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Introduction from the Editor

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*Features***The Environment and Human Rights: Making the Connections**Diego Quiroz ¹**Introduction**

A great deal of attention is currently paid to environmental issues; however this is largely informed by an economic perspective. The challenges are typically framed by reference to a modernist paradigm which seeks to address environmental concerns in ways compatible with the overarching goal of economic growth. This framing is seductive in the way it fits with current social structures, however it is also dangerous leading to limited and restrictive conceptualisations of environmental problems and their potential solutions or policy responses. In this context, the human dimension has long been neglected. Governments' actions and inactions indicate that traditional models of economic growth continue to outweigh human rights and environmental considerations. In practice, (as well as conceptually) very little attention is paid to the social aspects of environmental challenges, which include welfare and political aspects such as participation as well as individual aspects of human dignity and health. Addressing environmental issues (e.g. climate change) which involve ethical, cultural and philosophical disagreements and choices, is not possible solely through economics and science. Equally important is the human dimension. This paper therefore argues that it is essential to put human beings back at the centre of the discussion. However, acknowledgement of the link between the environment and human rights is not ground-breaking (the paper translates this link into practical meaning). The paper therefore starts by presenting the theoretical evolution of human rights in the environmental discourse, censuring the lack of human rights operationalisation in environmental policy and practice. Subsequently, it suggests a

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human rights can act as a catalyst for welfare aspects

model of how human rights principles can be used in practice by considering a rights-based approach and the basic standards for the realisation of human rights related to environmental challenges. Finally, the paper provides some examples of the work of the Scottish Human Rights Commission, which is the national human rights institution for Scotland, in promoting human rights and, in particular, encouraging best practice in this context.

The paper focuses on the importance of human rights within the environmental discourse, and will demonstrate that human rights are not only a societal aim, but that its principles can also act as a catalyst between ecological and economic concerns, creating a coherent and robust framework for human development. The paper also takes this argument a step further by setting out a practical framework of principles, standards, responsibilities and actors which are essential for operationalising a human rights-based approach to environmental issues.

Historical Development

Human rights are instrumental in leveraging key (environmental) policy reforms and providing significant mechanisms to ensure participation and accountability. In fact, human rights have inconsistently appeared and been (vaguely) accepted in the discourse of the environment and development from the 1970s.² However, lamentably, human rights have not been fully developed in this area.

In the early 1970s international declarations and United Nations ("UN") resolutions began to link environmental concerns to human rights concepts such as freedom, equality, adequate conditions of living and development. In 1972, the Stockholm Conference on Human Environment stressed that, "man is both creature and moulder of his environment". The Declaration stressed the urgent desire for protection and improvement of the human environment which affects the well-being of peoples and economic development throughout the world. This approach understood environmental protection as a pre-condition for the well-being of human beings and focused on the ecological framework. Nonetheless, the language and impact of human rights in environmental discourse at that time was scarce.

In the 1980s the United Nations convened the World Commission on Environment and Development³ producing the seminal, but much debated, Brundtland Report.⁴ The Report highlighted three fundamental components to sustainable development⁵: environmental protection, economic growth, and social equity. The Report used an economic analysis to yield different economic diagnosis of the environmental and development problem.

In 1992 the United Nations Conference on Environment and Development (also known as the Earth Summit⁶) followed a different approach, though also instrumentalist, that understands certain human rights as essential elements to achieving environmental protection, the protection of human health being the central one.⁷ In fact, the Rio Declaration formulates a link between human rights and environmental protection largely in procedural terms (Principle 10⁸). These procedural rights, inspired by and contained in all human rights instruments, were adopted in the environmental context in order to ensure more effective and transparent decision-making and enforcement.

A more recent approach to human rights and the environment views the links as indivisible and inseparable and thus posits the right to a safe and healthy environment as an independent substantive human right.⁹ Despite this, conceptual integration of human rights is limited. In practice, economic or ecology analyses are still the preferred option for presenting environmental and climate change concerns in the United Kingdom and elsewhere.¹⁰ This drives discussion in a very particular direction and creates a utilitarian framework, which is both narrow and unprincipled.

It is argued that in practice environmental, economic and social spheres are equally important and mutually supportive. The proposition in this paper is that human rights can act as a catalyst for welfare aspects such as fair distribution of, "environmental bads and goods" and more individual aspects such as empowerment and democratic accountability.¹¹ This approach (human rights-based) recognises a variety of human roles in the environmental and climate change narrative, but also brings in rights and responsibilities.

Human Impact and Human Rights

It is suggested that environmental protection is, in fact, vital to the global fulfilment of human rights. The dilemma is that human rights are both challenged directly and indirectly by threats related to environmental degradation and climate change. Rights to food, shelter, livelihood, work and health are some that are most immediately violated, while the rights to security, to life and even to a nationality are substantively threatened. The growing effects of climate change are already beginning to affect the most vulnerable in society, here and abroad, but often these effects are determined by non-climatic factors such as inequality and geographical location.¹² Therefore, those most at risk from climate change are those whose human rights are most widely denied or left unfulfilled whether in the social, economic, political, civil or cultural spheres (and often, in practice, a combination of these dimensions).

