Human Rights and the Environment
Carolina Academic Press
Law Casebook Series
Advisory Board

Gary J. Simson, Chairman
Dean, Case Western Reserve University School of Law

Raj Bhala
University of Kansas School of Law

John C. Coffee, Jr.
Columbia University Law School

Randall Coyne
University of Oklahoma College of Law

Paul Finkelman
Albany Law School

Robert M. Jarvis
Shepard Broad Law Center
Nova Southeastern University

Vincent R. Johnson
St. Mary's University School of Law

Michael A. Olivas
University of Houston Law Center

Kenneth L. Port
William Mitchell College of Law

H. Jefferson Powell
Duke University School of Law

Michael P. Scharf
Case Western Reserve University School of Law

Peter M. Shane
Michael E. Moritz College of Law
The Ohio State University

Emily L. Sherwin
Cornell Law School

John F. Sutton, Jr.
Emeritus, University of Texas School of Law

David B. Wexler
John E. Rogers College of Law, University of Arizona
University of Puerto Rico School of Law
Human Rights and the Environment

Cases, Law, and Policy

Svitlana Kravchenko
Professor of Law
LL.M. Program Director
University of Oregon School of Law

John E. Bonine
Professor of Law
University of Oregon School of Law

Carolina Academic Press
Durham, North Carolina
To all our parents,
to daughter Maria,
and to our professional families
at ELAW and EPL.
Summary of Contents

Preface xxi

Acknowledgments xxv

Chapter 1 · Why Human Rights and the Environment? 3
  I. Environmental Human Rights 3
  II. Linkages between Human Rights and the Environment 12
  III. Human Rights Instruments and Institutions 20

Chapter 2 · Substantive Environment Rights in International Law 23
  Introduction 23
  I. Environmental Rights under the European Convention 23
     A. European Convention on Human Rights 24
     B. Right to Private and Family Life 26
        1. Origin of the Article 8 Right 26
        2. Weakening of Article 8? 37
        3. Reestablishing Rights, Providing Remedies, Enforcing Precedents 43
     C. Right to Life 48
  II. Environmental Rights under the African Charter 52
     A. African Charter on Human and Peoples’ Rights 52
     B. Finding an Environmental Right 55
  III. Environmental Rights under the American Declaration and Convention 60
     A. American Declaration of the Rights and Duties of Man 60
     B. American Convention on Human Rights 62
     C. San Salvador Protocol 63

Chapter 3 · Substantive Environment Rights in National Law 67
  Introduction 67
  I. Substantive Rights in National or State Constitutions 68
  II. Challenging Government Action and Inaction 72
     A. Overturning Legislation 73
     B. Overturning Executive Action 79
     C. Requiring Affirmative Government Programs 93
  III. Challenging Actions by Private Parties 100
     A. Enforcement against Private Actors by Attorneys General 100
     B. Enforcement by Citizens against Private Defendants 105
  IV. Evaluating the Role of the Courts 110
<table>
<thead>
<tr>
<th>Chapter 4 · Right to Water</th>
<th>113</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>113</td>
</tr>
<tr>
<td>I. Right to Water in International and Regional Instruments</td>
<td>114</td>
</tr>
<tr>
<td>A. Soft and Hard Law Sources</td>
<td>114</td>
</tr>
<tr>
<td>B. General Comment 15: Private or Public Good?</td>
<td>119</td>
</tr>
<tr>
<td>II. Right to Water in National Instruments</td>
<td>129</td>
</tr>
<tr>
<td>A. Examples of the Right to Water at a National Level</td>
<td>129</td>
</tr>
<tr>
<td>B. Quantity, Affordability, and Procedure: Implementing South Africa’s Constitution</td>
<td>134</td>
</tr>
<tr>
<td>C. Quality: Interpreting India’s Constitution</td>
<td>139</td>
</tr>
</tbody>
</table>

