

## Environmental Governance After Johannesburg: From Stalled Legalization to Environmental Human Rights?

KEN CONCA\*

### INTRODUCTION: SORTING OUT THE UNCED LEGACY

More than a decade after its occurrence, the 1992 UN Conference on Environment and Development (UNCED) stands as the high water mark in efforts to negotiate a cooperative international framework for environmental governance. UNCED was organized around what I have referred to elsewhere as the 'grand strategy' of liberal international environmentalism: efforts to create issue-specific, functional, international regulatory regimes on environmental problems, embedded in a broader context of interstate diplomacy seeking to achieve a 'global bargain' on environment-development issues.<sup>1</sup>

To be sure, rancorous debate marked both the preparations for UNCED and the meeting itself in Rio de Janeiro. Negotiations on the climate change and biodiversity regimes proved highly contentious; an initiative on the world's forests unraveled entirely; development advocates decried the reluctance of the rich nations to commit additional funds; environmentalists pointed to the failure to entertain questions related to over-consumption and multinational corporate behaviour.<sup>2</sup> Yet despite these controversies and limitations, the UNCED process produced a framework convention on climate change, a convention on biodiversity and an ambitious 'Agenda 21' action plan on a wide array of sustainable-development issues.<sup>3</sup> Contrasting the event with its predecessor, the 1972 Stockholm Conference on the Human Environment, Richard Sandbrook of the International Institute for Environment and Development suggested that UNCED represented 'A mammoth step forward as politicians come to understand that the issues do not just concern plants and animals, but life itself ... Rio not only marked the beginning of a new era but a triumph for that small

---

\* Associate Professor of Government and Politics, University of Maryland, and Director of the Harrison Program on the Future Global Agenda.

<sup>1</sup> See Ken Conca, *Governing Water: Contentious Transnational Politics and Global Institution Building* (Cambridge, Mass.: MIT Press, 2006).

<sup>2</sup> For a critical perspective on UNCED, see Partha Chatterjee & Matthias Finger, *The Earth Brokers: Power, Politics and World Development* (London: Routledge, 1994).

<sup>3</sup> For a range of perspectives on the Earth Summit, see Ken Conca & Geoff Dabelko, 'The Earth Summit: Reflections on an Ambiguous Event' in Conca & Dabelko, eds., *Green Planet Blues: Environmental Politics from Stockholm to Kyoto*, 2nd ed. (Boulder, Colo.: Westview Press, 1998) at 161-67.

band of campaigners who set out at Stockholm.’<sup>4</sup>

A little more than a decade later, however, it is apparent that any UNCED-related momentum in interstate environmental diplomacy has largely run its course. Multilateral regime formation on pressing environmental issues has stalled on most fronts. Follow-through on Agenda 21 has been tepid and inconsistent. North-South bargaining on environment-development issues has effectively collapsed. The United Nations Environment Programme (UNEP) observed in its 2002 *Global Environment Outlook* that

The environment is still at the periphery of socio-economic development. Poverty and excessive consumption ... continue to put enormous pressure on the environment. The unfortunate result is that sustainable development remains largely theoretical for the majority of the world's population of more than 6000 million people. The level of awareness and action has not been commensurate with the state of the global environment today; it continues to deteriorate.<sup>5</sup>

When the 2002 World Summit on Sustainable Development (WSSD) convened in Johannesburg to assess progress in the decade since Rio, environmental concerns had been pushed so far to the margins of interstate diplomacy that many environmental activists ruefully dubbed the event ‘Rio Minus Ten’.<sup>6</sup> The International Institute for Sustainable Development summarized the lack of momentum from Rio to Johannesburg: ‘The world and summit weary felt that this anniversary would be held because it was scheduled, not because it was the result of an organic inspiration to meet.’<sup>7</sup>

There are more optimistic perspectives on UNCED's legacy, particularly those stressing its role as a catalyst for civil-society networking, social movement mobilization, and transnational advocacy. Such effects were not explicitly part of the official Rio model, which essentially understood ‘civil society’ as a residual category for tripartite

<sup>4</sup> Richard Sandbrook, ‘From Stockholm to Rio’ in *Earth Summit '92: The United Nations Conference on Environment and Development* (London: Regency Press, 1992) at 16, cited in Conca & Dabelko, ‘The Earth Summit’, *supra* note 3 at 163.

<sup>5</sup> United Nations Environment Programme, *Global Environment Outlook 3* (London: Earthscan, 2002) at xx.

<sup>6</sup> See for example Larry A. Swatuk, ‘Rio Minus Ten: The Political Economy of Environmental Degradation’ (2002) 14 *Europ. J. Devel. Res.* 264.

