

A decorative graphic consisting of a grid of small grey dots, with several larger red dots scattered throughout, primarily in the left and right sides of the page.

Rights and Environmental Protection Following Paris and the SDGs

Towards a Stronger Role for the United Nations

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- The UN's current »law and development« approach – better environmental law between nations and more sustainable development within them – has run up against the fundamental, structural limitations of an increasingly globalized international economy. Successful implementation of the Paris Accord and the Sustainable Development Goals will require making rights visible again and recognizing people as rights holders, not just stakeholders.
- Policy initiatives should be evaluated not simply for their aggregate national or global effects, but for their extra-territorial, cross-border reach and resulting impacts on local communities in other countries.
- Data collection must be done in a way that makes it possible to see impacts on specific subgroups, those who are most vulnerable and particular locales.
- The rights and safety of »environmental defenders« who challenge governments and transnational economic agents must be safeguarded against a growing wave of threats and violence, often perpetrated with impunity.

The Problem: Strengthening Rights in the Quest for Environmental Protection

Since the Stockholm Conference of 1972 first put the environment on the global agenda, the United Nations has made significant progress on some aspects of environmental protection. A broad international consensus has been built on the need for sustainable development, pursued through the Millennium Development Goals (MDGs) and now the post-2015 Sustainable Development Goals (SDGs). International environmental law has been strengthened, including critical accords on ocean protection, the ozone layer, toxic chemicals, biodiversity protection and, most recently, the Paris Accord on global climate change.

In the quest to protect the environment, however, the UN has drawn upon only some of the tools found in its mandate, which is to preserve the peace, promote development, protect human rights and strengthen the rule of international law. Efforts have relied much more heavily on the mandates for development and international law than on the equally important mandate elements for peace and human rights. Put bluntly, the UN has made progress in formulating the environmental rights and responsibilities of nations, but not those of people. The reasons for this selective approach are rooted in part in the clashing interests of member-states, but also in organizational incentives within the UN and in the uneven development of ideas about how the different parts of the mandate are related to protecting the environment.¹

Whatever the reasons, the UN's »law and development« approach – better environmental law between nations and more sustainable development within them – has run up against some of the fundamental, structural limitations of an increasingly globalized international economy. Relying on the regulatory capabilities of individual nations, supplemented (unevenly) by the cooperative efforts of member states, has not been enough to steer national food, water, energy and manufacturing systems onto more sustainable grounds. Nor has it succeeded in addressing the large and growing transnational activities that hide in the gaps between national regulation and international cooperation. Perhaps most importantly, the current approach lacks the motive force to overcome

political barriers to change: conferences of the parties, nationally determined contributions and the diffusion of best practices through expert networks have become increasingly detached from a broad popular demand for environmental protection.

Rights-based initiatives are critical to closing the regulatory gaps of globalization, strengthening accountability and generating renewed political momentum for sustainability. Human rights provide both analytical tools and a framework for action. *Tools*: analyzing policies, data and outcomes of sustainability efforts through a human-rights lens makes it possible to see the effects on different segments of society, particularly vulnerable or excluded subgroups. And *action*: drawing upon people's rights to participate, to access information and to press claims when their interests are affected or threatened is essential to ensuring that sustainability efforts have a broad foundation of social legitimacy and an ear to the ground for effectiveness.

The need is particularly urgent within the two most important environmental initiatives on the current UN scene: climate efforts following the Paris Accord and the implementation phase of the SDGs. Both Paris and the SDGs were crafted in ways that missed important opportunities to put human rights at the center of their rationale for action, their means of implementation or their metrics for success. In fact, they must be seen in a historical context in which the UN's articulated commitments to the environment as a human right have waned. The first global environmental summit, the 1972 Stockholm Conference, affirmed that people have »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«.² Twenty years later, at the 1992 Rio Earth Summit, the assembled governments would concede only that people »are entitled to a healthy and productive life in harmony with nature«. Most recently, for the Rio+20 summit of 2012, the UN High Commissioner for Human Rights noted severe rights-related flaws in the draft outcomes document and pleaded (unsuccessfully) with member states to »fully integrate key human rights considerations«.³

2. Declaration of the United Nations Conference on the Human Environment, Principle 1.

3. Open letter from Navanethem Pillay, High Commissioner for Human Rights, to UN member-states, 30 March 2012. Available at <http://www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf>.

1. See Conca, Ken (2015), *An Unfinished Foundation: The United Nations and Global Environmental Governance*, Oxford: Oxford University Press.

