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# Human Rights Practice: A Means to Environmental Ends?

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## Abstract

Can human rights practice in its current dominant forms tackle the challenge of climate change and global environmental degradation? This article argues that although there is now increased recognition of the links between human rights and the environment, and while human rights tools and principles can contribute in some concrete ways in moving forward the environmental agenda, their potential for doing is so far largely unrealised. The article analyses three different approaches used by advocates and activists in this field, before discussing potential alternatives and examples of radical or hybrid approaches, with a view to articulating a strategy for activism and praxis that can capture the real and lived inter-connectedness of human rights enjoyment and environmental factors more meaningfully.

## Key words

Human rights; environment; praxis; climate change; United Nations; development; activism

## Resumen

¿Puede la práctica de los derechos humanos en sus formas dominantes actuales hacer frente al desafío del cambio climático y la degradación global del medio ambiente? Este artículo sostiene que, aunque ahora hay un mayor reconocimiento de los vínculos entre los derechos humanos y el medio ambiente, y mientras que las herramientas y principios de los derechos humanos pueden contribuir en avanzar de manera concreta la agenda ambiental, su potencial se encuentra frustrado en gran parte hasta el momento. El artículo analiza tres enfoques diferentes utilizados por los defensores y activistas en este campo, antes de discutir alternativas y ejemplos de enfoques radicales o híbridos, con el fin de articular una estrategia para el activismo y la praxis que pueda capturar de manera más

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significativa la interconexión real y vivida del disfrute de los derechos humanos y de los factores medioambientales.

**Palabras clave**

Derechos humanos; medio ambiente; praxis; cambio climático; Naciones Unidas; desarrollo; activismo

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## 1. Introduction

The symbiotic nature of the relationship between enjoyment of human rights and environmental quality is now well established (e.g. ICHRP 2008 and Council of Europe 2012). Although until recently the human rights and environmental movements operated largely in isolation from each other, relationships of cooperation and consultation are growing. There is now a strong current within international human rights organisations, institutions and mechanisms to incorporate environmental issues within their work.[1] In terms of the foci of activism and praxis, this trend can be divided into three different types of approach, each premised on a somewhat different understanding of the relationship between human rights and the environment:

- Lobbying for the adoption and institutionalisation of new environmental human rights.
- Using existing human rights mechanisms to tackle environmental harms.
- Taking a human rights-based approach to environmental practice.

This paper will focus on how these three approaches are being realised, developed or used in practice, before going on to discuss potential alternatives and examples of radical or hybrid approaches in Section 4. A 'principled strategy' for the embedding of the interdependence of human rights and the environment in human rights practice will be discussed, based on a realistic interpretation of the strengths and weaknesses of human rights in its various shifting and contested forms. Finally, the paper will survey the challenges present at the level of international institutions and policy-making outside of the human rights sphere.

As part of the analysis, comparisons will be made with 1) development (as a field of theory and practice that has been the subject of human rights approaches and standard-setting for some time) and 2) economic and social rights (a field of rights into which 'environmental rights' as expressed in their various forms are often subsumed), as a method of speculating on the prospects for different approaches to the human rights/environment relationship. Activism and praxis at the international level will be the main focus, in particular that using or targeting UN human rights mechanisms, but national and grassroots practice will also be included in the analysis. Legal approaches are included, as one of the current dominant forms of human rights practice.

## 2. Environmental human rights

Many human rights practitioners and environmental activists are now involved in advocating for the institutionalisation of substantive environmental human rights (EHR), and/or use the language of EHR.[2] This section analyses such advocacy focusing on claims that EHR should be enshrined in a new human rights treaty or other standard, rather than more fluid claims-making linking human rights and the environment emanating from social movements (which will be discussed in Section 4).

[1] See for example Human Rights Watch (http://www.hrw.org/topic/environment) and Office of the UN High Commissioner for Human Rights (http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx). In terms of strategic litigation, see for example Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria, African Commission on Human and People's Rights, Communication No.155/96.

[2] In terms of organisations, see for example the Center for International Environmental Law, Friends of the Earth, The Center for Human Rights and the Environment, Oxfam, Earthjustice. In 2003 Jan Hancock conducted a survey of NGOs (chosen by him as representative of the "environmental social movement"), which were asked whether they recognised EHR. Of these, 54 answered affirmatively, 36 declined to state a position and only 32 stated that they did not (Hancock 2003, p. 56).

The concept of EHR has been emerging for some time, at least since the 1972 Stockholm Declaration,[3] which was the first authoritative statement to formulate international obligations to protect the environment in the language of human rights. It declared 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".

Subsequent international standard-setting documents and international/regional human rights instruments have included rights to "an environment adequate for health and well-being" (WCED 1987, p. 348), "a general satisfactory environment favourable to [human] development",[4] and to "live in a healthy environment".[5] In 1994, the UN's 'Ksentini Report' included a Draft Declaration of Principles on Human Rights and the Environment. It declared that "human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible" (Ksentini 1994, Annex 1, Principle 1) and postulated "the right to a secure, healthy, and ecologically sound environment" (Principle 2) and "the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs" (Principle 4). The report also concluded that there had been a "shift from environmental law to the right to a healthy and decent environment" (para. 22) and that this right was part of international law and capable of immediate implementation by existing human rights bodies (paras. 242 and 258). In 2005, by Hayward's estimation, around 50 states had environmental rights embedded in their constitution.

EHR are articulated in many different forms, as is illustrated by the above examples and the varying definitions many academics have given to EHR. Henry Shue has classified access to the atmosphere's "emission absorptive capacity" as being among basic rights and suggests that every person ought to have the right to a basic level of GHG emissions (cited in Vanderheiden, 2008, p. 247). Simon Caney (2008, p. 537) has argued that persons have a human right to a healthy environment, a "human right not to suffer from the ill-effects of global climate change" (2008, p. 551) and that "those who contribute to global climate change through high emissions are guilty of human rights violations" (2006, p. 278). Steve Vanderheiden (2008, p. 241 - 243) has posited the "right to climatic stability" and also endorses "survival emissions" as a basic right.