<sup>7</sup> International Institute for Sustainable Development, ‘Summary of the World Summit on Sustainable Development: 26 August-4 September 2002’ (2005) 22 *Earth Negotiations Bulletin* 1 at 16, online: <<http://www.iisd.ca/vol22/enb2251e.html>>.

corporatist bargaining with states and corporations. But the Global Forum gathering of citizens' groups, NGOs, and social movements, which occurred in parallel with UNCED, was an unprecedented gathering of a quite heterogeneous array of actors, establishing a precedent for subsequent global conferences. Karin Bäckstrand and Michael Saward suggest that the Commission on Sustainable Development (CSD), formed in the wake of UNCED, has been 'pioneering in its effort to open up, extend and institutionalize procedures for stakeholder and major group participation.'<sup>8</sup> They argue that, its limitations notwithstanding, the 2002 Johannesburg summit extended this process, 'exemplifying new deliberative stakeholder practices with general democratic potential at the global level.'<sup>9</sup> This view of UNCED as normative-network catalyst is consistent with a recent survey of international environmental experts, who identified the principal UNCED legacy as a set of indirect effects related to agenda-setting, issue framing, and network building.<sup>10</sup>

These two very different interpretations of UNCED's legacy relate to two conceptually distinct pathways by which actors may seek to build stronger and more effective global environmental governance, which I will refer to as progressive legalization and norm inscription. As discussed below, progressive legalization refers to bargaining processes that yield greater obligation, precision, and delegation of environmental commitments, while norm inscription refers to more contentious politicking that promotes the construction, dissemination and embedding of prescriptive and proscriptive rules and roles related to environmental protection. Although the two paths are certainly not mutually exclusive, we have very little understanding of how they may intersect or interact, in part due to their distinct theoretical origins. The legalization literature has a predominantly state-centered focus, although allowing a role for nonstate actors in nipping at the heels of the states they seek to herd into cooperation. More fundamentally, legalization is centered in cooperative bargaining theory and dominated

---

<sup>8</sup> Karin Bäckstrand & Michael Saward, 'Democratizing Global Environmental Governance? Stakeholder Democracy at the World Summit for Sustainable Development' (Paper for presentation at the Fifth Pan-European Conference on International Relations, The Hague, 9–11 September 2004) [unpublished] at 15. See also Minu Hemmati, *Multi-Stakeholder Processes for Governance and Sustainability: Beyond Deadlock and Conflict* (London: Earthscan, 2002). On historical challenges faced by NGOs within the UN System see Ken Conca, 'Greening the United Nations: Environmental Organizations and the U.N. System' (1995) 16 *Third World Q.* 441.

<sup>9</sup> Bäckstrand & Saward, *supra* note 8 at 2.

<sup>10</sup> See Adil Najam, 'Unraveling of the Rio Bargain' (2002) 21 *Polit. Life Sci.* 46 at 46–50.

by a conception of global environmental politics as a tragedy of the commons. The literature on normative advocacy, in contrast, has been influenced most strongly by theories of contentious politics and social movements. It takes the authoritative character and constitutive role of nonstate actors far more seriously. But it has focused primarily on the effects of contention on specific states and a handful of intergovernmental organizations such as the World Bank, with far less to say about any institution-building effects that may follow in the wake of those discrete normative struggles.

This article examines the interplay of these two conceptually distinct processes in the post-Rio era, arguing that as legalization strategies have faltered, transnational contentious politics has emerged as the primary source of global institution building for environmental governance. I pay particular attention to a specific point of convergence between contention and institution building, resulting from the rise of combined environmental and human-rights activism and advocacy. I interpret the rise of environmental human rights as not only a source of normative pressure on governments but also as an increasingly important arena of international legal-institutional development.

### **I PROGRESSIVE LEGALIZATION OF THE RIO STRATEGY: CONCEPTUAL, INSTITUTIONAL AND POLITICAL LIMITS**

The growing momentum for global environmental governance in the period leading up to the 1992 Earth Summit involved both conceptual and institutional developments. Conceptually, the key shift was the idea of sustainability, championed by the Brundtland Commission report *Our Common Future*<sup>11</sup> and given a more tangible expression by the massive Agenda 21 action plan agreed to at UNCED. Institutionally, key developments included the successful negotiation of global conventions on ozone-layer protection, climate change and biological diversity, the establishment of a funding mechanism in the form of the Global Environment Facility (GEF), and the creation of the UN Commission on Sustainable Development to monitor progress in the implementation of the Earth Summit blueprint.<sup>12</sup>

---

<sup>11</sup> World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987).

<sup>12</sup> UNCED's charge was 'To ensure effective follow-up to the Conference, as well as to enhance international cooperation and rationalize the intergovernmental decision-making capacity for the integration of environment and development issues and to examine the progress of the implementation of Agenda 21 at the national, regional and international levels.' See *Institutional arrangements to follow up the United Nations Conference on Environment and Development*, GA Res. 191 (XLVII), UN GAOR, 47<sup>th</sup> Sess., UN Doc. A/RES/47/191 (1992) at para. 2.

To some extent, the stalling of momentum in the wake of UNCED can be attributed in a straightforward manner to the pace and scope of world events. Rio-era optimism, while certainly not universal, was fed by several trends: the end of the Cold War; the seemingly broad consensus that environmental concerns and development needs could be married in the form of 'sustainable development'; and the powerful demonstration effect of diplomatic achievements, most notably a successful set of international accords on protecting the Earth's stratospheric ozone layer. Simply put, today's world of economic globalization, American unilateralism, and contentious North-South disputes around trade and investment rules provides far less fertile ground for liberal international environmentalism's grand strategy.

