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Rebecca Bratspies

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Do We Need A Human Right to a Healthy Environment?

Rebecca Bratspies

On September 16, 2012, the National Ice and Snow Center announced a grim record—the smallest expanse of Arctic sea ice ever documented.¹ The staggering decline in sea ice was announced on my forty-seventh birthday. This juxtaposition of the professional with the personal gave new urgency to my musings on whether we need a human right to a healthy environment. In my (relatively) short life, the Arctic has changed almost beyond recognition. Headlines about the Arctic proclaiming “After the Ice”² no longer seem entirely sensational. The ramifications of climate change for the Arctic’s inhabitants, human³ and animal,⁴ are overwhelming.

The Earth is projected to warm at least 2 °C⁵ by 2050.⁶ In its 2010 Annual

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1. Jane Beitler, *Arctic Sea Ice Extent Settles at Record Seasonal Minimum*, NAT’L SNOW AND ICE DATA CTR. (Sept. 19, 2012), <http://nsidc.org/arcticseaicenews/2012/09/arctic-sea-ice-extent-settles-at-record-seasonal-minimum/>.
 2. See, e.g., *Special Issue on the Arctic: After the Ice*, 478 NAT. INT’L WKLY J. SCI. 157 (2011).
 3. Arctic inhabitants face losing their homes to melting permafrost. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012). Arctic cultures are also in jeopardy, with Inuit elders complaining that their environment “has become a stranger.” See *Elder’s Conference on Climate Change: Final Report*, NUNAVUT TUNNGAVIK INC., 9 (2001), <http://www.tunngavik.com/documents/publications/2001-03-21-Elders-Report-on-Climate-Change-English.pdf>.
 4. GEORGE M. DURNER ET AL., U.S. GEOLOGICAL SURVEY, PREDICTING THE FUTURE DISTRIBUTION OF POLAR BEAR HABITAT IN THE POLAR BASIN FROM RESOURCE SELECTION FUNCTIONS APPLIED TO 21ST CENTURY GENERAL CIRCULATION MODEL PROJECTIONS OF SEA ICE (2007), available at http://www.usgs.gov/newsroom/special/polar_bears/docs/USGS_PolarBear_Durner_Habitat_lowres.pdf (predicting two-thirds of world’s polar bears will be gone by 2050); Kyle Hopkins, *Retreating Sea Ice Blamed for Crowded Shores*, ALASKA DISPATCH NEWS (Sept. 26, 2010), available at <http://www.adn.com/article/20100926/retreating-sea-ice-blamed-crowded-shores>; Seth Borenstein, *Melting Sea Ice Forces Walruses Ashore in Alaska*, USA TODAY (Sept. 14, 2010), available at http://usatoday30.usatoday.com/tech/science/2010-09-13-sea-ice-walrus_N.htm.
 5. Glen P. Peters et al., *The Challenge to Keep Global Warming Below 2 °C*, 3 NATURE CLIMATE CHANGE 1, 2 (2013). The Copenhagen Accord “recognize[d] the scientific view that the increase in global temperature should be below 2 degrees Celsius.” United Nations Framework Convention on Climate Change, Copenhagen, Den., Dec. 7-18, 2009, *Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/L.7 (Dec 18, 2009) [hereinafter *Copenhagen Accord*]. This two-degree threshold is not uncontroversial. See, e.g., Thomas E. Lovejoy, *The Climate Change Endgame*, N.Y. TIMES (Jan. 21, 2013), available at <http://www.nytimes.com/2013/01/22/opinion/global/the-climate-change-endgame.html?r=0> (describing the 2 degree target as “mostly derived from what seemed convenient and doable without any reference to what it really means environmentally”). Moreover, the status of the Copenhagen Accord is unclear. The Conference of the Parties agreed to “take note” of the document, rather than adopt it. United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009*, U.N. Doc. FCCC/CP/2009/11/Add.1 at 5 (Mar. 30, 2010) [hereinafter *Copenhagen Accord Addendum*].
 6. Over this same time period, resource use is projected to triple. U.N. Env’t Programme, Rep. of the Working Group on Decoupling to the Int’l Resource Panel, *Decoupling Natural Resource Use and Environmental Impacts from Economic Growth*, xi (Mar. 13, 2011), available at http://www.unep.org/resourcepanel/decoupling/files/pdf/decoupling_report_english.pdf. And, human population is expected to reach 9.5 billion. U.N. Dep’t of Econ. & Soc. Affairs, Population Div., *World Population Prospects: The 2012 Revision, Volume II, Demographic Profiles*, U.N. Doc. ST/ESA/SER.A/345 (2013), available at http://esa.un.org/wpp/Documentation/pdf/WPP2012_

State of the Climate Report, the National Oceanic and Atmospheric Administration (NOAA) declared that “[t]he scientific evidence that our world is warming is unmistakable.”⁷ This declaration was in line with the Intergovernmental Panel on Climate Change’s (IPCC) Fourth Assessment Report, which asserted with ninety-five percent confidence that human activity has had a warming effect, and with ninety percent confidence that the observed increase in average global temperatures since the mid-twentieth century is attributable to anthropogenic greenhouse gas emissions.⁸ The Fifth IPCC Report, issued in Fall of 2013, indicated that current warming was unequivocal, that future warming was virtually certain, and signaled even greater confidence (ninety-five percent) that human activities are driving global warming.⁹

Climate change is affecting everything, everywhere. Over the past few years, scientists have documented thousands of new record-highs in temperatures;¹⁰ Greenland has experienced unprecedented ice melts;¹¹ Hurricane Sandy devastated the Eastern seaboard;¹² fires scorched the parched western United States;¹³ and floods ravaged Australia,¹⁴ China,¹⁵ the Philippines,¹⁶ and Korea.¹⁷

Volume-II -Demographic-Profiles.pdf.

7. NOAA: *Past Decade Warmest on Record According to Scientists in 48 Countries*, NAT’L OCEANIC AND ATMOSPHERIC ADMIN. (July 28, 2010), http://www.noaanews.noaa.gov/stories2010/20100728_stateoftheclimate.html (describing the agency’s findings in its report *The State of The Climate in 2009*).
8. *Climate Change 2007: Synthesis Report*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, available at http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.
9. Intergovernmental Panel on Climate Change, Contribution of Working Group I to the Fifth Assessment Report of the IPCC, *Summary for Policymakers*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 3, 4-5, 14 (Thomas F. Stocker et al. eds., 2013), available at http://www.climatechange2013.org/images/report/WG1AR5_SPM_FINAL.pdf.
10. *National Overview for July 2013*, NOAA NAT’L CLIMATE DATA CENTER (Aug. 2013), <http://www.ncdc.noaa.gov/sotc/national/2013/7> (reporting, *inter alia*, 341 consecutive months with temperatures above the twentieth century average).
11. Alexandra Witze, *Greenland Enters Melt Mode*, SCI. NEWS, Aug. 25, 2012, at 8.
12. Sam Eaton, *Climate Change and Sandy*, PBS NOVA (Nov. 15, 2012), available at <http://www.pbs.org/wgbh/nova/earth/climate-change-sandy.html>.
13. The Yosemite Rim Fire had burned more than 200,000 acres as of September 2013, blanketing hundreds of miles with chokingly polluted air. *Rim Fire*, INCIWEB: INCIDENT INFORMATION SYSTEM, <http://www.inciweb.org/incident/3660/> (last visited Sept. 13, 2103). A wildfire in Arizona killed nineteen firefighters. Holly Yan et al., *Loss of 19 Firefighters in Arizona Blaze ‘Unbearable,’ Governor Says*, CNN (July 2, 2013, 6:44 AM EDT), <http://www.cnn.com/2013/07/01/us/arizona-firefighter-deaths>. Wildfires in Portugal, Australia, Indonesia and many other countries in 2013 alone caused massive social dislocation, loss of life, and property losses.
14. Jim Andrews, *Major Flooding in Australia Continues*, ACCUWEATHER.COM (Mar. 7, 2012, 12:14 PM EST), <http://webtv.accuweather.com/en/weather-news/major-australia-flooding-as-re-1/62299>; Rebekah Kebede, *Australian Floods Force Thousands From Their Homes*, REUTERS (Feb. 5, 2012, 11:40 PM EST), <http://www.reuters.com/article/2012/02/06/us-australia-floods-idUSTRE81508E20120206>.
15. *Beijing Chaos After Record Floods in Chinese Capital*, BBC (July 23, 2012, 3:20 AM EST), <http://www.bbc.co.uk/news/world-asia-china-18942984>.

Disaster seems to loom around every corner. While it remains difficult to establish that climate change *caused* any one of these catastrophes, it clearly created conditions that made each one of them more likely and more severe. Together, these “natural” disasters are harbingers of the emerging Anthropocene¹⁸—in which human activities, rather than geophysical forces, dominate the Earth.

Climate change is already one of the most important drivers of ecosystem changes, along with overexploitation of resources and pollution. Moreover, global warming compounds the harmful effects of environmental pollution by weakening resiliency. This environmental double-whammy—eroding ecosystems and weakening resilience—has implications for a wide range of human rights.¹⁹ When the environment suffers, people suffer. Melting ice, rising sea levels, and changing weather patterns attributable to climate change increasingly affect daily life for millions, and perhaps billions, of people. Across the world, these changes are accumulating, and the rate of change is accelerating. As a result, climate change increasingly interferes with the realization of fundamental, internationally recognized human rights—including the right to life, to health, to culture, to food, to self-determination, to property, and to development. This trend is only going to continue. The poorest and most vulnerable will suffer first, and perhaps most, but ultimately the crisis will reach all of us.

In 2005, the Inuit Circumpolar Conference sparked an international conversation about the human rights implications of climate change with its climate change petition submitted to the Inter-American Commission on Human Rights.²⁰ Two years later, small developing island nations, which are particularly vulnerable to climate change, advanced the ball with a clear articulation of this relationship in the 2007 Malé Declaration.²¹ The Malé Declaration proclaimed

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16. Floyd Whaley, *Rains Flood a Third of Manila Area, Displacing Thousands*, N.Y. TIMES (Aug. 7, 2012), <http://www.nytimes.com/2012/08/08/world/asia/flooding-in-philippines-grows-worse-as-thousands-flee-manila-and-desperate-residents-are-trapped-on-roofs.html>.
 17. *North Korean Floods: Death Toll Raised, WFP Sends Food Aid*, BBC (Aug. 4, 2012, 6:44 EST), <http://www.bbc.co.uk/news/world-asia-19124495>.
 18. See generally Jan Zalasiewicz et al., *The New World of the Anthropocene*, 44 ENVTL SCI. & TECH. 2228 (2010); Paul J. Crutzen, *Geology of Mankind*, 415 NATURE INT'L WKLY J. SCI. 23 (2002).
 19. U.N. Hum. Rts. Office of the High Comm'r for Hum. Rts., Report of the Office of the U.N. High Comm'r for Hum. Rts. on the Relationship between Climate Change and Hum. Rts., ¶16 U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter OHCHR: Relationship Between Climate Change and Human Rights].
 20. See Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States at 13-20 (Dec. 7, 2005), available at <http://www.inuitcircumpolar.com/uploads/3/0/5/4/30542564/final-petitionicc.pdf> [hereinafter Inuit Petition].
 21. Malé Declaration on the Human Dimensions of Global Climate Change (Nov. 14, 2007) (Republic of Maldives), available at http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

that “climate change has clear and immediate implications for the full enjoyment of human rights.”²² A few months later, the United Nations Human Rights Council seconded this perception, emphasizing, “climate change poses an immediate threat to people and communities around the world, a threat moreover with far-reaching implications for the full enjoyment of human rights.”²³ In 2009, the Office of the High Commissioner on Human Rights (OHCHR) concluded that climate change threatened the enjoyment of a broad array of human rights.²⁴ The High Commissioner also concluded that human rights law placed duties on states concerning climate change.²⁵

Just as a healthy environment can contribute to the enjoyment of human rights, there is a growing sense that environmental degradation and climate change have “generally negative effects on the realization of human rights.”²⁶ Thus, there is a growing sense that the goal of realizing human rights necessarily entails protecting the environment. While the High Commissioner may have stopped short of declaring climate change to be itself a human rights violation, there is “broad agreement that climate change has generally negative effects on the realization of human rights.”²⁷ No one disputes that every human being should have access to an environment conducive to health. As states and communities grapple with deteriorating environments, calls emerge to go beyond this consensus and recognize a human right to a healthy environment. Viewing environmental protection as a human rights obligation has the potential to promote policy coherence and legitimacy while also strengthening environmental outcomes. The actions of the Human Rights Council are therefore an important step in the right direction.