| Chapter 5 · Indigenous Rights and Environment | 147 |
| Introduction | 147 |
| I. United Nations Instruments and Institutions | 149 |
| A. International Covenant on Civil and Political Rights | 149 |
| B. Declaration on the Rights of Indigenous Peoples | 157 |
| C. ILO Convention No. 169 on Indigenous and Tribal Peoples | 160 |
| 1. Text of Convention | 161 |
| 2. International Remedies | 164 |
| 3. National Remedies | 168 |
| D. Convention on Biological Diversity | 170 |
| II. Regional Human Rights Instruments and Institutions | 171 |
| A. American Convention on Human Rights | 172 |
| B. African Charter on Human and Peoples’ Rights | 188 |
| C. European Convention on Human Rights | 191 |
| III. National Jurisprudence and Legal Systems | 193 |
| A. Indigenous Property Rights under National Jurisprudence | 193 |
| B. U.S. Courts, Indian Treaties, and the Environment | 202 |
| 1. The Right to Fish, and the Right to Insist on the Survival of Fish | 202 |
| 2. The Tribes’ Environmental Right: The “Culverts Case” | 210 |

| Chapter 6 · Right to Information | 219 |
| Introduction | 219 |
| I. The Right to Request Information | 221 |
| A. Europe, Caucasus, Central Asia — International Rights | 221 |
| B. Latin America — Statutory and International Rights | 233 |
| C. Asia — Constitutional and Statutory Rights | 244 |
| D. United States — Statutory Rights | 249 |
| II. The Right to Insist on Dissemination of Information | 251 |

| Chapter 7 · Public Participation | 259 |
| Introduction | 259 |
| I. Public Participation as a Right | 260 |
| II. Public Participation: Europe, Caucasus, Central Asia | 265 |
| A. The Ladder of Public Participation | 265 |
| B. Participation for Specific Projects | 267 |
| C. Participation in Plans, Programs, Policies and Executive Regulations | 275 |
| 1. Aarhus Convention | 275 |
| 2. Strategic Environmental Assessment | 285 |
SUMMARY OF CONTENTS

III. Public Participation in Other Regions 287
   A. Latin America 287
   B. Africa 293
   C. Asia and Pacific 300
   D. United States 306
      1. Participation for Specific Projects: EISs and EAs 306
      2. Executive Regulations and Public Participation Rights 309

Chapter 8 · Access to Justice: Compliance, Enforcement, and Remedies 311
   Introduction 311
   I. Regional Courts and Tribunals 311
   II. Committees and Mechanisms 312
      A. U.N. Human Rights Committee 312
      B. Compliance Committees 313
   III. National Courts 316
      A. Standing to Sue 316
      1. Standing in Various Jurisdictions 316
      2. New International Law on National Standing 340
      B. Financial Barriers to Access to Justice 356

Chapter 9 · Corporate Accountability 367
   Introduction 367
   I. International Standards, Liability, and Aspirations 367
      A. From Soft Law to Norms? 367
      B. Analysis 374
   II. Litigating in National Courts for Harms Abroad 380
      A. Corporate Liability for Crimes Abroad 380
      B. Corporate Liability for Torts Abroad 382
         1. Enforcing the Law of Nations in U.S. Courts 382
         2. Do Environmental Abuses Violate the “Law of Nations”? 398
      C. The Issue of Forum non Conveniens 410
      D. Ordinary Tort Liability in an Age of Forum non Conveniens 421
         1. Litigating Multinational Liability in the Country of Damage 421
         2. Anti-Forum non Conveniens Legislation 425
         3. The U.S. DBCP Litigation 437

Chapter 10 · Human Rights and International Financial Institutions 445
   Introduction 445
   I. Multilateral Development Banks 445
      A. History of MDBs 445
      B. Critiques of MDBs 446
      C. Information and Participation Rights in MDB Projects 453
   II. The World Bank Inspection Panel 457
      A. Overview 457
      B. Recourse and Remedies 459
      C. The Chad-Cameroon Pipeline 461
   III. IFC/MIGA Compliance Advisor and Ombudsman 475

Chapter 11 · Protecting Environmental Advocates and Defenders 483
   Introduction 483
SUMMARY OF CONTENTS

I. International Protections for Defenders 484
   A. The United Nations Declaration and Special Representative 484
   B. European Union Guidelines 489
II. Criminal Charges against Advocates 492
   A. Treason and Disclosure of Official Secrets 492
   B. Sedition 496
   C. Insult and Defamation 500
      1. Insult 500
      2. Defamation 504
III. Civil Charges and Remedies—SLAPPs 508
   A. Introduction to SLAPPs 508
   B. Legal Claims Against Appeals and Litigation 510
   C. Demonstrations and Economic Boycotts 513
   D. Campaigns, Criticisms, Defamation 521
      1. European and Inter-American Courts of Human Rights 521
      2. Australia 522
   E. Judicial Remedies in the U.S. and Europe 527
      1. U.S. “SLAPPback” 527
      2. Fair Trial and Disproportionate Damages 529
   F. Legislative Remedies in the U.S. and Australia 537
      1. Anti-SLAPP Legislation 537
      2. Changes in Australian Legislation 540

