

CHAPTER 6: HUMAN RIGHTS LAW

Pages 61-69

Human rights law has revolutionized the field of international law. In the nineteenth century, human beings were not recognized under international law; their rights were derivative from the rights of states. Under the classic conception, what a state did to its own citizens within its own territory was a matter of its "domestic jurisdiction" and not the business of any other state. But after World War II, the idea of human rights in international law was universally acknowledged as a result of the genocides committed during that War. The Nuremberg trials, and the Genocide Convention, effectively destroyed the idea that a government could do whatever it wished with respect to its citizens within its own territory. Government leaders were held personally accountable for committing acts of aggressive warfare and genocide.

Out of the human rights revolution have come claims that human beings have certain rights against all states if those states act in such a way as to impair or destroy the global ecosystem that sustains human life. In this conception, international environmental law is a law that gives human beings a primary right to a sustainable global environment. Even within this conception, however, one may ask whether the right to a sustainable global environment is a new human right or simply a right that grows out of traditional norms of human rights. This Chapter addresses those concerns.

A. The "Wrong"¹

Environmental disasters are increasing. They often result from human activities, such as the disposal of toxic chemicals, the generation of power, and the exploitation of oil. Mismanagement of natural resources has caused severe watershed erosion, desertification, and atmospheric pollution, which, in turn, have seriously impaired human life. Although the human suffering associated with environmental destruction is growing, international and regional human rights organizations and institutions have yet to clarify the obligation of governments to protect and provide remedies for these victims.

The development of large hydropower projects illustrates how resource extraction activities can displace human populations, disrupt food production, and spread disease. Uprooted communities, who must leave behind age-old social organizations and enter unfamiliar societies, often lose their cultural identity. Individuals within those communities, left helpless by the loss of their communal support systems, often become migrant laborers; some turn to prostitution or alcohol; and many die from diseases previously unknown to them, such as influenza, tuberculosis, and measles. Moreover, the people most affected by environmental damage are often excluded from their government's development planning, leaving them powerless to control their future.

The James Bay hydroelectric project in Quebec (Hydro-Quebec) poignantly illustrates this perverse process. Hydro-Quebec has affected the lives, cultural heritage, and livelihood of tens of thousands of native Cree and Inuit. Riverflow alterations have interfered with fish spawning and have desiccated the estuarine wetlands that supported waterfowl. Riverbank erosion drowned thousands of caribou, a staple of the community's diet. The disruptions also caused the release of the toxic metal mercury into the biotic food chain, making freshwater fish unsafe to eat. More than half of the James Bay Cree have absorbed unsafe levels of mercury. Although many reports have been prepared on various aspects of the project, Hydro-Quebec has never committed to undertake a full and independent environmental and social impact assessment.

The hydroelectric projects currently under way in Brazil provide another example. The government's electric power monopoly, Eletrobras, plans to build eighty dams in Amazonia by the year 2020. In all, the dams will flood approximately one million square kilometers of land, most of it lying along the Amazonian rivers' middle and upper reaches, which are occupied by indigenous peoples. These communities have limited access to information and no real opportunity to participate in the government's planning of hydroelectric power development. As most of this area still lacks basic infrastructure, legal and protective agencies often do not exist. Government corruption and suppression of information have stifled the region's ability to achieve the levels of participatory democracy that have emerged in other areas of Brazil.

Unsustainable development practices have led to another critical phenomenon. The increased desertification, flooding, and pollution worldwide, coupled with high rates of population growth, poverty, and economic polarization, have left tens of millions of people homeless. These "environmental refugees" migrate within and across borders. Left unchecked, the mass migrations will continue to increase and will, in turn, contribute to environmental degradation in the areas of refuge. Although the environmentally dispossessed comprise the fastest growing category of migrants in the world, international organizations have yet to address their plight effectively. The lack of legal protection for environmental refugees exacerbates their crisis.

Traditional norms of international law offer individuals no meaningful protection from these threats. International law addresses responsibility for environmental harm only in cases of transfrontier pollution. In that context, international duty arises from the principle that one should use one's own property in a manner that does not harm others. Commonly referred to as *sic utere*, this principle is supported by the decisions of international tribunals, the declarations of governments, and the codification of customary international law by publicists.