Space precludes a rigorous analysis of the ontological or metaphysical foundations of these various conceptions of EHR;[6] rather, this paper will concentrate on whether advocating for EHR is strategically useful or desirable. Firstly, many environmental activists have argued that such a strategy is *not* desirable, due to the different goals of the environmental and human rights movements. One may well ask the "critical question" of "whether the environment is really very well served by enhancing the right of *humans*" (Hayward 2005, p.32). Indeed, Arne Naess professed dismay at the "mass of ecologically irresponsible proclamations of human rights" and environmental ethicist John Rodman saw rights as being tied up with the "project of modernity – the total conquest of nature" (cited in Aiken 1992, p. 191). James Lovelock, at the extreme, sees the human species locked in rapacious conflict with the Earth and predicts a time when Earth's "plague of people" is "cured" by the death of billions (quoted in Gray 2002, p.6). Equally, human rights activists have criticised the environmental movement for disregarding immediate human needs. Anderson argues that such tensions cannot be wished

[3] Agreed at the UN Conference on the Human Environment, 1972.
[4] The African Charter of Human and People's Rights of 1981, Article 24.
[5] The 1989 San Salvador Protocol to The American Convention on Human Rights.
[6] For examples see the work of Henry Shue, Stephen Gardiner, Simon Caney, Richard Hiskes and Jan Hancock.


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away, and "the fashionable view" that human rights and environmental protection are interdependent and compatible "serves as a moral comforter which temporarily cloaks the extremely difficult questions which must be faced" (1996, p.3). It is indeed difficult to see how a human rights treaty with universal applicability could satisfactorily overcome these concerns and weave these values together.

However, the strategic appeal of advocating for environmental human rights is also clear. As Woods (2006, p. 579) states, "the idea of EHR offers an opportunity to critically engage with what is undoubtedly the biggest game in town in terms of moral language used in politics". Summarising his conclusions after a survey of NGOs working on environmental issues, Hancock (2003, p. 62) observes that EHR claims are seen as "a useful tactical approach for achieving political change", largely because linking human rights and environmental claims is perceived to broaden the social base and appeal of a campaign. The main perceived advantage of institutionalising EHR is the strength of the claim, the 'trump' effect that allegedly puts it beyond political compromise. There is a clear desire to increase opportunities for legal protection of the environment by harnessing the power of human rights law and its enforcement mechanisms (Woods, 2006, p. 577). As Nickel (1993, p. 283) says, "the human rights movement has strong international recognition, support, and institutions and thus has valuable resources to offer environmentalism".

However, despite this understandable appeal, advocating for an international treaty enshrining EHR may well be misguided, as institutionalised EHR would manifest a number of notable weaknesses. Issues of environmental justice require a rigorous engagement with power balances within and between States, and with corporate power. In contrast, institutionalised human rights are highly ambivalent with respect to power, frequently used to defend the status quo and to resist radical action. This is persuasively illustrated by Stammers (1999, p. 999), who argues that although initially rights claims can challenge existing power structures, "[o]nce rights are institutionalized, then they play a highly ambivalent role in respect of power". Moreover, the corporate role in human rights violations related to the environment is clear,[7] and yet the human rights legal regime is firmly premised on states as the guarantors and potential violators of human rights. Although activists have sought to hold governments to account for their support to corporate polluters (see e.g. Newell 2010), efforts to hold corporations themselves to account for human rights violations have largely been fruitless. Indeed, as Baxi (2010) and Grear (2007) have shown, human rights in their legal form can play an extremely conservative role in respect to corporate power. Advocates of EHR should thus be wary of envisaging human rights as a reliable weapon to wield against the structural, corporate and financial power lined up against tough environmental protection measures.

The state-centric nature of human rights has so far militated against a meaningful legalisation of extra-territorial human rights obligations, despite efforts from advocates.[8] This would clearly be a huge deficiency in terms of EHR claims. Environmental (and especially climate change) harms are often geographically (not to mention temporally) dispersed and the violator is often not the host state of the victim; certainly, it is not emissions from their own countries that primarily jeopardize the citizens of states like Bangladesh or The Maldives. Additionally, EHR are unlikely to address, and indeed may draw attention away from, global economic problems, or other structural causes of climate change and environmental damage. Rights in their legal form generally (although not inevitably) tackle symptoms

[7] See for example the environmental damage – and connected human rights violations - wrought by oil spills in the Niger Delta.

[8] See for example, the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights. Available at http://www.icj.org/dwn/database/Maastricht%20ETO%20Principles%20-%20FINAL.pdf.

rather than causes, which in this case would render extremely unlikely the consideration of vital issues such as relationships of political economy, technology choice, forms of production and distribution of goods (Anderson 1996, p.22).

Additionally, there is the question of the technical competence of a human rights mechanism for dealing with environmental issues. As Boyle (1996, p. 56) points out, international law is already replete with rules, principles and criteria for ensuring environmental quality, and it is therefore "far from certain whether much would be added by reformulating these rules in explicit human rights terms". All modern environmental treaties have their own supervisory institutions with, in some cases, more enforcement power than human rights bodies, and certainly more technical competence for weighing complex environmental claims. Indeed, Handl (1992, p. 133-5) argues persuasively that human rights mechanisms would be an inefficient, piece-meal route to environmental protection, because general standards would have to be developed on a case-by-case basis in reaction to individual complaints, while the environmental interests to be protected are better conceptualised as collective. Additionally, in practice the human rights regime has proven more effective in enforcing remedies once a harm has occurred than in ensuring prevention of harm, but in the case of climate change an after-the-fact remedy is clearly insufficient, particularly because the harm is likely to have impacted a large number of people rather than just one individual.

