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Climate rights: feasible or not?

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Scholars have argued that we have compelling reasons to combat climate change because it threatens human rights, referred to here as ‘climate rights’. The prospects of climate rights are analysed assuming two basic desiderata: the accuracy of the concept in capturing the normative dimension of climate change (reasons to prevent/mitigate/adapt to climate change), and its ability to generate political measures. In order for climate rights to meet these desiderata, certain conditions must be satisfied: important human interests are put at risk by global climate change; there is an identified rights-holder and obligation-bearer; this relationship is codified in a legitimate formal structure; it is feasible to claim the rights; an ‘enforcement mechanism’ (not necessarily of legal character) could strengthen compliance. When asserting climate rights, it is insufficient to consider the moral ground or actual enforcement possibilities by themselves. Normative and practical aspects are closely interlinked and must be studied in tandem.

Keywords: climate change; human rights; climate rights; feasibility; enforceability

Introduction

It is widely accepted that the effects of climate change (CC) will affect millions of people, primarily already vulnerable groups. Vital human interests and values are dependent upon natural resources and services. If or when these start to deteriorate, people’s subsistence, health, and the essentials for living a decent life are at risk. Furthermore, CC will in all likelihood substantially remould what we today consider a healthy environment and the basis of flourishing human lives and societies.

Taking *these* premises as their point of entry, a number of scholars (Shue 1999, 2011; Caney 2006, 2008, 2009, 2010, Hayward 2007, Vanderheiden 2008, Harris 2010, Humphreys 2010, Bell 2011) have argued that CC will violate human rights (HR) and that this gives us compelling reasons to prevent it.¹ These

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applications of the HR framework to the issue of CC are influenced by Shue's (1980, 1993) early writings on basic rights,² work on environmental law (e.g. Nickel 1993, Sands 2003, Hayward 2005), and general work on HR (e.g. Pogge 2008). The basic idea is captured in the following quote from Bell (2011):

[it] recognize[s] human rights to life, physical security, subsistence and health that should be protected from violation by human action. If anthropogenic climate change threatens to violate these basic rights, each one of us has (at least) a duty to pay his or her fair share of the costs of preventing anthropogenic climate change. (p. 100)

Some have even suggested there is a HR 'not to be exposed to dangerous climate change' (Caney 2006, p. 263, Caney 2008, p. 539, Vanderheiden 2008, p. 246). These perspectives are also found in various reports from NGOs and policy-oriented discussions (ICHRP 2008, Loftus-Farren and McKiernan 2009, OHCHR 2009, Robinson and Miller 2009). We refer to these various usages of the HR framework applied to the normative side of CC as 'climate rights' (CR).³

Here, we will analyse the prospects of a HR-based approach to CC politics such as CR. Whereas previous studies of this domain have tended to be single-handedly focused on either the normative or the practical side, we will attempt to reconcile and synthesise the two. In the next section, we will discuss the normative basis of rights claims and various ways of justifying these. Then a practical side will be added to consider the feasibility and enforceability of these purported claims. It is commonplace to assert that HR have both a moral and legal side; they are moral rights that profess to be legally guaranteed. The first way of assessing the feasibility of CR thus comes from considering whether they could be legally enforced. It is, however, unclear if proponents of CR, such as Bell and Caney, want to take this legal route. An alternative interpretation of CR is as a kind of criterion to be used to evaluate political, social, and economic institutions, rather than as individual rights with corresponding duties. This possibility will also be pursued throughout in order to provide a map of the potential of CR, including drawbacks and promises.

The 2005 Inuit case to the Inter-American Commission on Human Rights demonstrates a practical relevance of the discussion of CR from a legal perspective. The Inuit argued that their fundamental HR (rights to culture, life, and subsistence) had been violated due to impacts of CC, partly caused by acts carried out by the United States (OAS/IACHR 2005). These rights, it was claimed, were protected under the American Declaration of the Rights and Duties of Man. However, the Commission did not issue a decision on the case. It declined to review its merits, as 'the information provided does not enable us to determine whether the alleged fact would tend to characterize a violation of rights protected by the American Declaration'.⁴

By analysing both the normative and practical side of CR, we provide a set of six criteria that we argue should be in place in order to make CR commendable.

Fundamentally, these relate to what should be the two basic desiderata for a position such as CR: its accuracy in capturing the normative dimension of CC, and its ability to generate political measures⁵ to be taken in relation to these negative effects. Even when we later suggest that something like CR might not yet be able to meet these desiderata fully, we hope the present analysis will contribute towards realising its potential. Our aim here is to provide a thorough analysis of the relationship between the normative and practical side of HR claims in this specific application to CC. Similar studies can be found on the more general 'environmental human rights' (Shelton 1991, Nickel 1993, Hayward 2005, Hiskes 2009), but they cannot be directly translated to the case of CC because CC introduces different kinds of practical obstacles, which have consequences for the normative justification.

