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**Reflections on the Right
to a Healthy
Environment:
Comments on Rebecca
Bratspies' *Do We Need a
Human Right to a
Healthy Environment?***

Marcos Orellana

Introduction

The recognition and effective implementation of the right to a healthy environment is a critical legal tool to enable humanity to confront the environmental and equity crisis threatening the planet. This proposition presents a number of complex issues, and Professor Bratspies addresses them with great clarity. This paper engages three key points: (i) the tensions that arise when notions of state sovereignty are confronted with global threats; (ii) the limits of the approaches to human rights and environment linkages; and (iii) the outcome of the Rio+20 Conference on the Human Environment and prospects for further progress.

I. Sovereign Equality of States and Global Environmental Challenges

Professor Bratspies's analysis of the human rights and environmental linkages addresses a point often missed in the literature, namely the notion that while human rights establish a limit to state sovereignty by affirming the international community's interest in their promotion and effective enjoyment, environmental policy is premised on the sovereign rights of states, including with respect to use and exploitation of natural resources.¹ In other words, while human rights law recasts sovereignty and makes treatment of humans within boundaries an issue of international concern, international environmental law is firmly anchored in national sovereignty and excludes international oversight over national environmental policy. How this apparent contradiction of terms is reconciled appears to be a key legal and policy dilemma.

The author traces this core tension in the interface between human rights and the environment to the sources of international law. While human rights find a strong basis in natural law, the author argues that positive law and treaty-making have largely addressed the environment.² This proposition, as the author admits, runs the risk of oversimplifying the equation because human rights law also has a strong positivist underpinning, inasmuch as environmental law also finds support in natural law.

This latter assertion can be traced back to Grotian ideas of "the nature of things." If natural law was originally conceived as the expression of a natural order founded on the inscription in the human soul of divine law that human reason could discern, the notion of "the nature of things" can also be approached meaningfully from either secular or spiritual traditions that identify nature's

1. See Rebecca Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT'L L. 31, 45-46 (2015).
2. *Id.* at 48-49.

elements and limits. For example, certain traditions of indigenous peoples from various places in the world recognize humans as a thread in the inter-connected web of life, and thus they reject reductionist approaches that separate humans from nature. Accordingly, by virtue of the nature of things, the right to live in a healthy environment is a necessary corollary of the holistic approach to the value and protection of life and nature.

At the same time, the strictly rational scientific project is beginning to identify planetary boundaries that define the safe space for humanity and life on the planet. These boundaries, if exceeded, present planetary risks that threaten the fundamental values of human society. Accordingly, by virtue of the nature of things, humanity must give effect to legal norms that enable society to live safely within planetary boundaries. Given the need to safeguard the biosphere that enables human existence and wellbeing, the nature of things and natural law provide international environmental law with a solid axiological foundation to bind state conduct.

A political economy analysis may also help to disentangle the apparent dilemma posed in this tension between state sovereignty and global threats. What is the origin of the pervasiveness of national sovereignty in environmental policy? A big part of the answer is found in the struggle against colonialism in all its forms, particularly in respect to the use of natural resources. For several decades, “the environment”—as an international agenda issue—was seen with great suspicion by the developing world, especially newly independent States.³ The environment was perceived as yet another form of colonialism designed to place limits on self-determination, economic independence, and development.⁴ This suspicion was aggravated by the historical responsibility of the industrialized North in causing environmental threats of a global scale, such as climate change, that undermine prospects for sustainable development.

The debate over the right to a healthy environment challenges this State-centric approach to the political economy of international legal legitimacy. While the right to a healthy environment may involve transboundary issues, as analyzed further below, its strong locus and emphasis are on the local perspective. In that regard, the vantage point is structurally transformed: the right to a healthy environment enables an understanding of reality from the perspective of local communities who suffer environmental pollution or the unsustainable use or extraction of natural resources.⁵ By placing the perspectives of the vulnerable, the marginalized, and the disempowered at the core of legal analysis, a rights-based approach to

3. See DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 140-41 (2011).

4. Bratspies, *supra* note 1, at 46.

5. See *id.* at 48-49.

environmental policy can begin to overcome the global politicization of the environment.

As noted, the right to a healthy environment may involve transboundary issues. For example, pollution originating in one or several States may affect the rights of people in other States. The paradigmatic example of a global transboundary pollution problem is the climate change threat. An example in a regional setting is the so-called Southeast Asian Haze.⁶ In regard to these and other examples, the transboundary dimension of the right to a healthy environment engages the debate over extra-territorial obligations (ETOs) in human rights law.

