



## Situating human rights in the context of fishing rights – Contributions and contradictions

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### ABSTRACT

Human rights have become a salient topic in fisheries governance. There is an increasing call to operationalize human rights principles in management practices. Enthusiastically, human rights-related language has proliferated in policy texts and academic discourses, but seldom with precise understanding. This deficiency can create confusion and conflation on-the-ground, and is likely nowhere more pertinent than at the intersection of human rights and fishing rights with both converging on the application of rights. By applying a legal, applied perspective, this paper advances two aims. First, it distinguishes and clarifies key terms involved in a human rights-based approach, including human right, customary fishing right and constitutionally protected right to fish. Secondly, it exposes dilemmas that can arise when human rights and fishing rights are brought together in situations of rights allocation, that is, universality of human rights vs. exclusivity of fishing rights; rights versus attendant duties; prioritizing amongst competing human-cum-fishing rights; and individual vs. communal rights. Together, we submit that the human rights-based approach to fisheries will be most effective when a human rights-based approach is used to support (1) communal fishing rights rather than individual rights, assuming the community strives to ensure the basic dignity of all members by distributing fishing rights in a manner consistent with human rights principles, and (2) the fishing rights of small-scale fisheries against those of larger industrial fleets, rather than using it between two small-scale fishing groups. We illustrate these essential clarifications by drawing on contemporary examples from the Global South and North.

### 1. Introduction

Human rights and the attendant human rights-based approach (the “HRBA”) have become a salient topic in fisheries management, conservation and seafood discussions in recent years [1–5]. The United Nations Food and Agriculture Organization’s (the “FAO”) introduction of the *Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication* (the “SSF Guidelines”) in 2014 [6], which draws on human rights standards as its guiding precepts, has encouraged all fisheries stakeholders to seek a practical understanding of the HRBA (see [7,8]). Translating human rights principles into action appears a crucial step for ensuring the basic dignity of fishery-dependent people around the world and promoting their empowerment to achieve sustainable and equitable fishing livelihoods.

While great enthusiasm has gathered around the HRBA and the use

of human rights language, we argue that there remain notable conceptual ambiguities, which, if not made explicit with adequate discussion, may hinder our collective ability to implement HRBA within fisheries. In other words, notwithstanding other important factors that could impede progress (e.g., lack of administrative and cognitive capacities, insufficient political will, and policy incoherence, see for example [8,9]), practical efforts to implement HRBA may also run aground because the inherent contradictions within concepts may go unnoticed and stay unresolved throughout its application. This paper focuses on illuminating the nuanced linkages that exist between the notions of fishing rights and human rights. Questions we examine here are: how should human rights be presented in the context of fishing rights? Will HRBA enable a better protection of fishing rights for all small-scale fishers? Can the rights to fish really be a type of human rights?

Recent claims have tended to emphasize synergy between fishing

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rights and human rights (i.e., “Fishing Rights Are Human Rights”, see [10,11]). This encouraging sentiment arises out of the rejection of the so-called “rights-based” approach, in which fishing rights are privatized and individuated to become an ownership-based, tradable commodity (e.g., Individual Transferable Quotas, ITQs) and therefore serving as a neoliberal basis for few, select right-holders’ wealth accumulation [12]. The framing of seeing fishing rights as human rights is thus purposeful and effective to remind us that the rights of small-scale fishers to access and harvest fishery resources are, in many cases, a fundamental and indivisible part of their culture, survival, and wellbeing, which ought not be capitalized, sold, and otherwise removed from their social-historical contexts. Furthermore, equating fishing rights to human rights implies that fishing rights are integral to fishers for provision of food, income and nutrition as well as pride and a sense of place for themselves. In other words, fishing rights support fishers’ right to food and right to decent work, among other rights, which all fall under the broad umbrella notion of “human rights.” Indeed, understanding fishing rights as integral to fishers’ human rights would provide a strong rhetoric to fend off the socio-economic exclusion and marginalization undergirded by the prevailing trend of ‘proptertization’ of fishing rights [12,13].

Despite the normative appeal of this assertion, such synergistic (and simplistic) connection between fishing rights and human rights at the conceptual level, let alone in practice, is not likely evident. Others have alluded to this possible inconsistency but without any focused explanation (e.g., see [7]). The purpose of this paper is then to elucidate the untidy connections between the notions of human rights and fishing rights. We highlight four areas of potential contradictions that need to be considered when embarking on a practical quest of strengthening small-scale fishers’ basic fishing rights through HRBA.

