environment: Problems and possibilities' (2008) 38 *Environmental Policy and Law* 44.

³¹ D Shelton 'Human rights and the environment' in H Stockinger *et al* (eds) *Updating international nuclear law* (2007) 161.

³² In accordance with art 24 of the African Charter: 'All peoples shall have the right to a general satisfactory environment favourable to their development.'

an individual complaints procedure before the African Commission.³³ Until such time as the African Court on Human and Peoples' Rights becomes active,³⁴ the African Commission remains the most important regional monitoring body in relation to the rights guaranteed in the African Charter. Decisions by this body are non-binding, and the track record of states in giving them (voluntary) effect remains mixed. Even so, the decisions and recommendations of the African Commission remain an authoritative source that provides guidance to states in relation to the scope and content of their obligations under the African Charter.³⁵

The same could be said for the non-binding decisions and recommendations of the HRC that functions as the international treaty-monitoring body of ICCPR and *inter alia* considers individual complaints from those member states that have ratified the [First] Optional Protocol to the ICCPR of 1996.³⁶ Although ICCPR does not explicitly protect the right to a healthy environment, some indirect substantive protection has been derived from the rights of minorities as protected in article 27 of ICCPR.³⁷

Neither the European Convention nor any of its additional protocols explicitly protect any interest in the preservation of the environment. However, environmental interests may merit protection if and to the extent to which this is required for the protection of any of the other

³³ The individual complaints procedure resulted from art 55 of the African Charter in conjunction with ch XVII of the Rules of Procedures of the African Commission, 10 June 1995, http://www.achpr.org/english/_info/rules_en.html (accessed 13 July 2010); See also F Viljoen 'The African Commission on Human and Peoples' Rights' in C Heyns (ed) *Human rights law in Africa* (2004) 420 ff; See also F Ouguerouz *The African Charter on Human and Peoples' Rights* (2003) 485 ff.

³⁴ See text of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 6 October 1998 CAB/LEG/66.5, <http://www.chr.up.ac.za> (accessed 13 July 2010). At the time of writing, the African Court had only dealt with one case which was declared admissible. See *Michelot Yoyogombaye v Senegal*, African Court on Human and Peoples' Rights, Appl 001/2008, judgment, 15 December 2009, <http://www.african-court.org/en/cases/latest-judgments/> (accessed 13 July 2010).

³⁵ See extensively F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human Rights and Peoples' Rights, 1994-2004' (2007) 101 *American Journal of International Law* 1 ff.

³⁶ See art 1 of the First Optional Protocol to the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 302; See also SN Carlson & G Gisvol *Practical guide to the International Covenant on Civil and Political Rights* (2003) 11.

³⁷ Art 27 of ICCPR determines that '[i]n those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language'.

rights in the Convention.³⁸ Already under the former two-tier system of enforcement consisting of the European Commission of Human Rights (European Commission) and the European Court, the right to a private life, home and family (guaranteed in article 8(1) of the European Convention) emerged as the most likely vehicle for indirect substantive protection of environmental rights.³⁹ Since the replacement of the two-tier system by a single court on 1 November 1998, this role of article 8 has been developed further by the jurisprudence of the European Court.⁴⁰ The right to life in article 2 has also on occasion been relevant.⁴¹ The latter article implies a high threshold in the form of a real and immediate risk to life, as such is not a prominent vehicle for the indirect protection of the environment under the European Convention.

Neither the American Declaration nor the American Convention explicitly guarantees any environmental rights.⁴² Even so, the inter-American system of human rights, composed of the Inter-American Court and the Inter-American Commission, have provided indirect protection to the environment through the right to life, despite the high threshold applicable in this instance. The right to life is guaranteed both

³⁸ See Garcia San José (n 2 above) 29-30. This anthropocentric approach to environmental protection, whereby environmental harm must affect human well-being before human rights guarantees can be invoked, implies that unless there is a specific right to a healthy or ecologically-balanced environment, international human rights procedures cannot be used on behalf of the environment or to prevent threats to other species or to ecological processes. See Shelton (n 30 above) 45; For criticism on the limits of the anthropocentric approach, see G Lohmann 'Sollte es ein individuelles Menschenrecht auf eine angemessene Umwelt geben?' in PG Kirchenschläger & T Kirchenschläger (eds) *Menschenrechte und Umwelt* (2008) 104. See also A Peters 'Gibt es ein Menschenrecht auf saubere Umwelt? Menschenrechte und Umweltschutz: Zur Synergie völkerrechtlicher Teilregime' in Kirchenschläger & Kirchenschläger (above) 225-226.

³⁹ Art 8(1) of the European Convention determines: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'

⁴⁰ The single court consists of a chamber system with the possibility of appeal to the Grand Chamber. For a brief overview of the 'old' and 'new' systems of protection provided by the European Convention, see C Ovey & RCA White *Jacobs & White. The European Convention on Human Rights* (2006) 8 ff.

⁴¹ Art 2 of the European Convention determines that '[e]veryone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

⁴² It is worth noting that art 11 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador), 17 November 1988, OAS TS No 69, guarantees the right to a healthy environment. However, art 11 cannot form the object of an individual petition before the Inter-American Commission or the Inter-American Court and is therefore not directly enforceable. See Ulvsbäck (n 23 above) 28; see also IK Scott 'The Inter-American system of human rights: An effective means of environmental protection' (2000) 19 *Virginia Environmental Law Journal* 201.

in article 1 of the American Declaration⁴³ and article 4 of the American Convention.⁴⁴

The Inter-American Commission and the Inter-American Court both adjudicate violations of human rights.⁴⁵ The primary difference between the two bodies is that the Inter-American Court has the authority to render binding judgments on the parties involved and order reparations, while the Inter-American Commission publishes non-binding (albeit authoritative) recommendations.⁴⁶ Moreover, whereas complaints received by the Inter-American Court pertain to the rights guaranteed in the American Convention, the Inter-American Commission may also receive complaints based on the rights guaranteed in the American Declaration in relation to those members of the Organization of American States (OAS) that have not yet ratified the Inter-American Convention.⁴⁷ The Inter-American Commission thus assumes a dual role.

The above having been said, a number of substantive positive obligations relevant to environmental protection have crystallised in the jurisprudence of the above-mentioned human rights bodies. These obligations are discussed in the subsequent paragraphs.

2.1. Environmental assessments and regulation

A broad obligation to engage in environmental assessments⁴⁸ and regulation pertaining to environmental damage can be derived from

⁴³ Art 1 of the American Declaration states: 'Every human being has the right to life, liberty and the security of his person.'

⁴⁴ Art 4 of the American Convention states: 'Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.' See also Scott (n 42 above) 201.

⁴⁵ Scott (n 42 above) 200.

⁴⁶ Art 64 of the American Convention also provides for a broad jurisdiction in relation to advisory opinions. For a discussion, see Scott (n 42 above) 206-207.

⁴⁷ Scott (n 42 above) 201 205. Although this implies that the Inter-American Commission formally relies on different standards when reviewing human rights complaints against different OAS member states, on a practical level the standards in the American Declaration and American Convention often overlap and function as one set of standards.

⁴⁸ Environmental assessments refer in this context to either environmental impact assessments or environmental risk assessments. Due to some overlap no strict distinction between the two types of environmental assessments is made for purposes of this article. An environmental impact assessment is generally defined as a competent scientific analysis of the possible impacts on the environment, which is required by decision makers prior to the approval of certain activities or developments. See with reference to Robinson, JFC DiMento 'Science and environmental decision making: The potential role of environmental impact assessment' (2005) 45 *Natural Resources Journal* 297. An environmental risk assessment is more narrowly described as the process for identifying hazards and transforming related scientific data into meaningful information about the undesired effects of human activities on the environment; as well as combining it with an evaluation of the consequences. See F Klopff *et al* 'A road map to a better NEPA: Why environmental risk assessments should be used to analyse the environmental consequences of complex federal actions' (2007) 8 *Sustainable Development Law and Policy* 38.

article 24 of the African Charter. A similar obligation can be derived from articles 2 and 8(1) of the European Convention, at least in those instances where the harm posed by a particular activity for the environment, and as a result for certain aspects of human life, is beyond dispute.

