XLII POLISH YEARBOOK OF INTERNATIONAL LAW
2022
DOI 10.24425/PYIL.2023.147174
PL ISSN 0554-498X

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HUMAN RIGHT TO CLEAN ENVIRONMENT AND THE RIGHTS OF NATURE IN THE ANTHROPOCENE

Abstract: *This article examines the role of environmental human rights and the rights of nature in the era of the Anthropocene. The research question is whether the concept of the Anthropocene itself is a constructive remedy for the ecological destruction.*

The United Nations General Assembly resolution acknowledging a universal human right to clean environment is a ground-breaking event in a long process of the creation of such a right. This article examines the status quo of this right at present, both generally and in regional human rights treaties, as well as in the relevant case law and literature. The rights of nature are also examined, as they have become a very topical issue in light of the recent decision of the Conference of the Parties of the Convention on Biological Diversity, which expressly grants such a right. The question which may be posed is whether the approach adopted by the Anthropocene – which treats all actors equally – reflects the reality. The Western (Global North) approaches to the destruction of the Earth are contested by the Global South. The fractured approaches (by both the Global South and the Global North) to the decline of the environment may render questionable the suitability of the Anthropocene paradigm.

Keywords: The Anthropocene, United Nations, regional human rights treaties, rights of nature, COP CBD Decision, Indigenous Peoples

INTRODUCTION

We are at present in the area of the Anthropocene. In 2004 Professor Crutzen introduced this concept and as a new geological epoch.[1] In broad brushstrokes the

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[1] *See e.g.* P.J. Crutzen, *Geology of mankind*, 415 Nature 23 (2002); *see also* E. Ehlers, T. Krafft (eds.), *Earth System Science in the Anthropocene. Emerging Issues and Problems*, Springer, Berlin: 2006.

theory of the Anthropocene is based on the premise that human beings should, due to their impact on the environment, be considered a major geological and geobiological factor in Earth ecology. However, human beings are also capable of saving the Earth through the sustainable use of its resources and through the advancement of technology and culture. Therefore, the Anthropocene provides a holistic approach to problems concerning both the decline as well as the saving of the environment.

It was stated that:

> Past scientific discoveries have tended to shift perceptions away from a view of humanity as occupying the centre of the Universe. In 1543 Copernicus's observation of the Earth revolving around the Sun demonstrated that this is not the case. The implications of Darwin's 1859 discoveries then established that *Homo sapiens* is simply part of the tree of life, with no special origin. Adopting the Anthropocene may reverse this trend by asserting that humans are not passive observers of Earth's functioning. To a large extent the future of the only place where life is known to exist is being determined by the actions of humans. Yet the power that humans wield is unlike any other force of nature, because it is reflexive and therefore can be used, withdrawn or modified. More widespread recognition that human actions are driving far-reaching changes to the life-supporting infrastructure of Earth may well have increasing philosophical, social, economic and political implications over the coming decades.[2]

It may be said, however, that this theory is not without critique.[3] In particular, the criticism of the concept of the Anthropocene is based on the Marxist account of the planetary crisis linked to capital accumulation – the Anthropocene is limited to a technical and geological focus, excluding a social reading of the idea "developed in terms of the clear increases in scale, scope of synchronicity, and rate/speed of environmental change, driven by capital accumulation".[4] This approach is called "Capitalocene". The approach called "Technocene" takes account of the historical perspective and social science, including a non-anthropocentric perspective, and covers multi-species.[5]

It is argued that the main feature of the Anthropocene is that it reflects the concept that human and non-human elements of the Earth system have become so totally linked together that no modification can occur in one without impacting

[2] S.L. Lewis, M.A. Maslin, *Defining the Anthropocene*, 519 Nature 171 (2015), p. 178; *see generally*, on environmental governance and the Anthropocene, L.J. Kotzé, R. Kim, *Towards Planetary Nexus Governance in the Anthropocene: An Earth System Law Perspective*, 13 Global Policy 86 (2022).

[3] O. Lopez-Corona, G. Magellanos-Guijon, *It is not an Anthropocene: It is Really the Technocene: Names Matter Under Planetary Crisis*, 8 Frontiers in Ecology and Evolution 1 (2020).

[4] *Ibidem*, p. 1.

[5] *Ibidem*, p. 2.

the other. Therefore, if at present every environmental challenge is also a human challenge, it may be that the interests of both humans and non-humans are converging.[6] In light of this premise, it appears that both the human right to a clean environment and the rights of nature must be analysed as one entity, which is the approach adopted in this article. The underlying hypothesis and aim of this article is to examine whether, and in what way, the concept of Anthropocene is relevant to the human right to a clean environment and the rights of nature.

The human right to a clean environment has gained significance in light of the 28 July 2022 United Nations General Assembly (UNGA) Resolution granting the right to a clean and healthy environment as a universal human right.[7] This article will also examine regional approaches to the human right to a clean environment.

The question of the rights of nature has become particularly topical due to the decision of the Conference of the Parties of the Convention on Biological Diversity (CBD) adopted on 19 December 2022, the so-called "Kunming–Montreal Global Biodiversity Framework for the CBD":[8]

> Nature embodies different concepts for different people, including biodiversity, ecosystems, Mother Earth, and systems of life. Nature's contributions to people also embody different concepts, such as ecosystem goods and services and nature's gifts. Both nature and nature's contributions to people are vital for human existence and good quality of life, including human well-being, living in harmony with nature, living well in balance and harmony with Mother Earth. The framework recognizes and considers these diverse value systems and concepts, including, for those countries that recognize them, rights of nature and rights of Mother Earth, as being an integral part of its successful implementation.

1. GENERAL APPROACHES TO THE HUMAN RIGHT TO A CLEAN ENVIRONMENT

The link between the enjoyment of human rights and the environment was noted many years ago and has been evidenced in many soft law documents. The most important is the 1972 Declaration of the Conference (Stockholm Declaration), which recognizes that "man's environment [is] essential to his well-being and to the

[6] For an in-depth analysis, *see* M. Scobie, *Framing Environmental Rights in the Anthropocene*, in: W.F. Barber, J.R. May (eds.), *Environmental Human Rights in the Anthropocene. Concepts, Contexts and Challenges*, Cambridge University Press, Cambridge: 2023, p. 10.

[7] Resolution A/76/L.75; 161 votes in favour, and eight abstentions (i.e. Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, Syria and Russia).

[8] CBD/COP/15/L.25, available at: https://tinyurl.com/3m22b6je (accessed 30 April 2023).

enjoyment of basic human rights”, such as the right to life. Even before the UNGA Resolution of 28 July 2022, a synergy between the human right to a clean environment and human rights has been debated in numerous UN fora, as evidenced by the examples which are presented below.

The UN Human Rights Council (UNHRC) appointed an Independent Expert (Special Rapporteur) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. In 2012 the Special Rapporteur held that “all human rights are vulnerable to environmental degradation, in that full enjoyment of all human rights depends on a supportive environment”.[9] This was already recognised by the UNGA in 1988, which described climate change as a “common concern of mankind, since climate is an essential condition which sustains life on earth”.[10] More recently, in a 2019 Report the UNHRC Special Rapporteur identified several impacts of climate change on human rights, in particular the right to life, adequate food, water and sanitation, and health.[11] The Human Rights Committee (HRC), in its General Comment 36 on the Right to Life, identified environmental degradation as one of the “the most pressing and serious threats to the ability of present and future generations to enjoy the right to life,”[12] where the right to life (Art. 6 of the International Covenant on Civil and Political Rights (ICCPR)) embodies the duty of states to protect the environment. Another body which has considered the interlinkage between environmental degradation and human rights is the Committee of Economic Social and Cultural Rights Covenant (CESCR), consisting of 18 independent experts. Its functions include the monitoring and implementation of the International Covenant on Economic, Social and Cultural Rights (ECOSOC) by its States parties. It was established under the ECOSOC 1985 Resolution in order to carry out the monitoring functions assigned to the United Nations Economic and Social Council in Part IV of the Covenant. In its 2000 General Comment 14,[13] the CESCR observed that action should be taken to protect the right to health and in particular to “improve

[9] *Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, John H. Knox*, 24 December 2012, A/HRC/22/43, para. 19.

[10] UNGA, *Protection of global climate for present and future generations of mankind,* 6 December 1988, A/RES/43/53, para. 1.

[11] UNGA, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment. Note by the Secretary-General*, 15 July 2019, A/74/161, part II.

[12] CCPR/C/GC/36, para. 62. G. Reeh, *Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect,* EJIL: Talk!, 9 September 2019, available at: https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/ (accessed 30 April 2023).

