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978-1-108-71174-6 — Environmental Rights

Edited by Stephen J. Turner , Dinah L. Shelton , Jona Razzaque , Owen McIntyre , James R. May
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ENVIRONMENTAL RIGHTS

Environmental rights, also known as the human rights or constitutional rights that are used for the protection of the environment, have proliferated over the last 45 years. However, the precise levels of protection that they represent has since been a major question associated with this phenomenon. *Environmental Rights: The Development of Standards* systematically investigates this question by analyzing the emerging standards of environmental protection that are associated with such rights and the way that those associations are becoming formalized. It covers all of the relevant human rights treaties, selected national constitutions and other developments to illustrate how environmental rights standards are emerging in this dynamic area. Bringing together an elite group of scholars, this book discusses significant new insights into the way that environmental rights are developing, the standards of protection that they confer, and the way that standards in the field of environmental rights can potentially be further developed in the future.

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Environmental Rights

THE DEVELOPMENT OF STANDARDS

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Dinah L. Shelton joined the law school at George Washington University (Washington, DC) in 2004. She is the author or editor of three prize-winning books. In 2006, she was awarded the Elizabeth Haub Prize in Environmental Law. She has served as a legal consultant to the United Nations Environment Programme, UNITAR, World Health Organization, European Union, Council of Europe, and the Organization of American States. In 2009, she became the first woman nominated by the United States to become a member of the Inter-American Commission on Human Rights. She served a four-year term, during which she went on to become President of the Commission.

Stephen J. Turner is a senior lecturer at Lincoln University (United Kingdom). He specializes in the areas of international environmental law, global environmental governance and corporate law. He has written two books that relate to rights-based approaches to global environmental governance: *A Substantive Environmental Right* (2009) and *A Global Environmental Right* (2014). He has also held academic positions at Winchester and Kingston universities. In 2003 he was awarded a PhD scholarship from London University (Queen Mary), and in 2013 was named Researcher of the Year at Kingston University (Law School).

Foreword

John H. Knox

The concept of environmental human rights is a relative latecomer to human rights law. The Universal Declaration of Human Rights does not mention the environment at all, much less include a human right to a healthy environment. After the modern environmental movement began in the late 1960s, references to environmental rights did start to appear, especially in national constitutions, but it was not until the 1990s that national and international tribunals began to seriously explore what human rights law has to say about environmental protection.

Over the past two decades, the breadth and depth of rights-based environmental law have greatly accelerated. Many more countries have amended their constitutions to include a right to a healthy environment, and national courts have applied the right to a variety of environmental challenges and forged innovative and far-reaching remedies. At the international level, however, the right to a healthy environment has still not been recognized in a global agreement. While many regional human rights treaties have incorporated environmental rights, in one form or another, only the African Charter on Human and Peoples' Rights has provided for it to be applied by an oversight mechanism. In the absence of a justiciable, globally recognized right to a healthy environment, international human rights tribunals and quasi-tribunals have brought human rights norms to bear on environmental issues by "greening" well-established human rights such as the rights to life and health. Human rights bodies have described how environmental harm interferes with the enjoyment of these and other rights, and have held that governments have obligations under human rights law to protect against such harm.

In 2012, the United Nations Human Rights Council decided to appoint an independent expert to review these developments and clarify the obligations under human rights law relating to the enjoyment of a safe, clean, healthy and sustainable environment. I had the honor to receive this mandate, and I spent the next two years issuing a series of reports reviewing the extensive jurisprudence applying human rights law to environmental issues. Regional tribunals, UN human rights treaty bodies, Special Rapporteurs and other authoritative sources had issued dozens of

opinions, statements and reports on environmental issues. Despite addressing different rights, different environmental threats and different legal sources, they had reached very similar conclusions. Moreover, governments and international organizations were engaging in a broad range of good practices in the implementation of a rights-based approach to environmental protection.

I described the human rights obligations relating to the environment in a “mapping” report to the Human Rights Council, which I presented in 2014, and the following year presented a report identifying more than one hundred good practices in the use of these obligations. At the March 2015 session of the Council, it decided to renew the mandate for another three years, change my title to Special Rapporteur and request me to promote implementation of the obligations. The Council decision was adopted by consensus, illustrating the increasing acceptance of States that the human rights obligations relating to the environment are clear enough that it is reasonable to expect States to comply with them.

One of my goals over the next three years was to provide a clear, succinct statement of the obligations. To that end, I presented the Framework Principles on Human Rights and the Environment in March 2018, in my last report to the Council. These sixteen principles, with their accompanying commentary, set out the principal human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. I used the term “framework” to emphasize that while the Principles should provide a sturdy basis for further development, they are certainly not the final word. I expect that our understanding of environmental rights will continue to grow and deepen in coming years.