The *SERAC* case⁴⁹ thus far constitutes the only case before the African Commission in which the latter interpreted the scope of the right to a satisfactory environment in article 24 of the African Charter.⁵⁰ The Commission determined that through its involvement in the exploitation of the Niger Delta, the Nigerian government contributed both directly and indirectly to gross violations of the rights of the Ogoni people, including the right to a satisfactory environment. The contamination of air, water and soil resulted from actions of the Nigerian military forces in protecting the government's interest in the oil venture of a multinational company, as well as the negligent and unsound management of oil exploration in the Niger Delta.⁵¹

The African Commission concluded that article 24 required the government to take reasonable measures to prevent pollution and ecological degradation,⁵² as well as to promote conservation and ensure ecological sustainable development and the use of natural resources.⁵³ Among other things, this implied that the government had to guarantee, or at least permit the conduct of independent environmental impact assessments (scientific monitoring) before oil exploitations were undertaken. In addition, it had to guarantee the independent oversight bodies for monitoring the safe operation of the petroleum industry.⁵⁴

The *Öneryildiz* decision of the European Court⁵⁵ concerned the death of nine persons and the injury of several others due to a methane explosion at a waste collection site close to the slum in which they lived. The European Court found a violation of article 2 of the European

⁴⁹ *SERAC* case (n 24 above).

⁵⁰ Under the African Charter, some indirect environmental protection has also been recognised through the right to health in art 16(1). In *Free Legal Assistance Group & Others v Zaire (Free Legal Assistance Group case)* (2000) AHRLR 74 (ACHPR 1995), the African Commission was confronted with the provision of safe drinking water. In determining that the failure by the government to provide such a basic service constituted a violation of the African Charter, the African Commission only focused on art 16(1) and refrained from making the obvious link to art 24 of the African Charter; See M van der Linde & L Louw 'Considering the interpretation and implementation of art 24 of the African Charter on Human Rights and Peoples' Rights in light of the *SERAC* communication' (2003) 3 *African Human Rights Law Journal* 177.

⁵¹ *SERAC* case (n 24 above) 'Summary of the facts'; see also Van der Linde & Louw (n 50 above) 168; see Viljoen (n 17 above) 288.

⁵² *SERAC* case (n 24 above) para 52.

⁵³ *SERAC* case (n 24 above) para 52; Van der Linde & Louw (n 50 above) 178; Viljoen (n 17 above) 288.

⁵⁴ *SERAC* case (n 24 above) para 53.

⁵⁵ *Öneryildiz* case (n 25 above) 657.

Convention, since the Turkish authorities did nothing to prevent the danger to the affected individuals, despite the fact that they were well aware of the dangers present at the site as *inter alia* outlined in an expert report to the authorities in 1991. In evaluating the circumstances of this case the European Court took particular note of the danger inherent in the activity in question, namely, the operation of a waste-collection site.⁵⁶ It underscored the point that when such activities are undertaken, the state must enact a regulatory framework that governs the licensing, setting up, operation, security and supervision of the activity. In addition, the authorities must oblige all those concerned to undertake practical measures that provide effective protection to individuals whose lives are endangered by the inherent hazards.⁵⁷

The importance of the existence and enforcement of a system of proper authorisation of activities that are inherently hazardous can also be distilled from cases pertaining to article 8(1) of the European Convention,⁵⁸ a provision with a lower threshold than article 2.⁵⁹ Worthy of noting, in particular, is the *Lopez-Ostra* case.⁶⁰ The applicant and her daughter suffered serious health problems over a period of six years from the fumes of a privately-owned tannery waste treatment plant that operated on public grounds alongside the apartment building where they lived. The European Court concluded that the severe environmental pollution resulted in a violation of article 8(1), as it deprived the applicants from the enjoyment of their homes in such a way as to adversely affect their private and family life. A particularly aggravating factor was the fact that the waste plant operated without the required authorisation, with the knowledge of the authorities.⁶¹

Article 8(1) of the European Convention further reaffirms the obligation on authorities to undertake practical measures for protecting individuals whose lives were affected adversely by dangers inherent

⁵⁶ *Öneryildiz* case (n 25 above) para 71 ff; Shelton (n 31 above) 145.

⁵⁷ Shelton (n 31 above) 145 166.

⁵⁸ European Convention (n 10 above).

⁵⁹ Art 2 European Convention (n 41 above); European Court *Lopez-Ostra v Spain* (*Lopez-Ostra* case) judgment of 9 December 1994 (1995) 20 EHRR 277 para 51. However, it remains essential to determine whether the adverse effects of the environmental pollution had a detrimental effect on one or more of the rights explicitly mentioned in art 8(1). It is not the purpose of that article (or any other in the European Convention) to prevent or address environmental pollution as such; See also Ovey & White (n 40 above) 286; J Verschuuren 'Invloed van het EVRM op het materiële omgevingsrecht in Nederland' in T Barkhuysen *et al De betekenis van het EVRM voor het materiële bestuursrecht*, VAR preadviezen No 132 (2004) 266.

⁶⁰ *Lopez-Ostra* case (n 59 above) para 51.

⁶¹ As above. See also M Fitzmaurice & J Marshall 'The human right to a clean environment – Phantom or reality? The European Court of Human Rights and English courts' perspective on balancing rights in environmental cases' (2007) 76 *Nordic Journal of International Law* 117.

in certain activities or situations. In the case of *Fadeyeva v Russia*,⁶² the applicant lived in a security zone affected by air pollution from a steel plant built in Soviet times. After obtaining a court order against the authorities for resettlement, the applicant found herself as number 6 820 on the general waiting list. Even though the cause of the air pollution was undisputed and domestic legislation declared the zone in which she lived unfit for habitation, no priority waiting list was introduced.⁶³ Under these extreme circumstances, the positive obligations under article 8(1) may require a state to re-house those living close to industrial plants where the level of toxic emission is shown to be hazardous to health.⁶⁴

An important common denominator in all the above cases is the fact that the inherent danger of a particular activity was not disputed. In addition, harm to the environment and certain aspects of human life had already occurred, often aggravated by the illegal behaviour of the authorities themselves. The situation was, however, different in the *Hatton* case before the European Court, where the United Kingdom demonstrated that it engaged in regular risk assessment and updating of measures directed at minimising harm resulting from the aircraft noise at Heathrow Airport.⁶⁵ While confirming that article 8(1) of the European Convention obliged authorities to prevent excessive noise from the privately-owned and operated airport, the European Court did not find a violation of this obligation under the circumstances.⁶⁶

The applicants who resided near Heathrow alleged that the increased noise level that resulted from a new night schedule that was introduced in 1993 violated article 8(1).⁶⁷ According to the majority of the Grand

⁶² European Court *Fadeyeva v Russia* (*Fadeyeva* case) judgment of 9 June 2005 (2005) 40 ECHR 376.

⁶³ *Fadeyeva* case (n 62 above) paras 67 & 68. See also Fitzmaurice & Marshall (n 61 above) 128-129.

⁶⁴ *Fadeyeva* case (n 62 above) para 134; *Ovey & White* (n 40 above) 28; Fitzmaurice & Marshall (n 61 above) 130.

⁶⁵ European Court *Hatton v United Kingdom* (GC) (*Hatton* GC case) judgment of 8 July 2003 (2003) 37 EHRR 28 paras 43-45; Similarly, European Court *Powell & Raynor v United Kingdom* (*Powell & Raynor* case) judgment of 21 February 1990 (1990) 12 EHRR 355. This case also confirmed that the right to enjoyment of property protected in art 1 of Protocol 1 of the European Convention can also be affected by pollution or other environmental harm, where such harm has resulted in a very substantial reduction of the property at stake. However, in practice, this right has played a marginal role in the indirect protection of the environment in the jurisprudence of the European Court.

⁶⁶ *Hatton* GC case (n 65 above) paras 113-116. From a procedural perspective it is worth noting that the Grand Chamber held that the absence of a judicial review procedure which could determine whether the introduction of a new night flight schedule at Heathrow violated the private and family life of those in the vicinity, constituted a violation of the right to a remedy under art 13 of the European Convention. See also Fitzmaurice & Marshall (n 61 above) 126; S Zeichen 'Das Recht auf unversehrte Umwelt und die Europäische Menschenrechtskonvention' in M Geistlinger (ed) *Umweltrecht in Mittel- und Osteuropa im International und Europäischen Kontext* (2004) 58.

