

# Confronting inequality beyond sustainable development: The case for eco-human rights and differentiation

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## Abstract

The development model emphasizing economic growth has been at the root of today's environmental crises. Its reshaping as 'sustainable' development was supposed to address its shortcomings while giving particular attention to the needs of the poor. This has largely failed and in the process inequalities have increased significantly. Inequalities between people need to be addressed through eco-human rights that are collective and multi-level to better reflect today's environmental challenges. These rights build on the idea of solidarity rights, are framed around the principle of subsidiarity and the need for accountability beyond a single State. Inter-State inequality has been addressed in part through differential treatment in environmental law. It needs to be reconfirmed to address ongoing inequalities and increased resistance to such measures; needs to be more flexible to reflect the specific situation of smaller groups of countries; and needs to integrate elements of intra-State inequality.

## 1 | INTRODUCTION

The mainstream development model spearheaded by the global North focusing on economic growth and consumerism has been at the root of the current environmental crises. This 'development' has had such impacts on the planet that a new geologic era, the Anthropocene, has been named to reflect its destructive powers.<sup>1</sup> The environmental crises caused by this development model include various local to global issues, including climate change, biodiversity loss and land degradation.

Environmental crises reached such a magnitude by the last quarter of the twentieth century that international policymakers came up with new concepts to reflect the need to think differently

about development. It is in this context that the notion of sustainable development was framed. It sought first to offer a platform for integrating environment and development.<sup>2</sup> Since it was introduced at a time when debates around the development model focused on global South-global North dimensions, sustainable development was framed from the start around an understanding that poverty was one of the central concerns that needed to be addressed.<sup>3</sup>

The focus on extreme poverty eradication emphasizes the need to improve the situation of the worst off. Section 2 highlights that this does not necessarily lead to a focus on inequality. This proved to be a crucial shortcoming, as extreme poverty has not been eradicated yet,

<sup>1</sup>See, e.g., United Nations Development Programme (UNDP), Human Development Report 2020: The Next Frontier – Human Development and the Anthropocene (UNDP 2020); LJ Kotzé, 'Rethinking Global Environmental Law and Governance in the Anthropocene' (2014) 32 *Journal of Energy and Natural Resources Law* 121.

<sup>2</sup>Rio Declaration on Environment and Development in 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (vol I) (12 August 1992) Principle 4.

<sup>3</sup>World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press 1987).

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inequalities between countries have not significantly come down, and inequalities between people have increased dramatically. This eventually led to inequality being given more attention, as reflected in the introduction of Goal 10 of the Sustainable Development Goals (SDGs).<sup>4</sup> Its adoption indirectly confirms that policy measures seeking to realize sustainable development have failed to achieve significant reductions in inequality. At the same time, SDG 10 remains notable for its lack of ambition.<sup>5</sup> It is thus necessary to go beyond the mainstream policy framework. In a context where more than three decades of reliance on sustainable development have failed to prevent the world from breaching several planetary boundaries, there is a need to find a new policy language for the future. The concept of degrowth offers one of the possible ways forward to start with redistribution to ensure the well-being of all, rather than relying on the hypothetical benefits of trickle down.<sup>6</sup>

The findings of Section 2 provide the basis for articulating new ways to confront inequality. Section 3 starts by focusing on inequality between people and proposes the introduction of eco-human rights, building on discussions seeking to broaden human rights to make them more relevant in the environmental context. Eco-human rights comprise three central constituent elements. They first include a collective and global dimension, without which the nature of today's social and environmental challenges cannot be faced. Second, eco-human rights provide that States have increased obligation to effectively ensure their realization for all in all countries. Third, eco-human rights are framed around the duty bearer as a bottom-up, eco-friendly institutional structure that is democratically accountable from the local to the global level and is structured around the principle of subsidiarity.

Section 4 moves on to address inter-State inequality. It argues that differentiation in international environmental law, an emanation of intra-generational equity, has made a difference to inequality between the global South and the global North and that continued inequalities warrant further differential measures for decades to come. It then examines specifically developments in the climate change regime, which was at the forefront of differentiation but has also been at the centre of attempts to curtail its reach in the context of the negotiations towards the Paris Agreement. On this basis, it argues for moving towards forms of differentiation that better reflect inequality in environmental and social terms, that differentiate between smaller groups of countries or individually and that can be framed around specific groups of socio-economically marginalized people within countries.

## 2 | INEQUALITY AND DEVELOPMENT: BEYOND SUSTAINABLE DEVELOPMENT

Inequality and development are intrinsically linked. Development has been the marker of the distinction between the North and the South, the former being seen as having achieved development ('developed') and the latter trying to catch up ('developing'). Developing countries used this gap to call for redistribution and preferential treatment in international trade law. This eventually coalesced into the broader demands for a New International Economic Order (NIEO).<sup>7</sup> The NIEO did not lead to the kinds of changes that developing countries had hoped for, and over subsequent decades there has been only limited reference to the need for structural change at the global level. As a result, it is developing countries that bear most of the burden of adjustment.<sup>8</sup>

In practice, reliance on an understanding of development largely centred on economic growth has held sway since the late 1940s.<sup>9</sup> This seems to have done little to reduce inequalities between countries or people. To be sure, there are some success stories, such as South Korea, which became a member State of the Organisation for Economic Co-operation and Development (OECD) already in 1996. However, for many other countries, economic growth has not led to an appreciable relative appreciation of their development position. This is, for instance, the case for the least developed countries, whose share of world output is lower than it was in the mid-1970s, while their number has increased during the same period from 24 to 47.<sup>10</sup> Further, there is no necessary correlation between economic growth and higher social indicators. This is, for instance, the case of India whose economic growth averaged 7.1 percent in the decade to 2018 but whose ranking on the World Hunger Index was still 101 out of 116 listed countries in 2021.<sup>11</sup>

The latter confirms that inequality between people is just as important as inequality between countries. It is therefore extremely worrying to see that after several decades marked by high economic growth in several countries, inequality between people has been growing over time to reach unmatched levels by the end of the 2010s.<sup>12</sup> This inequality is not limited to its economic dimensions. The rich use more of the Earth's resources than the poor, the rich pollute more than the poor and overall contribute more to global environmental issues, such as climate change and biodiversity loss.<sup>13</sup>

<sup>4</sup>UNGA 'Transforming Our World: the 2030 Agenda for Sustainable Development' UN Doc A/ RES/70/1 (21 October 2015).