Climate change is at the centre of the environmental discourse and again the narrative is very much focused on the realms of physical science and economics. Several studies and reports provide an increasingly detailed picture of how weather changes related to climate change will impact on human lives. The United Nations Development Programme ("UNDP") highlights five key transmission mechanisms through which climate change could stall and then reverse human development: agricultural production and food security; water stress and water insecurity; rising sea levels and exposure to climate disasters; ecosystems and biodiversity; and human health.¹³ Similarly, the Intergovernmental Panel on Climate Change outlines impacts in six main areas: ecosystems, food, water, health, coasts, and industry, settlement and society.¹⁴ In addition, forced migration and the physical disappearance of a State's entire territory pose additional challenges to the international community and international law.¹⁵

In reality the impacts of climate change are distributed very unevenly¹⁶ and cannot fully be taken into account by cost-benefit analyses, which are excessively restrictive and incomplete. Far from being a simple problem of science or economics, the debate (how we frame it, how we define it and what actions are adequate) can only be grasped through consideration of its human dimension. For instance, one of the most difficult challenges in climate change is distribution. The distributional question is made particularly complex because those who have largely caused the problem (industrialised countries) are not going to be those who suffer the most in the short term. In contrast, developing countries, which have generally contributed the least to human-induced climate change, seem to be the most vulnerable to the impacts of climate change. It is apparent that industrialised countries will cope better with the economic consequences of climate change; nevertheless there is a higher degree of responsibility from these countries to help developing countries mitigate climate change effects.¹⁷ Human rights provide the shell of rights that can be used as a benchmark for reviewing the action of governments.

Indirectly human rights can also be negatively affected by the policies and measures adopted to combat the adverse effects of climate change: mitigation and adaptation measures.¹⁸ While some mitigation and adaptation measures can ensure human rights, they can also have the opposite effect, undermining the effective realisation of rights of individuals and communities. For example, the effects of biofuel policies in the EU and the USA have raised questions about the impacts of these policies on food security in vulnerable food-importing countries.¹⁹ Similarly, adaptation policies that are implemented in ways that

discriminate or are carried out without ensuring procedural protections (access to information, community participation, etc.) may result in human rights infringements, e.g. population movements have to be assessed and carried out under a human rights framework which identifies responsibilities and ensures full participation.

It is suggested that by adopting a human rights-based approach, the environmental model would improve its effectiveness by enhancing the ability to manage risks²⁰ and improve environmental (and development) outcomes as well as ensuring that policy responses to climate change do not exacerbate discrimination and inequity at home and abroad.

Human Rights-based Approach

A human rights-based approach constitutes a framework of action as well as a methodological tool to fulfil the rights of people. It identifies the existence of the rights where every human being is recognised both as a person and as a right-holder, but also reinforces capacities of duty bearers (usually governments) to respect, protect and guarantee these rights. A human rights-based approach ensures that people are able to participate in decisions on climate change and the environment. This approach identifies the human rights at risk as well as the responsibilities of all actors, which improves legal and social accountability.

The key elements of a human rights approach are: participation, accountability, non-discrimination, empowerment and legality ("PANEL"). Taking a human rights-based approach to climate change implies that the principle of the inherent dignity of the human person applies to all. The elements can be summarised as such:

- Participation in decisions which affect the realisation of human rights: public participation renders decision-making more transparent and public service more effective as it takes into account individual situations.
- Accountability of duty-bearers to rights-holders: individuals and groups should have recourse to effective remedies, including reparation.
- Non-discrimination and prioritisation of vulnerable groups: this element recognises that there are groups who are particularly vulnerable to climate-change related impacts, e.g. children, the poor, the elderly and people living in areas prone to flooding.
- Empowerment of rights holders: this element sees individuals and groups as owners of rights and provides them with the power, capacities and capabilities to change their own lives. It includes human rights education and environmental information.
- Legality and linkage to rights: policies, processes and mechanisms should be formulated with reference to

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international human rights instruments and standards (see below).

Analysing climate change through a human rights lens allows for an inclusive understanding of how laws, social norms, traditional practices, and institutional actions positively or negatively affect these issues. A human rights-based approach shifts the paradigm from one that identifies victims, who are most often perceived as passive, to one acknowledging affected groups as active stakeholders and critical voices. As such, framing and conceptualisation are more robust. Policy options and political process tend to be more participative and democratic. Programmes based on human rights are more likely to provide early warning of problems and alleviate violations resulting from policy measures. Human Rights Impact Assessments ("HRIAs") are means of assessing the impact of policy or practice on the rights of those affected once the policy is implemented.²¹ Just as policy-makers consider the environmental or economic impacts by conducting impact assessments to explore these issues, HRIAs aim to make policy-makers consider the human rights impact of their policies before implementation.²² This will help programme planning and design.

Applying a human rights-based approach to programme or policy implementation means ensuring that human rights principles and standards are consistently being respected throughout the programming cycle. The principles of non-discrimination, prioritising vulnerable groups and accountability are key during this phase. When monitoring, information has to be systematically collected and disaggregated by income, gender, ethnicity and other markers depending on the scope and objective of the analysis. Disaggregated data is important for two principal reasons: 1) to make information "actionable"; and 2) to identify vulnerable and marginalised groups. This will help to evaluate policies, programmes and outcomes as well as ensure compliance with human rights. Measurement tools are particularly important for the realisation of rights and strengthening the capacity of rights-holders and duty-bearers. Most importantly, human rights standards and principles guide all processes and outcomes in all phases.

As such, in practice, a human rights-based approach to the environment and climate change identifies responsibilities under five broad headings:

- (a) Conceptualisation and analysis;
- (b) Policy and strategic decision-making;
- (c) Programme planning and design;
- (d) Implementation;
- (e) Monitoring and evaluation.

This range of responsibilities translates human rights principles into practical meaning and measurable action.

More specifically, a rights-based approach to tackling climate change will bring human beings back to the centre of the environmental discourse and harmonise international efforts addressed to peace, security and development (which are the UN pillars) producing better integrated and coordinated results. Human rights are both a catalyst for participation and action as well as a societal goal.

