

Tom Kerns

"Barbarism is the absence of standards to which appeal can be made."

- José Ortega y Gasset⁵⁴

1. Introduction

In 2017, the Permanent Peoples' Tribunal Session on the Human Rights Impacts of Fracking will ask its judges to apply the standards of international human rights law to six subcases addressing the experiences of individuals and communities around the world who are being impacted by unconventional oil and gas extraction and usage, and by its resulting climate effects.

An additional day of tribunal hearings will be devoted to arguing the subcases on the grounds of the rights of nature as expressed in national constitutions such as Ecuador's, case law based on those constitutions and in formal statements such as the Universal Declaration of the Rights of Mother Earth presented to the United Nations in April 2011.⁵⁵

These human and environmental rights, whether expressed in national and international law or in national and sub-national constitutions, are often insufficiently brought to bear or protected by standard, state-based enforcement mechanisms. This failure of states to respect and enforce environmental rights can open the door for intervention by non-state actors such as the Permanent Peoples' Tribunal (the Tribunal) and other civil society institutions. The decisions and actions by these bodies, less influenced by the pressures of national politics and economic interests, can articulate and stand up for environmental human rights standards when states and international bodies fail to do so.

This Tribunal Session on the Human Rights Impacts of Fracking and Climate Change is intended to serve exactly that purpose. Firstly, it will collect, vet, and organize relevant expert and personal testimony. Secondly, it will provide prosecutors the opportunity to rehearse arguments grounded in human rights law and in environmental and constitutional

law. Finally, it will result in findings and recommendations that can provide a quasi-legal precedent useful as an interpretive aid in future human rights, environmental and constitutionally-based legal actions.

2. Beginnings

In 2011 the Tribunal held a Session in Bangalore, India indicting the six largest transnational agrichemical corporations on charges of human rights abuses related to their manufacture, marketing, distribution and use of pesticides, fertilizers and other agricultural chemicals.⁵⁶ That session was held over a period of several days and was streamed live so that anyone anywhere in the world could watch it, and I did.

Two years later when a group of us was preparing a Human Rights Impact Assessment of Fracking in the United Kingdom,⁵⁷ we asked the Tribunal if they would be interested in holding a Session on human rights and fracking. In January 2014 Dr. Gianni Tognoni, Secretary General of the Permanent Peoples' Tribunal in Rome, confirmed that the Tribunal was indeed interested in such a Session. He explained the petition process to us and indicated that he thought our team would be well positioned to initiate such a petition and to help organize a Session. Anna Grear, Damien Short and I developed

a proposal petitioning the Tribunal to schedule a Session on the human rights dimensions of hydraulic fracturing and other unconventional methods of oil and gas extraction and their consequences. In January 2015 we submitted a petition to indict a list of oil and gas corporations on charges of human rights abuses related to their fracking practices.

After some deliberation, though, we decided to indict states rather than corporations because states are the clear duty bearers in international human rights law. Whether non-state actors such as corporations have any clear human rights obligations is not as well established as the obligations of states. Moreover, we decided that rather than indicting the states directly, we would ask the panel of judges to determine whether sufficient evidence exists to indict states. That is the formal question on which the panel of judges will be asked to rule. The petition was thus modified in those two ways. submitted to the Tribunal Secretariat and was formally approved in May of 2015. One month later we launched our Tribunal website,58 issued press releases, and sent announcements to a variety of media outlets and relevant non-governmental organizations.

⁵⁶ http://www.agricorporateaccountability.net/en/page/ppt/2

A Human Rights Impact Assessment of Hydraulic Fracturing and other Unconventional Gas Development in the UK, commissioned by the Bianca Jagger Human Rights Foundation and prepared by the Global Network for the Study of Human Rights and the Environment, Environment and Human Rights Advisory, and the Human Rights Consortium, Grear, A; Grant, E; Kerns, T; Morrow, K; Short, D, 2014

⁵⁸ https://www.tribunalonfracking.org

3. The Tribunal, Vietnam and two philosophers

Today's Permanent Peoples' Tribunal, headquartered in Rome is a descendant of the 1966 Bertrand Russell-Jean-Paul Sartre Vietnam War Crimes Tribunal,⁵⁹ which was also international in scope and held sessions in Stockholm, Sweden and Denmark.