<sup>5</sup>See, e.g., P Cullet, 'SDG 10: Reduce Inequality Within and Among Countries' in J Ebbesson and E Hey (eds), *Cambridge Handbook on the Sustainable Development Goals and International Law* (Cambridge University Press 2022) fc.

<sup>6</sup>J Hickel, 'The Imperative of Redistribution in an Age of Ecological Overshoot: Human Rights and Global Inequality' (2019) 10 *Humanity* 416, 421.

<sup>7</sup>A Anghie, 'Inequality, Human Rights, and the New International Economic Order' (2019) 10 *Humanity* 429.

<sup>8</sup>K Freistein and B Mahler, 'The Potential for Tackling Inequality in the Sustainable Development Goals' (2016) 37 *Third World Quarterly* 2139, 2148.

<sup>9</sup>ALS Staples, *The Birth of Development: How the World Bank, Food and Agriculture Organization, and World Health Organization Changed the World, 1945–1965* (Kent State University Press 2006).

<sup>10</sup>D Nayyar, 'Can Catch up Reduce Inequality?' in PAG van Bergeijk and R van der Hoeven (eds), *Sustainable Development Goals and Income Inequality* (Edward Elgar 2017) 169, 177.

<sup>11</sup>P Gupta, 'This is the Story of India's GDP Growth' (World Economic Forum, 13 April 2018) <<https://www.weforum.org/agenda/2018/04/india-s-remarkably-robust-and-resilient-growth-story>>; K von Grebmer et al, '2021 Global Hunger Index' (Welthungerhilfe 2021).

<sup>12</sup>United Nations (UN), 'The Sustainable Development Goals Report 2019' (UN 2019) 2.

<sup>13</sup>See, e.g., D Kenner, 'Inequality of Overconsumption: The Ecological Footprint of the Richest' (Anglia Ruskin University 2015).

## 2.1 | From ‘development’ to ‘sustainable development’

Development has been associated for decades with progress and with a movement forward. This dynamic movement is centred around economic growth, which has been so crucial that it is usually seen as a pre-condition for development.<sup>14</sup> The consequence has been that other dimensions of development, such as social and environmental aspects, have remained subsidiary to the focus on growth.<sup>15</sup>

The limits of development as economic growth became more apparent once the environment became a significant policy concern at national and international levels. This led to the search for broader concepts to better reflect the multiple dimensions of development. This coalesced into the notion of sustainable development that has provided the linchpin of this broader discourse.<sup>16</sup>

Sustainable development grew over time to encompass all aspects of development, as reflected in the formalization of the three pillars (economic, social and environmental) meant to be its bedrock.<sup>17</sup> This very broad framework has allowed very different actors to have their own understanding of the term and this has contributed to its longevity. At the same time, this has hampered attempts at effective implementation.<sup>18</sup>

In its mainstream understanding, sustainable development has been a notion that does not upset existing equilibriums. It has provided the basis for ensuring that environmental and social factors influence decisions concerning economic development. At the same time, it has never gone much further than that because it remains centred on economic growth. This explains why nearly five decades after the first major report that warned humanity about the existence of limits to growth,<sup>19</sup> realizing sustainable development remains based on growth as its principal driver.<sup>20</sup>

Even this theoretical equilibrium between the economic, social and environmental dimensions of development has come under pressure, as confirmed, for instance, by the attempt to shift the discourse to the concept of ‘green economy’ at Rio+20.<sup>21</sup> Generally, efforts to reconcile the environment-development equation have failed as the ‘tension between these two competing terms remains’.<sup>22</sup> This explains why after more than three decades of reliance on sustainable

development, it is seen as doing little more than tinkering with development.<sup>23</sup>

## 2.2 | Sustainable development, poverty and inequality

Poverty has been at the centre of the sustainable development discourse since the World Commission on Environment and Development (WCED) report. The WCED emphasized ‘the concept of “needs”, in particular the essential needs of the world’s poor, to which overriding priority should be given’.<sup>24</sup> This was in keeping with the focus of development policy on poverty reduction.<sup>25</sup>

The focus on poverty reduction has remained at the centre of sustainable development policy to date. The Millennium Development Goals included the eradication of extreme poverty in the first goal.<sup>26</sup> The same is true of SDGs, whose Goal 1 is the eradication of extreme poverty. The distinction between poverty and extreme poverty is crucial. Indeed, even if ‘extreme poverty’ was eradicated, this would not amount to the realization of the basic content of all human rights for everyone, since living on more than US\$1.95 a day cannot be equated in and of itself with living a life of dignity. This is in part because poverty is multidimensional and cannot be reduced to a minimum income.<sup>27</sup>

As noted above, while poverty reduction has been at the centre of policy debates for decades, inequality among people was not recognized as a significant policy problem until the adoption of the SDGs.<sup>28</sup> This is despite the fact that it has been recognized for long that redistribution is necessary for ‘serious poverty reduction’.<sup>29</sup> There is indeed an important difference between a focus on poverty and inequality. This is because the latter is concerned ‘with how society as a whole is structured, not just with the outcome for those that are worst off’.<sup>30</sup>

A step has been taken in this direction with the inclusion of SDG 10, which explicitly addresses inequality between people and between States. It addresses horizontal inequalities or inequalities between social, ethnic, linguistic or other population groups; vertical inequalities or inequalities of wealth, income or social outcome.<sup>31</sup> It also addresses inequalities between countries, already covered since the

<sup>14</sup>A Kothari et al, ‘Introduction: Finding Pluriversal Paths’ in A Kothari et al (eds), *A Post-Development Dictionary* (Tulika 2019) xxi.

