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Don Anton - Is the Environment a Human Rights Issue?

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Chapter 1
Is The Environment A Human Rights Issue?*

I. Introduction

The environment is man's first right [*]

Over the course of the last 60 years, first International Human Rights Law, and then International Environmental Law, developed as distinct fixtures of the International Law curriculum. Almost from the emergence of contemporary International Environmental Law in the late 1960s, a relationship between the two areas was strongly perceived. In 1972, at the first major multilateral conference on the environment in Stockholm, the world proclaimed in the Stockholm Declaration that: "[t]he protection and improvement of the human environment is a major issue which affects the well-being of peoples. . . ." Report of the United Nations Conference on the Human Environment, DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, U.N. Doc. A/CONF.48/14/Rev.1, p. 3. The Stockholm Declaration went further and solemnly declared, in the language of human rights, that: "[m]an 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, and he bears a solemn responsibility to protect and improve the environment for present and future generations." Id., Principle 1, at p 4.

In the 1980s, the linkage between human rights and the environment recognized in the non-binding Stockholm Declaration was written into international law. The African Charter on Human Rights, adopted in Nairobi on June 27, 1981, proclaimed that "All peoples shall have the right to a general satisfactory environment favorable to their development." Article 24, African Charter on Human and Peoples Rights, AFRICAN CHARTER ON HUMAN AND PEOPLES RIGHTS, OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in, 21 I.L.M. 58 (1982). A more detailed formulation of the rights was included in the Additional Protocol to the American Human Rights Convention on Economic and Social Rights, adopted in San Salvador on November 17, 1988 (hence the Protocol of San Salvador), considers the rights of individuals as well as the duty of states in this field:

> 1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

[*] Ken Saro-Wiwa, *Stand by Me and the Ogoni People,* 10 Earth Island Journal 35 (No. 3, 1995). Saro-Wiwa was hanged, along with eight others, in Nigeria on November 10, 1995, ostensibly for incitement to murder. However, most believe that the defendants were put to death for raising environmental concerns about oil development by Royal Dutch Petroleum in their ancestral Ogoni lands. For a compelling account of the events, see IKE OKONTA & ORONTO DOUGLAS, WHERE VULTURES FEAST: SHELL HUMAN RIGHTS AND OIL IN THE NIGER DELTA (2003).

> 2. The States Parties shall promote the protection, preservation, and improvement of the environment.

Article 11, ADDITIONAL PROTOCOL TO THE AMERICAN CONVENTION ON HUMAN RIGHTS IN THE AREA OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS, O.A.S.T.S. 69, reprinted in, 28 I.L.M. 156 (1989).

A. Tension or Complementarity?

The assertions in the Stockholm Declaration sparked an early academic search for jurisprudential underpinnings for linkages between human rights and the environment. A number of texts and articles made their appearance in which the international legal case was made for "the human rights of individuals to be guaranteed a pure, healthful, and decent environment." W. Paul Gormley, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION 1, 233 (1976). Today, the protection of the environment and promotion of human rights are increasingly seen by many as intertwined, complementary goals. For Christopher Weeramantry, a former Vice-President of the International Court of Justice, this is self-evident. In his separate opinion in the *Case Concerning the Gabčíkovo-Nagymaros Project* Judge Weeramantry wrote:

> The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

Case Concerning the Gabčíkovo-Nagymaros Project, [1997] ICJ Rep. 7, 91–92.

Yet, other scholars reject the connection between human rights and the environment and see incompatibility or even danger in their coupling. They see human rights and environmental protection based on fundamentally different and ultimately irreconcilable value systems. These differences are, to them, much more likely to lead to conflict than to be complementary. The arguments proceed, on the one hand, with some environmental lawyers maintaining that a human rights focus for environmental law ultimately reduces all other environmental values to an instrumental use for humanity so that the quality of human life can be enhanced. This human-centered, utilitarian view reduces the non-human and non-living aspects of ecosystems to their economic value to humans and promotes unsustainable resource exploitation and environmental degradation as a human good. Furthermore, some human rights lawyers believe that linking human rights and the environment diminishes the importance and focus on protection of more immediate human rights concerns such as ending genocide, extra judicial killings, torture, and arbitrary detention.

Professor Dinah Shelton posits a third view which she says seems to best reflect the current state of play in law and policy.

> [This view] sees human rights and environmental protection as each representing different, but overlapping, societal values. The two fields share a core of common interests and objectives, although obviously not all human rights violations are necessarily linked to environmental degradation. Likewise, environmental issues cannot always be addressed effectively within the human rights framework, and any attempt to force all such issues into a human rights rubric may fundamentally distort the concept of human rights. This approach [thus] recognizes the potential conflicts between environmental protection and human rights, but also the contribution each field can make to achieving their common objectives.

Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment,* 28 Stan. J. Int'l L. 103, 105 (1991).

Perhaps these conflicting or differing views help explain why the relationship between human rights and the environment has had a slow, *ad hoc*, and uneven development. Disputes continue about how best to ensure human rights and environmental protection are mutually supportive. For instance, some favor approaches that deploy or reinterpret existing human rights in the cause of environmental protection. Others insist that the development of new substantive rights for the environment *pre se* is necessary.

Questions and Discussion

1. *An important distinction.* Throughout this course, bear in mind a distinction between two potential rights-holders, and what they mean for the environment. First, *human rights*, possessed by individuals, may provide certain protection for the environment derivatively when enforced. Second, the *environment* itself might be accorded rights that can be invoked by an appropriate party in cases of violation. For the most part, the environmental rights that we will study are not rights *for* the environment *per se*. Instead, we will be concerned the deployment of traditional human rights such as the right to life and health as a proxy for environmental protection. We will also examine the emergence of a new *human* right (or more accurately, a collection of rights) brought to bear on environmental protection for the benefit of the inherent dignity of all *humans beings.* Are these two views incompatible? Does Shelton's third view assist in reconciliation?

2. *Environmental rights proposals.* Initial environmental rights proposals surfaced at the beginning of the modern environmental movement as concern about environmental harm and its consequences increased. Frits W. Hondius, *Environment and Human Rights,* 41 Yearbook of the Association of Attenders and Alumni of the Hague Academy of International Law 68 (1971); E.F. Roberts,

The Right to a Decent Environment: A Premature Construct, 1 Environmental Policy and Law 185, 188 (and articles cites at *). See generally David W. Orr, *Constitutional Divide: Bridging U.S. Law and the Ecological Necessities of Life and Liberty*, 23 Orion 19, 22–23 (2004). See Chapter ___.

B. A Primer for What We Mean By "Rights"

When we claim that humans have rights or that the environment, itself, has rights, it is important to be clear what we mean by the term "rights". As Pound observed, "[t]here is no more ambiguous word in legal and juristic literature than the word right." Roscoe Pound, IV JURISPRUDENCE 26 (1959). A more detailed treatment will follow in Chapter 2, but an exposure now is important and will set the stage.

Ordinarily, the idea of rights connotes a substantial interest recognized and bounded by the law. A right is conferred as a mechanism to protect those substantial interests recognized in law. But, a right can be more or less. A legal right might be absolute (at least in theory) or might need to be balanced when it comes in to conflict with other rights. A right can also exist in a pre-legal state or as a moral claim outside the law.

The creation and the nature of rights are a product of direct human experience with wrongs. See Cass R. Sunstein, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 35–36 (2004). So, for instance, the Universal Declaration of Human Rights (UDHR), like the U.N. Charter, is a result of the traumatic historical experience of World War II and the atrocities and suffering it caused. The UDHR gives specificity to the more general language of the Preamble of the United Nations Charter: "We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women . . .."

1. Human Rights

For the purpose of this course, the term "rights" is not necessarily limited to those rights that are have been legally conferred by virtue of a judicial decision, statute, constitution, treaty or customary law. Human rights are often said to resemble "fundamental" or "natural" rights in the natural law tradition—that is, they are rights that do not owe their existence to a legal source and do not depend on legal sanction. Instead, human rights are claimed to transcend legal systems not in accord with those rights and obtain in all places and at all times regardless of what the law provides. If a legal system embodies these rights it is because it ought to do so. If it does not, it is deficient. From the start of the contemporary human rights movement following World War II, human rights have had universal aspirations, the foundation document being called the *Universal* Declaration of Human Rights (UDHR). The "relativity" of rights, though, has

always challenged universal claims through counterclaims of "particularity" or "cultural specificity". Compare, for instance, the following accounts of the universality of the UDHR.

