

4-1-1999

To the World Commission on Dams: Don't Forget the Law, and Don't Forget Human Rights-Lessons from the U.S.-Mexico Border

Raúl M. Sánchez

Follow this and additional works at: <http://repository.law.miami.edu/umialr>



Part of the [Human Rights Law Commons](#), and the [Immigration Law Commons](#)

Recommended Citation

Raúl M. Sánchez, *To the World Commission on Dams: Don't Forget the Law, and Don't Forget Human Rights-Lessons from the U.S.-Mexico Border*, 30 U. Miami Inter-Am. L. Rev. 629 (1999)

Available at: <http://repository.law.miami.edu/umialr/vol30/iss3/7>

ARTICLE

TO THE WORLD COMMISSION ON DAMS: DON'T FORGET THE LAW, AND DON'T FORGET HUMAN RIGHTS—LESSONS FROM THE U.S.-MEXICO BORDER

RAÚL M. SÁNCHEZ¹

| | | |
|------|---|-----|
| I. | INTRODUCTION | 630 |
| II. | CREATION OF THE WORLD COMMISSION ON DAMS | 632 |
| III. | WATER PROBLEMS ON THE U.S.-MEXICO BORDER: AN ALLEGORY | 637 |
| IV. | OVERVIEW AND CHRONOLOGY OF THE EL CUCHILLO CASE STUDY..... | 640 |
| | A. <i>Overview of the El Cuchillo Dam Project</i> | 640 |
| | B. <i>The Environmental Impact of the El Cuchillo Dam Project</i> | 642 |

1. The author (A.B. Princeton University, A.M. Stanford University, J.D. Harvard University), is currently Associate Professor of Law and Director of the Inter-American Legal Studies Program at St. Mary's University School of Law in San Antonio, Texas. Portions of this Article are based on a conference paper, entitled "Building Dams and Damning People in the Texas-Mexico Border Region: Mexico's El Cuchillo Dam Project", presented by the author on May 25, 1998. The conference, *Water Crises in the Southwest*, was organized by Professor Charles Miller, Professor of History and Chairman of the History Department at Trinity University, in San Antonio. The author gratefully acknowledges receipt of editorial suggestions and moral support from colleagues, Professors Emily Hartigan, Reynaldo Valencia, John Teeter and Monica Schurtman; and the editorial support from the staff of the *University of Miami Inter-American Law Review*. The author extends a special acknowledgement to Professor Barbara Bader Aldave, Former Dean of St. Mary's University School of Law. Those with comments may email the author: <sanchezr@law.stmarytx.edu>.

| | | |
|-------|---|-----|
| V. | TRANSBOUNDARY HARMS AND INTERNATIONAL ENVIRONMENTAL LAW | 647 |
| A. | <i>Transboundary Harms</i> | 647 |
| B. | <i>International Environmental Law</i> | 647 |
| VI. | ADOPTING A HUMAN RIGHTS PERSPECTIVE | 649 |
| VII. | CASE-STUDY CONCLUSIONS | 654 |
| VIII. | FINAL OBSERVATIONS FOR THE WCD | 656 |

I. INTRODUCTION

In recent years, dams around the globe have become extremely contentious battlegrounds with respect to their benefits, on the one hand, and their social, environmental, and economic costs on the other hand. Gone are the days when most people did not question the lavish praise heaped on gargantuan "pharaohnic projects"² which purported to "conquer" nature. Across all continents, persons negatively affected by dams and anti-dam advocates are increasingly challenging the building and financing of new dams and the continued operation of existing dams. Governments, dam-building corporations and industry associations, multi-lateral financing institutions, and other proponents continue to insist that the benefits of dams outweigh costs, but find themselves embattled and beleaguered around the world. Under unrelenting pressure from anti-dam advocates, the World Bank, the biggest multi-lateral financier of dams, and the World Conservation Union (IUCN), the world's largest network of conservation organizations and agencies, established the independent World Commission on Dams (WCD) with the intention of seeking a global consensus on dams.

The WCD has a two-year mandate "to review the development effectiveness of dams," "assess alternatives for

2. This phrase, translated by the author, is commonly used by speakers of Spanish (*proyectos faraónicos*) and Portuguese (*projetos faraônicos*) to refer to massive infrastructure projects, including dams, which are of a scale reminiscent of the Egyptian pharaohs.

water resources and energy development,” and “develop internationally-accepted standards, guidelines and criteria for decision making in the planning, design, construction, monitoring, operation and decommissioning of dams.”³ The WCD has embarked on an extensive study of specific dam sites and diverse dam-related issues, which will result in a comprehensive commission report.

This Article seeks to contribute to the debate surrounding international dams and, specifically, to the WCD’s study in two ways. First, this Article calls attention to a lacuna in the WCD’s Work Programme,⁴ namely, omission of domestic and international legal issues, impacts, and reforms as principal areas of investigation for the WCD. Second, based on study of the El Cuchillo Dam Project in the border region shared by the United States and Mexico, this Article underscores the need to utilize a human rights perspective when studying the impacts of dams on populations affected by dams and on the environment.

Part II of this article consists of a brief overview of the history of the WCD, its mandate and its Work Programme and points out the need for the WCD to include a specific and deliberate focus on domestic and international legal issues in its Work Programme. The remainder of the Article argues in favor of adopting a human rights perspective in considering the impacts of dams on affected populations, particularly across international borders. Specifically, Parts III-VII discuss issues which concern the building of dams in the border region shared by the United States and Mexico, environmental impacts across the international border, relevant legal analyses under international environmental law and international human rights law, and other related issues. Part III presents an allegorical metaphor, based on the children’s game of musical chairs, as a useful framework for understanding the substantive ideas and arguments which follow in Parts IV-VII. Part IV presents a brief factual and theoretical overview and chronological review of the El Cuchillo Dam Project. Part V summarizes relevant legal

3. See WCD Mandate (last modified Jan. 25, 1998) <<http://www.dams.org/default.asp>>. All WCD documents mentioned in this Article, and many other WCD-related documents, including press reports on the WCD, can be accessed through the WCD website <<http://www.dams.org>> [hereinafter WCD website].

4. See WCD Work Programme, WCD website *supra* note 3. This article utilizes this particular British spelling to reflect usage in WCD documents.

analyses of the El Cuchillo Dam Project under international environmental law. Part VI presents an alternative legal analysis from a human rights perspective. Part VII draws conclusions from the case study of the El Cuchillo Dam Project. Finally, Part VIII offers a few final observations for the WCD.

II. CREATION OF THE WORLD COMMISSION ON DAMS

In March 1997, a first-ever international conference of populations affected by dams gathered in Curitiba, Brazil, and initiated the idea of reviewing the record of large dams on a worldwide scale.⁵ One month later, in Gland, Switzerland, an unprecedented gathering of critics and supporters⁶ lent its unanimous support to the establishment of an international independent commission to review the social, economic and environmental costs and benefits of the world's dams and to make relevant recommendations.⁷ After some controversy over the balance of commission membership between anti- and pro-dam commissioners,⁸ the WCD finally began its work on February 16, 1998.⁹ According to a leading anti-dam activist and

5. See International Rivers Network, *Declaration of Curitiba: Affirming the Right to Life and Livelihood of People Affected by Dams* (last modified Mar. 18, 1997) <<http://www.irn.org/programs/curitiba.html>> [hereinafter *Rivers website*].

6. The IUCN and the World Bank convened a workshop of 37 diverse stakeholders in Gland, Switzerland, which included "representatives from governments, civil society organizations, international financial institutions, and the private sector." History of the WCD, WCD website, *supra* note 3.