In the remainder of this paper, we first proceed to unpack the meaning of ‘human rights’ and ‘fishing rights’, followed by an examination of HRBA to clarify its premise and potential. Next, we describe the four areas of critical consideration in the course of bringing fishing and human rights together – namely, exclusivity versus universality, rights and duties, competing rights, and individual versus communal rights. We conclude by reflecting on these nuanced interpretations and suggesting ways to advance HBRA for securing small-scale fishing rights.

## 2. Unpacking human rights, fishing rights and human rights-based approach to fisheries

### 2.1. What are human rights?

As a point of departure, it is helpful to differentiate between constitutional rights (or sometime called civil rights) and human rights. Constitutional rights are the rights that citizens in a state have because that state has granted these rights to them. Examples of these rights include, but are not limited to, equal protection under the law, due process, and the right against self-incrimination. By comparison, human rights are the most fundamental rights, that is, universal privileges that all human beings possess. They include, but are not limited to, the right to life, the right to protection from torture, the right to a fair trial as well as the right to education and freedom of expression. Generally, human rights recognize the inherent value of each person, regardless of one’s background, residency or system of belief, and are based upon the principles of dignity, equality, and mutual respect.

Although constitutional rights and human rights overlap, the formation of constitutional rights preceded human rights. The United Nations (UN) only formalized human rights after World War II when it adopted the *Universal Declaration of Human Rights* (the “UDHR”) in 1948 [14]. Subsequently, the UN has put forward several other relevant conventions to further build on the UDHR, such as the *International Covenant on Economic, Social and Cultural Rights* (adopted in 1966, entered into force in 1976) [15]; the *Convention on the Elimination of All*

*Forms of Discrimination Against Women* (adopted in 1979, entered into force in 1981) [16]; and the *1986 Declaration on the Right to Development* [17]. Additionally, the UN drafted and adopted many other declarations whose objectives are to protect a range of universal human rights, such as the right of self-determination, the rights of indigenous peoples and minorities, the rights of women, the rights of the child, the rights of persons with disabilities, the right to marriage, the right to work and to fair conditions of employment, the rights of migrants, as well as the right to be free from slavery, slavery-like practices and forced labour [18].

Although the UDHR and other human rights declarations are not legally binding, most national constitutions have adopted them in one way or another. Some states amended their constitutions to incorporate the UDHR (e.g., *Canada’s Charter of Rights and Freedoms* is entrenched in the *Constitution Act, 1982*) [19].

### 2.2. What are fishing rights?

Generally, fishing rights are a permission that a governing or licensing body gives to a fisher for that fisher to catch fish or another aquatic product. A governing or licensing body most often documents the permission in a written legal instrument, such as a fishing licence. The licence may be renewable (e.g., annually), revocable (e.g., by a ministerial decision), and transferable (e.g., transferable quotas or family inheritance). One private party can also grant a licence to another private party (e.g., a private auction house issuing private licence to sellers) [20].

At other times, the licence to fish is not a written document; rather it is implied. An implied licence to fish is unwritten; yet, the licensee still has permission to fish and the law may protect this permission. Implied licences sometimes arise out of circumstances and sometimes by operation of law [20]. Some rights differ from the typical resource access rights. For example, ITQs have evolved into a fisheries management system where a regulating authority establishes a species-specific total allowable catch (“TAC”). In other words, it establishes a cap on the total amount of a fish species that fishers may catch. The regulator then issues licences to individuals, which give them a share in the TAC [21].

It is important to note that fishing rights are distinct from a ‘constitutionally protected right to fish’, which many Native groups hold in countries such as Canada, the United States, and New Zealand (see section 2.3 below). Fishing rights are also distinct from customary fishing rights that arise through long-established routines as the latter may precede creation of more modern fishing regulations and licences. Post-harvest rights are context-specific. Sometime fishing rights include post-harvest rights and sometimes they do not. Laws in many jurisdictions often prevent fishers from selling directly to consumers [22].

### 2.3. What is a constitutionally protected right to fish?

It is courts that most often declare a constitutionally protected right to fish and they typically declare this right in relation to Aboriginal communities. There are several instances of courts declaring this right in Canada, the United States, and New Zealand. Generally, Aboriginal communities argue that they are entitled to fishing resources because of their historical use of those resources. If a court finds that such a right exists, it declares the right lawful and affords it constitutional protection. In the countries mentioned above, a constitutional framework exists, to various degrees, to recognize historical fishing rights, such as Canada’s *Constitution Act, 1982*, which protects Aboriginal rights to fish for food, social, or ceremonial purposes.