A human rights-based approach offers an invaluable opportunity to re-think the current models and focus on the costs of climate variation on vulnerable groups and development. This is a more participative, constructive and just model to deal with environmental and climate change concerns. Of course this is not cost free, a human rights-based approach is time-intensive, requires expertise and the ability to work with multiple participants; all of these are considerable challenges.

The Standards: Human Rights and Government Obligations

The protection of human rights by the rule of law is one of the greatest philosophical achievements of modern human history. One of the fundamental elements of a rights-based approach is that it recognises the existence of rights. In the context of environmental protection related to fulfillment of human rights, there are a number of standards and instruments, often developed in isolation from one another, that guarantee legal action²³ while fostering dialogue. These are:

1. Right to life: the right to life is protected by a number of international human rights instruments, e.g. art.6 of the International Covenant on Civil and Political Rights and art.2 of the European Convention on Human Rights ("ECHR"). The responsibility of the State to respect, protect and fulfil the enjoyment of this right requires not only a negative obligation to refrain from arbitrarily depriving a person of life, but also positive obligations.²⁴

The European Court of Human Rights ("ECtHR") has articulated similar obligations. The right to life is protected in art.2(1) of the ECHR in the environmental context. In *Budayeva v Russia*,²⁵ the ECtHR held that the Russian Federation violated its positive obligation to protect the right to life in the environmental context failing to: a) establish legislative and administrative frameworks to deter any threat to the right to life; and b) provide an adequate judicial response following alleged infringements of the right to life. In *Öneryıldız v Turkey*,²⁶ the ECtHR also consid-

ered States obligations under art.2 in a case involving a community living on a highly combustible rubbish dump in turkey.

2. Right to adequate food: the right to adequate food is protected or mentioned in a number of international human rights instruments, e.g. the International Covenant on Economic, Social and Cultural Rights; the International Convention on the Elimination of All Forms of Discrimination Against Women; the International Convention on the Rights of the Child; and the International Convention on the Elimination of All Forms of Racial Discrimination.

The UN Committee on Economic, Social and Cultural Rights ("CESCR") has expressly considered environmental degradation in its country reports, e.g. erosion and food contamination in Tunisia in 1986. In its General Comments No.12, on the right to adequate food, the CESCR affirmed that:

"[T]he right to adequate food is indivisibly linked to the inherent dignity of the human person and is indispensable for the fulfilment of other human rights enshrined in the International Bill of Human Rights. It is also inseparable from social justice, requiring the adoption of appropriate economic, environmental and social policies, at both the national and international levels, oriented to the eradication of poverty and the fulfilment of all human rights for all."²⁷

The CESCR expressed that States have a core obligation to take the necessary action to mitigate and alleviate hunger (as provided for in para.2 of art.11 of the Covenant), even in times of natural or other disasters. Elements of this right include adequacy and sustainability of food availability and access.

3. Right to the highest attainable standard of physical and mental health: the right to health is protected by art.12 of the International Covenant on Economic, Social and Cultural Rights ("ICESCR"), but also referred to in five other core international human rights treaties.

In General Comment No.14, on the right to the highest attainable standard of health, the CESCR acknowledged that:

"[T]he right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."²⁸

The Committee interprets the right to health as an inclusive right extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and

potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions,²⁹ and access to health-related education and information, including on sexual and reproductive health.

Article 12.2(b) of the ICESCR requires States parties to take the necessary steps for, "the improvement of all aspects of environmental and industrial hygiene". This includes adopting preventive measures in respect of: "[T]he 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."³⁰

A further important aspect pointed out by the CESCR is the participation of the population in all health-related decision-making at the community, national and international levels.

4. The right to water: the right to water is seen to be implicit in arts 12 and 11 (adequate standard of living) of the ICESCR. In General Comment No.15, on the right to water, the CESCR acknowledged that:

"Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity."³¹

In addition, environmental hygiene, as an aspect of the right to health under art.12 para.2(b) of the ICESCR, encompasses taking steps on a non-discriminatory basis to prevent threats to health from unsafe and toxic water conditions. States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees.

5. Right to adequate housing: the right to adequate housing is guaranteed in arts 11 (right to an adequate standard of living) and 12 (right to health) of the ICESCR. Article 11(1) of the Covenant requires State parties to, "recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions". Environmental degradation and climate change may increase urban and international migration.

In General Comment No.4, on the right to adequate housing, the CESCR noted that:

"The concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms

the right to water is seen to be implicit in arts 12 and 11

disadvantaged groups ...
should be ensured some degree of priority consideration
in the housing sphere

of shelter can be considered to constitute 'adequate housing' for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors."³²

These factors include accessibility, habitability and location as such housing should not be built on polluted sites or in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

In relation to accessibility the CESCR reminded the State parties that: "Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere."³³

6. Rights of internally displaced people ("IDPs") and the right to seek asylum: the right to seek asylum is primarily addressed by international refugee law. In recent years the environmental factor has become more recognised as one factor among many that may influence domestic and international migration. Those displaced by environmental degradation across borders do not enjoy international protection under the 1951 Convention Relating to the Status of Refugees ("Refugee Convention"). There is currently no clear legal basis for granting refugee status under international refugee law.³⁴ Some regional instruments have expanded the definition of refugees, e.g. the Cartagena Declaration on Refugees and the AU Convention Governing the Specific Aspects of Refugee Problems in Africa.

7. Right to respect for private and family life, home and correspondence: the right to private and family life is protected by a number of international human rights instruments, e.g. art.17 of the ICCPR protects people from "arbitrary or unlawful interference" with privacy, the family or the home. In the European context, art.8 of the ECHR provides similar protection. Article 8 rights have been used on numerous occasions to seek redress for human rights violations in the context of environmental contamination or deterioration, particularly noise and industrial pollution.

