THE INTERSECTION OF INTERNATIONAL HUMAN RIGHTS AND DOMESTIC ENVIRONMENTAL REGULATION

Rebecca M. Bratspies*

TABLE OF CONTENTS

I. INTRODUCTION ........................................... 650

II. HISTORY OF THE HUMAN RIGHTS APPROACH TO ENVIRONMENTAL PROBLEMS ........................................... 655

III. A BRIEF OVERVIEW OF THE RELEVANT UNITED STATES LAW AT PLAY IN THE CHUKCHI SEA LEASES .......................... 659

IV. WHAT PROCESS OCCURRED IN THE CHUKCHI SEA LEASES AND WHAT ARE THE KEY ENVIRONMENTAL ISSUES? ................ 663

V. HOW MIGHT A HUMAN RIGHTS FRAMING HAVE ENHANCED THE CHUKCHI SEA PROCESS? .................................. 668

VI. CONCLUDING NOTE ..................................... 670

* Professor of Law, CUNY School of Law. Thanks to Alexa Woodward and Thomas Mariadason for research assistance. This paper benefited from feedback at the University of Connecticut Conference on Human Rights in the USA (particularly the generous comments of my co-panelists James Nickel, Richard P. Hiskes, Elizabeth Burleson, and Joanne Bauer) and from the discussions at the University of Georgia School of Law Conference on International Human Rights and Climate Change.
I. INTRODUCTION

The idea of human rights—inalienable, universal rights that individuals are entitled to simply by virtue of being human—stands out as a significant achievement of twentieth century legal thought. While the intellectual history behind human rights certainly traces its roots back to the Enlightenment, the specific principles we think of as human rights emerged from the more immediate and bloody context of Nazi genocide. In particular, the Universal Declaration of Human Rights emerged as a response to the central international legal challenge of the twentieth century—the proper limits on state power vis-à-vis its own citizens, particularly those who are members of marginalized racial, ethnic, or religious minorities. As such, human rights deal mainly with how people should be treated by their government and its institutions.

Although we are only one decade into this century, it is already clear that the close of the twentieth century did not draw a line under this basic human rights question. One need look no further than the daily newspaper to realize that abuses continue, and that neither the Universal Declaration, the Genocide Convention, nor the International Criminal Court have put an end to genocide. Not only have these rights not eliminated this conduct by states, but the growing proliferation of non-state actors raises a whole other set of challenges. Profound questions remain about the utility of human rights for responding to abuses committed by non-state actors, particularly multinational corporations.

At the same time, the new century and millennium bring new challenges. In particular, environmental problems confront us ever more acutely. Each day brings new evidence that human activity is dramatically and irreversibly altering the entire planet, unraveling the life support systems on which we and all other living creatures rely. The defining moral issue and social justice challenge of the twenty-first century may well be the tragic effects of climate change, just as genocide and the struggle against oppression of stigmatized groups was the defining challenge of the twentieth century. As Amy Sinden

---


2 See generally Thomas Pogge, *The International Significance of Human Rights*, 4 J. ETHICS 45, 47 (2000) (noting that for human rights to be implicated, the offending conduct must be in some fashion official).


notes, human rights law has been, at least on the rhetorical level, "the law's best response to profound, unthinkable, far-reaching moral transgression." There is a great temptation to turn to this "law's best response" as we seek to address climate change.6

Thus, we see invocations of a human right to a healthy environment throughout the climate change discourse. One form this invocation takes is litigation in which communities argue that their justiciable human rights are violated by activities that promote climate change. For example, the Inuit people of the Arctic filed a petition with the Inter-American Commission on Human Rights claiming that the acts and omissions of the United States with respect to climate change are violating their human rights.7 Although it made headlines, the suit has so far gone nowhere.8 Communities in Africa's Niger Delta had more success suing Shell Oil9 on the theory that its wasteful practice

5 Id.
6 Id.
of "gas flaring," which contributed more greenhouse gas emissions than all of the other sub-Saharan African sources combined, constituted a human rights violation. But, what is the appropriate relationship between the individual human rights framework that developed in response to active and direct government abuses, and the ravages of climate change, which is primarily the result of private economic activity? While government policies, particularly those involving exercise of governmental licensing, taxation, and policy powers, obviously facilitate and channel private economic activity, there is, at least arguably, a difference between these activities and the kinds of direct government activities that human rights law has typically addressed. As a result, United States courts have often stated that the legislative and executive branches of government are better suited to establish environmental rights.