Arguments for climate rights

Perhaps the most obvious way of justifying CR is what Bell (2011) calls the 'important human interests' argument: 'human rights provide the strongest (moral) protection that we can offer, therefore, they must be connected to our most important interests' (p. 103). Similarly, Caney (2008) argues that 'persons have fundamental interests in health, subsistence and supporting themselves and that the duty to protect these interests from dangerous climate change is not unreasonably demanding on the appropriate would-be duty bearers' (p. 539). Consider the following version of this argument:

The 'important human interests' argument for CR: (1) A has a right *r* to *p* if and only if: A has an interest sufficiently weighty to impose obligations on others, and, *r* can protect these important interests of A's, (2) CC threatens basic human interests (e.g. of subsistence) of sufficient weight, (3) the costs of imposing a corresponding obligation are reasonable in the light of the weighty interests at risk, (4) thus, CC is a threat to human rights. (Caney 2008, pp. 537–539, Bell 2011, p. 103)

This argument suggests a 'naturalistic' rooting: CR protects basic human interests that are common and universal features of human beings, shared by all at all times. These normatively important human interests could be spelled out in different ways: in terms of 'personhood', 'capabilities', or 'moral powers', to name a few. The exact specification of it may not be that important, as they are likely to enjoy 'ecumenical support' (Caney 2007, p. 277). More contentious is the move from rights to *human* rights. The modified argument from Caney and Bell, presented above, starts with Joseph Raz's view of rights (premise 1) and concludes not only that rights are at risk with CC, but that these are *human* rights. What does this special status of being *human* rights entails?

A distinction between two possible functions of HR might illuminate the matter. First, one can argue that HR are general moral rights that are valid irrespective of being generally embraced or legally implemented (Pogge 2008,

Limon 2009, Griffin 2010). Second, one could argue that HR are a subset of rights that necessitate legal implementation and enforcement (Habermas 1997, Hayward 2005). This distinction does not necessarily concern the justification of the purported HR – one can argue that HR have a legal structure, even though their justification is thoroughly moral (Habermas 1997). However, depending on the chosen conceptualisation, HR will play different roles. This difference creates diverse arguments for CR. If one holds the first view, it may be ‘relatively straightforward to defend the claim that climate change violates basic human rights’ as Bell (2011, p. 103) contends. If instead CR is partly constituted by having a legal structure, the defence could be much more demanding.

Thomas Pogge’s (2008) distinction between ‘interactional’ and ‘institutional’ understandings of HR could also be invoked. According to the former, a HR is a relation between a right-bearer and a duty-bearer without any supposition about social institutions. On the institutional view, HR is instead conceived primarily as ‘claims on coercive social institutions and secondarily as claims against those who uphold such institutions’ (p. 51). To postulate a HR to X, under the institutional view, thus ‘entails the demand that, insofar as reasonably possible, any coercive social institutions be so designed that all human beings affected by them have secure access to X’ (*ibid.*, p. 52). Granted that CR are based on such an understanding, their practical role would quite likely be different from the interactional view. CR would not necessarily function to provide legal or constitutional guarantees of important human interests; rather they would aim to enable the realisation of a just social order as a criterion of basic justice. That would presumably entail different duties as well. Under the interactional understanding, it is natural to assume CR-generated duties are related to individual emissions of greenhouse gases, while under the institutional understanding duties more likely concern institutional reform. Of course, whether the obligations generated are reasonable in light of the interests at risk depends heavily on the conceptualisation chosen.

Both Caney (2007, pp. 281–286) and Bell (2011, fn. 21) criticise Pogge’s institutional view, even though neither wants to fully dismiss it. Bell (2011) argues:

... human rights generate a complex set of duties, which includes the duty not to personally violate that right, but also includes ‘a duty to create, if they do not exist, or, if they do, to preserve effective institutions for the enjoyment of what people have rights to enjoy’ (p. 111)⁶

Similarly, Caney (2007) argues for a ‘hybrid account’ containing parts of both the institutional and interactional views (p. 288). Unlike Pogge, neither Bell nor Caney seems to be committed to an answer to the question of whether it is necessary to implement and enforce HR/CR legally in order to provide secure access to the objects of the rights. What is clear is that CR, like HR, cannot be asserted without paying attention to the other side of rights, namely

corresponding duties. An account of CR needs an explanation of who is responsible for securing access to the objects of the rights. Much discussion about HR and CR comes from disagreements about the specification of corresponding duties. Before we move on to that discussion in the next section, we will present an alternative function that might be possible to envision for CR.