For several reasons, however, individuals harmed by environmental mismanagement cannot rely on *sic utere* to remedy their injuries. First, a violation of *sic utere* occurs only to the extent that a state can be viewed as directly or indirectly responsible for the action: liability for extraterritorial environmental degradation is predicated upon the complainant's ability to attribute the offending act or omission to the defendant state; show that the state breached an international duty; demonstrate that a causal relationship existed between the state's conduct and the injury claimed; and prove material damage. Furthermore, even if complainants could establish all the above elements, they really have no truly workable and accessible international mechanism for the adjudication and settlement of their claims. International tribunals, as presently constituted, are severely limited in their ability to contribute to the development of an operational international liability regime. Because only states have standing to appear as parties to proceedings before the International Court of Justice (ICJ), individuals or associations of individuals must attempt to prevail upon their national governments to espouse their claims. Seldom, however, do their governments acquiesce: states are generally reluctant to risk relinquishing even a small quantum of their sovereignty by submitting to binding third-party adjudication. Moreover, potential state complainants may decline to bring actions against offending states for fear that they will be called to task for their own polluting conduct in other situations. Finally, the source and content of the law that is to be applied by international tribunals remain unclear.

On the other hand, existing human rights mechanisms (or those which could be established under a progressive human rights regime) present a much more promising vehicle for the protection of environmental victims. Several international human rights tribunals and other bodies may hear, and in some cases provide redress for, the complaints of individuals. Furthermore, existing jurisprudence evidences a trend within the international community to recognize responsibility for the environment as a governmental obligation to protect human rights. Nevertheless, there is little jurisprudence on the rights that are implicated by environmental problems or the standards by which states will be held accountable for violating those rights.

B. DEBATE: A Human Right to Environment: The Remedy?

1. Affirmative²

A growing number of global and regional human rights instruments³ and national constitutions⁴ include a right to environment among their guarantees. The United Nations Commission on Human Rights also has asserted a link between preservation of the environment and the promotion of human rights. The Commission recently supported a decision of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the relations between the two subjects.

There is no doubt that the global environment is deteriorating and that failure to alleviate current environmental degradation may threaten human health and human life. However, the necessary and appropriate international legal response remains unclear. These problems generate a host of questions and public policy alternatives. A fundamental question is whether human rights and environmental protection are premised upon fundamentally different social values, such that efforts to implement both simultaneously will produce more conflict than improvement, or, on the other hand, whether human rights and environmental protection are complementary, each furthering the aims of the other.

Some theorists suggest that environmental issues belong within the human rights category, because the goal of environmental protection is to enhance the quality of human life. Opponents argue, however, that human beings are merely one element of a complex, global ecosystem, which should be preserved for its own sake. Under this approach, human rights are subsumed under the primary objective of protecting nature as a whole.

A third view, which seems to best reflect current law and policy, 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 recognizes the potential conflicts between environmental protection and other human rights, but also the contribution each field can make to achieving their common objectives.

In order to contribute to environmental protection using a human rights approach--or vice versa--this third view suggests several alternatives. First, environmental problems may be combated through the assertion of existing

human rights, such as the rights to life, personal security, health, and food. In this regard, a safe and healthy environment may be viewed either as a pre-condition to the exercise of existing rights or as inextricably intertwined with the enjoyment of these rights. A second, intermediate position proposes a set of "environmental rights" (rights of the environment as well as rights to the environment) based upon existing rights to information about and involvement in the political decision-making process. Third and most ambitiously, a specific "right to environment" could be formulated and added to the current catalogue of human rights. This article will suggest that although human rights and environmental protection represent separate social values, the overlapping relationship between them can be resolved in a manner which will further both sets of objectives. A clearly and narrowly defined international human right to a safe and healthy environment, currently emerging in international law, can contribute to this goal.

a. Human Rights Objectives

The goal of international human rights law, as expressed in the Universal Declaration of Human Rights and the International Covenants, is "freedom, justice and peace in the world." The means of achieving this goal begin with legal recognition of the equal and inalienable rights of all members of the human family and of the inherent dignity possessed by each individual.