Following that tribunal, and two or three subsequent international tribunals on similar human rights issues,60 it was decided in 1979 that the world needed a Permanent Peoples' Tribunal. The goal of this Tribunal would be "Recovering the authority of the Peoples when States and international bodies have failed to protect the rights of the Peoples."61 The Tribunal was founded in Bologna, Italy, under the auspices of the Lelio Basso International Foundation for the Rights and Liberation of Peoples,62 with the engagement of a range of legal experts, writers and leaders in civil society, including five Nobel Prize laureates. The Tribunal headquarters are now in Rome and it has, since 1979, held over forty Sessions on a variety of human rights situations.

The Tribunal, as it stands now, is an internationally recognized public opinion tribunal functioning independently of state authorities, national politics and vested economic interests. It hears cases based on the broadly recognized standards of international human rights law and, increasingly, on human rights standards embodied in national constitutions.

As Jayan Nayar, lecturer in the Law in Development program at the University of Warwick, has said,

"It is true that the Tribunal has no power to compel the 'accused' to appear before it, nor to enforce its judgment, [but] rather, it serves as a legitimating forum. Its judgments stand as a public record of the truth and of the crime of denial. The doing of law for the Tribunal is essentially a process of listening, giving to the narratives of suffering the dignity denied them elsewhere." 63

⁵⁹ Bertrand Russell / Jean-Paul Sartre Vietnam War Crimes Tribunal, 1966 https://en.wikipedia.org/wiki/Russell_ Tribunal accessed 21 April 2016

In one subsequent Tribunal, for example, the Russell Tribunal II on Repression in Brazil, in Chile and in Latin America, two public sessions were held, the first in Rome (March 30-April 6, 1974) and the second in Brussels (January 11-18, 1975). http://dlib.nyu.edu/findingaids/html/tamwag/tam_098/bioghist.html accessed 21 April 2016

⁶¹ http://www.tribunalonfracking.org/permanent-peoples-tribunal

⁶² http://www.fondazionebasso.it accessed 23 April 2016

http://www.truth-out.org/news/item/33066-permanent-peoples-tribunal-highlights-fracking-s-threat-to-human-rights accessed 25 April 2016

4. This Trial

The Tribunal's normal procedure is to impanel a selection of nine, eleven or thirteen judges, about half of whom are human rights jurists from around the world, and about half of whom are "respected members of civil society." The initiating organizations have no say in who those judges are or how many will be selected for the panel; the Tribunal arranges that independently.

When the selection of judges is impanelled, and when the Tribunal hearings begin, the formal question the judges will be asked to consider is:

"Does sufficient evidence exist, as measured against international human rights law and as embodied in national constitutions, to indict certain named States⁶⁴ on charges of failing to adequately respect the human rights of citizens as a result of their allowing hydraulic fracturing and other unconventional oil and gas extraction techniques within their jurisdictions?"⁶⁵

The overarching question is thus: Does sufficient evidence exist to indict these named states?

Legal standards to be applied include both international human rights law and environmental and human rights norms embodied in national and subnational constitutions. For example, this would include the public trust standard expressed in the Pennsylvania state constitution, 66 and in a handful of other national constitutions and state constitutions in the United States of America (US).67

While this appears to be only one question that will be put to the judges - is there sufficient evidence to indict? — since fracking has such a wide range of impacts on so many different dimensions of human concern, we have broken that overarching question down into six subcases. The prosecuting team will thus be arguing the following six subcases, all on human rights grounds.

In this case so far, that includes the US and the UK, perhaps also Australia and Canada, and maybe others that may come on board as the Tribunal gets closer.

For purposes of this Tribunal the term "fracking" will refer to the extraction of shale gas, coal-bed methane/coal seam gas (CBM/CSG) and "tight oil." A scaled-up form of hydraulic fracturing (high volume), involving injecting fluids under high pressure to crack the rock, is often used to release hydrocarbons during unconventional oil and gas extraction (UCG). UCG is a complex process, involving pad construction, well drilling, casing, stimulation (often including but not limited to hydraulic fracturing), extraction, waste disposal, well plugging (or failure to do so) and abandonment, as well as associated infrastructures such as pipelines, storage facilities, compressor stations and export terminals. The Tribunal will examine evidence on the full range of impacts of all forms of unconventional gas and oil production including, but not limited to, "fracking."

