

A RIGHT TO HEALTHY ENVIRONMENT: THE NEXUS BETWEEN ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS

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Abstract

This paper begins by considering the incorporation of the right to healthy environment under the Constitution of Rwanda or an obligation for the government to protect the environment or to make careful use of the country's natural resources. Primarily, the paper discusses the link between the environmental protection and human rights, as constructed within the international human rights legal framework and identifying some of the benefits of applying human rights to environmental protection. The paper also sheds light on some of the theoretical challenges to the recognition of such a right, both from within human rights discourse. Finally, the paper explores the right of access to information, public participation in decision-making and access to justice in relation to environmental protection.

I. Introduction

The incorporation of right to a healthy environment in the Rwandan Constitution or an obligation for the government to protect the environment or to make due diligence in the exploitation of the country's natural resources has become a very popular notion in recent times. The constitutions of most countries presently entrenched a provision of right to healthy environment that must be guaranteed by the State. Some authors hold the view that states which have not yet incorporated such a provision in their

Constitution should do so as soon as possible.²⁷

According to Hayward, who made an in-depth study of this subject, puts it this way, "A human right to an environment adequate for one's health and well-being is not a luxury. Moral consistency dictates it should apply equally to all"²⁸. In a similar expression, Knox noted "in the last two decades, the relationship of human rights

²⁷ Luc Lavrysen, "The Right to the Protection of a Healthy Environment" environment in the Belgian Constitution: retrospect and international perspective", in: I. Larmuseau (ed.), *Constitutional rights to an ecologically balanced environment*, (V.V.O.R.-Report; 2007/2), Gent, Vlaamse Vereniging voor Omgevingsrecht, 2007, 9-29.

²⁸ T. Hayward, *Constitutional Environmental Rights*, Oxford University Press, 2005, p. 210.

*and the environment has received much attention. Some fundamental aspects of that relationship are now firmly established, but many issues are still not well understood. Clarification of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment is necessary in order for States and others to better understand what those obligations require and ensure that they are fully met, at every level from the local to the global”.*²⁹

The influence of environmental factors on our ability to enjoy fundamental human rights is well recognised. Many of the rights guaranteed under international human rights law are defined to include an environmental dimension. For example, the rights to the highest attainable standard of health and to an adequate standard of living depend on a certain degree of environmental quality and in several cases, environmental degradation or destruction has been viewed as a violation of these human rights.

Many people, particularly those living in poor communities or developing states, rely directly on the environment for their livelihoods, and environmental problems like pollution or global warming can directly interfere with the enjoyment of their fundamental human rights.³⁰ This important relationship between a healthy environment and the enjoyment of our human rights is

²⁹ J. Knox, *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment*, A/HRC/22/43.

³⁰ Sumudu Atapattu, 'The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16 *Tulane Environmental Law Journal* 65.

well recognized. What is less well-accepted is the proposition that we, as humans, possess rights to the environment beyond what is necessary to support our basic human needs. The suggestion that a human right to a healthy environment may be emerging at international law raises a number of theoretical and practical challenges for human rights law, with such challenges coming from both within and outside the human rights discourse. It is argued that human rights law can make a positive contribution to environmental protection, but the precise nature of the connection between the environment and human rights warrants more critical analysis.

II. Protection of Right to a Healthy Environment under Rwandan law

The right to the protection of a healthy environment forms part of the economic, social and cultural rights which have been enshrined in the Rwandan Constitution since 2003. Article 49 of the Rwandan Constitution provides that:

Every citizen is entitled to a healthy and satisfying environment. Every person has the duty to protect, safeguard and promote the environment. The State shall protect the environment. The law determines the modalities for protecting, safeguarding and promoting the environment.³¹

Additionally, Article 6 Organic Law No. 04/2005 of 08/04/2005 determining the modalities for protection, conservation and

³¹ See the Constitution of the Republic of Rwanda of June 4, 2003 as amended to date.

promotion of the environment in Rwanda provides that:

“Every person in Rwanda has a fundamental right to live in a healthy and balanced environment. He or she also has the obligation to contribute individually or collectively to the conservation of natural heritage, historical and socio-cultural activities.”³²

The right to healthy environment has been relatively given little attention compared to the mere stipulation both in Rwandan Constitution and organic law. However, what is certain is that the term “healthy environment” is broadly interpreted. As research illustrated ‘every person has “the right to a decent, healthy and ecologically balanced environment”, and “the government has a special responsibility to ensure that future generations still have a livable environment. Its task in this respect is a very broad one.”³³ It not only covers conservation, but also the controlling of water, air and soil pollution, a proper planning of the available space and of farming and stockbreeding activities, and the promotion of environmentally-friendly technologies in industry and communications.³⁴

Although “healthy environment” is a broad concept, the most pressing question for the citizen, and especially for the practicing lawyer, concerns the enforceability – and

therefore the practicability – of the right to the protection of a healthy environment. As is often the case,

once the constitutional legislator has issued a constitution, the politicians have no more control over it, and the rules are allowed to lead a life of their own in legal practice.³⁵ This also applies to rules deriving from ordinary laws, yet the problem is even greater for the rules of a constitution, because such rules serve in a broad sense as guiding principles for law and society.

Conservation provides the conceptual foundation for sustainable utilization of the environment and its components so as to ensure sustainable development. In other words, if we are to find a fundamental justification for environmental law, it is to ensure that the development interests of the present generations are realized without jeopardizing those of future generations. Promotion of intergenerational equity, a key component of the concept of sustainable development is therefore fundamental to environmental law.

III. An emerging right to a decent environment

A conceptualization of the relationship between human rights and the environment provides that a decent or healthy environment is something to which human beings are entitled, independent from other human rights. It has been suggested by some that such a right is emerging at customary

³² See Organic Law No. 04/2005 of 08/04/2005 determining the modalities for protection, conservation and promotion of the environment.