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 individual human rights preserves them from the ordinary political process. Individual rights may thus significantly limit the political will of a democratic majority, as well as a dictatorial minority. For example, in attempting to attain a widely accepted policy goal, even a representative democracy may not produce legislation that limits or abolishes the individual right to be free from cruel, inhuman, or degrading treatment or punishment. This absolute limitation on domestic political decisions is potentially an important consequence of elaborating a right to environment, particularly given the high short-term costs involved in many environmental protection measures and the resulting political disfavor.

b. Environmental Law Objectives

Like international human rights protection, international environmental law has developed recently, but its ultimate goal is more difficult to define. Many commentators believe environmental protection exists to serve the interests of humans. An early environmental text best reflects this, even in its title: The 1902 Convention for the Protection of Birds Useful to Agriculture. Useful birds, strictly protected by the treaty, are insectivores. Non-useful birds, listed in Annex 2 of the Convention, include the majority of hunters, such as eagles and falcons, some of which today are threatened with extinction and strictly protected.

In contrast, some environmentalists fear that a human-centered, utilitarian view of environmental law ultimately reduces all non-human aspects of the ecosystem to consideration of their short-term economic value to humanity, exacerbating resource over-exploitation and environmental deterioration. To the extent that this view deems environmental protection an independent goal--nature for nature's sake--and the priority for national and international action, it either ignores or risks conflict with the human rights agenda.

c. Common Objectives

In reality, the apparent conflict between human utility and intrinsic value of the environment does not exist because it is impossible to separate the interests of mankind from protection of the environment. According to the World Charter for Nature, "[m]ankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients . . ." The Earth's biosphere is an integrated whole whose sustainability depends upon conservation of the collection of micro-ecosystems which comprise it. Each sector of the environment is critical, whether useful or not, because it forms an indispensable element of the whole interrelated system which must be protected to ensure human survival. While the ultimate aim of environmental protection remains anthropocentric, humans are not separable members of the universe. Rather, humans are interlinked and interdependent participants with duties to protect and conserve all elements of nature, whether or not they have known benefits or current economic utility. This anthropocentric purpose should be distinguished from utilitarianism.

The view that mankind is part of a global system may reconcile the aims of human rights and environmental protection, since both ultimately seek to achieve the highest quality of sustainable life for humanity within the existing global ecosystem. However, potentially conflicting differences of emphasis still exist: the essential concern of human rights law is to protect existing individuals within a given society, while the purpose of environmental law is to sustain life globally by balancing the needs and capacities of the present with those of the future. Therefore, protection of nature at times may conflict with preservation of individual rights. This problem cannot be avoided by developing a right to environment, but developing such a right would place environmental protection on an equal level with other human rights for balancing purposes, rather than subordinating it to human rights, such as the right

to property.

d. Applying Existing Human Rights to Environmental Protection

The 1972 Stockholm Declaration on the Human Environment recognized the link between human rights and environmental protection, stating 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." The Stockholm formulation invokes fundamental human rights guaranteed in international instruments since the 1948 adoption of the American Declaration of the Rights and Duties of Man and the Universal Declaration of Human Rights. The Stockholm Declaration does not actually proclaim a right to environment, but rather implies that the exercise of other human rights indispensably requires basic environmental health. The human rights directly threatened by environmental deterioration include the right to life, the right to health, the right to privacy, the right to suitable working conditions, the right to an adequate standard of living, and rights to political participation and information. United Nations texts since the Stockholm Declaration have generally used this indirect approach and have avoided explicitly claiming a new human right to environment.

The relationship between existing human rights and environmental protection has been described several ways. One view sees environmental protection as a prerequisite or precondition to the exercise of fundamental human rights. This formulation has inherent risks, however, because governments can and have used "preconditions" as a pretext to deny the enjoyment of guaranteed rights. For example, some developing countries have used economic development as a precondition to the enjoyment of civil and political rights, turning the latter into a "luxury" beyond their means.