Article 1, Section 27 reads "The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and aesthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people."

⁶⁷ English, A and Carroll, JJ, "State Constitutions and Environmental Bills of Rights," chapter 1, pp 18-22. The Book of the States 2015. The Council of State Governments. 2015

Six subcases

- 1) The human health subcase will examine the human rights implications of fracking both acute and chronic, especially for vulnerable groups resulting from exposures to, inter alia, endocrine disruptors, known and probable carcinogens, radon gas, neuro- and developmental toxicants, ozone, and noise.
- 2) The climate subcase will examine the human rights implications, for both present and future generations, of fracking on the climate system which may result from a CO2-intensive extraction process, fugitive and intentional methane emissions and releases, fostering a continued reliance on fossil fuels, and so on.
- 3) The ecosystems case will examine the human rights implications of fracking on, inter alia, ecosystems, oceans, wildlife, on contamination and depletion of ground and surface waters, and on the contribution to earthquake swarms.
- 4) The social costs case will address, amongst others, the human rights impacts of fracking on communities, social services, roads, housing, property values, and relations among neighbors. Both economic cycles of boom and bust trigger a wide range of human rights concerns.
- 5) The public participation case will examine the human rights

- implications of a lack of opportunities for public participation in decisionmaking about fracking.
- 6) And finally, the fuels infrastructure case will examine human rights impacts resulting from fracking infrastructure, such as pipelines, compressor stations, export facilities, Liquid Natural Gas facilities and storage facilities.

The prosecuting team will argue that there are human rights concerns in a wide range of dimensions for each of the above six subcases.

6 Flements of the Trial

The main elements in this Tribunal will be the same as the main elements in many other trials. There will be a panel of judges and a prosecuting team that brings to bear evidence of various kinds. This will include expert evidence on the processes, impacts and consequences of fracking, biomedical and public health research, greenhouse gas and climate research, as well as ecological and social science research. Several hundred government and industry reports, investigative reports and peer reviewed studies on these issues have been summarized. annotated and referenced in the Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking.68 This Compendium has been prepared by Physicians for Social

68

Responsibility and by Concerned Health Professionals of New York.⁶⁹ Its most recent edition is readily available on several websites.

Absolutely key in human rights trials is personal testimony – the personal narratives of individuals, families and communities who have been impacted by fracking.

Prosecutors will bring to bear on all the subcases both international and domestic human rights law and relevant human and environmental rights provisions in state constitutions.

A trial requires a defense team too, of course, so at some point the Tribunal will send out a summons to the indicted states explaining the details of the Tribunal and the rights, duties, and obligations of the indicted states. The states will be invited to provide defense attorneys to represent their interests. If they choose to ignore the summons, as they might, then the Tribunal provides defense attorneys for them, much as a domestic court would provide public defenders.

The Tribunal's plenary hearings are scheduled to take place in late 2017. After those hearings have been completed, the judges will retire to deliberate for some period of time and eventually issue findings and recommendations.

7. Mini-tribunals and Fact Finding Hearings

In anticipation of the plenary hearings, activists or interested parties anywhere in the world are invited to schedule and hold preliminary Mini-tribunals⁷⁰ and/or Fact Finding Hearings.

• The format of a Mini-tribunal would simply be as a smaller version of the large plenary sessions. That is, the same question would be posed to the judge or judges and attorneys, hopefully both prosecution and defense, would then present evidence and argue the law before those judges. The findings and recommendations of the Mini-tribunals would later be submitted for use during the main plenary hearings.⁷¹ One such

 [&]quot;The Compendium of Scientific, Medical, and Media Findings Demonstrating Risks and Harms of Fracking (the Compendium) is a fully referenced compilation of the evidence outlining the risks and harms of fracking. Bringing together findings from the scientific and medical literature, government and industry reports, and journalistic investigation, it is a public, open-access document that is housed on the websites of Concerned Health Professionals of New York (www.concernedhealthny.org) and Physicians for Social Responsibility (www.psr.org)."
 https://www.tribunalonfracking.org/preliminary-mini-tribunals/> accessed 23 April 2016

