

KEYNOTE ADDRESS

15TH ANNUAL VERMONT LAW REVIEW SYMPOSIUM: HABITAT FOR HUMAN RIGHTS

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INTRODUCTION

Thank you Stephanie¹ for that kind welcome. It is a real honor and pleasure for me to be here today with all of you, breathing the fresh air of a cool morning in Vermont.

I thought I should start this keynote presentation by suggesting that for a minute we look at ourselves from the perspective of how future generations will see us. I will submit to you there is a disconnect between how we see ourselves and how we will be seen (and judged) by future generations.

If we take a moment to look back and think about the practice of slavery and humans as property, or perhaps look at the dark ages and secret trials. We think about these as barbaric practices, but they did not happen that long of a time ago. When we see ourselves today, I think most of us will have an image of “well, we’re certainly somewhat sophisticated,” and as Dean Mihaly² put it: “educated.” Many of us wear a tie to appear respectful. But how will we be seen in the future? What are the kinds of issues that we are accepting and practicing and causing in the world today?

We are witnesses to unprecedented levels of inequality, destitution, and environmental deterioration.³ Much has been said about climate change and the apocalyptic future it will bring about; for many that dire future is already present.⁴ Much has been written about the global public health

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1. Stephanie Farior, Director of the Center for Applied Human Rights and Professor of Law, Vermont Law School.

2. Marc Mihaly, President and Dean, Professor of Law, Vermont Law School.

3. See U.N. Env’t Programme, GEO-5 Environment for the Future We Want, at xviii, U.N. Doc. DEW/1417/NA (2012) (exploring global environmental degradation); see also Intergovernmental Panel on Climate Change, Climate Change 2014 Synthesis Report, 40 (2015), http://www.ipcc.ch/pdf/assessment-report/ar5/syr/SYR_AR5_FINAL_full_wcover.pdf (examining the effect of global climate change); G.A. Res. 70/1, U.N. Doc. A/RES/70/1, at 5 (Oct. 21, 2015) (describing the many “challenges to sustainable development”).

4. U.N. Office of the High Comm’r for Human Rights, Understanding Human Rights and Climate Change, at 2 (Nov. 26, 2015),

crisis caused by exposure to chemicals and hazardous wastes,⁵ and about the fact that we as humanity are causing, as it is called, the sixth wave of biodiversity loss involving an unprecedented loss of species.⁶ For many of these species there is no tomorrow, there is no later, there is no coming back.⁷ So we as humanity are responsible for that extinction. How will that fact be seen by future generations? Do we still look that respectable? Is there a disconnect there?

The magnitude of the forces at play today is unprecedented, and so for that same reason, our response to those forces needs to be unprecedented. That is where human rights and the environment come into play: as new tools to address contemporary realities.

This morning I expect to lay out the general elements and boundaries of the human rights and environment field, so that the panels can delve deeper into specific issues. And so by way of roadmap, I will start laying out the evolution of human rights and the environment since its inception. That background will help determine what is the current state of play. Second, I will talk about lessons we have learned. Have we learned anything in the last four or five decades? Finally, I will address some of the challenging debates over the global recognition of the right to a healthy environment and conclude.

I. EVOLUTION OF THE LAW ON HUMAN RIGHTS AND THE ENVIRONMENT

The evolution of human rights law as it pertains to the environment finds its point of departure in the seminal declaration adopted in Stockholm by the United Nations Conference on the Human Environment. This conference took place in 1972.⁸ Much has been said about this conference but there is one point that I think needs to be highlighted. The Stockholm conference and resulting declaration were able to place a narrative in the

<http://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>; U.N. Office of the High Comm'r for Human Rights, Rep. of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, at 30, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

5. See Başkut Tuncak (Special Rapporteur), *Report of the Special Rapporteur on the Implications for Human Rights of the Environmentally Sound Management of Hazardous Substances and Wastes*, at 3, U.N. Doc. A/HRC/30/40 (July 8, 2015).

6. ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* 2–3 (2014).

7. THOMAS L. FRIEDMAN, *HOT, FLAT AND CROWDED: WHY WE NEED A GREEN REVOLUTION—AND HOW IT CAN RENEW AMERICA* 151, 153 (2008).

8. U.N. CONFERENCE ON THE HUMAN ENV'T, *DECLARATION OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT*, at 3–5, U.N. Doc. A/CONF.48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (June 5–16, 1972).

collective imagination of humanity, a narrative about why the environment is important, both as a national and international issue. The environment, prior to that, was peripheral to policymaking; it was not on the radar of high politics or social interaction. The Stockholm Conference brought the environment into the spotlight.

The Conference had to address severe tensions between national sovereignty, on the one hand, and the recognition of the environment as an issue of legitimate international concern, on the other. It had to confront significant skepticism by much of the developing world that the environmental agenda was being driven by the North, the industrialized North, so as to keep the South from developing.⁹ It was feared by many that neo-colonialism and neo-imperialism were all cloaked in the dress of environmental policy.¹⁰ At the same time there were real environmental issues that brought humanity together to think about the Earth as a shared space. The recognition of the environment as an issue of international concern thus led to the legitimacy of international action in this field. How to mediate that tension between national sovereignty and international action? That's where the environmental narrative of Stockholm succeeded in many respects, of which I will highlight three: the environmental rights revolution, the inception of the notion that the environment is a precondition for the enjoyment of human rights, and the opening of the debate on the right to a healthy environment.

The environment began to be seen as an issue of priority in many states, and this perspective led to unprecedented normative and institutional developments. Environmental ministries were created around the world, and so were environmental commissions, environmental laws, framework laws, environmental assessment laws, et cetera.¹¹ Perhaps the most important legal development for the purposes of human rights in the environment lies in the fact that, after the Stockholm Conference, this narrative led many countries to amend their constitutions—the framing of the basic social contract and the values enabling society—to incorporate environmental considerations in them. These references to the environment in national constitutions were often formulated as a duty of the State for environmental protection or as an individual or collective right that was

9. DAVID HUNTER ET AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 138 (5th ed. 2015).

10. *Id.*

11. *Id.* at 495–96.

enforceable in courts.¹² Back in 1994, there was a study by the United Nations that identified about 60 constitutions having environmental rights.¹³ Today, there are about 140 constitutions that have environmental rights written into them.¹⁴ This process that began in 1972 has been termed the “Environmental Rights Revolution.”¹⁵

Stockholm was also relevant for human rights and the environment because of the inception in the human consciousness of the notion that the environment is a precondition for the enjoyment of human rights. This notion has far reaching conceptual implications, including the idea that the environment is the infrastructure for civilization. This notion also brought to light the environmental underpinnings of the historical and physical context of the human rights project.¹⁶ And so quite plainly there is no possibility of talking about the meaning of the right to life in an environment that is so polluted it does not enable life. At that essential level of interaction between human rights and environment, Stockholm was a success.