Chapter 12 · Human Rights and Climate Change 549
Introduction 549
I. Climate Change, Its Effects, and International Obligations 550
II. Human Rights Litigation and Climate Change 554
   A. Litigation Theories 554
   B. Litigation in International Human Rights Bodies—The Inuit Petition 557
      1. Background 557
      2. Does Climate Change Violate Recognized Human Rights Law? 560
      3. The Next Step? 572
   C. International Court of Justice 573
   D. Substantive Rights in National Courts 575
   E. Procedural Rights in International and National Fora 583
      1. Access to Information 584
      2. Public Participation 585

Table of Authorities 597

Index 627
Contents

Preface xxi
Acknowledgments xxv

Chapter 1 · Why Human Rights and the Environment?
I. Environmental Human Rights 3
   Günther Handl, Human Rights and the Protection of the Environment 6
   Michael R. Anderson, Human Rights Approaches to Environmental Protection: An Overview 10
   Dinah Shelton, Environmental Rights 11
II. Linkages between Human Rights and the Environment 12
   Draft Principles on Human Rights and the Environment 13
   Meeting of Experts on Human Rights and the Environment 16
III. Human Rights Instruments and Institutions 20

Chapter 2 · Substantive Environment Rights in International Law 23
Introduction 23
I. Environmental Rights under the European Convention 23
   A. European Convention on Human Rights 24
      Convention for the Protection of Human Rights and Fundamental Freedoms 24
   B. Right to Private and Family Life 26
      1. Origin of the Article 8 Right 26
      López Ostra v. Spain 26
      Guerra v. Italy 31
      Mariana T. Acevedo, The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights 35
      2. Weakening of Article 8? 37
      Hatton v. United Kingdom 37
      David Hart QC, Comment 41
      3. Reestablishing Rights, Providing Remedies, Enforcing Precedents 43
      Fadeyeva v. Russia 43
   C. Right to Life 48
      Öneriylidiz v. Turkey 49
II. Environmental Rights under the African Charter 52
   A. African Charter on Human and Peoples’ Rights 52
      African Charter on Human and Peoples’ Rights 53
   B. Finding an Environmental Right 55
      Social and Economic Rights Action Center v. Nigeria 55
III. Environmental Rights under the American Declaration and Convention 60
   A. American Declaration of the Rights and Duties of Man 60
      American Declaration of the Rights and Duties of Man 60
      Resolution 12/85 [Yanomami Case] 61
   B. American Convention on Human Rights 62
      American Convention on Human Rights 62
   C. San Salvador Protocol 63
      Additional Protocol to the American Convention on Human Rights
      in the Area of Economic, Social and Cultural Rights 63
      Jorge Daniel Taillant, Environmental Advocacy and the Inter-American
      Human Rights System 63

Chapter 3 · Substantive Environment Rights in National Law 67

I. Substantive Rights in National or State Constitutions 68
   Barry E. Hill, Steve Wolfson, & Nicholas Targ, Human Rights
   and the Environment: A Synopsis and Some Predictions 68

II. Challenging Government Action and Inaction 72
   A. Overturning Legislation 73
      Montana Environmental Information Center v. Dep’t of Environmental Quality (USA) 73
   B. Overturning Executive Action 79
      Oposa v. Factoran (Philippines) 79
      Shehla Zia v. WAPDA (Pakistan) 87
      Senih Özay v. Ministry of the Environment and Eurogold Madencilik (Turkey) 90
   C. Requiring Affirmative Government Programs 93
      M. C. Mehta v. Union of India (India) 94
      Dhungel v. Godawari Marble Industries (Nepal) 96

III. Challenging Actions by Private Parties 100
   A. Enforcement against Private Actors by Attorneys General 100
      Pennsylvania v. National Gettysburg Battlefield Tower (USA) 100
   B. Enforcement by Citizens against Private Defendants 105
      Pedro Flores v. Corporación del Cobre-División Salvador (Chile) 105