To the extent that human rights are about remedying the power imbalance between individuals and their governments, they clearly resonate in the context of climate change. ExxonMobil earned $45.2 billion in 2008. This is a staggering number! It breaks down to more than $123 million per day; or more than $5 million per hour; $85 thousand per minute; or $1,433.28 per second.

---


11 Indeed, cases proceeding on other theories, particularly nuisance rather than human rights, continue to be filed. For example, the native Inupiat village of Kivalina, Alaska recently sued nine oil companies (including Shell and ExxonMobil Corp.), fourteen power companies, and one coal company for damages related to climate change. Complaint for Damages, Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2008) (No. 08-1138), available at 2008 WL 594713. Massachusetts v. EPA, 549 U.S. 497 (2007), also proceeded on a nuisance theory.


ExxonMobil’s profits were greater than the GDPs of 111 of the 186 countries about which the World Bank compiles statistics. ExxonMobil has been spending part of that vast intake of wealth in trying to discredit global warming science and the Intergovernmental Panel on Climate Change (IPCC). In 2008, the year it earned almost $1,500 per second selling fossil fuels, a primary contributor to catastrophic climate change, Exxon funded numerous groups claiming that global warming is a hoax. It is not surprising that those most affected by climate change, like the Inuit whose Arctic home is melting beneath their feet; farmers in Bangladesh and Africa who face flooding or drought; and nations like Tuvalu and the Maldives whose very existence is threatened by rising sea levels (not to mention coastal residents around the world), find it difficult to match the influence that ExxonMobil and the rest of the fossil fuel producers wield. So, how do we defuse that power dynamic? Is human rights discourse the answer? Well, the first logical question is whether that discourse even applies. Can we say there is a human right to a healthy environment?


See generally EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY, AND INTERGENERATIONAL EQUITY 17–46 (1989).

Dinah Shelton, Describing the Elephant: International Justice and Environmental Law, in ENVIRONMENTAL LAW AND JUSTICE IN CONTEXT 55–63 (Jonas Ebbesson & Phoebe Okowa
precautionary decision-making,\textsuperscript{22} and the polluter pays principle.\textsuperscript{23} That said, there is also vigorous debate about whether these norms have coalesced into a new human right—the right to a healthy environment. Rather than wade into those murky waters, I would like to bracket the question of whether these emerging norms give rise to a human right to a wholesome environment because the answer to that question is not relevant to an assessment of their possible resonance within the domestic regulatory arena. Regardless of whether these norms amount to a free-standing human right, they undoubtedly enrich our understanding of human rights clearly articulated in the Universal Declaration and the Human Rights Conventions like the right to life,\textsuperscript{24} health,\textsuperscript{25} culture,\textsuperscript{26} and property.\textsuperscript{27} Justice Weeramantry, for one, has characterized protecting the environment as “a vital part of contemporary human rights doctrine, for it is a \textit{sine qua non} for numerous human rights such as the right to health and the right to life itself.”\textsuperscript{28} Moreover, these norms certainly represent a gathering international consensus about the relationship between states and individuals vis-à-vis the environment, about the association between international environmental norms and established human rights. It is to that international consensus that this Article directs attention, with the hope that resorting to the human rights discourse as part of the domestic regulatory process can enrich our understanding of environmental rights currently conveyed by domestic law in the United States.

This Article focuses on how international human rights and their associated environmental norms can be useful for deepening the domestic legal process, particularly in the area of public participation in environmental decision-making in an age of global warming. To make this argument, this Article looks


\textsuperscript{23} The polluter pays principle dates back to the Trail Smelter Arbitration and is among the most venerable and well-established principles of international environmental law. For a full discussion of the Trail Smelter Arbitration, including edited versions of the decisions themselves, see generally \textit{TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMEETER ARBITRATION} (Rebecca M. Bratspies & Richard A. Miller eds., 2006).


\textsuperscript{25} Id. art. 25.

\textsuperscript{26} Id. art. 27.

\textsuperscript{27} Id. art. 17.

\textsuperscript{28} Gabčíkovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7, 91 (Sept. 25) (separate opinion of Vice-President Weeramantry).
at the process by which the United States approved oil leases in the Chukchi Sea, and how that process might have been improved had it been enriched by the international norms that would generally be considered to make up the putative right to a healthy environment. Part II provides a general introduction to the intersection of international human rights and environmental law. Part III offers a brief framework of the relevant domestic laws and then Part IV examines what the United States actually did to implement those laws in the context of the Chukchi Sea leases. Part V shows how interpreting these domestic legal obligations through the lens of the international environmental norms that make up the putative right to a healthy environment would make the domestic regulatory process not only better, fairer, and more legitimate, but also more likely to ensure that the state respects the human rights of its citizens. At the same time, Part VI points out some key limitations of the anthropocentric human rights approach for achieving environmental ends.