Another perspective views environmental protection not as a precondition for human rights, but rather as an integral part of their enjoyment. For example, individuals have brought petitions to international human rights tribunals alleging violations of guaranteed rights as a result of environmental damage. The United Nations Human Rights Committee, established by the International Covenant on Civil and Political Rights, recently decided such a case and recognized environmental harm as a valid cause of action.

These international cases of the European Commission and Court indicate that existing human rights standards can afford some limited environmental protection. In particular, international tribunals have accepted that environmental harm may violate the right to privacy, the right to life, and the right to property. In addition, the European cases demonstrate that human rights protections will not necessarily prevent a state from adopting and enforcing environmental norms, even though the European Convention does not explicitly include environmental protection as one of the permissible grounds for limiting human rights guarantees. However, the scope of protection for the environment based on existing human rights norms remains narrow because environmental degradation is not itself a cause for complaint, but rather must be linked to an existing right. As a result, efforts have arisen to enumerate more specific environmental rights.

e. Environmental Rights

The term "environmental rights" has several meanings. If interpreted in the same way as the term "human rights," it can be understood to refer to rights of the environment, i.e., rights that the environment possesses, rather than the right of humans to a healthy environment. Such a reading would cause concern for those who view the protection of nature and respect for human rights as conflicting interests, especially in the context of developing countries.

In a more manageable interpretation, "environmental rights" refers to the reformulation and expansion of existing human rights and duties in the context of environmental protection. This approach is an intermediate step between simple application of existing rights to the goal of environmental protection and recognition of a new full-fledged right to environment. These environmental rights would be closely aligned with the concepts of political participation and informed consent. By building on existing political rights, immediate procedural guarantees could be provided against arbitrary action likely to cause significant deterioration of the environment. Thus, an individual right of action to conserve the environment should be established. The direct involvement of those likely to be affected by environmental harm will help prevent the establishment of secret toxic dumpsites or other acts of deliberate pollution. Effectuating such a regime would require: (1) a right to prior knowledge of such actions, with a corresponding state duty to inform; (2) a right to participate in decision-making; and (3) a right to recourse before competent administrative and judicial organs. Implicit in the duty to inform would be the state's duty to acquire and study for dissemination all relevant information on the environmental impact of planned actions.

Many international documents over the last two decades have addressed the issue of informing the public about and involving them in decisions relating to the environment. For example, Principle 23 of the World Charter for Nature states that "[a]ll persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and

shall have access to means of redress when their environment has suffered damage or degradation."

Human rights instruments also provide a general right to access to information and to participation in decision-making processes. For example, article 10 of the European Convention on Human Rights guarantees "freedom to receive information." In 1981, the Council of Europe Committee of Ministers recommended to member states that every individual should have the right to obtain, on request, information held by public authorities, except for legislative bodies and judicial authorities. This approach of elaborating international environmental rights can have important consequences in protecting the environment of communities and states. However, with recognition of basic procedural rights, two fundamental questions remain unanswered: (1) to what extent does the right to information and participation apply to individuals affected outside the boundaries of the acting state; and (2) who makes the final decision on any project or action which may affect the environment, and are there substantive limits to the actions taken by the decision makers? With regard to the first question, if environmental rights to information and participation extend to "all affected persons," this inevitably will conflict with traditional concepts of state sovereignty because the affected persons may live outside the acting state's boundary. Because the environment does not recognize frontiers, effective implementation of procedural environmental rights should include recognition of transboundary harm and the right of non-nationals to information and participation in a state's decision-making process. States will probably resist such a result, although it would further both human rights and environmental protection objectives. A dilemma arises in trying to define the requisite probability, proximity, and degree of potential harm necessary for an individual or community to qualify as an "affected person" for purposes of environmental rights. In some cases, these rights could even be claimed for the world community, as, for example, in regard to any national decisions which could affect the global climate.

