

PREFACE

Dinah Shelton*

Towards the end of 2015, doctors in Flint, Michigan began to identify severe lead poisoning in the city's children, the result of official decisions to reduce costs by shifting to a new, albeit contaminated, source of drinking water.¹ In Mossville, Louisiana, residents suffer from blood diseases and respiratory ailments due to decisions to place highly polluting industries around the predominantly poor African American town.² In Southern California, a methane leak from a natural gas reservoir has forced hundreds of families to abandon their homes, at least temporarily.³ Similar incidents occur throughout the world, harming the environment, but also infringing the human rights of those affected. Although proposed policies and projects should be informed by the requirements of both areas of law, too often each is treated in isolation or both concerns are ignored by officials giving priority to short-term economic benefits. In response to the often devastating consequences of such decisions, an increasing number of scholars and activists are engaged in examining the interaction of social, economic and environmental concerns—recognized by the international community as the three pillars of sustainable development—in order to ensure that each pillar is taken into account.

In this context, it is unsurprising that Vermont Law School continues to demonstrate its preeminence in environmental law scholarship by inviting experts to address some of the complex and important topics related to environmental protection and the enjoyment of human rights. It is an honor to provide a preface to the thoughtful and important contributions presented at the 2015 *Vermont Law Review* Symposium, Habitat for Human Rights. As these articles reveal, the intersection between achieving environmental protection and implementing human rights guarantees has become increasingly evident during the nearly half-century long development of norms aimed at conserving the natural resource base on which life depends, leading to new approaches in both domains. As the Keynote address points

* Manatt/Ahn Professor of Law (emeritus) at the George Washington University Law School.

1. Dwight Adams, *Flint Water Crisis: 5 Things You Need to Know*, INDYSTAR (Feb. 6, 2016, 7:25 PM), <http://www.indystar.com/story/news/2016/02/04/flint-water-crisis-5-things-know/79753684/>.

2. See *Mossville Env'tl. Action Now v. United States*, Inter-Am. Comm'n H.R., Admissibility Report No. 43/10, Petition 242/05, ¶ 2 (Mar., 17, 2010), <http://www.oas.org/en/iachr/decisions/admissibilities.asp> (describing petitioners' claim that Mossville residents are the victims of "environmental racism" because high-polluting factories surround the minority community).

3. *Porter Ranch Gas Leak Updates*, L.A. TIMES (Feb. 8, 2016, 1:05 PM), <http://www.latimes.com/local/lanow/la-me-porter-ranch-gas-leak-live-htlmstory.html>.

out, a large majority of countries now constitutionally guarantee a specific level of environmental quality, as do several regional human rights treaties.⁴ National and international jurisprudence is giving greater content to these rights and the corresponding obligations of states and non-state actors.

This growth in legal recognition of the environment as a human rights issue and, to a lesser extent, respect for human rights as an avenue to greater environmental protection, may be attributed to several underlying factors. First, and perhaps most important, has been the gradual emergence of an ethic focused on protection of the environment as a fundamental value of society, an end in itself, on par with ensuring traditional liberties and satisfying basic human needs. Without this ethic, concern for the environment rests as simply one option among many in policymaking and human activities, often subordinated to short-term economic gains at the expense of long-term harm. Laws are shaped and compliance facilitated or undermined by ethics and a society's values, which are changing. The relationship between humans and nature has been ruled traditionally by an anthropocentric vision of human beings as the apex of creation, given complete dominion or ownership over the natural world.⁵ From this perspective, human self-interest is the sole justification for environmental protection, with other species and non-living resources having only utilitarian value to human well-being.⁶ The 2015 Encyclical Letter of Pope Francis devoted to "Our Common Home"⁷ indicates the emergence of a fundamental change in its message to "every person living on this planet."⁸ It rejects an expansive notion of "dominion," insisting instead that "[e]ach community can take from the bounty of the earth whatever it needs for subsistence, but it also has the duty to protect the earth and to ensure its fruitfulness for coming generations."⁹ As there is "no place for a tyrannical anthropocentrism unconcerned for other creatures,"¹⁰

4. Marcos Orellana, Keynote Address, *15th Annual Vermont Law Review Symposium: Habitat for Human Rights*, 40 VT. L. REV. 417, 419–20 (2016).

5. In antiquity, "Protagoras proclaimed it: Man is the measure of all things." John Rodman, *The Dolphin Papers*, 259 N. AM. REV. 12, 16 (1974). Enlightenment philosophers like Kant asserted that Man is the ultimate purpose of creation here on Earth. IMMANUEL KANT, *CRITIQUE OF JUDGMENT* 348–49 (J.H. Bernard trans., Macmillan 2d ed. 1914) ("[Man] is the ultimate purpose of creation here on earth, because he is the only being upon it who can form a concept of purposes, and who can by his Reason make out of an aggregate of purposively formed things a system of purposes.").

