

The Intersection Between Human Rights Law and International Environmental Law; An Analysis of Contemporary Developments Relating to The Growing International Recognition of Rights of Nature

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Abstract

Incontestably, the mutual interrelationship between humankind and the environment is as thick as thieves.¹ Humans require water, air, and survival food; therefore destruction, contamination, and adulteration of these essentials throw up threats to the health, wellbeing, and life of human beings.² Wherefore, human rights law and environmental law are attributes of the common interest of humanity.

This article sets to analyze how the earth has been facing a plethora of insurmountable deleterious environmental challenges such as pollution, loss of biodiversity, global warming, and desertification. Further, the article will show how, most global environmental issues have been dealt with through the international environmental law system. The article will further conceptualize how the global community has realized what needs to be done to tackle the alarming conundrum of environmental degradation.³ One of the worldly-wise ways of dealing with the effects of environmental degradation is using the human rights system. This system offers revolutionary legal mechanisms required to tackle the drastic effects of human activities on the environments

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¹ Kiss, Alexandre, & Dinah Shelton. Guide to international environmental law 238.

² Ibid.

³ John H. Knox, Climate Change and Human Rights Law 163-218.

and the human rights implications of ecological degradation.⁴ One of the ways through which the human rights system helps in tackling environmental issues in the international arena is through the empowering of individuals and states to safeguard the interests of both human rights and the ecosystem through various instruments and bodies.⁵ Finally, the article will analyze the challenges that face the human rights-based approaches and the remediations needed to ensure a sustainable balance and progression between humans and the environment.

1. Introduction

In the terminal decades of the twentieth century, the global environment became a serious concern.⁶ During these periods several environmental disasters were experienced stimulating the consciousness that environmental degradation had reached catastrophic proportions.⁷ Some of the worst environmental catastrophes that were experienced in the world during this period include the 1984 Union Carbide Accident in Bhopal, India that killed over two thousand people and injuring more than fifteen thousand others;⁸ the 1986 Nuclear Meltdown in Chernobyl that led to massive soil and water contamination threatening food supplies in Eastern Europe and the erstwhile Soviet Union and loss of lives;⁹ the 1986 poisonous chemical spill from the Basel chemical plant which resulted into the discharge of dangerous chemicals into the Rhine river;¹⁰ and the prodigious amount of destruction that was caused by the Gulf War in 1991.¹¹ These man-made calamities when

⁴ Quirico, Ottavio, & Mouloud Boumghar. Climate change and human rights: an international and comparative law perspective.

⁵ John H. Knox, "Climate Change and Human Rights Law 163-218.

⁶ Nanda, V. & Pring, G.R., 2012. International environmental law and policy for the 21st century 595.

⁷ Ibid.

⁸ Nytimes.com. 2020. THE BHOPAL DISASTER: HOW IT HAPPENED (Published 1985).

⁹ World-nuclear.org. 2020. Chernobyl | Chernobyl Accident | Chernobyl Disaster - World Nuclear Association.

¹⁰ Nytimes.com. 2020. MERCURY A KEY CONCERN IN RHINE SPILL (Published 1986).

¹¹ Roberts, Adam. "Environmental destruction in the 1991 Gulf War." 538-553.

augmented with other factors such as urbanization, and industrialization, have caused drastic social, economic, and physical destruction to the human environment.¹²

With expanding environmental awareness, the international community has been prompted to deliberate about the inauspicious impact of human activities on the environment and to address the consequential challenges.¹³ World leaders have for a number of times convened in various conferences such as the 1992 United Nations Conference on Environmental Development in Rio De Janeiro,¹⁴ and the 2002 United Nations World Summit on Sustainable Development in Johannesburg.¹⁵ Among the suggested responses towards curbing environmental deterioration is the recognition of individuals' environmental rights.¹⁶

Although many of these international instruments adopted during these meetings are not binding, many states have reaffirmed their provisions without reservations. This can be witnessed in the recognition of environmental human rights by many states both developing and developed in their constitutions and municipal laws.¹⁷ International and regional judicial bodies have also greatly contributed to advancing the connection between human rights law and international environmental law as will be illustrated herein under. This can be witnessed through the cases that have been brought before various human rights bodies such as the European Court of Human Rights (ECHR), the Inter-American Commission on Human Rights (IACHR), and the Human Rights Committee which have been able to tackle

¹² Kaplan, R. D. "The Coming Anarchy in The Atlantic Monthly."

¹³ Nanda, V. and Pring, G.R., 2012. International environmental law and policy for the 21st century 597.

¹⁴ Ibid, pg. 97.

¹⁵ Ibid.

¹⁶ Hajjar Leib, L., 2011. Human rights and the environment: philosophical, theoretical and legal perspectives 2.

¹⁷ 2020. [online] Available at: <<https://www.unenvironment.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what-0>> [Accessed 27 October 2020].

environmental issues through the interpretation of the various respective human rights.

This paper analyses the influence of human rights law on international environmental law. Additionally, the paper will conceptualize and contextualize how various international and regional instruments have been interpreted by different regional and international courts and tribunals in showing the effects of various humans on international environmental law. Finally, this article will show the various challenges associated with human rights-based approaches in the international context and the possible solutions on the challenges.

2. Influence of Human Rights Law on International Environmental Law

Many models and theories have been advanced against the background of human rights law concerning the protection of the environment. During its inception, the doctrine of human rights only concentrated on two theories; the natural theory of law and the positive theory of law.¹⁸ The former postulated that human rights law emanated from the inherent dignity of the human being while the proponents of the latter opined that the law emanated from the will of the state.¹⁹ Continued development brought about more theories such as utilitarianism which advocates for actions that promote happiness and castigates actions that cause harm or unhappiness among the majority.²⁰ Additionally, the theory of socialism was also advanced by proponents like Karl Marx to fill the gap that had been created by natural law.²¹ The theorists propounded that the natural law and positivist rights were made for the bourgeois hence ignored the benefits of liberating humans of the socio-economic factors such as labor and wealth production.²² This development led

¹⁸ William A. Edmundson, *An Introduction to Rights, Introductions to Philosophy and Law Series*.