<sup>15</sup>See, e.g., S Adelman, ‘Justice, Development and Sustainability in the Anthropocene’ in P Cullet and S Koonan (eds), *Research Handbook on Law, Environment and the Global South* (Edward Elgar 2019) 14, 15.

<sup>16</sup>See, e.g., M Jacobs, ‘Sustainable Development as a Contested Concept’ in A Dobson (ed), *Fairness and Futurity: Essays on Environmental Sustainability and Social Justice* (Oxford University Press 1999) 21.

<sup>17</sup>Johannesburg Declaration on Sustainable Development in ‘Report of the World Summit on Sustainable Development’ UN Doc A/CONF.199/20 (2002) para 5.

<sup>18</sup>JE Viñuales, ‘The Rise and Fall of Sustainable Development’ (2013) 22 *Review of European Community and International Environmental Law* 3, 4.

<sup>19</sup>DH Meadows et al, *The Limits to Growth* (Universe Books 1972).

<sup>20</sup>See, e.g., N Eisenmenger et al, ‘The Sustainable Development Goals Prioritize Economic Growth over Sustainable Resource Use: A Critical Reflection on the SDGs from a Socio-Ecological Perspective’ (2020) 15 *Sustainability Science* 1,101.

<sup>21</sup>Kothari (n 14) xxvi.

<sup>22</sup>JE Viñuales, ‘Sustainable Development’ in L Rajamani and J Peel (eds), *Oxford Handbook of International Environmental Law* (2nd edn, Oxford University Press 2021) 285, 299.

<sup>23</sup>A Kothari, ‘Radical Well-Being Alternatives to Development’ in Cullet and Koonan (n 15) 64, 65.

<sup>24</sup>WCED (n 3) 54.

<sup>25</sup>See, e.g., World Bank, ‘World Development Report 1978’ (World Bank 1978) iii.

<sup>26</sup>UNGA ‘United Nations Millennium Declaration’ UN Doc A/RES/55/2 (18 September 2000).

<sup>27</sup>See, e.g., Committee on Economic, Social and Cultural Rights, ‘Statement on Poverty and the International Covenant on Economic, Social and Cultural Rights’ UN Doc E/C.12/2001/10 (2001) para 7.

<sup>28</sup>S Fukuda-Parr, ‘Reducing Inequality: The Missing MDG: A Content Review of PRSPs and Bilateral Donor Policy Statements’ (2010) 41 *IDS Bulletin* 26.

<sup>29</sup>HE Daly, ‘Toward Some Operational Principles of Sustainable Development’ (1990) 2 *Ecological Economics* 1, 5.

<sup>30</sup>G Therborn, ‘Globalization and Inequality: Issues of Conceptualization and Explanation’ (2001) 52 *Soziale Welt* 449, 454.

<sup>31</sup>G MacNaughton, ‘Vertical Inequalities: Are the SDGs and Human Rights up to the Challenges?’ (2017) 21 *International Journal of Human Rights* 1050.

time of the Rio Declaration through the principle of common but differentiated responsibilities.<sup>32</sup>

With regard to inequality between people, the first outcome target focuses on ensuring that income growth of the bottom 40 percent of the population should be higher than the national average.<sup>33</sup> This approach is equivalent to seeking a reduction in income inequality, as measured by the share of the bottom 40 percent of the population in national income.<sup>34</sup> This is insufficient because it fails to address overall income inequality, is framed in such a way that the target can be realized while income inequality increases overall, and it fails to address the fact that inequality increases are created mostly at the top end of the income scale.<sup>35</sup> Inequality between States is addressed in some of the outcome targets, for instance, with a focus on the need to strengthen the position of developing countries in institutions where the one-State one-vote rule does not apply, such as international financial institutions.<sup>36</sup> However, SDG 10 neither reflects nor builds on developments in international environmental law concerning differential treatment addressed in Section 4 of this article.

SDG 10 breaks some new ground insofar as it recognizes the need to tackle inequality domestically and takes a step forward in calling for a reduction in inequalities of outcome.<sup>37</sup> Yet, overall, the targets included in SDG 10 are weak, give insufficient weight to reducing income inequality<sup>38</sup> and reflect a limited understanding of the demands of substantive equality by focusing on economic and financial aspects.<sup>39</sup> As a result, SDG 10 does not provide a template for comprehensively addressing the shortcomings of sustainable development. It remains firmly welded to a policy framework that sees development, and in particular economic growth, as the solution to inequality and poverty rather than being part of the problem.

### 2.3 | Finding alternatives to sustainable development

The need for change is now mainstream, and even the United Nations Development Programme finds that '[b]usiness as usual simply will not work'.<sup>40</sup> At the same time, the same report advocates against throwing out the central tenets of development policy. This will not suffice in a context where reliance on sustainable development for more than three decades has failed to ensure the eradication of extreme poverty, not to mention that of poverty in general. In

addition, development can also cause impoverishment, such as where development-related displacement makes people worse off.<sup>41</sup>

The problem is not just that economic growth has failed to trickle down, but also that it would be impossible to achieve the growth necessary to eradicate poverty without triggering dire environmental consequences for the planet.<sup>42</sup> Further, in a context where growth since the end of the twentieth century has led to fast-increasing inequalities among people, redistribution and well-being must be at the centre of attention.