By bringing new actors into the fold of law and by creating a more unified demand for enforcement of environmental protections, human rights might potentially answer both the power and the social aspects of the problem. Each day legal decision makers make an uncounted number of discretionary decisions with legal effect. Taken together, these decisions influence nearly every aspect of our lives. Yet, there is rarely much attention paid to the possibility of considering

22. *Id.* at 2. The Malé Declaration recognizes climate change as interfering, *inter alia*, with “the right to life, the right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health.” *Id.*

23. U.N. Human Rights Council Res. 7/23, Human rights and climate change, ¶ 1, Rep. of the Human Rights Council, 7th Sess., Mar. 3–Apr. 1, 2008, U.N. Doc. A/HRC/7/78, at 65 (July 14, 2008).

24. See OHCHR: Relationship Between Climate Change and Human Rights, *supra* note 19.

25. *Id.* at ¶¶ 71, 96. However, the Report stopped short of concluding that the act of emitting carbon dioxide and other greenhouse gases violated human rights.

26. *Id.* at ¶ 96.

27. *Id.* at ¶ 69.

these decision-making processes as a means to advance core human rights values. Instead, “the evolution of environmental protection measures has involved a constant reordering of socio-economic priorities, of accommodating, adjusting or offsetting mutually restrictive if not exclusive public policy objectives.”²⁸

Viewing environmental decisions as directly implicating human rights might inject a new level of urgency to the process.²⁹ Where sustainable development is about balancing competing social, economic, and environmental concerns, human rights are more absolute. If pollution and degradation signify the failure to realize human rights, then adoption of environmentally protective laws becomes much more than one option among a competing array of policy choices. Framing environmental protection as a human right eliminates those trade-offs that would lead to retrogression from existing levels of environmental protection, or would prevent states from providing a minimum core environmental quality. The human rights perspective thus adds legitimacy to the demand for making environmental protection the primary goal of policy-making. Moreover, there is an international human rights edifice that promotes awareness and offers the possibility of remedies to individuals deprived of these rights. The explicit recognition of a right to a healthy environment might therefore provide new tools for civil society to hold governments accountable for ensuring access to the right.

Critics warn of the danger that a human right to a healthy environment might translate into unrealistic or overly lofty expectations about immediate transformations to fulfil the right.³⁰ The resulting mismatch between expectation and accomplishment might diminish the significance of the right to a healthy environment and erode confidence in human rights more generally.³¹ This critique is often levelled at “rights talk” more generally.³² Yet, because realization

28. Gunther Handl, *Human Rights and Protection of the Environment: A Mildly “Revisionist” View*, in HUMAN RIGHTS & ENVIRONMENTAL PROTECTION 117, 121 (Antonio A. Cançado Trindade ed., 1992).

29. Amy Sinden, *In Defense of Absolutes: Combating the Politics of Power in Environmental Law*, 90 IOWA L. REV. 1405, 1474 (2005) (describing rights as an antidote to utilitarian calculation).

30. David Kennedy offered perhaps the clearest and most concise summation of these and other putative drawbacks to reliance on human rights, when he asserted that human rights “occupies the field of emancipatory possibility.” David Kennedy, *Boundaries in the Field of Human Rights: The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 99, 101 (2002). Other critics condemn human rights approaches as being Eurocentric, lacking cross-cultural legitimacy, and reiterating rather than challenging deep power relationships. Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 218-20 (2001).

31. JAMES SHAND WATSON, THEORY AND REALITY IN THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1-14 (1999).

32. Jacob Mchangama & Guglielmo Verdirame, *The Danger of Human Rights Proliferation: When Defending Liberty, Less Is More*, FOREIGN AFFAIRS (July 24, 2013), available at <http://www.foreignaffairs.com/articles/139598/jacob-mchangama-and-guglielmo-verdirame/the->

of most human rights is at least partially constrained by limited resources, the human rights approach from its very inception contemplated “progressive realization” of rights.³³ The Committee on Economic, Social and Cultural Rights has explained:

The fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être*, of the Covenant, which is to establish clear obligations for States Parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.³⁴

Other critics question the presumed “universality” of human rights, noting their very specific cultural origins, particularly their strong embrace of western individualistic conceptions of rights.³⁵ Indeed, it is worth noting that when the Universal Declaration was put to a vote in 1948, there were only 56 nations eligible to participate.³⁶ Much of the world was still under the thumb of colonial domination, and colonized peoples had no representation or voice in the negotiations except through their colonial masters.³⁷

danger-of-human-rights-proliferation.

33. See, e.g., International Covenant on Economic, Social and Cultural Rights, art. 2(1), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; Convention on the Rights of the Child, art. 4, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; Convention on the Rights of Persons with Disabilities, art. 4(2), Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD].
34. International Covenant on Economic Social and Cultural Rights, *The Nature of States Parties' Obligations*, ¶ 9, U.N. Doc. E/1991/23, annex III at 86 (Dec. 14, 1990), reprinted in U.N. International Human Rights Instruments, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 (2003).
35. See UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 52 (2006); Makau Mutua, *The Complexity of Universalism in Human Rights*, in *HUMAN RIGHTS WITH MODESTY: THE PROBLEM OF UNIVERSALISM* 51, 61 (András Sajó ed., 2004).
36. See John F. Sears, *Eleanor Roosevelt and the Universal Declaration of Human Rights*, FRANKLIN AND ELEANOR ROOSEVELT INSTITUTE (2008), available at <http://www.fdrlibrary.marist.edu/library/pdfs/sears.pdf> (providing details of the drafting process). Of the 18 members of the initial U.N. Human Rights Commission charged with drafting the Universal Declaration, two were from South America (Chile, Uruguay), one from Central America (Panama) and none were from Africa. The drafting committee itself was dominated by Western representatives—the co-chairs were from the United States (Eleanor Roosevelt) and Canada (John P. Humphrey) with the rest of the committee members representing Australia, the United Kingdom, France, the USSR, China, and Lebanon. *Id.*
37. For a discussion of this point, and of how the colonial powers sought to suppress discussions that integrated human rights and decolonization narratives, see Carmen G. Gonzales, *Environmental*

Reliance on human rights to achieve environmental ends raises a host of other questions. Among the most pressing are: who would hold a right to a healthy environment;³⁸ and how would the right account for future generations and group rights.³⁹ What steps are necessary to clarify and strengthen the human rights and environment linkage? Does international law currently recognize a stand-alone right to a healthy environment? If not, should it? Do equitable principles like inter-generational equity and common but differentiated responsibilities help mediate the relationship between environmental and human rights regimes? Perhaps most importantly, in our ever-more integrated, globalized world, how would the right to a healthy environment be enforced and would the right have any limits?⁴⁰

This paper does not purport to offer definitive answers to these questions. It does, however, contribute to the ongoing discussion by identifying the relevant legal institutions and procedures, and by exploring the substantive content of emerging international norms surrounding environmental rights. Part I of this paper describes why human rights are increasingly being invoked in the context of environmental decision-making. Part II offers a brief introduction to the limitations of domestic and international environmental law that drive interest in using human rights to address environmental challenges. Part III surveys existing human rights that have been pressed into service for environmental ends, and highlights the strengths and weaknesses using existing human rights norms to advance environmental goals. Part IV describes the emerging norms coalescing around the human right to a healthy environment. This section will re-analyze existing human rights cases through an environmental rights lens to highlight what environmental rights might add to the existing body of human rights law and jurisprudence. Part V considers whether invoking human rights extends

Justice, Human Rights, and the Global South, 13 SANTA CLARA J. INT'L L. 151 (2015).

38. It is possible to make too much of this claim. See John H. Knox, *Climate Change and Human Rights*, 50 VA. J. INT'L L. 163, 171 (2009) (making the point that many human rights agreements have been interpreted to require that states not only avoid directly violating the rights involved but also protect the enumerated rights from private conduct that interferes with their enjoyment).
39. See generally Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471, 471 (2007) (raising these questions); see also Gonzales, *supra* note 37.
40. The recognition of a human right does not mean that any interference with that right by any actor, anywhere in the world violates a legal duty. See Amartya Sen, *Elements of a Theory of Human Rights*, 32 PHIL. & PUB. AFF. 315, 321 (2004); John H. Knox, *Horizontal Human Rights Law*, 102 AM. J. INT'L L. 1, 27-28 (2008). Indeed, the provision in Article 2 of the ICESCR for "progressive realization" is an acknowledgment that full realization of these rights sometimes involves commitments beyond the immediate capacity of states. This critique about the contours of human rights is separate and apart from the more fundamental objection that an overemphasis on rights may actually interfere with social change by obscuring recognition of social duties and fragmenting accountability. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF SOCIAL DISCOURSE* 1-18 (1991).

state ability to regulate the environmental conduct of non-state actors like transnational corporations. Finally, Part VI returns to the introduction—putting human rights jurisprudence in the context of the scope and scale of the environmental problems we face. This section concludes with some reflections on the possibility of change, of success in an era of rapid carbon accumulation and profound environmental injustice.

I. Why Human Rights?

The idea that there is a set of inalienable, universal rights to which all are entitled simply by virtue of being human⁴¹ stands out as perhaps the most significant achievement of twentieth-century international jurisprudence. While the intellectual history behind human rights traces its roots back to the Enlightenment,⁴² human rights emerged as a body of international law as a response to Nazi atrocities in the early decades of the twentieth-century.⁴³ The Universal Declaration of Human Rights,⁴⁴ adopted alongside the United Nations Charter, began the process of redefining sovereignty to include responsibilities to citizens and inhabitants. As members of the United Nations, states committed themselves to “universal respect for observance of human rights and fundamental freedoms.”⁴⁵ The Universal Declaration focuses primarily on the proper limits of state power vis-à-vis individuals, particularly those who are members of marginalized racial, ethnic or religious minorities. As such, international human rights law deals mainly with how people should be treated by their government

41. See e.g., ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 98 (1995) (“a human right is a right held vis-à-vis the state by virtue of being human”). Article 1 of the Universal Declaration of Human Rights reads: “All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act toward one another with brotherhood.” Universal Declaration of Human Rights, G.A. Res. 217A (I), U.N. Doc. A/810 at 74 (Dec. 12, 1948) [hereinafter Universal Declaration]. For a discussion of the philosophical underpinnings of universal human rights, see JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 18-26 (1989).

42. For a discussion on this point, see Amy Sinden, *Climate Change and Human Rights*, 27 J. LAND RESOURCES & ENVTL. L. 255, 260-62 (2007); RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE 26-30 (2008); TOM CAMPBELL, RIGHTS: A CRITICAL INTRODUCTION 5-10 (2006).

43. See JOHN THOMAS PETERS HUMPHREY, HUMAN RIGHTS AND THE UNITED NATION: A GREAT ADVENTURE 38-45 (1984) (describing World War II as a catalyst for human rights). For a marvelous overview of the significance of the Universal Declaration and its origins, see generally Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

44. Universal Declaration, *supra* note 41. The vote in the United Nations was 48-0, with 8 abstentions.

45. *Id.* at pml.

and its institutions.⁴⁶

From this starting point, the burgeoning field of human rights articulated a growing list of basic rights that states were required to respect, and were responsible for ensuring. These human rights have increasingly been accepted as the governing norms for state behavior.⁴⁷ The International Human Rights Covenants,⁴⁸ and the proliferation of rights treaties that followed,⁴⁹ further detail the scope and reach of human rights described in the Universal Declaration. As the United Nations General Assembly reiterated in 1998, “each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.”⁵⁰ Thus, human rights set new standards of conduct for states and individuals, in a context of greatly increased expectations.

Yet, near universal adoption of international human rights treaties has not been a panacea. Abuses continue, and neither the Universal Declaration, nor the Genocide Convention,⁵¹ nor the International Criminal Court,⁵² have put an end

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46. See generally Thomas Pogge, *The International Significance of Human Rights*, 4 J. OF ETHICS 45, 47 (2000) (noting that for human rights to be implicated, the offending conduct must be in some fashion official); see also John H. Knox, *Diagonal Environmental Rights*, in EXTRATERRITORIAL OBLIGATIONS IN HUMAN RIGHTS LAW 148, 148-50 (2009).
47. Indeed, compliance with human rights norms is often the major criteria for categorizing states as “liberal” and therefore legitimate. See e.g., JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 84-104 (William Rehg trans., 1998); THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT’L L. 503 (1995); see also Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices*, in THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 1, 18-22 (Thomas Risse et al. eds., 1999) (describing the embrace of human rights as a global norm cascade). Although the delegates that adopted the Universal Declaration were careful to state that it was a statement of principles rather than a binding treaty, Eleanor Roosevelt’s prediction that the Universal Declaration would become “an international Magna Carta” was not far off. See Eleanor Roosevelt, *On the Adoption of the Universal Declaration of Human Rights*, AMERICAN RHETORIC (Dec. 9, 1948), <http://www.americanrhetoric.com/speeches/eleanorroosevelt/declarationhumanrights.htm>.
48. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; ICESCR, *supra* note 33.
49. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEAFDAW]; CRC, *supra* note 33, at 44; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter ICEAFRD].
50. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N. Doc. A/RES/53/144, at art. 2 (Dec. 9 1998).
51. Convention on the Prevention and Punishment on the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951). For updates, see GENOCIDE WATCH, <http://genocidewatch.net/>.
52. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 [hereinafter Rome Statute].

to them.⁵³ Even as old human rights problems linger, the new century (and millennium) brings new challenges. Each day brings new evidence that human activity is dramatically and irreversibly altering the entire planet—unraveling the life support systems on which we and all other living creatures depend.