A third element that is worthy of note from Stockholm, in addition to influencing the reform of national constitutions to secure environmental rights and affirming the notion of the environment as a precondition to the enjoyment of human rights, is that it opened the debate on human rights and the environment and particularly on the formulation and recognition of a right to a healthy environment. What is the content of said right? How can it be operationalized? This debate included objections to the recognition of the right to a healthy environment, several of which I would like to address in the coming minutes.¹⁷

For one, there was the issue of quality control. Many in Stockholm, even the United States government (which subsequently changed its position), came to the Conference advocating for the recognition of a new

12. Fatma Zohra Ksentini (Special Rapporteur), *Review of Further Developments in Fields in Which the Sub-Commission Has Been Concerned: Human Rights and the Environment*, U.N. Doc. E/CN.4/Sub.2/1994/9, annex III (Jul. 6, 1994).

13. *Id.*

14. DAVID BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* 47 (2012).

15. *Id.* at 3.

16. U.N. CONFERENCE ON THE HUMAN ENV'T, *supra* note 8, at 4.

17. See Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* 43, 63 (Alan E. Boyle & Michael R. Anderson eds., 1996) (“It is less clear whether, over and above existing human rights, there is any need for a separate, generic right to a decent, viable, or satisfactory environment or for the reconceptualization of international law into the international law of environmental rights.”).

human right to a healthy environment.¹⁸ And so many asked: do we need some kind of quality control for the recognition of new rights? Can we just proclaim rights and expect them to be recognized? What kind of considerations go into the recognition of a new right? The so-called debate of quality control is ongoing.¹⁹

This question of quality control is also relevant because once a right is recognized, implementation is expected to follow. That it will not be just a U.N. paper formulation but that the right will have meaning to people and the environment.

In this regard, the argument is often made that governments are already overwhelmed with the existing set of rights and lack the ability and the resources for implementation. Recognition of new rights, so the argument goes, could dilute the whole human rights project by compromising the realization of already recognized rights, thereby undermining its purpose. In other words, recognizing new rights can be counterproductive. And so the debate goes.

Another issue that has been deeply debated is the justiciability of the right to a healthy environment.²⁰ Can the right be formulated with a sufficient degree of concreteness in order for it to be justiciable? Can courts address it in any meaningful way? This debate, while vibrant in its early stages, has lost much of its relevance with the decades of experience in the justiciability of economic, social, and cultural rights. While the emphasis of civil and political rights is on the negative obligation of the state not to interfere in the affairs of the citizens,²¹ economic, social, and cultural rights involve an emphasis on positive action, including legislative measures and

18. U.N. CONFERENCE ON THE HUMAN ENV'T, *supra* note 8, at 3, 51.

19. Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 620–21 (1984).

20. See Alexandre Kiss, *An Introductory Note on a Human Right to Environment*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 199, 201 (Edith Brown Weiss ed., 1992) (“[T]he right to environment is as concrete in its implications as any other right guaranteed to individuals . . . [The individual] has access to adequate means of redress, either for the violation of these rights or in order to obtain satisfaction if his or her environment has already suffered damage.”).

21. This *emphasis* does not exclude positive characteristics of the legal obligation under the International Covenant on Civil and Political Rights under article 2, paragraph 1. International Covenant on Civil and Political Rights art.2, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171; see also Human Rights Comm., General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 5–8, at 3–4, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004) (declaring that States Parties have positive and negative legal obligations under Article 2 of the ICCPR and explaining what States Parties must do to meet those obligations).

the implementation of programs to fulfill the rights.²² And environmental protection, in many ways, falls under that framing because attaining adequate levels of environmental quality requires positive action, including policies and legislation. Experience has shown that a number of courts around the world have been able to articulate doctrines that enable the justiciability of economic, social, and cultural rights (ESCR).²³ These developments have dissipated this cloud that was at some point forming around ESCR that did not consider them as real rights; that considered ESCR as programmatic aspirations and therefore not justiciable.²⁴ Experience has shown that actually economic, social, and cultural rights can be justiciable.²⁵ Experience has also shown that courts around the world have given the right to a healthy environment a justiciable content.²⁶

Yet another element in the debate was the difference between individual and collective rights. This difference also ties in with remedies for past harm and prospective measures of prevention. Human rights at that time were quite concerned, and still are of course, with the individual; the protection of its autonomy and its dignity, especially against the powers of the state. The idea that collective rights could also be termed human rights was dissonant to many. Again, experience has shown that in a number of areas, collective rights have been recognized and have been enforced. For example, the adoption of Convention 169 on indigenous peoples' rights by the International Labor Organization clearly articulates collective rights, including in relation to culture, land and territories.²⁷ Similarly, the U.N. Declaration on the Rights of Indigenous Peoples, adopted by the U.N. General Assembly in 2007 after 25 years of negotiations, establishes that States shall cooperate with indigenous peoples through their own representative institutions in order to obtain their free, prior, and informed

22. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 9: Domestic Application of the Covenant, U.N. Doc. E/1999/22, annex IV (1999).

23. Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 1* (Malcolm Langford ed., 2008).

24. Stephen P. Marks, *The Past and Future of the Separation of Human Rights into Categories*, 24 MD. J. INT'L L. 209, 225 (2009).

25. G.A. Res. 63/117, annex, Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (Dec. 10, 2008).

26. Dinah Shelton, *Developing Substantive Environmental Rights*, 1 J. HUM. RTS. & ENV'T 89, 90 (2010).

27. LUIS RODRÍGUEZ PIÑERO, *INDIGENOUS PEOPLES, POSTCOLONIALISM AND INTERNATIONAL LAW* 321–22 (2005); see also MARCOS A. ORELLANA, *INDIGENOUS PEOPLES, MINING, AND INTERNATIONAL LAW* 13 (2002) (discussing International Labor Organization Convention 169 and its effect on indigenous peoples).

consent before adopting and implementing measures that may affect them.²⁸ These rights, by virtue of their own very nature, are of necessity exercised by the individual in connection with its community, and an individual can only meaningfully enjoy them within a cultural context.²⁹

Closely linked with the debate on collective and individual rights, another challenge brought forth by the integration of human rights and the environment is the notion of humanity as a holder of rights and duties, including with respect to the rights and interests of future generations. This framing forces the human rights system to think about humanity in the aggregate, and that is not something that the human rights system can easily do because it is designed to address protection of the individual, and groups in certain instances, but not necessarily that macro level of humanity. The notion of *erga omnes* obligations and the emergence of doctrines on an international law for humankind are beginning to widen the frames of references for human rights in this regard.³⁰

Perhaps one of the most hotly contested points of the debate that was sparked in Stockholm with respect to the right to a healthy environment concerns universality. How can a right to the environment be proclaimed as universal when environmental conditions are so different around the world? Moreover, societies enjoy different levels of development, and so they apply differing standards to manage and relate to their environment. This contention regarding the lack of universality of the right to a healthy environment was used to object to the recognition of the right.³¹ An answer to this argument can be found in the notion that all human rights are expressed in levels of abstraction and are thus in need of specification in concrete historical circumstances. That process of specification involves cultural and environmental conditions, so it is expected that there will be differences in the implementation of universal human rights across regions, cultures, religions, linguistic traditions, and other differences that enrich the mosaic of humanity. The process of translation and acquisition of meaning of a general and abstract right into a defined historical societal setting does

28. G.A. Res. 61/295, annex, art. 19, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

29. See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 56–61 (2004) (exploring contemporary trends in the indigenous rights movement); see also ROBERT A. WILLIAMS, JR., *THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST* 328 (1990) (examining historical and present day challenges facing American Indians).