7. See Patrick McCully, *Independent Commission to Review World's Dams*, 12:3 WORLD RIVERS REV. (June 1997) <<http://www.irn.org/pubs/wrr/19706/19706cover.html>>. See also IUCN & The World Bank Group, *Large Dams: Learning From the Past Looking at the Future*, (Workshop Proceedings Gland, Switz., Apr. 11-12, 1997), WCD website, *supra* note 3.

8. Dam critics accused the World Bank of appointing a majority of commissioners who favored dams. See Leyla Boulton, *Hitch for International Dams Commission*, FIN. TIMES, Nov. 24, 1997.

9. The WCD Commissioners are (for detailed descriptions, see WCD website, *supra* note 3): Kader Asmal, WCD Chair, Minister of Water Affairs and Forestry Republic of South Africa; Lakshmi Chand Jain, WCD Vice Chair, Indian High Commissioner to South Africa; Donald J. Blackmore, Chief Executive of the Murray-Darling Basin Commission in Canberra, Australia; Joji Carino, Executive Secretary of the International Alliance of Indigenous-Tribal Peoples of the Tropical Forest (native of the Philippines); José Goldemberg, Professor at the University of São Paulo, Brazil; Judy Henderson, Chair of Oxfam International, Board member of the Environmental Protection Agency of NSW, Australia, and Greenpeace International; Göran Lindahl, President and Chief Executive Officer of ABB Asea Brown Boveri, Ltd., a global engineering company with headquarters in Zurich, Switzerland; Deborah Moore, Senior Scientist at the Environmental Defense Fund; Medha Patkar, Social Scientist and founder of Narmada Bachao Andolan (Struggle

WCD commissioner:

The [WCD] is a major landmark in the struggle of the dam-affected and other deprived and exploited people across the world, . . . [and has] the great responsibility of conducting an unbiased scientific inquiry into the social, environmental, economic and political issues related to water and energy; and into the alternative paradigms of natural resource management within the framework of sustainability and justice.¹⁰

A pro-dam WCD Commissioner similarly observed:

I am sure [the WCD] will enhance our understanding of the role of reservoirs in sustainable development of water resources, and provide criteria and guidelines to harmonize future dam projects with the environment and the needs of the people directly affected by them.¹¹

The WCD has a two-year mandate which calls for "in-depth, independent analysis of the effectiveness of existing large-scale dams in meeting a broad range of development goals—economic, social and environmental."¹² The WCD's two overarching goals are: 1) to review the development effectiveness of dams and assess alternatives for water resources and energy development, and 2) to develop internationally-accepted standards, guidelines and criteria for decision-making in the planning, design, construction, monitoring operation and decommissioning of dams.¹³

to Save the Narmada River) in India, a non-governmental organization which is campaigning against the construction of large dams on the Narmada River; Thayer Scudder, Professor of Anthropology at the California Institute of Technology; Shen Guoyi, Director-General of the Department of International Cooperation in the Ministry of Water Resources, People's Republic of China; Jan Veltrop, formerly with the Harza Engineering Company, and formerly Chair of the U.S. Committee on Large Dams and President of the International Commission on Large Dams; and Achim Steiner, WCD Secretary-General, ex-officio WCD Commissioner.

10. WCD website, *supra* note 3 (statement of Medha Patkar, WCD Commissioner and leader of India's Narmada Bachao Andolan (Struggle to Save the Narmada River)).

11. WCD website, *supra* note 3 (statement of Wolfgang Pircher, Honorary President of the International Commission on Large Dams (later replaced by Jan Veltrop as WCD Commissioner)).

12. World Commission on Dams, World Commission to Study Grand Coulee Dam, Feb. 21, 1999 (press release) available in <<http://www.dams.org>>.

13. See WCD Mandate, *supra* note 3.

These goals are derived from a comprehensive set of objectives which were elaborated and accepted by the participants at the 1997 meeting in Gland, Switzerland.¹⁴

In brief, the WCD's Work Programme¹⁵ calls for: in-depth case studies of eight to ten large dams in diverse global regions;¹⁶ a limited analysis of 150 additional dams, based on existing data; analysis of social, economic, and environmental issues; assessment of options available, services provided, institutional capacity, and decision-making processes; consultations with interest groups involved in the international dams debate; and consideration of documentary submissions from interested parties, including academics.

Work Programme activities will produce three work products: a global review of the development effectiveness of dams; an options assessment regarding decision-making processes; and internationally acceptable criteria and guidelines for decision-making in all aspects of dam building and utilization. Based on these three outputs, WCD Commissioners will produce a final report by mid-2000, which "will determine policy options to guide future decision-making over dams and their alternatives."¹⁷

14. The gathering in Gland recommended that the mandate of the proposed WCD would be:

- to access the experience with existing, new and proposed large dam projects so as to improve (existing) practices and social and environmental conditions;
- to develop decision-making criteria and policy and regulatory frameworks for assessing alternatives for energy and water resources development;
- to evaluate the development effectiveness of large dams.
- to develop and promote internationally acceptable standards for the planning, assessment, design, construction, operation and monitoring of large dam projects and, if the dams are built, ensure affected peoples are better off;
- to identify the implications for institutional, policy and financial arrangements so that benefits, costs and risks are equitably shared at the global, national and local levels;
- to recommend interim modifications of existing policies and guidelines, where necessary, and promote "best practices".

See IUCN & The World Bank Group, *supra* note 7.

15. The summary description of the WCD Work Programme which follows is from documents which appear in the WCD's website, *supra* note 3.

16. Tentatively, the WCD expects to study dams in the following countries: Pakistan, Zambia/Zimbabwe, Thailand, United States, China, Brazil, Norway, Russia, Turkey, India, and South Africa. See WCD Work Programme, WCD website, *supra* note 3.

17. World Commission on Dams, World Commission to Study Grand Coulee Dam, Feb. 21, 1999 (press release) available in <<http://www.dams.org>>.

Glaringly, the WCD's Work Programme does *not* focus on legal issues related to dams and their impacts. It is possible and, perhaps, even likely that the WCD is planning to collect data on legal issues in the context of its thematic reviews and case studies listed in the Work Programme. However, the absence of legal issues as a specified principal focal point in the Work Programme appears to indicate that an understanding of the relevance of domestic and international law to the dams debate is a marginal concern, at best.¹⁸

The WCD would be negligent, and the WCD's final report and recommendations would be deficient, if the WCD fails to directly analyze and address relevant legal issues in its review of the world's dams. No dam ever has been built in a legal vacuum; the relevance and importance of domestic and international law is indisputable and well documented with respect to dams, in particular, and global water issues, generally.¹⁹ Furthermore, to the extent that dam-building efforts have been accused of being particularly insensitive to impacts on dam-affected populations, the WCD should pay particularly close attention to legal issues which concern protection, enforcement and exercise of the legal rights of individuals in connection with dam-building activities. The WCD would be well advised to undertake a specific thematic review on domestic and international legal issues, and revise its case-study methodologies to ensure collection of relevant legal data and analysis of the relevant legal issues.

A legal thematic review and all case studies should address the following ten questions, at least, with respect to all dam projects:

1) Were effective legal mechanisms in place under domestic law, including appropriate substantive law and procedures, to ensure that all affected populations:

—had effective access to project information?

18. One anti-dam advocate who was present at Gland indicated to the author that the absence of specific legal issues in the WCD's Work Programme probably was an oversight which was largely attributable to the absence of lawyers among the anti-dam advocates active in the struggle to establish the WCD. In fact, probably very little thought has been focused, as of yet, on how the eventual WCD recommendations might be transformed into law.

