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Neil A.F. Popovic
United Nations Program for Earth Justice

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Presentation by Neil A.F. Popovic*

Introduction

First, I would like to thank Wendy Irvine and everyone else who helped put this conference together. It is a particular pleasure for me to be here because my grandfather was a graduate of the University of Buffalo Law School.

The primary focus of my remarks today will be the process in the United Nations Commission on Human Rights that led to the Draft Declaration of Principles on Human Rights and Environment. Before I launch into that discussion, however, I wanted to make just one comment about Dr. Seviré Ercmann’s presentation. The convention that she mentioned, the UN Economic Commission for Europe (UN-ECE) Convention on Public Participation and Access to Environmental Information is not just a European instrument. The United States also is part of the UN-ECE, so this convention is of importance and interest -- and should be of interest -- to all of us in the U.S. who are concerned about the matters the convention addresses. And those matters, public participation and access to information, really get to the essence of the link between human rights and environment -- because the democratic principles of participation and access to information are crucial to effective advocacy efforts to protect the environment and affected communities.

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* Director, U.N. Program for EarthJustice, and Affiliate at Heller, Ehrman, White & McAuliffe. Mr. Popovic is a Lecturer at the Boalt Hall School of Law and directs the U.N. Program for EarthJustice (formerly the Sierra Club Legal Defense Fund). Mr. Popovic has spoken worldwide on the links between environmental and human rights and has also written numerous articles on this subject.
Now back to my topic. The UN study on human rights and environment is by no means the only forum or even the best or most effective forum in which the link between human rights and environment has been and is being pursued. It happens to be the arena in which I have been involved on a personal level, but I do not mean to suggest by my focus on the UN process that it is any more or indeed any less important than other advocacy efforts -- at the grassroots level, among activists, using public interest litigation, in the European human rights system, the Inter-American human rights system, and elsewhere. Not to overstate the point, the UN process has been an important part of the environmental human rights movement.

To provide some context, I will offer a cursory overview of the UN human rights system, at least the part of it that has been dealing with human rights and the environment. The Commission on Human Rights is by virtue of the UN Charter (Art. 68) the principal human rights organ of the United Nations. It reports to the Economic and Social Council which then reports to the General Assembly. The Commission is composed of approximately 54 member states represented by government-selected delegations. Thus the members of the Commission serve at the request of and report to their respective governments.

The Commission has a subsidiary organ called the Sub-Commission on Prevention of Discrimination and Protection of Minorities, the mandate of which is actually much broader than its title might suggest. The Sub-Commission is composed of "independent experts." The independent experts serve not at the direction of their governments but, in theory, in an individual capacity. As a practical matter, many members of the Sub-Commission also serve on their government’s delegation to the Commission or hold some other government post, which may call
their independence into question. There are situations though, where an official government delegation's position on an issue may be contrary to the position of that country's independent expert.¹

The Sub-Commission provides the entry point for many new human rights issues and provides a forum where representatives of non-governmental organizations can make "interventions" (oral presentations) and educate the international community about human rights situations that affect them or of which they are aware. Professor Welch spoke earlier about the importance of victims of human rights violations having a place to testify, to tell their story to the world. The Sub-Commission provides a place to do that.² It also provides a place to explore new human rights issues.

With the foregoing in mind, several non-governmental organizations, including the Sierra Club Defense Fund (which is now called Earthjustice Legal Defense Fund), decided to try to introduce the issue of human rights and environment at the Sub-Commission.³ In 1989, representatives of the Legal Defense Fund proposed that the Sub-Commission study the linkage between human rights and the environment.⁴ The Legal Defense Fund sought formal recognition that human rights violations often occur as a result of environmental problems and that those types of human rights violations deserve the attention of the international community and deserve recognition as a legitimate human rights issue.

In what is perhaps classic UN form, the Sub-Commission responded to the human rights and environment initiative by calling for a one year study about what a study of human rights and the

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¹ For example, that sometimes occurs with respect to the United States, when the independent expert was appointed during a prior presidential administration.

² In order to participate in the Sub-Commission, a nongovernmental organization must have consultative status with The Economic and Social Council.