A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (2001)
Mary Ann Glendon

The problem of what universality might mean in a multicultural world haunted the United Nations human rights project from the beginning. In June 1947, when word of a proposed human rights declaration reached the American Anthropological Association, that group's executive board sent a letter to the Human Rights Commission warning that the document could not be "a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America." . . . Earlier that year some of the world's best-known philosophers had been asked to ponder the question, "How is an agreement conceivable among men who come from the four corners of the earth and who belong not only to different cultures and civilizations, but to different spiritual families and antagonistic schools of thought?"

No one has yet improved on the answer of the . . . philosophers: Where basic human values are concerned, cultural diversity has been exaggerated. The group found, after consulting with Confucian, Hindu, Muslim, and European thinkers, that a core of fundamental principles was widely shared in countries that had not yet adopted rights instruments and in cultures that had not embraced the language of rights. Their survey persuaded them that basic human rights rest on "common convictions," even though those convictions "are stated in terms of different philosophic terms." The philosophers concluded that even people who seem to be far apart in theory can agree that certain things are so terrible in practice that no one will publicly approve them and that certain things are so good in practice that no one will publicly oppose them.

The Complexity of Universalism in Human Rights
Makau Mutua
HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM (A. Sajó, ed., 2004)

. . . Sanctimonious to a fault, the UDHR underscored its arrogance by proclaiming itself the common standard of achievement for all peoples and nations. The fact that a half-century later human rights have become a central norm of global civilization does not vindicate their universality. . . . Non-Western philosophies and traditions particularly on the nature of man and the purposes for political society were either unrepresented or marginalized during the early formation of human rights. . . .

There is no doubt that the current human rights corpus is well meaning. But that is beside the point. . . . International human rights fall within the historical

continuum of the European colonial project in which whites pose as the saviors of a benighted and savage non-European world. The white human rights zealot joins the unbroken chain that connects her to the colonial administrator, the Bible-wielding missionary, and the merchant of free enterprise. . . .

Thus human rights reject the cross-fertilization of cultures and instead seek the transformation of non-Western cultures by Western cultures.

Questions and Discussion

1. *Rights in Western cultures.* Consider the results of a survey of 100,000 high school students in the United States regarding the First Amendment to the U.S. Constitution, guaranteeing freedom of speech, of press, of religion, and of assembly, and the right petition the government for a redress of grievances.

> After the text of the First Amendment was read to students, more than a third of them (35 percent) thought that the First Amendment goes too far in the rights it guarantees. Nearly a quarter (21 percent) did not know enough about the First Amendment to even give an opinion.

John S. and James L. Knight Foundation, *The Future of the First Amendment*, available at http://firstamendment.jideas.org/findings/keyfinding1.php. Among high school teachers surveyed, 18% said that newspapers should not be allowed to publish stories without government approval, and another 27% only "mildly agreed." *Id.* 53% of high school teachers agreed strongly.

2. *What makes a right universal?* How does one tell whether a right is universal or not? If a human right to environmental quality exists, is it universal? Why? See further Chapter ___.

3. *Additional benefits of rights.* Human rights are of special value because they are premised on the inherent dignity and value of all persons who are deemed to possess equal worth. They require, in Kant's phrase, for individuals to be treated as ends and not as means. Kant, POLITICAL WRITINGS 24 (H.S. Reiss, ed., 1991). Additionally, the importance of human rights is that they serve as constraints on other incompatible individual and collective goals. So, to have the right to do W (or the right to require X to do Y or to forbear from doing Z) puts the holder of the right in a strong position in relation to others without a countervailing right. See generally Jeremy Waldron, ed., THEORIES OF RIGHTS (1984).

2. Rights of the Environment

Just as the inherent value of human beings serve as a predicate for human rights, so too it has been argued that all other non-human living beings (and even non-living components of ecosystems) possess an intrinsic worth which justifies according rights to non-humans and their environments. It is not difficult to find statements about the inherent value of the environment. Almost every state in the

world—one hundred and ninety states, not including the United States or Iraq—is party to the Convention on Biological Diversity (the most widely ratified environmental treaty today). In the Preamble to the Convention, states party recognize "the intrinsic value of biological diversity and of the ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values of biological diversity and its components." UNEP/Bio.Div/CONF/L.2 (1992), 1760 U.N.T.S. 142 (1993). Biological diversity includes diversity with and between species, as well as the ecological complexes of which they are part.

Aldo Leopold, writing in 1949, argued that the time had come to establish at least moral rights for the environment. Leopold famously wrote:

> There is yet no ethic dealing with man's relation to land and to the animals and plants which grow upon it. . . . The land-relation is still strictly economic, entailing privileges but not obligations.
>
> The extension of ethics to [the] environment is, if I read the evidence correctly, an evolutionary possibility and an ecological necessity. . . .
>
> The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.
>
> . . . A land ethic of course cannot prevent the alteration, management, and use of these "resources," but it does affirm their right to continued existence and, at least in spots, their continued existence in a natural state.
>
> In short, a land ethic changes the role of Homo sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.

Aldo Leopold, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 203–204 (1949).

Questions and Discussion

1. *Difficulty in establishing rights "of" the environment.* It is difficult to find legal examples that translate the recognition of intrinsic value into enforceable rights on behalf of the environment. Why? Are there problems with coherency? Enforceability? Skeptics are easy to find. In their view, a right for non-humans or non-living things is nonsense. See P.S. Elder, *Legal Rights for Nature—The Wrong Answer to the Right(s) Question*, 22 Osgood Hall L.J. 285, 288–89 (1984). Moreover, it is argued that courts should not provide environmental protection through a so-called right because it involves political choices over the use of scare resources. Finally, it is claimed that a right "of" the environment itself is impossibly vague and incapable of judicial application because there is no way to discern what the environment itself would prefer. See Mark Sagoff, *On Preserving the Natural Environment*, 84 Yale L. J. 205 (1974).

Another explanation for the difficulty in establishing rights of the environment might be found in the fact that very often it takes considerable time to move from moral claim to law. The slow process by which an extra-legal fundamental right

is harnessed to create a legal obligation can be seen in the evolution in ethical understanding about slavery, finally resulting in legal prohibition. The necessary constellation of political, economic, and moral conditions took centuries to develop before the fundamental right to be free from slavery became a legal right. In the United States slavery was not abolished until after a bloody civil war.

Yet another explanation may lie in the way environmental law, itself, has developed. Professor Dan Tarlock suggests that "environmental has failed to develop a substantive theory of environmental quality entitlement. The western tradition of expanding the concept of human dignity left no room for the protection of non-human values." A. Dan Tarlock, *Environmental Law, But Not Environmental Protection*, in NATURAL RESOURCES POLICY AND LAW: TRENDS AND DIRECTIONS 162, 171 (L.J. MacDonnell & S.F. Bates, eds., 1993). This suggestion seems to be supported by Justice William O. Douglas writing about a wilderness "bill of rights" in 1965:

> . . . The Bill of Rights, which makes up the first ten Amendments to our Constitution, contains in the main guarantees to minorities. These are guarantees of things that government cannot do to the individual because of his conviction of belief or other idiosyncrasies. When it comes to wilderness we need a similar Bill of rights to protect *those whose* spiritual values extend to the rivers and lakes, the valleys and the ridges, and *who* find life in a mechanized society worth living only because those splendid resources are not despoiled."

William O. Douglas, A WILDERNESS BILL OF RIGHTS 86 (1965)(emphasis added).

Under the Douglas theory it appears that wilderness is deserving of protection because of its importance to "idiosyncratic" nature lovers. It is this "minority" that is to be accorded rights in line with the western tradition of increasing protection of *human* values or dignity. This is not to say that wilderness does not receive surrogate protection through the enforcement of the legal rights of humans to wilderness; or that that the law does not exhibit a concern for (or even legal recognition of) wilderness through the protection of the human holder of the legal right. It is rather that the non-human values of wilderness, outside of those important to human rights holders, are left unprotected. Douglas expanded his view in the context of legal standing seven years later in his famous dissent in *Sierra Club v. Morton,* 405 U.S. 727, 741–55 (1972) ("Contemporary public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation." *Id.*, at 741–42).