IV. Evaluating the Role of the Courts 110
   Dr. Parvez Hassan & Azim Azfar, Securing Environmental Rights
   through Public Interest Litigation in South Asia 110
   Shubhankar Dam & Vivek Tewary, Is a “Polluted” Constitution
   Worse Than a Polluted Environment? 110

Chapter 4 · Right to Water 113

I. A Right to Water in International and Regional Instruments 114
   A. Soft and Hard Law Sources 114
   B. General Comment 15: Private or Public Good? 119
      Stephen C. McCaffrey, The Human Right to Water 119
      James Salzman, Thirst: A Short History of Drinking Water 123
II. A Right to Water in National Instruments 129
   A. Examples of the Right to Water at a National Level 129
      Erik B. Bluemel, The Implications of Formulating a
      Human Right to Water 129
   B. Quantity, Affordability, and Procedure: 134
      Implementing South Africa’s Constitution 134
      Residents of Bon Vista Mansions v.
      So. Metropolitan Local Council (South Africa) 134
   C. Quality: Interpreting India’s Constitution 139
      AP Pollution Control Board-II v. Prof. MV Nayudu (Retd) (India) 139
      Shajimon Joseph v. State of Kerala (India) 142

Chapter 5 · Indigenous Rights and Environment 147
   Introduction 147
   I. United Nations Instruments and Institutions 149
      A. International Covenant on Civil and Political Rights 149
         International Covenant on Civil and Political Rights 149
         Bernard Ominayak and the Lubicon Lake Band v. Canada 149
         Länsman v. Finland (I) 154
      B. Declaration on the Rights of Indigenous Peoples 157
         Declaration on the Rights of Indigenous Peoples 157
      C. ILO Convention No. 169 on Indigenous and Tribal Peoples 160
         1. Text of Convention 161
            Convention (No. 169) Concerning Indigenous and
            Tribal Peoples in Independent Countries 161
         2. International Remedies 164
            Linda A. Malone & Scott Pasternack , Defending the Environment:
            Civil Society Strategies to Enforce International Environmental
            Law (2006) 164
            The Ecuador Oil Consultation 166
            3. National Remedies 168
               Unconstitutionality of the General Forestry Act (Colombia) 168
      D. Convention on Biological Diversity 170
         Convention on Biological Diversity 170
   II. Regional Human Rights Instruments and Institutions 171
      A. American Convention on Human Rights 172
         Peter McManus, Sovereignty, Self-Determination, and
         Environment-Based Cultures: The Emerging Voice of
         Indigenous Peoples in International Law 172
         American Convention on Human Rights 172
         Mayagna (Sumo) Awas Tingni Community v. Nicaragua 174
         Moiwana Community v. Suriname (I) 180
         Moiwana Community v. Suriname (II) 181
         Saramaka People v. Suriname 186
      B. African Charter on Human and Peoples’ Rights 188
         African Charter on Human and Peoples’ Rights 188
         Social and Economic Rights Action Center v. Nigeria 189
      C. European Convention on Human Rights 191
         Rainer Grote, On the Fringes of Europe: Europe’s Largely
         Forgotten Indigenous Peoples 191
CONTENTS

III. National Jurisprudence and Legal Systems 193
   A. Indigenous Property Rights under National Jurisprudence 193
      Aurelio Cal v. Atty. Gen. of Belize 193
      Haida Nation v. British Columbia (Minister of Forests) (Canada) 201
   B. U.S. Courts, Indian Treaties, and the Environment 202
      1. The Right to Fish, and the Right to Insist on the Survival of Fish 202
         Treaty with the Nisqualli, Puyallup, etc. 202
            a. U.S. v. Washington, Phase I (Fair Share, 1970s) 203
            b. U.S. v. Washington, Phase II (False Start at Conservation, 1980s) 204
         Lewis Kamb, Boldt Decision 'Very Much Alive' 30 Years Later 205
      2. The Tribes' Environmental Right: The "Culverts Case" 210
         U.S. v. Washington (Phase II, Culverts) 210

