

# HUMAN RIGHTS IMPLICATIONS OF THE EXPORT OF BANNED PESTICIDES

Beth Gammie\*

## I. INTRODUCTION

Researchers discovered the pesticide DBCP<sup>1</sup> in the early 1950's. DBCP was very effective at protecting pineapple and banana trees from certain pests.<sup>2</sup> By 1958, scientific studies by the primary manufacturers of DBCP revealed that it caused sterility and precancerous lesions in lab animals.<sup>3</sup> These studies were suppressed, health risks ignored, and DBCP was used around the world for the next two decades.<sup>4</sup> By 1977 the Environmental Protection Agency (EPA) prohibited the domestic use of DBCP on many food crops.<sup>5</sup> Despite the ban on most of its uses and the scientific data that showed the dangers of DBCP, United States chemical companies continued to manufacture and export DBCP.<sup>6</sup> The health effects of these exports were as devastating as they were predictable. DBCP sterilized approximately 1,500 male banana plantation workers in Costa Rica alone and 300-400 workers in other countries.<sup>7</sup>

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\* Clinical Professor of Law, Florida State University College of Law. J.D. 1990 University of Illinois College of Law; B.S. 1986 University of Illinois. I would like to thank Ann Spillane for her comments on an earlier draft of this article.

<sup>1</sup> The chemical composition of DBCP is 1,2-dibromo-3-chloropropane. *Circle of Poison: Impact of U.S. Pesticides on Third World Workers: Hearings on S. 898 Before the Comm. on Agriculture, Nutrition, and Forestry*, 102d Cong., 1st Sess. 1 n.1 (1991) [hereinafter *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*] (statement of Sen. Leahy).

<sup>2</sup> DBCP eradicates nematodes, which are microscopic worms that attack the roots of plants. *Id.* at 5 (statement of Sen. Leahy); Lori Ann Thrupp, *Sterilization of Workers From Pesticide Exposure: Causes and Consequences of DBCP-Induced Damage in Costa Rica & Beyond 8-9* (1990) (World Resources Institute), reprinted in *id.*, at 23-51.

<sup>3</sup> Laboratory studies by Dow and Shell began in 1954 and 1955, and revealed DBCP's toxicity and harmful effects in rats, including sterility. Manufacture of DBCP began before the toxicity tests were completed. In a confidential report to Dow managers, toxicologist Dr. Charles Hine warned of the toxic effects caused by DBCP. After being hired by Shell in 1960, Dr. Hine minimized his warnings of ill effects and the need for safety precautions when using DBCP. Thrupp, *supra* note 2, at 9-10.

<sup>4</sup> *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 1.

<sup>5</sup> The EPA finally banned all uses of DBCP in 1985. *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 5-6.

<sup>6</sup> Thrupp, *supra* note 2, at 16-17.

<sup>7</sup> *Id.* at 3. The tragedy brought to Costa Rica by DBCP has been well docu-

On June 1, 1988 in a Costa Rican village, fifteen-year-old Heriberto Obando labored in the sugar cane fields. He applied Counter, a pesticide imported from the United States. Counter is so toxic that its use in the United States is restricted to applicators wearing protective clothing. Heriberto applied Counter without any such protection.<sup>8</sup> That day, workers began to suffer headaches and dizziness, and some vomited blood. Heriberto fell ill, and had foamed at the mouth by the time he reached the hospital. Heriberto died later that day from pesticide poisoning.<sup>9</sup>

These are but two examples of a deadly phenomena that occurs on a global scale. Pesticides that are restricted or banned in the United States because of their harmful health and environmental effects continue to be exported, often to developing countries. These deadly pesticides kill and injure people and animals, pollute ground and surface water, and cause the devastating problems that were prevented in the United States by prohibiting their domestic use. United States domestic law permits these exports, but these exports are illegal under international human rights law.

This Article discusses the scope and effect of the export of banned pesticides, *i.e.*, those which cannot legally be sold in the United States, including their effects on the health of the people and environment where they are used. It then briefly describes United States pesticide law and the legality of these exports under United States law. Next, the article provides an overview of international human rights law, including a description of the basic human rights and the institutions and treaties that protect them. The Article then describes how the exports violate the fundamental human rights of the people they injure. Finally, international and domestic fora and strategies for vindicating these human rights are discussed.

## II. SCOPE OF THE PROBLEM

Pests have plagued humankind from time immemorial and are generally defined as animals, plants, or diseases which adversely

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mented. See, e.g., DAVID WEIR & MARK SCHAPIRO, CIRCLE OF POISON 20-21 (1981); Bill Collier, *Ugly Secret: Sterility*, AUSTIN AMERICAN STATESMAN, Mar. 25, 1991, reprinted in *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 7-12; *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 1-6.

<sup>8</sup> Christopher Scanlan, *U.S. Pesticide Brings Death to a Tiny Village*, MIAMI HERALD, May 28, 1991, at 1A.

<sup>9</sup> *Id.*

affect crops, livestock, or human health.<sup>10</sup> Pesticides are chemicals applied to eradicate these pests. Pesticides may be classified by the pest they kill. For example, an insecticide kills insects, while a herbicide kills plants. Pesticides may also be classified according to their chemical composition. Many pesticides are made from a certain chemical "family," such as organochlorines, from which DDT is manufactured, or organophosphates, from which parathion and malathion are made.<sup>11</sup> Pesticides contain both active and inactive ingredients. The "active" ingredient is the chemical which acts on the pest, while the "inactive" ingredient is added to "dissolve, dilute, deliver, or stabilize the active component(s)."<sup>12</sup>

While pesticides were used as early as 1000 B.C.,<sup>13</sup> their use worldwide has skyrocketed since the end of World War II.<sup>14</sup> At first, pesticides seemed like the "magic bullet" to eradicate pests and prevent damage they cause. Initially, their agricultural use allowed food production to rise significantly. However, as time passed, what appeared to be a magic bullet often turned out to have devastating health and environmental effects. Rachel Carson's *Silent Spring*, published in 1962, began to expose the initially unknown and unexpected harm caused by pesticides.<sup>15</sup> *Silent Spring* documented how pesticides can upset the intricate balance of nature, contaminate ground water and surface water, reduce plant biodiversity, and negatively affect human health. While initially attacked and ridiculed, the thoroughness of Carson's data review and analysis proved correct.<sup>16</sup>

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<sup>10</sup> DAVID BULL, A GROWING PROBLEM: PESTICIDES AND THE THIRD WORLD POOR 6 (1982).

<sup>11</sup> *Id.*

<sup>12</sup> U.S. General Accounting Office, Pesticides: EPA's Formidable Task to Assess and Regulate Their Risks 23 (1986) [hereinafter GAO Report].

<sup>13</sup> WILLIAM FLETCHER, THE PEST WAR 45 (1974).

<sup>14</sup> RUTH NORRIS, PILLS, PESTICIDES & PROFITS 6 (1982). U.S. Pesticide production rose from 100 million pounds of pesticides in 1945 to 300 million pounds in 1950. Pamela A. Finegan, Note, *FIFRA Lite: A Regulatory Solution or Part of the Pesticide Problem?*, 6 PACE ENVTL. L. REV. 615, 619 (1989).

<sup>15</sup> RACHEL CARSON, SILENT SPRING (1962). In *Silent Spring*, Carson documented in detail the harm that pesticides caused to people, wildlife, and the environment. This book was very important in creating awareness of the problems that pesticides may bring. What appeared to be such a radical idea in 1962, however, that pesticides often upset the delicate balance of nature and can bring unintended and unexpected devastation, has gained acceptance as time has passed and harmful effects from pesticides have occurred throughout the world.

<sup>16</sup> Initially the reaction to Carson's book was very hostile, and her personal reputation was attacked. For example, the Federal Pest Control Review Board met to discuss *Silent Spring*. One observer stated, "[t]he comments alternated between angry attacks on *Silent Spring* and nasty remarks about Miss Carson . . . . One well-known board member . . . said, 'I thought she was a spinster. What's she so worried about genetics

A. *The Phenomena: Banned Pesticides Are Exported Worldwide*

A disturbing pattern has emerged. A chemical company often invests large amounts of capital to manufacture a pesticide and obtain its registration, which enables the company to sell the pesticide in the United States. The pesticide's harmful health and environmental effects subsequently appear, either through incidents of pesticide poisoning or further research. If the harm is serious enough, the slow and laborious process of removing the dangerous pesticide from the market begins. Eventually, after many years the EPA determines that the pesticide causes harm to human health or the environment, and the pesticide is finally removed from the American market. A chemical company that can no longer sell a banned pesticide<sup>17</sup> in the United States because of its health and environmental effects often continues to export the pesticide to foreign countries. This phenomena creates a "circle of poison" that begins with the pesticide's manufacture in the United States, continues with its export, and ends with the import of pesticide-tainted fruits and vegetables in the United States. As seen below, such exports are legal under United States law. Some graphic examples of this phenomena are the pesticides chlordane and heptachlor, DDT, and DBCP.

1. Chlordane and Heptachlor

Chlordane and heptachlor are "two of the most highly toxic, persistent and bioaccumulative insecticides ever made."<sup>18</sup> The adverse health effects caused by chlordane and heptachlor are devas-

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for ?" FRANK GRAHAM, *SINCE SILENT SPRING* 49-50 (1970). P. Rotherberg, the president of Montrose Chemical Corporation, declared that Carson was not a scientific writer, but "a fanatic defender of the cult of the balance of nature." *Id.* at 56. Time after time, the attacks on her analysis failed. For example, after attacks on the scientific basis of *Silent Spring* by Velsicol Chemical Corporation, her publisher had an independent toxicologist review the portions to which Velsicol objected. The toxicologist found Rachel Carson's statements accurate. *Id.* at 49. The ideas contained in *Silent Spring* have now gained scientific acceptance.

<sup>17</sup> For purposes of this Article, "banned pesticides" refers to pesticides which cannot be sold or distributed in the United States, either entirely or for particular uses. This includes pesticides which have not been registered, pesticides which have had their registration canceled or suspended because of its adverse effects, pesticides which have been voluntarily withdrawn by the registrant, and those pesticides which are "restricted" to certain uses because of their adverse health effects. For a more detailed discussion of United States pesticide law, see *supra* notes 74-104 and accompanying text.

<sup>18</sup> Sandra Marquardt, *Exporting Banned Pesticides: Fueling the Circle of Poison—A Case Study of Velsicol Chemical Corporation's Export of Chlordane and Heptachlor* 7 (1988).

tating and well-documented. Chlordane and heptachlor are easily absorbed through the skin.<sup>19</sup> The EPA found chlordane to be a tumor promoter, which is a chemical agent that magnifies the ability of other carcinogens to cause cancer.<sup>20</sup> Researchers have linked exposure to chlordane and heptachlor to leukemia.<sup>21</sup> Chlordane and heptachlor impact the central nervous system and cause headaches, blurred vision, nausea, diarrhea, ventricular fibrillation, and respiratory failure.<sup>22</sup> Based on scientific studies, the EPA found chlordane and heptachlor to be probable human carcinogens.<sup>23</sup> Chlordane and heptachlor may also cause low birth weight, premature birth, and delayed brain development.<sup>24</sup> As organochlorine compounds, chlordane and heptachlor persist in the environment for long periods of time.<sup>25</sup> Additionally, chlordane and heptachlor bioaccumulate in the fatty tissues and become more concentrated in animals as the food chain progresses.<sup>26</sup>

Because of their carcinogenic effects, persistence in the environment, and ability to bioaccumulate to dangerous levels, the EPA banned most agricultural uses of chlordane and heptachlor in 1978.<sup>27</sup> The EPA banned domestic sales for most other uses in 1987, finally banning heptachlor's use for seed treatment in May 1989.<sup>28</sup> Chlordane and heptachlor may now only be sold and used in the United States for underground cable treatment.<sup>29</sup>

Despite the fact that chlordane and heptachlor cannot be sold in the United States for agricultural purposes because of their carcinogenicity and multitude of acute health effects, Velsicol Chemical Corporation continues to produce and export enormous amounts of these compounds around the world. Between 1987

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<sup>19</sup> *Id.* at 10.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> *Id.* (citation omitted).

<sup>22</sup> *Id.*; United States Environmental Protection Agency, Recognition and Management of Pesticide Poisoning 19 (1989).

<sup>23</sup> Marquardt, *supra* note 18, at 11 (citing United States Environmental Protection Agency, Guidance for the Registration of Pesticide Products Containing Chlordane as the Major Ingredient (1986); United States Environmental Protection Agency, Guidance for the Reregistration of Pesticide Products Containing Heptachlor as the Major Ingredient (1986)).

<sup>24</sup> J. S. Hoffman, The Effects of Prenatal Heptachlor Exposure on Infant Development (1985) (Ph.D. dissertation, University of Hawaii).

<sup>25</sup> Chlordane and heptachlor have been found in soils fifteen years after application. Chlordane was frequently found in potatoes ten years after the EPA banned its use. Marquardt, *supra* note 18, at 13.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 2.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

and mid-1989, Velsicol exported nearly five million pounds of chlordane and heptachlor.<sup>30</sup> Between 1992 and 1993, almost three million pounds of chlordane and heptachlor were shipped from the Port of New Orleans alone.<sup>31</sup>

## 2. DDT

DDT<sup>32</sup> is perhaps one of the most well-known pesticides. DDT first appeared to be a panacea for eradicating deadly pests, such as malaria-spreading mosquitoes.<sup>33</sup> Introduced in the late 1940's, DDT became the main weapon in the fight against malaria, and within a number of years it dramatically reduced the incidence of malaria worldwide.<sup>34</sup> DDT was inexpensive, easy to produce and use, and it soon became very widely used.<sup>35</sup> However, DDT's effectiveness as an insecticide began to wane due to the pests' ability to develop resistance to it and doubts about DDT's safety began to arise.<sup>36</sup>

As an organochlorine compound, DDT is not acutely nor immediately toxic.<sup>37</sup> However, it is chronically toxic, meaning that its toxicity appears over a longer period of time. This is because DDT (and the other organochlorines) are very stable compounds, remaining in the environment decades before breaking down into separate chemicals.<sup>38</sup> Further, DDT dissolves in fat tissue, which

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<sup>30</sup> *Id.* Although the export of pesticides which are illegal in the United States is the focus of this Article, the domestic production of these pesticides is not without its hazards. For example, Velsicol discharged an estimated 8.6 tons of toxic chemical waste (including heptachlor and chlordane) in 1987 into a Memphis wastewater treatment plant. This wastewater plant is not equipped to handle toxic wastes. Seventy-five miles of Tennessee waters cannot be safely fished due to high toxic levels of heptachlor and chlordane. Three sites where Velsicol buried its pesticide wastes have been closed and are on the EPA's Superfund National Priorities List. *Id.* at 3.

<sup>31</sup> Mark Schleifstein, *Greenpeace: Port Allowing Toxins*, NEW ORLEANS TIMES-PICAYUNE, Aug. 13, 1993, at B1.

<sup>32</sup> The chemical compound of DDT is dichlorodiphenyltrichloroethane. NORRIS, *supra* note 14, at 20.

<sup>33</sup> *Id.* at 19-20.

<sup>34</sup> *Id.* In 1950, the World Health Organization based its malaria eradication plan on DDT. BULL, *supra* note 10, at 29-30. It is estimated that the number of malaria cases was reduced from approximately 300 million prior to 1946, to approximately 120 million in the late 1960's, while in that same time period the population had doubled. *Id.* at 30.

<sup>35</sup> GRAHAM, *supra* note 16, at 14-15.

<sup>36</sup> Reverses in the war against malaria began in 1965, and by the 1970's many of the gains made had been lost. BULL, *supra* note 10, at 30. CARSON, *supra* note 15, documented in detail the problems caused by DDT.

<sup>37</sup> NORRIS, *supra* note 14, at 20. Other organochlorines include aldrin, dieldrin, benzene, chlordane, and heptachlor.

<sup>38</sup> *Id.* at 21; CARSON, *supra* note 15, at 15-27.

causes it to accumulate in the fatty tissues of animals, the level of DDT increasing as it works its way up the food chain.<sup>39</sup> In 1973, because of the harmful effects to people and animals, all agricultural uses of DDT were banned.<sup>40</sup>

Despite the wealth of information on its toxicity, DDT continued to be manufactured in the United States for export. For example, Monsanto sold DDT to 21 foreign importers from 1979 to 1980.<sup>41</sup>

### 3. DBCP

Journalists, scientists, and government officials have extensively documented the tragedy of DBCP.<sup>42</sup> Early studies by Shell and Dow revealed that DBCP caused sterility and precancerous lesions in lab animals.<sup>43</sup> These results were not revealed to the workers in the DBCP manufacturing plants nor to the applicators who applied DBCP in the field.<sup>44</sup> The State of California banned the use of DBCP in 1977,<sup>45</sup> and the EPA also suspended the sale of DBCP for most uses in 1977.<sup>46</sup> One might think that the case of DBCP would have ended with the EPA removing DBCP from the market in the United States. The carcinogenic and sterilizing effects of DBCP, heretofore unknown (except to some of the manufacturers), had now come to light. The solution to the problem appeared to be simple: remove DBCP from the market and ban its use. Surprisingly, DBCP, with such known harmful effects, continued to be exported.