It comes from Charles Beitz's pragmatic view of HR (Beitz 2009). The reason why both traditional naturalistic (Griffin 2010) and political interpretations (Rawls 1999, Raz 2010) of HR fail, according to Beitz, is that they construe the function of the framework too narrowly. HR is not the lowest common denominator for morality located in universally shared features of mankind, nor is its only function to justify international interventions. HR have a multitude of usages and functions – from motivating military intervention to making trade agreements conditional, to exercising sheer political influence and empowerment – and include a variety of actors apart from nation states (e.g. NGOs). The 30 articles of the declaration, together with the more legally oriented covenants and conventions, present a broad spectrum of moral values, some simple (the right to life), others more complex (the right against genocide). These make up a sort of moral compass for various international dealings and justification is its practice, argues Beitz (2009).⁷

This amounts to a softened requirement of enforceability (Beitz 2001, p. 269) and pinpoints something that could critique the argument, which we make later, that enforcement is a necessary condition for CR/HR. Provided rights are respected, there is no particular need to re-enforce them. Even if this is true, one could argue that it misses the point. The need for enforcement is not a conceptual point, but comes from the fact that there are important human interests at risk and in need of protection in the actual world. Doubtless there are cases of non-compliance, and a sufficient number might cause one to reconsider the function. So although it may not be conceptually necessary to enforce CR, it could be necessitated by the practical reality of widespread non-compliance. That being said, Beitz's position could still be argued to serve as a complementary basis for CR by presenting an instrumental value of HR in the light of poorly functioning enforcement mechanisms. Even if the complete list of rights is not honoured globally, it still works if, for example, NGOs are armed with arguments in international negotiations.⁸ Maybe this is all that is needed for CR, or at least the most we could hope for. We return to this point in the discussion below.

The discussion about beneficiaries of rights should also be mentioned even if it cannot be thoroughly discussed here. CR-generated rights and obligations can be attributed to either individuals or collective entities, such as groups or generations. Both Bell and Caney hold the liberal position, where individual persons are the primary subjects of justice. This raises some problems of which they are well aware, but which will not be discussed here.⁹ An alternative view is to attribute rights to collectives instead of individuals (Page 2006, p. 150).

As this brief presentation of alternatives demonstrates, there are different options for underpinning CR. Apart from an interests-based justification, one

could argue for a more pragmatic rooting. One could also construe climate-related rights as being collective, accruing to generations rather than to individuals. These various positions represent different balances; it would seem that the scope of the theory is related to its function. An account of HR can be argued based on everything, from a fully comprehensive theory that exhausts morality to a very limited account with a specific task (e.g. to prevent genocides). *Prima facie* it seems that the richer the account, the greater the practical difficulties.

Given that CR consist of individual rights with a moral foundation in basic interests, is there something distinctive about these rights that distinguishes them from HR in general or 'environmental human rights' in particular? To our understanding, they are different in at least one sense. HR are most often assumed to be eternally and universally based on human nature, whereas CR are activated by human-induced CC. The right 'not to be exposed to dangerous climate change', vindicated by Caney, is directly triggered by the fact of dangerous CC. Whereas for a reductionist view, where CR equal HR in the context of CC, it is rather that the presence of CC makes it particularly urgent to protect existing HR. Either way, it is the actual existence of global CC that generates these CR. This means that CR are based on the unique and challenging conditions of CC that, for example, the consequences are dispersed over both space and time. The conclusion is that because of CR's relation to CC, the problem of tracking causality and responsibility in cases of possible rights violations is exacerbated. There are inevitably many boundary problems where it is unclear whether or when a specific right has actually been violated and if human-induced CC is the cause of it. Similarly, the political landscape surrounding the CC debate is characterised by a lack of consensus over the general question of responsibility. Such conditions make it particularly difficult to use CR politically and legally. Given the widely embraced idea that action against CC will soon be needed in the form of strong precautionary measures, another difference may be that the retroactive character of the legal enforcement is less hopeful for CR than for HR. Together these features of CC seem to make the possible use of something like CR more limited than that of HR.¹⁰

At this stage, we can at least assert that a statement of CR should contain the following two conditions: important human interests are at risk; by global CC. These are the two basic components of a CR theory, but are far from being the only ones needed. Additional criteria are derived from the practical perspective.

From feasible to enforceable

We have suggested that CR should include an enforceability requirement, but it is not clear how that should be spelled out. To remedy this, we will now present and discuss conditions necessary for CR to satisfy this demand. When considering this requirement, the extremes of strongly practical understandings (or 'legal positivists') and naïvely utopian understandings of enforcement need to be avoided. The requirement runs into trouble whether construed as successfully

enforced or simply conceivably enforced. This conclusion could be shown by discussing different degrees of feasibility in relation to the different functions of a theory of justice, but first we will present more basic presuppositions commonly argued for in an analysis of 'rights'.¹¹

In legal and philosophical discussions, it is common to present the relation between rights and duties as a 'Hohfeldian correlative': a (claim) right implies a corresponding duty. In this traditional view, to have a right is 'to have a claim against someone whose recognition as valid is called for by some set of governing rules or moral principles' (Feinberg 1969, p. 257). According to Feinberg (1969), there is but one exception to this general principle – what he refers to as 'manifesto rights'. He exemplified this category of 'rights' with writers who argue for the international recognition of a (human) right to basic needs provision. Although Feinberg was sympathetic to their ambitions, he argued that these 'rights' are more properly described...

as urging upon the world community the moral principle that *all* basic needs ought to be recognized as claims [...] worthy of sympathy and serious consideration right now, even though, in many cases, they cannot yet plausibly be treated as *valid* claims, that is, as grounds for any other peoples' duties. (p. 255)

They are thus manifesto rights, or a 'permanent possibility of rights'.¹² Except in this weak sense, scholars have generally reserved the term of rights to be the sense of something actually claimable. For instance, O'Neill (1998) has argued strongly that for rights to be acknowledged as rights, specific obligation bearers need to be determined; otherwise rights cannot be claimed, waived, or enforced.

