HUMAN RIGHTS

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Summary

There have been tremendous developments both in human rights and environmental law in the last decades. Both fields have mostly developed in parallel, but points of contact have multiplied in recent years. From a human rights perspective, the relationship between human rights and environmental protection has been envisioned in two ways. One has been the formulation and recognition of an individual substantive right to a satisfactory, decent or healthy environment. Another approach has been to consider the protection of the environment as a way to meet human rights standards. There has been an ambivalent support for the former approach in State practice. In fact, the most recent developments seem to move away from the recognition of an individual right to environment under international law. The supervising bodies of human rights conventions have adopted the second approach. It is still, however, of limited application.

From an environmental perspective, the most discernable influence of human rights law on environmental legislation has been the use of some civil and political rights to further and promote environmental protection, namely a right to information, a right to participation and a right to remedies. Recent conventions address different aspects of access to and dissemination of environmental information. Citizens' participation has

been enhanced through the expanding role of NGOs, both on the national and international levels. Another issue has been access to remedies for the prevention and reparation of environmental damage. Legal developments in that area have been sporadic. States have been reluctant to assume the financial burden associated with the reparation of environmental damage caused by private activities. The trend has rather been to promote international agreements channeling liability on private operators. Recent conventions have expanded the range of remedies that should be available under national law, or created specific procedures to foster enforcement of environmental law.

1. Introduction

There has been tremendous development both in human rights and environmental law in the last few decades, but both fields have developed in parallel with, until recently, few points of contact. International environmental law is mainly conceived in terms of inter-state relations, rather than in human rights terms, i.e. the relations between a State and the individuals under its jurisdiction. Thus, few environmental treaties include specific provisions on human rights or address explicitly human rights topics. Some conventions may, however, be regarded as a means of implementation of human rights obligations, for example, the protection of the right to life or the promotion of the right to health. Among other texts, the European Charter on the Environment and Health adopted in December 1989 by the WHO regional conference of ministers of health and environment recognizes, for instance, that a clean and harmonious environment exercises a beneficial influence on health and well being. The Charter provides that every individual is entitled to an environment conducive to the highest attainable level of health and well being. The Protocol on Water and Health to the 1992 Convention on the Protection and use of Transboundary Watercourses and International Lakes (London, 1999 (not in force)) implements the Charter in part. The aims of the Protocol are to provide universal access to drinking water and sanitation for everyone, and to promote the sustainable use of water resources. The connection between environmental protection and social and economic rights is here salient. References to the protection and promotion of human health are also found in conventions relative to the protection of the atmosphere, the movements of wastes and the protection of biological diversity, but only among the general objectives of these conventions. The preamble of the Protocol on Substances that Deplete the Ozone Layer (Montreal, 1987) thus provides that the Parties 'recognize that world-wide emissions of certain substances can significantly deplete and otherwise modify the ozone layer in a manner that is likely to result in adverse effects on human health and the environment.' Other than such general preambular references to the purposes of the convention, the linkage between human rights and environmental protection remains however tenuous.

Yet international environmental legislation is largely perceived, and often criticized, as being anthropocentric and utilitarian. It is seen as primarily aimed at the protection of humankind and the fulfillment of human needs. The anthropocentric approach of several conventions can be discerned, for instance, in the definition of 'pollution damage'. Adverse effects of environmental degradation on human health are part of most current definitions of 'pollution' and similar concepts found in international environmental treaties. This conception of pollution and environmental damage excludes in most cases damage to the environment *per se*, i.e., harm to the environment that cannot be

translated into damage to States, persons or private property. In cases of transboundary pollution, environmental damage can the most often be equated with damage to persons or property, but it is not always the case where environmental harm is caused to the global commons. Nonetheless, the approach to damage caused in the global commons has remained largely focused on injuries to States, natural or juridical persons, and property. The regime of liability established by the civil liability conventions applicable for oil pollution, for instance, has been exclusively concerned with damage to persons and property. The Stockholm and the Rio Declarations, although they recognize the duty to prevent damage to areas beyond the limits of national jurisdiction, only provide that 'States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage...'

New conventions, however, increasingly recognized that damage to the environment *per se* is subject to compensation. The Convention for the Regulation of the Antarctic Mineral Resources Activities (Wellington, 1988 (not in force)) was the first convention to define damage exclusively in environmental terms. It defined damage as 'any impact on the living or non-living components of that environment or those ecosystems, including harm to atmospheric, marine or terrestrial life, beyond that which is negligible or which has been assessed and judged to be acceptable pursuant to this Convention.' In other texts, such as the European Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (Lugano, 1993 (not in force)), the Protocol to Amend the Vienna Convention on Civil Liability for Nuclear Damage (Vienna, 1997 (not in force)) and the Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes (Basel, 2000 (not in force)), damage covers, for instance, the costs of measures of reinstatement of the impaired environment actually taken or to be undertaken. But even under those instruments, damage to areas beyond national jurisdiction is still not always covered.

The broadening of the notion of environmental damage can be seen as part of the general trend of international environmental law to take into account other interests than the satisfaction of immediate human needs. Principle 2 of the Declaration on the Human Environment (Stockholm, 1972) stated, for instance, that 'the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.' The more ecological UN General Assembly World Charter for Nature (1982) proclaimed that 'mankind is a part of nature and life depends on the uninterrupted functioning of natural systems which ensure the supply of energy and nutrients,' and that 'every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognition, man must be guided by a moral code of action.' The development of a more ecological approach is also apparent in international wildlife law. The signatories of the Convention on the Conservation of Migratory Species of Wild Animals (Bern, 1979), for instance 'recognize that wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic, and intrinsic value that needs to be preserved and handed on to future generations.' In this perspective, mankind is regarded as one component of the global ecosystem; hence it can benefit from the conservation and protection of the environment as a whole. Species are not seen exclusively as useful to humans, but as needed elements of ecosystems and,

as stated in the preamble of the Convention on Biological Diversity (Rio de Janeiro, 1992), 'the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere' is recognized.