In order for any legal rights-claim to be judged, a violation of one or more specific rights must be pinpointed. If conceived in broad, holistic terms, EHR would likely be too vague and complex for adjudication or enforcement by human rights bodies, but a list of specific, narrow environmental human rights would not adequately encapsulate the multi-faceted, context-dependent and inter-linked nature of the impact of environmental degradation on human life. Thus, while claims-making with regard to environmental rights may be a powerful tool for activists (see Section 4), it is the contention of this paper that an institutionalised form of environmental human rights does not have great potential to protect and promote both environmental *and* human flourishing.

## 3. Using existing human rights mechanisms to tackle environmental harms

In recent years, UN human rights mechanisms have begun to take environmental questions seriously. In March 2008, the UN Human Rights Council (HRC), "concerned" by the "threat" of climate change and its "implications for the full enjoyment of human rights", issued Resolution 7/23 (UNHRC 2008) requesting the Office of the UN High Commissioner for Human Rights (OHCHR) to conduct a detailed analytical study of the relationship between human rights and climate change (UNHRC 2009a). In 2009, HRC Resolution 10/4 was adopted, "[a]ffirming that human rights obligations and commitments have the potential to inform and strengthen international and national policy-making in the area of climate change" (UNHRC 2009b). The topic of the 2010 Social Forum[9] was climate change, and in early 2012 OHCHR held a seminar on human rights and climate change, also at the HRC's direction.[10] OHCHR now has a dedicated member of staff who acts as a focal point on the environment and climate change.

### *3.1. UN special procedures*

In 2012, after significant civil society lobbying, the HRC announced the appointment of a new UN special procedure, in the form of the so-called 'Independent Expert on the issue of human rights obligation related to the enjoyment of a safe, clean, healthy and sustainable environment' (hereafter, 'I.E. environment'). An American professor of law, John Knox, was subsequently

[9] A subsidiary body of the Human Rights Council, serving as a space for interactive dialogue between States, civil society and intergovernmental organisations.
[10] http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx.


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appointed as the first mandate-holder. Remarkably, climate change has not explicitly been included in the mandate[11] and there are now civil society actors and States advocating for another special procedure on climate change.[12] The introduction of this special procedure illustrates well the way in which existing human rights mechanisms have dealt with the environment 'issue', and is discussed below.

The UN special procedures are a human rights mechanism, created in 1979, that sits alongside the treaty bodies. They are created by the Human Rights Council and staffed by independent experts[13], or 'working groups' of independent experts, who serve in a voluntary unpaid capacity and are appointed to focus on certain thematic issues or country situations. They are supported by OHCHR, but capacity has grown ever more limited as the number of special procedures has multiplied without corresponding financial support from States (Piccone 2010, OHCHR 2013). This unwillingness of States to financially support mandates even as they propose and approve their creation raises the question of whether the appointment of a special procedure is just an easy conscience-salving 'action' from States on an issue of concern. One could proffer by way of example, the appointment of a Special Rapporteur on 'the situation of human rights in the Syrian Arab Republic' in 2011.

The thematic special procedures include mandates on the right to health, on cultural rights, on freedom of expression, on violence against women, on torture, and on extreme poverty. The special procedures undertake country missions, providing recommendations on the implementation of national laws, policies and programmes related to their mandate, and also submit thematic reports on global issues to the UN General Assembly and Human Rights Council.[14] As such, they operate at a high policy level, can exert a degree of influence on states and their reports can be a useful awareness-raising and advocacy tool (see Piccone 2010, Donnelly 2013 p. 163-4) They often work closely with civil society and thus are able to raise emerging, controversial or neglected issues in high-level UN fora. However, special procedures are also somewhat constrained in their actions: country visits depend on the invitation of states and diplomacy is generally favoured over naming-and-shaming (Pinheiro 2003). Their recommendations are not legally binding, but may be referred to in Universal Periodic Review[15] sessions and concluding recommendations of treaty bodies, although coordination with these other mechanisms requires systematic strengthening (Sepúlveda 2012). Of course, much also depends on the personal commitment and expertise of the individual mandate holder.

The new special procedure on the environment may well be able to have a positive impact. Of course, many academics and activists have already clarified how existing human rights laws, norms and principles apply to environmental harms (as indeed have UN agencies and bodies such as OHCHR and the Committee on Economic, Social and Cultural Rights - CESCR), but the work of a special procedure can increase visibility and catalyse improvements in respect for human rights, as well as contribute towards standard-setting (see Piccone 2010 for analysis and examples). The I.E. environment mandate is framed very conservatively ('on *the issue of* human rights obligation *related to* the enjoyment of a safe, clean, healthy and sustainable environment'), but many special procedure mandate holders have been able to push their mandate beyond the terms originally envisaged, albeit with

[11] http://www.ciel.org/Publications/UNRes_HRandENV_March2012.pdf.
[12] There is already (since 1995), a special procedure on the 'human rights obligations related to environmentally sound management and disposal of hazardous substances and waste'.
[13] Variously called 'Independent Experts', 'Special Rapporteurs', or 'Special Representatives of the Secretary General'
[14] See OHCHR website for more information: http://www.ohchr.org/en/HRBodies/SP/Pages/Welcomepage.aspx
[15] The UPR is a mechanism by which every UN member state submits to peer review (i.e., by other states) of its human rights record every four years (since 2008).

resistance and sometimes backlash from some states (see for example Lee and Horndrup 2005 and Human Rights Law Centre 2013). Many advocates hope that the mandate will lay the foundation for the HRC's recognition of the right to a healthy environment (see e.g. CIEL 2012).

However, there are also a number of potential weaknesses and drawbacks, on top of the general limitations of special procedures described above. It is possible that a special procedure may serve as a panacea, allowing the State members of the Human Rights Council to believe that they have taken adequate action on the environment issue. Ultimately, direct and meaningful action on the environment and climate change is unlikely to originate from the Human Rights Council on the urgent timescale required. After all, an environmental mandate has only just been created, and a mandate for climate change remains lacking, despite the links between human rights and the environment having been recognised by UN fora since the 1970s (see above) and the Human Rights Commission (the Council's predecessor) having officially recognised the threat of climate change in 1994 (Ksentini 1994).

