

Greening the International Human Rights Sphere? Environmental Rights and the *Draft Declaration of Principles on Human Rights and the Environment*

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"Human society cannot function independently of the natural environment."¹

Introduction

A vital connection exists between the natural environment and fundamental human rights. Basic survival of the human species is inherently linked to the healthy functioning of natural ecosystems, from which the essential components of daily life are directly and indirectly derived. The linkage between the environment and human rights has been recognized internationally in numerous human rights instruments. It formed the basis of a United Nations ("UN") sub-commission study on human rights and the environment in the early 1990s. The UN Special Rapporteur submitted her final report in 1994. Appended to her report was a *Draft Declaration of Principles on Human Rights and the Environment* ("the *Draft Declaration*").

Despite these efforts, and seemingly widespread recognition of the connection between human rights and the environment, formal recognition of "environmental rights" on a global level remains elusive. While the concept still generates occasional debate in international legal and political spheres, the *Draft Declaration*, which was designed to comprehensively address the environmental dimensions of human rights, has all but

disappeared from the human rights agenda. The reasons for this are unclear.

This examination begins with a contextual overview of environmental rights. The paper continues with an outline of the history and current status of the *Draft Declaration*, followed by a general analysis of the document. The paper explores arguments advanced by both supporters and critics of the rights-based approach, and briefly discusses two variations of the *Draft Declaration's* framework. In the end, however, the most viable way to address the relationship between environmental issues and human rights may not be the "greening" of the international human rights sphere.

Environmental Rights in Context

Before investigating environmental rights in detail, it is first necessary to locate environmental rights within the broader human rights context. The current analytical framework, developed by Karel Vasak, classifies rights into chronological "generations." This method is not without its critics,² but there are generally believed to be three generations of rights.

The first generation, civil and political rights, emphasizes the liberty of the individual, which is to be protected from state intervention. Rights such as the right to

¹ Neil A.F. Popovic, "In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment" (1996) 27:3 Colum. H.R.L. Rev. 487 at 487 [Popovic, "Commentary"].

² See Dinah Shelton, "Human Rights, Environmental Rights, and the Right to Environment" (1991) 28 Stan. J. of Int'l L. 103 at 122-123. Critics contend that the generational analysis is problematic in two ways: it does not account for examples where second-generation rights preceded those of the first generation, and it offers no guidance as to when a claim should be considered a human right.

life and security of the person fall under this heading. The second generation encompasses economic, social and cultural rights. Essentially claims to social equality, these rights include rights to education and an adequate standard of living, and require state intervention for their assurance. The third and final generation of rights are also called solidarity rights, since collective international action is required for their realization.³ Environmental rights, the right to peace, and the right to self-determination are among those included.

It has been argued that third-generation rights exist to enhance and facilitate the rights of the first and second generations.⁴ In this way, solidarity rights become almost a form of global policy goal. Environmental rights are uniquely suited to this formulation. While the health of the global environment cannot be significantly influenced by the actions of a single state, the environmental transgressions of that same state may affect the life and health of people around the world.⁵

Environmental rights per se continue to defy a single, substantive definition, which may prove to be the greatest obstacle to international recognition. At a minimum, various adjectives are inserted to qualify the right. Among many other things, the right to environment has been framed as a right to a clean, safe, healthy, healthful, liveable or ecologically balanced environment. These adjectives are also often combined, as in the right to a healthy and ecologically balanced environment. All of these variations convey a general belief that environmental quality

should be preserved, either for human beings or for the ecosphere itself. Environmental quality may entail: clean air, water and soil; freedom from environmental hazards; and the preservation of ecosystem biodiversity and reproductive capacities. The *Draft Declaration* defines environmental rights as the environmental components of existing human rights, like rights to life and work.⁶ In this sense, environmental rights influence the whole spectrum of recognized human rights.

Unlike definition, which remains problematic, the justification for constructing environmental rights is quite clear. The degradation of the natural environment poses threats to a broad range of human rights, from the right to life, to participatory rights, to the right to an adequate living standard.⁷ In preventing people from securing minimum requirements for survival, environmental degradation also impedes people's ability to enjoy and exercise other human rights.⁸ Faced with deciding between feeding a family whose subsistence farm was decimated by drought, and voting in a local election, most individuals would agree there is effectively no choice. As one commentator observes, "environmental degradation erodes freedom because it limits the range of choices for people today and for future generations."⁹

Gradual realization of the serious consequences for human rights posed by environmental degradation prompted a discourse of environmental rights in the 1970s. The *Stockholm Declaration*, from the UN Conference on the Human Environment in June 1972, is generally acknowledged as

³ Prudence E. Taylor, "From Environmental to Ecological Human Rights: A New Dynamic in International Law?" (1998) 10:2 *Geo. Int'l Env't L. Rev.* 309 at 318-319.

⁴ Jennifer A. Downs, "A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right" (1993) 3 *Duke J. of Comp. & Int'l L.* 351 at 358 (WL).

⁵ *Ibid.* at 385.

⁶ Neil A.F. Popovic, "Pursuing Environmental Justice with International Human Rights and State Constitutions" (1996) 15 *Stan. Env't L. J.* 338 at 347-348 (Lexis) [Popovic, "Environmental Justice"].