[13] “General comment is a treaty body’s interpretation of human rights treaty provisions, thematic issues or its methods of work. General comments often seek to clarify the reporting duties of State parties with respect to certain provisions and suggest approaches to implementing treaty provisions”, Dag Hammarskjold Library, available at: https://ask.un.org/faq/135547 (accessed 30 April 2023).

all aspects of environmental and industrial hygiene," which requires, for example, measures to ensure adequate water supplies.[14]

Resolution 48/13 adopted on 8 October 2021 by the HRC, recognising for first time that having a clean, healthy and sustainable environment is a human right, paved the way for the UNGA Resolution, which is based on the HRC text.[15] The main value of this non-binding Resolution was that it confirms "the idea that the right to a healthy environment should be universally protected".[16] The main tenets of the UNGA Resolution are as follows: (i) the right to a healthy environment is a human right; (ii) it is related to other rights and existing international law; (iii) the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law; and (iv) States and international organisations should adopt policies to enhance cooperation, to strengthen capacity-building, and continue to share good practices in order to increase efforts to ensure a clean, healthy and sustainable environment for all.[17]

The universal human right to a clean environment is squarely situated within the concept of sustainable development, which includes intergenerational equity. The UNGA Resolution recalls three dimensions of this concept: social, economic and environmental development, including the protection of ecosystems, and states that sustainable development contributes to and promotes "human well-being and the full enjoyment of all human rights, for present and future generations".

The Resolution reaffirms the UNGA 2015 Resolution "Transforming Our World: The 2030 Agenda for Sustainable Development".[18] It may be presumed that the main objective of the Agenda 2030, i.e., combatting and eliminating poverty, will also inform the implementation of the universal right to a clean environment. The Resolution also links climate change, toxic wastes, and degradation of the envi-

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[14] UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, *General Comment No. 14: The right to the highest attainable standard of health*, E/C.12/2000/4 (2000), available at: https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=E%2fC.12%2f2000%2f4&Lang=en (accessed 30 April 2023).

[15] UNHRC, *Resolution: The human right to a clean, healthy and sustainable environment*, 8 October 2021, A/HRC/RES/48/13, available at: https://bit.ly/3LcrMWN; for more on this, *see* A. Savaresi, *The UN HRC recognizes the right to a healthy environment and appoints a new Special Rapporteur on Human Rights and Climate Change. What does it all mean?*, EJIL: Talk!, 12 October 2021, available at: https://tinyurl.com/3c9mnpec (both accessed 30 April 2023).

[16] Savaresi, *supra* note 16.

[17] O. Johnson, C. Lewis, J. Whittaker, *UN General Assembly adopts landmark resolution on right to a healthy environment*, Clifford Chance Blog, 2 August 2022, available at: https://tinyurl.com/5n95ucsc (accessed 30 April 2023).

[18] A/RES/70/1, available at: https://sdgs.un.org/2030agenda (accessed 30 April 2023). *See also* M. Gutmann, D. Gorman (eds.), *Before the UN Sustainable Development Goals: A Historical Companion*, Oxford University Press, Oxford: 2022.

ronment generally as having a negative implication for the enjoyment of all human rights. The Resolution acknowledges that international cooperation is an essential element in assisting developing countries to strengthen their human, institutional, and technological capacities. Surprisingly however, the Resolution does not mention the principle of common but differentiated responsibilities (CBDR), which was first formulated in the Rio Declaration on Environment and Development and which is the fundamental principle of sustainable development and international environmental law.[19] According to the CBDR "States take on different obligations, depending on their socio-economic situation and their historical contribution to the environmental problem at stake".[20] The CBDR is based on a premise of differentiated responsibilities in international environmental law, which translates into a global partnership linked to the duty to cooperate. States' obligations are differentiated depending on their divergent situations, conditioned by "developmental needs, historical contribution to environmental degradation, present contribution to the problem and their access to technological and financial resources".[21] The CBDR has two elements: the responsibility element, which takes into account comprehensive and divergent circumstances; and a capabilities element, which is based on the assessment of economic capacities to contribute to environmental protection.[22] It can be said that the CBDR "has given developing States a basis for claiming that their position is to be taken into account in the formulation of treaty regimes".[23]

The question related to differentiated responsibilities was raised by Brazil, Pakistan, Syria and China (which abstained from voting due to the absence of this principle). Nicaragua raised a corollary point, emphasising that in order to have a right to clean and healthy environment, developed countries must first fulfil their commitments to offer support and developmental assistance to developing countries.[24]

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[19] Principle 7 of the Rio Declaration: "States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command". *See also Special Issue Global Solidarity and Common but Differentiated Responsibilities,* 51 Netherlands Yearbook of International Law (2022), and Johnson et al., *supra* note 12.

[20] E. Hey, S. Paulini, *Common but Differentiated Responsibilities,* Max Planck Encyclopedia of Public International Law, October 2021, available at: https://tinyurl.com/yckvunk6 (accessed 30 April 2023), para. 1.

[21] *Ibidem*, para. 5.

[22] *Ibidem*.

[23] *Ibidem*, para. 20

[24] Johnson et al., *supra* note 18.

The reactions of States emphasised the non-binding legal character of the Resolution. It was also observed that certain terms such as "clean", "healthy", "sustainable", "unsustainable" and the right itself lack internationally agreed-upon definitions.[25] The divergent views on the existence of such a right were exemplified by the United Kingdom's statement, which read as follows: "[T]here is no international consensus on the legal basis of the human right to a clean, healthy and sustainable environment and we do not consider that it has yet emerged as a customary right;" as well as: "Our understanding is that the right to a clean, healthy and sustainable environment derives from existing international economic and social rights law – as a component of the right to an adequate standard of living, or the right to the enjoyment of the highest attainable standard of physical and mental health".[26] It was observed in the literature that:

> These statements indicate that while there is a general consensus on the need to recognise the R2HE, there is still a considerable difference in opinion as to how that right should actually be defined, implemented and enforced – particularly on a State-specific basis. Ultimately however, it is likely that any divergence in approach to the R2HE will emerge on the basis of the differences between the rights articulated under domestic laws and policies among States in the future rather than the generality of the UNGA resolution.[27]

2. REGIONAL APPROACHES TO THE RIGHT TO A CLEAN ENVIRONMENT

2.1. The African Commission

The African Charter on Human and Peoples' Rights (ACHPR) includes a right to a clean environment, stating that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development" (Art. 24). In the *Ogoniland* case, the African Commission on Human and Peoples' Rights (African Commission) considered claims that the Nigerian government had adopted oil development practices leading to environmental degradation.[28] The Commission took the view

[25] *Ibidem*.

[26] UK Mission to the UN, *Explanation of vote on resolution on the right to a clean, healthy and sustainable environment. Statement delivered to the UN General Assembly at the adoption of resolution*, A/76/L.75, available at: https://www.gov.uk/government/speeches/explanation-of-vote-on-resolution-on-the-right-to-a-clean-healthy-and-sustainable-environment (accessed 30 April 2023).

[27] Johnson et al., *supra* note *18*.

[28] *Social and Economic Rights Action Centre & Centre for Economic and Social Rights v Nigeria*, Case No. ACHPR/COMM/A044/1, Communication 115/96 (*Ogoniland* case). *See also* D. Shelton, *Decision Regarding Communication 155/96* (*Social and Economic Rights Action Center/Center for Economic and Social Rights v. Nigeria). Case No. ACHPR/COMM/A044/1,* 96 American Journal of International Law 937 (2002); F. Fons Coomans, *The Ogoni Case before the African Commission on Human Rights and Peoples' Rights,* 52 International Comparative Law Quarterly 749 (2003).

that States must respect the right to health and should refrain from directly threatening the health and environment of their citizens. Furthermore, States are obliged to adopt measures that would prevent environmental degradation. It concluded that Nigeria, whilst enjoying the right to exploit its natural resources, had breached the human rights of people living in the Ogoni region.[29] Significantly, the Commission concluded that environmental degradation was not only leading to the violation of other rights, but also constituted a human rights violation in itself due to its impact on the quality of life.[30] Whilst this decision confirms the justiciable nature of Art. 24, the African Commission's restricted regulatory powers and the poor record of compliance with its recommendations limited the practical usefulness of its attempts to remedy environmental degradation in Africa.