This Article does not argue that there is an international human right to a healthy environment. Nor does it propose that the United States adopt international human rights as articulated in the Universal Declaration of Human Rights and the International Covenants as domestic law. It is not that I necessarily disagree with either proposition, but both are theoretical matters, and this Article focuses on practicality—on how available tools for “on-the-ground implementation” can make for a better regulatory system. Thus, my argument is more prudential than normative: regulators should incorporate environmental human rights concerns into domestic decision-making processes, not because incorporation of these concerns is mandatory under any existing hierarchy of law, but because it is useful.

II. HISTORY OF THE HUMAN RIGHTS APPROACH TO ENVIRONMENTAL PROBLEMS

International law first recognized the link between environmental protection and human rights in the Stockholm Declaration, adopted by the 1972 United Nations Conference on the Human Environment. Principle 1 of this Declaration proclaims that, “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”


30 Id. at princ. 1.
The 1992 United Nations Conference on the Environment and Development (UNCED or the Rio Conference) focused global attention on environmental concerns and more particularly on the unsustainable nature of human activities. More importantly, the Rio Declaration, issued at UNCED, recognized that human activity was undermining the integrity of natural systems on which human life and society depend. Yet the Rio Declaration did not, as some had hoped, announce a human right to a healthy environment. In fact, considering the fact that such language had been proposed and rejected from the Declaration, Rio may in fact represent a significant step away from such a commitment. From Rio onward, an explosion of international treaty-making produced a wealth of multilateral environmental agreements covering everything from access to environmental information to greenhouse gas emissions to persistent organic pollutants. None of these agreements have employed a human rights framing.

The United Nations’ 1994 Human Rights and the Environment Report proposed explicitly consolidating these norms into an articulated right to a “satisfactory environment” by declaring that “[a]ll persons have the right to a secure, healthy and ecologically sound environment.” As proposed, this right would encompass the right to be free “from pollution, environmental degradation and activities that adversely affect the environment” as well as a positive right to “protection and preservation of the air, soil, water, . . . and the essential processes and areas necessary to maintain biological diversity and ecosystems.” Other draft principles reiterate the information and procedural...

---

33 Aarhus Convention, supra note 19, art. 1.
37 Id. Annex I, ¶ 2.
38 Id. ¶ 5.
39 Id. ¶ 6.
rights endorsed by Principle 10 of the Rio Declaration and enshrined in the Aarhus Convention. Fifteen years later, the prospect for any such clear declaration of a human right to a healthy environment seems quite distant. Among the major sticking points are questions such as: who would hold such a right; how would it account for future generations and group rights; how could the right be enforced; and in an ever-more integrated, globalized world, would the right have any limits?

Given that pattern, why do we keep returning to the question of whether there is a human right to a healthy environment? The answer is fairly obvious. Despite the impressive body of normative international environmental law, the project’s on-the-ground, real world success has been underwhelming. The aggregate consequences of environmental exploitation threaten the very existence of life on earth. Unchecked commoditization continues to numb people to the natural world. The legal project seems stymied—unable to

40 Id. ¶¶ 15–20.
41 Principle 10 provides:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

*Rio Declaration*, supra note 32.

42 The Preamble to the Aarhus Convention “recognize[es] that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself.” Aarhus Convention, *supra* note 19.

43 That critique is separate and apart from the more fundamental objection that an overemphasis on rights actually interferes with social change by obscuring recognition of social duties and fragmenting accountability. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991) (outlining the questions surrounding human rights discourse).


45 Of course, some question the entire concept of “the natural world,” pointing to millennia of human manipulation of ecosystems and species as evidence that there is no such thing. See Robert H. Nelson, *Environmental Religion: A Theological Critique*, 55 CASE W. RES. L.
convert progress in negotiating legal documents into significant advances in preserving and protecting the earth's ecosystems. It is frustration with this system that prompts renewed calls for recognition of a human right to a healthy environment.