This could be related to the 'important human interest' argument presented in the previous section. It stated that HR are grounded on two facts: that important human interests are at risk and that these are sufficiently weighty to impose obligations on others. One could now argue that this is not sufficiently discriminatory. If HR/CR are perceived as claim-rights – and there are good reasons for that¹³ – it is not enough that obligations *could* be generated; the obligations also need to be pinned to potential duty-bearers. That is not to say that the relation between right-holder and duty-bearer needs to be simple; it may well be the case that a right generates a complex set of duties on different agents and institutions. In any case, two further criteria could be added for CR: at least one other person or similarly recognised entity has an obligation to the right-holder; and the right-holder can claim this right in relation to the duty-bearer.

A possible fifth condition for CR would be for the relationship between the rights-holder and duty-bearer to be codified in a legitimate formal structure, as legitimacy is a key factor for successful compliance. This can be understood as an expansion of the previous requirement; a framework recognised as legitimate by both right-holders and duty-bearers defining a 'claimable' right (cf. James 2003, p. 143). There may also be other such conditions pertinent to the success of a rights-framework that need to be in place,¹⁴ but we will subsume these under the third and fourth conditions.

A further condition now needs to be spelled out relating to the fact that we cannot expect CR to be fully (or even generally) respected. Instead, it is reasonable to assume that people will have their CR infringed, just as people have their HR infringed today. A first question to sort out is whether this only has to do with practical dimensions, or if it also relates to the moral justification of basic norms.

It is a general condition that a theory of justice should be feasible, in that the moral principles need to be action guiding in some sense. However, this requirement can look quite different depending on the function of the theory, an example being Rawls's (1971) distinction between 'ideal' and 'non-ideal' theory (pp. 7–8, 215–216). In an ideal theory, where the primary purpose is to stake out the aims of a fully just society, principles need to be feasible in the sense of not breaking any logical, metaphysical, or natural laws. Apart from such breaches, a general compliance with the principles of the theory is assumed. However, in practical terms, this is false, and non-ideal theory is needed to theorise about actual injustices. Accordingly, the function of non-ideal theory is to evaluate states of less than perfect justice, and give us guidance on how to realise the ideal theory. Such a theory needs to be feasible in a somewhat more discriminatory way. It would, for instance, need to be psychologically and institutionally possible. For non-ideal justice to function well, it must be possible to implement the principle under an institutional social framework despite non-compliance. This means that the practical and moral costs of constructing such a framework would have to be reasonable in relation to the principle. It does not mean, however, that such an institution needs to be in place here and now; merely that it could exist.

Practical constraints differ depending on whether we interpret CR as ideal or non-ideal theory. To provide tangible guidance for climate mitigation and evaluate different policies – that is, working non-ideally – various social and political limits need to be accounted for. When used as an overarching goal or aim for a future utopian society, feasibility conditions are looser, but then it might not fit in with a practical (non-ideal) political CC debate. Accuracy in framing the problem and in motivating tangible action – the assumed criteria of success – make it natural to regard CR as a non-ideal theory. This means the political and institutional costs of maintaining CR need to be included in its evaluation. The exact specification of these is, of course, an empirical question, although probably not insignificant. The most striking example of such costs comes from cases where a CR clashes with another HR, as when CC abatement is paid from existing foreign-aid budgets. Another example, realised if CR is enforced legally, is the cost of litigation that could be substantial for both the plaintiff and for society.

Given these three additional conditions of CR, the list now looks like this: important human interests are at risk; by CC; there is an identified rights-holder and obligation-bearer; this relationship is codified in a legitimate formal structure; and, finally, it is feasible (in the sense of an acceptable cost) to claim the right.

These constraints may be sufficient from some positions, but a further requirement might be necessary when talking about HR. This requirement has an even stricter form, because such principles, as has been suggested, include a legal function. Here, the demand is not only that they are ideally and non-ideally feasible, but also that they can actually be enforced, thus adding a sixth point to the list. This requirement moves CR from 'feasibility' towards 'enforceability'. The discussion of this possible criterion seems to divide political and legal theorists, not infrequently sorted into either of the extremes mentioned at the beginning of this section. On the one hand, it could be understood as a condition saying that CR is without value if not every instance of non-compliance is legally sanctioned and, on the other, be downplayed or fully ignored.

One might imagine many different forms of enforcement of CR. In line with Beitz's reasoning about HR, it is possible to argue that all ways leading to the protection of the objects of these rights should count. One could relate back to Pogge's (2008) position, and note his argument that the condition of legal enforcement is too strong (p. 51). But again, this is called for by the actual existence of non-compliance; if there is a need for legal enforcement of CR, it is because this is the strongest protection of important human interests threatened by CC. The point is well made by Hayward (2005) 'if a human right is to 'constrain legal and economic institutions', as Pogge envisages, it is hard to see how it will do so unless it has some constitutional force that can be applied, as necessary, through law' (p. 41). We therefore devote the last part of this section to consideration of the legal possibilities of CR.