⁶⁷ See also Garcia San José (n 2 above) 56.

Chamber there was no violation of this right, since the government of the United Kingdom had struck a fair balance between the rights of the plaintiffs and other public interests such as the economic well-being of the country, to which the night flights contributed. An important consideration was that the government had undertaken studies into aircraft noise and sleep disturbances over a long period of time, had complied with domestic regulations pertaining to environmental protection, and had repeatedly introduced certain measures to mitigate the effects of aircraft noise. In addition, the value of property in the Heathrow area was not negatively affected by the night flight schedule, as a result of which the plaintiffs could have moved away without incurring excessive costs.⁶⁸

In essence, the above decisions all acknowledge a positive obligation on state authorities to engage in risk and/or impact assessments of activities that pose a danger to the environment and/or human health. In relation to article 24 of the African Charter, this obligation concerns the impact of the activity (such as oil drilling) on the environment as such, regardless of whether the environmental impact also results in a violation of other rights of individuals. In the case of articles 2 and 8(1) of the European Convention, the obligation would be narrower, as it would be directed only at the impact of the situation or activity (such as the operation of waste disposal) on the rights contained in articles 2 and 8(1) respectively.

When referring to these rights, the European Court frequently makes reference to the impact of the particular environmental situation on the health and well-being of the claimants. These concepts both potentially have broad meanings, but the European Court has not given clear direction in this regard. In the cases under discussion, the European Court referred to physical health only (and did not elaborate on mental health), while well-being was closely connected to the enjoyment of home and family life. Where these rights were rendered meaningless, for example because the affected persons had to give up their homes as a result of an enduring environmental situation, their well-being was negatively affected.

In addition to impact studies and risk assessments, the state's regulatory system should be directed at the effective prevention of harm resulting from the activity in question. The scope of these measures would *inter alia* depend on the environmentally-relevant hazard inherent to the particular activity and the probability of any environmental harm occurring. This could for example require the introduction of a system of authorisation (such as licensing or permitting) for those wanting to engage in a particular activity, accompanied by measures ensuring its effective enforcement. The operation of the activity further

⁶⁸ *Hatton* GC case (n 27 above) paras 126-129; *Garcia San José* (n 2 above) 63; S Greer *The European Convention on Human Rights. Achievements, problems and prospects* (2007) 264.

has to be supervised in an ongoing manner. This could imply regular, updated impact- and risk assessments; adjustments of measures already in place to minimise harm to peoples' environment; as well as compliance audits and other monitoring and enforcement endeavours. In addition, the authorities have to undertake specific practical measures to protect vulnerable individuals from (further) harm resulting from the activity and its negative impact on the environment. These measures have to be appropriate to the circumstances of the case and can in extreme cases even imply the provision of alternative housing.⁶⁹

2.1.1 Protecting the way of life of indigenous peoples

A positive duty to limit the economic exploitation of natural resources, as well as to prevent pollution of water, air and soil and eradicate the consequences thereof, can also be derived from the rights of indigenous peoples.⁷⁰ The Inter-American Commission has relied on the right to life as a vehicle for the protection of the way of life of indigenous peoples, whereas the HRC has relied on the right to culture, which constitutes an element of minority protection under article 27 of ICCPR.

Although the trigger of the right to life as protected in the American Declaration and American Convention implies a high threshold,⁷¹ the Inter-American Commission has determined that environmental degradation *per se* can result in a violation of the right to life of indigenous groups in combination with other rights. In the case concerning the Yanomami Indians of Brazil, the Commission found that the construction of a highway through Yanomami territory and the authorisation of the exploitation of the territory's resources violated the community's right to life, liberty and personal security guaranteed in article 1 of the American Declaration, the right to residence and freedom of movement enshrined in article 8, as well as the right to health and well-being protected by article 11.⁷²

At the heart of the Inter-American Commission's decision was the fact that the economic undertakings led to a large influx of non-indigenous people, as well as the consequent spreading of contagious diseases that remained untreated due to a lack of medical care. The Inter-American Commission recommended the establishment of protected boundaries for the Yanomami lands and emphasised the responsibility

⁶⁹ D Shelton (n 31 above) 145 166.

⁷⁰ Scott (n 42 above) 215.

⁷¹ Scott (n 42 above) 212.

⁷² Inter-American Court *Comunidad Yanomami v Brazil (Yanomami case)*, decision of 5 March 1985, Case 7615, Res 12/85, reprinted in Inter-American Commission on Human Rights and Inter-American Court of Human Rights *Inter-American Yearbook of Human Rights* (1985), <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm> (accessed 13 July 2010). See also KSA Ebeku 'The right to a satisfactory environment and the African Commission' (2003) 3 *African Human Rights Law Journal* 149; Shelton (n 16 above) 20.

of member states to protect the cultural heritage and identity of indigenous people.⁷³

The Inter-American Commission took a similar approach in a country study that it undertook a decade later in relation to Ecuador.⁷⁴ However, it went further than in the case concerning the Yanomami Indians, as it explicitly addressed the issue of environmental degradation and its effects on the indigenous population. It lamented the fact that oil exploitation activities in the Oriente had resulted in the contamination of the water, air and soil, thereby causing illness in the region, and increasingly, the risk of serious illness. Both the government of Ecuador and the inhabitants agreed that the environment was contaminated, with inhabitants exposed to toxic by-products of oil exploitation, *inter alia* threatening food, fish supplies and wildlife. The Inter-American Commission stressed that the right to life and physical security may require positive measures that prevent the risk of severe environmental pollution that could threaten human life and health, as well as (government) response when persons have suffered injury.⁷⁵

The *Lubicon Lake Band* case⁷⁶ has thus far been the only case in which the HRC has determined a violation of the rights of indigenous peoples as a result of activities that affected the environment. According to the HRC, the government of the province of Alberta had deprived the Band of their means of subsistence by selling oil and gas concessions on their lands. A combination of historic inequities and more recent developments, including oil and gas exploitation, were threatening the way of life and culture of the Band, violating article 27(1) of ICCPR.⁷⁷

The situation in the *Lubicon Lake Band* case is distinguishable from that of the *Länsman* case,⁷⁸ where the HRC determined that stone-quarrying activities authorised by the Finnish Central Forestry Board did not violate the cultural rights of Sami reindeer breeders under article 27(1) of ICCPR. In this instance, the extent of quarrying did not (yet) disproportionately affect the way of life of the reindeer breeders.⁷⁹ The HRC observed that measures were taken to minimise the impact

⁷³ *Yanomani* case (n 72 above) consideration 10; Scott (n 42 above) 215.

⁷⁴ Ecuador Report (n 25 above).

⁷⁵ Ecuador Report (n 25 above) 77 ff; Shelton (n 16 above) 20 22.

⁷⁶ HRC *Chief Bernard Ominayak and the Lubicon Lake Band v Canada (Lubicon Lake Band case)* decision of 10 May 1990, Communication 167/1984 UN Doc CCPR/C/38/D/167/1984 para 33. See also Peters (n 38 above) 218.

⁷⁷ The flipside of the coin is that the rights of indigenous peoples may also at times be limited in order to protect the environment. This was confirmed by the HRC in the *Mahuika* case (n 26 above). In this case the government of New Zealand had regulated the fishing rights of the Maori community after a complicated process of consultation, in an attempt to conserve natural resources against the background of a dramatic growth in the fishing industry. The HRC confirmed that there was no violation of art 27 of ICCPR in this instance.

⁷⁸ *Länsman* case (n 26 above); Shelton (n 16 above) 8; S Joseph *et al The International Covenant on Civil and Political Rights: Cases, materials and commentary* (2005) 777.