The process for a state’s recognition of a constitutional right to fish is often an expensive, time-consuming, and litigious process. Typically, they are hard fought battles. The group asserting the right must lobby their parliament or convince the state’s high court of this right, depending on the constitutional framework in such state. Furthermore, in addition to appealing to the court’s conscience, the claimant must

satisfy a legal test. A legal test is a set of factors a court uses to resolve a legal matter [23]. Each jurisdiction develops a legal test for recognizing such rights. In this process, groups may use human rights or HRBA-inspired arguments to promote their interests.

Translating a fishing right into fishing access is not a foregone conclusion, however. Once a court recognizes a constitutional right to fish, a regulator must allocate those rights. As discussed earlier, fishing access rights are typically in the form of licences and the same is true for Aboriginal fishing access rights. Aboriginal fishing licences may have unique restrictions, such as non-transferability outside of the Aboriginal group who holds the licence. For example, in British Columbia, Canada, the *Aboriginal Communal Fishing Licences Regulations* prohibit anyone other than the holder of the licence from using it [24]. An important question arises with respect to constitutionally protected rights to fish: what happens to non-Aboriginal groups who may also hold legal access to the same or overlapping resource? We discuss competing rights to fish in section 3.3 below.

#### 2.4. What is HRBA?

The HRBA represents a bridging of ‘development’ and ‘human rights’ paradigms which were considered two separate spheres until the late 1980s; traditional development thinking had considered economic growth to be the complete solution [25]. It was becoming evident, however, that solely focusing on material deprivation and immediate needs-based interventions without redressing structural causes of poverty that produce exclusion and inequalities was not effective in resolving global injustices and eradicate persistent poverty. The 1986 *UN Declaration on the Right to Development* first formally recognized the significance of HRBA [17], by stating that: “the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized.” Subsequently, the HRBA establishes the indivisibility of civil, political and socio-economic rights while also promoting active agency of the vulnerable to human rights violations and aiming to ensure accountability for protections and freedoms [26].

Many United Nations agencies and programs have adopted HRBA over time. In 2003, the United Nations published the *Statement of Common Understanding on Human Rights-Based Approaches to Development Cooperation and Programming* to help mainstream the HRBA [27]. The FAO also bases its implementation of the 2012 *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests* on the seven mnemonic human rights principles called “PANTHER” – participation, accountability, non-discrimination, transparency, human dignity, empowerment, and the rule of law [28].

An adoption of the HRBA to small-scale fisheries received monumental support through the completion of the *SSF Guidelines* in 2014 [6], whose explicit integration of HRBA and adherence to international human rights standards is in itself an innovation in the domain of global fisheries instruments. The *SSF Guidelines* include 13 main principles: human rights and dignity, respect of cultures, non-discrimination, gender equality, equity and equality, consultation and participation, rule of law, transparency, accountability, economic, social and environmental sustainability, holistic and integrated approaches, social responsibility, feasibility, and social and economic viability. Although worded differently, these guiding principles for *SSF Guidelines* overlap with the other distinctions of human rights mentioned elsewhere, such as the rights of indigenous peoples and minorities (respect of cultures), the rights of women (gender equality), and the right to fair conditions of employment (non-discrimination). They also correlate with all PANTHER principles [29]. Therefore, one can categorize the *SSF Guidelines* as an applied human rights declaration that delineates human rights within the context of the world’s fisheries, highlighting small-scale fisheries’ unique vulnerabilities and offering roadmaps to

help them overcome their challenges.

#### 2.5. How to use HRBA with respect to fishing rights?

Translating a set of human rights principles into policy and decision-making at country level appears an onerous process so far [7–9] – an observation also forwarded from the field of international development whose experiences of operationalizing HRBA are likely the most robust [25]. Applying the HRBA to fisheries is also complicated by their novel features: that the multiple aspects of human rights need to be realized for the holistic improvement of people’s lives (civil, political, social, economic and cultural); that human rights principles needs to be integrated into all phases of governance processes; and that, in doing so, the capacities of fishers to claim their rights (as right-holders) and those of government institutions to meet their obligations (as duty-bearers) need to be enhanced.