The defining moral issue and social justice challenge of the twenty-first century may well be the tragic effects of climate change. Amy Sinden has called human rights law “the law’s best response to profound, unthinkable, far-reaching moral transgression.”⁵⁴ It should thus come as no surprise that many are eager to invoke the “law’s best response” to address climate change. And indeed, there are invocations of international human rights norms throughout the climate change discourse as legislators, regulators, and advocates seek to deploy “the power of human rights”⁵⁵ in this new struggle.

There are certainly advantages to such an approach, not least of which is the possibility of imbuing environmental issues with some of the unconditional normative value and immediate applicability associated with human rights. As Louis Henkin wrote, “human rights enjoy a *prima facie*, presumptive inviolability, and will often ‘trump’ other public goods.”⁵⁶ Or as Myers McDougal characterized it, the Universal Declaration of Human Rights is “established customary law having the attributes of *jus cogens*.”⁵⁷ International law seems to increasingly reflect this vision of the universality of human rights. For example, in its *Barcelona Traction* decision, the International Court of Justice (ICJ) suggested in

53. Though within the jurisdiction of the court, the International Criminal Court has yet to charge a defendant with genocide. See *Situations and Cases*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx. In 2008, the ICC Prosecutor requested a warrant for arrest for Sudanese President Omar Hassan al-Bashir for atrocities in Darfur, which included ten counts of genocide, but the court declined to accept the prosecutor’s request. See Press Release, ICC – ICC Prosecutor presents case against Sudanese President, Hassan Ahmad AL BASHIR, for genocide, crimes against humanity and war crimes in Darfur, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/press%20releases/Pages/a.aspx (last visited Nov. 12, 2014). As a result, the Prosecutor proceeded with an arrest warrant based on crimes against humanity and war crimes. See *id.* While limited prosecution for genocide has taken place in *ad hoc* tribunals, including the ICTR in Rwanda, as well as the ICTY, it has been used in limited circumstances, and has not been attempted by the ICC. See Press Release, *Rwanda International Criminal Tribunal Pronounces Guilty Verdict in Historic Genocide Trial*, UNITED NATIONS (Sept. 2, 1998), <http://www.un.org/News/Press/docs/1998/19980902.af:94.html>; see also *Jorgic v. Germany*, 2007-III Eur. Ct. H.R. 1 (genocide judgment for the Srebrenica massacre in Bosnia).

54. Sinden, *Climate Change and Human Rights*, *supra* note 42, at 257.

55. See generally CAMBRIDGE STUDIES IN INT’L RELATIONS, *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al. eds., 1999).

56. LOUIS HENKIN, *THE AGE OF RIGHTS* 4 (1990).

57. MYRES MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* 274 (1977) [hereinafter MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER*].

dicta that “basic rights of the human person” create obligations *erga omnes*.⁵⁸ This oft-quoted dictum built on Judge Tanaka’s earlier assertion that “the law concerning the protection of human rights may be considered to belong to the *jus cogens*.”⁵⁹

Recognition of the human right to a healthy environment would clarify the obligations that states have vis-à-vis environmental protection. By defining the outer boundaries of the state margin of appreciation to make environmental decisions, such a right would cast violations into sharp relief. Affected individuals would have the opportunity to seek redress through the state courts, as well as to avail themselves of the protection afforded by international tribunals, should state-level remedies prove inadequate. Indeed invoking human rights is a way to elevate environmental issues “above the rank and file of competing societal goals”⁶⁰ and endow it with an aura of timelessness, absoluteness, and universal validity.

Yet, there is perhaps no bigger gap between “law as it is” (*lex lata*) and “law as it should be” (*lex ferenda*) than the distance between the articulation of human rights in treaties and agreements and their realization on the ground. We have yet to realize most internationally recognized rights, even in their most rudimentary form, prompting skepticism about creating “new” rights.⁶¹ Add that concern to the ongoing debate about whether there is a hierarchy among human rights—particularly between the so-called first generation rights (civil and political), second generation rights (economic, social, and cultural) and third generation rights (solidarity rights, including the rights to peace, development, and a protected environment)⁶²—and questions arise about the utility of advocating for environmental protection through a human rights lens. In the context of climate change, for example, the United States has characterized attempts to link human rights and environmental protection as “impractical and unwise.”⁶³ Others object to human rights as focusing too much on human beings,

58. Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

59. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), Second Phase, 1966 I.C.J. 250, 298 (July 18) (Tanaka, J., diss. op.).

60. Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development*, 1 HARV. HUM. RTS. Y.B. 3, 3 (1988); see also JOSEPH RAZ, THE MORALITY OF FREEDOM 166 (1979) (arguing that claims that “X” has a right are really assertions that “X” has interests which are sufficiently weighty to impose obligations on others).

61. See generally Philip Alston, *Conjuring up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT’L L. 607 (1984).

62. See, e.g., Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1 (1986).

63. See H.R.C. Res. 7/23, *supra* note 23. In particular, this submission argued that the complex, global, long-term nature of climate change made it ill-suited for consideration as a human rights problem. *Id.*

at the expense of protecting the environment and other living beings.⁶⁴

II. Why Look Beyond Environmental Law

While there is certainly no unanimity on the desirability of using human rights as a tool for responding to environmental challenges, this turn to human rights answers some major limitations of existing environmental law, both domestic and international. Domestic environmental regimes have at least two major limitations: (1) sovereignty puts boundaries on the geographic reach of these legal regimes, and (2) the states that must enforce domestic legal regimes are often at a disadvantage when confronting powerful transnational corporations. International environmental law, which might in theory compensate for the deficits of state-based law, has its own set of limitations, most notably the marked lack of substantive obligations or enforcement mechanisms. Each of these limitations is addressed briefly below, with an eye toward summarizing how it contributes to the attractiveness of human rights as a tool for resolving environmental issues.

A. The Problem of Transboundary Environmental Harms

A growing majority of states, over 140 at last count,⁶⁵ have guaranteed some form of environmental rights in their constitutions, with nearly 100 guaranteeing an individual right to a healthy environment.⁶⁶ For example, the French Constitution was amended in 2005 to include a Charter for the Environment, which proclaims that “everyone has the right to live in a stable environment which respects health.”⁶⁷ To the extent that constitutions are considered “mirrors reflecting the national soul,”⁶⁸ these environmental provisions express the deepest, most cherished values of the societies they represent.⁶⁹ When constitutions are considered together with legislation, court decisions or

64. See, e.g., Handl, *supra* note 28, at 138-39; *Kyrtatos v. Greece*, App. No. 41666/98, Eur. Ct. H.R. 1, ¶¶ 51-55 (2003) (Eur. Ct. of H.R.) (finding that general environmental deterioration is not actionable under the European Charter of Human Rights).

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

66. *Id.* at 93 Fig. 4.1.

67. 1958 CONST., The Charter for the Environment, art. 1 (Mar. 1 2005), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/charter-for-the-environment.103658.html>. For a discussion of relevant constitutional provisions, see James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113, 113-14 (Winter 2005/2006).

68. *State v. Acheson*, 1991 (2) SA 805, 813-14 (High Ct. 1990) (Namibia).

69. James M. Buchanan, *Why Do Constitutions Matter?*, in *WHY CONSTITUTIONS MATTER* 1, 1-17 (Niclas Berggren et al. eds., 2002).

ratification of international agreements, the number of states recognizing environmental rights jumps to 177⁷⁰ (for perspective, there are currently 193 UN member states⁷¹). A plethora of national statutes purport to give effect to these constitutional provisions, imposing substantive standards and creating public access to information and routes for public participation in environmental decisions.

Yet, even as more and more states recognize environmental rights as a matter of domestic law, pollution continues to exact a terrible toll on public health across the globe, as coral reefs and marine biodiversity dwindle in acidifying, warming oceans, and carbon dioxide emissions continue unabated. Existing environmental law, even constitutional law, seems powerless to address these systemic, long-term environmental problems and their complex social interactions. Part of the problem is that environmental harms do not respect the political boundaries drawn with such elegant specificity on maps. Activities undertaken entirely within one nation's territory can have devastating effects on the territory of neighboring states or on global common areas, such as the atmosphere or the high seas.⁷² These problems, particularly those associated with climate change, can be significant enough to implicate international peace and security.⁷³

70. David Boyd, *The Constitutional Right to a Healthy Environment*, ENV'T MAG., July-Aug. 2012, available at <http://www.environmentmagazine.org/Archives/Back%20Issues/2012/July-August%202012/constitutional-rights-full.html>. The holdouts are: the United States, Canada, Japan, Australia, New Zealand, China, Oman, Afghanistan, Kuwait, Brunei Darussalam, Lebanon, Laos, Myanmar, North Korea, Malaysia, and Cambodia. *Id.* However, many states and cities within the United States recognize this right in their state constitutions or city charters. See, e.g., Michelle Bryan Mudd, *A 'Constant and Difficult Task': Making Local Land Use Decisions in States With a Constitutional Right to a Healthy Environment*, 38 ECOLOGY L. Q. 1, 3-12 (2011).

71. *Member States of the United Nations*, UNITED NATIONS, <http://www.un.org/en/members/> (last visited Nov. 30, 2014).

72. The notion of “good neighbourliness” or “*sic utere tuo ut alienum non laedas*” has deep roots in international law. For example, over a century ago Lassa Oppenheim wrote that “a State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State.” LASSA F. L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 220 (1912). Moreover, this principle was the cornerstone of the *Trail Smelter Arbitration*, and was mentioned prominently in the Stockholm Declaration. *Trail Smelter Arbitration (United States v. Canada)*, 3 U.N. Rep. Int'l Arb. Awards 1905 (1941); United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (1972) [hereinafter *Stockholm Declaration*].

73. Intentional environmental damage within the context of international armed conflict can be a war crime. Article 8.2(b)(iv) of the Rome Statute, for example, prohibits “[i]ntentionally launching an attack in the knowledge that such attack will cause . . . *widespread, long-term and severe damage to the environment* which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” See Rome Statute, *supra* note 52 (emphasis added). Similarly, Articles 35.3 and 55.1 of the 1977 Additional Protocol I to the 1949 Geneva Conventions already punish acts causing “widespread, long-term and severe damage to the natural environment” in armed conflict. International Committee of the Red Cross (ICRC), *Protocol Additional to the*

B. International Law is Light on Substance and Enforcement

Given the geographic limitations of state law, many see a turn to international law as the answer. International environmental law has been an important catalyst for environmental protection, building awareness and capacity around the globe. Much has been written about those successes, documenting the importance of multilateral environmental agreements to environmental protection. However, international environmental law has some significant limitations as well. Among the more significant of these limitations is the reality that these agreements bind only state-parties, offer little in the way of substantive obligation, and provide no recourse when violations occur. Because the turn toward a human right to a healthy environment is to some extent a consequence of those limitations, they are worth discussing in some detail.

Historically, international law applied between rather than within states, and a state's primary duty under international law was to live up to the commitments it voluntarily assumed toward other states or toward the international community.⁷⁴ Article 2(7) of the United Nations Charter (UN Charter) to some extent reflects this vision, providing explicitly that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state."⁷⁵ Westphalian notions of sovereignty steer international law toward politically bounded, express agreements negotiated between sovereign states.

Measured by sheer volume of agreements concluded, it would seem that international environmental law has been a grand success. A steady accretion of treaties and soft law agreements seems to have produced detailed governance regimes for individual environmental problems. However, this appearance of rigor can be deceptive. Most of these regimes are remarkably light on actual concrete obligations.⁷⁶ Instead, multilateral environmental agreements typically outline general principles, or hortatory goals, rather than specific binding obligations.

Because resource extraction and environmental protection have generally been considered internal, domestic affairs, states jealously guard these powers from

Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 1125 UNTS 3.

74. As a result, international law was relatively slow to recognize environmental problems as appropriate grounds for international law-making. See Richard B. Bilder, *The Settlement of Disputes in the Field of International Law of the Environment*, 144 RECUEIL DES COURS 139 (1975).