⁷⁹ See Shelton (n 16 above) 18.

on reindeer herding activity and on the environment. However, the HRC did warn that if the respective mining activities were approved on a large scale and significantly expanded in the future, such developments could result in a violation of article 27(1). Finland was thus obliged to keep this in mind when either extending existing contracts or granting new ones.⁸⁰

In essence, these cases reflect a similar methodology than those discussed in section 2.2.1. A violation is only at stake where the environmental degradation and its impact on the rights of indigenous persons are beyond dispute. However, this does not detract from the positive obligation on the authorities to regulate and monitor the environmental risk posed by certain commercial activities to the way of life and cultural heritage of indigenous communities in an ongoing manner. Although the health (and therefore the right to life) of the respective indigenous communities was central to some of the decisions of the Inter-American Commission, the jurisprudence pertaining to article 27 of ICCPR illustrates that their way of life, as a manifestation of their culture, requires protection in and of itself. This implies measures that protect a lifestyle closely connected to the land and a particular natural habitat. Depending on the impact of the environmental risk on the health and way of life of these communities, authorities are obliged to demarcate certain lands, forests and waters essential to the survival of indigenous communities; and limit the type of commercial activity such as quarrying or oil exploitation within this area; or even exclude them from commercial activity.⁸¹

On the whole, the substantive obligations for (indirect) protection of the environment distilled from international human rights bodies underscore the anthropocentric dimension of environmental protection. At the same time they remain rather general in nature. This can be explained in part by the fact that judicial bodies deal with individual cases and sets of facts as opposed to broad policy making, and have neither the expertise nor the democratic mandate to engage in the detailed regulation of specifics in a highly technical and rapidly-changing area of law.⁸² Since this reality is linked to the nature of the judicial process itself, it is also visible in proceedings such as the *SERAC* case. In this decision, the African Commission interpreted article 24 of the African Charter, which explicitly guarantees the right to a satisfactory environment. Although a judicial body can in such an instance address environmental protection directly and more comprehensively than

⁸⁰ As above.

⁸¹ See also Inter-American Commission of Human Rights, Third Report on the Situation in Paraguay (IACHR Paraguay Report) OEA/Ser.L/V/II 110 Doc 52, 9 March 2001; Shelton (n 31 above) 158.

⁸² D Bodansky & J Brunnée 'Introduction: The role of national courts in the field of international environmental law' in M Anderson & P Galizzi (eds) *International environmental law in national courts* (2002) 7.

through indirect protection, the benchmarks it designs will depend on the circumstances of the case at hand. In addition, the explicit recognition of a right to a satisfactory environment would not relieve courts (or policy makers) from balancing the positive substantive obligations inherent in such a right with other legitimate public interests, including the economic development of an area or the country as a whole. A weighing of different interests will therefore always have to be undertaken when determining the scope of the positive obligations directed at environmental protection.

Even so, the substantive positive obligations pertaining to the environment, which have thus far been generated through international human rights bodies, illustrate the inter-twining of human life (health and well-being) and the environment. They serve as outer boundaries for government actions and omissions that can trigger state responsibility when crossed.⁸³ The subsequent paragraphs focus on the guidance that the South African legislature, executive and courts can infer from the (two strands of) substantive obligations identified above, when interpreting and enforcing section 24 of the Constitution.⁸⁴ In addition, there is an assessment of the extent to which these positive duties have already materialised in the South African context via legislation, judgments of the courts and/or recommendations of the South African Human Rights Commission (SAHRC).

3 Implications for section 24 of the Constitution and developments in domestic law

Constitutional transformation in the early 1990s brought along, for the first time, constitutional protection of the environment in South Africa. Section 24 of the Constitution states:

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

⁸³ Bodansky & Brunnée (n 82 above) 8; Shelton (n 31 above) 159.

⁸⁴ It is acknowledged that constitutional interpretation requires that a right such as the environmental right be interpreted with, *inter alia*, contextual factors, constitutional values, the impact and scope of other constitutional rights as well as applicable internal limitations and the limitation clause (sec 36 of the Constitution) in mind. Guidance from international case law can accordingly only be a part of the domestic interpretation process.

A fair number of scholarly analyses pertaining to the scope and meaning of section 24 is available,⁸⁵ and it is widely accepted that this provision imposes both negative and positive obligations on the state.⁸⁶ Even so, judicial interpretation and clarification of the state's obligations contained in this right are crucial to guide the conduct of the legislature and the executive in relation to environmental governance. So far domestic judicial guidance in this respect has been limited due to the absence of cases dealing squarely with specifically the positive (substantive) obligations contained in section 24. Still, this does not free the legislative or executive branches of government from their duty to design and implement a regulatory framework that gives effect to this provision. In doing so, the jurisprudence of the international human rights bodies discussed above constitute a useful point of reference. In addition, the South African courts can draw guidance from the international jurisprudence once the need arises to interpret the substantive meaning of the environmental right.

With the exception of the *SERAC* case before the African Commission,⁸⁷ the obligations pertaining to environmental protection identified by international human rights bodies were all distilled from non-environmental human rights. Therefore, the scope of the substantive environmental obligations derived from the rights in question is likely to be more limited than what can be expected from a right explicitly directed at environmental protection such as section 24 of the Constitution. At the same time, section 24 is likely to cover those environmentally-relevant obligations that can be distilled from non-environmental human rights. If these obligations can already be generated by relying on human rights not directly aimed at protecting the environment, it is hard to see how such obligations could not be implied by a right explicitly directed at environmental protection.⁸⁸ This overlap suggests that the positive obligations generated through relevant international jurisprudence create a minimum threshold for environmental protection.

Section 24(a) of the Constitution is broad and carries considerable potential meaning. Sections 24(b)(i) to (iii) list a number of positive

⁸⁵ See, eg, the following: Glazewski (n 18 above) 67-68 72-81; M Kidd *Environmental law* (2008) 18-23; I Currie & J de Waal *The Bill of Rights handbook* (2005) 521-530; L Feris 'The socio-economic nature of section 24(b) of the Constitution – Some thoughts on *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (2008) 23 *SA Public Law* 194-207; L Feris & D Tladi 'Environmental rights' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 249; Kotzé & Paterson (n 6 above) 560-562 572-579; AA du Plessis *Fulfilment of South Africa's constitutional environmental right in the local government sphere* (2009).

⁸⁶ These duties arise from an inclusive reading of secs 24 and 7(2) of the Constitution. Sec 7(2) determines that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights'.

⁸⁷ *SERAC* case (n 24 above).

⁸⁸ Although the possibility exists that these internationally-recognised duties may assist further in the interpretation of other rights in the Constitution (eg the right to life or the right to dignity), it will not be discussed in any detail here.

state obligations such as the duty to prevent pollution and ecological degradation. These obligations are, however, without any detail. In principle, therefore, the added value of internationally-recognised positive obligations lies in clarifying the text and scope of section 24(a) as well as in concretising the obligations listed in section 24(b). With this in mind, the following section evaluates the potential meaning of the relevant international jurisprudence and the minimum threshold for environmental protection that it suggests, for the interpretation and enforcement of some of the positive duties that sections 24(a) and (b) impose on the state.

3.1 Environmental assessments and regulation

Section 24(a) read with section 7(2) of the Constitution places a positive duty on the state to ensure an environment that is conducive to health and well-being.⁸⁹ This obligation would *inter alia* imply environmental risk assessments in instances where a prevailing situation could be harmful to the health or well-being of individuals, in line with the *Öneryildiz*,⁹⁰ *Lopez-Ostra*⁹¹ and *Fadeyeva*⁹² cases. An environmental risk assessment can accordingly be triggered by potential hazards to human life, for example, human exposure to radioactive material or to high levels of uranium in drinking water. Section 24(b) further obliges the state to take reasonable legislative and other measures to promote conservation and secure ecologically sustainable development and the use of natural resources. It follows that an environmental impact assessment can also be triggered by potential harm to, or negative impacts on the natural environment *per se* as in the case of the development of an industrial site that would alter the ecological characteristics of an entire wetland, or for example a township development that would irreversibly disturb a significant portion of richly biodiverse grassland.

These obligations directed at the protection of natural resources are reminiscent of those contained in article 24 of the African Charter and confirmed by the *SERAC* case.⁹³ In this context it is important to note that the substantive obligations distilled from international human rights law stretch beyond the mere execution of environmental assessments. To be aware of the impact and risks that certain types of

⁸⁹ The exact meaning of health and well-being in this context has not yet been confirmed by the courts. Health in this context seems to refer to protection against environmental conditions that would negatively affect human health, such as excessive air or water pollution and exposure to toxic substances. Well-being seems to refer to environmental conditions that are not necessarily harmful to human health but that may otherwise negatively affect the interests that people hold in the environment, such as the aesthetic value of a wetland that attracts different bird species or the spiritual or religious value attached to a sacred forest.

⁹⁰ *Öneryildiz* case (n 25 above).