The Framework Principles show both how far human rights law has come in relation to environmental protection and how far it still has to go. Many of the obligations that human rights bodies have found it easiest to apply are essentially procedural obligations, including duties of States to provide environmental information, undertake environmental assessments of proposed projects and policies and to facilitate public participation. Nor is there much dispute that States have obligations to respect and protect rights to freedom of expression, peaceful assembly and association in the environmental context, to take steps to protect those who receive threats or suffer violence or harassment because of their exercise of their rights or to provide effective remedies for violations of rights.

Other areas remain less settled. While it is inarguable that obligations of non-discrimination apply to environmental law and policy, much more needs to be done to clarify what steps States must take to protect those who are most at risk from environmental harm. Treaty bodies with jurisdiction over the rights of women and children, for example, have only recently begun to start addressing environmental issues. Even when standards are clearly defined, of course, implementation often lags far behind. The obligations of States towards indigenous peoples, for example, are set out in international instruments, but they seem to be violated on a virtually continual basis. Nevertheless, the adoption of clear standards is critically important

because they at least provide a basis for criticism, legal proceedings and even, in some cases, sanctions.

Substantive environmental standards continue to resist clear definition. While it is clear that States have obligations to take steps to protect against harmful environmental interference with human rights, international human rights bodies have generally not set specific substantive standards. Instead, they have typically applied an indeterminate list of factors, including whether the standard is nonretrogressive and whether it takes into account relevant international or domestic standards. This differential treatment of substantive versus procedural standards may, to some extent, be unavoidable. Perhaps human rights bodies are simply better suited to police compliance with procedural standards and States should receive more discretion in setting substantive standards. At the same time, some national courts are showing a greater willingness to hold governments to specific substantive as well as procedural standards.

This volume provides an invaluable contribution to the ongoing clarification of the issues surrounding rights-based environmental standards. It includes essays by an extraordinary group of scholars, who address the topic from many different angles. They provide fascinating case studies of the growth of environmental rights in many countries around the world, including Argentina, Bhutan, France, India, Portugal and South Africa. The contributions also address regional developments, including in Africa, the Americas and Europe, as well as global multilateral environmental agreements and the United Nations human rights mechanisms. They also tackle the question from different cross-cutting thematic perspectives, including by focusing on obligations owed to indigenous peoples, rights to water and sanitation and rights of nature.

The scholarly and political discussion of these issues is far from over – indeed, it may be still in its early stages – so this book will not be the final word. But it will provide lasting guidance for all of those who work for a healthy environment that can and does support the full enjoyment of our human rights.

Preface and Acknowledgements

In April 2016, Lincoln University (UK) held a one-day symposium related to the development of “standards” in the field of environmental rights. The symposium focused on the actual standards of protection associated with particular environmental rights. A number of the contributors to this volume took part, including Alexandra Aragão, Gitanjali Gill, Evadne Grant, Louis Kotzé, James May, Áine Ryall and Stephen Turner. John Knox, the Special Rapporteur for Human Rights and the Environment, gave a pre-recorded video message for the delegates and Silvia Nonna delivered a keynote address.

The conceptual basis for the symposium had in part been prompted by some of the debates that took place at a conference held at Yale University in September 2014. That conference, the Yale/UNITAR Conference on Human Rights, Environmental Sustainability, Post-2015 Development, and the Future of Climate Change, involved many discussions, but some of them centered on the “vagueness” of the content of many environmental rights and the effect that such a lack of clarity can have. Later in 2015, Stephen Turner visited Buenos Aires University, which resulted in a discussion with Silvia Nonna related to standards in the Argentine constitution. This led to Silvia Nonna visiting Lincoln University to speak on the subject the following April, and this provided a good opportunity to hold a symposium at which experts could consider the way that standards are evolving within the field of environmental rights.

The symposium itself started the process of unpacking and analyzing the different types of standards emerging within the field of environmental rights. It resulted in a consensus from those attending that the subject deserved more detailed attention, and it was suggested that the group continue to work together with a view to developing a body of knowledge and analysis relating to the subject.

Following this, other leading academics in the field agreed to lend their skills, knowledge and experience to what loosely became known as the “Standards in Environmental Rights Project.” Therefore, at that juncture we welcomed Dinah Shelton, Linda Sheehan, Jona Razzaque, Anél du Plessis, Lara Ognibene, Karen

Morrow, Owen McIntyre, David Marrani, Craig Kauffman, Angela Kariuki, Erin Daly and Sumudu Atapattu. While this group are diverse in viewpoints, backgrounds and areas of expertise, they share an interest in furthering the understanding and development of the field. It was the combined efforts of all of the above-named academics that has led to this book coming to fruition.

A debt of gratitude is owed to numerous organizations and individuals for their support during different stages of this project.

Wilkin Chapman Solicitors LLP generously sponsored the symposium in April 2016, we therefore wish to thank them, and in particular Ruth Brewin, Peter Hanson and Alison Mitchell.

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Thanks are also due to Santander plc for the travel bursary for Stephen Turner's visit to Buenos Aires mentioned above.