2. *Pathfinder on Human Rights and the Environment.* Academic literature on the subject of Human Rights and the Environment continues to grow. Major texts include: Alan Boyle & Michael Anderson, eds., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (1996); Sven Deimann & Bernard Dyssli, eds., ENVIRONMENTAL RIGHTS: LAW, LITIGATION & ACCESS TO JUSTICE (1995); Agata

Fijalkowski & Malgosia Fitzmaurice, eds., THE RIGHT OF THE CHILD TO A CLEAN ENVIRONMENT (2000); ELI LOUKA, BIODIVERSITY AND HUMAN RIGHTS (2002); Romina Picolotti & Jorge Daniel Taillant, eds., LINKING HUMAN RIGHTS AND THE ENVIRONMENT (2003); Antonio Augusto Cançado Trindade, ed., HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT (1995); Laura Westra, ENVIRONMENTAL JUSTICE AND THE RIGHTS OF UNBORN AND FUTURE GENERATIONS (2006); Donald Zillman, Alastair Lucas & George (Rock) Pring, eds., HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT (2002). See also Linda A. Malone & Scott Pasternack, DEFENDING THE ENVIRONMENT: CIVIL SOCIETY STRATEGIES TO ENFORCE INTERNATIONAL ENVIRONMENTAL LAW, chap. 1 (2004).

Four important pamphlets are also worth noting: Boston Research Center, *Human Rights, Environmental Law and the Earth Charter* (1998); Council of Europe, *Manual on Human Rights and the Environment: Principles Emerging from the Case-law of the European Court of Human Rights* (2006); Council of Europe, *Environmental Protection and the European Convention on Human Rights* (2005); Aaron Sachs, *Eco-Justice: Linking Human Rights and the Environment* (Worldwatch Paper 127, 1995).

A collection of international and regional decisions and cases exists in Cairo A.R. Robb, ed., INTERNATIONAL ENVIRONMENTAL LAW REPORTS: HUMAN RIGHTS AND ENVIRONMENT, Vol. 3 (2001).

For early treatments of the synergies between to legal corpus of human rights and the environment see Anon, *Earthcare: The Human Right to a Sound Environment*, 1 Earth Law Journal 187 (1975); James L. Elsman, *Proposed First Amendment to the United Nations Charter: Right to a Natural Environment*, 12 CODICILLUS 42 (1971); W. Paul Gormley, *The Right to a Safe and Decent Environment*, 28 Indian Journal of International Law 90 (1974); Gregory Ho, *United Nations Recognition of the Human Right to Environmental Protection*, 2 Earth Law Journal 225 (1976); Frits Hondius, *Environment and Human Rights*, 41 YEARBOOK OF THE ASSOCIATION OF ATTENDERS AND ALUMNI OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 68 (1971).

For an extensive early bibliography see Donald K. Anton, *International Environmental Law Bibliography*, chap. 3 (1992), in Environmental Law Reporter online <http://www.elr.info/International/ielpre92/CHAP03.pdf>.

For a collection of international instruments see Maguelonne Déjeant-Pons, HUMAN RIGHTS AND THE ENVIRONMENT: COMPENDIUM OF INSTRUMENTS AND OTHER INTERNATIONAL TEXTS ON INDIVIDUAL AND COLLECTIVE RIGHTS RELATING TO THE ENVIRONMENT IN THE INTERNATIONAL AND EUROPEAN FRAMEWORK (2002).

II. Human Environmental Rights versus Rights of the Environment

People First, River Second . . .
Stephanie Peatling
Sydney Morning Herald (November 8, 2006, p. 1. col. 1)

Draining wetlands and cutting environmental flows to the Murray-Darling river system will be considered by a team of public servants ordered by state and territory leaders to find ways to guarantee towns, farmers, and irrigators do not run out of water.

A meeting between the Prime Minister, John Howard, and four state leaders yesterday heard the drought was much worse than a one-in-100-year event; it was more like one in 1000 years.

But scientists and environmentalists say the needs of the river system must be considered alongside those of the people relying on its water.

Professor Gary Jones, the head of the Co-operative Research Centre for Freshwater Ecology, said: "Whilst I recognise these are tough times for everyone concerned, we have to be careful because it won't do any good to damage the river system in the long term."

The executive director of the Australian Conservation Foundation, Don Henry, said any decision to forgo water for environmental purposes would be a "total admission of failure despite years and years of warning".

"We have to look after farmers that are suffering but the really crucial thing is we have to speed up work to bring the Murray-Darling back to health," he said.

After yesterday's summit, permanent water trading between NSW, Victoria, and South Australia will begin on January 1 next year. The leaders said this would free up water by dealing with the problem of overallocation of water licences. They agreed to work out how to secure water supplies for 2007–08. A group of state and federal public servants was asked to draw up plans for how this will be done. It will report back by the middle of December.

Mr. Howard said he would not direct them to consider specific proposals but "it will be apparent what some of the options are, including the draining of wetlands and allowing some of the dams to dry up. They will be considered. The purpose is to get a warts-and-all action plan. It's serious and we all understand that."

Water efficiency measures and alternative water source projects, such as desalination, will be prioritised when the Federal Government hands out funds from its $2 billion National Water Initiative. . . .

A scientific report, commissioned by a similar group of ministers in 2002, found 1500 gigalitres of water—enough to fill Sydney Harbour three times—was needed to address the decline of the whole Murray-Darling system. A meeting of

ministers the following year agreed to find a third of that water to sustain five key environmental sites along the river system, but none of that water has yet been returned to the river. . . .

The human need for fresh water demonstrates that, when push comes to shove, rights for the environment *per se* may become untenable, at least when protection of the environment *qua* environment impinges on provision of basic human needs. The next reading, a keystone in the literature on rights *for* the environment, takes a more environmentally accommodating approach.

Should Trees Have Standing? Towards Legal Rights for Natural Objects

Christopher Stone
45 S. Cal. L. Rev. 450 (1972)

It is not inevitable, nor is it *wise,* that natural objects should have no rights to seek redress in their own behalf. It is no answer to say that streams and forests cannot have standing because streams and forests cannot speak. Corporations cannot speak either; nor can states, estates, infants, incompetents, municipalities or universities. Lawyers speak for them, as they customarily do for the ordinary citizen with legal problems, One ought, I think, to handle the legal problems of natural objects as one does the problems of legal incompetents—human beings who have become vegetable. If a human being shows signs of becoming senile and has affairs that he is *de jure* incompetent to manage, those concerned with his well being make such a showing to the court, and someone is designated by the court with the authority to manage the incompetent's affairs. . . .

On a parity of reasoning, we should have a system in which, when a friend of a natural object perceives it to be endangered, he can apply to a court for the creation of a guardianship. . . .

. . . If, for example, the Environmental Defense Fund should have reason to believe that some company's strip mining operations might be irreparably destroying the ecological balance of large tracts of land, it could, under this procedure, apply to the court in which the lands were situated to be appointed guardian." As guardian, it might be given rights of inspection (or visitation) to determine and bring to the court's attention a fuller finding on the land's condition. If there were indications that under the substantive law some redress might be available on the land's behalf, then the guardian would be entitled to raise the land's rights in the land's name, *i.e.,* without having to make the roundabout and often unavailing demonstration . . . that the "rights" of the club's members were being invaded. Guardians would also be looked to for a host of other protective tasks, e.g., monitoring effluents (and/or monitoring the monitors), and representing their "wards" at legislative and administrative hearings on such matters as the setting of state water quality standards. . . .

As far as adjudicating the merits of a controversy is concerned, there is also a good case to be made for taking into account harm to the environment—in its own right. As indicated above, the traditional way of deciding whether to issue injunctions in law suits affecting the environment, at least where communal property is involved, has been to strike some sort of balance regarding the economic hardships *on human being*. . . .

The argument for "personifying" the environment, from the point of damage calculations, can best be demonstrated from the welfare economics position. Every well-working legal-economic system should be so structured as to confront each of us with the full costs that our activities are imposing on society. Ideally, a paper-mill, in deciding what to produce—and where, and by what methods—ought to be forced to take into account not only the lumber, acid and labor that its production "takes" from other uses in the society, but also what costs alternative production plans will impose on society through pollution. . . .