⁷ Shelton, *supra* note 2 at 112.

⁸ Downs, *supra* note 4 at 351.

⁹ Malcolm J. Rogge, "Human Rights, Human Development and the Right to a Healthy Environment: An Analytical Framework" (2001) 22:1 *Canadian Journal of Development Studies* 33 at 46.

the first articulation of the connection between human rights and the environment. Although the *Stockholm Declaration* does not explicitly create a right to environment, it strongly implies that the exercise of other human rights requires basic environmental health.¹⁰ The preamble outlines environmental concerns:

*We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth and living beings; major and undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources...*¹¹

and Principle 1 responds to these concerns by asserting that:

*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.*¹²

This expansive statement was significantly narrowed by the *Rio Declaration* of the UN Conference on Environment and Development in 1992: “[Human beings] are entitled to a healthy and productive life in harmony with nature.”¹³ A more eco-centric articulation of the connection between human rights and the environment is found in the 1982 *World Charter for Nature* (the

“*Charter*”). Drafted by the International Union for the Conservation of Nature, and subsequently adopted by the UN General Assembly, the Charter was intended to serve as an international standard against which human management of nature could be evaluated.¹⁴ The *Charter* uses language that situates human beings and civilization within an ecosystem context. Its preamble describes humans as “part of nature” and civilization as “rooted in nature,” before affirming that “[e]very form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action.”¹⁵

Some allege that the *Stockholm* and *Rio* declarations generated more confusion than clarity. This claim states that Principle 21 of the *Stockholm Declaration* contradicts the rights enumerated in Principle 1 by reinforcing the supreme sovereignty of states over their natural resources. On a similar note, the *Rio Declaration* is said to frame environmental responsibility in terms compatible with sustainable growth and development.¹⁶ These allegations open a wider debate on hierarchies of rights. Current space does not permit an examination of these concerns, but they underlie every discussion of environmental rights.¹⁷

At present, there are four alternative rights-based approaches to achieving environmental protection. The first reinterprets existing rights to incorporate standards of environmental quality – a

¹⁰ Shelton, *supra* note 2 at 112.

¹¹ *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 (1973), pmb., para. 3, in Patricia W. Birnie & Alan E. Boyle, *Basic Documents on International Law and the Environment* (Oxford: Oxford University Press, 1995) at 2.

¹² *Ibid.*, princ. 1, at 4.

¹³ *Rio Declaration of the United Nations Conference on Environment and Development*, U.N. Doc. A/CONF.151/5/Rev.1 (1992), princ. 1, in Birnie & Boyle, *supra* note 11 at 10.

¹⁴ Birnie & Boyle, *supra* note 11 at 15.

¹⁵ *World Charter for Nature*, G.A. Res. 37/7, U.N. GAOR, U.N. Doc. A/RES/37/7 (1983) pmb., para. 3(a), in Birnie & Boyle, *supra* note 11 at 16 [emphasis added].

¹⁶ David Smith, “Clean Air and a Clean Environment as Fundamental Human Rights” (1999) 10 *Colorado J. of Int’l Env’t L. and Policy* 149 at para. 7 (WL).

¹⁷ See Taylor, *supra* note 3 at 319ff. for a discussion of rights hierarchies.

"greening" of human rights. The second involves greater use of procedural rights to increase participation in environmental decision-making. The third approach advocates the creation of a substantive human right to a safe, healthy or sustainable environment. The last approach focuses on the intrinsic value of nature, championing the rights of nature itself.¹⁸ The *Draft Declaration* incorporates all but the final approach.

The Draft Declaration History and Current Status

In 1989, a group of non-governmental organizations ("NGOs") convinced the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (the "Sub-Commission")¹⁹ to establish a study on the connections between human rights and the environment. The Sub-Commission operates under the UN Commission on Human Rights (the "UNCHR"), which endorsed the Sub-Commission's request to appoint a Special Rapporteur for the study in 1991. Ms. Fatma Zohra Ksentini, an Algerian human rights lawyer and member of the Sub-Commission, was subsequently appointed.²⁰

Ksentini prepared a preliminary report in 1991 and progress reports in 1992 and 1993. She submitted her final report in August 1994. In her preliminary report, Ksentini found the idea of new ecological rights more attractive than modifying existing human rights to incorporate environmental concerns. She felt that the third approach "would take up more completely the ecological challenges confronting [humankind], while giving the

beneficiaries of those rights the legal means of protection that any recognized right confers."²¹ In May 1994, a group of international experts in human rights and international environmental law met in Geneva at the request of U.S.-based public interest environmental law firm Earthjustice (formerly the Sierra Club Legal Defense Fund). Together, these experts produced the *Draft Declaration* that was submitted as Annex I of Ksentini's final report.²²

The final report recommended establishing a centre to address human rights and the environment, as well as appointing another Special Rapporteur, this time under the UNCHR. Whereas an appointee under the Sub-Commission is only authorized to study issues generally, an appointee under the UNCHR has powers to investigate allegations of violations, as well as to examine, monitor and publicly report on human rights violations. Ksentini also called for the UN to adopt norms consolidating a right to environment, based on the *Draft Declaration*.²³

To date, there has been no movement on any of Ksentini's recommendations, nor have the final report or the *Draft Declaration* been substantively discussed. Efforts to incite discussion on the *Draft Declaration* by NGOs have been wholly unsuccessful.²⁴ Although the UNCHR asked state governments, NGOs and specialized agencies to submit comments on the final report in 1995 and 1996, it only received eight replies. At the UNCHR's 1997 session, NGOs and some governments lobbied for the creation of a permanent human rights and environment mechanism. Their attempts failed, and the UNCHR postponed further discussion on

¹⁸ Taylor, *supra* note 3 at 338.