30. ANTÓNIO AUGUSTO CANÇADO TRINDADE, *INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM* 318 (2013).

31. See, e.g., Günther Handl, *Human Rights and Protection of the Environment*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A TEXTBOOK* 303, 303 (Asbjorn Eide et al. eds., 2d ed. 2001).

not negate the universality of the right. On the contrary, that process of specification affirms the relevance of culture, not as an excuse to deviate from or disregard human rights (as has often been argued by oppressive regimes), but as the critical element in making a right meaningful for its realization in a specific society. These same ideas of specification, meaning, and realization apply to the right to a healthy environment.

Yet another element of the debate concerned the challenge that a right to a healthy environment is undemocratic because it transfers competencies from the legislature to the courts. It was argued that the legislature is concerned with public policy, including environmental policy, and the interests of society as a whole, while the courts deal with conflicts between individuals, as well as protection of individual rights.³² Again, here experience has shown a couple of things. One, that courts have been quite capable of dealing with broad policy issues as they relate to the environment.³³ Second, that the core element of the right to a healthy environment concerns the ability of people to participate in environmental decisionmaking, to have access to the information that they need to prevent environmental harm, to participate in debates, in societal dialogue regarding environmental risk; and to access courts if there are instances of environmental violations.³⁴ These core elements are the basis of democratic decisionmaking because they enable meaningful involvement of people in public affairs that concern their lives. Accordingly it is very hard to argue that the right to a healthy environment is undemocratic. It seems to be the other way around: that the right to a healthy environment is a key element in the democratization of power with respect to environmental decisionmaking.

Along those same lines, the inclusion of the right to a healthy environment in the catalog of protected rights in a national constitution elevates the environment within the hierarchy of values of that society.³⁵ And thus, when it comes to enforcement and justiciability, then we can see how democracies around the world are balancing fundamental rights in ways that no longer regard the environment as a marginal issue but at the same level as other important and recognized values.

32. See BOYD, *supra* note 14, at 4–5 (explaining that this argument is not always true as constitutions protect individual rights and courts protect human rights and the constitution).

33. *Id.* at 106, 252.

34. Marcos Orellana, *Reflections on the Right to a Healthy Environment: Comments on Rebecca Bratspies' Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT'L L. 71, 77–78 (2015).

35. Dinah Shelton, *What Happened in Rio to Human Rights?*, 3 Y.B. INT'L ENVTL. L. 75, 92–93 (1992).

I wish to mention a couple other points on this debate over the recognition of the right to a healthy environment. Many environmentalists and others were opposed to the idea of a human right to the environment because of its markedly anthropocentric character.³⁶ A right so formulated would see reality from the perspective of humans and potentially disregard a biocentric perspective or nature in its own right. In regard to this objection, cases that have been brought before courts of law in respect to the right to a healthy environment demonstrate that it is not only humans that benefit from a clean environment, but also the environment itself. There have been instances where purely environmental matters have also been protected through this tool.³⁷ This said, a human rights frame involves limits to the protection of the environment per se. For this reason and others, this debate is still ongoing, and for example a new paradigm focused on the rights of nature has emerged and already made its way into the Constitutions of Ecuador and Bolivia.³⁸

Another element in connection with the right to a healthy environment concerns its symbolic value.³⁹ We could ask: why did the drafters of the Universal Declaration of Human Rights not include environmental rights within the universally recognized rights? One answer is that drafters were not aware of the importance of the environment for the realization of rights. This awareness has come about as a result of human experience with environmental harm and the narratives that have been placed in the human imagination and consciousness by international conferences on the environment. Entrance into the field of visibility by an idea can make the difference between seeing and blindness, and in the face of the grave environmental challenges facing humanity in the Anthropocene, it can make the difference for the concrete and experiential affirmation of dignity for millions of people. It is not just raw power built on weapons that keeps structures of authority in place; perceived legitimacy on the basis of fundamental values keeps a society together. As pluralism inspires the construct of a collective human consciousness in a global society, the

36. Handl, *supra* note 31, at 315–16.

37. BOYD, *supra* note 14, at 44, 40.

38. REPÚBLICA DEL ECUADOR CONSTITUCIÓN DE 2008 [CONSTITUTION] Oct. 20, 2008, ch. 7, art. 71–74; CONSTITUCIÓN POLÍTICA DEL ESTADO PLURINACIONAL DE BOLIVIA [CONSTITUTION] Jan. 25, 2009, pt. IV, tit. II.; *see also* U.N. Secretary-General, *Harmony with Nature*, paras. 64, 66, U.N. Doc. A/69/322 (Aug. 18, 2014) (noting that Ecuador and Bolivia specifically recognize the rights of nature in their legal systems).

39. *See* Rebecca Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT'L L. 31, 45, 53, 57, 67 (2015) (noting that the right to a healthy environment is important on an international level because it serves as a catalyst for building awareness and motivating action).

symbolic affirmation of our collective right to live in an environment capable of sustaining human civilization cannot be discounted as a mere aspiration.

One final point I wish to make on the debate over the recognition of the right to a healthy environment is that it concerns not just rights but also responsibilities. This frame gets us back to thinking about future generations and how “we” will be seen (and judged) by “them.” A human rights and environmental approach aims at articulating compelling answers to the question concerning our responsibilities towards future generations. The proposal for the establishment of a U.N. High Commissioner on Future Generations, mirroring similar developments at the national level, moves in this direction in an institutional setting, for example.⁴⁰ The question, however, does not only involve collective elements, but also poses the issue of individual responsibilities, which call upon each one of us to examine our choices and decisions with a view to asserting how they may influence those that will come.

Coming back to Stockholm, if we identify its key contribution as its ability to place a narrative in human consciousness, then we may ask what happened since in the evolution of the law on human rights and environment? The chronology takes us to the U.N. Conference on Environment and Development, the so-called Rio Earth Summit, in 1992.⁴¹ What are some of the highlights of that Conference, 20years after Stockholm?

II. THE RIO EARTH SUMMIT

It has been noted that not much happened with respect to human rights at Rio.⁴² Nevertheless, the Earth Summit articulated a number of principles, the Rio Declaration, which have had a strong influence on the human rights and environment debate. Again here, the principles provide a narrative that integrates environment and development, and this intellectual construct is significant to human rights and the environment for several reasons.

40. MARCOS ORELLANA ET AL., CTR. FOR ENVTL. LAW & WORLD FUTURE COUNCIL, THE HIGH COMMISSIONER FOR FUTURE GENERATIONS: THE FUTURE WE WANT I (2012).

41. Report of the U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex 1 (June 3–14, 1992) [hereinafter *Rio Declaration*].