⁹¹ *Lopez-Ostra* case (n 59 above).

⁹² *Fadeyeva* case (n 62 above).

⁹³ *SERAC* case (n 24 above).

activities are likely to pose for humans and/or the natural environment is only one side to the positive duty of the state. Its regulatory system (including permitting, licensing, compliance monitoring, enforcement and other measures) must further be directed at the effective regulation, minimisation and prevention of environmental harm that may result from such activities. This translates into the duty to collect and record environmental information (on the state of the environment, environmental impacts, risks, etc.), and to act upon it. In this regard the *Lopez-Ostra* case⁹⁴ illustrates that when authorities are aware that a certain activity (in this case the operation of a private tannery waste treatment facility) takes place without the necessary environmental authorisation, it could reinforce a case against the state for non-compliance with its obligations under section 24 of the Constitution. The violation of article 2 of the European Convention identified in the *Öneryildiz* case⁹⁵ *inter alia* resulted from the fact that the authorities were aware of certain environmental dangers but refrained from taking action.

Some of the obligations related to environmental assessments and regulation that one finds in the international context have already found resonance in South African law. This applies in particular to environmental impact assessments (EIAs), which are widely accepted as one of the most successful environmental regulatory interventions to have emerged over the last four decades.⁹⁶ South Africa has a history of environmental impact assessments dating back to the 1970s.⁹⁷ An EIA is required to be able to obtain environmental authorisation prior to the commencement of certain listed activities. Both the EIA process and its requirements are currently regulated by chapter 5 of NEMA⁹⁸ combined with a set of EIA Regulations in terms of sections 24 of that Act.⁹⁹ NEMA determines that the potential consequences for or impacts on the environment of listed or specified activities¹⁰⁰

⁹⁴ *Lopez-Ostra* case (n 59 above).

⁹⁵ *Öneryildiz* case (n 25 above).

⁹⁶ More than 100 countries around the globe have adopted some form of EIA through legislation. See F Retief & LJ Kotzé 'The lion, the ape and the donkey: cursory observations on the misinterpretation and misrepresentation of Environmental Impact Assessment (EIA) in the chronicles of fuel retailers' unpublished conference paper delivered on 31 May 2009 at the Annual Environmental Law Association Conference, Johannesburg, South Africa.

⁹⁷ For a brief overview of the development of the EIA system in South Africa, see UN Economic Commission for Africa's report entitled *Review of the Application of Environmental Impact Assessment in Selected African Countries* (EIA Review) (2005) 24 http://www.unitednationonline.org/eca_programmes/sdd/documents/EIA_book_final_sm.pdf (accessed 13 July 2010).

⁹⁸ NEMA (n 7 above).

⁹⁹ Government Notices R385, R386 & R387 (EIA Regulations) in *Government Gazette* 28753, 21 April 2006, <http://www.environment.gov.za/> (accessed 13 July 2010).

¹⁰⁰ In this context, sec 1 of NEMA (n 7 above) broadly defines 'activities' as policies, programmes, processes, plans and projects.

must be considered, investigated, assessed and reported on to the competent authority or the Minister of Minerals and Energy.¹⁰¹ NEMA compels the competent authorities at national and provincial level to publish notices in the *Government Gazette* with the areas or activities that are subject to EIAs.¹⁰² A variety of activities and areas are currently listed¹⁰³ and include, for example, the construction of facilities or infrastructure (including associated structures or infrastructure) for the temporary storage of hazardous waste; the transmission and distribution of electricity above ground with a capacity of more than 33 kilovolts and less than 120 kilovolts; and the development of a new facility or the transformation of an existing facility for storage or manufacturing, generally, which occupies an area of 1 000 square meters or more outside an existing area zoned for industrial purposes. The types of activity at stake in the *Öneryildiz*,¹⁰⁴ *Lopez-Ostra*,¹⁰⁵ *Fadeyeva*¹⁰⁶ and *SERAC*¹⁰⁷ cases are in principle all covered by at least one of the categories of activities or areas that are currently listed in terms of section 24 of NEMA.

Of relevance are at least three of the framework environmental management principles that apply across the Republic to the actions of all organs of state that may significantly affect the environment and which apply 'alongside ... the state's responsibility to respect, protect, promote and fulfil the social and economic rights in chapter 2 of the Constitution'.¹⁰⁸ These principles are legally binding and should guide the interpretation, administration and implementation of NEMA, and any other law concerned with the protection or management of the environment.¹⁰⁹ NEMA requires 'the consideration of all relevant factors, including that a *risk-averse* and *cautious* approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions'. In addition, '*negative impacts* on the environment and on people's environmental rights must be anticipated and prevented, and where they cannot be altogether prevented, they must be minimised and remedied'.¹¹⁰ It further provides that '(t)he social, economic and environmental *impacts* of activities, including disadvantages and benefits, must be considered, assessed

¹⁰¹ Sec 24(1) of NEMA (n 7 above).

¹⁰² Sec 24D of NEMA (n 7 above).

¹⁰³ See the extensive list of activities in Government Notice R386 in *Government Gazette* 28753, 21 April 2006 (n 99 above).

¹⁰⁴ Erection and operation of a waste collection site in close proximity of a human dwelling (*Öneryildiz* case (n 25 above)).

¹⁰⁵ Erection and operation of a waste treatment facility (*Lopez-Ostra* case (n 59 above)).

¹⁰⁶ Erection and operation of a steel manufacturing plant (*Fadeyeva* case (n 62 above)).

¹⁰⁷ Oil extraction (*SERAC* case (n 24 above)).

¹⁰⁸ Sec 2(1)(a) of NEMA (n 7 above).

¹⁰⁹ Sec 2(1)(e) of NEMA (n 7 above).

¹¹⁰ Secs 2(4)(a)(vii) & (viii) of NEMA (n 7 above) (our emphasis).

and evaluated, and decisions must be appropriate in the light of such consideration and assessment.’¹¹¹

Formally, the NEMA principles above are judicially enforceable, but may nonetheless come across as a mere pooling of unclear terms and vague objectives. Even so, repeated references to ‘risk’ and ‘impact’ indicate that the state has a positive obligation to estimate and act upon environmental risks and impact as part of decision making and governance even in the event of an activity not listed in the EIA Regulations.¹¹² In essence, authorities must take decisions that are ‘appropriate’.¹¹³ NEMA links such appropriateness directly to known and unknown information about environmental impacts and risks. For example, in the (unlikely) event that the development of an off-shore wind-energy facility is not covered by any of the listed activities in the EIA Regulations, the section 2 NEMA principles still compel the state to apply its mind to the potential impact on marine life and the risks for conservation of the seabed. Another example would be if the facilities necessary for carbon sequestration were not (yet) covered by the EIA Regulations and where it would not (yet) be known if such facilities could harm human health in the long term. Even in such uncertain circumstances the state still has the duty to act with great caution in relation to potential harm and impact in terms of the overarching NEMA-principles.

South Africa may be lauded for the fact that its legal framework for environmental risk and impact is fairly tight and seems to take due account of the positive environmental obligations that were distilled in international human rights jurisprudence. With a set of new EIA Regulations published in June 2010,¹¹⁴ it also appears as if this area of environmental law is rapidly developing and under continuous scrutiny. This conclusion is not intended to deny the challenges that the state may face concerning the actual execution of its duties in relation to environmental impact, risk and regulation.¹¹⁵ Likely challenges in this respect *inter alia* relate to the procedural dimension of estimating

¹¹¹ Sec 2(4)(i) of NEMA (n 7 above) (our emphasis).

¹¹² EIA Regulations (n 99 above).

¹¹³ See sec 2(4)(i) of NEMA (n 7 above).

¹¹⁴ Amendments to the EIA Regulations (n 99 above) have recently been finalised by Department of Water Affairs and Forestry. The new Regulations were published on 18 June 2010 and will soon come into effect on a date to be announced. The 2010 Regulations can be retrieved via <http://www.environment.gov.za/> (accessed 13 July 2010).

¹¹⁵ For a discussion of some of the challenges that are generally experienced in relation to the institutionalisation of EIA systems and the conducting of EIAs *per se*, see EIA Review (n 97 above).

and regulating environmental risk and impact.¹¹⁶ However, the current legislative framework provides necessary preliminary steps for ensuring that the state gives effect to section 24 of the Constitution in a manner that also gives due consideration to South Africa's international obligations.