More specifically, the failure to sustain the UNCED process in the wake of the Rio summit has its roots in both the conceptual and institutional dimensions of the earlier UNCED-era momentum. Conceptually, the idea of sustainability has proved to be exceedingly malleable, to the point of providing little concrete guidance for policy change and substantial space to justify business as usual.<sup>13</sup> The political concept also wore poorly: the UNCED-era notion of cooperative interstate environmental governance, rooted in regime-based functionalism, has shown itself to be poorly suited to a world political economy marked by globalization, deepening economic integration, and forms of trans-state political power that remained at the margins of Rio's interstate conceptual design.<sup>14</sup> Similarly, the blueprint laid down in Agenda 21 conceived of sustainability essentially as a matter of developing national policy frameworks supplemented by international aid and expertise—a conceptual map that largely failed to account for the cascading effects of deepening globalization. Along similar lines, Peter Haas has suggested that two trends—'the growing complexity of a globalizing world' and 'the diffusion of political authority'—undercut the functionality of national sovereignty as a foundation for joint action on global collective-goods problems.<sup>15</sup>

Institutionally, the effort to weave a fabric of global environmental governance one regime-strand at a time has faltered. A 2002 review of 'core environmental conventions and related agreements of global significance' conducted by the UNEP identified only five such agreements in the period since 1996, as opposed to 16 in the UNCED

---

<sup>13</sup> On the ambiguities of sustainability, see Tim O'Riordan & Heather Voisey, eds., *The Transition to Sustainability* (London: Earthscan, 1998).

<sup>14</sup> See Ken Conca, 'Beyond the Earth Summit Framework' (2002) 21 *Politics and the Life Sciences* 53 at 53-5.

<sup>15</sup> Peter M. Haas, 'Addressing the Global Governance Deficit' (2004) 4 *Global Environ. Politics* 1 at 2.

era of 1990-5.<sup>16</sup> One problem has been the resistance of important states. The United States—which played a leadership role on an earlier generation of international agreements ranging from the 1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora* [CITES] to the breakthrough 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*—withdrew from the Kyoto Protocol to the climate regime; fought efforts to strengthen the 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*; and has failed to ratify the 1992 *Convention on Biological Diversity*, the 1998 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*, the 2000 *Cartagena Protocol on Biosafety*, and the 2001 *Stockholm Convention on Persistent Organic Pollutants*. In other cases, resistance has been more broadly multilateral. The UN General Assembly approved a global framework convention on shared watercourses in 1997, but many key river-basin states such as Egypt, India, Pakistan, Turkey and China either abstained from the process or opposed it outright, and only a handful of governments have seen fit to ratify the agreement.<sup>17</sup>

The effort to craft and deepen issue-specific regulatory regimes also encountered important incompatibilities with more fundamentally embedded—and increasingly neoliberal—global regimes governing international trade, finance and investment.<sup>18</sup> Scholars have debated whether trade-sanctioning regimes such as CITES or the 1987 Montreal Protocol on ozone-layer depletion face the threat of a serious challenge from the World Trade Organization (WTO). There is little doubt, however that the deepening and widening of trade liberalization has chilled the prospect of creating new environmental regimes that manipulate trade against the grain of neoliberalism (much in the same manner that structural adjustment pressures have complicated the development of stronger environmental regulations at the national

---

<sup>16</sup> United Nations Environment Programme, 'Multilateral Environmental Agreements: A Summary' (background paper for the First Meeting of the Open-Ended Intergovernmental Group of Ministers or Their Representatives on International Environmental Governance, New York, 18 April 2001), UN Doc. UNEP/IGM/1/INF/1 (2001).

<sup>17</sup> *Convention on the Law of the Non-Navigational Uses of International Watercourses*, 11 April 1997, UN Doc. A/51/869.

<sup>18</sup> Konrad von Moltke, 'Institutional Interactions: The Structure of Regimes for Trade and the Environment' in Oran R. Young, ed., *Global Governance: Drawing Insights from the Environmental Experience* (Cambridge, Mass.: MIT Press, 1997). See also Ken Conca, 'Environmental Change and the Deep Structure of World Politics' in Ronnie D. Lipschutz & Ken Conca, eds., *The State and Social Power in Global Environmental Politics* (New York: Columbia University Press, 1993).

level).<sup>19</sup>

The UN system has also faltered in its efforts to develop effective institutional arrangements.<sup>20</sup> Secretariats for environmental regimes are dispersed, yielding poor coordination. Many different institutions have some form of functional responsibility on environmental matters, creating serious gaps and overlaps, a dysfunctional competition for scarce resources, and a fragmented environmental voice in critical settings such as trade negotiations. The UNEP, although playing an important role in specific instances, has neither the capacity nor the mandate to catalyze system-wide coherence. Calls for the formation of a World Environment Organization, which reflect these concerns about institutional strength and coherence, have made almost no headway.<sup>21</sup>