In *Hatton v United Kingdom*,³⁵ the European Court of Human Rights ("ECHR") accepted that excessive noise could constitute a violation of art.8. In *López Ostra v Spain*, the ECtHR held that there had been a breach of art.8 since severe pollution, "may affect an individual's well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."³⁶

In *Fadeyeva v Russia*,³⁷ the applicant complained under art.2 of the Convention (right to life) that the toxic pollutants put her life in danger, and that the authorities had failed to resettle her. However, the ECtHR preferred to examine the applicants' complaints under art.8 (right to respect for private and family life).

Article 8 has been the most unexpected development in jurisprudence of positive obligations which requires State parties to protect the health of individuals in their jurisdictions by undertaking substantive and procedural measures to avoid environmental hazards. This is a significant contribution of human rights to the enforceability of legal rights.

8. Procedural rights. In relation to procedural rights the CESCR has expressed, in General Comment No.9 on the domestic application of the Covenant, that:

"The Covenant norms must be recognized in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place."³⁸

Moreover, the importance of participatory rights in the environmental context has been widely recognised in international and domestic law.³⁹ There are three components to participatory rights:

- (a) access to information held by public authorities;
 - (b) participation in decision-making;⁴⁰ and
 - (c) access to and effective remedy, which includes full reparation for the injury caused in the forms of restitution, compensation and satisfaction or guarantees of non-repetition, either singly or in combination.⁴¹
- Principle 10 of the Rio Declaration and the Aarhus Convention reaffirmed these procedural rights.

International and regional instruments:

- ☐ Universal Declaration of Human Rights (1948)⁴²
- ☐ United Nations Framework Convention on Climate Change (1994)⁴³
- ☐ Convention on Biological Diversity (1993)
- ☐ Rio Declaration on Environment and Development (1992)
- ☐ The Stockholm Declaration (1972)
- ☐ The European Charter on Environment and Health (1989)
- ☐ International Covenant on Civil and Political Rights (1966)
- ☐ International Covenant on Economic, Social and Cultural Rights, and General Comment Nos 4, 12 & 15 of the Committee on Economic, Social and Cultural rights
- ☐ Convention on the Right of the Child (1989)⁴⁴
- ☐ The Geneva Conventions and 1977 Additional Protocol I (during armed conflict)

- Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters ⁴⁵ (1998)
- Draft Declaration of Principles on Human Rights and the Environment (1994)⁴⁶
- Guiding Principles on Internal Displacement (1998)
- European Convention on Human Rights (1950), and
- In Scotland: The Scotland Act 1998; Human Rights Act 1998.

The Scottish Human Rights Commission

The Scottish Human Rights Commission ("the Commission") is the national human rights institution for Scotland. The Commission promotes and protects the human rights of everyone in Scotland. The Commission was established by The Scottish Commission for Human Rights Act 2006, and we started our work in 2008. The Commission is independent of the UK and Scottish Parliaments and Governments. We are working to increase awareness, recognition and respect for human rights in Scotland by connecting human rights to everyday issues of which climate change and environmental problems are examples.

The Commission focuses on the following points:

- Promote and protect the human dignity of everyone in Scotland by increasing empowerment, ability and accountability in relation to environmental degradation, in particular climate change mitigation and adaptation.
- Bringing human rights to life by helping to take human rights beyond the formalities of the legal system, seeking to achieve a culture of human rights in Scotland by using the environment as a context for change.
- Supporting human rights in the world by encouraging dialogue and sharing good practice by encouraging a rights-based approach to achieving environmental justice.

Some specific actions are:

- Bringing rights to life. Climate Justice Conference at Glasgow Science Centre. In November 2009, The Commission co-hosted a major conference on climate justice and human rights.⁴⁷
- Promoting a human rights-based approach to environmental challenges and translating it into practical meaning and actions.
- Developing integrated tools such as human rights impact assessment and human rights measurement.
- Engaging with stakeholders. In 2009, a Joint Communiqué between the Scottish Government, the Scottish Human Rights Commission, SEPA and BTCV Scotland was agreed to achieve specific operation on human rights and climate change.⁴⁸

□ Participating in international events that reflect Scottish experiences. The Commission is a member of the Commonwealth Forum of National Human Rights Institutions' Working Group on Climate Change and Human Rights. The Chair of the Commission participated in the "Scotland Day" Parallel event to COP 15 (UN international climate change conference), Copenhagen, organised by the Scottish Government, British Council Scotland and the University of Edinburgh.

□ Encouraging dialogue. The Commission is frequently invited to participate in environmental/climate change discussions and events.

Scotland is rapidly being recognised as a leading international player in addressing climate change.⁴⁹ The adoption of the key elements of a human rights approach (PANEL) in the environmental policy and practice will further demonstrate Scotland's commitment to being an international model of best practice. The Commission believes a human rights-based approach to environmental and climate change policy and implementation frameworks will minimise the negative effects of environmental degradation and climate change by enhancing the ability to manage risks and upgrading people's capability to cope with these problems while protecting and promoting human rights.

Conclusion

Environmental problems, such as climate change, present a significant challenge to contemporary global society. Moreover, they impact disproportionately on the most vulnerable members of society across continents and nations, e.g. the old, the very young and the poor. Additionally, there is a danger that policy measures used to respond to these problems could exacerbate discrimination and inequity. Yet the social dimension, which is underpinned by human rights, comprising both welfare and individual aspects, have not been included in a sufficient and practical manner.

This paper has argued that the dominant framing of environmental problems through modernist, economic paradigms has largely served to overlook important human aspects. It is therefore of great importance to put human beings back at the centre of debates around environmental issues (and policy responses). To this end, this paper has indicated a new approach on the basis of human rights law and standards which goes beyond pure economic (and ecological) considerations. It re-affirmed a paradigm where these three concepts are equally important and mutually supportive. It made the connections and provides the conceptual basis for the protection and promotion of human rights in the environmental context.