The more legally robust a mini-tribunal, the more powerful and relevant its findings will be. Elements of robustness include the heft and quality of submitted evidence; including defense attorneys in the process in addition to prosecutors; the reliability of personal testimony; including more than one judge, and judges familiar with human rights law; civil society representatives held in high regard for their character and wisdom; employing a structure, venue and procedures approved by the Tribunal; and so on.

preliminary tribunal, sponsored by the Australian Earth Laws Alliance, the Social Justice Commission Toowoomba, the Sisters Of Mercy, the Lock the Gate Alliance, the Western Downs Alliance and others, is scheduled to take place in Brisbane in February 2017.

Fact Finding Hearings⁷² would be a much simpler, local event that might cost very little to put on, maybe nothing at all. It would simply require an announcement of the date and location, and an invitation to people to share their story and submit their testimony about the impacts that fracking has had on them and their community, so it can be recorded. It should be made especially clear that that testimony can be presented in whatever form people are comfortable with. It could be presented orally in person, streamed live from elsewhere or submitted in written form or as an audio or video recording. Testimony could also be submitted by proxy and either with identification or anonymously. There are numerous obvious problems with anonymous testimony, but there is so much justifiable fear around standing up against the industry that a Factfinding Hearing will want to make it as easy as possible for affected persons to submit their story.

8. Pre-tribunal developments

Quite a significant range of pre-Tribunal human rights work on fracking and climate change has already been completed.

- A 2011 Human Rights Impact Assessment of Fracking in New York State⁷³ was commissioned by Earthworks in Washington DC, prepared by Environment and Human Rights Advisory and submitted to the New York State Department of Environmental Conservation.
- A Human Rights Impact Assessment of Fracking in the United Kingdom⁷⁴ was commissioned by the Bianca Jagger Human Rights Foundation,⁷⁵ co-authored by members of our team and hand-delivered by Bianca and some of the authors to Ten Downing Street.
- The Sisters of Mercy and Mercy International put together a third Human Rights Impact Assessment of Fracking titled A Guide to Rightsbased Advocacy: International Human Rights Law and Fracking.⁷⁶
- The 2013 Pennsylvania Supreme Court findings in Robinson Township v. Commonwealth of Pennsylvania held that major parts of Pennsylvania's

^{72 &}lt;a href="https://www.tribunalonfracking.org/preliminary-mini-hearings/">https://www.tribunalonfracking.org/preliminary-mini-hearings/>

⁷³ A Human Rights Assessment of Hydraulic Fracturing for Natural Gas, commissioned by Earthworks, prepared for the New York State Department of Environmental Conservation, prepared by Environment and Human Rights Advisory, Kerns, T, 2011

⁷⁴ op.cit

^{75 &}lt; http://www.biancajagger.org>

Prepared by the Sisters of Mercy, Mercy International (NGO), O'Connor, A, RSM, et al, 2015.

Act 13 (a statute enacted to facilitate fracking) were unconstitutional based largely on the public trust doctrine expressed in the state constitution's Article 1. Section 27.⁷⁷

- In December 2015 the Inter-American Commission on Human Rights issued a report on extraction industry impacts on indigenous and Afro-Descendant communities, titled *Understanding Human Rights and Climate Change*.78
- The Earth Law Center's 2015 report, Fighting for Our Shared Future: Protecting Both Human Rights and Nature's Rights, examines 100 cases from around the world involving coviolations of both human rights and rights of nature.
- Two United Nations reports on the human rights impacts of climate change were issued in 2015, one from the office of the United Nations High Commissioner on Human Rights⁷⁹ and one by the United Nations Environment Programme.⁸⁰
- In November 2015, just prior to the Conference of Parties (COP21) meetings in Paris, a team of scholars with the Global Network for the Study

- of Human Rights and the Environment issued a *Draft Declaration on Human Rights and Climate Change.*⁸¹ That document, after soliciting and receiving extensive feedback and review from all over the world, has now been issued in final form.⁸²
- And, of course, the papal encyclical, Laudato Si⁸³ issued in mid-2015 should not be ignored, since it too looks at climate change and unconventional fossil fuel extraction as moral issues.