The Case for Human Rights

Human rights are foundational tools of sustainability for several reasons:

- *Human rights enable substantive environmental claims against governments and intergovernmental organizations.* The historical record is quite clear: environments are best protected when citizens have the ability to demand clean water, breathable air, safe food and healthy ecosystems as their right. Recognition of such rights in international venues strengthens their diffusion and codification in national settings.
- *Human rights enable access to processes and decisions in regulatory arenas.* Principle 10 of the Rio Declaration, adopted at the 1992 Earth Summit, underscored that states should provide people with access to information, participation in the relevant arenas of decision making and judicial and administrative remedies. Without such capabilities, substantive rights to breathable air or clean water have little meaning. These process rights are also important, though often unrecognized, in international venues of decision making.
- *Human rights create transnational normative forces to counter the »distancing« effects of globalization.* Perhaps the biggest environmental challenge of globalization is the displacement of environmental effects far from the point of consumption in modern economies. Transnational informational and advocacy networks are essential to create accountability for harm that has been rendered distant, invisible and unrecognized. Such networks are most effective when they are able to link damaging practices to the violation of international human rights standards.
- *Human rights shine the spotlight on those communities and individuals most likely to be marginalized from environmental policy processes.* Laudably, the process around the SDGs has embraced the rhetorical goal of »leaving no one behind«. There is a real danger, however, that people and communities can become invisible in the face of aggregate measures of harm or progress – tons of carbon dioxide, hectares of protected areas, or parts per billion of chemical contaminants. Seeing people and communities as rights holders keeps them more visible in policy processes, and reinforces that an essential objective of international environmental cooperation is to respect, protect, and fulfill their rights.

- *Human rights provide tools to keep environmental protection efforts honest.* As with pollution and resource extraction, environmental protection may also harm the rights of individuals and communities, or enhance their risks and vulnerabilities. Coerced conservation is unlikely to work in the long run, but may occur when external actors make decisions over the heads of local communities. Sensitivity to the rights implications of environmental protection efforts is the best way to ensure their legitimacy, both for its own sake and as a key element of effectiveness.
- *Human rights defend environmental defenders.* None of the aforementioned is possible if those who seek to claim their rights are harassed, intimidated or subject to violence. The protective spotlight of human rights is no less important here than for political dissidents, independent journalists or anyone who promotes the public good at great personal risk.

As important as *what* rights can do is *how* they do it. International rights-based approaches can strengthen rights in the domestic sphere, either through the diffusion of new standards or by providing a channel for citizens to take advantage of legal tools and rights claims they may not realize are available to them. Rights-based approaches also create normative force, through »naming and shaming« campaigns. They can also bend the standard operating procedures of administrative systems toward more open reporting and information sharing and encourage the modeling of better practices for consultation, participation and dialogue. Perhaps most importantly, recognition of rights – and personal protections for the people who use them – can create a space in which to manage the very real conflicts that are inevitable around resource extraction and pollution, through dialogue, negotiation and the informed consent of affected communities. Indeed, such dialogue can be more than simply conflict management, but rather a way to tap positive synergies among sustainable resource use, confidence-building and social legitimacy.

Key Venues Going Forward: Paris and the SDGs

At present, Paris and the SDGs dominate the UN's environmental agenda as the most important arenas for action. Both have been the culmination of long and, at

times, contentious processes. The Paris Accord is the hard-fought successor to the disappointing achievements of the 1997 Kyoto Protocol to the UN Framework Convention on Climate Change. The SDGs are the consolidation of multiple, conflicting efforts to construct a post-2015 agenda for sustainable development. Both processes required late-stage, high-level political engagement to clear a path to agreement. Together, they promise to frame the focus, programming, budgets and partnerships on the environment for years to come, within the UN system and across the international community as a whole.

As instruments of environmental governance, Paris and the SDGs also share some important characteristics. Each is a universal regime that makes the problems it addresses the responsibility of the international community as a whole (in contrast to a dichotomous »North/South« frame employed by their respective predecessors). Both articulate ambitious goals: Paris calls for holding warming to »well below« 2 degrees Celsius, while the SDGs seek to eliminate extreme poverty, universalize water access and achieve gender equity, among other goals.

However, a critical challenge from a rights perspective is that both are essentially »opt-in« regimes, maximizing the latitude of individual countries to define both the ambitiousness of their efforts and the means to be employed. In the climate regime, this flexibility comes in the form of Nationally Determined Contributions (NDCs); for the SDGs, it is the Voluntary National Review (VNR) process (for governments) and the Partnership Exchange (for multi-stakeholder and voluntary private-sector efforts). This approach has some potential advantages, in that it allows for experimentation, innovation and the diffusion of positive practices. But it also raises serious questions about accountability, as well as where to find the political motive force needed to make sure that efforts are sufficiently ambitious.