¹⁹ *Ibid*.

²⁰ Bentham, Jeremy. "Critique of the doctrine of inalienable, natural rights." 489-534.

²¹ Cranston, Maurice. "Are there any human rights?." 1-17.

²² William A. Edmundson, *An Introduction to Rights, Introductions to Philosophy and Law Series*.

to the formation of socio-economic rights in the early 19th century.²³ Although the individual natural rights did not vanish, they were viewed through the utilitarian and socialist lenses as a medium of the public good.²⁴

More contemporary theories have been advanced to serve the issue of human rights in the relation to international environmental law. One such theory is the interest theory of legal rights which states that rights are created to serve the concerns of the addressee.²⁵ Accordingly, through the application of this theory, it is practicable for the human rights realm to include nature and ecosystems and right bearers.²⁶ These theories are the backbone of the human rights system and they help in showing that human rights can extend their dignity beyond themselves. Therefore, there are no theoretical obstacles that can prevent the incorporation of environmental interest in the system of human rights.²⁷

On the same wavelength, various human rights approaches have been fronted to deal with the link between human rights law and international environmental law.²⁸ These approaches include the expansion of the existing human rights, the dependence on procedural rights, and the contextualization of the discrete human right to the environment.²⁹ The contemporary interconnection and influence of human rights law on international environmental law has been philosophically conceptualized through three theories which include; the expansion theory, the environmental democracy theory, and the genesis theory.³⁰ The first two propositions correlate with the ‘greening’ of the prevailing procedural and substantive human rights, while

²³ Ibid.

²⁴ Ibid.

²⁵ Taylor, Prudence E. "From environmental to ecological human rights: A new dynamic in international law." *Geo*.

²⁶ Ibid.

²⁷ Cranston, Maurice. "Are there any human rights?." 1-17.

²⁸ Carl Wellman, "Solidarity, the Individual and Human Rights," 641.

²⁹ Ibid.

³⁰ Andre Mokkelgjerd, "Linda Hajjar Leib, Human Rights and the Environment 69-150.

the genesis theory is concerned with the emergence and development of the distinct right to environment in international law.³¹

2.1. Expansion Theory

This theory deals with the greening of well-established rights such as the right to health, the right to privacy, the right to life, and the property right.³² The expansion and reinterpretation of these rights have always been important in the protection of international environmental issues.³³ They have also helped in creating a way for future recognition of the distinct right to the environment.³⁴ These rights are also referred to as the first-generation rights.³⁵ They define individual freedom that governments have undertaken to defend and protect.³⁶ These rights have been advanced in different ways hence showing the growing connection between human rights and international environmental law.

The right to life is the backbone of all other human rights. Undeniably, an endangered or terminated life cannot appreciate other rights.³⁷ This right is recognized in the international arena as a peremptory norm that should not be derogated from.³⁸ Moreover, the right has been recognized by various international and regional instruments such as Article 3 of the Universal Declaration of Human Rights(UDHR), Article 3 of the International Convention of Civil and Political Rights(ICCPR), Article 2 of the European Convention on Human rights(ECHR), Article 4 of the American Convention on Human Rights(ACHR) and Article 4 of the African Convention on Human and People's Rights(Banjul Charter).

³¹ Ibid.

³² Lauren, Evolution of International Human Rights, 711–712.

³³ Lauren, Evolution of International Human Rights, 711–712.

³⁴ Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights," 703–723.

³⁵ Nanda, Ved, and George Rock Pring. International environmental law and policy for the 21st century.

³⁶ Ibid.

³⁷ Anderson, Michael R., and Alan E. Boyle. Human rights approaches to environmental protection.

³⁸ Ibid.

These international and regional instruments obligate states to take measures that ensure this right is adequately respected and guaranteed. A good example is Article 2 of the EHCR which requires states “not only to refrain from taking life intentionally but, further to take appropriate steps to safeguard life.”³⁹ Additionally, General Comment 6 of the United Nations Human Rights Commission (UNHCR) elucidates that the right to life is so supreme that states should always interpret broadly.⁴⁰ It is through these provisions that the application of the right has expanded beyond the conventional derogations that emanated from public authorities to encompass environmental threats impacting the wellbeing and livelihoods of humans across the globe.⁴¹

Consequently, many international and regional courts and tribunals have set the motion in the connection between the right to life and environmental protection. In the case of *Sawhoyamaxa Indigenous Community v Paraguay*, the Inter-American Court of Human Rights (IACHR) adjudicated that Paraguay failed to respect the right to life of the community members “since lack of recognition and protection of their lands forced them to live on a roadside and deprived them of access to their traditional means of subsistence.”⁴² It is through the lack of important living conditions such as medication and necessary nutrition that any member of the community died. As such the court ruled further that, “states have a duty to create the conditions necessary in order to prevent violations of such inalienable right.”⁴³ Accordingly, by upholding the rights of indigenous communities to their ancestral properties, the IACHR periphrastically promoted the protection of the environment for the present and future generations and preservation of nature as many indigenous communities are interlinked with their natural

³⁹ Churchill, R., 1996. Environmental rights in existing human rights treaties. Human rights approaches to environmental protection, 91.

⁴⁰ UN Human Rights Committee (HRC), CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982, available at: <https://www.refworld.org/docid/45388400a.html> [accessed 19 October 2020].

⁴¹ Hajjar Leib, Linda. Human rights and the environment: philosophical, theoretical and legal perspectives p.84.