In addition to those pre-Tribunal documents, the preliminary Mini-tribunals and Fact Finding Hearings mentioned above are also being planned in various countries. The responsibility of these preliminary events will be to collect personal and local testimony about the impacts of fracking, and to explore and develop legal and moral human and environmental rights arguments applicable to that testimony. These testimonies will then be submitted for use in the plenary hearings.

Dernbach, John C. and May, James and Kristl, Kenneth, Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications (March 1, 2014). Rutgers U. L. Rev. Vol. 67, 2015; Widener Law School Legal Studies Research Paper No. 14-10, http://dx.doi.org/10.2139/ssrn.2412657>

⁷⁸ Indigenous Peoples, Afro-Descendent Communities, and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation, and Development Activities, prepared by the Inter-American Commission on Human Rights, December 31, 2015.

⁷⁹ UN Office of the High Commissioner for Human Rights, prepared for the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change, 26 November 2015.

⁸⁰ Report on Human Rights and Climate Change, United Nations Environment Programme, December 2015.

^{81 &}lt;a href="http://gnhre.org/tag/declaration/">http://gnhre.org/tag/declaration/>

⁸² http://gnhre.org/declaration-human-rights-climate-change/

Laudato Si: On Care for our Common Home, Pope Francis, 2015.
http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html accessed 21 April 2016

The Actors

The actors so far in this Tribunal are:

- The Permanent Peoples' Tribunal in Rome:
- The three initiating organizations:
 - The Global Network for the Study of Human Rights and the Environment:⁸⁴
 - The Environment and Human Rights Advisory,⁸⁵
 - The Human Rights Consortium;86
- The Steering Group, with members in the US and in the UK, is composed of Initiators, researchers and directors of supporting non-governmental organizations; and
- The Kentucky Environmental Foundation⁸⁷ is fiscal sponsor.

10. Roles and responsibilities

It is the responsibility of the Tribunal itself to identify, select and impanel judges to hear the cases, provide defense attorneys if the indicted states fail to send their own, call the court to order, and support the judges in their deliberations and issuance of findings.

It is the responsibility of the Kentucky Environmental Foundation, as fiscal sponsor, to accept funds and to hold and disburse them as needed. In their role as Initiators, it is the responsibility of the three initiating organizations to petition the Tribunal, on behalf of complainants who have been affected by fracking and its consequences, to accept their case. This responsibility has now been completed.

The Steering Group, in their role as researchers testing an hypothesis about fracking and human rights, has a responsibility not unlike that of a Principle Investigator who is conducting a research trial.

In the sciences, a researcher who has a question about something, formulates that question into a testable hypothesis, designs a research protocol to test that hypothesis and then conducts the trial. Standard trial protocols vary widely among the different sciences, of course. The design of an astrophysics protocol to test whether light waves are affected by gravity, for example, will be very different than the design of a biomedical protocol to test whether a new drug is safer or more effective than a previous drug. That in turn will differ from the design of a political science protocol to test an hypothesis about the effect of natural resource extraction on the representativeness of governments.

⁸⁴ http://gnhre.org. Anna Grear (Cardiff Law School) is the Director. She is also the editor in chief of the Journal of Human Rights and the Environment.

⁸⁵ http://www.environmentandhumanrights.org. Tom Kerns, Director, in the US.

⁸⁶ http://www.sas.ac.uk/hrc, Damien Short, Director, in the School of Advanced Study at the University of London

^{87 &}lt;a href="http://www.kyenvironmentalfoundation.org">http://www.kyenvironmentalfoundation.org

The standard protocol for testing an hypothesis about the impacts of a fossil fuel extraction method on human rights norms is the "trial." That is, the system of contending advocacy before a disinterested judiciary following standard rules of evidence with appropriate application of relevant law. In this role, the Steering Group serves as the Principal Investigator who is using a standard protocol in the field to test the hypothesis that human rights norms are at issue in fracking.