The need of the hour is thus better sharing of existing resources and well-being rather than a call to regress.<sup>43</sup> This is well reflected in the concept of degrowth, which does not call for diminishing standards of living but rather for reorganizing production and consumption 'to achieve environmental sustainability, social justice, and well-being'.<sup>44</sup> One of the central elements found in notions such as degrowth is the emphasis on the need for democratically led redistribution.<sup>45</sup>

In a context where planetary boundaries preclude reliance on economic growth in the future as the main engine of progress,<sup>46</sup> it is redistribution between States and individuals that will ensure social and ecological sustainability.<sup>47</sup> This needs to be enshrined in legal terms. As the legal frameworks address people and States separately, the next two sections address each dimension in turn.

## 3 | CONFRONTING INEQUALITY BETWEEN PEOPLE: THE CASE FOR ECO-HUMAN RIGHTS

Inequality between people strikes at the root of the promise of human rights based on universal entitlements. The constraints that inequality puts on the realization of human rights for all is not a new challenge, and the push for the recognition of the right to development in the 1980s following the waning of the campaign for the NIEO was meant in part to contribute to bring about 'equitable development'.<sup>48</sup> In the meantime, inequalities have further increased. This reflects in part the fact that international human rights per se do not require 'any kind of limit on the gap between rich and poor'<sup>49</sup> and

<sup>32</sup>P Cullet, 'Principle 7: Common but Differentiated Responsibilities' in JE Viñuales (ed), *The Rio Declaration on Environment and Development: A Commentary* (Oxford University Press 2015) 229.

<sup>33</sup>UNGA (n 4) Target 10.1.

<sup>34</sup>E Anderson, 'Equality as a Global Goal' (2016) 30 *Ethics and International Affairs* 189, 193.

<sup>35</sup>ibid; MacNaughton (n 31) 1058; N Ahmed et al, 'Inequality Kills' (Oxfam 2022).

<sup>36</sup>UNGA (n 4) Target 10.6.

<sup>37</sup>M Luebker, 'Poverty, Employment and Inequality in the SDGs: Heterodox Discourse, Orthodox Policies?' in van Bergeijk and van der Hoeven (n 10) 141, 150.

<sup>38</sup>R van der Hoeven, 'Can the SDGs Stem Rising Income Inequality in the World?' in van Bergeijk and van der Hoeven (n 10) 192, 210.

<sup>39</sup>See, e.g., P Cullet, *Differential Treatment in International Environmental Law* (Ashgate 2003) 23.

<sup>40</sup>UNDP (n 1) 9.

<sup>41</sup>MM Cernea and JK Maldonado, 'Challenging the Prevailing Paradigm of Displacement and Resettlement: Its Evolution, and Constructive Ways of Improving it' in MM Cernea and JK Maldonado (eds), *Challenging the Prevailing Paradigm of Displacement and Resettlement: Risks, Impoverishment, Legacies, Solutions* (Routledge 2018) 1.

<sup>42</sup>J Hickel, 'The Imperative of Redistribution in an Age of Ecological Overshoot: Human Rights and Global Inequality' (2019) 10 *Humanity* 416, 421.

<sup>43</sup>Cf. Bruno Latour, *Down to Earth: Politics in the New Climatic Regime* (Polity 2018) 49.

<sup>44</sup>F Demaria and S Latouche, 'Degrowth' in Kothari et al (n 14) 148.

<sup>45</sup>A Kothari, F Demaria and A Acosta, 'Buen Vivir, Degrowth and Ecological Swaraj: Alternatives to Sustainable Development and the Green Economy' (2014) 57 *Development* 362.

<sup>46</sup>See, e.g., W Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 *Science* 736.

<sup>47</sup>Hickel (n 42) 424.

<sup>48</sup>Anglie (n 7) 429. Note that debates around the right to development have been revived in recent years. See, e.g., RG Teshome, 'The Draft Convention on the Right to Development': A New Dawn to the Recognition of the Right to Development as a Human Right? (2022) 22 *Human Rights Law Review* ngac001.

<sup>49</sup>Hickel (n 42) 416.

indicates that the traditional framing of international human rights is not well suited to addressing the challenges posed by substantial inequalities.<sup>50</sup>

The limitations of the mainstream framing of human rights are even more noticeable in the context of environment-related rights that pose additional challenges. First, environment-related claims can often not be easily reduced to individual claims that are the hallmark of international human rights.<sup>51</sup> Second, environment-related claims often span more than one country or even all States. Third, the inherent anthropocentricity of human rights collides with the ecocentric dimensions of environmental issues.<sup>52</sup>

Addressing inequality in terms of environmental rights thus calls for rethinking the way in which rights are conceived, and this article argues that there is a need for a new grammar of eco-human rights to reflect the changes needed. These rights rekindle debates that were started in the 1990s. Some of the fundamental issues arising are similar, but the context has changed, in part because the horrific scale of humankind's impacts on the environment has become much more evident. In earlier publications, eco-human rights were already seen as providing an avenue to bring together anthropocentric and ecocentric perspectives. The two were seen as inseparable insofar as the conditions allowing for the 'long-term realisation of human rights are precisely those conditions which allow for long-term ecological well-being'.<sup>53</sup> From another perspective, ecological rights were seen as human rights that are subject to certain limitations.<sup>54</sup>

Today's eco-human rights build on these premises. They are rights that can accommodate not just individual but also collective claims. They are rights whose duty bearer is not necessarily limited to a single State because an increasing number of environmental challenges cannot be addressed at the level of an individual state. The rights holders are human beings and therefore they borrow a large part of their content from human rights. At the same time, they include a strong ecocentric perspective that reflects the nature of the concerns addressed.

Eco-human rights are related in some ways to evolving debates over rights of nature.<sup>55</sup> They share the premise that a large part of environmental protection frameworks have been overly anthropocentric. Some understandings of rights of nature are ecocentric and may thus not entirely align with eco-human rights. In the practice of rights of nature in different parts of the world, however, their construction does not necessarily reflect a strong opposition between anthropocentric and ecocentric perspective but rather a synthesis that

foregrounds conservation without excluding livelihood uses.<sup>56</sup> In this way, there is significant correspondence between eco-human rights and rights of nature. One of the main differences is that eco-human rights specifically use the language of fundamental universal rights to foster similar aims.