While Dow, Occidental, and Shell ceased production of DBCP after California banned its use, a smaller company, American Van-

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<sup>39</sup> NORRIS, *supra* note 14, at 21.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Journalist Bill Collier wrote a series of articles on DBCP and its use in Costa Rica which appeared in the *Austin American Statesman* on March 24-26, 1991, *supra* note 7; it was the subject of a Ph.D. dissertation, Lori Ann Thrupp, *The Political Ecology of Pesticide Use in Costa Rica: Dilemmas in the Banana-Sector of Costa Rica*, *supra* note 2, at cover page; and was examined extensively in Senate hearings. See *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 1-6.

<sup>43</sup> *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 5.

<sup>44</sup> *Id.* The results of the earlier studies were confirmed by researchers at the National Cancer Institute, Soviet researchers, and by another Dow-Shell study. *Id.* at 5. Studies revealed that workers at a DBCP plant "with more than 90 days exposure had markedly impaired sperm counts, and as many as 70 percent were sterile." *Id.* at 6.

<sup>45</sup> WEIR & SCHAPIRO, *supra* note 7, at 21.

<sup>46</sup> 42 Fed. Reg. 57,543 (1977). Finally, the last crop use of DBCP, application to pineapples, was terminated in 1985. *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 6; WEIR & SCHAPIRO, *supra* note 7, at 21.

guard Corporation (Amvac), seized the opportunity to fill the vacuum in the DBCP market by manufacturing and exporting DBCP at this time.<sup>47</sup> Amvac produced and sold DBCP for export, and although Dow no longer manufactured DBCP, it received a three percent royalty on all DBCP sold, pursuant to a patent agreement.<sup>48</sup>

The effects of DBCP exports proved to be just what one would expect based on the numerous studies on DBCP exposure. DBCP sterilized many men, including those working in plants where DBCP was manufactured and those who applied DBCP in the field.<sup>49</sup> As of 1990, 1500 male workers, or approximately 20% of the banana workers in the Atlantic banana-growing area of Costa Rica, had been sterilized by their exposure to DBCP in the field.<sup>50</sup> These men, unable to father children, suffer a wide-range of secondary effects, including depression, impotence, and divorce.<sup>51</sup>

Heptachlor and chlordane, DDT, and DBCP are only a few examples of pesticides which cannot be sold in the United States but which the United States allowed to be exported despite the health and environmental harm they cause. The amount of these pesticides that are manufactured in the United States and exported is tremendous.

### B. Volume of Pesticide Exports

Obtaining accurate and complete data on the amount of exports of banned pesticides is difficult because chemical manufac-

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<sup>47</sup> In a report to the U.S. Securities and Exchanges Commission, Amvac stated: [m]anagement believes that because of the extensive publicity and notoriety that has arisen over the sterility of workers and the suspected mutagenic and carcinogenic nature of DBCP, the principal manufacturers and distributors of the product (Dow, Occidental, and Shell Chemical) have, temporarily at least, decided to remove themselves from the domestic marketplace and possibly from the world marketplace. Notwithstanding all the publicity and notoriety surrounding DBCP, . . . it was [our] opinion a vacuum existed in the marketplace that [we] could temporarily occupy. . . [we] further believed that with the additional DBCP, sales might be sufficient to reach a profitable level.

Form 10-K, American Vanguard Corp. (Amvac), December 31, 1977, U.S. Securities and Exchange Commission, *reprinted in part in* WEIR & SCHAPIRO, *supra* note 7, at 21. A former Amvac executive put it more succinctly: "[q]uite frankly, without DBCP, Amvac would go bankrupt." *Id.* at 22.

<sup>48</sup> WEIR & SCHAPIRO, *supra* note 7, at 22.

<sup>49</sup> There were approximately 250-300 known cases, mainly in the United States, Mexico, and Israel. Thrupp, *supra* note 2, at 27.

<sup>50</sup> *Id.* at 3.

<sup>51</sup> *Id.* at 4; *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, (testimony of Mario Zumbado), *supra* note 1, at 52.



turers and exporters often do not publicly report these volumes.<sup>52</sup> Chemical manufacturers must report to EPA which compounds they have exported but need not state the exports' destination.<sup>53</sup> When exporting an unregistered compound, an exporter must obtain a statement from the foreign purchaser acknowledging awareness that the pesticide cannot be sold in the United States.<sup>54</sup> These notices are not available to the public.<sup>55</sup>

Researchers for the Foundation for Advancement in Science and Education (FASE), an organization which studies the health effects of chemical exposure, performed a systematic analysis of available data in an attempt to identify and quantify pesticide exports. Studying U.S. Customs records, the most accurate and complete records on pesticide exports, researchers quantified pesticide exports during a three-month period in 1990.<sup>56</sup> Obtaining a complete picture of pesticide exports was difficult nonetheless, because on many of these customs records, exporters often employed very generic terms. For example, many exports were described as "pesticide" or "insect killer."<sup>57</sup> In this three-month period, 123 million pounds of pesticides were exported, and over half, or 67 million pounds, were described in such general terms as to prevent identification.<sup>58</sup> Of the compounds that could be identified, 55%, or over 19 million pounds were either very toxic or associated with adverse health or environmental effects.<sup>59</sup> FASE found that 3.5 million pounds of banned, canceled, discontinued, or withdrawn compounds were exported, equaling almost a ton per hour for the three-month period.<sup>60</sup> This high rate is still a conservative measure because over half of the exports could not be identified.

Other studies have documented the extent of banned pesticide exports. According to a Government Accounting Office (GAO) report, approximately 29% of all pesticides sold abroad are either banned, restricted, or unregistered in the United States.<sup>61</sup> A

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<sup>52</sup> Foundation for Advancements in Science and Education, Special Report: Exporting Banned and Hazardous Pesticides (1991), reprinted in *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 110-19 [hereinafter Foundation for Advancements in Science and Education].

<sup>53</sup> *Id.* at 110.

<sup>54</sup> See *infra* notes 105-07, and accompanying text.

<sup>55</sup> Foundation for Advancements in Science and Education, *supra* note 52, at 110.

<sup>56</sup> *Id.* FASE studied customs records from March through May, 1990. *Id.*

<sup>57</sup> *Id.* at 111.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 118. This 19 million pounds averages to 4.6 tons per hour. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> General Accounting Office, Better Regulation of Pesticide Exports and Pesticide Residues in Imported Foods is Essential 50 (1979).

Greenpeace study revealed that in a four-month period in 1991, United States manufacturers exported over three million pounds of five banned pesticides.<sup>62</sup> These figures, although probably conservative because of reporting loopholes, represent an enormous amount of exports of illegal pesticides. The effect of this pesticide "dumping" on foreign countries is considered next.

### C. *Health and Environmental Effects of Exporting Banned Pesticides*

The health and environmental effects caused by the export of pesticides too dangerous for use in the United States range from acute poisoning episodes to chronic illness. The effects of acute poisoning episodes include dizziness, vomiting, respiratory difficulty, and death. Chronic or long-term effects from such pesticide exposure include diseases such as cancer and respiratory disease.

In 1990 it was estimated that 25 million cases of acute pesticide poisoning occur annually.<sup>63</sup> The World Health Organization (WHO) estimated in 1985 that over 70,000 deaths resulted worldwide from accidental pesticide poisoning.<sup>64</sup> Global or even national statistics are difficult to obtain due to a large amount of misdiagnosis, underreporting, and incomplete reporting.<sup>65</sup> In addition, many pesticide poisoning victims do not seek medical treatment.<sup>66</sup>

Some specific instances illustrate the devastation that these exports can bring. In Guatemala, aerial fumigation programs used ethylene dibromide (EDB) which is banned in the United States

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<sup>62</sup> *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 125 (testimony of Sandra Marquardt, Greenpeace). Heptachlor is included since currently it can only be used on underground cables. *Id.* The exact amounts are: 2,251,440 pounds of Monsanto's butachlor (18,762 pounds per day); 370,406 pounds of FMC's carbosulfan (3,087 pounds per day); 324,750 pounds of Velsicol's heptachlor (2,706 pounds per day); 148,512 pounds of Velsicol's chlordane (1,237 pound per day); and 30,888 pounds of Dow Elanco's nuarimol (257 Pounds per day). *Id.*

<sup>63</sup> J. Jeyaratnam, *Acute Pesticide Poisoning: A Major Global Health Problem*, 43 *WORLD HEALTH STATS. Q.* 139, 141 (1990).

<sup>64</sup> The total deaths from pesticide poisoning was 220,000, but suicides account for two-thirds of these deaths. *Id.*

<sup>65</sup> For example, in Indonesia, official records do not reveal large amounts of pesticide poisonings, but local officials estimated 30,000 poisonings annually. Data on pesticide poisonings in Africa is just recently becoming available. *Id.* at 141.

<sup>66</sup> *Id.* at 142. To further complicate the process of obtaining accurate information, the percentage of poisoning victims seeking medical treatment may differ by country. For example, in Indonesia 70% of the agricultural workers poisoned by pesticides sought hospital treatment, while in Thailand that figure was only 8.4%. *Id.*

because of its carcinogenic effects.<sup>67</sup> The EPA imposed an emergency suspension in 1983 on EDB for soil fumigation uses and suspended all remaining uses in 1984.<sup>68</sup> Inhaling EDB vapors can cause severe acute respiratory injury, vomiting, and adverse impacts on the central nervous system.<sup>69</sup> Despite the severe health risks, the fumigation programs went ahead. Twelve adults and two children died after drinking water contaminated by the fumigants.<sup>70</sup>

DDT was sprayed heavily on cotton fields in Guatemala. Villagers near the fields have blood levels of DDT seven times higher than those living in urban areas, and thirty-one times higher than United States residents.<sup>71</sup> Residues of heptachlor have been found in the breast milk of mothers in Perth, Australia, in amounts fifteen times international standards.<sup>72</sup>

In addition, the chronic effects of these pesticide exports can also be devastating. The WHO estimated that approximately 37,000 cases of cancer result annually from pesticide exposure.<sup>73</sup> Other chronic effects may include sterilization, which has occurred with exposure to DBCP. Obtaining accurate data on the chronic effects from pesticide poisoning is even more difficult to obtain because the effect of a pesticide may not appear until years after exposure.

#### *D. Pesticide Regulation in the United States*

As discussed below, a pesticide that cannot legally be sold in the United States may yet be exported to foreign countries. This next section discusses the standards a pesticide must meet in order to be sold in the United States; and likewise, the dangers it must pose before the EPA can prohibit or restrict its sale in the United States.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)<sup>74</sup> establishes the regulatory system by which the federal government, through the EPA, regulates pesticides. FIFRA's pur-

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<sup>67</sup> Karen Parker & Melissa Thorne, *Fumigation Programs in Guatemala* 5 (1989) (on file with Sierra Club Legal Defense Fund, San Francisco).

<sup>68</sup> *Id.* at 7.

<sup>69</sup> *Id.* at 10.

<sup>70</sup> *Id.* at 25.

<sup>71</sup> NORRIS, *supra* note 14, at 17.

<sup>72</sup> Marquardt, *supra* note 18, at 4.

<sup>73</sup> Jeyaratnam, *supra* note 63, at 139-44.

<sup>74</sup> 7 U.S.C. §§ 136-136y (1994).

pose is to "protect man and his environment."<sup>75</sup> The primary method of regulating pesticides is through the process of "registration."<sup>76</sup> In order to be legally sold or distributed in the United States, a pesticide must first be registered with the EPA.<sup>77</sup> A new pesticide may not gain registration unless the registrant shows that the pesticide's intended use will not "generally cause unreasonable adverse effects on the environment."<sup>78</sup> FIFRA defines "unreasonable adverse effects on the environment" as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use" of the pesticide.<sup>79</sup>

If registered, the EPA will classify a pesticide according to its permissible uses. A pesticide will be registered for "general use" if the EPA determines the pesticide "will not generally cause unreasonable adverse effects on the environment" when used according to its instructions.<sup>80</sup> If a pesticide "may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator," the EPA may place restrictions on that pesticide's registration.<sup>81</sup>

Once registered, a pesticide may be legally sold in the United States. However, the EPA may remove a registered pesticide from the market through cancellation or suspension of its registration. In addition, a registrant may voluntarily withdraw a pesticide from the market.

### 1. Cancellation

The EPA may cancel a pesticide's registration if it determines

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<sup>75</sup> S. REP. NO. 838, 92d Cong., 2d Sess. 1 (1972).

<sup>76</sup> 7 U.S.C. § 136a(a).

<sup>77</sup> *Id.* This section states that "[e]xcept as provided by this subchapter, no person in any state may distribute or sell to any person any pesticide that is not registered under this subchapter." *Id.* In addition, when FIFRA was dramatically overhauled, pesticides that were initially registered prior to 1972, had to be re-registered because prior to 1972, pesticides were not sufficiently tested for health and environmental effects. 7 U.S.C. § 136a-1; Finegan, *supra* note 14, at 616-17; Phillip L. Spector, *Regulation of Pesticides by the Environmental Protection Agency*, 5 *ECOLOGICAL Q.* 233, 236 (1988); GAO Report, *supra* note 12, at 12-13.

To obtain registration for a pesticide or compound, an applicant must submit, *inter alia*, the pesticide's name, label, and directions for use. 7 U.S.C. § 136a(c). If requested by EPA, the applicant must also provide the testing procedures, results, and the pesticide's formula. 7 U.S.C. § 136a(c)(1).

<sup>78</sup> 7 U.S.C. § 136a(c)(5).

<sup>79</sup> 7 U.S.C. § 136(bb).

<sup>80</sup> 7 U.S.C. § 136a(d)(1)(B).

<sup>81</sup> 7 U.S.C. § 136a(d)(1)(c).

that the pesticide causes unreasonable adverse effects on the environment with considerable frequency when used in accordance with commonly recognized practices.<sup>82</sup> FIFRA essentially defines "adverse effects" as "unreasonable risks."<sup>83</sup> The registrant has the burden of proof in a cancellation proceeding.<sup>84</sup> This determination includes balancing the harm to the public safety and environment against the economic benefits of continued use of the pesticide.<sup>85</sup> The economic benefits calculation requires the EPA to consider the potential change in agricultural commodities and retail food prices.<sup>86</sup> The EPA must issue a cancellation notice and initiate administrative proceedings whenever there exists a "substantial question" about a pesticide's safety.<sup>87</sup> However, cancellation proceedings need not commence when the EPA merely believes there is "scientific uncertainty" about the danger a particular pesticide poses in combination with the "economic impact of cancellation on 'agricultural commodities, retail food prices and . . . the agricultural economy.'"<sup>88</sup>

The process of removing a pesticide from the market through cancellation is quite lengthy, taking from four to eight years.<sup>89</sup> The cancellation process involves "Special Review," a risk-benefit analysis commenced after a registrant submits comments, and data to the EPA in response to the Notice of Cancellation.<sup>90</sup> After the Special Review decision is released, the registrant may challenge it through an administrative hearing.<sup>91</sup> The registrant may then challenge the administrative decision in federal court.<sup>92</sup> Throughout this entire review process, the pesticide remains on the market unless the registrant has suspended or voluntarily withdrawn the product.

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<sup>82</sup> 7 U.S.C. § 136d(b); *Ciba-Geigy Corp. v. EPA*, 874 F.2d 277, 279 (5th Cir. 1989).

<sup>83</sup> *Ciba-Geigy Corp. v. EPA*, 874 F.2d 277, 279 (5th Cir. 1989).

<sup>84</sup> FIFRA places "[t]he burden of establishing the safety of a product requisite for compliance with the labeling requirements . . . at all time on the applicant and registrant." *Environmental Defense Fund v. EPA*, 548 F.2d 998, 1004 (D.C. Cir. 1976) (*quoting* *Environmental Defense Fund v. EPA*, 465 F.2d 529, 532 (D.C. Cir. 1972)).

<sup>85</sup> 7 U.S.C. § 136d(b).

<sup>86</sup> 7 U.S.C. § 136d(b); *McGill v. EPA*, 593 F.2d 631, 635 (5th Cir. 1979).

<sup>87</sup> *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 594 (D.C. Cir. 1971).

<sup>88</sup> *National Coalition Against the Misuse of Pesticides v. EPA*, 867 F.2d 636, 642 (D.C. Cir. 1989) (*quoting* 7 U.S.C. § 136d(b)).

<sup>89</sup> Marina M. Lolley, Comment, *Carcinogen Roulette: The Game Played Under FIFRA*, 49 MD. L. REV. 975, 991 (1990).

<sup>90</sup> 7 U.S.C. § 136d(b).

<sup>91</sup> 7 U.S.C. § 136d(b).

<sup>92</sup> 7 U.S.C §§ 136d(c)(4), n.