³³ Luc Lavrysen, *supra* note 1, p.5.

³⁴ *Ibid.*

³⁵ *Ibid.*

law,³⁶ or that it ought to be added to the catalogue of rights contained in multilateral human rights treaties.³⁷ The relationship between the environment and human rights is clearly significant, and on this basis, humans may be entitled to claim a certain degree of environmental well-being as fundamental.

Currently, various constitutions employ a very wide range of language to define the right to healthy environment, and are open to interpretation. Consequently, significant questions emerge: how is a 'healthy environment' to be defined? What is the scope and content of the right? Is it intended to mean an environment which is good for human's health, or which is in good health itself?

There have been many attempts to define what constitutes a satisfactory, sustainable or ecologically sound environment. But there hasn't been a common definition of healthy environment recognized universally. Indeterminacy is an important reason, it is often argued, for not rushing to embrace new rights without considering their implications.³⁸ Moreover, there is little international consensus on the correct terminology. Even the UN Sub-Commission which reported in 1994 could not make up

its mind, referring variously to the right to a 'healthy and flourishing environment' or to a 'satisfactory environment' in its report and to the right to a 'secure, healthy and ecologically sound environment' in the draft principles. Other formulations are equally diverse.³⁹ Principle 1 of the Stockholm Declaration talks of an 'environment of a quality that permits a life of dignity and well-being',⁴⁰ while Article 24 of the African Charter refers to a 'general satisfactory environment favourable to their development'.⁴¹ The 2012 ASEAN Declaration on Human Rights talks of a 'safe, clean and sustainable environment'. The Independent Expert on Human Rights and the Environment is focused on 'the enjoyment of a safe, clean, healthy and sustainable environment'.⁴²

In view of the above, John Lee has argued in favour of an independent, internationally-recognised human right to a health environment that is narrowly and rigorously defined so as to become a useful and legally applicable right.⁴³ Turner describes that a specific right in an international legal instrument would allow for claims to be brought by individuals or groups where domestic laws have failed to offer adequate remedies for harm suffered as a result of

³⁶ Stephen Marks, 'Emerging human rights: a new generation for the 1980s?' (1980-81) 33 *Rutgers Law Review* 435.

³⁷ Karen Macdonald, 'A right to a healthful environment – humans and habitats: rethinking rights in an age of climate change' (2008) 17 *European Energy and Environmental Law Review* 213.

³⁸ G. Handl, 'Human Rights and Protection of the Environment: A Mildly "Revisionist" View' in A.C. Trindade (ed.) *Human Rights, Sustainable Development and the Environment*.

³⁹ *Ibid.*

⁴⁰ Declaration of the United Nations Conference on the Human Environment (Stockholm, 16 June 1972).

⁴¹ The African Charter on Human and Peoples' Rights.

⁴² G. Handl, *Supra* note 9.

⁴³ John Lee, 'The underlying legal theory to support a well-defined human right to a healthy environment as a principle of customary international law' (2000) 25 *Columbia Journal of Environmental Law* 283.

environmental degradation.⁴⁴ It would also bolster the recognition which the right already receives in some domestic legal systems and enhance the positive duties which would flow from it.⁴⁵ In addition to the benefits that the new right would confer to victims of environmental problems, Turner further argues that recognising a new right to a healthy environment in international law would enhance existing mechanisms for environmental protection.⁴⁶

IV. Links between human rights and environment protection

In examining the relationship between the fields of human rights and environment, a primary question is: Why should environmental protection be treated as a human rights issue? There are several possible answers:

- A human rights perspective directly addresses environmental impacts on the life, health, private life, and property of individual humans rather than on other states or the environment in general.
- A human rights focus may serve to secure higher standards of environmental quality, based on the obligation of States to take measures to control pollution affecting health and private life.
- The link between human rights and environment helps promote the rule of law in environmental matters:

⁴⁴ Steve Turner, *The human right to a good environment – the sword in the stone* (2004) 4 *Non-State Actors and international Law* 277.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

governments become directly accountable for their failure to enforce the law and control environmental nuisances, including those caused by corporations.

- Human rights considerations can facilitate public participation in environmental decision-making, access to information, participatory rights and access to justice.
- A human rights approach can more emphatically embrace elements of the public interest in protection of the environment as a human right.
- Climate change and human rights implications.

Broadly speaking, there are at least two possible conceptualisations of the environment within a human rights legal framework. In one approach, the environment is viewed as a precondition for the enjoyment of human rights. Environmental factors may therefore influence or determine the level of rights fulfilment and environmental degradation can amount to a violation of those rights. This relationship is well established within international human rights legal discourse and the environmental dimensions of several long-standing rights have been well-defined. In an alternative approach, the environment is a form of entitlement to which a human right to a healthy environment exists. This section explores the first of these two approaches in more detail.

International environmental law and international human rights law have to a great extent developed separately. It is a

well-accepted principle of international human rights law that a healthy environment is a necessary precondition for the promotion of several recognized rights.⁴⁷ In his separate opinion in the *Gabcikovo-Nagymaros* case before the International Court of Justice, then Vice-President Justice Weeramantry stated:

*the protection of the environment is... a vital part of contemporary human rights doctrine, for it is sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration on Human Rights and in other human rights instruments.*⁴⁸

The way in which the environment operates as a precondition for the enjoyment of human rights can be described as either direct or indirect. In the sense of the former, poor environmental conditions can directly limit an individual's or a community's ability to enjoy a specific right which is guaranteed to them under law. In recognition of this, international law defines certain rights to include environmental dimensions.⁴⁹

⁴⁷ Phillippe Sands, *Principles of International Environmental Law* (Cambridge University Press, 2nd ed, 2003); Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (Oxford University Press, 3rd ed, 2008).