Fishing rights represent a specific domain of practice in the application of the HRBA. Fishing rights are a crucial enabler of legitimate fishing activities and fishing-based livelihoods. Where fishing rights do not exist or where they are contested, the HRBA could function as a practical guidance (thus beyond the level of rhetoric) that small-scale fishers may utilize to secure fishing rights via a legally recognizable and protected means.

Applying the HRBA to the matter of fishing rights in a technical sense is likely an intricate undertaking that involves administrative and legal exchanges. Most often, a group of small-scale fishers arguing for improved rights will find itself challenging a ministerial decision in court, as was done in South Africa in mid-2000s, for instance, when a group of artisanal fishers launched class action litigation against the Minister of Environmental Affairs and Tourism on the grounds that the fishing rights allocation policies of the government are inequitable and discriminatory, and violate the human rights of artisanal fishers in the country in favor of commercial fishing companies [30]. This is often the realm of either administrative law (when the group argues that the minister erred in his decision making for one reason or another) or constitutional law (when the group is arguing that the law or decision is unconstitutional). Every legal system has its own process for resolving either types of challenges along with the legal tests that the parties must meet. In many cases, there are specialized courts designed to hear specific challenges. In the case of South Africa, the group launched the case in both the High Court and the Equality Court, the latter of which is aimed at giving specific effect to the Equality Clause in the Constitution [30].

The proponents would then utilize the HRBA as a supporting argument or grounds to fit an element of these tests. For example, when a group raises arguments that a court or ministerial decision violates the right to equality, which is most often a constitutionally protected right, the group would first present their arguments in accordance with their local laws. They then can point to international human rights declarations, HRBA, and the principles in the *SSF Guidelines* to support their position. Although, these instruments are informative and not binding on courts, their use is nevertheless useful in persuading courts to conform with international trends. In the South African case above, the argument of the fisher group centred on, among others, the claim that the Minister’s failure to define and provide for the artisanal fishers as per the *Marine Living Resources Act* of 1998, and the consequences of this failure on the livelihoods of this fishing community, constitute a violation of a number of human rights contained in the *South African Constitution*, 1996 [31] and the *Equality Act*, 2000 [32] such as the right to be recognized, the right to a livelihood and the right to food and nutrition [30]. Representing a landmark case that brought about an integration of small-scale fishers in the allocation of fishing rights, an out-of-court settlement in 2007 resulted in an allocation of interim rights to small-scale fishers and the government’s commitment to developing a new small-scale fisheries policy (see also [33,34]).

An example from Iceland illustrates a lengthier and a more

persistent effort to oppose private property regimes and claim back public rights to resources declared by law (i.e., the Icelandic *Fisheries Management Act*, 1990) [35–37]. When two fishermen from the coastal village of Patreksfjörður were defiant in violating the fishing laws to protest against the ITQ system that they claim to be inequitable, unethical, unconstitutional and even illegal, the Icelandic Fisheries Agency filed suit against them. After the decision of the District Court, and later the Supreme Court, found the fishers guilty, the fishers submitted the case to the UN Human Rights Committee, who six years later in 2007 produced a decision. The Committee's decision judged the ITQ system as discriminatory towards the two fishers on the grounds that they were compelled to buy fishing rights from others while there are fishers who were gifted with an initial allotment of quota shares in the early 1980s [36]. Despite the committee's ruling that Iceland must revise its fisheries management system in accordance with human rights, the Icelandic government has rejected any radical change to re-allocating fishing rights. Still, there have been meaningful concessions won in view of the Human Rights Committee's recommendations and the mounting public demands to open up access to the fish stocks. The introduction of a free-entry, non-ITQ small-boat handline season called "coastal fishing" in 2009, although small in quantity in relation to the total Icelandic annual fish catch, brought a positive impact on small coastal communities by revitalizing local boat activities and enhancing employment in fish processing and service sectors [36]. The accusation of the UN Human Rights Committee was also widely perceived as a national embarrassment – especially for a country consistently top-ranked in widely-applied human development and equality measures, such as the UN Human Development Index and the Gini Index [37].

As such, the task of securing fishing rights through HRBA can yield positive outcomes, and the process would be relatively more straightforward in a case where the government is being challenged by one (unified) group of fishers. However, when multiple SSF groups with different claims, all founded on human rights, compete for access to the same resource, further challenges arise. In subsequent sections, we bring these challenges to the fore through our juxtaposition of human rights and fishing rights and of the slippery interface they together pose.

