

**ENVIRONMENTAL RIGHTS OR A RIGHT TO THE ENVIRONMENT?
EXPLORING THE NEXUS BETWEEN HUMAN RIGHTS AND
ENVIRONMENTAL PROTECTION**

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The importance of the environment to the fulfilment of human rights is widely accepted at international law. What is less well-accepted is the proposition that we, as humans, possess rights to the environment beyond what is necessary to support our basic human needs. The suggestion that a human right to a healthy environment may be emerging at international law raises a number of theoretical and practical challenges for human rights law, with such challenges coming from both within and outside the human rights discourse. It is argued that human rights law can make a positive contribution to environmental protection, but the precise nature of the connection between the environment and human rights warrants more critical analysis. This short paper considers the different ways that the environment is conceptualised in international human rights law and analyses the proposition that a right to a healthy environment is emerging. It identifies some of the challenges which would need to be overcome before such a right could be recognised, including those which draw on the disciplines of deep ecology and earth jurisprudence.

I INTRODUCTION

The influence of environmental factors on our ability to enjoy fundamental human rights is well recognised. Many of the rights guaranteed under international human rights law are defined to include an environmental dimension. For example, the rights to the highest attainable standard of health and to an adequate standard of living depend on a certain degree of environmental quality and in several cases, environmental degradation or destruction has been viewed as a violation of these human rights. Many people, particularly those living in poor communities or developing states, rely directly on the environment for their livelihoods, and environmental problems like pollution or global warming can directly interfere with the enjoyment of their fundamental human rights. The environment also frequently plays an integral role in the lives of indigenous communities, such that when the environment is damaged or destroyed it can have impacts for a wide range of social and cultural right as well. This important relationship between a healthy environment and the enjoyment of our human rights is well recognised. What is less well-accepted is the proposition that we, as humans, possess rights to the environment beyond what is necessary to support our basic human needs. The suggestion that a human right to a

healthy environment may be emerging at international law raises a number of theoretical and practical challenges for human rights law, with such challenges coming from both within and outside the human rights discourse. It is argued that human rights law can make a positive contribution to environmental protection, but the precise nature of the connection between the environment and human rights warrants more critical analysis.

This paper begins by considering the way that the environment is constructed within the international human rights legal framework and identifying some of the benefits of applying human rights to environmental protection. It will then evaluate the current legal status of a potential right to a healthy environment and the prospects for future development of this right. The paper will then address some of the theoretical challenges to the recognition of such a right, both from within human rights discourse and further afield, including those which draw on the disciplines of deep ecology and earth jurisprudence.

II CONSTRUCTION OF THE ENVIRONMENT IN INTERNATIONAL HUMAN RIGHTS LAW

Broadly speaking there are at least two possible conceptualisations of the environment within a human rights legal framework. In one approach, the environment is viewed as a precondition for the enjoyment of human rights. Environmental factors may therefore influence or determine the level of rights fulfilment and environmental degradation can amount to a violation of those rights. This relationship is well established within international human rights legal discourse and the environmental dimensions of several long-standing rights have been well-defined. In an alternative approach, the environment is a form of entitlement to which a human right to a healthy environment exists. This section will explore the first of these two approaches in more detail.

It is a well-accepted principle of international human rights law that a healthy environment is a necessary precondition for the promotion of several recognised rights.¹ In his separate opinion in the *Gabcikovo-Nagymaros* case before the International Court of Justice, then Vice-President Justice Weeramantry stated:

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

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¹ There is a great deal of literature elaborating on the relationship between the environment and human rights. See generally, Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16 *Tulane Environmental Law Journal* 65; Phillipe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2nd ed, 2003); Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2008); Dinah Shelton, 'Human Rights, Environmental Rights and the Right to Environment' (1992) 28 *Stanford Journal of International Law* 103; Fatma Ksetini, Special Rapporteur for Human Rights and the Environment, *Final Report to Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities: Human Rights and the Environment*, UN Doc E/CN.4/Sub.2/1994/9, 6 July 1994; Donald Anton and Dinah Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011); Wolfgang Sachs, 'Environment and Human Rights' (2004) 47(1) *Development* 42.