The South African courts for their part have thus far only dealt with cases related to the procedural dimensions of EIA studies.¹¹⁷ In addition, these cases were primarily based on the statutory provisions pertaining to EIA procedures and did not arise from disputes that directly involved section 24 of the Constitution.¹¹⁸ Even so, the courts have used these cases to give some (vague) indications of the positive obligations implied by section 24. In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*¹¹⁹ (BP case), the High Court had to decide a matter between British Petroleum (BP) and the environmental authority which had denied the oil company an environmental authorisation for purposes of a new petrol filling station based on the content of the EIA study and the application of various decision-making guidelines. The Court gave an indication of the obligations implied by section 24 for the conduct of EIAs, which the environmental authority and the Court perceived as being part of the state's positive mandate to 'take reasonable legislative and other measures' towards fulfilment of the environmental right. With reference to the notion of sustainable development¹²⁰ and the concept of inter-generational equity in the protection of the environment, the Court held that section 24 of the Constitution must be interpreted to extend the environmental authori-

¹¹⁶ An in-depth assessment of the effectiveness of the EIA system that considers in detail, eg, the qualifications and conduct of EIA practitioners, the scientific quality of assessments, fraud and corruption or the effectiveness of government in the issuing of records of decisions and monitoring of compliance, falls beyond the scope of this article. For further analysis, see SAIEA *Improving the effectiveness of environmental impact assessment and strategic environmental assessment in Southern Africa* (2003) 29-30 http://www.saiea.com/html/may_2003.pdf (accessed 13 July 2010).

¹¹⁷ See, eg, *Sasol Oil (Pty) Ltd & Another v Metcalfe NO* 2004 5 SA 161 (W); *All the Best Trading CC t/a Parkville Motors & Others v SN Nayagar Property Development and Construction CC & Others* 2005 3 SA 396 (T); *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd & Another* 2006 5 SA 483 (SCA); and *Capital Park Motors CC & Another v Shell South Africa Marketing (Pty) Ltd & Others* (unreported) [2007] JOL 20072 (T).

¹¹⁸ This is in line with the Constitutional Court's approach. In the case of *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) 51, 52 O'Regan J confirmed that '[w]here legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging the legislation as failing short of the constitutional standard'.

¹¹⁹ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* (BP case) 2004 5 SA 124 (W).

¹²⁰ Sec 24(b) of the Constitution makes explicit reference to the notion of sustainable development. In terms of sec 1 of NEMA (n 7 above), sustainable development is defined in the South African context as 'the integration of social, economic and environmental factors into planning, implementation and decision making so as to ensure that development serves present and future generations'.

ties' mandate in the conducting of EIAs beyond a consideration of strictly environmental impacts.¹²¹ In this respect, the Court held that:¹²²

Pure economic principles will no longer determine, in an unbridled fashion, whether a development is acceptable. Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of inter-generational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental judiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, inter alia, socio-economic concerns and principles.

Furthermore, in the 2007 *Fuel Retailers* case,¹²³ the Constitutional Court confirmed that both the need to protect the environment and the need for social and economic development, as well as 'their impact on decisions affecting the environment and obligations of environmental authorities in this regard, are important constitutional questions'.¹²⁴ Similar to the *BP* case, this case dealt with the nature and scope of the obligation to consider the social, economic and environmental impact of the proposed establishment of a petrol filling station, as well as whether the environmental authorities complied with that obligation. With reference to section 24 of the Constitution, the Court confirmed that socio-economic development had to be balanced with environmental protection.¹²⁵ However, these references were of a broad and general nature and the Court did not engage in an analysis of the complexities inherent in such a balancing act.

3.2 Protecting the way of life of indigenous peoples

Section 24 of the Constitution affords constitutional protection of the environment to everyone in South Africa. This includes the country's indigenous people and traditional communities. Defining indigenous people of South Africa is marked by controversy and uncertainty relating to the suitability of criteria that signify an indigenous community. However, for the purpose of this article the authors adopt the view that the country's indigenous people are the San, Khoe (Nama), Griquas, Koranas and revivalist Khoesan, all of whose way of life is closely

¹²¹ See for a more detailed discussion of this case Kotzé & Paterson (n 6 above) 573-575.

¹²² *BP* case (n 119 above) para B-D 144.

¹²³ *Fuel Retailers* case (n 5 above).

¹²⁴ *Fuel Retailers* case (n 5 above) para 41.

¹²⁵ *Fuel Retailers* case (n 5 above) paras 44-45. Although the facts were quite different, the Constitutional Court's thinking seems to signify the reasoning of the HRC in the *Länsman* case (n 26 above).

connected to nature and a particular natural habitat.¹²⁶ A traditional community refers to a community that is characterised by a particular social, cultural, language or religious system such as a black African community with distinct cultural practices (for example a Sotho or Xhosa community) or a religious community (for example a Muslim or Hindu community).¹²⁷

It is worth noting that the distinctions between the concepts of 'indigenous' and 'traditional' communities are blurred and that it is fair to conclude that a certain measure of overlap exists within the South African context. For example, in its Preamble, the Traditional Leadership and Governance Framework Act (Traditional Leadership Act)¹²⁸ explicitly refers to indigenous communities as consisting of a 'diversity of cultural communities', which would imply that they also qualify as traditional communities. The Intellectual Property Laws Amendment Bill (IPLA Bill) of 2010,¹²⁹ for its part, defines an 'indigenous community' as 'any community of people currently living within the borders of the Republic, or who historically lived in the geographic area currently located within the borders of the Republic'. This definition would be broad enough to cover a variety of (traditional) communities that share, for example, a particular cultural or religious tradition.

For the purposes of this article, this potential overlap in the scope of indigenous and traditional communities is relevant in as far as it indicates that a broad category of persons could claim protection of their natural habitat in order to preserve their traditional way of life – if section 24 of the Constitution is to be interpreted in accordance with international human rights jurisprudence. Of particular importance is the view of international human rights bodies that the protection of the way of life of indigenous peoples as a manifestation of their culture requires a limitation of the economic exploitation of their natural habitat, the prevention of pollution of their environment, as well as the eradication of the consequences of such pollution.¹³⁰

¹²⁶ For a detailed discussion, see *Country Report of the Research Project by the International Labor Organization (ILO) and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples: South Africa* (2009) 3-4 (ILO & African Commission Country Report) http://www.chr.up.ac.za/indigenous/country_reports/Country_reports_SouthAfrica.pdf (accessed 13 July 2010).

¹²⁷ Ch 12 of the Constitution acknowledges the role of 'traditional' leadership; according to sec 2 of Traditional Leadership and Governance Framework Amendment Act 41 of 2003, http://www.saflii.org/za/legis/num_act/tlagfa2003431.pdf (accessed 13 July 2010) (Traditional Leadership Act), a community is recognised as a 'traditional' community for purposes of application of the Act if it is subject to a system of traditional leadership and observes a system of customary law.

¹²⁸ Traditional Leadership Act (n 127 above).

¹²⁹ Intellectual Property Laws Amendment Bill (IPLA Bill) of 2010, http://www.pmg.org.za/files/bills/100422b8-10_0.pdf (accessed 13 July 2010).

¹³⁰ See also ILO & African Commission Country Report (n 126 above) 47, which submitted that sec 24 of the Constitution should be seen as a mechanism to protect the environment of South Africa's indigenous people.

The reasoning of international human rights bodies regarding the relationship between indigenous communities and the need for environmental protection is reinforced by a number of international instruments that protect the rights of indigenous people. Even though none of these instruments is legally binding on South Africa, they serve as a valuable source of interpretation of section 24 in a manner that compliments the standards distilled by human rights bodies. One such instrument is the United Nations Declaration on the Rights of Indigenous People (UN Declaration),¹³¹ which explicitly recognises that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment. The Declaration makes it clear that indigenous people have the right to health, conservation and the protection of the environment.¹³² Furthermore, the International Labour Organisation (ILO)'s Indigenous and Tribal Peoples Convention¹³³ (ILO Convention) provides that the rights of peoples concerned with the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of indigenous and tribal peoples to participate in the use, management and conservation of natural resources.