42. Shelton, *supra* note 26, at 75, 76 (1992); Marc Pallemaerts, *International Environmental Law from Stockholm to Rio: Back to the Future?*, in GREENING INTERNATIONAL LAW 1, 9 (Philippe Sands ed., 1994); Dinah Shelton, *Whiplash and Backlash—Reflections on a Human Rights Approach to Environmental Protection*, 13 SANTA CLARA J. INT’L L. 11, 19 (2015).

A first point I wish to highlight is the formulation of Principle 10 concerning environmental democracy.⁴³ According to Principle 10 of the Rio Declaration, environmental issues are best handled with the meaningful participation of the people concerned.⁴⁴ Principle 10 thus affirms access rights: access to information, participation, and justice in environmental matters.⁴⁵ This affirmation of principles is quite significant because the old vocabulary of “development” gives way to a new paradigm of “sustainable development,” which was endorsed by the international community at the Rio Earth Summit.

According to the new formulation, (sustainable) development is no longer a top down decisionmaking process driven by dictators or bureaucrats in national capitals or in the offices of international financial institutions. Instead, development is recast as a participatory process, one where society comes together in dialogue to address its challenges.⁴⁶ We are still seeing the implications of this change of paradigm today and the challenges of implementation.⁴⁷

A second angle I would highlight from Rio is the so-called “greening of human rights.” The Rio Declaration recognized integration as the key element of the new sustainable development paradigm. Neither the environment nor development could continue to be seen as isolated spheres or tracks of human activity.⁴⁸ The environment had to be integrated with development, including with respect to economic, social, and other dimensions of human interaction. This affirmation of principle further boosted efforts at the integration of human rights and the environment.

The greening of human rights focused on the environmental dimensions of the normative content of protected rights.⁴⁹ This manifestation of integration was especially visible at the regional level, given the role of human rights systems in Africa, Europe, and the Americas

43. Marcos A. Orellana, *Democracia Ambiental y Desarrollo Sostenible: Hacia un Instrumento Regional sobre Derechos de Acceso* [Environmental Democracy and Sustainable Development: Toward a Regional Instrument on Access Rights], in INFORME AMBIENTAL ANUAL 2014 [ANNUAL ENVIRONMENTAL REPORT 2014] 43, 44–45 (Fundación Ambiente y Recursos Naturales ed., 2014).

44. *Rio Declaration*, *supra* note 41, at 5.

45. *Id.*

46. *Id.*

47. Orellana, *supra* note 34, at 76–77.

48. *Rio Declaration*, *supra* note 41, at 4.

49. U.N. High Comm’r for Human Rights, *Analytical Study on the Relationship Between Human Rights and the Environment*, para. 48, U.N. Doc. A/HRC/19/34 (Dec. 16, 2011).

tasked with overseeing the implementation of and compliance with human rights instruments.⁵⁰

One of the first cases involving the integration of human rights and the environment that was brought under one of these regional systems is the seminal *López Ostra* case in Spain.⁵¹ People in their homes would open their windows, and a very bad smell would enter their homes from the tannery next door.⁵² The tannery had been authorized by the government, but there had not been any kind of public discussion about it; the permit was just issued to the tannery.⁵³ So people could not enjoy their home as a result of the stench. They tried environmental litigation in Spain, but to no avail.⁵⁴ Could they address the issues in a human rights context in the European Human Rights Court? There they tried by framing the environmental problem as a human rights issue concerning the right to private life.⁵⁵ After *López Ostra*, there have been many cases brought on the basis of a similar legal theory; cases involving airports and dams and chemicals and power plants, among many others.⁵⁶ But the *López Ostra* case is significant because the court had to grapple with the question of whether it needed a new theory of environmental rights or whether it could apply human rights tools to resolve this new problem. And it chose the latter course of action.⁵⁷

The court reasoned there was no need for a new theory since it could address environmental issues using human rights methodologies. What are those tools? They include positive obligations in relation to the duty to protect; balancing individual and societal interests under the frame of proportionality; and the margin of appreciation doctrine. The recognition of positive obligations by the State, in respect to protection of rights against interference from private parties, raises novel issues in the horizontal dimension of human rights law.⁵⁸ In such cases involving positive obligations, proportionality becomes key to assessing the merits of the

50. Thomas Buergenthal, *The Evolving International Human Rights System*, 100 AM. J. INT'L L. 783, 791, 796, 798 (2006).

51. *López Ostra v. Spain*, app. no. 16798/90 (Eur. Ct. H.R. Dec. 9, 1994), [http://hudoc.echr.coe.int/eng?i=001-57905#{"itemid":\["001-57905"\]}](http://hudoc.echr.coe.int/eng?i=001-57905#{).

52. *Id.* at paras. 7–8.

53. *Id.*

54. *Id.* at para. 10.

55. *Id.* at para. 15.

56. U.N. ENV'T PROGRAMME & CTR. FOR INT'L ENVTL. LAW, UNEP COMPENDIUM ON HUMAN RIGHTS AND THE ENVIRONMENT 57, 64, 88, 93 (2014).

57. *López Ostra*, at paras. 51, 58.

58. See, e.g., *Öneriyildiz v. Turkey*, 2004-XII Eur. Ct. H.R. 79, 81–82 (Nov. 30, 2004); *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 255, 282 (June 9, 2005).

case.⁵⁹ Proportionality in balancing the interests of the individual and the interests of society, under the light of the margin of appreciation that is afforded by the court to the regulator in respect of environmental policy. So the tools of the European human rights system were applied successfully in *López Ostra*. As I mentioned there have been a number of cases there after that,⁶⁰ and generally they follow the same theory of integration, a theory that has resulted in the greening of human rights in Europe.

In Africa, another seminal case came from Ogoniland, in Nigeria:⁶¹ oil corporations exploring and exploiting without adequate safeguards, without consulting communities, and communities suffering as a result. Environmental and human rights defenders were persecuted and murdered.⁶² The Ogoni case was brought before the African Commission on Human and Peoples' Rights back in 2002. In its analysis of the case, the African Commission put its faith in a procedural approach to the interpretation of the right to a healthy environment, which is explicitly recognized in the African Charter on Human and Peoples' Rights.⁶³ The Commission reasoned that individuals and communities should be informed about the risks associated with investment and development projects at the very least.⁶⁴ This information would allow potentially affected people to participate in the decisions that are relevant to those projects.

Some have questioned whether faith in the procedural approach is warranted in certain contexts because in many ways this approach is contingent upon a functional state system. And in too many places in the world, the state only exists on paper. In many places the concept and reality of sovereignty is like a thin veneer, under which powerful forces are shaping a political economy that recognizes no law. In this depiction of reality, there is a battle raging over control of territory between corporations that attempt to profit from natural resources extraction and communities that seek to survive and foster an identity. The absence of the State from the territory, or the inability of state institutions to secure respect for access rights, renders the procedural approach ineffective. So if the law on human rights and environment is anchored on a fictional representation of reality,

59. *Öneryıldız*, 2004-XII Eur. Ct. H.R. at 83–84.

60. See U.N. ENV'T PROGRAMME & CTR. FOR INT'L ENVTL. LAW, *supra* note 56.

61. Soc. & Econ. Rights Action Ctr. v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.H.], para. 2 (May 27, 2002), <https://www.escripnet.org/docs/i/404115>.