⁴² *Sawhoyamaxa Indigenous Community v. Paraguay*, 146 *Inter-Am Ct HR (ser c)*, par. 145 (2006).

⁴³ *Ibid.*

environment.⁴⁴ Additionally, in its report on the status of the human rights situation in Ecuador, the IACHR stated that “ the realization of the right to life, and to physical security and integrity is necessarily related and in some ways dependent upon one’s physical environment.”⁴⁵ From this holding, it is outrightly clear that the court expanded the scope of the right to life beyond the provisions of Article 4 of the ACHR by recognizing and accommodating environmental aspects.

In the *Inuit case*,⁴⁶ the Inuit Circumpolar Conference filed a petition to the IACHR against the United States (US) for the release of greenhouse gases (GHG) hence leading to climatic changes in the Arctic region. This in turn affected the lives of the people living in the Arctic region. Since the US was not a party to the ACHR, the petitioners relied on the American declaration on the rights and duties of man (ADRDM) which recognizes the right to life in its Article 1. They contended that climate change has caused massive degradation in the Arctic region hence leading to loss of species and diminishing of food reserves and as a result, their lives were threatened.⁴⁷ Although the petition was rejected because the information provided by the petitioners was inadequate to decide,⁴⁸ the case stands out as a significant precedent with invaluable deliberations showing the inextricable linkage between the right to life and international environmental law.

Equivalently, the African Commission on Human and People’s Rights (AComHPR) gave a landmark ruling on the relationship between human rights

⁴⁴ Ibid no. 44.

⁴⁵ The Report on Human Rights Situation in Ecuador, *Inter-American Commission on Human Rights, OEA/Ser.L/V/II.96, Doc.10 rev.1(1997), chap. VIII.*

⁴⁶ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005).

⁴⁷ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005).

⁴⁸ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (7 December 2005).

and the environment in the Ogoniland case.⁴⁹ The case concerned an alleged violation of the right to life, the right to health, and the right to a general satisfactory environment as outlined in Articles 2, 16, and 24 of the Banjul Charter respectively.⁵⁰ In this case, the Nigerian government through a state-owned company conducted an oil operation in a manner that was detrimental to the environment hence causing severe health problems to the neighboring communities. The African commission ruled against the Nigerian government and stated that the government was supposed to protect the environment and the lives of people in Ogoniland by ensuring further oil development operations and providing necessary information to the affected people on the possible health environment effects from the operations.⁵¹

Another important human right in this category is the right to privacy. This right is recognized in various international instruments including Article 17 of the ICCPR which states that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence...”⁵² this is also reiterated in Article 8 of the European Convention and Article 11 of the ACHR. Several cases have been brought forth before international and regional courts where environmental perils on the right to privacy.

In the case of *Guerra and others v Italy*, the ECHR sagaciously applied Article 8 of the European Convention and held that Italy had violated the applicants’ right to privacy and family life by not providing them with relevant environmental information that would allow them to assess the environmental effects of staying next to a chemical factory.⁵³ The applicants were living one kilometer from a fertilizer factory that produced environmentally hazardous chemicals.

⁴⁹ The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (Ogoniland case), Case No 155/96 (AComHPR, 27 October 2001).

⁵⁰ African Convention on Human and People’s Rights.

⁵¹ The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria (Ogoniland case), Case No 155/96 (AComHPR, 27 October 2001).

⁵² International Convention of Civil and Political Rights.

⁵³ *Guerra and Others v. Italy*, 26 Eur. Ct. H.R. 357 (1998).

On the same note, the case of *Mcginley and Egan v United Kingdom (UK)* also advanced the linkage between the right to privacy and international environmental law.⁵⁴ The petitioners, in this case, argued that the UK violated Article 8 of the European Convention when it failed to provide necessary information to them on the effects of nuclear tests that were taking place on Christmas Island in 1954.⁵⁵ The petitioners were members of the armed forces stationed on the Island. The Court rejected its application by stating that the government had provided the required information. However, the Court noted that “where a government engages in hazardous activities, respect for private and family life under Article 8 requires that effective and accessible procedure be established which enables such persons to seek all relevant and appropriate information.”⁵⁶

The right to health is another significant civil and political right that falls within this category. A healthy ecosystem is fundamental for health and well-being.⁵⁷ The International Covenant on Economic, Social, and Cultural Rights (ICESCR) states that state parties should recognize the right of everyone to a satisfactory living standard, which includes enough food, clothing, housing, and uninterrupted enhancement of living standards.⁵⁸ This also includes the right to be cushioned from hunger.⁵⁹ Incontestably, the attainment of the right to health is not only associated with the provision of better medical care but also encompasses the protection of the environment from hazards such as the release of contaminated sewage into water bodies, food adulteration, and radioactive pollution.⁶⁰ Other fundamental instruments that recognize the right to health include, United Nations Convention on the Rights of a Child,⁶¹ and the Banjul Charter.⁶²

⁵⁴ *McGinley and Egan v. United Kingdom*, 27 E.H.R.R. 1 (1998).

⁵⁵ *Ibid.*

⁵⁶ *McGinley and Egan v. United Kingdom*, 27 E.H.R.R. 1 (1998).

⁵⁷ Andre Mokkelgjerd, "Linda Hajjar Leib, Human Rights and the Environment 89.

⁵⁸ International Covenant on Economic, Social, and Cultural Rights, Article 11.

⁵⁹ *Ibid.*

⁶⁰ Thorme, Melissa. "Establishing environment as a human right." 319; Hajjar Leib. Human rights and the environment: philosophical, theoretical and legal perspectives.

⁶¹ United Nations Convention on the Rights of a Child, Article 24.

⁶² African Convention on Human and People's Rights., Article 16.