Internationally, the established view is that the natural habitat of indigenous peoples merits special protection due to their particular dependence for their way of life on such an environment.¹³⁴ This view has also been confirmed closer to home by the Botswana High Court in the case of *Sesana and Others v Attorney-General*.¹³⁵ In deciding this matter, and with reference to the UN Cobo Report,¹³⁶ the Court observed that there is 'a deeply spiritual relationship between indig-

¹³¹ See the Preamble of the UN Declaration on the Rights of Indigenous People (UN Declaration) adopted on 13 September 2007, http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf (accessed 13 July 2010). South Africa has signed the Declaration at the time of its adoption. For a discussion of the Declaration with a focus on its meaning for indigenous communities in Africa, see WJM van Genugten 'Protection of indigenous peoples on the African continent: Concepts, position seeking, and the interaction of legal systems' (2010) 104 *American Journal of International Law* 29-65.

¹³² Art 29 of the UN Declaration.

¹³³ Art 15 of the ILO Indigenous and Tribal Peoples Convention adopted on 27 June 1989 (ILO Convention) <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169> (accessed 13 July 2010). South Africa and most other African countries have not ratified the ILO Convention.

¹³⁴ Already in 1983, the ECOSOC Final Report on the Problem of Discrimination against Indigenous People, submitted by Special Rapporteur José R Martínez Cobo (Cobo Report) underscored the complexity and deep-seated implications of the relationship between indigenous communities and their land as reminiscent of their natural resource base. The Cobo Report is available at http://www.un.org/esa/socdev/unpfi/documents/MCS_xxi_xxii_e.pdf (accessed 13 July 2010).

¹³⁵ *Sesana & Others v Attorney-General* (*Sesana case*), High Court judgment, Misc No 52 of 2002; ILDC 665 (BW 2006).

¹³⁶ Cobo Report (n 134 above).

enous peoples and their land'.¹³⁷ However, it is true that, despite the special relationship between indigenous people and their natural resource base, activities in various African countries grossly disturb this relationship.¹³⁸ It is against this backdrop that the positive substantive duties of section 24 of the Constitution must be interpreted.

At first sight it is more difficult to link the positive obligation to protect the way of life and culture of indigenous peoples to the text of section 24 of the Constitution, than it is in the case of the obligation to undertake environmental assessments. Neither indigenous peoples nor issues of tradition, religion or culture have been explicitly included in section 24. Still, the state has the obligation to fulfil the right of everyone in South Africa to an environment that is not detrimental to their health or well-being (section 24(a)) and to secure the ecologically-sustainable development and use of natural resources while promoting, *inter alia*, social development (section 24(b)). It seems likely that 'the way of life' of indigenous peoples and traditional communities fits within the realm of the protection afforded by a right that mentions notions such as 'health', 'well-being' and 'social development'. These are all intrinsically part of human life.

The Constitution provides further guidance in this regard. Section 31(1(a)) determines that persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community, to enjoy their culture, practise their religion and use their language. This wording is reminiscent of article 27 of ICCPR.¹³⁹ In line with the jurisprudence of the relevant international human rights decisions analysed above, one can interpret article 24 (combined with article 31) as obliging the state *inter alia* to demarcate certain natural resources such as land, waters or forests essential to the survival of indigenous people, to limit or even exclude certain commercial activities and development within this area, to prevent the risk of environmental pollution that could threaten the way of life

¹³⁷ *Sesana case* (n 135 above) para H.1.5.b.

¹³⁸ Van Genugten (n 131 above) 32-34. In relation to the pastoralist indigenous communities of other African countries such as Nigeria and Tanzania, conflicts over land and other natural resources between these communities and state authorities are reportedly increasing 'at an alarming rate'; see International Working Group for Indigenous Affairs *The Indigenous world yearbook* (2009) 13 <http://www.iwgia.org/sw29940.asp> (accessed 13 July 2010). These tensions are of an ethnic nature and follow the forceful removal of indigenous communities from what they regard as 'their' land; For a critical view of the way in which climate change affects the way of life some of the pastoralist indigenous communities in Africa and the role of governments in addressing this impact through mitigation and adaptation strategies, see JO Simel 'The threat posed by climate change to pastoralists in Africa' in International Work Group for Indigenous Affairs *Climate change and indigenous affairs* 34-43, <http://www.iwgia.org/sw29928.asp> (accessed 13 July 2010).

¹³⁹ ICCPR (n 15 above); see also sec 30 of the Constitution, which determines that '[e]veryone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'.

of these communities, as well as to provide reparations in instances where members of these communities have suffered injury as a result of environmental degradation.

The South African legislature has made a particular effort to protect the cultural heritage resources of *inter alia* traditional communities and indigenous people through the enactment of the National Heritage Resources Act (NHRA).¹⁴⁰ This is significant since the NHRA defines a heritage resource as any place or object of cultural significance. It may typically include landscapes and natural features of cultural significance such as rivers, mountains and forests.¹⁴¹ Heritage resources are furthermore defined to include, for example, ancestral graves, royal graves and graves of traditional leaders. The NHRA further defines 'living heritage' as intangible aspects of inherited culture such as indigenous knowledge systems.¹⁴² The NHRA endorses the view that the cultural heritage of traditional communities and environmental protection go hand in hand. It provides that the identification, assessment and management of the heritage resources of South Africa must promote the use and enjoyment of and access to heritage resources (which may include natural resources) in a way consistent with their cultural significance and conservation needs.¹⁴³ Also, South Africa's framework environmental statute provides that 'decisions' must take into account the interests, needs and values of all interested and affected parties, and this includes recognising 'traditional knowledge'.¹⁴⁴ In similar vein, the National Department of Trade and Industry's Policy Framework for the Protection of Indigenous Knowledge through the Intellectual Property System (Policy Framework)¹⁴⁵ states that one of the objectives with formally protecting indigenous knowledge is to conserve the environment. The Policy Framework acknowledges, for example, that traditional farming methods by nature ensure the protection of the environment on which they depend and that land races, rotation

¹⁴⁰ National Heritage Resources Act 25 (NHRA) of 1999, assented to on 28 April 1999, http://www.saflii.org/za/legis/num_act/nhra1999278.pdf (accessed 13 July 2010). The importance of this Act for purposes of the protection of the environment of indigenous people is illuminated in the Country Report (n 126 above).

¹⁴¹ Sec 1 of NHRA (n 140 above).

¹⁴² As above.

¹⁴³ Sec 5(7) of NHRA (n 140 above).

¹⁴⁴ Sec 2(4)(g) of NEMA (n 7 above). Unfortunately the meaning of 'decision' and 'indigenous knowledge' is not clarified in the Act. It can, however, be derived from the scope of application of NEMA that a decision pertains to any decision taken in the public or private domain that is or could be of environmental relevance. Indigenous knowledge is in a very technical way defined in the IPLA Bill (n 129 above) as 'traditional intellectual property' which is reminiscent of indigenous knowledge systems and which comprises of traditional works, traditional designs, traditional performances and traditional terms and expressions.

¹⁴⁵ Policy Framework for the Protection of Indigenous Knowledge through the Intellectual Property System (Policy Framework) of 2008, <http://www.dti.gov.za/ccrd/ip/policy.pdf> (accessed 13 July 2010).

of crops and other traditional methods not only protect the land, but in fact increase harvest yields.¹⁴⁶

The National Environmental Management: Biodiversity Act (Biodiversity Act)¹⁴⁷ further provides that before a permit (environmental authorisation) for bio-prospecting¹⁴⁸ may be issued, the issuing authority must first protect any interests that an indigenous community may have where the proposed bio-prospecting project will involve such community's traditional uses of the indigenous biological resources at stake, or such community's knowledge of or discoveries about the biological resources to which the application relates.¹⁴⁹ The Biodiversity Act further provides for the sharing of any future bio-prospecting benefits with indigenous communities in the event that such communities' interests are involved.¹⁵⁰

It seems therefore that South African law protects indigenous peoples' interests in the event of economic developments that may exploit their natural resources or otherwise impact on their natural habitat. Arguably, the strength of this protection will depend on the availability to indigenous communities of information in relation to proposed developments, the accessibility of environmental and legal knowledge, as well as the ability and means to take action. An indigenous community can only protect and enforce protection of its environmental interests when it fully grasps the long-term ecological impact and consequences (including financial risks and benefits) of a bio-prospecting project, for example.