Finally, in their role as organizers, the Steering Group's responsibility is to organize the trial. Not to directly conduct the trial, but to set the groundwork and establish the conditions necessary for conducting the trial. Just as it is the responsibility of a Principal Investigator in the physical or social sciences to put in place the requirements, structures and financing to ensure that their trial is conducted according to standards, so too is that the responsibility of the Steering Group. This responsibility includes providing communication before, during and after the trial, identifying suitable venues. securing funding, selecting a prosecuting team, assisting the prosecuting team in locating expert evidence and personal testimony, and promulgating the Tribunal's eventual findings and recommendations.

11. Why human rights?

Human rights norms have a uniquely moral grounding that underpins their legal and policy force, and it is that moral grounding to which people impacted by fracking normally appeal. So a trial that addresses those moral concerns and frames them in human rights terms will be best suited to this situation.

In addition there are practical and legal considerations that differentiate human rights law from other kinds of law and may make it more amenable to people and communities impacted by fracking and its consequences.

The importance of personal narratives

One is the recognition of the special importance narratives of personal describing what has directly been experienced. Simple, clear personal accounts of direct impacts that fracking processes have had on individuals. families and communities, rooted in the "situated knowing" of personally impacted witnesses, are considered a priority in human rights law. They are also essential for awakening the moral imagination and evoking the compassion necessary for systemic change.88

Claims of injury in such narratives may need to be substantiated by reference to scientific studies or expert testimony, just as the moral intuitions about right and wrong will need to be substantiated by reference to human rights norms.

Standing

Every individual person is considered to have legal standing in international human rights courts, which eliminates one of the larger obstacles to having a case heard.⁸⁹

Standards of proof

Standards of proof in international human rights courts favor the plaintiff over the state. As Picolotti and Taillant explain in their book, *Linking Human Rights and the Environment*, "Unlike most national courts, the [Inter-American] Commission and Court have low standards of proof," sometimes admitting circumstantial evidence. This can benefit plaintiffs who often have less than perfect evidence to support claims of causality and health effects.

Burden of proof

The burden of proof in human rights courts is on the state in such an action, rather than on the plaintiff, even though the state would be the defendant. This means that facts presented by the claimant would be presumed true unless proven otherwise by the state. 22

Transnational

One significant problem has been that many bodies of law that could be seen as relevant to fracking are domestic and have efficacy only within the bounds of a given state. Human rights norms and law, however, are to some extent transnational, transcending the boundaries of individual states. This means that the findings and recommendations of a human rights tribunal are more likely to have bearing in jurisdictions elsewhere in the world than findings resulting from other kinds of law.⁹³

Those are the basics of this Tribunal's history, structure, pre-tribunal work, actors, responsibilities and standards.

The section below outlines the purposes and anticipated benefits of this Tribunal. The subsequent section then mentions the Tribunal's current needs.

92

93

^{89 &}quot;One of the most important successes of international human rights law is that it has given victims direct access to international human rights fora. Thus in international human rights law, individuals are subjects of law and can legally claim against human rights abuses perpetrated by states." Picolotti, R and Taillant, JD, Linking Human Rights and the Environment, University of Arizona Press, 2003, p 120.

lbid. p 133.
 "That is... the facts reported in the petition shall be presumed to be true if, during the maximum period set by the Commission, the government of the State in question has not provided pertinent information to the contrary.... If the State denies the evidence, it must specifically prove that the evidence is not valid." Ibid.

These last three apply at least in the Inter-American human rights system, and perhaps in some other regions as well. Taking a human rights approach may have disadvantages as well since corporations, considered as legal persons, have been making the claim that courts should treat them as holders of human rights as well, a claim which is closely examined in Grear, A, Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity, Palgrave Macmillan, 2010. On the other hand, this Tribunal process could also serve as an opportunity for testing those corporate claims.