It should be noted that no express procedural environmental right exists under the African Charter. However, in the *Ogoniland* case the African Commission recognised such a right based on Art. 24 ACHPR, which grants a substantive environmental right, and gave it meaningful content by supporting the right of the public to information and to participate in environmental matters.[31]

2.2. The Inter-American Court of Human Rights

The inter-American human rights institutions have limited powers with respect to the right to a clean environment. They may only receive reports from States on their observance of this right, and there is no right to individual applications to the Inter-American Commission on Human Rights (IACommHR) or the Inter-American Court of Human Rights (IACtHR) concerning breaches of the San Salvador Protocol. Nevertheless, these institutions have – in several cases involving indigenous rights – recognised the interlinkage between environmental degradation and human rights.[32] In *Mayagna (Sumo) Awas Tigni Community v Nicaragua*,[33] *Maya Indigenous Communities of Toledo District v Belize,*[34] and *Saramaka People v. Suriname*[35] it was stressed that economic development should be consistent with environmental obligations.

Art. 11 of the San Salvador Protocol has been a basis for environmental cases. *La Oroya* is an unusual case, in that it was not related to indigenous environmental rights, which constitute the majority of cases alleging the breach of human rights on, inter alia, environmental grounds. In the *La Oroya* case *(Community of La*

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[29] *Ogoniland*, para. 67.
[30] *Ibidem*, para. 51.
[31] Shelton, *supra* note 29, p. 939.
[32] IACommHR, *Yanomami v Brazil*, Res 12/85, 5 March 1985.
[33] IACtHR, Ser C No. 79, 31 August 2001.
[34] IACommHR, Report No. 40/04, 12 October 2004.
[35] IACtHR, Ser C No. 172, 28 November 2007.

Oroya v Peru),[36] the IACommHR considered, for the first time, the responsibility for a breach of human rights of non-indigenous people due to environmental degradation.[37] It was alleged that Peru had violated the rights of La Oroya inhabitants under both the American Convention on Human Rights (ACHR) and the San Salvador Protocol by not preventing environmental damage. In considering the case, the IACommHR granted precautionary measures, requiring Peru to provide medical treatment to the said inhabitants who had suffered health problems related to contamination from a metallurgical complex. Whilst the IACommHR stressed that the alleged violations of the San Salvador Protocol were outside its competence, it nonetheless felt obliged to take the Protocol into account when interpreting the scope and intent of the American Convention.[38]

Without doubt the most important, if not ground-breaking, decision in relation to the human right to a clean environment is the 2018 Advisory Opinion of the IACtHR *on the Environment and Human Rights*.[39] The opinion was issued following a request by Colombia to clarify the extent of state responsibility for environmental harm under the ACHR, in particular within the framework of the Convention for the Protection and Development of Marine Environment of the Wider Caribbean Region and customary international law.[40] The Court reaffirmed the existence of "an undeniable relationship" between human rights and the protection of the environment.[41] Furthermore, it reiterated "the interdependence and indivisibility of the civil and political rights, and economic social, and cultural rights, because they should be understood integrally and comprehensively as human

[36] ACommHR, Report No. 76/09, 5 August 2009.

[37] P. Spieler, *The La Oroya Case: the Relationship Between Environmental Degradation and Human Rights Violations*, 18(1) Human Rights Brief 19 (2010).

[38] *La Oroya*, para. 54 ("Lastly, the Commission is competent ratione materiae, because the petition alleges violations of human rights protected under the American Convention. The Commission notes that the petitioners cited Articles 10 and 11 of the Protocol of San Salvador and Articles 2, 3, 6, 16, and 24 of the Convention on the Rights of the Child. While under Article 29 of the American Convention these provisions can be taken into account in interpreting the scope and intent of the American Convention, the Commission reiterates that it is not competent to render decisions on instruments adopted outside the regional purview of the inter-American system (...). As for the Protocol of San Salvador, the Commission reiterates that Article 19.6 of that treaty provides a limited competence clause allowing organs of the inter-American system to render judgments on individual petitions related to the rights enshrined in Articles 8.a and 13").

[39] IACtHR, Advisory Opinion OC-23/17, Ser A No. 23, 15 November 2017.

[40] Request for Advisory Opinion OC-23, 14 March 2016; see further M.L. Banda, *Inter-American Court of Human Rights Advisory Opinion on the Environment and Human Rights*, 22(6) American Society of International Law Insights (2018); C. Vega-Barbosa, L. Aboagye, *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJIL: Talk!, 26 February 2018, available at: https://www.ejiltalk.org/human-rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/ (accessed 30 April 2023).

[41] Advisory Opinion OC-23/17, paras. 47-55.

rights".[42] On this basis, the Court elevated the right to a healthy environment under Art. 11 of the San Salvador Protocol to a justiciable right by interpreting Art. 26 ACHR to also include such a right.[43] The Court found support for its position in Member States' constitutions and international instruments.[44] Significantly, the Court accepted that in the case of transboundary pollution, there existed an extra-territorial breach of the human right to a clean environment.[45] Thus, these human rights obligations are capable of being invoked by individuals or groups against a foreign state. This recognition allows for cross-border human rights claims due to transboundary environmental damage.[46]

The Advisory Opinion was instrumental to the IACtHR Judgment in the 2020 case of *Lhaka Honhat v. Argentina*.[47] The Court applied a direct approach to violations of economic, social and cultural rights and also explicitly included environmental rights, thus treating environmental rights as an autonomous right. In an indirect approach, the Court establishes state responsibility for violation of these environmental rights through existing breaches of related civil and political rights, but not the environmental rights themselves. The Court also for this first time recognised the direct justiciability of the right to a clean environment.[48] However, this judgment is quite contentious, and the judges of the Court were divided regarding direct autonomy and the justiciability of such a right (e.g., based on the argument that under the San Salvador Protocol rights which are derived from Art. 26 of the Inter-American Convention on Human Rights are not justiciable). There is thus the possibility that the judgment in this case may be reversed in the future.[49]

2.3. The European Court of Human Rights and the Right to a Clean Environment

Although the European Convention on Human Rights and Fundamental Freedoms (ECHR) does not contain a direct substantive environmental human right,

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[42] *Ibidem*, para. 57.

[43] *Ibidem*.

[44] *Ibidem*, paras. 57-58.

[45] Banda, *supra* note 41.

[46] M. Feria-Tinta, S, Milnes, *The Rise of Environment Law in International Dispute Resolution: Inter-American Court of Human Rights Issues Landmark Advisory Opinion on Environment and Human Rights*, EJIL: Talk!, 26 February 2018, available at: https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/ (accessed 30 April 2023).

[47] IACtHR, *Lhaka Honhat (Our Land) Association v. Argentina*, 6 February 2020, Series C No. 420. For more on this, *see:* D. Mejia-Lemos, *The Right to a Healthy Environment and its Justiciability Before the Inter-American Court of Human Rights: A Critical Appraisal of the Lhaka Honhat v. Argentina judgment*, 31(2) Review of European, Comparative & International Environmental Law 317 (2022).

[48] Mejia-Lemos, *supra* note 48, p. 317.

[49] *Ibidem*, p. 323.

the European Court of Human Rights (ECtHR) has determined that a right to a clean and healthy environment emerges out of the civil and political human rights embodied in the ECHR and its Protocols. In particular, the ECtHR has interpreted the protection accorded to rights such as the right to life (Art. 2 ECHR); the right to respect for private and family life (Art. 8 ECHR); the right to freedom from torture (Art. 3 ECHR); and the right to property (Art. 1 of Protocol 1) as giving effect to environmental rights. The majority of such decisions have concerned the application of Art. 8 ECHR, which recognises limitations on the right to respect for private and family life as necessary in a democratic society. This interference must however be relevant and sufficient.[50] In *Powell and Rayner v the United Kingdom*[51] and *Flamenbaum and Others v France*,[52] the ECtHR had to balance the violation of inhabitants' quality of life caused by aircraft using the Heathrow and Deauville airports respectively, and the rights of the community at large, including economic stability. In both cases, the Court decided that the disturbances caused to the applicants' quality of life were necessary for the well-being of the community.[53] In these cases the ECtHR has initiated the approach of "balancing of interests" between the environmental needs of an individual and the economic well-being of the community.

More significant progress was made in the landmark judgment in *López Ostra v Spain*.[54] The applicant in this case claimed that fumes from a tannery waste treatment plant, which was erected 12 meters from her residence, were seriously affecting her and her family's quality of life. The Court recognised that environmental pollution, even if it did not cause serious health damage, could have a negative effect on the well-being of the applicant and hindered the enjoyment of her private and family life. Consequently, the Court decided that Spain had not achieved a proper balance between the applicant's rights and the economic benefits of the plant.[55]

More recently, in *Cordella v Italy*, the ECtHR considered an alleged violation of Art. 8 as a result of exposure to air pollution from a steel plant in Taranto.[56] Attempts by national authorities to decontaminate the polluted region were unsuccessful. The state allowed the steelworks to continue for years, despite scientific reports which concluded that such activities were adversely affecting the health of the region's population and the environment. Furthermore, inhabitants of the region remained without any information about the progress of the proposed clean-up

[50] ECtHR, *Olsson v Sweden (No. 1)* (App. No, 10465/83), 24 March 1988, para. 64.