### 3.1 | Collective and global dimensions of eco-human rights

It is widely acknowledged that human rights are 'premised on meeting the needs of the most vulnerable first'.<sup>57</sup> Yet, this has been based on an understanding of rights as individual, something that is particularly constraining in the context of environmental harms. The language of rights thus needs to be able to respond better to the distinct individual and collective issues that arise. It also needs to be able to respond to harms that are not caused specifically by actions of an individual State but that are related to global environmental issues.

First, eco-human rights need to be conceived in such a way that they can effectively address the types of environmental harms humankind faces today. In an increasing number of situations, the sum of individual harms cannot be equated with collective harm. This is, for instance, the case with regard to climate change-induced displacement that cannot be effectively tackled by addressing only individual rights, since this excludes all the collective aspects of community life.<sup>58</sup> At the international level, the lineaments of the recognition of collective rights can be found, for instance, in the UN Declaration on the Rights of Indigenous Peoples.<sup>59</sup> However, indigenous peoples' rights are still often considered as related but distinct from human rights.<sup>60</sup>

Further developments can be identified at the regional level, such as in the African Charter where collective rights have been effectively integrated for decades.<sup>61</sup> This confirms that the recognition of collective rights is possible and opens the door to a new understanding of rights, where livelihoods, culture and the environment can all be considered together, as the African Commission has already done.<sup>62</sup>

Another novel aspect is the global dimension of eco-human rights. This can be linked to the pre-existing debate on solidarity rights that have prefigured the need to think beyond the traditional framework of international human rights. These 'third-generation rights' reflect the global dimension of certain rights by recognizing that they

<sup>50</sup>Cf. Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Belknap Press of Harvard University Press 2018) 216.

<sup>51</sup>See, e.g., F Francioni, 'International Human Rights in an Environmental Horizon' (2010) 21 *European Journal of International Law* 41.

<sup>52</sup>See, e.g., LJ Kotzé, 'Human Rights and the Environment in the Anthropocene' (2014) 1 *Anthropocene Review* 252.

<sup>53</sup>M Halsey, 'Environmental Crime: Towards an Eco-Human Rights Approach' (1997) 8 *Current Issues in Criminal Justice* 217, 236.

<sup>54</sup>PE Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law' (1998) 10 *Georgetown International Environmental Law Review* 309.

<sup>55</sup>See, e.g., JJ Guzmán, 'Decolonizing Law and Expanding Human Rights: Indigenous Conceptions and the Rights of Nature in Ecuador' (2019) 4 *Deusto Journal of Human Rights* 59.

<sup>56</sup>See, e.g., M Tănăsescu, 'Rights of Nature, Legal Personality, and Indigenous Philosophies' (2020) 9 *Transnational Environmental Law* 429.

<sup>57</sup>M Kothari, 'Human Rights' in Kothari et al (n 14) 200, 201.

<sup>58</sup>See, e.g., Peninsula Principles on Climate Displacement Within States (2013) <<http://displacementsolutions.org/wp-content/uploads/2014/12/Peninsula-Principles.pdf>>.

<sup>59</sup>UNGA 'Declaration on the Rights of Indigenous Peoples' UN Doc A/RES/61/295 (2 October 2007).

<sup>60</sup>See, e.g., K Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 *European Journal of International Law* 141.

<sup>61</sup>Organization of African Unity (OAU), African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) 1520 UNTS 217.

<sup>62</sup>African Commission for Human and Peoples' Rights, Communication 276: Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (2003).

can only be effectively protected and realized at a broader level that transcends the nation State.<sup>63</sup> Eco-human rights constitute one of the categories of rights that cannot be effectively addressed only at the national level. This has become even much more visible over the past few decades, as confirmed by the rapidly growing concerns related to anthropogenic climate change.

In this broader framework, eco-human rights do not seek to replace existing rights but rather add some new levels of protection. The twin protection of individual and collective rights is nothing new, as confirmed by the African human rights regime. The global dimension is a challenge that has not been tackled yet. However, its relevance, which was first noted in the debates over solidarity rights in the last quarter of the twentieth century, has become much more apparent. This is a challenge that international human rights and environmental law share. Neither has effectively responded to the fact the realization of certain human rights or the solution to certain global environmental problems cannot be effectively found through legal instruments framed around the individual sovereign interests of States.

A realist response to this may be that States have not shown any willingness to mend their ways over the past few decades. Rather, the temptation to withdraw from multilateralism has been in evidence in recent years. In this regard, the COVID-19 pandemic has confirmed that a movement away from cooperation and solidarity is both unwise and impractical, something that is true *a fortiori* for the unfolding climate crisis.<sup>64</sup> This is in fact confirmed by the re-assertion of the old principle of solidarity among States.<sup>65</sup> This twin use of solidarity as a basis for solidarity rights and for inter-State relations offers a strong basis on which to build a regime that fosters redistribution and the realization of fundamental rights. Eco-human rights can in this sense provide a stronger framework for addressing inequality in a context of growing environmental crises that the present human rights framework has been unable to tackle effectively.