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.²

The way in which the environment operates as a precondition for the enjoyment of human rights can be described as either direct or indirect. In the sense of the former, poor environmental conditions can directly limit an individual's or a community's ability to enjoy a specific right which is guaranteed to them under law. In recognition of this, international law defines certain rights to include environmental dimensions.

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) article 12 establishes a 'right of everyone to the enjoyment of the highest attainable standard of physical and mental health'. A similar right is also enshrined in the *Convention on the Rights of the Child*,³ the *Convention on the Elimination of All Forms of Discrimination against Women*,⁴ and the *International Convention on the Elimination of All Forms of Racial Discrimination*.⁵

As outlined in Article 12, all states undertake to improve 'all aspects of environmental and industrial hygiene'. In the General Comment No 14, the United Nations Committee on Economic, Social and Cultural Rights elaborated on the meaning of article 12 stating 'The wording of article 12 is intended to include 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'. Article 12 also requires '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'.⁶ General Comment No 14 clearly indicates that the environment is considered a significant contributing factor to achieving an adequate standard of health, and environmental problems such as pollution are constructed as barriers to the full enjoyment of the right.

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.' This right is also located in the *Convention on the Rights of the Child*.⁷ It is considered that the right to an adequate standard of living implies rights to adequate food and water,⁸ and is clearly affected where environmental degradation such as pollution, deforestation or desertification

² *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Separate Opinion of Vice-President Weeramantry), [1997] ICJ Rep 92.

³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁴ *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

⁵ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

⁶ Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc No E/C.12/2004/4, 11 August 2000.

⁷ *Ibid*, art 27.

⁸ Committee on Economic, Social and Cultural Rights, *General Comment 12: The Right to Adequate Food*, UN Doc E/C.12/1999/5 (12 May 1999); Committee on Economic, Social and Cultural Rights, *General Comment 15: The Right to Water*, UN Doc E/C.12/2002/11 (26 November 2002).

affects the availability of clean and secure water supplies, or limits a community's ability to provide adequate food and nourishment.

The environment can also have a direct impact on indigenous human rights. International human rights law recognises the rights of indigenous peoples to enjoy their own culture, to profess and practise their own religion and to use their own language.⁹ It also recognises the rights of peoples to self-determination, including the right to dispose of their natural resources and to a means of subsistence.¹⁰ The International Labour Organisation's *Indigenous and Tribal Peoples Convention* imposes an obligation on governments to protect and preserve the environment of indigenous territories.¹¹ The Convention also guarantees rights to traditional activities such as hunting, fishing, trapping and gathering.¹² It is not difficult to appreciate the impact that environmental factors can have on these rights.

The environment can also have an indirect impact on the enjoyment of human rights. A poor environment may affect an individual's or community's capacity to realise their human rights generally, or impede a government's ability to protect the rights of its citizens. This is perhaps best demonstrated in the context of major environmental disasters such as floods, earthquakes or tsunamis, where resources which would otherwise be used for development of human rights, are necessarily diverted to address the more immediate environmental concerns.

Human rights fulfilment can also be seen as a stepping-stone towards better environmental protection. In circumstances where human rights capacity is maximised, governments are better able to address broader environmental issues, including climate change mitigation and adaptation strategies. Competing demands on a state's resources however may lead the government to prioritise more immediate human rights needs over broader, longer-term environmental protection measures. Nevertheless, where a population's human rights are generally satisfied, they are more likely to demand better environmental protection from their government, and the government is likely to be better equipped and more favourably disposed to provide it. With particular reference to climate change policy, where a State is struggling to meet the basic needs of its citizens, it may be difficult to obtain a commitment from that State's government to lower greenhouse gas emissions. The links between human rights and the environment can therefore be expanded to reveal a complex network of relationship of cause and effect in which the environment both supports and is supported by strong human rights protections.

III AN EMERGING RIGHT TO A HEALTHY ENVIRONMENT?