Questions and Discussion

1. *Stone v. Merton.* Christopher Stone, like Justice William O. Douglas who followed Stone's reasoning in dissent in *Sierra Club v. Morton,* 405 U.S. 727, 741–755 (1972), generally has been in the legal minority when it comes to rights for the environment itself. Is it just that Stone and Douglas are too far ahead of the thinking of the majority? Consider the following from Thomas Merton, a Trappist monk influential during the development of the early environmental movement:

> Some beavers, in Connecticut, have built a dam and are flooding a lot of roads. The highway department of the county where this disaster is taking place has brought the matter to court, asking for the power to remove these audacious beavers.
>
> The Attorney General, in Hartford, hands down a decision making this possible, by saying that the rights rational animals are inferior to those of the state, and therefore the rights of beavers are just that much more inferior to the rights of the state. Therefore, the beavers have to get out.
>
> On the other hand, the beavers also have rights, therefore "these little animals should be compensated." They will be removed to another home, where they will be "able to perform and exercise their natural skill and ability." . . .
>
> This hierarchy, *beavers: rational animals: state*, is just abstract enough to make me feel disturbed by the whole story. I wish they had kicked out the beavers without such a lot of talk: because obviously no court is going to bother with the rights of beavers anyway, not really. How can a court make itself responsible for dealing out justice to beavers? . . .
>
> I have no doubt the beavers have certain natural "rights," but I have every doubt whether those rights can be protected by a human court of law as if they were the rights of human beings. And what are the rights of

> these beavers? Life, liberty, and the pursuit of happiness? The court said they had a right to perform and exercise their natural skill and ability. . . .
>
> I don't suppose even a State supreme court could go so far as to puzzle over the rights of rabbits in relation to foxes. Let us take it for granted that irrational animals have rights before men who are capable of making judgments, but not before other animals.
>
> Even if beavers have rights (which I don't doubt), it doesn't do you any good to talk about them, or to guarantee them, or anything of the sort. On the contrary, to make a big argument over the rights of beavers is a suspicious enough joke to cast doubt on the validity of the rights of men.
>
> There is one very simple way of dealing with beavers: not according to rights, but according to love. . . .
>
> But admittedly a law court is not designed to take care of questions insofar as they can be decided by love: that is the difference between a court and a confessional. So let it pass.

Thomas Merton, THE SECULAR JOURNAL OF THOMAS MERTON 11–13 (1959). Who has the better argument, Stone or Merton?

2. *Human right to water.* As you will learn in greater detail in Chapter ____, the Committee on Economic, Social, and Cultural Rights established under the International Covenant on Economic, Social, and Cultural Rights (ICESCR) has issued a General Comment on the Human Right to Water. General Comment No. 15 (2002), U.N. Doc. E/C.12/2002/11 (20 January 2003) on the Right to Water under Articles 11 and 12 of the ICESCR states, "The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights. . . . The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible, and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal, and domestic hygienic requirements." Id, at. ¶¶ 1–2.

3. *Tensions and conflict.* The reading above highlights the tension that can arise when human needs and environmental protection come into conflict in the context of access to water and the protection of watercourses and drainage basins by ensuring adequate environmental flows. These tensions raise difficult questions about the purpose and function of linking human rights with the environment. For instance, when environmental human rights and other human rights come into conflict, which is to prevail? On what basis?

THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS (1989)
Roderick Frazier Nash

After Stone and Douglas located the conceptual door to the rights of nature in 1972, philosophers and legal theorists were quick to push it open. One indication of their growing interest was the application of John Rawl's *Theory of Justice* (1971) to environmental issues . . . [Lawyers] who read Rawls in the 1970s seized on his theories to make a case for nature. The more conservative simply contended that Rawls could be understood as supporting a moral obligation to resist environmental degradation in the interests of future generations of humans.

Others extended Rawls more radically. In 1974, Lawrence H. Tribe, a Harvard law professor, proposed adding nature to the contractual arrangements between people that Rawls presumed occurred at the beginning of any society. . . . Noting Christopher Stone's work, Tribe pointed to the recent growth of the idea that "persons are not the only entities in the world that can be though to possess rights." Although it was possible to understand this concept as a "legal fiction," Tribe preferred to see it as evidence of the capacity of humans to develop "new possibilities for respect and new grounds for community." . . . Tribe wrote about a "spirit of moral evolution" that had recently spread to include blacks and women and was beginning to incorporate animals, plants, and might, in the . . . future include "canyons . . . a mountain or a seashore.". . .

The same idea surfaced in an even more specific form in David F. Favre's 1979 proposal in the journal *Environmental Law* to enact a new constitutional amendment on behalf of wildlife. Favre, a professor at the Detroit College of Law, correctly questioned the widespread use of the phrase "animal rights." As a lawyer Favre knew that the interests of non-human creatures might be defended as a category of human rights, but in existing legal systems they as yet possessed no rights [of their own]. Favre sought to correct this with an addition to the document that provided the basis for rights in the American political system. His suggested amendment to the Constitution state that "all wildlife . . . shall have the right to a natural life." Humans must not "deprive any wildlife of life, liberty or habitat without due process of law." Favre explained that human survival interests could override wildlife rights, and he knew enough about ecology to recognize that in the absence of natural predation people might need to check excessive wildlife populations in the interests of those creatures. Thus his system tended to focus on the rights of species and habitats rather than individual organisms. Like Stone, he understood that humans would be the actual defenders of inarticulate wildlife in courts.

Questions and Discussion

1. *Advancing the argument for rights for the environment.* How do Tribe and Favre advance Stone's argument? Is the protection of the environment (or aspects of the environment) to be preferred when conflicting human interests, needs or rights come into conflict with such protection? If such a preference is not automatic, what sort of balancing test would be appropriate to employ? Under

what circumstances would environmental interests prevail over human interests, if ever?

2. *Water and the expansive right to environment.* How would the theories above apply in the context of the diminishing water in the Murray-Darling Basin in Australia, discussed in the newspaper excerpt? Would they protect environmental flows of the river? If so, on what basis? Do you need more facts? If so, what would you want to know?

III. Human Rights Approaches to Environmental Protection

A. Mobilizing Human Rights for the Environment

Environmental Rights
Dinah Shelton
PEOPLES' RIGHTS (P. Alston, ed., 2001)

Human rights law and environmental protection interrelate at present in four different ways. First, those primarily interested in the environment utilize or emphasize relevant human rights guarantees in drafting international environmental instruments. They select from among the catalogue of human rights those rights that can serve the aims of environmental protection, independent of the utility of such protection for the enjoyment of other human rights. Recognizing the broad goals of environmental protection, the emphasis is placed on rights such as freedom of association for members of non-governmental environmental organizations and the right to information about potential threats to the environment, which may be used for nature protection nor necessarily related to human health and well-being. The weakness of compliance mechanisms in nearly alt international environmental agreements raises questions about the short-term effectiveness of this method in achieving the goals of environmental protection, at least when compared with recourse to the more developed human rights supervisory machinery.

A second approach invokes existing human rights law and institutions, recasting or applying human rights guarantees when their enjoyment is threatened by environmental harm. This method is unreservedly anthropocentric. It seeks to ensure that the environment does not deteriorate to the point where the human right to life, the right to health, the right to a family and private life, the right to culture, the right to safe drinking water, or other human rights are seriously impaired. Environmental protection is thus instrumental, not an end in itself. . . . With a focus on the consequences of environmental harm to existing human rights, this approach can serve to address most serious cases of actual or imminently-threatened pollution. The primary advantage it offers, compared to pursuing the environmental route, is that existing human rights complaint machinery may be invoked against those states whose level of environmental protection falls below that necessary to maintain any of the guaranteed human rights. From the

perspective of environmental protection, however, this human rights approach is deficient because it generally does not address threats to non-human species or to ecological processes. . . .

The third approach aims to incorporate the environmental agenda fully into human rights by formulating a new human right to an environment that is not defined in purely anthropocentric terms, an environment that is not only safe for humans, but one that is ecologically-balanced and sustainable in the long term. Various international efforts have been undertaken in this direction, as discussed below, and some have proved successful. Nonetheless, despite the inclusion of ecological concerns in various formulations of the right, strict environmentalists continue to object to the anthropocentrism inherent in taking a human rights approach to environmental protection. In addition, the notion of a right to environment has met resistance from others who claim that the concept cannot be given content, who assert that the inherent variability of environmental conditions and qualities means no justiciable standards can be developed.

Finally, a fourth approach questions claims of rights in regard to environmental protection, preferring to address the issue as a matter of human responsibilities. Several projects to draft declarations of human responsibilities are underway and most have a strong environmental focus. Even some human rights texts that proclaim environmental rights balance these with a statement of human duties. . . .

