

The Right to a Clean, Healthy and Sustainable Environment

Martha L. Schmidt, LL.M., J.D.

7 March 2024

Monique & Roland Weyl

People's Academy of International Law

The collective human right to a clean, healthy and sustainable environment- a challenge to nation state-based system of public international law

- Right to healthy environment. Collective right=claims are aggregated on behalf of group. How meaningful are national borders? Duties of a state: to citizens, residents, others under state's jurisdiction and *erga omnes*.
- Purpose of this and all human rights is to promote human dignity. Interdependent with other collective rights, to self-determination of peoples, to peace, to sustainable development.
- Interdependence of right to a healthy environment and individual human rights, e.g., life, health (including health care).
- All rights **universal, indivisible, interdependent, interrelated.**

Decolonization is necessary to realize the right to a clean, healthy and sustainable environment

- Decolonization refers to colonialism and neocolonialism
- Amitav Ghosh in *The Nutmeg's Curse: Parable for a Planet in Crisis*(2021), the European muting of a large part of humanity “cannot be separated from the simultaneous muting of ‘Nature’.” To extract economic value, turning humans into slaves and servants and their environment into commodities (mere resources) requires belief in natural laws that some species are condemned to extermination or extinction.
- *Exterminate All the Brutes* means not only the humans. It is both genocide and omnicide.

The right to a healthy environment challenges powers controlling global political economy

- Current global PE characterized by gross disparity of wealth and power as result of colonialism, neocolonialism, imperialism. Disparity closely related to carbon emissions.
- Individualism and moral politics (“Be the change you want to see.”), while gratifying, diverts from systemic change focus.
- Capitalism and political-military dominance are obstacles to realizing the right to a healthy environment.
- Need for collective decision-making, preference for public good, human rights guaranteed by public authority, including authority of Indigenous Nations. A start: reverse privatization.

Recent (50 year) history of some steps in articulating the human right to a healthy environment

- UN-sponsored process of environmental conferences and treaties, resolutions of UNGA and UNHRC, creation HRC special procedures, experts, etc. UN Independent Expert, now Special Rapporteur on Human Rights and the Environment. Related experts, rapporteurs.
- Regional human rights treaties, protocols, decisions of regional international judicial bodies
- **Milestones:** 1972 Stockholm Declaration, Conference on the Human Environment; 1981 African Charter on Human and Peoples' Rights; 1982, World Charter for Nature (UNGA Res.) and UNCLOS; 1987, General Principles, Experts Group on Environmental Law, WCED; 1988, San Salvador Protocol; 1992, Rio Declaration on Environment and Development; 2018, Escazú Agreement; 2022 General Assembly Resolution, A/RES/76/300, Right to Healthy Environment

Key individual human rights instruments related to the right to health and to a healthy environment

- Universal Declaration of Human Rights (1948), Arts. 25 and 28, and 1993 Vienna Declaration and Programme of Action
- World Health Organization Constitution (1946), Principles
- International Covenant on Economic, Social and Cultural Rights (1966), Art. 12 (health) and International Covenant on Civil and Political Rights(1966), Art. 6 (life)
- Common Art. 1 of Covenants protects collective right to self-determination, a pre-condition for realization of individual human rights. Simma, ed., *The Charter of the UN: A Commentary*, 1994.
- International Convention on the Elimination of All Forms of Racial Discrimination, Art. 5(e)(iv) (right to public health)

Developing the right to a healthy environment by expanding human rights of Indigenous Peoples

- UN and OAS declarations- 2007 UN Declaration on the Rights of Indigenous Peoples, Arts. 24, 25, 29, 31; 2016 American Declaration on the Rights of Indigenous Peoples, Arts. XVIII and XIX
- Jurisprudence of IACtHR- use of hard and soft law to link ACHR individual rights (e.g., non-discrimination, education, basic services, property, cultural identity) to protect collective well-being of Indigenous Peoples in their environments; doctrine of inherent right to property, common property to protect land and resources for future generations, recognition of biocentric role of property, *Mayagna (Sumo) Awas Tingni v. Nicaragua* (2001)

Legal authority aligning the right to a healthy environment and the right to sustainable development

- Sustainable Development Agenda, 2015 GA Res. 70/1, 2030 Sustainable Development Goals (SDGs 1-3, 6, 12-15)
- Harmony with Nature, 2018 GA Res. 73/235 (economic, social, environmental dimensions integrated)
- *Buen Vivir* amendments to constitutions of Ecuador, Bolivia
- Rights of Nature, rights of ecosystems- metropolitan law developments since 2006, in 35 countries, to confer legal human person status on other beings, such as rivers, lakes, plants, forests, areas threatened by mining. White Paper, *Rights of Nature*, for COP 28, 2023

Advisory opinions of international courts to clarify the right to a healthy environment and state duties

- IACtHR Advisory Opinion OC-23/17 (2017)- first recognition of human right to a healthy environment, recognized procedural rights, connection between climate emergency and right to healthy environment, obligations on all states
- Pending requests: 1) submitted by small island states to ITLOS (Dec. 2022), on climate change and law of the sea; 2) submitted by Chile and Colombia to IACtHR (Jan. 2023) on scope of state obligations for response to climate emergency under human rights law (ACHR, ADRIP, Escazú); 3) submitted by GA to ICJ (March 2023) on states' obligations concerning climate change