We wish to thank John Knox in his role as the United Nations Special Rapporteur for Human Rights and the Environment. We thank him for his leadership, encouragement and advice, and for writing the Foreword for this book.

There are other colleagues that either supported or took part in the original symposium in April 2016 whom we wish to thank. These are Duncan French, Matthew Hall, Sam Adelman, Ole Pedersen and also Ben Standing of Browne Jacobson LLP.

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Finally, we thank our families and friends for all of their love, kindness and support.

Stephen Turner
Dinah Shelton
Jona Razzaque
Owen McIntyre
James May
August 2018

Abbreviations

ACHR	1969 American Convention on Human Rights
ACHPR	1981 African Charter on Human Rights and Peoples Rights
ACommHPR	African Commission on Human and People's Rights
ACUMAR	Matanza-Riachuelo Basin Authority
ANC	African National Congress
AQI	Air Quality Initiative
AU	African Union
BAT	Best Available Technology
BIS	Bureau of Indian Standards
BPJ	Best Professional Judgement
CAG	Comptroller and Auditor General
CBD	1992 Convention on Biological Diversity
CEDAW	1979 Convention on the Elimination of All Forms of Discrimination against Women
CERD	Committee for the Elimination of Racial Discrimination
CESCR	United Nations Committee on Economic Social and Cultural Rights
CESR	Centre for Economic and Social Rights
CJEU	Court of Justice of the European Union
COFEMA	Federal Council of Environment
CPCB	Central Pollution Control Board
CMA	Catchment Management Agencies
CRC	1989 Convention on the Rights of the Child
DWA	Department of Water Affairs
DWAF	Department of Water Affairs and Forestry
EBRD	European Bank for Reconstruction and Development
ECHR	1950 European Convention on Human Rights

ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
ENGO	Environmental Non-Governmental Organization
EPA	Environmental Protection Agency
ESIA	Environmental and Social Impact Assessment
EU	European Union
FAO	United Nations Food and Agriculture Organisation
FCPF	The Forest Carbon Partnership Facility
FMU	Forest Management Unit
FNCA	1995 Forest and Nature Conservation Act
FPIC	Free Prior and Informed Consent
GDP	Gross Domestic Product
GIS	Geographic Information System
GNP	Gross National Product
GNH	Gross National Happiness
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank for Reconstruction and Development
ICCPR	1966 International Covenant on Civil and Political Rights
ICESCR	1966 International Covenant on Economic Social and Cultural Rights
ICJ	International Court of Justice
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
IFI	International Financial Institution
IHP	International Hydrological Programme
ILA	International Law Association
ILO	International Labour Organization
IPPC	Integrated Pollution Prevention and Control
ISO	International Organization for Standardization
MDB	Multilateral Development Bank
MEA	Multilateral Environmental Agreement
MHI	Median Household Income
MOEFCC	Ministry of Environment, Forest and Climate Change
MOP	Meeting of the Parties
NAP	National Action Programme
NAPA	National Academy of Public Administration
NAP	National Action Plan

List of Abbreviations

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NEMA	1998 National Environmental Management Act
NFP	National Forest Policy
NGO	Non-Governmental Organization
NGT	National Green Tribunal
NNPC	Nigerian National Petroleum Company
NWA	1998 National Water Act
OAS	The Organization of American States
PEDF	Pennsylvania Environmental Defense Foundation
PCB	Polychlorinated Biphenyl
PIC	Prior Informed Consent
PIL	Public Interest Litigation
PNI	Projects of National Interest
P&CGC	Peer and Core Group Committee
REDD+	Reducing Emissions from Deforestation and Forest Degradation
RGOB	Royal Government of Bhutan
SAARC	South Asian Association for Regional Cooperation
SERAC	Social and Economic Rights Action Center
SDG	Sustainable Development Goals
SPCB	State Pollution Control Boards
SRO	Sustainability Rights Ordinance
TFEU	2007 Treaty on the Functioning of the European Union
UDHR	1948 Universal Declaration of Human Rights
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCCD	1994 United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa
UNCHE	United Nations Conference on Human Rights and the Environment
UNCLOS	1982 United Nations Convention on the Law of the Sea
UNDP	United Nations Development Programme
UNDRIP	2007 United Nations Declaration on the Rights of Indigenous Peoples
UNECE	United Nations Economic Commission for Europe
UNEP	United Nations Environment Programme
UNESCO	The United Nations Educational, Scientific and Cultural Organization
UNFCCC	1992 United Nations Framework Convention on Climate Change
UNGA	General Assembly of the United Nations
UNICEF	The United Nations International Children's Emergency Fund

USEPA	United States Environmental Protection Agency
VAT	Value Added Tax
WHO	World Health Organization
WINS	Water Information Network System
WMA	Water Management Area
WSA	1997 Water Services Act
WWF	World Wide Fund for Nature

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