⁴⁸ See *Gabcikovo-Nagymaros Project (Hungary v Slovakia)* (Separate Opinion of Vice-President Weeramantry), [1997] ICJ Rep 92 (MqJICEL (2012) Vol 8(1)).

⁴⁹ Bridget Lewis, 'Environmental Rights or a right to the environment? Exploring the nexus between

Dinah SHELTON, a well known scholar working in both fields of international law, observed in this connection: "The international community has adopted a considerable array of international legal instruments, and created specialized organs and agencies at the global and regional levels to respond to identified problems in human rights and environmental protection, although often addressing the two topics in isolation from one another."⁵⁰

On the international level there is recognition in non-binding declarations that there is a clear link between human rights and the protection of the environment. The starting point for associating human rights with environmental issues dates back to the 1970s, with the preparation of the Stockholm Declaration on the Human Environment.⁵¹ According to the Preamble of the Stockholm Declaration of the United Nations Conference on the Human Environment of 16 June 1972:

*"Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself".*⁵²

Human Rights and environmental protection'
MqJICEL (2012) Vol 8(1).

⁵⁰ D. SHELTON, "Human Rights and Environment: Past, Present and Future Linkages and the Value of a Declaration", paper presented on the High Level Meeting on the New Future of Human Rights and Environment: Moving the Global Agenda Forward, Co-organized by UNEP and OHCHR, Nairobi, 30 November- 1 December 2009, p. 2.

⁵¹ The Stockholm Declaration, *Supra* note 10.

⁵² Indeed, such a right was spelled out in the *Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development* adopted by the World Commission on Environment and Development Experts Group on

Principle 1 of this Declaration states: “*Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations*”.⁵³

This grand statement might have provided the basis for subsequent elaboration of a human right to environmental quality,⁵⁴ but it was not repeated in the 1992 Rio Declaration, which makes human beings the ‘central concern of sustainable development’ and refers only to their being ‘entitled to a healthy and productive life in harmony with nature.’⁵⁵ As Dinah Shelton noted at the time, the Rio Declaration’s failure to give greater emphasis to human rights was indicative of uncertainty and debate about the proper place of human rights law in the development of international environmental law.⁵⁶

In a few more recent International Human Rights Instruments there is some attention to environmental protection. The International Covenant on Economic, Social and Cultural

Rights contains a right to health in Article 12 that expressly calls on states parties to take steps “for the improvement of all aspects of environmental and industrial hygiene”.⁵⁷ In the General Comment No 14, the United Nations Committee on Economic, Social and Cultural Rights elaborated on the meaning of Article 12 stating. The wording of Article 12 is intended to include a ‘wide range of socio-economic factors and underlying determinants of health’ including ‘food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment’.⁵⁸ Article 12 also requires ‘the prevention and reduction of the population’s exposure to harmful substances such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health’. General Comment No. 14 clearly indicates that the environment is considered a significant contributing factor to achieving an adequate standard of health, and environmental problems such as pollution are constructed as barriers to the full enjoyment of the right.

A similar right is also enshrined in the Convention on the Rights of the Child refers to aspects of environmental protection in Article 24, which provides that States Parties shall take appropriate measures to combat disease and malnutrition “through the

Environmental Law, appended to the Brundtland Report *Our Common Future*, Oxford 1987: “1. All human beings have the fundamental right to an environment adequate for their health and well being.”

⁵³ *Ibid.*

⁵⁴ See L. Sohn ‘The Stockholm Declaration on the Human Environment’, 14 *Harv. ILJ* (1973).

⁵⁵ Principle 1, Declaration on Environment and Development, *Report of the United Nations Conference on Environment and Development*, I, (New York, 1992), UN Doc.A/CONF.151/26/Rev.1.

⁵⁶ D. Shelton, ‘What Happened in Rio to Human Rights?’ (1992) 3 *YbIEL* 75, 82 ff.

⁵⁷ The International Covenant on Economic, Social and Cultural Rights.

⁵⁸ Committee on Economic, Social and Cultural Rights, *General Comment 14: The Right to the Highest Attainable Standard of Health*, UN Doc No E/C.12/2004/4, 11 August 2000.

provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution”.

The United Nations has, so far, not approved any general normative instrument on environmental rights, although the UN Human Rights Commission has adopted several resolutions linking human rights and the environment and has appointed a Special Rapporteur on a particular environmental problem, the *Special Rapporteur on the adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights*.⁵⁹ The Commission adopted Resolution 2005/60 entitled *Human Rights and the environment as part of sustainable development*. It called on States “to take all necessary measures to protect the legitimate exercise of everyone’s human rights when promoting environmental protection and sustainable development and reaffirms, in this context, that everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights and fundamental freedoms.” It stresses “the importance for States, when developing their environmental policies, to take into account how environmental degradation may affect all members of society, and in particular women, children, indigenous people or disadvantaged members of society, including individuals and groups of individuals who are victims of or subject to racism, as reflected in the Durban Declaration and Program of Action adopted in September

⁵⁹ Luc Lavrysen, *supra* note 1, p.15 (footnotes).

2001 by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance”. It “encourages all efforts towards the implementation of the principles of the Rio Declaration on Environment and Development, in particular principle 10, in order to contribute, *inter alia*, to effective access to judicial and administrative proceedings, including redress and remedy”.⁶⁰

Another conceptual development of the area of human rights and the environment, at the international level, is clearly manifested in the appointment in 2012 of the United Nations Independent Expert on Human Rights and the Environment. The preliminary report gives some clear indications of the way forward:⁶¹

The recognition of the close relationship between human rights and the environment has principally taken two forms: (a) adoption of an explicit new right to an environment characterized in terms such as healthy, safe, satisfactory or sustainable; and (b) heightened attention to the relationship to the environment of already recognized rights, such as rights to life and health.