### 3. The untidy interface between human rights and fishing rights

#### 3.1. Exclusive versus universal nature of rights

The first conceptual difficulty in directly linking fishing rights and human rights relates to the competing and non-competing nature of the two respective rights. Rights tend to imply a certain degree of exclusion and inequality. The regulator's objective for fishing rights is to differentiate between right-holders and non-right-holders (e.g., licensees and non-licensees or quota-holders and non-quota-holders), that is to say, issuance of fishing rights is based on exclusivity. For instance, the premise of Territorial Use Rights for Fishing ("TURF") is that some groups have exclusive privileges associated with a specific area. Unless we speak of an 'open-access' regime in which everyone has the equal right to fish, the standard practices of a rights-based system places restrictions on who can and cannot fish. Hence, allocating rights to resources (who, what, where and how long) is usually a contentious topic that creates winners and losers. Nevertheless, a broad range of perspectives has called for clear and secure fishing rights. These perspectives include communitarians who view fishing rights as a common-property (e.g. [38]), socialists who view fishing rights as a manifestation of class struggle against the trends of structural marginalization, over-commercialization, and scientific modernization in fisheries (e.g. [1,39]), as well as neoliberals who view fishing rights as a rational enabler of rights-based management (e.g. [40]). Altogether, assigning rights to the "right" right-holders has been a dominant theme in fisheries, as this issue connects with the broader concerns of resource conservation, social justice, and food sovereignty.

Contrary to fishing rights, the fundamental premise of human rights

is that they are indivisible, universal and equally applied. By virtue of being human, everyone is a right-holder and is entitled to a suite of same human rights. In other words, one's human rights do not, and should not, exclude another's human rights.

This presents one possibility of a stark contradiction between fishing rights and human rights. When only a specific set of people possesses fishing rights (whether through private licenses or communal 'commons' management), by definition, this negates the claim that fishing rights are akin to human rights. Only when a fishery is strictly open-access, fishing access then becomes universal and impartial, and it might be possible to imagine fishing rights as a category of human rights. A comparable argument has been made which illuminates the "safety-valve" function of open-access by letting the rural poor in Southern Africa enter lake fisheries with little restriction in periods of economic stress [41,42]. This is not to say that abolishing fishing rights to (re)institute open-access is a realistic or desirable proposition in most fisheries. It would also be unwise to equate fishing rights to human rights in such a literal and sweeping manner. As mentioned in the preceding section, certain fishing rights, under special circumstances, would warrant enhanced protection and restitution. Promoting one's fishing rights as a matter of human rights would, therefore, be a worthwhile endeavour to strengthen the claim of marginalized fishing groups. Despite this admission, we urge fishery stakeholders to recognize this fundamental incongruity when planning and implementing HRBA to fishing rights allocation. Exclusivity is, however, not the only conceptual hurdle in the attempt to join these two ideas of rights. In fact, practising one's right to fish *as if* it is her human right (as opposed to 'equating' them in a categorical sense) also faces a further logical challenge, which we describe below.

#### 3.2. Rights and attendant duties

Fishing rights typically demand stewardship and sustainability duties. The idea that rights and duties are requisite to each other is similar to Gifford Pinchot's conservation ethic and wise-use movement, where individuals who have harvesting rights also have legal and moral duties to ensure that they care for and sustainably use the resources they benefit from [43]. Fishing rights, interpreted broadly, therefore, imply a socio-legal contract concerning a valuable public good [44–46]. Important fisheries literature has recognized this relationship. The 1995 *FAO Code of Conduct for Responsible Fisheries* states: "The right to fish carries with it the obligation to do so in a responsible manner so as to ensure effective conservation and management of the living aquatic resources" (Paragraph 6.1 [47]); Daniel Bromley [48, p. 2] similarly declared, "[r]ights have no meaning without correlated duties." Indeed, fishing rights are revocable privileges gained and justified through several legitimized means, such as group membership (in the case of fishing cooperatives), financial prowess (in the case of purchasable or tradable fishing quotas/permits), historic or habitual usage (in the case of Indigenous communities or locally-residing fishers), or entrepreneurial risk-taking (in the case of newly developing fisheries). Therefore, they can be withdrawn in most cases if fishing rights holders do not meet the qualifications including the attendant duties, at least in theory [49].