The interrelationship of human rights and environmental protection is undeniable. First, the enjoyment of internationally recognized human rights depends upon environmental protection. Without diverse and sustained living and non-living resources, human beings cannot survive. The problem can be demonstrated by the example of freshwater. Only 2 per cent of the water of the earth is accessible for human use. Any loss of water resources, especially pollution of underground aquifers poses dangers for generations to come. According to the UN Water Council between 5 million and 10 million people die each year as a result of polluted drinking water, most of them women and children in poverty. Severe water shortages exist in 26 countries and by 2050, two-thirds of the world's population could face water shortages. Sixty per cent of the world's drinking water is located in just 10 countries and much of it is polluted. Freshwater shortages are already raising tensions and threaten to be a cause of future interstate conflicts. Air pollution, contaminated soil and loss of food sources add to the problems of health and survival. Maintenance of the earth's cultural diversity, in particular the preservation of indigenous peoples and local communities, requires conserving the areas in which they live.

In turn, environmental protection is enhanced by the exercise of certain human rights, such as the right to information and the right to political participation. Unlike the field of human rights, where most violations are committed by state agents, environmental harm largely stems from actions of the private sector. Effective compliance necessitates knowledge of environmental conditions and norms. In addition, local communities play a vital role in preserving the resources upon which they depend. Allowing those potentially affected to participate in

decision-making processes concerning harmful activities may prevent or mitigate the threatened harm and contribute to public support for environmental action, as well as lead to better decisions. In the event the activity goes forward and harm is suffered, remedies can provide for restoration or remediation of the damaged environment.

Despite a common core of interest, the two topics remain distinct. Environmental protection cannot be wholly incorporated into the human rights agenda without deforming the concept of human rights and distorting its programme. Ecologists are concerned with the preservation of biological diversity, including species not useful or even harmful to humans, as well as with ecological processes whose full significance may not be fully known or understood. The central concern is the protection of nature because of its intrinsic value, not because its protection will provide immediate benefits to humans.

Further, not all human rights are immediately relevant to environmental protection, e.g. the right to a name and the right to marry are not crucial to achieving the environmental agenda. From the human rights perspective, neither does it appear that the enjoyment of these rights is negatively affected by environmental harm.

The view that mankind is part of a global ecosystem may reconcile the aims of human rights and environmental protection, because both ultimately seek to achieve the highest quality of sustainable life for humanity within existing natural conditions. Potentially conflicting differences of emphasis still exist, however, because the essential concern of human rights law is to protect individuals and groups alive today within a given society, an aim that might be referred to as intra-generational equity. Environmental law adds to the goal of human rights the additional purpose of sustaining life globally by balancing the needs and capacities of present generations of all species with those of the future; it is thus also concerned with intergenerational equity and inter-species equity. Together, the three aims can be seen to comprise the concept of environmental justice. Clearly, the broad protection of nature at times may conflict with preservation of individual rights, such as the right to property. It is not surprising, then, that international environmental law and international human rights law have at times placed emphasis on different components of environmental protection and human rights.

The proposal to guarantee a right internationally to an environment of a specified quality raises additional considerations. Some argue that it is unlikely that environmental protection will be accepted as a human right and efforts in this direction divert attention from other more worthy causes. Yet, laws often respond to perceived social problems by restraining the exercise of power and establishing agreed norms of public conduct. Viewed from this perspective, laws protecting human rights respond to threats to human dignity and existence by upholding the immutable foundations of human rights as recognized in international instruments. Formulations of rights reflect emerging social values. Thus, as environmental protection comes to be perceived as fundamental to human dignity and well-being, it moves towards the requisite acceptance. The growing awareness of the breadth

and depth of the environmental crisis can be seen in increasing recourse to rights language.

An immediate, practical objective of international human rights law is to gain international recognition of specific human rights. Successfully placing personal entitlements within the category of human rights preserves them from the ordinary political process. Rights may thus significantly limit the political will of a democratic majority, as well as a dictatorial minority. The limitation on domestic political decisions is an important consequence of elaborating a right. In the environmental field, the high short-term costs involved in many environmental protection measures often make environmental decisions unpopular with economically affected communities. The recognition that environmental protection is a core value and right can be particularly valuable in countering this disapproval and ensuring that the long-term needs of humanity are not sacrificed to short-term interests. . . .

Ultimately, the definition of a right to environment must refer to substantive environmental standards that quantitatively regulate harmful air pollution and other types of emissions. Some see this as undermining any claim that environmental protection can be considered a human right. In their view, it cannot be considered inalienable, defined as the impermissibility of derogations, because the constant reordering of socio-economic priorities involved in setting environmental policies precludes its having a fixed character. However, this same evolution and reordering of priorities and values is seen in respect to other internationally recognized human rights: education, equality and non-discrimination—especially in regard to what constitutes impermissible distinctions and therefore who benefits from the right—and in defining what constitutes cruel, inhuman or degrading treatment or punishment. Few if any rights are absolute or fixed in content and most are subject to limitations and even suspensions or derogations. Recognizing a particular interest or claim as a human right is one means of establishing an order or priority, in setting the right above other competing interests and claims not deemed rights.

To say that environmental entitlements have been and will continue to be susceptible to restrictions for the sake of other, socio-economic objectives, such as ensuring continued “development” or “saving jobs” is to establish the conclusion as a criterion. If there is no right to a safe and healthy environment, environmental considerations will be balanced against other social interests on an equal basis. Alternatively, if there is both a right to development and a right to environment, the same balancing of juridically equal interests is required. Only if one of the interests is designated a right does it have what Dworkin refers to as a “trumping” effect requiring that the balance be presumptively resolved in its favour.

Although establishing emission or quality standards requires extensive international regulation of environmental sectors based upon impact studies, such regulation is by no means impossible. Adoption of quality standards demands extensive research and debate involving public participation, but substantive minima are a necessary complement to the procedural rights leading to informed

consent. Otherwise, a human rights approach to environmental protection would be ineffective in preventing serious environmental harm.

Establishing the content of a right through reference to independent and variable standards is often used in human rights, especially with, regard to economic entitlements, and need not be a barrier to recognition of the right to a specific environmental quality. Rights to an adequate standard of living and working conditions and to social security are sometimes further defined in international accords such as the European Social Charter or Conventions and Recommendations of the International Labour Organization. States implement these often flexible obligations according to changing economic indicators, needs and resources. The "framework" of the human rights treaty contains the basic guarantee to be supplemented by further international, national and local regulations, laws and policies.

A similar approach could be utilized to give meaning to a right to environment. Both the threats to humanity and the resulting necessary measures are subject to constant change based on advances in scientific knowledge and conditions of the environment. Thus, it is impossible for a human rights instrument to specify precisely what measures should be taken, i.e. the products that should not be manufactured or the precise balance of land uses. These technical details can be negotiated and regulated through international environmental norms and standards, where the necessary measures to implement the right to environment can be determined by reference to independent environmental findings and regulations capable of rapid amendment. The variability of implementing demands imposed by the right to environment in response to different threats over time and place does not undermine the concept of the right, but merely takes into consideration its dynamic character.

Finally, it is claimed that there are political risks to recognizing a right to environment because different conditions require different solutions and it "might turn into an extremely effective legal platform for internationalizing national decision-making in areas that represent the core of traditional state sovereignty." This is true, but all international human rights law involves an invasion of "the core" of traditional state sovereignty. The law exists precisely for that reason and reflects the fact that the content of the reserved domain of states is constantly evolving. The sovereignty or domestic jurisdiction objection was raised by Mexico when the Inter-American Human Rights Commission considered a complaint regarding alleged election. fraud; by the former Soviet Union when the United Nations began to discuss its failure to permit the emigration of Soviet Jews; by South Africa in response to criticisms of apartheid. States have always been reluctant to adopt and implement international human rights norms. They have done so in response to public pressure, especially from non-governmental organizations, which became convinced that decisions about how governments treat human beings should not be exempt from international scrutiny and accountability.

Questions and Discussion

1. *Declaration of Principles on Human Rights and the Environment*. The four interrelationships between human rights law and environmental protection are explicitly recognized in a landmark document, and accompanying report, prepared by Fatma Zohra Ksentini, Special Rapporteur of what is today know as the Sub-Commission for the Promotion and Protection of Human Rights. The Document is know as The Declaration of Principles on Human Rights and the Environment and is considered more fully in Chapters ____.