Moreover, both Paris and the SDGs were missed opportunities to incorporate strong rights-based provisions in the codification of goals and procedures. The climate regime has long struggled with the controversial issue of how to address the »loss and damage« resulting from the effects of climate change. The Paris Accord acknowledged »the importance of averting, minimizing and addressing loss and damage« – but it explicitly severed efforts to do so from any basis for liability or compensation. The climate regime has also been very slow to recognize the rights challenges inherent in land-use

measures to mitigate climate change, or the risk of creating incentives for »land grabs« in the quest for carbon sequestration. Paris also continued the practice of failing to acknowledge that there is a human-rights obligation to act on climate change (even as the Accord's preamble urged parties to meet their human rights obligations, making it the first major environmental treaty to do so).

The SDGs were also a missed opportunity to codify the role of rights. Only four of the 16 goals in the SDGs make any reference at all to people's rights; none of the environment-centered goals (on agriculture, water, energy, cities, sustainable production and consumption, climate change, oceans and terrestrial ecosystems) do so. Thus, for example, Goal 6 – »Ensure availability and sustainable management of water and sanitation for all« – calls for universal access to water and sanitation, improved water quality and protection of the freshwater ecosystems on which our water supplies depend. But it fails to recognize that there is in fact a human right to water, which the General Assembly recognized in 2010. Nor do the goals affirm the Rio Declaration's call for access to information, participation and adjudicative justice. The idea of codifying the importance of rights-based approaches was discussed in the deliberations over Goal 16, the »governance« goal, but did not find its way into the final language.

Both regimes also lack provisions to create or strengthen conflict-resolution mechanisms, which are critical if rights-sensitive approaches are to be found for such controversial activities as mining, major changes in land use or water infrastructure projects. Conflict among stakeholders is inherent in processes of resource extraction, pollution or the transformation of ecosystems, as well as in any rule-making attempts to manage such change. Indeed, the ambitiousness of the goals articulated at Paris and in the SDGs means that such conflicts are likely to increase and intensify if those goals are pursued with any seriousness. But neither takes steps to create mechanisms through which such conflict may be aired, negotiated and resolved in a manner that respects, protects and fulfills people's rights.

What to Do

As both Paris and the SDGs turn to the early stages of their implementation phase, four broad elements are critical to make sure that each takes, and remains consistent with, a rights-based approach:

(I) Moving from Being Stakeholders to Rights-holders

There has been growing recognition that sustainability requires effective stakeholder dialogue; this is seen in a wide range of transnational efforts, such as the Extractive Industries Transparency Initiative, and in domestic processes such as the rise of national and regional »charrette« (intense consultation) dialogues. However, such processes often come with steep barriers to access, voice and expertise. The Women's Major Group within the SDG process, which conducted a review of the first batch of VNRs prepared for the just-completed High-Level Political Forum (HLPF), found that fewer than 10 per cent had consulted stakeholders from the start of the process.⁴ There are also no clear mechanisms in place for the consultation and informed consent of local communities when decisions about the »means of implementation« (read: financing) of sustainability initiatives are taken.

Moreover, it is critically important that people and communities be acknowledged as *rights-holders*, not just interest groups. For the SDGs, this means naming the specific basis in socioeconomic human rights – rights to food, water, health and so on – for each of the specific goals. It also means strengthening the role of Principle 10 of the Rio Declaration – that people have process rights to information, participation in decision making and access to judicial remedy – in both individual countries' VNR processes and in the assessment of and dialogue about those reviews around the HLPF.

For Paris, recognizing people as rights-holders starts with recognizing rights as an important part of the basis for combatting climate change – as noted by the UN High Commissioner for Human Rights and reaffirmed by all the Special Procedures mandate holders of the Human Rights Council. The Global Network for the Study of Human Rights and the Environment has noted that this should translate specifically into recognition of a right to investment in adaptation and mitigation, as well as a right to timely assistance.⁵ But human rights are not only a reason for combating climate change; they also

constitute a constraint on how climate adaptation and mitigation measures may be developed and pursued. Individual countries' NDCs must be developed in ways that embrace the Rio Declaration principles – for example, by establishing how all proposed projects will be subjected to objective, independent and accessible processes of prior impact assessment, in order to allow for communities' informed consent.