Traditionally, enforcement of HR involves international, regional, and domestic systems. According to most multilateral HR treaties, domestic institutions have primary responsibility to enforce HR (see, e.g., Article 2(2) of the 1966 International Covenant on Civil and Political Rights (ICCPR)). However, in relation to CC, this traditional view of legal enforcement may ultimately be impossible to apply owing to specific interrelated epistemic and ontological problems identified as the 'problem of *global* transboundary harm' and the 'legal knowledge-deficit of the global dimension'.

In the field of CC, the most commonly asserted legal connection to HR has been the concept of environmental human rights, i.e., environmental protection grounded in HR law and jurisprudence (Boyle 1996, Hayward 2005, Hiskes 2009, Knox 2009, McInerney-Lankford et al. 2011).¹⁵ Few treaties refer to environmental rights *per se*, and none of the universal HRs treaties do so.¹⁶ However, the environmental human rights jurisprudence (foremost dealt with by regional bodies) has derived norms of environmental protection from rights protected by major treaties, such as the right to life and health (Knox 2009, McInerney-Lankford et al. 2011).¹⁷ Thus regional interpretations may act as a 'persuasive authority for similar interpretations of human rights treaties with universal memberships, such as the international human rights covenants' (Knox 2009, p. 7).

In reference to the discussion on rights versus duties above, environmental HR jurisprudence has understood the treaties as imposing duties on states' own behaviour, as well as the behaviour of private entities subject to their jurisdiction (see, e.g., the Ogoniland case). Strict procedural duties have been set out assessing potential environmental harm and allowing participation in the decision-making process (Knox 2009). If procedural duties are adhered to, then states receive complementary rights by which they get to determine an acceptable level of environmental harm (provided that it does not result in infringement of HR). However, since these duties are limited to environmental degradation within the national jurisdiction of states, they do not directly transfer to the problem of CC, which involves *transboundary* harm (McInerney-Lankford et al. 2011). There have been some suggestions to provide a ground for 'extra-territorial duties' by invoking Article 2(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) (Knox 2009), which requires each party 'to take steps, individually *and through international assistance and co-operation* [...] to the maximum of its available resources' to realise the rights recognised in the covenant (emphasis added). This Article is seen as a strong basis on which to develop a single global polity, obliging states to 'act together to adopt decision-making procedures that assess the threat and provide informed access to affected communities' (Knox 2010, p. 6). However, there are two arguments posed against this usage of the Article: first, it has not found acceptance in practice (Humphreys 2010, McInerney-Lankford et al. 2011); second, it will still only treat CC as a series of *individual* trans-boundary harms and not as a 'global threat to human rights' (McInerney-Lankford et al. 2011, p. 43; a distinction that does not seem to concern either Bell or Caney¹⁸). This means that environmental HR law and jurisprudence, as they stand today, are not able to respond to the essential global properties of CC.

Considering the current inability to meet a central normative requirement of CR, the move from feasibility to enforceability seems hard to make. One may ask whether there is even a conceivable international legal possibility of enforcing CR, when taking into account the legal knowledge-deficit pertaining to the global properties of CC. One solution, although controversial and not without obvious problems,¹⁹ is to criminalise internationally acts leading to environmental degradation and CC (sometimes referred to as 'ecocide'). This idea has been proposed by Higgins (2010), and was tested on 30 September 2011 at a mock trial at the UK Supreme Court in London, set up to investigate how the crime of 'ecocide' would play out if adopted by the UN and added to the jurisdiction of the ICC²⁰ as a fifth international crime against peace. Higgins acknowledges the problem with grasping the global dimension,²¹ but by making it a crime, and thereby adding a strong requirement on legal certainty, this dimension has to be specified. Recognising ecocide as a crime could perhaps contribute to minimising the legal knowledge-deficit and perhaps also 'build [...] momentum towards a self-standing legal norm [...]' (McInerney-Lankford et al. 2011, p. 37). If one is able to solve this legal knowledge-deficit, then the idea of establishing

specialised 'climate courts' may not be far away. Even though these approaches are highly controversial and not even close to being realised, the development of an ecocide crime and/or specialised 'climate courts' represent a thought experiment on how law and legal institutions could be rearranged and adapted to deal with and enforce new phenomena such as CR.

As noted, legal systems have general difficulties in dealing with the global aspect of CC, largely due to the fragmentation of international law (McInerney-Lankford et al. 2011, cf. McDonald 2011). This may make a legally based enforcement requirement a non-starter. The question is thus raised once again: does the enforceability criterion have to be legal in character in order for CR to be commendable? Due to the dual character of HR, and dependent on the argued function of the framework as discussed here, the answer will probably be both yes and no – hence leading to a fuzzy sixth condition. As argued in the previous section, there is no conceptually necessary relation to legal enforcement of CR, but a practical and normative one. If this practical necessity cannot be maintained, the function of CR is, at the very least, called into question.