19. See generally, SCARCITY OF WATER: EMERGING LEGAL AND POLICY RESPONSES (Edward H. Brans et al. eds., vol. 40, 1997).

—were effectively consulted?

—effectively participated in project planning, approval and implementation activities?

—were adequately compensated when appropriate?

—had access to mitigation measures?

—benefited from relocation efforts?

2) Did all affected populations have effective access to legal mechanisms for contesting violations of individual rights alleged to have been occasioned by project-related activities?

3) Did all affected populations have effective access to effective legal counsel?

4) What violations of individual rights, under domestic law or international human rights law, may have occurred and/or were alleged to have been occasioned by project-related activities?

5) What legal challenges were commenced against any project-related activity, who commenced them, and what were the outcomes?

6) Did any alleged violations of multi-lateral lending institutions rules and/or regulations in connection with any project-related activities lead to, or contribute to violations of law or individuals' legal rights?

7) What violations of international environmental law or principles may have occurred in connection with project-related activities?

8) Specifically with respect to projects which resulted in environmental impacts across national borders, did the national governments of all affected states abide by their respective obligations under international law?

9) What legal reforms, on the domestic and/or international levels, are needed?

10) What reforms should be instituted within the multilateral lending institutions to ensure that all project-related activities are undertaken in accordance with all relevant legal domestic and international requirements?

These ten questions reflect many of the legal issues central to the dams debate; however, they are merely suggested as a

beginning. The WCD should develop a comprehensive methodology for obtaining information in the legal area as it has done with respect to other crucial areas. Specific and deliberate inclusion of a line of legal inquiry in the WCD's Work Programme will contribute to a more complete and comprehensive investigation and final report. Moreover, critical legal analysis now by the WCD may help illuminate the path later for transforming the WCD's recommendations into binding law.

III. WATER PROBLEMS ON THE U.S.-MEXICO BORDER: AN ALLEGORY

A young child attended a new summer camp, and quickly realized that traditional camp games were played under curious conditions. Games had odd rules; rules were changed without warning, or were ignored altogether. Winning or losing had more to do with how powerful or dominant a camper or a group of campers became. The rules appeared to be intended for preventing just results, instead of providing order and resolving disputes.

For example, the child observed how campers played an odd version of "musical chairs." The campers were divided into two teams: the Red-White-and-Blue Team (the "Blue Team") and the Red-White-and-Green Team (the "Green Team"). The teams walked around a row of chairs to music that was suddenly turned off, as in the traditional game. However, instead of taking away chairs round after round to eliminate players, the number of chairs remained the same and players were removed if they outnumbered the chairs. Additionally, the chairs were divided between blue chairs and green chairs, and Blue Team players could sit only on blue chairs and Green Team players could sit only on green chairs. The winners were the players of either team who slowly forced out their own team members, by force, persuasion or bribery, and acquired control over the greatest number of chairs by the end of the game.

Each team was supervised by a camp counselor, either the Blue Counselor or the Green Counselor, who was responsible for resolving disputes by enforcing camp rules among fellow team members and between the teams. In fact, the two counselors were close friends, and usually preferred to resolve problems to satisfy their own interests and not those of the campers they

were supposed to represent. The Camp Director also was available to resolve disputes which the counselors could not handle or preferred not to resolve. However, only the counselors, by mutual agreement, could take disputes to the Camp Director. The Camp Director would not listen to complaints from individual campers or initiate an investigation on their own.

Throughout the summer, each team also was free to organize their members and handle their respective chairs as they pleased as long as they did not disturb the enjoyment of the game for the opposing team. Almost immediately, powerful cliques formed which dominated each team. These ruling cliques soon eliminated members from their respective teams and acquired as many chairs as they could.

As the summer progressed, new children arrived at the camp and players were added to the Green Team, who requested a loan of chairs from the Blue Team. The members of the Blue Team were opposed to such a loan, but the Blue Counselor allowed the loan to be made and the Green Team painted over a number of their chairs with blue paint. The Green Team promised to return the borrowed chairs before the Blue Team might need them.

At the end of the summer and just before the camp was concluded, the number of blue and green players far exceeded the number of chairs in the game of musical chairs, and the Green Team had not yet begun to return the chairs it had borrowed. In addition, numerous players on either team now controlled numerous chairs. Now, when the music stopped after each round, several players from each team frequently were eliminated. Even more players were thrown out of the game as individual players increased their control over more and more chairs.

Many members of each team became extremely angry and unhappy with members of the opposing team and fellow team members. The only members of either team who remained happy were the players who still occupied a chair or, in fact, several chairs. After each round, the happy players, whose numbers were quickly dwindling, were increasingly surrounded by very disgruntled players who had been dispossessed of their chairs, and could no longer play the game.

Eventually, the "chair-less" campers protested. At a minimum, they demanded that they should have the right to

take their complaints directly to the Camp Director without the intercession of the Blue or Green Counselor. The campers already had observed that the counselors often resolved disputes and struck deals behind closed doors which resulted in the arbitrary ejection of players from their chairs and the game.

The campers were especially interested in having a system which would "keep an eye" on the camp counselors, prevent them from acting so arbitrarily, and provide rules which would treat every camper the same, regardless of their power or wealth. In the end, the campers knew that they still would have to struggle against the domination of fellow campers who would try to take over as many chairs as possible. Nevertheless, a set of rules which the campers could enforce directly through the Camp Director might maintain a minimum level of fairness in the game of musical chairs. A struggle for a more equitable distribution of chairs would await another day.

In summary, the foregoing story tells the tale of a single community (the U.S.-Mexico border region) which is arbitrarily divided between the Blue Team (the United States) and the Green Team (Mexico) who are in a struggle for a single resource: chairs (water). The division between blue and green chairs also is a formal and arbitrary one as in the case of the bi-national treaties signed by the United States and Mexico to apportion the waters of the Colorado, Tijuana, and Rio Grande Rivers and their respective tributaries. Contrary to camp rules (international law), the teams often are subjected to detrimental acts which originate with the opposing team (the country across the U.S.-Mexico border). Individual campers (residents of the border region) cannot complain directly to the Camp Director (an international legal tribunal). Instead, they must rely on camp counselors (national governments) whose decisions often do not reflect primary concern with the interests of the campers (border residents). Power and wealth eventually determine who wins the struggle within each team (country) and between the teams (countries). Nevertheless, the campers still would like to secure the rule of law and accountability over the arbitrary discretion of the counselors. The campers need the right (a human right) to invoke and enforce camp rules (international law) through direct access to the Camp Director (an international legal tribunal). The foregoing parentheticals are intended to signal the connection

between the metaphorical allegory and the narrative which follows.

IV. OVERVIEW AND CHRONOLOGY OF THE EL CUCHILLO CASE STUDY²⁰

This Article presents a case study of the El Cuchillo Dam Project as an example of why national governments and domestic and international environmental law cannot be expected to remedy environmental harms in the U.S.-Mexico border region. The case study also serves as the basis for this Article's advocacy for the recognition of an enforceable human right to a healthy environment.

A. *Overview of the El Cuchillo Dam Project*

The El Cuchillo Dam Project consists of the El Cuchillo Dam, a forty-three meter dam on the San Juan River, and its related infrastructure which includes pumping stations, over sixty miles of enclosed aqueduct, sewage collection and treatment facilities, and water metering installations.²¹ The El Cuchillo Dam, located approximately forty-eight miles south of the Rio Grande River

20. Portions of Part IV appeared in an article previously published by the author: *Mexico's El Cuchillo Dam Project: A Case-Study of Nonsustainable Development and Transboundary Environmental Harms*, 28 U. MIAMI INTER-AM. L. REV. 425 (Winter 1996-97).