(II) Accounting for Cross-border Effects

As mentioned above, one of the fundamental challenges of globalization is to recognize and address the manner that global production processes snake across sovereign borders, in ways that neither national regulations nor treaty-based processes can address on their own. For example, a civil-society review of 110 countries' climate pledges put forward in 2015, which form the basis for the first wave of NDCs under the Paris Accord, concluded that almost half of the reductions that need to take place globally in greenhouse-gas emissions will have to come from the supranational carbon footprints that developed countries generate by consuming vast quantities of goods and services originating from elsewhere.⁶ We cannot speak or act effectively on rights and responsibilities around climate without recognizing these demand-driven effects on where emissions occur.

Similarly, the SDGs cannot possibly be attained without some means of assessing and addressing cross-border economic activities that strengthen or inhibit access to water, food, health and so on. An NGO coalition including Amnesty International, the Center for Economic and Social Rights, the Center for Reproductive Rights and Human Rights Watch have put forward a proposal for the HLPF review mechanism to explicitly address states' effects beyond their borders. Such an approach would examine the impacts of financing, taxing and trade and investment practices, particularly by the advanced industrial economies of the world. It would also assess the impacts and effectiveness of transnational »partnerships« between governmental, private-sector and non-profit actors. The goal is to create a »web« of accountability for actions that harm progress toward the SDGs, but that are unlikely to be captured in national and regional review efforts.

4. Bianco, Mabel (2016), »Governments and Civil Society Association for National Reviews«, p. 3. A report of Fundación para Estudio e Investigación de la Mujer and Women's Major Group, 13 July 2016. Available at <http://www.womenmajorgroup.org/wp-content/uploads/2016/07/WMG-Report-by-Mabel-Bianco-final.pdf>.

5. Global Network for the Study of Human Rights and the Environment (2016), »Declaration on Human Rights and Climate Change.« Available at <http://gnhre.org/declaration-human-rights-climate-change/>.

6. Civil Society Review (2015), *Fair Shares: A Civil Society Equity Review of INDCs*. October 2015, p. 3. Available at <http://civilsocietyreview.org/>.

A second layer of cross-border effects for both Paris and the SDGs is the financial means of implementation to achieve those regimes' goals. In a letter to the 2014 Conference of the Parties to the climate regime, 26 independent experts noted that there are anticipatory obligations regarding impacts on vulnerable communities. Crucially, these obligations apply not only to the effects of climate change but to responses seeking to combat or adapt to it. John Knox, the Special Rapporteur on environmental human rights, has called for a series of rights-sensitive screens to be applied to all projects generated through the new climate mechanism of the Paris Accord (Article 6, Paragraph 4).⁷ Among the project safeguards called for by Knox are social and environmental impact assessments, effective public participation, clear and meaningful remedial procedures, legal and institutional protections against environmental and social risks and requirements to protect the most vulnerable.

One opportunity to make sure that cross-border effects and extra-territorial responsibilities do not fall into the cracks is take advantage of the HLPF's mechanism for considering thematic issues at its meetings. Accountability should not be left to the HLPF, however, which lacks the means for strong oversight in its current format of short meetings, unclear channels for participation and voluntary review. A more ambitious step would be to adopt a mechanism analogous to the binding periodic review utilized by the Human Rights Council (something for which governments have shown little appetite when it comes to the 2030 Agenda).⁸

(III) Collecting the Right(s) Data

One of the negative lessons of the MDGs was the consequences of the failure to collect disaggregated data and make it widely accessible. Without such information, it becomes tempting for governments to cherry-pick the easiest gains, with the result that aggregate indicators of progress are realized while leaving behind the most vulnerable and

worsening rather than improving distributional equity. As »opt-in« regimes that rely on national reporting and nationally self-defined contributions, there are twin dangers for both Paris and the SDGs: first, that they will fail to standardize reporting requirements in ways that make it possible to draw a comprehensive picture of progress towards rights fulfillment; and second, that whatever standards do emerge will be insufficiently disaggregated to see the impacts on specific communities or vulnerable sub-groups.

As Neven Mimica, European Commissioner for International Cooperation and Development, noted in a panel discussion of the 2016 High-Level Political Forum, »Missing data means missing people«. In the wake of the Addis Ababa Action Agenda on financing for development, civil society organizations making up the Financing for Development Group have flagged the problems of poor access to data, poor quality data and the inadequacy of gender-based and other forms of disaggregation.

In 2012 the Office of the High Commissioner for Human Rights (OHCHR) produced an extremely useful, detailed guide to developing human rights indicators so as to better implement countries' human rights commitments, measure rights-related outcomes and evaluate whether policies and actions are rights-sensitive.⁹ It stressed that data must be disaggregated (allowing for comparison across groups and sub-national regions), »context-specific« and dynamic (allowing for the tracking of trends). This approach should be required reading for both national statistical agencies and the Global Partnership for Sustainable Development Data, whose commitment to provide »the right information at the right time, in the right formats, and available for the right people to make the right decisions« should be expanded to stress the right *rights* information. Again, the HLPF's thematic focus on cross-cutting issues could also be tapped to engage the data question more robustly.