By contrast, claiming human rights are not conditioned upon fulfilling certain duties, let alone duties towards environmental sustainability and stewardship, because of the unnegotiable nature of human rights. That is, human rights are so basic that they defy being bargained or conditioned. Dowell-Jones [50, p. 50] admits that "the notion of human duties – of the capacity of the individual to bear responsibility for realisation of his/her own rights – is in many ways the forgotten chapters of the human rights dialogue, a topic on which comparatively little has been written." Typically, states are seen as the sole duty bearers of human rights because states (and by extension supranational institutions such as the European Union) are the primary political community that have authority over the right-holders [51,52]. They are

also the only institution deemed to have the capabilities to perform both the duties to *protect* (e.g., the duty to protect people against racial discrimination) and the duties to *provide* (e.g., the duty to guarantee the availability of clean water) [53].

As such, within the human rights tradition, right-holders have no obligations, aside from refraining from acts that will violate the human rights of others. Bromley's view, "the management problem with open access regimes is that there are no duties on aspiring users to refrain from use" [48, p. 2], speaks directly to the dilemma which we pose here. Hence, this contradiction about presence or absence of attendant duties is suggestive of another angle through which it appears problematic to conceive fishing rights as human rights when defining and practising fishing rights. While human rights serve as a useful impetus for strengthening the rights of unjustly excluded fishers, uncritical enthusiasm about human rights may lead to underemphasization of attendant duties, ultimately to the detriment of resource sustainability. Specifying responsibilities and duties in a way that is consistent with resource ethics will be an important challenge left to the operationalization of HRBA.

### 3.3. Whose rights matter more?

Further complicating the issue of linking fishing rights and human rights is the question of reconciling rights claims of more than one entity. Consider a case of multiple groups competing for the same or overlapping fishing rights all by way of human rights principles. The question becomes which groups of fishers should be given precedence when their fishing rights claims collide. Different communities may bring forward different human rights-inspired arguments to claim their right to fish, whether based on economic, social, cultural or moral reasons. One group may ground their argument on historic use, place attachment, or long-standing culture (e.g., constitutionally protected right to fish). Another group comprising tenureless migrants may be deemed highly vulnerable and demand special consideration to protect their livelihood needs. Migrant fishers' concerns might especially grow in size and relevance as the number of climate change refugees increases [54,55].

The 1999–2002 disputes between the Mi'kmaq community and the non-native fishers over lobster fishing rights in Miramichi Bay in Canada are illustrative of this dilemma. Asserting the 1760 *Treaty of Peace and Friendship* (the "Treaty", which proclaimed aboriginal fishing and hunting rights [56]), the Mi'kmaq demanded a right to enter fishery freely and fish year-round for subsistence and sale, while the non-native lobster fishers argued that such allocation would be detrimental to the conservation of lobster stocks and their own livelihoods, who themselves are also small-scale fishers. Spurred by the Supreme Court Decision *R. v. Marshall* and the subsequent clarification referred to as "Marshall 2", violent protests and vandalism ensued between native and non-native fishers. While appearing to uphold the treaty right, the court decisions ultimately affirmed that the treaty right cannot entirely supersede the Fisheries Minister's authority to intervene and the government's power to regulate. The process to resolution was not without standoffs and high tension. Notably, both parties relied on human rights arguments. Non-native fishers were demanding that native and non-native alike should be treated equally under the law with the same rights and the same system of fishing rules [57]. The Mi'kmaq people drew on more explicit human rights languages, such as their *inherent rights* to fish (as opposed to the treaty-based rights that actually had to be confirmed by the Supreme Court) and submitting their ordeal as the "best case of an abuse of human rights" (quoted in [58, p. 180]). The conflict officially ended when the parties reached an agreement, with the government offering material concessions to native fishers in exchange for their acceptance of a centralized system of licences and fishing rules. Hereditary Chief of the Mi'kmaq Grand Council, however, expressed indignation by declaring the agreement to be an outcome of structural coercion. Once again by appealing to the conscience of

human rights, he stated, "The UN Human Rights Committee has ruled that the extinguishment of our aboriginal and treaty rights is violation of fundamental human rights ... Peace cannot arise out of injustice and no 'certainty' can result from the imposing of an unequal agreement. The Crown, and Canadians, will get no lasting benefit from these 'deals' involving the annihilation of our rights, except the despair and resentment of generations of our children and people" [59].

When different parties attempt to secure their fishing rights by relying on human rights-based arguments, we contend that this can weaken the merit of employing the HRBA. This is because, at the most basic level, human rights defy prioritization. What should receive precedence between, for instance, 'equality and non-discrimination' for non-native small-scale fishers and 'justice and self-determination' for the native community? In fact, they are all important. Hence, in the context of conflicting rights claims between different groups of small-scale fishers, resorting to human rights arguments may not necessarily confer an advantage, while likely giving rise to messy, antagonistic (legal) battles. This conceptual uncertainty exposes another possible conundrum in implementing HRBA in fishing rights allocation. We provide further reflection and a potential way forward in the discussion section below.