An alternative conceptualisation of the relationship between human rights and the environment provides that a healthy environment is something to which human beings are entitled, independent from other human rights. It has been suggested by some that

⁹ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 23.

¹⁰ *Ibid*; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11.

¹¹ International Labour Organisation, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 17 June 1989, 28 ILM 1382 (entered into force 5 September 1991) art 7(4).

¹² *Ibid*, art 23(1).

such a right is emerging at customary law,¹³ or that it ought to be added to the catalogue of rights contained in multilateral human rights treaties.¹⁴ The relationship between the environment and human rights is clearly significant, and on this basis, humans may be entitled to claim a certain degree of environmental well-being as fundamental. The proposal however to recognise a stand-alone human right to an environment of a particular quality presents a number of practical and theoretical challenges.

For convenience this paper refers to the right to a healthy environment but it should be noted that the literature regarding this emerging independent right employs a wide range of language. As well as those who have advocated for recognition of a right to a healthy environment,¹⁵ other authors have adopted formulations including the right to a good environment,¹⁶ a healthful environment,¹⁷ a clean environment,¹⁸ a pure and decent environment,¹⁹ and various combinations thereof. Each formulation however is open to interpretation, leaving the precise scope and content of the proposed right unclear. Nevertheless, despite different terminology, some common characteristics are evident for example; environmental degradation *per se* would be a violation of human rights even where violations of other specific rights could not be established. An individual or a community would be able to claim a breach of the right without having to establish that any other rights violation had occurred.²⁰

It has been argued that the right to a healthy environment ought to be included in human rights law by way of a multilateral treaty.²¹ Given that the environment is of international concern, some have argued that it is only appropriate that environmental protection be addressed through international instruments, and that the strong links between human rights and environment warrant that international human rights law

¹³ Shelton, above n 1, 106; W. Paul Gormley, 'The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of human Rights Norms' (1990) 3 *Georgetown International Environmental Law Review* 85; Stephen Marks, 'Emerging human rights: a new generation for the 1980s?' (1980-81) 33 *Rutgers Law Review* 435.

¹⁴ Karen Macdonald, 'A right to a healthful environment – humans and habitats: rethinking rights in an age of climate change' (2008) 17 *European Energy and Environmental Law Review* 213; John Lee, 'The underlying legal theory to support a well-defined human right to a healthy environment as a principle of customary international law' (2000) 25 *Columbia Journal of Environmental Law* 283; Ksentini, above n 1.

¹⁵ Atapattu, above n 1; Shelton, above n 1; Achim Steiner, Executive Director United Nations Environment Programme, letter from UNEP to Council of Europe, 14 May 2010; James McClymonds, 'The human right to a healthy environment: an international legal perspective' (1992) 37 *New York Law School Law Review* 583; Jennifer Downs, 'A healthy and ecologically balanced environment: An argument for a third generation right' (1992-1993) 3 *Duke Journal of Comparative and International Law* 351; Iveta Hodkova, 'Is there a right to a healthy environment in the international legal order?' (1991) 7 *Connecticut Journal of International Law* 65.

¹⁶ Steve Turner, 'The human right to a good environment – the sword in the stone' (2004) 4 *Non-State Actors and international Law* 277.

¹⁷ Macdonald, above n 14.

¹⁸ Noralee Gibson, 'The right to a clean environment' (1990) 54 *Saskatchewan Law Review* 5; Barry Hill, Steve Wolfson and Nicholas Targ, 'Human rights and the environment: A synopsis and some predictions' (2004) 16 *Georgetown International Environmental Law Review* 359.

¹⁹ Gormley, above n 13.

²⁰ Macdonald, above n 14; Atapattu, above n 1, 97; Lee, above n 14.

