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SYMPOSIUM ON UN RECOGNITION OF THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT

THE RIGHT TO A HEALTHY ENVIRONMENT: BEYOND TWENTIETH CENTURY CONCEPTIONS OF RIGHTS

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The lengthy process culminating in the UN General Assembly's recognition of the right to a healthy environment provides important insights into the nature of today's international human rights regime. In particular, it shows that human rights have moved well beyond the impoverished conceptions of rights that dominated the second part of the last century, that new norms develop in ways that are more complex and flexible than traditional doctrinal accounts would suggest, and that today's process of norm generation involves a wide and diverse array of actors, with states sometimes struggling to keep up.

Thirty years or more ago, scholars looking at the emergence of a newly minted right to a healthy environment would likely have focused on issues such as: (1) which of the sources of law specified in Article 38 of the Statute of the International Court of Justice (ICJ) provides the foundation for the new right; (2) assuming custom is an important part of the equation, what is the evidence of state practice and *opinio juris*; (3) have substantive or procedural criteria for creating new rights been satisfied; (4) is the right economic and social or civil and political in character; (5) what are the definitions of the key terms used; and (6) are its collective dimensions compatible with the individual nature of human rights?

As we shall see below, the explanations of vote offered by the representatives of most major powers following the adoption of the General Assembly resolution suggest that these remain their central preoccupations today and that they consider that until such questions are answered satisfactorily the process of "legal recognition" will remain incomplete.

An alternative approach, proposed here, suggests that the (mostly) predictable answers to those questions will actually shed rather little light on the more salient issues of how we got to where we are today and what the significance of the resolution is likely to be in practice. In other words, such a traditional list of questions encourages us to engage in the sort of endless doctrinal debates beloved by international lawyers but which leave us, at the end of the day, with inconclusive answers to the important issues.

The Changing Conception of Human Rights

Judging by much of the literature over the past twenty years, the right to a healthy environment has seemed like a threatening prospect to many international lawyers. In order to understand why, a brief historical review is useful.

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The 1948 Universal Declaration of Human Rights (UDHR) brought together a diverse array of rights, but also glossed over some contentious issues. An effort by the United Nations Education, Science, and Culture Organization (UNESCO) to locate the enterprise within a coherent philosophical framework failed, and the drafters of the Declaration, perhaps wisely or without any real alternative, refused to pay any heed to the competing and mutually incompatible reflections of the leading public intellectuals who comprised the UNESCO Committee on the Philosophic Principles of the Rights of Man. None of those commentators made any mention of the natural environment, and instead their final statement proclaimed that one of the reasons why human rights "are now potentially open to all" was that "science and technology have given men greater control over nature."[1]

Whatever its shortcomings, the UDHR was an impressive package, bringing together norms of heterogeneous philosophical, religious, and moral provenance, and reflecting a carefully honed balance of competing ideological, geopolitical, and pragmatic considerations. It has in many ways stood the test of time far better than many or even most might have predicted. But in 1952, following a determined and persistent political push led by the United States and the United Kingdom, the carefully negotiated package was split asunder, largely in order to privilege traditional liberal Anglo-Americans notions of rights over competing traditions. All of the previously undifferentiated rights in the UDHR were allocated to either what would become the International Covenant on Civil and Political Rights or the International Covenant on Economic, Social and Cultural Rights. A range of different arguments were adduced to justify this division, although none on its own was clearly determinative, and a number were highly debatable. Assertions and claims about the "inherent" nature of the rights in each category were expressed in terms of a series of binary opposites: negative versus positive, hands-off versus interventionist (on the part of governments), cost-free versus costly, individual versus collective, liberal versus socialist, justiciable versus non-justiciable, traditional versus novel, and so on.

The onset of the Cold War, the preponderance of conservative governments in key Western countries, and the dominance of those states within the international human rights regime for many decades thereafter ensured that these distinctions went largely unchallenged and became increasingly entrenched in the relevant discourse.