### 3.4. Individual versus communal rights

Finally, even when a community has successfully applied the HRBA to secure their communal fishing rights, it is still unknown whether each individual fisher would receive adequate entitlement. Individual entitlement matters because, historically, the human rights paradigm has favoured individualistic orientation – to account for every person and aim that everyone is subject to equal and just treatment regardless of her social standing and political membership; it links well with the widely-recognized human development slogan of "leaving no one behind" (see [60]). Subsequently, this might mean that the HRBA as applied to the allocation of fishing rights has a similar endpoint, i.e., to have every qualified fisher or fishing household be secured with a right to benefit from her fishing work. On the contrary, discussion on HRBA to fisheries has tended to gravitate towards emphasizing the community-level as a site of HRBA implementation [1,61,62]. This latter view reflects the embedded nature of SSF in the values and traditions of local communities where fishing is not only an individual pursuit but also a collective endeavour situated within group norms. The community angle is unmistakable, though at times implicit, in many notable writings on this topic.

The potential danger in privileging the collective rights claims of fishing communities is that the group rights secured through human rights principles may nevertheless fail to guarantee the human rights of individual members. There may be context-specific, culturally-distinctive within-group dynamics that tolerate episodes of gender inequality, power imbalances, and lack of transparency in decision-making as well as unequal distribution of resource use rights among members (e.g., local elite capture). Moreover, community leadership may neither assume nor is required to be the duty-bearer of human rights, that is, there may be no codified obligation on their part to treat every member with equal respect, participation and sensitivity. As a result, individuals in possession of substantial authority, know-how, or financial capital such as community leaders, aquaculturists, or simply more established fishers may reap bigger shares of the benefit at the expense of other members in the community (see [63,64]). Therefore, the pitfall of such group-focus leaves open the question of within-group discrimination. For instance, halibut and sablefish fisheries in the Gulf of Alaska allows a Community Quota Entity (CQE) program where eligible communities through their local non-profit organizations can purchase quota shares which are then leased to community residents. In this case, the overarching CQE program does not mandate any uniform standard specifying how each community should make quota allocation decisions within itself, that is, each community is free to devise

allocation rules in any manner that it deems as efficient and necessary [65, p.307]. A further concern arises because beyond civil actions that can be taken against community organizations, or attacks on the general application and approval process at the federal level, Soliman [65, p.308] notes that there is no appeal process that can be used to contest the decisions of the board regarding whether or not quota share will be allocated to a particular resident. In the same vein, withholding the fishing right of a younger resident or a new entrant to the fishery, until they fulfill a prerequisite number of years or minimum fishing days as prescribed in community membership rules, may also unduly deprive these less established fishers of an opportunity to work and make a viable living. In South Korea, the membership rules vary by fishing village cooperatives where some impose high membership joining fees or even require fishers to hold a title to a house in the community [66]. In most cases, those excluded are at the mercy of such within-group dynamics and have few other options but to abide by local regulations in order to be accepted and benefit from the community's right to fish.

Despite such concerns, experiences tell us that applying the HRBA at the level of individual fisher would not constitute a viable strategy either. Focusing on the individuals and their independent rights to fish may mean that communal rights are further eroded and community identity dissipated, as a privatized and rationalized fishing sector has repeatedly worked to damage the social fabric of fishing communities [67,68]. Especially, the use of ITQs in many parts of the world has increased concentration and monopolization of quota shares in larger and wealthier commercial entities at the risk of forcing smaller owner-operator fishers or crew members to leave the fishery and even the locality altogether for seeking livelihoods elsewhere [67,69,70]. In short, applying the HRBA to allocation of fishing rights can either advance community entitlements as a whole but may not necessarily help all individuals in the community, or it can promote individual's rights discretely but put community integrity and functioning in peril. The realisation that HRBA may not achieve both community and individual benefits harmoniously and simultaneously forms an additional reminder of the untidy linkage that arise in the convergence of human rights and fishing rights.

