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Current Status and Future Prospects

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Contents

Chapter 1
Introduction to Environmental Human Rights and Climate Change

Abstract In recent decades we have observed an increased engagement with human rights law as a tool for activating environmental claims and pursuing environmental justice. We have reached an understanding that the relationship between environmental protection and human rights is mutually supportive, yet at the same time characterised by tensions and complexities which make it difficult to articulate clearly and comprehensively in law. This chapter introduces the concept of environmental human rights, and outlines the areas which will be examined further in the remainder of the book. In particular, it identifies the two key topics which are the subject of specific analysis, being the notion of a standalone human right to a good environment and the applicability of environmental human rights to climate change. This analysis leads to the conclusion that, while the environmental dimensions of existing rights have much to offer in addressing climate change and other environmental challenges, the concept of a standalone environmental right remains problematic, particularly if we seek to include it in the body of international human rights law. It is not possible to define a right to a good environment in a way which is at the same time theoretically cogent, practically useful, legally enforceable and politically acceptable for States. Rather than pursue recognition of a new right within international law, work should instead focus on clarifying and developing the environmental dimensions of existing human rights to strengthen the interdependent relationship between the environment and human rights.

1.1 Human Rights and the Environment: A Mutually Supportive Yet Complex Relationship

In recent decades the relationship between humans and the environment has become the subject of considerable analysis and critical thought. The global challenge of climate change and its wide-ranging impacts on the Earth's ecosystems has highlighted the fragility of the natural world and its vulnerability to human interference, while forcing us to confront our own attitudes towards natural resources and the way we consume them. Within this context we have also observed an

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increased engagement with human rights law as a tool for activating environmental claims and pursuing environmental justice. We have reached an understanding that the relationship between environmental protection and human rights is mutually supportive. This has been most recently articulated by John Knox, former UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. A key theme of Knox's final report to the Human Rights Council (2018) was the interdependence of protection of both the environment and human right. At the same time, this interdependent relationship is also characterised by tensions and complexities which make it difficult to articulate clearly and comprehensively in law.

Humans' enduring reliance on the environment as a source of sustenance and prosperity, as well as a provider of spiritual and cultural enrichment, means that protection of that environment underpins the enjoyment of a wide range of human rights. Many rights recognised by international and domestic law possess environmental dimensions. These rights, such as the right to health, the right to life, the right to an adequate standard of living and the right to adequate housing, are all potentially affected by poor environmental conditions, and in this sense a good environment can be seen as a precondition to the full enjoyment of human rights (Knox 2018: 2).

At the same time, protection of the environment can be best achieved where human rights guarantees are strong, as violations of human rights (especially civil and political rights) often go hand in hand with corruption and abuses of process which render the environment vulnerable to vested interests and the pursuit of personal or political gains. Strong protections of human rights such as freedom of information and expression, the right to vote in free elections and the right to equality before the law can help to strengthen environmental protections and promote sustainable development (Knox 2018: 2). As Gearty (2010: 13) has powerfully explained:

> It is tempting in the environmental context to move directly to the economic and social, bypassing the civil and political as being concerned with a different set of issues. But access to courts, the ability to protest, and the capacity to obtain information are all central features of the struggle to achieve better environmental protection…Even in democratic countries guided by the rule of law and informed by respect for human dignity, this has not been an easy matter: protest has been prohibited and then disrupted, protesters beaten, arrested, often jailed. In nondemocratic countries matters have been of course much worse. The ability to use the language of human rights as a shield against state power, this entitlement to declare that an unwelcome message is guarded by the civil and political rights adhering to the messenger, does important protective work in a hostile political environment, making communication both less difficult and less dangerous.

Yet this understanding of a mutually supportive relationship between human rights and the environment fails to accommodate other, more ecocentric understandings of our relationship with the natural world. Indeed, there are strong criticisms that any talk of human rights in relation to the environment implies an anthropocentric view of the planet which is incompatible with environmental protection and which perpetuates the sort of exploitative and possessory attitudes towards nature which have caused widespread environmental destruction and

degradation over the course of human history and which have led to global environmental crises such as climate change (Handl 1992; Adelman 2015). There are foundational issues surrounding how we construct our relationship with the environment and how that relationship ought to be captured within law and legal processes (Grear and Kotze 2015).

Consequently, while there is widespread recognition that human rights and the environment must both be protected, and an understanding that there are ways in which these objectives could be pursued concurrently, there remains considerable debate about exactly how this ought to be achieved. In particular, there is a lack of consensus about how (and whether) international and domestic law can enshrine an integrated approach to human rights and environmental protection, or whether the two ought to remain in separate legal domains (Anton and Shelton 2011: 118–120).

The mutually supportive connection between human rights and the environment has been invoked in relation to a number of complex issues, such as climate change, sustainable development and poverty-reduction, yet it is not always clear how this can work in practice. Difficulties here include identifying appropriate rights-holders and duty-bearers to formulate a legal claim and proving the requisite causal connection to establish a breach. There are also significant challenges presented by the need to balance the various complex and at times competing interests in the context of States' multiple duties and finite resources. With respect to a problem like climate change, where environmental degradation takes many forms, unfolds across State borders and over generations, and is the cumulative result of the actions of many State and non-State actors, applying traditional norms of human rights protection can be especially problematic.

However, this uncertainty and complexity has not deterred the use of human rights language and processes to pursue environmental-based claims. For example, a number of cases have been successful in the European Court of Human Rights where claimants have pursued their governments for breaches of human rights flowing from environmental harms.[1] The appeal of framing environmental harm as a human rights problem has been due both to the perceived juridical superiority of human rights and the moral and rhetorical weight which comes with labelling something a human rights issue. In many jurisdictions human rights enjoy a status which can trump other legal claims, particularly where they are enshrined in constitutional protections (Weston and Bollier 2013; Grear and Kotze 2015; O'Gorman 2017). Given that most environmental law does not possess the same level of authority, there is a clear appeal to being able to frame an environmental claim in human rights terms.

Furthermore, the moral weight which comes with the concept of human rights means that, as Kiss and Shelton (2007: 238) have argued, the use of human rights

[1]See, for example, *Budayeva and others v Russia* (European Court of Human Rights, Application Nos 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008); *Lopez-Ostra v Spain* (1994) 303-C Eur Court HR (ser A); *Oneryildiz v Turkey* (2004) XII Eur Court HR 657; *Tatar v Romania* (European Court of Human Rights, Application no 67021/01, 27 January 2009). These cases will be discussed in more detail in Chap. 2.

language can exercise a 'compliance pull' which can be harnessed to achieve environmental objectives. On a strategic level, in many cases human rights law imposes clearer substantive obligations on governments which might be more easily relied on than relevant environmental laws and offer a better chance of holding the government accountable (Boyle 2012). The combination of these factors has resulted in a notable increase in the number of environmental human rights claims in recent years. As this body of jurisprudence has grown it has consolidated as an avenue for seeking redress for environmental harm which impacts on the rights of individuals and communities.

1.2 Defining 'Environmental Human Rights'

This book examines a body of law and legal theory which it categorises as 'environmental human rights'. The category is broad and includes a diversity of formulations of varying legal status. One key area of environmental human rights encompasses the environmental aspects of other human rights, many of which have formed the basis of the legal claims referred to above, such as the right to life, the right to health, or the right to private and family life. Also included within environmental human rights are other laws at the international, regional and national levels which use the language of rights to grant environmental entitlements, establish environmental guarantees or impose environmental duties. These include, for example, constitutional guarantees of a right to a clean, healthy or decent environment, as well as constitutional duties which require governments to ensure protection and conservation of the environment. There are also a number of regional human rights instruments which recognise similar environmental human rights and duties, as well as soft-law instruments which articulate the importance of the environment to the fulfilment of human rights. By looking at these various forms of environmental rights, this book aims to map the relationship between human rights and the environment within legal structures and to help identify possible areas for future development.

In defining the scope of 'environmental human rights', a distinction needs to be made between this category of substantive rights which provide environmental guarantees or possess environmental dimensions, and a separate body of rights sometimes called 'environmental rights', which are more procedural in nature (Shelton 1991–1992: 104–105). 'Environmental rights' are principally found in environmental law and include the rights of individuals and communities to be fully informed about environmental impacts and to participate in decisions which affect their environment.[2] They also extend to rights to compensation or redress for

[2]See for example international and regional treaties, including the *Antarctic Treaty*, the *Convention on Biological Diversity* (1992), the *United Nations Framework Convention on Climate Change* (1992) and the *Aarhus Convention* (2001), as well as in soft law instruments like the *Rio Declaration* (1992) and domestic environmental law.

environmental harm. While these rights are obviously relevant to cases of environmental degradation, the environmental harm per se is not actionable, only the lack of due process related to such harm, and they should not be interpreted as giving rise to substantive rights (Merrills 1996: 39).

Another body of rights which needs to be distinguished here are 'rights of the environment'. This is an emerging field of law which can be traced back to Christopher Stone's (1972) influential work "Should Trees Have Standing?" and the theories of wild law and earth jurisprudence (Cullinan 2011; Burdon 2010). This body of law grants legal rights to natural objects such as rivers, lakes and mountains, or even to nature itself. Recent, world-leading examples can be seen in New Zealand, where the Urewera Forest and Whanganui River have been granted legal personality (*Te Urewera Act* 2014 (NZ); *Te Awa Tupua (Whanganui River Claims Settlement) Act* 2017 (NZ); Iorns Magallanes 2012; 2015a, b). In Ecuador, the Constitution of 2008 states in Article 71 that:

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

While these sorts of laws have the potential to alter fundamentally the way our law recognises and protects the environment, they are not a form of human rights properly understood—indeed, the separation of the environment from human interests is one of the key reasons these developments are so exciting—and therefore they not included in the body of 'environmental human rights' under primary examination in this book.

1.3 Two Key Issues: Climate Change and the Right to a Good Environment

In conducting an examination of environmental human rights and their potential future direction, this book identifies two key topics for specific examination. The first is climate change, which is the biggest environmental challenge facing the international community, and which is already causing observable adverse impacts across the Earth's ecosystems (Alexander et al. 2013). Predicted impacts include increases in the Earth's surface and ocean temperatures, changes to the volume of glaciers and ice sheets, increases in the frequency and severity of severe weather events such as cyclones, floods and droughts and rising sea levels, with consequential impacts on biodiversity and vegetation (Alexander et al. 2013: 17, 21, 23).

Viewed cumulatively, these impacts represent an environmental challenge on a scale not previously encountered and demanding serious, long-term and sincere commitment and cooperation from all nations. Separately, each of these impacts has potentially serious consequences for human communities. These include negative health consequences from heatwaves, droughts, floods and storms (Bernstein et al. 2007: 48; Alexander et al. 2013: 23; OHCHR 2009: [32]). Incidences of

cardiorespiratory and infectious diseases are expected to increase and vector-borne diseases such as malaria are likely to spread into new areas (Bernstein et al. 2007: 48; OHCHR 2009: [32]; Cameron 2010: 702; Schmidhuber and Tubiello 2007: 19705). Food and water insecurity are anticipated to increase due to changes in rainfall patterns and melt-water, and rising sea-levels, exacerbating existing pressures on food and water in areas already at risk from drought, overpopulation and poverty (Bernstein et al. 2007: 48–49; OHCHR 2009: [29]; Schmidhuber and Tubiello 2007: 19704). Damage to housing and infrastructure is predicted due to rising sea levels, storms and floods (Parry et al. 2007: 333, 672; Rolnik 2009: [13]), and it is expected that millions of people will face displacement (McAdam and Saul 2010).

These impacts have recognised consequences for the enjoyment of human rights. Human rights such as the rights to health, food, water, housing, self-determination and even the right to life are threatened by climate change, and there is a growing movement advocating for greater utilisation of human rights language and principles to articulate concerns about the human impacts of climate change (see for example Bell 2013; Caney 2009; Doelle 2004; Humphreys 2010; Knox 2009–2010; Lewis 2010, 2016, 2018; Limon 2009; Pedersen 2010; Stephens 2010).

In recent years we have seen the first attempts at litigation of climate change issues using human rights law. In 2005 a group of Inuit peoples petitioned the Inter-American Commission of Human Rights, alleging that the United States was in breach of its obligations under the *American Declaration on the Rights and Duties of Man* (1948) by failing to regulate greenhouse gas emission, which they claimed were causing loss of sea-ice and other weather changes affecting their livelihoods and traditional ways of life (Watt-Cloutier 2005). While the petition was ultimately unsuccessful, it captured the attention of those looking for ways to hold governments accountable for the human impacts of climate change, and a body of climate litigation has since emerged across a range of jurisdictions.

In 2015 the Lahore High Court ordered the Pakistan Government to implement its National Climate Change Policy, finding that "the delay and lethargy of the State in implementing the Framework offend the fundamental rights of the citizens" found in the Constitution (*Leghari v Pakistan* 2015: 6). Also in 2015, the well-publicised case of *Urgenda v The Netherlands* used human rights principles to give content to the Dutch government's duty of care to its citizens, which the court held had been breached by a failure to adopt stronger policies on climate change. A similar case is underway in the United States, where a group of 21 young people together with climate scientist James Hansen (who is representing future generations), have launched a constitutional claim against the Government based on its failure to cut greenhouse gas emissions despite knowing the harms of climate change (*Juliana v United States of America* 2016; Peel and Osofsky 2018). Other litigation is proposed in the European Court of Human Rights, where a group of Portuguese young people plan to bring a claim against 47 European governments for their failure to address the future impacts of climate change (Crowd Justice 2017). These human rights-based approaches to climate litigation are gaining

momentum and it is expected that more advocacy groups will seek to harness human rights laws in such a manner.

Given the significance of climate change as both an environmental and human rights issue, any analysis of environmental human rights must therefore consider how such rights apply to climate change. Arguably any configuration of an environmental human right which did not have potential to address climate change impacts would be significantly limited in its usefulness. Further, any new development in environmental human rights will require the support of nation states, who will inevitably be mindful of the context of climate change in assessing such new proposals. The book therefore provides an analysis of the application of environmental human rights to climate change, noting that the transnational, cumulative and intergenerational impacts of climate change create difficulties for the application of even well-established human rights. It is argued, however, that human rights-based approaches to climate change and the use of environmental human rights can be useful, particularly by helping to identify vulnerable individuals and groups, articulating impacts and balancing competing priorities. Significantly, environmental human rights can be an extremely useful advocacy tool, lending moral weight to calls for greater climate action and drawing attention to the significant and serious human rights consequences of climate change.

The second specific topic which is examined in this book is the concept of a standalone right to a good environment. As will be explained in Chap. 2, many human rights recognised in international, regional or domestic law possess environmental dimensions. The rights to food, water and health, for example, are clearly dependent on environmental conditions, and in a number of cases environmental damage or degradation has been held to amount to a violation of specific human rights.[3] Beyond identifying the environmental dimensions of other rights, some jurisdictions recognise a separate, independent right to an environment of a particular quality. This is referred to for convenience as a "right to a good environment" however, as will be shown in Chap. 4, there are a variety of formulations for such a right found in many regional and domestic laws, although it is not recognised in a multilateral treaty of widespread adoption.

Proposals for broader adoption of a right to a good environment have been put forward by a number of scholars in the field, many of whom have argued that the inter-connectedness of the environment and human rights described above should lead to the conclusion that humans possess a right to a good environment (Downs 1993; Symonides 1992; Rodriguez-Rivera 2001). Despite this support, there is little consensus on what such a right should entail or even what the current status of the right is within international human rights law (Pevato 1999), and a number of

[3]In addition to the European cases listed at footnote 1 above, see also the *Ogonliand* decision of the African Commission for Human and People's Rights (2002); the United Nations Human Rights Committee's decision in the *Port Hope Environmental Group v Canada* complaint (1982) and the Inter-American Court of Human Rights' ruling in *Yakye Axa Indigenous Community v Paraguay* (2005).

scholars have argued against its use (Merrills 1996; Boyle 1996; Hill et al. 2004; Handl 2001).

This book attempts to clarify the status and scope of the right to a good environment. It identifies some of the key challenges which would need to be overcome in order to achieve greater recognition of the right and suggests some areas for future development. It is argued that, while the environment and human rights are clearly interrelated, there are significant difficulties in constructing a good environment as something which is an appropriate subject for a new, standalone human right. To illustrate this, the book examines some of the formulations of the right to a good environment which are already found in regional and domestic law, and demonstrates that in many cases these are in fact restatements of the environmental dimensions of other rights or are best characterised as aspirational statements, rather than enforceable entitlements to an independent substantive right. Nonetheless, the concept of a right to an environment of some minimum quality has clearly attracted considerable support, and even as merely an aspirational statement it has potential to foster a greater understanding of the interconnectedness of the environment and human rights, and to encourage stronger and more meaningful State action to protect both.

1.4 Overview of Chapters

In order to present a comprehensive analysis of the current status of environmental human rights and their possible future direction, particularly in the context of climate change, this book includes both a descriptive overview of existing rights and a multifaceted critique of potential new developments in the field.

The book begins in Chap. 2 by mapping the relationship between the environment and human rights in existing legal structures to identify where environmental human rights are currently located and the various forms they take. This chapter explores the various human rights found in international, regional and domestic human rights law which are recognised as possessing environmental dimensions. Many rights such as the right to health, the right to life, the right to an adequate standard of living, the right to self-determination or to participation in cultural life are dependent upon or can be affected by environmental conditions, and are therefore at risk from actions which cause environmental degradation. It is these rights which have most commonly been relied upon to pursue claims for violations as a result of environmental harm (a process sometimes referred to as ‘greening human rights’ (Birnie et al. 2009: 282; Boyle 2012: 614)). Understanding the various ways in which these human rights apply in an environmental context is key to assessing their potential to deal with contemporary environmental issues and to identifying areas where further development of the law may be required.

Chapter 3 focusses on formulations of environmental human rights found in domestic law, particularly national constitutions. One of the key objectives of this chapter is to assess the degree of constitutional recognition of the right to a good

environment (or variations on that concept), and this contributes to the discussion of the international legal status of this concept in Chap. 4. Chapter 3 identifies that constitutional environmental rights adopt a variety of forms, ranging from aspirational statements about the relationship between humans and their environment through to binding and enforceable legal obligations. This diversity, particularly when considered in light of the identity of States which have taken the step of constitutionalising rights, indicates that no generally consistent State practice exists which would support a customary environmental norm.

In Chap. 4, the discussion of the right to a good environment is expanded to encompass coverage in regional and soft-law instruments. It demonstrates that the right to a good environment is most commonly defined not as a truly independent and substantive right, but as an articulation of the importance of the environment to the fulfilment of other rights. It explains that many of these formulations are best understood as a 'synthesis' (Cullet 1995: 27) or 'compendium' (Rodriguez-Rivera 2001: 9) of other rights, rather than a separate right to an environment of a particular quality. Chapter 4 concludes that no standalone right to a good environment currently exists within international human rights law.

After examining the range of formulations of a right to a good environment in domestic, regional and soft-law instruments, the book then proceeds to critically examine the concept from a number of perspectives. This analysis enables a consideration of the possible future development of the concept, and contributes to our understanding of environmental human rights more generally. In Chap. 5, the concept is considered from the perspective of various theories of human rights. This analysis is intended to identify the extent to which the right to a good environment could be justified as a 'right' according to any of the main philosophical accounts of human rights. It highlights the fundamental tension between human rights theory, which is intrinsically anthropocentric, and other theoretical approaches such as earth jurisprudence and deep ecology, which view humans as just one of many equal components of the natural world. Not only do these theoretical considerations present challenges for the greater recognition of a standalone right to a good environment, they also create difficulties for environmental human rights as a whole. So long as human rights remain linked to human interests (and there is no suggestion that these could ever be decoupled) there will always be an inherent tension within environmental human rights which may undermine the effectiveness of this body of law, and Chap. 5 concludes that it is not possible to define a right to a good environment in a way which makes it compatible with conventional human rights theory.

In Chap. 6, the analysis moves on to consider a range of other practical, legal and political considerations relevant to the right to a good environment and other formulations of environmental human rights. It identifies in particular the problem of defining applicable standards for a right to a good environment required to make it practically useful or enforceable within legal structures. It considers the ways in which these definitional problems have been dealt with in other claims for human rights violations based on environmental degradation, demonstrating that it is often difficult to prove that a duty-bearer (usually the State) has failed to discharge its

obligations with respect to the environment such that a human rights violation can be established. This analysis also includes a consideration of some of the political issues surrounding environmental human rights, and particularly relating to proposals for stronger protections at the international level, where it can be seen that States have to date shown little support for the adoption of a new right to a good environment within international human rights law.

In Chaps. 7, 8 and 9 the book shifts focus to consider the specific application of environmental human rights in the context of climate change. Chapter 7 begins by providing some background on the emergence of human rights-based approaches to climate change, illustrating some of the tensions and unresolved issues relating to the appropriate role of human rights in dealing with the environmental impacts of climate change. This chapter examines the likely consequences of climate change for a number of specific human rights, in order to demonstrate the potential for human rights to assist in addressing climate change. It argues that existing human rights can be used to help improve action on climate change, for example by identifying and describing the impacts of climate change and focusing attention on vulnerable groups. Human rights also provides a way of considering competing interests and it is argued that this can provide a useful means of balancing conflicting demands on States' resources.

Chapter 8 then proceeds to consider in more detail the limitations of a human rights-based approach to climate change. It identifies a number of difficulties in enforcing human rights law in the context of climate change. These flow from the nature of climate change as a transnational, cumulative and intergenerational problem, as well as from the norms, structures and methods of human rights law itself. They present questions about who would be the appropriate claimants and defendants in a human rights-based climate challenge, what standards of performance should apply to the relevant obligations, and how to prove causation and attribution of harm. Despite the many challenges, the chapter argues that there are benefits to be gained from a human rights-based approach to climate change, particularly where this is pursued outside the formal structures of international human rights law.

After identifying the challenges of a human rights-based approach to climate change using existing environmental human rights in Chaps. 8, 9 considers the potential of standalone environmental right in this field. It asks whether a new right to a good environment would be better able to overcome the difficulties facing traditional human rights-based approaches. Despite the appeal of a right which focuses squarely on environmental impact rather than consequential interference with other rights, this chapter argues that there are significant barriers to meaningful implementation of a standalone right to a good environment in the context of climate change. Most notably these relate to the problems of identifying appropriate rights-holders and duty-bearers, and to articulating sufficiently precise standards to enable enforcement of the right.

Ultimately the conclusion is drawn in Chap. 10 that it is not possible to define the right to a good environment in a sufficiently precise fashion to enable it to be enforceable as a human right without linking it to other human interests, in which

case the right would be unnecessary as such interests are already protected by other recognised human rights. Having regard also to the attitude of States in this area, it is unlikely that we will see any recognition of the right at the international level.

However, there is much that can still be achieved through the expansion and enhancement of environmental human rights, and Chap. 10 identifies some particular areas for future development. It calls for further clarification and specification of the environmental dimensions of other rights, to enable them to be utilised more effectively in combatting environmental harms of all kinds, including climate change. One way of pursuing this, it is argued, is through expanded use of litigation, exploring novel claims and targeting both government and non-government actors. Specific work could also be done to develop means and methods of protecting particular vulnerable groups, such as future generations, whose rights are currently inadequately protected through existing legal systems. And while the right to a good environment is unlikely to attain legal recognition at the international level, its domestic and regional formulations will continue to be used, at least as tools of advocacy and rhetoric if not as enforceable legal rights. As environmental human rights are developed and refined they will continue to contribute to our understanding of the fundamental relationship between human rights and the environment and, it is hoped, help to move the global community towards a more ecocentric and connected appreciation of our place in the natural world.

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Chapter 2
Environmental Dimensions of Human Rights

Abstract There are many well-recognised human rights which, due to their subject matter and purpose, possess an environmental dimension. The impact of the environment on human rights can be direct, in that a polluted or damaged environment will directly impinge upon a person's ability to enjoy their rights, or indirect, in that poor environmental conditions will impede a government's capacity to protect and fulfil the rights of its citizens. These rights can form the basis of a legal claim where an individual or community alleges that environmental degradation, or the failure of government to address it, amounts to a violation of their human rights as guaranteed under law. This chapter will explain a number of specific human rights and the environmental dimensions they possess. It will also provide an overview of a number of key cases in this area from various human rights regimes. By identifying the breadth of environmental content already contained in human rights law, this chapter lays an important foundation for the argument developed in the book that future work in environmental rights should concentrate on expanding and clarifying these existing environmental dimensions, rather than on pursuing a standalone environmental right.

2.1 Introduction

The body of environmental human rights law includes a range of specific rights and duties related to the environment, such as a right to a good, healthy, clean or ecologically balanced environment. These can be found in several regional human rights treaties and national constitutions. However, as will be discussed in later chapters, these specific environmental rights are often not as easily engaged or enforced as other human rights, and this book argues that the dual objectives of protecting both human rights and the environment can be better advanced by articulating and expanding the environmental aspects of existing rights, rather than pursuing the adoption of a new, standalone right to a good environment.

Many well-recognised human rights are understood to possess an environmental dimension based on their subject matter and purpose, and the importance of the environment to fulfilling human rights is axiomatic. In his separate opinion in the

B. Lewis, *Environmental Human Rights and Climate Change*,
https://doi.org/10.1007/978-981-13-1960-0_2

Gabcikovo-Nagymaros case (ICJ 1997), Vice-President Weeramantry of the International Court of Justice stated that:

> The protection of the environment is…a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the *Universal Declaration on Human Rights* and in other human rights instruments (91-92).

The environmental dimensions of human rights can be either direct or indirect: direct in the sense that a poor environment will directly limit an individual's or a community's ability to enjoy a specific right which is guaranteed to them, or indirect in the sense that a poor environment will affect an individual's or community's overall capacity to realise their human rights, or impede a government's ability to protect and fulfil the rights of its citizens. A good environment can therefore be seen as a precondition of the enjoyment of human rights, either because it is essential to the enjoyment of a particular right (for example, the right to health through the availability of clean drinking water) or because a good environment facilitates the enjoyment and fulfilment of human rights generally (Knox 2012, 2014 Sands 2003: 294; Ksentini 1994; Popovic 1995–1996).

Where environmental damage occurs it may be possible to bring legal action based on a breach of applicable human rights law. As will be seen in this chapter, the success of this approach often depends on a number of factors, particularly the way the right is interpreted and how the environmental obligations and associated standards are defined for the relevant duty-bearer (usually the State). It also varies depending on the particular human rights regime within which the claim is brought, especially the enforcement mechanisms which are available and the way in which the relevant rights have been applied by the decision-makers within that regime. Key to this is the way those decision-makers have approached the difficult issue of balancing human rights and environmental protection against other potentially competing interests like economic development. While numerous rights possess environmental dimensions, this chapter will illustrate the considerable variation between rights and across jurisdictions in terms of how human rights can be enforced in an environmental context, and in particular the extent to which they might be utilised to address widespread or generalised environmental harm, such as climate change.

Notwithstanding this variability, there have been a number of notable cases where a claim for a human rights violation has been upheld based on a government's failure to prevent or mitigate environmental harm, and this chapter will provide an analysis of a number of the key cases from various human rights systems.[1] The chapter identifies those rights which tend to be more successfully

[1]The focus of this chapter is on the rights provided within the international and regional human rights regimes. Numerous countries also provide protection for human rights in their national constitutions and legislation, but these are not considered in this chapter. Chapter 3 will provide more detailed analysis of constitutional protections for environmental rights.

applied in environmental cases. These are the subject of a process which has been called the 'greening' of human rights (Boyle 2012: 614; Birnie et al. 2009: 282), and they include the rights to health, an adequate standard of living, private and family life, property, self-determination and indigenous and minority rights, and even the right to life.

At this point it is appropriate to distinguish a separate body of procedural rights related to the environment. These procedural rights are sometimes called 'environmental rights' (Shelton 1992: 104–105) but should be distinguished from the environmental human rights which are the chief subject of this book. Procedural environmental rights include the rights of individuals and communities to be fully informed about environmental impacts and to participate in decisions which affect their environment. They also extend to rights to compensation or redress for environmental harm. These rights are located in a number of international and regional treaties, including the *Antarctic Treaty* (1959), the *Convention on Biological Diversity* (1992), the *United Nations Framework Convention on Climate Change* (1992) and the *Aarhus Convention* (1998), as well as in soft law instruments like the *Rio Declaration* (1992) and domestic environmental law. Some can also be found in national constitutions, as will be identified in Chap. 3.

Dinah Shelton has described these kinds of rights as occupying an intermediate conceptual position between the environment as a precondition of existing rights and an independent right to a good environment (1992: 104–105). They must be distinguished from other human rights as they do not provide any substantive right to be protected from environmental harm or to enjoy an environment of any particular quality. While the rights are obviously relevant to cases of environmental degradation, the environmental harm per se is not actionable, only the lack of due process related to such harm. This is the context in which such rights have been found to be relevant to human rights claims, most notably within the jurisprudence of the European Court of Human Rights. As will be seen, in extending to States a margin of discretion to develop their own environmental policies, the Court has used these procedural rights as a minimum standard of governmental conduct: provided due process rights are adhered to, a government will usually be excused for environmental harm which flows from legitimate State action, even where that harm interferes with human rights.

While procedural environmental rights can therefore be relevant to human rights claims, they should not be interpreted as giving rise to substantive rights (Merrills 1996: 39). Environmental procedural rights recognise that environmental degradation has negative effects on individuals and communities and they can help provide a remedy for individuals who have been affected by environmental harm without having to prove any other human rights violation. Further, they are an important part of environmental policy-making, ensuring that environmental laws do not impinge upon other human rights, and helping to develop laws which are effective and accountable (Knox 2012: 9–12). However, they are not equivalent to a substantive right to an environment of a particular quality, nor do they provide any other substantive guarantees, and as such these procedural 'environmental rights' will not be examined in great detail in this book.

The following discussion identifies the environmental dimensions of a number of the most relevant human rights and the way they have been applied by human rights bodies. In examining a number of key cases which have concerned these rights, the chapter considers the way in which judgments have conceptualised the relationship between the environment and human rights, and the extent to which existing human rights can provide a legal framework for greater environmental protection. It demonstrates that existing human rights law offers considerable scope to address environmental problems, at least to the extent that they impact on human lives, and therefore it may not be necessary to rely on a specific right to a good environment. However, as the chapter concludes, there are challenges in applying existing human rights to broader environmental issues such as sustainable development and climate change. These issues will be explored in more detail in subsequent chapters, with a view to identifying possible strategies for enhancing the effectiveness of environmental human rights.

2.2 The Right to Health

The environmental dimensions of the right to health are easily understood: good environmental conditions including clean air and water, safe and nutritious food, and adequate sanitation, are essential to a wide range of health outcomes, while a poor or polluted environment can have significant health ramifications (Atapattu 2004). The human right to the highest attainable standard of health is guaranteed in several international and regional human rights instruments. Article 12 of the *International Covenant on Economic Social and Cultural Rights* (ICESCR) (1966) reads:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
(b) The improvement of all aspects of environmental and industrial hygiene;
(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

Within the United Nations human rights framework the right to health is also guaranteed by the *Convention on the Elimination of All Forms of Racial Discrimination* (1966: Article 5(e)(iv)) and the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) (1979: Articles 11.1(f), 12). Additionally, Article 19 of the the Convention on the Rights of the Child (CRC) (1989) guarantees to all children the right to be free from injury and abuse, while Article 24 guarantees the right to the highest attainable standard of health, including specifically access to safe drinking water.

The United Nations Committee on Economic, Social and Cultural Rights' General Comment 14 (2000) makes it clear that the wording of Article 12 of the ICESCR is intended to include not just the right to healthcare, but also the right to a wide range of socio-economic factors and underlying determinants of health, including 'food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment' ([4]) as well as 'the prevention and reduction of the population's exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health' ([15]). General Comment 14 constructs this range of environmental factors as determinants of an adequate standard of health. The right to health is therefore linked to the environment in a way which contemplates environmental protection as a necessary precondition to the full enjoyment of that right.

The right to health is also recognised within a number of regional human rights regimes.

In Africa, the importance of the environment in fulfilling the right to health was confirmed by the African Commission on Human and Peoples' Rights in the *Ogoniland* decision (2002). In that case, the residents of the Ogoniland area in Nigeria brought a claim against their government alleging that its cooperation with the Shell Petroleum Development Corporation to exploit oil reserves in the region had violated their human rights. They claimed in particular that toxic waste and other effects of oil extraction activities in Ogoniland amounted to a violation of their right to health, among other rights. This right is provided for under the *African Charter of Human and People's Rights* (1981), which guarantees to all individuals 'the best attainable state of physical and mental health' (Article 16). The Commission found in favour of the claimants and ordered the Nigerian government to provide compensation and to ensure more adequate safeguards were put in place for any future development.

The Inter-American Commission on Human Rights has also addressed the effect that environmental degradation might have on the right to health. The Commission is a key body within the Inter-American human rights system, which operates under the auspices of the Organisation of American States, a multilateral organisation comprising 35 Member States from the Americas. It has responsibility for overseeing States' compliance with a number of human rights instruments, in particular the *American Declaration on the Rights and Duties of Man* (1948) and the *American Convention on Human Rights* (1969), and frequently conducts studies into thematic issues of concern relating to human rights. The Commission has competence to hear petitions from individuals, communities and non-governmental organisations alleging violations of these treaties.

Alongside the Commission, the Inter-American Court of Human Rights also hears complaints from individuals, but is limited to hearing cases against those Member States which have specifically accepted the jurisdiction of the Court

(American Convention: Article 62).[2] The Commission and other Member States may also refer a matter to the Court, which is also empowered to provide advisory opinions on legal issues arising under the treaties.

The right to health is guaranteed in the *American Declaration on the Rights and Duties of Man* (Article XI), and has been interpreted by the Commission on a number of occasions. Article XI reads:

> Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.

In its 1997 Country Report on Ecuador, the Commission addressed the fact that conditions of severe environmental pollution which cause serious physical illness, impairment and suffering on the part of the local populace are inconsistent with human rights (Ch VIII). The links between the environment and the right to health had already been articulated by the Commission in its 1985 Country Report on Cuba, wherein the Commission recommended that the State address environmental protection in order to ensure compliance with its human rights obligations, stating that 'a healthy environment is essential for a healthy population' (Ch VIII).

The right to health might also be impacted upon by environmental factors where the environment plays a particular role in the traditional, cultural or spiritual lives of certain groups of people. Indigenous peoples in particular may experience specific health risks where the natural environment around them is adversely affected. The Committee on Economic, Social and Cultural Rights recognised in General Comment 14 (2000) that indigenous peoples have a special relationship with their lands, and that

> the health of the individual is often linked to the society as a whole and has a collective dimension. In this regard, the Committee considers that … denying them their sources of nutrition and breaking their symbiotic relationship with their lands has a deleterious effect on their health [27].

The availability of traditional food sources or medicines may affect the health of people in certain communities. The Inter-American Commission on Human Rights noted the impact of the environment on indigenous health in its 2009 Country Report on Venezuela, finding that indigenous communities are 'exposed to conditions of extreme misery due to the lack of access to land and natural resources that are necessary for their subsistence' ([1076–1108]).

Where the environment plays a particular role in the cultural or spiritual lives of communities, there may also be adverse mental health outcomes which flow from environmental degradation. This was confirmed by the Inter-American Court of Human Rights in the *Yakye Axa* case (2005: [168]). In this case the Yakye Axa indigenous community alleged that the Paraguayan government was preventing

[2]Currently these are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay.

them from being able to access and use their traditional lands. The Court held that this amounted to a violation of a number of human rights, as the people were unable to enjoy their land and to use it to pass on their traditional customs and culture or to pursue traditional forms of livelihood. The Court noted that this separation from land had a negative impact on the health and well-being of the Yakye Axa people ([167]–[168]).

Environmental pollution or degradation which deprives indigenous communities of the ability to access or utilise their lands can be seen to have a wide-ranging impact on their right to health, as well as other human rights. The Inter-American Court and Commission have developed a notable body of jurisprudence on indigenous rights, and have expanded our understanding of the importance of the environment in ensuring that indigenous peoples' rights are fully protected and enjoyed. This body of work will be explored further in later sections, particularly in relation to the rights to property and self-determination.

2.3 The Right to an Adequate Standard of Living

Along with the right to health, the right to an adequate standard of living is perhaps most obviously susceptible to interference from environmental factors. Article 11 of the ICESCR guarantees to all individuals the right to an adequate standard of living, including adequate food, clothing and housing, and the continuous improvement of living standards. The Committee on Economic, Social and Cultural Rights has elaborated on the content of Article 11 and the associated obligations which fall on States in its General Comment 12 (1999). The right to adequate food is an inherent part of an adequate standard of living, and requires the adoption of appropriate environmental as well as economic and social policies in order to ensure the availability of adequate food supplies (General Comment 12: [14]). This entails an obligation on States to work towards the sustainable management of natural resources (General Comment 12: [25]).

Article 24 of the CRC guarantees to all children the right to the provision of adequate nutritious foods taking into consideration the dangers and risks of environmental pollution. Here, the law explicitly describes the environmental dimensions of a particular human right. While equivalent express provisions do not exist in human rights law for adults, similar requirements for the right to food are nonetheless implied from the right to an adequate standard of living and the right to self-determination.

The Committee on Economic, Social and Cultural Rights makes clear in its General Comment 15 (2003) that, along with adequate food, housing and clothing, Article 11 also guarantees the right to water, given that an adequate supply of safe water is indispensable for the realisation of an adequate standard of living. General Comment 15 also explains that the right to water is inextricably linked to the right to the highest attainable standard of health in Article 12. It is explained that, in ensuring the enjoyment of the right to water, States should ensure that natural water

resources are protected from harmful substances and should take steps to combat situations where aquatic ecosystems serve as a habitat for disease vectors (2003: [8]).

The right to water is explicitly recognised in other international treaties, including the CRC, which, as noted above, specifically guarantees to all children the right to safe drinking water as a component of the right to health in Article 24. The CEDAW also mentions water specifically in relation to the provision of adequate living standards for all women (1981: Article 14.2(h)). Where environmental degradation such as pollution or desertification affects the availability of clean and secure water supplies, the right to water is directly impacted, with potential to impinge upon the right to health and, where serious enough, even the right to life.

Clearly, the right to an adequate standard of living is closely linked to environmental conditions, and there are numerous ways in which environmental degradation might impinge upon the right. There are, however, few cases where a violation of this right has been pursued. In part this is due to the fact that until recently the Committee for Economic, Social and Cultural Rights lacked competence to hear individual complaints (Optional Protocol to the ICESCR 2008). In other jurisdictions, cases where environmental harm has impinged on living conditions have been pursued more commonly through other rights, such as the right to health, the right to the enjoyment of property, the right to respect for private and family life or the right to life itself (see below).[3] This itself is indicative of the significant overlap between these rights and the fact that a breach of one right seldom occurs without interference with other rights. It also may reflect the fact that standards of living are influenced by a range of factors aside from environmental conditions, and proving a violation may be difficult in anything other than direct cases of environmental interference. The following sections will examine rights which have historically been much more susceptible to successful claims in environmental contexts, most notably within the European and Inter-American human rights systems.

2.4 The Right to Respect for Private and Family Life

The European Court of Human Rights has contributed significantly to jurisprudence linking environmental protection and human rights through the success of a number of cases alleging that environmental degradation constitutes a violation of the rights contained in the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950). Despite the lack of a specific right to a good environment in the Convention, the Court has been willing to find violations of

[3]For example, in the *Case of the Indigenous Community of Xákmok Kásek v Paraguay* (2010), claims relating to inadequate access to food and water were pursued under the scope of the right to life, recognised in Article 4 of the *American Convention* and Article 1 of the *American Declaration* to encompass a right to a dignified existence ([194]–[202]).

other Convention rights on the basis of environmental damage, and one of the rights most commonly invoked in this way has been the right to respect for private and family life, guaranteed under Article 8 of the Convention. This section will first outline a number of general points about the European Court's approach to environmental cases, before looking specifically at the interpretation and application of Article 8.

The Court's approach has been to uphold claims for violations where a direct impact on an individual's human rights can be established, provided that the State in question has no legitimate justification for such interference. In *Kyrtatos v Greece* (2003), the Court confirmed that the European Convention provides no general protection of the environment (Pedersen 2008–2009: 89; Boyle 2012: 627; Boyle 2006–2007: 505; Shelton 2008: 45). The case concerned alleged breaches of the Convention based on the issuing of building permits for an area of swampland which was an important habitat for protected species. The applicants alleged a breach of Article 8 of the Convention and in considering whether the applicants' rights had been violated, the Court held that the crucial element in demonstrating that environmental pollution severely affects the rights protected in Article 8

> is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment. Neither article 8 nor any of the other articles of the Convention are specifically designed to provide general protection of the environment as such (268, [52]).

What is required therefore is demonstration of a particular impact on the individual's rights, rather than general environmental harm.

The Court has explained that the nature of a State's obligations is to take appropriate steps to secure the rights guaranteed under the Convention (*Fadeyeva v Russia* 2005; *Tatar v Romania* 2009; Shelton 2010: 106; Boyle 2012: 615; Boyle 2006–2007: 487). This means that a violation of an individual's human rights can occur either through direct interference by the State (*Dubetska v Ukraine* 2011; *Dzemyuk v Ukraine* 2014) or through a failure of the State to regulate the activities of private actors (*Fadeyeva v Russia* 2005; *Tatar v Romania* 2009). As will be discussed below, several claims have been successful against governments that have failed to take appropriate steps to control the activities of private companies resulting in a harmful interference with citizens' rights.

A key feature of the European jurisprudence is the application of the margin of appreciation, particularly in relation to the procedural aspects of environmental protection. Under the doctrine of the margin of appreciation, States are afforded a degree of discretion in determining how to give effect to their obligations under the Convention (*Dubetska v Ukraine* 2011: [141]). In environmental cases, the doctrine has been successfully argued by governments in defending claims of human rights violations by showing that a fair balance has been struck between environmental impacts and other legitimate objectives, such as development of public services and infrastructure (*Powell and Rayner v UK* 1990; *Hatton and Others v UK* 2003: [100], [119] and [123]; *G and E v Norway* 1983; *LCB v UK* 1998; Shelton 2010: 111). As the Court said in *Dubetska*, "the ultimate question before the Court is,

however, whether a State has succeeded in striking a fair balance between the competing interests of the individuals affected and the community as a whole" ([141]).

In relation to environmental claims, the European Court has held that States must take certain procedural steps in order to show that a fair balance is struck between the human rights of affected individuals and other legitimate interests. These procedural safeguards include assessing the environmental risks of the activity concerned, making that information available to those likely to be affected, allowing them the opportunity to participate in the decision-making process and enabling access to judicial remedies where they suffer harm as a result (Knox 2009–2010: 167; Shelton 2010: 111). Provided that these procedural steps are complied with, the Court will usually allow States a wide margin of discretion and defer to their judgment as to how the balance is to be struck (Knox 2009–2010: 167). The Court has therefore been open to the notion that some environmental and human rights impacts may be justified, provided certain procedural protections are in place. Nonetheless, there have been numerous cases where the harm caused was considered to go beyond the limits of the margin of appreciation, or where a procedural failure on the part of the government has led to a finding of a human rights violation.

The right to respect for private and family life, contained in Article 8 of the *European Convention*, is the most commonly invoked right in environmentally-based claims before the European Court. Article 8 states that:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

In the case of *Lopez Ostra v Spain* (1994), the European Court held that pollution from a tannery which was negatively impacting on the applicant's health was a violation of Article 8 (Popovic 1996: 350; Pedersen 2008–2009: 85). It concluded (at [51]) that severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life, even where the pollution did not seriously affect their health (see also *Guerra v Italy* 1998: [60]).

In *Dubetska v Ukraine* (2011), the Court explained the necessary threshold for environmental harm to be considered a breach of Article 8. It said that

> [n]o issue will arise if the detriment complained of is negligible in comparison to the environmental hazards inherent in life in every modern city. However, an arguable claim under Article 8 may arise where an environmental hazard attains a level of severity resulting in significant impairment of the applicant's ability to enjoy his home, private or family life. The assessment of that minimum level is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance and its physical or mental effects on the individual's health or quality of life ([105]).

As noted above, violations of Article 8 can occur where a State has failed to take the necessary steps to protect against interference by private actors. In *Fadeyeva* (2005) the decision of Russian authorities to authorise the construction of a steel plant in the midst of a densely-populated town was considered a violation of the applicant's right to respect for private and family life, as the State had failed to put in place any measures to limit the impact of toxic emissions on those living within close proximity or to assist them to relocate.

In *Tatar v Romania* (2009) the applicants, a father and son, lived in proximity to a privately-owned gold mine. They argued that the process employed by the company to extract gold, which involved the use of sodium cyanide, posed a risk to their health and well-being. The Court confirmed that the State has a duty to protect the rights of its citizens by regulating the activities of private companies, especially where industrial activities may be hazardous to the environment or human health. The facts presented to the Court indicated that the Romanian authorities had been aware of the potential risks, but had failed to take measures which would adequately control the company's activities. The Court therefore found that Article 8 had been violated. It also noted that the State had failed to take measures necessary to protect not only the applicants' right to private and family life under Article 8, but also 'more generally their right to enjoy a healthy and protected environment' (Press Release 27 January 2009: 3). While the *European Convention* contains no specific right to enjoy a healthy or protected environment, it is clear from the decision in *Tatar* that the Court has acknowledged the links between environmental health and human rights, and the potential for environmental pollution to cause significant interference with individual rights.

The case of *Di Sarno and others v Italy* (2012) related to the operation of a waste management plant in Campania in Italy. Between 1994 and 2009 a state of emergency had been in place in the region relating to significant problems of solid urban waste disposal. There had been ongoing problems administering an appropriate waste collection, transport, storage and disposal system across a wide area. The applicants lived and worked in the area, and claimed that the failure to properly attend to waste disposal had caused serious damage to the environment and to their lives and health, in particular their private and family lives as protected under Article 8. The Court held (at [110]) that the disposal of waste is an inherently hazardous activity, obliging the State to adopt appropriate measures to safeguard human rights. Following *Tatar*, the Court found not only that the State was obliged to protect the right to private and family life, but also the right to live in a "safe and healthy environment". Ultimately however the decision of the Court rested on the finding that the substantive aspect of Article 8 had been breached based on the protracted inability of the authorities to put in place appropriate waste disposal services.

Provided there is no disproportionate negative impact for particular individuals then under the second paragraph of Article 8, a State will be excused from a violation where it can point to a legitimate need, including the economic well-being of the country, and where measures are implemented according to the law. In applying this paragraph, the Court will weigh the competing interests of the

individual and the community in determining whether environmental harm amounts to a violation, and will find that a State's actions are justified only where a fair balance has been struck (*Hatton and others v UK* 2003; *Lopez Ostra v Spain* 1994; *Dubetska v Ukraine* 2011: [124]; *Shvidkiye v Russia* 2017). Where a fair balance has not been struck, the Court has concluded that the interference with the complainant's rights cannot be considered 'necessary in a democratic society' as required by Article 8(2).

In *Dubetska and Others v Ukraine* (2011), the Court considered whether the applicants' right to respect for private and family life was violated by their having to live in close proximity to a State-owned coal mine, coal processing facility and spoil heap for over a decade. The Court held that the Ukrainian authorities had failed to relocate the applicants or to address the risks posed to those living in close proximity to the coal facilities, in spite being aware of those risks. While the coal facilities did offer a legitimate benefit for the community, the State had failed to strike an appropriate balance between the interests of the affected individuals and the interests of the community, constituting a violation of Article 8 (at [154–156]).

As noted above, the European Court of Human Rights has often had regard to relevant procedural requirements when determining whether a State's actions amount to a violation of rights or could instead be deemed to fall validly within the margin of appreciation. In relation to Article 8, the Court has found violations to have occurred in a number of cases where environmental decision-making processes have not been adhered to. For example, the failure of authorities to disclose relevant information relating to the risks of harmful activities has led the Court to uphold a number of claims (Pedersen 2008–2009: 87; Boyle 2012, 2006–2007: 497). In *Guerra v Italy* (2008) the Court held (at 227–228) that the relevant authorities had failed to provide sufficient information to allow the applicants to assess the level of risk associated with residing close to a chemical factory. Similar reasoning has led the Court to find violations where authorities have neglected to undertake adequate investigations and assessments which would enable the provision of accurate information. For example, in *Taskin v Turkey* (2004) the Court held that a failure on the part of the State to take appropriate procedural and investigative steps to ensure the decision-making process was properly informed meant that it could not rely on the margin of appreciation to avoid responsibility. Inadequate assessment procedures have also been held to affect rights of participation in decision-making. For example, the Court held in *Giacomelli v Italy* (2006) that the failure to undertake environmental impact assessments prior to issuing a licence to operate a waste treatment facility deprived the applicant of a meaningful chance to participate in the decision-making process, a factor which contributed to the violation of Article 8.

The Court has also found violations of the right to private and family life in cases where existing domestic laws designed to prevent environmental harm have not been complied with. The deference normally afforded to States' decisions in environmental matters will be undone if States have ignored their own environmental protection laws (Pedersen 2008–2009: 88). For example, in *Fadeyeva v*

Russia (2005) the Court found that Russia had violated Article 8 due to its lack of attention to domestic laws which were intended to protect citizens from pollution (at 293; see also *Moreno Gomez v Spain* 2004, where a violation was based on the State's lack of willingness to enforce laws designed to abate noise levels).

In *Dzemyuk v Ukraine* (2014), the Court upheld a claim for a violation of Article 8 where a local authority's construction of a cemetery in close proximity to the applicant's residence was in contravention of the relevant domestic regulations (at [92]). Because of this illegality, the construction could not be justified under Article 8(2) of the Convention, which requires that measures for public benefit be in accordance with the law.

Provided that procedural rights and domestic environmental protections are complied with, the Court will normally defer to a State's judgment. However, there have been some cases where the Court has held that the State's margin of appreciation has been exceeded, resulting in a breach of Article 8. In *Lopez Ostra* (1994) the Court found (at [58]) that the margin of appreciation had been exceeded because the State had not struck an appropriate balance between the rights of the individual applicant and the needs of the community. This reasoning also applied in *Giacomelli v Italy* (2006), where the Court held (at [97]) that in allowing the construction of the waste treatment plant 30 metres from the claimant's home the government had failed to strike a fair balance between the interests of the community in building the facility and the claimant's effective enjoyment of her home.

While the right to respect for private and family life has been harnessed successfully to argue that environmental degradation amounts to a violation of human rights on a number of occasions, there are several limitations to its effectiveness. First, as noted by the Court in *Kyrtatos*, a claim under Article 8 can only be brought by a person directly affected, and the interference with their private and family life must be of a certain gravity (Martens 2007: 295–296). The right will obviously not be useful in addressing widespread or general environmental impacts, only those which affect an individual in some particular way. Further, the operation of the doctrine of the margin of appreciation means that as long as a State has complied with procedural safeguards and domestic laws it will largely be free to decide on a course of action which results in environmental damage where it can point to some economic or other justification. Finally, as Shelton (2002) has noted, the right has no application to 'issues of resource management and nature conservation or biological diversity,' which are 'more difficult to bring under the human rights rubric, absent a right to a safe and ecologically balanced environment' (at 11). The application of the right to private and family life in cases of environmental degradation is therefore limited, and the focus which is inevitably placed on the private and family life of the individual applicant leaves little scope to address broader environmental issues such as climate change or sustainable development.

2.5 The Right to Property

Another right which has been applied in cases of environmental harm is the right to property, which is guaranteed under the European, Inter-American and African regional human rights systems. In Europe, the right to property is protected under Protocol 1 to the European Convention. Article 1 of that instrument states:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

In Europe, cases relating to the right to property have adopted similar arguments to those relating to the right to private and family life, with claimants arguing that environmental degradation interferes with the quiet enjoyment of their property. For example, in *Oneryildiz v Turkey* (2004) the European Court of Human Rights held that the risk of a methane explosion occurring at a rubbish dump located close to the applicant's home constituted a violation of the right to the peaceful enjoyment of his possessions. As with Article 8 of the Convention, violations can take the form either of direct interferences by the State, or indirect interference through the State's failure to properly regulate the activities of private actors.

The cases relating to the right to property also highlight another aspect of the relationship between human rights and the environment as interpreted by the European Court. In a number of decisions, the Court has emphasised the importance of conserving the environment as a legitimate public objective, finding that government restrictions on private property can be justified when they are proportionate to achieving the aim of environmental protection or conservation. This was first articulated in *Fredin v Sweden (No 1)* (1991), where the Court found that the revocation of a licence to operate a gravel pit under the Swedish *Nature Conservation Act* did have implications for the right to private property under Article 1 of Protocol 1, but that such interference was not inappropriate or disproportionate, and did not therefore constitute a violation of that right.

In *Hamer v Belgium* (2007), the claimant argued that an order to demolish a building which had been constructed without planning permission in a woodland area amounted to a violation of her right to private property. In finding that no violation was made out, the Court noted that, while the Convention does not specifically address environmental protection, the environment is nonetheless an increasingly important public concern which must be given due regard. The Court stated that:

> The environment is a cause whose defence arouses the constant and sustained interest of the public, and consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard ([79]).

The question for the Court was then whether the restrictions in question were proportionate to the legitimate aim of achieving environmental protection, and after considering the various circumstances the Court was satisfied that such

proportionately could be made out (at [88]). (See also *Depalle v France*, 2010 and *Brosset-Triboulet v France*, 2010).

Many of the cases within the Inter-American system have involved claims based on the right of indigenous peoples to property in their traditional lands. Article XXIII of the *American Declaration on the Rights and Duties of Man* (1948) proclaims that:

> Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.

The right to property is also guaranteed in Article 21 of the *American Convention* (1969), which states that:

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

While the language of these provisions is quite similar to that found in Article 1 of the European Protocol, they have been applied by the Inter-American Court and Commission in particular ways in relation to the rights of indigenous peoples, and the American jurisprudence has helped to develop an improved understanding of the way in which human rights law can help to protect the relationship between indigenous peoples and their lands.

In *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001) the Inter-American Court of Human Rights held that the Nicaraguan government's decision to grant a logging concession over the traditional lands of the Awas Tingni community without their consent violated the community's right to property under Article 21 of the *Convention*. The Court held that Article 21 extends to protect the communal property rights enjoyed by indigenous communities, and encompasses the significant cultural and spiritual, as well as economic and material, elements of their relationship with the land.

The Court said:

> Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations ([149]).

It was on the basis of this understanding of property that the Court held that the logging and construction activities within the territory constituted a violation of Article 21 ([155]).

In the *Case of the Yakye Axa Indigenous Community v Paraguay* (2005), the Court confirmed (at [143]) that Article 21 includes both individual and communal property rights, and emphasised the importance of States having full regard for the

particular nature of indigenous peoples' relationship with their lands. The Court stated that:

> The culture of the members of the indigenous communities directly relates to a specific way of being, seeing and acting in the world, developed on the basis of the close relationship with their traditional territories and the resources within, not only because they are their main means of subsistence, but also because they are part of their world view … and therefore of their cultural identity ([135]).[4]

A similar interpretation was endorsed by the Inter-American Commission on Human Rights in the *Maya Indigenous Community of Toledo Case* (2004), where the Commission noted that

> land traditionally used and occupied by these communities plays a central role in their physical, cultural and spiritual vitality…Similarly, the concept of family and religion within the context of indigenous communities, including the Maya people, is intimately connected with their traditional land, where ancestral burial grounds, places of religious significance and kinship patterns are linked with the occupation and use of their physical territories ([155]).

These statements represent a significant development in American jurisprudence relating to the right to property, as they acknowledge that interests in land are held by indigenous peoples collectively, and not only on an individual basis. They also clarify the nature of those interests, which go beyond mere possession of land and economic utilisation, and encompass spiritual and cultural dimensions. This means that a violation of the right to property found in Article 21 can be established where the land is subject to interference which impacts on the group, without the need to demonstrate any particular impact for a given individual above and beyond that experienced by the rest of the community.

The Inter-American Commission and Court have also confirmed that the right to property enjoyed by indigenous communities extends to a right to enjoy and utilise the natural resources on and within that territory. The Commission held in the *Maya Indigenous Community of Toledo Case* (2004) that a logging concession granted over the Maya people's land had led to long-term and irreversible environmental damage which threatened the community's means of subsistence, including through impacting upon water supplies, animal and plant life, soil and forests. The Commission concluded that this interference violated the community's right to property, which included the right to use their land for subsistence ([145], [147]).

In the *Case of the Saramaka People v Suriname*, the Court stated that the right to use and enjoy property in traditionally owned lands necessarily implies a similar right with regards to the natural resources that are necessary for survival ([121]). The Court stated that, without the right to use the natural resources that the community has traditionally relied upon, the right to use and enjoy their property would be "meaningless" ([122]). In the words of the Court,

[4]See also the Court's judgment in the *Case of Sawhoyamaxa Indigenous Community* (2006), at [118].

> The demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property. From this analysis, it follows that the natural resources found on and within indigenous and tribal people's territories that are protected under Article 21 are those natural resources traditionally used and necessary for the very survival, development and continuation of such people's way of life ([122]).

The Court recognised in the *Saramaka* case that this interpretation of Article 21 ought not to mean that the State would be precluded from pursuing any exploitation of natural resources whatsoever ([126]). However, it explained (at [128]) that the State must not interfere in such a way as to deny the people its means of survival. To ensure this, the Court set out a number of safeguards with which the State must comply, including ensuring that the indigenous community is given an opportunity for consultation and that its consent is sought prior to any extraction or exploitation taking place ([133–137]). The State must also ensure that the benefits of such exploitation are shared with the community concerned, an obligation which flows from the duty to provide just compensation in Article 21(2) ([138–140]).