There is also the question of rights fragmentation; there is now a special procedure on toxic waste, on human rights obligations related to the environment, and next, quite possibly, climate change. It is difficult to see how these mechanisms will refrain from overlapping significantly. There is perhaps no harm in this in a strategic sense, but there are wider questions to be asked about the propensity of the human rights regime to divide issues into silos, to damaging effect (for example the persistent distinction made between economic, social and cultural rights and civil and political rights).

### *3.2. Treaty bodies and courts*

Clearly, however, special procedures are not the only human rights mechanism that can be applied to tackle environmental issues. Courts and treaty bodies may still play a role, and in some cases already have (see below).

One potentially important new tool is the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which came into force in May 2013. The OP-ICESCR allows individuals or groups of individuals to submit complaints to the Committee, a capacity that it has hereto lacked, unlike many other mechanisms (again showing the priority accorded to civil and political rights). The Committee will also be able to launch an inquiry procedure against a State Party (albeit only one that has recognised its competency to do so) if it receives "reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant" (UN General Assembly 2008). This could open up a space for environmental issues to be the subject of Committee investigations and (non-binding) findings, through complaints related to the rights to health, housing, work, adequate standard of living etc. This will constitute an important and interesting development in terms of supporting accountability for environmental harms, although of course general concerns regarding the potential restrictions of the human rights law approach still stand – regarding, for example, extraterritorial obligations and non-state actors.

Of course, environmental issues do not only engage social and economic rights, as the UN Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention, adopted 1998) explicitly recognises. Indeed, most cases regarding environmental quality or degradation have been given court hearings as civil and political rights claims. Courts have tackled issues related to the environment through claims brought on the basis of, for example, the rights to private and family life,[16] effective remedy,[17] life,[18] freedom of expression,[19]

[16] Lopez Ostra v Spain 16798/90 [1994] ECHR 46 (9 December 1994).


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property,[20] health[21] and other rights. The African Commission on Human and Peoples Rights has found violations under Article 24[22] of the African Convention, for example in the landmark *Ogoniland* case, holding that Article 24 imposes an obligation on the State to take reasonable measures "to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources".[23] The Indian Supreme Court has notably used constitutional rights to address issues of environmental protection (Sahu 2008), while the European Court of Human Rights (ECtHR), despite the lack of environmental, economic or social rights in the Convention, has increasingly examined complaints in which individuals have argued that a breach of one of their Convention rights has resulted from environmental factors (Council of Europe, 2012). Such jurisprudence will likely continue (see Boyle 2010) but ultimately can only tackle individual (or in some jurisdictions, group) harms caused by environmental damage in a piecemeal way. It should be noted that one necessary area of fusion between human rights and environmental issues is the frequent rights violations that environmental activists experience in many parts of the world, including arbitrary arrest, torture and assassination. Such cases easily fit under the mainstream and regular activities of human rights courts and litigation, being concerned with violations of individuals' rights. Of interest here is the potential for human rights treaty bodies and courts to tackle environmental degradation or climate change more broadly.

Ultimately, tackling environmental issues through human rights mechanisms (be they courts, UN treaty bodies or special procedures) is a worthwhile avenue in certain cases, but one with limited capacity and reach (Handl 1992, Boyle 1996). It is telling that although environmental issues are often classified as within the social and economic rights ambit, the vast majority of existing case law related to the environment is concerned with civil and political rights claims. This reflects the fact that social and economic rights are still (falsely) perceived by some to be non-justiciable and aspirational (see Nolan, Porter and Langford 2007). Those bringing environmental claims have been forced to do so within the framework of civil and political rights, or may have strategically chosen to use civil and political rights claims in other cases, recognising their perceived stronger force.

The new UN special procedure should help in terms of standard-setting, create publicity for the environment/human rights interface and for specific cases of rights-violations related to the environment, and may produce useful policy recommendations for states. However, for the special procedure and other human rights mechanisms, enforcement remains a critical gap that makes unlikely any radical or transformative effect on the ground, while the narrow focus of treaty bodies and courts on individual cases or national contexts limits the scope of their findings or pronouncements.

## 4. The human rights-based approach

In this section, it is argued that the 'human rights-based approach' to environmental matters, when applied to activism and action on the ground with a sensitivity to context, has greater potential to be far-reaching and holistic than the products of formal human rights mechanisms, engaging with the structural and multi-faceted causes of rights violations and lack of rights enjoyment.

[17] Zander v. Sweden, [1993] IIHRL 103 (25 November 1993).
[18] Oneryildiz v. Turkey, 48939/99 [2004] ECHR 657 (30 November 2004).
[19] Bladet Tromso and Stensaas v. Norway, 21980/93 [1999] ECHR 29 (20 May 1999).
[20] Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Report No. 40/04, IACHR, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004).
[21] Menores Comunidad Paynemils/acción de amparo, Cámara de Apelaciones en lo Civil de Neuquén, Sala II, Argentina (19 May 1997).
[22] The right to "a general satisfactory environment favourable to their development".
[23] The Social and Economic Rights Action Center v. Nigeria, African Commission on Human and Peoples' Rights, 155/96 (2001) Available from http://www1.umn.edu/humanrts/africa/comcases/155-96.html.