## 2. Suspension

The EPA may suspend a pesticide's registration while cancellation proceedings are under way if it determines suspension is "necessary to prevent an imminent hazard" to human health.<sup>93</sup> "Imminent hazard" is defined as "a situation which exists when the continued use of a pesticide during [cancellation] would be likely to result in unreasonable adverse effects on the environment or will involve unreasonable hazard" to a threatened or endangered species.<sup>94</sup> To suspend a pesticide, the EPA must show there exists a "substantial likelihood that serious harm will be experienced during" the cancellation proceedings.<sup>95</sup> Again, the EPA performs a risk-benefit analysis which balances the risks to health with the benefits of continued use during the cancellation proceedings.<sup>96</sup>

The difficulty the EPA faces under FIFRA in removing dangerous pesticides from the market is illustrated through the example of Alar, which is used extensively in growing apples.<sup>97</sup> Alar was registered in 1968, but studies since 1973 revealed it caused tumors in lab rats. It was not until 1985 that the EPA had enough scientific evidence to even propose banning Alar, and even then it took four more years before the EPA initiated cancellation proceedings.<sup>98</sup>

Whether a pesticide was never registered, its registration was canceled or suspended, or voluntarily withdrawn from the market, the effect is generally the same: it cannot be legally sold or distributed in the United States.<sup>99</sup> However, these "banned" pesticides which cannot be sold in the United States still may be exported to other countries. FIFRA authorizes these exports and regulates them through a notification process.

An exporter wishing to export such pesticides must obtain a statement from the foreign purchaser acknowledging the registration status of the pesticide.<sup>100</sup> FIFRA requires that the EPA notify foreign governments and appropriate international agencies of its

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<sup>93</sup> 7 U.S.C. § 136d(c)(1).

<sup>94</sup> 7 U.S.C. § 136(l).

<sup>95</sup> *Environmental Defense Fund v. EPA*, 465 F.2d 528, 540 (D.C. Cir. 1972).

<sup>96</sup> Lolley, *supra* note 89, at 990.

<sup>97</sup> *See id.* at 984-88.

<sup>98</sup> In 1989, the sole manufacturer, Uniroyal, agreed to stop sales of Alar. *Id.* at 988.

<sup>99</sup> However, the EPA may still allow the sale of existing stocks of such pesticides. For example, in *National Coalition Against the Misuse of Pesticides v. EPA*, the court approved an agreement between the EPA and Velsicol Chemical Company permitting the sale of existing stocks of chlordane outside of Velsicol's control (*i.e.*, chlordane which Velsicol had already sold) in exchange for Velsicol voluntarily withdrawing its registration as a termiticide.

<sup>100</sup> 7 U.S.C. § 136o(a)(2); 45 Fed. Reg. 50,274-275, 50,277 (1980). This statement

decisions to suspend or cancel pesticide registrations.<sup>101</sup> Further, FIFRA prohibits a pesticide's export if it is prepared or packaged in violation of the foreign purchaser's specifications.<sup>102</sup> However, the EPA interpreted these export requirements as not applicable to pesticides that are voluntarily withdrawn for use in the United States. Thus, manufacturers can avoid even these minimal requirements by voluntarily withdrawing the registration of a dangerous pesticide before it is canceled.<sup>103</sup> In addition, the EPA interpreted the notice provision as not requiring that notice be forwarded to the receiving government before the shipment reaches the foreign country.<sup>104</sup> As long as an exporter complies with these notice provisions, FIFRA authorizes the export of pesticides banned for use in the United States—pesticides whose registrations were canceled or suspended, those whose registrations were voluntarily withdrawn, and those that never gained registration in the first place.

### III. INTERNATIONAL HUMAN RIGHTS LAW

In order to analyze whether these exports violate international human rights law, a brief discussion of human rights and international law in general is needed. First, this section discusses the dramatic emergence of international human rights since World War II. Second, the sources of international law in general, and the sources of human rights law in particular, are addressed. Finally, this section analyzes the content and scope of the particular human rights that are implicated by the export of banned pesticides.

#### A. *International Human Rights*

International human rights law grew dramatically after World War II. Prior to that time, international law was concerned primarily with the rights and duties of sovereign states and governed the interaction of a state with other states.<sup>105</sup> Until the aftermath of

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is submitted to EPA, which forwards a copy of it to officials in the receiving country through the State Department. *Id.* at 50,276.

<sup>101</sup> 7 U.S.C. § 136o(b).

<sup>102</sup> 7 U.S.C. § 136o(a).

<sup>103</sup> *Federal Insecticide, Fungicide, and Rodenticide Reform Act and Pesticide Import and Export Act of 1983: Hearings Before the Subcommittee on Department Operations, Research, and Foreign Agriculture*, 98th Cong., 1st Sess. 166 (1983).

<sup>104</sup> United States Environmental Protection Agency, Statement of Policy on the Labelling Requirements for Exported Pesticides, Devices, and Pesticide Active Ingredients and the Procedures for Exporting Unregistered Pesticides, 45 Fed. Reg. 50,276, 50,277 (1980).

<sup>105</sup> See, e.g., Louis B. Sohn, *The New International Law: Protection of the Rights of Indi-*

World War II, international law generally did not recognize or protect an individual's rights, and a state's own citizens were completely at its mercy.<sup>106</sup> Any benefit that a rule of international law brought to an individual was incidental.<sup>107</sup>

The atrocities committed on civilian populations during World War II, including the genocide of six million Jews, changed the scope of international human rights law.<sup>108</sup> The prosecution of war criminals at Nuremberg and Tokyo facilitated the development of a human rights law that focused on individuals.<sup>109</sup> Chief American prosecutor at Nuremberg, Justice Robert Jackson, had the vision to recognize that the war crimes trials presented an historic opportunity to strengthen the role of law in the world order.<sup>110</sup> The Nuremberg decisions articulated the principle that international law "impose[d] duties and liabilities upon individuals as well as states."<sup>111</sup> Individuals accused of war crimes could not invoke the defense that they acted on behalf of the state.<sup>112</sup>

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*viduals Rather Than States*, 32 AM. U. L. REV. 1, 9 (1982); FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 1-2 (1990).

<sup>106</sup> Sohn, *supra* note 105.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> The International Military Tribunal at Nuremberg tried many Nazi leaders for crimes committed on civilian populations during World War II, including conspiracy to wage a war of aggression, crimes against peace, war crimes, and crimes against humanity. ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 1-6 (1962). The International Military Tribunal for the Far East, convened in Tokyo, and prosecuted twenty-eight civilian and military Japanese leaders for similar crimes as those in Nuremberg faced. Alexandr E. Lounev, *Legal Aspects of the Activities of the International Military Tribunal For The Far East*, in THE TOKYO WAR CRIMES TRIAL 31-32 (C. Hosoya, N. Ando, Y. Onuma, R. Minear eds. 1986) [hereinafter TOKYO WAR CRIMES TRIAL].

<sup>110</sup> Justice Jackson remarked:

[i]n untroubled times, progress toward an effective rule of law in the international community is slow indeed. Inertia rests more heavily upon the society of nations than upon any other society. Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions come rarely and quickly pass. We are put under a heavy responsibility to see that our behavior during the unsettled period will direct the world's thought towards a firmer enforcement of the law of international conduct.

B.V.A. Röling, *Introduction*, in TOKYO WAR CRIMES TRIAL, *supra* note 109, at 16.

<sup>111</sup> The Nurnberg Trial, 6 F.R.D. 69, 110 (1946).

<sup>112</sup> Sohn, *supra* note 105, at 10. The Nuremberg court stated that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing the individuals who commit such crimes can the provisions of international law be enforced." The Nurnberg Trial, 6 F.R.D. at 110. Although the fact that an individual was acting pursuant to orders could be considered in mitigation of punishment, that too was also no defense to individual liability. Sohn, *supra* note 105, at 10.



Thus began the birth of modern international human rights law. The development and codification of human rights continued immediately thereafter, in what Professor Sohn categorized as the four law-building stages of human rights: 1) asserting international concern about human rights in the Charter of the United Nations (U.N. Charter),<sup>113</sup> 2) listing these human rights in the Universal Declaration of Human Rights (Universal Declaration),<sup>114</sup> 3) elaborating on human rights in the International Covenant on Civil and Political Rights,<sup>115</sup> and the International Covenant on Economic, Social, and Cultural Rights;<sup>116</sup> and 4) the adoption of over fifty additional human rights declarations and conventions on regional and specific human rights issues.<sup>117</sup>

### 1. U.N. Charter

The U.N. Charter, signed in 1945, is the agreement creating and providing the structure for the United Nations.<sup>118</sup> It sought "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, [and] in the equal rights of men and women and of nations large and small."<sup>119</sup> The U.N. Charter sets the foundation for human rights, laying out the broad principles that are to be strived for and respected. The U.N. Charter declares that the United Nations has a duty to promote "universal respect for, and observance of, human rights and fundamental freedoms."<sup>120</sup> It was recognized in 1945 that a more detailed statement describing international human rights was needed, but at the time the U.N. Charter was drafted there was insufficient time to do this. Work on this more detailed statement, the Universal Declaration, began soon thereafter.

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<sup>113</sup> June 26, 1945, 59 Stat. 1031 [hereinafter U.N. Charter].

<sup>114</sup> G.A. Res. 217A, U.N. GAOR, 3d Sess., at 56, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

<sup>115</sup> G.A. Res. 2200A, U.N. GAOR 21st Sess., 1496th plen. mtg., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967) [hereinafter International Covenant on Civil and Political Rights].

<sup>116</sup> G.A. Res. 2200A, U.N. GAOR 21st Sess., 1496th plen. mtg., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967) [hereinafter International Covenant on Economic, Social, and Cultural Rights].

<sup>117</sup> Sohn, *supra* note 105, at 11-12.

<sup>118</sup> Professor Sohn calls the U.N. Charter the "constitution of the world, the highest instrument in the intertwined hierarchy of international and domestic documents [and that it] prevails expressly over all other treaties, and implicitly over all laws, anywhere in the world." *Id.* at 13.

<sup>119</sup> U.N. Charter, *supra* note 113, prmb., 59 Stat. at 1035.

<sup>120</sup> *Id.*, art. 55(c), 59 Stat. at 1046.

## 2. Universal Declaration of Human Rights

The U.N. General Assembly unanimously adopted the Universal Declaration in 1948.<sup>121</sup> The Universal Declaration gave more specific meaning to the broad declarations in the U.N. Charter. Although some argued that the Universal Declaration was not a binding treaty, others found that it expressed rules that were already recognized as binding customary international law.<sup>122</sup> The Universal Declaration is now considered the authoritative interpretation of the meaning of the U.N. Charter and has been invoked by some of the nations that initially doubted its validity. The Soviet Union, which originally protested that the Universal Declaration impermissibly intruded into a state's internal affairs, later charged South Africa with many violations of the Universal Declaration.<sup>123</sup> The United States recognized the validity and force of the Universal Declaration. For example, it invoked the Universal Declaration in a 1949 case challenging the authority of the Soviet Union to prevent the wives of non-Soviet husbands from leaving the Soviet Union.<sup>124</sup>

## 3. The International Covenants

The third stage in the law-building process involved formulating and defining the human rights contained in the Universal Declaration in a more precise manner. This was done primarily through two covenants: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social, and Cultural Rights. These two covenants stated with much greater precision the contours of international human rights. For example, the International Covenant on Civil and Political Rights specifically contains the right to self-determination,<sup>125</sup> detailed due process rights,<sup>126</sup> prohibitions on discrimination,<sup>127</sup> torture,<sup>128</sup> and slavery.<sup>129</sup> The International Covenant on Economic, Social, and

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<sup>121</sup> Universal Declaration, *supra* note 114.

<sup>122</sup> Sohn, *supra* note 105, at 15.

<sup>123</sup> *Id.* at 16.

<sup>124</sup> In this case, the General Assembly declared that Soviet attempts to keep Russian wives from leaving the Soviet Union violated the U.N. Charter. G.A. Res. 285, U.N. GAOR 3d Sess., U.N. Doc. A/900 (1949).

<sup>125</sup> International Covenant on Civil and Political Rights, *supra* note 115, art. 1, at 53.

<sup>126</sup> *Id.* art. 14, at 54.

<sup>127</sup> *Id.* art. 2, at 53.

<sup>128</sup> *Id.* art. 7.

<sup>129</sup> *Id.* art. 8, at 54.

Cultural Rights contains, *inter alia*, the rights to education,<sup>130</sup> work,<sup>131</sup> and to form trade unions.<sup>132</sup>

#### 4. Regional and Specific Issue Human Rights Agreements

Finally, the fourth stage in the process of developing human rights law has been the adoption of over fifty regional and specific issue human rights agreements on such areas as sex, race, and religious discrimination.<sup>133</sup> These include various regional agreements, such as the African Charter on Human and Peoples' Rights (African Charter),<sup>134</sup> the American Convention on Human Rights (American Convention),<sup>135</sup> and the European Convention on Human Rights (European Convention).<sup>136</sup> Some of the regional charters have established regional commissions or courts to hear complaints of human rights violations. For example, the European Convention established a European Commission on Human Rights<sup>137</sup> and a European Court of Human Rights<sup>138</sup> to hear and investigate human rights complaints.

#### B. Sources of International Law

The problem of where to find international law arises because of its global nature—it prescribes the rights and duties for sovereign states and all people of the world. Unlike domestic or municipal law there is no single legislative body or leader to prescribe what international law is. A key point in understanding the sources

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<sup>130</sup> International Covenant on Economic, Social, and Cultural Rights, *supra* note 116, art. 13, at 51.

<sup>131</sup> *Id.* art. 6, at 50.

<sup>132</sup> *Id.* art. 8.

<sup>133</sup> Sohn, *supra* note 105, at 12. See, e.g., Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 55, U.N. GAOR 36th Sess., U.N. Doc. A/RES/36/55 (1981); Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452, U.N. GAOR, 30th Sess., 2433d plen. mtg, Supp. No. 34, at 91, U.N. Doc. A/10034 (1976); Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, June 29, 1951, I.L.O. No. 100, 165 U.N.T.S. 303, 304.

<sup>134</sup> African Charter on Human and Peoples' Rights, Organization of African Unity in Document CAB/LEG/67/3/Rev.5; *reprinted in* 21 I.L.M. 59 (1982) [hereinafter African Charter].

<sup>135</sup> American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36 at 1, OEA/Ser. K./XVI/1.1, doc. 65 rev. 1, *reprinted in* 9 I.L.M. 673 (1970) [hereinafter American Convention].

<sup>136</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Convention].

<sup>137</sup> *Id.* art. 19, 213 U.N.T.S. at 234.

<sup>138</sup> *Id.*

of international law is to realize that it is created by the common consent of sovereign states. Ascertaining the substantive provisions of international law essentially involves answering the question of whether a state has consented (expressly or implicitly) to be bound by a particular rule of law. Likewise, the sources of international law are more accurately described as the forum or method by which a state consents or withholds its consent to a particular rule of law.

Article 38 of the statute establishing the Permanent Court of International Justice describes the four main sources of international law:

- (a) international conventions, whether general or particular, establishing rules expressly recognized (by the contesting states);
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of law.<sup>139</sup>

This is generally recognized as a complete list of the sources of and evidence for determining the content of international law,<sup>140</sup> and each of these is discussed in turn.

### 1. International Agreements and Treaties

Treaties and other written agreements between two or more states are the most obvious source of international law. These agreements are the means by which states most directly and expressly agree to be bound by certain rules. Treaties expressly describe the rules relating to the parties' rights and obligations and sometimes provide for remedies in the instance of a breach of its terms. The major human rights treaties and agreements are the U.N. Charter, the Universal Declaration, the International Covenant on Civil and Political Rights, and the International Covenant on Social, Cultural, and Economic Rights.<sup>141</sup>

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<sup>139</sup> Statute of the International Court of Justice, 59 Stat. 1031, June 26, 1945, art. 38 [hereinafter Statute of the International Court of Justice].

<sup>140</sup> IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 3 (4th ed. 1990); *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* § 102 (1987) [hereinafter *Restatement (Third) of Foreign Relations Law*].

<sup>141</sup> See *supra* notes 113-38 and accompanying text.

## 2. Customary International Law

Custom is the second main source of international law, or method by which a state consents to be bound by a norm of international law. This refers to a general practice by states which becomes binding as customary international law through its repetition and acceptance as law by states.<sup>142</sup> The Inter-American Commission on Human Rights has described the elements of a binding norm of customary international law as:

- (a) a concordant practice by a number of states with reference to a type of situation falling within the domain of international relations;
- (b) a continuation or repetition of the practice over a considerable period of time;
- (c) a conception that the practice is required by or consistent with prevailing international law; and
- (d) general acquiescence in the practice by other states.<sup>143</sup>

Vital to a norm becoming binding as customary international law is that states believe that the practice in question is required by international law.<sup>144</sup> Once created through custom, such a norm becomes international law and is binding on all states. The only exception to norms created by custom is that it does not bind those states which clearly and consistently objected to the practice being recognized as law.<sup>145</sup> The principle that the "persistent objector" is not bound by a particular norm logically follows from the consen-

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<sup>142</sup> Statute of the International Court of Justice, *supra* note 139, art. 38(1)(b), 59 Stat. at 1060; Karen Parker & Lyn Beth Neylon, Jus Cogens: *Compelling the Law of Human Rights*, 12 HASTINGS INT'L. & COMP. L. REV. 411, 417 (1989).