The Court concluded that the granting of logging concessions interfered with the Saramaka people's traditional use of their forests, which they had used for construction and trading of timber products ([154]). Further, while the Saramaka people had not traditionally made use of gold deposits located on their land, the extraction of that gold by commercial entities threatened a potentially negative impact on the Saramaka people's water supply. The Court therefore found that, in the absence of appropriate consultation and consent, the granting of gold concessions by the State also constituted a violation of Article 21 ([155]).

The emphasis on ensuring a means of subsistence as a component of the right to property helps to expand its application to environmental contexts. A violation of the right to property can occur not only where a person or community is unable to occupy property, but also where environmental conditions interfere with their ability to benefit from that property or rely on it for subsistence. This understanding of the right to property links it closely to the right to self-determination, which will be examined further in the next section.

2.6 The Right to Self-determination and the Rights of Indigenous and Minority Groups

The right to self-determination has been recognised as a fundamental right which underpins the enjoyment of other human rights and respect for which is essential to ensuring peace and security (*Universal Declaration of Human Rights* 1948: Preamble). Recognition of self-determination was a central guiding principle in the process of decolonisation following World War II and the United Nations has

continually proclaimed its importance (*Charter of the United Nations* 1945: Article 1; *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 1920).

Its status as a fundamental right is reflected by its inclusion in Article 1 of both the ICESCR (1966) and the *International Covenant on Civil and Political Rights* (ICCPR) (1966), which reads:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

This right can be directly impacted upon by environmental factors which deplete natural resources or affect a people's ability to provide for themselves, either through agriculture, hunting, fishing or other natural means.

An aspect of the right to self-determination, the right to freely dispose of natural resources, is specifically guaranteed in Article 21 of the *African Charter on Human and Peoples' Rights* (1981), which recognises it as a collective right enjoyed by all peoples. Article 21(1) states that:

> All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

The African Commission on Human and Peoples' Rights addressed Article 21 in the *Ogoniland* decision (2002). The Commission held that the decision of the Nigerian government to permit the exploitation by private actors of oil reserves in Ogoniland in such a way as to deprive the Ogoni people of any material benefit from those resources and without allowing them adequate participation in the decision-making process amounted to a violation of Article 21 ([55], [58]).

The link between self-determination and other rights is also apparent. It is clearly linked to the right of peoples, particularly indigenous peoples, to use and enjoy their land under the right to property, as discussed above in the previous section. Wherever environmental degradation affects the subsistence or development of a people as a whole it will also have implications for the group's individual members in terms of their rights to health, food, water and life.

In addition to these rights, some instruments also recognise specific rights for indigenous and other minority groups. Article 27 of the ICCPR states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the others members of their group, to enjoy their own culture, to profess or practise their own religion or to use their own language.

This right is also guaranteed to children under Article 30 of the CRC, which provides that a child who is a member of a minority group has a right to take part in the culture, religion and language of that group. In its General Comment 23, the

Human Rights Committee, which monitors and enforces the ICCPR, observed that culture manifests itself in a wide variety of ways and the cultural rights protected under Article 27 may include rights relating to the use of land, especially in the case of indigenous peoples (at 4, [7]). For instance, the Committee has found that traditional activities such as fishing and hunting are protected under Article 27 (*Ivan Kitok v Sweden*, 1988), as is the right to live in particular areas designed by law (*Lubicon Lake Band v Canada*, 1990). These rights clearly have a close link to environmental factors. Where a group of people share traditional or cultural practices which rely on the natural environment in some way, such as the hunting of certain local species, traditional medicinal practices using particular plant species or spiritual beliefs or customs which involve the natural environment, then these cultural or religious practices may be vulnerable to environmental degradation.

2.7 The Right to Life

In cases of severe environmental degradation the right to life may be threatened. This right is found in Article 6 of the ICCPR (1966), Article 2 of the *European Convention* (1950), Article 4 of the *African Charter* (1981) and Article 4 of the *American Convention* (1969), as well as Article 1 of the *American Declaration on the Rights and Duties of Man* (1948). The UN Human Rights Committee has acknowledged the environmental dimensions of the right to life. In the case of *Port Hope Environmental Group v Canada* (1984), the Committee agreed that the dumping of nuclear waste in the vicinity of a residential area could pose a threat to the right to life under Article 6 of the ICCPR. However, as there were other legal avenues available to the claimant under domestic law, the Committee ruled the particular complaint inadmissible under Article 5(2)(b) of the *First Optional Protocol* to the ICCPR (1966).

The Inter-American Commission on Human Rights noted in its 1997 Country Report on Ecuador that the realisation of the right to life and to physical security, found in Article 1 of the *American Declaration* and Articles 4 and 5 of the *American Convention*, is necessarily related to and dependent upon one's physical environment. Accordingly, where environmental contamination and degradation pose a persistent threat to human life and health, the corresponding rights are implicated (Ecuador Report, Ch VIII). The Commission has also noted the critical link between subsistence and environment, and the fact that in situations where environmental degradation deprives an individual or community of their means of subsistence, the right to life may be violated (Indigenous and Tribal People's Report 2009: [192]). In particular it has noted the implications of the right to life for indigenous peoples, where 'the life of members of indigenous communities fundamentally depends on subsistence activities that they carry out on their territories' (Indigenous and Tribal People's Report 2009: [154]; *Awas Tingni* 2001: [140(f)]). In the *Yakye Axa* case (1985), the Inter-American Court held that the State had

violated the right to life of the Yakye Axa people by depriving the community of access to its lands and of its traditional means of subsistence ([157(b)]).

In the *Yanomami Indians* case (1985), the Inter-American Commission held that the displacement of the indigenous owners of land caused by the construction of a road through their territories had so seriously affected them that it amounted to a violation of their right to life as well as their right to health. The forced displacement of the Yanomami people and the influx of other people seeking to exploit the natural resources of their lands had led to a number of serious negative impacts, including the introduction of diseases, loss of livelihoods and the outbreak of violence ([10]). The Commission held that the State had failed to protect the Yanomami people against these serious threats and was therefore responsible for a violation of their right to life.

In the *Case of the Sawhoyamaxa Indigenous Community v Paraguay* (2006) the Court held that the right to life is not limited to a right not to be arbitrarily deprived of life, but extends also to 'the right that conditions that impede or obstruct access to a decent existence should not be generated' ([161]). In this sense the right to life includes a right to access life in dignified conditions. At least with respect to indigenous peoples, the American jurisprudence confirms that this right can be impinged upon where environmental conditions deprive an indigenous community of access to its land or the ability to enjoy a close relationship with that land, such that it is no longer possible for them to have access to a life in dignified conditions (*Yakye Axa* 2005: [156]).

Beyond these circumstances the right to life would also be threatened in situations where environmental degradation is so severe that it deprives a person or community of their means of subsistence or otherwise threatens their survival. The Inter-American Court considered these issues most recently in its *Advisory Opinion on Environmental Human Rights* (2017). The opinion was issued in response to a request from Colombia for clarification on the nature of States' obligations in relation to environmental protection and the rights to life and physical integrity (*American Convention*, Articles 4 and 5). In confirming that protection of the environment and human rights are interdependent and indivisible, the Court articulated a number of obligations which are borne by States. It said that, in order to respect and guarantee the rights to life and physical integrity, States have a duty to prevent significant environmental damage, both inside and outside their territories (IACtHR 2018: 4).

The European Court of Human Rights has found violations of the right to life in situations where States have failed to protect their citizens against known environmental hazards. Like other rights within the *European Convention*, the right to life includes substantive and procedural aspects. Article 2 reads:

> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:

(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The obligation on States is therefore both to take steps to prevent violations of the right to life, as well as to ensure that appropriate procedural and legal frameworks are in place to reduce risk of violations of this right.

As noted above in Sect. 2.4, the margin of appreciation allows States discretion in determining what protective measures are appropriate, but the cases demonstrate that the Court will find a State responsible for a breach of Article 2 where it has failed to implement effective protective measures. In *Oneryildiz v Turkey* (2004), evidence indicated that the Turkish authorities were aware of the risk of a methane explosion at the rubbish dump adjacent to the applicant's residence but had failed to take appropriate steps to address that risk, such as the installation of gas extraction equipment. In fact an explosion did occur, destroying the applicant's house and killing nine of his relatives. The Court held that the State had failed to protect the applicant's right, and a violation of Article 2 was found. In *Budayeva v Russia* (2008), despite warnings of the risk of mudslides in the area surrounding the claimants' homes and reports which recommended appropriate precautionary measures, authorities had failed to take effective steps to safeguard the lives of people living nearby. This, the Court held, amounted a violation of Article 2. Clearly, where environmental conditions pose a serious risk to individuals and communities, they can be found to constitute a violation of the right to life in addition to other human rights.

2.8 Conclusion

From the discussion above it is clear that the environment can directly impact upon rights already guaranteed under international and regional human rights treaties, including the right to life, the right to the highest attainable standard of health, the right to an adequate standard of living (incorporating the right to water and the right to food), the right to enjoy private and family life, the right to self-determination and rights of members of minority and indigenous groups to enjoy their culture and to access their lands. These rights have been defined and applied so as to give them an environmental dimension, and they help create and articulate a strong nexus between the environment and human rights. This process of interpreting and articulating the environmental aspects of existing rights has been called the 'greening' of human rights (Boyle 2012: 614; Birnie et al. 2009: 282) and it has given rise to a number of successful claims under international and regional human rights law.

Despite the clear interrelationship between the environment and human rights which is expressed and recognised in this process however, the jurisprudence reveals a consistent attitude that environmental degradation is not in and of itself a violation of human rights. International and regional human rights law does not provide a right to an environment of any quality, beyond that which is necessary to support other existing rights. The law requires that a violation of some other existing right be identified in order for environmental damage to be considered as a breach of human rights (Shelton 1991–1992: 116; Boyle 2006–2007: 505). Further, as noted by the European Court of Human Rights in *Kyrtatos*, a claim for a violation can generally only be brought by a person who is directly affected by the environmental harm—there is no scope to pursue a claim relating to widespread or general environmental impacts, only those which affect an individual or group in some particular way. As Shelton (2002) has noted, this means that existing human rights are ill-suited to addressing issues of resource management, nature conservation and biological diversity (2002: 11).

They may also be similarly unsuitable to the context of climate change. While climate change has the potential to affect a range of the rights noted in this chapter, its environmental impacts are widespread and collectively experienced, evolving over a long period of time, and influenced by a range of complex, cumulative and interrelated factors. These characteristics may make it difficult to prove a violation of a particular right under traditional human rights law based on climate change. Chapters 7 and 8 will further explore the utility of existing human rights in the context of climate change, while Chap. 9 will examine the potential of a substantive right to a good environment.

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Chapter 3
Constitutional Environmental Rights

Abstract Over the last several decades there has been a noticeable increase in constitutional reform in the area of environmental human rights. Over 150 countries now include some form of environmental right or duty in their constitutions. These provisions can be understood to form a spectrum from aspirational yet legally weak provisions on one end, ranging through to explicit individual and collective rights, supported by clearly articulated duties and strong judicial oversight, at the other. Some constitutions even grant rights to nature itself, representing a significant move beyond anthropocentric rights and towards a more ecocentric understanding of our relationship with the natural world. This chapter presents an analysis of this body of law, noting the common themes and seeking to identify some of the factors which may have contributed to the pace of this movement for constitutional change. In doing so, it aims to address the ultimate question of whether constitutional environmental rights might provide evidence of a customary environmental right which would be enshrined in international law and binding on all States. This question will be picked up again in Chap. 4, where the status of the right to a good environment will be explored in more detail.

3.1 Introduction

Around the world, approximately 150 national constitutions contain an expression of some form of environmental right or duty. This represents a growing recognition among States of the importance of the environment and an acceptance of responsibility in relation to its protection and conservation. As this chapter will demonstrate, there is substantial variety among States in the way these environmental rights and duties are defined, structured and enforced. A small number of countries appear to have enshrined a substantive and standalone right to a good environment. Others have provided constitutional recognition of the importance of the

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environment to the enjoyment of other human rights—the relationship described in Chap. 2. Many countries have opted to impose an obligation on governments, individuals or the population as a whole to respect and protect the environment, but may not explicitly guarantee a corresponding right to an environment of any particular quality. The enforceability of the rights and duties included in national constitutions varies accordingly, with some being justiciable through the legal system while others are perhaps better characterised as aspirational statements.

As will be explained, these constitutional environmental rights and duties are a relatively recent development, with most being the product of constitutional reform which has taken place in the past 25 years (O'Gorman 2017; Boyd 2012). Given the number of States which have taken the step of constitutional recognition of the environment in some form, it is worth considering whether such action might be viewed as state practice in support of an emerging environmental norm of customary international law. Dinah Shelton identified this possibility in 1992, noting that as more states move towards constitutional recognition of an environmental right it might come also to be accepted at the international level (1991–1992: 132). More recently, the United Nations High Commissioner for Human Rights conducted an assessment of environmental rights in national constitutions and found that

> the practice of States in this area may eventually set the stage for a renewed debate on the status of customary law on the right to a health environment (2011: [31]).

This chapter will present an analysis of constitutional environmental rights with a view to ultimately addressing the question of whether they provide evidence of a new customary right to a good environment. As well as providing an overview of the variety of constitutional rights and duties which have been put in place, this chapter will also examine the identity of States which have taken the step of constitutional recognition and consider some of the possible factors which may have influenced them in doing so. Not only is this information helpful in understanding the nature of constitutional environmental rights around the world, but it also informs our assessment of their possible contribution to customary international law. As will be shown, while the movement of environmental constitutionalism is a significant development of recent decades, it lacks the generalised and consistent character necessary to generate customary international law, particularly with respect to a standalone right to a good environment. That right will then be the subject of further analysis in the next three chapters, which will examine its current recognition in international law and its potential for future development.

3.2 Constitutional Environmental Rights Around the World

Currently, around 150 nations include some form of environmental right or duty in their constitutions.[1] This includes more than 85 countries which have recognised a right to an environment of a certain quality.[2] Some of these rights are constructed as individual rights while some are framed as belonging to communities or the population as a whole. In addition to those States which recognise an environmental right, over 100 impose an obligation on governments to protect the environment to some extent.[3] Over 75 countries make it a duty of citizens to protect the environment.[4] A number of other countries include environmental protection or sustainable development as an objective of government or a guiding principle, even though

[1]A number of studies have been conducted in this area, most recently by O'Gorman, who found 148 States which had adopted some form of environmental constitutionalism (2017: 436). The results presented here are outcome of my own survey, conducted in 2017, although I have been guided by the interpretations and assessments of other authors including O'Gorman (2017), Boyd (2012) and May and Daly (2017).

[2]Angola, Argentina, Armenia, Azerbaijan, Belarus, Belgium, Benin, Bolivia, Brazil, Bulgaria, Burkina Faso, Cameroon, Cape Verde, Chad, Chile, Colombia, Comoros, Republic of the Congo, Costa Rica, Cote d'Ivoire, Croatia, Czech Republic, Democratic Republic of the Congo, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gabon, Georgia, Greece, Guinea, Guyana, Hungary, Indonesia, Iraq, Jamaica, Kenya, Korea, Kyrgyzstan, Latvia, Lesotho, Macedonia, Mali, Mexico, Moldova, Mongolia, Montenegro, Morocco, Mozambique, Nepal, Nicaragua, Niger, Norway, Paraguay, Peru, Philippines, Portugal, Romania, Russia, Rwanda, Sao Tome and Principe, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Somalia, South Africa, South Sudan, Spain, Timor Leste, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, Vietnam, Zimbabwe.

[3]Afghanistan, Andorra, Angola, Argentina, Austria, Azerbaijan, Bahrain, Belarus, Benin, Bhutan, Brazil, Bulgaria, Burundi, Cambodia, Cameroon, Cape Verde, Chad, Chile, China, Colombia, Republic of the Congo, Costa Rica, Croatia, Cuba, Democratic Republic of the Congo, Dominican Republic, Ecuador, Egypt, El Salvador, Equatorial Guinea, Eritrea, Ethiopia, France, Georgia, Germany, Ghana, Greece, Guatemala, Guyana, Haiti, Honduras, India, Iran, Kenya, Korea, Kuwait, Latvia, Lesotho, Lithuania, Macedonia, Malawi, Maldives, Mali, Malta, Mexico, Moldova, Mongolia, Montenegro, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, North Korea, Palau, Panama, Peru, Philippines, Poland, Portugal, Romania, Rwanda, Saudi Arabia, Serbia, Seychelles, Slovakia, Slovenia, Somalia, South Africa, South Sudan, Spain, Sudan, Swaziland, Sweden, Syria, Tajikistan, Tanzania, Timor Leste, Togo, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, Uzbekistan, Venezuela, Vietnam, Yemen, Zambia, Zimbabwe.

[4]Algeria, Angola, Argentina, Armenia, Benin, Bhutan, Bulgaria, Burkina Faso, Burundi, Cameroon, Cape Verde, Chad, Colombia, Comoros, Republic of the Congo, Croatia, Czech Republic, Democratic Republic of the Congo, Egypt, Estonia, Ethiopia, Finland, France, Gambia, Georgia, Ghana, Guatemala, Guyana, Haiti, Honduras, India, Iran, Kazakhstan, Kenya, Korea, Kyrgyzstan, Lao, Lithuania, Macedonia, Maldives, Mali, Moldova, Mongolia, Mozambique, Myanmar, Niger, Panama, Papua New Guinea, Poland, Portugal, Romania, Russia, Rwanda, Sao Tome and Principe, Serbia, Seychelles, Slovakia, Slovenia, Somalia, South Sudan, Spain, Sri Lanka, Sudan, Swaziland, Syria, Tajikistan, Tanzania, Tunisia, Turkey, Uganda, Ukraine, United Arab Emirates, Uruguay, Vanuatu, Venezuela, Vietnam, Yemen.

they may not include a specific right or duty along those lines.[5] These fall within the broader concept of 'environmental constitutionalism' defined by Kotzé (2012: 208), which entails some principle of 'environmental care' being laid down as a foundational concept to guide judicial, legislative and executive authority, and which O'Gorman (2017: 438) argues has the potential to influence a wider range of private and public interactions. The focus of this chapter is on environmental rights in a narrower sense, although the context of broader environmental constitutionalism is a relevant factor when we consider the reasons behind the recognition of environmental rights.

One of the most obvious features of the environmental rights under examination here is that there is no set formulation for their wording. While some phrases are commonly used, States generally employ a wide range of language, reflective of their different traditions, values, and legal and political systems. Variations can be identified in a number of areas. First is the obvious distinction between those constitutions which grant a right to an environment of particular quality and those which instead frame environmental protection as a duty of the government, individuals or the population as a whole. Of those nations which do provide a right, further distinctions can be seen in terms of who benefits from that right: individuals, groups, the population as a whole, or the State itself.

There is also much variety with respect to the standard of environment being assured—rights are articulated in terms of an environment which is good, healthy, clean, safe, decent or ecologically balanced, among many other expressions. These various formulations can be understood as reflecting a spectrum of conceptualisations of people's relationships with the environment. At one end, people have the right to be protected from environmental degradation which may cause them harm, such as pollution or exposure to other hazardous materials. Next along the continuum are formulations which recognise the beneficial role of the environment in fulfilling human development, a relationship reflected in the 'greening' of human rights discussed in Chap. 2. This may also incorporate notions of intergenerational equity which protect the ability of future generations to be able to utilise natural resources. Further along are rights which focus more on the well-being of the environment in its own right, and are not directly linked to human interests. These are closest to the concept of a standalone right to a good environment, and might be defined in terms of ecological balance, conservation of biodiversity and protection of areas of significant environmental value. At the far end of the spectrum is the rare case where a country has granted constitutional rights to nature itself, although it might be questioned whether this ought to be included in a discussion of environmental human rights, or whether it is something quite distinct. This chapter will look at a number of examples of constitutional rights from within each of these broad classifications.

[5]For example, Malawi, Maldives, Qatar, Sweden, Switzerland, which include obligations around sustainable development but no explicit right to environment.

The language of the various provisions can also be examined from the perspective of enforceability—some rights may be intended to be fully justiciable by individuals within the relevant legal system, while others may be intended to be more aspirational in nature. The enforceability for any given constitutional provision will depend largely on the specific legal system within which it operates, taking into account factors of standing, interpretation and judicial oversight. When the range of formulations is considered alongside the varying degrees of enforceability, the result is a diverse patchwork of environmental rights across a multitude of jurisdictions.

As has been said, this variety in language and enforceability will later be examined in terms of what it might mean for the potential customary recognition of a right to a good environment, but first it is useful to examine more closely what constitutional environmental rights do provide in the States which have adopted them. As will be seen, despite the variety in language, some common themes can be identified, and the willingness of so many States to include the environment in their constitutions in some form is an encouraging step for those who wish to see the protection of the environment given a more prominent place within our legal systems.

3.2.1 The Right to a Clean Environment, a Healthy Environment or an Environment Free from Pollution

A number of national constitutions include provisions which guarantee to people the right to live in a clean environment, or one which is free from pollution and other harmful materials. For example, the constitutions of Ethiopia and Togo grant to everyone the 'right to a clean environment' (Ethiopia 1994: Ch 3, part 2, Article 44(1); Togo 1992: Title II, Article 41), while the Angolan constitution refers to the right 'to live in a healthy and unpolluted environment' (2010: Article 39). Chile's constitution provides a right 'to live in an environment free from contamination' (1980: Article 19(8)), and the Mongolian constitution provides a right 'to a healthy and safe environment and to be protected against environmental pollution and ecological imbalances' (1992: Ch II, Articles 16 and 17). The South African constitution guarantees to citizens a right 'to an environment that is not harmful to their health or well-being' (1996: Ch 2, Article 24). Many former Soviet States have included a right along these lines, with some specifying the right to an environment which is 'safe for life and health', a likely response to events like the Chernobyl nuclear disaster, discussed in more detail below (see for example Moldova 1994: Title II, Ch II, Article 37(1) and Ukraine 1996: Article 16).

Several other constitutions impose an obligation on States to address pollution or other environmental hazards, and it may be possible to imply a corresponding right of citizens based on these obligations. For example, the Chinese Constitution (1982) provides that '[t]he State shall protect and improve the living environment

and the ecological environment, and prevent and remedy pollution and other public hazards' (Article 26). Under the Portuguese Constitution (1976), the State is required to 'prevent and control pollution, and its effects, and harmful forms of erosion' (Article 66). This sort of language appears intended to guard against the sort of environmental problems which have caused widespread human suffering in the past. The Ukrainian constitution (1996) does this most explicitly, referring specifically to the Chernobyl catastrophe and declaring that the State has a duty to overcome the consequences of that particular disaster (Ch 1, Article 16).

These formulations of rights and duties are designed to ensure that the population is protected against the negative effects of environmental degradation. A common variation on this theme is to guarantee to citizens the right to live in a healthy environment, or to impose an obligation on governments to ensure that people are able to live in a healthy environment.[6] This is generally understood to mean an environment which is conducive to human health, rather than an environment which is objectively in good condition, although this could be open to interpretation. The notion of a 'healthy environment' encompasses two interrelated yet distinct conceptualisations. The first is the idea that a poor environment poses a risk to human health, and it is this understanding that is captured by rights which explicitly guard against pollution or environmental contamination outline above. The other is that a good environment is a necessary precondition of good health. These dual understandings represent the positive and negative interpretations of the relationship between environment and the right to health, and can have different implications in terms of governments' corresponding obligations.

3.2.2 The Right to Live in an Environment Which Promotes Human Development

Beyond an environment which is clean and conducive to human health, some constitutions provide a right to an environment which is suitable for human development and productivity. For example, the constitutions of Spain (1978, Article 45(1)) and the Democratic Republic of the Congo (2005, Article 53) both refer to the right of citizens to a healthy environment that is favourable to their development. The Argentinean constitution (1853: part I, Ch 2, Article 41) provides that all residents should enjoy an environment

> which is fit for human development and by which productive activities satisfy current necessities without compromising those of future generations.

[6]See for examples: Azerbaijan, Bolivia, Burkina Faso, Cameroon, Chad, Colombia, Comoros, Cote d'Ivoire, Croatia, Democratic Republic of the Congo, Ecuador, Ethiopia, Fiji, Finland, Georgia, Hungary, Kenya, Macedonia, Mali, Morocco, Nicaragua, Niger, Norway, Panama, Senegal, Serbia, South Sudan, Uganda, Zambia.

The 2008 amendments to the Ecuadorian constitution introduced (among many other provisions relating to the environment) a guarantee for all people and communities to

> the right to benefit from the environment and from natural wealth that will allow wellbeing (Ch 3, Article 5).

These rights acknowledge the essential role that the environment plays in human development, as the provider of sustenance and the foundation of livelihoods, as well as the source of many nations' wealth in the form of natural resources. They therefore go beyond merely safeguarding people from potential environmental hazards or ensuring a healthy environment and recognise the important role the environment plays in facilitating human flourishing and the enjoyment of all human rights.

Some constitutions couple this with an acknowledgement that the utilisation of environmental resources for human development should be done sustainably. Most commonly this is reflected in obligations placed on States and citizens to manage natural resources in a sustainable fashion. For example, the constitution of the Dominican Republic (2015, Article 67(1)) provides that

> [e]veryone has the right, both individually and collectively, to the sustainable use and enjoyment of natural resources.

The Maldives constitution (2008, Article 22) obliges the State to

> undertake and promote desirable economic and social goals through ecologically balanced sustainable development and shall take measures necessary to foster conservation, prevent pollution, the extinction of any species, and ecological degradation from any such goals.

Some countries explicitly require that resources be managed for the benefit of both present and future generations, encompassing notions of sustainable development and intergenerational equity. For instance, the Cuban Constitution (1976, Article 27)

> recognises the close link between the environment and sustainable economic and social development, which ensures the survival, well-being and security of present and future generations.

Constitutional rights such as these play an important role in articulating the important relationship between the environment and other human rights, wherein a good environment is a necessary precondition for the enjoyment of a number of fundamental rights. They also emphasise the tensions which can exist between development and environmental protection, and between the needs of present and future generations. These tensions can be problematic to resolve in reality, and States can often find a legitimate justification for actions that jeopardise the environment. Nonetheless, inclusion of these sorts of rights in national constitutions is an important part of promoting sustainable development and may provide a means to hold governments accountable for unsustainable or inequitable actions taken in the name of economic development.

3.2.3 The Right to an Ecologically Balanced Environment

In addition to environmental rights which focus on the needs of citizens, both present and future, a number of constitutions include provisions which are more broadly defined in terms of environmental objectives like ecological balance or conservation of biological diversity. In many cases this is phrased as a right to an ecologically balanced environment, or a duty imposed on the government to ensure ecological balance.[7] The Brazilian constitution (2005: Title VII, Ch VI, Article 225), for instance, states that:

> Everyone is entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to a healthy life.

Several constitutions expressly address the need to ensure biological diversity and protect flora and fauna. For example, the Lithuanian Constitution (1992: Ch 4, Article 54) directs the State to

> Concern itself with the protection of the natural environment, its fauna and flora, separate objects of nature and particularly valuable districts.

It also obliges the state to supervise the use of natural resources to ensure their sustainable use and restoration. The Uzbek Constitution (1992: part III, Ch 12, Article 55) also states that the State shall protect 'the land, its minerals, fauna and flora, as well as other natural resources', which are considered to form the national wealth.

The Bhutanese Constitution (2008) takes an expanded view of this collective approach, constructing the protection of biodiversity and the natural environment as the duty of all citizens. Article 5.1 provides that:

> Every Bhutanese is a trustee of the Kingdom's natural resources and environment for the benefit of present and future generations and it is the fundamental duty of every citizen to contribute to the protection of the natural environment, conservation of the rich biodiversity of Bhutan, and prevention of all forms of ecological degradation including noise, visual and physical pollution through the adoption and support of environment friendly practices and policies.

The use of measures like ecological balance or biological diversity introduces a more objective element to environmental protection, one which is not so closely linked to human needs or well-being, but which acknowledges that the environment has value beyond what it provides for humans. As the language in the Brazilian constitution demonstrates however, such an ecologically balanced environment is still commonly viewed as something which is for the common good of mankind, to be enjoyed and utilised by people.[8] Even constructions like that of Bhutan (2008:

[7] See, for example, the Constitutions of Afghanistan, Andorra, Angola, Bhutan, Cape Verde, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Kenya, Maldives, Moldova, Mozambique, Panama, Paraguay, Portugal, Romania, Seychelles, South Africa, Suriname, Timor Leste, Ukraine, Venezuela.

[8] In this respect see also the constitutions of Bangladesh (1972) and the Maldives (2008).

Article 5.1), which positions all citizens as trustees of the environment, does so in the context of preserving natural resources and the environment for the benefit of the nation.

A notable exception to this sort of approach might be the constitution of Ecuador (2008), which includes the most expansive coverage of environmental human rights. In addition to a number of provisions setting out different rights and duties with respect to the environment, Chap. 7 establishes the rights of nature itself. Article 71 states that:

> Nature, or Pacha Mama, where life is reproduced and occurs, has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.

In order to ensure that these rights can be meaningfully applied, Article 71 further provides that:

> All persons, communities, peoples and nations can call upon public authorities to enforce the rights of nature. To enforce and interpret these rights, the principles set forth in the Constitution shall be observed, as appropriate.
>
> The State shall give incentives to natural persons and legal entities and to communities to protect nature and to promote respect for all the elements comprising an ecosystem.

In granting rights to nature, the Ecuadorian Constitution represents a pioneering attempt to move beyond an anthropocentric view of the environment and to recognise the inherent value of the natural world, along with our obligations to protect it. It echoes the principles of theories such as deep ecology and earth jurisprudence, which hold that humans are just one component part of the ecosystem, equal with all other members of that system, plant and animal (Naess 1995: 3; Redgwell 1996: 71; Fox 1990). Flowing from this, it is believed that 'the well-being and flourishing of human and nonhuman life on Earth have value in themselves … These values are independent of the usefulness of the nonhuman world for human purposes' (Devall and Sessions 1985: 70). This represents a powerful reconceptualisation of our relationship with the natural world, and it has yet to be seen how these rights of nature will be applied over time and what influence they might have in Ecuador's approach to development and environmental protection. The key to answering this question rests on the extent to which the rights of individuals, communities and nature itself can be effectively enforced, an issue which, as the next section will demonstrate, remains problematic for many nations.

3.3 Enforceability of Constitutional Environmental Rights

As well as the variations in scope and content noted above, constitutional environmental rights can differ in terms of their susceptibility to judicial oversight or other legal enforcement. The enforceability of constitutional rights varies according

to the domestic structures and legal traditions of each country, but it is possible to make some generalisations which are helpful in judging how likely these rights are to result in better environmental protection. This analysis also helps to assess the contribution of constitutional developments to a possible emerging environmental norm at customary international law, discussed in more detail below.

As demonstrated in Chap. 2, the use of more narrowly defined human rights to address environmental harm is often hindered by the need to establish a direct interference with the interests of a particular individual before a claim can be established. Countries with strict rules of standing often require a person to demonstrate a particular and personal harm before a constitutional challenge can be commenced (May and Daly 2017: 132). This is obviously a challenge to the efficacy of environmental rights, where the environmental harm may affect the community as a whole, or may have no identifiable human impact. This limitation can be overcome where standing is explicitly granted to individuals or communities to bring a legal claim based on a government's failure to protect biological diversity or ecological balance more broadly, or to pursue a claim in the public interest (May and Daly 2017: 132–137).

An example of this can be seen in the constitution of Ecuador (2008) which, as noted above, grants rights to nature coupled with an ability of all persons and communities to call on the government to enforce these rights (Article 71). In addition to this, Article 397 of the Ecuadorian Constitution provides that, with respect to the individual and collective rights to live in a healthy and ecologically balanced environment, the State must

> permit any natural person or legal entity, human community or group, to file legal proceedings and resort to judicial and administrative bodies without detriment to their direct interest, to obtain from them effective custody in environmental matters, including the possibility of requesting precautionary measures that would make it possible to end the threat or the environmental damage that is the object of the litigation. The burden of proof regarding the absence of potential or real danger shall lie with the operator of the activity or the defendant.

The positioning of the burden of proof with the respondent is a particular advantage to persons wishing to enforce their environmental human rights and acknowledges the imbalance in power which exists between governments and developers, on the one hand, and affected individuals and communities, on the other.

A number of other States ensure rights to bring legal claims in support of the environmental rights enshrined in their constitutions. In Kenya, the Constitution provides (2010: Article 70(1)) that any person who alleges that their right to a clean and healthy environment has been or is being infringed may apply to a court for redress. Similarly, the constitution of Mongolia (1992: Articles 16 and 17) guarantees to all citizens, in addition to the right to a healthy and safe environment, the right to seek legal redress for any violation of that right.

The constitution of Bolivia (2009: Article 34) provides that

> Any person, individually or on behalf of a community, is empowered to bring legal action in defence of environmental rights, without prejudice to the obligation of public institutions to act ex officio against attacks on the environment.

This provision goes beyond allowing citizens to bring a claim, and includes an obligation on the part of public institutions to take action in response to environmentally harmful acts.

Several other States have adopted a wide interpretation of standing to enable constitutional claims to be launched in environmental cases where no personal injury is established. Examples include Argentina, Chile, Costa Rica, Colombia, Mexico, South Africa, Philippines, Nepal and Bangladesh (May and Daly 2017: 133–134).

Another key factor in determining the justiciability of environmental rights is whether the constitutional rights in question are considered to be self-executing or require implementing legislation for them to be enforceable. The study conducted by May and Daly (2017) found that the majority of nations with a substantive environmental constitutional right class those rights as self-executing.

However, not all constitutions address the question of enforcement so explicitly, and in some cases the wording of the environmental rights may characterise them more fittingly as aspirational statements, rather than rights which are intended to be legally enforced. The task of drafting enforceable constitutional rights (environmental or otherwise) is a challenging one and, as Sunstein (1993: 36) has explained, it can be difficult to strike an appropriate balance between enforceability and legitimacy in constitutional language: '[i]f a constitution tries to specify everything to which a decent society commits itself, it threatens to become a mere piece of paper, worth nothing in the real world.' On the other hand however, as Gravelle (1996–1996: 634) explains, 'if the drafting is not precise in its language, then theoretically, the attempted granting of an environmental right might become nothing more than a general statement of public policy incapable of enforcement.' As the examples above demonstrate, many States' constitutions include environmental rights which are worded in fairly broad terms, and in many cases what constitutes a 'healthy', 'clean' or 'ecologically balanced' environment is left undefined.

In addition to environmental duties, States are also frequently obliged to fulfil other needs of their citizens, including through pursuing economic development. Where these demand conflict it may be possible for a State to argue that a negative environmental impact is a justified side-effect of pursuing another legitimate objective. This practice of trading off environmental protection against other interests is a common challenge for people seeking to enforce environmental rights, and is easier for a government to justify where environmental rights are worded broadly and are not accompanied by specific measures or definitions. The political judgments involved in balancing environmental protection against other social and economic needs has led some to argue that constitutional environmental rights are not suited to judicial oversight (May and Daly 2017: 8).

Nonetheless, judicial application of environmental constitutional rights has increased markedly in recent years. In his study of constitutional environmental rights published in 2006, James May concluded that, of the constitutions which do provide a right to a good environment, 'only a handful have earned judicial imprimatur as being enforceable by affected individuals' (114). He concluded at the time that 'national courts are reluctant to uphold fundamental environmental rights as self-executing and enforceable' (114). Since that time an expanding number of courts have considered environmental constitutional cases, and May and Daly have recently identified significant trends of judicial enforcement in South-East Asian and Latin American States (2017: 7–8). In Africa it seems that, with the exception of South Africa, environmental rights have largely been held to be unenforceable (May 2005–2006: 136; Kotzé 2008; Patterson et al. 2006), and the majority of Western European States are generally more restrictive when it comes to justiciability of environmental rights (May and Daly 2017: 132). Overall, however, the considerable development in some regions is encouraging. As May and Daly have said,

> Courts have engaged with environmental constitutionalism perhaps because they appreciate that through coordination with other parts of government and in dialogue with both the public and private sectors, they can play a pivotal role in securing environmental rights (2017: 7).

That being said, the test of judicial enforcement of environmental constitutional rights lies not in the text or structure of those rights, but in the actual judicial outcomes which are achieved (May and Daly 2017: 130). The capacity and willingness of courts to uphold constitutional environmental rights is a significant determinant of the effectiveness of those rights in securing meaningful change with respect to our management of the environment, and there are still many countries where constitutional environmental rights have yet to be supported by judicial enforceability. The test of the past 25 years of constitutional reform may well be in the judicial engagement which follows in the years to come.

3.4 What Do We Know About the States with Environmental Constitutional Rights?

The increased trend towards including environmental rights in national constitutions over the last 25 years may reflect a greater appreciation by States of the importance of the environment to the enjoyment of other human rights, as well as a recognition that we all bear a responsibility for protecting the environment for its own sake and for that of generations to come. In understanding the motivations of States in recognising these rights, and in order to find ways to encourage more States to do the same, it is helpful to consider the identity of the States which have taken such action already. This also helps us to assess the weight which can be given to this constitutional movement as evidence of emerging customary international law.

While over 150 States' constitutions include some form of constitutional right or duty, only 86 explicitly provide for an environmental right, making up less than half the world's nations. As noted above, many of those rights may be less that fully enforceable. In examining the uptake of constitutionally protected right to a good environment, Weston and Bollier (2013) have noted as significant the fact that among the States which have not supported a constitutional right are the majority of G-20 nations and approximately half of the world's top 33 economies. They argue (at 118) that '[n]on-support correlates closely with advanced economies that are operationally if not also ideologically committed to neoliberal economic dealing, domestically and internationally.' These States are less likely to want to commit to ideals of sustainable development, environmental human rights or, most particularly, the rights of nature in a manner which might legally bind them and disrupt free economic development. O'Gorman (2017) also identified that the majority of States with constitutional environmental rights come from the developing world, a factor he attributes at least in part to the process of decolonisation, discussed further below.

As has been noted, most of the relevant constitutional provisions are the result of amendments which have occurred in the last 25 years, and this correlates with rapid constitutional reform which has occurred in certain regions. Writing in 2005, May described this trend, contending that

> In the last decade, the wildfire that is nationalised fundamental environmental rights has spread to a majority of countries in Africa. It has also sparked modest reform in Indonesia and South East Asian countries, including East Timor and South Korea (at 132).

In Europe and the Middle East, 'nearly every emerging democracy of the former Eastern Bloc, Middle Eastern and Soviet-influenced countries has constituted fundamental environmental rights since the fall of the Soviet Union' (May 2005–2006: 130). While the States with a constitutionally enshrined right to a good environment come from almost all parts of the world (with the exception of North America and Australasia), there are concentrations of States in Africa and Latin America (Lee 2000; May and Daly 2017; O'Gorman 2017). One potential explanation is that most of these States are members of regional human rights systems which include specific environmental rights (discussed in more detail in Chap. 4), and their constitutional reforms may therefore relate to their desire to implement treaty obligations. O'Gorman has argued that the proliferation of constitutional environmental rights in Africa can be traced to the adoption of the *African Charter of Human and Peoples' Rights* (1981), which is founded on particular values relating to the continent's colonial past and the historical dominance of Western-liberal ideology (2017: 449). He notes that the constitutions of Benin, Cameroon and the Democratic Republic of the Congo include provisions of identical or very similar wording to the environmental right contained in Article 24 of the *African Charter*.

While it is not possible to conclude definitively that constitutional protection of environmental rights has been an effect of the implementation of regional human rights protections, the concentration of States in Africa and the Americas may

indicate a greater willingness among those States, many of which still bear the scars of colonial exploitation of their natural resources, to recognise the importance of the environment and to ensure its protection for the benefit of all.

The other major cluster of States with constitutional rights or duties can be found amongst former Eastern bloc and Soviet influenced States (O'Gorman 2017; May 2005–2006: 130; also Brown 1993; Pedersen 2008–2009).[9] The constitutions of former Soviet[10] and Eastern Bloc[11] States generally guarantee a right to a 'healthy'[12] or a 'favourable'[13] environment, or an environment which is 'safe for life and health'.[14] Only a few refer directly to the protection of flora and fauna, or of the ecosystem generally.[15] Significantly, most constitutions include express due process rights, most commonly the right to timely information concerning the state of the environment and the right to be compensated for injury caused by environmental degradation, the sorts of rights found in international instruments such as the *Aarhus Convention* (2001), which reflects a number of key principles of environmental law.[16] This focus on guaranteeing an environment which is 'safe and healthy' and in ensuring due process can be understood when examined against the backdrop of the end of the Soviet era.

Stephen Stec explains that during Soviet rule, the kind of environmental protection laws which were gaining traction in Western States were 'next to impossible in the East' (2005: 1). In Eastern Europe,

> the official doctrine included the notion that socialism provided all possibilities for a harmonious development between society and nature. And socialism, as it was practiced, diminished the status of rules and standards vis-a-vis economic goals of production, had no means for the introduction of market-based economic tools, and discouraged the involvement of anyone other than specialists in decision-making. The rigid Byzantine Wheel was characterized by excessive privileges, closed information and specialisation, and an illusion of responsibility and control.

It was in this climate that the Chernobyl nuclear disaster occurred, highlighting for many the 'secrecy and lies' which shrouded the environmental impacts of Soviet industrialisation. It took Soviet President Mikhail Gorbachev 18 days to 'back

[9]Note that other Western European states also include constitutional rights: France, Belgium, Portugal, Spain, Finland and Norway.

[10]Armenia, Azerbaijan, Belarus, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Lithuania, Moldova, Russian Federation, Tajikistan, Turkmenistan, Ukraine, Uzbekistan.

[11]Albania, Bulgaria, Czech Republic, Hungary, Poland, Slovak Republic, Romania. Also former Yugoslavian states of Serbia, Montenegro and FYR Macedonia.

[12]Azerbaijan, Georgia, Kazakhstan, Kyrgyzstan, Hungary, Serbia, Macedonia.

[13]Russian Federation, Turkmenistan, Czech Republic, Slovak Republic.

[14]Moldova and Ukraine. Montenegro guarantees a 'sound environment' (*Constitution of Montenegro*, (2007) Article 23) and Belarus a 'wholesome environment' (*Constitution of the Republic of Belarus* (1996) Article 46).

[15]Lithuania and Uzbekistan.

[16]Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Latvia, Moldova, Russian Federation, Ukraine, Slovak Republic, Albania, Serbia, Montenegro.

down under intense domestic and international pressure and pledge to make information about the disaster public… he used the prescient phrase that the Soviet people had a right to know' (Stec 2005: 1). As Stec describes:

> The explosion of environmental information in the wake of Chernobyl blew a hole in the totalitarian state by exposing an epidemic of false reporting and failed responsibility…What the public found was a level of endemic environmental degradation and intentional concealment that brought into question the sum of purported accomplishments of scientific socialism. Chernobyl became the symbol of the ultimate failure of the Soviet system to solve the problems of environmental protection imposed by rapid and uncontrolled industrialisation (Stec 2005: 1).

Against this backdrop we can understand the proliferation of environmental provisions in the constitutions of the newly formed States which emerged out of the Soviet Union. Ryan Gravelle contends that 'the nations of post-Communist Europe, perhaps to spearhead the clean-up of a half-century of neglect, included in their constitutions such comparatively bold environmental rights' (1996–1996: 633). The successor States of the USSR were concerned to ensure not only that people would be protected from environmental harm (Gravelle 1996–1997: 633), but also that they would be provided with accurate and timely information about the environment and that they would be entitled to compensation in the event of environmental injury. Such rights were viewed not only as a means of protecting the environment but also as an integral part of the process of democratisation (Stec 2005: 2–3).

This brief discussion is intended to highlight the various factors and experiences which may have influenced States in deciding to enshrine environmental rights and duties in their national constitutions. This is helpful in understanding what might encourage other States to take similar steps, or perhaps to identify that some States are unlikely to take any similar action in the current geopolitical climate.

3.5 Conclusion: Contribution to Customary International Law

As this chapter has demonstrated, there has been significant development of constitutional environmental rights across a large number of countries over the past several decades. This leads to the question of what impact this movement might have for global environmental norms, and in particular whether it might result in the evolution of a new norm of customary international law, and specifically a customary right to a good environment. The status of a right to a good environment in international law and its potential future development will be discussed further in later chapters, but some comments are presented here by way of drawing together the analysis of constitutional environmental rights above.

In order for a new norm of customary international law to be recognised, it must be supported by sufficiently wide and generally consistent State practice (ICJ, *North Sea Continental Shelf* 1969: 3). That is, it must be possible to show that the majority

of States already act in a fashion which is consistent with the proposed norm. Additionally, it must also be possible to demonstrate that, in acting in such a fashion, States are motivated by a sense of legal duty to do so (also known as *opinio juris*) (ICJ, *North Sea Continental Shelf* 1969: 3). It would not be sufficient, for instance, to show that States' actions are driven by political expedience, courtesy or tradition—they need to be of a view that the norm is already legally binding on them. In examining the constitutional environmental rights discussed in this chapter, it is these two elements of widespread state practice and *opinio juris* which need to be identified in order to draw a conclusion that customary law has evolved to include a new environmental norm.

With specific regard to a right to a good environment (which will be analysed in detail in Chap. 4), 86 states have recognised some form of environmental right, representing less than half of the total number of States. While the evaluation of whether a new customary norm is emerging is more than merely numerical, this relatively small uptake, together with the fact that it appears to be concentrated in certain regions where most States can be described as developing or emerging economies, suggests that the state practice is confined to certain classes of States and is not truly widespread.

Further, the fact that so few States have formulated their constitutional environmental rights in language which enables them to be judicially enforceable suggests that States may not view the right to a good or healthy environment with the requisite *opinio juris* to convert it into a rule of customary international law. Instead, many constitutional provisions might be more aspirational or idealistic in nature (Pevato 1999: 315; Pedersen 2008–2009: 82). The wide range of terminology used in the various constitutions and the variation in enforceability outlined above also indicates that States do not yet have a generally consistent approach to environmental rights which could form the basis of a customary norm (Pevato 1999: 315; Glazebrook 2009: 305).

As May identified, given that most constitutional provisions are less than 25 years old, 'their transformative repercussions are only beginning to be detected' (2005–2006: 115). Understanding the historical and regional contexts discussed above can help to interpret the provisions and analyse their impact on the formation of customary international law. For example, the practice of former Soviet States might be more a reaction to specific historic factors including the denial of freely available information about the environment and significantly harmful events which resulted from poor environmental protection. If that is the case then it is less likely to represent a generalised trend or an attitude that respect for environmental rights is already a legal obligation of States.

It may be too early to say whether the trend of constitutionalising environmental rights will lead to greater recognition at an international level. As it currently stands, the body of constitutional rights is insufficiently broad and consistent to evidence a customary environmental right. However, this trend does indicate a willingness by many States to put the environment higher on the policy agenda (Pevato 1999: 315) and even as merely political statements or aspirational objectives, these provisions represent a significant development in the recognition of environmental rights

around the world. Through the process of interpretation and application of these constitutional rights within domestic legal systems the obligations of governments and populations to protect the environment will be further clarified and developed, thereby strengthening our understanding of the interdependent relationship between human rights and the environment.

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Chapter 4
The Human Right to a Good Environment in International Law

Abstract One of the most compelling yet controversial areas of environmental human rights is the notion of a substantive right to an environment of a particular quality. Much has been written on the subject over the past 25 years, yet the debate as to its status, content, structure and effectiveness remains unsettled. This chapter explores in detail the idea of a standalone right to a good environment, one which is independent of other human needs or interests. Such a right, if it exits, could extend protection to natural places, ecosystems and biodiversity, without the need to demonstrate interference with any other human right. To date, such a right is not guaranteed within international human rights law, although some regional human rights treaties and soft-law instruments contain similar provisions, and variations can be found in several national constitutions, as identified in the previous chapter. As the discussion in this chapter demonstrates, there are a number of issues which will need to be resolved before the right is likely to achieve widespread recognition within international law. These include questions about whether a standalone right to a good environment would be supported by fundamental human rights theory, and whether it is possible to define the right in a way which makes it practically useful. In identifying these issues and clarifying the current status of the right, this chapter lays a foundation for further analysis in later chapters, including a consideration of how the right would apply in the context of climate change.

4.1 Introduction

As the previous chapters have shown, environmental human rights can be found in the 'greening' of existing rights, as well as in a wide range of constitutional provisions. Overwhelmingly these approaches construct the environment as something which is instrumental to the fulfilment of other human rights. They are inherently anthropocentric and, with the exception of a small number of constitutional provisions, do not explicitly recognise the inherent value of the environment. As a result, a person concerned about the impacts of State or corporate action on the environment is unable to engage human rights law unless they can demonstrate that

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those environmental impacts impinge upon their own human rights in some particular way. This has been identified as a shortcoming of human rights law, and there are strong arguments that what is needed is a recognised right to have the environment protected for its own sake, without a requirement to demonstrate any further human impact.

The idea of a substantive human right to an environment of a particular quality is a concept which has attracted significant scholarly attention over recent decades, along with the interest of a number of United Nations and other international or regional bodies. In 1972, the United Nations Conference on the Human Environment declared in Stockholm that '[m]an 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' (UNEP, 1972, Principle 1). Since that time, much has been written on the subject of a right to a good environment, and several regional human rights regimes have taken steps to include some form of this right in their human rights law. To date, however, it has not been recognised in any multilateral human rights treaty of widespread application. An analysis of the work which has occurred in this area reveals that, much like the constitutional developments examined in the previous chapter, there is considerable variation and no consensus on how a right to a good environment is best defined or structured.

This chapter seeks to examine the concept of a right to a good environment and its status in international human rights law. It begins by providing a snapshot of the debate around the concept of a right to a good environment in order to identify some of the key arguments for and against its recognition in international human rights law. As will be seen, one of the key points of debate relates to the current status of the right within that body of law, with some scholars claiming that it already exists, some arguing that it is currently emerging, and others refuting its existence entirely. The chapter therefore moves on to consider this issue, presenting a survey of relevant sources of international law in an effort to clarify the question of the right's current legal status. From this examination it is concluded that the right has some limited acceptance within some of the regional human rights systems, but that it lacks widespread recognition in international human rights law. Building on the analysis presented in Chap. 3, it concludes that State practice on the question to date is insufficiently consistent to support any customary recognition of the right.

Nevertheless, the possibility remains that the nations of the world might decide to add the right to international human rights law, and the chapter concludes by articulating the key issues which will need to be addressed if this further recognition is to occur and make a meaningful contribution to the protection of the environment. These issues will then be examined further in the following chapters, where it will be argued that future work on environmental rights may be more effective if it concentrates on developing and clarifying the environmental dimensions of existing rights, including constitutional environmental rights, rather than pursuing recognition of a standalone right within the international human rights framework.

4.2 Terminology

One of the difficulties in analysing and discussing the right to a good environment lies in the variable terminology employed by different scholars, institutions and instruments. As shown in the previous chapter, examples of environmental human rights come in the form of a right to a healthy environment, a safe, clean, decent, unpolluted, favourable or suitable environment, to name but a few. Within the literature on the subject, scholars use all of these phrases and more, and some have advanced proposals for very particular language to be included in human rights law. A key point of distinction is whether the concept should represent a truly new right to an environment of some particular quality, defined independently of other human needs, or whether it should be constructed as a synthesis of the environmental dimensions of other rights, in recognition of the many ways in which the environment supports human rights. As a result, it can be very difficult to compare and evaluate arguments for and against recognition of human rights in this area, as there is not always consistency in terms of the subject matter, scope and definitions being discussed.

In the interests of simplifying the discussion, this book adopts the terminology of a 'right to a good environment', where this is defined as a right to an environment of a good quality, but not necessarily linked to human interests or well-being. The word 'environment' is given a broad interpretation, encompassing the atmosphere, soil, water, sea-ice, flora and fauna, ecosystems and natural processes. It is not limited to the immediate environment in which human persons live or work. Such a broad concept of environment allows for a range of considerations to be taken into account.

The word 'good' has been employed for its simplicity. From its dictionary definition it clearly indicates a positive assessment, implying at least a satisfactory degree of whatever qualities are considered desirable, but it does not specify what those qualities are.[1] Importantly, it does not necessarily imply a link to the interests or needs of any other entity. Words such as 'safe' or 'healthy' suggest a relationship to individuals, communities or animals. By adopting the qualifier 'good' it is hoped to find a way of describing the right which does not presume these relationships, thereby facilitating a discussion which also encompasses less anthropocentric definitions and allows for analysis of a broad range of possible constructions.

Further, the right to a 'good environment' is very rarely found in the literature, as most authors adopt a signifier which aligns to their own preferred formulation and therefore choose more specific language. A 'good environment' is therefore more neutral, and does not preference any particular formulation of the right already put forward. It allows for a discussion of a broader range of analyses, proposals,

[1]The *Oxford English Dictionary* (2014) defines 'good' as "The most general and most frequently used adjective of commendation in English. Almost all uses convey the sense of being of a high (or at least satisfactory) quality, useful for some purpose (specified, implied, or generally understood), and worthy of approval."

regional formulations and constitutional provisions which can all be brought under the umbrella of a 'right to a good environment'.

What the investigation in this chapter is therefore considering is the concept of an independent and substantive right to an environment of a particular quality, defined without reliance on existing human rights. Such a right, if it exists, would be said to stand apart from, and not merely reiterate or synthesise, existing rights.

4.3 Discourse Surrounding Recognition of the Right to a Good Environment

Given the fundamentally important relationship between the environment and human rights we might expect to see strong support for the notion of a recognised right to a good environment. Yet the work of scholars and commentators in this area presents a range of opinions not only on the best way of framing the right, but also more fundamentally on whether the concept of a right to a good environment has merit, and whether it is appropriate for inclusion in international human rights law. A number of scholars have argued in favour of greater recognition of this right, advancing a variety of justifications (e.g. Shelton 1991–1992; Nickel 1993; Cullet 1995; Symonides 1992; Doelle 2004; Leib 2011; Sax 1990–1991; Alfredsson and Ovsiouk 1991; Turner 2004). Others argue that the right to a good environment already exists, or is emerging at customary international law (Marks 1980–1981; McClymonds 1992; Pedersen 2010; Thorme 1991; Hiskes 2009; Caney 2009; Hayward 2005; Vanderheiden 2008). On the other side of the debate are those authors who argue that the right does not exist (Pevato 1999; Hill et al. 2004; Glazebrook 2009) and that it should not be recognised (Handl 1992; Boyle 1996), drawing again on a number of different justifications to support their claims.

One of the factors which contributes to this disagreement can be traced to confusion and divergence about the exact nature of the relationship between the environment and human rights (Boyle 1996: 43). Alan Boyle identified this problem, explaining that 'what constitutes a decent environment is a value judgment, on which reasonable people will differ' (2012: 626). Boyle's work surveying the various formulations, justifications and criticisms of the right to a good environment is instructive, and it demonstrates the breadth of the issues which surround the concept (2006–2007). It also demonstrates the evolution of the debate over recent years. In 1996 Boyle expressed scepticism regarding the right to a good environment, suggesting that it was too uncertain a concept to be of any normative use, that its inherent anthropocentricity would limit its ability to effect real environmental protection, and that it was unnecessary, given that existing rights already incorporated environmental dimensions. While Boyle maintains some reservations regarding the right, particularly with respect to the issue of how it could be defined and applied by courts, he has more recently acknowledged that there may be a place for the right to a good environment within international human rights law. He now

argues that the right could be incorporated into the framework of economic, social and cultural rights, and that doing so may be necessary to address the global challenge of climate change (2006–2007: 509; 2012: 633). Clearly the emergence of new environmental challenges, such as climate change, has the potential to test pre-existing views on the relationship between human rights and the environment, and the debate around the right to a good environment has evolved alongside these new global issues.

The following discussion highlights some of the key points of contention surrounding recognition of the right to a good environment in international law. While most commentators adopt either a 'for' or 'against' position on the question of whether a substantive right to a good environment is something which should be pursued within international law, an examination of their reasoning reveals a broad and nuanced range of approaches. The discussion below elaborates on these, identifying some of the justifications often given for recognising the right, as well as some of the common criticisms. In doing this, it signals a number of important issues which will need to be addressed if the right is to be developed further.

4.3.1 Adequacy of Existing Laws

One of the most common and strongest arguments in favour of the adoption of a right to a good environment is that the obviously important link between human rights and the environment is not adequately recognised within existing law (e.g. Thorme 1991: 301; Cullet 1995: 25–26 and Symonides 1992: 38). A number of authors have argued that current frameworks of human rights and environmental law have proven to be inadequate in achieving meaningful environmental protection, thereby leaving human rights at risk (Rodriguez-Rivera 2001: 35; Cullet 1995). There are plentiful examples of communities who continue to live under environmental conditions that are inconsistent with the right to an adequate standard of living, the right to the highest attainable standard of health or even the right to life, and this suggests that the rights we currently rely on are not up to the task of addressing the harms caused by environmental degradation (Downs 1993: 362; Hodkova 1991: 64). One of the arguments for adopting a new substantive right is that, as Michael Anderson has explained, 'established human rights standards approach environmental questions obliquely and, lacking precision, provide a clumsy basis for urgent environmental tasks' (1996: 8). He has argued on that basis that a specific right would be better suited to the challenge of protecting the environment.

Other authors focus on specific deficiencies of environmental law in calling for a human right to a good environment. Philippe Cullet has argued that existing laws are deficient because they do not allow for adequate consideration of the particular problems confronting the global South. He suggests that traditional environmental law, comprised of largely procedural rights, has focussed on protecting people from pollution caused by industrial development, but has not addressed issues of clean

water and adequate food supplies. A substantive right to a good environment is required, he argues, to fill this gap (Cullet 1995: 26). Shelton (2010: 91) and Sax (1990–1991: 99–100) have also argued that procedural environmental rights, while beneficial in ensuring that decision-making is consistent with democratic principles, are inadequate to ensuring minimum standards of environmental protection. Because they are only a measure of governmental procedural compliance, they are incapable of guaranteeing a healthy or ecologically sound environment, or ensuring that people's basic needs are met (Shelton 2010: 91; Sax 1990–1991: 99–100). A substantive right to a good environment, it is argued, is necessary to address this shortfall in protection.