Could ETOs provide a common platform for human rights and the environment? The Maastricht Principles on the Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights restate existing human rights law in the field.⁷ These principles incorporate elements from the evolving law on human rights and the environment, such as the duty to assess and address risks, as well as the notions of foreseeability and uncertainty.⁸ The Maastricht Principles, by clarifying the transboundary dimensions of human rights and the environment thus provide an important tool for addressing the apparent tensions between the sovereign equality of States and global environmental threats.

II. Limits of Existing Approaches to Human Rights and the Environment

Professor Bratspies also presents the core elements and contours of the various approaches that have been articulated in respect to human rights and the environment. This exercise provides an analysis of the limits of these approaches and the need for a human right to a healthy environment.

This analysis directly relates to the creation and design of the special procedure on human rights and the environment by the UN Human Rights Council. To a large extent the successful experience with the mandate on water and sanitation served as a model. By clarifying human rights obligations relating to environmental protection, a consensus could be built toward the recognition of the

6. See ASEAN Agreement on Transboundary Haze Pollution, June 10, 2002, available at http://haze.asean.org/?wpfb_dl=32 (last visited Nov. 14, 2014).

7. See Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights (Sept. 28, 2011), available at <http://www.globalhealthrights.org/wp-content/uploads/2013/10/Maastricht-Principles-on-Extraterritorial-Obligations-of-States-in-the-area-of-Economic-Social-and-Cultural-Rights.pdf> [hereinafter Maastricht Principles]

8. See Olivier De Schutter, Asbjørn Eide, Ashfaq Khalfan, Marcos Orellana, Margot Salomon & Ian Seidermanf, *Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights*, 34 HUM. RTS. Q. 1084-1169 (2012); see also Maastricht Principles, *supra* note 7, at principles 13, 14.

right to a healthy environment at the global level by the Human Rights Council.

The driving force in this direction has been gaining momentum since the 1972 Stockholm Conference on the Human Environment, which proclaimed linkage between human rights and the environment.⁹ Since then, a number of questions have been answered, such as the collective dimensions of human rights; the justiciability of economic, social, and cultural rights; the existence of procedural and substantive human rights obligations regarding environmental protection; and the interplay between universality and diversity.

The author builds on these developments, arguing that a right to a healthy environment is urgently needed. The right to a healthy environment would give expression to the fundamental values of our global society. It would enable a better balancing of priorities in decision-making processes. It would also redefine priorities in the process of communication.¹⁰ This latter argument resonates with theories of power in society by Foucault and others that speak to the construction of legitimacy in the use of vocabulary.¹¹

In addition to these arguments, there are other answers to the question of whether we need a right to a healthy environment. For one, there is the need to establish tools to secure global environmental justice.¹² This issue pertains to ETOs addressed above, and has been debated at the Human Rights Council in regards to the creation of a special procedure on climate change and human rights.¹³ There is also the issue of securing State accountability at the international level as a fundamental element of a rights-based approach to environmental policy. Further, there is the need for enhanced implementation of the environmental dimensions of already protected human rights. In this light, the recognition of a right to a healthy environment would provide a new tool to address the dire, global environmental crisis facing humanity and the planet.

This is not to say that certain questions do not remain in need of further elaboration. Chiefly among them, what is the normative content of the right to a healthy environment? It could be argued that the content of this right can be

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9. United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (1972).
 10. Bratspies, *supra* note 1, at 67.
 11. See generally MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1982); MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (1995).
 12. Bratspies, *supra* note 1, at 53.
 13. Office of the High Comm'r, U.N. Hum. Rts. Council, Open Letter dated Oct. 17, 2014 from the Special Procedures mandate-holders of the Human Rights Council to the State Parties to the UN Framework Convention on Climate Change, *A New Climate Change Agreement Must Include Human Rights Protections for All*, available at http://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf.

constructed on the basis of the *acquis* of human rights and environment jurisprudence developed by the human rights machinery at the global and regional levels. It could also be noted that recognition of this right would enable national and international courts and monitoring bodies to progressively refine the right's content in light of changing societal needs and values.

III. Rio+20 and the Road Ahead

Twenty years ago, the Yearbook of International Environmental Law published an article by Professor Dinah Shelton called *What Happened in Rio to Human Rights?*¹⁴ Not much happened, concluded the author.¹⁵ Twenty years since the Earth Summit at the UN Conference on Sustainable Development, history has repeated itself, perhaps because Rio+20 was not prepared to go much beyond Rio 1992, as it was focused on renewing political commitment to sustainable development.