Finally, the UNCED process has stalled at the level of global bargaining. Although much of the attention on UNCED has centered on its conceptual and micro-institutional underpinnings, it can also be read as a broad political bargain between North and South that embedded specific soft-law principles. As Adil Najam has argued, four specific soft-law principles were at the heart of the Rio compromise: sustainability, additionality, common but differentiated responsibility, and the 'polluter pays' principle.<sup>22</sup> Sustainability was a key element of the bargain in that it offered a way to break the deadlock over Southern governments' fears that Northern environmental concerns were an obstacle to development. A commitment to additionality, or the promise of additional development assistance rather than the redirection of existing resources, was essential to bring wary Southern governments to the table. The principle of common but differentiated responsibility—enshrined most famously in the 1992 climate agreement—bridged the gap between the global-commons conceptual framework dominating the Earth Summit and the obvious differences among states in responsibility for, and responsive capacity to, global environmental ills. The polluter-pays principle also offered the possibility of compromise, as a staple of environmentalism that also resonated with the growing neoliberal gestalt on marketization and efficiency enhancement.

Najam suggests that the post-Rio loss of momentum is tied centrally to the failure of these soft-law principles to take root:

---

<sup>19</sup> Ken Conca, 'The WTO and the Undermining of Global Environmental Governance' (2000) 7 *Rev. Intl. Polit. Economy* 484.

<sup>20</sup> On UN environmental mechanisms, see Haas, *supra* note 15.

<sup>21</sup> On the debate over a World Environment Organization, see the discussion forum in (2001) 1 *Global Environmental Politics*.

<sup>22</sup> Najam, *supra* note 10.

Much of the attention since UNCED has focused on the failure of the North to deliver the “goodies” that had been promised or implied at Rio — such as additional resources, technology transfers, and capacity building. Indeed, the inability of the North to fulfill these commitments has been a major contributor to the growing sense of malaise. However, the erosion of the conceptual building blocks of the Rio Bargain is an even more telling indictment of the fast deteriorating state of North-South relations. As the concept of sustainable development loses its policy edge, and as the key principles of additionality, common but differentiated responsibility, and polluter-pays are steadily eroded with each new [multilateral environmental agreement], the developing countries have a diminishing interest in staying engaged in these processes. These issues defined the *raison d’être* for the South’s engagement in global environmental negotiations.<sup>23</sup>

As suggested above, sustainability, although a useful conceptual guide and rhetorical device, has proven too ambiguous and fluid a concept to anchor serious institution building. The principle of additionality was quickly undercut by the actions of the main donor states. US resistance to the climate regime, which has been cloaked rhetorically in concerns about the “free riding” of less developed countries, dealt a severe blow to the notion of common but differentiated responsibility. The polluter-pays principle is problematized by globalization: who exactly is the polluter in a world marked by an increasingly global logic and organization of production, in which commodity chains snake in and out of the territory of nominally sovereign entities on the path from production to consumption?<sup>24</sup>

## II BEYOND JOHANNESBURG: FROM LEGALIZATION TO TRANSNATIONAL CONTENTION

Scholars have identified the concept of legalization as an important bridge across the conceptual gap between international law and international relations (IR) theory. Legalization has been defined in terms of three criteria: ‘The degree to which rules are obligatory, the precision of those rules, and the delegation of some functions of

---

<sup>23</sup> *Ibid.* at 49.

<sup>24</sup> Ken Conca, ‘Consumption and Environment in a Global Economy’ (2001) 1 *Global Environ. Politics* 53. See also Thomas Princen, Michael Maniates & Ken Conca, eds., *Confronting Consumption* (Cambridge, Mass.: MIT Press, 2002).

interpretation, monitoring and implementation to a third party.<sup>25</sup> For those who view soft law as a stepping-stone to harder law—meaning stronger obligation, greater precision, and more extensive delegation—then the post-Rio trajectory of global environmental governance post-Rio has been marked by stalled legalization.

Scholars of a more classical IR orientation have suggested, however, that soft-law development can also be understood as an explicit choice in favour of a specific institutional form. Rather than a pale shadow of hard law, soft law can be viewed in terms of advantages such as greater adaptability in the face of uncertainty or a lesser impingement upon sovereignty.<sup>26</sup> From this conceptual vantage point, the post-Rio trajectory can be read not as fading momentum for progressive legalization but, rather, as a more deliberate choice. In this view, states—particularly the strong states that provide global institutions—have preferred maximum flexibility and minimum binding in this domain; non-state advocacy pressures have not been sufficiently powerful to change this preference. Obligation is limited, precision is lacking, and delegation is minimal because the specific perceived interests (environmental or otherwise) of the most powerful actors are better served that way.

Despite their differences, these contrasting perspectives on legalization share an important premise when applied to the domain of global environmental governance: that global environmental politics is a large-scale expression of Hardin's tragedy of the commons.<sup>27</sup> Just as each rational cowherd, unconstrained by property rights or the state, saw merit in sneaking a few more cows onto the commons, so too with states: they reap individual benefits that greatly complicate cooperation, and they are reluctant to shoulder the costs of providing public goods with benefits they can only partially capture. These incentives inhibit the realization of cooperative gains and, as a result, rational unit-level behaviour adds up to an inferior outcome at the system level.<sup>28</sup> A more optimistic spin on this model suggests that, under certain circumstances, self-organizing cooperation is possible without Hardin's extreme solutions of privatization or the coercive hand of a supra-level

---

<sup>25</sup> Judith Goldstein *et al.*, 'Introduction: Legalization and World Politics' (2000) 54 *Int'l Org.* 385 at 387.