Not all scholars agree, however, that a new right to a good environment would be more effective in addressing the human rights implications of environmental harm, and some have argued that a dedicated right would be redundant. As shown in Chap. 2, many well-settled human rights possess recognised environmental dimensions, and there is a growing body of jurisprudence in which environmental degradation has been successfully pursued as a human rights violation. A number of authors have argued that the recognition of a human right to a good environment would not achieve anything more than is possible under these existing laws and regulations (Handl 1992; Boyle 1996; Merrills 1996; Alfredsson and Oviousk 1991).

In 1992, Gunther Handl argued that attempts to recognise a right to a good environment would divert attention away from trying to improve the existing framework, claiming that such attempts are 'duplicative efforts without ever coming close to bringing about the same environmental benefits' (1992: 137). In his recent final report to the Human Rights Council, John Knox, the former UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, drew on his comprehensive work surveying the various protections of the environment and human rights in international, regional and domestic law and concluded that "explicit recognition of the human right to a healthy environment thus turned out to be unnecessary for the application of human rights norms to environmental issues" (2018: 4). While it is clear that to date human rights law has not been effective in eradicating harmful environmental conditions, arguably the problem lies not in an insufficiency of appropriately defined rights, but in an inadequate understanding of their environmental application and a lack of suitable processes to enforce them.

4.3.2 Risks of Proliferating New Rights

These concerns about the necessity of a standalone right to a good environment go beyond wanting to avoid unnecessary duplication of rights, as some argue that recognition of a new right may in fact be counter-productive and damaging to the body of existing rights. A number of human rights scholars have argued that adding new rights without sufficient justification threatens the integrity and significance of

the human rights tradition (Alston 1982; Higgins 1994; Donnelly 1984, 1985). Writing about the proliferation of human rights generally, Higgins contended that

> if States accede to this expansion for reasons of political convenience, rather than conviction, then the coinage will undoubtedly become debased, and the major operational importance of designating a right a human right – that opprobrium attaches to ignoring it – will be lost (1994: 105).

Critics of the right to a good environment have harnessed these attitudes towards the proliferation of rights generally in order to argue against the recognition of a new right. Even though Shelton argues that there are benefits to be gained from recognising a right to environment, she also acknowledges the limits of human rights in achieving environmental protection and cautions against trying to do too much with human rights in terms of pursuing environmental objectives: 'environmental protection probably can't be wholly incorporated into the human rights agenda without deforming the concept of human rights and distorting its program' (2006: 168).

There are persuasive arguments that introducing new rights without sufficient justification may undermine the integrity of human rights overall. One of the key purposes of this book is to determine if an appropriate rationale can be found, and later chapters will explore the question of justification in more detail.

4.3.3 Benefits of Recognising a Human Right to a Good Environment

The special nature of human rights also gives rise to a persuasive argument in favour of recognising a right to a good environment, which could still be harnessed for positive effect even if the right potentially duplicates protections found elsewhere (Kiss and Shelton 2007: 238). Recognition of a right to a good environment would elevate it to the same plane as other human rights and enable more effective balancing of potentially competing rights (Boyle 1996: 49, 2012: 629; Downs 1993: 378; Merrills 1996: 28–29). It would also create a 'trumping effect' (Rodriguez-Rivera 2001: 28) over other interests which are not described as rights. As Kiss and Shelton have explained, '[r]ights are inherent attributes of human beings that must be respected in any well-ordered society. The moral weight this concept affords exercises an important compliance pull' (2007: 238; Shelton 2008: 44). This moral weight can be traced to the philosophical foundations of human rights, which will be discussed in more detail in Chap. 5. Equivalent theoretical underpinnings cannot be identified for environmental law, and environmental protection does not have the same level of moral influence. This is one of the key factors behind efforts to expand human rights to cover environmental protection, including through the recognition of a new environmental right, in order to bring the environment within the field of moral rights represented by international human rights law.

While there are certainly advantages that come with calling something a 'human right', the use of such terminology also raises a number of challenges. Merrills examined a number of conceptual issues related to the recognition of environmental rights, including the right to a good environment. He considered the effect of calling something a human right in so far as elevates it beyond a 'mere preference'. He agrees that this has the consequence of allowing the right to trump preferences or other non-rights: '[i]f a preference can be turned into a right the position of the new rights-holder is greatly strengthened, especially when contending with an adversary whose preference has not been so transformed' (1996: 29). However, he questions whether creating a new right in order to balance it against other rights may not also create new challenges. If both parties are 'armed with rights' negotiating a compromise may be much more difficult to achieve. He argues that

> A proliferation of rights and rights-holders not only multiplies the occasions when rights-holders come into conflict with each other, but also generates a tension between rights as a basis for actions and other moral considerations. Thus a society which over-emphasises moral and legal rights may experience difficulties in maintaining community values such as cooperation, generosity, and civic duty, which cannot be brought within their scope (1996: 29).

Careful consideration of the theoretical foundations of human rights before new rights are adopted is therefore required, and Chap. 5 will highlight the significant difficulties in attempting to justify a right to a good environment on the basis of traditional human rights theory.

In addition to the symbolic or moral value of recognising a right to a good environment, there are also potential practical benefits which can be identified. Primarily these relate to the legal mechanisms which would become available for implementation and enforcement of the right. By framing a good environment as a human right, individuals would be able to bring an action against a duty-bearer (usually the State) for failing to respect, protect or fulfil their rights (McClymonds 1992: 592–593; Downs 1993: 378). Depending on the exact formulation and location of the right, specific supervision and enforcement machinery may be available to help ensure compliance. However, a key challenge in realising these benefits lies in defining the specific obligations of States and other actors, which must be identified before any allegation of breach could be established.

4.3.4 Defining Appropriate Standards for an Effective Right to a Good Environment

The challenge of defining appropriate standards for the right to a good environment is noted by both advocates and critics of the right, with a number of the right's opponents arguing that the inability to define the right sufficiently is a fundamental reason for its infeasibility (Handl 1992: 117, 2001: 313; Pevato 1999: 316). It has

been argued that the right must be capable of adequately precise definition in order to ensure it makes a meaningful contribution to human rights and also to facilitate its justiciability and practical implementation (Nickel 1993; Lee 2000; MacDonald 2008; Downs 1993; Alfredsson and Ovsiouk 1991; Symonides 1992). Some authors argue, however, that the precise standards could be left to judges or other decision-makers to determine, and that the existence of some ambiguity should not be enough reason to reject the right (Taylor 1998; Shelton 1991–1992; Giorgetta 2002).

Shelton acknowledges the difficulty in trying to define exactly what such a right should include, noting that the term 'environment' is broad and can encompass many things (1991–1992: 135). Commentators therefore employ a range of qualifiers when discussing the concept and, as noted above, much of the terminology used is vague or ill-defined (Rodriguez-Rivera 2001: 9–10). This inability to settle on consistent terminology is indicative of the challenge of defining the right for the purposes of legal implementation.

Beyond the formal language used to describe the concept of the right, a more difficult challenge lies in articulating the standards which should be incorporated into the right, and by which violations of the right would be judged (McClymonds 1992: 629; Downs 1993; Alfredsson and Ovsiouk 1991: 22). As MacDonald has explained, the challenge of defining the right is not limited merely to describing the sort of environment to which we are entitled in broad terms, but presents 'dilemmas concerning the nature and extent of the right, the shape of the right, the content of the right, the threshold required to trigger harm under the right and other definitional and content-based hurdles' (2008: 214). Alfredsson and Ovsiouk have argued that we need to

> specify the contents of existing and emerging standards, examine the sources and acceptance of the relevant rules, point at the exact beneficiaries of these rules, and make realistic suggestions on implementation methods, including the problem of transboundary transgression (1991: 22).

The need for standards is frequently articulated in terms of the need to be able to implement the right in practical terms, which is in turn connected to its justiciability (McClymonds 1992: 610, 629; Downs 1993: 382; Taylor 1998: 361–362; Thorme 1991: 331). In order for the right to be meaningful, and not simply a declaration which lacks legal meaning (Symonides 1992), it needs to be defined to include appropriate criteria for determining when it has been breached (Downs 1993: 380). As Lee has argued:

> for the right to be practically useful, it needs to be defined narrowly enough to allow a claim to be brought before a court … For a right to a healthy environment to be actually useful, and not just a theory or concept, it must be capable of being defined in such a way as to be applicable to specific real-life situations. Without this rigorous definition, a right to a healthy environment risks remaining an irrelevant member of the group of third-generation human rights which have proliferated recently (2000: 285, 297).

The sorts of criteria which are required include substantive standards to address air and water pollution, deforestation, emissions and other activities which are harmful to the environment (Shelton 2006: 164). These would need to be developed with regard to relevant environmental research and regulations (Shelton 2006: 164). At the same time, in order for the right to be sustainable, standards would need to be flexible enough to adapt to developments in science and broad enough to encompass evolving environmental and human rights issues (Kiss 1992: 201; Boyle 1996: 50–51). As Shelton has explained, allowing such flexibility would not undermine the right but instead acknowledge its dynamic character (2006: 164; 2008: 46).

It may be possible to leave the definition of precise standards up to judges or other experts in the particular circumstances, and other rights are frequently interpreted by judges in specific contexts (Taylor 1998: 361; Kiss and Shelton 2007: 24; Giorgetta 2002: 187). This would also facilitate greater flexibility to take into account local circumstances and the specific needs of communities (Giorgetta 2002: 187). However, almost all authors agree that some definition is necessary if the right is to be meaningful and practically valuable.

4.3.5 The Anthropocentricity of a Human Right to a Good Environment

A major criticism of the idea of a substantive human right to a good environment questions the very notion of 'environmental human rights' and argues that the inherent anthropocentricity of such a concept renders it antithetical to environmental protection, or at least undermines its effectiveness. Handl (1992) referred to the 'species chauvinism' of viewing environmental issues through a human rights focus, and criticised the idea of a human right to a good environment, arguing that it could not achieve meaningful protection of the environment in the absence of a direct link to human interests. Boyle has explained that looking at the problem of environmental degradation 'in moral isolation may reinforce the assumptions that the environment and its natural resources exist only for human benefit, and have no intrinsic worth in themselves' (1996: 51). These criticisms draw on the way of thinking about the environment and human rights found in theories like deep ecology and earth jurisprudence, which were mentioned in Chap. 3. They recognise that the other species, ecosystems and biodiversity have value beyond their utility to humans. Framing a good environment as a right which is possessed by humans neglects this value and instead reinforces attitudes towards the environment which have been a root cause of so much of our environmental abuse and destruction over many centuries.

However, there may be ways of thinking about the right to a good environment which could avoid this criticism of anthropocentricity, or at least mitigate these concerns to some degree. Much depends on the way the right is defined and the extent to which it protects the inherent value of the environment, and not only its

role in fulfilling human needs (Rodriguez-Rivera 2001: 34). Indeed, the version of the right which this chapter is exploring is one which is intended to separate environmental well-being from human needs. Catherine Redgwell has argued that humans are capable of possessing 'enlightened self-interest', which includes not only our own interests but also those of the broader environment (1996: 83). This might therefore afford us a definition of the right to a good environment which is more ecocentric and capable of a wider application by incorporating environmental issues in which we have no direct interest, such as the condition of animals and nature.

However, it is likely that there would still remain a degree of structural anthropocentricity built into the human rights framework (Rodriguez-Rivera 2001: 34). As Boyle has explained, the institutional framework of human rights is not well-suited to taking account of competing interests of the environment and its non-human components, and the human rights system may be incapable of properly balancing polycentric interests (1996: 52–53). While it might be possible, argues Boyle, to define the right in a way which minimises its anthropocentricity, 'at an institutional level it is much harder to avoid' (1996: 53). The challenge of reconciling anthropocentric human rights principles with ecocentric environmental protection presents fundamental issues relating to the relationship between the environment and human rights and the desirability of constructing the environment as a human right. These questions will need to be addressed in defining any new right and coming to an understanding of what it is intended to achieve.

4.3.6 Summary of Issues Surrounding the Right to a Good Environment

This discussion demonstrates the wide range of issues surrounding the concept of a human right to a good environment, and it is argued that these need to be addressed if the right is to be developed further. While there are clearly criticisms around the right, its future in international human rights law is largely in the hands of nation States, who have it within their power to formally recognise the right should they so choose. As the next section will demonstrate, some regional human rights organisations have taken steps in this direction. If the right is to move forward in international human rights law more broadly, the analysis above suggests that the challenge will be defining the right in a way which renders it practically useful, theoretically justifiable and likely to attract sufficient support of States. Later chapters will explore some of these issues in more detail, but before we can discuss the future prospects of the right to a good environment, it is first necessary to clarify its current status in international human rights law.

4.4 Current Legal Status of the Right to a Good Environment

As the previous section demonstrated, scholarly opinion on the merit of a legally recognised right to a good environment is unsettled, and it seems scholars in the area are not even in agreement as to the current status of the right, with some authors arguing that it already exists, while others are adamant that it lacks recognition and needs to be added to human rights law. Often these diverse opinions flow from the authors' differing views about which sources of law should be considered when identifying human rights. Some adopt a strict positivist position and look only to recognised sources of international human rights law, being treaties and custom. Others take a more theoretical approach, and look instead to considerations of natural law, moral rights or other similar theories to assess the status of the right.

Another factor which complicates the assessment of the legal status of the right is that much of the commentary on the right to a good environment is rather dated, emerging out of a flurry of activity in the 1990s but in need of updating. This section endeavours to provide an up-to-date assessment of the status of the right to a good environment in international human rights law. The approach taken here is essentially positivist, considering the generally accepted sources of international law—treaties and customary law—in search of expressions of the right which might establish it as a legally enforceable norm.

Chapter 2 has already explained the process of "greening" human rights, wherein the environmental dimensions of other human rights are elaborated and applied. What the investigation in this section is looking for is something different, searching for an independent, substantive right to an environment of a particular quality, defined without reference to existing human rights or human needs. After examining the body of international human rights treaties and soft law, and bearing in mind the constitutional developments discussed in the previous chapter, it is concluded that, despite widespread recognition of the mutually supportive relationship between the environment and human rights, there is little evidence to support a global, legally protected right to a good environment.

4.4.1 The Right to a Good Environment in Human Rights Treaties

The starting point in the search for the right to a good environment is international and regional human rights treaties. At present, none of the global human rights treaties includes reference to an independent right to a good environment. However, a number of regional treaties do provide for some environment-related rights and these may establish a limited right within those regional systems.

African Charter on Human and Peoples' Rights

The African Union's *Charter on Human and Peoples' Rights* (1981) provides in Article 24 that "All peoples shall have the right to a general satisfactory environment favourable to their development."[2] The *Ogoniland* case (2002), a decision of the African Commission on Human and Peoples' Rights, provides the most far-reaching interpretation of Article 24 (Birnie et al. 2009: 273; Shelton 2002: 341). The claimants in that case argued (at [10]) that the exploitation of oil reserves in Ogoniland violated their rights under 24 as well as Articles 2 (non-discrimination in enjoyment of rights and freedoms), 4 (the right to life), 14 (the right to property), 16 (the right to health), 18 (protection of the family) and Article 21 (the right to dispose of natural resources). These other breaches were discussed in more detail in Chap. 2.

With respect to Article 24, the African Commission held in the *Ogoniland* decision that the provision imposes an obligation on States to take reasonable measures 'to prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources' ([52–53]). The Commission outlined a number of actions which States are required to take in order to comply with their obligations under Article 24. These included:

- Ordering or at least permitting scientific monitoring of threatened environments;
- Requiring and publicising environmental and social impact studies prior to any major industrial development;
- Undertaking appropriate monitoring and providing information to communities exposed to hazardous materials and activities;
- Providing meaningful opportunities for individuals to be heard and to participate in development decisions affecting their communities ([54]).

The decision is significant in that it uses human rights law to enumerate substantive environmental obligations for States, and links human rights specifically to questions of resource use and sustainable development. A number of observations can be made in terms of what the *Ogoniland* decision tells us about Article 24, and whether it should be viewed as articulating a right to a good environment along the lines of the concept being considered in this chapter.

The first relates to the wording of the provision itself. Rather than establishing an independent right to a good environment, Article 24 clearly links the environment to human well-being. It does not include any independently discernible measure of environmental quality, but rather links the right to human development and the

[2]Fifty-three States have ratified the African Charter: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Central African Republic, Cape Verde, Chad, Cote d'Ivoire, Comoros, Congo, Djibouti, Democratic Republic of Congo, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea-Bissau, Guinea, Kenya, Libya, Lesotho, Liberia, Madagascar, Mali, Malawi, Mozambique, Mauritania, Mauritius, Namibia, Nigeria, Niger, Rwanda, South Africa, Sahrawi Arab Democratic Republic, Senegal, Seychelles, Sierra Leone, Somalia, Sao Tome and Principe, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

satisfaction of human needs (Churchill 1996: 106). This is consistent with a number of the specific obligations set out by the Commission in *Ogoniland*, which are linked to the rights of individuals and communities who are likely to be affected by proposed developments.

More broadly, the Commission recognised the fact that the environment affects 'the quality of life and safety of the individual' ([51]). The Commission quoted with approval Alexandre Kiss, who has said that:

> An environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living conditions and development as the breakdown of the fundamental ecologic equilibria is harmful to physical and moral health (1993: 553).

While Kiss and the Commission both spoke of the need to prevent pollution and promote conservation, these activities remain linked to the quality of living conditions for individuals and communities, rather than the well-being of the environment in its own right. It is in this context that the Commission also found violations of a number of other human rights, including the right to health and the right to property.

The *Ogoniland* decision is the first and only case in which the African Commission has found a violation of Article 24.[3] It is significant in advancing the integration of environmental and human rights concerns, and in articulating the duties of governments in relation to the environment, particularly with respect to the activities of multinational corporations. However, its contribution to developing an independent, substantive right to an environment of a particular quality at international law is limited for two reasons. First, as noted above, the decision deals with Article 24 in the context of widespread interference with the rights of a particular community, and emphasises the links between the environment and other rights, particularly health, housing and use of natural resources. The Commission was not required to address the issue of whether a breach of Article 24 could be established without proof of a negative impact on human well-being. The language of Article 24 and the reasoning of the Commission suggest such a conclusion would be unlikely, but to date the question has not been presented.

Second, the obligations which the Commission enumerated in relation to Article 24 tend to be more procedural in nature than substantive, emphasising Nigeria's duty to permit environmental and social impact assessments and to provide affected communities with relevant information and opportunities to participate in decision-making. Pedersen has commented that

> the most tangible characteristic of the Commission's interpretation of article 24 is the obligation to carry out environmental impact studies and facilitate participation. In other words, the outcomes of the substantive right enshrined in article 24 are procedural safeguards, which are arguably already embraced under international law (2008–2009: 80).

[3]One other petition has been made to the Commission relating to article 24 but this was withdrawn (*William A Courson v Zimbabwe*, Communication No. 136/94 1994).

The emphasis on procedural rights is partly attributable to the fact that the case involved a joint venture between the State and private companies, requiring the Commission to consider the nature of States' obligations to regulate private actors. While the focus on procedural obligations is therefore understandable, the decision consequently represents a limited contribution to the development of an independent, substantive right to a good environment. It is possible that future cases could develop substantive obligations further, but in the absence of further jurisprudence the interpretation of Article 24 is currently limited.

San Salvador Protocol

The Organisation of American States' *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights* (the '*San Salvador Protocol*') (1988) provides in Article 11 that:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the Environment.[4]

The *San Salvador Protocol* does not provide a definition of a 'healthy environment'. As was noted in Chap. 3, the concept of a 'healthy environment' is open to interpretation. In particular, it could be interpreted to mean an environment which is in a good condition objectively, or it may mean an environment which is healthy for humans. If the latter is understood as the meaning of Article 11, then the provision arguably does not guarantee a right which is independent from existing human rights, but merely reiterates the importance of the environment as a condition of achieving other human rights protections. The inclusion of the additional guarantee relating to access to basic public services would seem to confirm that the quality of the environment contemplated is one which is linked to human well-being, rather than the health of the environment per se. Churchill has argued that 'taken literally, the second paragraph is not limited to measures relating directly to promoting a healthy environment for humans, and could include a wide range of environmental measures not necessarily anthropocentric in nature'. However, he concludes that the heading of the article ('Right to a healthy environment') and the first paragraph indicate that the article should be read as referring only to measures which benefit humans (1996: 99).

Both the Protocol itself and the work of the Inter-American Commission on Human Rights seem to confirm that Article 11 is not intended to create a separate and independent substantive right. The Protocol limits the availability of individual petitions to alleged breaches of Articles 8(a) (trade union rights) and 13 (the right to education), with the result that individuals and groups cannot bring complaints to

[4]Sixteen States have ratified the *San Salvador Protocol*: Argentina, Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname and Uruguay.

the Commission based solely on alleged violations of Article 11 (Article 19.6; *La Oroya Community v Peru (Admissibility)* 2009; Knox 2018: 4). The Commission has focussed on articulating the links between the environment and other human rights, rather than drawing specifically on Article 11. The Commission has identified that 'several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality and are profoundly affected by the degradation of natural resources' and that member States of the OAS must prevent the degradation of the environment in order to comply with their human rights obligations in the framework of the Inter-American system (Inter-American Commission on Human Rights 2009: [190]).

Despite the lack of specific justiciability, the Inter-American Court of Human Rights has recently affirmed that the right to a healthy environment is binding on States and offered some interpretation of its content and associated obligations. In its 2017 *Advisory Opinion on Environmental Human Rights*, the Court stated that the right to a healthy environment "constitutes a universal interest, which is due to both present and future generations" (IACtHR 2018: 2). The Court reaffirmed the interdependent and indivisible relationship between the environment and other human rights, but noted specifically that the right to a healthy environment is an autonomous right, different in content from the environmental obligations that flow from other rights (2008: 2). However, because Colombia had requested the Advisory Opinion with respect to the application of Articles 4 and 5 of the American Convention (the rights to life and physical integrity), the Court was somewhat limited in its coverage of the right to a healthy environment.

The obligations which the Court articulated for States included an obligation to prevent significant environmental damage and adhere to the precautionary principle, to follow procedural rules relating to environmental impact assessments, public participation and access to justice, and to cooperate in good faith with other States. These general obligations do not offer much in the way of specific interpretation of the right to a healthy environment. The Advisory Opinion may signify an increased willingness on the part of the Court to have regard to the right to a healthy environment in interpreting and upholding States' obligations under the Inter-American framework. However, the language of the Protocol and its interpretation by the Commission indicate that Article 11 operates to expand and clarify the environmental dimensions of existing rights rather than create a truly independent right to a good environment of the kind under examination here.

European Human Rights Framework

In Europe, the European Union's *Charter of Fundamental Rights* provides that environmental protection must be integrated into the policies of the EU (2000: Article 37). However, Europe's principal human rights instrument, the Council of Europe's *European Convention on Human Rights* (1950) does not include a specific provision relating to the environment. Although there is growing jurisprudence in Europe (discussed in Chap. 2) indicating that environmental factors may impact on human rights, and may even in some cases amount to a violation of certain rights, the Council of Europe's Committee of Experts for the

Development of Human Rights has stated that 'the Convention is not designed to provide a general protection of the environment as such and does not expressly guarantee a right to a sound, quiet and healthy environment' (2005: Appendix II). This had been previously confirmed by the European Court of Human Rights, which held in *Kyrtatos v Greece* (2003) that the *European Convention* provided no general protection of the environment.

The *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998) asserts in its preamble that

> Every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations.

Article 1 of the *Aarhus Convention* declares that

> In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this convention.

While this provision appears to treat the right to a healthy environment as an established fact (Georgietta 2002: 187), Article 1 should be read in the context of the overall purpose of the Convention, which is to ensure procedural, rather than substantive, environmental rights (Boyle 2012: 622). This is highlighted by the fact that Article 1 relates to rights to information, participation in decision-making and access to justice. While the Convention has had some influence on the jurisprudence of the European Court of Human Rights, it does not in itself create any substantive rights in relation to the environment. As an articulation of procedural rights related to environmental matters, the *Aarhus Convention* contributes significantly to the body of procedural environmental rights discussed above in Chap. 2, but those procedural rights should not be seen to imply substantive human rights or standards of environmental quality (Pevato 1999: 313). Furthermore, although the preamble states that individuals have a right to an environment of a particular quality, no provision is made in the Convention for people to invoke that right through legal processes (Hayward 2005: 180). In any event the right which is presented in the *Aarhus Convention's* preamble again links the environment to the health and well-being of the individuals concerned, once again falling short of an independent right to a good environment.

Some efforts have been made within the Council of Europe to add a right to a good environment to the *European Convention on Human Rights*. In 2009 the Parliamentary Assembly of the Council of Europe passed a recommendation calling for a right to a good environment to be added to the Convention. In the recommendation the Parliamentary Assembly stated that it is 'not only a fundamental right of citizens to live in a healthy environment but a duty of society as a whole and each individual in particular to pass on a healthy and viable environment to future generations' (2009: [1]).

In 2010 the Committee of Ministers declined to take up the Parliamentary Assembly's recommendation. In their response they stated that:

> the Committee of Ministers recognises the importance of a healthy, viable and decent environment and considers that it is relevant to the protection of human rights. It therefore shares the concerns expressed by the Parliamentary Assembly … although the European Convention on Human Rights does not expressly recognise a right to the protection of the environment, the convention system already indirectly contributes to the protection of the environment through existing convention rights and their interpretation in the evolving case law of the European Court of Human Rights … the Committee of Ministers [does] not consider it advisable to draw up an additional protocol to the convention in the environmental domain (2010: [7], [9]).

Shelton suggests that there are a number of reasons for States' reluctance to recognise an independent right. She suggests that there is a fear that introducing a new right will dilute the power of existing rights. She also suggests that there is a belief that environmental claims lack the kind of justiciability which would qualify them as human rights claims. Further, Shelton cites reluctance on the part of States with environmental problems within their own borders to set themselves up for potential claims against them (1991–1992: 132). These factors may explain the Council of Europe's decision. They are not unique to Europe however, and will need to be addressed if the right to a good environment is to be further recognised at the international level.

Arab Charter and ASEAN Human Rights Declaration

The other two regional human rights instruments, the *Arab Charter on Human Rights* (2004) and the Association of South-East Asian Nations' *Human Rights Declaration* (2012), refer to the right to a healthy environment as part of the right to an adequate standard of living. The Arab Charter states in Article 38:

> Every person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a healthy environment. The States parties shall take the necessary measures commensurate with their resources to guarantee these rights.

The ASEAN Declaration states in Article 28 that:

> Every person has the right to an adequate standard of living for himself or herself and his or her family including: …
>
> … (f) The right to a safe, clean and sustainable environment.

Rather than set out an independent right to an environment of a particular standard, these two instruments construct a healthy environment as part of an already recognised right, recognising the essential role that the environment plays in the fulfilment of other rights. This therefore represents an example of the 'greening' of human rights discussed in Chap. 2. It is possible that these provisions may be interpreted as establishing an independent right to a good environment, however as neither the Arab nor the ASEAN human rights instruments provide complaints mechanisms the opportunities for articulating such an interpretation may be limited.

Summary of regional position

The analysis above suggests that the regional human rights treaties do not provide for a truly independent right to a good environment. Their coverage of the environment is restricted to articulating its importance in the advancement of human needs and allowing for an individual or group of individuals to claim a violation of their human rights when environmental degradation negatively impacts on their quality of life. As was shown in Chap. 2, such a claim is arguably already available on the basis of a range of other rights. This position was argued by the Council of Europe's Committee of Ministers, with the effect that the European human rights framework explicitly does not contain an independent and substantive right. The two regional treaties which do contain a form of independent right (the African and American treaties) apply only to 69 States, so that, even if they are taken to provide a truly independent right, the majority of States would be left unaffected, including most of the world's major greenhouse gas emitting States.

While national and regional instruments refer to the environmental dimensions of existing rights, there is not yet any right to a good environment per se. As MacDonald has said,

> what appears to be lacking is explicit recognition of a right to environment in order to take such claims one level further: ie to a level where one might be obliged to achieve a certain level of environmental standard without there having to be a pollution incident or adverse impact on an individual 'victim' so that they might enforce the right (2008: 218).

There remains the possibility that the right might be recognised in customary international law, which would be applicable to all States, regardless of their treaty participation. In order to establish a customary right, evidence must exist of sufficient State practice in support of the right.

4.4.2 A Customary Right to a Good Environment?

So far we have seen that the right to a good environment is not explicitly recognised in international human rights law. Even those regional treaties which purport to guarantee the right in some form are best understood as articulating the need to protect the environment to support other human rights, rather than a truly substantive right to an environment of a particular quality. It has been suggested, however, that an independent substantive right to a good environment, although not yet enshrined in international treaty law, may nonetheless be emerging in customary international law (Gormley 1990: 98; Taylor 1998: 346; Lee 2000: 300; Bratspies 2015). Along with treaties, customary international law is a primary source of international law. It is listed in Article 38(1)(b) of the *Statute of the International Court of Justice* as a source of law which may be applied by the Court. A rule of customary international law is binding on all States, and does not require their explicit consent to be bound. Rather, consent is implied by States' consistent compliance with or acquiescence to a rule, and a State will only be exempted where

it has persistently objected to that rule (*Anglo-Norwegian Fisheries*, ICJ 1951). In order for a norm to become binding as a rule of customary international law, it is necessary to establish the relevant elements of consistent State practice and an acceptance by States that the rule represents a legal obligation (known as *opinio juris*) (*North Sea Continental Shelf*, ICJ 1969; *Nicaragua* (*Merits*), ICJ 1986).

Evidence of State practice and *opinio juris* can be found in the conduct of States, including the adoption of domestic laws and constitutions, and their contribution to international instruments. As the analysis in Chap. 3 concluded, constitutional environmental rights are at this stage too diverse to establish a binding customary right separate from other recognised human rights. Another source of State practice might be found in the contributions of States to what is known as 'soft law'—the various non-binding declarations, principles or other instruments which States participate in creating and which might influence future legal developments. Soft law instruments provide some of the strongest and most explicit statements of a right to a good environment and may be evidence of an emerging customary right. Further evidence might be found in the contributions of States to discussions within relevant UN agencies, including the General Assembly and the Office of the High Commissioner on Human Rights. This section will analyse a number of key developments in the history of environmental human rights to determine whether they provide sufficient support for a customary right to a good environment.

Stockholm Declaration

The 1972 *Stockholm Declaration* is generally considered to be the first statement at the international level of the link between the environment and human rights, and establishes a number of principles which expound the role that the environment plays in the achievement of other human rights, as well as the obligation that individuals, communities and States have to protect the environment, for both current and future generations. The text of the document was drafted with input from States in early 1972 and then adopted by acclamation at the Conference on 16 June 1972. It was later endorsed by the General Assembly by a vote of 112-0 (with 10 abstentions) (Res 2994 (XXVII), 1972).

Principle 1 of the *Stockholm Declaration* states 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. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

Principle 1 is framed in terms of man's 'rights' being exercisable 'in an environment of a quality that permits a life of dignity and well-being'. While this could be construed as providing a right to an environment of a certain quality, it is more accurately viewed as an early recognition of the impact which environmental factors have on dignity and human rights, rather than a guarantee of a right to a good environment per se (Atapattu 2002–2003: 81). The standard of environmental

health which Principle 1 purports to provide is that which is necessary to ensure a certain quality of human life, rather than a stand-alone measure of environmental health.

Principle 2 of the Declaration states that:

> The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

This expands upon the concept of environmental protection, by referring to particular aspects of the natural world which ought to be safeguarded. However the wording of Principle 2 again indicates that environmental protection is to be viewed as something which facilitates human quality of life. The phrase 'for the benefit of present and future generations' may be open to a number of interpretations. On one hand it may impose a limitation on the obligation to protect natural resources of the earth—that the duty to safeguard natural resources only extends so far as such protection is necessary for achieving some benefit for present or future generations. Under this interpretation it is questionable whether Principle 2 could be seen as imposing an obligation to protect natural resources where no identifiable human benefit (short or long-term) could be located.

On the other hand, it is also arguable that Principle 2 provides that the preservation of natural elements such as earth, air, water, flora and fauna is in itself beneficial to present and future generations, even without establishing some other human need. Read in conjunction with the rights language of Principle 1, such an interpretation could resemble a statement of a right to a good environment, recognising the inherent value of the environment and guaranteeing its protection independent of any specific human interest. If this interpretation was deemed unsupported by the text then at the least Principle 2 ought to be read in a manner consistent with the concepts of sustainable development and inter-generational equity, which would allow for preservation of natural resources where the future human need of them may not yet be known.

The *Stockholm Declaration*, while arguably not establishing a clearly independent substantive right, has nonetheless been influential in the increased articulation of the relationship between human rights and the environment. It has been referred to in a number of subsequent instruments, and its influence as a starting point for greater integration between environmental and human rights principles remains significant (Bratspies 2015: 58; Shelton 2006: 130–134; Popovic 1996: 348). However, the language adopted in Principle 1, where environmental well-being is constructed as part of a 'fundamental right', has not been taken up by subsequent international instruments of similar standing (Knox 2012: 6). An examination of the language of the Rio de Janeiro Conferences of 1992 and 2012, as well as the Johannesburg Conference of 2002 (both discussed below) reveals a shift away from the language of human rights in relation to the environment.

Report of the World Commission on Environment and Development: 'Our Common Future'

The World Commission on Environment and Development[5] was created in 1983 with the task of investigating issues relating to the environment and development. In 1987 the Commission released a report entitled *Our Common Future* which articulated for the first time the concept of sustainable development and argued that economic and environmental issues were interrelated. It included legal principles which had been drafted by a group of experts, the first of which declared 'all human beings have the fundamental right to an environment adequate for their health and well-being' (Knox 2012: 7). The report was influential leading into the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, although the focus on sustainable development at Rio left the concept of a 'fundamental right' rather marginalised and many of the principles of *Our Common Future* were not implemented (Pedersen 2008–2009: 77). In 1990 the General Assembly adopted a resolution which incorporated somewhat softer language than the 1987 World Commission Report, asserting that: '[a]ll individuals are entitled to live in an environment adequate for their health and well-being' (Res 45/94 1990; Knox 2012: 6).

Rio Declaration

The United Nations Conference on Environment and Development was convened in Rio de Janeiro in 1992. The outcome document from that conference, known as the *Rio Declaration*, was endorsed by the General Assembly, which urged States to take the necessary steps to give effect to its provisions (Res 47/190 1992: [4]).

The language of the *Rio Declaration* deviates from that used at Stockholm 20 years earlier and does not refer to a right to an environment of a certain quality. It begins by noting that: '[H]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature' (Principle 1). The Declaration emphasises a number of procedural issues, coming from the perspective that 'environmental issues are best handled with the participation of all concerned citizens, at the relevant level' (Principle 10). The Declaration goes on to canvass a number of rights to information or participation, as well as remedies for environmental damage, but although it clearly adopts an anthropocentric perspective on the role of the environment in development, it makes no specific reference to human rights.

The Rio conference of 1992 also resulted in the adoption of *Agenda 21*, an implementation plan for sustainable development. *Agenda 21* recognises the fundamental connections between the environment and human well-being, and it acknowledges the essential need to respect human rights, in particular the rights of women and indigenous peoples, in formulating and implementing sustainable development practices. However, like the *Rio Declaration*, it avoids

[5]Also known as the Brundtland Commission, named after its chair, Gro Harlem Brundtland, former Prime Minister of Norway.

conceptualising the environment as a human right per se, and does not elaborate on the relationship between human rights and the environment in any detail. While Rio may be viewed as a backwards (or at least a sideways) step in the emergence of a right to a good environment (Bratspies 2015: 59; Shelton 1992: 89–93), other instruments reveal that support for such a right had not disappeared.

Special Rapporteur for Human Rights and the Environment and Draft Declaration of Human Rights and the Environment

In 1990 the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a Special Rapporteur on Human Rights and the Environment (Res 1990/7 1990). The Special Rapporteur, Fatma Zohra Ksentini, proceeded to examine the links between environmental protection and the promotion of human rights. In her 1991 preliminary report, the Special Rapporteur found that there was no legal basis for a new right to a good environment. She concluded that there was no right available to an individual to claim an environment of a certain quality. Further, she concluded that the definition and content of environment-related rights in international law was unclear.

The Special Rapporteur presented her final report to the United Nations in 1994. The report included a set of draft principles, the *Draft Declaration of Human Rights and the Environment* (Ksentini 1994). The *Draft Declaration* outlines the environmental dimensions of several recognised human rights along with corresponding duties, and it proceeds on the assumption that the environment and human rights are interdependent. The *Draft Declaration* begins in Article 1 by stating that 'Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.' It then goes on to describe the environmental dimensions of existing human rights (many of which have been outlined in Chap. 2). Article 7 states that 'all persons have the right to the highest attainable standard of health free from environmental harm.' Article 8 declares that 'all persons have the right to safe and healthy food and water adequate to their well-being,' while Article 10 states that 'all persons have the right to adequate housing, land tenure and living conditions in a secure, healthy and ecologically sound environment.'

Article 2 of the *Draft Declaration* states that '[a]ll persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.' Article 6 states that '[a]ll persons have the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna, and the essential processes and areas necessary to maintain biological diversity and ecosystems.'

These provisions suggest the recognition of an independent right to a good environment, but they must be read in the context of the rest of the *Draft Declaration*. The subsequent articles illustrate what a 'secure, healthy and ecologically sound environment' might mean in terms of the specific rights listed, and this intertwining of environmental concerns with other defined human rights might be seen to qualify any independent right which the *Draft Declaration* apparently creates. Nonetheless, Article 2 of the *Draft Declaration*, supported by Article 6,

remains one of the strongest statements of an independent right to an environment of a particular quality.

However, the influence of the *Draft Declaration* has been limited. Boyle has argued that, '[w]ith hindsight it can be seen that this early work was premature and overly ambitious, and it made no headway in the UN' (2012: 616). As John Knox, acting as the United Nations Independent Expert on the issue of human rights obligations relating to a safe, clean, healthy and sustainable environment, explained:

> Although the Human Rights Commission considered the report, it did not adopt or endorse the draft principles or appoint a Special Rapporteur itself. The Commission and the [Human Rights] Council, as well as other United Nations human rights bodies and mechanisms, have continued to study the interaction of human rights and the environment, but their attention has been directed primarily at the relationship of the environment with already recognised human rights (2012: 6–7).

This focus on the 'greening' of existing rights over the recognition of an independent right continued in the two subsequent international conferences on the environment, the World Summit on Sustainable Development, held in Johannesburg in 2002, and the United Nations Conference on Sustainable Development, held in Rio de Janeiro in 2012 (known as Rio+20).

Johannesburg Declaration

In 2002 States gathered in Johannesburg for the World Summit on Sustainable Development. The outcome document from this conference, the *Johannesburg Declaration for Sustainable Development*, was endorsed by the General Assembly in 2003 (Res 57/253). It acknowledged the Stockholm and Rio Declarations as significant milestones in the articulation of sustainable development principles. Similar to the *Rio Declaration*, the *Johannesburg Declaration* avoids the use of human rights language. The Declaration does speak of the connections between the environment and human well-being, recognising the 'interdependent and mutually reinforcing pillars of sustainable development—economic development, social development and environmental protection' and confirming States' responsibility to advance and strengthen these at local, national, regional and global levels ([5]). The Declaration also identifies the impact that environmental degradation has on human communities, for instance by recognising that 'desertification claims more and more fertile land' and 'air, water and marine pollution continue to rob millions of a decent life' ([13]). It acknowledges the 'indivisibility of human dignity' and commits States to increasing access to 'basic requirements such as clean water, sanitation, adequate shelter, energy, health care, food security and the protection of biodiversity' ([18]). While these things clearly have links to guaranteed human rights, the Declaration avoids referring to them in those terms. Beyond drawing these connections between the environment and human well-being, and in so doing alluding to human rights principles which have clear relevance, the Declaration makes no specific reference to rights and in particular does not construct a good environment as a human right.

Rio+20 and 'The Future We Want'

In June 2012 States reconvened in Rio de Janeiro for the United Nations Conference on Sustainable Development (dubbed 'Rio+20'). The report from that conference, entitled *The Future We Want*, is a lengthy document addressing the many facets of sustainable development. As the most recent multilateral instrument on the environment it is instructive in indicating the attitude of States towards the relationship between human rights and environmental protection. The report acknowledges human rights in its preamble, where States

> Reaffirm the importance of freedom, peace and security, respect for all human rights, including the right to development and the right to an adequate standard of living, including the right to food, the rule of law, gender equality, women's empowerment and the overall commitment to just and democratic societies for development ([8]).

The report also reaffirms

> [t]he importance of the Universal Declaration of Human Rights, as well as other international instruments relating to human rights and international law. We emphasize the responsibilities of all States, in conformity with the Charter of the United Nations, to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status ([9]).

The report addresses a number of themes which hint at the links between human rights and the environment. One of the key themes of the report was the eradication of poverty, and the dimensions of poverty are expanded on throughout the report. In particular, the report identifies the widespread problems of hunger and undernourishment, public health challenges and preventable diseases and urban overpopulation ([21]). It reaffirms the importance of promoting employment, empowering the poor and vulnerable and implementing effective social policies ([23]). It also recognises that

> [m]any people, especially the poor, depend directly on ecosystems for their livelihoods, their economic, social and physical well-being, and their cultural heritage. For this reason, it is essential to generate decent jobs and incomes that decrease disparities in standards of living in order to better meet people's needs and promote sustainable livelihoods and practices and the sustainable use of natural resources and ecosystems ([30]).

While these issues have a clear link to human rights principles, the declaration avoids any kind of human rights language in addressing either problems or solutions, except in paragraph 121 where the 'human right to safe drinking water' is addressed. The role of human rights in achieving environmental protection is limited to 'procedural rights' such as non-discrimination ([31], [45]), access to information and participation in decision-making, as well as access to justice ([43]), but even then these principles are not identified as human rights.

The rights of indigenous peoples are referred to in paragraph 49, where the importance of indigenous participation in sustainable development is emphasised. In this paragraph the report recognises the

> importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of global, regional, national and subnational implementation of sustainable development strategies ([49]).

No further reference is made to the UNDRIP however, and the outcome document is silent on the specific rights which may intersect with sustainable development and the nature of that intersection.

The report raises a number of issues which have clear implications for human rights. Poverty and underdevelopment for instance, one of the key themes of the conference, are drivers of wide ranging human rights problems, while unsustainable development and environmental degradation threaten to violate a number of human rights, including the rights to health and to an adequate standard of living. These relationships have been recognised in the past, including in the Special Rapporteur's *Draft Declaration on Human Rights and the Environment*, discussed above. However, *The Future We Want* adopts an approach consistent with the first *Rio Declaration* and the *Johannesburg Declaration* and avoids elaborating further on the linkages between human rights and the environment, and in particular does not construct a good environment as a human right.

The Rio+20 conference offered an opportunity to build on recognised linkages between human rights and the environment and to clarify the role that human rights principles are to play in achieving sustainable development. The choice for human rights principles to remain largely silenced in *The Future We Want* indicates a lack of willingness on the part of States to translate sustainable development and environmental protection into human rights terms (CIEL 2012: 4–5). It seems that the sustainable development agenda has moved away from the human rights language first seen in the Stockholm Declaration to the point where the recognition of an independent right to a good environment appears to lack any significant support from States.

Independent Expert and Special Rapporteur on Human Rights and the Environment

A recent development in the United Nations' work on the relationship between the environment and human rights is the creation by the Human Rights Council of a special mandate on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Under this mandate, John Knox was appointed as an Independent Expert in 2012 and was given the task of articulating the human rights obligations which relate to the enjoyment of a safe, clean, healthy and sustainable environment (HRC Res 19/10 2012). In 2015, Knox's mandate was extended for a further three-year term as Special Rapporteur (HRC Res 28/11 2015), and he delivered his final report to the Human Rights Council in 2018 (Knox 2018).[6]

Knox's work found that, while the relationship between human rights and the environment has been the subject of international discussion for decades, some

[6]In July 2018 the Human Rights Council appointed David Boyd to replace John Knox as Special Rapporteur on Human Rights and the Environment.

fundamental aspects of the relationship are now firmly established (2012: 1; 2018: 3). In particular, he concluded that the interdependent relationship between protection of the environment and protection of human rights is now well-recognised (2018: 2). In describing that relationship, Knox asserted that 'In a real sense, all human rights are vulnerable to environmental degradation, in that the full enjoyment of all human rights depends on a supportive environment' (2012: 7). At the same time, 'the exercise of human rights, including the rights to information, participation and remedy, is vital to the protection of the environment' (2018: 2).

From his work mapping international, regional and domestic obligations relating to human rights and the environment, Knox nonetheless concluded that there was a need to clarify the nature of human rights obligations which are related to the enjoyment of a safe, clean and healthy environment (2012: 3). To this end he drafted the *Framework Principles on Human Rights and the Environment*, annexed to his final report (2018: 7–20).

The *Framework Principles* build on the interdependent relationship between the environment and human rights and articulate a number of principles designed to guide implementation and development of this mutually supportive relationship. They include broad statements that States should protect the environment for the benefit of human rights (Principle 1) as well as respecting, protecting and fulfilling human rights in order to ensure a safe, clean, healthy and sustainable environment (Principle 2). They also include more instrumental principles, such as a requirement that States should work to create and enforce domestic environmental law (Principles 11 and 12) and work towards international cooperation for the protection of both the environment and human rights (Principle 13).

In terms of the contribution which the *Framework Principles* and the work of the special mandate might make to any possible customary norms in the area, a few points are worth noting. First, the Special Rapporteur has made it clear that the *Framework Principles* do not create any new obligations (2018: 3). They are intended instead to reflect existing human rights obligations relevant to the environment. It was a recurring theme of the Special Rapporteur's work that human rights law already includes a number of obligations which apply in an environmental context, and the mapping of these existing obligations was a key objective of his mandate (2012, 2013). Consequently, he found that "explicit recognition of the human right to a healthy environment thus turned out to be unnecessary for the application of human rights norms to environmental issues" (2018: 4) and the *Framework Principles* do not include any reference to a standalone right to a good environment.

A second point to note is that, in spite of concluding that an explicitly recognised environment right is not necessary, the Special Rapporteur recommends "that the Human Rights Council consider supporting the recognition of the right in a global instrument" (2018: 4). He suggests that this could be achieved through the adoption by the UN General Assembly of a resolution that recognises the right to a safe, clean, healthy and sustainable environment, on the basis that it is essential for the full enjoyment of other human rights. He argues that the content of such a right has been significantly clarified, through the work of other bodies and through his own work under the mandate, and that the term 'the human right to a healthy

environment' is already being used, even if not in a strict legal sense (2018: 4–5). While Knox concedes that States may be reluctant to recognise a 'new' right, he suggests that there are benefits to be gained from explicit acknowledgement, including raising awareness of the importance of the interdependence between environment and human rights, and that these could be done without changing the content of or adding to existing human rights obligations (2018: 5).

The Special Rapporteur also touches briefly on the issue of customary international law in his Final Report, albeit in a rather veiled fashion. In pointing out that the *Framework Principles* are based on existing obligations, he notes that there is an increasing coherence among the various interpretations of these environmental rights across human rights instruments and bodies. He says that this is "strong evidence of the converging trends towards greater uniformity and certainty in the understanding of human rights obligations relating to the environment. These trends are further supported by State practice, including in international environmental instruments and before human rights bodies. As a result, the Special Rapporteur believes that States should accept the Principles as a reflection of actual or emerging international human rights law" (2018: 3). The reference to 'emerging international human rights law' could hint at a possible customary status, although the clear statements elsewhere in the report that the Principles do not create new obligations, coupled with the reliance on existing rights as a platform for their articulation, seem to confirm that no customary law currently exists. Even if customary law could be identified, the work of the Special Rapporteur indicates that it does not contain an independent right to a good environment beyond the 'greening' of existing rights.

Global Pact for the Environment

In June 2017 the French President Emmanuel Macron and former Californian Governor Arnold Schwarzenegger, joined by former UN Secretary-General Ban Ki Moon and a number of other advocates for climate action, presented a preliminary draft for a new international instrument, the *Global Pact for the Environment*. The draft was then presented to the United Nations General Assembly at a high-level summit in September 2017. The document has been prepared with the intention of securing sufficient State support for its adoption as a legally binding treaty, and the draft includes the establishment of a committee of experts tasked with monitoring States' compliance with the various obligations contained within it.

Many of the obligations set out in the *Global Pact* could be classed as procedural environmental rights and duties, in the sense described in Chap. 1. They include obligations to ensure access to information (Article 9), public participation (Article 10) and access to environmental justice (Article 11). It also reiterates in fairly familiar terms a number of fundamental principles of environmental law such as the precautionary principle (Article 6), polluter-pays principle (Article 8) and intergenerational equity (4).

As far as substantive environmental human rights are concerned, the *Global Pact* sets out a general right and duty in Articles 1 and 2. Article 1 declares that "Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment." Article 2 couples this right with

a corresponding obligation, stating that "Every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels to the conservation, protection and restoration of the integrity of the Earth's ecosystem." As statements of fundamental environmental rights and duties these provisions are ambitious, and would represent a significant step forward in terms of recognising environmental human rights at the international level if successful in gaining widespread support of States.

However, despite attracting considerable media attention at the time of its launch, the *Global Pact* has yet to receive official endorsement from the UN General Assembly, and it remains to be seen if sufficient State support will be forthcoming.[7] Furthermore, it is arguable whether Article 1 would provide for a new right to a good environment and advance the status of environmental human rights beyond the scope of existing human rights, as its wording clearly links the environment to human health, well-being, dignity and culture, rights which are already established under current law. The *Global Pact* may yet prove to be a powerful catalyst in encouraging greater commitments from States towards the protection of environmental rights, but at this stage it cannot be said to contribute to any emerging customary norm.

Conclusion on Customary International Law

Although there had been some evidence of State support for an independent right to a good environment in the years surrounding the *Stockholm Declaration*, States appear to have moved away from the view which was articulated in Stockholm in 1972. There have been a number of more recent opportunities for States to express their opinions on the relationship between human rights and the environment and none of these have resulted in recognition of or significant advocacy for a new independent right. In terms of the emergence of a customary right, there has been very little in the way of consistent State practice. As outlined in Chap. 3, several States have taken steps at the national level to give recognition to environment-related rights, particularly in the form of constitutional provisions but, as was concluded there, these are too diverse in content and legal status to provide adequate support for a customary norm. The response of States towards relevant soft law instruments would certainly seem to confirm this assessment. Not only is there a lack of widespread and consistent State practice, but in particular there is an absence of *opinio juris* in support of the right. The few statements that could be interpreted as supporting a right to a good environment are either dated or normatively weak, and States appear to be conscious of avoiding the creation of any new legal obligation.

[7]The UN General Assembly adopted resolution 72/277 on 14 May 2018, entitled "Towards a Global Pact for the Environment". The Resolution requests the Secretary-General to report on gaps in international environmental law, and establishes a working group to consider the outcomes of that report and advise on measures to strengthen international environmental law.

4.5 Conclusion

This chapter has examined in some detail the concept of a standalone, substantive right to a good environment. Such a right would guarantee protection of the environment without necessitating a connection to any particular human need. As has been shown, however, recognition of this right is far from a straightforward process. An analysis of the environmental rights found in regional human rights treaties demonstrates that, while on the surface they might appear to guarantee a right to an environment of a certain minimum quality, they are more appropriately understood as restating the importance of the environment to the enjoyment of other rights, and they have been interpreted in this fashion by relevant judicial bodies. This does not mean of course that they have no value, and indeed any work which promotes greater and more explicit recognition of the fundamental relationship between the environment and human rights must be welcomed. But it leads to the conclusion that to date international human rights law does not effectively recognise a right to an environment of any particular standard beyond that necessary to fulfil other human rights. It therefore does little to protect natural spaces, other species or ecosystems in their own right.

The position at customary law is the same. While there have been some encouraging developments in soft law instruments and national constitutions, the progress in this area has been piecemeal and variable. As a result it is inadequate to establish the kind of widespread and consistent State practice which is required to establish a norm of customary international law.

The chapter has also identified a number of specific issues surrounding the concept of a right to a good environment, and these may go some way to explaining why the right has been unable to secure greater recognition at the international level. While the right promises greater benefits through harnessing the moral weight and enforcement machinery of human rights, there is disagreement as to whether it can really achieve more than is already possible under existing law. There are also concerns about whether the right is compatible with human rights theory and about the damage which might be done to human rights as a whole through the recognition of a new right which might be neither necessary nor theoretically justifiable.

Significant issues related to the definition of the right have also been identified. Not only is the terminology around the concept unsettled, but also the question of which standards need to be defined in order to facilitate meaningful enforcement. A major question remains as to whether it is possible to define the right in a way which shifts it towards a more ecocentric view, or whether the very nature of human rights means that any formulation will be inevitably anthropocentric.

These questions require further exploration if the right to a good environment is to have any future within international human rights law. The following chapters will examine in more detail the question of whether the right can be defined in a way which is both practically useful and theoretically justifiable. Chapter 5 will look at whether it is possible to define the right in a way which is consistent with the fundamental principles of human rights. This will consider whether a good environment, however defined, is in fact an appropriate concept for inclusion in human rights law, or whether

the right would need to be defined in a particular way to make it compatible with human rights theory. Chapter 6 will explore the question of whether and how the right can be defined so as to make it practically useful, having regard to the need to define appropriate standards and the issue of proving a violation, especially in the context of increasingly transnational and multi-causal environmental harm. These questions will help to define the possible parameters of the right which can then be considered in relation to the particular issue of climate change. Chapters 7–9 will consider whether a right to a good environment might enhance human rights-based approaches to climate change, or whether it would be preferable for future work in the area to focus on improving the application of existing human rights.

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Chapter 5
The Theoretical Basis for Expanding Environmental Human Rights

Abstract The concept of a human right to an environment of a particular quality intuitively appeals to those who wish to secure greater protection for the natural world and to promote an enhanced understanding of humans' relationship with it. Yet questions abound as to how such a right should be defined and how we can justify a good environment as something which ought to be characterised as a human right. This chapter considers a number of theories which explain what human rights are and why they warrant protection, and analyses whether any of them could support the notion of a right to a good environment. In seeking a theoretical rationale for the right to a good environment, the chapter identifies the need to exclude explanations which rely on the environmental dimensions of other rights, on the basis that human rights require some independent justification beyond merely providing instrumental benefit to the enjoyment of other rights. The chapter argues that it is extremely problematic to provide an account of the right to a good environment which demonstrates its essentiality for human dignity, autonomy or well-being without describing its value in terms of facilitating other rights. Consequently, it is difficult to find a home for the right within conventional human rights theories.

5.1 Introduction

As the previous chapter outlined, considerable support has been advanced over the past 25 years for recognition of a dedicated human right to a good environment at the international level. This suggestion has been buoyed by the growth of constitutional protections for environmental rights around the world described in Chap. 3. However, not all are in favour of a move to include a right to a good environment in international law. One reason for this reluctance relates to the difficulty of conceptualising a good environment as the sort of claim which ought to be admitted to the ranks of human rights. This concern in fact flows from the same place as many of the arguments in favour of recognition, that is, that human rights are special and that the human rights label carries significant moral weight. Advocates argue that

B. Lewis, *Environmental Human Rights and Climate Change*,
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this could be harnessed for the purpose of environmental protection were we to recognise a new right. Critics, on the other hand, argue that this same special quality demands that we exercise care when contemplating the creation of a new right.

Concerns about the unnecessary or uncritical proliferation of new rights and the potential for this to undermine the integrity of the existing body of human rights law might lead us to insist that new rights ought only be admitted when they possess the sort of characteristics which make them worthy of the human rights label. Philosophers and legal scholars have proposed various criteria for recognising a new human right, drawing on the underlying theories of rights and duties.[1] By considering some of these approaches it is possible to examine a proposed new right and evaluate whether its inclusion in human rights law would be justifiable according to the theoretical foundations of human rights, thereby minimising the risk that its recognition would diminish the value of that body of law as a whole (Lewis 2016).

Various approaches can be utilised to identify whether something is or ought to be considered a human right. These approaches operate in two separate, albeit related ways. First, we can look to the theoretical underpinnings of human rights and assess whether a new candidate for recognition as a human right would be compatible with these fundamental principles. Second, by examining the characteristics of accepted human rights it is possible to discern a set of common features which they possess, and against which we can test potential new rights to judge the propriety and practicality of their inclusion (Gibson 1990: 6–8). This chapter focuses on the first of these approaches and seeks to determine if the right to a good environment meets any or all of the criteria for new rights which can be derived from human rights theories, with the aim of concluding whether its inclusion in international human rights law would be justified. In doing so, it identifies a number of theoretical implications associated not only with the right to a good environment as a specific concept, but also with environmental human rights more broadly. Human rights theories identify as rights those things which are essential to human dignity, autonomy or well-being, but also demand that such claims be independently justifiable, and not merely instrumental to the fulfilment of other rights. While environmental conditions clearly contribute to a number of essential human rights, this alone is insufficient to create a justification for recognition of a new right.

The need to find an independent theoretical rationale for a human right to a good environment creates a significant barrier to the expansion of environmental human rights, at least within international human rights law. As this chapter demonstrates, it is not possible to identify a cogent explanation for why a good environment is essential to human dignity, autonomy or well-being without either drawing on connections which are already protected by other human rights, or

[1]Such scholars include Richard Bilder, Phillip Alston, John Finnis, Jack Donnelly, Maurice Cranston, Charles Beitz, Karel Vasek, Vernon van Dyke, Dinah Shelton, Linda Hajjar Leib, Stephen Marks, D.N. MacCormick, Joel Feinberg, W.N. Hohfeld and John Rawls.

reconceptualising humans' relationship with nature in a way which, while appealing as a foundation for more ecocentric and sensitive interactions with the environment, distorts notions of the human which have been central to human rights theory. These theoretical challenges suggest that the future of environmental human rights may lie in developing and clarifying the application of existing human rights, rather than working for recognition of a standalone right. The next chapter supports this argument by illustrating further difficulties related to legal enforceability and practical implementation of the right.