[51] ECtHR, *Powell and Rayner v. the United Kingdom* (App. No. 9310/81), 21 February 1990.

[52] ECtHR, *Flamenbaum and Others v. France* (App. Nos. 3675/04 and 23264/04), 13 December 2012.

[53] *Powell and Rayner*, paras. 41-42 on the economic welfare of the region (*Flamenbaum*, para. 154)

[54] ECtHR, *Lopez Ostra v. Spain* (App. No. 16798/90), 9 December 1994.

[55] *Ibidem*, para. 58.

[56] ECtHR, *Cordella v. Italy* (App. Nos 54414/13 and 54264/15), 24 January 2019.

operations. For these reasons, the Court found there to be a violation of Art. 8, as Italy did not take all necessary measures to protect the right to respect for private and family life, thus failing to ensure an appropriate balance between the interests of the applicants and the society as a whole.[57]

The *Hatton* cases (2001 and 2003) are an excellent illustration of the ECtHR's ambivalent and conflicting attitude vis-à-vis the human right to a clean environment. The first of these cases was decided by the Chamber of the Court and the Grand Chamber. They adopted diametrically different final decisions based on the interpretation of Article 8 of the ECHR and the principle of the balancing of interests between individual interests and those of the community.

These cases concerned night flights to and from Heathrow Airport which, it was argued by the applicants, disturbed their sleep. The UK government had introduced the use of noise quotas in order to minimize the disturbances caused by night flights. The case was first heard by the Chamber of the Court in 2001.[58] Referring to the "fair balance" that must be struck between the competing interests of the individual and the community as a whole, the Chamber first submitted that the State enjoyed a certain margin of appreciation in determining the steps to be taken to ensure compliance with the ECHR. The Chamber found however that despite the margin of appreciation left to the UK government, the implementation of the noise quota scheme failed to strike a fair balance between the country's economic well-being and the applicants' effective enjoyment of their right to respect for their homes and family lives; therefore violating Art. 8 ECHR. The UK government requested the referral of the case to the Grand Chamber. The Grand Chamber stated in no uncertain terms that "there is no explicit right under the Convention to a clean and quiet environment" and that only "where the individual is directly and seriously affected by noise or other pollution" may an issue arise under Art. 8.[59] Finding that there was no violation of Art. 8, the Grand Chamber reiterated the fundamentally subsidiary role of the Court, i.e. that national authorities have direct democratic legitimacy and are better placed than an international tribunal to assess local needs and conditions. In matters of general policy, which may involve different opinions contained within a democratic society, the actions of domestic policy-makers to ensure compliance with the ECHR should be given a wide margin of appreciation. A minority of judges appended a powerful joint dissenting opinion.[60] The dissenting judges argued that the "evolutive" interpretation of the ECHR has led to the construction of an environmental human right on the

[57] *Ibidem*, para. 174.

[58] ECtHR, *Hatton and Others v. United Kingdom* (App. No. 36022/97), 2 October 2001; ECtHR (GC), 8 July 2003.

[59] *Ibidem*, para. 96.

[60] *Ibidem*, Joint Dissenting Opinion of Judges Costa, Ress, Türmen, Zupančič, and Steiner.

basis of Art. 8.[61] They asserted that the ECtHR had on several occasions, including in *Lopez Ostra*, confirmed that Art. 8 embraces the right to a healthy environment:

> The Grand Chamber's judgment in the present case, in so far as it concludes, contrary to the Chamber's judgment of 2 October 2001, that there was no violation of Article 8, seems to us to deviate from the above developments in the case-law and even to take a step backwards. It gives precedence to economic considerations over basic health conditions in qualifying the applicants' 'sensitivity to noise' as that of a small minority of people (see paragraph 118 of the judgment). The trend of playing down such sensitivity – and more specifically concerns about noise and disturbed sleep – runs counter to the growing concern over environmental issues all over Europe and the world.[62]

On balance, the Grand Chamber in the 2003 *Hatton* case subsumed the environmental needs of an individual to the economic interests of the community.

Overall, the ECtHR in Hatton adopted a very restrictive and deferential view towards the State's position regarding environmental human rights and the possibility of redressing environmental degradation through Art. 8. The Court took into consideration the fact that the UK government had acted in conformity with national laws concerning night flights. By contrast, in *Lopez Ostra* the authorities had failed to comply with domestic law as there was no license for the tannery. This view was also confirmed by the Court in *Hardy and Maile v the United Kingdom*.[63]

While on several occasions the Court has held that not every case of environmental degradation would lead to a violation of Art. 8, nonetheless in *Fadeyeva v Russia* the applicant complained about air pollution from a steel plant built in the Soviet era but subsequently privatised. The Court established a number of requirements for pollution to be deemed to cause a violation under Art. 8. First, it was necessary for the harmful effects of pollution to directly affect the applicant's home, family or private life. Second, the adverse effects must have reached a certain minimum level, which is not a general level but depends on the relevant circumstances of the case such as the intensity and duration of the nuisance. The Court found that the emissions in the case at hand had a detrimental effect on the applicant's health and enjoyment of her home. It stated that the combined negative effects were of a level that was prohibited under Art. 8. The failure of the State to provide the applicant with an effective solution constituted a violation of Art. 8.[64]

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[61] *Ibidem*, para. 2.

[62] *Ibidem,* para. 5.

[63] ECtHR, *Hardy and Maile v. the United Kingdom* (App. No. 31965/07), 14 February 2012, paras. 218, 231-232.

[64] ECtHR, *Fadeyeva v. Russian Federation* (App. No. 55723/00), 9 June 2005, para. 133.

As mentioned above, the ECtHR has also considered environmental degradation in light of the right to life protected under Art. 2 ECHR. In *Öneryildiz v Turkey*,[65] *Budayeva and Others v Russia,*[66] and *Kolyadenko and Others v Russia,*[67] the Court decided that there was gross negligence attributable to the state, resulting in the loss of life from environmental degradation. In all three cases it concluded that the State had failed to protect the right to life, and held that activities which caused environmental degradation with potentially lethal effects should be regulated to ensure the protection of the lives of citizens, including ensuring the public's right to information. Furthermore, the ECtHR required that the States involved undertake appropriate procedures to identify the level of shortcomings. The Court found that there was an overlap between the positive obligations under Art. 2 and those discussed above under Art. 8 of the ECHR. In *Budayeva*, the State's positive obligations under the Convention were dependent on the origin of the disaster and whether the risks could be mitigated. The Court continued that where the infringement under Art. 2 was not caused intentionally, the positive obligation to provide an effective judicial inquiry did not always require criminal action. It may be sufficient to have impartial civil administrative or disciplinary remedies.

In light of the cases reviewed above, it would appear that despite the omission of environmental rights in the ECHR, the ECtHR has acted in a manner that combats environmental degradation in reliance on other human rights protected under the Convention. Nevertheless, in the light of the numerous requirements imposed to find a violation of the ECHR through environmental degradation, it is not unreasonable to state that environmental rights *per se* are not protected under the Convention unless there is a violation of the rights of individuals.

The ECtHR has also supported in its case law the so-called "procedural right to a clean environment". As was stated above, the peculiarity of the ECHR is that it does not list the right to a clean environment in itself as among its catalogue of protected human rights. However, it has adopted indirect procedural environmental rights based on the Arts. 8 and 10 ECHR. To a large extent, the jurisprudence of the Court supports the approach taken under the Aarhus Convention.[68] In number of decisions the Court has emphasised the duty of the State to provide access to environmental information as well as environmental procedures which are required to initiate projects, such as EIAs.[69] In the *Guerra* case, for example, the ECtHR held

[65] ECtHR (GC), *Öneryildiz v. Turkey* (App no 48939/99), 30 November 2004.

[66] ECtHR, *Budayeva and Others v. Russia* (App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02), 20 March 2008.

[67] ECtHR, *Kolyadenko and Others v. Russia* (App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05 and 35673), 28 February 2012.

[68] *E.g.* in the case *Budayeva, Tătar v. Romania* (App. No. 67021/01), 27 January 2009.

[69] ECtHR (GC), *Guerra and Others v. Italy* (App. No. 116/1996/735/932), 19 February 1998; ECtHR,

that providing relevant information to the applicants who lived in the vicinity of a factory could have a bearing on the rights protected under Art. 8, which includes the protection of private and family life. Furthermore, the Court held that Art. 10 ECHR, protecting the freedom of expression, prohibits a State from restricting a person from receiving information which others wish to give.[70] It should however be noted that the ECtHR's approach was restricted, and cannot be construed as imposing on a State a positive obligation to collect and disseminate information on its own accord.