²¹ Gormley, above n 13, 96; Turner, above n 16; Lee, above n 14; Steiner, above n 15.

ought to recognise the right to a healthy environment specifically.²² Lee has argued in favour of an independent, internationally-recognised human right to a health environment that is narrowly and rigorously defined so as to become a useful and legally applicable right.²³ Turner further describes that a specific right in an international legal instrument would allow for claims to be brought by individuals or groups where domestic laws have failed to offer adequate remedies for harm suffered as a result of environmental degradation.²⁴ It would also bolster the recognition which the right already receives in some domestic legal systems and enhance the positive duties which would flow from it.²⁵ In addition to the benefits that the new right would confer to victims of environmental problems, Turner also argues that recognising a new right to a healthy environment in international law would enhance existing mechanisms for environmental protection.²⁶

An argument in favour of including a right to a healthy environment in international human rights treaties is that it would enable environmental protection to be placed on equal footing with other human rights, allowing environmental needs to be balanced against other human interests so as to overcome some of the potential conflict between human and non-human objectives.²⁷

Conversely, one of the main criticisms of such a proposed right is in the inability to adequately define its scope.²⁸ While inclusion of the right to a healthy environment in a multilateral treaty may enable individuals to bring a claim to a relevant tribunal or committee it has been argued that it would be extremely difficult to identify appropriate standards of environmental health or well-being against which to adjudicate potential violations of such a right.²⁹ Interestingly, this rationale has been used by some authors as a justification for codification of a specific right in international treaty law,³⁰ while other commentators remain sceptical that it would ever be possible to achieve satisfactory specificity.³¹

While there is currently no broadly applicable multilateral treaty which guarantees the right to a healthy environment, there are a number of regional treaties and soft-law instruments which do refer to the right, as well as a growing number of national constitutions. For example, in 1972 the *Declaration of the United Nations Conference on the Human Environment* stated:

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

²² Turner, above n 16, 296; Gormley, above n 13.

²³ Lee, above n 14, 286-92.

²⁴ Ibid 292; Turner, above n 16.

²⁵ Ibid.

²⁶ Turner, above n 16, 294.

²⁷ Ibid, 295; Shelton, above n 1, 111.

²⁸ Gunther Handl, 'Human Rights & the Protection of the Environment' in Asbjørn Eide, Catarina Krause and Allan Rosas (eds) *Economic, Social and Cultural Rights* (Martinus Nijhoff Publishers, 2001) 303, 313; Prue Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1998) 10 *Georgetown International Environmental Law Review* 309, 361; Lee, above n 18, 339.

²⁹ Ibid 135.

³⁰ See, eg, Turner, above n 16; Lee, above n 14; Gormley, above n 13.

³¹ Shelton, above n 1, 135; Shelton, 'Human Rights and the Environment: What Specific Rights have been Recognised?' (2006) 35 *Denver Journal of International Law and Policy* 129, 164.

bears a solemn responsibility to protect and improve the environment for present and future generations.³²

The United Nations' *Draft Principles on Human Rights and the Environment* further proclaims that:

All 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.³³

While the cumulative effect of these statements provides evidence to support an emerging customary norm,³⁴ there are several issues which would need to be addressed before any consensus on this question is likely to be achieved. In order to evaluate the veracity of these claims that the new right is emerging in custom, it is necessary to analyse the current nature of state practice and associated *opinio juris*.

Support for a right to a healthy environment can be found within regional human rights regimes. The *Additional Protocol to the American Convention on Human Rights in Area Economic, Social and Cultural Rights* states that 'everyone shall have the right to live in a healthy environment and to have access to basic public services'³⁵ and the *African Charter on Human and Peoples' Rights* states that 'all peoples have the right to a general satisfactory environment favourable to their development.'³⁶

In addition, a growing number of states recognise the right to a healthy environment in national constitutions. Some fifty-nine constitutions guarantee a right to a healthy environment in some form, while over one hundred impose an obligation on governments to protect the environment.³⁷ It has been argued that this trend represents consistent state practice sufficient to evidence an emerging customary norm.³⁸ However, an examination of even a few of these constitutions reveals some significant challenges for this proposition.

The Argentine constitution provides that residents 'enjoy the right to a healthy, balanced environment which is fit for human development and by which productive activities satisfy current necessities without compromising those of future generations.'³⁹ Article 225 of the Brazilian constitution provides 'Everyone is entitled to an environment which is ecologically balanced, which is an asset for the people's

³² Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm, 16 June, 1972, U.N. Doc. A/CONF.48/14/Rev.1, Principle 1.