5.2 Why Consider Theoretical Foundations?

One of the key purposes of this book is to consider ways in which law, and particularly international law, can better protect environmental human rights. Why then is it necessary to consider the theoretical foundations of human rights? Why not follow the view, as Jeremy Bentham did, that our rights are those which are found in law? Bentham famously argued that any suggestion that humans possess rights beyond those that are accorded to them by law is 'nonsense on stilts' (1998: 56). The analysis presented in the previous chapter led to the conclusion that current international law does not recognise a right to a good environment, and on a positivist account of human rights we could conclude that the right does not exist in international law. But legal positivism, in focusing on what the law is, ignores the issue of what the law ought to be, and gets us no closer to answering the question of whether the right should be recognised. To answer this question other theoretical considerations must be taken into account to help judge whether a good environment is an appropriate subject for recognition within human rights law.

Ensuring a sound theoretical basis for new rights also provides a degree of quality control in the development of human rights law. Legal recognition of a right without an adequate theoretical justification risks diluting the strength of existing rights and of international human rights law in general. In the 1980s, during a period of expansion of human rights, Philip Alston argued that human rights scholarship had up to that point suffered from a major shortcoming in 'the lack, or at least the weakness, of attempts to develop the conceptual bases for the elaboration of new human rights policies and approaches' (1988: 9; also 1982). More recently, and with specific consideration of environmental rights, Linda Hajjar Leib also expressed concerns about the uncritical development of human rights, stating that if the term 'human rights' is neglected on a theoretical level then there is a risk that 'many might fill the gap with notions at odds with the essence of human rights' (2011: 41).

Requring a strong philosophical grounding for human rights assists in strengthening the normative structure of human rights law and can help us to resolve problems of interpretation and of prioritising competing rights. It also allows us to determine what kind of political action can be justified by a particular right, and who is entitled, or obliged, to take such action. Further, from a more

practical perspective, States are less likely to support the introduction of a new right if they do not agree that it is morally or theoretically appropriate. Human rights law which strays too far from its philosophical foundations is unlikely to achieve widespread support from States, be it in the drafting and adoption of those rights, or in respecting and enforcing them.

The potential risk of admitting a right to a good environment without adequate theoretical grounding is that doing so contributes to an unnecessary proliferation of human rights which threatens to undermine the entire human rights legal framework. It is therefore essential to ensure that any new right has an adequate justification. Further, as will be explored in the following chapter, it is necessary to ensure that recognition of the right is likely to make some positive and substantive contribution, and that it is more than merely an aspirational declaration or restatement of other rights. A right which is unachievable, unenforceable, ambiguous or devoid of substance runs the risk of trivialising the body of human rights as a whole.

Much scholarly work has been devoted to the challenge of identifying the underlying principle unifying the various types of relationships that are reasonably said to concern 'rights' (Finnis 2011: 203). Countless theories of rights have been expounded over time in an attempt to describe what rights are, who should be entitled to them and how they should function. These theories attempt to explain the philosophical justification of rights (including but not exclusively human rights) and in so doing provide various tests for whether a particular object ought to be called a right. The following sections of the chapter will test the compatibility of the proposed right to a good environment against a number of human rights theories.

The theories examined below draw primarily on Western liberal notions of human rights which have been influential in the development of international human rights law. The analysis is therefore susceptible to criticism for a failure to give adequate attention to rights theories from other traditions. Indeed, a similar criticism could be levelled at international environmental and human rights law more generally, where more inclusive and diverse approaches might lead to more effective, ecologically sustainable approaches to the protection of both human rights and the environment. These criticisms are valid. The approach taken here in focussing on a limited number of (mostly Western) theories is justified on three grounds:

1. The theories considered here are not intended to be an exhaustive list, but represent a selection of the most widely relied on theories in human rights discourse, each of which encompasses a range of more specific variations. They therefore capture a large proportion of the work done considering the potential theoretical rationales for recognising new human rights.
2. Many non-Western approaches to morals, ethics and rights bear similarities to the theories considered here, at least in terms of the sorts of claims or interests which they would recognise, if not also in the reasoning which underpins that recognition. This has been recognised in theories of overlapping consensus as it applies to human rights (Rawls 1982, 1999: 65–81; Donnelly 2007; Beitz 2009),

as well as by scholars such as Hugh Breakey, whose theory of 'gathering confluence' demonstrates the range of independent reasons why a person or community might come to support the recognition of human rights (2018).

3. The common use of these theories in explaining and justifying modern human rights law merits their application to new proposals, as any new right which could not be supported by such theories might appear as a more significant departure from convention and would require more work justifying its inclusion to States. This is particularly the case with respect to powerful Western States, without whose support the recognition of a new right may be politically unfeasible.

The following sections therefore consider four of the most commonly invoked theoretical explanations for modern human rights law: natural rights, will theory, interest theory and cosmopolitanism.

5.3 Natural Rights Theory

One of the principal theories advanced as a justification for human rights is natural rights theory. The philosophical heritage of modern natural rights theories can be traced back to Thomas Aquinas, and to early Western philosophers like Thomas Hobbes and John Locke, who developed theories of natural law which provided that certain basic principles of moral behaviour can be discerned from human nature, and are not dependent on recognition by the State.

Reflecting the basic principles of natural law, natural rights theory posits that each individual person is entitled to a number of fundamental claims which derive from their inherent human dignity (Finnis 2011: 272–273; Donnelly 1985a: 495–497). These rights derive from human nature and consist of such things as are essential to the protection and realisation of human nature and dignity, those things which are necessary for the maintenance of a life worthy of a human being.

Natural rights scholars have from this starting point devised various lists of specific rights which are considered fundamental and justifiable. Because natural rights theory is based on a theory of human nature or 'philosophical anthropology' (Donnelly 1982: 398), which presents an account of what it is to be a human being or moral person, the exact content of natural rights will vary depending on the particular concept of human nature which is devised. This gives rise to some variety within natural rights theories, as proponents develop different conceptions of human nature and what it requires. The common theme among these variations is that natural rights are entitlements or freedoms which are essential human goods, necessary to ensure 'good and proper order among persons, and in individual conduct' (Finnis 2011: 18).

Natural rights theory continues to play a significant role in contemporary human rights discourse. Many scholars maintain that human rights law developed out of natural rights theory and that it remains the appropriate philosophical justification for modern human rights, such that any new addition to the catalogue of human rights must satisfy the requirements of a natural right (Donnelly 1982: 403; Alston 1988: 26–27). Finnis considers human rights to be the contemporary idiom for natural rights, and he uses the two terms interchangeably (2011: 198). He does however distinguish human rights as natural rights from the list of rights guaranteed by international human rights law, and suggests that the realm of true human rights is in fact narrower than international doctrine would indicate (2011: 210).

As evidence that international human rights law has incorporated and is based upon the tradition of natural rights, we can look to the *Universal Declaration of Human Rights* (UDHR) (1948) and other prominent human rights instruments, which identify the source of human rights as the inherent dignity of the individual.[2] Article 2 of the UDHR (the terms of which are echoed in Article 2 of both the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966)) provides that human rights are guaranteed to all people regardless of race, nationality or social origin. These statements seem to confirm that contemporary human rights are natural rights, in that they flow from our existence as human beings, and are not a product of our social cooperation or membership of a community (Donnelly 1982: 403). Based on this reasoning, scholars like Jack Donnelly have argued that any right which does not satisfy the requirements of a natural right cannot be considered a human right at all.

Clearly, if we seek a justification of the right to good environment on a natural rights basis we must establish that such a right satisfies the definition of a 'natural right'. A similar examination was conducted in the 1980s in relation to the proposed right to development.[3] The scholarly debate surrounding the philosophical and legal justifications for that new right is instructive and reveals a number of key considerations which will be addressed in the following sections (Donnelly 1984, 1985a, b; Alston 1985, 1988; Shelton 1985; Gros Espiell 1981; Marks 2004; Rich 1984).

[2]The Preamble of the UDHR states: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' The inherent dignity of the person is also recognised in preambles of the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966), which both recognise 'that these rights derive from the inherent dignity of the human person'.

[3]The right to development was first proposed by the Commission on Human Rights in 1977 (Resolution 4 (XXXIII) (21 February 1977)) and was later enshrined in the *Declaration on the Right to Development*, a resolution passed by the General Assembly in 1986 (GA Res 41/128). It is not recognised in any international treaty but it has received widespread support and was recognised by a consensus of States at the Vienna World Conference on Human Rights in 1993 as a 'universal and inalienable right': *Vienna Declaration and Programme of Action* (1993).

5.3.1 Characteristics of Natural Rights

As a preliminary requirement, in order for a right to be classified as a natural right it must be of such a quality as to be indispensable to living a life of dignity. Adopting a natural rights account of human rights, it is clear that not all things that we consider to be good for individuals or for society, or which we aspire to achieve, or to which we are legally entitled, are human rights. Donnelly addresses this point in relation to the right to development, and argues that, while there may be a moral justification for pursuing development, 'not all moral "oughts" are grounded in or give rise to rights… we do not *have* rights, in the strict and strong sense of titles and claims, to everything that *is* right' (Donnelly 1985a: 490). He argues that modern human rights discourse too often conflates 'rights and righteousness': '[c]ollapsing rights… with mere righteousness is a self-defeating strategy which emasculates the alleged "right" and provides no additional force to claims for development' (1985a: 491). To qualify as a human right, the relevant claim must therefore be 'essential to one's standing as a moral person, one's status as a full human being' (Donnelly 1982: 404).

A related requirement of natural rights theory is that each right must be capable of independent justification. This can be contrasted against claims which are said to be implied from other rights, or derived from a synthesis of a number of more traditional rights. Donnelly identifies that these sorts of constructions are characterised by what he calls the 'instrumental fallacy' (1985a: 488). This is the reasoning by which human beings are argued to have a right to anything which is instrumental to or beneficial in achieving some other human right. Donnelly argues against this proposition: '[s]imply because *A* requires *x* to enjoy *r* does not entail that *A* has a right to *x*' (1985a: 484). In relation to the right to development he considers the argument that development is necessary to achieve the right to self-determination. He argues that self-determination only represents a right to pursue development; it cannot be seen to justify a right to development in and of itself. Similarly, Donnelly also argues against the right to development as a synthesis of more traditional human rights. He argues that it is not sufficient justification that the right to development supports or brings together existing rights; it needs to be justifiable in its own right (1985a: 484).

In relation to the right to a good environment, this approach would specify that, while it is axiomatic that a good environment is necessary for the enjoyment of good health and an adequate standard of living, this does not entail that we have a right to a good environment. Rather, a good environment would need to be established in its own right as something essential to human dignity, and not merely something which supports the fulfilment of other rights.

Because human rights flow from the fact of being human and the special quality of human dignity, they are not dependent on social membership or any collective relationship. From this it has been argued that human rights, at least as conceived within natural rights theory, belong only to individuals and not to collective entities (Donnelly 1985a: 497). There may of course be rights which require collective

action to fulfil, or which are most effectively delivered on a collective basis. It also goes without saying that all members of our society (or whatever group of individuals we might choose to define) will each possess the same set of rights. However, these facts do not mean that the rights are possessed by the group as a collective, but rather individually by the members of that group. This approach has led some scholars to argue that the collective rights found in international human rights law, most obviously the right of peoples to self-determination, are distinct from human rights proper (Donnelly 1985a; Cranston 1973).

However, other scholars have argued in favour of the moral rights of collective entities, such as States, peoples or ethnic minorities. Van Dyke, for example, has disagreed with natural rights theory's focus on individual rights, stating that 'Hobbes and Locke had no basis for assuming that individuals were the only significant, or the crucial units, in the state of nature' (1982: 39). But rather than argue in favour of an expanded natural rights theory which would accommodate the rights of collective entities, van Dyke argues that the theory itself fails to give adequate account for rights which he argues derive not from human dignity but, following Dworkin's theory of rights, from human interests. He argues that a moral right is a 'claim or entitlement that ought to be honoured if justice is to be done or the good promoted' and that 'human beings have those rights that are essential to the pursuit of their most basic interests and the satisfaction of their most basic needs' (23).

Philip Alston, writing in regard to the right to development, acknowledged that the collective dimension of the right gives it a character which is essentially incompatible with recognised rights, which are constructed on individualistic foundations (1988: 25). 'If we accept this conclusion, then it follows that any determination as to whether group rights are acceptable as human rights depends in turn on their compatibility with natural rights theory' (26). But he disagrees that we ought to be limited by natural rights theory in relation to group rights:

> My own assumption is that it is a matter of human decision what kinds of units are accepted as right-and-duty bearing units and what kinds of rights they shall have. It comports with past practice and common sense to hold that we are free to make comparable decisions with respect to groups (27, note 86).

Other authors such as Crawford (1988) and Brownlie (1985) have argued that human rights should be extended to groups. Brownlie argued that the classical approach to human rights which views rights as belonging to individuals, and the interests of groups thus protected through the protection of the rights of the individuals which comprise those groups, is too limited to ensure adequate protection of the legitimate claims of communities (1985: 105). Crawford has argued that the rights of groups should be recognised where those rights are necessary to protect and promote the interests of ethnic and religious minorities and other collectivities (1988).

Applied to the right to a good environment, these counter-arguments would not reject the right simply because it is constructed as a group right. However, they do not present an argument for group rights as part of the natural rights tradition.

Rather than arguing that it is wrong to insist that natural rights must be individual rights, these arguments rest instead on a refutation of natural rights as the dominant theory of human rights. Given that we are seeking here to test whether natural rights could justify the right to a good environment, their comments do not seem to advance our cause. According at least to the predominant theory of natural rights, the right to a good environment would have to be defined as an individual right in order to be justifiable.

We can therefore identify three criteria for new rights following a natural rights approach:

1. The right must be necessary to advance human dignity and a life worthy of a human being;
2. The right must be independently worthy, that is, it must not be a mere restatement of existing rights and it must avoid the instrumental fallacy; and
3. The right must be an individual right, deriving from individual dignity not social membership.

The following section will consider whether and how these requirements might be met in relation to the right to a good environment.

5.3.2 *Compatibility of the Right to a Good Environment with Natural Rights Theory*

In relation to the right to a good environment, the three requirements listed above demand that we show that a good environment is necessary for advancing human dignity and for ensuring a life worthy of a human being, but we must also prove this necessity without relying on other rights which are already recognised. It is not sufficient, for example, to argue that a good environment is necessary because it provides a means of subsistence, an adequate standard of living, economic prosperity or good health. It would also not be enough to argue that the environment has some inherent value which we are morally obliged to protect. We must be able to identify some independent and indispensable contribution that a good environment makes to the pursuit of human dignity.

This requirement would seem to rule out some of the formulations of the right which are found in the literature. The suggestion of scholars such as Symonides that guaranteeing a right to a 'clean, balanced and protected environment' is necessary because such environmental conditions are fundamental to the enjoyment of other rights clearly fails to avoid the instrumental fallacy (1992: 29). So too does Downs' proposal of a third generation right, possessed by groups, which she argued is necessary to facilitate the enjoyment of first (civil and political) and second (economic, social and cultural) generation rights (1993: 352). Similarly, formulations which construct the right to a good environment as a 'compendium' (Rodriguez-Rivera 2001) or 'synthesis' (Cullet 1995) right—one which draws

together the environmental dimensions of a number of other guaranteed rights—would also fall short of meeting the requirement for an independent, substantive justification.

The notion of a solidarity or collective right to a good environment is a common suggestion in the discourse around environmental rights. Enjoyment of the environment clearly has a collective dimension, as it is something that we experience and benefit from in community with other members of society (and other members of the ecosystem). The shared nature of our relationship with the environment would make it difficult for individuals to engage the right in the same way we can seize upon other individual rights and liberties (Gravelle 1996–1997: 636). Several authors have supported the idea of a third generation right, belonging to peoples or communities (Downs 1993: 351, 365) or a solidarity or collective right which, although belonging to individuals, requires collective action to secure its fulfilment (McClymonds 1992: 591; Symonides 1992: 39; Lee 2000: 297). This sort of formulation could incorporate both individual and collective elements to account for the fact that some forms of environmental degradation are best understood as group claims.

However, natural rights theory would require that the environment be constructed as something which each individual enjoys because of his or her humanity, not something which flows from our membership of the community or shared reliance on the environment to fulfil our basic needs for food, water and shelter, good health and social interaction. Group rights and synthesis rights which are designed either to recognise the importance of the environment to other rights, or to facilitate collective action, do not accord with natural rights theory's requirement that a human right be justified on the basis of an essential connection with individual human dignity.

Alternative arguments could be advanced that the environment comprises ecosystems, species and natural spaces which have inherent value and which we are obliged to protect. While this would view a good environment as something more than a 'mere aspiration', imposing upon us a moral obligation to protect other species and ecosystems, the source of that obligation would not be our own human dignity, but rather the inherent value of the environment itself. It would not, therefore, be a sufficient basis upon which to describe a human right which is consistent with the requirements of natural rights theory.

The challenge then is to find a way to construct a good environment as something which is essential to our fundamental human dignity without casting it exclusively as something which facilitates the enjoyment of other basic human rights. One possible solution to this problem relies on a reconceptualisation of human nature so as to view human beings as being part of the ecosystem, on an equal footing with other non-human species, similar to the view of humans which can be found in the discourse of deep ecology (Naess 1995; Devall and Sessions 1985; see Sect. 5.5 below). In this way the quality of the environment as a whole could be seen to influence the quality of our lives within it, and degradation of the environment would be seen as degrading all of its component parts. However, this represents a radical departure from the classical concept of natural law, which

attributes a special character to human dignity. While natural rights theory does allow for various conceptions of human nature, it is argued that such an extreme divergence could not be accommodated within that theory, but would represent some other kind of justification.

It seems therefore that it is not possible to formulate a right to a good environment in a way which satisfies the requirements of natural rights theory. While the environment is clearly essential to our ongoing well-being, and has its own inherent value which we are arguably morally obliged to recognise and protect, neither of these factors is capable of establishing a good environment as something which is essential to our human dignity, at least not without relying on some already recognised right as an intermediate link.

Given this conclusion that natural rights theory does not support a right to a good environment, we must turn to other approaches in search of a theoretical justification. While natural rights theory has had a clear influence on the development of international human rights law, it is not the only place to look when seeking theoretical support for new rights. Philip Alston has argued that, although human rights law may have developed from classical theories of natural rights, its philosophical heritage is by no means pure. He argues instead that human rights is a 'hodgepodge', which is 'not easily pigeon holed, analogised or catalogued in terms of one or another theory of moral, neutral or legal rights' (1988: 32). Instead, we should recognise the pluralistic nature of the philosophical foundations of human rights. He says:

> International human rights law moves uneasily between straightforward positivist assumptions which effectively eliminate the philosophical dimension … and the continuing use of philosophical argumentation to justify the application of norms in situations where convention-based obligations have not been formally accepted (1988: 29).

It is therefore appropriate and necessary to consider alternative theories of rights in order to establish whether a new right to a good environment could be theoretically justified. The discussion below examines the right to a good environment from the perspective of a number of other major theories of rights, namely will theory, interest theory and cosmopolitanism.

5.4 Will Theory

One alternative theory which has been used to explain human rights, and which could provide a philosophical justification for the right to a good environment, is will theory (sometimes also called 'choice theory'). This theory assumes that rights flow from each individual's ability to choose and exercise free will. As Finnis explains, under will theory:

> The point and unifying characteristic of rules which entail or create rights is that such rules specifically recognise and respect a person's *choice*, either negatively by not impeding or

> obstructing it (liberty and immunity) or affirmatively by giving legal or moral effect to it (claim-right and power) (2011: 204).

One of the principal proponents of will theory was HLA Hart, who described rights-holders as 'small scale sovereigns' (1982: 183). According to will theory, to have a right is to have 'the ability to determine what others may and may not do, and so to exercise authority over a certain domain of affairs' (Wenar 2011). The theory has links to Immanuel Kant's critical philosophy, which reasons that a person cannot be used as a means to an end but is an end in him or herself, and is entitled to autonomy and dignity as an individual with free will and the capacity for moral choice (Kant 2002). For Kant, human autonomy is the source of all laws of nature, and moral rules derive from human reason.

From this assertion of human autonomy as the defining human characteristic, will theory suggests that to have a right is to have the ability to limit or direct the actions of others. The function of a right is therefore to give the right-holder some control, particularly a control over another's duty. In Finnis's explanation above he utilises the language of Hohfeld's analysis of rights. Hohfeld sought to deconstruct rights language so that any transaction or relationship could be described in terms of four basic elements. These 'incidents of rights' are the privilege, the claim, the power and the immunity (Hohfeld 1978: 35–68; Finnis 2011: 199–201). To use this framework, will theory would conceive that each right must include a 'power' over a 'claim'.

A 'claim-right' is one which has a corresponding duty, such that the duty-bearer's duty is directed at the holder of the claim. For example:

> *A* has a claim that *B* Φ *if and only if B* has a duty to *A* to *Φ* (Finnis 2011: 199)

A 'power' is the Hohfeldian incident which enables the right-holder to alter another's Hohfeldian incidents. For example, a right-holder may have the power-right to waive their entitlement, by excusing a duty-bearer from the obligation to perform a certain act. A property owner has a claim-right to be able to exclude others from entering their property (with a corresponding duty on others not to enter) but they also possess the power-right to allow people to enter if they invite them to visit. Similarly, an individual's right to privacy encompasses a claim-right to be free from interference with their personal correspondence, and a corresponding duty on others not to intrude, but each individual also has a power-right to share personal information, thereby waiving their right to privacy in certain circumstances. Hohfeld's power-right incident is essential to the will theorist's view of what a right is, as it emphasises the centrality of human autonomy and free will.

A number of issues arise when we consider whether will theory would support the right to a good environment. Firstly, it is questionable whether will theory would support any form of collective or solidarity right. The emphasis on human autonomy would suggest that will theory would only accept rights which flow from an individual's inherent free will, and not from any social organisation or relationship. As with natural rights theory, will theory would seem to dictate that

any right to a good environment must be defined as an individual right and not a collective or third generation right.

Another requirement imposed by will theory is the need for the right to be capable of expression as a right which involves the 'power' element of Hohfeld's description. Since rights under will theory must flow from human autonomy, there appears no scope for rights over which the right-holder has no control—rights which could be described as being 'unwaivable'. It is argued that a right to a good environment would be an unwaivable right. Even if the right is defined as an individual right, the shared nature of the environment would make it difficult to conceive of a way for one individual to waive their right to a good environment without impacting on the equivalent right of other right-holders. An individual right-holder could not be said to have autonomous control over their enjoyment of the right where that enjoyment is susceptible to being diminished or destroyed by the waiver of another individual right-holder. The interconnectedness and interdependence of individuals' rights would seem to negate any one individual's power-right, suggesting that the right to a good environment cannot be justified using will theory.

It may be possible to adjust the way the way we conceive of a right to a good environment in order to make it compatible with will theory but, as will be shown, in doing so the objective of environmental protection is undermined. One possibility involves adopting a narrow definition of the environment, viewing it as referring to an individual's localised surroundings, such that one person's actions with respect to their environment would not impact on another's enjoyment of their environment. This definition presents two problems however. Practically, the definition ignores the reality of environmental systems. It is not possible to disconnect the elements of the environment and the natural systems and processes which comprise it so as to guarantee that one person's actions will not affect anyone else's rights. Further, this segmented view of the environment is antithetical to the understanding of the environment and our relationship to it which has prompted calls for the recognition of the right in the first place. It perverts our usual understanding of the environment as comprising interconnected natural spaces, ecosystems and biodiversity, not capable of division into individualised units. Doing so would arguably conceptualise the environment in a way which is counterproductive to the right's intended purpose, by making the environment a thing which each of us has at our own disposal, to do with as we choose. Such a construction would empower individuals to destroy the environment according to their will, rather than strengthen environmental protection for the good of humanity and the environment itself.

A second possible conceptualisation of a right to a good environment which might be compatible with the waivability requirement inherent in will theory is based on the assumption that our right to a good environment imposes a corresponding duty on the State to protect the environment for the benefit of individual right-holders. Under will theory an individual should be able to waive that right and

permit the State to harm the environment. This could arguably be achieved through democratic processes, allowing States to carry out environmentally harmful activities based on the consent they have received from individuals through informed decision-making and following lawfully-established processes.

This conceptualisation allows for an understanding of the environment which is more realistic, as it recognises our common interest in the environment and the interconnectedness of environmental components, but it relies on a more limited construction of individual autonomy. Will theory creates rights and duties based on individual claims, powers, privileges and immunities, and these must be understood as arising from individual will, and not dependent on the State. While the State may be the bearer of duties which correspond to our rights, it is not the only such duty-bearer; other individuals will bear duties as well.

Even if we accept that individuals can collectively waive their right to a good environment with respect to the State's duties through democratic decision-making, an individual cannot waive their right independently of this process without impacting on the enjoyment of the environment by others, including their ability to waive their own rights in the same fashion. The common concern we all have in the environment ultimately makes it something which cannot be reduced to individualised claims and powers such as are envisaged by will theory.

The unwaivability of the right to a good environment suggests that it cannot be satisfactorily explained by a will theory account of human rights. It is arguable that international human rights law already recognises other unwaivable rights—MacCormick suggests that freedom from slavery is one such right (1997: 195–196), and similar arguments could be made for other rights such as freedom from torture and arbitrary detention. However rather than indicate that will theory could accommodate the right to a good environment, this seems best understood as suggesting that not all rights within international human rights law would meet the test for a right under a will theory approach, and are instead justified by an alternative philosophical account (freedom from slavery and arbitrary detention, for example, are easily accounted for under natural rights theory).

Another challenging issue exists in relation to the possibility of future generations being right-holders under will theory. Any careful examination of the relationship between the environment and human rights will inevitably take into account the potential impact our present activities may have on the ability of future generations to enjoy an environment of comparable quality to that which we enjoy. The interest of future generations in the environment was a key component of Edith Brown Weiss's theory of intergenerational equity (1989), which prescribes that present generations are obliged to leave the planet in no worse condition than they received it, in order to ensure that future generations have equitable access to its resources. Drawing on Rawls' *Theory of Justice* (1971), Brown Weiss developed a concept of intergenerational justice which incorporates three key principles. These are (1) conservation of options (requiring the conservation of diversity in the natural

and cultural resource base); (2) conservation of quality (requiring that we leave the planet in no worse condition than we found it); and (3) conservation of access (requiring equitable access to the use and benefits of the planet's resources) (Brown Weiss 1989).

Several authors have identified the interests of future generations as a key issue to be resolved in the formulation of a right to a good environment. Shelton has noted that the right would imply 'significant, constant duties towards persons not yet born,' since future generations will be unable to enjoy the same economic, social and cultural rights in a world depleted of resources by the actions of past generations (1991–1992: 134). Hiskes (2005) argued that a right to a safe environment would need to extend to future generations, but acknowledges that this would create problems in trying to fit the right within current human rights theory. Atapattu (2002–2003) has similarly argued that the fact that environmental problems will affect future generations is one of the reasons why current human rights are not well-suited to addressing environmental problems. This therefore raises the issue of whether the right to a good environment can be constructed in a way which acknowledges it as a right of future generations as well. Whether it is possible to recognise rights belonging to future generations at all is a subject of some contention, which will be considered in more detail in Chap. 9. Applying will theory it would seem that no such rights could be accepted as members of future generations clearly cannot exercise free will, nor are they capable of claiming or waiving their rights in the Hohfeldian sense.

As a result of will theory's focus on the autonomy of each individual, the class of rights-holders is limited to those capable of exercising free will and control. Following this reasoning, Hart stated that it would be wrong to speak of the rights of babies or animals (1955). This would seem to suggest that the class of rights accepted by will theory is narrower than those already accepted in international law. Some rights which are recognised by international human rights law, for example the rights of young children under the *Convention on the Rights of the Child* (1989), or the rights of persons with intellectual disabilities or who otherwise lack mental capacity, would be excluded by will theory. It would similarly rule out any component of the right which was constructed for the benefit of future generations, since they have no capacity yet to make decisions, discharge obligations or make a legal claim on their own behalf.

Taking the above considerations into account, it is difficult to conceive of a definition of the right to a good environment which would fit with the concept of a right under will theory. The unwaivable nature of the right to a good environment makes for an uneasy fit with the rights traditionally justified by will theory, and the theory's inability to make room for the rights of future generations would significantly limit the application of the right. It appears necessary to continue exploring other possible alternatives for a theoretical grounding of the right to a good environment.

5.5 Interest Theory

Since neither natural rights nor will theory provide an appropriate justification for a right to a good environment, we must look elsewhere for theoretical support for the right. The work of Joel Feinberg in relation to the rights of animals and future generations may point us in the right direction. Feinberg argues that it is possible to conceive of an explanation for human rights that accounts for the rights of future generations if we rely not on individuals' autonomy, but on the need to protect their fundamental interests: 'The identity of the owners of these interests is now necessarily obscure, but their interest-ownership is crystal clear, and that is all that is necessary to certify the coherence of present talk about their rights' (1971). This brings us to a third possible philosophical justification for the right to a good environment, interest theory, which may provide a more suitable theoretical framework for understanding the right to a good environment.

Interest theory offers an alternative explanation for why certain things are considered 'rights'. According to interest theory, rights are those things that human beings are entitled to claim because they are necessary for their well-being or to further their interests. As an alternative to will theory it is capable of explaining both unwaivable rights and the rights of those who lack capacity. It also seems to explain the connection we intuitively sense between holding rights and being better off (Wenar 2011).

Joseph Raz developed an interest theory of rights. He argued that a person has a right to *X* when *X* is a fundamental interest that is weighty enough to impose obligations on others (1986: 166). Simon Caney has adopted Raz's explanation of human rights and applied it to the issue of climate change (to be discussed in more detail in Chap. 9). As Caney explains, 'we ascribe rights to protect highly valued interests (such as liberty of conscience, association, and expression) and our standard ascription of rights is guided by our account of what persons' most important interests are' (2006: 259, 2008).

Feinberg has argued in favour of rights for animals and future generations based on a version of interest theory. He argued that anything can have rights where it is capable of having interests, that is, where it can have a 'good' or 'well-being' of its own which should be protected by legal or moral rules (1971: 5). On this account he excludes as rights-holders 'mere things' which have no capacity to have desires or aims, arguing that the cognitive capacity to formulate desires or wants is the foundation of interests. He argues that neither individual plants nor whole species can have interests sufficient to give rise to rights, but that individual animals, babies or future generations can possess the sorts of interests capable of giving rise to rights (1971: 6; see also Van Dyke 1982: 39; Moller Okin 1981: 230; Miller 1976: 67).

If the right to a good environment is to be justified according to interest theory we must be able to show that a good environment is necessary to achieving some human interest. At first glance this seems intuitively straightforward: protection of the environment is something which concerns most people and few would argue

against the general proposition that a good or healthy environment is preferable to an unhealthy or degraded environment. For example, Hayward has argued that 'an adequate environment is as basic a condition of human flourishing as any of those that are already protected as human rights' (2005: 11). However, the question of exactly why a good environment is in the human interest has significant implications for how we might define the right to a good environment.

As illustrated in Chap. 2, a good environment is necessary for the enjoyment of a wide range of human rights, and it is accepted that environmental degradation can in certain circumstances amount to a violation of human rights which are protected under law. In this sense, a good environment can clearly be seen to be in the human interest, as an unhealthy environment has the potential to cause harm to humans in any number of ways.

However, the task here is to determine if the right to a good environment can be justified as an independent right, not reliant on other rights for its authority. For reasons which will be explored in more detail in the next chapter, in order to avoid criticisms of redundancy or unnecessary proliferation of human rights, it is important that the right to a good environment can be framed in a way which is more than a mere restatement of existing rights. If we are to justify the right to a good environment on the basis of interest theory, we need to show that a good environment is in the human interest for some reason other than its instrumental value in achieving other human interests (such as health, subsistence, economic prosperity etc.). The following discussion examines a number of possible arguments that a good environment per se is in the human interest, to determine if any of them are likely to justify a new human right.

Option 1: Humans have an interest in protecting the environment because it gives us pleasure and/or we are concerned for its protection

One option for explaining how the environment is in humans' interest is to argue that humans derive pleasure from experiencing the environment and comfort from knowing that the environment is in good condition (Feinberg 1971). For example, many people enjoy living near or visiting natural spaces, spending time in the environment and experiencing the beautiful, diverse and challenging landscapes within it. Beyond these direct encounters, many have a broader interest in protecting the environment and are concerned, for example, about the survival of tigers or polar bears in the wild, or the conservation of the Amazon rainforest or the Great Barrier Reef. Those of us who share these concerns would argue that seeing the environment protected is in our interest. However, very few of us would experience any direct or practical change in our lives if tigers or polar bears went extinct, or the rainforest or reef suffered irreparable damage. People who rely on certain species or natural spaces more directly, for example as species to hunt or fish, or as tourism destinations from which they draw a livelihood, would obviously have a more direct relationship, but their interest would then be described as something other than pleasure, and the loss of those species or spaces would have broader implications. For the rest of us, the argument is that we derive pleasure from experiencing the environment and knowing that it is protected, because we value nature and have concern for its welfare. There are a number of problems which arise in

attempting to transplant our interest in and concern for the environment into a right to see it protected however.

First, a distinction needs to be drawn between being interested in the conservation of the environment and having an interest in that outcome sufficient to justify the protection of that interest as a right. Arguably there are many things which give us pleasure but which would fall short of being appropriate subject matter for human rights. For example, I may derive pleasure from playing a musical instrument, but that is not enough justification for declaring a right to play music. What is required is some closer link to my fundamental well-being, an interest derived from my basic needs, rather than a hobby which improves my quality of life.

The example of the musical instrument leads to another problem with seeking to justify the right to a good environment based on the claimed interest that humans may have in seeing the environment protected: concern for the environment, like playing music, is by no means universal. Not everyone has the same concern for the environment. While most people would claim an interest in their immediate environment as it affects them, many people may have no interest in the natural world more generally. Human rights, however, are said to be universal—they are rights which are guaranteed to all people. It seems difficult to justify a universal right to a good environment based on the concern that only some humans have for it.

Another problem with trying to justify the right based on the interest that humans have generally in the protection of the environment is identifying which individuals would be entitled to bring a claim. The legal enforcement and justiciability of the right will be considered in more detail in the following chapter, but if we are mounting an argument for the right to a good environment which can tolerate the fact that an individual may have no direct or personal involvement in any alleged breach, merely a concern or sentimental interest, then the class of claimants is potentially limitless. It would seem therefore that the fact that humans derive pleasure from the environment or are concerned for its protection is an inadequate justification for a right to a good environment based on interest theory.

Option 2: *Human beings are part of a global ecosystem which we have an interest in protecting*

Another possible argument for asserting that a good environment is in the human interest could be based on the fundamental tenet of the deep ecology movement that human beings are part of the global ecosystem and therefore have an interest in securing its continued survival (Devall and Sessions 1985; Naess 1995). Such an interest would not be limited to the particular human needs which are facilitated by the environment, but would extend to include an interest in the diversity and longevity of the natural world in general.

As noted in Chap. 3, deep ecology is a movement in environmental philosophy which posits that humans are an integral part of the environment, possessed of no more worth than nonhuman organisms (Redgwell 1996: 71; Fox 1990). Like other environmental philosophers, deep ecologists are concerned to locate a satisfactory ethic of obligation and concern for the nonhuman world. They attempt to 'find a rationale for a claim that nonhuman individuals merit the same consideration which

Kant thought should be extended to rational beings' (Grey 1993: 464–465). According to deep ecologists, 'all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth' (Gibson 1990: 13; citing Devall and Sessions 1985: 67). In the language of the founder of deep ecology, Arne Naess, the philosophy rejects the idea of 'human-in-environment' and instead sees 'organisms as knots in the biospherical net or field of intrinsic relations' (1995: 3). Flowing from this, it is held that 'the well-being and flourishing of human and nonhuman life on Earth have value in themselves … These values are independent of the usefulness of the nonhuman world for human purposes' (Devall and Sessions 1985: 70).

Reconceptualising humans' relationship with and role within the natural world could work as a way of establishing an interest capable of expression as a right under the interest theory. If we view ourselves as being one part of a larger ecosystem then we would clearly have an interest in the well-being of the system as a whole. However, if we are to view humans as being equal members of the ecosystem, as deep ecologists would suggest, then we would have to extend equal rights to all other members of the ecosystem. This is at odds with traditional human rights doctrines which, for better or worse, place a particular kind of value on being human. It should be noted that for these and related reasons deep ecologists are critical of the proposal to recognise a human right to a good environment, arguing that it wrongly privileges humans over non-human species (Redgwell 1996).

It does not necessarily follow that in acknowledging that non-human species may have rights we are precluded from adding a human right to a good environment, but it does create certain difficulties in terms of how the human right would operate. If we argue for a human right to a good environment based on an interest in the environment which we share equally with all other species, then we confront the question of how to prioritise our rights against theirs in the inevitable event that they conflict.

There is also the problem of identifying who would be an appropriate claimant where an alleged violation of the right to a good environment had occurred. If our right to a good environment flows from our equal membership in the global ecosystem then we are arguably all potential claimants should environmental destruction occur. Such a limitless class of claimants is unworkable. We could try to limit this class by requiring some special link to the harm in order to establish standing, but that raises the question of whether that nexus could be defined in a way which did not rely on interests which are the subject of other human rights.

If the human right to a good environment is to be practically workable then some more specific basis for it is required than our equal membership of the global ecosystem. While we all have an interest in seeing the global environment protected, such an interest is arguably too generalised to be an adequate grounding for a specific human right with any prospect of practical meaningfulness.

Option 3: The interests of future generations

A third possible line of reasoning flows from the presumption that future generations have an interest in having the environment preserved for them, so that they

might enjoy the same benefits of access and use that we have enjoyed. This interest creates a duty for present generations to see that it is achieved. Writing in relation to protecting particular animal species, Feinberg argues that

> We do have duties to protect threatened species, not duties to the species themselves as such, but rather duties to future human beings, duties derived from our housekeeping role as temporary inhabitants of this planet (1971).[4]

While we might be able to identify duties borne by current generations to protect the environment for the benefit of future generations, the problem lies in showing why that obligation translates into a right of present generations to a good environment. One possibility is that the right belongs to future generations, but is exercisable by present generations as caretakers of the environment they will inherit, to ensure that the right can be enforced while doing so still has potential to yield some positive outcome. However, practical challenges seem likely with this reasoning similar to those outlined in relation to the previous proposition. If the right to a good environment belongs to future generations then we need some way of identifying who is entitled to bring a claim on their behalf, and of proving that the right has been or will be violated.

At a more fundamental level, the duties we owe to future generations do not, as a logical consequence, give rise to a right to a good environment which we can claim to possess now. The interest which future generations have in our preserving the environment relates to the fact that the environment will be essential to the fulfilment of their other interests. That is, under an interest theory approach, the rights possessed by future generations, and which give rise to corresponding duties on the part of current generations, are rights to the same basic needs and interests which are already the subject of other human rights. They do not create a new right to a good environment for future generations, any more than our present interests in enjoying clean water, adequate food and good health create that right for people living today. Even though we arguably owe duties with respect to the environment based on the interests of future generations, those duties do not translate into a new right to a good environment.

5.5.1 Conclusion

While on first inspection it seems intuitively obvious that humans have an interest in maintaining a good environment, it is a difficult prospect to explain the precise nature of that interest without resorting to arguments which rely on the importance of the environment to the enjoyment of other human rights. Arguments which rely on a general concern for the natural world seem to lack the universal character or specificity necessary to transplant them into a human right. Reasoning based on our

[4]For further discussion of the application of human rights to future generations see Joel Feinberg (1981); Partridge (1990); Bell (2011); Gosseries (2008).

equal membership of the global ecosystem or the interests of future generations seem inordinately broad, and create significant other challenges in terms of the legal workability of the ensuing right.

If the legal and practical difficulties can be overcome—a question which will be addressed in Chap. 6—then the interest theory may have some potential as a justification for a right to a good environment, but it seems that whatever interest we claim will inevitably be very broad in nature, creating significant difficulties in arriving at a right with much legal or practical utility.

5.6 Cosmopolitan Theories of Human Rights

In addition to natural rights, will and interest theories, other theories of rights have been proposed by scholars seeking an alternative explanation for what human rights are and when they should be recognised in law. One such theory is that put forward by Charles Beitz, who rejected the natural rights explanation, arguing that it misrepresents the practice of human rights and ignores the important function that human rights doctrine is intended to perform (2009: 8). He has stated that the 'tendency to identify human rights with natural rights is a kind of unwitting philosophical dogmatism' (2003: 37). Beitz also argues that natural rights explanations are at odds with the historical development of human rights, citing the fact that the framers of international human rights law chose not to align that body of work with any one philosophical tradition, but preferred to adopt a doctrine that could be endorsed by a number of cultural, moral or religious perspectives (2009: 8).

Beitz proposes an alternative model to explain the various questions related to human rights: what kind of objects are called 'human rights', what responsibilities do they entail and what actions would they justify? In answering these questions he draws on the cosmopolitan school of political philosophy. Cosmopolitanism takes the position that all human beings are members of a single community and that as part of that community we have duties to assist others which are not limited by ideas of statehood or nationality (Kleingeld and Brown 2013). Beitz has been referred to as a 'Rawlsian cosmopolitan' (Blake 2008) because he takes the theory of justice developed by Rawls (1971, 1999; Beitz 2003: 38) and applies it to the global arena in order to draw conclusions about the way that rights and responsibilities should be distributed among all members of the international community to achieve just outcomes.

The liberal theory of justice which the Rawlsian cosmopolitans have developed seeks to examine international institutions and relationships and apply principles of justice to ensure that our institutions address inequalities and improve the position of those members of the international community who are worst off. This has given rise to cosmopolitan theories on human rights and how they can be used within international institutions to achieve justice. Thomas Pogge, another Rawlsian cosmopolitan, has argued that the fulfilment of human rights depends on the

structure of our global institutional order, and that that order may need to be redesigned in order to ensure the rights of all people (2000: 56).

In establishing a foundation for his theory of human rights, Beitz draws on Rawls' view of human rights as representing 'one element of a larger conception of public reason worked out for an international society of liberal-democratic and 'decent' peoples organised politically as States' (Beitz 2009: 96; Rawls 1999: 79–80). Human rights form part of Rawls' idea of the 'law of peoples'. These are the rules that the 'society of peoples' has developed to regulate their relationships and which justify political action or interference in each other's affairs (Rawls 1999: 79–80; Beitz 2009: 97). Rawls describes human rights as the special class of rights which are indispensable to any common idea of justice, the adherence to which is necessary for a State to have good standing in the society of peoples (Rawls 1999: 79–80). Rights are explained not as a list of entitlements discerned from human nature, but as the necessary conditions for political legitimacy of the State.

Beitz takes from Rawls the idea that we can define human rights according to the role they play within the discursive practice of public reasoning. From here he proposes his model of rights, which he bases on the observable elements of contemporary international human rights. The model describes human rights as possessing three features:

1. Human rights are intended to protect 'urgent individual interests' against certain 'predictable dangers' (2009: 109). Urgent individual interests are defined as those which are 'recognisable as important in a wide range of typical lives that occur in contemporary society' (2009: 110). Predictable dangers are also called 'standard threats'—they represent the kind threats to individual interests which are reasonably predictable in the circumstances in which the right is intended to operate (2009: 111).
2. Human rights apply in the first instance to the political institutions of States and create for those institutions three levels of obligation:
    a. To protect the relevant interest in the conduct of the State's official business;
    b. To protect the relevant interest against threats from non-State actors which are under the State's jurisdiction or control;
    c. To assist those who have suffered deprivation of the interest non-voluntarily (2009: 109).
3. Human rights are matters of international concern such that failure of a State to fulfil its first-level responsibilities may justify interference by 'second-level' agents. Such interference arises in the form of action to hold the State accountable for its violation, or the provision of assistance to the State to help it satisfy its obligations. It might also be action taken by other agents to step in and protect the relevant interest where the State is unwilling to do so (2009: 109).

From this description of the nature of human rights as they appear in international human rights doctrine, Beitz proposes a test for whether a specific interest should be protected as a human right:

1. The interest must have the kind of importance that would reasonably be recognised across a wide number of lives;
2. In the absence of the protections embodied in the right there is a real risk that States will behave in a way which threatens the interest;
3. The right can be accompanied by some form of permissible international action which would render the interest less susceptible to threat (2009: 111).

Addressing the test outlined above, we can assess whether the right to a good environment would be compatible with Beitz's concept of a human right. To begin with, we would need to show that a good environment is the kind of interest that would be widely recognised as important. If we take this to mean the same sort of interest that would translate into a right under interest theory, then all the same challenges exist as were raised in the previous section. We may however be looking for something less rigorous, given that Beitz speaks only of an interest which is important to a wide range of people, rather than something that is universal or essential to human well-being, and that this is not the only requirement for a right to be said to exist according to Beitz.

The degree of importance required for an interest to be regarded as a right could potentially be demonstrated in a number of ways in relation to the environment. One possibility is to frame the interest in terms of our need to ensure that we can continue to use our natural resources into the future. The need for some form of environmental protection to ensure sustainable resource use is an interest almost universally accepted as important. We might also express our interest in a good environment based on some reckoning of its inherent worth, by which we accord to plant and animal species, or even whole ecosystems, some value beyond what they can do for human beings. By accepting that the environment is a 'good' then it could be argued that we have an interest (and arguably also a moral obligation) in protecting the environment for its own sake.

As was discussed in the previous section, it could also be argued that we have obligations towards future generations to ensure that they have access to natural resources, as well as the ability to enjoy natural spaces. These obligations arguably give rise to a present interest in seeing the environment protected. There are therefore a number of possible ways of seeing a good environment as something which might satisfy the first of Beitz's requirements.

As well as demonstrating that the interest in a good environment has some widely recognised importance, Beitz's second requirement is one of necessity. We must be able to show that the protections embodied in a right to a good environment are necessary to prevent abuse by the State. What is required is proof that, were the right not to be recognised, the interests would not be adequately protected. This therefore implies that we take into consideration existing protections which act as restraints on governments' actions.

Looking at the possible interests suggested above, they involve sustainable use of resources, for our own benefit and for the benefit of future generations, as well as protection of the environment for its own sake, in recognition of its inherent worth. Arguably, a significant body of environmental laws are already in place to protect

the environment. In addition to these laws, there are already a number of human rights (outlined in Chap. 2) which operate to protect the environment. While there are certainly shortcomings in the application and enforcement of these laws, it is not clear that the situation would be any better with a new environmental right. It may therefore be difficult to show that the introduction of a right to a good environment within the international institutional framework is necessary to fill a gap in existing legal protections.

Beitz's third requirement, that the right can be supported by some form of international action, is least problematic. It is possible to conceive of international supervision and enforcement mechanisms for the right to a good environment along the lines of those which exist for other human rights within the international system. The effectiveness of these measures may be questionable, however, depending on how the right and its accompanying standards are defined. This question will be explored in more detail in the following chapter, where the practical, political and legal implications of the right to a good environment will be analysed.

If we are following Beitz's approach to cosmopolitan rights then the right to a good environment would also need to be defined as an individual interest. Although Beitz does accept the idea of collective rights in his model, he describes these as being interests of individuals the value of which is only explained by reference to their membership of a particular group, such as the right to self-determination or the right of members of a minority to participate in cultural practices (2009: 113). These rights remain individual rights, although they involve a clear collective element. Beitz's model would therefore dictate that any definition of the right to a good environment should construct it as a right of individuals, not of communities or groups, although it may be enforceable or exercisable in a collective manner.

If we consider then that Beitz's theory would require that the right to a good environment be defined both as belonging to individuals and as independent of other rights, we run into the same sorts of difficulties that were canvassed above in relation to natural law and interest theory. In order to be necessary, the right to a good environment must be defined independently of other human rights, but it is difficult to find a sufficiently compelling way to describe an individual's interest in a good environment without relying on the links between the environment and other recognised rights.

5.7 Conclusion

Many of the theoretical questions which surround the right to a good environment have been considered in relation to the right to development since it was first suggested in the 1970s. In spite of the widespread support which has been expressed for the right to development by scholars, NGOs and States, it remains a contentious subject, and there is still little agreement as to its content or practical application (Alston and Goodman 2013: 1528; Marks 2004; Vandenbogaerde 2013). As a result it has contributed little to the cause of human development, at

least compared with other applicable human rights such as the right to an adequate standard of living or the right to the highest attainable standard of health. The right to development demonstrates the need to exercise caution in the expansion of human rights as, while new rights may appear to promise profound benefits, without a solid theoretical justification they may prove to be of little practical advantage and can detract from other human rights-based efforts to address broad-based challenges.

In searching for a theoretical justification for the right to a good environment, this chapter has considered a number of different theoretical perspectives on human rights. It has sought to identify answers from each theoretical approach to the questions 'where do human rights come from?' and 'what sorts of things should be human rights?' In so doing, it has considered whether the right to a good environment would be compatible with any of the theoretical approaches and whether they would impose any conditions on the definition of the right.

The several theories presented here employ different reasoning in answering the first question: 'where do human rights come from?' Natural rights theory argues that rights come from our inherent human dignity, while will theory derives human rights from individual autonomy and freedom of choice. Interest theory would recognise as human rights those things which are essential for human well-being or which are in the human interest. Cosmopolitan approaches, such as that presented by Beitz, would argue that human rights are a necessary part of achieving international justice among all individuals.

While the particular approaches differ, a number of common conclusions are revealed when they are each applied to the right to a good environment. First, it is clear that all theoretical approaches require some link to fundamental human qualities or needs, leading to some similar answers to the question of 'what sorts of things are human rights?' As a consequence of their emphasis on essential human needs and characteristics, the different theoretical approaches consistently reject recognition of new rights which are merely repetitive of existing rights, or which are justifiable only on the basis that they seek to protect things that are already recognised as rights.

These two factors—the need for some link to essential human qualities or needs, and the imperative to avoid reiteration or duplication of existing rights—combine to present a significant challenge in seeking to justify a right to a good environment on the basis of current human rights theory. The challenge lies in explaining how a good environment is essential to human dignity, autonomy or well-being without describing our relationship to the environment by reference to existing rights.

Our dependence on the environment as a source of sustenance and natural resources, and its fundamental role in securing our livelihoods and health, and facilitating our social and cultural lives, are undeniable. These aspects of our relationship to the environment, however, are already protected by the rights such as the rights to health, to food and water, to an adequate standard of living and to self-determination, the environmental dimensions of which are increasingly recognised in international law and in human rights jurisprudence.

This leaves the question then of what is left which could form the basis of an independent right to a good environment. One possible approach to overcome this challenge is to conceive humans' relationship to the environment as being one of interdependent equality, where we are just one part of an integrated ecosystem. In this way we might argue that we have an interest in the health and welfare of the entire ecosystem, without needing to show a particular significance for our own personal well-being.

However, such a reconceptualisation of humans' place within the environment creates other potential incompatibilities with human rights theories, including the potential breadth of the class of rights-holders it would produce, and a diminished emphasis on the significance of human dignity, autonomy and other essential human qualities, which are at the heart of human rights theories in the first place.

It is therefore difficult to identify an undisputed justification for the right to a good environment based on the commonly accepted theoretical approaches to human rights. This is not to conclude that an alternative justification could not be found, or that international law-makers would not, or should not, go ahead and adopt the right in spite of its uncomfortable fit with traditional theories. However, the common attitude is that human rights law reflects those basic entitlements which flow from our humanity and that the law is based on the philosophical foundations of rights. The more tenuous the link to those foundations, the less likely it is that a new right will receive the widespread support required to elevate it to the status of a legal human right.

Should it be considered worthwhile to persevere with recognition of the right regardless of its problematic theoretical basis, there are a number of other legal and practical considerations which will need to be confronted. These include determining who would have standing to bring a claim for the enforcement of the right and how they would prove that their right had been violated. The following chapter will examine the legal and practical requirements for introducing a new right to a good environment and the implications these would have for the scope and content of any right which was to be recognised.

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Chapter 6
Legal, Practical and Political Implications of Expanding Environmental Human Rights

Abstract In recent years there have been many calls for greater recognition of environmental human rights within international human rights law, and particularly for the proclamation of a human right to a good environment. As creators of international law, nation States have the power to respond to these calls through the enactment of a new treaty or modification of existing laws. Yet, as this chapter argues, there are many factors which are likely to influence States' actions in this area, and a number of important legal and pragmatic issues which need to be considered in determining how any new rights should be constructed. Particular care is required to ensure that new rights are meaningful and do not risk undermining the integrity of the international human rights framework as a whole. This chapter argues that there are significant challenges in formulating a right to a good environment which is suitable for inclusion in international human rights law and likely to attain the necessary support from nation States, suggesting that the protection of environmental human rights would be more effectively achieved through the clarification and articulation of obligations under existing human rights.

6.1 Introduction

Human rights possess a special kind of moral weight, derived from their connection with fundamental human dignity and autonomy. If we are to respect and preserve this moral weight then we need to take care that any new rights proclaimed within human rights law are compatible with the philosophical foundations of that law. This ensures that new rights are not trivial, but rather that they can be justified on the grounds that they are necessary to protecting human dignity and freedoms, or fulfilling basic human needs.

The analysis in the previous chapter demonstrated the difficulty of conceptualising environmental human rights in a way which is supported by the principal theories of human rights. Explanations for why the environment is necessary for human dignity, autonomy or well-being are invariably restatements of the environmental dimensions of other rights which are already protected under law.

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Alternatively, explanations can be advanced which rely on a reconceptualisation of humans' relationship with the environment but these seem incompatible with the underlying assumption of human rights theories that there is some special value attached to being human. For these reasons, the previous chapter argued that it would be difficult to construct a definition of the right to a good environment which is consistent with human rights theory. These challenges are present for environmental human rights generally, but are particularly problematic when we consider the question of proclaiming a standalone human right to an environment of a particular quality, currently absent from international human rights law.

While the theoretical aspects of the right to a good environment remain relevant, this chapter broadens the analysis to look at how environmental human rights work in practice by considering the legal, pragmatic and political dimensions of expanding environmental rights within international human rights law. The chapter recognises that international law is the law of States and that ultimately the question of which new rights will be admitted is determined by whether States are prepared to recognise them, either in the form of a treaty or other legal or normative instrument, or as customary international law. With this in mind, the chapter considers a number of factors which might influence States in agreeing to be bound by a new human right which might shape the process of making such a decision.

As was noted in the previous chapter, States may decide to recognise a new human right regardless of its theoretical implications, but they are unlikely to support a right which bears no resemblance to the traditional idea of a 'human right'. States' views on what human rights are (or what they should be) are therefore relevant to whether they are likely to support a new right. As such the theoretical issues raised in the previous chapter represent one factor which can influence States' behaviour in this regard. Other factors can be derived by looking at the sorts of rights which have already been accepted as law, and the way in which these are implemented and enforced. Successful proposals for new rights typically need to relate to an objective which is broadly desirable and which States are able to achieve (at least progressively), and they need to be defined with sufficient precision to allow the articulation of appropriate obligations and standards. These sorts of requirements also help ensure that new rights are meaningful, and that we do not undermine the value of existing rights by proclaiming new rights which are trivial, unnecessary or not able to be enforced. In this way we seek to develop new rights which are not only compatible with the theoretical foundations of human rights, but are also sufficiently precise and ambitious to make them meaningful, different and independent from other rights so as to make them necessary, and appropriately flexible and achievable to attract the support of States.

The chapter begins by examining the tension between dynamism and proliferation in human rights law—the need for international human rights law to be responsive to emerging needs and challenges while maintaining the normative force of the concept of human rights by avoiding unnecessary proliferation. In response to this, a number of scholars have identified criteria which could be used to assess proposals for admitting new rights. While there has been scholarly debate surrounding the best criteria to use for identifying new rights (Alston 1982; Ramcharan

1983; Gibson 1990; Marks 2004), and indeed some scholars have argued that there is little point trying to establish a definitive list of criteria (Alston 1982: 616–617), the discussion around this issue provides valuable insight into the sorts of factors which need to be considered when pursuing greater legal recognition of environmental human rights.

While these issues are relevant to any form of environmental human right which is put forward for inclusion within international human rights law, the right to a good environment (or a variation of that concept) is the most likely candidate. As will be shown, there are a number of issues which are likely to affect States' attitudes towards the right to a good environment and several matters which will need to be clarified, such as the scope and content of the right, the standards which it would impose on duty-bearers, and practical matters relating to its implementation and enforcement. This chapter identifies these matters as requirements which would need to be addressed in order for legal recognition to proceed, and evaluates the likelihood that a satisfactory definition of the right to a good environment can be devised which meets these conditions and is also able to attract the necessary support of States to secure international legal recognition. It concludes that there are significant legal, practical and political challenges which will need to be overcome if the right to a good environment is to achieve recognition within international human rights law, pointing to the fact that environmental human rights would be most effectively employed in the form of existing human rights, rather than through a standalone environmental right.

6.2 Balancing Dynamism and Proliferation in International Human Rights Law

In Chap. 4 the sources of international law were examined in order to determine the current legal status of the right to a good environment. This survey was conducted on the basis that, as Bertrand Ramcharan has said, '[t]he determination of what are international human rights is a matter that belongs, in the final analysis, in the domain of international law' (1983: 267). He has stated that '[t]he question whether a particular international human right exists is a normative one, to be determined by reference to the law-creating processes or the law-determining agencies of international law' (1983: 267). But, as Stephen Marks has said:

> Anyone who has studied international law knows, however, how exceedingly complex it is to determine what the exact rules are. In the field of human rights this determination is rendered even more problematical by the temptation to believe that a desirable proposition is a human right and to rely on the slightest evidence, such as a resolution of the General Assembly of the United Nations, to prove it (2004: 436).