<sup>26</sup> Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 *Int'l Org.* 421.

<sup>27</sup> Garrett Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 1243.

<sup>28</sup> Robert O. Keohane & Elinor Ostrom, eds., *Local Commons and Global Interdependence: Heterogeneity and Cooperation in Two Domains* (London: Sage, 1995); Peter M. Haas, Robert O. Keohane & Marc A. Levy, *Institutions for the Earth: Sources of Effective International Environmental Protection* (Cambridge, Mass.: MIT Press, 1993).

regulatory authority.<sup>29</sup> Yet whether conceptual optimism or pessimism prevails, global environmental governance is understood as a set of bargained rules about behaviour, with the character of the bargaining generating institutionalized cooperation to a greater or lesser extent. Non-state actors may wield knowledge-power, set agendas, and create political pressures, but ultimately it is the explicit efforts of states to bargain their way to cooperation on collective problems such as climate change, biodiversity loss, and ozone-layer damage that are the source of institutionalization.

There is ample evidence of this process at work—and, in the post-Rio period, even more evidence of its failure to work. Yet even as formal cooperation has stalled, surprisingly little attention has been paid to political contentiousness and extra-institutional political behaviour as important sources of institutional development, norm inscription, and various gradations of ‘soft’ international law. This is particularly surprising when one considers that, historically, the rise of serious environmental action at the domestic level has invariably been marked by contention and social conflict. This has been the case in instances as diverse as the state’s response to toxic horrors in a rapidly industrializing Japan of the 1960s, nuclear politics in Cold War Germany of the 1980s, rainforest preservation in post-authoritarian Brazil of the 1990s, or controversies over watershed management in contemporary China. Given the newness of the environment as an explicitly recognized problem-set and issue-domain, such struggles have more often than not played out in the absence of a well-established institutional and policy framework at the national level. In this sense, environmental politics viewed in a dynamic, historical perspective soften the classical distinction between the domestic polity as a zone of rule-governed order and the international sphere as a zone of anarchy.

With the flagging of the post-Rio interstate cooperative dynamic, more contentious, extra-institutional processes have arguably moved to the forefront of international institutionalization as well. Central to this process has been the convergence between movements for environmental protection and human rights.

### III THE RISE OF ENVIRONMENTAL HUMAN RIGHTS

The environmental and human rights movements are probably the most frequently cited and extensively studied manifestations of activism in world politics. They are often characterized summarily, even conflated,

---

<sup>29</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990); Nives Dolšak & Elinor Ostrom, *The Commons in the New Millennium: Challenges and Adaptation* (Cambridge, Mass.: MIT Press, 2003).

as ‘liberal’ advocacy. Historically, however, the two have been distinct enterprises with separate trajectories of development and frequent moments of tension. The possibility that environmental protection initiatives may have negative ramifications for human rights is well known, in part given the roots of some strands of environmentalism in a wilderness model that presupposes the radical separateness of the human and natural spheres of existence. Nancy Peluso coined the phrase ‘coercing conservation’ to describe a large family of cases in which international environmentalism has steamrolled local community rights—often with the blessing of international environmental law as codified in interstate agreements such as CITES or the International Tropical Timber Agreement.<sup>30</sup> As Joanne Bauer has pointed out, such cases combine procedural and substantive rights violations:

Procedurally, inadequate inclusion of affected peoples in policy processes that both define and implement ‘public interest’ results in undermining the right to livelihood and corresponding subsistence rights ... A fair resolution demands a recognition that both sets of values matter and must be incorporated into the policy solutions better than they have in the past.<sup>31</sup>

A classic example is the conflict over the Lacandon Selva in southern Mexico, where land struggles around the Montes Azules Biosphere Reserve have pitted poor settlers against state authorities and international environmentalists.<sup>32</sup>

Such tensions notwithstanding, the past decade or two has seen a strong and growing synergy between environmental activism and human-rights advocacy. One reason for this is the obvious fact that large-scale environmental destruction—the clearing of forests, draining of wetlands, conversion of coastal zones, or damming of waterways—can also yield an impressive array of procedural and substantive human rights abuses. In substantive terms, these transformations of localized landscapes have dramatic livelihood ramifications for communities living off of local renewable resources. And where local communities lack the ability to exercise well-established procedural rights (in other words, almost everywhere), dramatic violations of procedural rights are also common. For example, the World Commission on Dams estimates

---

<sup>30</sup> Nancy Peluso, ‘Coercing Conservation’ in Ronnie D. Lipschutz & Ken Conca, eds., *The State and Social Power in Global Environmental Politics* (New York: Columbia University Press, 1993).

<sup>31</sup> Joanne Bauer, ‘Commentary on “The conflict between rights and environmentalism”’ (2004) 2 Human Rights Dialogue 19.