¹⁹ In 1999, the name was changed to the Sub-Commission on the Promotion and Protection of Human Rights. See online: UN Sub-Commission on the Promotion and Protection of Human Rights <<http://www.unhchr.ch/html/menu2/2/sc.htm>>.

²⁰ Popovic, "Commentary," *supra* note 1 at 490.

²¹ Reprinted in Shelton, *supra* note 2 at 131.

²² Popovic, "Commentary," *supra* note 1 at 492.

²³ Caroline Dommen, "Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms" (1998) 11:1 *Geo. Int'l Env'tl L. Rev.* 1 at 33.

²⁴ *Ibid.* at 33-34.

human rights and the environment until 1999. The UNCHR also asked that its consideration of these issues be submitted to the UN General Assembly for their 1997 follow-up session to the Rio Conference. That was not done, nor was the report brought to the attention of the UN Environment Programme, the Development Programme, or other relevant bodies.²⁵

The above reports, and a further report on human rights and the environment prepared for the UNCHR's 1999 session, do not appear to be available on the Sub-Commission or UNCHR websites. There is no mention of the *Draft Declaration* on any UN home page. An Internet search generates only two links to the *Draft Declaration*, both of which are wholly independent of the UN.²⁶ It is possible to obtain a copy of the final report from a UN depository, but for a document whose authors sought wide circulation to generate discussion,²⁷ the *Draft Declaration* is conspicuously absent from places where it could achieve this goal.

Structure and Content

Neil Popovic, one of the creators of the *Draft Declaration*, explains that it was drafted in five parts without using descriptive titles, so that the principles contained in the *Draft Declaration* were not forced into pre-defined categories. Nonetheless, Popovic acknowledges that the document is basically organized as follows:

- *Preamble: Reflects inspiration from basic principles of international human rights and international environmental law.*
- *Part I: General Concepts*

- *Part II: Substantive Environmental Human Rights*
- *Part III: Procedural Environmental Human Rights (participatory rights)*
- *Part IV: Duties Corresponding to Environmental Human Rights*
- *Part V: Special Considerations (to inform meanings throughout the document)*²⁸

The Preamble provides guidance about the themes underlying the *Draft Declaration*. It is firmly grounded in established principles and instruments of international human rights law, and emphasizes the "universality, indivisibility and interdependence of all human rights, which ensure balance and preclude relativistic attempts to devalue certain principles."²⁹ Also of note is the clear articulation of a reciprocal relationship between human rights and environmental degradation, and how each affects the other.³⁰

The general approach of the *Draft Declaration* relates environmental protection issues to the established framework of human rights. The authors place particular emphasis on the rights to life and health; the right to non-discrimination; the right to work and to equally benefit from natural resources; and the more controversial rights, to development and self-determination. Almost all human rights, however, are encompassed by various principles in the *Draft Declaration*. Popovic justifies the approach by arguing that it reflects the human consequences of ecological disruption and the stake that affected people have in avoiding or remedying that disruption. The rights model

²⁵ *Ibid.* at 34.

²⁶ See online: The University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/instree/1994-dec.htm>>; The Fletcher School of Law and Diplomacy's Multilaterals Project <<http://www.tufts.edu/departments/fletcher/multi/www/1994-decl.html>>.

²⁷ Popovic, "Commentary," *supra* note 1 at 603.

²⁸ *Ibid.* at 498.

²⁹ *Ibid.* at 500-501.

³⁰ *Review of Further Developments in Fields with Which the Sub-Commission Has Been Concerned, Human Rights and the Environment: Final Report Prepared by Ms. Fatma Ksentini, Special Rapporteur*, U.N. ESCOR Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994) at para. 248, 251, cited in *ibid.* at 501.

used, he asserts, "treats the physical environment not as an abstract value, but instead in terms of its relationship to people."³¹

The *Draft Declaration* is comprehensive, so each aspect of it cannot be addressed in this examination.³² To highlight both problematic and progressive features of the *Draft Declaration* as it currently stands, the following section provides an overall analysis of its contribution to the debate on human rights and the environment.

Analysis

From its Preamble, the *Draft Declaration* shows promise. It is guided by major international human rights instruments, including the Universal Declaration of Human Rights (the "UDHR"), the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights. The *Draft Declaration* also references the *Stockholm* and *Rio* declarations and the *World Charter for Nature*. The document states its recognition of rights to self-determination and sustainable development, and it creates a link between these rights and the right to a "secure, healthy and ecologically sound environment."³³ Once past the opening, however, several issues begin to detract from this positive start.