This silent outcome was not for lack of effort in civil society. A caucus on human rights and sustainable development was formed across all Major Groups involved in the preparatory meetings of the Rio+20 Conference. The caucus engaged in advocacy with governments, delivered statements during official meetings, and prepared analysis on a rights-based approach to sustainable development. The conceptual platform of this caucus first and foremost called for the recognition of the right to a healthy environment.¹⁶

Civil society's message, however, fell on the deaf ears of the States. The North was concerned that the ETO dimension of the right to a healthy environment could pose a threat against its interests. The South was concerned that international monitoring of the health of the environment within national territories could undermine their sovereignty.

In order to overcome this stalemate, civil society engaged the UN human rights machinery. In response to civil society's appeal, the High Commissioner for Human Rights became involved in the negotiations by advocating for references to certain rights.¹⁷ The High Commissioner, however, was not prepared to advocate for the right to a healthy environment, noting the lack of a global instrument

14. See Dinah Shelton, *What Happened in Rio to Human Rights?*, 3 Y.B. INT'L ENVTL L. 75, 75-93 (1992).

15. Dinah Shelton, *Whiplash and Backlash—Reflections on a Human Rights Approach to Environmental Protection*, 13 SANTA CLARA J. INT'L L. 11, 27-29 (2015).

16. See Rights & Equity Cluster of the NGO Major Group, *A Rights-Based Approach To Sustainable Development: 5 Proposals For The Rio+20 Outcome Document* (May 29, 2012) (unpublished working document, on file with author).

17. U.N. High Comm'r for Hum. Rts., Open Letter dated Mar. 30, 2012, available at <http://www.ohchr.org/Documents/Issues/Development/OpenLetterHC.pdf>.

recognizing it.¹⁸ At the same time, all Special Procedures mandate-holders of the Human Rights Council prepared a joint statement highlighting the need for accountability as a central element of a rights-based approach to sustainability.¹⁹ The Committee on Economic, Social and Cultural Rights also submitted a statement on “The Green Economy in the Context of Sustainable Development and Poverty Eradication,” which called on the Rio+20 Conference to advance the integration of sustainable development and economic, social, and cultural rights.²⁰

In the end, the Rio+20 outcome document—*The Future We Want*—includes a general reference to the Universal Declaration of Human Rights and the importance of freedom, peace, and security, respect for all human rights, as well as specific references to certain human rights, such as the right to development, the right to an adequate standard of living, the right to food,²¹ and the right to water and sanitation.²² But *The Future We Want* does not establish a robust rights-based framework for sustainable development. For example, it was expected that the implementation of sustainable development goals (SDGs) could be monitored by a sustainable development council. Instead, a High Level Political Forum (HLPF) was established to, *inter alia*, follow-up and review progress with sustainable development commitments. There is no mention of the right to a healthy environment in the Rio+20 *The Future We Want*.²³

All in all, Rio+20 did set in motion certain processes that could strengthen a rights-based framework for sustainable development. For example, in regards to the SDGs, the Office of the High Commissioner has refined its positions and emphasized that a healthy environment is a key element in the implementation of the right to development.²⁴ Steps toward the creation of a High Commissioner for Future Generations, such as the elaboration of a report by the UN Secretary General on the topic and the inclusion of the issue in the agenda of the HLPF, could also contribute to strengthening a rights-based approach to inter-generational equity.

Perhaps most significant is the Declaration on Principle 10 subscribed to by ten

18. *See id.*

19. *See supra* note 13.

20. U.N. Economic and Social Council, Statement in the context of the Rio+20 Conference on ‘the green economy in the context of sustainable development and poverty eradication,’ ¶ 8, 48th Sess., Apr. 30-May 18, 2012, U.N. Doc. E/C.12/2012/1 (June 4, 2012).

21. Rio+20 U.N. Conference on Sustainable Development, Rio de Janeiro, Brazil, June 20-22, 2012, *Outcome of the Conference-The Future We Want*, ¶ 9, U.N. Doc. A/CONF.216/L.1 (June 19, 2012), available at http://www.uncsd2012.org/content/documents/774futurewewant_english.pdf.

22. *Id.* at ¶ 8.

23. *Id.* at ¶ 121.

24. U.N. High Comm’r for Hum. Rts., Open Letter dated June 6, 2013 regarding *Human rights in the Post-2015 Agenda*, available at http://www.ohchr.org/Documents/Issues/MDGs/OpenLetterMS_Post2015.pdf.