75. U.N. Charter art. 2(7).

76. See Rebecca M. Bratspies, *State Responsibility for Human-Induced Environmental Disasters*, 55 GER. Y.B. INT'L L. 175 (2012).

external interference. The legacy of colonialism complicates this even further.⁷⁷ Of the many complex motivations that drove colonialism, one was the desire to secure access to the mineral, timber, and biological wealth of the colonized states for the benefit of the colonial masters. Because this kind of exploitation focused on the needs and desires not of the inhabitants of a place, but of producers and consumers elsewhere, attention to the social and environmental costs it imposed was rare. The rush to extract wealth from colonial holdings devastated local environments and societies. One very visible consequence of decolonization was that the newly-independent states could not make their own choices about resource exploitation. States that experienced colonization are deeply suspicious of many human rights and environmental initiatives as a new guise for interfering in their sovereignty. This historical experience, coupled with the commitment to common but differentiated responsibilities, means that negotiators have a limited margin within which to develop agreements.

The failure to negotiate binding commitments to reduce carbon dioxide emissions at the Copenhagen COP⁷⁸ highlights the limitations of international environmental law's agreement-based structure. Without the strong backing of the major carbon emitters, the negotiations were mired in squabbling.⁷⁹ The Copenhagen Accord salvaged something from what could have been a complete failure, but did not create a coherent international regime to manage carbon emissions.⁸⁰ This failure echoes the frustrations of regional fisheries organizations, where recalcitrant states can easily block catch limits, even in the face of plummeting fish stocks. The nature of international law makes it difficult to respond to complex environmental issues, even in the face of clear scientific evidence. And that failure can threaten international peace and security. Indeed, Canada and Spain nearly went to war over fishing in the mid-1990s.⁸¹

77. For a discussion of how the legacies of colonialism live on in the context of resource decisions, see generally Gonzales, *supra* note 37; see also Rebecca Bratspies, *Assuming Away the Problem? The Vexing Relationship Between International Trade and Environmental Protection*, in NON-STATE ACTORS, SOFT LAW AND PROTECTIVE REGIMES 227 (Cecilia M. Bailliet ed., 2012).

78. The Copenhagen Accord marked a shift from the binding emissions reductions targets assigned by the Kyoto Protocol to state-generated voluntary commitments. Copenhagen Accord, *supra* note 5. The status of this agreement is a bit unclear because the Conference of the Parties agreed to "take note" of the document, rather than adopt it. Copenhagen Accord Addendum, *supra* note 5.

79. *Why did Copenhagen fail to deliver a climate deal?*, BBC NEWS (Dec. 22, 2009, 16:33 GMT), <http://news.bbc.co.uk/2/hi/8426835.stml>; see also Meinhard Doelle, *The Legacy of the Climate Talks in Copenhagen: Hopenhagen or Brokenhagen?*, 4 CARBON & CLIMATE L. REV. 86 (2010).

80. John Vidal et al., *Low targets, goals dropped: Copenhagen ends in failure*, THE GUARDIAN (Dec. 18, 2009, 19:47 EST), <http://www.theguardian.com/environment/2009/dec/18/copenhagen-deal>; see also Doelle, *supra* note 79.

81. *Court Backs Canada's Seizure of Trawler During 'Turbot Wars'*, CBC NEWS (July 27, 2005, 10:44 AM EST), <http://www.cbc.ca/news/canada/story/2005/07/27/Turbot-Estai-050727.html>; see also Derrick M. Kedziora, *Gunboat Diplomacy in the Northwest Atlantic: The 1995 Canada-EU*

By design, many environmental treaties are long on aspirations but short on specifics. When treaties do include specific, enforceable obligations, those obligations are typically procedural rather than substantive.⁸² Moreover, even when multilateral environmental agreements do contain specific obligations, they often fail to identify the consequences that should attach to a breach. Multilateral environmental agreements are remarkably silent on how breaches of treaty obligations should be addressed. In many agreements, the legal machinery that would enable compensation, reparation or sanctions is entirely absent.⁸³ Instead, these treaties often invite State Parties to cooperate in the development and implementation of appropriate rules and procedures for determining the consequences for violations of obligations under their provisions.⁸⁴ Even the Montreal Protocol, which imposes detailed substantive international standards for production, import, and export of ozone depleting chemicals, has little in the way of dispute resolution. Its sole dispute resolution provision merely directs the parties to “consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.”⁸⁵ And, the state-to-state nature of the agreements means that any treaty-based remedy that does exist is typically not

Fishing Dispute and the United Nations Agreement on Straddling and High Migratory Fish Stocks, 17 NW. J. INT'L L. & BUS. 1132 (Winter 1996 / Spring 1997).

82. Convention on Environmental Impact Assessment in a Transboundary Context art. 2(1), Feb. 25, 1991, 1989 U.N.T.S. 309 [hereinafter CEIATC] (creating a set of procedural responsibilities for environmental decision-making that includes “all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities”); Convention on the Transboundary Effects of Industrial Accidents art. 3(3), Mar. 17, 1992, 2105 U.N.T.S. 457 [hereinafter CTEIA] (imposing obligations that include prevention (art. 3(3)); information exchange (art. 9(3)); notification (art. 10(2)); and assistance (art. 12(1))); Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (requiring states to regulate production, transportation, and disposal of hazardous wastes (art. 4) and to cooperate on the dissemination of information about transboundary movement of hazardous wastes (art. 2)).
83. Bratspies, *State Responsibility for Human-Induced Environmental Disasters*, *supra* note 76, at 201-03 (making this point).
84. The U.N. Framework Convention on Climate Change, for example, directs Parties to “seek a settlement through negotiation or any other peaceful means of their own choice.” United Nations Framework Convention on Climate Change art. 14(1), May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC]. The Convention on Nuclear Safety devotes virtually no attention to dispute resolution and similarly provides that in the event of a disagreement, “the Contracting Parties shall consult within the framework of a meeting of the Contracting Parties with a view to resolving the disagreement.” Convention on Nuclear Safety art. 29, July 17, 1994, 1963 U.N.T.S. 293. The 1979 Convention on Long-Range Transboundary Air Pollution explicitly brackets the issue of state responsibility and liability from its coverage. Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 1302 U.N.T.S. 217.
85. Montreal Protocol on Substances that Deplete the Ozone Layer art. 8, Sept. 16, 1987, 1522 U.N.T.S. 3.

available to injured individuals.

These limitations raise real questions about whether international environmental law offers viable tools for responding to climate change. Despairing of this process, environmental advocates increasingly look for additional international law tools beyond treaty negotiation. A frequently invoked alternative is reframing human-induced environmental disasters as breaches of individual human rights by states or other individuals (including juridical persons).⁸⁶

III. The Intersection of Human Rights and the Environment

At the global level, multiple institutions operate under environmental mandates. An analogous but distinct set of international institutions is charged with realizing human rights. These institutions grew out of very different legal traditions. To over-generalize, human rights are rooted in the natural law tradition in international law, while environmental law is the product of a much more state-centered positive law tradition.⁸⁷ Unlike human rights law, environmental law does not necessarily have protecting human beings *qua* individuals at its core. Indeed, environmental law's most distinctive feature may be its focus on the natural environment.⁸⁸ By contrast, even when invoked in the environmental context, human rights focus on protecting the human beings⁸⁹

86. In the run-up to the 2012 Rio+20 Summit, the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Environmental Project (UNEP) issued a joint report. See Human Rights and the Environment, Rio+20: Joint Report of UNEP and OHCHR (June 19, 2012), available at <http://www.unep.org/environmentalgovernance/Portals/8/JointReportOHCHRandUNEPonHumanRightsandtheEnvironment.pdf> [hereinafter Joint Report]. In July of 2012, the UN Human Rights Council (UNHRC) appointed John Knox as its Independent Expert on Human Rights and the Environment. *John Knox, Independent Expert on human rights and the environment*, OFFICE OF THE HIGH COMM'R FOR HUM. RTS., <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/JohnKnox.aspx> (last visited Nov. 30, 2014).

87. One must be careful not to make too much of this distinction. As Gunther Handl notes, most international lawyers agree that human rights law involves overlapping positive and natural law concepts. Handl, *supra* note 28, at 120; see also Sohn, *supra* note 43, at 16-18.

88. For a rich exploration of this point, see Richard J. Lazarus, *Restoring What's Environmental about Environmental Law in the Supreme Court*, 47 U.C.L.A. L. REV. 703 (2000).

89. See, e.g., *Kyrtatos*, *supra* note 64, at ¶ 52 (concluding that nothing in the European Convention on Human Rights provided "general protection of the environment as such"); Metropolitan Nature Reserve v. Panama, Case 11.533, Inter-Am. Comm'n H.R., Report No. 88/03, OEA/Ser.L/V/II.118, doc. 70 rev ¶ 34 (2003) (rejecting as inadmissible the attempt to assert a claim to protect a nature reserve from development on behalf of all citizens of Panama); see also Dinah Shelton, *The Links Between International Human Rights Guarantees and Environmental Protection*, 22 (University of Chicago, Center for International Studies, 2004), available at <http://internationalstudies.uchicago.edu/environmentalrights/shelton.pdf> (noting that "[h]uman rights are by definition anthropocentric").

rather than on protecting the environment itself.⁹⁰

In addition to the foundational and conceptual difference, timing also played a part in the separate development of human rights regimes and environmental regimes. The foundational human rights instruments were drafted long before awareness of environmental challenges like climate change existed. As a result, they are largely silent about the environment. The climate change regime was negotiated much later, and could take for granted the pre-existing body of human rights law.

The 2005 Inuit petition to the Inter-American Commission on Human Rights⁹¹ brought these two strands of international law together. In this Petition, the Inuit Circumpolar Council alleged that the United States had violated its obligations under the American Declaration on the Rights and Duties of Man by failing to regulate greenhouse gas emissions, and that the United States' inaction threatened the Inuit's right to life, health, culture, and livelihood.⁹² Although the Inter-American Commission did not issue a judgment,⁹³ this Petition established that the intersection of human rights and climate change as a topic of serious international consideration.

The points of intersection and overlap between separate environmental and human rights mandates are increasingly apparent.⁹⁴ Responding to this convergence, environmental and human rights institutions are engaged in unprecedented cooperation, coordinating activities, aligning policies, and generally building bridges between bodies of law and practice traditionally viewed as separate and distinct. These efforts would undoubtedly be strengthened were

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90. NICOLAS DE SADELEER, ENVIRONMENTAL PRINCIPLES: FROM POLITICAL SLOGANS TO LEGAL RULES 277 (2003); Handl, *supra* note 28, at 138-39.
91. Inuit Petition, *supra* note 20.
92. For an in-depth discussion of the Inuit Petition, see Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675 (2007).
93. Andrew C. Revkin, *Inuit Climate Change Petition Rejected*, N.Y. TIMES, Dec. 16, 2006, at A9. The Commission held hearings in early 2007. See Testimony of Earthjustice Managing Attorney Martin Wagner before the Inter-American Commission on Human Rights, THE CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL) (Mar. 1, 2007), http://www.ciel.org/Publications/IACHR_Wagner_Mar07.pdf (last visited Nov. 12, 2009); see also Testimony of Sheila Watt-Cloutier Before IAHR on Global Warming and Human Rights, EARTHJUSTICE, http://earthjustice.org/sites/default/files/library/legal_docs/testimony-before-iachr-on-global-warming-human-rights-by-sheila-watt-cloutier.pdf (last visited Nov. 12, 2014).
94. Philippe Sands, *Sustainable Development: Treaty, Custom, and the Cross-Fertilization of International Law*, in INTERNATIONAL LAW AND SUSTAINABLE DEVELOPMENT: PAST ACHIEVEMENTS AND FUTURE CHALLENGES 39, 43 (Alan Boyle & David Freestone eds., 1999); see also MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 57, at 38-44 (taking for granted that there is a direct relationship between environmental protection and human rights).

the international community to provide more coherent mandates that expressly directed these institutions to address climate change in a holistic fashion. In the absence of an express mandate, or a single institution with a clearly structured mandate, scholars and policy makers are using the existing international legal tools creatively. By focusing on the intersection of human rights and the environment, they aim to reconstruct the international governance system, building a capacity to respond effectively to the pressing and multifaceted environmental and human rights challenges into existing institutions.