The *Draft Declaration* consists of 27 principles, through which it attempts to address virtually every major aspect of human rights law contained in other human rights instruments. A sampling of the principles is illustrative. Principle 14

addresses indigenous peoples' rights to control their own lands and resources, and their right to protection from impairment of those resources. The same sentiment is captured by the *Draft Declaration* on the Rights of Indigenous Peoples.³⁴ In a similar vein, Principle 11 speaks to a qualified right not to be evicted as a result of decisions affecting the environment. General freedom from eviction is covered by an International Labor Organization Convention.³⁵ The remainder of the *Draft Declaration* is directed at everything from cultural rights (Principle 13), to participatory rights (Part III), to the duty of state governments to control transnational corporations (Principle 22). The result is a document that reads like a "kitchen-sink" approach to environmental human rights, rather than a focused attempt to strengthen the connection between human rights and environmental protection.

It is argued that international negotiations are highly prone to becoming a "garbage can" of policy problems because of the constant redefinition inherent in the process.³⁶ The *Draft Declaration* appears to have fallen into this same trap. In a self-professed attempt to "cover most aspects of human life"³⁷ and conclusively demonstrate the pervasiveness of the natural environment in human society, the *Draft Declaration* nearly eradicates any possibility for recognition of environmental rights independent of an existing human right. It is difficult to see what the *Draft Declaration* adds if the environmental component of these human rights could essentially just be read into existing instruments. This may partially

³¹ Popovic, "Environmental Justice," *supra* note 6 at 340.

³² For a full discussion of each principle in the *Draft Declaration*, please see Popovic, "Commentary," *supra* note 1.

³³ *Draft Declaration of Principles on Human Rights and the Environment*, pmbl., in U.N. Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Human Rights and the Environment: Final Report*, Annex I, U.N. Doc. E/CN.4/Sub.2/1994/9 (1994), online: *Draft Declaration of Principles of Human Rights and Environment* (1994) <<http://www1.umn.edu/humanrts/instree/1994-dec.htm>> [*Draft Declaration*].

³⁴ Popovic, "Commentary," *supra* note 1 at 541-542.

³⁵ *Ibid.* at 533-534.

³⁶ Miranda A. Schreurs & Elizabeth Economy, "Domestic and International Linkages in Environmental Politics" in Miranda A. Schreurs & Elizabeth Economy, eds., *The Internationalization of Environmental Protection* (Cambridge: Cambridge University Press, 1997) 1 at 14.

³⁷ Popovic, "Commentary," *supra* note 1 at 602.

explain why the *Draft Declaration* has failed to generate more discussion.

The effective relegation of environmental issues to a sort of “gloss” on recognized human rights is almost certainly a function of the deliberate attempt to fit the *Draft Declaration* into the existing human rights framework. The “gloss” is particularly apparent in Principle 16: “[a]ll persons have the right to hold and express opinions and to disseminate ideas and information regarding the environment.”³⁸ Is the basic guarantee of freedom of expression in article 19 of the UDHR³⁹ somehow insufficient for environmentally related information? This is the sentiment implied by Principle 16 of the *Draft Declaration*. One is left wondering if the *Draft Declaration*’s broad-brush approach actually detracts from valid claims to environmental rights.

The *Draft Declaration* also contains few obligatory statements. The majority of the text is framed as affirmative “rights to” a particular condition. Some obligations arise under Part IV of the *Draft Declaration*, but these are mostly aimed at state governments. This raises a further concern with the *Draft Declaration* – that of guidance for ensuring that the enumerated rights are respected. While it is possible that the authors intended the creation of guidelines for implementation to be part of subsequent discussions on the document, there is no such indication in either the *Draft Declaration* or in Popovic’s elaborate treatment of it. One place where lack of guidance is particularly problematic is in Part V of the *Draft Declaration*. Principle 25 directs that special consideration shall be given to “vulnerable persons and groups,”⁴⁰ yet nowhere in the text is there a definition of who fits the label “vulnerable.” While Popovic does an admirable job of outlining

those who fit the description in his article,⁴¹ it may not be as clear for anyone reading the text alone. On one hand, this omission allows for flexible arguments as to who would qualify. Unfortunately, it also presupposes that readers will possess the knowledge and the ability to construct those arguments. In the same way, there is no indication of a standard for what constitutes “a secure, healthy and ecologically sound environment.”

The *Draft Declaration* further provides very little guidance for those whose rights are violated. While it is recognized that the *Draft Declaration* was designed as a statement of general principles rather than as a binding agreement, it provides in Principle 20 that “[a]ll persons have the right to effective remedies and redress in administrative or judicial proceedings for environmental harm or the threat of such harm.”⁴² Under Principle 22, the state is charged with adopting measures for providing adequate remedies, but does this mean that an affected individual has recourse only to domestic mechanisms? Is there a right of appeal to a body outside of the state? If so, must all domestic remedies be exhausted before such an appeal is filed? The answers to these questions remain unclear.

Finally, while setting ambitious goals for social equality, the *Draft Declaration* does not address the differential capacities of states to enact and observe the Principles. States have an obligation under Principle 22 to adopt measures that are necessary to effectively implement the rights in the *Draft Declaration*. Is a developing country’s obligation to fulfill the “right to safe and healthy food and water adequate to [a person’s] well-being”⁴³ on par with that of a developed country? Will this lack of

³⁸ *Draft Declaration*, *supra* note 33, princ. 16.