62. *Id.*

63. African (Banjul) Charter on Human and Peoples' Rights art. 24, Oct. 21, 1986, 1520 U.N.T.S. 217; Soc. & Econ. Rights Action Ctr., para. 50.

64. Soc. & Econ. Rights Action Ctr., para. 53.

one premised on a functional State, then in actual fact the law will cease to be relevant and effective. That is what seems to be happening in many parts of the world, unfortunately.

This critique does not dismiss the procedural approach to the integration of human rights and the environment as irrelevant; rather it highlights its limits and weaknesses. It also raises the need to further explore the substantive contents of the right to a healthy environment implicated in the Ogoni case.

This greening of human rights that was sparked in the Rio Earth Summit also saw some important developments in the Americas. Given the significant presence of indigenous peoples in the region, it is no surprise that they brought cases to the human rights system that concerned their rights. The landmark case here is the *Awes Tingni (Mayagna Sumo)* case⁶⁵—a case involving Nicaragua, where the government issued a forest concession in the lands and territory belonging to the Awes Tingni communities without prior demarcation of the territory, without prior consultation, without providing information on the project.⁶⁶

This was another seminal case that allowed the Inter-American human rights system to understand the linkages between land, territories, culture, identity, human rights, and the environment. Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have not only employed a procedural approach to the integration of human rights and the environment based on access rights to information, participation, and justice. They have also elaborated certain substantive elements in order to enhance the protection of the human rights regime and to ensure the survival of indigenous and tribal groups. This evolution can be traced from the *Awes Tingni* case and its recognition of the property rights of indigenous peoples over the lands they have traditionally used or occupied, together with the concomitant State obligation to demarcate indigenous peoples' territories, all the way to another key case—the *Saramaka* case involving tribal peoples in Suriname.⁶⁷ Also affected by a

65. *Mayagna (Sumo) Awes Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), http://www.oas.org/en/iachr/indigenous/decisions/ia_court_hr.asp.

66. *Id.* at para. 2.

67. *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007), http://www.oas.org/en/iachr/indigenous/decisions/ia_court_hr.asp; see also Marcos A. Orellana, Case Note, *Saramaka People v. Suriname, Inter-American Court of Human Rights, Series C, No. 172 (2007)*, 102 AM. J. INT'L L. 841 (2008) (reviewing, summarizing, and analyzing the IACHR's judgment).

similar forest concession, in addition to mining concessions that affected water and access to food, which also had been granted without prior consultations, the Inter-American Court of Human Rights applied its jurisprudence on indigenous peoples to tribal peoples.⁶⁸ In its reasoning, the court considered that in light of the inextricable connection between indigenous and tribal peoples with their lands and territories, and in order to ensure the survival of the peoples concerned, the State, prior to approving an investment or development project, was required to observe certain safeguards.⁶⁹ A substantive element can be observed in this construct since the procedural approach may not be sufficient to secure the survival of the group. In other words, the system of protection of human rights cannot be circumvented by state officials that approve projects simply after going through the motions of a specified procedure of risk assessment and consultations, since a substantive approach to human rights and the environment also upholds the survival of groups that so depend on their environment. In that sense, the requirement of free and prior informed consent with respect to projects imposing significant threats should be seen not only as an element of a procedural approach, which it also is by way of its implication of the rights of information and participation, but should also be seen as a substantive element of protection that places the ultimate decision over a project in the hands of those that stand to lose their lives and livelihoods as a result.

These examples show that in these three regions, where there are international mechanisms for human rights accountability—although with serious limitations it must be said—the greening of human rights has been brought about by the initiative of civil society. By people, by individuals like you and me, who have resorted to courts of law to place and change the agenda of what it means to implement sustainable development. These changes in normative standards have resulted not from enlightened government officials (which of course there are and we need more of them) but by the citizens that use the courts. This type of empowerment by individuals, communities, and civil society is precisely the kind of transformative change that was anticipated and has been enabled by Principle 10 of the Rio Declaration.

A third element I wish to highlight very briefly regarding the legacy of the Rio Earth Summit, in addition to environmental democracy and the greening of human rights, could be described as commonality of principles.

68. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, para. 1.

69. *Id.* at para. 96.

There has been great progress in identifying which principles are common to the human rights and environment fields, including with respect to their synergies and cross-pollination. Principles such as prevention, precaution, non-regression, and environmental impact assessments are playing increasing roles in the adjudication of cases by national courts and human rights mechanisms and tribunals.⁷⁰

This quick overview of the historical evolution, including its inception at Stockholm and the legacy of the Rio Earth Summit, raises the question as to what is the state of play in the law on human rights and environment.

III. STATE OF LAW ON HUMAN RIGHTS AND THE ENVIRONMENT

Where are we today on the state of human rights and environmental protection? The state of play could be described in reference to landscape, theoretical interactions, normative content, and lessons learned.

A. Landscape

Today we find ourselves in a very broad normative and institutional landscape. We have global human rights treaties and treaty bodies that have commented on the environment, including the General Comments on housing, water, standard of living, food, cultural life; the list goes on.⁷¹ We have seen how the special procedures of the Human Rights Council, including special rapporteurs and independent experts, have pronounced on the environment.⁷² Today the Human Rights Council, previously called the Human Rights Commission, has addressed environmental issues and human rights as they relate to toxic waste,⁷³ chemicals,⁷⁴ food,⁷⁵ water,⁷⁶

70. See Case C-531/13, *Marktgemeinde Straßwalchen v. Bundesminister für Wirtschaft, Familie und Jugend*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-531/13> (Feb. 11, 2015) (holding that environmental assessments for exploratory petroleum drilling may be required, and that national authorities must consider the cumulative impact of projects when determining whether an environmental assessment is required); see also *Greenpeace Se. Asia v. Env'tl. Mgmt. Bureau of the Dep't of Env't & Nat. Res.*, G.R. No. 00013, (Ct. App., May 17, 2013) (Phil.), <http://edigest.elaw.org/sites/default/files/ph.greenpeacece.pdf> (applying the precautionary principle to adjudicate the case).

71. *Analytical Study on the Relationship Between Human Rights and the Environment*, *supra* note 49, at paras. 56–63.

72. *Id.* at paras. 45–46, 50–52, 54.

73. *Id.* at para. 45.

74. *Id.* at para. 53.

75. *Id.* at para. 50.

76. *Id.* at para. 54.

indigenous peoples,⁷⁷ business and human rights,⁷⁸ and internal displacement.⁷⁹ The United Nations Environment Program (UNEP) has included human rights and the environment as an agenda item in its Montevideo IV program for the development of environmental law.⁸⁰ This is the program that informs UNEP's activities in the area of environmental law.⁸¹

Of particular note, the Human Rights Council has created a special procedure, first as an independent expert and now as a special rapporteur, focused on human rights and the environment, with the mandate to clarify human rights obligations with respect to environmental protection.⁸²

The establishment of an institutional locus that could focus the attention of the U.N.'s human rights machinery on the environment was a development that took more than 20 years in the making. For the first time in 1989, the then Sub-Commission on Prevention of Discrimination and Protection of Minorities began addressing human rights and the environment.⁸³ While the Sub-Commission did not succeed in convincing its parent body, the then Commission on Human Rights, to adopt the results of its work, it nevertheless contributed to clarifying several important angles in the human rights and environment interface.⁸⁴ For example, the Sub-Commission addressed legal foundations; the right to development; participatory democracy; vulnerable groups; and peace, security, and armed conflict. We thus see a long history and a broad landscape.