The reality is that few of the rights recognized in the UDHR fit neatly into the binary columns which have come to colonize our own understandings and made it difficult for us to engage in deeper reflection as to the nature of specific rights and of the system as a whole. This helps to explain the problems that some commentators have long identified in relation to the right to a healthy environment. In fact, it transcends many of the assumptions built into the understandings of human rights that emerged from the Cold War. It has unavoidable collective dimensions, and makes limited sense if one insists on trying to shoehorn it entirely into an individual rights template. It implicates both sets of rights and demands recognition of their indivisibility (think environmental racism), it has justiciable as well as non-justiciable dimensions, it implicates corporate as well as governmental action, and it highlights the need to engage with the structures that underpin rights violations rather than only with their surface manifestations.

Finally, the right to a healthy environment will make a major contribution to the overall human rights regime by undermining a longstanding strategy on the part of many states, often led by the United States, of keeping human rights in a silo on their own. Whenever human rights-related issues are raised in settings such as the World Trade Organization, the World Bank, the International Monetary Fund, or the Organization for Economic Co-operation and Development, the invariable response by these states is that such matters belong solely in the Human Rights Council. Such a strategy will be ever less convincing and tenable if the right to a healthy environment is taken seriously.

[1] *The Grounds of an International Declaration of Human Rights*, *in* HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS, Appendix II, at 4, UNESCO/PHS/3 (rev) (1948).

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New or Derived Right?

Four decades ago it seemed to make sense to separate out the process of recognizing new rights from that of expanding the interpretation and scope of existing rights. I argued in 1984 that the General Assembly could be seen as the ultimate "arbiter" in transforming rhetorical claims into recognized rights.[2] I explored some possible substantive requirements that should be taken into account and then proposed detailed procedural steps that might ensure the probity of the process. The General Assembly reacted in 1986 by adopting Resolution 41/120 which endorsed some substantive guidelines in "developing international instruments in the field of human rights," and also made procedural suggestions designed to ensure more formal and systematic scrutiny.

But in the intervening years the process of norm generation has been significantly democratized, in the sense that a diverse range of actors now serve as "norm entrepreneurs" and some of these, most notably the treaty bodies, have been very active, including in relation to environmental rights. The formal process(es) envisaged in the earlier analyses were, to a significant degree, overtaken by the more flexible route of identifying expansive normative implications flowing from established rights. In most cases it seemed neither necessary nor politic to acknowledge that an interpretation introduced a "new" right. Special Procedures mandate-holders have also played crucial roles in developing what can certainly be called new norms, if not necessarily new rights. Examples include Guiding Principles on Internal Displacement presented by Francis Deng in 1998, and Guiding Principles on Business and Human Rights presented by John Ruggie in 2011. In many such cases, the norm entrepreneurs have been able to act because of a vacuum created by the inability of states, in more formal settings, to agree on standards that are nonetheless widely agreed to be needed.

The difficulty of distinguishing new rights from expansion of existing ones is illustrated in a recent book.[3] The editors define new rights as those "that, when first conceived, are not expressly recognised in any human rights treaty and are not in any other way recognised as rights in a legal sense." They divide the overall process into phases involving the "idea," its normative "emergence," and its "full recognition," resulting in the new right becoming "legally binding." They acknowledge the relevance of the separate process by which treaty bodies purport to derive new rights from existing ones, but they do so on the basis of an analysis by Dinah Shelton that hews closely to traditional doctrine in arguing that treaty body interpretations "will have persuasive force insofar as the organs retain their independence, deliver reasoned and consistent opinions using accepted methods of treaty interpretation, and establish a pattern of compliance by States parties."[4] The reality, however, is that the pronouncements of treaty bodies can sometimes affect the course of international and domestic law with little regard to some of these formalities.