A similar language can be found in subsequent resolutions whereby the mandate was renewed: e.g. Resolution 2001/35 on the Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights (E/CN.4/RES/2001/35) and

⁶⁰ *Ibid.*

⁶¹ J. Knox, *supra* note 3.

Resolution 2004/17 “Affirming that the illicit movement and dumping of toxic and dangerous products and wastes constitute a serious threat to human rights, including the rights to life, the enjoyment of the highest attainable standard of physical and mental health and other human rights affected by the illicit movement and dumping of toxic and dangerous products, including the rights to water, food, adequate housing and work, particularly of individual developing countries that do not have the technologies to process them” (E/CN.4/RES/2004/17).⁶²

Some regional human rights treaties contain specific provisions on the right to a healthy environment. The African Charter on Human and Peoples’ Rights in its Article 24 provides: “All peoples shall have the right to a general satisfactory environment favorable to their development”.⁶³

Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights provides that :

“Right to a Healthy Environment

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.”⁶⁴

⁶² *Ibid.*

⁶³ See the African Charter on Human and Peoples’ Rights.

⁶⁴ See Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights.

As far as Europe is concerned, there is no explicit recognition in the European Convention on Human Rights of a right to a healthy environment, but any serious harm to the environment, may according to the case law of the European Court of Human Rights⁶⁵ constitute a violation of Article 8 European Convention on Human Rights (right to respect for private and family life) and, in particular circumstances, of Article 2(right to life).⁶⁶

A particular link between the protection of human rights and environmental protection is equally reflected in Aarhus Convention, where the first three articles of the Convention comprise the objective, the definitions and the general provisions. The Convention adopts a rights-based approach. Article 1, setting out the objective of the Convention, requires Parties to guarantee rights of access to information, public participation in decision-making and access to justice in environmental matters.⁶⁷ It also refers to the *goal of protecting the right of every person of present and future generations to live in an environment adequate to health and well-being.*

These rights underlie the various procedural requirements in the Convention. However, I will discuss the significance of this convention later.

⁶⁵ C. SCHALL, “Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?”, *J.Env.L.* 2008, 417-453.

⁶⁶ See the European Convention on Human Rights.

⁶⁷ See the Aarhus Convention.

The environment can also have an indirect impact on the enjoyment of human rights. A poor environment may affect an individual's or community's capacity to realize their human rights generally, or impede a government's ability to protect the rights of its citizens. This is perhaps best demonstrated in the context of major environmental disasters such as floods, earthquakes or tsunamis, where resources which would otherwise be used for development of human rights, are necessarily diverted to address the more immediate environmental concerns.

Human rights fulfilment can also be seen as a stepping-stone towards better environmental protection. In circumstances where human rights capacity is maximised, governments are better able to address broader environmental issues, including climate change mitigation and adaptation strategies.⁶⁸ Competing demands on a state's resources however may lead the government to prioritise more immediate human rights needs over broader, longer-term environmental protection measures.

Nevertheless, where a population's human rights are generally satisfied, they are more likely to demand better environmental protection from their government, and the government is likely to be better equipped and more favourably disposed to provide it. With particular reference to climate change policy, where a State is struggling to meet the basic needs of its citizens, it may be difficult to obtain a commitment from that State's government to lower greenhouse gas

⁶⁸ Bridget Lewis, *Supra* note 15, p.39.

emissions. The links between human rights and the environment can therefore be expanded to reveal a complex network of relationship of cause and effect in which the environment both supports and is supported by strong human rights protections.⁶⁹

V. Environmental Law Principles and Human Rights

The past 40 years or so have seen the development of a range of environmental law principles that have been incorporated directly or indirectly both in international environmental instruments as well as national and sub-national legislation.⁷⁰ Such as:

The principles of equal access to information, public participation and access to justice in environmental matters;
The principle of preventive action;
The principle of cooperation;
The principle of sustainable development;
The precautionary principle;
The polluter pays principle;
The principle of common but differentiated responsibility;
The principle of intergenerational and intra-generational equity;
The principle of non-discrimination;
The principle of environmental impact assessment;
The principle of non-regression in environmental law.

⁶⁹ *Ibid.*

⁷⁰ Derived from the 1992 Rio Declaration on Environment and Development. Philippe Sands, Jacqueline Peel et al., *Principles of International Environmental Law*, 3rd ed. 2012.

Some of these principles can be linked directly to environmental rights, most notably access to information, public participation and access to justice in environmental matters. These have translated directly into human rights law, via Principle 10 of the Rio Declaration on Environment and Development, the 1992 Aarhus Convention, and the jurisprudence of human rights courts and treaty bodies. They are broadly supportive of the idea of a human right to a safe, clean, healthy and sustainable environment. The others remain more relevant to an understanding of international or national environmental law in general than to the application of human rights approaches to environmental protection.

Some of the main human rights treaties do include specific environmental provisions, often phrased in relatively narrow terms focused on human health.⁷¹ Among human rights treaties, only the 1981 African Charter on Human and Peoples' Rights proclaims environmental rights in broadly qualitative terms. As already pointed out, it protects both the right of peoples to the 'best attainable standard of health' and their right to 'a general satisfactory environment favourable to their development.'⁷² In the *Ogoniland* case, the African Commission on Human and Peoples Rights concluded that 'an environment degraded by pollution and defaced by the destruction of all beauty and variety is as contrary to satisfactory living

⁷¹ See Article 12 of the 1966 ICESCR; 1961 European Social Charter, Article 11; 1988 Additional Protocol to the AmCHR, Article 11; 1989 Convention on the Rights of the Child, Article 24(2)(c).