The author acknowledges the contributions of the Center for Border Studies and the Promotion of Human Rights (*Centro de Estudios Fronterizos y de Promoción de los Derechos Humanos, A.C.*) in Reynosa, Tamaulipas, and its President, Arturo Solis, for helping to piece together the story of the El Cuchillo Dam Project, and fighting tirelessly for the human rights of the people of Tamaulipas. See CENTRO DE ESTUDIOS FRONTERIZOS Y DE PROMOCIÓN DE LOS DERECHOS HUMANOS, A.C., *LA CONSTRUCCIÓN DE LA PRESA 'EL CUCHILLO' Y EL IMPACTO EN EL MEDIOAMBIENTE EN TAMAULIPAS* (Oct. 1996) (hereinafter CEFPRODHCAC).

For a detailed policy discussion from a domestic Mexican perspective, see Ismael Aguilar Barajas, *Interregional Transfer of Water in Northeastern Mexico: The Dispute Over El Cuchillo*, 39 Nat. Resources J. 65 (1999).

21. This factual description was taken from the following environmental impact statements filed with the Inter-American Development Bank: SERVICIOS DE AGUA Y DRENAJE DE MONTERREY, COMISIÓN AGUA POTABLE Y DRENAJE DE MONTERREY, MANIFIESTO DE IMPACTO AMBIENTAL (MODALIDAD GENERAL): PROYECTO DE ABASTO DE AGUA DEL SISTEMA REGIONAL CHINA-MONTERREY (Oct. 1989); COMISIÓN NACIONAL DEL AGUA, PROYECTO DE ABASTO DE AGUA DEL DISTRITO REGIONAL CHINA-MONTERREY, NUEVO LEÓN: MANIFESTACIÓN DE IMPACTO AMBIENTAL MODALIDAD INTERMEDIA (Oct. 1990).

near the town of China, Nuevo León, possesses a usable storage capacity of 676 million cubic meters.²² Five pumping stations convey the water from the El Cuchillo Dam to the Monterrey area, a distance of approximately fifty-one miles.²³ The Project also includes additional infrastructure built to facilitate water delivery and metering to the end-users.²⁴ The Project's objective is to increase water availability for residential and industrial purposes in the Monterrey area.²⁵

Additional major elements of the El Cuchillo Project include a sewage and wastewater collection system in an area northeast of Monterrey.²⁶ The effluent is supposed to be treated in three new treatment plants and pumped into the Pesquería River, which flows out of Nuevo León and, once in Tamaulipas, flows into the San Juan River approximately twenty miles upstream of Sugar Lake.²⁷ The Project's design appears to have anticipated substantially reduced water levels in Sugar Lake, because the Project also provided for the building of a new canal for Reynosa to pump its drinking water directly from the Rio Grande River.²⁸ Apparently, Project planners always intended that the inhabitants of Reynosa no longer would drink the relatively clean water from Sugar Lake which had been pumped to the city via the old Guillermo Rhode Canal.

The El Cuchillo Dam Project was completed at breakneck speed during the six-year administration of President Carlos Salinas de Gortari (Salinas), who assumed office in January 1988.²⁹ During Salinas' presidency, the Project was designed, environmental impact studies were written, financing was requested and received from the Inter-American Development

22. See COMISIÓN NACIONAL DEL AGUA, *supra* note 21, at 2.

23. See *id.* at 4.

24. See SERVICIOS DE AGUA Y DRENAJE DE MONTERREY, *supra* note 21, at 9-10.

25. See *id.* at 9.

26. See *id.*

27. See *id.*

28. See *id.*; Letter from Miguel E. Martínez, Manager, Regional Operations Department II, Inter-American Development Bank, to Professor Raúl M. Sánchez, St. Mary's School of Law 2 (April 19, 1996) (on file with the *University of Miami Inter-American Law Review*).

29. See *Mexican City to Get Potable Drinking Water*, TORONTO STAR, Aug. 28, 1993, at F18; Antonio Jaquez, *Con Carlos en la Presidencia, Raul y Enrique Tejeiron la Red de Relaciones que Llevaron la Prosperidad "a Todos": Politica, Negocios, Creditos y Favores, en el Toma y Daga de los Salinas con los Magnatias de Monterrey*, INFOLATINA, Feb. 5, 1996.

Bank (IDB), and construction was completed.³⁰ A comparable project in the United States would have been in litigation for at least ten years simply to confirm the content of the environmental impact statement!³¹ In October 1994, key portions of the Project remained unfinished, including the sewage treatment plants which were to send treated effluent down the Pesquería and San Juan Rivers to Sugar Lake. Nevertheless, with considerable pomp and fanfare, Salinas inaugurated the El Cuchillo Dam.³² Shortly thereafter, the floodgates were closed, the reservoir behind the dam began to fill, and a slow motion disaster began to unfold downstream as the life-sustaining waters of the San Juan River stopped flowing into Tamaulipas.

B. The Environmental Impact of the El Cuchillo Dam Project

According to environmental impact assessments written by Mexican agencies and delivered to the IDB, the building of the Project was not expected to cause any problems downstream of the El Cuchillo Dam.³³ Possible impacts in Tamaulipas or Texas were not addressed in the assessments, and IDB experts did not raise any red flags. Presumably, the Mexican documents were accepted on their face. Despite the positive assessments, the El Cuchillo Dam has caused severe social and environmental harms in the Mexican state of Tamaulipas and the U.S. state of Texas.

In the fall of 1994, the people and ecosystems downstream of the El Cuchillo Dam, particularly in Tamaulipas, began to suffer the devastating impacts of the closing of the dam's floodgates—severe water shortage.³⁴ To make matters worse, a devastating drought which has laid siege to northern Mexico, beginning in 1993 to the present day, has severely aggravated the downstream

30. See Maggie Rivas, *Mexican Dam to Address Several Problems*, DALLAS MORNING NEWS, July 18, 1993, at 18A.

31. For examples of U.S. projects involving long-term studies, see: Steven P. Garmisa, *Impact Statements Protect the Public*, CHI. SUN-TIMES, July 30, 1997, at 62; Herbert A. Sample, *Auburn Dam Backers: Foes to Pour it on as Key Vote Nears*, SACRAMENTO BEE, June 9, 1996, at A1; D. Kevin Dunn & Jessica L. Wood, *Substantive Enforcement of NEPA Through Strict Review of Procedural Compliance: Oregon Natural Resources Council v. Marsh in the Ninth Circuit*, 10 J. ENVTL. L. & LITIG. 499, 501 (1995).

32. See *Thirsty Mexican States at War Over Water*, SAN ANTONIO EXPRESS, Jan. 8, 1996, at E12.

33. See sources cited *supra* note 21.

34. See *Thirsty Mexican States at War Over Water*, *supra* note 32.

water shortage.³⁵ The coincidence of the start up of the El Cuchillo Dam and the regional drought provided Mexican authorities with a convenient excuse: the severe water shortage in Tamaulipas was caused by nature. Undoubtedly, the drought has made matters much worse, however, but for the El Cuchillo Dam, reservoir water levels would be higher and not as contaminated.