As for the second question, political bodies of the acting state are in the best position to make the final decision on projects and actions which affect the environment, but their discretion should be limited by substantive international environmental norms. Procedural guarantees of information and participation can prove insufficient to protect the environment if a fully informed society decides to sacrifice environmental quality in order to advance economic or cultural considerations. Such decisions can have harmful consequences for other states or the international commons. For example, a culture devoted to whaling might receive full information on environmental issues, such as the need for biological diversity, but still conclude that whaling should continue, even if it means the depletion or extinction of a species of mammals. A majority of the world may reach the opposite conclusion given the same information and consider the national conclusion unacceptable. Major environmental decisions, which require global participatory rights, should thus be made through the adoption of international environmental regulations, including effective measures for implementation and control.

In sum, environmental rights, understood as procedural guarantees of information and political participation which have been reformulated and extended specifically to cover environmental decisions, can effectively protect the environment only if coupled with substantive international regulation. However, such a linking of procedural rights to substantive environmental norms may go farther by leading to the creation of a new human right: the right to environment.

f. The Right to Environment

Not every social problem must result in a claim which can be expressed as a human right. Indeed, the criteria for considering a claim as a human right generate extensive debates, leading to a lack of consensus as to existing human rights.

A few authors have proposed classifying existing and evolving rights into "generations" according to perceived historical evolution and theoretical differences. Under this framework, civil and political rights are "first generation" rights and define a sphere of personal liberties into which the government cannot enter. For example, freedom of speech simply requires the government to abstain from interference. Economic and social rights, the "second generation" of rights, require government action. The right to a certain standard of living necessitates the involvement of the state. New rights, established under the rubric "third generation," may both be invoked against the State and demanded of it; but above all (and herein lies their essential characteristic) they can be realized only through the concerted efforts of all the actors on the social scene: the individual, the State, public and private bodies and the international community.

This formulation presents several difficulties. First, in the domestic law of some countries and to a certain extent in international law, economic and social rights and their corresponding imposition of duties were the "first generation," preceding the recognition of civil and political rights. Second, the concept of "generations," and whether or not a right fits into a particular generation, gives no guidance as to whether or not a claim should be recognized as a human right. Third, the claimed "generational" distinctions between positive and negative state obligations and those rights which encompass both do not exist in practice. As recent case law has clarified, the

obligations generally imposed upon states in human rights instruments demand both abstention from violation and positive action to ensure the rights guaranteed.

g. Issues Posed by the Right to Environment as a Human Right

In positive international law, a right to environment is not clearly or frequently stated. However, future human rights and humanitarian instruments will probably contain additional expressions of this emerging legal norm because the environmental movement continues to gather force as more global environmental problems are identified and because the link between human rights and the environment increasingly is recognized.

However, if the goal of establishing a right to environment were accepted, the issue would be complicated by both temporal and geographic elements absent from consideration in regard to other human rights. As discussed above, the environmental rights of future generations are implicated. A depleted environment harms not only present generations, but future generations of humanity as well. First, an extinct species and whatever benefits it would have brought to the environment are lost forever. Second, economic, social, and cultural rights cannot be enjoyed in a world where resources are inadequate due to the waste of irresponsible prior generations. Third, the very survival of future generations may be jeopardized by sufficiently serious environmental problems. A right to environment thus implies significant, constant duties toward persons not yet born.

Another unusual aspect of a right to environment would be the potentially vast expansion of the territorial scope of state obligations. Present human rights instruments generally require each state to respect and ensure guaranteed rights "to all individuals within its territory and subject to its jurisdiction." This geographic limitation reflects the reality that a state normally will have the power to protect or the possibility to violate human rights only of those within its territory and jurisdiction. However, nature recognizes no political boundaries. A state polluting its coastal waters or atmosphere may cause significant harm to foreign individuals thousands of miles away. States that permit or encourage depletion of the tropical rain forest can contribute to global warming which may threaten the world environment.

Any elaboration of a right to environment must consider the temporal elements inherent in the protection of future generations, as well as the geographic extent of state responsibility for environmental harm. The required broad extension of state liability may prove to be the biggest single hurdle to establishing a right to environment. This problem seems to exist only within a human rights framework due to the structural differences between enforcement in a human rights and in an environmental regime. Most environmental protection treaties are not implemented through liability regimes or state responsibility, but rather through various incentive or trade-off mechanisms. In contrast, human rights treaties rely upon state reporting procedures, inter-state complaints, and individual petitions or complaints, all of which directly or indirectly permit attack or criticism of non-complying states.