Although there continues to be a vibrant debate about the need for new rather than derived rights, such as in response to the impacts of new digital and other technologies (a right to internet access or to digital inclusion), the likelihood is that derivation and expansion rather than the recognition of new rights will play the key role.

But even if this assessment is correct, it is still appropriate to ask why some states in the right to a healthy environment debates clearly believed that they were recognizing a new right rather than simply consecrating an interpretation that was emerging anyway. Costa Rica, on behalf of the Maldives, Morocco, Slovenia, and Switzerland, the five original co-sponsors of the General Assembly resolution, spoke of the right's recognition as being a

[2] Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AJIL 607 (1984).

[3] Kerstin von der Decken & Nikolaus Koch, *Recognition of New Human Rights: Phases, Techniques and the Approach of "Differentiated Traditionalism," in* THE CAMBRIDGE HANDBOOK OF NEW HUMAN RIGHTS: RECOGNITION, NOVELTY, RHETORIC 2 (Andreas von Arnauld, Kerstin von der Decken & Mart Susi eds., 2020).

[4] Dinah Shelton, *The Legal Status of Normative Pronouncements of Human Rights Treaty Bodies, in* COEXISTENCE, COOPERATION AND SOLIDARITY – LIBER AMICORUM RÜDIGER WOLFRUM, VOL. I (Holger P. Hestermeyer et al. eds., 2012).

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"historic moment," a "unique opportunity," a moment of "paramount" significance, and a "step forward into [the] future."[5]

Paradoxically, the answer is that it is in the interests of different participants in the process to adopt competing perspectives on the new versus derived debate. For environmental proponents the right to a healthy environment, as a single integrated formulation, does indeed take human rights law into new territory and present important opportunities for further development both of the right itself and of the other component parts of the overall system. Thus the co-sponsors hoped that the right "will catalyse transformative changes" in society, and generate "a paradigm shift." Notwithstanding the fact that jurisprudence emerging in recent years from the Inter-American Court of Human Rights, the Human Rights Committee, the African Commission on Human and Peoples' Rights, and a range of other important bodies has already recognized important component parts of the right, it is clear that we are witnessing the birth of a new human right.

But most states see things differently. Their concern is to maintain control over the process and avoid the sense that something genuinely novel, let alone transformative, has already emerged fully-fledged. For this purpose, three different strategies have been employed. The first is to downplay the resolution's significance as being a matter of "moral and political aspirations," as the United States put it, or of a "political declaration," in the words of New Zealand.[6] The second is to insist that the right to a healthy environment is "merely" a derived right. Hence the United Kingdom's statement that the right "derives from existing international economic and social rights law as a component of the right to an adequate standard of living or the right to the enjoyment of the highest attainable standard of physical and mental health."[7] If this approach is accepted, it should follow that the development of the "offspring" right will be genetically constrained. The third strategy, adopted by Russia, is to accept that a new right is in the process of emerging, but that this can only be consummated through an intergovernmental treaty-making process.[8]

Bypassing Conventional International Lawmaking

There are two very different lenses through which the emergence of the right to a healthy environment can be viewed. The first can be thought of as the ICJ lens. As New Zealand put it, the right "does not have a legally binding character. It has not been agreed in a treaty, and this resolution does not . . . provide evidence of a new norm of customary international law."[9] The United States, and other governments, spoke in like terms.[10]

But the trajectory to date of the right and its steadily growing normative importance, combined with a powerful political constituency linked to the threat of irreversible global warming, suggests that these formal doctrinal benchmarks are unlikely to be at the center of attention in the years ahead. Three international tribunals—the ICJ, the Inter-American Court of Human Rights, and the International Tribunal on the Law of the Sea—have recently been requested to issue advisory opinions clarifying states' obligations in relation to climate change. There is little doubt that arguments before the ICJ, in particular, will focus on the non-binding nature of General Assembly resolutions, the paucity of *opinio juris*, the lack of definitional clarity, the limitations of soft law, the role of persistent objectors, and so on. But the Court will hopefully also take account of the much broader

[5] GA Res. 76/300, at 5 (Aug. 1, 2022).