The analysis presented in Chap. 4 concluded that, while there are many statements referring to the interrelated nature of human rights and the environment, and a number of regional, national or soft law proclamations of environmental human

rights in some form, as yet no authoritative source of international law recognises a clearly defined right to a good environment as a human right. However, there is nothing to prevent States from recognising a human right to a good environment, or any other human right, should they choose. States, and the international organisations to which they belong, have exercised this power to proclaim new rights in the past, with a number of rights being acknowledged since the initial adoption of the *Universal Declaration of Human Rights* in 1948 and the two International Covenants of 1966.[1]

This ability to recognise new rights is an essential quality of contemporary human rights (Ramcharan 1983: 280; Mutua 2007: 619; Bilder 1969: 175; Marks 2004: 451). Human rights law must be adaptable to changing international issues and emerging threats, and therefore some degree of dynamism within the system is necessary. As Ramcharan says

> It is fallacious to confine the definition of human rights only to traditional categories or criteria. There are ongoing processes of discovery, recognition, enlargement, enrichment and refining, and adapting and updating … It is open to authoritative organs to recognise new rights and to declare or proclaim their existence, particularly if an international consensus exists over the recognition of such a right (1983: 280–281).

However, as was identified in the previous chapter, labelling a particular social claim as a 'human right' is 'to vest it emotionally and morally with an especially high order of legitimacy' (Bilder 1969: 171). The significant value of having a particular claim designated as a 'human right' has led to a wide variety of interest groups and non-governmental organisations seeking to have new human rights recognised (Bob 2009). Philip Alston identified this effect in relation to the emerging right to development in the 1980s. He commented that '[g]iven such perceptions of the potential power of rights rhetoric, it is hardly surprising that claims for the recognition of new rights have proliferated dramatically in recent years' (Alston 1988: 3). This has become a 'time-honoured and proven technique' for mobilising public support around a particular issue, and has been employed by numerous international organisations (Alston 1982: 608). Consequently, as Anthony D'Amato has identified, '[m]any "rights" have been asserted in print, ranging from the fundamental to the vague, from the consistent to the incoherent' (1982: 1128).

Richard Bilder identified the consequences of such an expansion of the list of human rights, noting that 'acceptance of the human rights label for some types of social claims while denying it to others implicitly accomplishes a sort of ordering of social values, prejudging which claims and interests are to prevail and which are to be sacrificed when different values come into conflict' (1969: 174). He suggested that if we allow too many claims to be designated as human rights, 'the usefulness of human rights as an ordering device may be distorted, diminishing their

[1]For example the rights of women in the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) and of children in the *Convention on the Rights of the Child* (1989).

helpfulness in solving those crucial and recurrent conflicts between competing values which every society confronts' (1969: 175–176). Rosalyn Higgins has similarly warned that the 'coinage' of human rights will 'undoubtedly become debased' if States agree to the expansion of human rights without adequate justification, with the consequence that 'the major operational importance of designating a right a human right—that opprobrium attaches to ignoring it—will be lost' (1994: 105). Alston has agreed that 'a proliferation of new rights would be much more likely to contribute to a serious devaluation of the human rights currency than to enrich significantly the overall coverage provided by existing rights' (1982: 614; also Alston 1991: 46). For these reasons, it is important to be sure that new candidates for admission to the body of human rights law have a sufficient justification through an adequate connection to the philosophical foundations of human rights, as was argued in the previous chapter.

The risk that international law will tolerate the overuse of the human rights label, and consequently that the integrity and weight of existing human rights will be undermined, is exacerbated by what Alston has referred to as the 'uncritical dimension' in which rights develop (1988: 10). While many international organisations and interest groups have sought to have particular claims recognised as human rights, Alston argues that international organisations are 'notoriously unsatisfactory incubators of intellectual ideas (1988: 10)' Where an organisation has identified the recognition of a new right as one of its priorities, 'challenging scholarly analysis' and 'critical propositions' are nearly impossible (Alston 1988: 10). Ramcharan has argued that when it comes to proposals to recognise new rights:

> Unfortunately the debate tends to proceed mostly on the basis of each protagonist's assertions of what he or she considers to be a human right, rather than in terms of the criteria available in international law for determining what a human right is and whether an asserted right or category of rights meets those criteria (1983: 268).

The value of the human rights label being attached to a particular interest is so great that advocates will inevitably push for the recognition of a new right without necessarily examining the full implications or inviting critical input from opposing or even neutral analysts. From this uncritical starting point, new rights can 'gain momentum within the United Nations system without being subjected to rigorous analysis and with the self-perpetuating effect of internal authority' (Alston 1988: 10). Alston has argued that the concern with new human rights is not their proliferation per se, but the

> haphazard, almost anarchic manner in which this expansion is being achieved. Indeed, some such rights seem to have been literally conjured up, in the dictionary sense of being 'brought into existence as if by magic' (1982: 607).

Alston suggested that reform was required within the United Nations system to ensure that proposals for recognising new rights were subjected to appropriate critical assessment and consultation, and sufficient time allowed for the various legal, practical and theoretical implications to be thought through.

Given the significant rhetorical and normative value to be gained from designating something as a 'human right' it is not surprising that advocates for environmental protection have sought to have the issue described in human rights terms. However, in order to maintain a level of 'quality control' in international human rights law it is essential that environmental human rights are examined critically and carefully before they are proclaimed. As illustrated in Chap. 4, many statements have been made declaring that humans have a 'right to a good environment,' or that the right should be recognised, without adequate or consistent analysis of what the right means or where it comes from. There is a risk that the continued reference to a 'right to a good environment' without proper critical consideration may contribute to a devaluing of existing human rights and damage the credibility of the existing human rights framework. This book attempts to fill this gap by examining critically the potential justifications for recognising a new right, including the theoretical considerations analysed in the previous chapter. The need to avoid unnecessary proliferation was addressed in that chapter in the context of locating an independent justification for an environmental right, and constructing it in a fashion which was not merely repetitive of existing rights. The following sections go on to examine a number of other criteria which influence the way a new right to a good environment could be structured and affect the likelihood of its being recognised within international law.

6.3 Ensuring Quality Control in the Recognition of New Rights in International Human Rights Law

In response to the problem of unnecessary proliferation of human rights, several scholars have suggested criteria or guidelines for the admission of new rights (Ramcharan 1983; Marks 2004; Gibson 1990; Mutua 2007; Meron 1982). The criteria proposed include practical and legal issues, such as implementation and justiciability, as well as substantive matters relating to the subject matter and attainability of new rights, which are reminiscent of some of the theoretical issues addressed in the previous chapter. Rather than simply considering the nature of human rights on a theoretical level however, these criteria are designed to help guide the makers of international human rights law by attempting to define the sorts of claims that are appropriate for recognition as rights under that particular body of law. The discussion below looks at a number of commonly suggested criteria, which can be derived from looking at rights which are currently recognised and the way they are enforced and implemented. These are analysed to see how they apply to environmental human rights and the right to a good environment in particular. From this analysis it is possible to identify certain requirements and parameters which would apply to the definition and implementation of the right to a good environment if it is to be proclaimed within international law.

Before considering specific criteria, it should be noted that not all scholars agree that it is possible or advisable to identify fixed criteria for the proclamation of new human rights. Alston, despite having expressed concerns about the proliferation of new rights, has argued that attempting to identify definitive substantive criteria for new human rights is unworkable, saying '[t]he establishment of criteria of enduring relevance is almost impossible in a field that is constantly undergoing evolutionary flux' (1982: 616). Further, he argues, 'even if such criteria could be agreed upon, the process of transforming a claim into an international human right is far from being scientifically pure' (1982: 616). He argues that we should not try to distil from a broad range of existing rights any valid criteria for new claims. However, many scholars have attempted to do just this, and Alston himself even provides a list of requirements that we could use 'if we wanted a set of criteria for new rights' (1982: 165).

It is inevitably the case that any fixed set of criteria would at times be considered inapt or outdated, or would be difficult to apply in practice, and Alston is correct that the 'evolutionary flux' of human rights makes it difficult to say with certainty what human rights should look like in the future. But it is precisely this tendency towards flux and expansion which makes it necessary to consider at least some form of baseline parameters for new rights, even if we accept that those parameters ought not to be viewed as being rigidly binding. Further, upon examining the various criteria proposed in the literature, certain common elements can be identified. It is argued that the right to a good environment should be compared to these common elements to determine whether it would satisfy the possible criteria for admission as a new human right. While the considered criteria are not (and arguably should not be) mandatory, it is argued that a new right which failed to satisfy any of the commonly suggested criteria ought to be rejected, unless a profound reason could be asserted to justify its inclusion in international human rights law.

In 1986 the United Nations General Assembly adopted resolution 41/120 on 'Setting International Standards in the Field of Human Rights.' In this resolution the General Assembly noted the 'extensive network of international standards in the field of human rights which it, other United Nations bodies and the specialised agencies have established' (Preamble). It recognised 'the value of continuing efforts to identify specific areas where further international action is required to develop the existing international legal framework in the field of human rights' but at the same time noted that 'standard setting should proceed with adequate preparation' and should be 'as effective and efficient as possible' (Preamble). With this in mind, the General Assembly urged Member States to have regard to the existing legal framework when developing new standards, and proposed a set of guidelines for developing international human rights instruments. The guidelines stated that such instruments should:

1. Be consistent with the existing body of international human rights law;
2. Be of fundamental character and derive from the inherent dignity and worth of the human person;

3. Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
4. Provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
5. Attract broad international support (para [4]).

These guidelines marry with many of the criteria for recognising new rights which are frequently proposed in the literature. The following sections will examine these common criteria and consider how they apply to environmental human rights and the right to a good environment.

6.3.1 *Sufficient Precision to Identify Obligations and Standards Connected to New Rights*

General Assembly resolution 41/120 states that human rights instruments should be 'sufficiently precise to give rise to identifiable and practicable rights and obligations.' Some degree of specificity is clearly required in formulating new rights in order for their object and purpose to be defined and corresponding obligations articulated. In order for human rights norms to be effective, they need to incorporate standards which are precise and enforceable. As Makau Mutua has argued, human rights norms need to be 'unpacked into clear components, spelling out obligations and rights, and identifying the path to their implementation at the national level' (2007: 618). Mutua's approach highlights the linkages between the various guidelines suggested by the General Assembly in Resolution 41/120, in particular that normative precision is a necessary step towards implementation and enforcement. In his words, '[v]acuous, rhetorical and vague standards accomplish little … To be effective, standards must have a clear path for their implementation and enforcement' (2007: 620).

Normative precision is therefore a crucial component of ensuring the implementation and enforcement of human rights. Without it, specific human rights may offer little practical benefit and may ultimately be little more than symbolic statements of aspiration. Mutua cites the right to development as an example of a new human rights standard which has fallen by the wayside due to a lack of clarity and precision:

> The fate of the right to development underscores the reluctance by States and inter-governmental organisations to work for a definitive, powerful and clear language of obligatory norms … The failure to develop convincing, credible and clear language to talk about this right has marginalised discourse on it (2007: 618).

As noted in Chap. 5, the right to development can be considered a cautionary tale for advocates of environmental rights, teaching of the importance of achieving clarity in how we define new rights.

Clearly, some level of normative precision is a requirement of new rights, but how much specificity is required? Rights which are so vague or ambiguous that their meaning is obscured ought not to be pursued, or at least require substantial refining. At the same time, however, many rights imply different obligations or require special implementation methods in different contexts. It may not be possible or even helpful to try to articulate all these variables in exact detail, and some rights may be best defined in terms which are adaptable to differing situations and actors.

The question of where to draw the line between specificity and flexibility has occupied the attention of human rights scholars for some time (Bilder 1969; Alston 1982, 1988; Marks 2004; Mutua 2007). One approach to determining the necessary degree of specificity is to look at what is needed to achieve the practical implementation and enforcement of the right and articulate obligations and standards accordingly (Campbell 1986). Alston has cautioned against an approach which demands so much detail that human rights norms are transformed into justiciable rules, however, arguing that this goes beyond what is really required for the recognition of new rights (1988: 37). He acknowledges that normative precision is an important requirement for new rights, but he also points out that in most cases a new right will start off in a rather generalised form and then 'gradually, through a variety of means, greater specificity will emerge' (1988: 37). While some precision is necessary to give the right meaning, to create identifiable rights and obligations (Alston 1982: 615), and to make the right susceptible to effective implementation (Alston 1988: 38), the exact requirements of the right will vary according to the context. As Alston identifies, although a more specified formulation typically emerges, 'recognition of the right usually occurs at a much earlier stage on the basis of a much less sophisticated and far more imprecise formulation' (1988: 37). This suggests that the new right could be recognised before its full scope and content has been precisely identified.

There are also other pragmatic consequences which flow from the level of specificity with which new rights are described. Imprecision may in fact be influential for States in agreeing to new rights, as it leaves them some discretion as to how they will implement the rights, and allows them to avoid overly specific or onerous obligations (Alston 1982: 613; Bilder 1969: 206; Mutua 2007: 614). Alston argues that, in the short-term, a new right's 'chameleon-like characteristics' may enable it to claim a place on the international agenda which would 'almost certainly have been denied to a more clearly focussed but equally innovative formulation' (1988: 39). There are drawbacks to this approach, however, which Alston also acknowledges. Where a right is too broadly defined, 'time and energy which should be spent focusing on specific proposals is wasted on 'shadow-boxing' or 'phantom-chasing' in the form of addressing or refuting interpretations of the new right which reflect the worst fears of its opponents rather than the aspirations of the majority of its proponents (1988: 39). Also, allowing States too much flexibility in determining their obligations creates significant difficulties for ensuring compliance, and may undermine the objective of the right in the first place.

Arguably, the degree of normative precision required for a new right cannot in itself be precisely determined. It seems what is required is sufficient precision to

enable the scope and content of the right to be understood, for obligations to be identifiable and for implementation mechanisms to be workable. At the same time, what a particular human right requires in a given situation will vary with the context, and the definition ought to allow for some flexibility in this regard. Inevitably new human rights will be developed with the understanding that too much specificity in terms of States' obligations may create difficulties in obtaining majority support of States. This and other political factors impacting on States' recognition of new rights will be explored in more detail in Sect. 6.4 below.

With specific regard to the right to a good environment, a number of key issues need to be addressed if the right to a good environment is to be defined with enough precision to identify appropriate obligations and standards to ensure meaningful implementation. As outlined in Chap. 4, many authors have noted the inherent ambiguity of the notion of a 'good environment' and the need to settle on a definition before a new right could be recognised in international human rights law. The questions which must be addressed include:

- What standard of environmental health or well-being is meant by a 'good environment' and how is it to be measured?
- Are States required to take positive action to repair and restore environmental damage or are they obliged to prevent future damage?
- Are States obliged to prevent third parties or non-State actors from damaging the environment or does the right only relate to the State's own direct conduct?
- To whom would States owe obligations? Is the right to be enjoyed by individuals or groups, or both? Are obligations owed towards future generations or people beyond the State's borders?
- Does the right only relate to an individual's or group's immediate environment or are they entitled to a good environment more broadly?
- How is the right to be balanced against other potentially conflicting human rights, for example the right to an adequate standard of living and other economic rights?

Many scholars have attempted to answer these questions in putting forward proposals for a right to a good, healthy, safe, clean or balanced environment. Despite this considerable body of analysis, however, many of the above questions remain considerably unsettled. For instance, the issue of whether the right to a good environment should be an individual or collective right remains the subject of debate. According to most rights theories, an individual right would be most compatible with the philosophical foundations of human rights, as outlined in Chap. 5. However, many authors maintain that the right to a good environment is most appropriately viewed as a collective right, due to the shared nature of our interactions with and experiences of the environment (Gravelle 1996–1997; Lee 2000; McClymonds 1992; Hodkova 1991).

The nature and extent of States' obligations is something which also requires much more consideration. As will be demonstrated in Chaps. 8 and 9 with particular reference to climate change, there is ongoing debate within human rights

discourse as to the geographic and temporal scope of States' human rights obligations. The extent to which a State would owe obligations to persons outside its territory or jurisdiction, or to the members of future generations, remains problematic. There is also much diversity in the literature with respect to the content of the obligations a right to a good environment would entail, with a number of scholars noting the intrinsic ambiguity of the concept of a 'good environment.' Even if we adopt one of the more specific qualifiers such as a clean, healthy or balanced environment, this would still require considerable refinement to identify the nature of States' obligations in a way which satisfactorily addresses the sorts of questions listed above.

The issue of defining the right and corresponding obligations also has bearing on who would be entitled to bring a claim relating to a particular environmental harm. As the previous chapter argued, it is difficult to define a class of persons with a sufficiently proximate interest in the environment to form the basis of a legal claim without reference to interests or connections which are the subject of other rights. Yet, in order to establish that a right to a good environment is necessary and justifiable, we need to be able to define it independently from other rights, and not just construct it as a restatement or synthesis of existing rights. If the right to a good environment is defined as a right to some substantive measure of environmental quality beyond the environmental dimensions of existing rights, it then becomes difficult to identify a particular individual or community with a sufficient interest to found a claim when that environment is harmed or degraded.

The requirement that new human rights not be merely repetitive of existing human rights was also identified as being relevant to a number of the theoretical approaches to human rights discussed in the previous chapter. In that context, avoidance of repetition and redundancy was necessary in order to ensure that any new right could be independently rationalised with reference to relevant theoretical foundations and did not rely on other rights for its justification. Avoiding duplication of rights is also essential to maintaining an effective international legal framework of human rights, and is a key component of avoiding the unnecessary proliferation of rights (Meron 1982: 756; Alston 1982: 615; Gibson 1990: 6; Turner 2004: 299). A right which is merely repetitive of existing rights would be redundant, would contribute little to building and maintaining an effective human rights system, and would even risk undermining the rights which are already well-settled within that system.

For a right to a good environment to be recognised in international law, it must be possible to define what a 'good environment' means and to do this in a way which goes beyond simply restating existing rights and duties within an environmental context. If the definition of the right to a good environment cannot be specified in a way which clarifies the nature of States' obligations, the details of who would be entitled to bring a claim and the standards against which an alleged violation is to be judged, then it is unlikely that States will offer their support for the adoption of the right. Some of these issues will be explored in more detail below, and much more work is clearly required before it is likely that a definition of the right to a good environment could be agreed upon which is sufficiently specific.

6.3.2 *Content for New Rights Which Is Attainable and Capable of Implementation*

The preceding discussion on normative precision of new rights suggested that one way of determining if a right is defined with sufficient precision is to assess its susceptibility to implementation, on the basis that a right will be unable to be implemented if it is overly ambiguous. However, the capacity of a right to be meaningfully implemented is determined not only by its precision in terms of correlative obligations and standards. It is also determined by its substantive content and structure, as well as the implementation machinery which accompanies it within the legal framework.

A number of authors have identified implementation as a criterion relevant to the recognition of new human rights (Bilder 1969; Meron 1982; Mutua 2007; Marks 2004), and one of the factors which is determinative of implementation is the extent to which the right is attainable. A right to something which is unrealistic or impracticable will not be capable of implementation by States, even though it might be clearly defined with precise obligations and standards.

Concern over the attainability of human rights goes back to the early debates surrounding the adoption of the major human rights covenants and the question of whether to extend the International Bill of Rights to include economic, social and cultural rights as well as civil and political rights.[2] In 1945, Hersch Lauterpacht argued in favour of including economic and social rights in the International Bill of Rights. He said then that:

> They can be included if and when States agree that this part of the Bill of Rights is not only a declaration of common principles of policy but also a mutual legal promise to give effect to it; that all signatories to the Bill of Rights shall henceforth acquire legal interest in the fulfilment of that promise by all other signatories; that the manner of its fulfilment is a legitimate subject matter of international concern and discussion; and that machinery must be set up for supervising and enforcing its clauses (Lauterpacht 1945: 46; quoted in Alston 1988: 38).

The subsequent adoption and entry into force of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966) can be seen as confirmation that many States have adopted the position described by Lauterpacht, and the importance of economic, social and cultural rights is now widely recognised, such that they are considered to be interdependent with and indivisible from civil and political rights (Vienna Declaration and Programme of Action 1993).

The path to acceptance for economic, social and cultural rights has not always been smooth, however. In 1969, Richard Bilder argued for restricting human rights to civil and political rights, arguing that economic, social and cultural rights were

[2]The International Bill of Rights is comprised of the *Universal Declaration of Human Rights* (1948), the *International Covenant on Civil and Political Rights* (1966) and the *International Covenant on Economic, Social and Cultural Rights* (1966).

not realistically achievable in many cases and that we should exercise caution in seeking to expand recognition of these rights. He said:

> If we include as human rights claims to economic, social and cultural benefits that clearly cannot be achieved by most present societies, and which are difficult to practically embody within a framework of legal rights and sanctions, we may tend to raise unrealistic popular expectations and to move the entire human rights idea to the level of utopian aspiration, to which governments need feel little present obligation (Bilder 1969: 176).

Bilder's point about attainability still has relevance in relation to contemporary human rights. Human rights ought to be more than merely aspirational statements if they are to demand anything of substance from governments or offer any meaningful chance of improving the lives of individuals and communities. Human rights need to be attainable, if not immediately then at least progressively.

The question of attainability is of crucial importance to the right to a good environment and links directly to the issue of how the right is defined, discussed in the previous section. The language used to define the right must cast it as something which is within the power of States to provide. Parallels can be drawn here with the right to health contained in article 12 of the ICESCR. That provision guarantees to all people the 'highest attainable standard of health.' It does not guarantee a right to good health or a right to be healthy, as these are things which no State can definitively guarantee.

Article 12 of the ICESCR works in conjunction with Article 2 of that treaty, which establishes the standard to which States must comply with the various convention rights. This provision obliges States to take all reasonable steps, to the maximum of their available resources, towards the progressive realisation of the rights contained in the Convention. These qualifying statements recognise that States may not have the resources to provide full health care to all their citizens immediately, but the Convention nonetheless obliges States to keep striving to improve the standards of health of their citizens.

A similarly realistic and practical approach may be necessary for the right to a good environment. The right must be defined in such a way that its ultimate goal is something which States can achieve, at least progressively. It should also acknowledge the interaction between the environment and other rights, particularly those relating to economic development, and the potential for conflicting priorities in that context. Depending on how the right is defined, a State may not be able to guarantee a good environment while still meeting its obligations in relation to other rights. Thus, the attainability of a 'good environment' may be impacted upon by other legitimate human rights interests. In order to be capable of implementation, the right to a good environment must be defined in a way which allows it to be balanced against other rights. An absolute standard of environmental well-being would ignore the realities of governments' other obligations, and would therefore be incapable of implementation and unsuitable for inclusion as a recognised human right under international law (Boyle 2012: 628). This suggests that a more nuanced, flexible formulation is called for.

Alongside attainability of rights in terms of their subject matter, new rights also need to be supported by an implementation framework within the international human rights system. If governments know that there is limited monitoring of their performance then they cannot be expected to pay more than lip-service to their human rights obligations (Bilder 1969: 206; Marks 2004: 452). Effective implementation processes involve a number of dimensions and serve multiple purposes. They establish competent authorities which have responsibility for interpreting standards and articulating technical requirements (Meron 1982: 756–758). They also provide appropriate support for and supervision of States' performance of obligations, ensuring that implementation is not left entirely to the capabilities and discretion of States (Alston 1982: 614). Further, they help to avoid conflict between different organs performing implementation roles by having clear allocation of responsibilities (Meron 1982: 756).

In relation to the right to a good environment, the importance of effective implementation mechanisms is clear. In many cases damage to the environment can occur relatively quickly and easily, but cannot as quickly be restored, if at all. A right to a good environment is of little value if States do not implement it in good faith, as once a State violates the right there may be little which can be done to repair the breach. If the right to a good environment is to be proclaimed, the formulation of the right must include details of relevant implementation machinery and processes to ensure that States respect the right and genuinely work towards its realisation.

6.3.3 Enforcement and Justiciability of New Rights

In addition to being capable of implementation, proposals for new rights must also be amenable to some form of enforcement or justiciability, to ensure that States meet their implementation obligations (Campbell 1986; Bilder 1969; Downs 1993; Taylor 1998; Thorme 1991; McClymonds 1992; Symonides 1992; Pevato 1999). Enforceability of obligations is clearly an essential requirement to ensure that States do not simply ratify new human rights treaties without any intention of implementing them (Mutua 2007: 573). Mutua has argued that many States have a 'trigger happy' approach to ratification of human rights treaties where they feel that they can achieve some good will or positive publicity by supporting human rights, but do not intend to implement those rights because they regard the enforcement mechanisms as impotent (2007: 573; Bilder 1969: 206).

While some form of enforcement is clearly necessary to ensure States take their obligations seriously, there are questions as to what form of enforcement is required. Alston has argued that it is not essential for human rights to be justiciable within a legal system, and that new rights could be admitted even though they may be difficult to pursue through conventional, tribunal-based enforcement mechanisms (1988: 38). He addresses the strong links between implementation, enforcement and normative precision, arguing that 'those who demand a level of

specificity adequate to full justiciability demand too much' (1988: 38). Many existing rights, he says, fail to satisfy this standard, so it is inappropriate to require a higher level of justiciability for new rights.

While there is debate about whether justiciability is an essential element of human rights, it is clear that for human rights to be practically meaningful they must be capable of implementation and some form of enforcement must be in place to ensure that States carry out their obligations to respect, protect and fulfil human rights. If rights are not justiciable or otherwise enforceable then, while they will remain relevant as a dimension of human dignity, they will be of little practical use to those who possess them. The exact form of enforcement measures needs to be tailored to the particular circumstances, and as Resolution 41/120 suggests, it needs to be compatible with the existing international legal framework.

Existing human rights supervision and enforcement mechanisms could be of use in relation to an environmental right. These include periodic reporting by States to a supervisory body or the establishment of dedicated committees to hear petitions from individuals or groups who allege that their rights have been violated. One relevant factor for the enforcement of the right to a good environment is the ease and speed with which widespread environmental damage can occur. Once damaged, restoring the environment may not be possible, or at least may take a considerable length of time. A process by which an individual or group could bring a complaint to an international human rights tribunal in order to halt an act of environmental destruction would be a useful tool in protecting the right to a good environment (and the environment itself), and would arguably be more effective than supervisory or reporting mechanisms, provided such a mechanism could be activated in a suitably timely fashion.

However, there are other issues which are thrown up by the proposal to allow justiciable claims in relation to the right to a good environment. One threshold issue is that of determining who would be entitled to bring a claim. As noted in Chap. 5, if the right to a good environment is defined independently of other existing rights then the class of potential claimants is very broad, as possession of the right is not limited only to those persons who have suffered some direct impact. It would be difficult to identify who would have a sufficient interest in the environmental harm to bring a claim, without relying on some other interest or need which is served by the environment.

Ultimately, questions of enforcement and justiciability of a right to a good environment are dependent on how that right is defined, the obligations which it imposes on States and the standards to which States will be held in discharging those obligations. While there is some debate among scholars as to the degree to which human rights should be justiciable, it seems clear that a right which is not subject to at least some degree of enforcement, be it via individual claim or international supervision, will offer few guarantees of effectiveness.

6.3.4 *Substantive Content Which Is Appropriate for Inclusion Within International Human Rights Law*

The preceding discussion focused on requirements for new rights relating to their capacity for implementation and enforcement, flowing from issues surrounding the definition of sufficiently precise obligations and standards. Underpinning these considerations are questions relating to the substance of the rights themselves. These have obvious connections to the theoretical considerations discussed in the previous chapter, but the factors considered here go beyond theoretical justifications to include the structure and purpose of new rights and the nature of rights already guaranteed by international human rights law. They therefore also have relevance to the issues of attainability and specificity discussed above, but those criteria alone do not place any inherent restrictions on the sorts of things which can be added to international law as new human rights. Although they may shape the expansion of human rights law by filtering out rights which are unattainable or incapable of precise definition, they do not otherwise impose any limitations on subject matter. The discussion here looks at the question of which sorts of rights should be considered appropriate content for international human rights law.

Again, the work of human rights scholars can be helpful here. In order to try to identify criteria for when a new right should be recognised, Bertrand Ramcharan examined the practice of the United Nations and identified certain facts about the human rights which have been recognised in the past and the circumstances of their adoption. From this he proposed a set of substantive criteria for human rights, to help guide the future development of human rights law into new areas (1983: 280). Ramcharan defines human rights as legal rights which possess one or more of the following qualitative characteristics:

1. Appurtenance to the human person or the group;
2. Universality;
3. Essentiality to human life, security, survival, dignity, liberty and equality;
4. Essentiality in the conscience of mankind;
5. Essentiality for the protection of vulnerable groups (1983: 280).

A number of other scholars have also attempted to set out substantive criteria for recognising new human rights. James Nickel, for example, has proposed four conditions for new rights:

1. The claim concerned must be of some great value to the individual or to society, and the value must be something which is frequently threatened;
2. The claim cannot be satisfied by some lesser formulation—a right is required;
3. Proposed duty bearers can be legitimately subjected to positive and negative duties which the right implies;
4. The right is feasible, given current economic and institutional resources (1993: 288; drawing on Nickel 1987).

Some of these requirements, particularly the need for new rights to be feasible, are reminiscent of the issues considered above, but the first and second requirements—that the right be of some great value to the individual or to society, where that need cannot be satisfied by anything less than a right—seek to impose substantive criteria for the sorts of things which should be recognised as rights, and can therefore be seen to reiterate the requirement that human rights law reflect the philosophical foundations of human rights.

General Assembly Resolution 41/120 sets out a similar substantive requirement when it suggests that new human rights should 'be of fundamental character and derive from the inherent dignity and worth of the human person' (para [4(b)]). Alston too, although he argued that it is not practical to try to apply definitive substantive criteria for new rights, nonetheless proposed a list of requirements that could be used 'if we wanted a set of criteria for new rights' (1982: 615). This list included requirements that the right 'reflect a fundamentally important social value' and that it be 'relevant, inevitably to varying degrees, throughout a world of diverse value systems' (1982: 615).

Having regard to these different sets of criteria we can see that there is a common emphasis on the 'human' dimension of human rights. They reflect a belief that a human right is something which is relevant to human lives, essential to human dignity and conscience and universal to all people, and therefore have clear links to several of the theoretical explanations of human rights which were canvassed in the previous chapter. But the criteria are derived not from classical theories of human rights, but from the sorts of rights which have already been recognised by international law. They are intended to fulfil one of the other requirements in Resolution 41/120, that new rights should be 'consistent with the existing body of international human rights law' (para [4(a)]). The importance of these qualitative criteria lies in the fact that without them there would be no way to ensure that the proclamation of new rights does not 'devalue the currency' of existing human rights by undermining their normative force and integrity.

A number of issues arise when considering how these criteria would apply to the right to a good environment. Looking at Ramcharan's list, for example, we see that human rights must be essential to human life, dignity, liberty, equality and security, as well as essential to the 'conscience of mankind'. Applying this to the right to a good environment, the legitimacy of the right rests on being able to demonstrate that a good environment is of some essential value to human lives. The question then becomes essentially the same as that considered in Chap. 5: is it possible to explain why the environment is essential to human dignity, liberty or well-being without relying on other human rights as the basis for that explanation? While Ramcharan does not mention the need for new rights to be independently justifiable, it is implied in the notion of essentiality. If other human rights could adequately offer the same protection, the new right could not be said to be essential. The difficulty in answering this question was analysed in detail in Chap. 5 where it was argued that, while the environment plays a fundamental role in supporting humans' lives and livelihoods, that relationship is already accommodated within the environmental dimensions of existing human rights.

The requirement of universality warrants examination in the context of the right to a good environment as well. Universality is a fundamental tenet of international human rights law, and it is listed by both Ramcharan and Alston as a condition of new rights. It is understood that human rights are universal because they have their source in fundamental human qualities which every individual possesses.[3] If recognised, the right to a good environment would be guaranteed to all persons equally, regardless of race, nationality, religion, gender or any other attribute. The requirement that new rights be universal is understood in this context as imposing a requirement that a new right must relate to some need or interest which is possessed by all persons. This interpretation is supported by the other requirement that new rights relate to something which is essential to human life, dignity, liberty and equality.

There is no logical reason to suggest that the right to a good environment ought to be enjoyed by some persons and not others. The environment is obviously of universal importance to all human beings as it is the source of our food, water, air and all other necessities of life. It is therefore instrumental in facilitating the enjoyment of a range of human rights. The challenge however is to find a way to describe the right to a good environment which emphasises its universal nature without defining it in terms of other recognised rights, so as to demonstrate that the right needs to be recognised at all. In attempting to do this we confront some of the same issues which were discussed in the previous chapter in relation to the possible theoretical justifications for the right.

One possible explanation of the universality of a right to a good environment rests on the argument that a good environment is in the interests of all humankind because we all have a concern to prevent the destruction of ecosystems and ensure the preservation of the natural world. As was raised in the previous chapter, the problem with this argument is that it may not in fact be true. It seems unrealistic to assert that all humans are interested in the protection of the environment, at least not beyond their immediate environment and its role in providing for their daily needs.

A related but distinct argument, that we all have an interest in the preservation of the environment because we are all part of a common ecosystem, was also canvassed in the previous chapter, where it was argued that this reconceptualisation of humans' place in the environment does not sit comfortably with the emphasis traditionally placed on human dignity, liberty and autonomy within human rights discourse—ideas which have traditionally privileged humans and attributed to them a special status. While humans can be viewed as being a part of the broader ecosystem and thereby have a universal interest in its welfare, it is argued that this relationship would be insufficient to demonstrate the additional requirement that the right also be linked to our inherent dignity, autonomy or liberty. The challenge of explaining how

[3]The principle of universality is a key principle of the UDHR and is echoed in the ICCPR and ICESCR. It is emphasised in the *Vienna Declaration and Programme for Action* which states in particular that, '[w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms' (1993: [5]).

the environment is essential to fundamental human qualities was considered in detail in the previous chapter and it is clear that the same issues persist when it comes to determining the suitability of the right for legal recognition.

Ramcharan's list includes another requirement that the right is necessary to protect vulnerable groups. This correlates with Nickel's requirement that for a new right to be recognised it must be shown to be necessary in order to protect some value which is under threat, and which can only be protected through the articulation of a rights-based claim. The challenge of showing that there are particular groups who require protection through the recognition of a new human right involves similar issues as those related to justifying the right in the first place. Obviously there are certain groups, such as indigenous peoples, persons living in poverty or those who rely directly on the environment for their subsistence, who are more vulnerable to the consequences of environmental damage. However, these groups are all identified by reference to the particular role the environment plays in their lives. That is, they are vulnerable in this context because of the potential impact of environmental harm on their other human rights.

If we maintain that the universal human right to a good environment must be defined without relying on other existing rights then it becomes difficult to point to any persons who are more vulnerable than others. Whatever reason we give for saying that certain groups have a special interest or require particular protection would seem to rely on other existing rights as its basis. Certainly, the implementation and enforcement of those other rights may require greater attention and stronger action from States, but that should not be a reason for creating a new right altogether. The requirement for universality and the need to show that the right is necessary to protect vulnerable groups also raise the question of who would be entitled to bring a claim for a breach of the right to a good environment and on what basis. Further, they suggest greater problems with being able to define the right in a manner which is sufficiently precise to render it capable of implementation and enforcement.

6.3.4.1 Conclusion

As the analysis of these various criteria demonstrates, there are significant challenges in locating a definition of the right to a good environment which evidences both its link to fundamental human dignity, autonomy and well-being, and its necessity for inclusion within international human rights law. While the environment is universally important in providing for our basic needs, those needs are already protected by other human rights. More novel attempts to explain why a good environment ought to be protected within international human rights law ultimately end up taking us outside the conventional understanding of humans' place in the natural world. While these sorts of reconceptualisations are welcome in encouraging us to think differently about the way we use the environment, they do not sit comfortably within a traditional human rights discourse and are therefore ill-suited to inclusion within the framework of international human rights law given its longstanding connection with human rights theories.

6.4 Political Realities of Admitting New Rights

The requirements for admitting new rights to international human rights law cannot be considered in isolation from the political context in which those laws are created, and a likelihood of receiving broad support from States has been suggested as an additional criterion for proposed new rights (Alston 1982: 615; Marks 2004: 451–452). Necessarily, without strong support from States, new rights will not progress far in international law, and in a practical sense there may be little point in pursuing new rights which have only a minimal chance of attaining an adequate level of support. There is also arguably little normative value in proclaiming new rights which States are unlikely to accept as obligating them in any meaningful way. This section will examine the issues which confront environmental human rights in achieving necessary support of States.

Treaty-making is arguably the best tool for creating binding human rights norms, but it can be a slow and difficult process. Differences of opinion regarding the appropriate content and structure of a new right, and even as to the nature of human rights generally, can mean that negotiating a new human rights instrument is 'a long, slow and contentious process sometimes resulting in unsatisfactory compromises and ongoing disagreement' (Taylor 1998: 317). The large number of agents and processes involved in the development of new human rights standards means that there are many complex factors influencing the process of negotiation and consensus-building which is a precursor to the recognition of any new human right (Mutua 2007: 549). Further, States which do not support a new proposal (but which may not wish to say as much publicly) can adopt a number of practices in order to frustrate the development of a new treaty, including procrastination and procedural delays; artificially prolonging negotiation and drafting processes; entering reservations or denying ratification (Mutua 2007: 570).

The almost universal membership of States in the United Nations has led to an increased diversity of opinions which influence the formulation of new international law. The need to achieve consensus among these many and varied actors has led to a 'lowest common denominator' approach to treaty drafting, where the final wording often reflects the least ambitious and most easily reached level of agreement between States. This is frequently characterised by deliberately ambiguous language or the inclusion of significant exceptions or 'escape hatches' (Bilder 1969: 206). However, this diversity of opinion does have benefits. As Mutua has noted, since the end of the Cold War more States have been free to articulate their own positions on a number of international issues. He argues that we are now able to give 'the religious, cultural, or political considerations of a State more weight than was previously possible' (2007: 566). While a diversity of ideas arguably enables greater consideration of previously marginalised voices, these voices are too often drowned out by more powerful States, and we are frequently forced to settle for standards which are less than ideally effective in the search for consensus.

History has shown that States are typically reluctant to sign on for more obligations (Mutua 2007: 560). One example of this is the development process behind

the drafting of the *Guiding Principles on Internal Displacement*, and the decision of Francis Deng, the Representative of the Secretary-General on the issue, to adopt a set of guiding principles rather than pursue a binding multilateral treaty (Deng 1998). As Mutua explained:

> Since the existing law was largely sufficient – so the argument went – why not merely restate it in a non-binding document instead of plunging into uncertain and risky waters, leaving the fate of internally displaced persons exposed and open to the whims of States? The gamble was that States would find the Guiding Principles more palatable because ostensibly they did not create new norms or additional obligations (2007: 560).

This demonstrates the preference States have for avoiding the expansion of their obligations. This may explain why most statements of the right to a good environment to date have been in non-binding form, or have focussed on elaborating the environmental dimensions of existing rights and obligations, rather than moving into new areas where the nature of States' obligations may be unpredictable.

This attitude can also have an influence on the kinds of implementation and enforcement measures which are put in place. Strong implementation mechanisms are more prescriptive for States and limit their flexibility and discretion in performing their human rights obligations. They also create a greater risk of States being found to be non-compliant, as thorough supervision keeps closer watch on their actions. Where enforcement options are available, States may find themselves more frequently responding to complaints and other legal proceedings. Not surprisingly, these measures can act as a disincentive for States to support a new human rights treaty, and widespread participation is often traded off against meaningful enforcement (Bilder 1969: 209).

While States are cautious about committing themselves to further human rights obligations, most simultaneously wish to appear supportive of human rights in general, and this has the effect of complicating and constraining the development of new human rights. States will therefore usually couch their opposition to a new right or treaty in terms of legitimate State interests, such as sovereignty, self-defence or anti-imperialism, in order to avoid declaring openly that they do not support stronger human rights protections (Mutua 2007: 573). This prolongs the negotiation process and further dilutes the strength of proposed measures, as those working for the development of new rights

> strive for an instrument that is both acceptable to States and which States will feel obligated to implement. However, States want norms which will exact the lowest cost on their sovereignty. This requires a highly skilled balancing act by States because no State wants to be perceived as a gratuitous opponent of human rights (Mutua 2007: 613).

The way in which the human right to a good environment is defined in any specific proposal will determine to a large extent the degree of support which it will receive from States. Given that States are the key agents in developing new human rights standards in international law, their attitudes will at the same time shape the contours of the new right. The effect of this is likely to be that any definition of the right will represent a compromise between the strong, detailed, enforceable

obligations which non-government organisations would prefer, and the relatively weak, ambiguous and discretionary promises which States are willing to make.

The primary concern for States in this context is likely to be the extent to which the right to a good environment imposes positive obligations on them or restricts potential development activities or economic growth. While States have in the past been willing to acknowledge the environmental aspects of existing human rights, because doing so has little real effect beyond their existing obligations, they are unlikely to agree to the creation of new rights where such rights are accompanied by strong implementation or enforcement mechanisms. Weston and Bollier have identified that States' attitudes towards the right to environment, and towards the environment generally, represent the principal barrier to the recognition of new rights in the area. They have concluded that 'as long as ecological governance remains in the grip of essentially unregulated (liberal and neoliberal) capitalism—responsible for most of the plunder and theft of our ecological wealth over the last century and a half—there never will be a human right to an environment widely honoured across the globe in any official sense' (Weston and Bollier 2013: 188).

The concerns of States represent one of the most significant obstacles to the recognition of a new right to a good environment, and account for the lack of a multilateral treaty-based right to date. If work on the development of the right is to proceed, the definition of the entitlements and obligations which comprise it will need to be very carefully composed so as to maximise the participation of States while still offering some form of substantial benefit. Chapter 9 will consider the attitude of States towards human rights and climate change, and will demonstrate how States have expressed significant reservations about the expansion of human rights law into environmental issues such as climate change. As will be explained, it seems extremely unlikely that States will offer support for the recognition of a new right to a good environment, particularly after considering the potential implications of such a right in the context of climate change.

6.5 Conclusion

There are a number of legal, pragmatic and political factors pertaining to the question of whether environmental human rights, and the right to a good environment in particular, can be recognised as part of international human rights law. These factors influence both how a right to a good environment could be defined and whether it is likely to garner sufficient support from States to secure its admission into the body of human rights law. The discussion in this chapter highlighted the close links between contemporary human rights law and the theoretical foundations of human rights, demonstrating that the problem of justifying the right to a good environment as an independent claim essential to human dignity and well-being transcends theoretical debate and presents challenges for securing legal recognition. Given the concerns which surround the unchecked proliferation of new

human rights, the need to ensure that the right is justified and necessary is essential to the integrity and credibility of the human rights legal framework itself.

To examine these issues further, the chapter considered a range of criteria which have been proposed by human rights scholars to ensure quality control in the expansion of human rights law. Some of these relate to the substance of the right, and are very closely linked to the theoretical principles discussed in the previous chapter. As was argued there, there are significant obstacles to articulating and demonstrating that a good environment is a universal claim, essential to human dignity, autonomy and liberty, without incorporating the essence of other rights which are already recognised in human rights law. Given that the strength of the human rights legal framework relies in part on ensuring that new rights are necessary and do not merely duplicate existing rights, it would appear unlikely that a definition of the right to a good environment could be devised which does not offend either the rule against duplication or the requirement for a link to human dignity, autonomy or well-being.

The imperative that the right be independently justified and defined also presents a problem in identifying who the bearers of the right would be, and who would be entitled to bring a claim under human rights law for a violation of the right. If the right must be defined without reference to other interests, it seems problematic to demonstrate how a person would have a sufficient interest in environmental harm to entitle them to bring a legal claim to redress it.

The intrinsic ambiguity of the notion of a good environment adds to the difficulty of identifying a suitable definition of the right. Maintaining a degree of quality control in the development of new human rights necessitates that those rights are able to be defined with sufficient precision to give rise to identifiable and practicable obligations, which can then be balanced against other potentially competing human rights. Such precision is necessary to ensure that rights are justiciable where standards are violated. A related concern is ensuring that new human rights are attainable, as rights which are mere aspirations undermine the normative weight of labelling a claim a 'human right.' These objectives also require that human rights be accompanied by useful mechanisms for implementation and enforcement. The ambiguity of the concept of a 'good environment' is likely to limit the willingness of States to support the right, given their anticipated reluctance to be bound by a right which potentially implies broad and vague obligations, or to undertake legal obligations in relation to something which is seen as being more aspirational than attainable.

Together, these requirements of attainability, specificity and enforceability can be used as a set of criteria for identifying suitable candidates for recognition as new rights. It is argued that the right to a good environment cannot be defined in a way which satisfactorily meets these three objectives. The ambiguity of what amounts to a 'good environment' requires that we identify a set of standards which would be utilised to give shape to States' obligations and to judge when those obligations have been violated. This is difficult when the right must be defined independently of other human needs and interests. While it would be possible to formulate a set of scientific standards of environmental health and well-being, these are arguably

already provided for in environmental law, and fail to demonstrate the requisite link to human dignity, autonomy and liberty which would justify constructing a good environment as a 'human right.'

Synthesising the various criteria set out in this chapter together with the theoretical foundations considered in Chap. 5, it appears unlikely that the right to a good environment can be defined in such a way as to make it a suitable addition to international human rights law. Ultimately the right would seem to be unable to satisfy both the requirements for novelty and independence, on the one hand, and essentiality to human dignity on the other. Given that other human rights possess recognised environmental dimensions, which are increasingly being applied by human rights courts and tribunals, the future of environmental human rights may lie in existing human rights law, rather than in the development and proclamation of a new, standalone right to a good environment.

The prospect of widespread, anthropogenic climate change presents an environmental and human rights challenge on a scale not seen before in modern times. It is necessary therefore to consider what role environmental human rights might have in addressing this issue, and whether the particular nature of the challenges ahead provide any alternative justifications for a right to a good environment. These questions will be explored in the following chapters.

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Chapter 7
The Role of Environmental Human Rights in Addressing Climate Change

Abstract The threat of widespread, potentially catastrophic environmental changes as a consequence of anthropogenic global warming represents a challenge for the international community of a magnitude not previously encountered by modern international law and institutions. Climate change threatens not only environmental systems, but also the human communities which depend on them. The broad range of environmental impacts generate an equally wide range of human impacts, and will interfere with the realisation of many human rights. It is therefore appropriate to ask what role environmental human rights can and should have in addressing the many challenges of climate change. This chapter begins this examination by providing an overview of the emergence of human rights-based approaches to climate change, illustrating some of the tensions surrounding the employment of human rights in such a context. This lays a foundation for further analysis in Chaps. 8 and 9, which will identify a number of limitations to a human rights-based approach to climate change, and consider whether these could be overcome through the adoption of a standalone environmental right.

7.1 Introduction

Climate change represents the single biggest environmental challenge currently facing the international community, and is what Daniel Bodansky has referred to as the 'pre-eminent environmental problem of our time' (2010: 512; see also Doelle 2004: 179; Abate 2007: 4). The significance of climate change as an international challenge derives not only from its potential to generate widespread, serious and diverse environmental changes, but also because it is anthropogenic in nature, being brought about by centuries of human activity which is intimately linked to our ideas of achievement and prosperity. Further, climate change represents a significant issue of justice and equality, since those who are least responsible for greenhouse gas emissions are simultaneously those who will suffer most from the negative impacts of climate change, while enjoying little of the benefits of industrialisation which have flowed from emitting activities (McInerney-Lankford et al. 2011: 11;

B. Lewis, *Environmental Human Rights and Climate Change*,
https://doi.org/10.1007/978-981-13-1960-0_7

UNDP 2013: Westra 2010: 181). These questions of justice render climate change not just a legal, scientific or economic issue, but also a moral issue of profound significance.

Given that climate change is an environmental problem that threatens 'potentially catastrophic consequences' (Cameron 2010: 675) and which presents challenging questions of justice and equality, it is appropriate to ask how environmental human rights might be applied. Analysing climate change from the perspective of human rights not only offers new ways of thinking about the problem but also the potential to locate innovative solutions which might have a practical benefit for those whose lives are impacted by climate change. This process also allows us to explore and improve our understanding of environmental human rights, and identify areas where interpretations and implementation of these rights might need to be refined or enhanced. This in turn can provide insight into the areas where a standalone right to a good environment, or some other more climate-specific formulation, might be called for.

An analysis of the observed and predicted effects of climate change reveals that it threatens the enjoyment of a wide range of human rights. The rights to health, food, water, housing, physical security, freedom of movement, self-determination and even the right to life are all at risk through the various environmental changes occurring as a consequence of climate change. Further dangers are posed by the measures taken by States in the name of climate mitigation and adaptation. Because of the profound effects which climate change threatens to have on human lives, many have advocated for a human rights-based approach to climate change. Such an approach would engage the environmental dimensions of human rights to provide a language for activism and shift the debate away from the scientific, economic and political realms to focus on the human perspective, highlighting in particular the very serious issues of vulnerability and equality between different States and communities. Because the rights affected by climate change are guaranteed under international human rights law, a human rights-based approach to climate change also offers an avenue for claims to be brought to enforce those rights. In an effort to take a human rights-based approach even further, some have also argued that climate change is such a serious problem that it requires attention through a standalone right to a good environment, to climatic stability or to some other climate-specific formulation (Vanderheiden 2008: 252; Caney 2008: 539, 2006: 263; Bell 2011: 101–102).

The remaining chapters of this book explore the potential for environmental human rights to generate real benefits for those who are suffering, or are likely to suffer, the harshest impacts of climate change. By way of background, this chapter begins by providing an overview of the emergence of human rights-based approaches to climate change, demonstrating some of the tensions relating to the appropriate role of human rights in dealing with the environmental impacts of climate change. It then considers a number of specific human rights and how they are likely to be affected by climate change, unpacking the broad potential for a human rights understanding to contribute to addressing climate change.

This chapter provides a foundation for the analysis in Chap. 8, which will identify a number of challenges and limitations of a human rights-based approach, while also highlighting the benefits which may yet be attained. Chapter 9 then goes on to analyse the need for, and potential contribution of, a standalone environmental right in the context of climate change. Overall it will be shown that, while there are obstacles to implementing an effective human rights-based approach to climate change, these are not overcome by recognising a standalone right to a good environment, which presents its own challenges and offers few additional benefits.

7.2 Emergence of Human Rights-Based Approaches to Climate Change

Climate change is increasingly being viewed as a human rights issue as the impacts on human rights are becoming better understood and the links between the two fields are being more clearly articulated (see, for example Doelle 2004; Aminzadeh 2006–2008; Atapattu 2008, 2016; Bell 2011, 2013; Humphreys 2010; Knox 2009, 2009–2010, 2016; Lanyi 2012; Limon 2009; Pedersen 2010). That being said, international interest in the relationship between climate change and human rights is relatively recent. In the last decade a small number of particularly vulnerable States and communities have attempted to harness these linkages in an effort to advance their case for stronger international action, beginning with a petition brought before the Inter-American Commission of Human Rights in 2005 by the Inuit Circumpolar Conference on behalf of a number of Inuit nations, described in more detail below. These actions were prompted by frustration at the perceived lack of action at the international level and the need to shift the debate away from the science of climate change, which they felt was already well established, and on to the 'victims' of climate change. Small island nations such as the Maldives were also prompted by what they saw as a lack of accountability of large emitters in a context characterised by so much inequality (Limon 2009: 440). For these States, human rights offered an attractive means of reframing the debate and focussing attention on what they saw to be the priority for international action.

It is now the case that climate change is widely regarded to be a human rights issue, in addition to being an environmental, scientific, political or economic problem. However, while the assertion that climate change is a human rights issue is largely uncontroversial, the exact nature of the linkages between human rights and climate change and the ways in which human rights considerations can or should shape our responses to climate change is still the subject of much debate (Bodansky 2010: 514).

The divergence of opinion surrounding the appropriate role for human rights law and principles within climate change responses was evident in the negotiations for the *Paris Agreement* in 2015, adopted under the *United Nations Framework Convention on Climate Change* (1992). During the negotiations a number of States

and non-government organisations advocated for strong references to human rights in the text of the agreement (Saveresi and Hartmann 2015). Early drafts of the text had included provisions which would have obliged States to respect, protect, promote and fulfil human rights (Ad Hoc Working Group 2015: Article 2.2). Despite strong advocacy, and under the influence of a number of powerful developed States, these proposals were gradually watered down so that the final text of the agreement includes only a single provision urging States, when taking action on climate change, to "respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations" (*Paris Agreement*: 2015, Preamble). This appears in the Preamble of the Agreement and not in the operative part of the text, with the result that the Paris Agreement makes only a minimal contribution to furthering a human rights-based approach to climate change (Atapattu 2016; Savaresi 2016; Bodansky 2016). Nonetheless, the reference to existing obligations leaves open the possibility that other international law might be applied to the challenge of climate change, and creates the potential for a human rights-based approach to make a meaningful contribution. To explain the objectives and modalities of human rights-based approaches to climate change, this section provides an overview of their development with reference to the advocacy of particular States and the work of international organisations and NGOs.

Several key developments are worth noting for their significant contribution to bringing human rights issues within the mainstream of climate change discourse and expanding our understanding of the interplay between the environment and human rights. In 2005, a group of Inuit peoples brought a petition before the Inter-American Commission on Human Rights arguing that acts and omissions of the United States had violated several human rights guaranteed under the *American Declaration of the Rights and Duties of Man* (1948) including the right to enjoy the benefits of culture, the right to property, the right to the preservation of health, life, physical integrity, security and a means of subsistence, the right to residence, movement and inviolability of the home (Watt-Cloutier 2005; McInerney-Lankford et al. 2011: 8–9). The Inuit alleged that the United States' failure to adequately regulate greenhouse gas emissions amounted to a violation of these human rights because it had caused widespread environmental changes (Watt-Cloutier 2005). The petition claimed that 'changes in ice and snow jeopardize individual Inuit lives, critical food sources are threatened, and unpredictable weather makes travel more dangerous at all times of the year' (Watt-Cloutier 2005: 90–91; McInerney-Lankford et al. 2009: 13).

In a report for the World Bank on human rights and climate change, McInerney-Lankford, Darrow and Rajamani elucidated the impact of climate change on Arctic communities, explaining that

> The jeopardy to individual lives results from the changing climate: the sea ice on which the Inuit travel and hunt freezes later, thaws earlier, and is thinner; critical food sources are threatened because warming weather makes harvestable species scarcer and more difficult to reach; a greater number of sudden, unpredictable storms and less snow from which to

> construct emergency shelters have already contributed to death and injuries among hunters and the decrease in summer ice causes rougher seas and more dangerous storms, making water travel more dangerous (2009: 13).

The Inuit also claimed that their right to health was being affected by climate change:

> As weather conditions change, the fish and game on which the Inuit rely disappear, adversely affecting their nutrition, new diseases move northward, the amount and quality of their drinking water decrease, and their mental health suffers because of the diminished quality of their lives (McInerney-Lankford et al. 2009: 16; also Watt-Cloutier 2005: 87–88).

The Inter-American Commission declined to rule on the petition, stating that the 'information provided does not enable us to determine whether the alleged facts would tend to characterise a violation of rights protected by the American Declaration' (George 2006). The Commission did grant the Inuit a more general hearing however, where testimony was given detailing the various impacts of global warming on the Inuit's human rights (IACHR 2007; Wagner 2007; Goldberg 2007; Watt-Cloutier 2007). While the case did not result in a conclusive ruling, it was instrumental in attracting widespread attention and generating debate about the linkages between climate change and human rights (Harrington 2007; Abate 2007; Osofsky 2006–2007; Aminzadeh 2006–2007).

At the same time that the Inuit petition was progressing through the Inter-American system, another group of peoples vulnerable to the effects of climate change was attempting to highlight the impacts on their human rights. Representatives of Small Island Developing States (SIDS) met in November 2007 to adopt the *Male' Declaration on the Human Dimension of Climate Change*. The Declaration expressed the States' concern that

> climate change has clear and immediate implications for the full enjoyment of human rights including inter alia the right to life, the right to take part in cultural life, the right to use and enjoy property, the right to an adequate standard of living, the right to food, and the right to the highest attainable standard of physical and mental health.

Since the adoption of the *Male' Declaration*, SIDS have been among the most vocal proponents of a human rights-based approach to climate change. The leaders of States such as Kiribati and Tuvalu have used the language of human rights to articulate the plight of their people, who face severe impacts from climate change but lack the resources and capacity to respond adequately to the problem. The challenge they face has even been described as an 'existential threat', given that rising sea levels and other effects of climate change continue to jeopardise their ability to sustain themselves on their own territories (Duyck 2015; OHCHR 2015).

The seriousness of the consequences of climate change for SIDS and other vulnerable communities has introduced the prospect of 'climate refugees', as individuals and communities are forced to relocate from their homes (Gerrard and Wannier 2013; McAdam 2010a, b, 2013, 2016; Atapattu 2009; Hausler and McCorquodale 2011). The obligations of States with respect to these people are the subject of much scholarly debate, particularly given the fact that the legal

framework which applies to refugees does not include persons forced to flee due to natural disasters or other environmental causes (Refugee Convention 1951: Article 1; *Teitiota v Chief Executive of the Ministry of Business, Innovation and Employment* 2014; Baker-Jones and Baker-Jones 2015). Given that displacement would affect the enjoyment of a number of human rights, as outlined below, human rights law may offer some guidance for how to deal with the challenges of climate change displacement (Duong 2010; see also McAdam 2008).