In its General Comment 14 on the right to health and highest standard of living, the Committee on Economic, Social and Cultural Rights (CESCR) provided a broader explication of the right to health by stating that “it is an inclusive right extending to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition, and housing, healthy occupational and environmental conditions.”⁶³ This Comment shows that the right to health is indistinguishably linked to linked and fixated to the environment.

In the case of the *Marangopoulos Foundation for Human Rights v Greece*,⁶⁴ the European Committee on Social Rights (ECSR) through its recommendations, found the linkage between the right to health and the environment. The Committee found that Greece violated the right to health as it had failed to take precautionary measures to prevent environmental pollution caused by lignite mining and power stations powered by lignite whose effects were likely to cause air pollution and climate change in the area. The Committee took into consideration international and European legal frameworks such as the ECHR and the European Social Charter (ESC) and significantly highlighted Greece’s non-compliance.⁶⁵ This is an important precedent as it highlights the connection between the rights to health and the right to life with environmental degradation in the realm of international law. Additionally, in the case of *Yanomami v. Brazil*,⁶⁶ the petitioners who are an indigenous community in the amazon filed a case in the IACHR against Brazil. The members of the community argued that the construction of the Trans-Amazonian Highway across their homelands without compensation infringed on their rights. This highway led to mining activities in the area which in turn led to the unreasonable displacement of the community members. This subjected them to diseases such as influenza and tuberculosis. The petitioners

⁶³ General Comment 14: The Right to the Highest Attainable Standard of Health, *Committee on Economic, Social and Cultural Rights, UN Doc E/C.12/2000/4 (2000)*.

⁶⁴ *Marangopoulos Foundation for Human Rights (MFHR) v Greece, Collective Complaint No 30/2005*.

⁶⁵ *Ibid*.

⁶⁶ *Yanomami Community v. Brazil Inter-Am Comm HR, Brazil, Resolution No. 12/85, Case No. 7615(1985)*.

argued that their right to life and personal security and the right to health and wellbeing as provided by the American Declaration of the Rights and Duties of Man was greatly infringed upon.⁶⁷ Although the Commission did not stop the Brazilian government from continuing with the environmental degradation, it ruled in favor of the community and proposed that the Brazilian government should take measures to protect the lives and health of the member of the community and ensure demarcation of boundaries that protected the communities from infringement and displacement.⁶⁸ This shows that the destruction of the environment can lead to severe health effects on individuals dependent on such an environment and individuals can use the right to health to protect their environmental rights.

Additionally, the property right is another important right in which landmark cases have been decided to advance the relationship between this human right and the environment. Particularly, some of the cases include, the Kichwa People of Sarayaku v Ecuador,⁶⁹ Maya indigenous communities of the Toledo District (Belize),⁷⁰ Mayagna (Sumo) Awas Tingni Community v Nicaragua⁷¹, and the Indians of Yanomami case.⁷² These cases were caused by environmental degradation resulting from the extraction, logging, infrastructural developments, and mining in the ancestral lands of indigenous communities respectively. This led to a violation of the right to property of the people as per Article 21 of the ACHR.⁷³ The IACHR interpreted the rights

⁶⁷ American Declaration of the Rights and Duties of Man; Yanomami Community v. Brazil, *Inter-Am Comm HR, Brazil, Resolution No. 12/85, Case No. 7615(1985)*.

⁶⁸ Yanomami Community v. Brazil *Inter-Am Comm HR, Brazil, Resolution No. 12/85, Case No. 7615(1985)*.

⁶⁹ Kichwa Indigenous People of Sarayaku v. Ecuador, 2012 Inter-Am Court H.R. (ser C) 245 (2012).

⁷⁰ Maya Indigenous Community of the Toledo District v. Belize, 2004 I.A.C.H.R. Case 12, 2004 Case 12 (2004).

⁷¹ Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) 79, 2001 Inter-Am Court H.R. (ser C) 79 (2001).

⁷² Yanomami Community v. Brazil *Inter-Am Comm HR, Brazil, Resolution No. 12/85, Case No. 7615(1985)*.

⁷³ American Convention on Human Rights.

widely including the communal customary property of the communities and the right to life under Article 4 of the ACHR.⁷⁴

2.2. Environmental Democracy Theory

It is through this theory that democratic governance is introduced into the field of environmental sustainability.⁷⁵ Procedural rights such as the right to information, right to participation, and access to justice are applied in the realm of international environmental law to empowers individuals, challenge decisions and influence international resolutions and policies.⁷⁶ These rights are alternatively referred to as the second-generation rights and the goal is to help individuals seek affirmative action from the authorities.⁷⁷

These procedural rights are important in the realm of international human rights law. They have also been recognized in various international and regional instruments including the Universal Declaration of Human Rights(UDHR) which sets out some of the rights as follows; right to an effective remedy in tribunals,⁷⁸ the freedom of expression, and opinion which includes the right to receive and impart information,⁷⁹ the right to participate in government either directly or indirectly⁸⁰ and the right to be educated.⁸¹ Equally, the ICCPR recognizes rights in Articles 14, 19, and 25. Moreover, the Aarhus Convention provides for the right to environmental information and public participation in decisions that impact the environment.⁸² The United National Framework Convention for Climate Change(UNFCCC) recognizes these rights by stating that, “ state parties shall promote and facilitate at the national...sub-regional and regional, and in accordance with national laws and regulations, and their respective capacities public access to

⁷⁴ Ibid.

⁷⁵ Mason, Michael. Environmental democracy.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ Universal Declaration of Human Rights, Article 8.

⁷⁹ Ibid, Article 19.

⁸⁰ Ibid, Article 21.

⁸¹ Ibid, Article 26.