### *4.1. Components of a human rights-based approach*

There is no single definition of the human rights-based approach (alternatively called rights-based approach, or RBA). However, the core elements, common across nearly all frameworks, include: accountability; equality and non-discrimination; participation and empowerment (see UN Development Group, 2003). None of the elements are in themselves revolutionary concepts but if implemented together, meaningfully, the potential for more sustained and sustainable change is increased. It is important to note that the understanding of each of the components of the RBA is quite particular, based on human rights obligations enshrined in international treaties and courts' and treaty bodies' interpretation of said rights. For example, under the RBA the principles of equality and non-discrimination would mandate that all measures (say, environmental protection or climate change mitigation measures) should be implemented in a gender-sensitive, non-discriminatory manner that ensures that all concerned individuals and groups can benefit equally. More progressively, substantive equality under human rights law also implies affirmative action, so disadvantaged individuals and groups should be identified and *prioritised* in any measure taken, including in resources allocated.[24] Given that climate change and environmental degradation has a disproportionate effect of on certain groups – most notably, people living in poverty, women, and indigenous peoples (see e.g. Neumayer and Plümper 2007), this is an extremely important principle or guideline for policies and interventions.

The RBA rests on the State's legal obligation to respect, protect and fulfil human rights of individuals (UNDP 2001, UNFPA 2010). Thus, for instance, anti-poverty programmes cannot be seen as a discretionary matter of charity or goodwill, for they are an obligation under international human rights law. Similarly, the component principles of the RBA – such as equality and participation – are themselves understood as rights, which generates a discourse and expectations of duties and obligations. Thus, RBAs are simultaneously an approach and an end in themselves; both the process and the outcome are equally important (Uvin 2007, UNFPA 2010 p.89).

### *4.2. RBA and development*

The processes and outcomes of development clearly overlap with and affect human rights, and indeed development is the field of practice where RBA has been most widely used. The link between development and human rights was formally enshrined in the Declaration on the Right to Development, adopted by the General Assembly in 1986, although the right to development continues to prove weak and contested. However, human rights has gained another, more secure footing in the development field since the 1980s, as development actors increasingly frame their work in human rights terms. Although its concrete impact and successes are hard to measure, the RBA to development is now widely used by bilateral development agencies, donors, and international development NGOs such as Oxfam, ActionAid and CARE International. It is also used by the UN Development Programme (UNDP); indeed, human rights has, in theory at least, now been mainstreamed across the activities and programmes all UN agencies.[25] A document of 'Common Understanding' on the human rights-based approach to development cooperation and programming was adopted by the UN Development Group in 2003 (UNDG 2003), and the approach is mandated for UN Country Teams (McInerney-Lankford, 2009, p. 63).

[24] See for example Convention on the Elimination of All Forms of Discrimination against Women, art. 4(1) and International Convention on the Elimination of All Forms of Racial Discrimination, art. 2(2). Treaty bodies have consistently interpreted non-discrimination and equality along these lines: see for example Human Rights Committee General Comment 18 para. 10 and CESCR, General Comment 20 paras. 9 & 39.

[25] See the UN Human Rights-Based Approach portal: http://hrbaportal.org/the-un-and-hrba.

The RBA has the potential to address and question structural and systemic causes of disempowerment and vulnerability to (for example) poverty or environmental harm. McInerney-Lankford (2009, p. 52) argues that human rights should be systematically integrated into development policy and practice for three reasons: 1) they [human rights] are intrinsically valuable in aiming to protect human dignity (which can be harmed by development interventions); 2) they are instrumentally useful to enhance development processes, address certain types of social risk, ensure accountability and secure more equitable and sustainable development outcomes; 3) human rights treaty obligations are legally binding. Certainly, environmental policy and practice could also benefit in these three manners; indeed, one could happily substitute 'environmental' for 'development' in each of the three points above.

According to the development NGO CARE Denmark, RBA is a systemic approach: "[i]t changes the work of an organisation by bringing it to reflect on and tackle not only immediate but also underlying causes of poverty" (CARE 2009, p.2). The RBA is contrasted with a needs-based approach: while a needs-based approach to development or poverty reduction might see vulnerability as being a symptom of poverty, a rights approach would view vulnerability as a structural issue and as an underlying cause of poverty. The former would see the poor as victims, who are then to be helped and accept assistance as and when it is provided, whereas the RBA would support them to participate in decision-making and to assert their rights (CARE 2009, p. 3). "The move from needs to rights, and from charity to duties, also implies an increased focus on accountability" (Uvin 2007, p. 602-3), and thus a concern with accountability mechanisms is at the heart of any rights-based approach to development.

### *4.3. Participation, poverty and power*

The human rights-based understanding of participation is of great importance to environmental matters (as manifested to some extent in the Aarhus Convention). Participation was already a feature of much development practice prior to the spread of RBAs. During the proliferating neo-liberal reforms of the 1980s-90s, major international aid, finance and development institutions began to incorporate participation into technical approaches to development, seeing its value as a means of reducing costs and enhancing the efficacy of interventions. Through the neo-liberal lens, the subjects of development were largely seen as passive 'service users' or 'customers' (Cornwall and Gaventa 2001). However, partly due to the growth in NGOs, participation became increasingly contested, criticised as having been co-opted by dominant institutions and disconnected from social transformation (Hickey and Mohan 2008). However, once development actors began to frame their work in human rights terms, a re-politicisation of participation took place, with advocates of this approach envisaging 'transformative' participation that is both a means and an end and prioritises empowerment (White 2006).[26] Now, the human rights approach to development clearly implies an "absolute requirement of participation" (Uvin 2007, p. 604).

The right to participation in public, political, cultural, economic and social life is enshrined in a number of international human rights treaties, including the Universal Declaration of Human Rights (articles 21 and 27) and the International Covenant on Civil and Political Rights (article 25). Participation therefore holds a critical place in RBAs, as a necessary part of any rights-respecting policy or decision-making process and a right in itself. Consequently, RBAs are "specifically concerned with finding ways of empowering those whose rights are denied to assess their condition, to identify the root causes of their marginalisation and to

[26] White's 'ladder of participation' presents 4 forms of participation: 1) nominal, 2) instrumental, 3) representative, and 4) transformative.

take action – individually or collectively – to define, claim and realise their rights" (Ling *et al.* 2010, p. 8).