(IV) Defending Environmental Defenders

None of the above can be done effectively if individuals and groups that seek to make use of their rights are subjected to threats, harassment or physical violence. A report by the NGO Global Witness found that 2015

7. Knox, John H. (2016), »Human Rights and Safeguards in the New Climate Mechanism established in Article 6, paragraph 4 of the Paris Agreement«, Letter to the Subsidiary Body for Scientific and Technological Advice (SBSTA) of the Conference of the Parties to the UN Framework Convention on Climate Change, 3 May 2016. Available at <http://srenvironment.org/>.

8. Jens Martens (2016), »The HLPF 2016: First global meeting on the implementation of the 2030 Agenda and the SDGs«, *Global Policy Watch* no. 11, 9 August 2016. Available at https://www.globalpolicywatch.org/wp-content/uploads/2016/08/GPW11_2016_08_09.pdf.

9. Office of the High Commissioner (2012), *Human Rights Indicators: A Guide to Measurement and Implementation*. HR/PUB/12/5. New York: United Nations.

was the worst year on record for the killing of »land and environmental defenders«.¹⁰ They documented 185 killings – more than double the number of journalists killed that year – as well as troubling trends of criminalizing advocacy, blocking funding for advocates and ignoring transparent threats made prior to many of these assassinations. Building on the Human Rights Council's recent resolution requiring states to ensure the safety of human rights defenders, the UN Special Rapporteurs on environment, human rights defenders and indigenous people have together outlined specific obligations for protective measures, rapid response and prompt investigation.¹¹

Global Witness, the Special Rapporteurs and many others have also noted that such acts of violence are a symptom of the impacts that controversial projects are having on people and communities.¹² The UN Environment Programme recently developed a mediation guide for natural resource disputes, stressing the key role of access to information and venues.¹³ The principal responsibility for mediating such disputes will typically lie with local and national governments. However, as a study by Chatham House noted, the international community can play an important supporting role: by doing no harm, by helping with capacity building and by offering effective and impartial mediation services when disputes have proven to be intractable, when funding is lacking or when mistrust prevents parties from coming together for dialogue.¹⁴

Conclusion: Rights as the Fusion of Ends and Means

The UN has several tools at its disposal for helping member states steer both Paris and the SDGs back onto a rights-based trajectory of implementation. The environ-

mental and developmental organs within the UN system have grown increasingly familiar with rights-based strategies. The Special Rapporteurs to the Human Rights Council have deepened not only the issue-specific understanding but also their intersection, as in the links among land rights, indigenous people and climate mitigation measures, or those joining extractive industries, prior informed consent and violence against environmental defenders.

As the UN's Open Working Group was deliberating over wording for the SDGs, the Mining Working Group noted ruefully that »the OWG approach to mainstreaming human rights has amounted to making them invisible«.¹⁵ Making rights visible again should be a central aim of Paris and the SDGs in their implementation phase, as well as an important means to realizing their success.

10. Global Witness (2016), *On Dangerous Ground*, p. 8. London: Global Witness. Available at www.globalwitness.org.

11. Joint statement of UN Special Rapporteurs John Knox, Michel Forst, and Victoria Tauli Corpuz, 5 June 2016. Available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20052&LangID=E>.

12. See, for example, Conca, Ken (2012), Decoupling Water and Violent Conflict, *Issues in Science and Technology* Volume XXIX Issue 1 (Fall): 39–48.

13. United Nations Environment Programme (2015): *Natural Resources and Conflict: A Guide for Mediation Practitioners*. Nairobi: UNEP. Available at <http://www.unep.org/disastersandconflicts/Introduction/EnvironmentalCooperationforPeacebuilding/Mediation/tabid/794616/Default.aspx>.

14. Brown, Oli and Michael Keating (2014), *Addressing Natural Resource Conflicts: Working towards More Effective Resolution of National and Sub-National Resource Disputes*, London: Chatham House. Available at https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/20150619AddressingConflictResourcesBrownKeating.pdf.

15. Mining Working Group at the UN (2014): Letter of 7 July 2014 to H.E. Ban Ki-Moon, Secretary-General of the United Nations, p. 2. Available at https://miningwg.files.wordpress.com/2014/07/sg_letter_mwg_7-7-2014.pdf.



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