<sup>143</sup> Case 9647, Inter-Am. C.H.R. 147, 166, OEA/ser. L/V/II.71, doc. 9 rev. 1 (1987) [hereinafter the Roach Death Penalty Case]. The requirements for the terms of a treaty to become binding customary international law on all states are: 1) the treaty must be norm-creating in nature; 2) there is widespread state practice even by states not a party to the treaty; 3) the norm must be in the *opinion juris*; and, 4) there must be a sufficient lapse of time. North Sea Continental Shelf Cases (F.R.G. v. Den; F.R.G. v. Neth.), 1969 I.C.J. 3, 41-43 (Feb. 26).

One commentator has described the elements of a binding norm of customary international law as duration, consistency of practice, generality of practice, and the acceptance by states of the practice *as law*. BROWNIE, *supra* note 140, at 5-7. No particular duration of the practice is required, but the passage of time may evidence a practice's consistency and generality. Consistency refers to the uniformity of the practice, while generality refers to the number of states which must follow a practice for it to become binding. *Id.*

<sup>144</sup> There must be a "sense of legal obligation, as opposed to motives of courtesy, fairness, or morality . . ." BROWNIE, *supra* note 140, at 7.

<sup>145</sup> See, e.g., David A. Colson, *How Persistent Must the Objector Be?* 61 WASH. L. REV. 957 (1986); Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985).

sual nature of international law.<sup>146</sup>

Some norms of customary international law are so essential, fundamental, and overriding that they attain a higher status, that of *jus cogens*. *Jus cogens* norms are the strongest norms of international law.<sup>147</sup> *Jus cogens* means "cogent law" and are "those rules which derive from principles that the legal conscience of mankind deem absolutely essential to the coexistence in the international community."<sup>148</sup> Norms of customary international law attain the status of *jus cogens* because of their important and profound nature.<sup>149</sup> For example, the prohibition on piracy and slavery are the oldest *jus cogens* norms.<sup>150</sup> Other rules of law achieving *jus cogens* status include the prohibition against genocide,<sup>151</sup> the right to life and protection against arbitrary deprivation of life,<sup>152</sup> prohibition against war crimes and crimes against humanity,<sup>153</sup> prohibition against the use of force,<sup>154</sup> prohibition against torture,<sup>155</sup> and the

<sup>146</sup> Colson, *supra* note 146, at 957-58.

<sup>147</sup> Parker & Neylon, *supra* note 142, at 417; Committee of United States Citizens Living in Nicaragua v. Reagan, 859 F.2d 929, 935 (D.C. Cir. 1988); Restatement (Third) of Foreign Relations Law, *supra* note 140, § 102 cmt. k.

<sup>148</sup> U.N. Conference on the Law of Treaties, U.N. GAOR 1st and 2d Sess., Vienna, Mar. 26 - May 24, 1968, U.N. Doc. A/CONF./39/11/Add. 2 (1971) (statement of Mr. Suarez (Mexico)).

<sup>149</sup> Parker & Neylon, *supra* note 142, at 428.

<sup>150</sup> BROWNIE, *supra* note 140, at 513; Parker & Neylon, *supra* note 146, at 429.

<sup>151</sup> Parker & Neylon, *supra* note 142, at 430. Genocide is recognized as a crime against humanity. G.A. Res. 96(I), U.N. GAOR 1st Sess, addendum pt. 1, at 188-80, U.N. Doc. A/64 (1946). In the *Roach Death Penalty* case the Inter-American Commission on Human Rights held that genocide "achieves the status of *jus cogens* precisely because it is the kind of rule that it would shock the conscience of mankind . . . for a state to protest." *Roach Death Penalty Case*, *supra* note 143, at 169.

<sup>152</sup> Parker & Neylon, *supra* note 142, at 431.

<sup>153</sup> War crimes and crimes against humanity are among the gravest of crimes in international law. Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, art. I(a), Nov. 11, 1970, 754 U.N.T.S. 73, reprinted in 8 I.L.M. 68 (1969).

<sup>154</sup> The International Court of Justice, stated:

[a] further confirmation of the validity as customary international law of the principle of the prohibition of the use of force . . . may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*"

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Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 100-01 (June 27).

<sup>155</sup> In a 1986 report on torture for the U.N. Commission on Human Rights, Peter Kooijmans stated "the prohibition of torture can be considered to belong to the rules of *jus cogens*. If ever a phenomenon was outlawed unreservedly and unequivocally it is

prohibition against apartheid.<sup>156</sup>

Significant effects result from a rule of law achieving *jus cogens* status. The most important effect of a *jus cogens* norm is that any treaty (or clause thereof) which contravenes a norm of *jus cogens* is null and void.<sup>157</sup> The Vienna Convention on the Law of Treaties states:

[a] treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of the states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.<sup>158</sup>

Further, as a newly formed norm of *jus cogens* emerges, any existing treaty to the contrary also becomes null and void.<sup>159</sup> These principles articulated in the Vienna Convention bind states that were not parties to the Convention because this rule regarding the effect of a *jus cogens* norm has itself become customary international law, and is therefore binding on all states who have not objected to it.<sup>160</sup>

The second effect of *jus cogens* is that it avoids the following judicial doctrines which may otherwise preclude adjudication in United States courts of claims of human rights violations: act of state, political question, self-execution, last in time rule, and standing.<sup>161</sup>

### 3. General Principles of Law Recognized by Civilized Nations

The third main source of international law is what the Statute of the International Court of Justice described as "general princi-

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torture." U.N. ESCOR, 42d Sess., Agenda Item 10(a), at 1, U.N. Doc. E/CN.4/1986/15 (1986).

<sup>156</sup> Parker & Neylon, *supra* note 142, at 439.

<sup>157</sup> See, e.g., *id.* at 443-44. Brownlie describes *jus cogens* norms as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." BROWNIE, *supra* note 140, at 513.

<sup>158</sup> The Vienna Convention on the Law of Treaties, *in force* Jan. 27, 1980, 1155 U.N.T.S. 331 [hereinafter the Vienna Convention].

<sup>159</sup> *Id.* art. 64; Restatement (Third) of Foreign Relations Law, *supra* note 144, at § 331(f).

<sup>160</sup> See, e.g., Restatement (Third) of Foreign Relations Law, *supra* note 140, at § 331(2)(b), comments e, f, g; § 102 comment k; Parker & Neylon, *supra* note 142, at 444.

<sup>161</sup> For a thorough discussion of how *jus cogens* operates to avoid these procedural barriers, see *infra* notes 253-69 and accompanying text.

ples of law recognized by civilized nations."<sup>162</sup> This refers to common principles of national law which are used to provide the rule of international law when no treaty or principle of customary international law exists.<sup>163</sup> Some examples of these general principles are the concepts of *res judicata*, good faith, and burden of proof.<sup>164</sup>

#### 4. Judicial Decisions and the Writings of Publicists

The last main sources of international law are judicial decisions and scholarly publications by experts.<sup>165</sup> As article 38 of the International Court of Justice states, these can be used as "subsidiary means for the determination of law."<sup>166</sup> Judicial decisions include opinions rendered by international tribunals, such as the International Court of Justice, and ad hoc international tribunals, such as the International Military Tribunal at Nuremberg.<sup>167</sup> Other judicial decisions which may be considered as evidence of substantive international law are decisions from national courts.<sup>168</sup> Scholarly writing by "the most qualified publicists of various nations"<sup>169</sup> are also used to indicate the state of international law on various issues.<sup>170</sup>

#### C. Human Rights Implicated by the Export of Banned Pesticides

The specific human rights implicated by the export of banned, unregistered, and restricted use pesticides are the rights to life,<sup>171</sup> health,<sup>172</sup> and the right to family, or reproduction.<sup>173</sup> This section discusses both the source of and content of each of these rights. Then, this section analyzes how these human rights are violated by the export of banned pesticides.

When discussing the scope of a particular right protected by international human rights law, it is important to recognize the dy-

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<sup>162</sup> Statute of the International Court of Justice, *supra* note 139, art. 38(1)(c), 59 Stat. at 1060.

<sup>163</sup> BROWNLIE, *supra* note 140, at 15-18.

<sup>164</sup> BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED TO INTERNATIONAL COURTS AND TRIBUNALS 326-57 (1987).

<sup>165</sup> Statute of International Court of Justice, *supra* note 143, art. 38(1)(d), 59 Stat. at 1060.

<sup>166</sup> *Id.*

<sup>167</sup> BROWNLIE, *supra* note 144, at 19-24.

<sup>168</sup> *Id.* at 23.

<sup>169</sup> Statute of International Court of Justice, *supra* note 143, art. 38(1)(d), 59 Stat. at 1060.

<sup>170</sup> BROWNLIE, *supra* note 144, at 24-25.

<sup>171</sup> See *infra* notes 174-202 and accompanying text.

<sup>172</sup> See *infra* notes 203-16 and accompanying text.

<sup>173</sup> See *infra* notes 217-28 and accompanying text.



namic nature of human rights. One of the hallmarks of human rights law is its evolutionary nature, in both recognizing new rights and in the realization that an established human right may encompass more elements than when the right was first recognized. In addition, when analyzing the scope or content of a particular human right, it is important to distinguish whether its source is a treaty or whether it arises from customary international law, for the elements are not necessarily the same. When analyzing the substance of a right in a specific convention, one begins with the language in the instrument. However, when considering a right as a norm of *jus cogens*, for example, one looks to the content of the norm as accepted by the international community.<sup>174</sup> Treaty provisions can influence the scope of an international human right and international treaties may form customary international law "when they are intended for general adherence and are widely accepted."<sup>175</sup>

### 1. The Right to Life

The right to life has been called the most fundamental of all the human rights recognized in international law.<sup>176</sup> Kurt Herndl, when Assistant Secretary-General for Human Rights of the United Nations, stated "[o]f all the norms of international law, the right to life must surely rank as the most basic and fundamental, a primordial right which inspires and informs all other rights, from which the latter obtain their *raison d'être* and must take their lead."<sup>177</sup> Another commentator remarked that "[t]he right to life must certainly be one of the most basic and elementary of the human rights. Emphasis on human rights would be quite meaningless, without the survival of living subjects to be the carrier of those rights. Its primacy is reflected in a pride of place accorded to it in human rights instruments, and in the restraint on its derogation"

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<sup>174</sup> See B.G. Ramcharan, *The Concept And Dimensions Of The Right To Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW* 3 (B.G. Ramcharan ed., 1985) (discussing the content of the right to life).

<sup>175</sup> See Jonathan I. Charney, *International Agreements And The Development Of Customary International Law*, 61 WASH. L. REV. 971, 973 (1986); Restatement (Third) of Foreign Relations Law, *supra* note 140, § 102(3) ("International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."). Many of the provisions of the major human rights treaties are good examples of treaties that have ripened into customary international law.

<sup>176</sup> See, e.g., F. Menghitsu, *The Satisfaction of Survival Requirements*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra* note 174, at 63.

<sup>177</sup> Herndl, *Foreword*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra* note 178, at XI.

in times of emergency.<sup>178</sup>

a. *Source of the Right to Life*

Although worded somewhat differently, the right to life features prominently in every major human rights treaty and covenant. It is expressly provided for in the Universal Declaration,<sup>179</sup> the International Covenant on Civil and Political Rights,<sup>180</sup> the European Convention,<sup>181</sup> the American Convention,<sup>182</sup> and the African Charter.<sup>183</sup> Further, these treaties have been signed by the vast majority of the world's states. Between the global treaties and conventions (the Universal Declaration and the International Covenant on Civil and Political Rights) and the regional treaties (European Convention, American Convention, and the African Charter) the vast majority of the nations of the world have recognized and agreed to uphold the right to life of all human beings. The United States is included in this group of nations. It is a party to the Universal Declaration, the International Covenant on Civil and Political Rights, and the American Convention. However, recognition of and respect for the right to life is nothing new to American law. The American Declaration of Independence states that everyone has an inalienable "right to Life, Liberty and the pursuit of Happiness."<sup>184</sup>

In addition to express provisions in the major human rights treaties, the right to life arises from customary international law.

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<sup>178</sup> Leo Kuper, *Genocide And Mass Killings: Illusion And Reality*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra* note 174, at 114.

<sup>179</sup> "Everyone has the right to life, liberty and security of person." Universal Declaration, *supra* note 114, art. 3.

<sup>180</sup> "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." International Covenant on Civil and Political Rights, *supra* note 115, art. 6, at 53.

<sup>181</sup> "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentional save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." European Convention, *supra* note 136, art. 2(1), 213 U.N.T.S. at 224.

<sup>182</sup> "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." American Convention, *supra* note 135, art. 4(1), 9 I.L.M. at 676.

<sup>183</sup> "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." African Charter, *supra* note 134, art. 4, 21 I.L.M. at 60.

<sup>184</sup> The Declaration of Independence para. (U.S. 1776). In fact, the right to life first appeared in the June 12, 1776, Declaration of Virginia. Declaration of Virginia (1776). For a history of the drafting of the right to life provisions, see J. Colon-Colazo, *A Legislative History of the Right to Life in the Inter-American Legal System*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra* note 174, at 33-61.

The right to life is so compelling, fundamental, and widely accepted as law that it has achieved the status of *jus cogens*.<sup>185</sup> The U.N. Commission on Human Rights found the right to life "a fundamental right in any society, irrespective of its degree of development or the type of culture which characterizes it, since this right forms part of *jus cogens* in international human rights law. The preservation of this right is one of the essential functions of the State . . . ." <sup>186</sup> The prominence of the right to life in human rights treaties as an obligation of law, and the sheer logic that, without the right to life all other human rights become meaningless, all indicate that the right to life has the force of *jus cogens*.

b. *Scope and Content of the Right to Life*

The substantive content or scope of the right to life, as expressed in the Universal Declaration and the International Covenant on Civil and Political Rights, was originally given a restrictive reading.<sup>187</sup> This interpretation held that the right to life merely protected individuals against arbitrary deprivations of life, such as homicide. Some commentators argued that the right to life encompasses only the right to be protected against arbitrary killing.<sup>188</sup> In this narrow reading, the right to life limited the permissible conditions and situations in which one may be deprived of the right to life, such as establishing the conditions under which the death penalty may be applied.

However, the right to life evolved to include more than the right to be free from arbitrary killing. Its vital nature, that of a prerequisite for the enjoyment of all other human rights and its grave importance are recognized by the international community.<sup>189</sup> Further, the international community recognizes that vari-

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<sup>185</sup> See, e.g., W. Paul Gormley, *The Right to Life and the Rule of Non-Derogability: Peremptory Norms of Jus Cogens*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra* note 174, at 121-22; Parker & Neylon, *supra* note 142, at 431-32.

<sup>186</sup> Ramcharan, *supra* note 174, at 14 (citation omitted).

<sup>187</sup> *Id.* at 3.

<sup>188</sup> Yoram Dintstein, *The Right to Life, Physical Integrity and Liberty*, in *THE INTERNATIONAL BILL OF HUMAN RIGHTS* 114, 115 (Louis Henkin, ed., 1980).

<sup>189</sup> Various resolutions by the Commission on Human Rights have affirmed and declared the importance of the right to life. For example, in a 1982 resolution the Commission stated that the right to life is inherent, enjoyed by all individuals, and protecting this right is a prerequisite for enjoyment of all other rights. Ramcharan, *supra* note 174, at 4-5 (citing Res. 1982/7, Feb. 19, 1982). In a 1983 report, the Commission stated "for people in the world today there is no more important question than that of preserving peace and ensuring the *cardinal right of every human being, namely, the right to life*." *Id.* at 5 (quoting Res. 1983/43, Mar. 9, 1983 (emphasis added)).

ous situations in the world threaten the right to life that perhaps were unthought of when the Universal Declaration or the International Covenants were drafted decades ago. The Human Rights Committee, which examines reports by states parties to the International Covenant on Civil and Political Rights, recognized that astronomical rates of infant mortality, malnutrition, epidemics, the threat of thermo-nuclear war, genocide, war, and missing and "disappeared" persons all implicate the right to life.<sup>190</sup> The realization that situations other than homicide affect the right to life has expanded the scope of this right.<sup>191</sup>

Thus, the right to life has evolved to encompass protection of the elements necessary for survival, such as food and water.<sup>192</sup> One commentator noted there are two main ways of depriving an individual of their right to life: 1) by cold-blooded killing such as execution or torture, and 2) by starvation and lack of basic needs, such as food and health care.<sup>193</sup> While the right to life has always generally encompassed the first category, it has evolved to include those situations in the second category.