<sup>32</sup> Bill Weinberg, ‘Mexico: Lacandon Selva Conflict Grows’ (2003) 36 NACLA Report on the Americas 26.

that some 40 to 80 million people have been relocated to make way for dam projects—many of them forcibly, and most of them with little or no voice or compensation.<sup>33</sup>

At a minimum, environmental human rights coalitions emerge around the recognition that environmental activists are prime targets for human-rights abuses. A good example is the joint initiative of the Sierra Club and Amnesty International on ‘Defending Environmental Defenders’.<sup>34</sup> More broadly, as western environmental organizations embraced increasingly international agendas in the 1980s and gained increasing contact with the diverse environmental agendas of people across the global South, some have relinquished the wilderness model and grown increasingly comfortable with the language of grassroots development, community stewardship, and human rights as a language of environmentalism. Such groups have been met by the growing emphasis on community rights and socioeconomic rights within human-rights advocacy, making potentially powerful new coalitions possible. Network-based organizational forms of transnational and global advocacy such as the Rainforest Action Network, the International Rivers Network, and the Pesticide Action Network represent one prototypical expression of this phenomenon, although looser, episodic coalitions are also common.<sup>35</sup>

Environmental human rights coalitions have emerged most strongly around precisely the set of global environmental problems pushed into the background by UNCED’s framework of interstate bargaining on global-commons problems. They typically emerge around complex socio-ecological systems such as forests, rivers, coastlines, and other landscapes, for which we have seen the global proliferation of site-specific conflicts. Rather than being understood as common-pool resources of the sort conceived in Hardin’s stylized tragedy, their politics is better grasped in terms of simultaneous multiple meanings. These systems are, at once, foundations of local livelihood and culture, critical ecosystems, and extractable commodities with transnational market value (be it a stand of timber, fresh water, a fishery, or an eco-

---

<sup>33</sup> World Commission on Dams, *Dams and Development: A New Framework for Decision-Making. The Report of the World Commission on Dams* (London: Earthscan, 2000).

<sup>34</sup> See online: Sierra Club <<http://www.sierraclub.org/human-rights/amnesty/>>. See also Folabi K. Olagbaju & Stephen Mills, ‘Defending Environmental Defenders’ (2004) 2:11 Human Rights Dialogue 32.

<sup>35</sup> On the distinction between networks and coalitions, see Sanjeev Khagram, James V. Riker & Kathryn Sikkink, eds., *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis: University of Minnesota Press, 2002).

tourist's landscape). As different actors try to make these frequently incompatible meanings real, they become engaged in complex authority struggles that have proven difficult to stabilize through either domestic political processes or interstate bargaining.

The simultaneous rise of environmental human rights advocacy and the flagging of the Rio model of environmental diplomacy suggest an important possibility: these contentious political episodes may be supplanting interstate bargaining as the primary motive force behind the further institutionalization of some form of global environmental governance. The potential political influence of advocacy networks has been an important emergent theme in IR scholarship.<sup>36</sup> I have argued elsewhere that this literature has paid far more attention to the origins, workings, and episode-specific effects of these networks than to their long-term implications for institutionalization.<sup>37</sup> Moreover, where that question has been examined, processes of norm institutionalization are typically juxtaposed against, rather than integrated with, the legalization perspective sketched previously. For example, Ellen Lutz and Kathryn Sikkink show that legalization, while not irrelevant, has hardly been central to the notable trajectory of norm-governed human rights improvements in Latin America during the 1990s.<sup>38</sup>

Yet the injection of the environment/human rights synergy directly into international law is beginning to happen, through the interactive activities of intergovernmental organizations and transnational activism. Water provides a revealing example. In 2002 the UN Committee on Economic, Social and Cultural Rights adopted a General Comment declaring that access to water is 'a human right and a public commodity fundamental to life and health.'<sup>39</sup> Specifically,

The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realization of other human rights ... Water should be treated as a social and cultural good, and not primarily

---

<sup>36</sup> Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); Khagram, Riker & Sikkink, *supra* note 35.

<sup>37</sup> Conca, *Governing Water*, *supra* note 1; Ken Conca, 'Old States in New Bottles? The Hybridization of Authority in Global Environmental Governance' in John Barry & Robyn Eckersley, eds., *The State and the Global Ecological Crisis* (Cambridge, Mass.: MIT Press) [forthcoming in 2005].

<sup>38</sup> Ellen L. Lutz & Kathryn Sikkink, 'International Human Rights Law and Practice in Latin America' (2000) 54 *Int'l Org.* 633.

<sup>39</sup> 'United Nations: Access to Water Enshrined As A Human Right' *South North Development Monitor* 5245 (29 November 2002).

as an economic good ... Water, and water facilities and services, must be affordable for all.<sup>40</sup>

The comment was based on an interpretation of the International Covenant on Economic, Social and Cultural Rights, even though the ICESCR does not mention water explicitly.