³³ Draft Principles On Human Rights And The Environment, UN Doc E/CN.4/Sub.2/1994/9, Annex I (1994).

³⁴ Marks, above n 13; Shelton, above n 1.

³⁵ *Protocol of San Salvador*, opened for signature 17 November 1988, 28 ILM 156 (entered into force 16 November 1999) art 11.

³⁶ *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 21 ILM 58 (entered into force 21 October 1988) art 24.

³⁷ Earth Justice, *Environmental Rights Report 2008: Human Rights and the Environment* (2008) <<http://www.earthjustice.org>>.

³⁸ Lee, above n 14.

³⁹ Constitución Nacional de la República Argentina, 1852 [Republic of Argentina Constitution], art 41.

common use and is essential to a healthy life.’⁴⁰ The Mongolian constitution refers to the ‘right to a healthy and safe environment, the right to be protected against environmental pollution and ecological imbalances, and the right to seek legal redress for violations of those rights.’⁴¹ The constitution of Latvia imposes an obligation on the state to ‘protect the right of everyone to live in a benevolent environment by providing information about environmental conditions and by promoting the preservation and improvement of the environment.’

As can be seen from this small sample, various constitutions employ a very wide range of language, and are open to interpretation. Even an apparently simple formulation such as ‘right to a healthy environment’ raises significant questions as to the scope and content of the right. How is a ‘healthy environment’ to be defined? Is it intended to mean an environment which is good for human’s health, or which is in good health itself?

Many formulations of the right to a healthy environment appear on closer inspection to be merely reiterations of existing rights, albeit with emphasis on their environmental dimensions. There are relatively few examples of a truly independent right articulated in national constitutions or regional instruments. For example, the right to a generally satisfactory environment found in the African Charter refers to an environment which is favourable for people’s development, the implication being that we should judge how satisfactory the environment is by reference to whether it serves to further human development. As such, rather than providing evidence of a new right, domestic and regional human rights law seems merely to reaffirm existing human rights principles.

The other criterion for accepting a new principle of customary international law is that of *opinio juris* – that is, consistent state practice must be accompanied by an attitude among states that they are legally obliged to adhere to the those practices.⁴² Although national constitutions indicate a willingness to recognise certain values or national priorities, the mere inclusion of wording in a constitution is not on its own, sufficient evidence of *opinio juris*. Furthermore it would be necessary to consider the justiciability of such constitutional rights, their enforcement by the courts and their incorporation into legislation. While beyond the scope of this paper, without evidence of widespread implementation and enforcement within domestic legal systems, it seems unlikely that a customary right could be established at the international level.

IV CHALLENGES FOR A NEW RIGHT

The analysis above suggests that it is unlikely that the right to a healthy environment currently exists in any enforceable sense at international law. There are those who would advocate for its inclusion by way of a multilateral treaty. This section considers

⁴⁰ Constituição da República Federativa do Brasil [Federal Republic of Brazil Constitution], art 225.

⁴¹ Монгол Улсын Үндсэн Хууль [The Constitution of Mongolia] (1992), arts 16, 17.

⁴² Henry Steiner, Philip Alston and Ryan Goodman, *International human rights in context: Law, politics, morals* (Oxford University Press, 3rd ed, 2007) 71-73; American Law Institute, *Restatement of the Law, Third, The Foreign Relations Law of the United States* (1987) (Restatement) § 102.

some of the challenges for such a proposal, in both theory and practice, and from within and outside the human rights discourse.