⁷² The African Charter on Human and Peoples' Rights, *supra* note 29.

conditions and development as the breakdown of the fundamental ecologic equilibriums is harmful to physical and moral health'⁷³.

VI. Interactions between Climate Change and Human Rights Regimes

As noted elsewhere, there has been an increasing focus on human rights and climate change in recent years. In 2009, the Office of the U.N. High Commissioner for Human Rights (OHCHR) became the first international human rights body to examine the relationship between climate change and human rights, concluding in its report that climate change threatened the enjoyment of a broad array of human rights. Moreover, human rights law placed duties on states concerning climate change, including an obligation of international cooperation.⁷⁴

Although the 1992 Rio Declaration on Environment and Development did recognise the link between human rights and environment at the 1992 Rio Earth Summit, a human rights approach to climate change concerns had, until recently, been absent from the international negotiations – the two issues being considered separate, belonging to different regimes.

⁷³ J.C. Nwobike, *The African Commission on Human and Peoples' Rights and the Demystification of Second and Third Generation Rights under the African Charter (2005)* 1 African Journal of Legal Studies 129 at 139.

⁷⁴ OHCHR, Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61, Jan. 15, 2009.

Most recently, the Rio+20 Conference on Environment and Development is the most recent international meeting to acknowledge that climate change is a crosscutting issue. It undermines the ability of all countries, especially developing countries, to achieve sustainable development.

Should climate change be addressed under human rights regimes?

Climate change is a global problem. It cannot easily be addressed by the simple process of invoking human rights law. It affects too many States and much of humanity. Its causes, and those responsible, are too numerous and too widely spread to respond usefully to individual human rights claims.⁷⁵ The response of human rights law – if it is to have one – needs to be in global terms, treating the global environment and climate as the common concern of humanity. In that context, focusing on the issue within the corpus and institutional structures of economic, social and cultural rights, makes sense. The policies of individual states on energy use, reduction of greenhouse gas emissions, land use and deforestation could then be scrutinised and balanced against the evidence of their global impact on human rights. This is not a panacea for deadlock in the United Nations Framework Convention on Climate Change (UNFCCC) negotiations, but it would give the rights of humanity as a whole a voice that at present is scarcely heard.⁷⁶ Whether the UNHRC

⁷⁵ See Boer & Boyle, 'Human Rights and the Environment – Background Paper for the 13th Informal ASEM Seminar on Human Rights' at: <http://ssrn.com/abstract=2393753>.

⁷⁶ *Ibid.*

wishes to travel down this road is another question, which is for politicians rather than lawyers to answer, but that is where it must go if it wishes to do more than posture on climate change.

In 2009 the UN Human Rights Council adopted Resolution 10/4 (2009) on Human Rights and Climate Change:

'Noting that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.'

Two observations in the 2009 OHCHR report are worth highlighting. First, 'while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense.'⁷⁷ Secondly, 'human rights litigation is not well-suited to promote precautionary measures based on risk assessments, unless such risks pose an imminent threat to the human rights of specific individuals. Yet, by drawing attention to the broader human rights implications of climate change risks, the human rights perspective, in line with the precautionary principle, emphasises the need

⁷⁷ OHCHR 2009 Report, para. 70.

to avoid unnecessary delay in taking action to contain the threat of global warming.⁷⁸ On the view set out here, a human rights perspective on climate change essentially serves to reinforce political pressure coming from the more vulnerable developing states.

It is easy to see that all governments have a responsibility to protect their own citizens from pollution that affects the right to life, private life or property.⁷⁹ But this essentially domestic, internally focused perspective does not address the larger global issue of preventing climate change – it merely assists with amelioration of harm to particular individuals and communities within a State's own borders. However, in the climate change context, where the impacts are global, the key question is whether greenhouse gas (GHG) emitting states also have a legal responsibility to protect people in *other* States from the harmful impacts of those emissions on the global climate. Human rights treaties generally require a State party to secure the relevant rights and freedoms for everyone within its own territory or subject to its jurisdiction.⁸⁰ The question whether these treaties can have extra-territorial application is for that reason a difficult one.

VII. Challenges of a New Right to Healthy Environment

The analysis above suggests that it is unlikely that the right to a healthy environment currently exists in any

enforceable sense at international law. There are those who would advocate for its inclusion by way of a multilateral treaty. This section considers some of the challenges for such a proposal, in both theory and practice, and from within and outside the human rights discourse.

A. Challenges from within Human Rights Law

The ICCPR, ICESCR, ECHR, AmCHR do not in general serve to protect the environment as such. They are relevant to environmental problems insofar as existing rights – usually the rights to life, private life, health, water, and property - are infringed by environmental nuisances. The 'environmental' case law of human rights courts and treaty bodies does however reflect the phenomena we talked of above, namely the 'greening' of existing human rights, a process that is not only taking place in Europe, but extends across the IACHR, the AfCHPR and the ICCPR regimes.

Several scholars have argued against recognising a new right to a healthy environment in international law. One criticism centres on the problem of proliferation of human rights. As Shelton argues, 'there are legitimate fears that the addition of numerous claims will devalue existing human rights.'⁸¹ Gibson emphasises the need to ensure that any new right is supported by existing human rights theory and architecture commenting:

⁷⁸ *Ibid.*

⁷⁹ Boer & Boyle, *supra* note 50.

⁸⁰ *Ibid.*

⁸¹ D. SHELTON, *supra* note 22.

*the right to a clean environment is not a frivolous claim; however, declaring it to be a human right without support at the highest level threatens the integrity of the entire process of recognising human rights.*⁸²

Some authors have attempted to set out criteria for accommodating new rights. Ramcharan states that human rights are rights which possess certain characteristics, such as universality; essentiality to human life, security, dignity, liberty and equality; essentiality for international order and for the protection of vulnerable groups.⁸³ Gibson argued that any new right must be consistent with but not repetitive of existing human rights law.⁸⁴ As earlier noted, human rights law already recognises the significant links between environment and human rights protection. Following from this, Handl has argued that it is difficult to conceptualise the right to a healthy environment as an independent and inalienable right.