Participation is an integral part of empowerment, accountability and of ending cycles of deprivation and dependency in favour of the autonomy and social inclusion of vulnerable groups (see Sepúlveda 2013 for a fuller analysis). Additionally, participation in decision-making processes also increases the chance that such policies will be effective, sustainable, inclusive and equitable: for example, there is little chance that poverty reduction programmes will work "if there is no participation of the very poor in the interpretation and transformation of their reality" (Godinot and Wodon 2006, p. 8). All these benefits of participation are clearly shown in the work of the NGO International Movement ATD Fourth World (ATD), which aims to find solutions to eradicate extreme poverty, working in partnership with people living in poverty, using a human rights-based approach.[27] As well as developing material assets and human capital, the goal is to "work towards building a consensus for a new social contract in which the extreme poor (and excluded people in general) assume the role of subjects in the process of transforming and recreating the institutions that regulate decision making as well as the distribution and redistribution of assets" (Godinot and Wodon 2006, p. 9). Clearly, the institutions and decision-making processes related to environmental governance and climate change could benefit from such a transformation.

A rights-based understanding of participation also pays increased attention to the way that power relations play out in certain contexts, recognising the fact that traditional 'participation' often tends to be *pro forma*, taking the form of information-giving or 'consultation' regarding decisions already made. Truly meaningful participation is dependent on other rights, such as non-discrimination and equality. Thus, under an RBA particular care should be taken to include and support those who are most excluded, including by providing accessible information and covering all costs, (Uvin 2007) and taking into account inter- and intra-community power dynamics and socio-cultural practices (Veneklasen *et al.* 2004). A traditional approach to participation might ask whether women were included, and the affirmative reply would cite a headcount of women present. A human rights approach would ask 'but how many of them spoke?' and demand that both sexes are given the chance to represent their views, including, if necessary, through specially-targeted consultations and support (ActionAid 2012, p. 59). The findings of a cross-country study conducted by the UK Inter-Agency Group on Human Rights Based Approaches[28], show that RBA projects "systematically increased the representation of poor and marginalised people", and although the non-RBA projects examined often emphasised securing participation, it was not done so in a way which linked participation to inclusion and fulfilment of obligations (UK Interagency Group, 2007, p. 44). The study also found that RBA projects featured more attempts to link citizens and state directly, rather than relying on an NGO mediating and liaising between them (ibid. p. 39).

### *4.4. Evidence for the RBA*

It must be acknowledged that there is not a solid evidence base demonstrating the success (or failure) of rights-based approaches. This is partly due to the practical difficulties of measuring or evaluating human rights work, which generally aims at long-term social change and shifts in power distribution (See ICHRP 2012). However, the findings produced by the UK Interagency Group on Human Rights Based Approaches "suggest that RBA projects are having considerably more success than non-RBA projects in attaining impacts that will lead to sustained positive change. RBAs tackle the underlying causes of poverty and disadvantage,

[27] http://www.atd-fourthworld.org/-Who-are-we-.html

[28] The Group includes the UK Department for International Development, HelpAge International, CARE UK, Save the Children UK and OXFAM.

and work in partnership with a wide range of stakeholders to address these causes. They link citizens and state in new ways and create systems and mechanisms that ensure that all actors can be part of accountable development processes" (UK Interagency Group 2007, p. 7-8).

A study of RBA and non-RBA projects by CARE USA and Oxfam America (2007) does not conclude that one of the other has more or less impact. Rather, both were found to produce different *types* of impact, with RBA projects addressing the underlying causes of poverty and exclusion rather than just the immediate and intermediate causes, producing less immediate and less tangible - but more sustainable - impacts (Gready 2009, p. 397).

### *4.5. Conclusions on the RBA*

RBA can be interpreted and applied in a number of ways and in some instances are justly,subject to accusations of opportunism, misinterpretation or donor appeasement. Certainly, in the absence of a grounding in people's daily needs and struggles for survival and dignity, rights-based approaches can be dismissed as merely a new technocratic fad that combines expert-driven social and economic interventions with legal change that may be irrelevant to people and communities (VeneKlasen *et al.* 2004, p. 3). Meanwhile, for human rights purists, especially lawyers, RBA may feel like a dilution of the rights enshrined in legal standards.

This paper takes the alternative view that "the lack of consistency could be seen as a flowering of human rights, set free from the rather set ways of working which characterize the human rights mainstream" (Gready 2009, p. 393). Despite potential shortcomings if used instrumentally, an RBA to climate change or the environment can be a useful tool to inform environmental efforts, especially those taking place at the local and regional level. A wider use of RBA will help to ensure not only that responses to climate change and environmental degradation are more inclusive, appropriate and sustainable, but also that the process of, for example, climate change mitigation or adaptation, is empowering, accountable, non-discriminatory and capacity-building in and of itself. This is a vital matter; as a UN guide to the RBA to climate change states: "Inadequate mitigation and adaptation strategies can lead to human rights violations where adequate participation of local communities is not assured or if due process and access to justice is not respected for any necessary displacement" (OHCHR, 2010).

Regarding RBAs to development, Gready argues that the "deployment of rights by RBA specifically to address systemic, structural causes of poverty is ground-breaking; on the other hand, the challenges to power and marginalization at present appear localized" (Gready 2009, p. 398). However, as RBA becomes ever more widespread across development and environmental practice (undertaken by NGOs, UN agencies and bilateral aid agencies), its potential to challenge the status quo will grow.

## 5. A principled strategy for practice

There are strategic merits for practitioners and activists in all of the three approaches discussed above, depending on need, tactics and circumstances. Crucially, environmental activists on the ground are already using human rights strategically, where they are felt to be appropriate or useful. Many are doing so without any prompting from or links with national or international human rights organisations, and many are combining human rights with other languages of social or climate justice. As Scholsberg (2013) observes, "the diversity of concerns in environmental justice movements have been reflected in the broad and pluralistic definition of justice used"; it is therefore unsurprising that human rights have now been added to the mix.