In several cases, the ECtHR has considered that "whilst Article 8 contains no explicit procedural requirements, the decision-making process leading to measures of interference must be fair and such as to afford due respect for the interests of the individual as safeguarded by Article 8".[71] The participation of those affected by environmental issues is necessary in order to comply not only with Art. 8 ECHR, but with Art. 6 of the Aarhus Convention as well.[72] The rights of information and participation guaranteed by the Aarhus Convention were explicitly recognised by the ECtHR in *Tătar*. The Court held that prohibiting interested persons from obtaining information and participating in environmental decision-making would breach such rights. However, it considered this right of participation to be available only to those persons whose rights have been affected, and not to the general public at large.[73] It must also be mentioned that the EU has bolstered the procedural rights to clean environment through the obligation to conduct an Environmental Impact Assessment (EIA) relating to activities which would result in serious environmental harm. The premises on which EIAs are based are environmental information and public participation in environmental decision-making.[74] Any request for development consent and the information supplied must publicised within a reasonable

Taşkin and Others v. Turkey (App. No. 46117/99), 10 November 2004; *Öneryildiz, Giacomelli v. Italy* (App. No. 59909/00), 2 November 2006; *Tătar*.

[70] *Guerra*, para. 53.

[71] *Taşkin*, para. 118; *Giacomelli*, para. 82.

[72] A. Boyle, *Human Rights or Environmental Rights? A Reassessment*, 7 Fordham Environmental Law Review 471 (2007), p. 496.

[73] *Tătar*, para. 97.

[74] Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26 1 (recital 16 and 17):

"(16). Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.

(17) Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including, inter alia, by promoting environmental education of the public".

time-frame in order to give members of the public concerned the opportunity to express their opinion before the development is allowed.

The above analysis of the various approaches to the existence and content of the human right to a clean environment shows quite significant differences in adhering to the existence of a human right to a clean environment. The regional courts (the IACtHR has to be especially singled out here) have embraced the existence of such a right, linking it with other conventions and fundamental principles underlying international environmental law (such as the precautionary principle), thus fleshing out its content. The ECtHR on the other hand has made only limited use of the possibility of interpreting some of articles of the ECHR to give effect to an environmental right.

It may be said that the recognition of a separate set of rights to a clean environment (both substantive and procedural) has been a gradual process. The initial debate concerning the existence of such a right was focused on the possible use of the existing catalogue of human rights to offer humans protection from environmental degradation.[75] The critique of the human right to a clean environment has been based on several/various premises. It was considered, *inter alia*, vague and nebulous and that its inherent ambiguity might render such a right meaningless and undermine other human rights. Other arguments against such a right was their lack of enforceability, although the existing enforcement mechanisms in relation to other human rights might be applicable to a human right to a clean environment. It was also observed that a human right to a clean environment is in essence anthropocentric, and thus does not take into consideration the rights of nature. However, as the practice has shown, the human right to a clean environment can and has been interpreted in such a way as to consider the interests of nature. Finally, it has been argued that the focus on a "new" right to a clean environment will divert the attention from the consolidation of other human rights to their detriment. However, emphasising the need to consolidate existing human rights cannot halt the evaluation of new ones.[76] The specificity of a separate human right to a clean environment is often established within environmental justice and ethics discourses, inasmuch as they concern environmental stewardship for future generations, and thus from this special perspective merit their own legal existence.

The concept of legal stewardship is also relevant in connection to debates of ecocide and cultural genocide, which is environmental degradation resulting in the deterioration of the way of life and livelihood of a particular ethnic group.[77]

[75] A. Boyle, *The Role of International Human Rights Law in the Protection of the environment*, in: A. Boyle, M. Anderson (eds.), *Human Rights Approaches to environmental Protection*, Oxford University Press, Oxford: 1996, p. 43.

[76] Scobie, *supra* note 2, pp. 15-16.

[77] *Ibidem*, p. 13.

The UNGA Resolution and the robust judicial practice of international courts and tribunals appear to confirm that a right to a clean environment already exists, although it is without doubt a still developing area of human rights and international environmental law and its legal nature (both substantive and procedural) is somewhat in a state of a flux. However, its legal content is consistently evolving, which is evidenced by the 2018 *Advisory Opinion* of the Inter-American Court of Human Rights, where this right has been accorded a very far-reaching scope of application.

Here the question arises: Is the Anthropocene a proper and effective framework for a human right to a clean environment? Michelle Scobie has persuasively argued that the Anthropocene is an apt, but imprecise, normative context for the contemporary debate concerning environmental rights. Despite the fact that the concept has a certain usefulness for the legal debate (such as removal of global inequality), overreliance on the concept may incorrectly attribute ecological problems to human actions in general, and "thus mask the differentiated rights and responsibilities of those affected by ecological crisis".[78] According to Scobie, there are two main problems with positioning environmental human rights within the Anthropocene. First, this concept places the victims and perpetrators in the same moral space and hides the problem of various universalist approaches to the environmental crisis. The ecological crisis has resulted from actions of a minority, which the Anthropocene ignores by attributing the crisis to all actors. Scobie further argues that the ecological crisis is not so much anthropocentric, but rather due to the Western political and economic system of unfair allocation of environmental goods and services. Thus, within the Anthropocene system human rights place equal obligations on all societies rather than endeavour to reform Western societies which had created exploitative, capitalist, affluent and destructive social systems.[79] Therefore, the Anthropocene should be replaced by Capitalocene or Plantationnocene. The inequality of human rights and the environment has been much debated in the Global South and has become part of an argument put forward by scholars representing Third World Approaches to International Law (TWAIL). Kotzé, one of most prominent scholars of the TWAIL, has observed that the "'drain of wealth' colonial policies, coupled with distorted educational practices, has negatively impacted human capital accumulation, and societies have been generated that, to this day, are characterized by dysfunctional institutions, rent-seeking elites, and ethnic conflict, often leading to grave human rights abuses and unsustainable developmental practices".[80] There are also other issues which distinguish the Global South from the Global North

[78] *Ibidem*, p. 14.

[79] *Ibidem*.

[80] L.J. Kotzé, *Human Rights, the Environment, and the Global South*, in: S. Alam et al. (eds.), *International Environmental Law and the Global South*, Cambridge University Press, Cambridge: 2015, p. 178.

in relation to approaches to the human right to a clean environment. Kotzé refers to a subtle form of neo-colonialism, which means that Global North countries, using foreign-based extraction companies as conduits, exploit the natural resources of the Global South. Therefore, from the viewpoint of the Global South the environment-human rights discourse is more closely related to core issues of "equity, survival, peace and security, human capital development, and defunct governmental practices".[81] Such a complex situation calls for strong environmental human rights. This is dictated by the need to overcome poor socio-economic conditions, which lead to a very restricted access to indispensable natural resources "in societies that are rife with discrimination, exclusion, and marginalisation [...] and they relate to the need to ensure good governance (as a counterpoint to corruption and exclusionary decision-making)".[82]

3. RIGHTS OF NATURE

It is argued that in order to save the Planet Earth from an Anthropocene catastrophe separate rights need to be granted to Nature.[83] Granting them legal personhood and making the rights defendable before courts and tribunals would be a feasible solution to avert the ecological tragedy.[84] The rights of nature are very closely linked to the beliefs of Indigenous Peoples (if not constituting a part thereof).

The ground-breaking international instrument on the rights of nature (including the Indigenous way of thinking) is the 2010 Universal Declaration of the Rights of Mother Earth, adopted in Bolivia and modelled on the Universal Declaration on Human Rights. The Preamble already signals a uniform approach to nature, stating that:

> [T]he Peoples and nations of Earth: considering that we are all part of Mother Earth, an indivisible, living community of interrelated and interdependent beings with a common destiny; convinced that in an interdependent living community it is not possible to recognize the rights of only human beings without causing an imbalance within Mother Earth; affirming that to guarantee human rights it is necessary to recognize and defend the rights of Mother Earth and all beings in her and that there are existing cultures, practices and laws that do so.

[81] *Ibidem*, p. 179.

[82] *Ibidem.*

[83] L. Viaene, *Can Rights of Nature Save Us from the Anthropocene Catastrophe? Some Critical Reflections from the Field*, 9 Asian Journal of Law and Society 202 (2022).

[84] *Ibidem.*

This all-inclusive approach is further developed in Arts. 1 and 4 of the Declaration. In particular, Art. 1 proclaims, inter alia, that:

> (6) Just as human beings have human rights, all other beings also have rights which are specific to their species or kind and appropriate for their role and function within the communities within which they exist.
> (7) The rights of each being are limited by the rights of other beings and any conflict between their rights must be resolved in a way that maintains the integrity, balance, and health of Mother Earth.