Moreover, the term "environment" is neutral in itself, implying no measure of environmental quality. As a result, texts that speak of the right to environment generally add qualifying terms. The Stockholm Declaration utilizes the phrase "environment of a quality that permits a life of dignity and well-being." Constitutional texts that proclaim a right to environment or state duties to protect the environment add standards of varying specificity. For example, the Spanish Constitution speaks of "the right to enjoy an environment suitable for the development of the person." The 1979 Peruvian Constitution recognizes "the right to live in a healthy environment, ecologically balanced and adequate for the development of life and the preservation of the countryside and nature." These elaborations remain fairly nebulous; likewise, human rights treaties will not be able and should not try to define all the elements of environmental quality. It should be recognized that the same problem arises when interpreting and applying many other human rights, where equally conceptually difficult and vague terms such as "due process," "ordre public," "national security," "social security," and "self-determination" must be implemented.

These classic terms, long familiar to democratic societies, have attained precision through both legislative action and judicial interpretation. Public consciousness can take abstract terms in law and give them meaning in a concrete social and historical context, rendering them sufficiently precise to allow judicial decisions. There is no reason why such developments could not occur in the area of the environment. In many societies, the basic concept that the environment should be preserved and that each person should benefit from it already exists. Tribunals which have customarily dealt with human rights issues are capable of bringing content to a right to environment and particularly to the procedural duties corresponding to that right. Moreover, the increasingly effective supervisory technique of state reporting on implementation of human rights obligations seems well designed as a mechanism for enforcing an international right to environment.

Ultimately, the definition of a right to environment must include substantive environmental standards that quantitatively regulate harmful air pollution and other types of emissions. Although establishing quality standards requires extensive international regulation of environmental sectors based upon impact studies, such regulation is by

no means impossible. While adoption of quality standards demands extensive research and debate involving public participation, substantive minima are a necessary complement to the procedural rights leading to informed consent. Otherwise, a right to environment would be ineffective in preventing serious environmental harm.

Establishing the content of a right through reference to independent and variable standards is used in human rights, especially with regard to economic entitlements. Rights to an adequate standard of living and to social security are implemented in varying measures by individual states based on general treaty provisions, according to changing economic indicators, needs, and resources. No precise standard exists, nor can such a standard be established in human rights treaties. Instead, the conventions state rights to "adequate" living conditions for health and well-being and to social security without defining the term further. The "framework" treaty allows national and local regulations to elaborate on these rights, since norms are easier to define and amend on the local level and are more responsive to the needs of the community.

A similar approach should 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 models of the environment. Thus, it is impossible for a human rights instrument to specify precisely the products which should not be used or the chemical composition of air which must be maintained. These matters will vary in the same way that the economic situations of communities change. The necessary measures to implement the right to environment will thus be determined by reference to independent environmental findings and regulations capable of rapid amendment. For this reason, international environmental instruments commonly regulate through the use of framework treaties of general obligation, supplemented by annexes or more easily amended protocols. The fact that the right to environment will be implemented in varying ways 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.

In a human rights approach, the ultimate problem becomes one of balancing competing rights. For example, the right to environment may at times conflict with the right to property or the right to culture. In particular, environmental protection might in some cases require limits or restrictions on current uses of resources and property, or perhaps even a denial of property rights. However, the need to balance is not unique to the subject of environmental protection and human rights and has been effectively accommodated in other contexts.

h. Conclusion

The recognition of a right to environment would add to the protection of the biosphere whose health and safety are essential for human existence. A right to environment would also impose state obligations to protect the environment, even if there are no consequences outside the territory of the given state. Drafting efforts will need to clarify the obligations of states both temporally and spatially, especially regarding the issue of participatory rights of non-nationals and non-residents who may be affected by environmental decisions. The implementation of a right to environment will depend on independent criteria of health and safety, which will vary with scientific knowledge over time and space, yet the right to environment has a core of meaning which can be defined and made enforceable through legal instruments. Formulations of a right to environment already included in international and national legal instruments attest to the viability of, and interest in, furthering environmental protection as a fundamental human right.