This approach to human rights will be termed a 'principled strategic' one, although some would call it merely an 'instrumental' approach. Baxi writes that for the victims of the Bhopal catastrophe, human rights languages were not important in themselves but only as a means to the ends of justice (Baxi 2010, p. 33-4). This may be so, but the divide between the means and the end is not a simple one; the means can change the ends, create new ends, or be ends in themselves. This approach is strategic *and principled,* because, as Mark Goodale writes of his anthropological research in a Bolivian community legal services centre, "the decision to embrace human rights discourse cannot be understood merely strategically, like making the decision to use genetically modified potato seed to increase crop yields. Rather, for many people in rural Bolivia, the shift in consciousness itself is the purpose of human rights discourse" (Goodale 2006, p. 31). Similarly, claims-making is a distinctive part of human rights practice and has intrinsic worth and radical potential.

The power of human rights lies not always in their legal forms, but in their conception of what it is to be human, their discursive power, in the claims-making itself. Human rights evolve and change through their use in grass-roots movements, in local activism, in power struggles, applied to issues that the drafters of the Universal Declaration of Human Rights could not have envisaged. For Baxi, (2010, p. 44) "[t]he message of Bhopal…constructs some new alternate futures beyond the new paradigm of trade-related, market friendly and environmentally hostile human rights". This, surely, is a crucial outcome: movements which use human rights, even in a strategic/instrumental way, even when failing to achieve their desired ends (in this case, meaningful justice for Bhopal victims) can thus reconstruct human rights in more radical form, struggling free from the grip of the powerful. This is similar to the way in which women's rights activists have drawn attention to the limitation of traditional legalistic approaches to human rights work, going beyond the content of laws to reconceptualise rights as a process of political struggle by which people translate their needs and aspirations into demands and enforceable commitments by states (Veneklasen *et al*. 2004).

'Human rights' has achieved a remarkable degree of monopoly over conceptions and languages of justice, and its practitioners are often extremely protective over this status. However, in order for human rights to remain relevant, radical reformulations of human rights should not be rejected. Although they seem to rest on a static legal basis, the nature of human rights claims and duties is deeply political and constantly shifting, "for what is socially and legally feasible today is never fixed, but a matter of political struggle." (Uvin 2007, p. 603) Nor should other languages of social justice be neglected. As Goodale states, "the impact of human rights is never separate from the swirl of other sources of normative inspiration", be they community norms, state law, or religious standards (Goodale 2006, p. 29). And after all, why should activists accept the limits placed on their demands, to ask for only what is already written, to demand only those human rights that emerged from previous struggles and have been consolidated into new forms of political power? (Hoover and De Heredia 2011, p. 215.)

Hoover and De Heredia contend that the dominant account of human rights is premised on "an unsustainable division between moral philosophy and political action". Rights, understood as inherently political and contested, are reconstructed in their account as a "moralized politics" (Hoover and De Heredia 2011, p. 193). As an example of how individuals and groups "reconstruct both the practice and idea of human rights in light of their own experience", they examine the discourse of the Zapatistas in Mexico and the Landless Peasant Movement (Moveimento dos trabalhadores rurais Sem Terra, or MST) in Brazil, two social movements not explicitly supported or recognised by mainstream human rights bodies or organisations, but which nevertheless use rights ideas and language in their claims and discourse. The MST, for example makes strategic use of the state framework of human rights to demand government accountability, security and redistribution and

gain international appeal, while simultaneously occupying land and demanding radical changes to the economic order. Here, the MST is one among many advocates and activists using 'universal human rights' to lend moral and political legitimacy to their work.

Thus, while conventional understandings of human rights make it difficult to alter the basic structures of sovereignty, representative government and economic decision-making, "looking to the reality of social struggles, especially those not sanctioned by mainstream human rights bodies, provides important insight for reconstructing rights" (Hoover and De Heredia 2011, p. 205). As Žižek argues in his provocative article 'Against Human Rights', "something that was originally an ideological edifice imposed by colonizers" can be "taken over by their subjects as a means to articulate their 'authentic' grievances" – like the Virgin of Guadalupe in newly colonized Mexico, whose appearance to an indigenous person allowed that population to appropriate Christianity "as a means to symbolize their terrible plight" (Žižek 2005). The struggle for environmental or climate justice has the potential to contribute to a much-needed task: the renewal and reconstruction of human rights in a more radical form.

The Universal Declaration of the Rights of Mother Earth,[29] drafted at the 2010 World Peoples' Conference on Climate Change and the Rights of Mother Earth in Cochabamba, Bolivia (Cochabamba Declaration) is one example of what Sally Engle Merry called "remaking human rights in the vernacular" (Merry 2006). In the Cochabamba Declaration, human rights are adapted and translated to a specific need: to a vision of human beings embedded in and dependent on nature, which includes a recognition of the destructive effect of capitalism and affirms "that to guarantee human rights it is necessary to recognize and defend the rights of Mother Earth". The Declaration includes the "inherent rights of Mother Earth and all beings of which she is composed" (including the right to life, to maintain identify and integrity, and the right to clean air) and the obligations of human beings to Mother Earth. Why should this conception of rights be any less valuable, or universal, than those enshrined in the International Bill of Rights?

Of course, human rights practitioners should not force human rights tools and language on local activists.[30] As a recent study of activist organizing in the United States shows, human rights may not always be the best choice of means or language, due to political and more importantly, cultural obstacles to their acceptance (Finnegan *et al.* 2010). However even in 'hostile' contexts many organisations inevitably find ways to remake rights in their particular vernacular. One US-based environmental activist organization, the Community Environment Legal Defense Fund, works to establish "community rights", in particular assisting communities to draft Community Bills of Rights which assert the "right to local self-governance", so that "communities are able to say 'no' to [environmental] threats and 'yes' to sustainability". These Bills establish rights, including to clean air, to clean water and to sustainable energy, and prohibit "activities that would violate these rights, such as fracking and GM seeds" (CELDF website, undated).