At this point it is worth mentioning a few developments in the South African courts and before the SAHRC in relation to the protection of the way of life of indigenous and traditional communities. The decision of the Supreme Court of Appeal in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁵¹ was based on section 31(1) of the Constitution. The question before the Court was whether the existence of graves and places of religious significance can be taken into account in township-establishment applications. The case concerned more than 20 graves that had special religious and cultural significance to

¹⁴⁶ Policy Framework (n 145 above) 9.

¹⁴⁷ National Environmental Management: Biodiversity Act 10 (Biodiversity Act) of 2004, assented to 7 June 2004, <http://www.info.gov.za/acts/2004/a10-04/index.html> (accessed 13 July 2010).

¹⁴⁸ Bio-prospecting is defined in sec 1 of the National Environmental Management: Biodiversity Act (n 147 above) as any research on, or development or application of, indigenous biological resources for commercial or industrial exploitation, and includes *inter alia* the utilisation for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities. An example is the commercialisation of the medicinal uses of the indigenous Hoodia plant as originally discovered by the San people.

¹⁴⁹ Sec 82(1) of the Biodiversity Act (n 147 above).

¹⁵⁰ Sec 83 of the Biodiversity Act (n 147 above).

¹⁵¹ *Oudekraal Estates (Pty) Ltd v The City of Cape Town & Others* (25/08) [2009] ZASCA 85; 2010 1 SA 333 (SCA) (3 September 2009).

the members of the Cape Town Muslim community. Two of the graves were so-called 'kramats' with particular spiritual significance. The Court held in favour of this traditional community, stating that the exercise of property rights could be constrained by the law and by the protection of other constitutional rights (legal interests) of a particular group of people. Even though this decision concerned a religious minority (which would satisfy the definition of a traditional community)¹⁵² as opposed to an indigenous community and had a more nuanced bearing on environmental protection,¹⁵³ it reflects sensitivity on the part of the courts for heritage resources, cultural practices and the way of life of minorities.¹⁵⁴ It is likely that the courts will display a similar sensitivity towards the way of life of indigenous people, including their dependency on the preservation of a particular natural habitat.

Although no relevant cases involving indigenous peoples have thus far come before the courts, the SAHRC Report on the Inquiry into Human Rights Violations in the Khomani San Community in the Andriesvale-Askham Area of 2004¹⁵⁵ explicitly highlights the environmental rights of the Khomani San people. The inquiry (research, public hearings and a final report) followed a number of alleged human rights violations in the area, subsequent to the settlement of the Khomani San's land claim in 1999 in terms of the national Land Reform Programme provided for by the Restitution of Land Rights Act.¹⁵⁶ Amongst others, the SAHRC's enquiry involved a consideration of the alleged violation by the state (the government in its entirety and specifically the Mier Local Municipality) of section 24 of the Constitution. The land of the Khomani San was found to lack the necessary environmental management practices to secure an environment not detrimental to health and well-being

¹⁵² For the definition of a 'traditional community', see n 127 above.

¹⁵³ See the inclusion of cultural interests in the definition of the environment, sec 1 of NEMA (n 7 above). Note also that the NHRA (n 140 above) is often classified as an environmental law despite it being administered by the national department responsible for arts and culture.

¹⁵⁴ In this regard, although this matter dealt specifically with the retrospective application (statutory interpretation) of sec 28 of NEMA (n 7 above), the case of *Bareki NO & Another v Gencor Ltd & Others* 2006 1 SA 432 (TPD) should be noted. It addressed the historic pollution caused by an asbestos mine. The main applicant was a traditional leader acting in his own name and on behalf of the community living adjacent to the mine. The applicants alleged that the mine caused, and continued to cause, significant pollution due to the dispersion of asbestos fibers, which were causing ill health in the traditional community. The court confirmed, without further elaboration, that pollution and degradation of the environment present a serious health risk to residents and occupiers of the areas concerned, as well as a significant threat to the environmental integrity of the region.

¹⁵⁵ SAHRC Report on the Inquiry into Human Rights Violations in the Khomani San Community in the Andriesvale-Askham Area (November 2004). This report is on file with the authors.

¹⁵⁶ Restitution of Land Rights Act 22 of 1994, assented to 25 November 1994, <http://www.info.gov.za/acts/1994/a22-94.pdf> (accessed 13 July 2010).

and the protection of this community's fragile and vulnerable natural resource base.¹⁵⁷

Furthermore, the SAHRC found that the Khomani San lacked access to basic environmental services such as access to water, sanitation and waste management.¹⁵⁸ The SAHRC's findings and recommendations acknowledged that section 24 in the broad sense imposes positive environmental duties on the state in relation to the Khomani San as an indigenous community.¹⁵⁹ However, no mention was made of a special kind of constitutional protection by virtue of this community's 'indigenous' status, nor of the international discourse on the close relationship between their natural environment and indigenous peoples' way of life.

4 Conclusion

In the final analysis the two strands of substantive obligations pertaining to the protection of the environment that were distilled from international human rights jurisprudence contribute to an improved understanding of the meaning and scope of section 24 of the South African Constitution. At first sight one might conclude that positive obligations to conduct and monitor environmental impact and risk assessments do not have much added value in the South African context, since these obligations have already been concretised extensively in domestic legislation. Similarly, there is domestic legislation in place to give effect to the obligation to preserve the culture and way of life of indigenous communities. However, so far the South African courts and other judicial bodies have not yet explicitly acknowledged that these obligations have a constitutional character, nor have they buttressed such an interpretation with international human rights jurisprudence. If South African judicial bodies were to do so, it would confirm the special nature of the obligations at stake, notably that they constitute a minimum threshold of protection, which cannot be discarded through policy whims of the legislature and the executive. In addition, such an approach would underscore the inter-twining of environmental protection with (other) human rights and therefore serve as an indication of the priority that environmental governance should receive at all levels of governance. Such recognition of priority can in turn serve as a useful tool for informing the public and political debate pertaining to the challenges that the state faces in relation to the implementation of its environmental obligations.

The above analysis further illustrates that international human rights jurisprudence has inherent limitations when identifying positive

¹⁵⁷ SAHRC Report (n 155 above) 28.

¹⁵⁸ SAHRC Report (n 155 above) 12.

¹⁵⁹ SAHRC Report (n 155 above) 11 28.

obligations pertaining to the environment. This is related to the fact that environmental protection *per se* is not yet a justiciable right before most international human rights bodies. As a result, these bodies can only distill positive obligations pertaining to the environment where they are also clearly linked to the protection of other (internationally justiciable) human rights. This reality necessarily limits the role of international human rights bodies in determining positive obligations directed at environmental protection to particular categories of cases. The only exception in this regard is the right to a satisfactory environment in article 24 of the African Charter which is justiciable before the African Commission and African Court of Human and Peoples' Rights. It is possible that in future these bodies may build on and further concretise the positive obligations identified in the *SERAC* case. Such a development would be of particular relevance to South Africa, given the broad scope of section 24 of the Constitution and the fact that South Africa is a party to the African Charter.

For the time being, however, South African courts may be confronted with the concretisation of particular substantive duties pertaining to section 24 of the Constitution, in relation to which international jurisprudence does not yet exist. In such a situation, the roles would be reversed in the sense that the South African courts could contribute to the development of international law in a bottom-up manner. By linking their interpretations explicitly to article 24 of the African Charter, which is binding on South Africa, domestic courts could provide the regional human rights bodies with an indication of the substantive meaning of this article. Some of the substantive questions that may arise before the courts in future could include the meaning of and positive obligations attached to the concepts of health and well-being (section 24(a) of the Constitution), how authorities are to determine and implement the notion of 'environmental benefit for future generations' (section 24(b) of the Constitution), as well as what may be regarded as 'reasonable' legislative and other measures on the part of the state given the limited and diminishing availability of natural resources such as water and minerals (section 24(b) of the Constitution).

When confronted with these questions, the courts will face the challenge of giving concrete meaning to constitutional and international obligations in an area that is highly technical and subject to rapid change and scientific development. It is to be expected that the domestic courts (like their international counterparts) will act prudently under these circumstances and limit their findings to the concrete context of the case at hand. However, this should not detract from the fact that their jurisprudence plays an important role in clarifying and enforcing the minimum threshold of protection pertaining to the environment that is mandated under the South African Constitution and international law.