From a human rights perspective, the relationship between human rights and environmental protection has principally been envisioned in two ways. One has been the formulation and recognition of an individual substantive right to a satisfactory, decent or healthy environment. Another approach has been to consider the protection of the environment as a way to fulfil human rights standards. From an environmental perspective, by far the most discernable influence of human rights law on environmental legislation has been to use some civil and political rights to foster and promote environmental protection. The overview presented here shows that recent environmental texts have incorporated such concepts as a right to environmental information, a right to participation and a right to remedies.

2. Human Rights Perspectives on Environmental Protection

Different approaches to environmental protection from a human rights perspective may be identified in international practice and literature. A first suggestion is the recognition of an individual human right to a satisfactory, decent or healthy environment, which would involve the promotion of a certain level of environmental quality. Another view is to consider the quality of the environment as intertwined with existing human rights, such as the right to life, to health or to an adequate standard of living.

2.1 A Right to a Satisfactory, Decent or Healthy Environment

Few of the universal or regional conventions on the protection of human rights – most of which were drafted before environmental concerns swept international law – provide for an individual 'right to environment'. In fact, the majority of human rights conventions do not mention the environment except in very circumscribed contexts. The Stockholm Declaration (1972) also fell short of proclaiming a right to environment, even though some suggestions had been made in this sense by some delegations at the Stockholm Conference.

Still, a right to a satisfactory, decent or healthy environment appears in several national constitutions, especially those drafted or revised since the early 1980s. In international law, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador, 1988) remains the first and only treaty that recognizes an individual 'human right to a healthy environment'. Article 11 of the Protocol provides that 'everyone shall have the right to live in a healthy environment and to have access to basic public services. The State Parties shall promote the protection, preservation and improvement of the environment.' This provision, however, does not impose very stringent obligations on State Parties. The Protocol does not give any indication on the measures envisioned for 'the promotion of the protection, preservation and improvement of the environment' and, furthermore, Article 11 must be construed in conjunction with Article 1 of the Protocol, which states that 'Parties undertake to adopt the necessary measures ... to the extent allowed by their available resources, and taking into account their degree of development, for the purpose of

achieving progressively and pursuant to their internal legislations, the full observance of the rights recognized in this Protocol.' Hence, States are required to promote a healthy environment, but only to the extent that their resources allow. Another approach is taken by the African Charter on the Human Rights and Peoples' Duties (Banjul, 1981). Article 24 states that 'all peoples have the right to a general satisfactory environment favorable to their development.' The Charter thus recognizes a collective right rather than an individual right to environment. The implications of the recognition of such a right are, however, not clear. The African Commission of Human Rights has given few indications on the measures that would be required to implement Article 24. In its guidelines for national periodic reports (1989), it indicated that States should initially report on 'the principal legislation and other measures taken to fulfill the intentions of the Article regarding prohibition of pollution and efforts to prevent international dumping of toxic wastes or other wastes from industrialized countries. Scientific and efficient methods utilized for effective disposal of locally produced wastes' and, in subsequent reports, 'continuation of development to curb wastes and removal of pollution on land, in water and in the air.'

In the preparatory works for United Nations Conference on Environment and Development (UNCED) held in Rio in 1992, some attempts have been made to formulate a right to environment. The set of legal principles proposed by the Group of Legal Experts of the World Commission on Environment and Development provided that 'all human beings have the fundamental right to an environment adequate for the health and well-being.' Both the Commission on Human Rights and the General Assembly recognized in 1990 that 'all individuals were entitled to live in an environment adequate for their health and well-being.' UNCED has, however, played down the linkage between human rights and environmental protection. The Rio Declaration (1992) and Agenda 21 contain very few references to human rights. Principle I of the Declaration merely states that 'human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'

In conclusion, one might consider that the existence of a substantive right to environment is still controversial. Several authors suggest that the evidence that States have accepted a generic right to environment is not convincing. Others question the judiciousness or the usefulness of the concept in international law. Some underlined the vagueness of the concept of environment, even when qualified with terms such as 'decent', 'healthy,' or 'satisfactory'. Others argue that such a broad entitlement would be too indeterminate to be meaningful. Furthermore, its application would heavily depend on the context, so that it could not be regarded as a universal standard. The vagueness of the terms 'right to a healthy environment' or 'right to a safe environment' is not necessarily an insurmountable obstacle to their interpretation and application in concrete situations. Human rights law teems with vague terms that are eventually given more precise meaning through State practice and judicial interpretation. But it seems difficult to develop environmental standards through individual claims to a satisfactory environment, particularly given the subjective nature of a 'satisfactory environment'. Furthermore, environmental protection is mostly concerned with the promotion of collective interests. An individual claim to environment might not be suitable to ensure that broader or competing interests are duly taken into account.

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Biographical Sketch

Richard Desgagné is finishing a doctoral dissertation to be defended at the Graduate Institute for International Studies in Geneva. He has collaborated in research projects in Switzerland and in the United States and has written several articles on international environmental law, human rights law, and humanitarian law. He is presently a senior researcher in international law at the T.M.C. Asser Instituut in The Hague.