³⁹ *Universal Declaration of Human Rights*, Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, U.N. Doc. A/810 (1948) article 19, cited in Popovic, “Commentary,” *supra* note 1 at 549.

⁴⁰ *Draft Declaration*, *supra* note 33, princ. 25.

⁴¹ See Popovic, “Commentary,” *supra* note 1 at 592-599.

⁴² *Draft Declaration*, *supra* note 33, princ. 20.

⁴³ *Ibid.*, princ. 8.

recognition in the *Draft Declaration* for the particular challenges faced by developing nations prevent some interested nations from becoming signatories? Again, the answers are uncertain.

These criticisms do not mean that the *Draft Declaration* is without merit. On the contrary, several aspects of the document have significant potential. The imposition of duties for individuals, state governments and international organizations to protect environmental resources under Part IV is a much-needed articulation of the responsibilities that must attach to environmental rights. Although the creation of specific duties in human rights instruments is not a new concept,⁴⁴ the *Draft Declaration* specifically addresses the importance of *collective* duties in the environmental context. The shared nature of the obligation is critical where, as here, one person's derogation from an environmental duty has the potential to interfere with everyone else's rights.⁴⁵

Another welcome addition to articulated principles is the provision for remedies and redress for environmental harm or the threat of environmental harm. Principle 20 legitimizes the harm caused by environmental degradation by recognizing the need to provide compensation. The wording of the provision also allowed the authors to include the precautionary principle in the *Draft Declaration*. By affording judicial or administrative redress for the threat of harm, an individual could secure an injunction against possible environmental degradation, without bearing the burden for *conclusive* proof of harm. This is especially significant given the uncertainty that pervades human understanding of nature's processes.

The closest the *Draft Declaration* comes to expressing an independent right to environment is Principle 2: "[a]ll persons have the right to a secure, healthy, and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible."⁴⁶ As it is written, this right stresses the importance of environmental quality as a basic element of the quality of human life. Popovic defines "a secure, healthy and ecologically sound environment" as one that is sufficiently free of human intervention to maintain its essential natural processes and sustain biodiversity and human life.⁴⁷ His definition commands respect for the intrinsic needs of the natural environment. While his expression of the right is unfortunately not embedded in the text, it is, at least, a start.

The interdependence aspect of Principle 2 also warrants comment. An interdependent interpretation of rights obviates any argument based on a rights hierarchy. For example, if the right to economic development is interdependent with the right to a healthy environment, it cannot be treated as a higher priority. In this construction, "each right informs and moderates the others,"⁴⁸ preventing arguments of differing social values or state domestic policy from relegating rights that require more effort to a place of subservience. Any formulation of environmental rights will benefit from this interpretation.

On the whole, the *Draft Declaration* disappoints. It lacks a strong expression of the individual legitimacy of environmental rights that is necessary to refocus international attention on specific challenges posed by continued human destruction of

⁴⁴ The *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic and Social Rights*, and the *African Charter on Human and Peoples' Rights* all include specific duties. See, generally, Popovic, "Commentary," *supra* note 1 at 566-567.

⁴⁵ Popovic, "Commentary," *supra* note 1 at 567.

⁴⁶ *Draft Declaration*, *supra* note 33, princ. 2.

⁴⁷ Popovic, "Commentary," *supra* note 1 at 504.

⁴⁸ *Ibid.* at 508.

the natural environment. By framing environmental concerns as simply component parts of existing human rights, actual protection of the environment receives little energy. The *Draft Declaration* does, however, make several positive contributions. Specific duties establish the framework for the collective action necessitated by environmental issues. Provisions for redress of environmental harms emphasize the gravity of environmental degradation and validate the use of the precautionary principle.

In summary, the *Draft Declaration* is a starting point on which to build further efforts to achieve international recognition of the connection between human rights and the environment.

Supporters of the Human Rights Approach

Approaching environmental protection through the international human rights sphere and its mechanisms does have its strengths. Some argue that the benefits of the rights-based approach confirm the *Draft Declaration* as the appropriate channel through which to address environmental issues. For these supporters, the next step toward achieving international environmental rights is the creation of a judicial body to deal specifically with violations of those rights.

The human rights approach draws strength from its basis in international law and its connection to the UN. As one author observes, the most important role of international law in a global society is its function as "the expression of fundamental norms (or values) among peoples."⁴⁹ Proponents hope that using this background

to address environmental issues will lead to the desired scale of international recognition for the importance of environmental protection. At the same time, a link to the UN process provides a crucial element for creating legitimacy and enforceability of a right within the international community.⁵⁰ As one frequently quoted observer has noted, a right becomes a right when the UN General Assembly says so.⁵¹ Association with the UN also provides access to its almost unique service as a forum for raising consciousness and mobilizing politics,⁵² both of which are essential for the realization of environmental protection.

In the international community there is an existing, generally widespread recognition of obligations to protect and promote human rights. This could also work to the benefit of environmental issues, in the sense that acceptance of new obligations may be easier if they are connected to existing ones. It is important to note that the UDHR did not represent the existing state of international human rights law when it was adopted.⁵³ The current paucity of international environmental rights law should therefore not prevent the creation of a standard toward which states can work.