IDB officials also adhere to the same "natural" explanation about the drought. However, as late as the spring of 1996, they privately acknowledged that the new sewage treatment plants were not completely operational and that untreated effluent had been pumped into area water bodies since 1993.³⁶ Nevertheless, IDB officials refuse to acknowledge, or assume any liability for funding a large infrastructure project that failed to take into account all negative impacts on the environment and large segments of the population. IDB representatives insist that Mexican authorities effectively consulted affected populations, but have not provided any proof of such consultations.³⁷

The water shortage caused by the El Cuchillo, and exacerbated by the drought, has devastated northern Tamaulipas. Approximately 300 families which earned a living from fishing in Sugar Lake have lost their livelihood.³⁸ The farmers of the region have virtually no irrigation water, and have lost their crops over several seasons. Estimates of the number of hectares of affected crop lands range as high as 70,000, and estimates of the number of farming families range as high as 20,000.³⁹ Local merchants and owners of rustic motels, who

35. See Isaac Levi & Dave Harmon, *Drought Chokes Northern Mexico: Dry Spell Inflicts Blow to Wounded*, AUSTIN-AM. STATESMAN, May 26, 1999, at D1; Philip True, *Five-year Dry Spell Drains Hopes*, SAN ANTONIO EXPRESS, Aug. 9, 1998, at A1; *Recrudescen Sequias Pais*, INFOLATINA, Apr. 29, 1999. See generally Symposium: *Coping with Scarcity in the Rio Grande/Rio Bravo Drainage Basin: Lessons to be Learned from the Droughts of 1993-1996*, 39 NAT. RESOURCES J. 1 (1999).

36. Telephone interview with a representative of the Department of Water Treatment (*Dirección de Saneamiento*) of Water and Drainage Services of Monterrey (*Servicios de Agua y Drenaje de Monterrey*) (June 29, 1998). The Department contends that three treatment plants were operational by January 1996, but admits that, as of June 1998, the three plants were still functioning below 70% of capacity. See *id.*

37. In the summer of 1996, the author met with several staff members of the Inter-American Development Bank. At that meeting, IDB officials promised to provide such proofs, see Letter from Miguel E. Martínez, *supra* note 28, but have never delivered.

38. See CEFPRODHC, *supra* note 20.

39. See Enrique Pedroza, *Acaba la Presa El Cuchillo con el Potencial Agrícola de 70 mil Hectareas en Tamaulipas*, INFOLATINA, Jan. 5, 1999 (quoting Libaldo Garza Moreno,

earned a living from recreational fishermen, especially from the United States, were ruined financially.⁴⁰ Boat docks and ramps which previously gave direct access to lake waters now led to expanses of mud flats, and later just to scrub brush because what remained of the lake was now hundreds of meters away.⁴¹

Many Tamaulipan residents became environmental refugees;⁴² they sold their instruments of trade, boarded up their homes, and moved in search of a better life.⁴³ Some moved to other Mexican cities along the border; others slipped over the international border to work as undocumented laborers in the United States.⁴⁴ Residents who have remained in the Sugar Lake area report that colonies of friends and relatives are living in San Antonio and Houston, Texas.⁴⁵ Some individuals may have died trying to flee north, either by drowning in the Rio Grande River or traversing the harsh countryside of south Texas.⁴⁶

Residents in the Sugar Lake area also report confidentially that a substantial number of local residents who can no longer fish or farm have turned to a more lucrative trade: drug trafficking.⁴⁷ Area residents are familiar with convenient routes which lead up to the U.S. border and fording points across the Rio Grande River. Such knowledge is invaluable to drug dealers

PRI Deputy).

40. See CEFPROD HAC, *supra* note 20.

41. In December, 1995, the author traveled to the affected area and interviewed many residents [hereinafter Resident Interviews].

42. For a general discussion of environmental refugees, see: Norman Meyers, *Environmental Refugees: A Crisis in the Making*, 3:4 PEOPLE & THE PLANET (1994); Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 355-59 (1993). See also, Jim Motavalli, *Exodus: Rise in Refugees Due to Environmental Degradation*, E, Nov. 21, 1996, at 30; David Douglas, *Environmental Eviction: Migration from Environmentally Damaged Areas*, CHRISTIAN CENTURY, Sept. 11, 1996, at 839; Nolan Fell, *Outcasts from Eden*, NEW SCIENTIST, Aug. 31, 1996. For arguments that the environmental refugees may qualify for asylum in the United States, see Jessica B. Cooper, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENVTL. L.J. 480 (1998).

43. See Resident Interviews, *supra* note 41.

44. See *id.*

45. See *id.*

46. See John Ward Anderson, *Death on the Frontier: U.S. Border Crackdown Pushes Illegal Migrants Onto Treacherous Ground*, WASH. POST, May 27, 1998, at A1; Michael E. Young, *A Crossing to Bear: Mexican Braves Deadly Heat Along Border to Enter U.S. in Search of Work*, DALLAS MORNING NEWS, Sept. 7, 1998, at 33A; Rick Lyman, *Heat Making Illegal Border Crossings Deadlier*, N.Y. TIMES, Aug. 5, 1998, at A1; Dane Schiller, *Perilous Journey: Immigrants Say Dangers are Worth Chance for Better Life*, SAN ANTONIO EXPRESS, Aug. 2, 1998, at A1.

47. See Resident Interviews, *supra* note 41.

who need local guides or agents to move drug shipments northward to the United States. Such reports are consistent with increased seizures of drug shipments reported by U.S. police officials along the Texas-Tamaulipas border in recent years.⁴⁸

By April 1996, severe drought conditions had spread to Texas. Unauthorized pumping (known as "diversions") on the part of Mexican farmers, became more widespread, and patience and tolerance on the part of U.S. water users evaporated.⁴⁹ Growers and ranchers in South Texas became extremely vocal about what they considered to be the theft of their water by Mexican farmers.⁵⁰

Additional widespread negative economic and environmental impacts of the El Cuchillo Dam Project can be gleaned from press reports, field inspections and field interviews. The precise extent of such impacts must remain largely anecdotal and speculative because neither the Mexican government nor the U.S. government acknowledges that the El Cuchillo Dam Project has caused such impacts. Badly needed environmental assessments have not been undertaken. Mexican authorities insist that the ongoing drought, which has plagued northern Mexico for several years, is solely to blame. U.S. officials are, or pretend to be, ignorant of the consequences north of the Rio Grande River. Admittedly, harm in the United States has not yet been as serious as in Tamaulipas, but it probably has been significant, and will likely grow in the future.

The El Cuchillo Dam created a formerly non-existent reservoir, and caused a water shortage which dried up area lakes

48. See generally, Thaddeus Herrick, *Crime on Border Crunches Courts; Federal Focus on Immigration, Drugs Swamps Justice System*, HOUSTON CHRON., June 20, 1998, at A1 (discussing increased drug trafficking, among other crimes, along U.S.-Mexico border); *Huge Mexican Drug Hauls*, DAILY TELEGRAPH, June 3, 1998, at 19 (discussing drug seizures on main drug routes to United States in Tamaulipas); S. Lynne Walker, *Drug Traffic a Way of Life Along Border: Money, Narcotics Flow Freely in Many Towns*, SAN DIEGO UNION-TRIB., Feb. 28, 1998, at A1, (documenting the pervasiveness of drug trafficking in border towns); Jodi Bizar, *Mexican Border Mayors Seek Help in Drug Battle*, SAN ANTONIO EXPRESS-NEWS, Oct. 1, 1996, at A5.

49. See Robert Bryce, *Modern-Day Rio Grande Water Wars*, L.A. TIMES, June 4, 1995, at A13; Nancy Cleeland, *It's a Tale of Two Nations: Mexico Fields Wither as Water Runs Short But U.S. Crops Thrive*, SAN DIEGO UNION-TRIB., June 26, 1995, at A1.

