Environmental rights:
An introduction to global law and policy

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HUMAN RIGHTS AND THE ENVIRONMENT IN THE EU / TOWARDS AN INCLUSIVE DEBATE

TIESS TRANSDISCIPLINARY INSTITUTE FOR ENVIRONMENTAL AND SOCIAL STUDIES

Introduction

This introductory essay traces the birth and evolution of environmental rights at the global level, providing a snapshot of legal and policy developments at the international, regional, and national levels. I start from some necessary conceptualizations: what we mean by environmental rights, how human rights and environmental protection can be linked in law and policy, what is their nature, content, and reach. I then take an historical approach to explore the evolution of the relation between human rights and the environment, from the 1972 UN Conference on the Human Environment to the 2021 UN resolution on the right to a clean, healthy and sustainable environment and the explosion of climate litigation across the globe.

A vast amount of literature has been exploring the interlinkages between human rights and the environment. This essay provides a very general overview of the area, highlighting the relevant legal instruments, policy developments, and case law from the international to the national level, and directing the reader to sources and further literature.

Environmental rights: a conceptualization

Many reasons justify the link between human rights and environmental protection. First of all, environmental stability is the precondition for the enjoyment of all the traditional human rights. Second, both environmental and human rights protection raise issues related to the application of international minimum standards. Third, both subjects consider the information and participation of individuals and NGOs and the opening of the decision-making processes of particular importance. The concept of environmental rights[1] implies that citizens, either individually or in groups, may be involved in pursuing not only their private interests, but also in

[1] See: Council of Europe, *Manual on Human Rights and the Environment* (2012); UN High Commissioner for Human Rights, *Analytical Study on the Relationship between Human Rights and the Environment*, UN Doc. A/HRC/19/34 (December 16, 2011); Knox, J. & Pejan, R. (Eds.), *The Human Right to a Healthy Environment* (Cambridge University Press, 2018); Grear, A. and Kotzé, L. (eds.), Research Handbook on Human Rights and the Environment (Edward Elgar, 2015); Dupuy, P. and Viñuales, J. (2018). *International Environmental Law*, 357-409 (2nd ed., Cambridge University Press, 2018); Bratspies, R. "Do We Need a Human Right to a Healthy Environment?" *Santa Clara Journal of International Law* 13 (2015) 31-69.

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Research paper for the project "Human rights and the environment in the EU. Towards an inclusive debate" funded by Erasmus+, Jean Monnet.

contributing towards what is generally considered a public goal or interest: protection of the environment.

They are categorized into procedural rights, which involve access to information, participation in decision-making, and access to justice; and substantive environmental rights. Substantive rights generally concern the state of the environment as such, as its degradation may imply violation of several "traditional" individual human rights, such as the right to health and the right to life.[2] As such violation may refer to both current and future generations, environmental rights have an inter-generational component. Substantive environmental rights however may also take the form of collective rights, including of particular groups, populations, and peoples, who enjoy a special relationship with the land and natural resources. Such rights involve territorial rights and rights to the use of natural resources for indigenous peoples, and rights to land and to seeds for peasants and rural populations in general. The right to prior informed consent (PIC) is a particular one, connecting procedural and substantive rights. The right to PIC refers to the right of Indigenous Peoples and local communities to consent to developments affecting their environment and livelihoods. It thus includes both a procedural component, referring to the consultative and decision-making process leading to providing PIC or not, and a substantive component, referring to the development in question and whether it agrees with the choices and aspirations of the specific community[3].

Environmental rights can thus be used as: defensive legal tools, to directly protect human rights such as the right to life or the right to health from environmental damage; or forward-looking legal tools, to promote longer-term environmental goals and obstruct destructive developments through individual or collective legal action.