Bearing in mind our stipulated list of conditions for CR to be commendable, we note that this was constructed in order to include both the possibility of capturing normative reasons to combat CC and its likelihood of motivating political action. A legal requirement for enforceability could provide some actors with incentives to comply with CR but provide others with an excuse not to realise CR at all, since legal instruments might not be signed at all due to fear of international sanctions (Limon 2009, p. 460); the rights might never be enforced anyway; and for those that do sign, the eventual sanction would not make a practical difference because failing to comply would not be due to lack of interest but rather to technical and/or financial constraints (Brunnée 2005, p. 7). Whether legal in character or not, the success of the demand for political action will ultimately be an empirical question.

Conclusion

We suggested that in order for CR to meet two reasonable desiderata – accuracy in capturing reasons for CC action and ability to motivate political action in accordance with those – the following conditions need to be met: important human interests are at risk; by global CC; there is an identified rights-holder and obligation-bearer; this relationship is codified in a legitimate formal structure; it is feasible to claim the rights; and there is a functioning 'enforcement mechanism' in place to strengthen the political will to comply with CR. Our conclusion is that the 'realisation' of CR will probably be problematic due to a number of issues.

The main reason to assert CR is that important human interests are at risk as a result of CC, and that these need to be safeguarded somehow. We have seen, however, that it is not obvious exactly how CR is supposed to provide for that need. The natural suggestion is to argue that CR should be legally enforced and

that this is how it will protect important human interests from the risks of CC. We have argued here that if CR is based on such a promise, it is still far from being a reality. The legal system is ill adapted to the challenge of CC. This does not mean that it cannot be modified, particularly since many obstacles may be technical or owing to knowledge gaps (one idea could, for instance, be the creation of specialised 'climate courts'). However, and this is the main point we have argued, the eventual enforcement of CR has its price – and this might be substantial. By looking at both the moral justification and practical feasibility of these CR proposals, it is possible to see how they interact. To give yet another example, the reasonable requirement that any eventual enforcement mechanism should stem from a legitimate structure in order to be effective limits their design.

It could be argued that the idea is not primarily legal enforcement of CR, but that the importance of CR should instead be measured in terms of effectiveness in challenging political, economic, and institutional design. Similarly, the argument that there is no need to re-enforce HR/CR legally if the objects of these rights are respected is something that could be thought of as opposing the arguments of this article. Ideally, it is true that, in such a case, there is no need for legal re-enforcement, but then CR also loses much of its purpose. In the non-ideal real world, it is specifically this need that must be recognised and accounted for in order to be credible. When thinking about the feasibility of a proposal like CR, it is insufficient to imagine a conceivable world in which they are realised. One needs instead to show that implementation could take place given what we know about the social world. That is not to say that CR are only feasible once already realised and respected, but it should probably be moving in this direction. Whether such momentum is present or not is an empirical question that cannot be answered here. More positively, political willingness, to which the feasibility of CR in the end boils down, is at least not static. The very concept of CR, presented by worried citizens and NGOs, is a strong force in challenging institutional and political feasibility.

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Notes

1. Most of our discussion will be centred on the accounts of Bell and Caney; others will only be referred to in order to draw out nuances when needed.
2. Apart from his influential account of basic rights (Shue 1980), Shue (1993) has also presented his own application to the CC discussion, arguing that traditional cost–

benefit analyses of climate change mitigation miss the point that 'some sources [of greenhouse gases] are essential and even urgent for the fulfilment of vital needs and other sources are inessential or even frivolous' (p. 211). Shue thus uses HR in the CC discussion (primarily) as a way of distinguishing legitimate from illegitimate greenhouse gas emissions, with the result of what has been called 'emission rights'. It could accordingly be described as using HR to protect against an unfair distribution of climate-related obligations rather than as a motivation for climate change mitigation *per se*. Hayward (2007) has convincingly argued against this usage, and we will not discuss it further.