A *Challenges from within Human Rights Law*

Several scholars have argued against recognising a new right to a healthy environment in international law. One criticism centres on the problem of proliferation of human rights. As Shelton argues, ‘there are legitimate fears that the addition of numerous claims will devalue existing human rights.’⁴³ Gibson emphasises the need to ensure that any new right is supported by existing human rights theory and architecture commenting:

[t]he right to a clean environment is not a frivolous claim; however, declaring it to be a human right without support at the highest level threatens the integrity of the entire process of recognising human rights.⁴⁴

While it is important for international human rights law to evolve to meet contemporary problems, Alston argues that a ‘delicate balance must be struck which ensures respect for the integrity of the tradition both in terms of its content and of the process by which it evolves.’⁴⁵

Some authors have attempted to set out criteria for admitting new rights. Ramcharan states that human rights are rights which possess certain characteristics, such as universality; essentiality to human life, security, dignity, liberty and equality; essentiality for international order and for the protection of vulnerable groups.⁴⁶ Gibson argued that any new right must be consistent with but not repetitive of existing human rights law.⁴⁷ As discussed earlier in this paper, human rights law already recognises the significant links between environment and human rights protection. Following from this, Handl has argued that it is difficult to conceptualise the right to a healthy environment as an independent and inalienable right.

While several authors have attempted to formulate a definition or checklist for what a human right is, Alston has argued that setting substantive criteria for determining human rights is unworkable.⁴⁸ Writing in relation to the right to development, he has said that there are no inherent reasons why new rights shouldn’t be recognised, but that ‘much work remains to be done before the concept of [the right to development] can attain the degree of specificity and concreteness which would enable it to be operationally significant at either the national or international levels.’⁴⁹ Inferring that at the very least Alston would require some clarity of scope and content before accepting a new right to the human rights catalogue, the right to a healthy

⁴³ Shelton, above n 1, 121.

⁴⁴ Gibson, above n 18, 9.

⁴⁵ Philip Alston, ‘Creating New Environmental Rights under International Law: Desirability and Feasibility’ in *Human Rights and Environmental Protection: The Vital Link Proceedings* (Sydney, 12 October 1991), 46.

⁴⁶ Bertrand Ramcharan, ‘The Concept of Human Rights in Contemporary International Law’ (1983) *Canadian Human Rights Year Book* 267, 280.

⁴⁷ Gibson, above n 18, 6-8.

⁴⁸ Philip Alston, ‘Conjuring up new rights’ (1984) 78 *American Journal of International Law* 607, 617.

⁴⁹ *Ibid.*

environment might fail his test as well; the challenge of defining the right with sufficient specificity has been outlined above. Ultimately, the lack of consensus regarding the definition of such a right would mean that any attempt to include it in international treaty law would inevitably be a slow and contentious process.⁵⁰

As well as concerns relating to the proliferation of new rights, some scholars have identified substantive issues with the scope and content of a right to a healthy environment and on those grounds have argued that it may be inappropriate subject matter for international human rights law, or at least that its inclusion would require significant work in carefully defining the right. Shelton recognises that environmental degradation has the potential to impact upon future generations, and points out that any right to a healthy environment implies ‘significant, constant duties toward persons not yet born.’⁵¹ Further, the right to a healthy environment potentially expands the territorial scope of state obligations. Shelton has argued that ‘the required broad expansion of state liability may prove to be the biggest single hurdle to establishing a right to environment.’⁵²

Environmental problems such as pollution, disruption of biodiversity and global warming are not usually confined to political boundaries. Developing over a lengthy period of time, it is difficult to identify the precise cause and effect, or the identity victims of human rights violations. The temporal and geographic dimensions of the right to a healthy environment presents challenges for human rights theory which has traditionally limited the responsibilities of states to protect and fulfil the rights of their own citizens or those within their territories. In light of these obstacles, Shelton concludes that ‘environmental protection cannot be wholly incorporated into the human rights agenda without deforming the concept of human rights and distorting its program.’⁵³

B *Challenges from outside Human Rights Law*

A major criticism of the proposal to introduce a right to a healthy environment is that such a right would be too anthropocentric. In casting the right to a healthy environment as a human right, it is inextricably linked to human interest. This alignment has provoked criticism from the fields of deep ecology,⁵⁴ and earth jurisprudence,⁵⁵ on that basis that it effectively denies recognition of animals, plants, species and ecosystems as rights-holders, thereby making their protection contingent on establishing some other human interest.⁵⁶

⁵⁰ Taylor, above n 28, 317.

⁵¹ Shelton, above n 1, 134.