This was not always the case. Indeed, the Inuit filed their petition, in part, because international treaty regimes were slow to recognize the relationship between human rights and climate change. It took until the 2010 Cancun Agreements for the United Nations Framework Convention on Climate Change (UNFCCC) to declare that parties should respect human rights in the implementation of the Framework Convention.⁹⁵ The 2012 Doha Agreement did not mention human rights.⁹⁶ For a long time, the Human Rights regimes were equally silent about climate change. Indeed, it was only in 2009 that the Human Rights Council officially recognized that climate change has a “range of implications, both direct and indirect, for the effective enjoyment of human rights.”⁹⁷ Yet, once that first step was taken, the Human Rights Council embraced the need to think of climate change in human rights terms. By 2011, the Council had provided the Office of the High Commissioner on Human Rights with a clear mandate to work closely with the UNFCCC secretariat, noting that the “full, effective and sustained implementation of the [UNFCCC] . . . is important in order to support national efforts for the realization of human rights implicated by climate change-related impacts.”⁹⁸ In 2012, the Council created the position of Independent Expert on Human Rights and the Environment,⁹⁹ and appointed law professor John Knox as the Independent Expert.¹⁰⁰ Climate

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95. United Nations Framework Convention on Climate Change, Cancun, Mex., Nov. 29–Dec. 10, 2010, Decision 1/CP.16, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, ¶ 8, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) (emphasising “that Parties should, in all climate change related actions, fully respect human rights”).
96. *Human Rights Analysis of the Doha Gateway*, CIEL (May 29, 2013), http://www.ciel.org/Publications/Analysis_Doha_10Apr2013.pdf.
97. U.N. Human Rights Council Res. 10/4, Human rights and climate change, 10th Sess., Mar. 2-27, 2009, U.N. GAOR, 64th Sess., Supp. No. 53, A/64/53, at 29 (Mar. 25, 2009).
98. U.N. Human Rights Council Res. 18/22, Human rights and climate change, 18th Sess., Sept. 12-30, 2011 and Oct. 21, 2011, U.N. GAOR, 66th Sess., Supp. No. 53, A/66/53/Add.1, at 55 (Oct. 17, 2011).
99. U.N. Human Rights Council Res. 19/10, Human rights and the environment, 19th Sess., Feb. 27-Mar. 23, 2012, U.N. GAOR, 67th Sess., Supp. No. 53, A/67/53, at 55 (Mar. 22, 2012).
100. *John Knox, Independent Expert on Human Rights and the Environment*, *supra* note 86.

change has been incorporated into resolutions extending the mandates of the Special Rapporteur on the right to food,¹⁰¹ and the Special Rapporteur on adequate housing.¹⁰² Moreover, the Council has established special procedures on the environment, as well as on clean water and sanitation, toxic waste disposal, the right to food, the right to housing, indigenous cultural rights, corporate responsibility, and other relevant human rights implicated by climate change.¹⁰³

In assessing the relationship between human rights and the environment, there are two very different schools of thought—one that views environmental protection as a precondition for realizing human rights, and another that views human rights as a means to achieve environmental outcomes. In Resolution 16/11, the Human Rights Council articulated both approaches, noting that environmental protection “can contribute to human well-being and the enjoyment of human rights,” and also that “human rights obligations and commitments have the potential to inform and strengthen international, regional and national policymaking in the area of environmental protection.”¹⁰⁴

A. A Healthy Environment as a Precondition for Human Rights

Former United Nations Environment Programme (UNEP) Executive Director Klaus Toepfer, eloquently stated that “[h]uman rights cannot be secured in a degraded or polluted environment.”¹⁰⁵ If he is correct, then a wide range of environmental threats, including climate change, jeopardize fundamental human rights, including the right to life, health, adequate food, housing, and culture. Under this framing, environmental protection is a precondition to the realization

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101. U.N. Human Rights Council Res. 7/14, The Right to Food, 7th Sess., Mar. 3-28, 2008 and Apr. 1, 2008, U.N. GAOR, 63rd Sess., Supp. No. 53, A/63/53, at 113 (Mar. 27, 2008) (“Noting that environmental degradation, desertification and global climate change are exacerbating destitution and desperation, causing a negative impact on the realization of the right to food, in particular in developing countries.”).
 102. U.N. Human Rights Council Res. 6/27, Adequate housing as a component of the right to an adequate standard of living, 6th Sess., Sept. 10-28, 2007 and Dec. 10-14, 2007, U.N. GAOR, 63rd Sess., Supp. No. 53, A/63/53, at 45 (Dec. 14, 2007) (expressing concern about, *inter alia*, the “challenges to the full enjoyment of the right to adequate housing caused by the impact of climate change, natural disasters and pollution”).
 103. See *Thematic Mandates*, OFFICE OF THE HIGH COMM’R FOR HUM. RTS. (Oct. 1, 2014), <http://www.ohchr.org/EN/HRBodies/SP/Pages/Themes.aspx>.
 104. U.N. Human Rights Council Res. 16/11, Human Rights and the Environment, 16th Sess., Feb. 28-Mar. 25, 2011, U.N. GAOR, 66th Sess., Supp. No. 53, A/66/53, at 47 (Mar. 24, 2011). The Council also noted “that environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights.” *Id.*
 105. Klaus Toepfer’s statement to the 57th session of the Commission on Human Rights in 2001 is quoted in UNEP News Release 01/49, *Living in a Pollution Free World a Basic Human Right*, UNITED NATIONS ENV’T PROGRAMME (Apr. 27, 2001), <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=197&ArticleID=2819>.

of human rights. Drafting and implementing laws that protect the environment therefore become a form of human rights advocacy.

This vision of “environment as a human rights prerequisite” traces its roots back to the Stockholm Declaration, the first formal international law recognition of the links between environmental protection and human rights. Principle 1 of the Stockholm Declaration asserted 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.”¹⁰⁶ The United Nations General Assembly endorsed this approach in 1990, declaring that “a better and healthier environment can help contribute to the full enjoyment of human rights by all.”¹⁰⁷

The Inter-American Court and Commission has developed this “environment as precondition” concept in some detail, articulating the right to an environment of a quality that permits the enjoyment of the human rights explicitly guaranteed in the American Declaration of the Rights of Man and the American Convention on Human Rights. This approach emphasizes the idea that by their very nature, human rights require a basic level of environmental protection. The Commission embraced the notion that human rights like the right to health, life, and food cannot be enjoyed in a degraded environment.¹⁰⁸ In its Report on Ecuador, for example, the Commission noted that “[c]onditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.”¹⁰⁹

Similarly, in his separate opinion in the *Case Concerning the Gabčíkovo-Nagymaros*, Judge Weeramantry described environmental protection as “a vital part of contemporary human rights doctrine,”¹¹⁰ calling it “a *sine qua non* for numerous human rights,”¹¹¹ including the right to health and the right to life

106. Stockholm Declaration, *supra* note 72, at Principle 1.

107. G.A. Res. 45/94, 68th plen. mtg., Need to ensure a healthy environment for the well-being of individuals, U.N. GOAR, 45th Sess., U.N. Doc. A/RES/45/94, at 178 (Dec. 14, 1990).

108. See *Moiwana Village v. Suriname*, Preliminary Objections, Merits, Reparation and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2004), available at <http://www1.umn.edu/humanrts/iachr/C/124-ing.html>; *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, (Aug. 31, 2001), available at <http://www1.umn.edu/humanrts/iachr/AwasTingnicase.html>; *Coulter et al., v. Brazil (Yanomami)*, Case 7615, Inter-Am. Comm’n H.R., Report No. 12/85, OEA/Ser.L/V/II.66, doc. 10 rev. 1 (1985), available at <http://www.cidh.org/annualrep/84.85eng/Brazil7615.htm>.

109. Inter-Am. Comm’n H.R., Report on the Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, doc. 10 rev. 1 (1997), at ch. VIII, available at <http://www.cidh.oas.org/countryrep/ecuador-eng/Index-Ecuador.htm> [hereinafter Rep. on Ecuador].

110. *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Separate Opinion of Judge Weeramantry, 1997 ICJ 88, at 91 (Sept. 25), available at <http://www.icj-cij.org/docket/files/92/7383.pdf>.

111. *Id.*

itself, adding that “damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.”¹¹²

By viewing environmental protection as an essential component of efforts to realize human rights more generally, this approach posits environmental protection as a form of human rights protection. Efforts to protect the environment draw additional legitimacy from this association with the normative framework of human rights. As a result, environmental protection not only invokes the underlying normative values associated with human rights, but also becomes part of the legal obligations states incur by ratifying bilateral and multilateral human rights agreements.

This framing has a profound resonance for questions of environmental justice. The right to equality and the principle of non-discrimination are among the most fundamental principles of human rights law. Viewing environmental protection as human rights protection means that it will not be enough to judge progress in terms of aggregate statistics for the environment as a whole. The human rights approach demands special attention to those groups most vulnerable to environmental harms (like children, the elderly, and those with underlying health issues) as well as to those already overburdened by environmental harms.

This “environment as precondition” approach has much to offer as a way to think about the relationship between human rights and the environment. However, lessons from sustainable development have shown time and again that it is not always possible to avoid trade-offs and choices between competing priorities, including the priorities of promoting human rights and protecting the environment. The key challenge is to strike a balance between these competing priorities. For example, what if a development project promotes the right to livelihood and housing for one group of people, but also causes environmental degradation that might in the short or long-term implicate the right to health for others? Is the project consistent with the progressive realization of human rights or not? This is not idle speculation. Human rights courts are asked to grapple with similar conflicting rights claims on a regular basis. As the European Court of Human Rights noted in *Lopez Ostra v. Spain*, the state has a margin of appreciation in striking a fair balance between the human rights claim advanced by an individual and the economic interests of the community as a whole.¹¹³ In that case, the Court had to balance an individual’s asserted right to privacy in the home, protected by Article 8 of the European Convention, against the economic

112. *Id.* at 92.

113. *Lopez Ostra v. Spain*, App. No. 16798/90, 20 Eur. H.R. Rep. 277, ¶ 51 (1995) (Eur. Ct. of H.R.).

interests of the town in which she lived.¹¹⁴ Merely announcing that environmental protection is a pre-requisite for human rights offers little in the way of guidance for how such a balance should be struck.

B. Human Rights as Tools to Address Environmental Issues

An alternative approach flips the presumed relationship between environmental protection and human rights. Rather than considering environmental protection as a precondition for human rights, this approach emphasizes the possibility of using human rights to achieve environmental ends. This relationship was clearly articulated in the Rio Declaration, which emphasized the importance of access to information, public participation, and access to justice for environmental protection.¹¹⁵ Embracing this vision, states have incorporated rights to information, participation, and access to justice in a wide range of multilateral environmental treaties and soft-law environmental agreements.¹¹⁶ The thinking behind this move is that these procedural rights will help secure governance structures capable of adopting fair and appropriate environmental policies.

This “human rights as tools” approach also underscores the environmental

114. *Id.* at ¶ 58.

115. United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 10, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*].

116. Treaties incorporating these measures are too numerous to list in full. Among these are: Article 23 of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, which requires Parties to facilitate awareness, education and participation concerning the safe transfer, handling and use of living modified organisms in relation to the conservation and sustainable use of biological diversity, taking into account risks to human health. Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 23, Jan. 29, 2000, 2226 U.N.T.S. 208. The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade requires in Article 15(2) that each state party ensure, to the extent practicable, public access to information on chemical handling and accident management and on safer alternatives. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade art. 15, Sept. 10, 1998, 2244 U.N.T.S. 337. The United Nations Convention to Combat Desertification in Those Countries Experiences Serious Drought and/or Desertification requires in Article 3 that all decisions to combat desertification or to mitigate the effects of drought be taken with the participation of populations and local communities. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa art. 3, Oct. 14, 1994, 1954 U.N.T.S. 3. Article 9 of the Helsinki Convention on the Transboundary Effects of Industrial Accidents requires that States Parties provide adequate information to the public and, whenever possible and appropriate, give them the opportunity to participate in relevant procedures and afford them access to justice. CTEIA, *supra* note 82, at art. 9. Article 6 of the Convention on Environmental Impact Assessment in a Transboundary Context requires that Parties provide an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities. CELATC, *supra* note 82, at art. 6.

dimensions of substantive human rights like the right to life and the right to health. There is no question that the realization of many well-established human rights is jeopardized by pollution, environmental degradation, and climate change. The observed and projected effects of climate change undoubtedly pose threats to the right to life, protected by the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child.¹¹⁷ Climate change will exacerbate weather-related disasters. Given the high death toll associated with many such disasters, climate change will undoubtedly interfere with the enjoyment of the right to life for millions of people.¹¹⁸ Climate change will similarly interfere with realization of the right to food, protected under Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹¹⁹ Article 24(c) of the Convention on the Rights of the Child, and Articles 25(f) and 28(1) of the Convention on the Rights of Persons with Disabilities.¹²⁰ Climate change is expected to result in an overall decrease in food production, increasing the risk of hunger and malnutrition,¹²¹ especially in Southern Africa, a region already beset with food insecurity.¹²²

The right to the highest attainable standard of health, protected in Article 12 of the ICESCR, as well as in Article 12 and 14(2)(b) of the Convention on the Elimination of All Forms of Discrimination Against Women,¹²³ Article 24 of the Convention on the Rights of the Child,¹²⁴ Article 16 of the Convention on the Rights of Persons With Disabilities,¹²⁵ and Article 5(e)(iv) of the International Convention on the Elimination of All Forms of Racial Discrimination,¹²⁶ will also be affected. The right to health is already tightly linked to environmental characteristics.¹²⁷ In a changing climate, this right will be jeopardized not only by

117. ICCPR, *supra* note 48, at art. 6; CRC, *supra* note 33.

118. U.N. Office of the High Comm'r of Hum. Rts., *Rep. of the Office of the High Comm'r for Human Rights on the Relationship between Climate Change and Human Rights*, ¶ 23, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009) [hereinafter Report on CC & HR].