Bringing rights to life

a practical and comprehensive human rights framework to be considered

Additionally, this paper, and the Commission, has taken this project a step further by offering a practical and comprehensive human rights framework to be considered. The framework identifies principles, standards and responsibilities which are to guide thinking in all phases: from policy to evaluation. The human rights approach recommended by the Commission provides a principled and imaginative alternative to the current models.

The paper has highlighted the Commission's line in this area and programme of action for the future. A programme that promotes and contributes to the development of policies and implementation frameworks, locally, nationally and internationally that protects and promotes human rights (especially social and economic) which might be affected by environmental degradation.

¹ Diego is the Policy Officer at the Scottish Human Rights Commission. Prior to taking up this position, he held a lectureship in Law at the Robert Gordon University and was a visiting lecturer at Universitat Jaume I, Spain, and ESC Clermont, France. He has an LL.M. in International Human Rights Law, Organisations and Humanitarian Law from the Lund University, Sweden. His research has led to him working with the UN Special Representative on the issue of Human Rights and Transnational Corporations and Other Business Enterprises at Harvard University, United States. He has also worked with the United Nations High Commissioner for Refugees in Central America and previously worked in Colombia as a corporate lawyer and as a research assistant for the judiciary.

² There are a number of UN bodies, Specialised Agencies and programmes that focus on these issues such as United Nations Framework Convention on Climate Change ("UNFCCC"); The Human Rights Council ("HRC"); The Office of the Human Rights Commissioner for Human Rights ("OHCHR"); United Nations Economic Commission for Europe ("UNECE"); the United Nations Development Programme ("UNDP") and the Global Compact ("GC").

³ Brundland Report (A/RES/38/161).

⁴ The approach taken by the Report has been much criticised by development studies, Sociology of Science and Technology and some human rights scholars.

⁵ Sustainable development is defined as, "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."

⁶ The following documents were adopted in the Earth Summit, Rio de Janeiro : a) Rio Declaration on Environment and Development; b) Agenda 21; c) Convention on Biological Diversity; d) Forest Principles; and e) Framework Convention on Climate Change (followed up by the Kyoto Protocol).

⁷ D. Shelton (2002) "Human Rights, Health & Environmental Protection: Linkages in Law & Practice", Health and Human Rights Working Paper Series No.1, WHO.

⁸ Principle 10 stresses that, "environmental issues are best handled with participation of all concerned citizens." The 2001 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters elaborates on this principle.

⁹ The International Court of Justice, the judicial organ of the UN, has also been involved in the protection of the environment. In the Case concerning the Gabčíkovo-Nagymaros Project (*Hungary v Slovakia*), Judgement of September 25, 1997, the Court stated that: "The protection of the environment is... a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments." See also *Yanomami v Brazil*, The Inter-Am CHR 1985; SERAC and *CEJR v Federal Republic of Nigeria*, ACHRPR, Comm. 155/96, 2001. For a further discussion see D. Shelton (2002) "Human Rights, Health & Environmental Protection: Linkages in Law & Practice", available at http://www.unhcr.org/hhr/Series_1%20%20Sheltonpaper_rev1.pdf.

¹⁰ See, e.g. The Stern Review on the Economics of Climate Change (2006). Tony Blair claimed that: "This is the most important report on the future published by the Government in our time in office." (Speech, October 30, 2006, London).

¹¹ For democratic accountability see Behn, Robert (2001) "Rethinking Democratic Accountability", Washington, D.C., Brookings Inst. Press; Ahlback, Shirin (1999). Revisionens roll i den parlamentariska demokratin. I: SOU 1999:76. Demokratiutredningens forskarvolym 1. Stockholm: Fritzes.

¹² German Socio-Economic Panel ("GSOEP") 1986-2006. Detailed information on the GSOEP is found at <http://www.din.de/english/sop/>.

¹³ UNDP Report 2007-08 Fighting climate change: Human solidarity in a divided world, available at: <http://undp.org>.

¹⁴ Intergovernmental Panel on Climate Change ("IPCC") AR4 Synthesis Report, pp.48-53.

¹⁵ The First Assessment Report of the IPCC (1990) noted that the greatest single impact of climate change might be on human migration. The report estimated that by 2050, 150 million people could be displaced by climate change-related phenomena (A/HRC/10/61:18). The current international refugee framework does not cover environmental factors as grounds of persecution.

¹⁶ An estimated 262 million people were affected by climate disasters annually from 2000-2004, of whom over 98 per cent live in developing countries (UNDP, Human Development Report 2007/2008, Fighting climate change: Human solidarity in a divided world, p.8).

¹⁷ The unequal burden of the effects of climate change is reflected in art.3 of the UNFCCC Convention, referred to as, "the equity principle".

¹⁸ Mitigation measures seek to reduce the anthropogenic causes of climate change, especially by reducing greenhouse gas emis-

sions and adaptation measures seek to adjust to new environmental conditions.

¹⁹ Human rights and Climate Change: 4th Meeting of the Group of Experts on Biodiversity and Climate Change, CoE, T-PVS/Inf (2009) 4.

²⁰ For example, using human rights impact assessment tools.

²¹ HRIAs should go beyond the strict legal focus of the current Human Rights Act approach. Consideration should also be given to economic, social and cultural rights and rights protecting particular groups (e.g. children, people with disabilities etc.) and the new duty under the Equalities Act 2010 to consider equality on ground of socio economic status.

²² The EU Commission has adopted a model of integrated impact assessment ("IIA") to assess its policy-making and formulation of legislative proposals. The integrated model includes assessment of economic, environmental and social impacts. See the impact assessment guidance at http://ec.europa.eu/governance/better_regulation/impact_en.htm.