12. Purposes and benefits

One of the Tribunal's key purposes is to provide opportunity for those who have been personally affected by fracking to share their experience, to have it be heard, taken seriously⁹⁴ and documented. It will then be entered into the public record so it can be made available for this Tribunal and for any future legal actions anywhere in the world (if individuals give permission for that). Kathleen Dean Moore has said this especially well in her article for Truthout explaining why this Tribunal is so important. One of its goals, she says there, is to give voice to those whose voices have been

"...actively silenced by industry, pressured into silence by neighbors, frightened into silence by possible repercussions, or battered into silence by poverty, social situation, and distance from resources - marginalized and ignored by industry and government alike."95

One of the Tribunal's primary goals is to give voice to the marginalized, the poor, children, indigenous communities, and future generations and, as Bertrand Russell said, to "expose the crime of silence." And most important, Moore continues, it will

offer a voice to those who have no voice at all - "future generations of people, plants, and animals, all the young and hopeful ones. They are the ones who will pay the price of hydraulic fracturing in the currency of their health and prospects." 96

As such, one of the Tribunal's main purposes is to provide opportunity for impacted persons to tell their story and make it part of the public record.

A second key purpose is to foreground human rights standards as part of the conversation about fracking and its consequences. Human rights have not been a significant part of the conversation thus far, and the hope is that this Tribunal, and the events leading up to it, will promote an appreciation of those moral and legal dimensions of the conversation. Impacted persons already have a clear, if inchoate, sense of outrage97 something is fundamentally wrong with what industry has been allowed to do to people and communities. However, they do not yet have an adequate language for articulating that outrage. We think that human rights language can help serve that purpose.98

A third purpose is to have expert and personal testimony formally and publicly

Many impacted persons feel as if they have told their story multiple times but that it has not been heard, or has not been taken seriously or has been dismissed altogether.

⁹⁵ Kathleen Dean Moore, 'Fracking Goes on Trial for Human Rights Violations' Truthout, 14 November 2015. http:// www.truth-out.org/opinion/item/33588-fracking-goes-on-trial-for-human-rights-violations accessed 21 April 2016 96 ibid

⁹⁷ Tom Kerns, 'Schopenhauer's Mitleid, environmental outrage and human rights' in Anna Grear and Evadne Grant (eds), Thought, Law, Rights and Action in the Age of Environmental Crisis (Edward Elgar 2015) pp 220-248

⁹⁸ Kerns, T, Ten Practical Advantages of a Human Rights Approach to Environmental Advocacy, Journal of Environmental Studies and Sciences: Vol 3, Issue 4 (2013), Page 416-420.

presented and vetted against defense attorneys and judges so it can be made available for use in future legal cases.

A fourth purpose is to provide prosecuting attorneys an opportunity to rehearse legal arguments and explore precedent in the Tribunal, which may later be used in national and international courts if actions are brought.

A fifth purpose is for the Tribunal's findings and recommendations to provide a quasi-legal precedent that could be referenced as interpretive "soft law" in the event of future legal actions.

A sixth purpose is to provide grounding and support for the growing movement to instantiate human environmental norms within national and subnational constitutions.

The final purpose is to simply show those who might like to bring a future action what a legal action against unconventional oil and gas extraction might look like. The section below describes some of the Tribunal's current needs

13. Current needs

As David Bollier, policy strategist and co-founder of the Commons Strategies Group, reminds us in his blog post of July 29, 2015:

"Like any commons, the Tribunal does not go of itself; it relies upon people's active participation and help. People are invited to submit witness statements, donate to help fund the proceedings (travel, lodging, office services); conduct minitribunals in their countries; and to endorse the Tribunal "99

In addition, the Tribunal's Steering Group needs to finish assembling the legal team¹⁰⁰ which consists of legal advisors, litigators for each of the six subcases and legal researchers to help the litigators develop their cases. The expectation is that the researchers will primarily be law students and law clinics, and there will be a further need for a research-volunteer coordinator. Assistance in collecting evidence, including organizing and conducting fact-finding hearings and mini-tribunals, will also be required.