After highlighting the human rights impacts of climate change, the *Male' Declaration* also requested the United Nations Office of the High Commissioner for Human Rights to conduct a detailed study on the relationship between human rights and climate change. The request was formalised in the form of a Resolution by the Human Rights Council on 28 March 2008 (Res 7/23), and in the subsequent years United Nations human rights bodies have been actively engaged in exploring the connections between human rights and climate change. The report produced by the OHCHR in response to the HRC's request was published in January 2009. It concluded that climate change threatens the enjoyment of a wide range of human rights, including the rights to life, health, food, water, housing and self-determination. The OHCHR did not conclude that climate change represents a violation of human rights, but it was prepared to state that international human rights law imposes obligations on States in relation to climate change (2009: 24–28).

Following the findings of the OHCHR, the Human Rights Council has adopted a series of resolutions articulating its concerns over the impacts of climate change on the enjoyment of human rights and calling on States to take human rights into account when developing their responses to climate change (HRC 2011, 2014, 2015a). It has incorporated climate change into its regular programme of work, holding a number of expert meetings and discussions to explore ways to better address the impacts of climate change and to encourage greater cooperation between the human rights and climate change communities (HRC 2015b, 2016).

In 2016, John Knox, the former Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, handed down a report on the human rights obligations relating to climate change.[1] As well as confirming the potential for widespread and significant interferences with human rights as a result of climate change, Knox also stressed the need for States to cooperate to fully implement the commitments made in the Paris Agreement in order to avoid the negative human rights consequences which will flow from climate change (2016: [45]–[46]).

The OHCHR has continued to develop a considerable body of work evidencing the impacts of climate change on human rights and providing recommendations for States in ensuring their climate change responses are consistent with human rights standards (OHCHR 2012). In 2016 it convened an expert meeting to canvass,

[1]Knox's work mapping and interpreting human rights obligations in relation to the environment was discussed in Chap. 4.

among other things, the implications of the *Paris Agreement* in shaping the responsibilities of States and other actors related to human rights and climate change. The outcome of this meeting was a range of recommendations directed towards States, civil society and intergovernmental organisations designed to reinforce a human rights-based to climate change (OHCHR 2016: Summary of Recommended Actions).

Representatives from SIDS and like-minded NGOs were a significant driver of the human rights agenda at the Paris climate talks. The inclusion of a reference to human rights in the final Agreement, even if less than some had hoped for, is a significant step forward and is attributable in no small part to the persistence and passion of these groups in advocating for a human rights-based approach. The increased presence of human rights within the climate change discourse was evident at Paris, although the level of debate during the negotiations signifies that there is still much work to be done to clarify the most appropriate role for human rights and the ways in which a human rights-based approach can be implemented. In the end the Agreement's reference to the "respective human rights obligations" of States emphasises existing commitments and avoids any suggestion of new undertakings being imposed. Nevertheless, these "respective obligations" are numerous, and many of them have direct application to the context of climate change. The following section will look at some of these specific rights and elaborate on some of the ways they may be affected by climate change.

7.3 The Impact of Climate Change on Specific Rights

In Chap. 2 it was demonstrated that environmental factors have the potential to impact on the enjoyment of a wide range of human rights and have been held to amount to a violation of rights in some cases. A human rights-based approach to climate change builds on this way of thinking to demonstrate how those same human rights encompass climate change-related impacts, and argues that the effects of climate change will interfere with the enjoyment of a wide range of rights, and may amount to violations of those rights under international law (Bell 2013; Cameron 2010; Caney 2009; Doelle 2004; Humphreys 2010; Knox 2009–2010; Limon 2009; Pedersen 2010; Westra 2010). This section will examine some specific rights in more detail to assess the ways in which climate change may interfere with their realisation.

7.3.1 The Right to Life

Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR) (1966) provides that every human being has the inherent right to life. The Human Rights Committee has adopted a broad definition of the right to life, interpreting it

to impose positive obligations on States to protect against threats to life, including specifically malnutrition and epidemics (HRC 1982: [5]; Ramcharan 1983: 305, 1984: 1–7; Joseph and Castan 2000: Ch 8; Cameron 2010: 701; McInerney-Lankford et al. 2011; 12). The right to life can therefore be violated where States allow conditions to exist which present an imminent threat to life (HRC 1982; KNLH v Peru 2003). In addition to the ICCPR, the *Convention on the Rights of the Child* (CRC) also guarantees to all children the right to life and obliges States 'to ensure to the maximum extent possible the survival and development of the child' (1989: Article 6(2)).

Adopting this understanding, the right to life can be defined as the right 'to access to the means of survival; realise full life expectancy; avoid serious environmental risks to life; and enjoy protection by the State against unwarranted deprivation of life' (Stephens 2010: 53). A similar definition of the right to life was applied in the *Yanomami Indians* petition before the Inter-American Commission on Human Rights (1988). In that case, the Commission recognised that the realisation of the right to life is closely connected with and dependent on one's physical environment. The Commission found that the actions of the Brazilian government in allowing the construction of a road and granting mining licences on the Yanomami's indigenous land violated their human rights, including the right to life, because the work led to the introduction of a number of infectious diseases to which the people had previously not been exposed (1985; Doelle 2004: 200).

With this understanding, the effects of climate change threaten the right to life in a number of ways, both directly and indirectly. The Intergovernmental Panel on Climate Change (IPCC) projects with confidence that climate change will cause a number of potentially life-threatening environmental impacts, including heatwaves and drought, storms and cyclones, heavy precipitation events and longer monsoon seasons, leading to more frequent flooding (Alexander et al. 2013; Field et al. 2014). It is predicted that these changes will increase the number of persons suffering from death, disease and injury (Huang et al. 2011; Hajat et al. 2014). The World Health Organisation has predicted that between 2030 and 2050, climate change will account for approximately an additional 250,000 deaths each year (2017).

Climate change will also impact on the right to life through 'an increase in hunger and malnutrition and related disorders impacting on child growth and development; cardiorespiratory morbidity and mortality related to ground-level ozone' (Field et al. 2014: 12). Particular communities also face specific threats. As the Inuit petition argued, for example, diminishing sea ice presents a serious risk of injury and death for Arctic communities who regularly travel across the ice (Laidler et al. 2009; Ford et al. 2014).

Climate change is also predicted to exacerbate weather-related disasters, which already kill thousands of people each year (Field et al. 2014: 12, 20). Destructive events such as heatwaves, storms and floods have the effect of arbitrarily depriving people of their life and thereby undermine the right to life (Caney 2009: 230). Further, the potential for climate change to exacerbate other life-threatening problems such as malnutrition and epidemics enlivens the Human Rights

Committee's definition of the right to life, with the result that a State which fails to take action to prevent or minimise these conditions would be in violation of its human rights obligations (McInerney-Lankford et al. 2011: 12–13; Atapattu 2008: 46–47). Climate change thus has the potential to affect the right to life both directly and indirectly, as it impacts on the determinants of life including food, shelter and healthy conditions, as well as causing or contributing to life-threatening events.

7.3.2 The Right to Health

The right to the highest attainable standard of physical and mental health is guaranteed in Article 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966), and is referred to in the CRC (1989: Article 24), the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) (1979: Articles 12, 14(2)(b)), the *Convention on the Elimination of all forms of Racial Discrimination* (CERD) (1966: Article 5(e)(iv)), the *Convention on the Rights of Persons with Disabilities* (CRPD) (2007: Articles 16(5), 22(2) and 25), and the *Convention on the Protection of the Rights of All Migrant Workers and their Families* (CMW) (1990: Articles 43(1)(e), 45(1)(c) and 70). As noted above, the right to health is one of the few human rights which is specifically mentioned in the Preamble of the *Paris Agreement*.

The 2009 report of the OHCHR into human rights and climate change described the right as implying:

> the enjoyment of, and equal access to, appropriate health care and, more broadly, to goods, services and conditions which enable a person to live a healthy life. Underlying determinants of health include adequate food and nutrition, housing, safe drinking water and adequate sanitation, and a healthy environment (OHCHR 2009: [31]; see also CESCR 1999; McInerney-Lankford et al. 2011: 15; Hunt and Khosla 2010).

It is projected that climate change will affect the health of millions of people in a wide variety of ways, including through the effects noted previously in relation to the right to life. Additionally, rates of malnutrition from food and water insecurity are expected to increase (Schmidhuber and Tubiello 2007: 19704; Ahlgren et al. 2014). There is also an increased risk of injury due to extreme weather events such as heatwaves, droughts, floods and storms (Alexander et al. 2013: 23; Field et al. 2014: 7-12-13; OHCHR 2009: [32]). Higher temperatures are predicted to lead to a higher incidence of food poisoning, while extreme rainfall events and floods are likely to cause an increased prevalence of water-borne diseases such as cholera (Schmidhuber and Tubiello 2007: 19705). Overall, rates of diarrhoeal, cardiorespiratory and infectious diseases are likely to increase, and it is expected that global warming may also lead to a spread of malaria and other vector-borne diseases into new areas (Field et al. 2014: 12, 20; OHCHR 2009: [32]; Cameron 2010: 702).

These effects will have a disproportionately serious impact on already at-risk groups including indigenous peoples, the elderly, children and people with

disabilities. Communities in sub-Saharan Africa, South Asia and the Middle East are also more likely to be affected, where climate change is likely to exacerbate existing vulnerabilities and reduce the capacity of individuals and groups to adapt (Jones et al. 2014; OHCHR 2009: [32]; UNDP 2013: 10, 95). The former Special Rapporteur on the right to health has warned that climate change will place severe additional stress on health systems worldwide and that 'failure of the international community to confront the health threats posed by global warming will endanger the lives of millions of people' (Hunt 2007: [102]).

States' obligation under international human rights law is to work progressively towards the full realisation of the highest attainable standard of health (ICESCR 1966: Article 2). This does not require them to prevent absolutely any climate-related health impacts, and it is acknowledged that States' differing capacities will determine what is achievable for each. Nonetheless, at a minimum, States need to address any immediate threats to health presented by climate change, such as inadequate food and water supplies, and continue to work cooperatively towards providing appropriate protection against climate-related health hazards and healthcare for those suffering illness and injury.

7.3.3 The Right to Adequate Food

The ICESCR guarantees in Article 11 the right of everyone to an adequate standard of living, including adequate food (Article 11(1)). The article explicitly recognises the right of all people to be free from hunger (Article 11(2)) and to this end imposes an obligation on States to improve methods of food production and distribution (Article 11(2)(a)), and to ensure an equitable distribution of world food supplies (Article 11(2)(b)). The right to food is also mentioned in the CRC (1980, Article 24 (2)) and the CRPD (2007: Articles 25(f), 28(1)) and is referred to by implication in the CEDAW (1979: Article 14(2)(h)), and the CERD (1966: Article 5(e)).

According to the Committee on Economic and Social Rights' *General Comment 12* on the right to adequate food, elements of the right include the availability of adequate food (including through the possibility of feeding oneself from natural resources) which must be accessible to all individuals under the jurisdiction of the State. States must also take necessary action to alleviate hunger, even in times of natural or other disasters (CESCR 1999: [6]; OHCHR 2009: [25]).

It is predicted that climate change will impact on food production, availability and stability in a number of ways. Production and availability of food will be affected directly through changes in agro-ecological conditions (Schmidhuber and Tubiello 2007: 19703; Ahlgren et al. 2014). Changes in temperature and precipitation will lead to changes in land suitability and crop yields (Schmidhuber and Tubiello 2007: 19704; Parry et al. 2009: 14, 58). While in some temperate areas, such as Russia and Central Asia, higher temperatures may lead to benefits in the form of expanded areas suitable for cropping and longer growing seasons, in arid or semi-arid areas the effect is likely to be negative, with high temperatures leading to

lower livestock productivity and higher livestock mortality rates, as well as an expansion of agricultural pests (Schmidhuber and Tubiello 2007: 19704).

Climate change is also likely to affect food security indirectly by destabilising access to food. Local food supplies will become more susceptible to interruptions due to extreme weather events, especially floods and droughts (Field et al. 2014: 7, 12; Atapattu 2008: 52–53). Prices of food are also likely to rise under climate change due to problems of supply and increased costs of transportation. While in some areas this is likely to be offset by increased income due to growths in economic development, the effects of that development are unevenly spread. Where income levels remain low, higher food prices will exacerbate existing food security problems. Climate change is therefore likely to cause disproportionately negative impacts on the right to food in already food insecure areas. The biggest losses in cropland are likely to be in Africa and the current disparities in crop production between developed and developing countries are estimated to increase (Schmidhuber and Tubiello 2007: 19704–19706; Parry et al. 2009: 60, 67, 74; Field et al. 2014: 7, 12, 20).

The right to food is also at risk from actions taken in the pursuit of climate change mitigation and adaptation. For example, mitigation efforts aimed at reducing greenhouse gas emissions might involve greater production of biofuels as a source of renewable energy. Where this requires changes to land use, agricultural production for food may be diminished. Similar changes to land use, whether for biofuel production, forestry or new varieties of climate-resistant crops, might also require people to move off or cease using land which has been utilised for subsistence farming or hunting, with consequences for the availability of adequate food (Lewis 2016: 43–44).

Overall, the World Food Programme has predicted that by 2050, the number of people at risk of hunger as a result of climate change will increase by 10–20% more than would be the case in a world free of climate change, and that the number of malnourished children is expected to increase by 24 million, which represents a 21% increase on the number which would be affected without climate change (Parry et al. 2009: 4). It is therefore imperative that States consider the impacts of climate change on the right to food and take the necessary steps to alleviate these risks.

7.3.4 The Right to Water

As outlined in Chap. 2, the right to water is implied by the rights to an adequate standard of living and the right to health in Articles 11 and 12 of the ICESCR. The Committee on Economic, Social and Cultural Rights had defined the right to water as 'the right of everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses, such as drinking, food preparation and personal and household hygiene' (2003: [2]). The right is also implied in the CEDAW and the CRPD which include access to water as an element of an adequate

standard of living (CEDAW 1979: Article 14(s)(h); CRPD 2007: Article 28(2)(a)), while the CRC refers to the provision of clean drinking water as one of the steps States must take to combat malnutrition and disease among children (1989: Article 24(2)(c)).

The complexity of our relationship with water, which is both a basic necessity for life as well as an essential requirement for agriculture and many industrial processes, means that the pressure placed on water supplies by climate change has the potential to impact in a number of negative ways (Westra 2010: 162). According to the IPCC's *Fifth Assessment Report*, it is very likely that climate change will cause sea ice cover to shrink and thin and that Northern Hemisphere spring snow cover and glacier volumes will significantly decrease (Alexander et al. 2013: 17). These changes to the cryosphere are projected to negatively affect water availability for more than one-sixth of the world's population supplied by melt water from mountain ranges. Water supplies will also be affected by weather extremes such as floods and droughts, and salt-water inundation due to storm surges and sea-level rise. Climate change is predicted to increase existing water stress caused by factors such as population growth, environmental degradation, poor water management, poverty and inequality (Field et al. 2014: 6, 27–29, 34).

Given the fundamental nature of our reliance on water, the threat posed by climate change represents a danger not only to the right to water itself, but also to a number of interrelated rights. It must therefore be a priority area for States to address, including through cooperative arrangements with other States, to ensure that all people have reliable access to safe and affordable water supplies at all times.

7.3.5 The Right to Adequate Housing

The right to adequate housing is protected by international law as another limb of the right to an adequate standard of living (ICESCR 1966: Article 11). The Committee on Economic, Social and Cultural Rights has defined the right as 'the right to live somewhere in security, peace and dignity' (1991: [7]). Elements of the right include security of tenure, protection against forced evictions, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location and cultural adequacy (CESCR 1991: [7]; see also CESCR 1997).

Climate change is predicted to affect the right to adequate housing in a number of ways. Rising sea levels, storm surges and extreme weather events will directly affect coastal settlements (Field et al. 2014: 15). Arctic communities, Small Island States and low-lying mega-delta regions are particularly at risk, and these impacts have already caused the flooding of millions of homes in recent years and even the relocation of some communities in the Arctic and in low-lying island States (Rolnik 2009). The OHCHR has elaborated on the nature of States' obligations with respect to housing in the context of climate change hazards, suggesting that States must ensure adequate protection of housing from weather hazards, as well as access to housing away from hazardous zones and access to shelter in case of displacement during extreme weather events. It has also stressed the need for States to ensure that

communities who are relocated during disaster are protected, and that people are not forced to relocate without appropriate consultation and legal protections (OHCHR 2009: [38]).

As well as direct impacts on housing caused by flooding, erosion and rising sea levels, climate change also impacts upon the right to housing when people are forced to move to more urban areas as rural livelihoods become less reliable. Today, an estimated one billion people live in urban slums in unsafe areas, such as fragile hillsides or flood-prone river banks, where they are more vulnerable to climate impacts. It is predicted that many more people will be forced to move to urban slums or informal settlements as a result of climate change (UNDP 2008: 9; OHCHR 2009: [47]; Field et al. 2014: 18). Raquel Rolnik, former UN Special Rapporteur on adequate housing, reported that 90% of the increase in population over the next decade would be accommodated in urban areas of less developed countries: '[f]actors such as advanced desert frontiers, failure of pastoral farming systems and land degradation would lead to more migration and more pressure on urban housing conditions' (2009: [13]). Relocation to urban areas may also occur as a result of people being moved off their land to make way for mitigation and adaptation activities.

Given the large numbers of people living in unsafe slum conditions, climate change poses a threat not only to the right to adequate housing and an adequate standard of living, but also to the right to health and even the right to life. It is therefore a key area requiring States' attention, and ensuring safe and adequate housing must be considered as a crucial component of any mitigation or adaptation program which involves the relocation of individuals, families or communities.

7.3.6 Indigenous Rights and the Right to Self-determination

Climate change threatens to interfere significantly with the human rights of indigenous peoples and other minority groups. A key right at risk of such interference is the right to self-determination. This right is guaranteed in common Article 1 of the ICCPR and the ICESCR, which states that

> All peoples have the right of self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

Two key elements of the right to self-determination are the right of a people not to be deprived of its means of subsistence and the obligation of States parties to promote the realisation of the right, even outside their own territory (HRC 1984: [6]). This right is recognised to be of *erga omnes* character, that is, it is an obligation borne by all States and owed to the international community as a whole (ICJ, *East Timor Case* 1995; ICJ, *Israeli Wall Opinion* 2004).

Climate change has the potential to impact on the right to self-determination of indigenous peoples and in some cases the populations of entire States. For indigenous peoples, climate change threatens their ability to live on traditional territories or rely on traditional means of subsistence (OHCHR 2009: [40]). Rising sea levels and

increased extreme weather events threaten the habitability of some Small Island States or communities in low-lying areas. The potential disappearance of a State's territory due to inundation by rising seas would clearly impact upon the right to self-determination (Maguire and McGee 2017). This consequence is rendered particularly unjust by the fact that the peoples most likely to suffer loss of territory are those who have contributed least to the problem. Seen from the perspective of self-determination, loss of habitable territory represents a double breach: not only can the people no longer use their land to pursue their own economic and social development, but that circumstance has been forced upon them without any real fault of their own, and often by countries who have been responsible for past injustices during colonisation.

The potential loss of a State's entire territory also presents a range of legal challenges, including issues relating to the status of citizens of that State and the protections afforded to them under international law (Burns 1997; Jacobs 2005; McAdam 2010a, b; McAdam and Saul 2010). The 2009 OHCHR Report states that:

> While there is no clear precedent to follow, it is clear that insofar as climate change poses a threat to the right of peoples to self-determination, States have a duty to take action to avert climate change impacts which threaten the cultural and social identity of indigenous peoples (OHCHR 2009: [41]).

As well as the right to self-determination, international human rights law also protects other rights of indigenous peoples related to culture. These are enshrined in the ICCPR (1966: Articles 1 and 27) as well as the International Labour Organisation's *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) and the *United Nations Declaration on the Rights of Indigenous Peoples* (2007). These instruments guarantee to indigenous peoples the rights to participate in and pass on their traditional skills, customs, spiritual beliefs and practices, and languages.

The Inuit petition outlined above demonstrates the impact of climate change on indigenous rights, as environmental changes in the Polar Regions affect traditional livelihoods and force relocation from traditional lands. Indigenous peoples inhabiting low-lying areas or Small Island States face similar threats. As the 2009 OHCHR report states:

> Climate change, together with pollution and environmental degradation, poses a serious threat to indigenous peoples, who often live in marginal lands and fragile ecosystems which are particularly sensitive to alterations in their physical environment (OHCHR 2009: [51]).

Where climate change impacts on traditional lands a wide range of indigenous human rights are implicated, including rights to self-determination and cultural rights (Doelle 2004: 181; Stephens 2010: 54; Williams 2001). In addition to the specific rights to culture and self-determination enjoyed by indigenous peoples, the rights to food, water, health and housing described above are enjoyed equally with all non-indigenous peoples, but may impose particular obligations on States in order to ensure that they are fulfilled in an appropriate fashion, and that the specific needs of indigenous peoples in the context of climate change are identified and addressed.

Taken together, the right to self-determination and other indigenous rights provide a strong platform for addressing some of the most obvious injustices of climate change. They demand that States, particularly high-emitting, developed

States, respect the autonomy and independence of other, smaller nations and of indigenous peoples, and provide appropriate assistance to ensure they can adapt to climate change in a manner characterised by dignity and respect.

7.4 Conclusion

As has been demonstrated, the effects of climate change, and of our responses to it, impact on a wide range of human rights. Impacts on water supplies, agriculture and biodiversity undermine rights to food and water, subsistence and livelihoods. These impacts also contribute to other health concerns, exacerbating threats to the right to health and the right to life. Indigenous peoples' rights to self-determination and other cultural rights are also threatened in a number of ways. Given these consequences, it is appropriate to frame climate change as a human rights issue, and many States have taken up the language of human rights to draw attention to their situations and demand stronger international action.

However, identifying that climate change impacts on the enjoyment of human rights is only the first step of pursuing a human rights-based approach to climate change. What is also required is finding ways to integrate human rights principles more meaningfully into climate change responses to take full advantage of this new way of thinking about the problem. One of the major benefits promised by a human rights-based approach is the possibility of using the longstanding framework of international human rights laws to hold governments accountable for a failure to address climate change. However, the effectiveness of this approach depends a great deal on the way we define the obligations of States under human rights law in the particular context of climate change, and on our ability to establish that a violation has occurred. The following chapter will examine these issues in more detail, identifying a number of challenges confronting a human rights-based approach to climate change which is grounded in traditional norms and processes of international human rights law. At the same time, it will argue that, while there may be some limitations to the application of human rights laws, there is still significant rhetorical and moral value attached to the language of human rights and consequently much to be gained from its continued linkage with climate change.

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Chapter 8
Challenges Confronting a Human Rights-Based Approach to Climate Change

Abstract There are many variations of a human rights-based approach to climate change. In its most legalistic form, a human rights-based approach entails claims pursued through legal processes to seek accountability and compensation for human rights violations caused by the effects of climate change. While such an approach has the potential to result in meaningful changes to government policy and positive impacts on the lives of affected individuals and communities, there are numerous challenges to its effectiveness, particularly when it relies on conventional systems of international human rights law. These challenges flow from the cumulative, transnational and intergenerational nature of climate change impacts, as well as from the norms, structures and methods of human rights law itself. This chapter analyses these various obstacles, drawing on recent jurisprudence from domestic and regional jurisdictions. Despite the challenges which are identified, the chapter argues that there are many benefits to be gained from a human rights-based approach to climate change, particularly when we look beyond the confines of traditional legal mechanisms to alternative forms of advocacy.

8.1 Introduction

The significant and serious impacts of climate change on human lives make human rights a relevant and appropriate lens through which to view the problem. As the previous chapter explained there are many techniques which come under the umbrella of human rights-based approaches to climate change. Such approaches range from the rhetorical use of human rights language, which emphasises the moral and ethical dimensions of rights, to exert pressure on responsible parties, to integrating human rights principles into climate change decision-making and mitigation and adaptation responses. In its most legalistic form, a human rights-based approach to climate change involves claims pursued through frameworks of international or domestic laws in order to seek accountability and compensation for violations of legally enshrined rights.

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Despite the appeal of a claim-based approach, climate change presents several significant challenges for any legal framework purporting to assist and protect potential victims, and specific issues for human rights law in particular. These challenges relate to the cumulative and transnational impact of greenhouse gas emissions: the impact of one State's emissions is not limited to that State's territory, but contributes to global warming everywhere. For human rights law this presents considerable challenges to traditional jurisprudence, where human rights duties are typically owed by a State to its own citizens or to those within its territory or jurisdiction. The timeframe over which the effects of climate change are realised raises corresponding questions about responsibility for past emissions and duties owed to future generations. The combination of these factors makes climate change more complex and problematic than any environmental issue that has confronted international law, especially human rights law, to date.

A number of cases have already been pursued in domestic and regional legal systems to enforce human rights in the context of climate change (see e.g. *Leghari v Pakistan* 2015; *Urgenda Foundation v The State of the Netherlands* 2015; *Greenpeace Norway and ors v Norway* 2018; Watt-Cloutier 2005). Not all cases have been successful, but the favourable outcome for plaintiffs in cases like *Leghari v Pakistan* (2015) and *Urgenda v Netherlands* (2015) perhaps signifies an increasing acceptance by courts that human rights principles do apply to climate change actions and a willingness to hold governments accountable for their human rights obligations. This chapter identifies numerous difficulties in replicating these successes at the international level, however. A threshold issue is identifying an appropriate duty-bearer against whom a claim can be pursued and a specific duty that is alleged to have been breached. This is problematic in the context of climate change, where responsibility may be levelled at a range of State and non-State actors, across international borders and over a long period of time, each of whom might seek to deflect blame elsewhere. Assuming a duty-bearer can be identified who is susceptible to a claim within the relevant legal system, a further challenge exists in proving that a violation has been committed. The problem here again flows from the fact that the impacts of climate change are the cumulative effect of many States' greenhouse gas emissions over time, making it problematic to draw a causative connection between specific actions and effects.

This chapter will analyse these challenges in detail, focusing on international human rights law, as this legal framework has the broadest international application and is most reflective of the global nature of climate change. The chapter will begin by defining the duties to respect, protect and fulfil human rights which correlate to the rights analysed in Chap. 7. Particular focus will be given to the potential for these duties to extend beyond national borders so that a State may be held responsible for the consequences of its actions for people outside its territory. The chapter will also consider the issue of proving a violation of human rights law. While this presents as one of the most challenging barriers to be overcome in pursuing a successful claim, it is not insurmountable and it is possible to conceive of some cases which may be easier to prove, especially when we consider the experiences of domestic litigation to date.

Notwithstanding these limitations, there are many benefits to be gained from a human rights-based approach to climate change. Most notably these relate to the moral and normative force of employing human rights language to describe the causes and effects of climate change. The chapter concludes by exploring these benefits further and argues for an expansion of these modalities of the human rights-based approach. Given the significant obstacles identified in using existing human rights law, Chap. 9 goes on to consider whether a new human right to a good environment would be any better equipped to meet these challenges. It will also examine whether the new right could offer any additional benefits in tackling the effects of climate change compared to those which are available under existing rights.

8.2 Defining States' Duties with Respect to the Human Rights Impacts of Climate Change

As the previous chapter explained, climate change has the potential to interfere with the enjoyment of a wide range of human rights. The analysis in Chap. 2 demonstrated that in certain circumstances environmental harm has been held to amount to a violation of human rights. To what extent then is it correct to speak of climate change as a human rights violation? How are we to distinguish between the human rights impact of climate change and human rights violations in a climate change context? As Daniel Bodansky has put it:

> Legally, climate change no more violates human rights than does a hurricane, earthquake, volcanic eruption or meteor impact. Human rights are "human" by virtue of not only their victims but also their perpetrators. And they represent human rights "violations" only if there is some identifiable duty that some identifiable duty-holder has breached (Bodansky 2010: 519).

The critical issue therefore is whether we can point to a legal duty which has been breached. Central to this question is how we define the obligations which correlate to the human rights discussed in the previous chapter (Knox 2009–2010; Pedersen 2010: 244).

The nature of climate change presents numerous challenges to the traditional view of human rights duties. The cumulative effect of global greenhouse gas emissions means that each State's actions contribute to global climate change, and therefore to human rights implications worldwide. However, international human rights law does not require States to respond to human rights threats wherever they arise. Rather, States' obligations are defined with reference to a limited class of rights holders—typically citizens and those within the State's territory or jurisdiction. While this limitation of duties helps provide clarity for States and avoid the practical challenges that would come with more broadly framed duties, such an approach fails to capture the reality of the way climate change impacts on human

rights, where neither territorial boundaries nor jurisdictional limits are adhered to (Bodansky 2010: 522).

The application of human rights duties is further complicated by the fact that a significant proportion of greenhouse gas emissions are contributed by non-State actors, principally private corporations. Such entities are not parties to human rights treaties and are generally not directly bound by international law (McCorquodale 2002: 384, 2009). States may have obligations to regulate emissions by non-State actors, but those actors still remain only incidentally bound by human rights law. These factors present challenges to the effective use of human rights law in addressing climate change.

In order to optimise the benefits of a human rights-based approach to climate change, it is essential that we can clearly define what duties States are to be bound by, and how they are to be enforced. To demonstrate a violation of human rights law it must be possible to identify a right-holder and a corresponding duty-bearer, and the content of obligations owed by the duty-bearer to the right-holder must be established. Only once the relevant duties are clarified can we talk of violations of those duties and possible actions against States.

International human rights law typically entails three levels of obligation owed by States. These are the duties to respect, to protect and to fulfil (Steiner et al. 2007: 185–189). The first obligation, the duty to respect human rights, normally requires that a State take no positive action which would interfere with the enjoyment of the right in question. In that sense it is referred to as a negative duty—an obligation to refrain from activities that would violate the right. The second level of obligation, the duty to protect human rights, requires a State to take positive measures to prevent interference with human rights, including from non-State actors or other external factors. The third level of obligation is the duty to fulfil. This usually imposes positive obligations on States to take steps to ensure all persons enjoy the human rights to which they are entitled. The exact requirements of each level of obligation vary according to the particular right and the way it is defined in international law. For example, for civil and political rights within the *International Covenant on Civil and Political Rights* (ICCPR), States are obliged to take the necessary steps to give effect to the rights contained within the covenant (1966: Article 2). The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) imposes a lower standard for fulfilment, requiring that States take steps towards the progressive realisation of the relevant rights, to the maximum of their available resources and with the assistance of other States (1966: Article 2).

The content of obligations to respect, protect and fulfil human rights in relation to environmental degradation is fairly well established where that environmental degradation occurs within a State's territory, or where it is under its control. The jurisprudence of the European Court of Human Rights, discussed in Chap. 2, provides numerous examples of this. As will be discussed in more detail below, the possibility of these duties applying extraterritorially is problematic, and may limit the effectiveness of a human rights-based approach to deal with the global consequences of climate change (McCorquodale and Simons 2007: 602; McCorquodale 2009: 388). However, there is a general understanding that States must not

undertake acts or omissions which cause harm beyond their borders (*Trail Smelter* 1949; *Corfu Channel* 1949; *Pulp Mills* 2010) and the concept of 'jurisdiction' has been interpreted to extend States' human rights duties to exercises of their authority which occur outside their territory or which produce effects outside that territory (*Armed Activities* 2005; McCorquodale and Simons 2007: 602; King 2009: 522). On these bases, there may be scope to for human rights obligations to be more broadly applied. However, even under a restricted view where States only owe obligations to people within their territory or subject to their jurisdiction, there are a number of duties which apply in the climate change context, and which could form the basis of a claim for a violation. The nature of the possible duties which apply can be examined in the context of the tripartite obligations to respect, protect and fulfil.

8.2.1 Duty to Respect

Given that climate change is predicted to negatively impact on a wide range of human rights, the duty to respect those rights would impose an obligation on governments to refrain from activities which directly contribute to climate change. If it is understood that climate change affects the human rights of all persons, at least to some extent, then arguably all States share the obligation to respect those rights. Even under the conventional view that human rights obligations are only owed to persons within a State's own territory or jurisdiction, each State would at least bear an obligation to respect the rights of those persons.

In terms of specific actions which would fall under the duty to respect, States are required to prevent, or at least reduce, greenhouse gas emissions (Quirico et al. 2016: 9). This duty is generally understood to relate to States' own actions, so it would apply principally to State-owned or operated activities, such as publicly-owned power stations. It should also be seen to extend to exercises of government authority which will bring about interference with human rights. For example, the decision of a government to approve the construction of a new privately-owned coal mine or power station, or to provide the operators with subsidies or other incentives to bring the project to fruition, would represent a breach of the duty to respect human rights, as the State action can be seen to facilitate the emitting activities. While regulation of the actions of private entities ordinarily falls within the duty to protect, discussed below, where interference with human rights is inherent in the very purpose of the project, as it would be with any proposal which will make a significant contribution to global greenhouse gas emissions, then government approval or facilitation of that activity ought to be viewed as a breach of the duty to respect, in addition to the duty to protect.

The duty to respect ought also to encompass a duty on States to foster an energy policy and accompanying regulations which minimise greenhouse gas emissions, or at least which ensure compliance with that State's commitments under the international climate regime (Bodansky 2010: 519–520). This extends also to a duty not

to avoid, distort or deny scientific information on the causes and effects of climate change, especially where such behaviour is intended to facilitate ongoing or increased emissions (Watt-Cloutier 2005: 109; Quirico et al. 2016: 9). These obligations are necessary to ensure that the State complies with its duty to respect human rights through refraining from actions which would interfere with the enjoyment of those rights.

However, the obligation to reduce greenhouse gas emissions in order to respect human rights must be balanced against States' other human rights obligations. It could be argued by States that a certain level of emissions is a necessary consequence of efforts to fulfil other specific human rights, particularly economic, social and cultural rights. In this context there is a potential conflict between the duty to respect human rights (expressed as an obligation to prevent greenhouse gas emissions) and the duty to fulfil human rights (through development activities which produce emissions) (Doelle 2004: 180). Given this conflict, the general duty to respect human rights may not necessarily translate into a positive obligation to reduce greenhouse gas emissions.

Another difficulty lies in the fact that, at least under conventional human rights principles, States' obligations are owed to a limited class of persons. As was noted above, most adverse effects of climate change will be experienced by developing States, whose governments contribute comparatively little to greenhouse gas emissions. Those States which are the major emitters would only owe an obligation to respect the rights of their own citizens or persons under their jurisdiction or control, who are typically not as badly affected. At the same time, the States suffering the worst impacts of climate change are simultaneously low-emitters of greenhouse gases and ill-equipped to deal with the consequences of global warming. The result would be that the people most in need of having their rights respected would not be able to point to a duty-bearer who is both legally obliged to respect those rights and who has the capacity to do anything constructive to help them. This points to the need to find a way to move beyond conventional, territorial notions of human rights obligations, a question which will be addressed in more detail below.

While it is possible to point to specific activities which fall within a State's duty to respect human rights, translating the obligation into a specific context and proving a violation would involve demonstrating that, were the State to act in a particular way (for example, continuing to emit greenhouse gases at an unsustainable rate) a specified human right would be negatively affected, such that the duty to respect that right requires the State to act differently. The cumulative effect of greenhouse gas emissions makes it difficult to isolate the impact of a single State's actions, except perhaps with the largest emitting activities. However, as our understanding of the science of climate change has improved, we are better equipped to analyse the respective contributions of particular States and to understand the aggregate effect of global emissions (Knox 2016: 9–10). States are consequently less able to deflect blame by arguing that their emissions make no appreciable difference. The duty to respect human rights requires that all States play their part in addressing the harmful effects of climate change.

As well as a duty to refrain from activities which would cause negative human rights impacts by contributing to climate change, the duty to respect applies to States' actions in implementing mitigation and adaptation strategies. States must ensure that the measures they employ to address climate change do not cause other negative impacts for the enjoyment of human rights (Pedersen 2010: 245). This provides a set of minimum standards for governments to adhere to in developing climate policy. The duty to respect human rights is easier to enforce with respect to mitigation and adaptation measures, as these clearly flow from the exercise of a State's authority, and are likely to have impacts on human rights which are more direct. Importantly, the people affected can be more easily demonstrated as being people to whom States owe obligations. As such, the duty to respect human rights can at least be seen to require States' attention to human rights in formulating their responses to climate change, and as argued here ought also to extend to addressing the broader impacts of climate change itself.

8.2.2 Duty to Protect

The second level of human rights obligations is the duty to protect. States have an obligation to protect their citizens and those subject to their jurisdictions from the harmful effects of climate change, and this translates into an obligation to take effective adaptation measures within their territory (Knox 2009–2010: 191). The obligation to protect also requires that States not permit private actors under their jurisdiction to carry out activities that would violate human rights, and to provide a remedy for such violations if they occur (Knox 2016: 16–17; Quirico et al. 2016: 13; McCorquodale 2009: 387).

The requirements of the obligation to protect human rights in a climate change context can be derived from the jurisprudence of the European Court of Human Rights on environment-based violations of human rights, which requires States to put in place regulatory frameworks to ensure that non-State actors do not violate human rights (Pedersen 2010: 245; Knox 2009–2010: 191). This approach has typically been used to find violations of human rights based on States' failure to adequately regulate activity by private actors which threatens to damage the environment in ways which interfere with the enjoyment of citizens' human rights.[1] Following this logic, States would be required to prevent emissions from privately owned operations, such as power plants, which contribute high levels of greenhouse

[1]There have been several cases before the European Court of Human Rights which have successfully argued that environmental interference amounts to a violation of the rights protected in the European Convention. See for example *Fadeyeva v Russia* (2005) and *Lopez Ostra v Spain* (1994), where the State failed to meet domestic standards by allowing excessive levels of pollution; *Taskin v Turkey* (2004) and *Giacomelli v Italy* (2006), where the State failed to implement a domestic court's decision to close a facility; and *Onyeryildiz v Turkey* (2004), where the State failed to take adequate precautions to guard against a foreseeable risk of harm.

gas emissions. They would also be required to regulate the activities of private entities involved in carrying out mitigation or adaptation measures, to protect against incidental human rights breaches.

An important feature of the European jurisprudence is that it separates the State's duty to protect from the underlying cause of the harm. In *Budayeva v Russia* (2008), for example, the State was held to have a duty to protect against the adverse effects of a mudslide, even though it could not be said to have caused the harm itself. As former Special Rapporteur John Knox has explained, 'the fact that the State did not cause the threat does not excuse the State's failure to protect against it' (2009–2010: 197). This indicates an obligation to undertake adaptation measures to protect against the unavoidable effects of climate change, which would be independent from the State's individual contribution to global warming, and would apply even to the lowest-emitting States. Such an obligation would also sit apart from the State's duty to regulate the activities of private actors, and would apply even where the cause of the human rights interference was beyond the control of the State.

The duty to protect human rights might also impose on States an obligation to reduce emissions from public as well as private sources, based on our now well-established understanding of the effect of aggregate greenhouse gas emissions. This would in practice be similar to the duty to respect, but it is based on the State's positive duty to take preventive and protective steps, rather than a negative duty to refrain from interference.

However, the problem of cumulative impact is present here as well: given that the reduction of emissions within one State will have little immediate effect on the human rights of that State's citizens, there may be no obligation on States to undertake such a reduction. Following this reasoning, arguably only the largest emitters would have any duty to reduce their emissions, since all other States could claim that cutting their emissions alone would have negligible effect. John Knox counters this, however, by pointing out that States also owe a duty to protect the human rights of their citizens against interference from outside actors, including other States. This duty may require that States do what is in their power to help reduce global greenhouse gas emissions. This might reasonably entail an obligation to try to negotiate a cooperative international response, and in the course of such negotiations States may have to commit to cutting their own emissions (Knox 2009–2010: 198). In a climate change context then, the duty to protect could require governments to reduce greenhouse gas emissions, including by implementing measures to regulate private emissions within their territory, as part of an agreement with other States to take collective action to limit climate change (Bodansky 2010: 520; Cameron 2010: 699). The duty to protect human rights therefore encompasses obligations in relation to both mitigation of and adaptation to climate change.

8.2.3 *Duty to Fulfil*

The third level of human rights duties is the duty to fulfil. This can be divided into three further duties: to facilitate, promote and provide human rights (De Schutter 2016: 427–31). This is the most demanding standard of obligation as it requires States to take positive steps to ensure all people, at least those within the State's territory or jurisdiction, are able to enjoy the full range of rights. It is also arguably the most difficult to apply in the context of climate change. The duty to fulfil requires positive action to address the negative effects of climate change, principally through undertaking and supporting adaptation measures which can ensure people continue to enjoy their human rights in the face of climate change (Quirico et al. 2016: 17–19; Bodansky 2010: 520).

The duty to fulfil human rights might also be understood to support mitigation action by States, on the basis that lowering levels of atmospheric greenhouse gases is a key means of ensuring that human rights can be enjoyed into the future. As Quirico et al. explain, this construction of 'complementary mitigation' as being part of the promotion and facilitation of human rights helps to support positive, proactive policy making. It can therefore be contrasted with the duties to respect and protect, which focus primarily on constraining government action which is counter-productive to mitigation (Quirico et al. 2016: 16).

Locating the duty to fulfil human rights in the face of climate change with the State in whose territory the negative effects are experienced raises issues of justice however, as many of the States who will be confronted with serious climate change impacts lack the resources to deal with them effectively. Further, many of these States have contributed comparatively little to global greenhouse gas emissions. This problem is in part addressed by the concept of 'progressive realisation' which is found in international human rights law. As will be discussed in more detail below, the ICESCR qualifies the obligation to fulfil human rights by requiring that States work towards the progressive realisation of economic, social and cultural rights, rather than demanding immediate fulfilment (1966: Article 2). It also links States' obligations to their capacity, so that wealthier countries will be expected to do more than poorer ones.

The ICESCR also suggests another means of addressing the justice considerations outlined above by referring to the importance of international cooperation to achieve economic, social and cultural rights. A number of scholars have suggested that there is a duty of international cooperation with respect to the human rights implications of climate change, according to which States must work together to reduce greenhouse gas emissions and wealthy States must take steps to assist poorer States (Cameron 2010: 699; Knox 2016). The potential of a duty to cooperate will be examined further below as a possible solution to the problem of extraterritoriality, but it should be noted that States, especially developed States, have consistently rejected any suggestion that human rights law places them under a legal obligation to provide assistance to other States (Knox 2009–2010: 208). The duty to fulfil human rights would place governments under a duty to address human rights

deficits within their own territory, including where such problems are the result of global warming. But it would not, it seems, oblige States to provide positive assistance beyond their own borders. There is an obligation under the *United Nations Framework Convention on Climate Change* and *Paris Agreement* for wealthy States to provide assistance to poorer States in taking adaptation and mitigation measures (UNFCCC 1992: Article 4; Paris Agreement 2015: Articles 7 and 9), however such obligations are not part of human rights law and are limited to the particular obligations contained in the UNFCCC and subsequent climate agreements. The question of the extent to which human rights duties extend beyond States' borders is fundamental to understanding the benefits and limitations of a human rights-based approach to climate change, and will be examined in more detail in the following section.

8.2.4 The Challenge of Extraterritorial Duties

As the previous analysis shows, the obligations of a State to respect, protect and fulfil human rights extend to the climate change context. Specifically, they require States to protect against the adverse effects of climate change by undertaking adaptation measures. States must also take steps to reduce emissions from both public and private sources, and work in good faith towards cooperative global solutions. They are further required to ensure that mitigation and adaptation measures do not cause incidental human rights impacts. However, the usual jurisdictional parameters of States' duties under international law limit the applicability of human rights in the context of climate change. While the causes and effects of climate change typically operate on an international scale, human rights law allows for extraterritorial application of human rights duties only in limited circumstances.

Under international law generally, before a State can be held responsible for the international consequences of its acts or omissions it must be established that those consequences were the result of some exercise of the State's jurisdiction or control (Knox 2013: 17). While this test might be easily made out in the case of transboundary pollution of a river, for instance, it is much more difficult to demonstrate with respect to global greenhouse gas emissions where the consequences are the cumulative effect of the actions of many State and non-State actors across a multitude of jurisdictions. Yet the potential for climate change to impact on the human rights of persons around the world is profound, and if a human rights-based approach to climate change is to provide meaningful assistance then human rights law needs to have an extraterritorial application (Knox 2009–2010: 200, 2013). This is especially needed to help address the injustice inherent in the fact that the countries causing most of the damage are not the worst affected by those actions, and restricting human rights duties to States' own people would leave many who suffer serious consequences unable to enforce their rights against the chief perpetrators of that harm. The necessary expansion of the rules relating to extraterritorial responsibility for human rights represents one of the most significant challenges to

developing a human rights-based approach to climate change within the existing legal system (Shelton 1991–1992: 134, 2008).

In looking for a way to extend human rights obligations, Alan Boyle has argued that jurisdiction could be established by emphasising authority over the person affected, rather than simply focussing on territorial control (2012: 638). He contends that where it is possible for a State to take effective measures to prevent or mitigate transboundary harm to human rights then 'the argument that the State has no obligation to do so merely because the harm is extra-territorial is not a compelling one' (2012: 639). Rather, he suggests that the fundamental principle of non-discrimination in human rights would require a polluting State to treat extra-territorial environmental nuisances no differently from domestic nuisances (2012: 640). However, Boyle acknowledges that even if this reasoning is correct for the usual forms of transboundary environmental nuisance, 'it does not follow that it will be equally valid in cases of global environmental harm, such as climate change' (2012: 640; see also Voigt 2008). The cumulative contributions of multiple States and the difficulty of showing a direct connection to the victims will make it much harder to frame such a situation in terms of jurisdiction or control of persons or territory as usually understood within human rights jurisprudence.

It may therefore be necessary to find more novel ways of expanding human rights obligations so that they apply extraterritorially. Former Special Rapporteur on Human Rights and the Environment, John Knox, has addressed this issue and suggested two possibilities. One way is to extend the current jurisprudence of human rights law to develop obligations for States which apply across national borders. The other way, he proposes, is to develop a new jurisprudence based on an obligation of international cooperation (2016: 11; 2009–2010: 200).

In terms of extending existing human rights jurisprudence to incorporate extraterritorial duties, Knox looks at the potential of both procedural and substantive obligations, drawing on the relationship between the two that has been employed by the European Court of Human Rights (discussed in Chap. 2). Firstly, he suggests that procedural duties could be extended so that States are obliged to undertake an expanded assessment of the impacts of their actions which incorporates an evaluation of transboundary harm (2009–2010: 200). States might also be obliged to allow non-residents to have access to information and to participate in decision-making processes. While this extension of procedural rights and duties seems possible for some forms of transboundary harm, such as air or water pollution which affects neighbouring States, it is difficult to see how it could be feasible in terms of greenhouse gas emissions. States would have difficulty in assessing accurately the potential impact of a specific activity on other territories, given the complexity of causal factors involved. Some form of assessment may be possible for particularly large projects with expected high levels of emissions, but even these impacts could only be assessed in quite general terms in relation to global greenhouse gas contributions.

Perhaps more difficult still would be opening up the consultation process to the full range of potential interest-holders, which would seem to be unmanageable, particularly with respect to large projects with the potential to have a widespread,

long-term impact (producing a rather counter-intuitive result where the bigger and more damaging the project, the less realistic it is for States to be able to conduct an appropriate impact assessment or consultation). Furthermore, traditional environmental human rights jurisprudence would defer to States' judgements when balancing competing rights provided that the procedural safeguards had been put in place, so that States could feasibly justify continued emissions where they served some other legitimate purpose (Boyle 2006–2007: 497).

Beyond procedural obligations, it is necessary to ask whether any of a State's substantive obligations to respect, protect and fulfil human rights could be extended to have extraterritorial application. In this respect Knox has argued that States have at least a duty to respect the rights of people in other states, if not also to protect and fulfil through the provision of international assistance (2009–2010: 201; 2013: 17–18). This may be possible through an extended interpretation of the notion of 'jurisdiction'. The Human Rights Committee in its General Comment 31 on the nature of legal obligations under the ICCPR clarified that the obligations owed under the covenant are not limited to a State's citizens but apply also to anyone within the State's territory or jurisdiction (2004). The Committee made clear that a person 'subject to the jurisdiction' of a State is any person within that State's power or control, even if they are outside the territory (HRC 2004: [10]; McCorquodale and Simons 2007: 602; McCorquodale 2009: 388). This effective control test has been used to extend the application of the ICCPR in circumstances where a State can be said to have responsibility for the rights of an individual even when they are outside the borders of the State, for example in the cases of occupied territories (*Israeli Wall Opinion* 2004), offshore processing of refugees (Francis 2008) or extradition cases (Knox 2009–2010: 203; Miller 2009). Climate change is more difficult to explain in terms of effective control however, for the same reasons that were identified as challenging traditional jurisdictional limits in the first place. While States have control over the emissions they produce, they do not have control over the consequences of those emissions, which are the product of incredibly complex and lengthy scientific processes.

An alternative way of thinking about this problem could be to view the process of climate change not as a random lottery of possible particularised consequences, but as a constant package of outcomes. While we may not know exactly which outcome will affect which group of people or when, we do have a reasonably detailed picture of the likely impacts, and we know that all greenhouse gas emissions contribute to the overall problem. Considered this way, a State can know that when it emits greenhouse gases it will be causing climate change as an inescapable consequence of those emissions. It could be argued then that the State, in having control over its emissions, also has control over the consequences, since the two go hand-in-hand, and that when those consequences materialise the State can be held responsible.

While conceptualising climate change in this fashion might ensure States cannot avoid blame by pointing to the sheer size of the problem, it is less useful as a way of identifying particular rights-holders who could bring a claim against a particular State, and questions of proving a violation would remain problematic, as will be

discussed below. Further, as Knox has pointed out, conceptualising the human rights impacts of climate change as a network of extraterritorial obligations may not be that useful. As he says, 'in the human rights context, climate change is probably not best understood as a set of simultaneously occurring transboundary harms that should be addressed by each State trying to take into account its individual contribution to the effects of climate change in every other State in the world' (2016: 11).

For these reasons, Knox argues instead for a different understanding of climate change and human rights, one based on a duty of international cooperation. He characterises climate change as 'a paradigmatic example of a global threat that is impossible to address effectively without coordinated international action' (2016: 11). He points to the agreement of States to adopt the UNFCCC and Paris Agreement as evidence that States already treat climate change as a global problem that requires a global solution and the work of the Human Rights Council and Office of the High Commissioner for Human Rights, which have regularly called for greater international cooperation to address the human rights implications of climate change (2016:11; HRC Resolution 26/27 and 29/15).

In 2009 the Office of the High Commissioner for Human Rights drew on the cooperative nature of the duties in the ICESCR in arguing that human rights duties do exist in the context of climate change, and, significantly, that these duties apply extraterritorially (2009: [85]). The ICESCR contains wider language than the ICCPR when it comes to defining obligations in relation to economic, social and cultural rights. Article 2 of the ICESCR refers to the obligation to work towards the realisation of human rights with the aid of international assistance. In relation to the right to an adequate standard of living, Article 11 of the ICESCR explicitly recognises 'the essential importance of international cooperation'. These provisions seem to contemplate the notion that responsibility for human rights is not limited to the nation State but requires a cooperative response.

The OHCHR's report refers to General Comment 3 of the Committee on Economic, Social and Cultural Rights, which outlines four ways in which the duties within the ICESCR are to apply extraterritorially. The General Comment provides that States have an obligation to:

- Refrain from interfering with the enjoyment of human rights in other countries;
- Take measures to prevent third parties within their control, for example private companies, from engaging in such interference;
- Take steps through international assistance and cooperation to facilitate the fulfilment of human rights in other countries, including disaster relief, emergency assistance and assistance to refugees and displaced persons; and
- Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact human rights (CESCR 1990, [14]).

However, States have strongly resisted any interpretation of the ICESCR that would imply that they are legally obliged to provide assistance to other States.

While developed States have in many cases accepted a moral or ethical duty to assist poorer States, there is strong opposition to this duty being framed as a legal obligation (Knox 2009–2010: 208). The wording of Articles 2 and 11 could perhaps be interpreted to impose a duty to seek out international assistance, but it is questionable whether it imposes a duty to provide it. Furthermore, as Knox points out, the interpretations of the Committee on Economic, Social and Cultural Rights are not binding, and in any event would not apply to civil and political rights because of the specific language in the ICCPR which limits the application of the convention to individuals within the territory or jurisdiction of the state (ICCPR 1966: Article 2; Knox 2009–2010: 493).

While the suggestion for an obligation to cooperate internationally is appealing, and would seem to be supported by the principles of the UNFCCC, there is little legal basis for it within human rights law, and it would not provide a basis for extending existing human rights obligations beyond the territorial limits to which they are currently confined. The scope for international human rights obligations to apply extraterritorially is therefore limited. Where it can be established that a State is exercising effective control in relation to activities or people in the territory of another State then human rights obligations will apply. If it can be shown that a State's actions within its own territory cause a direct harm to people in another State then responsibility will attach to those actions. But it is more problematic to establish obligations and responsibility where the relationship between action and consequence is more remote, and especially where the consequences are the cumulative result of the actions of many States.

Possibly States are under a broader obligation to respect human rights in other territories, and in this manner would be required to ensure that their actions do not interfere with the ability of others elsewhere to enjoy their human rights. The obligation to protect human rights might also require States to prevent non-State actors within their control from acting in such a way as to interfere with human rights in other places. The legal bases for these obligations are untested however, and it remains to be seen that an individual or group could assert that they were owed an obligation by a foreign State to protect or fulfil their human rights in the context of climate change. Even if a duty could be made out, the challenge of proving that a State has violated that duty remains to be confronted.

8.3 The Challenge of Enforcing Human Rights Obligations in the Climate Change Context

In addition to the challenge of showing that a State owes a duty to a particular rights-holder in the context of climate change, there is also the issue of how that duty can be enforced. The first issue here relates to identifying appropriate standards for compliance with those duties. Once standards have been identified, the bigger problem of proving a violation must be confronted. This section will explore

the challenges of identifying a violation of human rights law and enforcing it with respect to climate change.

8.3.1 Standards of Compliance with Human Rights Duties

The first step in enforcing human rights duties is identifying the standard of performance required from States to comply with those duties. The standard necessary to discharge an obligation will vary from one human right to another, and may also differ according to the State's particular circumstances. The duties to protect and fulfil human rights, and especially those relating to economic, social and cultural rights, place significant demands on States' resources, and it is almost always the case that some rights will be prioritised over others. Human rights-based obligations to act on climate change must be viewed in this context, and judgments as to whether violations have occurred cannot be made in isolation from other considerations.

States are usually afforded a margin of appreciation in determining how they will fulfil their obligations under human rights law, and international courts and tribunals will generally not want to micromanage domestic environmental law (Pedersen 2010: 246). This can be seen in the environmental rights jurisprudence of the regional human rights bodies, discussed in Chap. 2. The European Court of Human Rights has traditionally found that, provided States establish and comply with adequate procedural safeguards, they will not be held to have committed a violation of the *European Human Rights Convention* where environmental degradation interferes with the enjoyment of human rights.[2] This deference to States' discretion will make it difficult for any claimant to prove a violation of human rights in a climate change context.

States' capacity to fulfil human rights is also relevant to the applicable standard of compliance, and some have questioned whether it makes sense to impose human rights obligations on States which cannot meet them because they lack the necessary resources (Cameron 2010: 700). This argument is particularly pertinent to economic, social and cultural rights, where the costs of full implementation can be substantial. However, while States may not be able to fulfil all their human rights obligations immediately, it is nonetheless important that they continue to take steps towards eventual realisation (CESCR 1990). Further, the ICESCR acknowledges that some States may require financial or other assistance from other States in order to fulfil their obligations (1966: Article 2). An appropriate standard of performance should therefore be identified which represents a progression from previous levels of enjoyment, taking advantage of available assistance.

[2]See for example *Powell and Rayner v United Kingdom* (1990); *G and E v Norway* (1983); *LCB v United Kingdom* (1998).

In order for a human rights obligation to be enforced in relation to climate change, it is not enough to show that a State owes a duty to the relevant right-holder. It is also necessary to consider precisely what it is required to do in order to discharge that obligation. In many cases there will be competing interests which a State must balance and addressing harm from climate change may not always take precedence over other legitimate objectives. The legal issue of applicable standards is therefore a key threshold issue to address before any violation can be enforced. Further, in order to succeed in a claim for a violation of human rights based on climate change, it must be proved on the available evidence not only that the State failed to discharge its duty to the requisite standard, but also that such failure resulted in the particular harm suffered.

8.3.2 Proving a Violation of Human Rights Based on Climate Change

The definition of suitably precise obligations is only part of the problem for establishing violations of human rights in a climate change context. Assuming that a duty can be imposed and a corresponding standard of performance identified, any claim alleging a human rights violation will face the significant challenge of proving that the duty-bearing State has caused the alleged harm, so that it can be shown to amount to a legal violation. This is most problematic when the harm is alleged to flow from climate change itself, rather than from States' mitigation and adaptation actions taken in response to global warming. Daniel Bodansky and John Knox have both explained the two-step process involved in proving a human rights violation related to climate change. First there is the challenge of attributing the particular harm to climate change. This entails showing that the environmental impact which interferes with human rights is a consequence of anthropogenic global warming. Second is the problem of tracing the causal connection between emitters and victims, a task which Bodansky argues is even harder (Bodansky 2010: 523; Knox 2009–2010: 488; Cameron 2010: 705).

In relation to the first of these two issues, locating sufficient evidence that a particular interference with human rights is due to climate change depends on the credibility of the science presented (Doelle 2004: 213). While our understanding of the causes and effects of climate change has developed immensely in recent years, it remains difficult to attribute a particular event or impact reliably to global warming, given that it is frequently only one of a number of contributing factors. The complexity of the causal links and the long period of time between cause and effect also create what Ole Pedersen has called a 'significant and forensically problematic delay' before the harm of greenhouse gas emissions manifests, making it difficult to prove that a given outcome is caused by climate change (2010: 246). As John Knox has argued, it may be difficult to blame global warming for every drought or hurricane which interferes with human rights. But, he argues, not all problems are

so difficult. He gives the example of the Inuit petition to the Inter-American Commission on Human Rights, which was based on scientific reports which stated with 'very high confidence' that the adverse effects observed and projected in the polar region are caused by global warming from greenhouse gas emissions (2009–2010: 488). He also cites the situation in the Maldives, where there is substantial scientific consensus that greenhouse gas emissions are causing sea level rises which will threaten the country (2009–2010: 489). It is therefore not impossible to find examples where environmental impacts which interfere with human rights can be attributed to global warming caused by greenhouse gas emissions, although this is by no means always achievable and in many cases the question of attribution will be contentious.