While several authors have attempted to formulate a definition or checklist for what a human right is, Alston has argued that setting substantive criteria for determining human rights is unworkable.⁸⁵ Writing in relation to the right to development, he has said that there are no inherent reasons why new rights shouldn't be recognised, but that 'much work remains to be done before the

concept of [the right to development] can attain the degree of specificity and concreteness which would enable it to be operationally significant at either the national or international levels.'⁸⁶ Inferring that at the very least Alston would require some clarity of scope and content before accepting a new right to the human rights catalogue, the right to a healthy environment might fail his test as well; the challenge of defining the right with sufficient specificity has been outlined above. Ultimately, the lack of consensus regarding the definition of such a right would mean that any attempt to include it in international treaty law would inevitably be a slow and contentious process.⁸⁷

As well as concerns relating to the proliferation of new rights, some scholars have identified substantive issues with the scope and content of a right to a healthy environment and on those grounds have argued that it may be inappropriate subject matter for international human rights law, or at least that its inclusion would require significant work in carefully defining the right. Shelton recognises that environmental degradation has the potential to impact upon future generations, and points out that any right to a healthy environment implies 'significant, constant duties toward persons not yet born.'⁸⁸ Further, the right to a healthy environment potentially expands the territorial scope of state obligations. Shelton has argued that 'the required broad expansion of state liability may prove to be

⁸² Noralee Gibson, 'The right to a clean environment' (1990) 54 *Saskatchewan Law Review* 5.

⁸³ Bertrand Ramcharan, 'The Concept of Human Rights in Contemporary International Law' (1983) *Canadian Human Rights Year Book* 267.

⁸⁴ Noralee Gibson, *supra* note 50.

⁸⁵ Philip Alston, 'Conjuring up new rights' (1984) 78 *American Journal of International Law* 607, 617.

⁸⁶ *Ibid.*

⁸⁷ Bridget Lewis, *supra* note 21.

⁸⁸ D. SHELTON, *supra* note 22.

the biggest single hurdle to establishing a right to environment.⁸⁹

Environmental problems such as pollution, disruption of biodiversity and global warming are not usually confined to political boundaries. Developing over a lengthy period of time, it is difficult to identify the precise cause and effect, or the identity victims of human rights violations. The temporal and geographic dimensions of the right to a healthy environment presents challenges for human rights theory which has traditionally limited the responsibilities of states to protect and fulfil the rights of their own citizens or those within their territories. In light of these obstacles, Shelton concludes that 'environmental protection cannot be wholly incorporated into the human rights agenda without deforming the concept of human rights and distorting its program.'⁹⁰

B. Challenges from outside Human Rights Law

One of the major criticisms of the proposal to incorporate a right to a healthy environment is that such a right would be too anthropocentric. This proposal is essentially human-centred insofar as it focuses on the harmful impact on individual people, rather than on the environment itself: it amounts to a 'greening' of human rights law, rather than a law of environmental rights.⁹¹ This alignment has provoked

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International*

criticism from the fields of deep ecology,⁹² on that basis that it effectively denies recognition of species, such as animals, birds, reptiles, plants and ecosystems as rights-holders, thereby making their protection contingent upon establishing some other human interest.⁹³

Gibson argues that by labelling the right to a clean environment a 'human' right, the natural world is valued according to human values and needs with humans being promoted to a position of superiority.⁹⁴ This is contrary to the deep ecologists' account, which holds that 'all organisms and entities in the ecosphere, as parts of the interrelated whole, are equal in intrinsic worth.'⁹⁵ Promoting a human right to a healthy environment, it is argued, perpetuates the values and attitudes that are at the root of environmental degradation, and reinforces the idea that the environment is only there to serve human needs, creating a hierarchy where human needs supersede environmental concerns.⁹⁶

Both Gibson and Macdonald argue that, while a rights-based approach to environmental protection can be useful, the use of human right to a healthy environment may be problematic, in that it takes away

Covenant on Civil and Political Rights (Oxford, 1994).

⁹² Bill Devall and George Sessions, *Deep Ecology* (Gibbs Smith, 1985).

⁹³ Alan Boyle, 'The role of international human rights law in the protection of the environment' in Alan Boyle and Michael Anderson (eds), *Human Rights Approaches to Environmental Protection* (Oxford University Press, 1996) 43, 48-9.

⁹⁴ Noralee Gibson, *supra* note 50.

⁹⁵ *Ibid.*

⁹⁶ Bridget Lewis, *supra* note 21.

from a more ecocentric approach.⁹⁷ Macdonald argues, however, that human rights law can contribute to environmental protection by strengthening the appreciation of environmental considerations and providing practical mechanisms for achieving better environmental outcomes.⁹⁸ According to Taylor, while an environmental human right is essentially an anthropocentric concept which presents some concerns, it may nonetheless play some useful role in developing an ecological consciousness which will 'foster the adoption of a new environmental ethic'.⁹⁹

VIII. Access to Information, Participatory Rights and Access to Justice

The development of environmental law on an international and national basis has seen the increasing acceptance of the need to involve the public at all levels of environmental decision-making. The philosophy behind public participation relates to the idea that those affected by decisions concerning governmental and/or private sector development activities should have the right to influence those decisions.¹⁰⁰

A. The Aarhus Convention

The UNECE Convention on Access to Information, Public Participation in

Decision-making and Access to Justice in Environmental Matters was adopted on 25th June 1998 in the Danish city of Aarhus. The Convention, which entered into force on 30 October 2001, has now been ratified by 44 Parties, including the European Union and, with the exception of Ireland, all Member States of the European Union.¹⁰¹ The Aarhus Convention links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It focuses on interactions between the public and public authorities in a democratic context and is forging a new process for public participation in the negotiation and implementation of international agreements. The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is therefore not only an environmental agreement; it is also a Convention about government accountability, transparency and responsiveness. The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice.¹⁰²

Access to information, public participation and access to justice rights in environmental

⁹⁷ Noralee Gibson, *supra* note 50. Karen Macdonald, *supra* note 10.