⁵² Ibid 134.

⁵³ Ibid 137.

⁵⁴ Bill Devall and George Sessions, *Deep Ecology* (Gibbs Smith, 1985).

⁵⁵ Judith Koons, ‘Earth Jurisprudence: The Moral Value of Nature’ (2008) 25 *Pace Environmental Law Review* 263; Judith Koons, ‘What is Earth Jurisprudence?: Key Principles to Transform Law for the Health of the Planet’ (2009) 18 *Penn St Law Review* 47; Cormac Cullinan, *Wild Law: A Manifesto for Earth Justice* (Chelsea Green, 2nd ed, 2011).

⁵⁶ Taylor, above n 28, 346; Alan Boyle, ‘The role of international human rights law in the protection of the environment’ in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996) 43, 48-9.

Gibson argues that by labelling the right to a clean environment a ‘human’ right, the natural world is valued according to human values and needs with humans being promoted to a position of superiority.⁵⁷ This is contrary to the deep ecologists’ account, which holds that ‘all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth.’⁵⁸ Promoting a human right to a healthy environment, it is argued, perpetuates the values and attitudes that are at the root of environmental degradation, and reinforces the idea that the environment is only there to serve human needs, creating a hierarchy where human needs supersede environmental concerns.⁵⁹

Both Gibson and Macdonald argue that, while a rights-based approach to environmental protection can be useful, the use of *human* right to a healthy environment may be problematic, in that it takes away from a more ecocentric approach.⁶⁰ Macdonald argues, however, that human rights law can contribute to environmental protection by strengthening the appreciation of environmental considerations and providing practical mechanisms for achieving better environmental outcomes.⁶¹ Furthermore Taylor suggests that, while an environmental human right is essentially an anthropocentric concept which presents some concerns, it may nonetheless play some useful role in developing an ecological consciousness which will ‘foster the adoption of a new environmental ethic.’⁶²

V CONCLUSION

A wide range of international, regional and domestic instruments refer to the relationship between the environment and human rights. An examination of these instruments reveals an equally diverse range of conceptions of that relationship, many of which have been taken up or critiqued in relevant scholarly work. It is reasonably well-accepted that the environment is important for the enjoyment of human rights, and that a healthy environment is instrumental in the fulfilment of human rights such as the rights to health, water, food and housing. There also seems to be a common perception that a human rights-based approach to environmental problems can yield practical benefits for environmental protection, although the best way to harness this effect has yet to be fully explored.

In other instances the protection of the environment is regarded as something to which humans are entitled, independent of their other needs or interests. While intuitively it may seem appropriate for humans to claim some entitlement to a good environment (however that may be defined), whether such a claim ought to be recognised as a ‘human right’ under international law, and, if so, how such a right should be defined and implemented remains unclear.

An independent right to a good environment must be justified on the basis that an environment of a particular standard is essential for human well-being. In order to avoid duplication of existing rights, the right would need to stand alone from other

⁵⁷ Gibson, above n 18, 14.

⁵⁸ Devall and Sessions, above n 54, 67; Gibson, above n 18, 13.

⁵⁹ Taylor, above n 28, 351.

⁶⁰ Gibson, above n 18, 14; Macdonald, above n 14, 216.

⁶¹ Macdonald, above n 14, 217.

⁶² Taylor, above n 28, 311.

human needs, yet still remain precise enough to enable meaningful implementation and enforcement. These requirements however of essentiality, independence and precision have so far proved difficult to reconcile. Accordingly, the question remains as to how a right to a good environment can be defined with adequate precision so that the human interest in the environment is made clear without reference to other human needs which are already the subject of existing human rights.

It may be the case that the ongoing focus on the right to a good environment distracts us from valuable work which can still be pursued using the human rights which are already guaranteed. A better understanding of environmental dimensions of existing rights, and the mutually beneficial interactions between environment and human rights may be a worthwhile alternative than to offer pursuing a new right which arguably has limited prospects of achieving consensus in terms of its scope and implementation, and similar challenges in garnering adequate support from states to grant it admission at international law.