119. ICESCR, *supra* note 33.

120. CRPD, *supra* note 33; CRC, *supra* note 33.

121. Report on CC & HR, *supra* note 118, ¶26.

122. INT'L FOOD POLICY RESEARCH INST., 2012 GLOBAL HUNGER INDEX REPORT: THE CHALLENGE OF HUNGER: ENSURING SUSTAINABLE FOOD SECURITY UNDER LAND, WATER, AND ENERGY STRESSES 11-14, 31-32 (2012), available at <http://www.ifpri.org/publication/2012-global-hunger-index>.

123. CEAFDAW, *supra* note 49.

124. CRC, *supra* note 33.

125. CRPD, *supra* note 33.

126. ICEAFRD, *supra* note 49.

127. A significant percentage of the disease burden in poor countries is linked to environmental factors. Malaria and other disease-borne vectors increase with ecological damage and deforestation. ANNE E. PLATT, INFECTING OURSELVES: HOW ENVIRONMENTAL AND SOCIAL DISRUPTIONS TRIGGER DISEASE, 129 WORLDWATCH PAPER (World Watch Inst., 1996). Viewing

malnutrition and extreme weather events associated with climate change, but also by the spread of malaria and infectious diseases that thrive in warmer weather.¹²⁸ Similar cases can be made for how climate change will impact the right to water, to housing, to culture, to self-determination, and to property.

UNEP and OHCHR have expressed support for this vision. In particular, they seek to define the green economy—a central commitment of the Rio+20 Outcome Document—as “an economic system ‘that recognizes the properties of healthy ecosystems as the backbone of economic and social well-being and as a precondition for poverty reduction.’”¹²⁹ To that end, the OHCHR-UNEP held a Joint Side Event at Rio +20 entitled “Human Rights at the Center of Sustainable Development – Honoring Rio Principle 1.”¹³⁰ This meeting built on the 2009 High Level Expert Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward. The report produced through this side event describes a vision of sustainable development rooted in human rights and environmental protection. Rather than a balance between economic, environmental, and social priorities, this report strongly advocated for a rights-based approach in order to integrate and transform the relationship between these three pillars of sustainable development.¹³¹

Viewing environmental protection through the lens of protecting these well-established substantive human rights finds echo in the jurisprudence of the European Court, which has a lengthy record deciding environmental claims brought under the right to life, to family, and to health.¹³² Yet, this approach, like the “environmental protection as precondition” approach, has its limits. Critics point out that not all environmental concerns involve humans,¹³³ and that there is a host of other human rights concerns that might be more immediate than climate change. Climate change, and measures taken to mitigate or adapt to its effects,

this relationship, the UNEP and the OHCHR concluded that the enjoyment of the internationally guaranteed right to health depends upon a sound environment. *See* Joint Report, *supra* note 86.

128. Report on CC & HR, *supra* note 118, ¶ 32.

129. Joint Report, *supra* note 86, at 6.

130. 15:00 to 16:45: *Human Rights at the centre of sustainable development - Honouring Rio Principle 1 Joint Report UNEP and OHCHR*, UNITED NATIONS, <http://www.uncsd2012.org/index.php?page=view&nr=1152&type=13&menu=27> (last visited Nov. 30, 2014).

131. *Id.* at 8.

132. *See* Leon and Agnieszka Kania v. Poland, App. No. 12605/03, (2009), ¶ 98 (Eur. Ct. of H.R.), available at <http://app.vlex.com/vid/case-leon-and-kania-poland-61168330> (citing *Hatton v. United Kingdom*, App. No. 36022/97, 37 Eur. H.R. Rep. 28, ¶ 96 (2003)); *López Ostra v. Spain*, *supra* note 113; *Powell and Rayner v. United Kingdom*, App. No. 9310/81, 12 Eur. H.R. Rep. 355, ¶ 40 (1990) (Eur. Ct. of H.R.); *Furlepa v. Poland*, App. No. 62101/00 (2008), available at <http://caselaw.echr.globe24h.com/0/0/poland/2008/03/18/furlepa-v-poland-85838-62101-00.shtml>.

133. *See e.g.*, *Handl*, *supra* note 28, at 38-39; *Kyrtatos*, *supra* note 64, at 16 ¶¶ 51-55 (2005) (Eur. Ct. of H.R.) (actions challenging state decisions that cause only general environmental deterioration are not actionable under Article 8).

will impact a wide array of human rights, and may impact some rights differently than others. The “human rights as tools” approach to environmental protection is inherently fragmented and episodic. Yet climate change calls out for an integrated, holistic response. It is very difficult to see how the “human rights as tools” approach can facilitate a systematic consideration of cumulative impacts, or how it can account for the actions of multiple institutions operating simultaneously at multiple scales. As a result, this approach is unlikely to promote the integration of all the myriad human rights considerations associated with climate change, and offers little possibility for synthesizing responses to broader questions of environmental degradation.

IV. An Emerging Right to a Healthy Environment?

The enjoyment of human rights depends on environmental protection. At the same time, environmental protection depends on the ability to exercise certain human rights, most notably the rights to information, public participation in decision-making, and access to justice. This mutuality led to dissatisfaction with the limitations of adopting either approach exclusively and prompted calls for a third way—one that recognizes the right to a safe and healthy environment as an independent substantive human right. The 1994 Draft Declaration of Principles on Human Rights and the Environment, prepared by the Commission on Human Rights’ Sub-Commission on Prevention of Discrimination and Protection of Minorities, embraced this position.¹³⁴ Principle I (2) of the Draft Declaration announced that “[a]ll persons have the right to a secure, healthy and ecologically sound environment.”¹³⁵ The Draft Declaration situated this right in the indivisibility of “[h]uman rights, an ecologically sound environment, sustainable development and peace,”¹³⁶ and represented the right to a healthy environment as interdependent with other human rights, including civil, cultural, economic, political, and social rights.¹³⁷ The right to a healthy environment thus represents a synthesis of the “environment as precondition” and “human rights as tools” approaches.

The 1972 Stockholm Declaration offers some support for this approach.¹³⁸ Secretary General Maurice Strong opened the Stockholm Conference with a

134. United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, May 16, 1994, *Draft Principles On Human Rights and the Environment*, U.N. Doc. E/CN.4/Sub.2/1994/56, Annex I (1992).

135. *Id.* at ¶ 2.

136. *Id.* at ¶ 1.

137. *Id.* at ¶ 2.

138. Stockholm Declaration, *supra* note 72.

speech that drew heavily on both the U.N. Charter and the Universal Declaration of Human Rights.¹³⁹ Principle 1 of the Universal Declaration proclaims 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 the solemn responsibility to protect and improve the environment for present and future generations.”¹⁴⁰ Scholars like Dinah Shelton have argued persuasively that the Stockholm Declaration indelibly linked environmental protection with human rights.¹⁴¹ At a minimum, the Stockholm Declaration certainly reflects the growing recognition that human rights are interdependent with and interrelated to the environment.¹⁴²

Since the 1972 Stockholm Conference on the Human Environment, the relationship between human rights and the environment has developed largely along the “environment as prerequisite” and “human rights as tools” paths described above. In the run-up to the 1992 United Nations Conference on the Environment and Development (the “1992 Conference” or the “Conference”),¹⁴³ General Assembly Resolution 45/94 seemed to offer support for the notion of a stand-alone right to a healthy environment, when it recognized that “all individuals are entitled to live in an environment adequate for their health and well-being.”¹⁴⁴ The 1992 Conference certainly focused global attention on environmental concerns, and more particularly, on the unsustainable nature of human activities. More importantly, the Rio Declaration, which came out of the Conference, marked a global recognition that human activity was undermining the integrity of natural systems on which human life and society depend.

139. *1972 Stockholm Conference Opening Statement*, MAURICESTRONG.NET, <http://www.mauricestrong.net/index.php/speeches-remarks3/103-stockholm> (last visited Nov. 12, 2014).

140. Stockholm Declaration, *supra* note 72.

141. Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?*, 35 DENV. J. INT'L L. & POL'Y 129, 130-34 (2006); Donald K. Anton & Dinah Shelton, *Environmental Rights*, in PEOPLE'S RIGHTS 68, 118, 785 (2011).

142. International workshops on this theme have been too numerous to mention. A few of note include the 2002 joint seminar on human rights and the environment organized by OHCHR and UNEP, which documented growing recognition of the connection between human rights, environmental protection and sustainable development. Office of the High Comm'r of Hum. Rts. and U.N.E.P., *Promotion and Protection of Human Rights Science and Environment: Report of the Joint OHCHR and UNEP Seminar on Human Rights and the Environment*, U.N. Doc. E/CN.4/2002/WP.7 (Jan. 16, 2002), available at http://www.ohchr.org/Documents/Issues/Environment/Reportonjoint_OHCHR-UNEPseminar2002.pdf. Similarly a 2012 UN Interregional Crime and Justice Research Institute Conference identified the relationship between human rights and the environment as a topic for thematic debate. *International Conference on Environmental Crime: Current and Emerging Threats*, UNITED NATIONS INTERREGIONAL CRIME AND JUSTICE RESEARCH INSTITUTE, <http://www.unicri.it/topics/environmental/conference/> (last visited Nov. 12, 2014).

143. Rio Declaration, *supra* note 115.

144. G.A. Res. 45/94, *supra* note 107.

Yet the Rio Declaration did not announce an explicit human right to a healthy environment.¹⁴⁵ In fact, considering that such language had been proposed and rejected from the Declaration, some suggest that Rio may represent an international legal step away from such a commitment.¹⁴⁶ State practice in the international arena in the years after Rio tends to support this interpretation. The next few decades saw an explosion of international environmental treaty-making, covering everything from access to environmental information¹⁴⁷ to greenhouse gas emissions¹⁴⁸ to persistent organic pollutants.¹⁴⁹ None of these agreements have employed an explicit human rights framing, and most do not mention human rights.

Human rights treaties are similarly silent about environmental rights. Of course, the fact that a healthy environment is not mentioned does not mean that humans do not have a right to it. The need to protect and improve the environment is mentioned as a means of achieving the right to health in the ICESCR—Article 12(2) states that “the steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for . . . [t]he improvement of all aspects of environmental and industrial hygiene.”¹⁵⁰ In General Comment No. 12, the United Nations Committee on Economic, Social, and Cultural Rights explicitly recognizes the links between the right to food and environmental conditions.¹⁵¹ Although routinely cited as evidence of an emerging right to a healthy environment, it is perhaps more appropriate to read this language as a recognition of the entwined nature of a healthy environment, an adequate food supply, and healthy people.¹⁵²

Regional agreements have been more specific in their recognition of a right to a healthy environment. The Additional Protocol to the American Convention on Human Rights, and the African Charter on Humans and Peoples Rights (the

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145. Dinah Shelton, *What Happened in Rio to Human Rights?*, 3 Y.B. INT'L ENVTL. L. 75, 89-93 (1992).
146. *Id.*
147. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (1999).
148. UNFCCC, *supra* note 84, at 165-88; Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (1998) [hereinafter Kyoto Protocol].
149. U.N. Environment Programme, Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532 (2001).
150. ICESCR, *supra* note 33, at art. 12(2).
151. ICESCR General Comment No. 12, ¶¶ 7, 8, 28, U.N. Doc. E/C.12/1999/5 (May 12, 1999) [hereinafter ICESCR General Comment 12].
152. An additional caveat is that the Committee's findings have no force of law—they are not binding, on the Convention's 161 parties, nor on the 32 U.N. member states that have not ratified the Convention. Nevertheless, as the Committee's definitive interpretation of Article 12(2), it is certainly possible, maybe even probable, that over time General Comment 12 will shape state practices to such an extent that a new customary norm will emerge.