As Peter Gleick has pointed out, there has long been a basis in international law, covenants, and declarations for recognizing a human right to water, primarily as 'an implicit part of the right to food, health, human well-being and life.'<sup>41</sup> The means of realizing that right was understood historically to come from interstate cooperation, development assistance, and technical progress in harnessing water resources. In contrast, the recent pulse of activity around a human right to water employs a framework stressing transnational stakeholder dialogue rather than interstate diplomacy, and an acknowledgement of the role of water in the cultures and livelihoods of distinct communities such as indigenous peoples.<sup>42</sup> Rather than conceiving of water as a national resource, it is understood as a collective social and cultural good, on the scale of individuals, households, and communities. These aspects of the new right-to-water frame can be traced directly to contentious social activism against large dam projects and water privatization schemes.<sup>43</sup> The 2002 UN declaration adopted a foundational frame of water rights activism when it stressed that '[w]ater should be treated as a social and cultural good, and not primarily as an economic commodity.'<sup>44</sup>

Some of the activities of norm entrepreneurs are captured through social movement theory and network-based perspectives on transnational activism.<sup>45</sup> Others, however, blur the line between theoretical perspectives on norm inscription and progressive legalization. For example, operating in parallel to the more explicitly contentious and extra-institutional movements on water have been a series of transnational parliamentary initiatives, rooted primarily in green parties and other national political organizations. The primary

---

<sup>40</sup> *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: The Right To Water*, UN CESCR, 2003, UN Doc. E/C.12/2002/11 (2003).

<sup>41</sup> Peter H. Gleick, 'The Human Right to Water' (1998) 1 *Water Policy* 487 at 490.

<sup>42</sup> *Substantive Issues*, *supra* note 40 at 3-4.

<sup>43</sup> Conca, *Governing Water*, *supra* note 1 at c. 6, 7.

<sup>44</sup> *Supra* note 40.

<sup>45</sup> The term 'norm entrepreneur' is from Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 *Int'l Org.* 887.

stimulus to this activity has been the rise of a neoliberal agenda of water privatization. In 1998 the Committee for a World Water Contract (a group of prominent international individuals led by former president of Portugal, Mario Soares) issued a Water Manifesto calling for recognition of water as 'an inalienable individual and collective right.'<sup>46</sup> The group also proposed negotiations for a World Water Treaty that would bolster water rights in the face of growing commercialization—and which would be conducted not via standard interstate diplomacy but rather through a transnational network linking national parliaments. European green parties have also become active on the issue: Greens in the European Parliament used the 2000 P-7 summit (a symbolic counter-gathering to the G-7 meeting) to oppose water privatization as a human rights violation.

Another intriguing example is the growing momentum behind the idea of holding governments accountable for climate change as a human rights violation. In a case that is expected to appear before the Inter-American Commission on Human Rights, the Inuit Circumpolar Conference (ICC) is preparing to argue that 'the erosion and potential destruction of the Inuit way of life brought about by climate change resulting from emission of greenhouse gases amounts to a violation of the fundamental human rights of Inuit.'<sup>47</sup> According to Sheila Watt-Cloutier of the ICC, 'Inuit believe there is sufficient evidence to demonstrate that the failure to take remedial action by those nations most responsible for the problem does constitute a violation of their human rights — specifically the rights to life, health, culture, means of subsistence, and property.'<sup>48</sup> The basis for this petition is the Arctic Council's *Arctic Climate Impact Assessment* which forecasts devastating impacts on the Inuit way of life ranging from human health effects and food insecurity to more extreme weather conditions and resource-related cultural impacts.<sup>49</sup> The gains from prior cases involving the impact of deforestation, extractive industries and land conversion on indigenous peoples including the Awas Tingni (Nicaragua), Huaorani (Ecuador), and Yanomami (Brazil-Venezuela border region) have set the stage.<sup>50</sup>

The Inuit initiative is telling on several levels. Rather than

---

<sup>46</sup> Global Committee for the Water Contract, *The Water Manifesto: The Right to Life* (Lisbon: Global Committee for the Water Contract, 1998).

<sup>47</sup> Sheila Watt-Cloutier, 'Climate Change and Human Rights' (2004) 2:11 Human Rights Dialogue 10.

<sup>48</sup> *Ibid.*

<sup>49</sup> See Susan Joy Hassol, *Arctic Climate Impact Assessment: Impacts of a Warming Arctic* (Cambridge: Cambridge University Press, 2004).

<sup>50</sup> Jorge Daniel Taillant, 'A Nascent Agenda for the Americas' (2004) 2:11 Human Rights Dialogue 28.

framing climate change as a Hardinesque problem of the global commons, the emphasis is on specific community-level impacts in a particular historical, economic and cultural context. Rather than crafting a technical-functional problem frame of the sort that typically infuses interstate regime bargaining, the Inuit case rests on an interesting analytic synthesis of universalized climate science and localized, highly context-specific ways of knowing rooted in an indigenous knowledge system; much of the evidence is derived from Inuit observations and understandings of ongoing changes to the Arctic environment. And rather than flowing from cooperative interstate bargaining to allocate the costs of responding to a shared problem, the interstate machinery of the Organization of American States is instead being pulled along in the wake of these contentious challenges, with a series of resolutions to study the link between the environment and human rights and identify opportunities to harmonize their interaction.<sup>51</sup>

#### IV HUMAN RIGHTS, ENVIRONMENT, AND NEOLIBERALISM

One important question that needs further study is the relationship between the two trends sketched here, the decline of the Rio paradigm and the rise of contentious transnational environmental activism as an institution-building force. Is it just coincidence that emergent controversies around local livelihood-and-rights struggles have come to the forefront as Rio's diplomacy for sustainability has waned? Here we must confront two alternate explanations for the linkage. One obvious possibility is that the palpable lack of momentum for Rio-style bargaining is feeding a new radicalism in environmental advocacy. In this view, actors who have grown frustrated with the slow pace of states in taking action for sustainability have adopted more contentious approaches, at a time when the communications revolution and post-Cold War political openings have made it easier to organize and advocate across borders.