3. Referring to these various proposals as CR is a theoretical simplification. We do not claim these authors defend a new category of 'climate rights'. Even if Caney's right 'not to be exposed to dangerous climate change' could be said to be on the 'rights-side' of HR, the 'obligation-side' is probably generally more central. Our main discussion should thus be read not as a critique of any particular account but as premised on a rights-based grounding of climate change action to test the viability of such a possible attempt.
4. Official response to the petition by the Commission. According to M. Wagner (personal communication, 22 December 2011), lawyer at Earth Justice, a non-profit public interest law firm involved in submitting the petition.
5. These measures could be of various kinds. In the CC discussion, it is common to make a distinction between mitigation and adaptation. If CR aims to motivate such measures, it could be understood to generate obligations to mitigate the negative effects of CC in order to prevent any HR from being infringed. Now, due to the commonly asserted legal form of HR (CR), it is perhaps more likely that the measures generated are more indirectly related to mitigation/adaptation; it could be that it is rather 'corrective justice' that is its function. That is, CR amounts to regulation of potential infringements of HR that have resulted from CC. The difference between the two kinds of measures is that the former (mitigation/adaptation) is proactive whereas the latter (corrective justice) is reactive.
6. Bell later makes references to Shue (1980) and Caney (2007).
7. He writes: '[w]e [should] understand the concept of a human right by asking for what kinds of actions, in which kinds of circumstances, human rights claims may be understood to give reasons' (Beitz 2009, p. 9)
8. There is another kind of instrumental value that certainly cannot be used for CR: empowerment of the beneficiaries of the rights. Because of their non-existence, this move does not work here, even if it can be important to the traditional debate on HR.
9. There are two problems in particular. First, the well-known 'non-identity' problem, which raises problems when explaining the harm inflicted upon future persons when the same policies that bring this upon them may also be a necessary condition of their very existence. Second, future persons' non-existence seems to preclude the conditions of reciprocity essential to many moral theories. For a discussion of these problems, see Page (2006, chs. 5–6).
10. Woods (2006) provides an informative discussion of the strategic advantages and disadvantages for environmentalists of using the HR framework. The general features she discusses also apply to CR. For instance, she points to the kind of pragmatic benefits that Beitz argues for (e.g. that the HR language lends legitimacy and intelligibility to the general public in comparison with more abstract philosophical reasoning). Our contention, though, is that the prospects for CR are worse than for environmental human rights because of the situation round CC.
11. We assume here that CR can be understood as a kind of theory of (climate) justice.
12. For a similar position in a discussion directly about HR, see Cranston (1983), pp. 12–13.

13. There are many alternative usages of rights, such as the other Hohfeldian notions: rights as 'powers', 'immunities', and 'privileges'. But none of them seem to capture the intended meaning of CR. The main idea of asserting climate specific rights surely is one of generating correlated duties to make the rights claimable.
14. For a right to be claimable 'an agent will need access to money, information about procedures and entitlements, sufficient authority to lodge and negotiate her claim, and access to specialists of various kinds' (James 2003, p. 141).
15. The discourse is commonly divided into two dimensions with respective bases in 'ecocentric' (see, e.g., Bosselmann 2008) and 'anthropocentric' perspectives. We reserve focus on the latter because rights-discourse often takes this perspective by default and because the former seems to have an even slimmer chance of generating political measures.
16. Only two *regional* agreements recognise this right: the 1981 African Charter on Human and People's Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.
17. See, e.g., the Inuit case and the Ogoniland case.
18. But most proponents of something similar to CR recognise that it is not a panacea (Caney 2008, p. 537, cf., Nickel 1993, p. 283).
19. Known problems include the requirement of causation and due diligence standard (Brunnée 2005).
20. The ICC has limited jurisdiction and essentially addresses 'the most serious crimes of concern to the international community as a whole' these falling under the categories of genocide, war crimes, crimes of aggression and crimes against humanity. ICC Statute, Article 5.
21. See discussion on 'ascertainable' vs. 'non-ascertainable ecocide'.

References

- Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador), November 17, 1988, 28 I.L.M. 156.
- African Charter on Human and People's Rights, June 27, 1981, 21 I.L.M. 58.
- Beitz, C., 2001. Human rights as a common concern. *The American Political Science Review*, 95 (2), 269–282.
- Beitz, C., 2009. *The idea of human rights*. Oxford: Oxford University Press.
- Bell, D., 2011. Does anthropogenic climate change violate human rights? *Critical Review of International Social and Political Philosophy*, 14 (2), 99–124.
- Bosselmann, K., 2008. *The principle of sustainability. Transforming law and governance*. Hampshire: Ashgate.
- Boyle, A., 1996. The role of international human rights law in the protection of the environment. In: A. Boyle and R. Anderson, eds. *Human rights approaches to environmental protection*. Oxford: Oxford University Press, 43–69.
- Brunnée, J., 2005. Enforcement mechanisms in international law and international environmental law. *Environmental Law Network International Review*, 1, 1–12.
- Caney, S., 2006. Cosmopolitan justice, rights and global climate change. *Canadian Journal of Law and Jurisprudence*, XIX (2), 255–278.
- Caney, S., 2007. Global poverty and human rights: the case for positive duties. In: T. Pogge, ed. *Freedom from poverty as a human right: who owes what to the very poor?* Oxford: Oxford University Press, 275–302.
- Caney, S., 2008. Human rights, climate change, and discounting. *Environmental Politics*, 17 (4), 536–555.