Art. 4 explains that the term "'being' in the Declaration includes ecosystems, natural communities, species, and all other natural entities which exist as part of Mother Earth". Art. 2 states that "each being has the right to a place and to play its role in Mother Earth for her harmonious functioning; every being has the right to wellbeing and to live free from torture or cruel treatment by Human beings".

Finally, Art. 6 enumerates the rights inherent to Mother Earth:

> Mother Earth and all beings of which she is composed have the following inherent rights: the right to life and to exist; the right to be respected; the right to continue their vital cycles and processes free from human disruptions; the right to maintain its identity and integrity as a distinct, self-regulating and interrelated being; the right to water as a source of life; the right to clean air; the right to integral health; the right to be free from contamination, pollution and toxic or radioactive waste; the right to not have its genetic structure modified or disrupted in a manner that threatens it integrity or vital and healthy functioning; the right to full and prompt restoration for the violation of the rights recognized in this Declaration caused by human activities.

At the national level, the acknowledgment and implementation of the Indigenous way of thinking is very complex and may encounter several difficulties based on the very foundations of the political system, which is not pluralistic but rather dominated by States which may assimilate and dominate Indigenous knowledge. This is exemplified by para. 6 of the Preamble to the Kunming–Montreal Global Biodiversity Framework for the CBD, which states as follows:

> The Conference of the Parties [...] reaffirms its expectation that Parties and other Governments will ensure that the rights of Indigenous Peoples and local communities are respected and given effect to in the implementation of the Kunming-Montreal global biodiversity framework.

Thus, the Conference of the Parties takes into account the rights of Indigenous peoples through the prism of States' actions, not as an independent actor.

The idea of rights for non-humans is not new. In 1972 Professor Stone asked whether trees should have standing.[85] Since then there have been numerous developments, in particular in national laws, vesting rights to nature generally or to particular subjects, such as rivers. From the legal perspective, a distinction should be made between general constitutionally granted rights of nature and specific subjects such as rivers, forests, mountains etc., which are granted specific personhoods.

Ecuador is the first State in the world to include the Rights of Nature and recognise *Pachamama* (*Quechua for Mother Earth*) and *Sumak Kawsy* (Buen Vivir, Living Well) in its 2008 Constitution. The Plurinational State of Bolivia enshrines the Aymara Indigenous principle of *Suma Qama~na* (Living Well) in its 2009 Constitution. It adopted a Law on the Rights of Mother Earth (No. 71 of 2010), updated by a Framework Law of Mother Earth and Integral Development for Living Well.[86] The Law has established an autonomous entity – the Plurinational Authority of Mother Earth – under the Ministry of Environment and Water to formulate policies, plan technical management, execute strategies, programmes and projects, and manage financial resources for climate change.[87] The Law has defined an integral development – which combines harmony and equilibrium with Mother Earth for Living Well – to secure the continuity of and the capacity of regeneration of Mother Earth, while at the same time striving to eliminate poverty and inequality. Importantly, the Framework Law acknowledges the role of Indigenous cultures in the definition of "Living Well" and "Integral Development"; however, it provides for mining and hydrocarbon industries (if they use the cleanest technology and are subject to monitoring with the participation of the affected population). Finally, it states that the most important provision is land-use planning, which aims at the management of life in harmony and equilibrium with Mother Earth; and recognises the cosmovision of Indigenous communities, nationalities, and Afro-Bolivian communities.[88]

The rights of nature have been weakened by regulations which allow for the exploitation of natural resources. For example, in Ecuador the Constitutional right of nature has been followed by a 2009 Mining Law (for mining in fragile areas),

[85] C. Stone, *Should Trees Have Standing? Towards Legal Rights of Natural Objects*, 45 South California Law Review 450 (1972).

[86] H. Danzer, *Harmony with Nature: Towards a New Deep Legal Pluralism*, 24 The Journal of Legal Pluralism and Unofficial Law 21 (2021), p. 27.

[87] R. Merino, *Law and Politics of Human/Nature: Exploring the Foundations and Institutions of the Rights of Nature*, in: U. Natarajan, J. Dehm (eds.), *Locating Nature Making and Unmaking International Law*, Cambridge University Press, Cambridge: 2022, p. 321.

[88] *Ibidem*, pp. 321-322.

and the general law of the 2017 Organic Code of Environment, which allows for an exception for extractive activities in protected areas.[89] Indigenous Peoples and environmental activists have criticised the government for twisting the meaning of *Sumak Kawsyto* to fulfil its own agenda.[90] Interestingly, most effective in protecting Nature is the use of other legal mechanisms, such as in 2019 when the Waorani People achieved their landmark legal victory to protect half a million acres of Amazon rainforest based on their Indigenous rights to Free Prior and Informed Consent over oil-drilling in their territory. Danzer has observed that in light of the example of the Waorani People and other similar experiences, "ecosystems have often received greater protection when Indigenous Peoples' rights are recognised".[91]

Ecuador has a general provision of standing for the protection of nature. Any natural or legal person, Peoples, or nationality might initiate legal constitutional and criminal actions before judicial *fora* and use the right of appeal to the proper administrative authority to undertake administrative actions of various kinds. It can be observed that in Ecuador, the rights of nature are located in the centre of the system of administrative protection, in which their explicit recognition has compelled judges and the administration to consider the interests of the environment to a greater extent than in systems of environmental protection based exclusively on the human right to a clean environment.[92] Indigenous movements are very active in initiating court proceedings in relation to various industrial projects. An example is the 2013 case brought (together with environmental and human rights NGOs and affected communities) before the 25th Civil Court in the Pichincha province in relation to suspension of the Condor-Mirador mining project. It was brought against, *inter alia,* the Ministries of Non-Renewable Natural Resources and of the Environment, alleging that mining in this area would affect the right of nature. The claimants have lost the case and appealed to the Inter-American Court of Human Rights (not the national court).[93]

The 2016 decision of the Constitutional Court in Colombia, which accorded personhood to the Atrato River and proclaimed it a legal subject is ground-breaking.[94] The *Atrato* ruling results from a *tutela* filed by the non-governmental organisation Tierra Digna on behalf of various Afro-descendant communities.[95] The river is situated in the department of Choco, with an 87% Afro-descendant

[89] *Ibidem,* p. 318.

[90] Danzer, *supra* note 87, p. 32.

[91] *Ibidem*, p. 33.

[92] Merino, *supra* note 88, p. 319.

[93] *Ibidem*, p. 320.

[94] For a detailed description, *see* P. Weschke, *Rights of Nature in Practice: A Case Study of the Impacts of Colombian Atrato River Decision*, 33 Journal of Environmental Law 531 (2021).

[95] *Ibidem*, p. 535.

population and 10% Indigenous communities. The Court's ruling was a result of illegal gold mining which caused social and environmental issues in the River and the failure of the State to remedy them.[96] The Court recognised the human rights of the Claimants, but in its landmark ruling it also introduced for the first time a non-human natural entity as a subject of rights, and by introducing the concept of biocultural rights of indigenous and Afro-descendant communities it adopted "an explicit ecocentric approach to environmental protection, granting legal personhood to the Atrato River".[97] The ecocentric approach means that Earth does not belong to humans, but rather that humans, along with other species, belong to Earth. Humankind does not own nature; nature is a subject of rights in its own capacity.[98] According to the Court, biocultural rights refer to:

> the rights of ethnic communities to autonomously administer and protect their territories – in accordance with their own laws and customs – as well as the natural resources that constitute their habitat, where their culture, traditions and way of life are developed based on their special relationship with the environment and biodiversity. In effect, these rights result from the recognition of the profound and intrinsic connection that exists between nature, its resources, and the culture of ethnic communities, [...] which are interdependent and cannot be understood in isolation.[99]

According to Weschke, the Court's concept of biocultural rights has not established new rights for Indigenous and Afro-descendant communities, but rather has integrated existing constitutional rights to their natural resources and their culture within one single category, and has acknowledged that multiple forms of life expressed as cultural diversity are inherently linked to the diversity of ecosystems and territories. The Court also emphasised that the relations of the different ancestral cultures with nature, and with the environment in general, actively contribute to biodiversity. Therefore, the Court concluded that the protection of culture (as enshrined in the Constitution of Colombia) implies the protection of biodiversity, and *vice versa*, as they are two sides of the same coin. The Court found that due the organic link between culture and nature, it is necessary for local and Indigenous communities to participate in the framework of management.[100]

As a result of according personhood to the Atrato river, a guardianship body was established, comprising both the Ministry of the Environment and the community