There is also a very different explanation, suggesting that environmental human rights advocacy is not an expression of opposition so much as a disciplining of it. Balakrishnan Rajagopal has argued that mainstream human-rights discourse resonates with important elements of neoliberalism. As a result, the emergence of human rights as the predominant discourse of resistance to the 'violence of development' has rendered the resistance of grassroots groups outside the neoliberal paradigm less visible to both scholars and liberal activists.<sup>52</sup> In a similar vein, a rights-based discourse of

---

<sup>51</sup> OAS, General Assembly, *Resolution: Human Rights and Environment*, AG/RES. 1819 (XXXI-O/01) (2001). See also Taillant, *supra* note 50.

<sup>52</sup> Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge: Cambridge University

environmentalism could be read as an expression of global neoliberalism.

For movements tagged frequently with accusations of elitism and western liberal bias, the possibility must be taken seriously. Yet actors seeking to reconcile environmental protection with neoliberal conceptions need not do so through the subtle channel of human rights activism. The post-UNCED era has seen a rise of an avowedly pro-market environmentalism, replete with tradable pollution permits, public-private partnerships, voluntary compliance, and market-based regulatory mechanisms such as nonstate-based product certification.<sup>53</sup> Indeed, these trends were a large part of the disquiet that many environmentalists felt over the 2002 Johannesburg summit. In this context, my sense is that environmental human rights coalitions have flourished more in opposition to these tendencies than in consonance with them. Whatever the consequences of their actions, the actors engaged in pressing these claims in the water and climate controversies discussed previously understand themselves to be opposing, rather than reinforcing, these tendencies. Thus, anti-privatization activists in the water issue-arena have emphasized water rights explicitly in opposition to commodification, and with the recognition that rights are socio-cultural properties of communities and not simply economic properties of individuals.<sup>54</sup>

Nor are the synergies between environmental activism and human rights advocacy always straightforward and easily tapped, as some models of neoliberal hegemony tend to imply. After dabbling with the trend toward integrated conservation-and-development initiatives throughout the 1990s, several of the largest conservation NGOs have been moving away from alliances with local communities and indigenous peoples in recent years—sparking tensions between these organizations and some of their progressive funders, to say nothing of on-the-ground conflicts with local communities.<sup>55</sup> Moreover, while a human-rights agenda may be insufficiently ecologically focused for these environmentalists, it may be insufficiently politicized for some others. As Jeffery Atik points out, there can be a significant difference between

---

Press, 2003).

<sup>53</sup> See for example Jennifer Clapp, 'The privatization of global environmental governance: ISO 14000 and the developing world' (1998) 4 *Global Governance* 295. On product certification, see Benjamin Cashore, Deanna Newsom & Graeme Auld, *Governing Through Markets: Forest Certification and the Emergence of Non-State Authority* (New Haven, Conn.: Yale University Press, 2004).

<sup>54</sup> Conca, *Governing Water*, *supra* note 1 at c. 7.

<sup>55</sup> See Mac Chapin, 'A Challenge to Conservationists' (2004) 17 *World Watch* 17.

the minimum standard inherent in the idea of environmental rights and the emphasis on distributional equity and disproportionate burden that infuses most environmental-justice activism.<sup>56</sup>

In other words, contentious politics are not limited to the external dealings of environmental human rights activism. The specific undercurrents, intended consequences, and unintended effects of environmental human rights advocacy deserve careful study. But it would be a mistake to dismiss the trend as little more than a manifestation of the neoliberal colonization of activist imagination.

## CONCLUSION

Environmental human rights alliances have been central to the transnationalization of contentious environmental politics. They amplify the grievances that spring from the environmental damage inflicted on local communities around the world and frame them as specific manifestations of a larger pattern. For a growing array of environmental issues of international significance, these acts of transnational contention appear to be the central arena from which increasingly institutionalized forms of global environmental governance will emerge. Thus, despite the stalling of momentum for interstate environmental diplomacy, there have been important evolutionary trends in the political and legal foundations of global environmental governance since UNCED—including trends that differ fundamentally from the blueprint laid down at Rio. Driven by a new geopolitical and economic context, a new generation of environmental challenges, and the changing foundations of authority in world politics, the global interstate cooperative framework envisioned at Rio is being transcended by more complex patterns of institutional development, grounded in political contention and transnational linkages.

---

<sup>56</sup> Jeffery Atik, 'Commentary on 'The relationship between environmental rights and environmental injustice' (2004) 2:11 Human Rights Dialogue 26.