77. *Id.* at paras. 46, 51.

78. *Id.* at paras. 47, 53.

79. *Id.* at paras. 52.

80. Rep. of the Meeting of Senior Government Officials Expert in Environmental Law on the Midterm Review of the Fourth Programme for the Development and Periodic Review of Environmental Law, U.N. Doc. UNEP/Env.Law/MTV4/MR/1/5, at para. 19 (Oct. 31, 2015); Rep. of the Meeting of Eminent Legal Experts on the Midterm Review of the Fourth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme IV), U.N. Doc. UNEP/Env.Law/MTV4/MR/1/INF.3, at para. 5 (Aug. 3, 2015).

81. Rep. of the Meeting of Senior Government Officials Expert in Environmental Law on the Midterm Review of the Fourth Programme for the Development and Periodic Review of Environmental Law, *supra* note 79, at para. 1; Rep. of the Meeting of Eminent Legal Experts on the Midterm Review of the Fourth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme IV), *supra* note 79, at paras. 1, 4, 5.

82. John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations on the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, at para. 1, U.N. Doc.A/HRC/25/53 (Dec. 20, 2013).

83. See generally Ksentini, *supra* note 12 (containing a set of draft principles on human rights and the environment).

84. *Id.*

Also at the regional level, as noted earlier, there has been dynamic activity on human rights and environment, including the drafting of treaties, pronouncements by the regional human rights courts and commissions, and expert seminars.⁸⁵ And at the national level, constitutional developments have been key in fostering a jurisprudence on the protection of rights. National human rights institutes are also becoming involved in human rights and environmental issues.⁸⁶

The human rights and environment issue has become cross-thematic. It has begun to address transnational corporations,⁸⁷ international financial institutions,⁸⁸ and military activities.⁸⁹ So we see an expanding area of law involving numerous thematic interfaces and levels of analysis as well as multiple actors and spaces for action, debate, and standard-setting. That is by way of landscape.

B. Theoretical Interactions

By way of theoretical interactions, we find the now universally-endorsed recognition that environmental protection strengthens human rights and that respect for human rights advances environmental protection. The mirror image of this fundamental recognition holds that environmental deterioration undermines the enjoyment of human rights, while the denial of human rights undermines the ability of a society to adopt strong environmental policies.

In the elaboration of theoretical interactions there has been a particular focus on vulnerable populations and on transboundary issues. The focus on vulnerable people responds to one of the key elements of a rights-based approach that affords priority to the plight of the vulnerable, of those who suffer from environmental harm.⁹⁰ The focus on transboundary issues rests

85. John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/22/43, at paras. 34–36 (Dec. 24, 2012).

86. *Id.*

87. SVITLANA KRAVCHENKO & JOHN E. BONINE, HUMAN RIGHTS AND THE ENVIRONMENT (2008); DONALD K. ANTON & DINAH SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 863–64 (2011).

88. KRAVCHENKO & BONINE, *supra* note 87, at 445–82; ANTON & SHELTON, *supra* note 87, at 779.

89. See ANTON & SHELTON, *supra* note 87, at 757 (explaining that the use of military intervention is unacceptable for resolving environmental disputes).

90. OFFICE OF THE UNITED NATIONS HIGH COMM’R FOR HUMAN RIGHTS, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION (2006), <http://www.ohchr.org/Documents/Publications/FAQen.pdf>.

on the interaction between key principles of international environmental law, such as the duty to avoid causing significant transboundary harm, and extraterritorial obligations in human rights law.⁹¹

C. Normative Content

These are key elements of the state of play in the field; what we know today after decades of activity and research. In the context of law specifically (since we are in a law school, I will also talk about law) there have been important developments in clarifying the normative content of rights. For example, what is a State bound to do to respect and promote the right to life, the right to health, the right to private life, and the right to property? Key elements concern how to address risk, including: providing information in the face of risk; regulating risks that become known; and confronting risks through participatory processes.

Another key principle with respect to State responsibilities in the field is that of non-regression in the levels of protection against risks—the notion, legally expressed, that societies should not scale back their levels of protection but incrementally move them forward as science, technology, and awareness progress.

Another important principle is that of special measures of protection owed to vulnerable groups. Children, for example, because of their biological characteristics, are more sensitive to certain chemicals and the environmental legal framework should respond to this reality. Also, special measures of protection are due to indigenous peoples given the legacies of historical discrimination and the current threats against lands and territories by non-state actors.

The analysis of normative content can also point to limits in the exercise of jurisdiction with respect to human rights and the environment. Interconnectedness can only take us so far. Today, we understand that humanity is a part of nature that connects with other sentient beings and the totality of life. But in the exercise of jurisdiction, the human rights approach

91. ETO CONSORTIUM, MAASTRICHT PRINCIPLES ON EXTRATERRITORIAL OBLIGATIONS OF STATES IN THE AREA OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS 3 (2013), http://www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1%5BdownloadUid%5D=23Maastricht; see also Olivier De Schutter et al., *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084, 1112 (2012) (explaining that “[s]tates must desist from acts and omissions that create a real risk of nullifying or impairing the enjoyment of economic, social and cultural right extraterritorially”).

to environmental protection will focus on the impacts on humans.⁹² Would an environmental impact, which may affect humans at some point in the future through interconnectedness but does not negatively affect people presently, be cognizable in the human rights frame? That is one of the limits still today. We have not yet elaborated a viable theory of interconnectedness that could enable the exercise of jurisdiction with respect to cases involving environmental harm but less apparent risk or harm to humans.

D. Lessons Learned on Human Rights and Environment

If that is the state of human rights and the environment in broad strokes, what are some of the lessons that have been learned in this debate? I have already addressed several of these lessons above in the discussion on the right to a healthy environment. Here, I wish to recap and delve deeper on the issue of justiciability. To recap, the strict legal nature of a right to environment has been questioned, in light of uncertainties regarding its holder, duty-bearers, scope, and content.⁹³ In addition, the argument was made, and sometimes it still is made, that economic, social, and cultural rights, including the right to a healthy environment, are non-justiciable because they concern broad policies and do not concern individual rights.⁹⁴ Instead, so the argument goes, the right to a healthy environment is justiciable only in connection with other rights, such as in relation to the environmental dimensions of the right to life or the environmental dimensions of the right to health.⁹⁵ This “connectivity theory,” as it is sometimes termed, is limited in virtue, however, because it excludes the possibility of identifying the specificity of a given right.⁹⁶

In this regard surfaces the question: what is specific, what is unique to the right to a healthy environment? It may be its ability to bring together under one single umbrella the normative content of the variegated rights affected by environmental harm. This normative consolidation, as it were,

92. Alan Boyle, *Human Rights and the Environment: A Reassessment*, U.N. ENVTL. PROGRAMME 1–2, <http://www.unep.org/delc/Portals/24151/Towardsthedeclarationhumanrights.pdf> (last visited May 3, 2016); *see also* Pallemaerts, *supra* note 42, at 12.

93. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 51–52 (2003); LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 51 (2006).

94. BOYD, *supra* note 14, at 37.

95. Suárez Peralta v. Ecuador, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 261, at paras. 88–101 (May 21, 2013) (Ferrer Mac-Gregor Poisot, J., concurring).

96. *Id.* at paras. 77, 90, 101–02.

may help with the implementation of the right to a healthy environment, and given the need for additional legal tools to address the environmental crisis we are confronting, added strength to implementation could only be welcome.

Another lesson that I would submit has been learned is that collective rights have been recognized within the human rights universe. This development has been particularly fruitful with regards to the rights of indigenous peoples over their lands and territories. In this realm there has been increasing activity at the regional levels, both in Africa and in the Americas.⁹⁷ Similarly, the U.N. Declaration on the Rights of Indigenous Peoples mentioned earlier serves as a testament to the individual and collective dimensions of human rights law and policy.

Yet another lesson is that the linkage between human rights and the environment is not just about procedures. Information, participation, and justice as “access rights” that enable a dialogue are doubtless critical to the ability of a society to coalesce, and in that regard they are recognized as civil and political rights that establish the cornerstones of democracy. But access rights are not enough to successfully meet environmental threats. The integration of human rights and environment also involves a focus on substantive outcomes, on the state of environmental quality. There is an element of irony in that Western democracies have the most sophisticated environmental procedures in the world, and yet, the Rio Declaration and other international pronouncements, including the Future We Want resulting from the Rio+20 U.N. Conference on Sustainable Development,⁹⁸ recognize that the pressures on the global environment have been put by the Global North, which bears the responsibility to clean it up and to lead in addressing environmental issues.⁹⁹ In that sense, there is a commonality in the principle of Common But Differentiated Responsibilities (CBDR) and the urgent need to go beyond procedures and achieve substantive outcomes in environmental quality, especially on climate change and chemical pollution. The importance, as well as the limits, of procedures; that much I will submit we have learned.¹⁰⁰

97. *Id.* at paras. 88–108; Ctr. for Minority Rights Dev. v. Kenya, Communication 276/03, African Commission on Human and Peoples’ Rights [Afr. Comm’n H.P.R.], at paras. 149–51, 158–59, 162, 241 (Nov. 25, 2009), http://www.achpr.org/files/sessions/46th/communications/276.03/achpr46_276_03_eng.pdf.

98. See G.A. Res. 66/288, The Future We Want, at paras. 67–69, U.N. Doc. A/RES/66/288 annex (July 27, 2012) (calling on industrialized nations and global business leaders to become involved in sustainable development).

99. *Rio Declaration*, *supra* note 41, at 4.

100. *Id.*

And I will also say that we have learned that law is not a panacea, but we probably knew that already. That a functioning state and rule of law— an independent judiciary, freedom of expression, and freedom of assembly— are essential to meaningful realization of human rights. If environmental and human rights defenders are persecuted, harassed, assassinated, or tortured for mobilizing communities in defense of rights,¹⁰¹ well, then the rule of law breaks down and human rights and the environment break down.

IV. GLOBAL RECOGNITION OF THE RIGHT TO HEALTHY ENVIRONMENT

The last theme I would like to address in this Keynote remark concerns the current movement toward the global recognition of the right to a healthy environment. This is, I would say, the challenge today, the horizon as it were. We have come a long way in the integration of human rights and the environment, but this element is still missing. The right to a healthy environment has been incorporated in numerous constitutions; as I mentioned, more than 140 constitutions around the world.¹⁰² And it has been empirically shown that this constitutional recognition has influenced the development of national legislation, influenced public interest litigation for the benefit of the environment and human rights, and improved environmental performance and environmental quality.¹⁰³ So the legal tool works at the national level. Moreover, it can be argued that in the face of the global environmental crisis humanity needs new legal tools, and the right to a healthy environment at the global level is precisely one of such new tools.

So why the hesitance to recognize the right at the international level? I will suggest there has been great resistance because the right to a healthy environment is rather subversive. It is subversive on several grounds. For one, like other human rights, it implicates accountability, and most governments prefer not to account for their actions at the international level. It could even be argued that the internal logic of power tends towards concentration and secrecy. The need for checks and balances has long been understood as indispensable to control the exercise of authority and avoid tyranny. At the international level, we are witnessing a revival of national

101. FEDERICA PRINA & DAVID BANISAR, ARTICLE 19, A DANGEROUS SHADE OF GREEN: THREATS TO ENVIRONMENTAL HUMAN RIGHTS DEFENDERS AND JOURNALISTS IN EUROPE 11–20 (2014).

102. BOYD, *supra* note 14, at 47.

103. *Id.* at 276–77.

sovereignty after the demise of the Cold War and the emergence of a polio-centric, or non-centric world.

Accountability for global environmental justice in a fragmented mosaic of national sovereignties naturally raises concerns and resistance when the nation state is the supreme locus of governance. To a large extent, the debate over the right to a healthy environment is caught in a broader debate as to the role of international human rights law in disciplining governmental action. If the post-World War II momentum toward affirmation of dignity led to the establishment of a new world order based on human rights, then today we are seeing forces that wish to weaken international mechanisms of protection.

At the same time, we are seeing the international community globalized in unprecedented ways. The emergence of global civil society and the globalization of certain fundamental values, such as those embodied in the right to a healthy environment, are mobilizing peoples around the globe. Information that flows across political boundaries enables people to demand accountability for the globalization of environmental harm. In this scenario, extraterritorial human rights obligations acquire prominence as a key tool in rebalancing the international order and fulfilling the promise of the human rights project. Examples abound, ranging from the dumping of hazardous wastes in faraway countries where people are poor and, for all purposes in the international system, where people do not matter because they have no voice. Or climate change, where those making profits are not the ones paying the price. Or the environmental crimes of States, a concept discussed by the International Law Commission back in the 1970s and 1980s in the context of state responsibility for wrongful acts, in relation to nuclear tests in the Pacific Ocean, the use of Agent Orange in Vietnam, and other forms of environmental modifications in military activities.¹⁰⁴ Or environmental crimes of corporations in the Democratic Republic of the Congo or Trafigura in the Ivory Coast, to name a couple.¹⁰⁵

Globalization is raising elements of global solidarity here. And against the demands by global civil society for global environmental justice, the aversion of governments to international accountability largely explains the resistance to the recognition of the right to a healthy environment.

How can that resistance be overcome? I will argue that it is only through civil society mobilization because there are very powerful

104. G.A. Res. 37/7, annex, World Charter for Nature, (Oct. 28, 1982).

105. GREENPEACE & AMNESTY INT'L, THE TOXIC TRUTH 2 (2012); *see also* VIRUNGA, <http://virungamovie.com/> (last visited May 3, 2016) (documentary exploring the forces behind environmental destruction in the Congo).

individuals and entities banking on environmental destruction. Changing the status quo will take an unprecedented level of mobilization and awareness.