³ Friends of the Earth was also involved, along with another group called the Natural Heritage Institute.

environment would look like. So from 1989 to 1990 the Sub-Commission oversaw a study about a study. In 1990 the study was presented to the Sub-Commission and was favorably received. The Sub-Commission recommended the appointment of a special rapporteur (which is a UN term for someone appointed to study and report on an issue of concern), who would have a mandate to study the linkage between human rights and the environment. The Commission on Human Rights endorsed that recommendation and a then-member of the Sub-Commission, an Algerian human rights lawyer by the name of Fatma Zohra Ksentini, was appointed as special rapporteur.

Ms. Ksentini was enthusiastic about her appointment and also was receptive to assistance and input from non-governmental organizations. Because of that openness, the Legal Defense Fund and other interested parties were able to play a significant role in helping the rapporteur shape her study and prepare her reports. That included working with her directly and indirectly on her behalf. NGOs specifically helped the rapporteur put together a series of annual reports that addressed factual and legal aspects of the linkage between human rights and environment.

The UN study process initially focused on whether there exists a "right to environment." This phase of the inquiry looked at whether such a right should be recognized based on existing law or whether instead there should be some new right called the right to environment -- and if so what it would mean. Over the course of the several years that she continued with her study, the special rapporteur's approach to environmental human rights kind of evolved. (A similar evolution was taking place among activists and others working in the area.) Instead of focusing on a new right or a

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separate and distinct right to environment, the special rapporteur shifted her focus to looking at the environmental context of established human rights.

That shift had some specific advantages. For example, it enabled advocates of environmental human rights to draw on the scholarship, case law, and experience that went along with well-recognized human rights principles, many of which had already been addressed in the context of environmental issues. In a case involving the Lubicon Lake Band of Canada for example, the UN Human Rights Committee (which administers the International Covenant on Civil and Political Rights) decided that the Canadian government’s allowance of certain development activity violated the Band’s right to self-determination and culture. The shift also reflected recognition that at a political level, it can be easier to get governments or others who are resistant to human rights campaigns to accept the expansion of or a new understanding of an existing right than it might be to get them to recognize an entirely -- and forthrightly -- new right which likely involves some new obligations for the government.

Formulation of the Draft Declaration of Principles on Human Rights and the Environment

In the special rapporteur’s 1993 progress report, she called for a meeting of experts to come up with a set of guidelines and principles on human rights and the environment and also to come up with recommendations about what the UN and other international bodies could do to advance the protection of human rights and environment. The Sub-Commission endorsed the rapporteur’s recommendations including the recommendation of a meeting of experts. The Commission on Human Rights endorsed the recommendation as well, but the UN would not provide the necessary

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funds to implement the proposal. Several organizations led by the Legal Defense Fund realized the proposed meeting of experts provided a rare opportunity to convene a high level meeting on human rights and the environment, with UN support (at least moral, if not fiscal). Those organizations did not want to lose the opportunity, so they raised the necessary funds themselves, with the help of some Swiss non-governmental organizations.

As it turned out, two lawyers from the Legal Defense Fund (Adriana Fabra and I) took on the task of organizing the meeting and preparing a working draft of a declaration of principles on human rights and the environment. By then the scope of the meeting had been scaled down to producing a set of principles, without an accompanying set of recommendations. We invited scholars, activists (from the developing world and the developed world) and UN officials. We did not invite any government representatives. The decision not to invite governments reflected a conscious desire to keep the process relatively nonpolitical. Thus, none of the invited experts would have to clear his or her position with any government.

The decision not to invite government representatives was not a simple matter. On the one hand, keeping the process nonpolitical made it more likely we would come out with a relatively pristine instrument, especially because nearly everyone who participated in the meeting of experts agreed with the initial premise that producing a set of principles on human rights and the environment was a good idea. On the other hand, excluding governments increased the likelihood of producing an unrealistic instrument, precisely because it would not have been subjected to the political process. On balance, we determined we wanted the meeting of experts to result in an instrument that at least its drafters felt addressed the problems we had set out to work on -- namely to give formal legal recognition and meaningful expression to the linkage between human rights and the environment. That way, if and when the resulting instrument were injected into the political process, any dilution or compromise would be obvious, making it very clear that governments had
consciously downgraded their human rights obligations. Hopefully, that transparency would make it more difficult politically for governments to undermine the principles.