²³ The Human rights Act 1998 and Scotland Act 1998 (s.29).

²⁴ See The Human Rights Committee, General Comment No.6, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

²⁵ [2008] ECHR 15339/02.

²⁶ [2004] ECHR 657.

²⁷ E/C.12/1999/5.

²⁸ E/C.12/2000/4.

²⁹ See, e.g. *Budayeva v Russia* (ECtHR); *Hatton v UK* (ECtHR); *Fundepublico v Mayor of Bugalagrande* (Colombia); *Mebta v Union of India* (India).

³⁰ E/C.12/2000/4.

³¹ E/C.12/2002/11.

³² E/13/12/91.

³³ Ibid.

³⁴ Article 1A(2) of the Refugee Convention defines a refugee as: "[A]ny person who ... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country."

³⁵ (2002) 34 EHRR 1.

³⁶ (1994) 20 EHRR 277 at para.51.

³⁷ Application no.55723/00 ECHR.

³⁸ E/C.12/1998/24.

³⁹ See also recent jurisprudence emerging from art.6 of the ECHR in the context of town and country planning, e.g. *R (on the application of Alconbury Developments Ltd) v Secretary of State* [2001] All E.R. (D) 116.

⁴⁰ HRC found that people have the right to participate in decision-making which may affect the realisation of their rights in *Apirana Mabuika et al v New Zealand* (CCPE/C/70/D/547/1993).

⁴¹ For a further discussion see UN Doc. E/C.12/2000/4.

⁴² Article 28 of the UDHR states: "Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

⁴³ The Convention on Climate Change sets an overall framework for intergovernmental efforts to tackle the challenge posed by climate change. The Convention entered into force on March 21, 1994 and is the principal forum to discuss climate change. The Convention enjoys near universal membership, with 192 countries having ratified. The UNFCCC Secretariat recently designated a focal point on human rights with respect to adaptation.

⁴⁴ See art.24 of the CRC.

⁴⁵ The Aarhus Convention links environmental rights and human rights and grants the public rights regarding access to information, public participation and access to justice in governmental decision-making processes. The Convention has a unique compliance review mechanism in international environmental law. However, despite human rights being the foundation of this Convention, there is no sign of it being incorporated in the review process.

⁴⁶ The 1994 Draft Declaration describes the environmental dimension of established human rights, such as the rights to life, health and culture. It also describes the procedural rights, such as the right to participation, necessary for realisation of the substantive rights. The Draft Declaration also describes duties that correspond to the rights—duties that apply to individuals, governments, international organisations and transnational corporations. The Draft Principles have been used by domestic courts for the protection of the environment (e.g. "a healthy environment is a sine qua non condition for life itself and that no right could be exercised in a deeply altered environment" in *Fundepublico v. Mayor of Bugalagrande*, Juzgado Primero superior, Interlocutorio No.32, Tulua, Colombia, December 19, 1991). The 1991 Colombian Constitution establishes a link between public health and protection of the environment (arts 8, 49, 79, 80, 86 and 88).

⁴⁷ For more information see SHRC website at <http://www.scottishhumanrights.com/news/latestnews/article/climateconferencenews>.

⁴⁸ The Communiqué was discussed by delegates from environmental, social, business and governmental organisations who participated in the Human Rights and Climate Change Conference held in Glasgow on November 23, 2009. In their workshop discussions, delegates considered how the principles of the Communiqué could be translated into practice in Scotland. For the Joint Communiqué see <http://www.scottishhumanrights.com/news/latestnews>.

⁴⁹ The Scottish government commitment to reduce domestic greenhouse gas emissions by 2020 is 42 per cent. In the longer term, the target is to reduce 80 per cent of emissions by 2050. These targets were incorporated in the Climate Change (Scotland) Act 2009 and will play a significant part in the UK's effort to reduce emissions by 60 per cent by 2050.

"Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized"

Potter v Scottish Ministers
[2010] CSOH 85*Current Awareness*Compiled by Scott Blair, *Advocate***ECHR ARTICLES INDEX***Article 6—Case 2**Article 8—Case 1***PRISONS****(1) Potter v Scottish Ministers [2010] CSOH 85**

P, a prisoner, sought judicial review of a Direction of the Scottish Prison Service (“SPS”) which advised the recipients of telephone calls made from prison that the call emanated from prison. Calls were also monitored and this was made known as part of the message. P argued that the Direction was an unlawful and disproportionate interference with his rights under art.8. His contention was that the blanket effect of the Direction posed an unjustifiable limitation on his right to contact family and friends, particularly as the recipient of the call might not know the caller was in prison. He succeeded but the respondents reclaimed. They argued that the Direction served to protect the public, including victims of crime, from unwanted calls from prisoners. The Inner House ([2007] CSIH 67) allowed that appeal and remitted the case back to the Outer House for a proof, principally on the question of proportionality. After hearing the proof Lord Matthews held that there was no breach of art.8.