The drafting history of the right to life provisions in the International Covenant on Civil and Political Rights further indicates the right was meant to include more than a prohibition on homicide. The Australian government, which had been a member of the Commission on Human Rights during the drafting of the Covenant, commented on a draft of the Covenant as follows:

[t]wo elements have engaged the attention of the draftsmen during the preparation of the article. These may be described as, firstly, expression of what might be termed a traditional imperative of all civilized societies—"Thou shalt not kill"—and secondly, some positive provision concerning the right to life which, although not defined in the Covenant or in the Universal Declaration, may be assumed to mean the right of every person to preservation and enjoyment of his existence as an individual. In the earlier drafts, attention was concentrated on the first ele-

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<sup>190</sup> *Id.* at 4-5.

<sup>191</sup> *Id.* at 5. The Human Rights Committee stated:  
the right to life has often been too narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner and the protection of this right requires that States adopt positive measures. In this connection the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.

*Id.*

<sup>192</sup> *Id.* at 8-10.

<sup>193</sup> Menghitsu, *supra* note 176, at 63.

ment, but at the sixth session of the Commission, attention was given to the second element by providing that "the right to life shall be protected by Law."<sup>194</sup>

The Inter-American Commission on Human Rights also holds that the right to life encompasses more than a prohibition against homicide. It declared that with regard to the right to life, any government is obligated "to strive to attain the economic and social aspirations of its people, by following an order that assigns priority to the basic needs of health, nutrition and education."<sup>195</sup> Similarly, the European Commission on Human Rights stated that the right to life provision in the European Covenant requires the state to take measures to safeguard life, in addition to avoid taking life intentionally itself.<sup>196</sup>

The foregoing makes apparent how environmental threats may directly endanger the right to life. For example, testing of nuclear devices and the dumping of toxic or hazardous wastes which result in the deaths of people have clearly deprived these people of their right to life.<sup>197</sup> Through "ecocide" or destruction of the environment, people are killed just as certainly as through execution. The Inter-American Commission on Human rights, in the Yanomami Case, found that environmental degradation from development in the Amazon rain forest threatened the right to life and culture of indigenous people in the area.<sup>198</sup> The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities recognized the link between environmental degradation and the right to life in a recent report entitled "Human Rights and the Environment."<sup>199</sup>

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<sup>194</sup> Ramcharan, *supra* note 174, at 9 (citation omitted).

<sup>195</sup> INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, TEN YEARS OF ACTIVITIES, 1971-1981 322 (1982).

<sup>196</sup> Association X. v. United Kingdom, App. No. 7154/75, 14 Eur. Comm'n H.R. Dec. & Rep. 31, 32 (1979).

<sup>197</sup> A. Redelbach, *Protection of the Right to Life by Law and Other Means*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW, *supra* note 174, at 182, 191; RICHARD FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 167 (1981); Jennifer A. Downs, Note, *A Healthy And Ecologically Balanced Environment: An Argument For A Third Generation Right*, 3 DUKE J. COMP. & INT'L LAW 351, 367, 376-78 (1993).

<sup>198</sup> Case 7615, Inter-Am. C.H.R. 24, 28, 33, OEA/Ser.L/V/11.66, doc. 10 rev. 1 (1985) [hereinafter Yanomami Case].

<sup>199</sup> *Human Rights And The Environment*, Final report prepared by Mrs. Fatma Ksentini, Special Rapporteur, U.N. ESCOR 46th Sess., Agenda Item 4, at U.N. Doc. No. E/CN.4/Sub.2/1994/9 (1994) [hereinafter *Human Rights And The Environment*]. The report quoted Professor Gallicki's comment to the Special Rapporteur that "[t]he right to life is the most important among all human rights legally guaranteed and protected . . . this right, like no other, may be directly and dangerously threatened by detrimen-

c. *Whether the Export of Banned Pesticides Violates the Right to Life*

The export of pesticides which cannot be legally sold in the United States may violate the right to life of the people killed through acute poisoning or causation of terminal diseases. Further, these exports may violate the right to life by eliminating survival requirements, *i.e.*, by contaminating clean water and food supplies. As discussed earlier, thousands of people die every year from acute pesticide poisoning.<sup>200</sup> Those with the closest contact to the pesticide, such as those who apply, transport, or store the pesticide are most at risk for acute poisoning. In addition to acute poisoning resulting in immediate deaths, the use of illegal pesticides violates the right to life by causing fatal but long-term diseases, such as cancer. While not as immediate, the result is the same—death. If the disease has been caused by exposure to the pesticide, then the use of that pesticide has violated that person's right to life.

Pesticides are poisons—they are produced and developed because of their lethal qualities. The key to finding a usable pesticide is to ensure that it is effective against a pest, but at the same time it must be safe for human use. To allow the export of banned pesticides clearly threatens and violates the right to life of those who come into contact with them and die as a result. The United States, through these exports, violates "the strict duty [on states] . . . to take effective measures to prevent and safeguard against the occurrence of environmental hazards which threaten the lives of human beings."<sup>201</sup>

Banned pesticides may also violate the right to life by contaminating food and water supplies so as to destroy necessary requirements for survival. By destroying the means to live, the right to life is violated. Thus, through contamination, lethal pesticides can violate the right to life as surely as if someone died from direct pesticide poisoning.

That United States law, through FIFRA, authorizes such exports is irrelevant to their legality under international human rights law. The right to life has the status of *jus cogens* and thus is non-derogable. A violation of this right cannot be legitimized by the domestic law of any state. Just as any treaty contravening the

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tal environmental measures. The right to life and the quality of life depend directly on positive or negative environmental conditions." *Id.* at 45.

<sup>200</sup> See *supra* notes 64-76 and accompanying text.

<sup>201</sup> *Human Rights and the Environment*, *supra* note 199, at 45 (quotations omitted).

right to life would be null and void, so too is any contrary measure of domestic law. Just as a state could not legitimize, for example, torture by legalizing it under its domestic law, it cannot legally, under international law, authorize pesticide exports which violate the right to life.

Likewise, the fact that a state permits the import of a banned pesticide is also irrelevant to the legality of the import. A state cannot assent to the violation of the right to life of its people. Just as the Nazi government in Germany could not kill its own citizens in concentration camps, a state cannot make legal, through its permission, the violation of the right to life of its people.

Furthermore, a state cannot justify the use of pesticides which are lethal to those who must apply them on the grounds that people are starving and pesticides are needed to save lives. The right to life, because of its *jus cogens* status cannot be abrogated in times of emergency, as is the case with some other human rights. As a practical matter, this argument would be specious. The inappropriate use of pesticides, while sometimes providing an immediate increase in production, will inevitably result in a decrease in food production as pests develop resistance to the pesticide and as the pesticide destroys the pests' natural enemies.<sup>202</sup> Further, there are alternatives to the hazardous pesticides which may be safely used.<sup>203</sup>

Finally, the fact that these pesticides are exported without an intent to kill does not exculpate their export under international law governing the right to life. Although the intent to kill is clearly absent in these exports, that has never been an element of the right to life.<sup>204</sup> Further, to require intent to kill before the right to life would be violated would contravene the nature of the right: inherent, supreme, and non-derogable even in times of emergency.

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<sup>202</sup> Scientists are finding that to truly increase yield and food supply, over-dependence on pesticides should be avoided. See BULL, *supra* note 10, at 16-26.

<sup>203</sup> An alternative to using hazardous pesticides is employing an integrated pest management (IPM) strategy. This involves taking advantage of pests' natural enemies, using physical methods to control pests, using plant varieties which are pest-resistant, and sterilizing pests through the release of large numbers of sterile insect, and other methods in addition to the judicious use of safe pesticides. *Id.* at 124-28.

<sup>204</sup> Criminal or civil responsibility may attach under international law for "causing serious environmental hazards posing grave risks to life. This responsibility is a strict one, and should arise irrespective of whether the act or omission in question is deliberate, reckless, or negligent." *Human Rights and the Environment*, *supra* note 199, at 45 (quotations omitted).

## 2. The Right to Health

The right to health, along with the right to life, is "at the basis of the *ratio legis* of international human rights law and environmental law."<sup>205</sup> The right to health, although "inextricably interwoven with the right to life,"<sup>206</sup> is indeed a separate right from the right to life.

### a. Source of the Right to Health

The right to health is expressly provided for in several human rights treaties. For example, the International Covenant on Economic, Social and Cultural Rights recognizes "the right of everyone to the enjoyment of the highest attainable standard of physical and mental health" and State parties agree to take steps necessary for "[t]he improvement of all aspects of environmental and industrial hygiene" and for the "prevention, treatment and control of epidemic, endemic, occupational and other diseases . . . ."<sup>207</sup> The Universal Declaration guarantees the right to "life, liberty, and security of person,"<sup>208</sup> as well as the individual's "right to a standard of living adequate for the *health and well-being* of himself and his family . . . ."<sup>209</sup>

In addition, the American Convention guarantees that "[e]very person has the right to have his physical, mental, and moral integrity respected."<sup>210</sup> The 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights recognizes a right to health, stating, "[e]veryone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being."<sup>211</sup> The European Social Charter also recognizes the human right to health protection, including an agreement by State

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<sup>205</sup> *Human Rights and the Environment*, *supra* note 199, at 146 (quotation omitted).

<sup>206</sup> A.A. Cançado Trindade, *The contribution of international human rights law to environmental protection, with special reference to global environmental change*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 280 (Edith Brown Weiss ed. 1992) ("The right to life implies the *negative* obligation not to practice any act that can endanger one's health, thus linking this basic right to physical and mental integrity and to the prohibition of torture and of cruel, inhuman, or degrading treatment . . . .") (emphasis in original).

<sup>207</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 116, art. 12., at 51.

<sup>208</sup> Universal Declaration, *supra* note 114, art. 3.

<sup>209</sup> *Id.* art. 25 (emphasis added).

<sup>210</sup> American Convention, *supra* note 135, art. 5, 9 I.L.M. at 676.

<sup>211</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), art. 10, *opened for signature* Nov. 17, 1988, *reprinted in* 28 I.L.M. 161, 164 (1988).



parties "to remove as far as possible the causes of ill health."<sup>212</sup> The African Charter provides that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development"<sup>213</sup> and also asserts an individual's right "to enjoy the best attainable state of physical and mental health" and a corresponding duty on the state to "protect the health of their people."<sup>214</sup>

There is no consensus on whether the right to health has become a binding norm of customary law, and further, whether it has reached the status of *jus cogens*. However, given the fact that the right to health is "inextricably interwoven" with the right to life, and its express inclusion in many of the major human rights instruments, it is quite likely that the right to health also arises from customary international law and at least some elements of the right have achieved the status of *jus cogens*.

#### b. *Scope of the Right to Health*

The scope of the right to health is very wide, as there are obviously many components of health and many forces which can adversely affect human health. Furthermore, human health is inherently variable, and in some ways uncontrollable, as is the case with genetically determined diseases. However, the right to health does not guarantee the state of good health; rather it guarantees the right to conditions necessary for good health to occur. The importance of the right to health cannot be overstated. Short of death, ill health or a chronically debilitating physical condition can rob an individual of the ability to enjoy or pursue his or her life. One commentator aptly stated "[t]he integrity of man is in the first place the integrity of his body and . . . [t]he protection of the body, however simplistic this may appear, is of itself the beginning of personal freedom."<sup>215</sup>

The rights encompassed by the right to health have been categorized as including the right to: protection against external risks likely to endanger health; the organization and availability of adequate health services and access to medical care; and security and hygiene in professional endeavors.<sup>216</sup>

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<sup>212</sup> European Social Charter, Oct. 18, 1961, art. 11, 529 U.N.T.S. 89, 104. The European Social Charter also includes the right to safe and healthy working conditions. *Id.* art. 3, 529 U.N.T.S. at 96.

<sup>213</sup> African Charter, *supra* note 134, art. 24, 21 I.L.M. at 63.

<sup>214</sup> *Id.* at art. 16, 21 I.L.M. at 61.

<sup>215</sup> THE RIGHT TO HEALTH AS A HUMAN RIGHT 139 (comments of L. Schwarzenberg at workshop) (René-Jean Dupuy ed., 1978).

<sup>216</sup> *Id.* at 144 (comments of F. Wolf).

The component of the right to health that is threatened by the export of banned pesticides is in the first category—the right to be protected from external threats to health, and the third—the right to healthy working conditions. While the right to health may encompass many elements such as the right to medical treatment or minimum levels of nutrition, it surely includes the right to be free from poisoning, an element that has reached the status of *jus cogens*.

c. • *Whether the Export of Banned Pesticides Violate the Right to Health*

As with the right to life, the connection between environmental degradation and the right to health is becoming clear. In a report examining the link between human rights and the environment, the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities found that “[i]n the environmental context, the right to health essentially implies . . . freedom from pollution, . . . such as the continuous discharge of toxic and hazardous substances into air, soil and water.”<sup>217</sup> Environmental conditions which contaminate the air, water, and food we rely on clearly affect human health. As one commentator stated, “[d]esirable standards of health and welfare will be impossible to sustain in an atmosphere depleted of life-giving and life-sustaining elements.”<sup>218</sup> Poisonous pesticides that humans come in contact with inevitably threaten the right to health, and the question becomes only to what degree their health is affected.

Banned pesticides clearly constitute a threat to the health of the people in other countries who are exposed to them. The World Health Organization estimates the number of incidents of acute pesticide poisoning in the millions per year. These pesticides violate the “security” and “integrity” of the persons whose bodies they invade, inevitably damaging their health. Banned pesticides pollute the lungs, tissue, organs, and blood of those who are exposed to them. They cause dizziness, vomiting, nervous system damage, sterilization, *inter alia*, on a wide scale. Exporting them to foreign countries, where people are exposed and harmed by them violates those people’s right to the highest attainable standard of health, of the integrity and security of their person, of their right to health.

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<sup>217</sup> *Human Rights And The Environment*, *supra* note 199, at 46.

<sup>218</sup> R.S. Pathak, *The human rights system as a conceptual framework for environmental law*, in *ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW*, *supra* note 206, at 211.

### 3. The Right to Family

#### a. *Source of the Right to Family*

The right to family appears in all the major human rights treaties. The Universal Declaration of Human rights articulates the right to family as the right of "[m]en and women of full age . . . have the right to marry and found a family."<sup>219</sup> The International Covenant on Economic, Social and Cultural Rights also requires that "[t]he widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment . . . ." <sup>220</sup> The Covenant further requires that "[s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth."<sup>221</sup> The International Covenant on Civil and Political Rights likewise protects the "right of men and women . . . to marry and found a family . . . ." <sup>222</sup> The regional human rights instruments also recognize and protect the right to family.<sup>223</sup>

#### b. *Scope of the Right to Family*

As with the right to health, there are many components of the right to family.<sup>224</sup> Clearly it includes the right to marry, and some argue it includes the right to family planning services. However,

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<sup>219</sup> Universal Declaration, *supra* note 114, art. 16. Further, the Universal Declaration recognizes the family as "the natural and fundamental group unit of society and is entitled to protection by society and the State." *Id.*

<sup>220</sup> International Covenant on Economic, Social and Cultural Rights, *supra* note 116, art. 10, at 50

<sup>221</sup> *Id.* at art. 10, at 50.

<sup>222</sup> International Covenant on Civil and Political Rights, *supra* note 115, art. 23, at 55.

<sup>223</sup> The American Declaration recognizes that "[e]very person has the right to establish a family, the basic element of society, and to receive protection therefor." American Declaration of the Rights and Duties of Man, May 2, 148, O.A.S. Off. Rec. OEA/Ser.L./V/II.71, art. 6 [hereinafter American Declaration]. The European Convention states that "[m]en and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right." European Convention, *supra* note 136, art. 12, 213 U.N.T.S. at 232. The African Charter similarly protects the right to family. See African Charter, *supra* note 134, art. 18, 21 I.L.M. at 61.

<sup>224</sup> The major human rights treaties recognize the right to family. The right also includes right to enter into marriage freely. The International Covenant on Economic, Social and Cultural Rights also protects children and recognizes that because of their status children are particularly vulnerable, stating, "[c]hildren and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law." International Covenant on Economic, Social and Cultural Rights, *supra* note 116, art. 10, at 50.

this discussion focuses only on the right to conceive and bear healthy children. The U.N. recognized the right to family as including the right of the parents to decide when and whether to bear children when it stated at the 1968 Conference on Human Rights that "[p]arents have a basic human right to determine freely and responsibly the number and spacing of their children."<sup>225</sup>

The United States recognized the right to conceive and bear children through its condemnation of China's policy of allowing couples to have only one child. This "one-child" policy was an attempt to control its large population through a system of incentives and disincentives.<sup>226</sup> Reports indicate that forced abortions and sterilizations are part of the policy.<sup>227</sup> The United States House of Representatives voted to condemn China's population control policy as a crime against humanity.<sup>228</sup> Representative Christopher Smith stated that this policy was in "total contravention of U.N. human rights declarations and resolutions concerning voluntarism and non-coercion" in decisions to have children.<sup>229</sup> Professor John Cooper called forced abortions "another violation of human rights that has and continues to take place" in China.<sup>230</sup> Clearly the right to family includes the right to conceive and bear children.