The move to identify and codify a human right to a healthy environment is one approach for straddling these many interactions by giving them a coherent orientation. The invocation of other human rights norms to inform existing environmental decision-making processes is another. Both are proposed with increased frequency in response to a growing sense of environmental crisis. Yet, it is not at all clear that a human rights-based framework will be successful in this area. After all, environmental problems are complex and ambiguous, straddling multifaceted interactions between ecological and human systems. Successfully responding to these problems requires a dynamic balancing process capable of accounting for rapid technological change amidst conflicting national imperatives. At the same time, many instances generating the most pressure for invoking human rights involve the environmental rights of indigenous peoples. Given the tenuous historical relationship between indigenous groups and international law, and the ambiguities of group rights as human rights, the Draft Declaration on Indigenous Rights notwithstanding, it is difficult not to notice the irony of this use of human rights principles.

The rest of this Article tests the strengths and weaknesses of a human rights based approach to environmental protection by examining how a human rights orientation might have reshaped a significant recent United States environmental regulatory decision—the decision to lease a vast swath of the Chukchi Sea for oil and gas exploration.46 This decision is part of a national energy strategy that has focused on increasing domestic production of fossil fuels.47

---


Of all the climate change issues that face the United States in its domestic policy sphere, few are as rancorous as the question of whether to allow off-shore oil exploration and drilling. The urge to "drill baby drill" regardless of the social and economic consequences represents a mindset at odds with sustainable development. The public is sharply divided, with environmentalists, often supported by local governments and indigenous groups, squaring off against oil companies and oil-independence nativists. Genuine public consideration of the rapid environmental changes we are witnessing has been lost in the cacophony. As the United States grapples with the proper balance between the nation's immediate energy desires and long-term sustainability interests it needs a new way of framing the energy discourse to account for the warming, shrinking world. Human rights can provide that frame.

III. A BRIEF OVERVIEW OF THE RELEVANT UNITED STATES LAW AT PLAY IN THE CHUKCHI SEA LEASES

The United States currently does not recognize a federal constitutional right to a healthy environment. This remains true despite decades of discussion about whether such a right should be subject to constitutional guarantee. The first meaningful attempt to enshrine environmental rights in the U.S. Constitution came in 1968 when Wisconsin Senator Gaylord Nelson proposed a constitutional amendment which read: "Every person has the inalienable right to a decent environment. The United States and every State shall guarantee this right." Although this and similar subsequent attempts to include environmental rights in the U.S. Constitution failed, Senator Nelson’s proposed amendment certainly did much to raise awareness about then-looming environmental issues.

The absence of a federal constitutional right does not mean that there are no environmental rights in United States' law. First, many states guarantee some
version of environmental rights in their state constitutions. Second, there are a host of federal legislative enactments that create environmental rights akin to those identified with a human right to a healthy environment.

The National Environmental Policy Act (NEPA) recognizes "the profound impact of man's activity on . . . the natural environment . . . ." Additionally, NEPA announces "a national policy which will encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment . . . ." To that end, NEPA explicitly commits the federal government to, "(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations; [and] (2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings . . . ."

NEPA requires that the federal government consider the environmental consequences of its actions before making major decisions. Although it has been interpreted to create only procedural rather than substantive environmental rights, these rights are still significant. You have the right to demand that the environmental consequences of government activities be given due consideration. As part of this process, you are entitled to information necessary to facilitate your participation in this process, a right clearly related to the emerging international environmental norms about access to information. These rights can be enforced in a court of law.

---

52 Id. § 4321.
54 Unlike many other environmental statutes, NEPA does not contain a citizen's suit provision. Therefore, suits must proceed under the APA and must request that a reviewing court "compel agency action unlawfully withheld or unreasonably delayed," 5 U.S.C. §706(1) (2006), and in addition or in the alternative to "hold unlawful and set aside agency action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law . . . [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2) (2006).
The Clean Air Act requires that national ambient air quality standards be set at a level that protects the public’s health and welfare. In doing so, the Act prohibits anyone from putting anything into the air that will harm the health or welfare of others. The Act also requires that states create, implement, and enforce plans for ensuring that this ban on harmful substances in the air is achieved. The statutory language thus creates specific, nondiscretionary duties on the federal government and places obligations on the state to deliver clean air to its citizens and residents in order to protect their health, community, and property. The interested public has the right to go to court to demand that the U.S. Environmental Protection Agency (EPA) promulgate such rules. The public also has the justiciable rights to participate in the rulemaking process and to demand that polluters comply with the law.