Chapter 6 · Right to Information 219
   Introduction 219
      I. The Right to Request Information 221
         A. Europe, Caucasus, Central Asia—International Rights 221
            Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) 221
            Svitlana Kravchenko, The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements 227
            Findings and Recommendations with Regard to Compliance by Kazakhstan 228
         B. Latin America—Statutory and International Rights 233
            Eric Heyer, Latin American State Secrecy and Mexico's Transparency Law 233
            Claude Reyes v. Chile 239
         C. Asia—Constitutional and Statutory Rights 244
            Forests Survey Inspection Request Case (Korea) 244
            The Right to Information Act, 2005 (India) 249
         D. United States—Statutory Rights 249
            David Banisar, Freedom of Information Around the World 2006 249
      II. The Right to Insist on Dissemination of Information 251
         Guerra v. Italy 251

Chapter 7 · Public Participation 259
   Introduction 259
      I. Public Participation as a Right 260
CONTENTS


John E. Bonine, *The Construction of Participatory Democracy in Central and Eastern Europe* 262

*International Norms for Public Participation* 263

II. Public Participation: Europe, Caucasus, Central Asia 265
   A. The Ladder of Public Participation 265
   B. Participation for Specific Projects 267
      Jurisprudence of the Aarhus Compliance Committee 270
      Findings and Recommendations with Regard to Compliance by Ukraine 270
   C. Participation in Plans, Programs, Policies and Executive Regulations 275
      1. Aarhus Convention 275
      Findings and Recommendations with Regard to Compliance by Albania 278
      2. Strategic Environmental Assessment 285
         Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Context 286

III. Public Participation in Other Regions 287
   A. Latin America 287
      Jorge Caillaux, Manuel Ruiz, & Isabel Lapeña, *Environmental Public Participation in the Americas* 288
   B. Africa 293
      Collins Odote & Maurice O. Makoloo, *African Initiatives for Public Participation in Environmental Management* 293
      *Earthlife Africa (Cape Town) v. Dept. of Envt'l Affairs & Tourism & Eskom Holdings (South Africa)* 297
   C. Asia and Pacific 300
      Roda Mushkat, *The Principle of Public Participation: An Asia-Pacific Perspective* 300
      *Note on Thailand's 1997 Constitution* 303
      *Policy Responses—Asia and Pacific* 304
   D. United States 306
      1. Participation for Specific Projects: EISs and EAs 306
         *National Environmental Policy Act of 1969* 306
         *Regulations for Implementing NEPA* 307
      2. Executive Regulations and Public Participation Rights 309
         *Administrative Procedure Act* 310
Chapter 8 · Access to Justice: Compliance, Enforcement, and Remedies

Introduction

I. Regional Courts and Tribunals

II. Committees and Mechanisms

A. U.N. Human Rights Committee

B. Compliance Committees

Svitlana Kravchenko, *The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements*

III. National Courts

A. Standing to Sue

1. Standing in Various Jurisdictions

2. New International Law on National Standing

Hon Justice Peter McClellan, *Access to Justice in Environmental Law: An Australian Perspective*

Kellas v. Department of Corrections (USA)


B. Financial Barriers to Access to Justice


John E. Bonine, *Removing Barriers and Providing Incentives for Citizen Enforcement of Environmental Laws*

Access to Justice as a Guarantee of Economic, Social, and Cultural Rights

Steel & Morris v. United Kingdom: Legal Aid in the European Court of Human Rights

Chapter 9 · Corporate Accountability

Introduction

I. International Standards, Liability, and Aspirations

A. From Soft Law to Norms?

Olivier de Schutter, *Challenge of Imposing Human Rights Norms on Corporate Actors*

U.N. Global Compact

OECD Guidelines For Multinational Enterprises

ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy
(Draft) Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights

B. Analysis

John Ruggie, Mapping International Standards of Responsibility and Accountability for Corporate Acts

II. Litigating in National Courts for Harms Abroad

A. Corporate Liability for Crimes Abroad

John Ruggie, Mapping International Standards of Responsibility and Accountability for Corporate Acts

B. Corporate Liability for Torts Abroad

1. Enforcing the Law of Nations in U.S. Courts

Harold Hongji Koh, Transnational Public Law Litigation

Sosa v. Alvarez-Machain

Doe I v. Unocal

2. Do Environmental Abuses Violate the “Law of Nations”? R

Richard L. Herz, Litigating Environmental Abuses under the Alien Tort Claims Act: A Practical Assessment