Elements of the right to family, specifically the right to conceive and bear children, also arise from customary international law. The fundamental nature of the right, and its wide recognition in all the major human rights instruments has led to its acceptance

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<sup>225</sup> Teheran Proclamation on Human Rights, in Final Act of the International Conference on Human Rights, at 4, U.N. Doc. No. A/Conf. 32/41, U.N. Sales No. E.68.XIV.2 (1968)

<sup>226</sup> The policy was officially instituted in 1978. Anne Joyce, *China: United States Withdrawal of Support from the United Nations Fund for Population Activities*, 1 HARV. HUMAN RTS. YEARBOOK 205, 206 (1988).

<sup>227</sup> *Political Developments and Human Rights in the People's Republic of China: Hearings Before the Subcommittee on Human Rights and International Organizations and the Subcommittee on Asian and Pacific Affairs of the House Committee on Foreign Affairs*, 99th Cong., 1st Sess. 5 (statement of Rep. Christopher H. Smith) [hereinafter *China Hearings*].

<sup>228</sup> The House resolution stated in part:

[t]he Government of the People's Republic of China has systematically employed coercive abortion and coercive sterilization as a means of enforcing that Government's "one-child-per-couple" policy. The rigid application of the "one-child" policy has also led to large scale infanticide.

The Congress condemns these practices as crimes against humanity and calls upon the Government of the People's Republic of China to cease these human rights abuses.

*Id.* at 5.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 248 (prepared statement of Professor John F. Cooper).

as a norm of customary international law that has achieved the status of *jus cogens*.

c. *Whether the Export of Banned Pesticides Violates the Right to Family*

Exports of pesticides that sterilize men or women, or otherwise endanger pregnant women and the health of the fetus *in utero*, violate the right to family. If an involuntary, pesticide-induced sterilization does not violate the right to family, it is hard to imagine what would. While the effect on reproductive ability may not be intended by those producing and exporting illegal pesticides, any sterilization or miscarriage caused by such exports happens just as surely as in the case of China's one-child policy. As seen with DBCP, a pesticide may have devastating and irreversible effects on a person's reproductive ability. Pesticides that have this effect, or otherwise harm the health of the fetus, would likewise violate the right to family of those affected.

IV. PREVENTION OF AND REMEDIES FOR PESTICIDE-RELATED HUMAN RIGHTS VIOLATIONS

This section discusses a number of avenues available to address the human rights violations caused by the export of banned pesticides. The first option is legislative, and the repeated attempts to amend FIFRA to prohibit these exports is discussed. Next, the possibility of litigating the legality of these exports under human rights law in state and federal courts is analyzed. Finally, this section surveys the opportunity to challenge the exports in various international fora.

A. *Legislative Solutions to the Export Problem*

Ideally, the best way to end the export of banned pesticides from the United States is for the United States to recognize that this practice inevitably causes significant human rights violations and to voluntarily end such exports. There has been an ongoing attempt to do this by amending FIFRA to prohibit such exports under United States law.

Attempts to legislatively end the export of hazardous pesticides go back over twenty years.<sup>231</sup> The most recent attempts to

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<sup>231</sup> Raymond Hill, *Problems and Policy for Pesticide Exports to Less Developed Countries*, 28 NAT. RESOURCES J. 699, 709 (1988). In 1980 a bill introduced by Representative Michael Barnes would have prohibited export of hazardous substances unless they met the regulations of the United States and the importing country. H.R. 6587, 96th

prohibit such exports have also failed. Senator Patrick Leahy introduced The Pesticide Reform Act of 1990 as part of the 1990 proposed farm bill.<sup>232</sup> These amendments would have banned the export of American-made pesticides that the EPA has found too hazardous to human health to be sold in the United States.<sup>233</sup> In the House, similar legislation was introduced and included in the House bill.<sup>234</sup> At conference committee, the provisions were dropped from the 1990 farm bill. The Bush Administration played a key role in defeating the FIFRA amendments. Officials from the EPA, Departments of Agriculture, Commerce, Justice, and the United States Trade Representative all argued that the legislation would disrupt trade worth millions of dollars per year, endanger American jobs, and cause "serious damage to the American agricultural chemical industry."<sup>235</sup> The EPA representative argued this despite the fact that the EPA did not even know how many pounds of banned pesticides are exported from the United States.<sup>236</sup>

Senator Leahy introduced similar legislation the next year as the "Circle of Poison Prevention Act of 1991."<sup>237</sup> The "Circle of Poison" referred to the poisonous circle begun in the United States with the manufacture and export of deadly pesticides, their use on crops in foreign countries, and then the completion of the circle through the import of crops that often have residues of toxic chemicals on them. Hearings on the Circle of Poison Prevention Act of 1991 focused both on the harmful effects on foreign agricultural workers<sup>238</sup> and on American consumers who eat food tainted with illegal pesticides.<sup>239</sup> Witnesses presented compelling testimony on the amount of pesticide poisoning and death caused by American pesticide exports, the lack of proper labeling and instructions on the dangers of the pesticides, and the acute and chronic health effects of pesticide poisoning. The lack of proper

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Cong., 2nd Sess. (1980). This bill did not reach a House vote. Christina L. Baird, Note, *No More Excuses: Adopt the "Circle of Poison Prevention Act of 1991"*, 21 CAP. U. L. REV. 963, 975 (1992).

<sup>232</sup> S. 2227, 101st Cong., 2d Sess. § 1 (1990).

<sup>233</sup> *Id.*

<sup>234</sup> This House bill was introduced by Representatives Synar, Panetta, and Glickman. Baird, *supra* note 231, at 975.

<sup>235</sup> *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 145.

<sup>236</sup> *Id.*

<sup>237</sup> S. 898, 102d Cong., 1st Sess. (1991).

<sup>238</sup> See generally *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1.

<sup>239</sup> See generally *Circle of Poison: Impact on American Consumers: Hearing Before the Committee on Agriculture, Nutrition, and Forestry*, 102d Cong., 1st Sess. (1991).

inspection and detection limits on imported fruits, vegetables, and beef also points out that American consumers are not protected from the return of banned pesticides to their dinner tables.<sup>240</sup> Bush Administration officials and the chemical industry associations made similar objections as they had the year before and the bill was defeated.<sup>241</sup>

It is important to note that no human rights bases were advanced in support of legislative attempts to end the export of banned pesticides. This could have changed the posture of the debate. Because the export of banned pesticides violates the human rights of those they kill and injure, none of the arguments advanced against the Circle of Poison Prevention Act of 1991 and its predecessors are valid. For example, Bush Administration and chemical industry officials repeatedly argued that prohibiting these exports would result in a loss of "millions" of jobs. This claim is doubtful,<sup>242</sup> but even if true, it provides no justification to violations of the right to life under international human rights law. As one commentator stated, "[t]he right to life, as an imperative norm, takes priority over economic considerations."<sup>243</sup>

Likewise, another argument advanced to defeat the bill also becomes irrelevant under a human rights analysis. Officials from the EPA and the Department of Agriculture argued that "the United States is only one participant in a global market for pesticides, and . . . unilateral action will not eliminate the production and use of unregistered chemicals in other countries."<sup>244</sup> However, the fact that other countries may be causing similar human rights violations is no justification under human rights law for the United

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<sup>240</sup> The detection methods are woefully inadequate. *Id.* at 2. The Act also contained a provision suspending the "food tolerance" for illegal pesticides, in effect stating that no residue of that pesticide would be tolerated on food imported into the United States.

<sup>241</sup> *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 87 (July 15, 1991 letter from Sen. Leahy to William K. Reilly, EPA Administrator and Edward Madigan, Secretary of the Department of Agriculture).

<sup>242</sup> The Senate Agricultural Committee refuted claims that the Act would result in massive job loss in the chemical industry. It found that in a worst case scenario, only 700-1,000 jobs would be affected. This represents .04-.06% of all chemical industry jobs and is compared to the 10,000 chemical workers per year who leave their jobs due to retirement and lay offs. *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 88.

<sup>243</sup> *Human Rights and the Environment*, *supra* note 199, at 45. The United States government would find it incredulous for manufacturers of chemical or biological weapons, or those growing illegal drugs to advance these arguments of economic loss in support of their exports.

<sup>244</sup> *Circle of Poison Prevention Act: Impact of U.S. Pesticides on Third World Workers*, *supra* note 1, at 89.

States to do so. For example, if it were revealed that the United States tortured political prisoners, it would obviously be no defense for the United States to argue that it was "only one participant in this global practice."

Finally, under international human rights law, there exists a duty to take affirmative measures to protect life and the rights to life.<sup>245</sup> The United States government has a duty to stop these exports, and it clearly has failed to carry out this duty. When one begins to see the United States pesticide export practice in terms of its human rights implications, justifications for continuing the exports of banned pesticides quickly pale and lose their force.

### B. Domestic Litigation

Another way in which the legality of banned pesticide exports may be challenged is through domestic litigation in United States courts. First, FIFRA § 17,<sup>246</sup> which authorizes the export of banned pesticides, may be challenged as contravening human rights law. Second, the fact that these exports violate human rights law may be incorporated into a necessity defense for those citizens who protest the manufacture and export of banned pesticides.

#### 1. Federal Cause of Action Challenging the Legality of FIFRA

FIFRA § 17 may be challenged in federal court as violating international human rights law. A declaratory or injunctive action could be brought by plaintiffs injured from exposure to banned pesticide imported from the United States. A federal court would have jurisdiction under the general federal question provision of 28 U.S.C. § 1331<sup>247</sup> over a complaint alleging that FIFRA violates international human rights law. It is well established that customary international law is part of the federal common law.<sup>248</sup> As the Supreme Court held in *The Paquete Habana*, "[i]nternational law is part of our law, and must be ascertained and administered by the courts of justice and appropriate jurisdiction, as often as questions of right depending on it are duly presented for their determination."<sup>249</sup> Customary international law is treated as the "the law of the land" under the Supremacy Clause of the United States Consti-

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<sup>245</sup> Ramcharan, *supra* note 174, at 8; Yanomami Case, *supra* note 202, at 33.

<sup>246</sup> 7 U.S.C. § 136o.

<sup>247</sup> 28 U.S.C. § 1331 (1994).

<sup>248</sup> *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

<sup>249</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).



tution.<sup>250</sup> Thus, claims alleging violations of customary international law "arise under" laws of the United States for purposes of federal court jurisdiction under 28 U.S.C. §1331.<sup>251</sup>

Although profound in its implications, the argument to find FIFRA § 17 invalid as contravening human rights law is itself quite simple. It is well-grounded in established law and relies on a few premises, discussed above. Each premise will need to be carefully articulated and supported for this argument to receive consideration. A traditional hostility exists in American courts to find that the ability of the government restrained in any way by its obligations under international law.<sup>252</sup>

The first premise of this argument is that the manufacture and export of pesticides that cannot legally be sold in the United States violates the human rights of those people the pesticides kill and injure. As discussed in detail above, the human rights that are violated are the right to life, right to health, and right to family.<sup>253</sup>

Second, these norms are well-established in customary international law. Most, if not all, have achieved the status of *jus cogens*. The meaning of *jus cogens* and its procedural effects need to be explained since it is likely the court hearing the case will have little experience with international law concepts.

Third, these norms, since they have achieved the status of *jus cogens*, must be respected, cannot be derogated, and any domestic law to the contrary is rendered void. A state can never legitimize a violation of a norm of *jus cogens* through legislation or treaty. Any such law or treaty, if it attempts to authorize human rights violations, becomes null and void.

Finally, a number of doctrines are routinely raised to prevent the adjudication of claims based on international law and they may be raised to prevent the human rights arguments from being addressed by the court. Since the human rights norms at issue have achieved the status of *jus cogens*, these doctrines should not operate to bar adjudication of the claim. The next part discusses each in turn.

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<sup>250</sup> U.S. Const. art. VI, cl. 2; Joan Hartman, *Enforcement of International Human Rights Law In State And Federal Courts*, 7 WHITTIER L. REV. 741, 746 (1985).

<sup>251</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 n.22 (2d Cir. 1980). While the court found federal jurisdiction existed under the Alien Tort Statute (28 U.S.C. § 1350), it realized that "our reasoning might also sustain jurisdiction under the general federal question provision, 28 U.S.C. § 1331." *Id.*

<sup>252</sup> Joan Hartman, *Enforcement of International Human Rights Law in State and Federal Courts*, 7 WHITTIER L. REV. 741, 744-45 (1985).

<sup>253</sup> See *supra* notes 171-230 and accompanying text.

a. *Act of State Doctrine*

The act of state doctrine prohibits courts in one nation from ruling on acts committed by another nation in that nation's own territory.<sup>254</sup> It is based on the principle of the sovereignty of nations. Courts have held that the act of state doctrine bars relief where the rule of law involved could not be characterized as *jus cogens*.<sup>255</sup> When the challenged act violates *jus cogens*, however, the act of state doctrine should not preclude adjudication of the claim. In *Filartiga v. Pena-Irala*, the court's reasoning clearly indicated that alleged torture by a Paraguayan official could not be considered an act of state, and thus would not fall under the requirements of the doctrine.<sup>256</sup> Since the requirements of international human rights law in effect abrogate a state's "right" to violate the human rights of its citizens, the act of state doctrine should not preclude the justiciability of claim based on a human right having *jus cogens* status.<sup>257</sup>

b. *Political Question Doctrine*

The political question doctrine requires courts to abstain from deciding issues that are more appropriately resolved in the executive or legislative branches of government.<sup>258</sup> The landmark case of *Baker v. Carr* identified six factors that, if present, would require a court to abstain from deciding the issue: 1) express constitutional authority given to the executive or legislative branch to resolve that type of issue; 2) no judicially discoverable or manageable standards exist to decide the issue; 3) there is a need for an initial policy instead of a judicial determination; 4) judicial determination would impliedly undermine the authority of either the executive or legislative branches; 5) there is a need to follow a political decision already made by another branch of government; or 6) the potential for embarrassment caused by conflicting pronounce-

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<sup>254</sup> See, *Underhill v. Hernandez*, 168 U.S. 250 (1897).

<sup>255</sup> See, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964). In this case, plaintiffs attempted to challenge, in federal district court, Cuba's nationalization of property owned by private businesses as a violation of customary international law. The court found that nationalization of private property did not violate customary international law, and thus the act of state doctrine barred the court's consideration of the claim. *Id.* at 421-437.

<sup>256</sup> Although the act of state doctrine had not been raised as a defense, the court stated even if that argument had been raised, the court would not have given it effect. *Filartiga*, 630 F.2d at 889-90.

<sup>257</sup> See *Parker & Neylon*, *supra* note 142, at 446.

<sup>258</sup> See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

ments by various branches or departments on the issue.<sup>259</sup>

Examination and application of these factors to a claim based on a violation of a *jus cogens* rule of law reveals that none of these factors applies and the political question doctrine should not bar adjudication of the claim.<sup>260</sup> The authority to decide such claims is constitutionally in the judicial branch.<sup>261</sup> There exists judicially discoverable and manageable standards to decide the issue. Courts have already ascertained and applied rules of customary international law.<sup>262</sup> Because of the peremptory nature of a *jus cogens* norm, no derogation from that norm is permitted, whether by treaty, act, or in any other manner. Thus, the authority of the other branches of government cannot be undermined by a judicial decision on the matter because the other branches simply do not have the authority to violate *jus cogens* rules of law.<sup>263</sup> Likewise, there cannot be differing pronouncements on the issue by different branches of government—those differing pronouncements would be void.<sup>264</sup> Although courts have used the political question doctrine to preclude adjudication of claims that fall within *jus cogens*, plaintiffs in those cases did not expressly rely on *jus cogens* but instead brought their claims under various laws and treaties.<sup>265</sup>

### c. *Self-Execution Doctrine*

This doctrine requires that for a treaty to be justiciable it must operate of itself, or be "self-executing."<sup>266</sup> Whether a treaty (or

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<sup>259</sup> *Id.* at 217.

<sup>260</sup> Parker & Neylon, *supra* note 142, at 447.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*; *The Paquete Habana*, 175 U.S. 677, 700-08 (1900) (ascertaining and applying customary international law governing the seizure of fishing vessels during war time); *Filartiga*, 630 F.2d at 880-885 (ascertaining a prohibition of torture by government officials under customary international law).

<sup>263</sup> Parker & Neylon, *supra* note 146, at 447.

<sup>264</sup> *Id.*

<sup>265</sup> In *Crockett v. Reagan*, the district court dismissed a suit by twenty-nine members of Congress challenging the legality of United States military aid to El Salvador under the War Powers Resolution. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983). Despite the fact that the challenged acts presented claims of *jus cogens* violations, the court held that it lacked judicially discoverable and manageable standards to decide the issues of the nature of the United States involvement in El Salvador. *Id.* at 898.