⁹⁸ *Ibid.*

⁹⁹ Prue Taylor, 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1998) 10 *Georgetown International Environmental Law Review* 309, 361.

¹⁰⁰ Boer & Boyle, *supra* note 50.

¹⁰¹The UNECE (United Nations Economic Commission for Europe) region covers more than 47 million square kilometers. Its member States include the countries of Europe, but also countries in North America (Canada and United States), Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) and Western Asia (Israel). Today, UNECE has 56 member States.

¹⁰² *Ibid.*

matters stem from the Aarhus Convention which goes back to Principle 10 of the Rio Declaration on Environment and Development, adopted during the United Nations Conference on Environment and Development (Rio de Janeiro, 3 - 14 June 1992), which reads as follows:

*“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”*¹⁰³

In many jurisdictions, this philosophy has been translated into legislative requirements. These include freedom of information in relation to potential development activities, the right to participate in spatial planning, the right to make submissions pursuant to Environmental Impact Assessment (EIA) processes, the right to appeal decisions concerning the merits of development activity and to request judicial review as to the legality of governmental administrative decisions.¹⁰⁴

B. Access to Information

¹⁰³ *Ibid.*

¹⁰⁴ Boer & Boyle, *supra* note 50.

In Rwanda, access to information is set out in Article 3 of law N° 04/2013 of 08/02/2013 relating to access to information, which provides that:

*Every person has the right of access to information in possession of a public organ and some private bodies.*¹⁰⁵

A similar provision is envisaged in Article 7, paragraph 4, of Organic Law n° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda, provides that:

The Principle of Information dissemination and Community sensitisation in conservation and protection of the environment.

*Every person has the right to be informed of the state of environment and to take part in the decision taking strategies aimed at protecting the environment.*¹⁰⁶

Article 6 of the preceding law relating to access to information provides: *a public organ or a private body to which this Law applies shall disclose information where the public interest in disclosure outweighs the interest of not disclosing such information.*¹⁰⁷

¹⁰⁵ See *Official Gazette n° 10 of 11 March 2013* (Law N° 04/2013 of 08/02/2013 relating to access to information).

¹⁰⁶ See Organic Law n° 04/2005 of 08/04/2005 determining the modalities of protection, conservation and promotion of environment in Rwanda.

¹⁰⁷ Law relating to access to information, *supra* note 77.

For private entities to which this law applies are those whose activities are compatible with public interest, human rights and freedoms, as set forth in Article 13 of the foregoing law.

With regard to public participation, Article 9 of Ministerial Order N° 003/2008 of 15/08/2008 relating to the requirements and procedure for Environmental Impact Assessment provides:

The stakeholders may comment on the environmental impact report and express views on the impact of the proposed development. The Authority shall cover all costs of the public hearing process. In the framework of public hearing, the Authority shall notify the public of:

- (a) The day, time and venue where the public hearing shall take place by using at least any of the three of the following means:
 - (i) Publishing a notice twice in any local newspapers;
 - (ii) Running four (4) radio announcements;
 - (iii) Putting up posters at the site of the proposed development.¹⁰⁸

Article 10 of Ministerial Order N° 003/2008 of 15/08/2008 relating to the requirements and procedure for Environmental Impact Assessment provides that:

¹⁰⁸ See Ministerial Order N° 003/2008 of 15/08/2008 relating to the requirements and procedure for Environmental Impact Assessment.

The Authority shall communicate its decision to the developer in writing.¹⁰⁹

Article 11 of the preceding Ministerial Order states that:

In case a project is not approved, a developer may appeal against the decision of the Authority to the Ministry in charge of environment within thirty (30) working days from the date of the decision notification.

The appeal file shall contain the following:

- a) A duly signed petition;
- b) Copy of the record of decision;
- c) Any other document deemed relevant.¹¹⁰

In view of the preceding provisions, public organs are duty bound to routinely make environmental information available to the public enables civil society to take an active role in ensuring accountability, reinforcing and expanding upon government accountability efforts.

In this regard, RIO+20 and the World Congress of Chief Justices, Attorneys and General Auditors General noted that access to information fosters community engagement and development of an environmental ethic throughout civil society, industry, and government.¹¹¹ This precept is of course only meaningful to the extent that an active government effort is underway to monitor and assess environmental conditions and polluting activities. Systematic information collection and assessment can

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ See UNEP, RIO+20 and the World Congress of Chief Justices, Attorneys and General Auditors General: Advancing Justice, Governance and Law for Environmental Sustainability.

support review of environmental program and policy effectiveness and thereby improve performance.

Many countries have freedom of information laws requiring government disclosure of a wide range of information and limiting exceptions to promote transparency. But the mere existence of a disclosure law is only part of the dynamic; public demand, governmental readiness and capacity to manage and provide information, and procedures for resolving disclosure disputes are also needed.¹¹²

C. Participatory Rights and Access to Justice

Public participation should have an opportunity to engage regulators regarding rules that affect them before decisions are made as well as the opportunity to challenge government decision-making not grounded in science and law. Public participation role has recently been underscored by RIO+20 and the World Congress of Chief Justices, Attorneys and General Auditors General that a range of public engagement processes may be appropriate, depending on the type of action, timing considerations, and other factors.¹¹³ Communication and education efforts can enhance public awareness and understanding needed for effective public participation, and can also nurture development of an environmental ethic that can serve to further intensify public engagement.¹¹⁴

¹¹² *Ibid.*

¹¹³ UNEP, RIO+20, *supra* note 83, P.20.