### 3.2 | More extensive duties of States

The traditional understanding of human rights limited to a relationship between individuals and one State is insufficient to reflect the multiple relationships that are at play in environmental matters. This is, for instance, the case with regard to cross-border duties of States. A debate concerning extraterritorial duties of States has started, but this needs to be given new bases in an environmental context. In general, these duties find an anchor in the 1966 International Covenant on Economic, Social and Cultural Rights that mentions the duty of assistance of each State to other States to help them realize the rights recognized.<sup>66</sup> Debates on extraterritorial duties of States have

progressed since the beginning of the century but generally remain framed within the framework offered by human rights law,<sup>67</sup> even though some authors have gone further, and, for instance, considered solidarity and economic redistribution as a basis for extraterritorial duties.<sup>68</sup>

The debate on extraterritorial duties has been taken up in an environment-specific context and framed, for instance, in terms of diagonal rights.<sup>69</sup> This is based on the same idea that our understanding of human rights should not be constrained by sovereign borders but the conceptual framework on which it is based remains that of reciprocal obligations between formally equal States. Eco-human rights go beyond this by integrating equity in terms of differential treatment as reflected in the principle of common but differentiated responsibilities (and respective capabilities).<sup>70</sup> This offers a substantive link between the human rights and environmental law regimes and the basis for considering equity between States as a relevant factor in framing duties. Thus, States that have either contributed proportionally more to environmental harm or that have proportionally higher capacity to address this harm have duties towards other States, as well as towards holders of human rights in other countries. In other words, eco-human rights require going not only beyond the singular vertical relationship that has characterized human rights to date but also beyond formal sovereign equality in a context where inequality is at the root of most environmental problems.

### 3.3 | Rethinking the duty bearer as a bottom-up eco-friendly institution

The expansion of the scope of rights that is called for in the context of eco-human rights makes the introduction of a new understanding of the duty bearer a necessity. In the context of global environmental issues, it is not possible to ensure the realization of rights by one specific State or even by several States, as implied by the concept of extraterritorial duties. As a result, a new institutional framework is necessary to ensure the effective realization of eco-human rights.

International law does not offer much guidance in this regard because States have been generally unwilling to set up human rights institutions that would be able to take binding decisions for member States. A potential template could be that of the International Seabed Authority set up to manage the use and protection of deep seabed minerals.<sup>71</sup> This arrangement was made possible because negotiating States agreed to the principle of common heritage of humankind as

<sup>63</sup>See, e.g., K Drzewicki, 'The Rights of Solidarity: The Third Revolution of Human Rights' (1984) 53 *Nordisk Tidsskrift for International Ret* 26.

<sup>64</sup>Cf. T Heyd, 'Covid-19 and Climate Change in the Times of the Anthropocene' (2021) 8 *The Anthropocene Review* 21.

<sup>65</sup>UNGA 'Towards a New International Economic Order' UN Doc A/RES/75/225 (21 December 2020) para 3.

<sup>66</sup>International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 art 2(1).

<sup>67</sup>N Bhuta, 'The Frontiers of Extraterritoriality: Human Rights Law as Global Law' in N Bhuta (ed), *The Frontiers of Human Rights* (Oxford University Press 2016) 1.

<sup>68</sup>See, e.g., R Wilde, 'Pursuing Global Socio-Economic, Colonial and Environmental Justice through Economic Redistribution: The Potential Significance of Human Rights Treaty Obligations' in C Bindert et al, *Research Handbook on International Law and Social Rights* (Edward Elgar 2020) 56.

<sup>69</sup>See, e.g., JH Knox, 'Diagonal Environmental Rights' in M Gibney and S Skogly (eds), *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press 2010) 82.

<sup>70</sup>Rio Declaration on Environment and Development (n 2) Principle 7.

<sup>71</sup>United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 art 156.

the basis for regulating the Area, even if it had to be watered down before the regime could come into force.<sup>72</sup> No such consensus exists for matters related to human rights. In any case, even if States did come to a consensus position on a centralized authority to govern eco-human rights, this would not be a suitable framework. The basic underlying reason is that even if the principle of common heritage of humankind is equitable in terms of inter-State relations, it does not offer a bridge between individuals, groups, States and international institutions.

The institutional framework for eco-human rights needs to be based on a different basis that is able to address the local to global dimensions of the issues concerned and that can effectively reflect the needs and concerns of individuals and groups at the local level, as well as the broader dimensions that need to be addressed at a global level. In a context where States have not proved able to transcend their perceived sovereign interests at the international level and sovereign powers at the national level, a separate institutional framework is needed.

The temptation to go for the easy option of having a strong international institution overseeing the realization of these eco-human rights should be resisted. What is needed is decision making centred on rights holders rather than a power centre located even further away from them than national governments currently are.

To be legitimate, the duty bearer needs to be accountable for its actions. Further, to be acceptable, it needs to be conceived from the local to the global level and needs to be framed on a nested basis. The underlying principle should be that of subsidiarity, implying that power should be preferentially located at the lowest possible level unless coordination is required at a higher level.<sup>73</sup>

There are some existing frameworks that can provide a starting point for framing an accountable and democratically legitimate institutional framework. The public trust doctrine has been extended to water and other natural resources in several countries, specifically to counter the tendency of the State to assert control and/or ownership.<sup>74</sup> A statutory framework for the same exists, for instance, in South Africa.<sup>75</sup> To date, public trustees that have been set up are usually the subnational or national government, and this fails to effectively restrict the power of the State. At the same time, the same concept could be used in more imaginative ways, such as by linking it with indigenous principles.<sup>76</sup> Another option is the setting up of an ombudsperson to represent interests that cannot represent themselves, such as in the case of future generations. This has, for instance,

been given the shape of a Future Generations Commissioner in Wales.<sup>77</sup> A further option is found in places where nature's rights have been formalized, as in the case of New Zealand's Whanganui River.<sup>78</sup> It is recognized as a legal person, but its human face is Te Pou Tupua, which manages the river on a day-to-day basis. In practice, Te Pou Tupua is represented by one person nominated by the government and one by the Iwi with interests in the Whanganui River.<sup>79</sup>

Overall, the new institutional structure can build on various models at the national level paving the way for more socially equitable, democratic and environmentally friendly governance of the environment. The main challenge is to apply this model at the international level. There may be limited scope for global institutions with effective democratic legitimacy at this juncture. At the same time, in the same way that supranationalism remains relatively novel, this is an idea that has progressed. It warrants much improvement even in the context of the European Union, where it is most developed but the very idea of the direct election of Members of the European Parliament is a testament to the fact that there is scope for change.<sup>80</sup>

#### 4 | CONFRONTING INTER-STATE INEQUALITY: THE NEED TO RETHINK AND STRENGTHEN DIFFERENTIATION

Inequality between States has been a subject of increasing attention. Addressing inequality between States was done for long mostly at the level of specific cases of application of specific rules. In other words, equity was applied essentially in the context of disputes between States by international adjudicatory bodies.<sup>81</sup> It was progressively realized that this was not sufficient and that more structured measures were needed. These can be generally seen as reflecting distributive justice concerns framed around intra-generational equity.