Held: petition dismissed. (1) The SPS clearly regard the rehabilitation of prisoners and the maintenance of contact between them and their families and friends as a priority. On the other hand, it has to manage the prison population. As a public authority they owed duties also to persons outwith the prison, if they might be affected by the activities of the prisoners. The maintenance of good order and discipline within the prisons involved some degree of control over people outside to stop them from encouraging prisoners to misbehave or from bringing prohibited articles into the prison and it was necessary to exercise some control over the use to which telephones are put. It was plainly necessary, in my view, that the prison authorities be able to monitor and record telephone calls for the purposes of the prevention of disorder and crime but, in particular, for the discipline and control of persons required to be detained therein in terms of s.39(1) of the Prisons (Scotland) Act 1989. (2) The surveillance operated by SPS was intended to be overt rather than covert. In any event, that that is so can be seen from the notice which advises prisoners of the fact of monitoring and recording, etc. (3) While on occa-

sions covert surveillance would be justified, that would not be the case in the vast majority of cases. The significant number of calls made from prison shows that there are a significant number of recipients whose art.8 rights would be infringed were they not made aware of the fact of the surveillance. They would thus at the very least require to be told of this surveillance. (4) There would be little point in advising someone that their calls were being logged, recorded and perhaps monitored without telling them who was doing the logging, etc. On this basis alone, it was considered that there is a pressing objective need for the message and that s.39 has to be construed in a way which allows for its imposition in the telephone calls. (5) The Court placed weight on evidence of prisoners making unwanted telephone calls to the victims of their domestic abuse and violence. A number of women had provided evidence that the message provided them with an opportunity to decide how to deal with unwanted calls. One third of women experienced ongoing harassment after a relationship had ended. (6) Although criticism was made of the blanket approach in Scotland, when one examined the systems in England and Ireland, the Court could see that they encounter the same problems but tackle them in a different way. In England, most of the prisoners are on a call-enabling system with a sample being monitored but responsibility for advising the recipient of calls that the call is coming from a prison is left to the prisoner. This system was formerly in use in Scotland and was abandoned because Scottish prisoners did not pass on the information. In Ireland there is a different approach but the prisoner can only telephone a limited number of people who will, in view of the way the system works, know that he is calling them from a prison. (7) The fact that the contents of the Direction were not debated in Parliament was not of any significance. If there is any interference with the petitioner’s art.8 rights it is not on the same level as the deprivation of a right to vote, and so it was unnecessary for the Direction to have been the subject of Parliamentary scrutiny. (8) Assuming the Direction and the inclusion of the message to be, “according to law” there was still no breach of the petitioner’s rights under art.8(1). The right under art.8 is a nuanced or sophisticated one. Further, the case of *AB v the Netherlands* (2003) 37 EHRR 48 indicated that there was no right to the use of a telephone and that failure to provide a telephone to a prisoner would not breach art.8(1), albeit that it might impinge on the prisoner’s ability to contact his family. That always presupposes that there is some other means of communication available, which is plainly the case here. Quite apart from letter writing, the evidence

disclosed that the office phone could be used in emergencies and the petitioner has access to visits. Here there were conditions which controlled the use of a telephone but in fact only tangentially affected it. They are designed for proper purposes and in as much as they may impinge upon the art.8(1) rights of the prisoner, that impact was tenuous. Also, on a more fundamental level and far from being an interference with the petitioner's art.8(1) rights, the provision of the telephone with the conditions attached is an example of SPS giving effect to those rights. They were not required to provide a telephone but they did so, albeit with conditions attached. (9) A blanket approach was justified. The statistics could be read as showing that the existence of the message actually works. The hang-up rates are impressive when compared with hang-up rates from other organisations. There is a limited amount of information available from the statistics about the number of threats made, etc. As a proportion of the total number of calls made in any one year they do not amount to a great deal. However, they did show that this kind of activity does go on. The fact that the monitoring is overt allows people to know that their calls will be listened to and can self-evidently act as a deterrent, albeit the statistics show that some people nonetheless engage in criminal activity. It is likely that since only some of the calls are monitored the actual numbers of prisoners and recipients engaging in such an activity are greater. It was plain that the message does not work for everyone but that is no reason to discard it. (10) The regulation of prisoners is a matter of great importance. The SPS have operational knowledge of what goes on in prisons and bullying and exploitation are likely to result from a system which discriminates between prisoners as to their use of the phone. The interference with a prisoner's art.8(1) right is marginal at best. Arrangements can be made to make calls at specific times, as was done in the petitioner's case. The suggestion that the message acts as a reminder either to him or to the recipient of the call that he is in prison is entirely baseless. The prisoner cannot but be aware during every waking hour where he is and it was difficult to envisage that at least for the most part, his family and friends do not know where he is. Doubtless he will constantly be asked how he is coping and told that he is being missed. If there are other people whom he wishes to contact, who do not know that he is in prison, he had the option of writing to them or making arrangements for someone else to answer the phone in the first instance. If there was interference with the petitioner's art.8(1) rights, such interference was proportionate.

CHILDREN

(2) *Knox, Authority Reporter v S and L* [2010] CSIH 45

These two appeals, brought by way of stated case, give rise to the same question—whether on a proper construction of the Children (Scotland) Act 1995 (“the 1995 Act”) an unmarried father with a contact order in his favour in respect of his child is a “relevant person” in terms of s.93(2)(b), with consequent important procedural rights in respect of a Children's Hearing held in relation to that child. S and L argued that their rights under arts 6 and 8 were infringed because they were allowed to attend such a hearing but could not be heard at it. They sought Declarations of Incompatibility.