6. A prevalent view in the past claimed human supremacy and ownership over all creation based on the "dominion" given humans in the first of the Creation stories in Genesis. *Genesis* 1:28.

7. POPE FRANCIS, *ENCYCLICAL LETTER: 'LAUDATO SI' ON CARE FOR OUR COMMON HOME*, (May 24, 2015), http://w2.vatican.va/content/dam/francesco/pdf/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si_en.pdf.

8. *Id.* at para. 3.

9. *Id.* at para. 67.

10. *Id.* at para. 68.

It is not enough . . . to think of different species merely as potential “resources” to be exploited, while overlooking the fact that they have value in themselves. Each year sees the disappearance of thousands of plant and animal species which we will never know, which our children will never see, because they have been lost forever. The great majority become extinct for reasons related to human activity. Because of us, thousands of species will no longer give glory to God by their very existence, nor convey their message to us. We have no such right.¹¹

In sum, “[t]he natural environment is a collective good, the patrimony of all humanity and the responsibility of everyone.”¹² The impact of a shift away from a utilitarian vision to one grounded in the intrinsic value of nature cannot be underestimated.

Human rights are also a fundamental value of the international community today, with more than 100 global and regional human rights texts. A focus on human rights in the context of environmental protection may raise the specter of reinforcing the “tyrannical anthropocentrism”¹³ referred to above. However, the second factor stimulating closer attention to the interrelationship of both fields has come from recognition that many guaranteed human rights, including the right to life, cannot be enjoyed without ensuring a healthy environment. The Keynote also notes many of the developments leading to and resulting from this recognition.¹⁴

Third, as a practical matter, many persons and organizations concerned with environmental protection have turned to human rights law “*faute de mieux*”, because in its seven decades of development, human rights law has developed international complaints procedures and tribunals that remain largely absent from international environmental law. Many cases where environmental harm undermines the enjoyment of human rights are thus brought before regional and global human rights bodies for remedies and redress. These include cases stemming from the situations discussed in several of the articles published in this volume. Guatemalan gold-mining, discussed in depth by Raquel Aldana and Randall Abate,¹⁵ led local communities to file petitions and request precautionary measures from the Inter-American Commission on Human Rights. On May 20, 2010, the Commission granted the precautionary measures on behalf of the members

11. *Id.* at para. 33.

12. *Id.* at para. 95.

13. *Id.* at para. 68.

14. Orellana, *supra* note 4, at 420.

15. Raquel Aldana & Randall S. Abate, *Banning Metal Mining in Guatemala*, 40 VT. L. REV. 597, 597 (2016).

of eighteen communities of indigenous Mayans, asking the State of Guatemala to suspend mining in the Marlin I project and other activities related to the concession granted to the company pending an examination of the merits of the complaint about the process that led to the concession and contamination of the local water supply.¹⁶ The situation in the Oriente region of Ecuador, addressed by Judith Kimerling,¹⁷ has also been addressed several times in the Inter-American system, as she ably discusses. In Africa, the human rights and environmental problems of the Niger Delta not only led to developments in Nigerian legislation, presented by Adebola Ogunba,¹⁸ but produced the landmark *SERAC* decision of the African Commission on Human and Peoples' Rights.¹⁹

A fourth factor that may be cited as stimulating the intersection of human rights norms and environmental law is the result of how states draft international texts. Often they use undefined and general terms that may be given content through references across legal regimes. An example can be found in the United Nations Framework Convention on Climate Change, which obligates states to take action to prevent undefined "dangerous" levels of greenhouse gas concentrations in the atmosphere.²⁰ The states parties could define this term by setting a specific degree of global average temperature that states must ensure is not exceeded, as they seem to have