2. Negative⁵

While it should be self-evident that there is a direct functional relationship between protection of the environment and the promotion of human rights, it is much less obvious that environmental protection ought to be conceptualized in terms of a generic human right. Indeed, the emphasis on such a perspective on the interrelationship of human rights and environmental protection carries significant costs; it reflects a maximalist position that offers little prospect to becoming reality in the near term while its propagation diverts attention and efforts from other more pressing and promising environmental and human rights objectives. In short, a generic international environmental entitlement, both as an already existing and an emerging human rights concept, is a highly questionable proposition.

Narrowly defined environmental objectives may, of course, be vindicated through the assertion of individual human rights as in a situation in which environmental conditions pose a threat to life or health. Likewise, environmental protection objectives may be incidentally vindicated in human rights complaints.

The proposed generic environmental human right, by contrast, would make broad environmental policy decisions, such as standard-setting--the determination of what is a "healthy environment" or what constitutes an "adequate margin safety" etc.--a central concern of an individual right-based process. This offers the prospect of a too narrowly focused, piecemeal approach to setting general environmental policy. Moreover, a generic environmental human rights proposal would presumably imply that alleged violations be dealt with in international

human rights fora, few of which might be able to discharge efficiently the task of deciding whether a human right based on the generic entitlement has been violated. This conflicts with the general recognition that in the field of environmental protection, decision-making--except as regards basic policy parameters--is best entrusted to specialized or technical fora: the domestic administrative agencies, and conferences of the parties as repositories of specialized knowledge, in the case of international environmental regimes.

Moreover, the notion of "environmental human rights" fosters an anthropocentric view of the environment which offers no guarantee against global environmental degradation and instability. For a human-rights based approach to the environment--even one that reflects sensitivity to intergenerational concerns--may well be strictly instrumentalist in the sense of subordinating all aspects of nature to the human enterprise. Besides, the very label of "human rights" connotes "species chauvinism," no matter how enlightened the underlying definition of the "human right." The legitimacy of, indeed the moral obligation to espouse, a more discriminating environmental point-of-view, i.e., one that recognizes the intrinsic merit of protecting nature for nature's sake, has been endorsed in the literature.

Thus, although the proposal for an environmental human right might have a certain attractiveness in that it may (temporarily) give a high profile to environmental issues, in the end, it would amount to little more than legal window dressing. It is unlikely to promote realistic environmental or human rights objectives. Realism calls instead for a more modest, yet focused campaign which aims at gaining general international recognition of specific or well-defined environmental rights and at strengthening or building upon existing international environmental review procedures.

FOOTNOTES CHAPTER 6

¹ Michelle Leighton Swartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 355-59 (1993). Copyright 1993. Reprinted by permission.

² Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. INT'L L.J. 103, 103-11 (1991). Copyright 1991. Reprinted by permission.

³ See, e.g., United Nations Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., art. 24, U.N. Doc. A/RES/44/25 (1989), reprinted in 28 I.L.M. 1448 (1989); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, "Protocol of San Salvador," Nov. 14, 1988, art. 11, O.A.S.T.S. No. 69, 28 I.L.M. 156 (1989); African Charter of Human and Peoples Rights, opened for ratification June 27, 1981, art. 24, O.A.U. Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1982).

⁴ At least forty-four national constitutions as well as some twenty state constitutions contain provisions concerning environmental rights and duties. Moreover, virtually every constitution revised or adopted since 1960 has addressed environmental issues. See Alexandre C. Kiss, *Environnement et Développement ou Environnement et Survie*, 118 JOURNAL DU DROIT INTERNATIONAL 263, 266-27 (1991).

⁵ Gunther Handl, *Human Rights and Protection of the Environment: A Mildly "Revisionist" View*, in A. Cancado Trindade (ed.), *Human Rights, Sustainable Development and the Environment* 117, 119-20, 133, 135, 137-38 (Instituto Interamericano de Derechos Humanos, San Jose, 1992). Copyright 1992. Reprinted by permission.