The Clean Water Act similarly invokes public health as the reason for limiting toxic pollutants in our water. Indeed, the Clean Water Act identifies eliminating all pollution of United States’ waters as a national goal. Like the Clean Air Act, it creates rights that can be enforced in court. Again, you have the justiciable right to demand that the required standards be promulgated and implemented.

These statutes arguably guarantee substantive rights to individuals and communities, and create the possibility of individual juridical enforcement of those rights, should the government fail to do so in its representative capacity. Note how similar these rights are to aspects of the emerging environmental norms of access to information and advanced informed consent that are part of the putative right to a healthy environment. Statutory rights are not the same as human rights, because there are still issues of standing that complicate

---

56 Id. § 7410.
59 Id. § 7604(a).
61 Id. § 1251(a)(1).
62 Id. § 1365 (authorizing civil action by “any citizen” alleging point source of pollution is in violation of permit or order or alleging that Administrator has failed to perform a non-discretionary duty).
63 Indeed, the Supreme Court recently complicated the standing question in a fashion that is likely to have repercussions for environmental plaintiffs. Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009). See generally CHRISTOPHER D. STONE, SHOULD TREES HAVE STANDING?
access to the courts; nevertheless, they are claimable rights that individuals currently hold against their government.

Yet, rights can be fickle, subject to interpretation, and prone to dilution. Some argue that these environmental rights have largely been read out of the domestic environmental statutes. NEPA, in particular, has been interpreted to create only procedural, rather than substantive rights. As a result, its putative role as an "environmental Magna Carta" and as a "national charter for protection of the environment" has been thwarted. At the same time, unambiguous environmental commitments in the Clean Water Act, the Clean Air Act, and other environmental statutes have been interpreted creatively to diminish environmental rights into mere "interests" that can be weighed against costs and other "interests." More fundamentally, the doctrines of standing and political question have been used to limit the scope of who can access the courts in order to claim these rights.

Emerging international law environmental norms might be a way to reestablish these environmental rights, qua rights, into United States' environmental law. In short, a human rights focus might help us rethink our current understanding of United States' regulatory regimes for the environment. However, an attribute that U.S. environmental statutes share with

AND OTHER ESSAYS ON LAW, MORALS AND THE ENVIRONMENT (1996) (arguing for an expansion in standing through special guardians empowered to speak for different elements in nature).


67 The Supreme Court's most recent standing case, Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009), may have significantly narrowed the doctrine of standing, and consequently limited the class of people who will have access to the courts to enforce these rights.

68 In two cases decided in 2009, the Second and Fifth Circuits allowed global warming nuisance suits against power companies to go forward, concluding that the political question doctrine did not bar the suit. Connecticut v. Am. Elec. Power Co., 582 F.3d 309 (2d Cir. 2009); Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009). The Fifth Circuit reviewed the Comer en banc, but unable to form a quorum, concluded that it had no choice but to reinstate the district court decision dismissing the case, despite a panel decision overturning it. Comer v. Murphy Oil USA, No. 07-60756, WL 2136658 (May 28, 2010). Contemporaneous with the 2009 decisions in Comer and American Electric Power Company, a California District Court reached a directly contrary result in Native Vill. of Kivalina v. ExxonMobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009).
human rights and the environment

IV. WHAT PROCESS OCCURRED IN THE CHUKCHI SEA LEASES AND WHAT ARE THE KEY ENVIRONMENTAL ISSUES?*

The Chukchi Sea separates northwestern Alaska from northeastern Siberia. It serves as the lifeblood for communities like the Native Village of Point Hope, where residents have relied on the sea for cultural and nutritional subsistence for thousands of years. One oil spill could destroy their way of life. The Chukchi Sea is home to endangered bowhead whales; a critical habitat for endangered spectacled eider; and an important summer feeding ground for the Pacific walrus. It is also home to roughly 10% of the Arctic’s polar bears. Unfortunately for the native Inuit and the endangered fauna, the United States portion of the Chukchi Sea is believed to hold fifteen billion barrels of...
recoverable oil and seventy-six trillion cubic feet of recoverable natural gas. Even though burning of fossil fuels is a primary threat to Arctic ecosystems like the Chukchi Sea, the attraction of this petro-wealth proved irresistible, and the federal government opened approximately 29.7 million acres of the pristine Chukchi Sea to oil and gas development activities.