¹¹⁴ *Ibid.*

In Rwanda's context, the process of public participation is reaffirmed in the General Guidelines and Procedures for Environmental Impact Assessment published in 2006, which provides that "public hearing is designed to guide discussion by interested parties in an organized way. It gives stakeholders an opportunity to contribute to project design and implementation, which enhances harmony between the project and host communities. When people are informed about projects and empowered to invoke changes, their concerns reduce and are more receptive to proposed developments."¹¹⁵

Furthermore, Public participation is equally empathized in the Final Report Guidelines for Environmental Audit in Rwanda, March 2009, stating that "environmental audits have been generally considered as private and confidential. However, it is possible to use the public in audits so that they highlight areas of priority concern to them. Local communities close to a facility can assist greatly in monitoring and compliance. An organisation making its audit public can help establish good community relations and transparency, that it has nothing to hide and seeks the community's welfare."¹¹⁶

However, the analysis shows that Environmental Impact Assessment (EIA) integration into the planning system is still low in Rwanda. In fact, this is common in

¹¹⁵ General Guidelines and Procedure for Environmental Impact Assessment, *supra* note 4, p.27.

¹¹⁶ Final Report of Guidelines for Environmental Audit in Rwanda, *supra* note 16, p.28.

most developing countries where EIA is conducted more or less as a separate technical exercise divorced from the technical and economic aspects of project planning and design.¹¹⁷

According to the study conducted, the interviews showed that once an EIA study is complete for a given project, the output from the study highly influenced the decision to approve or reject the project.¹¹⁸ It has been highlighted that more than 95% of respondents agreed that the EIA report influences the decision-making process. The significance of this influence varies and is a subject that needs to be studied. Rwanda, like partner states of East Africa, public participation in the EIA process is still low. Furthermore, statistics have revealed that 86% respondents articulated that the level of public participation was either very low or negligible.¹¹⁹ Lack of public participation is perceived to be mainly due to insufficient knowledge by the general public about EIA and lack of information from the authorities. While the responsibility to organize public hearings is incumbent on the developer, the facilitation is done by Rwanda Environment Management Authority (REMA).

It is believed that EIA process is virtually non-existent; the relevant institutions have done less to raise the awareness of EIA significance. There is a need to disseminate

the information through various mediums, such as newspapers, magazines, radios and television. It is equally imperative to engage the local leaders and all stakeholders to educate the public through training and/or seminars. Clearly, public participation has been relatively ineffective, and the tendency is always to shorten the timing for the consultation process.

It can be stressed that participation of public concerned is a right, rather than the discretion of relevant authorities. Unfortunately, the procedural law lacks the essential elements *inter alia* the provision regarding early public participation when all options are open, provision regarding time-frame for public participation (how long e.g. one week or month or more?) and no provision on access to information before and after decision-making.

It can be noted that lack of specialized judiciary body for entertaining environmental disputes poses another challenge in regard to access to justice. This could impede the ability to arbitrate in the situation of differences between decision-makers and developers. The importance of having a specialized tribunal to adjudicate environmental disputes is well expounded by Professor Anna Spain, once expressed that “adjudication is appealing because it offers certainty of process, legitimacy and a binding outcome that enjoys promise and compliance under international”.¹²⁰

¹¹⁷ *Ibid.*

¹¹⁸ M. Marara et al., *Environmental Impact Assessment Review* 31 (2011) 286–296; See also journal homepage: www.elsevier.com/locate/eiar.

¹¹⁹ *Ibid.*

¹²⁰ Anna Spain, *Beyond adjudication: Resolving International Resource Disputes in an era of climate Change*, *Stanford Environmental Law Journal* Vol. 30:343, p. 355.

Conclusion

A wide range of international, regional and domestic instruments refer to the relationship between the environment and human rights. An examination of these instruments reveals an equally diverse range of conceptions of that relationship, many of which have been taken up or critiqued in relevant scholarly work. It is reasonably well-accepted that the environment is important for the enjoyment of human rights, and that a healthy environment is instrumental in the fulfillment of human rights such as the rights to health, water, food, fresh air and housing. There also seems to be a common perception that a human rights-based approach to environmental problems can yield practical benefits for environmental protection, although the best way to harness this effect has yet to be fully explored.

The convergence of human rights law and environmental law is clearly emerging as a phenomenon, through the 'greening' of human rights institutions and instruments. However, that convergence can never be complete, given that the two fields do not always serve the same interests or constituencies. What is clear however is that, without more coordinated and conscious effort on the part of regional organizations, national governments, together with their human rights bodies and environment departments, closer integration will continue to depend on the determination of non-government organizations to effect change, the initiatives and innovative arguments of courageous litigants and their

lawyers, the acceptance of cases by the courts and well-reasoned judgments by the judges.

An independent right to a good environment must be justified on the basis that an environment of a particular standard is essential for human well-being. In order to avoid duplication of existing rights, the right would need to stand alone from other human needs, yet still remain precise enough to enable meaningful implementation and enforcement. These requirements however of essentiality, independence and precision have so far proved difficult to reconcile. Accordingly, the question remains as to how a right to a good environment can be defined with adequate precision so that the human interest in the environment is made clear without reference to other human needs which are already the subject of existing human rights.

A better understanding of environmental dimensions of existing rights, and the mutually beneficial interactions between environment and human rights may be a worthwhile alternative than to offer pursuing a new right which arguably has limited prospects of achieving consensus in terms of its scope and implementation, and similar challenges in garnering adequate support from states to grant it admission at international law.