The second part of the causation challenge is more difficult, however. This involves assigning responsibility for the human rights interference to a particular State. The cumulative effect of greenhouse gas emissions makes it almost impossible to hold a particular State responsible for a given consequence. The 2009 report of the Office of the High Commissioner on Human Rights into climate change and human rights concluded that it would be 'virtually impossible to disentangle the complex causal relationship linking historic greenhouse gas emissions of a particular country with a specific climate change-related effect' (OHCHR 2009: [70]). So, even if a human rights interference can be demonstrated to be the result of climate change, it would be difficult to establish that it was caused by the conduct of a particular State, at least not in the way normally understood to amount to a breach of human rights.

John Knox proposes one solution to this problem, arguing that, while 'assigning responsibility to specific States for climate change is a real problem…the primary difficulty is not causation' (2009–2010: 489). He argues that it is not necessary to link the emissions of a particular State to a particular harm in order to assign responsibility for that harm. Instead, since all greenhouse gas emissions contribute to climate change, responsibility could be allocated according to States' shares of global emissions. In this manner it would be possible to conclude that, while all States contributing to global warming are 'joint violators', some States are more culpable than others.

While Knox's solution would help avoid the issue of proving that a single State is responsible for a given human rights impact, it highlights once again the crucial issue of identifying appropriate duty-bearers and articulating their obligations, and may create further problems for achieving a meaningful human rights-based approach to climate change. If the only way to establish causation is to argue, as Knox does, that all States are jointly to blame (albeit to differing degrees) then the pool of potential duty-bearers is similarly opened up. As noted above, showing that a State owes a duty under human rights law normally depends on establishing links of citizenship, territory or jurisdiction, and individuals will normally face difficulties bringing a claim against foreign States. However, if their own State is not among the highest emitters then even if its share of responsibility can be established it may be of little practical benefit.

There are also questions of fairness which flow from establishing causation based on collective contributions over a cumulative period. As Knox points out, distributing responsibility based on shares of global emissions is complicated by questions of past and per capita emissions. A simple allocation according to current percentages is likely to be a less than equitable system (Knox 2009–2010: 489). Further, as Naomi Roht-Arriaza explains, 'it may be difficult to characterise 'causing' climate change as itself a violation since it is not clear that, until recently, States knew or should have known the dangers of unrestricted greenhouse gas emission' (2009–2010: 595). While a concept of shared responsibility may help avoid some of the evidentiary hurdles, it potentially creates other issues elsewhere.

The delay between cause and effect also raises the question of how best to address the predicted harms of climate change (Pedersen 2010: 247; Boyle 2012: 618). Human rights claims are usually brought in response to violations that have already occurred, where causation of that harm is much easier to establish. However, given the timeframe over which the effects of climate change manifest, and the potential seriousness of those effects, it would be most effective to deal with States' actions or inaction now, rather than wait for the results to materialise fully. This creates a significant evidentiary challenge, however, as it is uncertain whether sufficiently reliable evidence could be found now to establish a violation in relation to a predicted impact (Doelle 2004: 203, 205). Knox has suggested that it may be sufficient to prove that an imminent effect, that is one which is difficult or impossible to forestall, will cause a violation of human rights (2009–2010: 489). Even this lower threshold of imminent harm requires some level of proof, however, whereby the imminent violation can be shown to be the inevitable or at least likely result of the greenhouse gas emissions of the alleged violating State. With these difficulties in mind, Stephen Tully is correct in saying that 'the human rights paradigm cannot address the disjuncture between 'victims' and their diffuse or distant 'perpetrators' where 'violations' are only predicted, rather than known and identifiable' (2008: 220).

As has been shown, there are considerable challenges to enforcing human rights obligations in the context of climate change. To prove that a State has breached international law it would be necessary to prove first that it owed an obligation under that law, and that the obligation was owed to the relevant claimant. Next it would be necessary to show that the State failed to perform its obligation to the requisite standard, having regard to its available resources and capacity, its previous level of progress in fulfilling human rights, and its other human rights obligations and legitimate interests. Where the harm is alleged to flow from climate change, rather than from mitigation or adaptation measures, proof would also be required that the harm was in fact caused by climate change. Perhaps most challenging of all, it would need to be established that the accused State has caused (or at the very least made a substantial contribution to) the greenhouse gas emissions which are the root of the problem. For these reasons the prospects of bringing a successful claim under international human rights law for a violation based on climate change are somewhat limited.

8.4 The Benefits of a Human Rights Approach to Climate Change

In spite of the difficulties in enforcing human rights duties in a climate change context identified in the previous section, a human rights-based approach nonetheless offers a number of instrumental benefits, and many of its proponents argue that it is the best way of addressing the human impacts of climate change. The phrase 'human rights-based approach to climate change' encompasses a diverse range of techniques for applying human rights principles and laws to the problem of climate change. At the most legalistic end of the spectrum it envisages victims of climate change utilising international, regional or domestic human rights laws and institutions to bring claims against those responsible for global warming where it has led to alleged violations of their legally guaranteed human rights. The problems with this approach have been outlined in detail above. A less formal approach involves an increased incorporation of human rights principles into climate negotiations and policy development. This includes acknowledging that climate change impacts on the enjoyment of human rights in the ways described in the previous chapter, and providing for human rights implications to be considered alongside economic, environmental, scientific or other factors. It recognises that adaptation and mitigation strategies also have potential to impact on human rights, and encourages policy developers to minimise potential negative consequences. It also utilises existing human rights principles and frameworks as analytical tools for assessing the implications of climate change on individuals and communities. A human rights-based approach can involve any or all of these strategies to different degrees.

Alexandre Kiss and Dinah Shelton have described the benefits of using human rights to effect environmental protection generally. They said: 'Rights are inherent attributes of human beings that must be respected in any well-ordered society. The moral weight this concept affords exercises an important compliance pull' (2007: 238). They also identified that the enforcement of human rights at the international level is more developed than the procedures of international environmental law. Both these advantages can be translated into the climate change context, where the moral force of human rights concepts and the legal infrastructure which supports them offer a number of benefits for those seeking action on climate change.

Despite the challenges of successfully proving a claim based on climate change, international and regional human rights frameworks do offer potential avenues for holding governments accountable for the impacts of global warming. The widespread participation of States in international human rights law allows for climate change issues to be brought within the monitoring and complaints mechanisms of specific treaties, helping to draw attention to States which are failing to take adequate steps to address the human impacts of climate change. While human rights are only briefly mentioned in international climate change agreements, States are already obliged under international law to respect, protect and fulfil human rights

and a human rights-based approach can emphasise these long-standing commitments.

Further, while the options for bringing a successful claim under international law are limited, there have been some promising developments within domestic legal systems. As Peel and Osofsky (2018) have concluded, most successful climate litigation to date has been based on tortious or statutory causes of action, but increasingly plaintiffs are turning to rights-based claims or making arguments based on human rights principles. A significant development in this field came in 2015 when the Lahore High Court ruled in the case of *Leghari v Pakistan*. The plaintiff, a farmer, argued that the government had breached the Constitutional rights of the Pakistani population by failing to adequately implement Pakistan's National Climate Change Policy. It was claimed that climate change posed a serious threat to water, food and energy security in Pakistan, particularly by causing increased incidence of drought and flood. This, it was argued, presented a serious risk to the enjoyment of fundamental rights protected by the Constitution, including the rights to life (Article 9) and dignity (Article 14). Pakistan's National Climate Change Policy focuses on adaptation and was intended to address climate threats by requiring a range of actions from various government departments and agencies. The High Court found that government actors had failed to make adequate progress in implementing the policy and that 'the delay and lethargy of the State in implementing the Framework offends the fundamental rights of the citizens which need to be safeguarded' (Order 4 Sept, 2015, [8]). The Court ordered a number of actions to address these breaches, including the creation of a Climate Change Commission to help coordinate adaptation across government actors (Order 14 Sept, 2015).

Not long after the *Leghari* ruling, another landmark case was decided in the Netherlands. Urgenda, a climate NGO, brought the case on its own behalf and that of 866 Dutch citizens and the Dutch population as a whole, before the Hague District Court (*Urgenda Foundation v The State of the Netherlands* 2015). Urgenda claimed that the Dutch government had breached its duty of care to its citizens by failing to commit to emissions reduction targets consistent with international climate policy and science. In addition to this claim, Urgenda also argued that the government's contribution to global greenhouse gas emissions threatened to cause irreversible harm to human health and the environment, which in turn represented breaches of rights found in the *European Convention on Human Rights*, to which the Netherlands is a party. The Court found in Urgenda's favour in relation to the duty of care argument, and ordered the government to adopt more stringent emissions reduction targets (specifically, 25% below 1990 levels by 2020). However, it did not find that the rights contained within the ECHR had been violated as there was insufficient evidence of how the 886 individual plaintiffs had been affected.

Despite not finding a violation of human rights, the Court made use of human rights principles in informing the standards to be applied to the State's duty of care. The Court made reference to human rights in articulating the dangers presented by climate change for the population and against which the State has a duty to protect.

While the case is subject to an appeal, on the question of judicial oversight of policy decisions[3] the Dutch government has committed to implementing stronger emissions reduction measures in line with the Court's decision, in recognition of the seriousness and time-sensitive nature of climate action (Peel and Osofsky 2018: 49).

The success of cases like *Urgenda* and *Leghari* demonstrates the potential for claims to be brought within domestic legal systems. Inspired by the positive outcomes in these cases, other litigation has been commenced in other jurisdictions which makes use of human rights principles. For example, litigation is currently underway in the United States which argues that the government's failure to adequately mitigate climate change amounts to a breach of both the public trust obligation to conserve natural resources as well as the constitutional rights of the plaintiffs (*Juliana v US*). The plaintiffs in the *Juliana* case are 21 young people represented through the NGO Our Children's Trust, which seeks stronger climate action on behalf of future generations. The litigation has been besieged by repeated motions from the Trump administration to dismiss or stall the case, but following the dismissal of the Government's petitions for a writ of mandamus and stay of proceedings a trial date has been set for 29 October 2018.

In the Philippines, Greenpeace has brought a petition to the Philippines Commission of Human Rights to investigate the responsibility of 50 large fossil fuel companies (known as the 'Carbon Majors') for violations of human rights (Greenpeace 2016). Greenpeace argues that these violations are inherent in the extreme weather events which have been so destructive in the country, most notably Typhoon Haiyan which killed more than 6000 people in 2013. The petition alleges that the Carbon Majors have contributed to these breaches of human rights, drawing on the principles articulated in the UN's Guiding Principles on Business and Human Rights. While a number of the respondent companies are challenging the Commission's jurisdiction, the Commission has in the interim launched an inquiry into the issues raised in the petition.

Other cases have also been successful in Austria and South Africa, where human rights principles were used by the courts in determining whether the government had struck an appropriate balance between the competing interests of economic growth, sustainability and the public interest in approving infrastructure projects (*Third Runway at Vienna International Airport* 2017; *Earthlife Africa Johannesburg v minister for Environmental Affairs & Ors* 2017). In both cases the court held that the human rights impacts of climate change ought to be taken into account by State decision-makers in performing their legislative functions.

In addition to these cases within domestic legal systems, a successful climate change action within regional human rights regimes may also be not far off. As noted in Chap. 4, the Inter-American Court of Human Rights recently issued an Advisory Opinion in which it affirmed the right to a healthy environment found in Article 11 of the *San Salvador Protocol* (1988). The Court stated that the right has

[3]A hearing was held in the Hague Court of Appeal in May 2018.

both individual and collective connotations and is 'due to both present and future generations' (IACtHR 2018: 2). Importantly, it noted that the right has an extraterritorial application, emphasising States' obligations to respect and protect human rights of all people, including those located outside their borders. The opinion may pave the way for a potential contentious claim based on climate change, given the broad consideration given to both transnational and intergenerational concerns.

In Portugal, a group of schoolchildren, supported by the NGO Global Legal Action Network, have launched a crowd-funding campaign to raise funds to commence legal action against 47 high-emitting States in the European Court of Human Rights (Crowd Justice 2017). The case would allege that the failure to mitigate climate change by cutting greenhouse gas emissions represents a breach of rights found in the *European Convention of Human Rights*, including the right to life (Article 2), which is evidenced by deadly events such as the forest fires which caused the deaths of more than 60 people in Leiria region of Portugal in 2017.

As more cases like these are heard and more successful judgments are handed down, we may see a significant impact on the debate around climate change and a strengthening of the bases for a human rights-based approach. One of the hoped for effects of this trend is that governments around the world will observe the increased prevalence and success-rates of rights-based lawsuits and be prompted to take stronger action on climate change within their own jurisdictions or risk similar litigation themselves. A proliferation of human rights claims based on climate change (even unsuccessful claims) will also help change the way we perceive climate change by drawing global attention to the human impacts of climate change and forcing governments to engage with specific issues confronting their own citizens.

A human rights-based approach would also provide a means of positive action and advocacy by groups who lack other avenues under international law. Human rights furnishes us with a language to talk about climate change not in terms of economic impacts or future targets, but in terms of current obligations and existing illegality (Bodansky 2010: 517). As Simon Caney has argued, a rights-based approach 'provides a fruitful way of thinking about climate change' (2009: 228) by encouraging us to think not only about what rights are implicated, but also about who is duty-bound to uphold those rights. In this way it helps to give an account of relevant responsibilities in the climate change context. This stronger focus on obligations which a human rights approach affords can therefore help to strengthen accountability (McInerney-Lankford et al. 2011: 55).

Another aspect which can be of benefit to climate change policy development relates to the first of Kiss and Shelton's benefits described above, that is the moral weight afforded by the concept of human rights. Aside from the legal duties which human rights may impose, they have value in a moral sense, establishing that climate change is a moral as well as a technical or environmental challenge (Knox 2009–2010: 166). A human rights-based approach therefore imbues climate change with a sense of gravity and moral urgency. This in turn can help strengthen public support for greater action, building pressure on governments to do more about

cutting greenhouse gas emissions. These benefits are available even though legal enforcement options may be limited.

A related benefit is that human rights can help bring issues of equity and vulnerability to the foreground of climate change debates (Barnett 2010; Doelle 2004; Cameron 2010; Limon 2009; Pedersen 2010; Bodansky 2010). A human rights-based approach places the individual at the centre of our enquiry, helping to put a human face on the problem and tell the stories of those likely to be affected, thereby serving as a tool for advocacy and promoting public awareness of the injustices inherent in the problem. It draws attention to the impacts that climate change has on the realisation of human rights and empowers vulnerable communities by supporting their claims for international assistance.

Understanding vulnerability to climate change is a crucial component of developing effective and equitable mitigation and adaptation strategies. Climate change has been described as a 'multiplier of vulnerabilities' (Cameron 2010: 708) and operates to amplify existing inequalities. The relationship between climate change, human rights and vulnerability is complex, as climate change undermines the ability of individuals and communities to enjoy their human rights, while at the same time pre-existing violations of human rights increase vulnerability to climate change. Protection of human rights and resilience to climate change are therefore mutually reinforcing. A human rights-based approach allows us to shift the focus of discourse away from economic factors towards human impacts, particularly the intergenerational and intra-generational equity issues inherent in climate change. As Marc Limon points out, climate negotiations have typically been 'dominated by large States involved in largely economically motivated power plays and trade-offs' (2009: 451). By shifting the focus of attention on to individuals affected by climate change, a human rights-based approach can help to 'level the playing field' (Parsons 2008–2009: 22).

A human rights-based approach also provides a number of procedural benefits in dealing with climate change. The World Bank report on human rights and climate change authored by Siobhan McInerney-Lankford, Mac Darrow and Lavanya Rajamani described human rights as providing a frame for policy choices (2011: 55). The report conceptualised human rights as a way of framing, rather than necessarily resolving, difficult policy choices and trade-offs. Human rights can help achieve this by drawing attention to human impacts and putting a normative focus on human welfare, as noted above (2011: 56). It also provides a number of procedural standards which can help improve the decision-making and negotiation processes. These include requirements for participation and consultation with affected groups, and the principles of non-discrimination, equality and respect for the rule of law. By improving the standards for the decision-making and negotiation processes, human rights can also help to limit corruption, build accountability and enhance the legitimacy and sustainability of overall policy outcomes (Lewis 2015, 2017).

These principles also empower individuals and communities and give them a voice in the decision-making process, potentially leading to more effective and equitable strategies. A human rights-based approach provides procedural entry

points for vulnerable groups to participate, which can strengthen governance by allowing for more meaningful consultation and access to justice. As a complement to other impact assessment processes, human rights could be instrumental in providing a useful analytical tool for assessing social and environmental impacts and identifying minimum acceptable levels of protection against climate change. Edward Cameron suggests that one of the benefits of a human rights approach is that it examines each harm on its own rather than looking for a broadly acceptable threshold for climate change (such as the suggested two degree rise in temperatures) (2010: 707–708). This ability to provide an assessment of each impact against substantive criteria and minimum standards provides a valuable means of prioritising and reconciling competing interests and a qualitative value basis for decision-making.

A human rights-based approach can also improve our mitigation and adaptation actions in a number of ways. By highlighting vulnerability and establishing minimum thresholds of acceptable interference from climate change, a human rights-based approach helps us to focus our adaptation actions on the populations most in need of assistance. This in turn helps to ensure a more targeted and efficient use of resources. Crucially, a human rights-based approach ensures that our mitigation and adaptation measures do not cause other negative human rights impacts, by requiring consultation with affected communities and demanding minimum standards of human rights protections. It also enhances accountability of States through providing supervision and reporting mechanisms, and potential avenues for complaints where mitigation or adaptation measures cause unlawful interference with human rights (Lewis 2016).

Another important benefit of a human rights-based approach is identified by McInerney-Lankford, Darrow and Rajamani, who point out the utility of human rights in assessing States' relative capacity for addressing climate change and arriving at equitable outcomes for burden sharing (2011: 59). They describe this process as 'rights based budget analysis', whereby States' allocation of resources to human rights (and in particular towards the realisation of economic, social and cultural rights) can be evaluated and their capacity for addressing climate change assessed. Such analysis feeds back into decision-making processes and can enable more equitable outcomes from climate policy negotiations.

As this section has demonstrated, a number of benefits can flow from a human rights approach to climate change, even if we accept the limited possibility of successful claims relating to human rights violations under international human rights law. These benefits flow from the normative weight of human rights language and its ability to focus attention on the most pressing needs of vulnerable individuals and communities. Existing reporting and claims mechanisms can add additional force, helping to encourage States to take more effective action to address the human impacts of climate change. Human rights also provide a frame for decision-making, providing minimum guarantees and helping to guide decision-making as to appropriate strategies and the balancing of competing interests.

8.5 Conclusion

This chapter has argued that, while there are numerous benefits to be gained from a human rights-based approach to climate change, pursuing such an approach through traditional human rights litigation and enforcement is problematic. The human rights consequences of climate change are obvious, but it is less clear that climate change can be constructed as a violation of human rights, resulting in significant challenges for any applicant seeking to enforce their rights through the usual legal approaches. International law imposes obligations to respect, protect and fulfil human rights but these are typically only owed by States towards their own citizens or people within their jurisdiction or control. These limitations are problematic in the context of climate change. While it might be argued that States are obliged to ensure that their actions do not interfere with the enjoyment of human rights outside their territory, States do not appear to have obligations to take positive steps to protect or fulfil human rights beyond their jurisdictional limits. This restricted view of States' obligations conflicts with the reality of climate change, wherein the effects of one State's greenhouse gas emissions impact on the enjoyment of human rights everywhere. Limiting human rights obligations to a State's own territory fails to give adequate recognition to the extraterritorial nature of climate change, and renders the human rights-based approach rather ineffectual.

In addition to the difficulty of showing that States owe duties to protect and fulfil human rights outside their own territories, enforcing those obligations through legal claims requires showing that the harm can be attributed to the State by establishing both that the harm suffered is a result of anthropogenic climate change and that the State concerned is responsible. The cumulative nature of global greenhouse gas emissions and the timeframe over which the effects are revealed makes it extremely difficult to show that any one State's actions are responsible for a particular human rights impact.

However, in spite of these challenges, we are starting to see a trend of successful cases develop. To date these have been pursued primarily within domestic legal systems and have made varying use of human rights principles, but they signify that further growth in this area is likely. Even where traditional litigation does not promise positive results, a human rights-based approach can encompass less formal mechanisms, and these also offer significant benefits. There are also rhetorical advantages to describing the impacts of climate change in human rights language, given the moral and normative value of human rights. A human rights-based approach gives weight to the plight of vulnerable individuals and groups and can help focus attention on their needs, encouraging States to tailor responses to addressing the human impact of climate change, rather than merely scientific or economic concerns. Human rights equips those groups with morally powerful language and ideas to improve their negotiating power in advocating for strong international solutions. The existing reporting, supervision and claims mechanisms also offer avenues for greater consideration of the human rights impacts of both climate change and our responses to it, and may serve to encourage States to take

more effective action. Human rights principles also provide a framework for decision makers, helping to navigate complex questions relating to competing priorities and to ensure that policy decisions address the most urgent needs of those most affected. The various techniques that come within the umbrella of human rights-based approaches to climate change offer an equally broad range of benefits. Understanding the limitations and potential of these methods is essential to optimising their effectiveness. The next chapter brings together the analysis of the preceding chapters to consider whether it might be possible to enhance this effectiveness further through the recognition of a dedicated human right to a good environment.

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Chapter 9
Do We Need a New Environmental Human Right to Deal with Climate Change?

Abstract The difficulties in applying existing human rights law to the complex challenges of climate change which were identified in the previous chapter might suggest that a new standalone environmental right is required to implement an effective human rights-based approach. This chapter challenges that assertion by analysing whether a new right could overcome the limitations of the existing framework, or offer new or enhanced benefits in tackling the human impacts of climate change. It is argued that there are significant difficulties defining the beneficiaries of a new right, as well as the corresponding duties and duty-bearers, in a way which captures the characteristics of climate change and its causes and effects, and which is practically useful to those affected by it. Further, the analysis draws on States' previously expressed attitudes on the subject of human rights and climate change to argue that achieving adequate State support to enshrine a new right in international law is unlikely without a substantial shift in perceptions about our obligations towards the environment. It is concluded that efforts to improve human rights based-approaches to climate change ought to focus on enhancing the application of the existing framework, rather than pursuing a new environmental or climate-specific right.

9.1 Introduction

The significant and varied implications of climate change for the enjoyment of human rights warrant greater incorporation and utilisation of human rights principles in our international and domestic responses to the problem. A human rights approach offers numerous benefits in terms of emphasising both the plight of vulnerable communities and the existing human rights obligations of States. Beyond the rhetorical and strategic benefits of using human rights language, we have also seen a number of examples of human rights law being used within domestic legal systems to hold governments accountable for failures to take stronger action on climate change. Attempts to extend this litigation-based approach to the international level face numerous hurdles however. Barriers to successful

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claims flow from the transboundary nature of climate change and the cumulative effect of all States' greenhouse gas emissions, which present challenges to traditional understandings of human rights obligations and evidentiary problems in proving a violation of those obligations in a given case.

On the basis of these limitations, which were analysed in more detail in Chap. 8, it could be argued that climate change highlights the shortcomings of applying existing human rights mechanisms to environmental problems, particularly where those problems are broad in scope and variable in impact. It has been argued that using existing rights to address climate change cannot be effective, and that climate change, more than any other environmental problem currently confronting us, points to the need for an explicit right to a good environment. This chapter aims to test that assertion and assess whether an explicit right to an environment of a particular quality would add anything to currently available human rights approaches to climate change by overcoming existing limitations or enhancing potential benefits.

The analysis proceeds on the assumption laid out in earlier chapters that a new right to a good environment ought not to be recognised where it is merely reiterative of existing rights. Previous chapters argued that the right needs to be independently justifiable in order to avoid unnecessary duplication of rights and to preserve the integrity of human rights as a normative system. Here, the instrumental value of a new environmental right is analysed, and it is argued that to avoid criticisms of redundancy, a new right should contribute something positive to a human rights approach to climate change, either by way of overcoming the challenges presented by the existing framework or by offering new benefits not previously available. This chapter therefore seeks to examine the implications of a standalone right to a good environment in the context of climate change and identify the potential positive contribution such a right might make.

In addition to any objective benefits which a new environmental human right might offer in the context of climate change, there is also the issue of whether the international community is likely to agree to recognise the new right and, importantly, undertake to comply with the duties it entails. Because climate change is the biggest environmental issue facing the international community, States will inevitably examine proposals for a new environmental right through the prism of climate change and form their attitudes according to the perceived impact of the right in that context. The way the right is defined and the support it receives from States will be shaped largely by competing influences: on the one side a push for a new right which offers real and enhanced benefits for those who are vulnerable to the effects of climate change, and on the other side resistance from States to undertake greater obligations, particularly where such duties may extend beyond their territorial boundaries or be owed towards future generations. If States perceive that the new right will impose burdensome or inequitable obligations in relation to climate change, they will be unwilling to support its introduction.

The feasibility of a human rights approach to climate change which incorporates an explicit right to a good environment at the international level therefore depends critically on the willingness of States to accept the links between human rights and

climate change and to recognise the entitlement of individuals and communities to an environment of a particular quality. Without the support of States, any proposal to recognise a new right to a good environment will remain confined to the field of academic debate and aspirational statements by NGOs, lacking the essential requirement for it to become operationalised in international law. It is possible to gain an insight into States' attitudes towards a new environmental right by studying their expressed views on human rights and the environment more generally, and in particular on the relationship between human rights and climate change.

This chapter will provide an assessment of the merits of a new right to a good environment in the context of climate change by considering a number of issues. First, it will examine a number of arguments presented in legal and philosophical literature in favour of the recognition of distinct human rights in the context of climate change. This analysis reveals a number of specific issues relating to the application of the right to a good environment to climate change. These include the questions of who the beneficiaries of the right would be and whether the right could be enjoyed by future generations. Similar questions arise relating to the identity of corresponding duty-bearers, including whether the right could impose obligations on non-State actors. The chapter will then analyse the extraterritorial aspects of the right, to consider whether a new right to a good environment could overcome any of the difficulties identified in the previous chapter relating to the transboundary nature of climate change.

The chapter will also consider the nature of obligations which would flow from recognition of the right to a good environment with respect to climate change, and how they might be balanced against obligations implied by other, potentially competing human rights. These questions are analysed in the context of considering the potential success of a claim for violation of the right to a good environment based on climate change, which also requires consideration of issues relating to causation and attribution. The chapter will then analyse the attitudes of States towards a human rights-based approach to climate change and whether they are likely to support the recognition of a new human right to a good environment. This analysis seeks to identify whether it is possible to define a new right in a way which is likely to attract the support of States while still contributing new or enhanced benefits in addressing the challenge of climate change.

The chapter argues that, while the notion of a standalone environmental right is intuitively appealing in the context of climate change, where so many negative human rights impacts are threatened by the environmental changes inherent in global warming, in reality it offers limited benefits beyond existing human rights law. Leaving aside the hurdle of achieving recognition among nation States (which is considerable), the difficulties of enforcing a standalone right within the international human rights legal system are at least as problematic as those facing the enforcement of existing rights. There are symbolic and rhetorical gains to be made in articulating the interconnectedness of environmental and human rights harms which flow from climate change, but these are attenuated where they are not

supported by widespread State support or legal enforceability. There may ultimately be little tangible benefit to pursuing a standalone environmental right as part of a human rights-based approach to climate change, and effort would instead be better directed at improving existing approaches.

9.2 Does Climate Change Justify the Adoption of a New Human Right? A Review of the Arguments

As outlined in Chap. 4, many scholars have argued in favour of recognising a new, standalone right to a good environment. Among these arguments are claims that climate change, more than any other environmental problem, highlights the shortcomings of utilising existing human rights to address environmental issues (Abate 2007; Adelman 2010; Depledge and Carlane 2007; Limon 2009; Tully 2008). Some have argued a separate right to a good environment is required which would be better capable of dealing with the distinctive characteristics of the environmental harm caused by climate change (Abate 2007; Depledge and Carlane 2007; Limon 2009). Some have advocated for the recognition of a specific right to a clean atmosphere or to be protected from the effects of climate change (Vanderheiden 2008; Caney 2008). On the other hand, others have argued that human rights may be inadequate to deal with climate change at all, with or without a specific environmental right (Tully 2008; Adelman 2010). This section examines some of these suggestions in more detail, drawing on the work of legal scholars as well as moral and political philosophers.

Several rights theorists have argued that climate change provides a justification for recognising a right to a good environment, or even that we possess a specific right to be free from the ill-effects of climate change (Caney 2006, 2008; Nickel 1993; Hayward 2005; Vanderheiden 2008; Adger 2004; Bell 2013). The rationale for these suggestions is usually not that current frameworks are inadequate (a more common argument among human rights lawyers as will be shown below), but that climate change threatens fundamental human interests and therefore requires that we recognise a human right to be free from those negative impacts.

One proponent of this approach is Steve Vanderheiden, who has argued that all persons possess a right to climatic stability (2008). Vanderheiden argues that this right is derived from the right to an adequate environment, which he adopts from Tim Hayward's examination of environmental rights generally (2008: 241; Hayward 2005). Vanderheiden accepts Hayward's argument that there must be a right to an adequate environment because 'an adequate environment is as basic a condition of human flourishing as any of those that are already protected as human rights' (Vanderheiden 2008: 241; Hayward 2005: 11). An adequate environment, according to Hayward, meets the test for a genuine human right because it protects human interests that are of paramount importance (2005: 11). A similar argument was advanced by James Nickel, who argued that protection of the environment serves the

interests of life, health and welfare, such that we should recognise a human right to an adequate environment (1993: 290). Accepting these arguments, Vanderheiden goes on to contend that, while there are many ongoing threats to the environment, climate change is among the most serious and so a right to a stable climate is an 'obvious corollary' of the right to an adequate environment (2008: 241).

Vanderheiden's claim that the right to a stable climate is an 'obvious corollary' of the right to an adequate environment has received criticism, however. Derek Bell has suggested that climate change may not always undermine our ability to maintain an environment adequate to our health and well-being (2013: 163). He argues that 'we might maintain an environment adequate for health and well-being through actions such as building better flood defences and introducing drought-resistant crops' (2013: 163). This indicates, argues Bell, that a right to a stable climate is not an 'obvious corollary' of a right to an adequate environment, since adaptation measures might enable us to maintain an adequate environment in spite of climate change.

Another potential criticism of the right to a stable climate flows from questions regarding its necessity. The interests which are said to justify the right—such as life, health, subsistence—are already protected by widely recognised rights. On this basis, Bell argues that it might be preferable to understand climatic instability as a 'new threat to old rights'. As he points out, while a new right might be useful in drawing attention to the specific impacts of climate change, 'it may be difficult to specify without reference to more traditional rights' (2013: 165). The suitability of introducing new rights which restate existing rights has been examined in previous chapters with respect to environmental rights generally. In relation to climate change, Bell concludes that:

> the right to a sufficiently stable climate might be best understood as a composite right that is derived from other rights, such as the right to life and the right to health. If this is correct, it may be more useful and parsimonious to think about how climate change or climate instability threatens basic rights rather than trying to defend a right to a stable climate (2013: 165).

Simon Caney has also argued that persons possess specific rights in relation to climate change, in particular that we have a right not to suffer from the ill-effects of climate change (2006, 2008). Drawing on Joseph Raz's 'interest theory' of rights (1986: 115) (discussed in more detail in Chap. 5), Caney argues that climate change threatens our fundamental interests in subsistence, health, economic security and the capacity to attain a decent standard of living, and that those interests are sufficiently weighty to impose obligations on others not to interfere with them (2006: 259; 2008: 535–539). Further, he argues that the obligations to address the impacts of climate change are not so demanding as to be unjust (2006: 259). Caney concludes that 'employing the normal kinds of arguments for justifying rights shows that persons have a right not to suffer from dangerous climate change' (2008: 537; see also Adger 2004).

Caney's conclusion that persons have a right not to suffer from the effects of climate change based on the impacts that climate change has on other human rights

could be subjected to the same criticism that Bell makes against Vanderheiden's concept of a right to climatic stability—that is, that climate change is best understood as a new threat to old rights. Indeed, Caney has argued elsewhere that climate change violates a number of existing rights and that greater international action can be demanded on this basis, without needing to rely on a new independent right (Caney 2009, 2010).

Arguments for a new right to climatic stability, or a right to be protected from climate change, are justified based on the impact that climate change will have on human interests. As explained in the previous chapter, these interests are already protected by well-recognised rights. It is not clear from the arguments of scholars like Caney and Vanderheiden why these existing rights are inadequate to achieve the necessary protection, or at least how a new right would be better able to avoid the shortcomings of a human rights approach to climate change which is based on existing rights. Further analysis is therefore required to assess the need for a new, independent right to a good environment in relation to climate change.

While moral and political philosophers such as Caney, Vanderheiden, Hayward and Bell have focussed on the legitimacy of a moral right to an adequate environment or to be protected from the harmful effects of climate change, other scholars have looked at the existing framework of human rights law to identify whether a new right is necessary (see e.g. Limon 2009; Boyle 2012; Abate 2007; Depledge and Carlane 2007).

A common theme in the literature is that the specific characteristics of climate change, its transboundary, intergenerational and cumulative nature, render a traditional human rights-based approach ineffectual. These issues were examined in detail in the previous chapter. As noted there, while there are rhetorical and strategic benefits which can still be gained from relying on existing rights, the moral value of human rights is not enough to ensure that action is taken to protect people affected by climate change—some legal enforceability is required. This is the position of Marc Limon, a former advisor to the government of the Maldives and now director of the NGO Universal Rights Group. He contends that some degree of justiciability is required to make a human rights-based approach meaningful for those individuals and communities who are affected by climate change. After identifying the difficulties of relying on the rights currently recognised in international human rights law to address the plight of Inuit peoples and Small Island States, Limon asks: '[c]an we tell these people that their human rights have not been violated because it is difficult to apportion responsibility?' (2009: 468). He argues that 'climate change demonstrates, perhaps better than any other issue, the inadequacy of existing human rights law in the context of the modern, globalised world' (2009: 469). Limon concludes that the issue of climate change points to the need for a realisation of human rights, and that it indicates a 'major gap in the international human rights conventions—namely, the lack of an explicit right to a safe and secure environment' (2009: 469).

Despite having been initially sceptical about the necessity and feasibility of a right to a good environment, Alan Boyle has more recently advanced an argument for recognition of the right within the existing framework of economic, social and

cultural rights (Boyle 2006–2007: 509–510, 2012: 633). He argues that such an expansion is necessary to address global environmental challenges like climate change, where States have been historically reticent to take stronger action, and where vulnerable States and communities are facing serious and irreversible environmental consequences. He argues that adopting such a right would 'reconceptualise in the language of economic and social rights the idea of the environment as a common good or common concern of humanity' (2012: 633). Situating the right within the framework of economic, social and cultural rights would, he argues, be a more feasible approach than attempting to introduce a wholly new right, and would enable environmental concerns to be balanced against other rights, particularly economic rights (2006–2007: 509). However, he acknowledges that the potential development of the right is ultimately a matter for States to decide, and that there will be problems of definition and implementation which will need to be addressed (2012: 642).

The requirement that a human rights-based approach provide mechanisms for affected individuals and communities to seek relief has prompted calls for a new approach which incorporates a specific environmental right. However, not all agree that a specific right to a good environment would be able to overcome the inherent limitations of a human rights approach to climate change, questioning whether human rights is at all capable of capturing the nature of climate change. Sam Adelman has addressed the shortcomings of a human rights-based approach to climate change which is limited to the rights currently recognised by human rights law. His analysis proceeds on the basis that 'human rights provides an important means of addressing climate change' although he concedes that the language of rights may prove inadequate for encapsulating the breadth of problems posed by climate change, and that we 'may be asking them to achieve something for which they are not designed' (Adelman 2010: 159; see also Depledge and Carlane 2007: 238). Adelman argues that climate change presents a challenge which is qualitatively different from other risks confronting mankind, saying that 'in no other field are law, policy and regulation so thoroughly contingent upon science and, more problematically, economics' (2010: 160).

The concepts of sovereignty and statehood also create significant obstacles for human rights approaches to climate change. In this context, Adelman has argued that the classically privileged place of States within international law is no longer appropriate in the modern context:

> Methodological nationalism, which comprehends law, politics and economics primarily through the prism of States, is rendered redundant by the aterritoriality of markets, the globalisation of law, the attenuation of sovereignty and the transboundary nature of global warming (2010: 165).

However, '[d]espite this, sovereign rationality continues to define the dimensions and possibilities of a rights-based approach to climate change' (2010: 165). This problem would persist even with a dedicated right to a good environment, so

long as such a right was situated within conventional human rights law and bounded by the realities of politics and economics.

Existing human rights law is also challenged by specific aspects of climate change, including its non-human impacts and the implications for future generations (Lewis 2016, 2018; Tully 2008: 218). As Stephen Tully has explained, climate change is a kind of hazard which was not recognisable at the time that human rights law was formulated (2008: 218). Because of its widespread and long-term impacts, it is not easily characterised as the sort of direct persecution or threat which usually comprises a human rights violation (2008: 219). Issues of territoriality are a major hurdle in addressing climate change through existing human rights, as explained in the previous chapter. In this respect Tully has argued that 'nationality and territoriality presumptions will insulate developed States from the human rights claims of individuals from developing States' (2008: 220). The timeframe over which climate change effects manifest also presents a significant obstacle. Tully concludes that 'the human rights paradigm cannot address the disjuncture between 'victims' and their diffuse or distant 'perpetrators' where 'violations' are only predicted rather than known and rectifiable' (2008: 221).

The problems which Adelman and Tully identify relating to the traditional State-centric view of human rights and international law, and the inherently extraterritorial and intergenerational nature of climate change, may not be capable of resolution through a new right to a good environment, at least not without a reconfiguration of the conventional approaches to human rights law. Michael Depledge and Cinnamon Carlane have proposed a reconceptualisation of the relationship between the environment and human rights, arguing that 'the transboundary, intergenerational and cross-sectoral nature of climate change creates a strong case for developing a new category of rights that recognises that individual rights are intrinsically tied to the health of the global commons' (2007: 239). They suggest that it is time for the creation of a collective right based on the notion of common concern for the environment (2007: 238). This kind of innovative approach could offer considerable advantages in aligning rights-based approaches more effectively with the reality of climate change and our relationship with the natural world, although it is unlikely that such a reformulation could be accommodated within existing human rights law, for reasons discussed in more detail below.

While many scholars question whether human rights will ever be capable of fully addressing the problems of climate change, most do acknowledge that a human rights approach offers a number of benefits. The question remains therefore whether a new right to a good environment would be able to offer any improvements on the currently available rights-based approach, either by mitigating the challenges of the current framework, or by enhancing any of the possible benefits. The following section endeavours to get closer to an answer by considering whether and how a right to a good environment might make a positive contribution.

9.3 What Should a Right to a Good Environment Look Like in the Context of Climate Change?

The theoretical and legal analyses examined in the previous section raise a number of issues relating to the possible effectiveness of a new human right to a good environment in addressing climate change and it is evident that work needs to be done in clarifying the scope of the right as it applies in this context. If we take an effective rights-based approach as one which minimises the negative impact of climate change on human rights, then we seek a definition of the right to a good environment which allows for an optimal contribution to this objective. Whichever way we define the right to a good environment, it should be able to address certain key aspects of climate change, and these can be used as parameters within which we can seek to locate an appropriate definition.

As noted above, a number of inherent characteristics of climate change present challenges to the definition and application of the right to a good environment. These were discussed in Chap. 8 in relation to human rights-based approaches which utilise existing law, and any new right would also need to be able to address them. They include the fact that greenhouse gas emissions will impact upon future generations, and that such impacts will be collective rather than individual. The cumulative and transnational effects of greenhouse gas emissions also need to be accommodated, as does the contribution of non-State actors. Moreover, these factors need to be considered in the broader context of the human implications of climate change and the policies we devise to address it. With these issues in mind, a definition of the right to a good environment needs to clarify who should be identified as rights-holders and duty-bearers, what the obligations attached to the right would be and how the right would be balanced against other potentially competing rights. An examination of each of these issues allows us to determine whether the right can be defined in a way which makes it an effective tool in tackling the impacts of climate change.

9.3.1 Identifying Right-Holders: Individuals or Groups?

The discussion in previous chapters, particularly Chap. 5, considered whether the right to a good environment could be possessed by groups or only by individuals. It was concluded that, in order to be consistent with traditional human rights theory, the right ought to be constructed as an individual right. It was also noted, however, that the environment is a collective 'good', and that viewing it as something enjoyed only by individuals creates potential conflicts and is inconsistent with ideas of interconnected ecosystems and the global commons. This problem is amplified with respect to climate change. Greenhouse gas emissions are an inherently 'collective' problem, and the effects of climate change are transboundary and cross-sectoral, making them ill-suited to a narrow, individualised discussion.

We must consider then the possibility of recognising the right to a good environment as a collective right in order to make it more useful in the context of climate change. There is limited precedent in international law for recognising collective rights. The right to self-determination, recognised in common article 1 of the *International Covenant on Civil and Political Rights* (ICCPR) (1966) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) (1966), is constructed as a group right, enjoyed collectively by peoples. As argued in Chap. 5, however, such group rights depart from the theoretical foundations of human rights, which base rights on individual dignity and autonomy, rather than on relationships between the members of a particular community (Donnelly 1985a; Alston 1988). The recognition of the right to self-determination is best understood not as a right derived from classic human rights theory, but as an attempt to redress the harms caused by colonisation and the subjugation of indigenous peoples (Brownlie 1985; Crawford 1988). The right to self-determination is intended to ensure that colonised and indigenous peoples are able to achieve meaningful enjoyment of the full range of human rights. In this sense it can be seen as a special kind of right recognised by international law.

In the same way that self-determination was recognised as a right that was necessary in the particular context of decolonisation, and which was intended to acknowledge the range of human rights harms associated with colonial subjugation of peoples, States could decide to adopt a new environmental right in order to recognise the broad implications of climate change. However, the difficulty of expanding human rights law to recognise additional group rights can be observed in the debates around the right to development which, despite attracting considerable support from UN bodies and scholars, has yet to be enshrined in international human rights law (Donnelly 1984, 1985a, b; Alston 1985, 1988; Marks 2004; Shelton 1985). Further, as the discussion below will demonstrate, States' current attitudes indicate limited willingness to articulate the connections between human rights and climate change in an international legal instrument, and a new group right appears unlikely to achieve the required support.

The formulation of the right to a good environment which is most consistent with human rights theory is as an individual right, but such a construction sits awkwardly with our understanding of the interconnectedness of ecosystems and environmental processes, and with climate change as a global phenomenon. Breaking down the environment to an individual right reduces it to a series of particularised assessments of what is required to fulfil the right. When the environmental challenge is climate change, this kind of fragmented approach cannot fully account for the realities of its transnational, intergenerational and cumulative impacts. To be consistent with human rights theory while at the same time making sense in the context of climate change, the right to a good environment would need to acknowledge the collective experience of climate change while still constructing the right as one which belongs to individuals.

This could be possible by recognising that, while the right is possessed by individuals, it is enjoyed collectively with other members of their community (or indeed even with all other members of the world's population). Violations of the

right could be identified where collective impacts are experienced, although claimants seeking to bring an action with respect to those violations would do so in an individual capacity. The cumulative and collective nature of climate change impacts are likely to present other problems for pursuing such a claim, particularly with respect to issues of causation and attribution of harm, although this alone should not preclude recognition as an individual right.

The difficulty emerges, as argued in Chap. 5, when we try to define a right to a good environment which is both possessed by individuals and independent of other human rights, so as to demonstrate its necessity and avoid criticisms of repetitiveness or redundancy. As was argued in Chap. 5, it is difficult to construct a good environment as being necessary to human dignity, interests or autonomy, or which is supported by cosmopolitan theories, without relying on its connections with other human rights, such as the rights to health, life and an adequate standard of living. While it is not impossible to conceive of a right to a good environment belonging to individuals and enjoyed collectively, such constructions are difficult to justify using traditional human rights theory while at the same time demonstrating that they are necessary when compared to existing human rights.

9.3.2 Identifying Right-Holders: Future Generations?

Another issue which relates to the identity of the beneficiaries of a human rights-based approach to climate change is whether human rights, including any standalone environmental right, can be said to be possessed by future generations. The nature of climate change means that our actions now are going to impact on the lives of persons living in the future. Any reductions we make to current rates of greenhouse gas emissions will take effect in the future. To capture the nature of climate change and offer a meaningful contribution to addressing its full impact, a rights-based approach needs to make allowance for the needs and interests of future generations.

In her influential work on intergenerational justice, Edith Brown Weiss has identified that: 'no longer can we ignore the fact that climate change is an intergenerational problem and that the well-being of future generations depends upon actions that we take today' (2008: 616). Her theory of intergenerational justice involves three pillars: equity of options, equity of quality and equity of access (2008: 616). These concepts, although not developed explicitly as a theory of rights, can be understood in rights language, because they imply an obligation borne by current generations to ensure that future generations are able to enjoy their human rights by having access to, and choice of, the resources necessary for their basic needs. Equitable and rights-based perspectives on climate change therefore demand that we consider the duties which we might owe to future generations, and whether those generations might be said to be holders of human rights.

A number of proponents of the right to a good environment have considered what the right might mean for future generations. Some scholars have stated that the

right to a good environment should extend to future generations, but it is not always clear whether this is intended to confer the right on members of future generations or to impose a duty on current generations to protect future generations' interests as part of their obligations under the right. Most proposals for a new environmental right seem to hold that the right would create a duty to protect the environment for the benefit of present and future generations, but do not propose that the right would be held by members of future generations themselves (Thorme 1991; Symonides 1992; Downs 1993; Turner 2004). Generally, the place of future generations seems to be as beneficiaries of a duty corresponding to the right, but not as right-holders themselves (Depledge and Carlane 2007: 238–239; Adelman 2010: 173).

The rather ambiguous way in which the interests of future generations are brought into discussions about the right to a good environment in the literature raises the question of how human rights ought to apply to future generations, and whether members of current generations can be held to owe duties correlative to those rights. While these questions are relevant to all human rights, they are especially germane to the right to a good environment given the concepts of conservation and sustainability which that right seems to imply.

A number of contemporary rights theorists have addressed the issue of the rights of future generations. Drawing on liberal political philosophy, Derek Bell has argued that anthropogenic climate change constitutes a violation of human rights, specifically the basic rights of life, health, subsistence and physical security, and that this violation includes an interference with the rights of future generations (2011: 101). In defending this claim, Bell considered the work of a number of scholars who have argued that it is not possible to say that future persons have human rights. For instance, Ruth Macklin has argued that because future persons do not exist they cannot possess human rights. Such persons will possess human rights once they are 'actual persons' but they cannot possess them until that point in time (Macklin 1981: 152; Bell 2011: 105; de George 1981: 157). Axel Gosseries has expressed this in terms of the 'right-bearer contemporaneity' requirement—that is, that a person can only have rights once he or she comes into existence (2008: 456; see also Bell 2011: 105).

As a result of this, scholars such as Macklin and Gosseries argue that current generations cannot owe correlative duties to persons who do not yet exist (Macklin 1981: 152; Gosseries 2008: 456). If future generations do not possess human rights, current generations could not be said to be under an obligation to take certain action now on the basis that it is required to protect the rights of persons living in the future. This criticism applies equally to currently recognised rights as well as the proposed new right to a good environment.

However, there are persuasive arguments that current generations can in fact be said to owe duties to future generations. Scholars such as Joel Feinberg and Ernest Partridge have argued that, because human rights are based on human interests, if we accept that our actions can affect the interests of future persons then we must also accept that our actions can impact upon the enjoyment of their rights (Feinberg 1971, 1981; Partridge 1990; Bell 2011, 2013). From this we can conclude that current generations have an obligation now not to act in a way which will adversely

affect the interests of future generations, as doing so would violate their rights. The fact that future persons do not yet exist does not prevent us from recognising that when they do exist they will have human rights. Given the virtual certainty that persons will exist in the future, we know that those future persons will possess future human rights (Partridge 1990: 53; Bell 2011: 105–106; Feinberg 1981: 147; Elliot 1989: 162).

An objection to this line of reasoning is that, although we might accept that future persons will exist, their identity is indeterminate, and so we cannot say who exactly will possess human rights (Macklin 1981: 152). Furthermore, as Derek Parfit identified, our actions today not only influence the lives of persons in the future but also determine the identity of the people who will exist in the future. Parfit referred to this as the 'non-identity' problem (1984: 351) and he suggested that, because our actions determine the identity of people who will be born in the future, it is not possible to say that our actions can breach the lives of those people, since changing our actions would change the identities of the individuals comprising future generations.

Bell argues however that it is not clear why the uncertainty or variability of future identities alters our understanding of whether those persons have rights. He contends that, because human rights flow from our humanity, we can accept that future persons will have rights on the same basis, even if we do not know their identities. As he says, 'the indeterminacy of the identity of future persons does not offer any grounds for denying that they will have human rights' (2011: 107; see also Feinberg 1981: 148; Meyer 2003: 146; Partridge 1990: 56). Further, the non-identity problem fails to answer to the morally intuitive notion that it is wrong for us to knowingly act in a way which will lead to a poorer quality of life for future generations (Lewis 2016: 214).

If we accept that persons living in the future will have human rights, it follows that we have duties now not to act in a way which would adversely affect those rights. Consequently, we have duties to respond to climate change in order to ensure that the human rights of future generations are not violated as a consequence of our current inaction (Lewis 2018). This reasoning is consistent with the general obligation to respect human rights, that is, to ensure that our actions do not compromise the ability of others (including persons not yet born) to enjoy their human rights.

However, while we can accept the theoretical proposition that human rights duties are owed now towards future persons, a number of difficulties arise when we consider how to translate this concept into legal terms. One obvious difficulty relates to the justiciability and enforcement of those duties. Human rights law as it is currently formulated does not provide a mechanism for a claim to be brought on behalf of a person who does not yet exist. Even if a claim could be brought on their behalf, there would be significant challenges in proving a violation of human rights based on future impacts of current acts or omissions. For reasons such as these, authors like Depledge and Carlane, Tully and Abate have made the argument that the current legal framework is inadequate for dealing with the human rights

implications of climate change for future generations (Depledge and Carlane 2007; Tully 2008; Abate 2007).

For reasons explained previously, climate change does not fit the paradigm of a human rights violation. As Bell has argued, greenhouse gas emissions increase the risk of future harm, but do not fit the usual model of act/prohibition or omission/positive duty (2011: 111). Further, the impacts of climate change are the consequence of the cumulative action of many agents over time; no single actor alone is enough to cause the harms of climate change. On this basis, it might be concluded that no one actor can violate human rights through the processes of climate change. As Bell explains, this creates confusion about who owes duties with respect to climate change and what precisely they are obliged to do, particularly when the obligations relate to future impacts (2011: 113). This makes the challenge of enforcing a human rights violation in this regard even more difficult.

These challenges are more problematic in relation to a right to a good environment than they might be with respect to other recognised human rights. As demonstrated in Chap. 8, the difficulty of bringing a claim for a violation of a current right, for instance the right to the highest attainable standard of health, lies in being able to demonstrate to an acceptable standard of proof that current actions or omissions will cause a negative impact on the ability of future generations to enjoy that right. These issues are made more complicated when the right we are seeking to enforce is a right to a good environment. Recent scientific analysis indicates that anthropogenic climate change is likely to cause a range of environmental impacts, including increases to the Earth's surface and ocean temperatures, changes to precipitation, reduction in volume of ice sheets and glaciers and rising sea levels (Alexander et al. 2013). However, while the assessments indicate that certain regions are more likely than others to undergo particular changes, we are still limited in our ability to predict which communities will suffer which particular effects in the future. Exceptions to this might be found in communities such as Inuit peoples, who are likely to be impacted upon by changes to the Arctic ice sheets and spring snow coverage (Alexander et al. 2013: 17) or the populations of Small Island States, due to the expected impact of rising sea levels (Alexander et al. 2013: 18), but predictions beyond these particularly vulnerable groups tend to be rather more generalised. It is therefore more difficult to say which groups might suffer violations of their right to a good environment in the future, and what form those violations might take, at least to the degree of certainty that would normally be required to establish a breach under human rights law.

There is also the problem of causation in linking a particular future impact back to current greenhouse gas emissions. While the science indicates a high level of confidence that certain changes will happen, and that those changes are the result of human activity (Alexander et al. 2013: 10, 14), the complexity of environmental and climatic systems creates significant challenges in proving that a given act or omission has caused (or is likely to cause) the alleged violation, particularly when that violation is against the rights of persons not yet born.

Even where we can be more confident about the impacts in a particular area, there are further difficulties in proving that those impacts will amount to a violation

of the right to a good environment. As the discussion in previous chapters demonstrates, there are a wide variety of suggestions for how a right to a good environment should be defined. Whereas rights like the right to the highest attainable standard of health come with fairly well-described standards, a 'good environment' (or a healthy, safe, clean or decent environment) is an inherently broad concept which defies specification. This definitional problem is even more complex in the context of the future impacts of climate change. While some environmental impacts, for example water or air pollution, might be easily categorised as 'negative' impacts, other impacts, such as changes in the distribution of species or growing seasons for particular crops, are less easily characterised as 'good' or 'bad'. A particular change might have negative consequences for some people but positive implications for others. This problem will be examined in more detail below, but the point to make here is that it is difficult to predict the impact that climate change will have on members of future generations with sufficient precision to say whose rights will be violated and how.

While we might, in theory, be able to say that current generations owe duties to protect the human rights of future generations from the negative impacts of climate change, it is a much less straightforward task to show how those duties might be enforced under the current framework of human rights law. The problems of proving a future violation of human rights are significant under existing human rights law; they are even more challenging in relation to a new right to good environment.

9.3.3 Identifying Duty-Bearers: States and Non-State Actors

If the right to a good environment is to make a positive contribution to addressing climate change, it needs to be is structured and defined so as to place obligations on those parties who are contributing to the problem. Non-State actors contribute significantly to the causes of anthropogenic climate change, so any successful action to reduce greenhouse gas emissions requires their cooperation, either voluntarily or through State-based regulation. With respect to a human rights-based approach, if the impacts of climate change are to be sufficiently combatted by a new right to a good environment, non-State actors would need to be bound by that right (Adelman 2010: 173, 175).

As discussed in the previous chapter, the traditional approach of human rights law is to place obligations on States to respect, protect and fulfil the human rights of their citizens and those subject to their jurisdiction. States are therefore the principal duty bearers. As Robert McCorquodale has explained, the conventional view of human rights represents a 'binary opposition between the individual and the State, with the individual being 'rights-bearing' in relation to the State. Thus the individual has rights against the State—and only the State' (McCorquodale 2002: 387). McCorquodale explains that human rights law does not therefore impose any direct obligations on non-State actors: '[n]on-State actors are treated as if their actions

could not violate human rights, or it is pretended that States can and do control their activities' (2002: 384).

In some circumstances, the actions of a non-State actor may be attributable to the State itself under the rules relating to the responsibility of States for internationally wrongful acts, found in the Draft Articles drafted by the International Law Commission and endorsed by the United Nations General Assembly (2002). For example, if a corporate entity is acting under the instruction, direction or control of the State (Article 8) or exercising governmental authority (Article 9), its actions would be deemed to be actions of the State and the State would be responsible for any breach of international law, including human rights law.

Where the actions of a non-State actor are not attributable to a State, the mechanism by which human rights standards are applied to non-State actors is through States' obligation to protect the rights of persons subject to their jurisdiction. As discussed in Chap. 7, States have an obligation to protect human rights, which entails a duty to ensure that rights are not violated by non-State actors, such as corporations, who are subject to their laws (McCorquodale 2009: 387). A State can be held to have breached its obligations under international human rights law where its acts or omissions have enabled a non-State actor to act in a way which violates the human rights which the State has undertaken to protect.[1]

There are significant problems in relying on States to enforce human rights standards against corporations however. As McCorquodale points out, many corporations, particularly large transnational corporations, wield great power in the States in which they operate, and some may even be wealthier than the host State itself. In situations such as these, 'no State, whether it is a host State (in which they operate) or the home State (in which they are incorporated) feels able or willing to control their activities for fear of losing the benefits of investment' (2009: 386).

There is currently nothing under human rights law which would make a non-State actor directly responsible for a human rights violation. The State-centric system of international law is not suited to bringing non-State actors within the scope of obligations, and they remain only indirectly bound. While initiatives like the United Nations Guiding Principles on Business and Human Rights have sought to extend human rights principles to corporations and embed the concept of corporate social responsibility, they remain non-binding and rely heavily on long-standing notions of the duties to respect and protect human rights (United Nations 2011).

Looking specifically at the right to a good environment, the restrictions of the State-based system of international law would prevent any more broadly-framed

[1] As discussed in Chap. 2, this approach has been taken by the European Court of Human Rights in cases such as *Fadeyeva v Russia* (2005) where a breach was found based on the State's failure to regulate private industry. A similar decision was reached in *Onyeryildiz* (2004) where the State was found to have an obligation to put in place necessary legislative and administrative frameworks to protect human rights. It has also been adopted by the African Commission in the *Ogoniland* case (2002), where the unregulated actions of a corporate entity could amount to a violation by the State.

right being adopted. The inability to extend already longstanding human rights laws to non-State actors, resulting in the adoption of the soft-law Guiding Principles, indicates that any attempt to create a new right which would be binding on non-State actors is likely to fail. In the context of climate change, the contributions of non-State actors to greenhouse gas emissions and resulting human rights violations can therefore only be brought within the framework of international human rights law through the conduit of States' obligations. Responsibility for a violation would rest with the State where it can be demonstrated that it failed to take the necessary regulatory or legislative steps to prevent the breach. The non-State actor itself would be liable only under the relevant domestic law, and not under international law.