50. See sources cited *supra* note 49; Mark Smith, *Bush Will Remind Mexico to Honor Water-Sharing Accord*, HOUSTON CHRON., May 31, 1996, at A27; Letter from Lower Rio Grande Valley Water District Manager's Association to The Honorable John Bernal, Commissioner, International Boundary & Water Commission (Apr. 17, 1996) (on file with the University of Miami Inter-American Law Review).

and rivers and contaminated other bodies of water. Such results likely affected the habitats of many plant and animal species in the United States and Mexico. Similarly, erosion of dry river and lakebeds, and previously irrigated croplands has increased and groundwater levels in the United States and Mexico have been lowered. Contaminated drinking water likely has caused increased incidents of disease among local inhabitants.⁵¹

Amazingly, the environmental degradation caused by the El Cuchillo Dam Project has not caused pause among dam-proponents. In November 1997, announcement was made of the construction of a new dam, the Las Blancas Dam, on the Alamo River, another Mexican tributary of the Rio Grande River.⁵² The new dam, a response to the political pressure generated by the farmers of the Twenty-Sixth Irrigation District and other water users in Tamaulipas, is to be built in the vicinity of the city of Ciudad Mier, Tamaulipas, which is located only a few miles from the U.S.-Mexico border.⁵³ The Las Blancas dam and a new aqueduct will convey water to Sugar Lake for the benefit of the Twenty-Sixth Irrigation District, however, once again, local populations and elected officials have not been consulted,⁵⁴ and it remains to be seen whether appropriate environmental impact studies were, or will be, conducted. Thus, the problems of the El Cuchillo Dam Project may be repeated once again very soon, but this time only a stone's throw from the U.S.-Mexico border.

51. For example, high incidences of gastro-intestinal diseases, cholera, hepatitis and dengue fever have been reported in northern Tamaulipas and south Texas. See generally, Susan Duerksen, *Tuberculosis: When Disease Knows No Boundary*, SAN DIEGO-UNION TRIB., Dec. 28, 1997, at A16; U.S. Department of Health & Human Services, *Dengue Fever at the U.S.-Mexico Border, 1995-1996*, MORBIDITY & MORTALITY WKLY REP., Oct. 4, 1996, at 841.

52. See *Trasvasan 95 Millones de M3 de la Presa el Cuchillo a Tamaulipas*, INFOLATINA, Nov. 13, 1997.

53. See *id.*

54. This assertion is based on public statements made by a representative of a local ranchers' association and the mayor of Ciudad Mier in the presence of the author on June 27, 1998.

V. TRANSBOUNDARY HARMS AND INTERNATIONAL ENVIRONMENTAL LAW

A. *Transboundary Harms*

U.S. and Mexican governmental authorities seem willing to tolerate many environmental harms,⁵⁵ which originate on the opposite side of the Rio Grande River (transboundary harms), and the many violations of international environmental laws which result from such transboundary harms. For residents of the border region on either side of the international border, obtaining domestic legal remedies in the courts of the neighboring country for transboundary harms is only a theoretical possibility. In fact, U.S. and Mexican border residents have virtually no access to immediate or effective legal remedies for the transboundary environmental harms which are common in the region.⁵⁶

A transboundary environmental harm usually begins as a domestic harm in violation of domestic laws on one side of the international border. Upon crossing the border, the environmental harm also frequently results in violations of international legal norms, especially in the area of international environmental law. The willingness of the governments of the United States and Mexico to overlook many transboundary environmental harms, the related violations of international law, and their own respective domestic environmental harms, evidences the two governments' complicity in fouling the environment in the border region, notwithstanding the human costs and ecological impacts.

B. *International Environmental Law*

Traditional norms of international law offer no meaningful protection or remedy to the victims of the El Cuchillo Dam Project, especially to those within Mexico's borders. Generally recognized norms address responsibility for environmental harm

55. The term "environmental harm" is used throughout this paper to mean negative impacts related to the environment.

56. See generally, Carolyn King, *Open "Borders"—Closed Courts: The Impact of Stanguik v. Shiley, Inc.*, 28 U.S.F. L. REV. 1113 (1994).

only in cases of transboundary pollution. In such a context, an international duty arises from the principle that a state should not use its territory in a manner that could harm other states. This principle, *sic utere tuo ut alienum non laedas* (one should use his own property "in such a manner as not to injure that of another"⁵⁷) and commonly called the principle of "good neighborliness," is supported by judicial decisions, the practice of states, treaties, and the work of international legal scholars.⁵⁸

Individuals harmed by environmental mismanagement, such as the El Cuchillo Dam Project, cannot rely on the principle of good neighborliness to remedy their injuries for several reasons.⁵⁹ First, as a threshold matter, such individuals would encounter great difficulty in establishing that the Mexican state is directly or indirectly responsible for the alleged harms. While the government of Mexico is unquestionably responsible for building the El Cuchillo Dam Project, the responsibility for the sequence of consequences which followed is legally unclear. Furthermore, Mexico undoubtedly would continue to defend itself on the basis that the environmental problems have been caused by the ongoing drought, and not the dam. To demonstrate that Mexico should be held accountable under international law for the transboundary harms caused by El Cuchillo, a critic has the ominous burden of proving: 1) attribution of the offending act or omission to the government of Mexico; 2) that the government of Mexico breached an international duty; 3) that a casual relationship existed between Mexico's conduct and the injury claimed; and 4) material damage.⁶⁰ Even if complainants could establish the foregoing elements, no effective legal mechanism exists to adjudicate or settle any claim, and access to affordable legal counsel is extremely limited. Third, international legal tribunals, as currently constituted, are severely limited in their ability to advance the development of an international liability regime.⁶¹

Similarly, individuals harmed by environmental misconduct cannot rely upon the International Court of Justice (ICJ) for

57. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 807 (2d ed. 1990).

58. Schwartz, *supra* note 42, at 357-58. See also AMERICAN BAR ASS'N, TRENDS IN INTERNATIONAL ENVIRONMENTAL LAW 15-46 (Harv. L. Rev. eds., 1992).

59. See Schwartz, *supra* note 42, at 358.

60. See *id.*

61. See *id.* See also AMERICAN BAR ASS'N, *supra* note 58, at 21-28.

relief because only states have standing to bring an action before the ICJ. Thus, individuals and/or associations of individuals would have to convince the U.S. government to espouse their claims. Obtaining the support of a state is highly unlikely, however, because states are usually reluctant to pursue such claims for fear, in part, of relinquishing any portion of their sovereignty to binding third-party arbitration and inviting complaints about their own environmentally degrading conduct.⁶²

In the case of the El Cuchillo Dam Project and related transboundary environmental harms which have affected U.S. territory, the U.S. government has not manifested any detectable concern about such impacts, and is not likely to be interested in upsetting bilateral relations by filing a complaint against Mexico in the ICJ. In addition, the precise source and content of relevant international law to be applied by international tribunals remains unclear.⁶³ Thus, international law is not a viable mechanism for relief to those injured by environmental harms.

VI. ADOPTING A HUMAN RIGHTS PERSPECTIVE

A human rights approach⁶⁴ to state⁶⁵ actions or omissions which lead to environmental harms offers a promising alternative for securing state accountability. Under international human rights law, the individual is a subject, as well as an object, of international law. Therefore, individuals whose human rights have been violated can seek redress on their own behalf (theoretically, at least) without having to rely on the intercession of their own government, as is required in all other areas of international law, including the environmental area.