⁸² Convention on access to information, public participation in decision making and access to justice in environmental matters, Article 1.

information and public participation.”⁸³ This is also reiterated in Principle 10 of the Rio Declaration.⁸⁴

Since these participatory rights are precautionary and pro-active, they help in the proper management and protection of the environment.⁸⁵ Through the participation of individuals in decision-making, they help to make good environmental decisions and averting ecological pollution. Strictly speaking, these procedural rights incorporate democratic elements that help in environmental management both in the national, and international arena.⁸⁶ Particularly, in the realm of international environmental law, these human rights give non-state actors such as non-government organizations (NGOs) to participate in global policy-making and global dispute resolution processes.⁸⁷

The ‘greening’ and ‘proceduralisation’ of these human rights have been brought out sagaciously in the case of Maya Indigenous communities of the Toledo district,⁸⁸ the state of Belize alleged infringed on the traditional rights of the communities by allowing logging and oil exploration and mining the lands. The petitioners contended that the State failed to protect their lands at the same time, it failed to accord them an opportunity to judicially protect their traditional lands. The Inter-American Commission on Human Rights held that Belize’s conduct infringed on the rights of the Maya community by threatening the natural environment of the community which in turn endangered the economic and life support of the community. This was a breach of the right to property and judicial protection as provided for in the ADRDM. Accordingly, the Commission ordered Belize to restore the property

⁸³ United Nations Framework Convention for Climate Change, Article 6.

⁸⁴ Rio declaration on Environment and Development.

⁸⁵ Symonides, J., 1992. Human Right to a Clean, Balanced and Protected Environment. *Int'l. J. Legal Info.*, 20.

⁸⁶ Handl, Günther. "Human rights and protection of the environment: A mildly revisionist view." *Human Rights, Sustainable Development and the Environment*, San José de Costa Rica/Brasilia 117-142.

⁸⁷ *Ibid.*

⁸⁸ *Maya Indigenous Community of the Toledo District v. Belize*, 2004 I.A.C.H.R. Case 12, 2004 Case 12 (2004).

rights by conducting fully informed consultations with the Maya people and most essentially to restore the environmental harm suffered.⁸⁹

Additionally, in the Center for Minority Rights Development on behalf of the Endorois Community v Kenya, the petitioners alleged that the Kenyan government forcibly removed the members of the indigenous community without any consultations to set up a game reserve on their land.⁹⁰ Additionally, there was no adequate compensation to the members of the community. This violated significant provisions of the Banjul Charter including the right to acquire justice, right to property, and the right to culture. After extensively reviewing the case, the AComHPR held for the Endorois people and stated that indeed Kenya violated their rights. one of the fundamental principles that Kenya violated is the duty not to pollute traditional environments which are provided for in the united nations on the situation of human rights and fundamental freedoms of indigenous people.⁹¹

Moreover, in the case of *Saramaka v Suriname*, which also involved the rights of indigenous people, the court accentuated the significance of public participation, environmental impact assessment, and access to information, and prior informed consent with regards to environmental interruptions on indigenous peoples' properties.⁹² The importance of the right to information with regards to environmental exploitation was also greatly emphasized by the IACHR in the case of *Claude-Reyes et al. v. Chile*.⁹³ In this case, the court expanded on the provisions of Article 13 of the ACHR.⁹⁴

⁸⁹Maya Indigenous Community of the Toledo District v. Belize, 2004 I.A.C.H.R. Case 12, 2004 Case 12 (2004).

⁹⁰ Centre for Minority Rights Development v. Kenya, 2009 A.H.R.L.R. 75 (2009).

⁹¹ Stavenhagen. The Situation Of Human Rights And Fundamental Freedoms Of Indigenous People; Centre for Minority Rights Development v. Kenya, 2009 A.H.R.L.R. 75 (2009).

⁹² *Saramaka People v. Suriname*, Judgment of 28 November 2007, Series C No. 172, paras. 129 - 134

⁹³ *Claude-Reyes et al. v. Chile*, 2006 Inter-American Court of Human Rights (Ser. C) No. 151, para. 76–77.

⁹⁴American Convention on Human Rights.

2.3. Genesis Theory

This theory interlocks with Ronald Rich's "indispensability theory" which talks about the right to development.⁹⁵ Proponents of this theory opine that the right to development is necessary for the enjoyment of basic human rights.⁹⁶ Therefore, just as the right to development is necessary, the right to the environment is necessary for the fulfillment of basic human rights.⁹⁷ Further, they claim that as much as the first and second-generation rights are important in preventing environmental degradation, they are limited in scope and somehow restricted.⁹⁸ Consequently, the recognition of distinct environmental rights helps in fighting human rights consequences of environmental degradation without having to supplicate the existing first and generation human rights, that would demand, "fitting the potentially round peg of environmental concerns into the square of staunchly anthropocentric human rights."⁹⁹ Plaintiffs are forced to show the connection between the unwelcome environmental element and an existing human right.¹⁰⁰ A good example is the case of *X and Y v federal republic of Germany* where the court rejected a petition filed by environmental organizations against marshlands for military purposes based on inconsistency with the European Convention.¹⁰¹ The ECHR held that "no right to nature preservation is as such included among the rights and freedoms guaranteed by the convention."¹⁰²

The rights advanced through this theory are commonly known as third-generation rights or solidarity rights.¹⁰³ They are not contingent upon the already existing human rights in the international area, nor do they replace

⁹⁵ Rich. The right to development as an emerging human right 312-320.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*, pg 321.

⁹⁸ Hajjar Leib, L., 2011. Human rights and the environment: philosophical, theoretical and legal perspectives.

⁹⁹ Leib. Chapter Three. Theorisation Of the Various Human Rights Approaches to Environmental Issues. In *Human Rights and the Environment* 69-108.

¹⁰⁰ Hajjar Leib. Human rights and the environment: philosophical, theoretical and legal perspectives.