On February 6, 2008, the Minerals Management Service (MMS), an agency within the Department of the Interior, auctioned off oil and gas leases within the Chukchi Sea. An American subsidiary of Royal Dutch Shell, the same company sued for its gas flaring activities in Nigeria, paid $2.6 billion for the right to develop the Chukchi Sea through oil and gas exploration leases. Shell was also the highest bidder for leases in the adjacent Beaufort Sea. Shell is a business, it expects to profit from those leases for which it paid record amounts. But, what about the rest of society? Before selling these kinds of leases, the Department of Interior was required by law to examine and consider the environmental impacts of the proposed leases. It is in that evaluative process that resort to emerging environmental norms might be critical.

---


In 2003, the Secretary of the Interior first floated the idea of leasing part of the Chukchi Sea for oil and gas exploration. She solicited comments in order to "ensure a decision that considers the concerns of all respondents in future decisions in this leasing process." Under NEPA, the MMS was required to prepare an Environmental Impact Statement (EIS) to assess the effects that its proposed action would have on the pristine Chukchi Sea environment. According to the Federal Register notice that accompanied publication of the draft EIS, the EIS analyzed the "potential direct, indirect, and cumulative environmental impacts of the sale, including estimated exploration and development and production activities related to the sale, on the physical, biological, and human environments in the Chukchi Sea area." Yet, the scoping document and the final EIS ignored some of the most obvious environmental impacts from the proposed development.

In particular, despite an internal report specifying the likelihood of oil spills, and the lack of technology to respond to oil spills in the Arctic, the EIS did not consider the deleterious effects these oil spills will have on vulnerable Alaskan fauna, including polar bears, walrus, and whales. The EIS also minimized the likelihood and size of any oil spills by using a production estimate significantly lower than the one billion barrels the agency had elsewhere concluded would be the minimum economically viable level of production. Even with this manipulation of the data, the agency concluded that there was a 40% chance of a significant oil spill. The EIS similarly failed to consider the cumulative effects of oil and gas exploration in the Chukchi and

---

75 Id.
76 Chukchi Sea Planning Area Oil and Gas Lease Sale 193 and Seismic Surveying Activities in the Chukchi Sea, 71 Fed. Reg. 60,751, 60,751 (Oct. 16, 2006).
78 See MINERALS MGMT. SERV., SCOPING REPORT: CHUKCHI SEA PLANNING AREA OIL AND GAS LEASE SALE 193 ENVIRONMENTAL IMPACT STATEMENT 9 (2006), available at http://www.mms.gov/alaska/cproject/Chukchi193/Scoping%20ReportLS193.pdf (raising concerns about serious problems associated with the possibility of an oil spill in the Chukchi Sea). Even as the MMS actively promoted these oil leases, it conceded that oil spills are likely from its proposal to open up the Chukchi Sea to oil and gas development. And, according to the U.S. Army Corps of Engineers, there are no effective methods for cleaning up oil spills in Arctic waters.
Beaufort Seas, increased boat traffic and spills attributable to a proposed liquid natural gas transfer station, and the overall contribution that the oil and gas extracted from the Chukchi sea would make to the problem of global warming—a problem that is jeopardizing the survival of polar bears and other arctic marine mammals and is likely to undermine the cultural survival of Alaska's native populations.

At the same time that MMS was conducting this flawed EIS process, the U.S. Geological Survey (USGS) was predicting that, due to global warming, most of the polar bears would be gone within the next fifty years, along with the sea ice on which they depend. Based on these predictions, the U.S. Fish and Wildlife Service (FWS), another agency within the Department of the Interior began considering whether to list the polar bear as threatened under the Endangered Species Act. The main justification for the proposed listing was

Despite the pleadings of agency scientists, the cumulative effects of oil development was not considered in the EIS. For example, only one small part of the proposed Chukchi Sea development was considered (the first well) in the EIS, and the EIS explicitly refused to consider the combined impacts of Beaufort Sea development, North Slope Development, and Chukchi Sea development, even though many of the threatened and endangered species across that region are considered one population. "Gas development in the Chukchi OCS should not be included in the reasonably foreseeable scenario. Therefore, offshore gas development and transportation impacts are not thoroughly analyzed in this EIS."); see also NORTHERN ECONOMICS, ECONOMIC ANALYSIS OF FUTURE OFFSHORE OIL AND GAS DEVELOPMENT: BEAUFORT SEA, CHUKCHI SEA, AND NORTHERN ALEUTIAN BASIN, tbl.2, at 8, 22 (2009), available at http://www-static.shell.com/static/usa/downloads/about_shell/strategy/major_projects/alaska/econanalysisofoffshoreogdevpt.pdf (indicating that liquefied natural gas was not among the development scenarios considered).