“African Charter”) are the most prominent examples of explicit recognition of a right to a healthy environment. Both agreements specifically recognize a right to healthy environment. Article 11 of the Additional Protocol to the American Convention on Human Rights (the “Protocol”) addresses this right as an individual right, stating that “[e]veryone shall have the right to live in a healthy environment.”¹⁵³ To that end, the Protocol directs States Parties to “promote the protection preservation and improvement of the environment.”¹⁵⁴ Article 24 of the African Charter, by contrast, frames the right to a healthy environment as a group right, stating that “[a]ll peoples shall have the right to a general satisfactory environment favourable to their development.”¹⁵⁵ In addition, Article 38 of the Arab Charter on Human Rights provides that “[e]very person has the right to an adequate standard of living for himself and his family, [that] ensures their well-being and a decent life, including food, clothing, housing, services and *the right to a healthy environment.*”¹⁵⁶

Outside the treaty arena, the idea of a right to a healthy environment has gained significant traction. According to Canadian scholar David Boyd, an overwhelming majority of the 193 states in the United Nations have recognized the right to a healthy environment.¹⁵⁷ This right is enshrined in the constitutions of over 92 states, and is protected by municipal law or treaty in many more.¹⁵⁸ This widespread adoption raises the possibility that the right to a healthy environment may be becoming a “general principle of law recognized by civilized nations” and thus, a source of international law under Article 38 of the ICJ Treaty.¹⁵⁹

John Knox, the UN Independent Expert on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, seems to capture the utility of embracing all these approaches. He

153. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, *Protocol of San Salvador*, art. 11, Nov. 17, 1988, 28 I.L.M. 161.

154. *Id.*

155. The African Charter on Human and Peoples' Rights art. 24, June 27, 1981, 1520 U.N.T.S. 217 (1982). The Court found this right to be enforceable in its Ogoni decision. Fons Coomans, *The Ogoni Case Before the African Commission on Human and Peoples' Rights*, 52 INT'L & COMP. L.Q. 749, 754-55 (2003); *see generally* Decision Regarding Communication 155/96 (Soc. & Econ. Rts. Action Ctr./Ctr. for Econ. & Soc. Rts. v. Nigeria), Case No. ACHPR/ COMM/A044/1 (Afr. Comm'n on Hum. & Peoples' Rts., May 27, 2002), *available at* <http://cesr.org/downloads/AfricanCommissionDecision.pdf> [hereinafter Ogoni Decision].

156. Arab Charter on Human Rights art. 38, May 22, 2004, *reprinted in* 12 INT'L HUM. RTS. REPS. 893 (2005), *available at* <http://www1.umn.edu/humanrts/instreet/loas2005.html> (emphasis added).

157. BOYD, *supra* note 65, at 59-62.

158. *Id.*

159. Statute of the International Court of Justice art. 38(c), *available at* http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&#CHAPTER_II.

has characterized the procedural rights embodied in the “human rights as tools” approach as a way to “safeguard the environment from the types of harm that violate [substantive environmental rights].”¹⁶⁰ He views rigorous compliance with good process as a way to produce better environmental outcomes. However, Knox also seems to embrace the notion of a stand-alone right, noting that “environmental rights may . . . give rise to certain minimum *substantive* environmental standards that apply regardless of whether procedural requirements are followed.”¹⁶¹

V. What About Non-state Actors?

The primary focus of the three approaches to articulating a relationship between human rights and the environment described above—the “environment as precondition” approach, the “human rights as tools” approach, and the stand-alone right approach—has been on governments. Declarations, treaties, and court decisions focus largely on imposing state duties, or creating state responsibilities. Under this framing, it is the government’s obligation to regulate private actors and activities to head off unsafe or unhealthy environmental conditions. States have a responsibility to enact and enforce laws providing appropriate processes,¹⁶² and in many cases, to achieve acceptable environmental results. States must also ensure that their agents comply with these laws. The state is responsible regardless of whether environmental harm is directly caused by the state, or is a result of state failure to adequately regulate private activities.¹⁶³

This means that states have a duty to protect people from threats to human rights even when the states are not directly responsible for creating those threats.¹⁶⁴ This vision of state responsibility certainly establishes an important

160. U.N. Human Rights Council, Report of the Independent Expert on the Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, *Preliminary Report*, ¶ 40, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012).

161. *Id.* at ¶ 43 (emphasis in original). Interestingly, Knox relies on the Committee on Economic, Social and Cultural Rights’ General Comment No. 15 on the right to water as embracing an obligation on states to “tak[e] [non-discriminatory] steps . . . to prevent threats to health from unsafe and toxic water conditions.” *Id.* (quoting ICESCR General Comment No. 15, ¶ 8 U.N. Doc E/C.12/2002/11 (2002)). Yet, Knox clearly sees this environmental obligation as distinct from what he would call “greening” the already-existing right to health. *Id.*

162. *See* Rep. on Ecuador, *supra* note 109 (noting that “the absence of regulation, inappropriate regulation, or a lack of supervision in the application of extant norms may create serious problems with respect to the environment which translate into violations of human rights”).

163. *See, e.g.*, *Hatton v. United Kingdom*, App. No. 36022/97, 37 Eur. H.R. Rep. 28 (Eur. Ct. of H.R.) (2003); *Mareno Gomez v. Spain*, App. No. 4143/02, 41 Eur. H.R. Rep. 40 ¶ 55 (Eur. Ct. of H.R.) (2004); *Giacomelli v. Italy*, App. No. 59909/00, 45 Eur. H.R. Rep. 38 ¶¶ 78-79 (Eur. Ct. of H.R.) (2007); *Surugiu v. Romania*, App. No. 48995/99 (2004), *available at* <http://caselaw.echr.globe24h.com/0/romania/2007/06/20/case-of-surugiu-against-romania-81550-48995-99.shtml>.

164. Indeed, the Human Rights Council and the General Assembly recognized this state duty as the

baseline.¹⁶⁵ Although state responsibility is a necessary component of protecting environmental rights, this state-centric vision, however, is not by itself sufficient for assuring these rights. To the extent that some states either do not have the political power (or will) or the legal infrastructure to ensure that private actors comply with environmental directives, this state-centric approach does not provide the needed tools to protect human right and the environment.

It is in this context of responding to abusive business practices that human rights and environmental protection have perhaps their clearest common cause. In a review of the scope and pattern of more than 300 alleged corporate-related human rights abuses, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises found that “nearly a third of cases alleged environmental harms that had corresponding impacts on human rights.”¹⁶⁶ The Special Representative found this association across all nine industry sectors he analyzed, including extractive industries, financial services, food and beverage, heavy manufacturing, infrastructure and utilities, information technology, electronics and telecommunications, pharmaceutical and chemical, retail and consumer products, and other (a residual category). These findings also allude to a troubling truth: the entwined aspect of sustainable development and economic activity too often morph into an antagonist of human rights and environmental protection.

What is needed is an international legal framework that can directly bind private actors and hold them accountable for protecting human rights and the environment.¹⁶⁷

first pillar of a triad of obligations concerning human rights in the context of business. See *Guiding Principles on Business and Human Rights Implementing the United Nations Protect, Respect and Remedy Framework*, OFFICE OF THE HIGH COMM’R FOR HUM. RTS. (2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (last visited Nov. 12, 2014). International Tribunals have also made this point. See e.g., *Ogoni Decision*, *supra* note 155, at ¶ 57 (“Governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties”). This decision from the African Commission finds its echo in decisions of the Inter-American Court and the European Court. See *Velásquez Rodríguez v. Honduras*, Inter-Am. Comm’n H.R., OAS/Ser.L/V/III.17, doc. 13 (1988), ¶172 (noting that the state has responsibility of due diligence to prevent violations of human rights by private actors); *Kania v. Poland*, *supra* note 132, at ¶ 99; see also *X and Y v. The Netherlands*, App. No. 8978/80, 8 Eur. H.R. Rep. 235, ¶ 23 (Eur. Ct. of H.R.) (1986).

165. For a discussion of state responsibility in the transboundary environmental context, see Bratspies, *State Responsibility for Human-Induced Environmental Disasters*, *supra* note 76.

166. U.N. Secretary-General, *Rep. of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Addendum: Corporations and Human Rights: A Survey of the Scope and Patterns of Alleged Corporate-related Human Rights Abuse*, ¶ 27, U.N. Doc. A/HRC/8/5/Add.2 (May 23, 2008).

167. Under United States domestic law, this question of whether international human rights law reaches the conduct of corporations has drawn widely divergent decisions. See e.g., *Kiobel v. Royal*

There are two relatively simple ways that this might happen. The first involves going back to the root of human rights law and thinking carefully about the scope of the Universal Declaration. The Universal Declaration, by its own terms, explicitly applies “to every individual and every organ of society.”¹⁶⁸ I have argued elsewhere that corporations must be viewed as “organs of society”¹⁶⁹ and thus within the scope of human rights. Similarly, the ICESCR recognizes that “the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant.”¹⁷⁰ This kind of a human rights-based approach has the potential of extending primary obligations under international law to actors like transnational corporations that seem increasingly able to elude the grasp of states.

In an era where the most powerful actors are increasingly transnational enterprises rather than states, and a willingness to tolerate pollution is pitched as a competitive advantage,¹⁷¹ the relatively all-encompassing reach of a human rights approach under the Universal Declaration seems to offer some advantages. In 2003, the United Nations Sub-Commission for the Promotion and Protection of

Dutch Petroleum, 621 F.3d 111, 148-49 (2d Cir. 2010) (finding that the Alien Tort Statute did not reach the conduct of corporate actors), *cert. granted*, 132 U.S. 472 (2011), *aff'd on diff. grounds*, 133 U.S. 1659 (2013); *but see* Doe v. Exxon Mobil, 654 F.3d 11, 57 (D.C. Cir. 2011) (finding that it would create a bizarre anomaly to immunize corporations from liability for the conduct of their agents in lawsuits brought for “shockingly egregious violations of universally recognized principles of international law”), *dism'd en banc*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo v. Firestone Nat. Rubber*, 643 F.3d 1013, 1018-19, 1025 (7th Cir. 2011) (finding that corporations can be civilly liable for violations of international law); *Sarei v. Rio Tinto*, 671 F.3d 736, 747-48 (9th Cir. 2011) (same), *judgment vacated and remanded*, 133 U.S. 1995 (2013). The Supreme Court ultimately resolved *Kiobel* on the issue of territoriality, leaving unanswered this underlying question of corporate liability for conduct that violates international human rights law. 133 U.S. 1659.

168. The General Assembly proclaimed the Universal Declaration to be:

[A] common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Universal Declaration, *supra* note 41, at 71.

169. See Rebecca Bratspies, *Organs of Society: A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities*, 13 MICH. ST. INT'L L. 9 (2005); see also Knox, *Horizontal Human Rights Law*, *supra* note 40.

170. ICESCR, *supra* note 33, at pmb1.

171. As Vice-President and Chief Economist of the World Bank, Lawrence Summers perfectly captured this perspective when he wrote: “I think the economic logic behind dumping a load of toxic waste in the lowest wage country is impeccable and we should face up to that.” See *Furor on Memo at World Bank*, N.Y. TIMES (Feb. 7, 1992), available at <http://www.nytimes.com/1992/02/07/business/furor-on-memo-at-world-bank.html> (last visited Nov. 1, 2014).

Human Rights attempted to do just this when it unanimously approved the Norms on Transnational Corporations and Other Business Enterprises (the “Norms”).¹⁷² The Norms would have imposed international human rights duties directly on transnational companies and related business entities.¹⁷³ However, the Norms did not receive support from critical constituencies, and in 2004 the UN Commission on Human Rights declined to adopt them.¹⁷⁴ In the intervening decade, the United Nations has taken no further action on the Norms. Instead, the United Nations created a new process for considering the relationship between human rights and transnational corporations, this time under the auspices of a Special Representative to the Secretary General.¹⁷⁵

Yet, even after the demise of the Norms, it is clear that non-state actors like corporations are firmly cemented as actors with important human rights obligations within the human rights universe. Indeed, the Guiding Principles on Business and Human Rights, which was unanimously endorsed by the Human Rights Council in 2011, articulated a clear duty on the part of business enterprises to respect human rights.¹⁷⁶ This provides a platform from which to build a more robust vision of the human rights obligations of non-state actors, most notably transnational corporations.

Yet, this saga also highlights the mistake of thinking that legal transformation can happen by itself. Unlike a treaty, the Norms were not supposed to be a

172. U.N. Sub-Commission on the Promotion and Protection of Human Rights, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, 55th Sess. U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (Aug. 26, 2003) [hereinafter Norms]. For insight into the drafting history of the Norms, see Carolin F. Hillemanns, *UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights*, 4 GER. L. J. 1065 (2003).

173. Article 1 of the Norms stated:

Within their respective spheres of activity and influence, transnational corporations and other business enterprises have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in international as well as national law, including the rights and interests of indigenous peoples and other vulnerable groups.

Norms, *supra* note 172.

174. Indeed, the Commission explicitly characterized the Norms as having “no legal standing” and directed the Sub-Commission to refrain from conducting any monitoring of them. Comm’n on Hum. Rts. Res. 2004/116, Responsibilities of Transnational Corporations and Related Business Enterprises with Regard to Human Rights, Mar. 15-Apr. 2004, U.N. ESCOR, 66th Sess., Supp. No. 3 (Apr. 20, 2004).