¹⁰¹ *X and Y v. Federal Republic of Germany*, 15 *Eur Comm HR* 161, 161 (1976).

¹⁰² *Ibid.*

¹⁰³ Noralee Gibson, "The Right to a Clean Environment," 5-18.

them.¹⁰⁴ They have been developed due to the changing circumstances in the international arena hence prompting the need for new rights.¹⁰⁵

The right to the environment has been advanced in a number of international instruments including the Arab Charter on Human Rights which recognizes the right to a healthy environment as part of the right to an acceptable standard of living.¹⁰⁶ On the same wavelength, the ASEAN Declaration on human rights in its Principle 28 states that “ every person has right to an adequate standard of living for himself and his family including.....the right to a safe, clean and sustainable environment.”¹⁰⁷ At the international plane, the ICESCR encapsulates the right by urging states parties to ensure the improvement of all aspects of environmental and industrial hygiene.”¹⁰⁸ The Earth Charter in Principle 6 advocates for the actions that help in “avoiding the possibility or serious or irreversible environmental harm...” even with insufficient scientific knowledge.¹⁰⁹

One of the greatest developments with regards to the right to environment is the Draft Statute for the International Environmental Agency plus the international court of the environment. The Draft Statute was presented at the 1992 UNCED conference in Rio de Janeiro.¹¹⁰ Although the draft statute is not binding it provides a good pathway in the recognition of the right to environment in the international arena. This Statute makes substantive provisions for the right to environment and good relationship with other human rights. Particularly in Article 1, it states that “ everyone has a fundamental right to environment and an absolute duty to preserve life on earth for the benefit of the present and future generations.”¹¹¹ Additionally, the statute provides for an adjudication body which is the international court

¹⁰⁴ Ibid.

¹⁰⁵ Ibid.

¹⁰⁶ Arab Charter on Human Rights, Article 38.

¹⁰⁷ ASEAN Declaration of Human Rights.

¹⁰⁸ International Covenant on Economic, Social, and Cultural Rights, Article 12(2)(b).

¹⁰⁹ Earth Charter Initiative, The Earth Charter (2000) Principle 6, <www.earthcharterinaction.org/content>.

¹¹⁰ Draft Statute for the International Environmental Agency.

¹¹¹ Ibid.

of the environment that will adjudicate on matters arising from the violation of the right to the environment.¹¹² The court will have jurisdiction over non-state persons and states.¹¹³ This development is so great as it shows that the world is on the right track towards recognizing the individual right to the environment and according to significant protection for the rights. Relatably, the San Salvador protocol which was added to the ACHR expressly recognizes the right to a clean and healthy environment in its Article 11.¹¹⁴

In recognizing the right to the environment, the AComHPR in the Ogoniland case held that states are obligated to take reasonable measures to avoid pollution and environmental degradation, to promote conservation, and to ensure environmentally sustainable development and use of natural resources.¹¹⁵ This ruling is outstanding as it stresses the importance of the right of communities to a clean and healthy environment through sustainable exploitation of natural resources. Additionally, it also indicates the significance of the right to information and public participation in environmental matters. On the same note, in *Hamer v Belgium* the ECHR held that states have put environmental protection mechanisms in place to protect their citizens, certain human rights and economic considerations should not reign primacy over environmental protection.¹¹⁶ Additionally, in the case of *Mangouras v Spain* that concerned an environmental disaster when an oil tanker prestige ran aground at the Galician coast in 2002 discharging seventy thousand gallons of oil into the Atlantic ocean, the ECHR adjudicated that when determining bail, “ the disastrous environmental consequences” of the

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights of 14 Nov. 1988 (Protocol of San Salvador).

¹¹⁵ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (Ogoniland case), Case No 155/96 (AComHPR, 27 October 2001).

¹¹⁶ *Hamer v. Belgium*, Judgment of 27 November 2007, ECHR Application No. 21861/03, para. 79.

prestige disaster should be one of the important factors to be taken into account in determining the seriousness of the offense.¹¹⁷

Through the judicial interpretation of various treaty provisions, it is trite to say that a substantial amount of progress has been made towards the fusion and assimilation of human rights norms and international environmental values. Accordingly, the interaction between international environmental law and human rights law will continue to loom large in the international law arena. Nevertheless, these human rights-based approaches to tackling environmental issues have a number of challenges.

3. Challenges Associated with The Application of Human Rights-Based Approaches in The International Context

Some of the challenges associated with the application of these human rights-based approaches in the international environmental law context include anthropocentricity, definition, *forum non conveniens*, jurisdictional competition, fragmentation of international instruments and *locus standi*. This article will focus on the first four.

3.1. Anthropocentricity

One of the challenges associated with the application of the human rights model in the realm of international environmental law is the contextualization of human rights as environmental rights. This leads to an anthropocentric prejudice on the environment hence offering no assurance against global environmental degeneration.¹¹⁸ Put differently, the anthropocentric nature of human rights concentrates on the effects on humans rather than the ecosystem itself.¹¹⁹

¹¹⁷ *Mangouras v. Spain*, ECHR Application No. 12050/04, Grand Chamber, Judgment of 28 September 2010, para. 92.

¹¹⁸ Acevedo, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights* 437; Birnie, Patricia W., & Alan E. Boyle. *International law and the environment* 279

¹¹⁹ Birnie, Patricia W., & Alan E. Boyle. *International law and the environment* 268-334.

This was well put in the case of *Guerra and other v Italy* where the ECHR held that when individuals seek the protection of environmental interest through the incantation of privacy rights, these individuals ought to invoke such a right when such an environmental effect or pollution impacts on them directly and severely.¹²⁰ Moreover, the ECtHR reiterated that there should be a very strong causal link between environmental injury and the polluting factory.¹²¹ From this case, it can be deduced that the interpretation of human rights is only concerned with the human effects and not the environment. Almost always, one has to strongly indicate that they suffered from specific pollution. This even if the environment suffered and no right was infringed upon, there will be no remedy.