16. *Medidas Cautelares MC 260-07, Comunidades del Pueblo Maya (Sipakepense y Mam) de los Municipios de Sipacapa y San Miguel Ixtahuacan en el Departamento de San Marcos, Guatemala* [Communities of the Maya People (Sipakepense and Mam) of the Sipacapa and San Miguel Ixtahuacan in the Department of San Marcos, Guatemala], Inter-Am. Comm'n H.R. (May 20, 2010), <http://www.oas.org/es/cidh/decisiones/cautelares.asp>. Later the same year, in Precautionary Measure 199-09, *300 Inhabitants of Puerto Nuevo, Peru*, the IACHR called for the adoption of precautionary measures to protect the life and personal integrity of those affected by the warehousing and transport of lead. The Commission asked the Peruvian State to adopt the necessary measures with a view to suspending lead warehousing and transport activities in Puerto de Callao until such time as it is able to adopt, among other things, measures to effectively eliminate the situation of environmental contamination, relocate the population, or provide for an alternative lead warehousing site; to adopt the necessary measures to provide specialized medical diagnostic services for the beneficiaries as well as appropriate and specialized medical treatment to those whose diagnosis indicates a risk of irreparable harm to their personal integrity or life; and to continue adopting the necessary measures to mitigate harm to the environment. *Medidas Cautelares MC 199-09, 300 Pobladores de Puerto Nuevo, Peru* [300 Residents of Puerto Nuevo, Peru], Inter-A. Comm'n H.R., (Dec. 27, 2010), <http://www.oas.org/es/cidh/decisiones/cautelares.asp>.

17. Judith Kimerling, *Habitat as Human Rights: Indigenous Huaorani in the Amazon Rainforest, Oil, and Ome Yasuni*, 40 VT. L. REV. 445, 445 (2016).

18. Adebola Ogunba, *An Appraisal of the Evolution of Environmental Legislation in Nigeria*, 40 VT. L. REV. 673, 673 (2016).

19. *Social and Economic Rights Action Center (SERAC) v. Nigeria*, No. 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], (Oct. 27, 2001), http://www.achpr.org/files/sessions/30th/comunications/155.96/achpr30_155_96_eng.pdf.

20. U.N. Framework Convention on Climate Change, art. 2, May 9, 1992, 1771 U.N.T.S. 107.

done with the Paris Agreement discussed by Tracy Bach.²¹ Alternatively, or to supplement the Paris Agreement, the term dangerous could be defined to mean those concentrations of greenhouse gases that impair the enjoyment of internationally-recognized human rights. Similarly, just as human rights can inform environmental terminology, environmental law can inform or supplement human rights law: the European Court of Human Rights, for example, has referenced environmental agreements to define the scope of states' positive obligations to protect the right to life from hazardous installations and activities.²²

The development of rights-based approaches to environmental protection has not gone unchallenged. Resolutions to take up environmental matters in United Nations human rights bodies have often been adopted by a divided vote, opposed by developed states and supported by developing countries. Efforts for more than 30 years to have the United Nations adopt a declaration of environmental rights have been unsuccessful. At the regional level, the Council of Europe's Committee of Ministers has repeatedly rejected proposals to add a right to environmental quality to the European Convention on Human Rights and Fundamental Freedoms. Yet, undeniable progress has occurred through the efforts of some states and legions of civil society organizations.

If there has been some success in developing environmental rights in national constitutions and human rights texts, the same cannot be said with equal conviction with respect to the inclusion of rights language in environmental agreements. Proposals at the Stockholm and Rio Conferences to recognize the right to a safe and healthy environment were rejected, with little mention of the topic at the subsequent World Summit on Sustainable Development in Johannesburg and the Rio+20 meeting. Principle 10 of the Rio Declaration does recognize the procedural rights to information, public participation, and redress,²³ but strong treaty guarantees of these rights are essentially limited to the provisions of the Aarhus Convention.²⁴ Other major agreements, including the Convention on Biological Diversity and the Framework Convention on Climate Change, contain only weak obligations

21. Tracy Bach, *Human Rights in a Climate Changed World: The Impact of COP21, Nationally Determined Contributions, and National Courts*, 40 VT. L. REV. 561, 561 (2016). See also Conference of the Parties on the U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, art. 2, para. 1, (Dec. 12, 2015), <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf> (holding the increase in average temperatures from pre-industrial levels to less than two degrees Celsius).

22. Öneriyıldız v. Turkey, 2004 XII Eur. Ct. H.R. 79 (Nov. 30, 2004).

23. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992).

24. U.N. Econ. Comm'n for Eur., *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, art. 1 (June 25, 1998).

that states should, as appropriate, provide information and allow public participation.²⁵ The Paris Agreement, as Tracy Bach notes, only acknowledges in its preamble that states “should . . . respect, promote and consider . . . human rights” in actions concerning climate change.²⁶ Public participation is an “aim” in Article 6(8)²⁷ and something states parties “should” do in taking adaptation action in Article. 7.²⁸ The parties are obligated in Article 12 to “cooperate in taking measures . . . to enhance . . . public access to information” and participation, but only “as appropriate.”²⁹

If there is a reticence to include or reaffirm human rights guarantees in environmental protection laws and policies, it is worth considering why, when environmental concerns have been incorporated in human rights law. One reason may be purely economic. As Mark Squillace’s article on “fracking” reveals, economic projects can encounter considerable resistance from local communities when they are informed about the environmental and health risks presented, leading to controversy over priorities and how to balance economic, social, and environmental costs.³⁰ Information and public participation does not necessarily lead to consensus, but may produce tensions and divisions. Proponents of projects and those who will benefit from them may seek to avoid such problems by minimizing opportunities for opposition to develop and be heard. At the international level, challenges to economic development projects and foreign investment can lead to backlash against human rights institutions that find such projects may violate human rights as a consequence of environmental destruction.