In practice, concerns for equity between States became much more prominent after decolonization led to the creation of a large group of new States that were classified as developing countries because they were deemed to be behind other countries in terms of levels of economic development. This led to the development of 'preferential treatment' measures in international economic law, in recognition of the fact that formal legal equality was insufficient to allow developing countries to compete.<sup>82</sup>

<sup>72</sup>ibid art 136; Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (adopted 28 July 1994, provisionally entered into force 16 November 1994) 1836 UNTS 3.

<sup>73</sup>GR Marshall 'Nesting, Subsidiarity, and Community-based Environmental Governance Beyond the Local Level' (2008) 2 International Journal of the Commons 75.

<sup>74</sup>See, e.g., *National Audubon Society v Department of Water and Power of the City of Los Angeles* Supreme Court of California, 17 February 1983, 658 P.2d 709; *MC Mehta v Kamal Nath* Supreme Court of India (1997) 1 SCC 388; Republic of South Africa, National Water Act, 1998, s 3.

<sup>75</sup>South Africa, National Environmental Management Act, 1998, s 2.

<sup>76</sup>F Mazzocchi, 'A Deeper Meaning of Sustainability: Insights from Indigenous Knowledge' (2020) 7 Anthropocene Review 77, 89.

<sup>77</sup>Well-being of Future Generations (Wales) Act, 2015.

<sup>78</sup>New Zealand, Te Awa Tupua (Whanganui River Claims Settlement) Act 2017.

<sup>79</sup>ibid ss 14, 18, 20.

<sup>80</sup>E de Brabandere, 'The Impact of Supranationalism on State Sovereignty from the Perspective of the Legitimacy of International Organisations' in D French (ed), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 450, 460.

<sup>81</sup>See, e.g., A Gourgourinis, 'Delineating the Normativity of Equity in International Law' (2009) 11 International Community Law Review 327.

<sup>82</sup>See, e.g., N Kofele Kale, 'The Principle of Preferential Treatment in the Law of GATT: Toward Achieving the Objective of an Equitable World Trading System' (1987) 18 California Western International Law Journal 291.

#### 4.1 | Addressing inequality in international environmental law: Differential treatment

International environmental law responded to inequality between States with the introduction of measures of 'differential treatment'. Overall, international environmental law can be seen as generally more responsive to international inequality than some other branches of international law. In fact, the introduction of sustainable development as the guiding principle for environmental policy was seen at the outset as a positive step reflecting in part the concerns of the global South in terms of environmental policy.

In practice, environmental regimes have been structured for decades around the need to reflect the different position of global South countries in international treaties. This is achieved through differential measures that move away from the traditional principle of reciprocity of obligations in recognition of the fact that a legal regime based on formal legal equality does not necessarily lead to outcomes that are equitable if there is too much inequality among the parties.<sup>83</sup>

Differentiation is reflected in the principle of common but differentiated responsibilities (CBDR) that has come to epitomize differential treatment in international environmental law.<sup>84</sup> The importance of CBDR as a marker of the difference of international environmental law explains why developing countries have repeatedly argued for its reassertion.<sup>85</sup>

#### 4.2 | Strengths and shortcomings of differentiation in the climate change regime

Differential treatment has been particularly important in the climate change regime. This is reflected in the fact that the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) is one of the fundamental principles in the United Nations Framework Convention on Climate Change and therefore informs all climate change legal instruments.<sup>86</sup> It reflects equity generally but happens to reflect the situation prevailing in the climate change context particularly well, in particular as of the early 1990s when there was a very good correlation between higher historical and present greenhouse gas emissions by developed countries, and higher capacity to address the problem. This provided the basis for the adoption of the Kyoto Protocol's differentiated emission reduction commitments.<sup>87</sup>

This extensive application of differentiation was already controversial in the 1990s and played a significant role in the United States failing to ratify the Kyoto Protocol.<sup>88</sup> In the meantime, putting all

developing countries in a single category has become increasingly difficult to justify in a context where China has, for instance, become the highest emitter of greenhouse gases.<sup>89</sup> It is probably no surprise that in the context of the negotiations for what became the Paris Agreement, an attempt was made to sideline the principle of CBDRRC.<sup>90</sup> Eventually the principle was retained but with the addition of a qualification 'in the light of different national circumstances'.<sup>91</sup> This change is what allowed the shift from negotiated commitments as was the case in the Kyoto Protocol to so-called nationally determined contributions (NDCs).<sup>92</sup> The result has been hailed by some as a step forward from an 'a bipolar, rigid and static type of differentiation'.<sup>93</sup>

In reality, the Paris Agreement reflects not just an overall lack of ambition in terms of addressing climate change but also a steep movement backwards in terms of South–North equity. NDCs signal not just a return to reciprocity based on formal equality. In fact, they turn the clocks back much further since they reflect an absence of international ambition to effectively address climate change. This is due to the fact that each country essentially determines its commitment according to its own sovereign interests.