The Draft Declaration of Principles that emerged from the meeting of experts was included in the special rapporteur's final report, which she submitted to the Sub-Commission in 1994. Because the Draft Declaration was not a separate document, it was not formally voted on by the Sub-Commission. Instead it was annexed to the special rapporteur's report which as a whole was endorsed by the Sub-Commission. The final report specifically included a recommendation that the Draft Declaration serve as the basis for the UN to develop a formal instrument on human rights and environment, which might lead to a treaty or other legal instrument.

While far from perfect, the Draft Declaration is, to my knowledge, the first relatively comprehensive instrument that focuses on the linkage between human rights and the environment. Although several steps short of a legally binding treaty, the Draft Declaration is a legal instrument and has been recognized by the UN as a standard setting exercise. That recognition is a significant step in the direction of codification.

The Draft Declaration has, since its promulgation, taken on something of a life of its own. It has been cited by judges and scholars; it provides an empowerment mechanism for activists in various communities; and it has been distributed in many parts of the world to help educate people about the existence and content of rights that they have and that they should be demanding their governments recognize. Although the absence of legal enforceability certainly imposes some limitations, it does not deprive the Draft Declaration of value as a legal instrument, and certainly not as a social instrument and activist tool.

The Draft Declaration begins by addressing some general principles such as the interdependence of various human rights and the interdependence of human rights and other important values such as an ecologically sound environment, sustainable development and peace. It then enumerates particular substantive rights, including a "right to environment." Recognition of a free-standing right to environment remains a goal of activists and it has already been achieved in some regional human rights instruments. The African Charter on Human and Peoples' Rights has an environmental provision, and there is an as yet unratified protocol to the Inter-American Convention on Human Rights that recognizes environmental rights as well.\(^14\)

The Draft Declaration also spells out the environmental components of other substantive human rights, such as the right to health and the right to life. In addition, the Draft Declaration highlights particular environmental media, such as air, water, flora and fauna and a medium I was not aware of prior to the meeting of experts, sea ice. The Draft Declaration also includes procedural rights such as the right to information, freedom of opinion and expression, education, freedom of association, and the right to effective remedies.\(^15\) The Draft Declaration addresses all of these procedural elements in the context of environmental protection, such as the right to environmental information, the right to speak freely about environmental issues. The execution in 1995 of environmental activist Ken Saro-Wiwa in Nigeria furnishes a tragic example of a

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15 These are the same rights addressed in the UN-ECE Convention discussed above.
government's failure to uphold environmental due process and the consequences of trying to speak out about environmental problems in a society that does not respect human rights.

The Draft Declaration also deals with duties, most of which correspond to the rights set forth in the instrument. There are duties of individuals, duties of governments, duties of transnational corporations, international organizations and intergovernmental organizations. The latter includes entities such as multilateral financial institutions, which are responsible in various ways for a great deal of environmental destruction that has severe and widespread consequences.

Post-1994 Developments

In Spring 1995, as a follow-up to the Sub-Commission process, the Commission on Human Rights took on Ms. Ksentini's final report, including the Draft Declaration. The Commission, as mentioned earlier, is a political body in the sense that its members serve as representatives of their governments and not as independent experts. Not surprisingly, the Draft Declaration met with substantial resistance at the Commission. Likely explanations include the fact that virtually all of the governments involved could be accused of violating the principles set forth in the Draft Declaration in various ways. Unlike many types of human rights issues, environmental human rights issues may be equally prevalent in developed and developing economies, in democratic and nondemocratic political systems. Accordingly, while it may be relatively easy for the U.S. government to chastise others with respect to human rights issues like forced disappearances or torture, the U.S. may have a harder time handling issues such as environmental racism, which may hit much closer to home -- and which may constitute clear violations of well-established human rights.