2. *Commensurability between human rights and the environment.* Like the readings in the introductory section, Professor Shelton highlights tensions raised by linking human rights and the environment. She suggests that these tensions might be reconciled by recognizing that both fields "ultimately seek to achieve the highest quality of sustainable life for humanity within existing natural conditions". Is this reasoning persuasive? What if "existing" conditions are insufficient?

B. Formation and Linkages between Human Rights and the Environment

Human Rights Approaches to Environmental Protection: An Overview
Michael R. Anderson
HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (A. Boyle & M. Anderson, eds., 1996)

1. Relationship Between Human Rights And The Environment

Upon . . . inspection, the precise relationship between human rights and environmental protection is far from clear. The relationship may be conceived in two main ways. First, environmental protection may be cast as a means to the end of fulfilling human rights standards. Since degraded physical environments contribute directly to infringements of the human rights to life, health, and livelihood, acts leading to environmental degradation may constitute an immediate violation of internationally recognized human rights. The creation of a reliable and effective system of environmental protection would help ensure the well-being of future generations as well as the survival of those persons, often including indigenous or economically marginalized groups, who depend immediately upon natural resources for their livelihoods.

In the second approach, the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection. Thus the full realization of a broad spectrum of first and second generation rights would constitute a society and a political order in which claims for environmental protection are more likely to be respected. A more ambitious variant of this view provides that there is and should be an inalienable human right to a satisfactory environment, and that legal means should exist to enforce this right in a consistent and effective manner. Put in these terms, it is no longer the impact of the environment on other human rights which is the law's focus; but the quality of the

environment itself. Expressed in this qualitative way, a right to a decent environment has much in common with other claims, such as sustainable development or intergenerational equity, and suffers comparable problems of subjectivity, definition, and relativity which make it inherently problematic for any notion of universal human rights.

2. Human Rights Approaches to Environmental Protection

. . . If we accept that the concept of human rights is viable (some reject the idea altogether), and that rights may be extended to human goods beyond the core liberties (some argue that this dilutes the impact of human rights), then it remains to be seen how human rights approaches add anything to existing arrangements for environmental protection. . . . [T]here appear three main approaches: first, mobilizing existing rights to achieve environmental ends; secondly, reinterpreting existing rights to include environmental concerns; and thirdly, creating new rights of an explicitly environmental character. . . .

(a) Mobalizing Existing Rights

. . . [H]uman rights norms which are already protected under international instruments and domestic constitutions play an important role in environmental protection. It may even be argued that existing rights, if fully realized, are so robust in themselves that proposals for new environmental rights are at best superfluous and at worst counter-productive. The body of existing rights at the international level is detailed and comprehensive. An argument may be made out that if activists devoted their attentions to securing additional ratifications and campaigning for effective implementation of existing international instruments, rather than dreaming up and promoting new standards, then environmental protection will follow automatically. Whether this argument stands or falls depends upon the scope of existing rights, and these may be considered in their entirety, including: first, civil and political rights; secondly, economic, social and cultural rights; and thirdly, the right to self-determination.

(i) Civil and political rights

. . . the importance of civil and political rights lies in their ability to foster an environmentally-friendly political order. The realization of such rights—including the rights to life, association, expression, political participation, personal liberty, equality, and legal redress—goes a long way toward enabling concerned groups to voice their objection to environmental damage. These guarantees are necessary preconditions for mobilizing around environmental issues and making effective claims to environmental protection. The converse is also true, for serious damage to the physical environment is frequently accompanied by repression of activists and denial of access to information. . . .

(ii) Economic, social and cultural rights

While civil and political rights may contribute to environmental protection principally through guarantees of process and participation, the second generation rights contribute mainly through substantive standards of human well-being. Existing human rights treaties . . . already contain provisions on the right to health, the right to decent living conditions, and the right to a decent working environment—all of which may bear directly upon environmental conditions. The right to health, for instance, if approached rigorously, requires the state to take steps to protect its citizens from a poisonous environment and to provide environmental goods conducive to physical and mental well-being. In many cases, this will require policies to prevent environmental degradation. The right to health may be linked to environmental protection in another way, too. . . . [P]olicies designed to protect humans may also protect flora, fauna, and ecological processes as a consequence. For example, measures designed to guard against the radiological exposure of humans will also protect non-human species from exposure.

In addition to the right to health, other second generation rights may also be used to environmental ends. The right to education may help to raise environs mental awareness, and equip disadvantaged groups with the skills required to combat ecological damage in political fora. [I]lliteracy can leave the marginalized unable to work the levers of the existing political system. . . . [Violation of] cultural rights can [also] accompany environmental degradation. So the right to participate in cultural life, if properly protected, may require the state to preserve the physical environments upon which certain cultures depend.

Like civil and political rights, the second generation rights offer considerable promise, particularly since international supervision of economic, social, and cultural rights involves the monitoring of general policies with regard to human welfare. Also, because such rights are related directly to human well-being and capacity building, rather than simply the character of the political order, they are conceptually closer to environmental matters than first generation rights. . . .

(iii) Right to Self-determination

At another level, the collective right to self-determination . . . may contribute to environmental protection in two ways. Where local environments were subjected to imperial priorities under colonialism, the acquisition of statehood has liberated peoples to manage their own resources. The concept of permanent sovereignty over natural resources, which emerged from the post-war drive for self-determination, aimed to assert a degree of economic self-determination which might provide states with the legal space in which environmentally degrading foreign investment could be restrained. Efforts in this area largely failed, however, and even in those areas where they did succeed through nationalization of foreign

property, it is hardly clear that post-colonial governments exercised greater environmental sensitivity than the private firms they supplanted.

There is a second approach to self-determination which does not assert that absolute sovereignty should be granted, but rather that ethnically distinct groups should be accorded a degree of political and economic autonomy within existing state boundaries. This is one of the justifications for recognizing the rights of indigenous peoples. . . . [I]ndigenous or tribal peoples [may be] particularly vulnerable to environmental degradation. . . . Existing international law, including the ILO Indigenous and Tribal Peoples Convention of 1989, may apply in such circumstances. . . . [T]he Convention requires party States to safeguard the environment in co-operation with the peoples concerned, but does little to afford actual rights to indigenous groups. There is a tendency in international law to treat indigenous groups as objects of protection rather than legal subjects capable of exercising rights. However, it is only with effective rights that such groups may act to protect their immediate environments from outside depredation. The key to mobilizing the right to self-determination for indigenous peoples or other distinct populations is finding an. effective procedural remedy under existing legal regimes. . . .

(b) Reinterpretation of Existing Rights

While existing human rights standards do provide some weapons which can be used in environmental protection, there is an argument that they are inadequate so long as conventional means of interpreting and applying such rights are followed. On this argument, the mere mobilization of existing rights norms will not satisfy environmental needs. Instead, existing rights must be reinterpreted with imagination and rigour in the context of environmental concerns which were not prevalent at the time existing rights were first formulated.

Established human rights standards which do not directly touch upon environmental issues may house an implicit relevance capable of juridical development. The right to life, for example, may be deemed to be infringed where the state fails to abate the emission of highly toxic products into supplies of drinking water. If enforcement bodies explicitly recognize such links, then environmental criteria may be incorporated overtly into the monitoring and enforcement of the right to life. This approach has been developed probably most fully by the Indian judiciary, which . . . has been active for more than a decade in fashioning environmental rights out of a more conventional catalogue of constitutional rights. The expansion has been explicit, so rather than the courts simply examining environmental matters in the course of enforcing the right to life, the judges have stated directly that the right to life includes the right to live in a healthy environment, a pollution-free environment, and an environment in which ecological balance is protected by the state. . . .

. . . Apart from the rights to life and health, which other settled rights might lead to direct environmental protection? Several candidates emerge. First, the

right to equality may be read widely to include the right to equal access to, and protection of, environmental resources. . . . [A] profound inequality of exposure to environmental degradation is a consequence of economic and political inequalities. Affluence and poverty create different environmental problems, and it is sometimes the case that only the problems of affluence are addressed in state policy. An effective right to procedural equality would help in such circumstances, but some judicial enforcement of a right to substantive equality, as has occurred in India, holds far greater potential. Secondly, the right to freedom of speech may easily be extended to encompass the right to voice objections to environmental damage. . . . Thirdly, although the right to property has conventionally been conceived mainly in terms of political and economic protection, it is amenable to a thoroughgoing environmental reinterpretation. [B]ut . . . that the right to property may be a two-edged sword since, although it may be used to protect customary land rights and the environmental quality of land in general, it may also be used by private, developers to inhibit the creation of national parks and conservation areas. It is precisely for this reason that a full reinterpretation of the right, rather than a mere mobilization of it, is necessary for environmental protection. Fourthly, religious rights may have an environmental dimension. . . . [T]he right to religious practice and profession [may also serve] as a possible vehicle [for environmental protection].