Likewise, in *Sanchez-Espinoza v. Reagan*, the court held the political question doctrine barred consideration of claims by members of Congress arising out of United States assistance to counter-revolutionary forces in Nicaragua. *Sanchez-Espinoza v. Reagan*, 770 F.2d 202 (D.C. Cir. 1985). The court found the political question doctrine barred consideration of their claim. *Id.* at 210.

<sup>266</sup> See, e.g., Stefan A. Riesenfeld, *The Doctrine of Self-Executing Treaties and United States v. Postal: Win at Any Price?*, 74 AM. J. INT'L L. 892 (1980).

clause thereof) is self-executing depends on whether it grants personal rights, parties lack discretion to fulfill obligations, and whether no further Congressional action is necessary to fulfill treaty obligations.<sup>267</sup> The self-execution doctrine does not bar a claim based on *jus cogens* because that norm is binding *independent* of any treaty. While the norm may be codified in a treaty, as are most human rights norms, that fact is irrelevant once the norm has achieved the status of *jus cogens*. In other words, even if there is no treaty on the subject, the *jus cogens* norm is binding and a justiciable claim exists. Likewise, if there is a treaty on point but it is not self-executing, a claim may still be brought because the rule of law exists independent of any treaty. That a norm has been codified, or has developed from a treaty that is not self-executing should not act to bar its justiciability.<sup>268</sup>

d. *Standing*

Standing requires a plaintiff to have suffered personal and individual harm and have a personal stake in the outcome of litigation in order to have standing to bring suit.<sup>269</sup> Those suffering human rights violations are sometimes unable to sue on their own behalf, for obvious reasons. The International Court of Justice recognized that a claim of a violation of a *jus cogens* rule of law need not be restricted to those who are suffering the violation.<sup>270</sup> Regardless, it is unfortunately true that potential plaintiffs actually harmed by exported banned pesticides would not be hard to find and would meet traditional standing requirements.

In conclusion, FIFRA § 17 cannot legitimize what no law ever can: violations of the right to life, right to health, and the right to family. Because FIFRA § 17 allows exports which violate the human rights of those that it kills or injures, it contravenes the most fundamental norms which bind and obligate all nations, and a court should therefore find it null and void.

2. Incorporating Human Rights Law in the Necessity Defense for Protesters

On October 18, 1989, at Velsicol's heptachlor-manufacturing plant in Memphis, Greenpeace activists protested the manufacture

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<sup>267</sup> See, Parker & Neylon, *supra* note 142, at 449; Riesenfeld, *supra* note 270, at 896-902.

<sup>268</sup> Parker & Neylon, *supra* note 142, at 449.

<sup>269</sup> See, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972).

<sup>270</sup> *Barcelona Traction, Light & Power Co. (Belg. v. Spain)* 1970 I.C.J. 4, 325 (Feb. 5) (Ammoun, J., separate opinion).

and export of the banned pesticide heptachlor. They broke into the plant, scaled a tower, and hung a banner proclaiming: "The Circle of Poison Starts Here—Velsicol: Stop Making Heptachlor."<sup>271</sup> The activists were arrested and charged with criminal trespass and malicious mischief.<sup>272</sup> In August 1993, six activists were arrested in New Orleans while protesting the shipment of banned pesticides from the Port of New Orleans. They were detained after they tried to blockade a freighter loaded with banned pesticides as it attempted to leave the port.<sup>273</sup> Four activists were arrested and charged with trespass after hanging a banner over the Mississippi River urging: "Break the Circle of Poison."<sup>274</sup>

It is possible that these and similar protesters could have successfully incorporated international human rights law into their defense of criminal charges arising from their protest activities. This section lays out the framework of such a necessity defense that could be employed by those protesting the manufacture and export of banned pesticides.

In its most simple terms, the common law principle of "necessity" authorizes laws to be broken when it is necessary to prevent a greater harm.<sup>275</sup> This principle originated in the English common law and has a long history in American jurisprudence. It is based on the principle that a person should not receive punishment when an act of violating the law prevents more harm than it causes.<sup>276</sup> A classic example of the principle is found in a California Supreme Court case in which a public official ordered the destruction of a number of houses to prevent the spread of a fire.<sup>277</sup> The destruction of these homes, the court ruled, was justified in order to prevent the imminent and greater harm of many more buildings burning. The court held that "[t]he right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society and the civil government."<sup>278</sup>

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<sup>271</sup> Tom Charlier, *Protest at Velsicol Cites Pesticide*, MEMPHIS COM. APPEAL, Oct. 20, 1988, at B1.

<sup>272</sup> Telephone conversation with Sandra Marquardt, Greenpeace (August 28, 1994).

<sup>273</sup> Mark Schleifstein, *6 Activists Blocking Ship Detained*, NEW ORLEANS TIMES-PICAYUNE, Aug. 17, 1993, at B3.

<sup>274</sup> *Hanging Tough*, NEW ORLEANS TIMES-PICAYUNE, Aug. 20, 1993, at B1.

<sup>275</sup> See, e.g., Robert Aldridge & Virginia Stark, *Nuclear War, Citizen Intervention, and the Necessity Defense*, 26 SANTA CLARA L. REV. 299 (1986).

<sup>276</sup> *Id.* at 301 (quotation and footnote omitted).

<sup>277</sup> See, e.g., *Surocco v. Geary*, 3 Cal. 69 (1853).

<sup>278</sup> *Id.* at 73.

The elements that a defendant must show in order to establish a necessity defense vary from jurisdiction to jurisdiction, but have generally been condensed into six main elements:

- 1) The defendant has a reasonable belief that a great harm is occurring or about to occur;
- 2) The harm to be prevented is likely to occur so soon that citizen intervention can reasonably be assumed necessary at the present time;
- 3) The harm defendant is attempting to prevent is greater than the injury resulting from defendant's intervention;
- 4) No reasonable traditional alternatives are available to stop or prevent the harm, or a history of futile attempts to use accepted means makes the results from those means, alone, illusory;
- 5) The accused has a reasonable belief that a causal relationship exists between the citizen intervention action and prevention of the harm; and
- 6) No evidence shows force or violence was used against other persons by the citizen intervention act.<sup>279</sup>

A number of states have codified this principle.<sup>280</sup> In other states it exists strictly in the common law.<sup>281</sup> Whether a defendant has established the elements of the necessity defense is a question for the jury.

When analyzing how the necessity defense can incorporate international human rights law and be used by pesticide protesters, a key distinction must be kept in mind. Acts of protest to prevent the greater harm of death and injury caused by pesticide poisoning needs to be distinguished from what is traditionally known as "civil disobedience." Civil disobedience is the refusal to obey an unjust or immoral law, on the belief that it is unjust or immoral. Classic examples of civil disobedience are sit-ins at segregated lunch counters and Rosa Park's refusal to sit at the back of the bus. These were acts of civil disobedience based on the protesters' belief that the law itself was unjust. "Civil resistance" or "citizen intervention," on the other hand, is not based on the belief that the particular law violated is unjust. Rather, it is the necessity principle in action: the

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<sup>279</sup> Aldridge & Stark, *supra* note 275, at 326.

<sup>280</sup> For example, the Illinois statute codifying the necessity defense states: "Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation, and reasonably believed such conduct was necessary to avoid a public or private injury which might reasonably result from his own conduct." ILL. ANN. STAT. ch. 720, para. 5-17 (Smith-Hurd 1993).

<sup>281</sup> For example, Massachusetts, Michigan, and Pennsylvania have all developed the elements of the necessity defense through their common law. FRANCIS ANTHONY BOYLE, *DEFENDING CIVIL RESISTANCE UNDER INTERNATIONAL LAW* 241 (1987).

law which is broken is recognized as valid, but it is violated to prevent a greater harm.

A number of defendants have successfully incorporated international law and the prevention of human rights violations as justifications for their actions. In *Chicago v. Streeter*,<sup>282</sup> individuals attempted to meet with the South African Consul to discuss that country's apartheid policy. The Consul refused to meet with the individuals, and they refused to leave the building. These individuals were then charged with trespass. They invoked the necessity defense, alleging their actions were necessary to prevent the greater harms of genocide, apartheid, torture, and other human rights violations.<sup>283</sup> The defendants were acquitted of all charges.<sup>284</sup> Similarly, defendants have successfully incorporated international human rights law into their necessity defense against various charges arising from acts protesting American military intervention in Central America<sup>285</sup> and the buildup and use of nuclear weapons.<sup>286</sup>

In the appropriate case, pesticide protestors could establish the elements of the necessity defense as follows:

1. Defendant Has a Reasonable Belief that a Greater Harm is Occurring or About to Occur

The harm to be prevented in the case of exports of banned pesticides are the significant human rights violations of those who are injured by the exported pesticide. A key question for this element is the reasonableness of the defendant's belief that a greater harm will occur. Given the abundant documentation of the deaths and injuries caused by the exports, such a belief would likely be found reasonable. WHO reports, numerous magazine and newspaper articles, books, doctoral dissertations, and Senate hearings have all documented that a significant harm is occurring worldwide.

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<sup>282</sup> *Chicago v. Streeter* (No. 85-108644) in the Circuit Court of Cook County, Illinois, discussed in *id.* at 223.

<sup>283</sup> *Id.* at 225-26.

<sup>284</sup> *Id.* at 10.

<sup>285</sup> In *People v. Jarka* (No. 002170) in the Circuit Court of Lake County, Illinois, defendants linked arms and sat down in the middle of a road in front of the Great Lakes Naval Training Center. Defendants were charged with mob action and resisting arrest. Defendants successfully argued that they were justified in their actions under the necessity principle, to act to prevent the greater harms of crimes against peace, crimes against humanity, violations of the U.N. Charter, violations of the O.A.S. Charter, and violations of the Geneva Convention. Defendants were acquitted. *Id.* at 9.

<sup>286</sup> See Aldridge & Stark, *supra* note 275, at 310-325.

## 2. The Harm to be Prevented is Likely to Occur

This element is present because the harm is ongoing. Millions of pounds of illegal pesticides are continually shipped from American ports, and a defendant would have no reason not to believe that injuries are occurring daily.

## 3. The Harm Defendant is Attempting to Prevent is Greater Than the Injury From Her Actions

This element could easily be established since the gravity of the human rights violations clearly outweigh the harm caused by a non-violent protest. The human rights violations involved in pesticide exports all involve bodily injury, including death. The harm caused by, for example, a trespass, is insignificant compared to the human rights violations caused by the exports. In the break-in of Velsicol's manufacturing plant in Memphis, it appears the activists could have established this element.<sup>287</sup>

## 4. No Reasonable Alternatives Are Available to Stop the Harm

The more imminent the harm, the "less likely the existence of an alternative course of action."<sup>288</sup> Traditional alternatives, such as seeking change in the law to prohibit such exports, have proved futile. As discussed above, attempts to legislatively prohibit illegal pesticide exports have failed for the past twenty years. Likewise, with such great profits at stake, the attempt to persuade American chemical companies to voluntarily end the exports is also futile.<sup>289</sup>

## 5. Defendant Has a Reasonable Belief That a Causal Relationship Exists Between The Citizen Intervention Act and Prevention of the Harm

Numerous examples of non-violent civil resistance which have helped change governmental policies bolster the reasonableness of a citizen's belief that civil resistance to stop illegal pesticide exports will help end the practice. Indeed, the United States in part arose from a significant act of citizen protest—the Boston Tea Party. Henry David Thoreau's refusal to pay taxes in protest of American

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<sup>287</sup> In a newspaper article describing the action, Greenpeace spokesperson Kenny Bruno "described Velsicol's continued production of heptachlor as a crime. If the multipurpose pesticide is unsafe in the United States . . . it is unsafe anywhere. . . 'We've committed a minor crime. . . ' Bruno said, referring to the protest actions. 'That's nothing compared to the crime that Velsicol is committing every day right here.'" Charlier, *supra* note 271.

<sup>288</sup> *People v. Pena*, 197 Cal. Rptr. 264, 272 (1983).

<sup>289</sup> After the Greenpeace activists hung a banner from Velsicol's plant in Memphis to protest the production and export of heptachlor, Velsicol spokesperson Donna Jennings stated that heptachlor was safe and its export proper. In a prepared response she stated that tests reveal that heptachlor "poses no threat to the international or domestic environment or community." Charlier, *supra* note 271.



involvement in the Mexican War helped bring attention to that situation and led to his classic Civil Disobedience. Massive citizen protests against the Vietnam war and the draft are credited in part with hastening the end of American involvement in Vietnam. Mohandas Gandhi's non-violent civil resistance movement led to India's self rule.<sup>290</sup>

Therefore, citizens who wish to commit acts of civil resistance to attempt to end the export of pesticides that are too dangerous to be sold in the United States can see a long history of the positive effects of citizen intervention. They could reasonably believe that public awareness is crucial to ending the export of illegal pesticides. Acts that draw public attention to this issue could reasonably be believed to help end the exports.

#### 6. The Citizen Intervention Was Nonviolent

This would be relatively easy to establish if the protest was, in fact, nonviolent. Witnesses can be on hand to function as observers. The acts of civil resistance could be videotaped, which would provide compelling documentation that the participants did not employ violence.

In conclusion, in the appropriate situation, the human rights violations caused by the pesticide exports could be incorporated into a defense against charges arising from pesticide protests. Human rights violations can also be addressed in international fora which are specifically in place to investigate and hear human rights complaints.

#### C. *Human Rights Complaints in International Fora*

This section explains the various procedures for filing a human rights complaint in international venues, such as with United Nations bodies or regional human rights entities. For a number of reasons, only those procedures by which an individual or a non-governmental organization (NGO) may be heard are discussed. First, any state so concerned about the harmful effects of imported pesticides could presumably protect its citizens simply by banning the pesticide imports. States that could have prohibited the import of American pesticides, but have not done so, are unlikely to try and achieve the same result through the process of utilizing human rights complaint procedures. Second, even if a State wished to ban such imports, but lacked the political will or power to do so, then presumably the same would hold true for that

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<sup>290</sup> Aldridge & Stark, *supra* note 275, at 345.

government filing a human rights complaint. Finally, the interests which profit from the export of pesticides which have lost a market in the United States have great power and motivation to influence the importing country's government to continue allowing the imports. It is unlikely that a rural, poor, and often uneducated foreign agricultural workers would have the power to defeat powerful interests in their country. In such instances, often the only hope for redress is through filing a complaint with an international tribunal or committee.

The complaints or petitions discussed in this section would be directed against the United States government for failing to take measures to prevent a pattern of ongoing human rights violations caused by the toxic pesticides it permits to be manufactured and exported from within its borders. The first part of this section describes treaty-based procedures established within the United Nations system, to allege violations of specific treaties. Second, non-treaty procedures within the United Nations system are described. Finally, procedures available under the regional systems established by the Organization of American States are discussed. Complaints could also be directed against the companies who manufacture and export the pesticides, those who carry the exports, and countries and officials who facilitate the exports along the way to their final destination.

1. Complaints Under the Optional Protocol to the International Covenant on Civil & Political Rights

This option is viable for an individual's complaint based on a violation of a human right found in the International Covenant on Civil and Political Rights. However, because the United States is not a party to the Optional Protocol,<sup>291</sup> it cannot be the subject of a complaint by this procedure. This procedure may still be used by those individuals in countries that are parties to the Optional Protocol<sup>292</sup> to bring a complaint against their country for the import of such pesticides.

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<sup>291</sup> Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 19, 1966, G.A. Res. 2200A, U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302 [hereinafter *Optional Protocol*].

<sup>292</sup> These countries are: Algeria, Argentina, Austria, Barbados, Bolivia, Cameroon, Canada, Central African Republic, Columbia, Congo, Costa Rica, Denmark, Dominican Republic, Ecuador, Equatorial Guinea, Finland, France, Gambia, Hungary, Iceland, Ireland, Italy, Jamaica, Luxembourg, Libyan Arab Jamahiriya, Madagascar, Mauritius, Netherlands, New Zealand, Nicaragua, Niger, Norway, Panama, Peru, Philippines, Portugal, Saint Vincent & the Grenadines, San Marino, Senegal, Spain, Suriname, Sweden, Trinidad & Tobago, Uruguay, Venezuela, Zaire, and Zambia.