As Gearty states, "[s]uccessful social movements are absolutists in the pursuit of their interests but invariably open-minded about how they can be realized" (Gearty 2010, p. 14). Thus, those who are concerned with environmental protection and with human flourishing in a healthy environment should encourage, use or welcome a 'principled strategic' use of human rights, based on an analysis of what can best realize inevitably contextual visions of justice, dignity and flourishing.

[29] Available at http://www.rightsofmotherearth.com/declaration/.
[30] Although human rights education is desirable to ensure that the choice is at least available those who may not be rights-aware.

## 6. Note: Obstacles in international environmental governance

It is worth noting that recent years have seen human rights increasingly sidelined in international environmental fora, in contrast to the growing prominence of environmental matters in human rights discourse. For example, while the outcome document of the Cancún COP included substantive references to human rights, they were notably absent from the equivalent document negotiated at Durban in 2011. While 1972 saw the Declaration on the Human Environment, explicitly linking human rights and the environment, and human rights and human flourishing remained central to the 1992 Rio Earth Summit and the Rio Declaration, the Rio +20 negotiating text and eventual Declaration are very weak on human rights. Particularly notable was the replacement of the rallying call of 'sustainable development' with 'green economy'.[31] This marginalisation of human rights is problematic. No governmental or inter-governmental actor seriously questions the inter-dependence of human rights and environmental quality, and environmental issues are now taken seriously in human rights fora, but yet the international institutions with most environmental impact (including the UNFCCC) go about their business with barely even a tip of the hat to human rights. This lack of policy coherence and the reality of institutional fragmentation at the international level is even more visible when the WTO, the IMF and the World Bank are included in the analysis. The environment, like the issue of global poverty, is an area where most governments speak in one voice in one arena and a different one entirely in another – promising to honour commitments to fight poverty or climate change at home and abroad, while simultaneously making trade or investment deals that cannot fail to undermine these commitments.

## 7. Conclusion

This analysis has shown that human rights practice, even in its dominant forms, is not monolithic. Hence, it can offer various avenues for environmental concerns: 1) using human rights law and its mechanisms in as progressive a way as possible, pushing for recognition of rights claims related to the environment; 2) the use of RBA on the ground by development and environmental protection practitioners; and 3) supporting alternative and radical conceptions of rights and environment claims emanating from grassroots contexts. Each of these can be of use, if undertaken in a radical and/or strategic way, recognizing the limitations and strengths of the current human rights regime, while seeking to improve it.

However, further action beyond these approaches is clearly necessary. For example, environmental and human rights campaigners must keep challenging the insidious notion of corporate humanity and lobbying for legal recognition of the human rights duties and accountability of corporations and International Financial Institutions. Other languages and conceptions of justice are also important (that of distributive justice, for instance) and human rights actors should resist the temptation to capture or co-opt these discourses and reformulate them purely in human rights terms.

A multi-faceted approach is crucial because human rights practice tends to tackle environmental issues at a (comparatively) micro-level: an RBA project promoting participation of marginalized people in environmental decision-making in one community; a grassroots activist group using radical rights discourse to protest river pollution in another; a court ruling that a rights violation has been committed against an individual exposed to environmental toxins. Undoubtedly, such events are important, especially in combination. However, in order to achieve truly

[31] This prompts the Centre for International Environmental Law to say: "Looking back at the three UN landmark conferences, the focus on environmental protection appears to have been diluted over time. This change in focus is not only evidenced by the changes in the names of the conferences, but also by the issues discussed as well as the content of the outcome documents." http://www.ciel.org/Publications/Rio+20_IssueBrief_Feb2012.pdf.


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sustainable environmental protection, a profound shift in dominant political-economic ideologies will be necessary.

Ron Dudai (2009) argues that although human rights can attempt to ensure the fairness and appropriateness of *responses* to climate change, it does not have a role in engaging with the *substance* of climate change policy. This is true in some respects: clearly climate change and broader environmental issues often require technical and scientific approaches and solutions. However, human rights can and should inform environmental policies, actions and agreements at the international and national level, including in such 'technical' areas as technology transfer (see ICHRP 2011), emissions targets, REDD[32] and biofuels. These are after all, issues that engage profound questions of justice, and could promote or obstruct the enjoyment of human rights on the ground. As Gearty argues, the human rights approach is an "essential ethical component of a proper response to climate change" because it can help to ensure that decisions in this area do not again result in the world's poor being made to pay a disproportionate price (Gearty 2010, p. 21). Human rights offer a strong ethical and legal basis from which to approach these issues, and can help direct resources, technologies and/or action where they are most urgently needed, keeping a focus on the most vulnerable and marginalized communities.

Environmental protection, like poverty reduction, requires a persistent engagement with structural causes, and a coordinated, multifaceted approach at all levels of global and national governance. If human rights is fit for its role as the dominant *lingua franca* of global social justice, it must have something to contribute. Human rights practice has evolved in various directions in order to deal with the growing threat of environmental degradation and climate change; it can and should play a major part in response to these existential threats to human flourishing. It has been argued here that there is no one 'correct' approach, based on an understanding that human rights practice should be principled yet strategic, profoundly context-dependent, and ultimately directed at empowerment and shifting power relations. This may seem unfocused and even a dilution of legally recognized human rights. However, while human rights *practice* can be an end in itself – creating popular participation, empowerment, socio-cultural change – human rights themselves, as law or concept, are worthless if they are not useful to social justice struggles on the ground. Therefore, human rights practitioners must remain open-minded and imaginative regarding efforts to save and protect Earth's environment. Ultimately, this is a battle that may well define the future of human rights, which were, and continue to be, developed, discarded and reconstructed within specific contexts and political struggles.

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