Until the signing of the Universal Declaration of Human Rights (UDHR)⁶⁶ in 1948, and subsequent developments in the

62. See Schwartz, *supra* note 42, at 358.

63. See *id.* at 359.

64. A "human rights approach" refers to rights imbued in the individual and recognized under international law as "human rights." For an overview of the human rights field, see Burns H. Weston, *Human Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 14-31* (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992).

65. Unless used in the context of referring to individual "state" governments (e.g., Texas, Tamaulipas or Nuevo León), the term "state" is used throughout this Article to refer to all agents and agencies of government.

66. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3rd Sess.,

human rights arena, the field of international law stood exclusively as the province of nation-states. Today, the sub-field of human rights stands as an exception in the larger field. With respect to human rights, the individual is now a subject as well as an object of international law. As such, the individual may seek to assert and vindicate directly individual universal rights through several international legal mechanisms, and, where possible, in domestic tribunals.

The Stockholm Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration),⁶⁷ signed in 1972, recognized the connection between human rights and environmental protection. It states, in part, "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being..."⁶⁸ This reference to a healthy environment invokes fundamental human rights but does not unequivocally proclaim a right to a healthy environment. The human rights directly threatened by environmental degradation include rights to life, health, privacy, adequate working conditions, political participation and information. United Nations documents since the Stockholm Declaration have used such an indirect approach, thereby avoiding an explicit claim of a right to a healthy environment.⁶⁹

Persuasive legal arguments support the view that a right to health and a right to a healthy or healthful environment are fundamental human rights.⁷⁰ The legal argument goes as follows: governments are responsible for protecting all human rights; if governments permit and even promote activities which threaten human life, such actions may be labeled as human rights violations, and the responsible governments may directly be called to account as human rights violators. Such a strategy is a moral, legal, and practical necessity.

pt. I, at 71, U.N. Doc. A/810 (1948).

67. Stockholm Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14/Rev. 1, at 3 (1972), *reprinted in* 11 I.L.M. 1416 (1972).

68. *Id.* at pt. I(1).

69. See Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 111-12 (1991).

70. See *id.*

A right to a healthy environment may be understood as a so-called "third generation" or "solidarity" right, which is not universally accepted as an enforceable right.⁷¹ The "first generation" is usually understood as referring to civil and political rights. The "second generation" concerns rights to economic and social welfare.⁷² The second and third generation rights are neither universally nor uniformly accepted as binding and affirmative on the state.

A right to enjoy and use a clean, ecologically balanced and protected healthy environment which is comprised of its physical, social and cultural elements adequate for individual well being and dignity and collective development, can be seen as necessarily underlying all other rights.⁷³ Nevertheless, the lack of an explicit international proclamation of the right to a healthy environment has fueled debates in an extensive human rights legal literature as to whether and/or to what extent a right to a healthy environment actually exists, and how such a right might be enforced and further developed. Some legal scholars insist that such a right does not exist or ought not exist.⁷⁴ Others take the opposite position, but debate whether such a right exists as a human right or as a component of environmental protection. Even among those scholars who agree that a right to a healthy environment is a human right, debates persist as to the scope of the substantive and procedural aspects of such a right.⁷⁵ In addition, some believe that, as a human right, a right to a healthy environment exists as a corollary to otherwise recognized rights, such as civil and political liberties, while others prefer the view that such a right exists as an independent right.

This Article does not seek to add substantially to these theoretical debates. Instead, this study of the El Cuchillo Dam

71. See generally, Jennifer A. Downs, Note, *A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right*, 3 DUKE J. COMP. & INT'L L. 351 (1992).

72. See Weston, *supra* note 64, at 18-21.

73. See Mark Allan Gray, *The International Crime of Ecocide*, 26 CAL. W. INT'L L.J. 215, 223-24 (1996).

74. See generally, INTERNATIONAL ENVIRONMENTAL LAW ANTHOLOGY 68-69 (Anthony D'Amato & Kirsten Engel, eds., 1996) (quoting Gunther Handl, *Human Rights and Protection of the Environment: A Mildly 'Revisionist' View*, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT, (Antonio Augusto Cancado Trindade ed. 1992).

75. See Shelton, *supra* note 69, at 105.

Project is intended to convince the reader that if a right to a healthy environment is not currently recognized, resources should be marshaled and efforts should be directed at recognizing such a right. Furthermore, existing legal instruments and mechanisms should be utilized, or new ones developed, to enforce the right.

The most direct and immediate avenue to secure an enforceable human right to a healthy environment in the United States and Mexico would be for the governments to sign and ratify the American Convention on Human Rights (American Convention)⁷⁶ and the related Additional Protocol of the American Convention in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador).⁷⁷ The latter specifically recognizes a right to a healthy environment.⁷⁸ Furthermore, Mexico and the United States could permit actionable claims to be brought in domestic courts under these treaties. In addition, the Inter-American Commission for Human Rights and the Inter-American Court of Human Rights also could entertain complaints under the two agreements.

Other opportunities to create a legally enforceable right to a healthy environment abound. For example, the United States and Mexico also could amend existing agreements to include a human right to a healthy environment⁷⁹ or, the United States and Mexico could pursue new instruments and/or new

76. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

77. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador), *opened for signature* Nov. 17, 1988, 28 I.L.M. 156 (not yet in force) (hereinafter Protocol). In fact, the government of Mexico already signed the American Convention and the Protocol of San Salvador. U.S. President Jimmy Carter signed the American Convention on behalf of the United States. However, the United States is not a signatory of the Protocol of San Salvador.

78. Article 11 states in relevant part: "Everyone shall have the right to live in a healthy environment and to have access to basic public services." *Id.* art. 11, 28 I.L.M. 165.

79. For example, the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10827 (La Paz Agreement), could be amended to narrowly provide for such a right only in the U.S.-Mexico border region, covering 100 kilometers on either side of the international border, an area already designated by the agreement as environmentally significant. More ambitiously, the United States, Mexico and Canada could seek to amend the North American Agreement on Environmental Cooperation, Sept. 14, 1993, U.S.-Can.-Mex., 32 I.L.M. 1480, to provide for an enforceable human right to a healthy environment or to provide for an environmental court.

institutions.⁸⁰ For example, a regional or global Convention on Human Rights and the Environment could be created. A Draft Declaration of Principles on Human Rights and the Environment currently exists to provide a guide.⁸¹ Another option is for the United States and Mexico to approve a constitutional amendment for a right to a healthy environment.⁸² The enforcement of a right to healthy environment in U.S. state constitutions also offers a viable possibility.⁸³ These suggestions represent only a few viable options.⁸⁴

80. For example, a North American Court of Environmental Justice, or a U.S.-Mexico Border Region Environmental Law Court, or an International Environmental Court could be established. An Italian jurist, Amadeo Postiglione, who is now a Justice on the Italian Supreme Court, first suggested the idea for an international environmental court. For a collection of relevant documents and an extensive bibliography, see COMITÉ ARGENTINO PRO TRIBUNAL INTERNACIONAL DEL AMBIENTE, *LA CAMPANA A FAVOR DE LA CORTE INTERNACIONAL DEL AMBIENTE* (1995). See also <<http://www.greenchannel.com/icef/>> (the website of the International Court of the Environment Foundation). For the most recent discussions, including the proposition of the Permanent Court of Arbitration as the appropriate forum for settling international environmental disputes, see Dr. Alfred Rest, *The Indispensability of an International Court for the Environment*, a working paper presented at an Environmental Law Conference titled, *Is There a Need for a Body to Resolve International Environmental Disputes? Why, What and How?*, convened at George Washington University, Washington, D.C., Apr. 15-17, 1999.