Creative legal strategies to address climate disruption and other environmental crises- 1

- Hearing before IACHR seeking recognition of the forced displacement of people as a consequence of climate disruption and guidance on rights of internal and external migrants (Feb. 2024), to address criminalization and *réfoulement* of migrants by states
- Drafting of Antarctica Declaration (Nov. 2023) to strengthen and expand the 1959 Antarctic Treaty, aligning human rights with rights of natural beings (non-human kin), linking human rights with health of Earth Community. Complementary legal regimes. Invokes principles of harmonious coexistence, prevention, precaution, interdependency, prohibition of military activities, prohibition of resource exploitation and ownership.

Creative legal strategies to address climate disruption and other environmental crises- 2

- Involvement of scientists, environmental policy experts and human rights experts in drafting Universal Declaration on the Rights of Wetlands. Purpose to expand the 2018 Ramsar Convention on Wetlands which has not been successful in saving wetlands. A paradigm shift, using the UDHR, to include universal rights for nature, expanding human rights to other beings.
- Includes 8 rights: to exist; to ecologically determined location in the landscape; to natural, connected, sustainable hydrological regimes; to ecologically sustainable climatic conditions; to have naturally occurring biodiversity; to integrity of structure, function and to fulfill ecological role; to freedom from pollution and degradation; and the right to regeneration and restoration.

Human rights analysis- the rights to health and to a healthy environment- 1

- Analysis of collective right involves similar elements as for individual rights, e.g., universality, non-discrimination, equity.
- Example: the right to *health care* requires 1) universal access, 2) no cost barriers to use (free at point of access, fair financing through progressive tax), 3) comprehensive goods, services, 4) available infrastructure, 5) equity (address greater need, history of social deprivation); 6) no discrimination based on status, e.g., race, gender for procedural and substantive equality, 7) highest attainable quality standard to achieve physical and mental health, 8) civil rights to receive information, participate in decisions, etc., access to legal remedies when system fails.

Human rights analysis- the rights to health and to a healthy environment- 2

- Common elements: universality- pertains to each human regardless of identity, status; access- requires governmental action eliminating barriers, economic and social; equity means that those in greater need can have more or different (but fair) goods, services, treatment; equality- requires a common standard of the highest attainable physical and mental health; related civil rights- respect, protection and fulfillment of expression, association, assembly; access to justice/remedies.
- Estimated (2023) 7 million people will die *p.a.* from illness caused by air pollution, the highest single health impact. What implications for human rights to health and a healthy environment?

Principles of international environmental law governing state obligations relating to the right to a healthy environment

- Cooperation (UN Charter, Arts. 1, 55-56)
- Prevention of environmental harm
- Precaution (adopting measures despite lack of complete information in order to avoid danger)
- Polluter pays
- Using best available scientific knowledge
- Non-retrogression (treaty obligations and commitments)
- Equality and non-discrimination
- Intergenerational equity
- Differentiated obligations (North/South, DC/LDC, equity applied to duties)

Framework principles on human rights and the environment-obligations of states- 1

- Guidance proposed by Special Rapporteur, A/HRC/37/59 (2018), accepted by UNHRC Res. 37/8, referenced in GA Res. on human right to a clean, healthy, sustainable environment
- FP 1 & 2- ensure healthy environment to respect, protect and fulfill human rights; respect, protect, fulfill human rights in order to ensure healthy environment (interdependence)
- FP 3 & 4- prohibit direct and indirect discrimination, ensure equal effective protection against discrimination in relation to a healthy environment; provide enabling, safe environment for individuals, groups who are human rights defenders

Framework principles on human rights and the environment- obligations of states- 2

- FP 5- free expression, association, assembly in relation to environmental matters
- FP 6 & 7- education, communication on environmental matters, collection of information to facilitate protective measures, affordable, timely access to environmental information
- FP 8- environmental impact assessments, including human rights effects of projects and policies
- FP 9- early public participation in decision-making, including marginalized, justification for decisions, considered and public decisions

Framework principles on human rights and the environment- obligations of states- 3

- FP 10 & 12- provide effective remedies for violations of human rights and domestic laws relating to environment, ensure effective enforcement against public and private actors (apply Guiding Principles on Business and Human Rights)
- FP 11- establish and maintain substantive environmental standards that are non-discriminatory, non-retrogressive, that respect, protect and fulfill human rights. Full realization by all appropriate means (=deliberate, concrete, targeted measures). Take into account best available science, use effective, proportionate measures to prevent harm (precaution).

What is missing from the framework principles and entire human rights and environment system?

- Weak and facilitating approach to privatization and acceptance of commodification of human rights throughout UN system. Tepid calls for governments to regulate private actors. Requests to business to comply voluntarily. Corporate capture+ Capitalism in new phase dominated by FIRE. (Hudson and Desai)
- International mechanisms to address human rights of migrants, people caught between states. Rework of state-based system and duties limited by relation to states.
- Evidence-based assessment of all military activities on the environment. Application of principles to assess and address military activities, especially for US.