[6] *Id.* at 14.

[7] *Id.* at 11–12.

[8] *Id.* at 7 (Russia).

[9] *Id.* at 13.

[10] *E.g.*, *id.* at 13 (Japan); 15 (United States, India); 17 (Egypt).

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set of developments within the legal landscape and of the unavoidability of a paradigm change in relation to international law and the environment.

The alternative lens is to recognize that terms such as "standard-setting," which implies vague and non-binding standards, and "lawmaking," which generally implies the opposite, no longer provide a very helpful indication as to the strength of the relevant norms or the ways in which they might influence legal outcomes and serve to mobilize or legitimize broader policy initiatives that might have important and concrete policy outcomes. The human rights regime has not been dependent on formal judicial imprimaturs to transform the law relating to contested issues, and the right to a healthy environment will be promoted through an array of mechanisms and processes.

"Democratization" of the Process

Traditionally, diplomatic negotiations were viewed as the principal locus for the development of new standards, which might or might not have involved "new rights," but this was not so with the right to a healthy environment. It emerged through a much more diffuse set of processes, over a longer period of time, and with a broader array of actors making major contributions at different stages of the process. A few scholars did a huge amount to develop the conceptual foundations of the right in the early years, civil society groups led movements to recognize national-level constitutional environmental rights, UN agencies such as UNEP contributed, and there were some key supporters among governments.

The role of governments shows the complex politics at play. The resolution was initially co-sponsored by five mid- or small-sized states. Two months after it was adopted, the Committee of Ministers of the Council of Europe balked at a proposal by the Parliamentary Assembly that it endorse a new right to a healthy environment protocol to the European Convention on Human Rights. Even when the final list of cosponsors expanded to fifty-five states, Italy was the only large Council of Europe State to sign on. The governments of powerful states such as China, India, Japan, Russia, and the United States all expressed considerable reservations about the process, but neither they nor any other state felt that they could oppose the resolution. Instead they took refuge in detailed explanations of votes expressing caveats and conditions which, for the most part, will likely do little to slow the momentum. The central importance of public opinion is illustrated by the fact that all eight abstaining governments have been characterized as authoritarian.

And two relatively new sets of actors played very important parts. Successive UN High Commissioners for Human Rights focused on these issues. And two Special Rapporteurs on human rights and the environment, John Knox and David Boyd, greatly facilitated the final outcome through powerful, carefully reasoned, and highly persuasive reports.

An Open-Ended Interpretive Process

The way in which the right to a healthy environment has achieved formal recognition also has important implications for its future normative development, interpretation and application. In the explanations of vote, both China and the United States regretted the lack of a shared understanding on the basis, definition, and scope of the right.[11] India observed that even terms such as clean, healthy and sustainable "remain open to subjective interpretation," and the United Kingdom bemoaned the creation of "ambiguity."[12] It is, of course, not impossible that these or other states will initiate a formal treaty drafting process that could clarify such ambiguities. But this seems

[11] *Id.* at 15, 18.
[12] *Id.*

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unlikely, given the extent of underlying disagreements, the realization in other environmental contexts that soft law steps are more effective and feasible, and the urgency of taking action.

With processes already well underway to obtain advisory opinions, an explosion of climate change litigation at the national level, and treaty bodies becoming increasingly aware of the indispensability of factoring environmental considerations into their extensive interpretive functions, there will be no shortage of contexts in which the process of interpretation will take place. The resulting plurality of venues and perspectives could bring fragmentation, but is more likely to involve a complex but constructive set of iterative interactions. On its own, of course, recognizing the right to a healthy environment will do all too little to halt the headlong rush to an unsustainably warming planet and the unwillingness of governments to value the environment for other than instrumental reasons.

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