Beanal v. Freeport-McMoran

Flores v. Southern Peru Copper

Sarei v. Rio Tinto

Sarei v. Rio Tinto

C. The Issue of Forum non Conveniens

Judith Kimerling, Transnational Operations, Bi-National Injustice — ChevronTexaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador

Aguinda v. Texaco

Englebert Ngcobo v. Thor Chemicals (United Kingdom)

D. Ordinary Tort Liability in an Age of Forum non Conveniens

1. Litigating Multinational Liability in the Country of Damage

William Langewiesche, Jungle Law

2. Anti-Forum non Conveniens Legislation

Winston Anderson, Forum Non Conveniens Checkmated? — The Emergence of Retaliatory Legislation

Henry Saint Dahl, Forum Non Conveniens, Latin America and Blocking Statutes

E.E. Daschbach, Where There’s a Will, There’s a Way

Law No. 364 Nicaragua

Consultation on Law 364 (Nicaragua)

2007 National Trade Estimate Report on Foreign Trade Barriers

3. The U.S. DBCP Litigation

Dow v. Calderon

Tellez v. Dole

Noaki Schwartz, $2.5 Million in Punitive Damages Awarded to Banana Workers

Chapter 10 · Human Rights and International Financial Institutions

Introduction

I. Multilateral Development Banks

A. History of MDBs
## CONTENTS

### B. Critiques of MDBs

John W. Head, *For Richer or for Poorer: Assessing the Criticisms Directed at the Multilateral Development Banks*  
446

### C. Information and Participation Rights in MDB Projects

Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks*  
453

### II. The World Bank Inspection Panel

#### A. Overview

Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks*  
457

#### B. Recourse and Remedies

Dana L. Clark, *The World Bank and Human Rights: The Need for Greater Accountability*  
459

#### C. The Chad-Cameroon Pipeline

461

Genoveva Hernández Uriz, *To Lend or Not to Lend: Oil, Human Rights, and the World Bank’s Internal Contradictions*  
463

Ngarlejy Yorongar, *Request for Investigations by the World Bank Inspection Panel*  
465

**World Bank, Chad-Cameroon Petroleum and Pipeline Project**  
468

### III. IFC/MIGA Compliance Advisor and Ombudsman

Nathalie Bernasconi-Osterwalder & David Hunter, *Democratizing Multilateral Development Banks*  
475

LEAT, *Bulyanhulu Complaint to IFC/MIGA Compliance Advisor/Ombudsman*  
477

**CAO, MIGA’s Guarantee of the Bulyanhulu Gold Mine, Tanzania**  
479

**The Yanacocha Mine, Peru**  
481

### Chapter 11 · Protecting Environmental Advocates and Defenders

#### Introduction

483

#### I. International Protections for Defenders

A. The United Nations Declaration and Special Representative  
484

Hina Jilani, *Report of the Special Representative of the Secretary-General on Human Rights Defenders*  
487

B. European Union Guidelines  
489

*Ensuring Protection—European Union Guidelines on Human Rights Defenders*  
489

#### II. Criminal Charges against Advocates

A. Treason and Disclosure of Official Secrets  
492

*Nikitin v. Russia*  
492

B. Sedition  
496

*Tundu Lissu, View from the Accused*  
497

*Alloyce Komba, Environment Lawyer in Court*  
498

C. Insult and Defamation  
500

1. Insult  
500

*Dr. R. Panji Utomo, Petitioner (Indonesia)*  
500

*Marilyn J. Greene, It’s a Crime: How Insult Laws Stifle Press Freedom*  
504
Chapter 12 · Human Rights and Climate Change

Introduction

I. Climate Change, Its Effects, and International Obligations

A. Litigation Theories

Sara C. Aminzadeh, *A Moral Imperative: The Human Rights Implications of Climate Change*

B. Litigation in International Human Rights Bodies—The Inuit Petition

1. Background

Donald M. Goldberg & Martin Wagner, *Petitioning for Adverse Impacts of Global Warming in the Inter-American Human Rights System*

2. Does Climate Change Violate Recognized Human Rights Law?

Sheila Watt-Cloutier, *Petition to the Inter-American Commission on Human Rights*