The most significant benefits accruing from this approach are the remedial possibilities available to *individuals* through human rights mechanisms. As a general rule, international law is concerned only with states, so human rights mechanisms "are virtually unique in offering avenues of redress for individuals or groups wishing to appeal beyond their own state in cases of harm that constitute a violation of their

⁴⁹ Edith Brown Weiss, "The Emerging Structure of International Environmental Law" in Norman J. Vig & Regina S. Axelrod, eds., *The Global Environment: Institutions, Law, and Policy* (Washington, DC: Congressional Quarterly Press, 1999) 98 at 102.

⁵⁰ Downs, *supra* note 4 at 355.

⁵¹ Richard B. Bilder, "Rethinking International Human Rights: Some Basic Questions" (1969) *Wisconsin L. Rev.* 171 at 173, cited in Shelton, *supra* note 2 at 122.

⁵² Dommen, *supra* note 23 at 48.

⁵³ Louis Henkin et al., *International Law: Cases and Materials*, 2nd ed. (St. Paul, MN: West, 1987) at 114-115, cited in Downs, *supra* note 4 at 359.

rights."⁵⁴ There are two reasons why this is particularly important in the environmental context. First, the worst victims of environmental harm tend to be "those with the least political clout, such as members of racial and ethnic minorities, the poor, or those who are geographically isolated from the locus of political power within their country."⁵⁵ The possibility of seeking redress independent of the state is crucial for these people. Second, environmental problems rarely respect national borders. The ability to seek redress outside of the domestic jurisdiction thus becomes very significant. There is, however, a caveat to this benefit: individuals must generally exhaust all domestic remedies first, or must show why domestic redress is not a feasible solution in the circumstances of the particular case.⁵⁶

To address the concern that environmental rights terminology, such as "clean" or "safe" environment, is simply too nebulous to be justiciable, supporters of this approach draw attention to other human rights terms, like self-determination, which were originally just as imprecise. They maintain that, through public consciousness, these terms can be given meanings in a concrete social and historical context.⁵⁷ Similarly, in response to concerns of potential conflict between environmental rights and the right to development, champions of the human rights approach assert that the construction of development and environmental protection as mutually

exclusive is artificial and damaging. Human development, they argue, is greatly dependent on the existence of natural resources that can be transformed into basic goods.⁵⁸ These, in turn, are used to build more sophisticated capacities. In this way, development and preservation of the environment become tightly linked, and the "short-term benefits reaped from environmental degradation pale in comparison to the long-term impacts of stripping the environment of its productive capacity."⁵⁹

Confident of the strengths of a rights-based approach to environmental protection, advocates push for the creation of an enforcement mechanism unique to environmental rights – in short, an international environmental court. At present, there is no international judicial mechanism capable of assessing environmental damages or fashioning remedies to compensate for transborder harm.⁶⁰ While the International Court of Justice (the "ICJ") did set up a special chamber for environmental matters in July 1993, it has yet to deal with a purely environmental conflict.⁶¹ The ICJ is also limited to hearing actions submitted by states.⁶² The concept of an international environmental court is not a recent invention. In 1989, the International Congress on Efficient Environmental Law and Setting Up an International Court for the Environment Within the United Nations (the

⁵⁴ Dommen, *supra* note 23 at 3.

⁵⁵ *Ibid.*

⁵⁶ Shelton, *supra* note 2 at 113-114.

⁵⁷ *Ibid.* at 135.

⁵⁸ Rogge, *supra* note 9 at 34.

⁵⁹ Popovic, "Commentary," *supra* note 1 at 488.

⁶⁰ Kenneth F. McCallion & H. Rajan Sharma, "Environmental Justice Without Borders: The Need for an International Court of the Environment to Protect Fundamental Environmental Rights" (2000) 32:3 *Geo. Wash. J. of Int'l L. and Economics* 351 at 352.

⁶¹ Michael Faure & Jürgen Lefevere, "Compliance with International Environmental Agreements" in Vig & Axelrod, *supra* note 49, 138 at 151. For the chamber to be used, one state would need to file a claim against another, playing essentially a whistle-blower role. Where environmental issues are concerned, the probability of this is quite small, since most states are reluctant to expose their own domestic environmental practices to international scrutiny.

⁶² McCallion & Sharma, *supra* note 60 at 359.

"International Congress") recommended the approval of an international convention establishing a human right to the environment. At the same time, the International Congress set out guidelines and procedures for an international court to which individuals and groups could bring environmental claims.⁶³ The International Congress expressly articulated the need to create a separate and independent court:

[W]e must have an International Court for the Environment that draws moral and legal strength not from countries, but from individuals who are the real holders of a universal human right.... They must have a court at their disposal that has the power to impose itself on all individuals and countries because it judges in the name of the international community—i.e., for the whole of mankind today and for future generations.⁶⁴

If this course of action is followed, the groundwork has effectively already been laid. An international environmental court would consolidate all the benefits cited by supporters of the rights-based approach to environmental protection, providing redress for individuals in an internationally sanctioned setting.