Held: there would be a violation of art.6 if the fathers could not be heard before the Children's Hearing. Using s.3(1) of the Human Rights Act 1998, s.93(2)(b) could be read in a way which was compatible with art.6. (1) After an analysis of the statutory provisions the question came to be whether a construction of the 1995 Act, having the effect that an unmarried father with a contact order in his favour is not a “relevant person”, could be said to be incompatible with his art.6 and/or art.8 rights. (2) In relation to art.6 the primary question which arises is whether, when a Children's Hearing makes a supervision requirement providing for no contact between a child and his father (notwithstanding a contact order in his favour), it can be said to involve a determination of the father's civil rights within the meaning of that art.6. (3) Once granted, the orders were plainly enforceable against any party seeking to prevent their exercise. They may be lesser rights than parental rights and responsibilities, but they are nevertheless rights, and important ones at that. In particular, for an unmarried father the obtaining of a contact order is invariably an important step on the way to establishing family life. The question came to be whether, insofar as a Children's Hearing makes an order which has the effect of preventing or limiting the exercise of contact under a contact order, it could be said to involve a determination of that civil right. It is, of course, true that a Children's Hearing would have no power to create or to take away the right afforded by a contact order. (4) It was well established that art.6 covers proceedings the result of which are decisive for private rights and obligations (*Le Compte, Van Leuven and De Meyere v Belgium* (1982) 4 EHRR 1 at para.44 and *Ringeisen v Austria* (1971) 1 EHRR 455 at para.94). That, however, does not mean that only proceedings which create or take away rights can be regarded as decisive for them. Equally, at the other end of the scale, a mere tenuous or remote connection between the outcome of proceedings and the civil right in question is not enough (see e.g. *Fayed v United Kingdom* (1994) 18 EHRR 393). (5) Further, as was re-

Knox, Authority Reporter v S and L [2010] CSIH 45

***HJ (Iran) and HT(Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31**

cently emphasised in the House of Lords in *R (Wright and others) v Secretary of State for Health* [2009] 1 A.C. 739 at para.21, whereas art.6 does not ordinarily apply to proceedings in which provisional measures are taken, “[s]ome interim measures have such a clear and decisive impact upon the exercise of the civil right that Article 6(1) does apply” (Baroness Hale of Richmond). It was thus held that since the provisional listing of a care worker on a list of people considered unsuitable to work with vulnerable adults could result in irreparable damage to the person’s employment or prospects of employment, it amounted to a determination of a civil right within art.6(1). (6) It was not suggested in the present case that the decision of the Children’s Hearings could be said to have been provisional or interim, and it could readily be said that loss of contact over any significant period could do real and possibly irreparable damage to a father’s prospects of establishing or maintaining contact, and thus family life, with his child in accordance with a contact order in his favour. In these circumstances the art.6 rights of an unmarried father with a contact order would be engaged in any Children’s Hearing which could reach a decision which would have the effect of suspending or materially restricting the exercise of the rights afforded by that order. (7) It could not be disputed that if unmarried fathers in the position of S and L were not afforded “relevant person” status in respect of any relevant Children’s Hearing, they would not be afforded sufficient rights to enable them effectively to participate and thus to have a fair hearing in accordance with art.6. They would, in particular, not have the rights afforded to relevant persons in the Act and in the 1996 Rules. Although the Chairman of a Children’s Hearing has discretion to allow attendance under r.13(d), and this was allowed in L’s case, that would not be enough as it did not give a right to be heard. (8) It followed that it cannot be said that, insofar as the relevant Children’s Hearings involved a determination of the civil rights of S and L, either of them was afforded a fair hearing in accordance with art.6. (9) Having reached the conclusions on art.6 it was unnecessary to reach a decision in respect of the question of the compatibility of the provisions of the 1995 Act with art.8. However, there was no doubt that this was a more difficult matter for the unmarried fathers. First, there might be issues over whether a father might properly be said to have established family life with the child. Secondly it is plainly arguable, insofar as the 1995 Act requires an unmarried father in the position of S and L first to obtain a parental rights and responsibilities order in order to qualify as a relevant person, that while such an application could be refused, having regard, in particular, to the welfare of the child, any consequential interference with art.8 rights (in their procedural aspect) would fall to be regarded as legitimate and proportionate. (10) Insofar as the Act, con-

strued according to ordinary canons of construction, would be incompatible with the art.6 rights of unmarried fathers with contact orders in their favour, the question is whether the provisions of the Act can be construed in such a way as to avoid that incompatibility. The duty under s.3(1) of the Human Rights Act 1998 is clear. “So far as it is possible to do so, primary legislation...must be read and given effect in a way which is compatible with the Convention rights”. It is clear that this is a powerful tool, albeit that a meaning may not be adopted which departs substantially from a fundamental feature of an Act (see e.g. Lord Nicholls of Birkenhead in *In Re S (Care Order: Implementation of Care Plan)* [2002] 2 A.C. 291, 313). It would be necessary to imply words by so that could be done and to make it compliant with art.6 the subsection would have to be read as: “Any parent enjoying parental responsibilities or parental rights or a right of contact in terms of a contact order under Part I of this Act”.

HUMAN RIGHTS STOP PRESS

The Supreme Court has continued to make its mark in the human rights field. In *HJ (Iran) and HT(Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31, two gay asylum seekers from Iran and Cameroon won their fight against deportation after the Supreme Court ruled that they have the right to asylum in the UK. Agreeing with the Home Office, the Court of Appeal had found both men could conceal their sexuality to avoid the risk of being persecuted and neither had a, “well-founded fear of persecution” which entitled them to protection under the UN Convention on Refugees. This argument did not find favour with the Supreme Court, however. Lord Hope said: “To compel a homosexual person to pretend that his sexuality does not exist or suppress the behaviour by which to manifest itself is to deny him the fundamental right to be who he is.”

Awaiting judgment in the Supreme Court is the case of *Cadder v HM Advocate*. This is an appeal from the High Court of Justiciary. The issues are whether the use of: (i) material obtained in a police interview without legal representation; and (ii) dock identification, in the criminal proceedings in which the Appellant was convicted, rendered his trial unfair contrary to art.6 ECHR. The appellant was convicted of assault and breach of the peace. At trial, the prosecution led evidence which the appellant provided while being interviewed by police without a lawyer being present. There was also a dock identification. The outcome of the case is keenly awaited as if a finding of a breach of art.6 is made it could lead to a considerable number of appeals as well as the need to secure legal aid for representation at all police station interviews.