In a preliminary finding, the U.S. Fish and Wildlife Service announced on September 8, 2009 that it was considering listing the Pacific walrus, found in the Chukchi Sea, under the Endangered Species Act because of the threat that global warming poses to their survival. Press Release, U.S. Fish and Wildlife Service, supra note 70.


See Endangered and Threatened Wildlife and Plants; 12-Month Petition Finding and Proposed Rule to List the Polar Bear (Ursus maritimus) as Threatened Throughout Its Range, 72
that polar bears faced severe habitat loss due to the melting sea ice attributable to global warming.\textsuperscript{85} Oil development in the Chukchi Sea would clearly increase the threat these animals faced. Indeed, the Chukchi Sea EIS concluded “it is certain that some [polar] bears will be harassed or killed as a result of industrial activities in their habitat”\textsuperscript{86} and the effects of accidental oil spills could be “significant,”\textsuperscript{87} pervasive, and potentially devastating.\textsuperscript{88}

In May of 2008, FWS ultimately decided to list the polar bear as threatened.\textsuperscript{89} Unfortunately, that decision came three months after the Chukchi Sea lease sale and four months after the statutory deadline by which the Department of the Interior was required to have made a listing decision. Had the Department of the Interior complied with applicable law, the polar bear listing decision would have been published a month before the proposed Chukchi Sea lease sale.\textsuperscript{90} Instead, the agency announced that it was delaying a listing decision for “further study.” This delay of the listing decision was critical for the success of the lease sale. If the polar bear had been listed as scheduled, FWS would have been required to designate a critical habitat for the bear. That habitat would almost inevitably include the same waters contained in Lease Sale 193, making the sale less likely. Instead, MMS cited the delay in listing the polar bear under the Endangered Species Act as the reason it would not impose requirements on oil companies to minimize risks for polar bear populations. Congress has already held hearings about why the decision on listing the polar bear was delayed past the Chukchi lease sale.\textsuperscript{91} Indeed, it

\begin{footnotesize}
\begin{itemize}
  \item Fed. Reg. 1064-01, 1065 (Jan. 9, 2007) (describing the history behind the listing proposal).
  \item Id. at 1071–76; see also Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28,212, 28,219–28,226 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17) (detailing the loss of sea ice due to climate change, and the projected effect on polar bears).
  \item Id. at 1071–76; see also Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. 28,212, 28,219–28,226 (May 15, 2008) (to be codified at 50 C.F.R. pt. 17) (detailing the loss of sea ice due to climate change, and the projected effect on polar bears).
  \item Id. at IV-164.
  \item Id. at IV-163, 165–68.
  \item Id. at IV-171.
  \item Id. at IV-164.
  \item Determination of Threatened Status for the Polar Bear (Ursus maritimus) Throughout Its Range, 73 Fed. Reg. at 28,212, supra note 85.
\end{itemize}
\end{footnotesize}
seems clear that the delay in listing was, at least in part, a deliberate attempt to thwart any serious consideration of protecting polar bear habitat as part of the Chukchi Sea lease sale.

The D.C. Circuit recently found that the Department of Interior’s entire 2007–2012 Outer Continental Shelf drilling plan was irrational because it was based on a flawed analysis of the environmental sensitivity of Arctic waters. The status of the Chukchi leases, which were issued under this now invalidated plan, is unclear as of this writing.

V. HOW MIGHT A HUMAN RIGHTS FRAMING HAVE ENHANCED THE CHUKCHI SEA PROCESS?

There are many lessons to draw from the Chukchi Sea saga. For now, we will focus on how employing the emerging norms associated with the right to a healthy environment might have channeled agency discretion down paths that supported, rather than undermined, regulatory legitimacy. As hard choices are made with regard to priorities, the emerging international environmental norms of precautionary decision-making, advanced informed consent, intergenerational equity, and common but differentiated responsibility might have led to better, more sustainable decision-making.

The NEPA requirement that the agency prepare an EIS before making a decision about leasing already serves a number of purposes related to those captured by emerging international environmental norms. First, an EIS promotes transparency by requiring the government to identify proposed actions and to solicit comments thereon. Second, an EIS promotes participation by allowing all interested to comment. However, the EIS requirement would be enhanced if it were interpreted in concert with the emerging international environmental norm of advanced informed consent and the right to environmental information. These norms embody a different and more robust concept of public participation than currently seen under United States law. They require the government to make the right to participate concrete by actively soliciting participation from groups, particularly indigenous groups, that might otherwise not participate in the decision-making process. If NEPA were interpreted along those lines, voices that typically do not get attention prior to post-decision-making litigation—if indeed they are heard at all—would become an integral part of shaping the EIS inquiry itself. As a result, the government would hear a more diverse array of voices when they could do more good—when the government is deciding the scope of

---

92 Ctr. for Biological Diversity v. U.S. Dep’t of the Interior, 563 F.3d 466 (D.C. Cir. 2009).
activity to investigate, rather than at a later litigation phase, challenging a decision that is already a fait accomplis.