#### 4. Discussion: A way forward

Human rights discourse now experiences widespread usage in many sectors of our society, from international law, development and politics to natural resource governance – including the field of fisheries and aquaculture more recently. It has become the basic normative currency for addressing political, social, and economic injustices and insecurity [51]. When we call something a human right, we are claiming that it is of grave concern and deserving utmost priority in reasoning and action. Human rights-based arguments can therefore bring an added urgency towards securing small-scale fishing rights “as part of a wider mission for self-determination and equal rights as citizens” [2, p. 20]. Yet, there is a danger of devaluation and indifference, too, if the language of human rights proliferate but fails to underpin practical decisions. As the greatest emancipatory potential lies not in the rhetoric but in its application – here, in the infusion of human rights standards into the decisions of rights allocation, we will likely see an increasing need for, and use of, human rights-based arguments to support the urgent, controversial and critical cases of fishing rights claims.

The purpose of this article was, therefore, to assist the application of the HRBA by highlighting four conceptual hurdles between human rights and fishing rights that, if not adequately made aware of, could confound legal and regulatory procedures and frustrate on-ground allocation outcomes. Importantly, because we do not expect clear-cut solutions to these incongruities, this article suggests that the process of fishing rights claim via human rights principles may be punctuated with hard choices on the part of regulators and judiciaries and undue winners and losers on the part of fishing groups. Based on our analysis, however, we offer two ways forward in terms of alleviating this

dilemma. First, we reason that applying the HRBA to the allocation of fishing rights will be most effective when the human rights principles are used to promote communal rights rather than individual rights insofar as groups are motivated to ensure the basic dignity of all members by distributing fishing rights in a manner consistent with the human rights standards. In the Alaskan example, the Old Harbor's CQE has created a distribution system that is meant to be equitable, accountable, and achieves the community's goal of providing opportunities for both long-established residents and new entrants [65]. This was to be achieved, for instance, through setting aside 20% of leases for inexperienced community residents with limited resources (e.g., small-boat fishers) to reduce barriers to entry and by limiting the number of leases per household to two to ensure that the benefits of the program are spread throughout the community [65, p. 312].

Second, we advise the HRBA to focus on strengthening the fishing rights of SSF against the claims of larger, wealthier and more privileged fishing entities, rather than using it between SSF groups. The South African example described earlier was the case of pitting the rights of a group of artisanal fishers against the rights of larger and more established commercial operators, who were also predominantly white (see [30,33,34]). Our view is that because of the clear disparity between the two groups in terms of their scale, rationale and modus operandi, the human rights-based arguments formulated for small-scale fishers likely gained greater conviction and possibly became more impactful. Thus, prioritizing SSF against large-scale fisheries, instead of adjudicating between two or more groups all characterized as SSF, would represent the least problematic and most persuasive linkage that human rights have to fishing rights. A related question is: should the HRBA also apply to large-scale fisheries? The blatant violations of human rights such as at-sea slavery and human trafficking suggests a clear role of the HRBA in the large-scale fishing sector [71,72]. However, when it comes to fishing rights allocation, we submit that the HRBA would lose much of its potency and purpose if it were to be aimed at securing the economic interests of large-scale fisheries. Such affirmative action in prioritizing the needs of the most marginalized and the vulnerable is indeed a basic tenet of the HRBA [1,8,61,73].

The practical quest of securing the fishing rights of small-scale fishers does not happen overnight and would require well-guided effort in assisting and empowering communities through creating alliances with legal practitioners, human rights commissions and/or non-governmental organizations. The government, too, must not only focus on the outcomes of the HRBA as it would try to adapt to the new allocation decisions, but also respect and meet the human rights requirements embedded in procedures. Relevant questions in this respect are (for details, see [8, p. 783]) – are fishing communities being adequately consulted? Can they freely express their views without fear and shame? Are they allowed and encouraged to assemble and organize to influence decisions that matter to them? Is information being provided in forms and language understandable to them? Is there a mechanism in place to deal with grievances and are there options for recourse to appeals?

Fishing rights are a crucial and legitimized means to ensure a bundle of human rights for communities of fishworkers. Reciprocally, the HRBA is needed for the process of (re)allocating fishing rights to secure the basic rights of those most marginalized and vulnerable. We argue that it is this nuanced and circuitous connection that allows us to go past the simple rhetoric of equating fishing rights to human rights and chart out the conceptual contradictions as well as their mutually-supporting functions. Critical consideration will bring more meaningful contribution. Intricacies of these concepts further call for care and sensitivity in implementation, an important reminder for realizing *human-cum-fishing rights* to benefit the world's small-scale fisheries.

#### Declaration of interest

None.

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