Preventing anthropocentrism, States should embrace, adopt, and recognize nature as legal subject or person both in the international arena and at the domestic level.¹²² Although some States such as Ecuador have been able to address this,¹²³ more needs to be done across the globe by envisaging the possibilities nature can provide as a legal person with its rights.¹²⁴ During the adoption of more international environmental instruments, the rights of nature should be explicitly recognized and embraced in such instruments to ensure a wholistic respect for nature in end.

3.2. Definitions

The difficulty of defining terms and contextualizing them is another challenge associated with the application of human rights-based models in international environmental law. Particularly, understanding terms such as ‘environmental rights’ have proved to be a tall order not only to the courts but also to the experts.¹²⁵ On the one hand, these terms may be elucidated to mean the rights

¹²⁰ *Guerra and Others v. Italy*, App. No. 14967/89, 26 Eur. H.R. Rep. 357(1998).

¹²¹ *Guerra and Others v. Italy*, App. No. 14967/89, 26 Eur. H.R. Rep. 357(1998).

¹²² Kersten, Jens. "Who Needs Rights of Nature?" *RCC Perspectives*, no. 6 (2017): 9-14. Accessed April 29, 2021. <http://www.jstor.org/stable/26268370>.

¹²³ Ecuador Constitution, Articles 71 & 74.

¹²⁴ Kersten, Jens. "Who Needs Rights of Nature?" *RCC Perspectives*, no. 6 (2017): 9-14. Accessed April 29, 2021. <http://www.jstor.org/stable/26268370>.

¹²⁵ Nanda, V. & Pring. *International environmental law and policy for the 21st century*.

of elements of the ecosystem such as animals. Conversely, they may mean the right of humans as regards the caliber of the environment they are living in. This begs the question as to what movement would be an environmental infringement be inferred as a human right violation?¹²⁶

Some of the instances where this definition perplexity has been witnessed include the United Nations Sub-Commission which referred to the right to the environment as, “healthy and flourishing environment,” or a “satisfactory environment” in its report and the right to a secure, healthy, and ecologically sound environment” in its draft principles.¹²⁷ This confusion may sometimes make it difficult for one to receive justice as international courts and tribunals take a lot of time grappling with the meaning of these terms.¹²⁸ This greatly slows the progression and development of human rights law on the international environmental law plane.

3.3. *Forum Non Conveniens*

The principle of *forum non conveniens* doctrine is a discretionary power that allows judicial authorities to deny jurisdiction in cases or matters related to a foreign land or the denial of transboundary access to justice on the basis that domestic laws do not have extraterritorial application.¹²⁹ Sometimes the application of human rights models in the international plane is difficult. One of the reasons for this is the non-uniformity of the state’s adherence to certain international instruments. A good case in point is where the US not a party to the ACHR hence bringing a case before the AICHR against the US will be a problem.¹³⁰ That’s why in case of in the Inuit case the court was forced to use the ADRDM which the US is a party to.¹³¹

¹²⁶ Ibid.

¹²⁷ UN Commission on Human Rights, Human Rights and the Environment.

¹²⁸ Birnie, Patricia W., & Alan E. Boyle. International law and the environment 268-334.

¹²⁹ Ibid, pg.306.

¹³⁰ American Convention on Human Rights.

¹³¹ Inuitcircumpolar.com. 2020. Inuit Circumpolar Council – United Voice Of The Arctic. [online] Available at: <https://www.inuitcircumpolar.com/?auto_slide&ID=16&Lang=En&Parent_ID> [Accessed 27 October 2020].

Additionally, despite the principle of non-discrimination being considered advanced by several international instruments such as the IACHR, the principle of *forum non conveniens* is still applied in certain cases. In *In re Union Carbide Corporation Gas Plant Disaster at Bhopal*, the United States' courts declined to hear the case on grounds of *forum non conveniens* and stated that Indian courts were the best placed to hear the matter.¹³² It is through the same rule that made the *Trail Smelter* case to end up in international arbitration and not Canadian courts.¹³³ Another example is the *Dagi v Broken Hill Proprietary Co Ltd*, where indigenous communities who had suffered harm from mining by an Australian company in New Guinea were denied access to justice in New Guinea hence were forced to apply to Australian courts where they were finally heard.¹³⁴

From these cases, it is outrightly clear that the application of human rights models in the international arena may be difficult at times. Moreover, these cases were only concerned about human rights and the harm they suffered, no one cared about the environmental effects at large. Since the environment is part and parcel of humanity whenever such cases activate the bureaucracies of *forum non-conveniens* should not be invoked as the overall goal of protecting the environment will not be achieved. Curtailing the right to justice causes more violations of important human rights such as the right to the environment.

One of the best ways to avoid the issues of *forum non conveniens* in the protection of human rights is the regulation of jurisdiction and the recognition of judicial pronouncements and their enforcement in both civil and commercial at the international area.¹³⁵ This will culminate into easy access of justice by transboundary litigants and excluding reliance on *forum non*

¹³² *In re Union Carbide Corporation Gas Plant Disaster at Bhopal* 634 F Supp 842 (1986)

¹³³ *Trail Smelter Arbitration (US v Canada)* 3 RIAA 1905 (1941).

¹³⁴ *Dagi v Broken Hill Proprietary Co Ltd* (1997) 1 Victoria Reps 428.