There are other elements that explain the resistance. The right to a healthy environment has been perceived as subversive to certain longstanding principles held dear by the Global South. For example, the principle of permanent sovereignty over natural resources emerged from concerted political action by developing states in the 1960s and 1970s toward a new international economic order.¹⁰⁶ Similarly, self-determination was written into the international covenants of human rights in order to further the new international economic order.¹⁰⁷ In that vein, human rights already posed an injunction to the unfettered expansion of the principle of permanent sovereignty over natural resources, since self-determination underscored the necessity of exploiting natural resources in the interest of national development and of the well-being of the people of the state concerned. And this emphasis of self-determination has implications both at the national level as well as the international level, with the aim of promoting human rights, social justice, and cooperation for development.¹⁰⁸

Moreover, the concerns over the right to a healthy environment find resonance in the fears expressed in environmental negotiations that affirmation of human rights can lead to environmental conditionalities and protectionism in disguise, which undermines self-determination as well as sovereignty over environmental policy and natural resources.

The tensions between fundamental principles are apparent in this debate: on the one hand, self-determination and sovereignty over natural resources and environmental policy, and on the other hand, human rights

106. See NICO SCHRIJVER, SOVEREIGNTY OVER NATURAL RESOURCES: BALANCING RIGHTS AND DUTIES 33–112 (1997) (tracing the United Nations General Assembly debates on the key resolutions relating to permanent sovereignty over natural resources and the new international economic order); see also Karol N. Gess, *Permanent Sovereignty over Natural Resources: An Analytical Review of the United Nations Declaration and Its Genesis*, 13 INT'L & COMP. L.Q. 398, 399 (1964) (explaining that the Permanent Sovereignty Commission considered permanent sovereignty over natural resources during its third session in May 1961, and the General Assembly considered the topic at its seventeenth session in 1962); Burns H. Weston, *The Charter of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 AM. J. INT'L L. 437, 448–51 (1981) (discussing the NIEO proposal to endow the Charter of Economic Rights and Duties of States with the characteristics of law and to equate the resolutions with legislation).

107. International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights art. 1, Dec. 19, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

108. Paul Peters et al., *Permanent Sovereignty, Foreign Investment and State Practice*, in PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW 88, 104 (Kamal Hossain & Subrata Roy Chowdhury eds., 1984).

and the environment driving a discourse of accountability and indicating that States can indeed be scrutinized for the decisions they make in respect to natural resources and environmental protection. This tension at the level of principles mirrors the longstanding tension between the exclusive domain of sovereignty and the legitimate sphere of international concern, and it also explains the paralysis in the recognition of the right to a healthy environment.

I will also note that mobilization towards the recognition of a right to a healthy environment has begun and is gaining strength on account of its discursive strength. The right to a healthy environment is rooted in a fundamental respect for life in its totality, as much as it implicates global human solidarity and consciousness that cut across time, cultures, and political boundaries.

And so if we turn back for a moment to the opening theme: is there a disconnect in how future generations will see us and how we see ourselves? In that sense, are we failing in our collective imagination? The example of the frog in a pot that begins to heat up but does not jump, or the example of the dolphins encircled by nets and then drown when they could have jumped over the nets—are we humans also failing from imagination and stuck in a governance structure that is causing this apocalyptic present and future? This is where the right to a healthy environment once again becomes relevant because it is an element of legitimization of power and authority; of the ideas that we accept or that we reject.

In a way, the right to a healthy environment opens new doors of perception to our self-awareness and our identity as humans by underlining our responsibilities toward future generations and toward life on the planet. What makes us humans? Just our DNA code? Is it the information, the knowledge, the culture that we have been able to construct and pass on over generations? A central element of that knowledge, of that culture, needs to be, if we are to address this crisis, our responsibility toward future generations and our responsibilities to this planet. Therefore, the right to a healthy environment becomes an element of our own consciousness and a key to the construction of our own identity.

The Special Rapporteur on Human Rights and the Environment has done great work in clarifying human rights obligations with respect to environmental protection. Many in civil society see that platform as laying the basis for the recognition of a right to a healthy environment. The response has been: what could the right to a healthy environment at the global level bring that has not yet been achieved by the greening of human rights, by the integration of human rights and the environment, by

environmental democracy, by national constitutions? A fair question, no doubt.

I will enunciate a couple things that can be achieved with the new right. It will bring all the normative content under the umbrella of one right; making it more simple, making it more effective, helping it in its implementation. It would also allow for international scrutiny of unsustainable environmental decisions. It would give victims of environmental harm a clear, strong, and legitimate basis to support their claims for environmental justice. It would enable international tribunals to continue refining jurisprudence on environmental rights, thereby providing a remedy to victims and guidance to States for implementation. It would also allow us to test the elements and limits of interconnectedness, in order to operationalize in law the fact that humans are not separate from nature but integral to it. The specificity of the right could then be under the spotlight for courts to further develop the right in the future.

Moreover, here in the United States it is conceivable that if the right to a healthy environment were recognized at the international level as an element of customary law, then it could become justiciable by way of the alien tort statute.¹⁰⁹ The use of the alien tort statute has changed the dynamics in the business and human rights field significantly, and so profound changes in corporate practices could come about from said recognition.¹¹⁰ Similar developments could take place in other areas of the world. At the same time, there could be prospects for further evolution in our collective consciousness and the legal tools stemming from it.

CONCLUSION

We are at 45 minutes, and like a good soccer match, it may be time for a break. So by way of stoppage time, I will conclude by noting that since Stockholm there have been many lessons that have been learned in the human rights and environment debate. And there are many unfinished agenda items that are coming up. For example, what does a rights-based

109. See *Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 237, 247 (2d Cir. 2003) (analyzing whether the right to a healthy environment is international customary law and thus violates the alien tort statute).

110. Jacob Stone, *Sovereignty, Norms and the Alien Tort Claims Act: An Inquiry into the Sovereignty Implications of the ATCA*, ATLANTIC INT'L STUD. ORG., <http://atlismta.org/online-journals/0506-journal-government-and-the-rights-of-individuals/sovereignty-norms-and-the-alien-tort-claims-act/> (last visited Apr. 25, 2016).

approach mean for the design and implementation of multilateral environmental agreements? Should civil society be able to trigger and engage a compliance mechanism in multilateral environmental agreements? What do human rights contribute to the operationalization of the climate change regime as we move to the Paris Agreement? What would a right to a healthy environment mean for the obligations of transnational corporations?

While there are several outstanding agenda items, at the macro level human rights and the environment can be said to have been successful at bringing together two movements: the environmental movement that began looking at human rights approaches to secure remedy to victims of harm, and the human rights movement that has also begun to see that its standards can only be meaningful in a healthy environment that enables a life of dignity. At that macro level, the integration of human rights and the environment empowers civil society to confront the dire crises that humanity is facing today, so that perhaps in the future that disconnect of how we see ourselves today and how we will be judged may be bridged. The right to a healthy environment may be the glue that builds that bridge. Thank you very much.