Human rights is a way of empowering the most vulnerable segments of society and ensuring that the democratic process does not disadvantage minorities who cannot determine the outcome of decision-making processes. The siting of hazardous industries in poor communities is well-known and

25. See U.N. Convention on Biological Diversity, art. 13, June 5, 1992, 1760 U.N.T.S. 79 (requiring Parties to “[p]romote and encourage understanding of the importance of, and the measures required for, the conservation of biological diversity . . . [and] [c]ooperate, as appropriate, with other States and international organizations in developing educational and public awareness programmes”); U.N. Framework Convention on Climate Change, *supra* note 20, art. 6 (stating that Parties to the Convention “shall promote and facilitate . . . [p]ublic access to information on climate change and its effects [and] [p]ublic participation in addressing climate change and its effects and developing adequate responses”).

26. Bach, *supra* note 21, at 570–71 (quoting Conference of the Parties on the U.N. Framework Convention on Climate Change, *supra* note 21, pmbl.).

27. Conference of the Parties on the U.N. Framework Convention on Climate Change, *supra* note 21, art. 6.

28. *Id.* art. 7.

29. *Id.* art. 12.

30. Mark Squillace, *Managing Unconventional Oil and Gas Development as if Communities Mattered*, 40 VT. L. REV. 525, 525 (2016).

has an international dimension with the dumping of toxic and hazardous wastes and products in the least-developed countries least able to handle such substances in an environmentally-sound manner that avoids risks to human health and well-being. The benefits of such activities are gained by the powerful while the burdens are borne by the poor.

Climate change poses stark problems of ensuring human rights and protecting the environment, if it is acknowledged that economic and social rights are, as proclaimed by the international community, indivisible and interdependent with civil and political rights. The United Nations adopted the Sustainable Development Goals for the period 2015–2030, in which it “recognize[d] that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development.”³¹ One of the specific goals is to provide affordable energy to the 1.5 billion persons who now lack access to electricity.³² This policy of priority for the poor will require reductions on the part of wealthy countries in actions related to climate change mitigation and adaptation, because there is a zero-sum global budget for greenhouse gas emissions. Poverty alleviation requires economic development that will raise greenhouse gas emissions in poorer countries, necessitating an offset by developed countries if total emissions are to be reduced.

For the present, all climate change policies involve increasing carbon pricing, which will increase poverty unless cheap alternative energy sources are provided.³³ Mitigation strategies that rely on increasing the price of carbon (through cap and trade or carbon taxes) will raise energy prices, creating a critical obstacle to development and poverty reduction.³⁴ Addressing climate change should at a minimum not make the situation worse, but neither should addressing poverty exacerbate climate change. Given that the cumulative carbon budget is zero-sum, developed countries will have to take politically unpopular measures to meet the goal of providing affordable energy while also reducing fossil fuel emissions. Industries dependent on fossil fuels and all the persons whose employment is linked to those industries are likely to resist the necessary changes.

31. G.A. Res. 70/1, Transforming Our World: the 2030 Agenda for Sustainable Development, U.N. Doc. A/RES/70/1, pmb. (Sept. 25, 2015).

32. *Id.* (directing nations in Goal 7 to “[e]nsure access to affordable, reliable, sustainable and modern energy for all”).

33. Henry Shue, *Climate Hope: Implementing the Exit Strategy*, 13 CHI. J. INT’L L. 381, 386 (2013).

34. *Id.* at 383.

All human activities have environmental consequences as an unavoidable byproduct. If human well-being depends on resource use, the problem of achieving fulfillment of economic and social rights without destroying the resource base will only grow as the human population increases. Laws and policies that take into account both human rights and environmental protection will have to consider matters of distributive justice. As has been noted, highly industrialized countries are responsible for more than three times the emissions between 1850 and 2002 of developing countries, but developing country residents will suffer disproportionately more from climate change and far more people live in these countries.³⁵ Understanding what this means in terms of human rights and environmental protection must be a priority for legal scholars for the foreseeable future. The contributions in this volume provide a rich basis for continuing the discussion.

35. Lukas H. Meyer, *Why Historical Emissions Should Count*, 13 CHI. J. INT'L L. 597, 603 (2013).