Giving those typically under-represented groups a special role in the conduct of an environmental assessment, a new and improved EIS process would also help promote the additional emerging norm of inter-generational and intra-generational equity. Particularly where irreversible changes are contemplated, intergenerational equity would put a thumb on the scale for precaution, sustainably managing and preserving rather than overexploiting resources.

Similarly, embracing the venerable international environmental norm that "the polluter pays" (which dates back to at least the 1941 Trail Smelter Arbitration) would keep regulatory attention focused on the environmental effects of conduct like oil and gas exploration. A regulatory system infused with this principle would not sideline questions of environmental damage, and a court system that viewed polluter pays as an integral part of a justiciable human right would be far less likely to dismiss claims on political question or standing grounds.

Because the Chukchi Sea process was so poorly managed from an environmental rights perspective, it also raises the question of whether a human right to a healthy environment could have restrained the government in its relentless attempt to promote oil exploration in this pristine area. When a government does not care about the environment and bends existing law to avoid giving force to environmental rights, would a claimable human right make a difference? The answer is both yes and no. A government bent on violating human rights can certainly do so. But, the existence of a vibrant jurisprudence of human rights means that it can no longer do so with impunity. If the United States recognized a human right to a healthy environment, it would have been much more difficult to play fast and loose with environmental statutes than it was for the Bush Administration in the Chukchi Sea. Such a right would remove the standing hurdle that keeps so many of these issues out of court. Even without a justiciable human right to a healthy environment, if existing United States' environmental rights were imbued with more of a human rights sensibility it might create a culture shift that would make scenarios like the Chukchi Sea leases less likely.

Thus, a human rights framework might have avoided some of the regulatory failures that surrounded the process of issuing oil leases in the Chukchi Sea. However, the human rights-based approach leaves significant questions associated with protecting the environment unresolved.

---

93 See supra note 23 and accompanying text.
Human rights are anthropocentric: they are focused on human beings. Thus, the utility of a human rights framework to protect Arctic ecosystems or polar bears in their own right, rather than as an environmental amenity for humans, is not clear. Often the link between the human environment and any particular species (think snail darter, spotted owl, or desert fly) is tenuous at best. Charismatic macrofauna, to which humans have an emotional attachment, tends to fare a bit better, but even for them, the arguments for protecting individual species and their habitats under a human rights analysis are derivative at best. Yet, from an ecological perspective, protecting these species is critical to maintaining overall system resilience. As the human right to a healthy environment evolves and solidifies, it may resolve this problem. Certainly, it is at least plausible that protecting the polar bear implicates several of the human rights enumerated in the Universal Declaration. For example, Alaska’s Inuit groups have repeatedly asserted that their cultural survival hinges on sea ice and on the continued survival of species like the polar bear, seal, and walrus.

V. CONCLUDING NOTE

The relationship between international law and domestic law is a fraught question in the United States. Several Supreme Court justices and numerous elected representatives are on record for the proposition that resort to international law to understand United States law, particularly constitutional law, is inappropriate. This legal isolationist stance finds support in a popularly-

---

94 Universal Declaration of Human Rights, supra note 24.
96 Justice Scalia in particular has expressed hostility towards the use of foreign law. For example, in 2004 Justice Scalia told the American Society of International Law that “‘It is my view that modern foreign legal material can never be relevant to any interpretation of, that is to say, to the meaning of the U.S. Constitution.’” Scalia Skeptical About International Law in U.S. Courts, MARIN INDEP. J., Apr. 3, 2004, available at http://www.freerepublic.com/focus/f-news/1110916/posts.
held Panglossian vision of U.S. law as the best, truest, and fairest of possible legal systems. The logical corollary of this belief is a disinclination to look elsewhere for guidance—if what exists here is already the "best of all possible worlds" any resort to foreign or international law will degrade rather than enhance domestic legal processes. This Article suggests instead, that looking to international law might be a really good thing to do as we strive to give human rights content to environmental rights guaranteed under United States statutory regimes.