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[96] *Ibidem*, p. 538.
[97] *Ibidem*, p. 539.
[98] *Ibidem*.
[99] Cited in Weschke, *supra* note 95, p. 539.
[100] *Ibidem*, pp. 529-540.

guardians.[101] Its work has thus far focused "on the collective and participatory construction of public policies". In addition, the community guardians have invested great efforts in educational and socialisation activities with communities in the territory. In this context, the legal recognition of the river has led to important symbolic effects in terms of enhancing environmental awareness among communities.[102] However, the *locus standi* of the guardians in possible legal proceedings remains a contentious issue.[103]

The most interesting case is that of the Whanganui River in New Zealand. It originated from the Whanganui Iwi Maori Indigenous peoples' claims against the expropriation of the land by the colonial State, rather than asserting the rights of nature to the river.[104] Nonetheless, the 2017 Te Awa Tupua Act has assigned to the river the rights, powers, duties, and liabilities of a legal person and has declared two guardians responsible for maintaining the river's health and well-being: a representative of the New Zealand Government and a representative of the Whanganui Iwi which, based on their genealogical origins, exercise the customary rights and responsibilities in relation to the Whanganui River.[105] The rights of nature can be drawn from the Maori Iwi peoples' beliefs, as they regard all elements of the world as related to each other through *whanaungatanga* kinship ties between living and dead people, nature, and the spiritual world (gods); and that the rights of people and nature are bound together.[106] The Maori people do not recognise anything which "does not recognise any transactional or hierarchical relationship between people and Nature".[107] Subsequently, the Te Urewera forest and Taranaki Maunga (formerly Mount Taranaki) were granted personhood. Nonetheless, the legal framework of these regulations, which are set out within the State's legislative framework, may permit certain extractive activities.[108] However, as Danzer concludes "the outcome of the legal interactions went beyond creating a hybrid concept. The decentring of state dominance in the substance of the legislation is arguably the furthest that a contemporary state has gone to decolonising the relationship between people, the state, and Nature and recognising deep legal pluralism in Earth law".[109]

[101] *Ibidem,* p. 547.

[102] *Ibidem*, p. 548.

[103] *Ibidem*, p. 549.

[104] *See* Danzer, *supra* note 87, p. 34; M. Kramm, *When a River Becomes a Person*, 21 Journal of Human Development and Capabilities 307 (2020). This author has suggested interesting modifications of the existing regulation of the River.

[105] Kramm, *supra* note 105, p. 308.

[106] Danzer, *supra* note 87, p. 34.

[107] *Ibidem.*

[108] *Ibidem*, p. 35.

[109] *Ibidem*.

It may be said that at present, from the points of view of the jurisprudence and States' practice, the rights of nature are not fully recognised in national and international systems, where the dominant approach is still anthropocentric, i.e. that nature is an object (not the subject) and a service provider, regulated by property laws. There is a hierarchical relationship between humanity and nature, with human interests being superior over natural beings. Treating humanity and nature as a single continuum and entity still lies in the future, where human-nature would be the foundation of a new legal order whereby humanity and nature's rights are one category.[110] In order to achieve this, Danzer postulates that a regime of new "deep" legal pluralism (both nationally and internationally) is needed (following New Zealand's example) and must be integrated into a sustainable development concept.[111] "These new global legal developments arrive alongside what appears to be a wholesale re-evaluation of the place of human interests in relation to nature. New Zealand's Te Urewera Act is seen to be novel for its changes to the very nature of property ownership. It is an unequivocal rejection of a human-centred rights regime for protecting nature as property".[112] The rights of nature signal a radical change in our way of thinking, eschewing our anthropocentric legal system.[113]

According to Maloney, "[a] rights-based approach is not just about conferring rights on nature; it is a means of giving legal recognition to nature's inherent worth by recognizing what is already there. In operational terms, it is largely for the purpose of redressing the balance between humans and nature".[114]

The personhood accorded to nature has, however, given rise to a host of questions of a legal nature, which are not yet fully clarified. They have been comprehensively analysed by Pecharroman. For example, what are the legal implications and the meaning of providing legal personhood to nature? This question arises because the definition of legal personhood is not uniform across legal systems. The *locus standi* of nature is also an unresolved issue, which requires that the relevant laws are reconceptualised and reformulated.[115] There is also the issue of enforcement of the rulings concerning the rights to nature, which has proved challenging given the lack of both precedent and of compliance therewith, as evidenced by the ruling concerning Vilcabamba (Ecuador), which has taken many months to be even partially implemented.[116] Finally, Pecharroman raises "the question of how much should we

[110] Merino, *supra* note 88, p. 331.

[111] Danzer, *supra* note 87, pp. 35-36.

[112] G.J. Gordon, *Environmental Personhood*, 43 Columbia Journal of International Law 50 (2018), p. 52.

[113] M. Maloney, *Australian Earth Laws Alliance. Building an Alternative Jurisprudence for the Earth: The International Rights of Nature Tribunal*, 40 Vermont Law Review 133 (2016).

[114] *Ibidem.*

[115] *Ibidem.*

[116] *Ibidem.*

give up in terms of development in order to respect the rights of nature?" – which means that in practice "establishing the right balance between human development and the respect of nature's rights will prove challenging for the courts".[117]

The identity of Indigenous Peoples is also a very complex matter in international law and human rights law. Without doubt, however, their special relationship with land and natural resources is a part of their spiritual identification with nature. The HRC has contributed greatly to further development of the understanding and the interpretation of Art. 27 of the ICCPR. In its General Comment No. 23, it stated as follows:

> With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.[118]

At the same time the 2021 HRC's landmark decision further clarifies the complex issues of Indigenous peoples' identity in relation to cultural identity (and their relation to nature in this respect). The HRC found that Paraguay's failure to prevent and control the toxic contamination of traditional lands of the Ava Guarani peoples due to the intensive use of pesticides by nearby commercial farms violates the Indigenous community's rights and sense of "home". Hélène Tigroudja, a member of the HRC, stated that lands represent home, culture, and the community of Indigenous peoples. Thus serious environmental damages adversely impact Indigenous people's family life and traditions as well as their identity, and can even contribute to the disappearance of their community. It inflicts serious damage on the existence of the culture of the group as a whole. The activities in nearby farms have not only contributed to the destruction of Indigenous community's life stock; affected subsistence crops and fruit trees; impacted hunting, fishing and foraging resources; contaminated the waterways and harmed people's health; but also affected their spiritual identity by the disappearance of the natural resources needed for hunting, fishing, woodland foraging, and Guarani agroecology, and led to the loss of traditional knowledge. The HRC has affirmed for the first time

[117] *Ibidem.*

[118] HRC, *General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, UN Doc CCPR/C/21/Rev.1/Add.5, para. 7. *See also* HRC Communication No. 197/1985 *Ivan Kitok v. Sweden (1988)* UN Doc CCPR/C/33/D/197/1985.

that in the case of indigenous people the notion of "home" should be understood within the context of the special relationship between them and their territories, including their livestock, crops and their way of life such as hunting, foraging, and fishing.[119] This case is an excellent example of how the relationship of Indigenous Peoples with nature is an expression of their identity.

The complex problem of the rights of nature in the Anthropocene still awaits further refinement and clearer legal content and structure, which at the moment remain quite opaque. In many instances (such as New Zealand) the rights of nature have been implemented through indigenous peoples' rights.[120] The concept of biocultural rights is also a possible way forward, as it acknowledges the intrinsic value of nature.

CONCLUDING REFLECTIONS

The issues surrounding the human right to a clean environment and the rights of nature are complex, still developing, and far from being definitively resolved, both in law and philosophy. These areas are still quite nebulous in their content, *locus standi* etc., but it appears that the absolute rejection of their existence is a very harsh and perhaps too far reaching conclusion. For example, Handl, a well-known sceptic of the existence of a substantive human right to a clean environment and the rights of nature, has put forward several arguments in support of his approach.[121] It is correct that the universal human rights treaties do not contain a human right to a clean environment, and in the cases of regional treaties which include it, the enforcement of an environmental human right is very complex. He argues that very often decisions of human rights courts, such as the famous 2018 Advisory Opinion of the IACtHR, are based on vague and nebulous principles of international environmental law. At the same time however, there has been a steady and consistent progress towards the recognition of such a right, culminating in the 2022 Resolution of the UNGA. According to Conclusion 6 of the International Law Commission Draft Conclusions on Identification of Customary International Law, the practice of States can also be inferred from, *inter alia*, resolutions adopted by

[119] HRC, *Paraguay: Failing to prevent contamination violates indigenous people's right to traditional lands*, 14 October 2021, available at: https://www.ohchr.org/en/press-releases/2021/10/paraguay-failing-prevent-contamination-violates-indigenous-peoples-right (accessed 30 April 2023).