(c) New Human Rights [for] Environmental Protection

Although existing human rights, if fully mobilized, may offer a great deal to global and local environmental protection, there are good reasons to suspect that they will fall short of meeting desired ends. Established human rights standards approach environmental questions obliquely, and lacking precision, provide clumsy tools for urgent environmental tasks. It may be argued that a comprehensive norm, which relates directly to environmental goods, is required. . . . [Scholars] are divided on whether new environmental rights, if desirable, should be mainly procedural or substantive in character.

(i) Procedural rights

. . . [There] are a range of procedural rights at both the international and domestic levels which are relevant to environmental protection. These include: the right to information, including the right to be informed in advance of environmental risks; the right to participate in decision-making on environmental issues at both the domestic and international level; the right to environmental impact assessment; the right to legal redress, including expanded *locus standi* to facilitate public interest litigation; and the right to effective remedies in case of environmental damage.

A procedural or participatory approach promises environmental protection essentially by way of democracy and informed debate. The enthymeme in this

argument is that democratic decision-making will lead to environmentally friendly policies. The point remains to be demonstrated, but one argument in its favour is that in creating legal gateways for participation, it is possible to redress the unequal distribution of environmental costs and benefits. Thus marginalized groups who currently suffer the most deleterious effects of environmental degradation—including women, the dispossessed, and communities closely dependent upon natural resources for their livelihood—can be included in the social determination of environmental change. If the people who make the decisions are the same as those who pay for and live by the consequences of the decisions, then we go a long way toward protecting the environment.

There is another argument in favour of a procedural right, rather than a substantive right, which is this: because the desired quality of the environment is a value judgment which is difficult to codify in legal language, and which will vary across cultures and communities, it is very difficult to arrive at a single precise formulation of a substantive right to a decent environment. Therefore, the more flexible, honest, and context-sensitive approach is to endow people with robust procedural rights which will foster open and thoroughgoing debate on the matter. Much the same argument applies to the pursuit of sustainable development.

(i) Substantive rights

Yet even if the virtues of procedural rights are acknowledged, they may not provide adequate protection of environmental goods. If we take this view, then an argument for a substantive right to a satisfactory environment may emerge. . . . [A] substantive right can provide more effective protection, and may play a role in defining and mobilizing support for environmental issues. Advocates of substantive environmental rights may not trust procedural rights alone for the simple reason that even if procedural or participatory rights are fully realized, and perfectly distributed throughout civil society, it is entirely possible that a participatory and accountable polity may opt for short-term affluence rather than long-term environmental protection. Democracies are entirely capable of environmental destruction, and may even be structurally predisposed to unfettered consumption. Indeed, the industrial democracies of the North, with their liberal rights-based legal systems, are disproportionately responsible for much environmental damage, including the consumption of finite resources and the emission of greenhouse gases. The point is that procedures alone cannot guarantee environmental protection. But if substantive rights are contemplated, then urgent questions of definition and application arise. These are considered in the next section.

Questions and Discussion

1. *Linkages between human rights and the environment.* In January 2002, the United Nations High Commissioner for Human Rights and the Executive Director of the United Nations Environment Programme jointly convened an group, including Professor Kravchenko, to review and assess progress achieved since the

1992 United Nations Conference on Environment and Development (UNCED) in promoting and protecting human rights in relation to environmental questions and in the framework of Agenda 21. In connection with both substantive and procedural rights outlined by Anderson above, the Experts Group recommended:

> With regard to procedural and substantive rights there is a need:
>
> - To enhance public awareness, especially in the corporate sector, of the connections between human rights protection and environmental protection; and
>
> - To ensure that persons promoting the protection of human rights and the environment are not penalized, persecuted or harassed for their activities.
>
> - There is a need for more certainty and consistency at the national and international levels respecting procedural (participatory) rights, inter alia by:
>
> - Adopting new instruments, mechanisms and procedures to implement Principle 10 of the Rio Declaration;
>
> - Facilitating and improving rights of access to information, effective participation in decision-making and access to justice and other remedies in national and international fora and instruments; and
>
> - Creating greater awareness of the need to avoid merely pro forma provisions on participation (especially in national systems).
>
> With regard to substantive rights, further steps need to be taken:
>
> - To affirm the link between human rights and environmental protection as an essential tool in the eradication of poverty and the achievement of sustainable development;
>
> - To treat economic, environmental and human rights norms in an integrated manner, and develop legal and other concepts and techniques for achieving such integration;
>
> - To recognize the environmental dimension in the effective enjoyment of human rights protection and promotion, and the human rights dimension in environmental protection and promotion, in part by developing rights-based approaches to environmental protection and promotion of sustainable development;

- To support the growing recognition of a right to a secure, healthy and ecologically sound environment, either as a constitutionally guaranteed entitlement/right or as a guiding principle of national and international law;

- To emphasize the responsibility of private actors and develop effective mechanisms to prevent and redress environmental degradation, including remedies for victims, in national and international instruments in the field of environment and human rights;

- To consider more broadly the catalogue of substantive human rights that can be marshaled to assist in achieving environmental protection, with particular reference inter alia to the rights of indigenous peoples and other vulnerable groups; and

- To identify and move to correct gaps and limitations in substantive protections, with a view to strengthening international instruments and further normative developments aiming at consistency and equality in the application of minimum standards of environmental protection within the framework of human rights protection.

Meeting of Experts on Human Rights and the Environment, Final Text (January 16, 2002), available at:
http://www2.ohchr.org/english/issues/environment/environ/conclusions.htm

2. *The generations of rights.* Anderson mentions that economic, social and cultural rights are "second generation" human rights. Some scholars have described the evolution and development of human rights in terms of three generations. The first generation of human rights comprises ancient civil and political rights opposable against the state and includes rights such as the right to life. The second generation of rights emerged more recently and is regarded as those rights concerned with economic, social and cultural welfare. The so-called third generation of human rights (also called "solidarity rights" or "peoples' rights" on account of their group nature) has developed since World War II and is imperfectly recognized. As we will further explore, the substantive right to live and work in an environment of a certain minimum quality falls into the third generation of human rights. For an examination of the controversy surrounding the terminology of third generation rights see Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscations of International Human Rights Law*?, 29 Netherlands Int'l L. Rev. 307 (1982).

3. *The trump card.* Professor Anderson notes that one value of a human right is "that it is available as a moral trump card precisely when legal arrangements fail." Do you agree? Is a moral trump card a sufficient substitute for binding legal norms requiring or prohibiting state action? Are there any moral trump cards available in environmental law?

4. *Responses to potential problems.* In addition to the problems outlined above, Professor Günther Handl has made one of the most fulsome critiques of a human right to environment. Günther Handl, *Human Rights and Protection of the Environment: A Mildly "Revisionist" View*, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND THE ENVIRONMENT 117–32 (Antonio Augusto Cançado Trindade, ed.,1995).

IV. Comparing International Environmental Law and Human Rights: The Environmental Justice Dimension

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

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

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

In contrast, international human rights law focuses entirely upon human impacts, with little concern for the environmental dimension of the problem. Only two binding human rights treaties contain a right to a healthy environment—the African Charter on Human and Peoples' Rights and the San Salvador Protocol—so most human rights litigation brought to address environmental harm involves an application of general rights, such as rights to life and health, to the environmental harm. In fifteen of the sixteen case studies, for example, the claimed rights violations included the environment as part of the factual situation causing the harm; the rights themselves had no specific connection to the environment.

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

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

1. International environmental law

The international community began to put limits on environmental sovereignty well before the modern treaty regime emerged following the Stockholm Conference in 1972. In addition to the early conventions on migratory wildlife and shared watercourses, the 1941 Trail Smelter arbitration reinforced the notion that compensation must accompany state behavior that produces environmental damage beyond its borders. The international environmental treaty regime that exploded following the 1972 conference at Stockholm addresses problems ranging from regulating the use of Antarctica and outer space to controlling marine, river, and air pollution to protecting endangered species. By the 1980s a "second generation" of environmental treaties had emerged to address more complex global issues such as ozone depletion, climate change, shared use of the ocean, movement and disposal of hazardous waste, and biodiversity. Additional declarations reinforced the principles that undergird these agreements and the customary international law that emerged from them. The limitations created by these agreements attempt to address not only transboundary but also global commons harms.