81. See Neil A.F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487 (1996).

82. A draft amendment has been circulating since 1990. One version of the "Green Amendment," as some have dubbed it, states, "The natural resources of the nation are the heritage of present and future generations. The right of each person to clean and healthful air and water, and to the protection of the other natural resources of the nation, shall not be infringed upon by any person." Coalition of Legislators for Environmental Action Now, *The Constitutional Amendment for Environmental Rights* (visited December 16, 1999) <<http://www.law.pace.edu/env/summary.html>>. See also Eric T. Freyfogle, *Essay on the Bill of Rights, Should We Green the Bill?*, 1992 U. ILL. L. REV. 159 (1992); Rodger Schlickeisen, *Protecting Biodiversity for Future Generations: An Argument for a Constitutional Amendment*, 8 TUL. ENVTL. L.J. 181 (1994). Such an amendment to Mexico's national constitution also has been proposed. See Rodrigo J. Prudencio & Martin Edwin Andersen, *Perspective on Mexico: A Green Revolution in Politics*, L.A. TIMES, Aug. 22, 1994, at B7.

83. The Supreme Court of Montana recently ruled that such a right exists under the Montana state constitution. See *Montana Envtl. Info. Center v. Department of Envtl. Quality*, 1999 Mont. 248 (1999). See generally Mary Ellen Cusack, *Judicial Interpretation of State Constitutional Rights to a Healthful Environment*, 20 B.C. ENVTL. AFF. L. REV. 173 (1993).

84. For a discussion of several proposals, see Joshua P. Eaton, *The Nigerian Tragedy: Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment*, 15 B.U. INT'L L.J. 261, 305-307 (1997).

The governments of the United States and Mexico probably would oppose the creation of a legally enforceable human right to a healthy environment. The current legal framework and particularly the lack of available remedies with respect to transboundary environmental harms, as demonstrated by the El Cuchillo Dam Project, permit maximum discretion to the two governments regarding environmental degradation. Private industry would lobby hard against such rights as it already has done in other areas.⁸⁵

Despite the likely resistance, a human right to a healthy environment, enforceable through effective, independent legal mechanisms, should be a goal of those governments. Such rights could provide remedies for environmental degradation throughout the globe. Thus, the WCD should advocate for the creation of a legally enforceable human right to a healthy environment.

VII. CASE-STUDY CONCLUSIONS

The construction of a dam, as an act of government, may be debatable in terms of government policy, but human rights violations committed in connection with the construction of a dam are not debatable. The building of a dam may even constitute a crime or many crimes.⁸⁶ Specific human rights violations can be discerned by examining every aspect of the dam's design, approval, financing, construction and operation.

Many share the blame for El Cuchillo. The Project represents a case study where the forces of globalization have coincided with traditional porkbarrel and special interest politics in the apportioning of an increasingly precious commodity—water.

85. For example, a coalition of U.S. industries is currently waging a campaign against the ratification of the Kyoto Protocol of the United Nations Framework Convention on Climate Change. *See generally*, Geeta Sharma-Jensen, *Business Leader Assails Global Climate Treaty: Head of Coalition Critical of How Kyoto Pact Deals with Developing Nations*, MILWAUKEE J. SENTINEL, Jan. 19, 1998, at 6; Dan Balz, *Defining the Kyoto Treaty Debate May Be Most Crucial Political Test*, WASH. POST, Dec. 14, 1997, at A10.

86. For arguments of why construction of a dam might be an international crime, see Eaton, *supra* note 84.

In recent years, knowledgeable observers have commented that wars in the next millennia will be fought over water.⁸⁷ It is difficult to imagine, or preferable not to imagine, the United States and Mexico ever going to war again. However, bi-national water issues undoubtedly will add serious strain to the bi-national relationship. The United States and Mexico are making some efforts toward bi-national cooperation in the area of rational water management and environmental protection in the U.S.-Mexico border region. However, both governments also are willing to play fast and loose with human rights and environmental protections when such actions suit them and powerful business interests in both countries, with the complicity of the neighboring government. As a result, many border residents on both sides of the international border are condemned to live in an increasingly polluted environment.

Both countries are hemispheric leaders and the United States is the only global superpower. Both nations could take aggressive roles in the hemisphere and in the world in advancing the cause of sustainable development and human rights. However, border residents cannot wait for their respective governments to do the right thing. Legal protection of an individual human right to a healthy environment is desperately needed *now* in the U.S.-Mexico border region.

The people of the U.S.-Mexico border region are already acutely aware that the actions and inactions of their respective governments speak for themselves. For example, as recently as July 4, 1998, a *New York Times* writer observed:

The North American Free Trade Agreement was supposed to provide the border area with billions of dollars to address air and water pollution. . . .

87. "We already have 40 percent of the world's population living on rivers shared by more than one country. Many of the wars in this century were about oil, but wars of the next century will be over water." Barbara Crossette, *Severe Water Crisis Ahead for Poorest Nations in Next 2 Decades*, N.Y. TIMES, Aug. 10, 1995, at A1 (quoting Ismail Serageldin, Vice President for Environmentally Sustainable Development, World Bank). See also, Terry Collins, *And Not a Drop to Drink? Too Many People and Not Enough Fresh Water has all the Potential to be a Global Crisis*, TORONTO SUN, Apr. 3, 1999, at 17; Michael S. Serrill, et al., *Wells Running Dry: Rampant Waste and Pollution of our Most Vital Resource Create a Crisis that Could Lead to Future Armed Conflicts*, TIME, Nov. 1997, at 16.

But nearly five years after NAFTA was ratified, not a single environmental project financed by the [North American Development Bank] is in operation. To the more than 10 million people living along the border of the United States and Mexico, the money promised for the region's serious environmental problems is too long and too little in the coming.

....

No one disputes that environmental conditions along the border are making people sick. On the Texas side, rates of hepatitis, diarrheal diseases and gastroenteritis—all commonly linked to water and sanitation problems—are two to six times the state average. And conditions are worse on the Mexican side.⁸⁸

Ultimately, the entire population of each country should strive to ensure that their respective governments, in fact, represent their fundamental interests without also condemning human beings elsewhere to an environmental hell. In the meantime, demanding and struggling for an enforceable human right to a healthy environment may have to suffice. If not, when the music stops sometime in the future, very, very few people will find a chair upon which to sit.

VIII. FINAL OBSERVATIONS FOR THE WCD

The WCD will issue a final report with recommendations which, optimistically, will reflect a genuine international consensus on many issues concerning dams. However, the WCD also should directly address how the individual rights of affected populations can and should be protected, *notwithstanding* the existence of such an international consensus. Until the WCD's recommendations are converted into binding legal norms, the WCD's final report will be merely an aspirational instrument of best practices. The WCD's final report will be little solace to anyone whose human rights are trampled upon by the construction of another dam, which may or may not meet international standards.

88. Sam Howe Verhovek, *Pollution Puts People in Peril on the Border with Mexico*, N.Y. TIMES, July 4, 1998, at A1.

The WCD should recommend the adoption of measures which ensure transparency and accountability in government and multi-lateral funding agencies. Presently, individuals can hold governments and those that fund dam projects accountable by enforcing and defending their individual rights only if: legal grounds exist for bringing a claim; effective, independent judiciaries exist to entertain and fairly adjudicate a claim; and affected persons have access to effective legal counsel who can help bring a claim. Deficiencies exist in all of these areas in most countries, as illustrated in part by the case study about the El Cuchillo Dam Project. Thus, any endorsement by the WCD the right to a healthy environment as a human right would be a pharoahnic step in the right direction.