- Caney, S., 2009. Climate change, human rights and moral thresholds. In: S. Humphreys, ed. *Human rights and climate change*. Cambridge: Cambridge University Press, 69–90.
- Caney, S., 2010. Human rights and global climate change. In: R. Pierik and W. Werner, eds. *Cosmopolitanism in context: perspectives from international law and political theory*. Cambridge: Cambridge University Press, 19–45.
- Cranston, M., 1983. Are there any human rights? *Daedalus*, 112 (4), 1–17.
- Feinberg, J., 1969. The nature and value of rights. *The Journal of Value Inquire*, 4, 243–257.
- Griffin, J., 2010. Human rights: questions of aim and approach. *Ethics*, 120 (4), 741–760.
- Habermas, J., 1997. Kant's idea of perpetual peace, with the benefit of two hundred years' hindsight. In: J. Bohman and M. Lutz-Bachmann, eds. *Perpetual peace: essays on Kant's cosmopolitan ideal*. Cambridge, MA: The MIT Press, 113–155.
- Hayward, T., 2005. *Constitutional environmental rights*. Oxford: Oxford University Press.
- Hayward, T., 2007. Human rights versus emissions rights: climate justice and the equitable distribution of ecological space. *Ethics and International Affairs*, 21 (4), 431–450.
- Harris, P., 2010. *World ethics and climate change: from international to global justice*. Edinburgh: Edinburgh University Press.
- Higgins, P., 2010. *Eradicating ecocide: laws and governance to prevent the destruction of our planet*. Hallsford Bridge: Shephard-Walwyn.
- Hiskes, R.P., 2009. *The human right to a green future. Environmental rights and inter-generational justice*. Cambridge: Cambridge University Press.
- Humphreys, S., 2010. Introduction: human rights and climate change. In: S. Humphreys, ed. *Human rights and climate change*. Cambridge: Cambridge University Press, 1–35.
- International Council on Human Rights Policy, 2008. *Climate change and human rights, a rough guide*. Switzerland: Versoix.
- International Covenant on Civil and Political Rights, 1966. 6 I.L.M. 368.
- James, S., 2003. Rights as enforceable claims. *Proceedings of the Aristotelian Society*, 103, 133–147.
- Knox, J.H., 2009. Climate change and human rights law. *Virginia Journal of International Law*, 50, 1.
- Limon, M., 2009. Human rights and climate change: constructing a case for political action. *Harvard Environmental Law Review*, 33, 439–476.
- Loftus-Farren, Z. and McKiernan, C., 2009. *Protecting people and the planet: a proposal to address the human rights impacts of climate change policy*. Berkeley and San Francisco, CA: DIANE.
- McDonald, J., 2011. The role of law in adapting to climate change. *Wiley Interdisciplinary Reviews: Climate Change*, 2 (2), 283–295.
- McInerney-Lankford, S., Darrow, M., and Rajamani, L., 2011. *Human rights and climate change – A review of the international legal dimension*. A World Bank Study.
- Nickel, J., 1993. The human right to a safe environment. *Yale Journal of International Law*, 18 (1), 281–295.
- Office of the UN High Commissioner for Human Rights [OHCHR], *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights*, UN Doc. A/HRC/10/61 (15 January 2009)
- Ogoniland Case (Social and Economic Rights Action Center v. Nigeria), Communication 155/96 (African Commission on Human & Peoples' Rights, Oct. 2001).
- O'Neill, O., 1998. Rights, obligations and needs. In: G. Brock, ed. *Necessary goods: our responsibility to meet others' needs*. Lanham, MD: Rowman and Littlefield, 95–112.

- Organization of American States, Inter-American Commission on Human Rights, 2005. *Petition seeking relief from violations resulting from global warming caused by acts and omissions of the United States*.
- Page, E., 2006. *Climate change, justice and future generations*. Cheltenham: Edward Elgar.
- Pogge, T., 2008. *World poverty and human rights*. 2nd ed. Malden, MA: Polity Press.
- Rawls, J., 1971. *A theory of justice*. Cambridge, MA: Harvard University Press.
- Rawls, J., 1999. *The law of peoples*. Cambridge, MA: Harvard University Press.
- Raz, J., 2010. Human rights without foundation. In: S. Besson and J. Tasioulas, eds. *The philosophy of international law*. Oxford: Oxford University Press, 321–337.
- Robinson, M. and Miller, A.M., 2009. *Expanding global cooperation on climate justice* [online]. Bretton Woods Project. Available from: <http://www.brettonwoodsproject.org> [Accessed 10 October 2011].
- Sands, P., 2003. *Principles of environmental law*. 2nd ed. Cambridge: Cambridge University Press.
- Shelton, D., 1991. Human rights, environmental rights, and the right to environment. *Stanford Journal of International Law*, 28, 103–138.
- Shue, H., 1980. *Basic rights: subsistence, affluence and U.S. foreign policy*. Princeton, NJ: Princeton University Press.
- Shue, H., 1993. Subsistence emissions and luxury emissions. *Law and Policy*, 15 (1), 39–59.
- Shue, H., 1999. Global environment and international inequality. *International Affairs*, 75 (3), 531–545.
- Shue, H., 2011. Human rights, climate change, and the trillionth ton. In: D.G. Arnold, ed. *The ethics of global climate change*. Cambridge: Cambridge University Press, 292–315.
- Vanderheiden, S., 2008. *Atmospheric justice: a political theory of climate change*. New York: Oxford University Press.
- Woods, K., 2006. What does the language of human rights bring to campaigns for environmental justice? *Environmental Politics*, 15 (4), 572–591.