Despite these incursions upon traditional sovereignty, international environmental law constrains international intervention when behavior lacks transboundary or global commons impacts. This principle has been enunciated in both the Stockholm and Rio Declarations and throughout the scholarly literature. Although the international community certainly would prefer that states follow good internal environmental practices, international environmental law provides no basis for external intervention when the harm is purely domestic.

2. International human rights law

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

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

Some of these human rights treaties have created international and regional tribunals to hear claims of human rights abuses suffered within state parties' borders. In addition, treaties addressing violations of slavery, apartheid, terrorism, and torture have contained increasingly explicit international criminalization and universal jurisdiction provisions. Some nations' courts—particularly those of the United States and other common law countries, have adjudicated human rights claims—based mainly on customary international law, on universal jurisdictional grounds.

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

Moreover, prior to the establishment of the International Criminal Court, international prosecutions of human rights violations were entirely ad hoc, arising out of a desire to address the atrocities committed during the conflicts of World War II, the former Yugoslavia, and Rwanda. These ad hoc tribunals, like the fledgling International Criminal Court, have focused primarily on the prosecution of international criminals rather than on the redress of victims' grievances. That prosecutorial focus has limited their utility as forums in which victims can address environmental harms.

Despite these limitations, international human rights law provides a potential avenue of redress for victims of environmental damage. . . . [V]ictims of environmental abuse have been able to obtain positive judgments from international and regional human rights tribunals. Nations retain permanent

sovereignty over their natural resources, but face checks on how they treat the people who are affected by resource use. If environmental damage constitutes a human rights violation, grounds exist for a claim under international law, even when the harm occurs solely within a state's territorial jurisdiction. The international human rights regime thus provides a mechanism for limiting state sovereignty when environmental harm impacts human beings. . . .

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

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

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

Questions and Discussion

1. *Environmental justice.* Linkages between human rights and the environment are restricted neither to international law nor to developing countries. Environmental burdens in the United States, for example, have in many instances been disproportionately borne by minority, disadvantaged or impoverished communities that have little political or economic power. Indeed, in many countries not all are guaranteed an environment of equal quality or equal protection under environmental law. This failure of the law has led to the growth of the law of Environmental Justice and efforts to apply municipal civil and political rights to environmental discrimination. See Clifford Rechtschaffen & Eileen Gauna, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION (2003).

2. *Environmental equity as part of environmental justice.* Professor Shelton comments in the excerpt above, pp. ____, that environmental justice might be thought of comprising three distributive justice aims: intra-generational equity, inter-generational equity and inter-species equity. In a subsequent article

Professor Shelton makes an explicit link between environmental justice and human rights. She writes:

> Recently, the concept of environmental justice has come to play an important role in international environmental law and policy as a means of integrating human rights and environmental law, even as the content and scope of the term remains under discussion. It is increasingly recognized that favorable natural conditions are essential to the fulfillment of human desires and goals. Preservation of these conditions is a basic need of individuals and societies. Environmental justice encompasses preserving environmental quality, sustaining the ecological well-being of present and future generations, and reconciling competing interests. There is also an element of distributional justice, as it has become clear that the poor and marginalized of societies, including the global society, disproportionately suffer from environmental harm.
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> Environmental justice emphasizes the environment as a social good rather than a commodity or purely economic asset. The focus is on the proper allocation of social benefits and burdens, both in the present and in the future. Thus, it requires the equitable distribution of environmental amenities and environmental risks, the redress and sanctioning of environmental abuses, the restoration and conservation of nature and the fair allocation of resource benefits. The "polluter-pays" principle itself is based on the concept of environmental justice, as it encompasses the notion that those who engage in and profit from activities that damage the environment should be liable for the harm caused. On the most fundamental level, environmental justice can be seen as a term that encompasses the twin aims of environmental protection and international protection of human rights.

Dinah Shelton, *The Environmental Jurisprudence of International Human Rights Tribunals,* in LINKING HUMAN RIGHTS AND THE ENVIRONMENT 23 (Romina Picolotti and Jorge D. Taillant, eds., 2003). The relationship between human rights and environmental justice is further explored below, pp. ___ by Professor Osofsky.

V. Recognition of the Rights Related to the Environment in International and Municipal Law

PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW (2003)
Philippe Sands

. . . [S]ome non-binding and widely accepted declarations supporting the individual right to a clean environment have been adopted. Although the 1982 World Charter for Nature does not expressly provide for the individual's right to a

clean environment, it was one of the first instruments to recognise the right of individuals to participate in decision-making and have access to means of redress when their environment has suffered damage or degradation. The 1989 Declaration of the Hague on the Environment recognised "the fundamental duty to preserve, the ecosystem" and "the right to live in dignity in a viable global environment," and the consequent duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the environment. The UN General Assembly has declared that "all individuals are entitled to live in an environment adequate for their health and well-being"; and the UN Commission on Human Rights has affirmed the relationship between the preservation of the environment and the promotion of human rights. More specifically, the Sub-Commission on Prevention of Discrimination and Protection of Minorities has considered the relationship between human rights and the movement and dumping of toxic and dangerous products and wastes, supported further study, and considered the relationship between the environment and human rights in the context of chemical weapons. The Sub-Commission has also received reports on "Human Rights and the Environment" which analyse many of the key concepts and provide information on decisions of international bodies. More specifically, the UN Commission on Human Rights has declared that the movement and dumping of toxic and dangerous products endanger basic human rights such as "the right to the highest standard of health, including its environmental aspects". Efforts to further develop language on environmental rights continues under the auspices of several international institutions including the Council of Europe and the UN Economic Commission for Europe. Other efforts include the IUCN's draft International Covenant on Environment and Development prepared by the IUCN's Commission on Environmental Law.

Many states have adopted national measures linking the environment and individual rights. The constitutions of about 100 states now expressly recognise the right to a clean environment. These constitutional provisions vary in their approach: they provide for a state duty to protect and preserve the environment; or declare the duty to be the responsibility of the state and citizens; or declare that the duty is imposed only upon citizens; or declare that the individual has a substantive right in relation to the environment; or provide for an individual right together with the individual or collective duty of citizens to safeguard the environment; or provide for a combination of various state and citizen duties together with an individual right.

What are the practical consequences of recognising the link between international human rights law and the protection of the environment? The question may be addressed in the context of the distinction which has been drawn in international human rights law between economic and social rights, and civil and political rights. The nature and extent of economic and social rights deter mines the substantive rights to which individuals are entitled, including in particular the level below which environmental standards (for example, in relation to pollution) must not fall if they are to be lawful. Civil and political rights, which are also substantive in nature and sometimes referred to as "due process" rights, determine procedural and institutional rights (such as the right to information or

access to judicial or administrative remedies). International environmental law has progressed considerably in building upon existing civil and political rights and developing important new obligations, most notably in the 1998 Aarhus Convention which provides for rights of access to information, to participation in decision-making, and to access to justice. While economic and social rights have traditionally been less well developed in practice, recent judicial decisions indicate that international courts and tribunals are increasingly willing to find violations of substantive environmental rights.

Questions and Discussion

1. *Earthjustice database.* Every year the public interest environmental law firm, Earthjustice, produces a report on Human Rights and the Environment for what is now the United Nations Human Rights Council (until 2006 the Commission on Human Rights), see further Chapter 3, pp. ____. These reports elaborate developments and trends at the international and municipal levels, including case studies. The reports can be viewed at: http://www. earthjustice.org/our_work/issues/international/human_rights/human-rights-report/international _human_rights_full_report.html.

2. *Constitutional environmental provisions.* A collection of environmental constitutional provisions from around the world are found on a website maintained by the Environmental Law Alliance Worldwide, a group of public interest environmental lawyers and scientists working across borders to protect the environment. See http://www.elaw.org/resources/text.asp?id=1082. A collection of U.S. state environmental constitutional provisions are found in Barry E. Hill, Steve Wolfson & Nicholas Targ, *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 Georgetown Int'l Envtl. L. Rev. 359, Appendix A (2003).