Unsurprisingly, even the UN General Assembly has noted 'with concern that ... the nationally determined contributions presented thus far by the parties to the Paris Agreement are not sufficient'.<sup>94</sup> This reflects the underlying analysis that the aggregate effect on global emissions of new mitigation pledges for 2030 is insufficient.<sup>95</sup>

#### 4.3 | Finding a new grammar for differentiation

There remain deep inequalities in terms of human development indicators between States. This has been made worse by the pandemic, which has disproportionately impacted poor countries. In this context, the need for differentiation is as great as ever. What is needed is thus to reaffirm the need for equity measures while at the same time working towards addressing the shortcomings that have been identified over time. Differentiation of the future should be in particular more responsive to the diversity of situations found within each large group of countries, as well as better reflect the environmental dimension of the issues addressed, rather than the existing criterion of levels of economic development.

The need for rethinking the bases for differentiation directly derives from the failure of negotiating States to adopt an ambitious climate change agreement. The Paris Agreement's NDCs are not just a

<sup>83</sup>Cullet (n 39) 23.

<sup>84</sup>Rio Declaration on Environment and Development (n 2) Principle 7.

<sup>85</sup>UNGA 1 (n 4) para 12.

<sup>86</sup>United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 art 3.

<sup>87</sup>Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162 art 3.

<sup>88</sup>See, e.g., P Lawrence and M Reder, 'Equity and the Paris Agreement: Legal and Philosophical Perspectives' (2019) 31 *Journal of Environmental Law* 511, 522.

<sup>89</sup>See, e.g., World Bank, 'Data – Total Greenhouse Gas Emissions (kt of CO<sub>2</sub> Equivalent)' <<https://data.worldbank.org/indicator/EN.ATM.GHGT.KT.CE>>.

<sup>90</sup>See, e.g., L Rajamani, 'Differentiation in the Emerging Climate Regime' (2013) 14 *Theoretical Inquiries in Law* 151.

<sup>91</sup>Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 55 ILM 740 art 2.

<sup>92</sup>*ibid* art 4.

<sup>93</sup>S Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?' (2016) 25 *Review of European, Comparative and International Environmental Law* 151, 154.

<sup>94</sup>UNGA 'Protection of Global Climate for Present and Future Generations of Humankind' UN Doc A/RES/76/205 (17 December 2021) para 6.

<sup>95</sup>United Nations Environment Programme (UNEP), 'Emissions Gap Report 2021: The Heat Is On – A World of Climate Promises Not Yet Delivered' (UNEP 2021) xvii.

disappointment in terms of mitigation commitments but also a retreat from solidarity. Putting solidarity at the centre of international relations in the 2020s is not just a way to return to a more humane international society, it is also essential to address the various pressing environmental crises that humankind faces. This will require not only framing measures in the context of solidarity as has been done in the past but also agreeing that sovereign interests are not the appropriate lens to address global environmental problems.

The framing for differential treatment measures remains the deep inequalities that have structured attempts to foster substantive equality among states for decades. What needs to change is the manner in which differentiation is operationalized. Since the late twentieth century, differential treatment has been framed in the context of sustainable development, which has led to the emphasis being put on 'development' as the marker of differentiation rather than environmental elements. This needs to be recast so as to put the primary emphasis on environmental and social indicators.

Further differentiation needs to move ahead of the division of the world in two broad categories to reflect the situation of each individual country or at a minimum smaller groups of countries effectively sharing common characteristics, as well as common interests in terms of the environmental issue considered. At present, in a case such as climate change, it is at the very least unsuitable to find that countries whose economies are entirely dependent on fossil fuel extraction are put in the same category as countries slated for submergence by sea-level rise caused by the use of fossil fuels.

In addition, in a context where eco-human rights can be framed around nested institutions from the local to the global level, there is no reason why environmental differentiation cannot conversely go beyond the veil of sovereignty. This may be strongly resisted by some States arguing against interference in their domestic affairs. At the same time, this will help in revealing the fact that it is inappropriate to look at countries only through the lens of macro-indicators. This is well reflected in the case of India, which is now one of the leading economies and leading contributors to climate change. At the same time, some social indicators for a significant part of the population remain very low and it is therefore correct to argue that India cannot be asked to take the same commitments as OECD countries. This finer analysis provides a way to go beyond aggregate features and to adopt a more nuanced understanding of what a country is in international terms. This could also ensure that any differential measures adopted at the international level effectively reach the more marginalized populations, or in other words that domestic inequality be integrated to international negotiations. This is in a sense what SDG 10 proposes by addressing simultaneously inequality between people and countries. This is also an excellent way to ensure that inequality is not just looked at in terms of global South-global North relations but can also be applied to inequalities within global North countries.

## 5 | CONCLUSION

The COVID-19 pandemic has confirmed what the world knew for a long time but increasingly refused to acknowledge. Humankind shares a single planet that steadfastly refuses to recognize political boundaries as relevant factors in framing health or environmental problems. The move away from solidarity in recent years has had dramatic impacts for the majority of the world's population and for the planet. To address this, the first step that needs to be taken is to move away from the discourse of (sustainable) development that has failed to offer the solutions people and the planet require. The age of development needs to give way to new thinking that acknowledges and responds much better to inequality, as a starting point for addressing the social and environmental crises that humankind faces today. This will require a new understanding of progress and well-being.

The new policies that are necessary to address global environmental problems need to be built around the recognition of fast increasing inequality and to link inequality between people and between states. SDG 10 provides a limited starting point for doing so. This needs to be supplemented with rethinking the way in which the law can provide answers to the challenges humankind faces. The first proposed step is to recognize eco-human rights. These build on the promise of human rights but are framed in such a way that they are better suited to the collective and global dimensions of the environmental challenges that need to be addressed. The second step is to build on the promise of differential treatment in international environmental law to foster more extensive redistributive measures. This needs to better reflect the fact that inter-State inequalities often mask even more significant intra-State inequalities.

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