175. In July 2005, U.N. Secretary General Kofi Annan appointed Professor John G. Ruggie to this post. Press Release, Secretary General, Secretary-General Appoints John Ruggie of United States Special Representative on Issue of Human Rights, Transnational Corporations, Other Business Enterprises, U.N. Press Release SG/A/934 (July 28, 2005), available at <http://www.un.org/press/en/2005/sga934.doc.htm>.

176. U.N. Human Rights Council Res. 17/4, Human Rights and Transnational Corporations and Other Business Entities, 17th Sess., Jul. 6, 2011, U.N. GOAR, 67th Sess., A/67/285 (Aug. 10, 2012).

politically enforceable document. Instead, they were presented as a restatement of the existing law. As such, the Norms, like all social norms, purported to rest on social commitment as opposed to bare legal enforcement. Yet, subsequent events demonstrated the lack of political and social will to translate the Norms into practice. This intense pushback was enough to doom the project. The lesson is clear—to be successful, legal articulation of human rights obligations must dovetail with social and political support for those obligations. That does not relegate advocates to relying on the lowest common denominator—unanimity, or even consensus is not required. But, to be successful in enforcing human rights against non-state actors like transnational corporations, new human rights developments must rest on strong coalition-building and social advocacy.

Another very straightforward approach to resolving the problem of the human rights obligations of corporations involves rethinking what we mean by the expression “state actor.” Corporations are wholly creatures of state law—they have no existence other than by statutory creation. State law defines many aspects of the corporation as an entity—including the requirement that it have a board of directors, hold annual meetings, and identify an agent capable of accepting service of process. For public companies, the requirements include mandated financial disclosures, annual meetings, and having certain numbers of outside directors. By specifying the minimum criteria for incorporation, the state defines the personality of corporations. The state has the power to change that state-created definition of corporate personhood to address this human rights gap. In short, states can use their power to bestow corporate personhood to make responsibility for human rights a condition of incorporation.

Yet, in identifying these possibilities, it is important to remember that the environmental problems we face are not wholly about gaps in the legal framework. Even those states that seemingly have the power and the network of necessary laws (like the United States) fail to adequately protect their environment. Environmental protection is as much a problem of social will as it is a problem of a lack of available legal tools. Human rights, like environmental protection, are a long game—one that aims to change the way that actors view their agency in order to alter the very fabric of their decision-making. The goal is nothing short of redefining the contours of society, of government, and of markets. That means reaching actors at all levels of society, in all walks of life.

VI. Conclusion

Realizing human rights involves three different kinds of duties: the duty to

respect, the duty to protect, and the duty to fulfil.¹⁷⁷ Considering environmental rights through this lens, it becomes less important to determine whether environmental rights exist as a stand-alone right to a healthy environment or as a component of other human rights. Either way, the emergence of these rights represents a process of “authoritative decision-making” described by New Haven school theorists.¹⁷⁸ This framing may help us move forward on tough questions, including how an international regime built on the sovereign equality of states can best respond to transnational environmental problems, and how such a system can account for the actions of non-state actors, especially transnational corporations.

In realizing this goal, it is important to keep in mind Professors McDougal and Lasswell’s important insight¹⁷⁹ that there are other legal decision-makers besides judges, and other ways to impose and enforce an authoritative decision besides litigation.¹⁸⁰ Thinking of human rights law as a guide to authoritative decision-making may offer a way forward in both environmental protection and in human rights. Using Michael Reisman’s insights about the contours of authoritative decision-making, we can view human rights as a process of communication

177. Committee on Economic, Social and Cultural Rights, Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights, ¶¶ 3-6, U.N. ESCOR 46th Sess. May 20, 2011, U.N. Doc. E/C.12/2011/1 (July 12, 2011); ICESCR General Comment 12, *supra* note 151, at ¶ 15. The African Charter identifies a fourth duty—“the duty to promote.” Ogoni Decision, *supra* note 155, at ¶¶ 44-47.

178. “Authoritative Decision” is a central concept in New Haven School theories. It represents the synthesis of effective control with legitimate process that comports with the “shared expectations of the members of a community about how decisions should be taken.” Myres S. McDougal et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT’L L. 188, 195 (1968). See generally Rebecca M. Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Approach to Sustainable Development*, 32 YALE J. INT’L L. 363, 370-77 (2007). It involves a deliberative, problem-solving, and decision-making vision of law. See HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY*, VOL. 1 1172 (New Haven Press 1992); see generally MYRES S. MCDUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: PUBLIC ORDER OF THE WORLD COMMUNITY* (1981); Myres S. McDougal, *International Law and the Future*, 50 MISS. L.J. 259, 259 (1979) (viewing law as “a process of authoritative decision through which the members of a community seek to clarify and secure their common interests”). When I use the terms authoritative decisionmaking or authoritative decisionmakers, I do so with this definition in mind.

179. See generally LASSWELL & MCDUGAL, *supra* note 178 (exploring the question of authoritative decisionmaking in exhaustive, and sometimes excruciating detail); see also Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Approach to Sustainable Development*, *supra* note 178.

180. See MYRES S. MCDUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* (1987). The core ideas of the “authoritative decisionmaker” with the power to advance “human dignity” may be of value in any attempt to expand the reach of human rights norms beyond the courtroom into administrative decisionmaking.

involving "policy content, authority signal and control intention."¹⁸¹

While some might view the lack of a codified human right to a healthy environment as a failure or a rejection of the principle, I think such an approach is misguided. As a process of communication, these emerging human rights norms have been remarkably successful. Measured through this lens of assimilation and adoption of ideas, the human right to a healthy environment has had an almost miraculous impact. It has dramatically transformed the legal, constitutional, and political cultures of many states, and of international institutions. This insight about the power of environmental human rights norms to shape expectations and behavior may be particularly useful in light of the clear consensus that "[i]rrespective of whether or not climate change effects can be construed as human rights violations, human rights obligations provide important protection to the individuals whose rights are affected by climate change."¹⁸² If all human rights are indeed "universal, indivisible, interdependent and interrelated,"¹⁸³ then environmental activists have a wealth of tools at their disposal.

The discourse around a human right to a healthy environment signals both a social decision that environmental protection must be a priority, and an express intent for lawmakers of all stripes to effectuate that decision as they create, interpret, and enforce law. As such, articulating a functioning and healthy environment as a human right does more than to emphasize the importance of environmental protection among competing (largely economic) priorities. Such a framing grounds this environmental priority as a bedrock concern for international law—a key component of the entire international legal edifice erected to preserve international peace and security. It emphasizes the obligation of states to respect, protect, and fulfill this right nationally and internationally.

This kind of fundamental legal transformation is already occurring, albeit in fits and starts. One of the most radical approaches involves redefining the basic notion of who qualifies as a legal subject in law. Two states, Ecuador and New Zealand, have granted legal personhood to rivers. One consequence of this move directly contradicts the legal pre-commitment to viewing the natural world as a series of ownable discrete resources. In doing so, it forces this pre-commitment from the shadows, and forces a conversation about the previously unthinkable—recognizing rivers as actors with interests and agency. In 2008, Ecuador amended

181. W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 PROC. AM. SOC'Y INT'L L. 101, 113 (1981).

182. Report on CC & HR, *supra* note 118, at ¶ 71.

183. World Conference on Human Rights, June 14-25, 1993, *Vienna Declaration and Programme of Action*, ¶ 5, U.N. Doc. A/Conf.157/24 (July 12, 1993).

its constitution to recognize the inalienable right of ecosystems to exist and flourish.¹⁸⁴ In the first test of this new provision, the Vilcambara River won a lawsuit against the provincial government of Loja¹⁸⁵ over unsustainable road construction that polluted the river. The next year, New Zealand granted its longest river, the Whanganui, legal personhood.¹⁸⁶ While critics deride these moves as absurd,¹⁸⁷ supporters note it is no less logical than granting legal personhood to corporations.¹⁸⁸ Corporate personhood was equally unthinkable, until it emerged during the industrial revolution and ultimately transformed society in ways unimaginable at the time.

A growing international movement seeks to drive these changes beyond their national limits and fundamentally redefine how humans think of their environment. The non-governmental World People's Conference on Climate Change and the Rights of Mother Earth drew 35,000 people to Bolivia in 2010 and produced the Universal Declaration of the Rights of Mother Earth.¹⁸⁹ Among the

184. CONSTITUTION OF ECUADOR, art. 10, 71-74, available at <http://therightsofnature.org/wp-content/uploads/pdfs/Rights-for-Nature-Articles-in-Ecuadors-Constitution.pdf>. In particular, Article 71 provides:

Nature or Pachamama, where life is reproduced and exists, has the right to exist, persist, maintain and regenerate its vital cycles, structure, functions and its processes in evolution. Every person, people, community or nationality, will be able to demand the recognitions of rights for nature before the public organisms. The application and interpretation of these rights will follow the related principles established in the Constitution.

Id. at art. 71.

185. *Wheeler v. Director de la Procuraduria General Del Estado de Loja*, Juicio (2011) No. 11121-2011-0010 (Prov. Ct. of Loja), available at <http://blogs.law.widener.edu/envirolawblog/2011/07/12/ecuadorian-court-recognizes-constitutional-right-to-nature>; see Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, GLOBAL ALLIANCE FOR THE RIGHTS OF NATURE, <http://therightsofnature.org/first-ron-case-ecuador/> (last visited Nov. 1, 2014). Of course, the news from Ecuador is not uniformly positive. In August 2013, Ecuador announced that it would allow oil drilling in the pristine Yasuni National Park after its proposal that developed countries create a trust fund to pay for conservation failed. See Clifford Krauss, *Plan to Ban Drilling in the Amazon is Dropped*, N.Y. TIMES (Aug. 16, 2013), available at http://www.nytimes.com/2013/08/17/business/energy-environment/ecuador-drops-plan-to-ban-drilling-in-jungle.html?_r=0&pagewanted=print. It is unclear whether the Ecuadorian constitution can be used to block drilling.

186. Kate Shuttleworth, *Agreement Entitles Whanganui River to Legal Identity*, N.Z. HERALD (Aug. 30, 2012, 5:56 PM), http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10830586; *New Zealand's Whanganui River Gets Personhood Status*, ENVTL NEWS SERV. (Sept. 13, 2012, 6:41 PM), <http://ens-newswire.com/2012/09/13/new-zealands-whanganui-river-gets-personhood-status/>.

187. See, e.g., Andrew Travis, *New Zealand: Rivers are People Too*, THE DAILY SIGNAL (Oct. 25, 2012), <http://blog.heritage.org/2012/10/25/new-zealand-rivers-are-people-too/> (arguing this move “strip[s] personhood of any meaning and make[s] a mockery of the concept of rights”).

188. Alison Fairbrother, *I River: In New Zealand, the Whanganui River Becomes a Legal Person*, TAKEPART (Sept. 17, 2012), <http://www.takepart.com/article/2012/09/13/new-zealand-river-becomes-person>.

189. Universal Declaration of the Rights of Mother Earth (2010) (Draft published Apr. 22, 2010 at the

provisions, this declaration recognizes the inherent right of Mother Earth to “continue vital cycles free from human interference.”¹⁹⁰ At least a dozen well-attended side events at Rio+20 were organized around the theme of rights for nature.¹⁹¹ Paragraph 39 of the Outcome Document, titled “The Future We Want,” included a reference to rights of nature.¹⁹² One need not embrace the anthropomorphic notion of “Mother Earth” to recognize that this “rights of nature” approach has the potential to spark new legal thinking about how to protect human rights and the environment in the context of development. By laying bare the formerly obscured value judgments and economic pre-commitments that undergird law, this development offers an alternative way to think about what law and legal systems are intended to achieve, creating the possibility of dramatically different legal regimes.

World People’s Conference on Climate Change and the Rights of Mother Earth, Cochbamba, Bolivia), available at <http://therightsofnature.org/universal-declaration/>.

190. *Id.* at art. 2. Readers looking for an in-depth, scholarly exploration of these ideas should read CORMAC CULLINAN, *WILD LAW: A MANIFESTO FOR EARTH JUSTICE* (2nd ed., 2011).

191. For information on the People’s Summit for Social and Environmental Justice, see *Rio+20 Essential Information*, RIGHTS OF MOTHER EARTH, <http://www.rightsofmotherearth.com/essential-information-rio20/>.

192. Paragraph 39 of the Outcome Document read as follows:

We recognize that the planet Earth and its ecosystems are our home and that Mother Earth is a common expression in a number of countries and regions and we note that some countries recognize the rights of nature in the context of the promotion of sustainable development. We are convinced that in order to achieve a just balance among the economic, social and environment needs of present and future generations, it is necessary to promote harmony with nature.

G.A. Res 66/288 U.N. GAOR, 66th Sess., Supp. No. 49, U.N. Doc. A/66/49 (Vol. III) (July 27, 2012).