¹³⁵ Birnie, Patricia W., & Alan E. Boyle. *International law and the environment*, pg 345.

conviniens as an exclusionary doctrine.¹³⁶ This is issues of jurisdictional limits has been applied in a number of international treaties hence making access to environment justice in those jurisdiction easy. A good example is the Aarhus Convention which requires parties to grant access to information, justice and decision making without discrimination based on citizenship or domicile.¹³⁷ This provision of the Convention ensures that environmental human rights cases are not dismissed based on the aspect of *forum non conviniens*.¹³⁸ It also reduces the denial of jurisdiction as a result of extraterritoriality.¹³⁹

Accordingly, states need to adopt treaties and agreements that ensure the issues of *forum non conviniens* never arise on transboundary environmental human rights cases. Courts should also adopt these principles with goal of protecting environmental rights. A case resulting from the Sandoz chemical spillage in the Rhine River good precedent on this issue and it was successful determined without resorting to issues of extraterritoriality.¹⁴⁰ The case of *Michie v Great Lakes Steel Division* also judicious avoided the issues of *forum non conviniens* by allowing Canadian plaintiffs to bring a tort action in the united states as a result of transboundary air pollution.¹⁴¹

3.4. Jurisdictional Competition

In the recent past, a large number of regional and international environmental agreements have been developed in isolation from each other.¹⁴² This occurrence has caused treaty snarl-up causing various overlaps both us substantive regulations and institutional compositions.¹⁴³ Most of these

¹³⁶Ibid.

¹³⁷ UNECE Convention on Access To Information, Public Participation In Decision Making And Access To Justice In Environmental Matters (Aarhus Convention), Article 3(9).

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Francioni, Francesco, and Tullio Scovazzi, eds. *International responsibility for environmental harm*. London: Graham & Trotman, 1991,pg 429.

¹⁴¹ *Michie v Great Lakes Steel Division* 495 F 2d 213 (1974).

¹⁴² Stephens, Tim, and Timothy Stephens. International courts and environmental protection.

¹⁴³ Wolfrum, Rüdiger, and Nele Matz. Conflicts in international environmental law.

duplications are favorable to each other as most instruments employ comparable principles on the same issues.¹⁴⁴ However, some overlaps can cause challenges if they comprise differing prescriptive principles and rules. An example of treaties where such overlaps exist is the Montreal Protocol on the ozone layer and the Kyoto Protocol of the framework convention on climate change. These two instruments are based on common aspects of environmental concern and are aimed at mitigating problems in the global atmosphere. Nevertheless, within the climate change regime, hydrofluorocarbons are considered destructive and emitters of GHGs while on the other hand they are considered as alternatives for ozone layer depleting substances under the Montreal Protocol.¹⁴⁵ These challenges also lead to problems in various adjudicative procedures. With these overlaps, the application of human rights in the realm of international law becomes a nightmare.¹⁴⁶

Additionally, these treaty contradictions have been experienced in a number of cases including the Mox Plant Dispute that was primarily concerned with the right to release information.¹⁴⁷ This case was about the Commission of a nuclear plant in the United Kingdom.¹⁴⁸ The dispute presented some jurisdictional conundrums and competitions since the dispute settlements of the law of the sea convention, the European Community Treaty, and the OSPAR Convention were all actuated to tackle the issues of the conflict.¹⁴⁹

The best way forward on the issue of jurisdictional competition is through coordination between competing jurisdictions.¹⁵⁰ The coordination should always be conducted with the aim of promoting and achieving a smooth,

¹⁴⁴ Article 11 of Vienna Convention on Ozone Layer; Article 14 of United Nations Climate Change Convention; Biodiversity Convention, Article 27.

¹⁴⁵ Sebastian Obert, "Linkages Between the Montreal and Kyoto Protocols."

¹⁴⁶ Rosendal, G. Kristin. "Impacts of Overlapping International Regimes: The Case of Biodiversity." 95-117.

¹⁴⁷ Ireland v. United Kingdom, 2 E.H.R.R. 25, 25 Eur. Ct. H.R. (ser. A) 66 (1978).

¹⁴⁸ Ireland v. United Kingdom, 2 E.H.R.R. 25, 25 Eur. Ct. H.R. (ser. A) 66 (1978).

¹⁴⁹ Ibid.

¹⁵⁰ Stephens, Tim, and Timothy Stephens. *International Courts and Environmental Protection*. Vol. 62. Cambridge University Press, 2009.

efficient operation of international law at the same time safeguarding the environmental rights of the affected parties.¹⁵¹ This can be achieved through unilateral forum selection by state parties involved in a dispute.¹⁵² In this process parties in a transboundary and/or international dispute collaborate in forum shopping and decide unilaterally the forum upon which the dispute on environmental rights will be solved.¹⁵³

4. Conclusion

Unquestionably, from the foregoing illustrations, it is crystal clear that the protection and preservation of the environment as well as promoting environmental human rights is necessary for the international arena. Moreover, it is unimpeachably trite to say the interaction between the protection of human rights and the environment will continue to feature conspicuously in the international law arena.

¹⁵¹ Ibid.

¹⁵² Shany, Yuval. "Competing Jurisdictions of International Courts and Tribunals: Which Rules Govern?." PhD diss., SOAS University of London, 2001.

¹⁵³ Ibid.

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Convention on the Elimination of All Forms of Discrimination against Women

Directive Principles of State Policy

Declaration on the Right to Development

Economic, Social and Cultural Rights

European Convention on Human Rights

*The Intersection Between Human Rights Law
and International Environmental Law; An Analysis
of Contemporary Developments Relating to The
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Inter-American Commission on Human Rights

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

International Law Association (ILA) New Delhi Declaration of Principles of
International Law Relating to Sustainable Development

Optional Protocol to the International Covenant on Economic, Social and
Cultural Rights

Universal Declaration of Human Rights

Convention on the Rights of the Child

United Nations Convention on the Law of the Sea

United Nations Framework Convention on Climate Change