This introduces another step in an already complex process of establishing responsibility for a breach of the right to a good environment in the context of climate change. The problems of proving a violation of the right based on climate change would be significant, as will be discussed below. Demonstrating that the negative impact on that right was a result of a State's failure to regulate non-State actors may be even more complex. Given the ambiguity of the concept of a 'good environment' and the complexity of cause and effect between cumulative greenhouse gas emissions and mitigation and adaptation strategies, on the one hand, and long-term, transnational and variable environmental impacts on the other, it may be extremely difficult to show that a State has failed to take reasonable steps to control the activities of non-State actors in way which has led to a breach of the right to a good environment. If it cannot be established that a State is responsible for the breach then no remedy will be available under international human rights law.

The inability to impose obligations directly on non-State actors represents a significant limitation on the ability of a human right to a good environment to be effective in the context of climate change, at least where we are seeking to have it apply within the framework of international human rights law.

9.3.4 Extent of Obligations: Extraterritoriality

If it were possible to extend responsibilities to non-State actors that would go some way to ensuring that the impacts of climate change can be properly captured by a human rights-based approach, but it would still not be sufficient. Another key issue relates to the transboundary nature of greenhouse gas emissions, and the extraterritorial application of human rights obligations. As discussed in more detail in the previous chapter, human rights law imposes obligations on States to respect, protect and fulfil the human rights of individuals within their territory or subject to their jurisdiction. The concept of jurisdiction has been interpreted to mean that States have human rights obligations with respect to any act undertaken pursuant to their authority, including where that act produces effects outside its territory (McCorquodale 2009: 388; McCorquodale and Simons 2007: 602; King 2009).

In theory, then, a State could be held responsible for climate change-related acts or omissions which cause human rights violations elsewhere. However, as was argued in Chap. 8, the particular characteristics of climate change make even this extended understanding of jurisdiction difficult to apply. The challenge lies in showing that a particular environmental impact of climate change is linked to an exercise of a State's jurisdiction, so as to bring it within the scope of that State's human rights obligations. Using the right to a good environment may be easier in this respect than other human rights, since it would only be necessary to demonstrate a link to the environmental harm generally, and not to a specific impact in terms of the right to health, food water and so on. However, the gap between act and effect which hinders the establishment of extraterritorial obligations also creates challenges for proving that such an obligation has been violated. These challenges are difficult to overcome, even when a claim is based on the right to a good environment, and will be detailed in the next section.

9.4 Establishing a Violation of the Right to a Good Environment Based on Climate Change

Aside from the troublesome issues of ensuring that the right to a good environment would extend to future generations and that obligations could be imposed on non-State actors and across State borders, a fundamental challenge to relying on the right to a good environment in a climate change context is being able to prove that a violation of the right has occurred. This issue was addressed in the previous chapter with respect to a human rights-based approach under current law. The problems of using a new right to a good environment are equally, if not more, difficult to overcome, and suggest that a new right may not be especially helpful in enhancing human rights-based approaches to climate change.

If we define the right to a good environment in a way which would allow a claim solely on the basis of environmental impact, the challenge would be to prove that an accused duty-bearer (presumably a State, as discussed above) has caused that impact by its acts or omissions. Proving this involves two steps. The first is identifying the level of responsibility for climate change that can be attributed to the particular State. The second is proving that the environmental impact was caused by climate change, and particularly by the State's contribution (or the collective contributions of numerous States). The problem of proving that a State's actions caused an environmental impact also raises the question of standards—not just what standard of proof we should consider sufficient to establish causation, but what standard of environmental impact we would consider to be a violation. The following discussion examines the two-step process in relation to both standards of proof and standards of harm.

9.4.1 Standards of Proof

The first step in proving a violation of the right to a good environment based on climate change would be to show that a State has some responsibility for climate change, such that it could be held liable for a particular climate change impact. As discussed in the previous chapter, the cumulative effect of greenhouse gas emissions creates a difficult challenge in identifying the share of responsibility which a given State should bear. This is complicated by the fact that some high per capita emitters have low overall contributions to greenhouse gas emissions, raising the question of how States are to be judged in terms of their respective responsibility (Doelle 2004: 214). In this respect, Meinhard Doelle has asked whether accused States will be able to avoid liability by claiming that climate change would be happening even if they made more serious efforts to reduce their emissions (2004: 213). This is a significant problem, as no single State has it within its power to avert the course of climate change and each State could therefore assert that they have not *caused* climate change. A successful strategy for addressing climate change, be it under human rights law or any other body of law, therefore demands a different approach to attribution of responsibility, where collective contributions can be taken into account.

The second step in proving a violation builds on the first: even if it can be shown that a State has some responsibility for climate change, we must still demonstrate that the environmental impact complained of was caused by the State's acts or omissions. This is arguably a much more difficult process, as it raises the question of what standard of proof ought to apply to establish causation in relation to the environmental impacts of climate change. Doelle has argued that a conventional 'but-for' test would be inappropriate for establishing causation, as that would allow a State to avoid responsibility on the basis that its contributions are not sufficient to cause climate change alone, but merely one contribution among many. He further contends that a more lenient approach to evidence is required in recognition of the imbalance of power between States and individual or community claimants who frequently have very limited resources (2004: 214).

Doelle also points out that there are numerous secondary effects of a State's position on climate change—for example, a State's position on energy efficiency, public transport, conservation or urban planning can affect its overall per capita emissions as much as its direct contribution to greenhouse gases. A State's approach to the negotiation process for climate agreements might result in lower international targets and delays in implementation which also combine to produce an effect which goes well beyond greenhouse gas emissions alone. Given the range of ways by which a State can contribute to climate change, Doelle argues that a more appropriate standard of proof would be that which applies in domestic cases involving multiple defendants or collective responsibility. He proposes that the standard should be one which imposes liability where an accused State has, on balance, contributed to the problem rather than the solution (2004: 214).

However, this standard is not without its problems either. A binary distinction between problem and solution does not allow for a full consideration of the nuances of climate change policies. It is not clear, for instance, what should be made of a State which, while still contributing greenhouse gas emissions, is nonetheless taking steps to reduce them or to provide adaptation mechanisms. It is also not clear how historic emissions are to be regarded, and how a decision is to be made as to whether these various factors are on balance part of the problem or the solution.

Another issue which needs to be considered in the context of establishing a standard of proof is the effect of potentially competing human rights claims. States may argue that, while they are contributing to the problem of climate change and consequential environmental impacts, they are doing so in the pursuit of other human rights which must be balanced against the right to a good environment. The problem of balancing potentially competing human rights will be considered below in the context of examining whether a State might be excused for a prima facie violation of the right to a good environment on the basis that it was pursuing other legitimate human rights aims. They are relevant to the issue of standard of proof because they complicate the assessment of whether a State is contributing to the problem or the solution, to use Doelle's test.

As the previous chapter highlighted, the cumulative, long-term and transnational effects of greenhouse gas emissions make it extremely difficult to prove that a particular impact is the consequence of a State's act or omission. Traditional approaches to the standard of proof, particularly the 'but-for' test, are inadequate, and would potentially allow all but the very highest emitters of greenhouse gas emissions to avoid liability. The introduction of a right to a good environment would not overcome this problem. While the challenge of proving that a State caused a negative impact might be somewhat lessened when we seek to prove an interference with the environment more broadly, rather than with a particular human right such as the right to health or to an adequate standard of living, this is off-set by the complexities introduced by the range of natural factors, long-term patterns and interconnected systems which contribute to environmental changes. The recognition of a human right to a good environment would seem to do little to improve a human rights-based approach to climate change, at least with respect to the challenges of proving attribution and causation of harm necessary to establish a violation.

9.4.2 Standards of Harm

Beyond the challenge of proving a causative link between a State's action and a resulting environmental impact is the more fundamental issue of how we should characterise such an impact as 'negative' for the purposes of establishing a violation. To show that an environmental impact has been caused which violates acceptable standards of a good environment we must first be able to say what those standards are. As was explored in Chap. 4, many scholars have argued that the right

to a good environment needs to be accompanied by clear, measurable standards of ecological health, in order to be able to identify what the right entails and when it has been violated (see for example, Shelton 2006: 164; Turner 2004; MacDonald 2008: 218; Pathak 1992). However, while we can arguably outline some minimum levels for environmental health, such as tolerable levels of pollution, healthy average temperature ranges, or sustainable population levels of particular species, the variability of the environmental impacts of climate change indicates that there will be some specific effects which may not be susceptible to a classification as either 'good' or 'bad', 'healthy' or 'unhealthy.' This is complicated by the inherent capacity of ecosystems to adapt to change, which may make it difficult for us to judge whether a long-term outcome is 'better' or 'worse'.

Of the changes which are projected to occur as a result of climate change, some are difficult to characterise as positive or negative. For example, it is expected that migration patterns of some species will change as temperatures rise (Field et al. 2014: 5). This could be expected to have an impact on the ecosystems in which those species play a part. However, it is not clear by what standard we can say that such changes are negative, other than holding that any change is inherently bad. Ecosystems are prone to adapting, and have adapted to purely natural forces in the past, so it seems mistaken to say that change is negative per se.

Perhaps the better approach is to say that it is the human interference that renders an environmental consequence a negative one. However, it is also true that there are examples of human interference in the environment which are not negative, such as sustainable fishing or forestry, or which are even positive, for example through conservation measures. Further, such reasoning would mean that the right to a good environment would be violated wherever humans affect the world around them. Such a broad standard arguably renders the right unworkable and ineffective.

It is argued, therefore, that while basing a claim on a new right to a good environment might remove the requirement of proving a particular human impact, the task of proving a negative environmental impact can be equally problematic. It may in fact be the case that it is easier to prove a negative environmental outcome by reference to measurable human impacts, but even these are not straightforward. For example, rising temperatures in Europe are likely to cause a range of different consequences including increased susceptibility to heat-related health impacts and increases in severe weather events causing injury and loss of property (Adger 2007: 14). In some more temperate areas however, changing temperatures are projected to have some positive impact, particularly with respect to agriculture as growing seasons are extended and viable crop varieties diversify (Adger 2007: 14; Schmidhuber and Tubiello 2007: 19704). The same greenhouse gas emissions which cause negative effects in some regions will cause positive outcomes in other areas. If we seek a formulation of the right that includes extraterritorial obligations, which, as argued above, is necessary to capture the transnational consequences of States' emissions, then we open up the scope of inquiry in ways which create other challenges elsewhere.

The challenge of defining the right to a good environment in a way which will make it possible to identify a violation in purely environmental terms is clearly a

significant one. Even if we can identify what a violation would look like, the problem of proving that it has been caused by the acts or omissions of a particular duty-bearer still remains. Overall, the problems identified in the previous chapter about proof and causation in relation to breaches of other human rights are not any more easily resolved with respect to the right to a good environment. The problems of proving a violation based on cumulative, intergenerational and transboundary impacts still remain, and there exists the additional challenge of establishing adequately precise standards by which to judge that a particular environmental impact is negative.

9.5 Balancing the Right to a Good Environment Against Other Rights in the Context of Climate Change

One of the advantages of a human rights-based approach to climate change is that it lends weight to the human impacts of climate change and affords them a greater status in the decision-making process alongside economic and scientific considerations. A commonly presented justification for the adoption of a standalone right to a good environment is that it would elevate environmental concerns to the same plane as other human rights, allowing them to be balanced against potential competing rights (Boyle 1996: 491; Downs 1993: 378; Merrills 1996: 28–29). Thus, a human rights-based approach to climate change which incorporates a right to a good environment ensures both that the human implications of climate change are given greater consideration, and that purely environmental implications can also be viewed as a human rights issue, attaching more weight to environmental concerns and allowing them to be factored in as one of the potential human rights issues to be taken into account.

A human rights-based approach to climate change also provides a framework of standards against which we can evaluate current or proposed mitigation and adaptation strategies, with the aim of minimising the human rights impact of our responses to climate change. This implies that a balance may need to be struck between the need to reduce emissions in order to address future human rights impacts, and the need to ensure that mitigation and adaptation strategies do not negatively affect the current enjoyment of human rights in other areas. In considering whether actions and omissions relating to climate change could amount to a violation of human rights, it is necessary to consider any potentially competing human rights obligations.

Just as individuals and communities may claim that their human rights are violated by the impacts of climate change, States may also seek to justify their choices with respect to cutting emissions on human rights grounds. For example, a State may argue that current emissions levels are justified on the basis that they are inherent in continuing progress towards economic and social development, which is pursued in order to realise rights such as the right to an adequate standard of living.

Usually human rights law would excuse a State for restricting some human rights where those restrictions are considered necessary to promote other legitimate human rights objectives.[2] Thus, the question of how to balance competing rights is a crucial component of understanding when the right to a good environment might be considered to have been violated, and of assessing the contribution it can make to human rights-based approaches to climate change.

In a climate change scenario the duty to respect the right to a good environment might suggest an obligation on States to reduce greenhouse gas emissions so as to prevent environmental harms like desertification, coral bleaching, atmospheric pollution or the melting of polar ice caps. An argument might be made, however, at least by developing States, that greenhouse gas emissions are a consequence of necessary activities which promote economic growth and facilitate infrastructure and employment. At least where clean and renewable energy sources are not available or affordable, the need to protect and fulfil economic and social rights might outweigh the need to respect the right to a good environment.

The question of where the appropriate balance should be struck between these competing rights and duties would be complicated further if we also consider the rights of future generations. The question becomes one of how to balance the needs of current generations against the rights of future generations. Simon Caney has argued that members of future generations possess the same interests in health, subsistence and a decent standard of living as current generations, and that there is no morally significant reason to discount the interests of future generations. The interests of future generations, he says, have the same moral weight as those of current generations (2008: 540). But a human rights-based approach to climate change relies heavily on rights as they are enshrined in law (particularly international law), and when determining legal responsibility for human rights impacts there are limited ways to give regard to future generations' interests.

In consideration of these issues, the right to a good environment may not be as effective as other rights in making a case for stronger action on emissions reductions. As noted above, the right to a good environment will inevitably be defined in general terms, given the inherent breadth of the concept of a 'good environment'. The nature of the environment necessarily implies a spectrum of environmental well-being, making it difficult to assert specific standards for a 'good environment'. At the same time, the characteristics of climate change mean that it is not possible to say with certainty just how bad a particular environmental consequence will be, or how likely it is to occur. In balancing the right to a good environment against other human rights we seek to weigh a rather broad and uncertain right against more specific, more immediate demands. For example, the need to prevent future negative environmental threats could be balanced against the impact of emissions

[2]For example, the ICCPR allows for the exercise of certain rights to be restricted where those restrictions are necessary to protect the rights of others, for example Article 18 (freedom of thought, conscience, and religion) and Article 19 (freedom of expression). See also the European decisions of *Powell and Rayner v United Kingdom* (1990); *LCB v United Kingdom* (1998); *G and E v Norway* (European Commission of Human Rights) (1983). See also Shelton (2010: 111).

restrictions on the ability of a developing State to fulfil the economic and social rights of its citizens. Where the latter are more clearly identifiable and more certain, it may be concluded that the risks of deferring or preventing development activities outweigh the potential environmental benefits which might be secured by reducing emissions. Some environmental harm might be considered a legitimate price to pay for securing greater, more immediate enjoyment of other human rights.

However, as noted in the previous chapter, the human rights implications of climate change are much more widespread than the purely environmental impacts. An alternative way of looking at the problem of balancing human rights in the context of climate change would be to balance the impacts of reducing emissions on rights associated with development against the impacts of climate change on rights such as the rights to health, life, physical security and subsistence. Each of these rights is capable of more specific definition than the right to a good environment, enabling them to compete with other currently recognised rights on a more even playing field.

It has been argued that some human rights ought to be given priority over others, because they are linked to essential human needs (Sachs 2013; Shue 1980: 118; Hassan and Khan 2013). Wolfgang Sachs has powerfully argued that

> Survival comes before a better life. The unconditionality of human rights may therefore serve as the basis for the setting of priorities: the realization of fundamental rights must take precedence over all other activities, including the realization of non-fundamental rights (2013: 32).

In a contest between these basic rights and other less urgent needs the demands of basic rights ought to win out. Consequently, it would seem that an argument for climate change action grounded in basic human needs is more likely to defeat a competing human rights claim than one based on the right to a good environment.

If the ultimate object of a human rights-based approach to climate change is to secure stronger action from States on reducing emissions and addressing adaptation needs, it is argued that existing rights are better equipped for this task than a new right to a good environment. The balancing of potentially competing human rights is more appropriately conducted by balancing like against like. A new right to a good environment would be no more effective than existing rights and arguably would be outweighed more often than not by more immediate, more clearly understood human rights needs associated with development.

9.6 Attitude of States Regarding the Relationship of Human Rights and Climate Change

The analysis above reveals a number of significant problems in defining a right to a good environment which would be capable of making a meaningful contribution to a human rights-based approach to climate change. Yet, the question of whether a new right is to be recognised in international human rights law is ultimately a

question for nation-States. This section examines the evidence of States' attitudes on the issue of human rights and climate change in an effort to determine the likelihood that the international community will take the step of adopting the right to a good environment within international law.

As noted in Chaps. 7 and 8, the human impacts of climate change are increasingly gaining attention in international discussions, and particularly within human rights discourse. While the human rights implications of climate change and relevant human rights principles occupy an expanding place within the work of NGOs and human rights bodies in the broader debate about climate change strategies, human rights principles have only made their way into international climate agreements in recent years. In 2010 the Conference of Parties (COP) to the *United Nations Framework Convention on Climate Change* (UNFCCC) (1992) adopted the *Cancun Agreements*, and for the first time acknowledged the impacts of climate change on human rights. The agreements emphasised that 'Parties should, in all climate change related actions, fully respect human rights' (UNFCCC COP 2010: para 8). Then, in 2015, States agreed upon a successor agreement to the *Kyoto Protocol* (1997) (which is due to expire in 2020) and the *Paris Agreement* was adopted. It includes one reference to human rights, located in the Preamble to the Agreement, which reads:

> Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity (para 11).

While this provision is rather meagre, and much less than many advocates had hoped for, it nonetheless represents a significant step forward relative to previous climate treaties, where human rights had been given no explicit coverage.

The reluctance of States to give human rights a more prominent place within the climate regime was assessed by McInerney-Lankford et al. in 2011. They concluded that it

> seems to reflect differences of views between States (and regional and other groupings of States) on the so-called value-added of human rights in the climate change context, the comparative weight and focus to be given to human rights obligations within and beyond national borders, and perhaps also perceptions in various quarters that human rights might risk overloading an already fragile climate change agenda (2011: 10).

This assessment rings true with respect to the Paris negotiations as well, where opposing views on the role and relevance of human rights were expressed, and initial proposals for strong, legally binding human rights language were gradually watered down through the negotiating process (Atapattu 2016; Savaresi 2016; Bodansky 2016; Saveresi and Hartmann 2015; Huggins and Lewis forthcoming).

Over the past 10 years a number of themes can be observed in States' attitudes towards climate change and human rights. Some States have argued that the complex, global, long-term nature of climate change makes it ill-suited for

consideration as a human rights issue. Some have stressed that climate change does not violate human rights. On the other side of the debate, many countries from the developing world, particularly those which are most vulnerable to the effects of climate change, have pushed for greater recognition of the human rights implications, and have sought to use human rights language to bolster their calls for stronger international action (Knox 2009: 490).

An examination of States' attitudes towards human rights and climate change reveals useful information not only about the prospects of success for a human rights-based approach to climate change, but also about the likelihood that States would support a new right to a good environment. It is assumed that States will view any proposal for recognising the new right with climate change in mind, given that climate change represents the most significant environmental issue currently confronting the global community. The attitude of States to climate change and human rights more broadly therefore provides insight into their likely attitudes towards the right to a good environment in particular.

Some of the most useful recent indications of States' attitudes towards the relationship between human rights and climate change can be found in their contributions to studies by the Human Rights Council and the Office of the High Commissioner for Human Rights (OHCHR) on the relationship between human rights and climate change (discussed in Chap. 7) (HRC 2008, 2009a, b; OHCHR 2008, 2009). In preparation for its study into the issue, the OHCHR called for submissions from States indicating their views on the interplay between their human rights obligations and climate change (OHCHR 2008). The submissions which were received reveal a number of recurrent themes from developed and developing States, which can also be observed in the negotiations between States prior to the adoption of the *Paris Agreement* in 2015 (Huggins and Lewis forthcoming).

The submissions received by the OHCHR in 2009 from developed States such as Australia, Canada, the United Kingdom and the United States indicate that, while they accepted that climate change could impact on the enjoyment of human rights, they felt that climate change is already appropriately addressed through UNFCCC processes and that a human rights-based approach has little to offer (Canada 2008: 1; Australia 2008: 4; USA 2008: 1; OHCHR 2008: 7; HRC 2009b: 10). In particular, developed States were not prepared to accept the notion that climate change violates human rights. (Australia 2008: 4; United Kingdom 2008: 3; USA 2008: 1, 4, 6; HRC 2009b: 7–8). Marc Limon, who at the time was Advisor at the Permanent Mission of the Maldives to the United Nations, described the attitudes of States during the discussions, explaining that industrialised nations continued to argue that 'the relationship between climate change and human rights is at most a loose causal one and is a statement of fact not law' (2010: 559).

Developed States have also commonly asserted that human rights law does not impose any obligations on States to take particular action with respect to climate change (Australia 2008; Canada 2008; United Kingdom 2008; USA 2008; Limon 2010: 561). This attitude was confirmed when States debated Human Rights Council Resolution 10/4, which was passed by consensus following discussions of

the OHCHR's report (HRC 2009a). According to Limon, the draft resolution originally included reference to human rights obligations but this was strongly opposed by developed countries. They argued that the inclusion of any reference to international obligations would 'dilute the State-centric nature of the international human rights protection system' and argued that while international cooperation to address the human rights impacts of climate change is 'important', it is not a legal obligation (2010: 556).

Opposition to a strong human rights-based approach generally continued through to the Paris negotiations. A number of meetings occurred in the lead-up to the Conference of Parties in Paris, where representatives of States discussed drafts of the agreement texts. Several wealthy States, including the United States, China, Norway, Saudi Arabia, and Australia reportedly argued strongly that human rights language should not be included within the operative sections of the Agreement as doing so would create the risk of possible future legal liability (Deconstructing Paris 2015a, b; Human Rights Watch 2015; Rowling 2015).

On the specific issue of a new right to a good environment, the USA's submission to the OHCHR study stated that it did not consider that such a right exists under international law. The submission noted that a number of different formulations of the right have been proposed and argued that 'the sheer number of different formulations of this 'right' is indicative of the fact that it does not have a basis in international law' (USA 2008: 3).

Developing countries have generally adopted a different approach, and have been keen to stress the human rights impact of climate change and to link it to obligations and enforcement mechanisms (Mauritius 2008: 5). The statements of developing States during both the OHCHR study and the Paris negotiations emphasise that climate change does impact on the enjoyment of human rights, and that it affects the most vulnerable and least responsible States. These States have generally adopted a broader understanding of how human rights can be utilised, and argued for a greater attention to human rights issues in the implementation of a wider framework. Developing States have also been keen to highlight the issue of balancing obligations, pointing to the injustice of obliging developing and vulnerable states to meet domestic human rights needs when those same human rights stand to suffer when developed States fail to meet their international obligations (see for example Mauritius 2008; Maldives 2008; also comments of Maldives, Philippines, and Bhutan to the Human Rights Council panel discussion, HRC 2009a, 2009b; Limon 2010: 596). This was the purpose of the Geneva Pledge, an instrument adopted by a number of mostly developing States following a negotiation meeting in Geneva in the lead-up to the Paris Conference (Saveresi and Hartman 2015; Deconstructing Paris 2015b).[3]

[3]The Geneva Pledge was adopted by 18 mostly developing countries at a meeting of State representatives to discuss the draft Paris Agreement in Geneva in February 2015. The initial signatories to the Geneva Pledge were Chile, Costa Rica, France, Guatemala, Ireland, Kiribati, Maldives, Marshall Islands, Micronesia, Mexico, Palau, Panama, Peru, Uganda, Uruguay, Samoa and Sweden. The subsequent signatories to the Geneva Pledge are Andorra, Algeria, Belgium,

After examining the contributions of States to the United Nations' work on human rights and climate change, a number of conclusions can be drawn. First, there is a lack of consensus among States about what a human rights-based approach to climate change entails, and this contributes significantly to States' attitudes about the benefits and practicality of such an approach. Developed States generally argue that human rights law is ill-equipped to deal with climate change (OHCHR 2008: 7; Huggins and Lewis forthcoming). However, they have tended to adopt a narrow understanding of what a human rights-based approach involves, one which is focussed on legal obligations, violations and remedies. Such an approach necessarily emphasises the need to identify specific harms and establish causative links—aspects which are problematic for the reasons discussed above.

Developing States, on the other hand, appear to take a broader view of human rights, one which is about setting standards and utilising the internationally accepted values inherent in human rights to motivate stronger cooperative action. They see human rights not only as a tool of legal enforcement, but also as a means of articulating more effective, sensitive and sustainable policies for addressing climate change (Bodansky 2010; Limon 2009: 458). These differing views go some way to explaining the disagreements between States about the role that human rights principles should play in the climate change framework.

Another theme that emerges from the consultative processes outlined above is that States appear to be concerned that human rights principles and mechanisms should not interfere with the UNFCCC. A number of States appear wary of 'duplicating the UNFCCC process or challenging its primacy on climate change matters' (Limon 2009: 460). States were concerned that greater inclusion of human rights issues in post-Kyoto negotiations might lead to diminished willingness to commit to stringent emissions reduction targets in case failure to meet those obligations left them exposed to potential human rights litigation (Limon 2009: 458). This is one of the reasons that references to human rights in the *Paris Agreement* were reduced to a singular mention in the Preamble (Human Rights Watch 2015; Deconstructing Paris 2015a, b; Rowling 2015).

A third insight which can be inferred from the discussions is an apparent lack of trust between developed and developing States. This lack of trust is perhaps best exemplified by the United Kingdom's proposed 'Compact' mechanism. In its submission to the OHCHR study into human rights and climate change in 2009, the UK proposed a system whereby developing States would be required to make a commitment to use the aid they receive to help the most vulnerable groups within their populations. There was an apparent concern that aid money would not be used appropriately, and the Compact proposal was intended to assure accountability and transparency (United Kingdom 2008: 3). Developed countries were also wary of the political and legal implications of recognising human rights more formally, fearing that affected individuals or countries might use human rights 'as a political or legal

Cote d'Ivoire, Fiji, Finland, Germany Italy, Luxembourg, Morocco, Netherlands, Philippines, Romania, Slovenia, Switzerland, and the United Kingdom.

weapon against them' (Limon 2009: 461). This distrust was also evident in the Paris negotiations, where reports describe developed States' strong stance against including human rights language as an act of retaliation against developing countries who were demanding the inclusion of a stronger loss and damage mechanism (Vidal and Vaughan 2015).

From the other side of the divide, there has also been apparent mistrust on the part of developing countries towards industrialised nations. Limon explains that some developing countries perceive that the West may want to use human rights to prevent their development, by using climate change to argue that industrialisation impacts negatively on human rights, thereby implying that development ought to be slowed. They also fear that the West could use human rights principles to qualify the provision of adaptation funds (for example in the manner proposed under the UK's 'Compact') (Limon 2009: 462).

The lack of trust between developed and developing States represents a significant barrier to achieving a greater implementation of human rights principles within the climate change framework. It also signifies that recognition of the right to a good environment is extremely unlikely. In this respect specifically a number of developed countries have expressed concerns that acknowledging the linkages between human rights and climate change in any formal sense might allow developing States to use climate change as a 'backdoor' to extend human rights obligations extraterritorially, or to seek the establishment of a new right to a good environment (Limon 2009: 461; Shelton 2008: 46).

States' comments in this area indicate that much division still remains on the issue of human rights and climate change. The recognition and adoption of a new right to a good environment would appear unlikely until States approach consensus on this broader issue. Currently there is a lack of agreement as to the necessity, feasibility and desirability of a right to a good environment in the context of climate change. While some States, mostly vulnerable countries within the developing world, have argued in favour of recognising a new right to a good environment in international law, there has been limited detailed discussion about how the right would be defined or what it would require. Further, some developed States appear strongly opposed to the recognition of a new right. This indicates that any attempt to introduce a right through the usual process for creating international law would face significant obstacles, and would be unlikely to succeed at this time.

9.7 Conclusion

The discussion in this chapter reveals a number of significant challenges presented by the possible application of a right to a good environment in the context of climate change. The analysis presented here is premised on the assumption that any new right to a good environment ought to be able to offer some positive benefits in the context of climate change, given that climate change represents the most widespread and complex environmental problem currently confronting the

international community. In order to ensure the right's effectiveness in this context, it must be defined and structured in a way which enables it to address certain key characteristics of climate change. These aspects have been examined above and provide a set of parameters within which a suitable definition of the right must be located.

The future impacts of current greenhouse gas emissions dictate that an effective right to a good environment ought to address the rights and needs of future generations. While it is theoretically possible for obligations to be owed now which operate in favour of future generations, translating those obligations into human rights law in a way which makes them enforceable is problematic. This is due in no small part to the problem of proving a violation of the right based on climate change impacts which have not yet materialised.

Another factor which needs to be taken into account is the contribution to climate change made by non-State actors. International human rights law does not currently impose obligations directly on non-State actors, but instead makes States liable to regulate the activities of non-State actors under their authority. While it is possible for the right to a good environment to apply indirectly to non-State actors in this fashion, holding them accountable using existing models of international law would rely on proving that a State had failed to take reasonable steps to control their activities. This would seem equally as difficult as proving that a State had caused a negative environmental impact through its own direct contribution to climate change, with the added complication that non-State actors may ignore a State's regulations or may structure their activities in a way to avoid strict regulations.

The cumulative and transnational impact of a State's greenhouse gas emissions must also be addressed. While international human rights law would hold a State responsible for the extraterritorial impacts of its acts or omissions, this will be especially difficult to prove where those impacts are the consequence of the cumulative actions of many States. As discussed in the previous chapter, proving that a State has caused a particular human rights violation through its contribution to climate change is likely to be extremely difficult. Using a right to a good environment does not alleviate any of these difficulties, but instead creates new problems relating to the question of which standards to use when judging whether the right has been breached. Not only is there the challenge of proving that a State's actions have caused a particular environmental impact, but there is the additional problem of establishing that that impact was a negative impact, without reference to any other human rights standards. The variability of the environmental consequences of climate change and the adaptability of environmental systems further complicate this issue.

An additional challenge in proving that the right to a good environment has been breached by climate change relates to balancing competing human rights obligations. If a new right to a good environment is to be introduced then it will need to be balanced against other human rights under international law. It is plausible that a State could justify actions which breach the new right on the basis that it was fulfilling other human rights obligations, particularly economic or social rights. Given that these current rights are more clearly defined and the impacts on them

more easily measured, it may be the case that the right to a good environment lacks the precision and certainty to win out in a contest against established human rights.

In terms of its effectiveness in the context of climate change, the right to a good environment appears unable to offer sufficient benefits to outweigh the practical and technical challenges of implementing it within international human rights law. It is not possible to define the right in a way which is workable yet which also addresses the key characteristics of climate change. The problems identified in the previous chapter relating to current human rights-based approaches to climate change still remain, and overshadow any possible benefits offered by a standalone environmental right. These conclusions appear to be reflected in the comments of States on the topic of human rights and climate change, and the current state of international opinion would indicate that ultimately there is inadequate support among States for the recognition of a new right to a good environment.

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Chapter 10
Future Directions for Environmental Human Rights in a Changing Climate

Abstract Environmental rights have a vital role to play in addressing the world's increasingly pressing environmental problems, particularly the widespread and varied impacts of climate change. Human rights-based approaches to climate change offer numerous benefits, including through drawing attention to the impacts of climate change for vulnerable individuals and communities and, increasingly, holding governments to account through climate litigation. Yet the effectiveness of human rights-based approaches is challenged by the structures and principles of human rights law, as well as by the nature of climate change itself. Despite its intuitive appeal, a standalone right to a good environment is unable to overcome these challenges. Difficulties defining the right and its associated obligations, combined with the significant challenge of proving a violation in the context of climate change, lead to the conclusion that a standalone right offers little advantage over existing human rights. In particular, the right struggles to capture the inter-generational and transnational dimensions of climate change which are so problematic for current human rights-based approaches. This chapter identifies a number of alternative pathways which might promise more useful and meaningful outcomes for protecting human rights in the context of climate change.

10.1 Introduction

Environmental human rights have a vital role to play in addressing the world's increasingly pressing environmental problems. Articulating environmental rights and duties allows us to affirm the importance of the relationship between human rights and the environment—recognising that environmental conditions are an essential determinant of the enjoyment of a wide range of human rights, as well as establishing that the responsibility which rests with governments, corporations and citizens alike to care for the environment bears the character of a human rights obligation. Such a characterisation brings the environment within the ambit of human rights law and associated enforcement mechanisms and offers the potential to capitalise on the long-established authority of human rights principles and

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language. In some cases, environmental rights have been used to recognise the inherent value of the environment itself, possibly signifying a fundamental shift in the way we think about the environment and its role in human lives.

Given this potential, it is not surprising that environmental rights have been endorsed by some as a means of addressing the harms caused by climate change. Climate change represents not only the biggest environmental challenge confronting the global community, but also a serious human rights issue, with the potential to impact on the full range of human endeavours. Environmental changes such as increasing temperatures, changes to precipitation rates, rising sea levels, and increasingly common and severe storms, floods and bushfires will undermine the enjoyment of the human rights to life, health, food, water, property and self-determination, among many others. Further, these impacts are projected to affect most seriously those individuals, communities and States who are already most vulnerable, aggravating existing human rights problems and further weakening resilience.

As we seek to address the negative human rights impacts of climate change, environmental human rights have much to offer as a way of understanding the relationship between the environment and human rights and as a set of principles which help us balance environmental protections against other human needs and interests.

At the same time, climate change presents an opportunity to refine and strengthen the body of environmental human rights. As the most significant environmental challenge the world has faced, climate change helps to crystallise a number of questions about our relationship with the natural world and the role of law, particularly human rights law, in pursuing environmental protection. Such questions include:

- How well can environmental rights be enforced when the environmental harm complained of is global, cumulative and intergenerational? Are environmental human rights more, or even exclusively, useful in addressing localised, discrete environmental harms, as opposed to larger-scale and potentially more damaging problems?
- Does the framework of international human rights law require a new treaty or instrument to recognise a specific right to a good (or healthy, balanced, clean, sustainable) environment? Would such a right help in addressing challenges like climate change? If such a right is to be introduced, what should it look like?
- To what extent is it even appropriate to speak of climate change and other environmental harms as human rights issues, given the serious impacts that will be experienced by non-human species, ecosystems and the planet as a whole?
- Given that humans are responsible for the voracious industrialisation and exploitation of natural resources that has led to current levels of greenhouse gas emissions, should we still seek to frame the impacts of climate change as a violation of human rights? Does the concept of a human right to a good environment perpetuate the same attitudes of entitlement with respect to the natural world that have led to so much destruction of the environment in the past?

The analysis in this book has attempted to expand on some of these questions and, it is hoped, contribute to a conversation that might go some way towards answering them.

As this book has illustrated, environmental human rights encompass a wide variety of formulations. They are commonly found in the environmental dimensions of other human rights, which recognise that human rights depend on or are influenced by environmental conditions. In some cases it is appropriate to speak of a violation of human rights based on environmental harms, such as the pollution of a water supply or the destruction of forests on traditional Indigenous lands, and human rights courts and tribunals have held as much in a number of cases. As discussed in Chap. 2, the growing body of jurisprudence from various national and regional bodies confirms that human rights obligations can require both governments and corporations to take adequate steps to protect the environment.

Another variation of environmental human right comes in the form of a standalone right to an environment of a particular quality, such as the right to a healthy, clean, decent, safe, or ecologically balanced environment. As demonstrated in Chaps. 3 and 4, these formulations are more common within national constitutions, although some variations can be found within regional human rights treaties. The growing body of constitutional environmental rights also includes duties placed on governments and citizens to protect the environment and ensure sustainable development, and in the case of Ecuador, the constitution even goes so far as to grant rights to nature itself.

The body of environmental human rights has increased rapidly over the past 25 years, enhancing recognition of the importance of the environment to human lives. Yet the enforcement of such rights through traditional legal practices has not always been an easy matter, and in many cases the potential of environmental human rights has yet to be fully realised. This problem is most acute at the level of international human rights law, where challenges relating to the scope of obligations, standing to bring a claim, and proving attribution and causation can limit the responsiveness of international human rights law to environmental issues. Regional and domestic legal systems may have better potential to implement and enforce environmental human rights, particularly where environmental impacts are more discrete and localised. It seems that the more globalised, cumulative and long-term an environmental problem is the more difficult it is to deal with through traditional means of rights enforcement.

These challenges are most noticeable with respect to climate change. Conventional paradigms of human rights law relating to the content and extent of States' obligations and the manner of proving a violation are challenged by the intergenerational, transnational and cumulative impact of greenhouse gas emissions. The fact that environmental changes occur gradually and are the result of a combination of factors makes it difficult, if not impossible, to trace a direct link between a State's actions and a particular harm, assuming it can be established that the State owed an obligation to the victims in the first place. A human rights-based approach to climate change centred around current human rights law may offer

limited prospects for bringing a successful claim using conventional notions of rights and duties, proof and causation.

Again, litigation within regional and domestic systems may offer a better chance of success than at the international level. Cases such as the *Urgenda* decision in the Netherlands (2015) and the *Leghari* case in Pakistan (2015) demonstrate the willingness of domestic courts to have regard to rights principles in holding governments responsible for inadequate responses to climate change. A proposed action within the European Court of Human Rights by a group of young Portuguese people against 47 European countries may be the first successful case before a regional human rights court (Global Legal Action Network 2017), some 15 years on from the Inuit petition to the Inter-American Commission of Human Rights which brought so much attention to the human rights implications of climate change (Watt-Cloutier 2005). Even where cases are unsuccessful, such litigation can nonetheless motivate governments to take stronger action on climate change.

There are other benefits to be gained from a human rights-based approach to climate change. Human rights language brings with it a moral force which can be harnessed by vulnerable groups wishing to build awareness of and sympathy for their plight. Human rights principles help to focus attention on the human impacts of climate change, and on those communities who will be worst affected. These principles can also assist in balancing social and cultural impacts against other potentially competing objectives, such as the pursuit of economic development.

Notwithstanding these potential benefits, the pressure which human rights can place on States to take stronger action on climate change is ultimately undermined by the reality that enforcement options against such States are limited, and that States are unlikely to have a human rights claim proved against them based on the effects of their climate change policies, at least within the international human rights framework.

The concept of a right to a good environment has been recommended by some as a solution to the limitations of traditional human rights approaches to climate change. Some have argued that it is better equipped to take account of the global nature of the problem of climate change, and could be utilised where breaches of other human rights are difficult to prove. Despite the broad appeal of a standalone environmental right in capturing the important relationship between humans and the environment, such rights are difficult to apply, due to the challenge of defining appropriate standards, identifying rights-holders and corresponding duty-bearers, proving causative links and balancing environmental protection against other potentially competing rights. These problems are amplified in the context of climate change, where environmental harms are the result of long-term, cumulative actions which create impacts across borders and generations.

Furthermore, proposals to recognise a right to a good environment (or some other formulation) face considerable theoretical, practical and political challenges. As the analysis in Chap. 5 revealed, it is difficult to justify a right to a good environment according to any of the major theories of human rights, at least not without relying on other existing rights as the basis for an explanation of the importance of the environment to human dignity, autonomy or well-being. Even if a

definition could be found which satisfies these theoretical requirements, the practical difficulties of implementing and enforcing the right within the existing system of international human rights law are considerable, particularly in the context of climate change.

Versions of the right found in national constitutions or regional human rights instruments offer some promise, but if a standalone environmental right is to make a meaningful contribution to addressing climate change then it needs to be binding on all States, and especially those who are among the highest emitters of greenhouse gases. The most appropriate format would be in a human rights treaty of universal application, but current assessments of States' attitudes suggest this is unlikely to be achieved in the foreseeable future. Having regard to these considerations, the future of the right to a good environment within international human rights law does not appear promising.

Nonetheless, the potential for environmental human rights to have a positive impact and contribute to addressing climate change should not be dismissed. The various other forms and sources of environmental human rights provide a powerful means of understanding and articulating the human impacts of climate change, and the emerging trend of climate litigation indicates an increasing role for human rights law and principles in enforcing States' obligations. There is still more which can be done to capitalise on the potential of environmental human rights. The discussion below suggestions some areas for future development.

10.2 Developing the Environmental Dimensions of Existing Human Rights

As the discussion in Chap. 2 demonstrated, the environmental dimensions of rights like the rights to life, health, private and family life, self-determination, property and an adequate standard of living have been the subject of considerable academic and judicial consideration over recent years. Jurisprudence from the European Court of Human Rights and the Inter-American Court and Commission of Human Rights have significantly expanded our understanding of how human rights apply to environmental harms within those jurisdictions, and we now have relatively well-established principles and methods for dealing with environmental claims.

Similar work is lacking in other human rights jurisdictions however, and at the international level there have been very few cases pursued based on environmental issues. Further, there is very little guidance available on how the environmental dimensions of human rights apply in the context of climate change or other situations of transboundary environmental harm. Given the challenges of defining and applying a standalone environmental right, the benefits of a rights-based approach to climate change are best achieved under current human rights law, and work in this area should therefore focus on existing rights. This requires further work to

develop modalities in which human rights can be applied to climate change and to clarify what obligations are to be expected of governments.

One area for future work is to integrate human rights principles more effectively with the international climate regime under the *United Nations Framework Convention on Climate Change* (UNFCCC) (1992) and the *Paris Agreement* (2015). The reference to human rights in the preamble of the Paris Agreement was an important step forward, but its focus is on respecting human rights in climate mitigation and adaptation action, rather than on addressing the human rights impacts of climate change itself. It also offers little guidance for how States should balance their obligations to respect and promote human rights in the context of climate change with their other duties under human rights law, including the obligation to progressively realise economic and social rights through development projects, improvement of infrastructure and ensuring access to energy. Further work articulating the environmental dimensions of existing rights, and particularly the way they apply in the context of climate change, is required in order to optimise the benefits of environmental human rights and a rights-based approach to climate change.

10.3 Climate Litigation

A proven means of clarifying and developing the scope of rights and associated duties is through the process of litigation. The pursuit of claims within domestic and regional systems can be an effective way of articulating the standards which attach to specific obligations, as well as determining issues relating to standing, procedure and remedies. With respect to climate change, litigation also serves as an innovative way of holding governments accountable in the absence of strong, easily enforceable international commitments within the UNFCCC.

As discussed in Chap. 8, Peel and Osofsky's (2018) recent work analysing the body of climate litigation identifies a trend of using human rights, not only within human rights tribunals but also in domestic courts, where human rights principles can be used to help interpret the nature and scope of the State's obligations under the constitution and other laws and policies. Climate litigation also offers a means of applying human rights principles to corporate actors, in particular fossil fuel companies, who have previously been only indirectly susceptible to human rights law. Litigation in the Philippines (Greenpeace 2016) and New York (*City of New York vs BP & ors* 2018), for example, is seeking to hold fossil fuel companies responsible for the impacts of their greenhouse gas emissions, with the Philippines case in particular pursuing the action as a human rights claim. As this trend increases into the future we may see environmental human rights applied in increasingly novel ways, as new obligations are articulated and new arguments tested relating to causation, attribution and the burden of proof. Further work in this

area offers great potential to ensure that governments fulfil their responsibilities with respect to climate change in good faith, and that corporate entities can be held to account for their role in causing global warming.

10.4 Future Generations

Despite the promise of positive human rights outcomes being achieved through climate change litigation, there are some areas where more substantial development of the law is required to give full effect to environmental human rights. One area identified in this book is the protection of the rights of future generations. Future generations stand to be significantly affected by climate change, as well as by other serious forms of ongoing environmental harm. As discussed in Chap. 9, while human rights theories can accommodate the notion of obligations being owed for the benefit of future generations (see Feinberg 1981; Bell 2011), current human rights law does not adequately address their rights and options for holding current generations accountable for actions that will negatively affect the rights of future generations are extremely limited. Current litigation in the United States seeks to enforce the rights of future generations to a life free from the negative effects of climate change by naming 21 plaintiffs all aged in their teens or early 20s, together with a guardian of future generations in Professor James Hansen (*Juliana v United States,* 2017). A proposed action within the European Court of Human Rights by a group of Portuguese young people would adopt a similar approach, seeking to litigate the future impacts of climate change and naming 47 European governments as defendants (Global Legal Action Network 2017). The potential to litigate in relation to more remote impacts or on behalf of persons not yet born is considerably more limited.

One option for addressing this shortcoming would be the creation of a specialised body to represent the interests of future generations (see Lewis 2016, 2018). This could be in the form of an ombudsman or other representative tasked with speaking on behalf of future generations in domestic, regional or international fora. Alternatively, rules of standing could be adjusted and processes created which would allow legal action to be commenced on behalf of future generations. Assuming standing could be addressed, work would still need to be done to identify appropriate standards of proof and causation to deal with future impacts, but as our understanding of climate impacts improves and climate litigation becomes more common, these matters will no doubt be refined. Focussing on the duty to respect human rights (one limb of the tripartite human rights obligations consisting of the duties to respect, protect and fulfil) could be one way of progressing such cases, as it would require governments at the very least to refrain from taking action which would prevent future generations from being able to enjoy their rights. Given the serious intergenerational impacts threatened by climate change, further work on protecting the rights of future generations deserves greater attention as we develop environmental human rights.

10.5 The Future of a New Human Right to a Good Environment

The analysis in this book argues that the concept of an internationally recognised human right to a good environment is problematic, and that future work on environmental human rights and climate change in international law is best pursued within the framework of existing rights. With the will of States, however, it is feasible that a new environmental right could be adopted. This is the hope of the drafters of the *Global Pact for the Environment* (2017), Article 1 of which declares that 'Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment'. The draft was launched in June 2017 by French President Emmanuel Macron, along with former UN Secretary-General Ban Ki Moon and prominent climate justice advocates including Mary Robinson and Arnold Schwarzenegger. The purpose of the Global Pact is to bring together principles of environmental law and justice under a single instrument which, it is in intended, will be adopted by States as a new environmental treaty.

A more ambitious set of principles can be found in the *Declaration on Human Rights and Climate Change* (2016), drafted by a group of academics, lawyers and activists known as the Global Network for the Study of Human Rights and the Environment. The Declaration affirms the interdependence of all life on Earth, as well as the indivisibility of all human rights, and emphasises the destructive impacts of climate change for all species and ecosystems. It declares that "all human beings, animals and living systems have the right to a secure, healthy and ecologically sound Earth system" (Principle 2). It also declares that

> All human beings have the right to a planetary climate suitable to meet equitably the ecologically responsible needs of present generations without impairing the rights of future generations to meet equitably their ecologically responsible needs (Principle 5).

The Declaration articulates a set of other principles and declares a number of more specific rights and obligations designed to contribute to a radical reformation of our ideas around State and non-State accountability and liability in relation to the environment and climate change.

While neither the *Declaration on Human Rights and Climate Change* or the Global Pact establish legally binding commitments, they are emblematic of a growing movement to encourage greater understanding of the interconnectedness of human rights and the environment, particularly in the context of climate change, and to seek out new ways of approaching the problem. The Global Pact in particular indicates a level of support for environmental justice from high levels of the international community which is encouraging, and may demonstrate a new willingness by governments to engage with principles of environmental human rights. It remains to be seen if this initial support will translate into a willingness to adopt a binding environmental treaty. An examination of the attitude of States on the relationship between human rights and the environment, and particularly with

respect to human rights and climate change, suggests that so far States have been unwilling to act on suggestions to create a new, legally enforceable right to a good environment (see Chap. 9). The negotiations for the Paris Agreement demonstrated a reluctance on the part of governments to undertake any new commitments to protect human rights from the effects of climate change, and a number of States have expressly rejected the notion that climate change might represent a violation of human rights.

If States do become more willing to work towards the adoption of new environmental human rights, any new right would need to be established within certain parameters if it is to be both practically meaningful and consistent with existing human rights theory and law. This book has identified a number of requirements for any new environmental right, drawn from theoretical, legal, political and practical considerations relevant to the expansion of human rights law. Other criteria have also been identified from an analysis of the application of human rights to climate change. This analysis is predicated on two assumptions relating to climate change. The first is that it is reasonable to expect that any newly recognised right to a good environment ought to be capable of offering a positive contribution to our efforts to address climate change, given that it represents the biggest environmental challenge currently confronting the global community. The second is that States, when deciding whether to support the adoption of the new right, will assess its implications with climate change in mind. By considering the various theoretical, legal, political and practical issues in the context of climate change, some conclusions can be reached about the future shape of a standalone environmental human right.

The first is that a new right to a good environment must be independently justifiable and defined without reliance on other human rights. In order to ensure the integrity and credibility of the human rights framework, it is necessary to impose some requirements for 'quality control' in the introduction of new rights. Rights which merely duplicate or reiterate existing rights contribute nothing to the body of human rights law and ought to be avoided. New human rights should be just that, and not simply restatements of rights which are already recognised.

New human rights should also be compatible with the theoretical foundations of human rights in order to ensure that they are consistent with our ideas of what human rights should be and why they matter and to maintain the force of human rights as a normative framework. The theoretical foundations of human rights demand that new human rights are capable of independent justification, and are not merely instrumental to the fulfilment of other rights. Such justifications can be established in various ways, based on the different theories of human rights which exist. Chapter 5 examined the principles of natural rights theory, interest theory, will theory and cosmopolitanism. It was demonstrated that, while each theory constructs a different explanation of why certain claims should be considered to be 'human rights', they all require such claims to be linked in some way to fundamental human, dignity, autonomy or well-being. Chapter 5 demonstrated the difficulty in defining a good environment as something which is essential to human interests, dignity or autonomy without relying on interests which are already protected under existing human rights law. While it may be possible to conceptualise

the environment as something of inherent value and which is of concern to humans, even something which humans have a moral obligation to protect, translating this into a right which humans possess risks distorting both the concept of human rights and the objectives of environmental protection.

Second, the right must be capable of sufficiently precise definition, so that it is enforceable and attainable, and therefore capable of offering some practical contribution in protecting the environment. Rights which are merely aspirational or which are unable to be enforced ultimately undermine the credibility of human rights law as a whole. For rights to be enforceable and attainable, they must be defined with a certain degree of precision. It must be possible to know what the right is intended to guarantee, and the standards to which States are required to fulfil it. Without these details it would not be possible to say whether a State was in violation of its obligations. If the standards are set too high then the right may not be attainable and would risk being dismissed as a 'mere aspiration' which States could not be realistically expected to achieve.

The challenges of defining a sufficiently precise right to a good environment are significant, given the inherent ambiguity of the concept of the environment and the imperative that the right be defined independently of other rights. Fundamentally, it must be possible to clarify what is meant by a 'good environment', so that we are able to identify what States are obliged to do and when they will be considered to have violated those obligations. While objective standards of environmental health and well-being could be specified, it would still be necessary to show why such standards belong in human rights law, especially given the growing body of environmental law which arguably is a more appropriate place for such principles to be located. We are left with the question of what a 'good environment' should mean in human rights terms, with the persistent requirement that we not describe a 'good environment' in terms of its relationship to other rights, such as health, food or water.

The problem of defining the right to a good environment is most challenging when it is considered in relation to climate change. Several fundamental issues must be confronted, none of which is easily resolved. For instance, it is not clear how broad a concept of environment is to be encompassed in the right. Given that climate change is a global problem based on cumulative effects, it could be argued that the right to a good environment should not be limited to claims relating to a person's local or immediate environment. However, this creates significant difficulties in identifying appropriate claimants in relation to a given incident of environmental harm. Further, it is problematic to devise standards which could be used to determine whether an environmental impact is positive or negative. Without linking standards to human interests, some environmental changes are hard to characterise as good or bad when viewed in the abstract, while other changes may have positive consequences in some regions and negative consequences in others. These challenges are complicated further when we take into account the gradual nature of the environmental shifts caused by climate change, and the natural tendency of environmental systems to adapt over time. Taking all these factors into consideration, it is difficult to define standards which would enable the right to a

good environmental to be both enforceable and practically useful, as any standard which is flexible enough to encompass the full range of variables would be inadequate to ensure meaningful implementation and enforcement.

Third, the right must be defined so that beneficiaries and duty-bearers can be identified. Whichever way the right to a good environment is defined, in order for it to be practically useful it must be clear who the beneficiaries of the right are intended to be, and who are proposed to be the corresponding duty-bearers. If the right is to be defined independently of other human interests, then a challenge arises in formulating a means of identifying when a person will be entitled to bring a claim. On what basis could a person claim that they have a sufficient interest in an environmental impact to bring a claim without expressing that interest in terms of other human rights? While a claim could arguably be brought based on geographic proximity to the relevant environmental impact, this approach encounters difficulties when it is applied to climate change, as some of the impacts of climate change, such as rising temperatures, are very broad in scope while others, such as severe weather events, are variable in location.

Even if a suitable claimant could be identified, there are two respects in which the right to a good environment fails to adequately address the environmental harms inherent in climate change. The first relates to identifying the appropriate duty-bearer against whom a claim could be made based on the right. Given the cumulative nature of greenhouse gas emissions, all States bear a responsibility to prevent negative environmental impacts as a result of climate change. Yet, under conventional human rights principles, States generally only owe obligations with respect to the rights of their citizens and those under their jurisdiction and control. This approach fails to capture the transnational and collective nature of climate change, and leads to a situation where the individuals and communities most affected by climate change may not be able to bring a claim against those States which are most responsible, as those States are sheltered by the territoriality of international human rights law and do not owe obligations beyond their own jurisdictions. In defining the right to a good environment, it is essential that we devise a way of identifying who the appropriate duty-bearers would be in relation to any particular breach of that right. When the environmental harm is caused by climate change, where all States are implicated in one way or another, this seems an intractable problem.

The second problem relates to the timeframe over which climate change is taking place, and the reality that our actions today will impact on the ability of future generations to enjoy their human rights. In order for the human right to a good environment to properly address the environmental impacts of climate change, we need to be able to enforce the rights of future generations in order to constrain States' current actions. As noted above, this represents a significant expansion of human rights principles, which traditionally have held that rights are only held by persons who currently exist. Even if we accept that States can have a duty now not to act in a way which would jeopardise the future enjoyment of human rights, more work is required to develop ways to enforce those rights for the benefit of future persons.

Finally, the right must be defined in a way which would enable a violation to be proved. The nature of climate change presents significant challenges for proving a violation of human rights. The cumulative nature of States' contributions to the problem make it difficult to prove that the actions or omissions of any one State caused a particular human rights impact, as no single State could be said to be solely responsible and each could argue that negative outcomes would have occurred even if it had acted differently.

The conventional approaches to human rights obligations, where States owe obligations to persons within their territory or under their jurisdiction, are ill-suited to the transnational nature of climate change, where one State's actions contribute to environmental impacts around the world. The intergenerational impacts of climate change also create significant barriers to proving a human rights violation. The environmental impacts currently being observed are due to the actions of States going back over a century, while our current actions will continue to influence environmental changes for centuries to come. It is therefore extremely problematic to trace a link between a State's actions and a particular human rights impact which would satisfy our traditional notions of causation with respect to human rights violations, particularly where the relevant impact is predicted and details of its scope, location and severity cannot yet be precisely known. These challenges apply to any human rights violation alleged on the basis of climate change, and they are no less problematic in relation to the right to a good environment.

10.6 Conclusion

The relationship between human rights and the environment is a mutually supportive one, and the development of linkages between the two areas of discourse offers great potential for addressing serious environmental problems, including climate change, which impact on the lives of many people. The proposal to recognise a new human right to a good environment presents many challenges, however. Principally, it is not possible to define a 'good environment' as something which has a sufficient value to humans to justify its inclusion as a human right without duplicating or reiterating the rights which are already recognised in international human rights law. Further, it is problematic to find a way of defining the right which would be sufficiently precise and attainable to make it enforceable and practically feasible, particularly in the context of climate change. There are benefits to be gained from a human rights based-approach to climate change, but they are available under current human rights and do not require the introduction of a new right to a good environment, which has no better prospects of being effectively enforced. Given that one of the key benefits of a human rights-based approach to climate change is that it encourages greater focus on the human impacts of climate change, this is best achieved through an approach which utilises well-established, clearly defined rights based on identifiable human needs and interests, rather than a right to a good environment which is at best ambiguous and at worst unworkable.

This analysis indicates that the future of environmental human rights lies not in the pursuit of an independent right to a good environment situated in a multilateral human rights treaty, but instead with the further expansion, clarification and application of existing environmental rights. The environmental dimensions of rights like the rights to health, food, water, an adequate standard of living and even to life itself have greater potential to yield positive results in terms of protecting both the environment and human rights. The substantial body of constitutional environmental rights, grown significantly over the past 25 years, offers meaningful opportunities to hold governments accountable for failing to protect their citizens and the natural world from environmental harms, including from the hazards of climate change. Direct action against governments through constitutional or other domestic claims may provide the best avenue for achieving meaningful change, and may place pressure on governments to cooperate more effectively to address the enormous global challenges inherent in climate change. The intricate links between the environment and human rights demand not only that we pursue opportunities to advance their mutual protection through legal mechanisms, but also that we push to reconceptualise humans' relationship with the natural world and to understand the environment not only as something to which humans are entitled, but something to which we owe moral and legal obligations.

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