Critics of the Human Rights Approach

Critics of the rights-based approach to environmental protection have several misgivings. The first concern stems from the nature of the rights system. Even at its best, it remains largely dependent on the will of states, which must not only sign the rights instruments, but which are also primarily

responsible for ensuring that rights are protected according to internationally established standards. This puts a lot of faith in states' willingness to cooperate. Critics caution that if the international agenda is at odds with domestic priorities, state cooperation may not materialize.⁶⁵

Another criticism relates to the conviction that proliferation of new rights will devalue those already in existence.⁶⁶ Since both the human rights and the general environmental fields currently experience significant treaty congestion problems,⁶⁷ this may be a very real fear. Ecosystem-minded critics fear that coupling environmental protection with human rights will result in a merely "interpreted" right which would "carry neither the clout nor the binding legal status necessary for the effective enforcement and implementation of environmental programs and standards."⁶⁸ In reality though, these critics are far less numerous than those whose mainstay argument is the seemingly ageless "trees versus jobs" dichotomy.

For these critics, human rights and environmental protection are fundamentally conflicting values. The main platform for the assertion is the right to economic development. Essentially, this argument constructs the interaction between economic development and environmental rights as a zero-sum game. The consequence of this construction is usually to draw lines between developed and developing countries, with the latter questioning all environmental initiatives as the former's attempts to limit economic development and maintain the existing status quo of dependency.⁶⁹ Recognizing environmental rights would only serve to inflame the conflict further and,

⁶³ Downs, *supra* note 4 at 373.

⁶⁴ *Ibid.*

⁶⁵ Schreurs & Economy, *supra* note 36 at 8.

⁶⁶ Shelton, *supra* note 2 at 121.

⁶⁷ It is estimated that more than 900 international legal instruments include one or more provisions concerned with the environment. Human rights provisions are even more numerous. See Weiss, *supra* note 49 at 111.

⁶⁸ Downs, *supra* note 4 at 378.

⁶⁹ Norman J. Vig, "Introduction: Governing the International Environment" in Vig & Axelrod, *supra* note 49, 1 at 6.

in their opinion, since the conflict cannot be reconciled, it should not be permitted.

Among numerous other criticisms of the rights-based approach are persistent concerns about state sovereignty and compliance. Present human rights schemes only charge states with responsibility for persons within and subject to state jurisdiction. Environmental rights issues that transcend borders would require a broad extension of state liability,⁷⁰ which will most certainly be unpopular. Related to this, there is no current articulation of a compliance scheme for environmental rights. A right whose violation incurs no consequence is effectively without substance, since there is little incentive to promote respect.⁷¹ Ensuring compliance with environmental rights may be further complicated by the extent to which realization requires behavioural change, which may be costly both to individuals and the state.⁷² If compliance cannot be ensured or enforced, the right is an empty promise.

Critics of the rights-based approach to environmental protection have diverse angles of concern, but they would nonetheless all maintain that international recognition of environmental rights would prove problematic beyond any possible worth.

Variations on the Human Rights Approach

Some commentators see the value in recognizing environmental rights, but would advocate different methods from those used in the *Draft Declaration*. Two variations on the international human rights approach are frequently proposed, and both warrant more detailed consideration than can be presented in this brief summary. Unfortunately, even a cursory inspection of either "alternative" reveals a perhaps inevitable inability to address the same shortcomings of the human

rights approach that detract from the promise of the *Draft Declaration*.

The first variation is a systems-based approach to environmental protection. Arguing that the rights-based approach is inherently utilitarian, since it is premised on "human" rights, proponents of a systems-based approach believe that an emphasis on the connections between constituent parts of an integrated whole would make it possible to see the protection of nature for nature's sake as ultimately beneficial for humans.⁷³ Essentially, a systems-based approach advocates adopting a different unit of reference. Rather than focusing on an individual human to whom environmental human rights should accrue, the focus shifts to the larger ecosystem in which the human is situated.

Viewed in this context, advocates argue that it becomes impossible to support the false and damaging dichotomy between human interests and the intrinsic value of nature. Each individual element of the ecosystem must be valued and protected as essential to the functioning of the whole, which in turn creates the critical foundation for human survival.⁷⁴ In addition, each ecosystem is itself part of a larger whole, and the concept can be abstracted to encompass the entire planet, if not the known universe. Proponents believe that by shifting the focus to a level of abstraction where the connection between environmental and human functioning may be open to less skepticism, they can prevent individual ecosystem components from being isolated in terms of their particular utility to humans.⁷⁵ While in the short run this may seem like protection of nature for the sake of the continued functioning of a natural system, the ultimate justification is still couched in terms of subsequent benefit for

⁷⁰ Shelton, *supra* note 2 at 134.

⁷¹ Taylor, *supra* note 3 at 351.

⁷² Faure & Lefevre, *supra* note 61 at 144.

⁷³ Shelton, *supra* note 2 at 110.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

humans. What happens if humans somehow manage to completely circumvent their dependencies on the natural world? Without an ultimate justification that implicates humans, is there a residual rationale for protecting the system, at any level? Regrettably, since the systems-based approach does not create this independent rationale, it is unclear what this variation actually adds.