[120] P. Gottschalk, *Taking environmental Rights in the Anthropocene Seriously. The Case of Biodiversity and Nagoya Protoco*l, in: W.F. Barber, J.R. May (eds.), *supra* note 2, p. 52. *See also* M. Hulbert, *Environmental Rights through Indigenous Rights*, in: W.F. Barber, J.R. May (eds.), *supra* note 2, p. 132.

[121] G. Handl, *The Human Right to a Clean Environment and the Rights of Nature. Between Advocacy and Reality*, in: A. von Arnauld, K. von der Decken, M. Susi (eds.), *The Cambridge Handbook of New Human Rights. Recognition, Novelty, Rhetoric*, Cambridge University Press, Cambridge: 2020, p. 137.

international organisations.[122] While they should be approached with due caution, the resolutions of the General Assembly and the statements of representatives in the course of debates can nevertheless express the *opinio juris* of States (especially if adopted by consensus),[123] and thus constitute important evidence of a global will on the part of States participating in the adoption of such a resolution.

The UNGA Resolution recognizing the right to a clean, healthy, and sustainable environment as a human right was adopted by vote of 161 in favour, zero against. Only eight Member States – Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, the Russian Federation, and Syria – abstained.

The author of this article is of the view that even considering the weak and ill-defined normative content of such a right and the questions arising in relation to its implementation and enforcement, the practice of States and judicial decisions may justify the suggestion that even if such a right is not yet fully established and developed, it is in its incipient stages of being created. The relationship between human rights and the environment – a question distinct from the protection of the environment *per se* during armed conflict[124] – is nonetheless further strengthened by International Humanitarian Law, which has been developing norms on protection of the environment during armed conflict, culminating with the adoption by the International Law Commission (ILC) in 2022 of Draft Principles on Protection of the Environment in Relation to Armed Conflicts.[125] Its Preamble states that it is: "[a]ware of the importance of the environment for livelihoods, food and water security, maintenance of traditions and cultures, and the enjoyment of human rights".

Historically, a link between human rights and environmental protection during armed conflict could have been inferred from various provisions, such as the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, which states in. Art. 55 that "forests and agricultural estates are to be protected because

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[122] Adopted at the 70th session of the ILC, submitted to the UNGA, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf (accessed 30 April 2023).

[123] S.M. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law,* Proceedings of the Annual Meeting (American Society of International Law), vol. 73 (26-28 April 1979), pp. 301-309. *See also* T. Treves, *Customary International Law,* Max Planck Encyclopedia of Public International Law, November 2006, available at: https://tinyurl.com/yju8zz4s (accessed 30 April 2023), paras. 44-46, 50.

[124] In this connection Art. 8.2 (b)(IV) of the Rome Statute must be mentioned:

"2. For the purpose of this Statute, 'war crimes' means: [...]

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: [...]

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".

[125] Adopted by the ILC at 73rd session and submitted to the UNGA, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/8_7_2022.pdf (accessed 30 April 2023).

of their indispensable value in supporting human life". This provision was applied after the Second World War in relation to German industrialists with respect to their over-exploiting of Polish forests for timber during the period of occupation.[126]

While judicial practice (both national and international) based on regional human rights treaties is indeed quite scarce and also varied, nonetheless it has greatly contributed (especially within the Latin American context) to the process of developing such a right to a clean environment. However, it must be stated that the ECtHR has evidenced a very restrictive approach towards interpreting the articles of the ECHR to give an effect to an environmental right.

While indeed universal human rights treaties, such as International Covenant on Political and Civil Rights (ICPCR), generally do not contain a right to a clean environment, the HRC, its monitoring body, has dealt with these issues. In 2019, in the *Portillo Cáceres v. Paraguay* case, it analysed the question of the States' duty to protect individuals from environmental degradation under Arts. 6 (right to life) and 17 (protection of the family) of the ICPCR. As was stated above, in 2018 the HRC adopted the General Comment No. 36 on the Right to Life, which stated that: "The duty to protect life also implies that States parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include [...] degradation of the environment" (para. 26). Reeh has commented as follows: "The Committee used strong language, stating that international tribunals have found an 'undeniable link' between environmental protection and human rights, thus following the approach of the IACHR, and called their practice 'established' (paras. 7.3, 7.4)".[127] The HRC has opined that "there is generally an undeniable link between the protection of the environment and the realization of human rights".[128] Therefore, while not unequivocally proclaiming a human right to a clean environment, it did however link existing human rights in the ICPCR to preventing environmental degradation, and substantiated its approach by the practice of regional human rights courts.

The focus on development of the environment is best exemplified by the evolution and practical implementation of the concept of intergenerational equity. When

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[126] A. Afriansyah, *The Adequacy of International Legal Obligations for Environmental Protection During Armed Conflict*, 3(1) Indonesia Law Review 55 (2013), p. 57.

[127] G. Reeh, *Human Rights and the Environment: The UN Human Rights Committee Affirms the Duty to Protect*, EJIL: Talk!, 9 September 2019, available at: https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/ (accessed 30 April 2023); E. Brown-Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*, United Nations University, Tokyo: 1988.

[128] General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life https://www.ohchr.org/sites/default/files/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf.

Brown-Weiss published her seminal monograph on this subject in 1988, the views on the practical implementation of such a concept were quite varied. However, at present intergenerational equity has been relied on by both international and national courts, and the institution of an ombudsman for future generations has become an established institution in many States.[129]

Handl is similarly sceptical regarding the rights of nature, hinging his view on a concept of the intrinsic value of nature which, according to him, is the process of ascribing rights to nature which are eminently human-centred. In order to shift from such an approach it is necessary to adopt a pluralistic system of granting rights to nature. As Dancer persuasively observed:

> The New Zealand model offers the closest example to date as to how a loosening of legal hierarchies towards deep legal pluralism may be achieved within a national legal order. However, the impetus for this approach came from the fight for Indigenous Peoples' rights, rather than taking the Rights of Nature as the starting point. In other contexts, states will need to find ways of recognising Nature as a legal subject in a way that decentres the state irrespective of whether Indigenous Peoples' interests are bound with the land in question...[n]ew deep legal pluralism is needed, which recognises Nature as subject and decentres the state in favour of an equitable sharing of power over human-Earth relations. The aim should be to find context-specific power-sharing solutions that protect and respect Nature, human rights and relationships with the Earth, and legal and cultural diversity. This could ultimately lead to radical shifts in legal cultures and hierarchies. The integrity of a move towards Earth law depends on a pluralist approach that recognises and promotes the diversity of worldviews and looks for common ground between them.[130]

Thus, the way forward is to abandon the inherently anthropocentric approaches to nature and shift the focus away from nature as a service provider, acknowledging

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[129] E. Brown-Weiss, *Intergenerational Equity,* Max Planck Encyclopedia of Public International Law, April 2021, available at: https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1421?print (accessed 30 April 2023).

[130] Dancer, *supra* note 87, pp. 35, 36.

the role of indigenous peoples but granting the intrinsic rights to nature independently of just their interests.[131]

Dancer postulated that at the international level Rights of Nature should be integrated into existing international environmental law such as the CBD.[132] This happened in December 2022 (see above).

In the view of this author, many significant developments relating to the human right to a clean environment and the rights of nature have taken place. There is certainly an evolution toward acknowledging a substantive human right to a clean environment, exemplified by the (non-binding) Resolution of UNGA. At the same time however, it remains undisputedly true that the content of such a right is vague, not very well defined, and difficult to implement and enforce. Even if such a right exists in a catalogue of human rights listed in a human rights treaty, the question arises whether it can be invoked as a self-standing right before an international or national court or tribunal. In the *Ogoni case*, it was just one of the grounds for lodging the case, together with many other rights invoked with an acknowledged normative content.

The same reflections are related to the rights of nature. The question of their locus standi, economic policies, and conflicting interests weaken any imminent world-wide establishment and implementation of such rights. It may be said however that the recent decision of the COP 15 of the CBD is a harbinger of change. Therefore, to play a significant role in the Anthropocene era, many significant social, economic and cultural issues will have to be resolved, such as the differentiation between human actors in remedying the decline in ecology, therefore acknowledging the division between North and South.[133] Thus, the full acknowledgement of such rights – both a human right to a clean environment and the rights of nature – will take many years to be fully established and crystallised.

[131] *Ibidem*, p. 35.

[132] *Ibidem.*

[133] J. Rose, M. Wewerinke-Singh, J. Miranda, *Primal to Anthropocene: Narrative and Myth in International Environmental Law*, 66 Netherlands International Law Review 463 (2019).