3. The Next Step?

C. International Court of Justice

Rebecca Elizabeth Jacobs, *Treading Deep Waters*
CONTENTS

D. Substantive Rights in National Courts 575
  Jonah Gbemre v. Shell Petroleum (Nigeria) 575
  Eric A. Posner, Climate Change and International Human Rights Litigation: A Critical Appraisal 581
E. Procedural Rights in International and National Fora 583
  U.N. Framework Convention on Climate Change 584
  1. Access to Information 584
  2. Public Participation 585
  Gray v. Minister for Planning (Australia) 585

Table of Authorities 597

Index 627
Preface

Courts, legislatures, and experts increasingly recognize environmental rights—both substantive and procedural—as enforceable human rights. Environmental law can no longer be viewed only as something for legislatures to consider as a matter of policy choices. It is time for new thinking and new teaching. It is time also to view this developing field not as one exclusively of international law, nor national law, nor comparative law. All three are important.

A new casebook

This new casebook provides, for the first time, primary case law and other legal materials edited for study in classes and seminars on the protection of environmental rights. We include international and national court cases from Europe, Africa, Asia, and the Americas that interpret treaties, constitutions, and human rights legislation in light of environmental imperatives. We seek to prepare students to think creatively about human rights instruments when asked by clients to evaluate or take action regarding an environmental problem. In this book, we also ask them to consider the development of the law in countries and cultures other than their own, in hopes that they may gain useful insights.

There is no reason to be coy about our own beliefs. We believe that a human rights approach to environmental protection brings advantages to both fields. Robust and established human rights instruments can help protect the environment. In a clean and safe environment, human rights can be fully enjoyed and realized. We also believe in environmental democracy and the increasing role of non-state actors in international environmental and human rights law. At the same time, in this book we offer materials and ask questions that challenge these and other points of view and encourage students to reach their own conclusions.

Two converging fields of law

The notion that environmental degradation can lead to violations of human rights, first broached nearly 40 years ago, has grown apace in the last two decades. A human right to a safe or healthy environment has appeared not only in scholarly articles and several books, but increasingly in treaties and multilateral environmental agreements and in national constitutions. “Rights” are of limited value if they cannot be enforced by courts or other independent and impartial bodies. That is why development of case law in this field is so important, as well as citizen enforcement in domestic courts and individual complaints in international human rights courts and compliance mechanisms. The jurisprudence of human rights courts, commissions, and committees, as well as that of domestic courts in some countries, has endorsed and expanded environmental rights in various ways. Lawyers have worked to fuse environmental concerns with protection of fundamental rights—rights to life, health, property, private and family life, freedom of expression, petition, self-determination, and culture.
Authors’ backgrounds

As professors in the former Soviet Union, Ukraine, and the United States for more than thirty years, the authors have moved from viewing environmental law as a domestic legal discipline to viewing it also in its comparative and international law dimensions. One of this book’s authors has been teaching a class titled Human Rights and the Environment for the last six years, which has led to stimulating discussions with numerous students in those classes and has provided the genesis for many of the ideas in this book. The other has been teaching Comparative Environmental Law with a special focus on access to justice.

The authors have worked for national and international governmental and non-governmental organizations. Each co-founded the first environmental law clinic in his or her home country, plus the public interests law firms Ecology-People-Law (EPL) in Ukraine and the Western Environmental Law Center (WELC) in the United States. Both have been involved in drafting and negotiating multinational environmental agreements and helping oversee their implementation, one of us in the capacity of the Vice Chair of the Compliance Committee under the UN ECE Aarhus Convention. One co-founded the Environmental Law Alliance Worldwide (ELAW) and the other started its Ukraine office. ELAW is a network of public interest environmental lawyers in seventy countries, whose lawyers bring cases both in national courts and before international human rights and environmental institutions and support one another with ideas and consultations across national borders. Several lawyers involved in ELAW have offered advice in the preparation of this casebook.