The second variation, which uses regional or domestic rather than international mechanisms, gives a more positive first impression. At the domestic level, there is already a considerable basis on which to build. Virtually every national constitution enacted since 1970 addresses environmental issues at some level.⁷⁶ The Brazilian Constitution, for example, includes the following provision: "[e]veryone has the right to an ecologically balanced environment, which is a public good for the people's use, and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations."⁷⁷

Supporters of this shift in scope and application submit that regional systems, like the European Union, are a better focus for efforts to establish broader consistency, as they generally possess a common tradition and common interests.⁷⁸ Bargaining and debates at the domestic or regional level usually involve a smaller group of participants, many of whom will share knowledge of both the areas concerned and the interests at stake. This familiarity with the issues may give regional and domestic processes a head start and a better foundation from which to proceed. Both national and regional mechanisms may also

contribute to the "bottom-up" creation of international law: as recognition of environmental rights grows at the lower levels, it motivates the creation of a general principle in international law.⁷⁹

Beyond the first impression, however, the second variation suffers a similar fate to that of the first. There is little consideration of the environment outside the sphere of its utility for humans. The Brazilian Constitution, praised for its creation of a positive duty to protect the environment, bluntly characterizes the environment as a commodity item to be preserved for the use of future generations. The proposed strengths of this approach may actually prove to be greater weaknesses. For example, a purported familiarity with regional or domestic issues may inhibit or prevent honest dialogue among participants. Rather than engaging in a discussion to clarify and target real concerns, participants in a regional or domestic process may instead proceed on the basis of their perceived understanding, which may not reflect current positions. In addition, regional systems may encourage the creation of environmental standards based on the lowest "common denominator,"⁸⁰ since that may be the only basis on which agreement can be reached. Decentralization of environmental issues to regional and national systems also detracts significantly from the ability to secure a consistent and strong commitment to action. In effect, with this second variation, many of the problems associated with the rights-based approach simply reappear on a smaller scale.

The longer the international community waits to act on environmental rights, more variations will develop. An unfortunate side-effect that flows from the

⁷⁶ Taylor, *supra* note 3 at 350.

⁷⁷ *Ibid.*

⁷⁸ W. Paul Gormley, *Human Rights and Environment: The Need for International Co-operation* (Leyden: A.W. Sijthoff, 1976).

⁷⁹ Popovic, "Commentary," *supra* note 1 at 603.

⁸⁰ Angela Liberatore, "The European Union: Bridging Domestic and International Environmental Policy-making" in Schreurs & Economy, *supra* note 36, 188 at 206.

creation of "camps" to support these "alternatives" is the development of a false but increasingly powerful sense of distance between people who began with a common interest in the environment. It can be argued that this distance will make it even more difficult to secure a commitment to a common goal of environmental protection. While the majority of rumblings are currently at the grassroots and NGO level, further delay may result in action by broader-based coalitions whose political influence – and often, therefore, whose ideological isolation – is correspondingly increased.

Conclusion

In concluding this discussion, two core concepts are worth brief exploration: anthropocentrism and eco-centrism. These two value sets are at the heart of the debate about whether the human rights framework is an appropriate forum in which to discuss environmental concerns. Despite potential benefits that may accrue from a human rights approach to environmental issues, the concept of *rights* inherently reinforces the idea that the environment is composed purely of natural resources that "exist only for human benefit and have no intrinsic worth."⁸¹ The idea of "greening" the international human rights sphere essentially constructs a relationship of dependency between human rights and the environment, annulling the environment's independent value. This approach also narrows the possible scope of environmental protection to fit within the human rights framework. From this anthropocentric position, it may be impossible to encourage the sacrifice in current lifestyles needed to ensure environmental conservation.

With this in mind, the environment – and, ultimately, humankind as a result – may be much better served by an eco-centric

approach that moves beyond utilitarian values. In the last half century, we have seen the proliferation of human rights and other international treaties with ambitions set so high as to basically isolate them from the state behaviour they were designed to influence.⁸² If the continued functioning of the environment is really a priority, and it should be, perhaps it is better addressed by a more grassroots approach. At that level, people seem more capable, and perhaps most importantly, more *willing* to think beyond themselves, in order to shift the focus away from humans and toward broader goals. From this perspective, it may prove possible to re-establish belief in the independent value of the environment. If this belief can be nurtured to critical mass, perhaps it can eventually encourage explicit, international commitment to protecting the intrinsic value of the natural environment. An effective and sustainable way of ensuring a healthy environment may surface once attempts to mold environmental priorities so that they fit into other "boxes" – whether those are boxes for human rights or otherwise – are abandoned. Only then can energies be refocused on giving environmental concerns recognition on environmental terms. The global community's understanding of the context in which rights are exercised must be broadened to include the context of the natural environment. Perhaps in this broadened context, human rights can be exercised in a way that affords respect to both human and other living beings in this shared world.

⁸¹ Taylor, *supra* note 3 at 351.

⁸² Henry J. Steiner, "Preface" in *Human Rights at Harvard: Interdisciplinary Faculty Perspectives on the Human Rights Movement - Proceedings of the Second Symposium*. (Cambridge, MA: University Committee on Human Rights Studies, 1999) at 7.