David Bollier, " 'People's Tribunal to Assess Fracking and Human Rights' (News and Perspectives on the Commons,
 29 July 2015) http://bollier.org/blog/people's-tribunal-assess-fracking-and-human-rights accessed 26 April 2016
 Our legal Advisors to date include Mary Christina Wood. Professor. University of Oregon School of Law, author of

Our legal Advisors to date include Mary Christina Wood, Professor, University of Oregon School of Law, author of Nature's Trust; Evadné Grant, Associate Head, Department of Law, University of the West of England: Editor, Journal of Human Rights and the Environment; Evan Hamman, Faculty of Law, Queensland University of Technology, Brisbane, Australia; Burns Weston served as legal Advisor and Steering Group member until his untimely death in the fall of 2015. Current Litigators include Don Anton, Professor of International Law at Griffith University Law School in Brisbane, Barrister & Solicitor, Victoria and High Court of Australia and Artroney & Counselor of the Supreme Court of the US; Benedict Coyne, President of the Australian Lawyers for Human Rights; and Linda Sheehan, Director and Attorney at the Earth Law Center, who will argue the cases from a Rights of Nature perspective.

Truthout, the alternative news outlet, has offered eighteen articles on the Tribunal. Two of those have already been published¹⁰¹ and authors will be needed for the next sixteen. What those articles would cover has already been outlined and experts identified who could be contacted for each.

This Tribunal has real potential and it would be important to have a record of it and to know how it came to be. To that end, the services of an historian will be required. Kathleen Dean Moore¹⁰² will be covering the hearings live as a reporter and analyst, so if the Tribunal were to be the subject of a book or a dissertation, her reporting could serve as important source material

14. Conclusion

One of the purposes of human rights law is similar to a purpose for which the Babylonian Code of Hammurabi (1754 BCE) was enacted. This was, according to its introduction, "so that the strong should not harm the weak." ¹⁰³

The Permanent Peoples' Tribunal does not enjoy state sanctioned power to compel enforcement of its findings. However, according to Kathleen Dean Moore, it does still matter "to tell the truth in a public place. It matters to affirm universal standards of right and wrong, to clearly say, 'There are things that ethical people do not do to one another and to the Earth."¹⁰⁴

"Business-as-usual," she continues, "has a terrible power." If people do not stand up and say "These things are wrong," then those wrongs become simply "stuff that happens."

Silence normalizes iniquity; silence normalizes the violation of human rights. The violation becomes, in the popular expression, "the new normal." The result is a sliding baseline of morality as people expect less and less of their corporations and governments, and hold them less and less to account.¹⁰⁵

This Tribunal will ask whether fracking should be accepted as "the new normal." It will also encourage people to not expect less of their governments, but instead to hold their governments accountable to the legal standards embodied in their constitutions and to the moral standards they have publicly espoused.

¹⁰¹ http://www.truth-out.org/news/item/33066-permanent-peoples-tribunal-highlights-fracking-s-threat-to-human-rights and http://www.truth-out.org/opinion/item/33588-fracking-goes-on-trial-for-human-rights-violations accessed 15 July 2016

¹⁰² Kathleen Dean Moore is professor emerita of environmental philosophy at Oregon State University, co-editor of Moral Ground: Ethical Action for a Planet in Peril, and author of Great Tide Rising: Toward Clarity and Moral Courage in a Time of Planetary Change.

^{103 &}lt; http://www.constitution.org/ime/hammurabi.htm>

^{104 &}lt; http://www.truth-out.org/opinion/item/33588-fracking-goes-on-trial-for-human-rights-violations>

¹⁰⁵ ibid

Tom Kerns

founder and Director of Environment and Human Rights Advisory, authored the 2011 Human Rights Impact Assessment of Fracking in New York State commissioned by Earthworks, co-authored the 2014 Human Rights Impact Assessment of Fracking in the United Kingdom commissioned by the Bianca Jagger Human Rights Foundation, and served on the Drafting Group of GNHRE's 2016 Declaration on Human Rights and Climate Change. He is Emeritus Professor of Philosophy at North Seattle College and currently serves on the Steering Group organizing the Permanent Peoples' Tribunal Session on the Human Rights Impacts of Fracking. He has authored three books on human rights issues in public health, and recent articles include "Ten Practical Advantages of a Human Rights Approach to Environmental Advocacy" (2013), and "Schopenhauer's Mitleid: environmental outrage and human rights" (2016)

















Division of Environmental Law and Conventions P.O Box 30552, 00100 Nairobi, Kenya

Tel: +254 20 7624011 Fax: +254 20 7624300

E-mail Address: delc@unep.org