Thanks to many

This book could not have happened without the help of many people. We are especially grateful to the following law students (many of them now lawyers and the others soon to be) who toiled long hours as our heroic and skilled research assistants: Jia Min Cheng, Marianne Dellinger, Rebecca Kammerling, Genevieve LeBlanc, Brook Meakins, Ryan Orr, Kevin Parks, Mark Reece, Erin Roach, Mae Sader, Paul Tassin, Brian Walker, Casey Whe lan, and Dinara Ziganshina. They did excellent work under sometimes pressing deadlines, finding cases and scholarly articles, helping to edit them, suggesting ideas, formulating the first drafts of some questions and discussion materials, proofreading, and obtaining copyright permissions. We are also thankful to law students Michael Borges, Judson Brehmer, Betsy Bridge, Morgan Dethman, and Amanda Freeman for their assistance. For specialized translation or substantive help, we appreciate the contributions of our colleagues Astrid Puentes of Colombia, Isabela Figueroa of Ecuador, Su Jeong Suh of Korea, Carla Garcia Zendeja of Mexico, Meche Lu of Peru, and Hanna Khomechko and Elizaveta Aleksyeyeva of Ukraine. We also appreciate invaluable comments on the manuscript and information provided by Professor Donald Anton of Australian National University. Despite the wonderful help from all these bright minds, we assume responsibility for any errors that remain.

An undertaking such as this book would not have been possible without the aid of the University of Oregon’s skillful and truly committed administrative assistant, Debby Warren. We thank her for her tremendous help, often at night and on weekends, and also Jill Forcier for initial help on formatting. Invaluable support was provided by Debby Thurman by organizing the work of our wonderful administrative staff. We are also thankful to Dean Margie Paris and other members of the law school staff for organizational support.
Excerpts and stylistic matters

Despite our intention to give reasonably comprehensive and reliably accurate coverage to the major issues in the field of human rights and the environment, this book is designed for teaching, not for research. Therefore, in editing the cases, treaties, guidelines, articles (including book chapters), and other materials, we have strived to make them readable. To that end, we have changed fonts, deleted paragraph numbering, and omitted most citations and footnotes. Our own footnotes are indicated by letters instead of numbers. We have shown deletions of paragraphs or words with small ellipses (triple dots). For deletions of entire paragraphs or of words at a paragraph’s beginning, we appended ellipses to a preceding paragraph. We have left British spelling if used in cases, articles, or legal instruments. We have changed all punctuation to American style. We have used periods in the names of the U.S. and U.N., but omitted periods for other organizations (such as UNEP or ILO).

Some final words

Good advocates are those whose eyes are wide open—not only to alternative legal arguments but to the humanity of those around them. A now-deceased human rights and environmental lawyer and law professor—himself a desaparecido in Argentina in the late 1970s—remarked to one of us and to his own students, “In this life, once you have opened your eyes, you can never close them again.” We hope to contribute to that process.

Svitlana Kravchenko and John Bonine
Eugene, Oregon, July 2008
Acknowledgments


Bluemel, Eric B., *The Implications of Formulating a Human Right to Water*, 31 Ecology L.Q. 957 (2004), (c) 2004 Regents of the Univ. of California, reprinted by permission


Hart, David, Comment (July 2003)


Jacobs, Rebecca Elizabeth, Treading Deep Waters Substantive Law Issues in Tuvalu’s Threat to Sue the United States in the International Court of Justice, 14 Pac. Rim L. & Pol’y 103 (2005)

Lamb, Lewis, Boldt Decision ‘Very Much Alive’ 30 Years Later, Seattle Post-Intelligencer (February 12, 2004)


Koh, Harold Hongju, Transnational Public Law Litigation, 100 Yale L.J. 2347 (1991)


Langewiesche, William, Jungle Law, Vanity Fair (May 2007)

Lissu, Tundu, View from the Accused, Email letter (2002)
ACKNOWLEDGMENTS


McManus, Peter, Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law, 23 Wis. Int’l L.J. 553 (2005), Copyright by The Board of Regents of the University of Wisconsin System; Reprinted by permission of the Wisconsin International Law Journal


Philippines, Supreme Court of, Oposa v. Factoran, G.R. No. 101083, 224 SCRA 792 (July 30, 1993), 33 I.L.M. 173 (1994)


Price, Tom, Fighting the Big Gunns in Tasmania, CorpWatch (March 14, 2005)

Pring, George (Rock), & Penelope Canan, SLAPP: GETTING SUED FOR SPEAKING OUT, Temple Univ. Press (1996)


Salzman, James, Thirst: A Short History of Drinking Water, 18 Yale J.L. & Humanities 94 (2006), reprinted by permission of The Yale Journal of Law & the Humanities


Watt-Cloutier, Sheila, Inuit Petition to the Inter American Commission on Human Rights (2005)