Complaints under the Optional Protocol are filed with and heard by the United Nations Human Rights Committee, which was created by article 28 of the Covenant itself.<sup>293</sup> The Human Rights Committee is composed of eighteen human rights experts, who, while nationals of State parties to the Covenant, act independently from the instruction of their respective governments.<sup>294</sup>

A complaint, called a "communication," may be filed with the Human Rights Committee by "individuals subject to [the State party's] jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant."<sup>295</sup> The individual must allege she was personally harmed by the alleged violation.<sup>296</sup> The communication must allege a violation of a right contained in the International Covenant on Civil and Political Rights. As discussed above, the rights violated by hazardous pesticide exports are all guaranteed by the Covenant: the right to life,<sup>297</sup> the right to health,<sup>298</sup> and the right to family.<sup>299</sup>

A State Party can restrict the right of an individual to petition the Human Rights Committee by making a reservation at the time of ratification, and therefore, one should check to make sure the state to which the complaint is directed has not added such a reservation.<sup>300</sup> Furthermore, the Human Rights Committee cannot consider a communication if the same matter is also being considered under another international procedure.<sup>301</sup> Before a communication may be considered, the Human Rights Committee requires exhaustion of domestic remedies, unless such remedies are not available.<sup>302</sup>

Once a communication is declared admissible, the state to which the complaint is directed has six months to submit a written

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<sup>293</sup> International Covenant on Civil and Political Rights, *supra* note 115, article 28, at 56.

<sup>294</sup> *Id.* "The Committee shall be composed of nationals of the States Parties to the present Covenant who shall be persons of high moral character and recognized competence in the field of human rights, consideration being given to the usefulness of the participation of some persons having legal experience." *Id.* See generally Siân Lewis-Anthony, *Treaty-based Procedures for Making Human Rights Complaints Within the UN System*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 42 (Hurst Hannum ed., 2d ed. 1992).

<sup>295</sup> Optional Protocol, *supra* note 291, art. 1, 999 U.N.T.S. at 302.

<sup>296</sup> Lewis-Anthony, *supra* note 294, at 42.

<sup>297</sup> International Covenant on Civil and Political Rights, *supra* note 115, art. 6, at 53.

<sup>298</sup> *Id.* art. 7, at 53.

<sup>299</sup> *Id.* art. 23, at 55.

<sup>300</sup> Lewis-Anthony, *supra* note 294, at 44.

<sup>301</sup> Optional Protocol, *supra* note 291, art. 5, 999 U.N.T.S. at 303.

<sup>302</sup> Lewis-Anthony, *supra* note 294, at 45.

explanation or clarification of the matter to the Human Rights Committee,<sup>303</sup> and the author of the communication is usually given six weeks to respond to the State's written remarks with additional information or other remarks.<sup>304</sup> The Human Rights Committee decides the matter by majority vote and communicates its opinion in the form of "views" which it forwards to both parties.<sup>305</sup> The Committee's views do not legally bind the parties but the attention focused on the State's practice can be a catalyst for it to change its practices. Currently, the Human Rights Committee is following up with compliance monitoring procedures, and it may make further reports indicating non-compliance with its views.<sup>306</sup>

## 2. Non-Treaty Based Procedures Within the United Nations System

Given the United States' abysmal failure to ratify many of the major human rights treaties, it is fortunate that a number of non-treaty based procedures exist to hear and decide individuals' and NGO's human rights complaints based on violations of customary international law. These procedures exist under the auspices of the United Nations Human Rights Commission (Human Rights Commission).

The Human Rights Commission consists of fifty-three members who are elected by the Economic and Social Council of the United Nations (ECOSOC).<sup>307</sup> The members and their delegations operate on behalf of the state they represent.<sup>308</sup> A subsidiary commission of the Human Rights Commission which hears human rights complaints is the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (Sub-Commission), and it is composed of twenty-six human rights experts elected by the Commission.<sup>309</sup>

Initially, the Human Rights Commission lacked power to act on human rights complaints.<sup>310</sup> Instead, the newly-formed Human Rights Commission focused on establishing human rights norms through the drafting of the Universal Declaration, the Convention

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<sup>303</sup> Optional Protocol, *supra* note 291, art. 4, 999 U.N.T.S. at 303.

<sup>304</sup> Lewis-Anthony, *supra* note 294, at 47.

<sup>305</sup> *Id.* at 47-48.

<sup>306</sup> *Id.* at 48.

<sup>307</sup> Nigel S. Rodley, *United Nations Non-Treaty Procedures for Dealing with Human Rights Violations*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE, *supra* note 294, at 60.

<sup>308</sup> *Id.* at 60-61.

<sup>309</sup> *Id.* at 61.

<sup>310</sup> NEWMAN & WEISSBRODT, *supra* note 105, at 109.

on the Prevention and Punishment of the Crime of Genocide, and the two International Covenants.<sup>311</sup> In 1967, however, the Human Rights Commission requested such authority from ECOSOC.<sup>312</sup>

a. *1235 Procedure*

The Economic and Social Council granted the Human Rights Commission's request in resolution 1235,<sup>313</sup> and therefore the complaint procedure subsequently established became known as the "1235" procedure. This resolution established the authority of the Human Rights Commission and its Sub-Commission to examine information about situations which "appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."<sup>314</sup>

The 1235 procedure principally allows written and oral complaints during the sessions of the Commission and the Sub-Commission about situations involving substantial patterns of human rights violations.<sup>315</sup> These presentations are termed "interventions" and have resulted in lively public debate in the Commission and Sub-Commission on various human rights situations.

While the 1235 procedure does not result in a binding order, several positive developments can result from an intervention. By simply making a carefully thought out and well documented statement before the Commission or Sub-Commission, one can effectively focus public attention on the situation.<sup>316</sup> Because the meetings of the Commission and Sub-Commission are open to the public and involve debate, complaints before these bodies are often covered by the international media.<sup>317</sup> After such interventions, the Commission and Sub-Commission can adopt resolution regarding particular situations.<sup>318</sup> A Sub-Commission resolution on a matter can accomplish three things:

first, it can give political impetus to further action by the Commission; second, even if the Commission is unwilling to act, a

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<sup>311</sup> *Id.* at 111.

<sup>312</sup> C.H.R. res. 8 (XXIII), at 131, U.N. Doc. E/CN.4/940 (1967).

<sup>313</sup> E.S.C. res. 1235 (XLII), U.N. ESCOR 42d Sess., Supp. No. 1, at 17, U.N. Doc. E/4393 (1967).

<sup>314</sup> *Id.*

<sup>315</sup> NEWMAN AND WEISSBRODT, *supra* note 105, at 112-13; INDIAN LAW RESOURCE CENTER, INDIAN RIGHTS HUMAN RIGHTS: HANDBOOK FOR INDIANS ON INTERNATIONAL HUMAN RIGHTS COMPLAINT PROCEDURES 27 (1984) [hereinafter INDIAN RIGHTS HANDBOOK].

<sup>316</sup> INDIAN RIGHTS HANDBOOK, *supra* note 315, at 28.

<sup>317</sup> *Id.*

<sup>318</sup> Rodley, *supra* note 307, at 62.

Sub-Commission resolution represents the opinion of a formally-constituted UN body of human rights experts, which is not without independent influence; and, third, it may build up an official documentary record by requesting a report by the Secretary-General on the situation.<sup>319</sup>

The Sub-Commission seems an especially receptive arena for interventions alleging human rights violations caused by the export of banned pesticides because it has already demonstrated that it understands the link between environmental degradation and human rights. Two cases involving environmentally-caused human rights violations were successfully presented to the Sub-Commission.<sup>320</sup> In a report presented to the Sub-Commission's Forty-first Session in August 1989, a Sierra Club Legal Defense Fund report challenged aerial fumigation programs in Guatemala that were jointly carried out by the United States and Guatemala.<sup>321</sup> The report challenged the fumigation programs which used pesticides banned by the EPA in the United States, and their use in Guatemala which led to severe environmental harm and human injury.<sup>322</sup> The report documented that pesticides were "contaminating local ecosystems, including groundwater sources, rivers and estuaries, fish and wildlife, nearby villages, food crops, and farm animals."<sup>323</sup> In addition, studies revealed dangerously high levels of malathion in the milk of nursing Guatemalan mothers.<sup>324</sup> In 1987, fourteen people died from drinking pesticide-contaminated water and many crops were unsafe for human consumption due to the pesticide residue.<sup>325</sup> In this intervention, the documented injuries including deaths of villagers, their crops and livestock, was challenged as violating, *inter alia*, the right to life and security of the person, right to health and well-being, and the right to safe working conditions.<sup>326</sup>

In the other case, the Sierra Club Legal Defense Fund, intervening on behalf of the Huaorani people, challenged a proposal by the Conoco Oil Company to build an access road in the Yasuni National Park in Ecuador.<sup>327</sup> The proposed road would have di-

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<sup>319</sup> *Id.*

<sup>320</sup> See generally Melissa Thorne, *Establishing Environment as a Human Right*, 19 DEN. J. INT'L L. & POL'Y 301, 305-08 (1991).

<sup>321</sup> *Id.* at 306; see Parker & Thorne, *supra* note 67, at 1-2 (1989).

<sup>322</sup> Parker & Thorne, *supra* note 67, at 1-5.

<sup>323</sup> *Id.* at 14.

<sup>324</sup> *Id.* at 15-16.

<sup>325</sup> *Id.* at 25.

<sup>326</sup> *Id.* at 26-38.

<sup>327</sup> See Thorne, *supra* note 320, at 306; Karen Parker & Melissa Thorne, Oil Road

vided the territory of the indigenous Huaorani Indians, resulting in the destruction of their culture and way of life.<sup>328</sup> The proposed road construction was challenged as a violation of the Huaorani people's right to self-determination, right to be protected from genocide, as well as their individual right to life and security of person, and the right to health.<sup>329</sup>

The Sub-Commission further indicated that it understands the link between environmental damage and human rights violations. During that same session of the Sub-Commission, a representative of Friends of the Earth orally intervened and recommended the Sub-Commission set out "methods and mechanisms to be undertaken by the Sub-Commission and Commission regarding human rights and the environment."<sup>330</sup> Some Sub-Commission members decided that on the basis of information submitted to it, the Sub-Commission would study the relation between environmental problems and human rights.<sup>331</sup> The Sub-Commission requested the Secretary-General invite interested governments and organizations to submit information. In 1990, the Commission discussed the progress of the Sub-Commission and adopted a resolution approving the Sub-Commission's acceptance of the concept of environment as a human right and advocated the Sub-Commission to continue with this process.<sup>332</sup> In July 1994, the Special Rapporteur released her final report which thoroughly examines and recognizes the link between environmental degradation and the threat to human rights.<sup>333</sup>

b. *1503 Procedure*

While the 1235 procedure involves open public debate and consideration of human rights violations, there exists a method for the confidential consideration of human rights complaints. In 1970, the Economic and Social Council adopted resolution 1503,<sup>334</sup> which authorizes the Sub-Commission to appoint a working group of up to five of its members to meet in private to consider human rights complaints "with a view to bringing to the

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Construction through Ecuador's Yasuni National Park 1-4 (1989) (available from the Sierra Club Legal Defense Fund, San Francisco) [hereinafter *Oil Road Construction*].

<sup>328</sup> *Oil Road Construction*, *supra* note 327, at 1-4.

<sup>329</sup> *Id.* at 13-19.

<sup>330</sup> Thorne, *supra* note 320, at 307.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 307-08.

<sup>333</sup> See generally *Human Rights And The Environment*, *supra* note 199.

<sup>334</sup> E.S.C. Res. 1503, U.N. ESCOR, 48th Sess., Supp. No. 1A, at 8, U.N. Doc. E/4832/Add.1 (1970).

attention of the Sub-Commission those communications, together with replies of Governments, if any, which appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms."<sup>335</sup>

Under the 1503 procedure, a "communication" may be brought by an NGO or an individual, and must allege a "consistent pattern" of human rights violations. The working group will not consider communications alleging individual or singular instances of human rights violations.<sup>336</sup> The author of the complaint may request to remain anonymous, but in practice the subject government may learn the identity of the author throughout the course of the procedure.<sup>337</sup> The communication must document a consistent pattern of gross human rights violations—meaning more than a couple of incidents of serious violations, such as killing or torture. The communication must contain a factual description of the violations and must indicate the specific rights involved. It is best to specifically state the rights involved in terms of which specific articles in the Universal Declaration are at issue since the Working Group operates on an article-by-article basis.<sup>338</sup>

Further, under the procedure, the purpose of the communication must be stated, such as a request that "UN action bring about an end to the violation of human rights disclosed in this communication."<sup>339</sup> As with other international procedures, there must be a statement explaining how domestic remedies have been exhausted. In addition, the communication must not appear to be "manifestly politically motivated."<sup>340</sup>

The government which is the subject of a 1503 communication is often requested to respond to the charges in writing.<sup>341</sup> The Sub-Commission may discuss the matter with the government's representative in private, which sometimes results in the government changing its practice.<sup>342</sup> The secret nature of this procedure is intended to facilitate resolution of human rights complaints without the offending government losing face in public. However, it is unclear at this point whether the 1503 procedure would be effective in a challenge to the United States for permitting the ex-

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<sup>335</sup> *Id.*

<sup>336</sup> INDIAN RIGHTS HANDBOOK, *supra* note 315, at 32.

<sup>337</sup> Rodley, *supra* note 307, at 68.

<sup>338</sup> *Id.*

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 67.

<sup>341</sup> INDIAN RIGHTS HANDBOOK, *supra* note 315, at 32.

<sup>342</sup> *Id.*



port of illegal pesticides. The United States Congress has consistently failed to prohibit the export of banned pesticide, buckling for the most part to the powerful chemical industry. The possibility of a behind the scenes settlement, wherein the United States would quietly agree to stop manufacturing and exporting banned pesticides seems unlikely. As mentioned above, however, the human rights violations resulting from the exports were not part of the legislative debate. Framed in these terms, and directed to a new administration, such a complaint may have a chance, albeit a slim one.

3. Procedures Established by the Organization of American States

The OAS Inter-American Commission on Human Rights (Inter-American Commission) established a procedure for hearing human rights complaints. Such complaints must allege a violation of a right guaranteed under either the American Declaration or the American Convention. Since the United States has not ratified the American Convention, a complaint against the United States must allege violation of a right contained in the American Declaration.<sup>343</sup> The Inter-American Commission may also consider and act on a complaint alleging a violation human rights protected by customary international law.<sup>344</sup> All of the human rights violated by the pesticide exports discussed above are found in either the American Declaration or a part of customary international law. Therefore, the Inter-American Commission could properly find admissible a complaint against the human rights violations caused by the export of dangerous pesticides.

Once the Inter-American Commission finds a complaint admissible, it requests the government to which the complaint is directed to respond to the complaint. The author of the complaint then may reply to the government's submission.<sup>345</sup> The Inter-American Commission meets in Washington, D.C., and it may decide to hold private hearings on the complaint. It may also send members or representatives to make on-site investigations, including victim and witness interviews.<sup>346</sup> The parties may also submit written materials to keep the Inter-American Commission up to date on subsequent developments.

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<sup>343</sup> *Id.* at 38.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 39.

<sup>346</sup> *Id.* at 39-40.

The Inter-American Commission attempts to work out friendly settlements. However, if this is not possible, the Commission will prepare a report, which may include proposals and recommendations to remedy the situation. If the government does not act on the report, it will then be made public.<sup>347</sup>

The Inter-American Commission has also proved to be an effective forum to address human rights violations arising from environmental degradation. In the Yanomami case, discussed *supra*, the Inter-American Commission found that environmental destruction caused by development in the Amazon region would result in violations of the Yanomami people's right to life, self-determination, and culture.<sup>348</sup> In 1990, the Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatorian (CONFENIAE) petitioned the Inter-American Commission on behalf of the Huaorani people.<sup>349</sup> This case arose out of Conoco Oil Company's road construction and proposed oil development in the Ecuadorian Amazon rainforest, and was the subject of a 1235 complaint before the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities.<sup>350</sup> In January 1993 a Supplemental Report was filed on behalf of the Huaorani people, and the case is still pending before the Inter-American Commission.<sup>351</sup>

#### CONCLUSION

Every year, millions of pounds of pesticides that the EPA has found too dangerous to be sold in the United States are exported world-wide. These pesticides that cannot be legally sold in the United States cause great damage and injury to the people who come in contact with them. The export and use of banned pesticides cause significant violations of the rights to life, health, and family. The United States is obligated under international human rights law to respect these rights. It is further bound by its obligations under human rights law to bring an end to these exports. A number of arenas are available to challenge the export of banned pesticides. Numerous attempts have been made to legislatively

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<sup>347</sup> *Id.* at 40.

<sup>348</sup> See Yanomami Case, *supra* note 198.

<sup>349</sup> Petition Submitted to the Inter-American Commission on Human Rights by Confederacion de Nacionalidades Indigenas de la Amazonia Ecuatoriana (CONFENIAE) Against Ecuador (June 1, 1990) (available from the Sierra Club Legal Defense Fund, San Francisco).

<sup>350</sup> See *supra* notes 327-29 and accompanying text.

<sup>351</sup> Telephone interview with attorney Karen Parker (August 29, 1994). The supplemental report is available from the Sierra Club Legal Defense Fund, San Francisco.

prohibit the exports, although the fact that these exports cause serious human rights violations was not raised during the debate on various bills. Another arena to challenge the exports using international law is through domestic litigation. Finally, bringing human rights complaints in international fora could prove quite successful as various human rights tribunals and U.N. bodies begin to recognize the link between environmental degradation and human rights.