States of the Latin America and Caribbean Region in Rio+20.²⁵ By 2014, nine more countries had signed the Declaration, representing more than 500 million people, and at the same time including more than half of all Latin American and Caribbean countries.²⁶ The signatory countries to the Declaration express their commitment to a process that explores the viability of a regional instrument that will assure the comprehensive implementation of the rights to access of information, participation, and justice, enshrined in Principle 10 of the Rio Declaration of 1992.²⁷ This process progressed in accordance with a 2012-2014 Plan of Action agreed to by the signatory countries, and in November 2014 the participating governments decided to commence negotiations on the regional instrument on rights of access to information, participation, and justice regarding environmental matters, with a view to concluding them by December 2016.²⁸

The progress towards the Principle 10 Instrument in Latin America and the Caribbean has witnessed several successful meetings of the participating governments. The third meeting, held in Lima in November 2013, agreed on the Lima Vision for the instrument, which recognizes “[t]hat everyone has the right to a healthy environment, which is essential for the full development of human beings and for the achievement of sustainable development, poverty eradication, equality, and the preservation and stewardship of the environment for the benefit of present and future generations.”²⁹

Further progress on this regional instrument on access rights and environmental democracy involves important questions. For example, how should a new instrument articulate and operationalize the right to a healthy environment? Is the Aarhus Convention’s approach sufficient—*i.e.*, relegating the

25. See Marcos A. Orellana, *Democracia Ambiental y Desarrollo Sostenible: Hacia un Instrumento Regional sobre Derechos de Acceso [Environmental Democracy and Sustainable Development: Toward a Regional Instrument on Access Rights]*, in FARN INFORME AMBIENTAL ANUAL [FARN ANN. ENVTL. REP.] 43, 44 (2014).

26. *Declaration Principle 10: Access to information, participation and justice in environmental matters in Latin America and the Caribbean*, ECONOMIC COMMISSION FOR LATIN AMERICA AND THE CARIBBEAN, <http://www.cepal.org/cgi-bin/getprod.asp?xml=/rio20/noticias/paginas/3/49603/P49603.xml&xsl=/rio20/tpl-i/p18f-st.xsl&base=/rio20/tpl-i/top-bottom-10.xsl> (last visited Nov. 30, 2014) [hereinafter ECLAC Website]; see United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, principle 10, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), Annex I (Aug. 12, 1992) [hereinafter Rio Declaration].

27. See ECLAC Website, *supra* note 26; Rio Declaration, *supra* note 26, at principle 10.

28. See Economic Comm’n for Latin America and the Caribbean, *Santiago Decision* (Nov. 10, 2014), available at http://repositorio.cepal.org/bitstream/handle/11362/37214/S1420707_en.pdf?sequence=1 [hereinafter Santiago Decision].

29. U.N. Economic Comm’n for Latin America and the Caribbean, *Lima Vision for a Regional Instrument on Access Rights Relating to the Environment* (Oct. 31, 2013), available at http://www.cepal.org/rio20/noticias/noticias/2/50792/2013-914_P10_LIMA_vision.pdf.

right to a healthy environment to a statement of objective and only regulating its procedural dimension?³⁰ This question was addressed by governments and civil society in San José, Costa Rica in October 2014. The results of those discussions informed the San José Content, which include the right to a healthy environment in the general principles of the operative part of the regional instrument.³¹ Then, in Santiago in November 2014, the participating governments endorsed the San José Content in order to consider it in the negotiations of the regional instrument.³² Thus, the direct link between the right to a healthy environment and sustainable development affirmed in this process, particularly the Lima Vision and the San José Content, provides a strong basis for further progress in the road ahead.

Conclusion

The debate over the right to a healthy environment must be seen against the environmental crisis and inequity affecting our planet and the daily lives of so many people. The Human Rights Council has already recognized that the realization of human rights depends on a healthy environment.

The recognition of the right to a healthy environment would help to strengthen accountability and understanding of the consequences of environmental damage for human rights. The right to a healthy environment would also help to preserve the ecosystems we depend upon, as well as to aid the achievement of sustainable development.

30. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention) art. 1, 2161 UNTS 447 (1999).

31. See Economic Comm'n for Latin America and the Caribbean, Proposal on the Nature and Content of the Regional Instrument for Consideration at the Fourth Meeting of the Focal Points Appointed by the Governments of the Signatory Countries of the Declaration on the Application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean, LC/L.3898 (Oct. 3, 2014), *available at* http://www.cepal.org/dmaah/noticias/noticias/2/53802/Nature_and_Content_of_the_Regional_Instrument.pdf.

32. See Santiago Decision, *supra* note 28.