Since 1994, the progress of environmental human rights in the UN human rights system has slowed down a bit. The Commission first (in 1995) called for comments on Ms. Ksentini's final report from governments, NGOs, and international organizations. Because
of administrative problems at the UN, the invitation to submit comments never actually got mailed out to a great many of potential commentators. When the time came, Human Rights Centre in Geneva simply did not have adequate paper to print the request on or sufficient money for postage to send it out. Not surprisingly, the Commission received only a handful of comments. As a result, in 1996 the request for comments was renewed. When the Commission revisited the issue in 1997, after receiving additional comments, the U.S. government led an effort at the Commission to prevent the establishment of any kind of formal process to advance the Draft Declaration or to set up a procedure for receiving complaints or otherwise addressing violations of environmental human rights at the Commission.

Through various political machinations the U.S. delegation garnered a majority of Commission members to support its position that the Commission should not formally take on environmental human rights. As a result, the issue was taken off the Commission’s agenda for the 1998 session: but it will be back on the agenda in 1999.

In the meantime, part of the plan of those opposed to addressing environmental human rights at the Commission on Human Rights was to deflect the issue to some other UN agency, in particular, the Commission on Sustainable Development (CSD). The CSD was established as a result of the 1992 UN Conference on Environment and Development, held in Rio de Janeiro. The CSD’s mandate consists primarily of monitoring and facilitating implementation of Agenda 21, the sustainable development “Plan for Action” that emerged from the Rio conference.

As part of its 1997 decision on human rights and environment, the Commission on Human Rights suggested that the issue should be considered as part of the post-Rio process. However, the CSD is neither equipped nor designed to deal with human rights issues, and it has failed to embrace human rights and the environment as a CSD issue. The CSD is not a place for individuals affected by environmental problems to testify, nor is it an appropriate forum for standard-setting in the field of human rights. Thus, although the work
of the CSD and the development of environmental human rights are compatible and complementary, the CSD has so far declined to make itself available as a forum for human rights and the environment.

Human rights and the environment will return to the Commission on Human Rights' agenda in 1999, so it is up to the proponents of the initiative to demonstrate to the Commission that whether or not the UN cares to participate, legal standards recognizing that environmental degradation is a legitimate human rights issue are being developed. And if the UN Commission on Human Rights is to maintain its role at the center of international human rights, it should increase its involvement. Otherwise, it risks being relegated to the role of spectator. With or without the Commission's guidance or assistance, diverse standards are being developed in various forums that deal with environmental human rights issues. While different political, economic and social settings may make diverse standards appropriate, the coherent and cohesive development of environmental human rights standards requires the UN Commission on Human Rights to play a part -- at least as coordination mechanism and/or clearing house.

Realistically, the UN human rights system has serious problems dealing even with traditional core human rights issues. The Commission on Human Rights and the Centre for Human Rights are woefully underfunded and they are prone to political infighting and competing agendas that may have little to do with protecting human rights. For example, in 1995 the Commission appointed a special rapporteur on toxics and human rights. From its inception, that process has been highly politicized. Initial voting on appointment of the rapporteur split sharply on north-south lines, and the process has produced often acrimonious debates at the Commission, seeming at times to be more about assigning blame than about solving environmental or human rights problems.

Nevertheless, the appointment and, in 1998, reappointment of a special rapporteur on toxics demonstrates that with sufficient political clout, it is possible to get the Commission to take significant steps on environmental issues. On the other hand, even though the special rapporteur on toxics has a budget and a relatively broad
mandate, her access to funds has been limited and her impact on the human rights consequences of toxics has not yet lived up to its potential. What could be a significant boost for environmental human rights has, so far, succeeded in polarizing the Commission instead of bringing governments together on an issue of common concern.

Conclusion

My last point is that much of the progress on human rights and environment is in some way attributable to the efforts of non-governmental organizations. In that sense, NGOs and of course the people that sustain them, can make a difference. By the same token, when NGOs run into problems, financial or otherwise, the initiatives they support can suffer as a result.

For example, when the Sierra Club Legal Defense Fund scaled back its involvement in human rights and environment, the special rapporteur, who had come to depend on the Legal Defense Fund for assistance, was caught by surprise. Ideally, the UN-NGO relationship should be cooperative and open, with clear lines of communication and a healthy regard for the integrity of both substantive and procedural considerations. Thank you.