These rights have been developed progressively within the global framework, leading to the recent adoption of the (individual and collective) right to a healthy environment by the UN Human Rights Council, as well as a more novel development, rights of nature[4]. Instruments establishing rights for nature, an item which falls outside the scope of this essay, grant legal rights to nature itself, together with enforcement rights to affected communities. This development has been witnessed in different jurisdictions across the globe, including Ecuador, Bolivia, and New Zealand, arguably

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[2] See: Boyle, A. E., "Human Rights and the Environment: Where Next?," European Journal of International Law 23(3) (2012), pp. 631–42; Hiskes, Richard P., The Human Right to a Green Future: Environmental Rights and Intergenerational Justice (Cambridge University Press, 2008); Lee, J., "The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law," Columbia Journal of Environmental Law 25 (2000), pp. 283–339.

[3] See: Anaya, S. J., Indigenous Peoples in International Law, 2d ed. (Oxford University Press, 2004); Rodríguez-Garavito, C., "Ethnicity.gov: Global Governance, Indigenous Peoples and the Right to Prior Consultation in Social Minefields," Indiana Journal of Global Legal Studies 18(1) (2011), pp. 263–305; Osakada, Y., Indigenous peoples as actors in international law-making: focusing on international environmental law. In: Scott, K.N., et al. (Eds.), *Changing Actors in International Law*, 101-129 (Brill, 2020); Charters, C., The sweet spot between formalism and fairness: indigenous peoples' contribution to international law. AJIL Unbound 115 (2021) 123–128.

[4] See: May, J. R. and Daly, E., "New Directions in Earth Rights, Environmental Rights and Human Rights: Six Facets of Constitutionally Embedded Environmental Rights Worldwide," IUCN Academy of Environmental Law E-Journal 1 (2011); Borràs, S. "New Transitions from Human Rights to the Environment to the Rights of Nature" Transnational Environmental Law, 5:1 (2016), 113–143.

marking a move from an anthropocentric to a more eco-centric approach to environmental law and policy. Its political connotations and legal implications remain to be assessed.

The evolution of environmental rights: an overview

Establishment of the right to a healthy environment was the outcome of a lengthy international legal and policy debate on its content and usefulness for the promotion of environmental or human rights goals.[5] The direct relationship between environmental protection and human rights promotion was almost self-evident in many international fora: first, individual and collective human rights can be used to enhance environmental protection and second, an ecologically balanced environment is a precondition for the enjoyment of human rights. Nevertheless, the way that this relationship should be translated into law was not self-evident.

The UN Declaration on the human environment, adopted by the UN Conference on the Human Environment held in Stockholm in 1972 is considered the point of departure. Principle 1 of the (non-binding) Stockholm Declaration provides that "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of 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..." Sexist language aside, the principle recognizes the link between fundamental rights and environmental protection. Although it stops short from recognizing the human right to a healthy environment as such, it can be interpreted as an indirect recognition of such right. In fact, the Stockholm Declaration built on earlier language contained in the 1966 UN International Covenant on Economic, Social and Cultural Rights, which recognized the individual's right to "the continuous improvement of living conditions" (Article 11) as well as to "the enjoyment of the highest attainable standard of physical and mental health" (Article 12) and committed states to protecting the right to health by positive measures, including through "the improvement of all aspects of environmental and industrial hygiene."

The Stockholm Declaration inspired many national constitutions developed in the 1970s, and initiated the debate on a human right to the environment, but has not lead to the development of a binding international law rule. Linking human rights with environmental protection remained hugely controversial in the global arena. The UN Conference on Environment and Development, held in Rio de Janeiro in 1992, did not manage to reach consensus on explicit recognition of a human right to environment, resulting in an arguably watered down formulation, making reference to the anthropocentric nature of environmental protection and the relative "entitlement" of humans to live in harmony with nature. Principle 1 of the Rio Declaration states thus that "Human beings are at the

[5] *See* Handl, G., "Human rights and the protection of the environment. A mildly 'revisionist' view" in Cançado Trindade, A. A. (ed), *Human rights, sustainable development and the environment* (Instituto Interamericano de Derechos Humanos, 1992), 117; Kiss, A. "The right and possible implications of the right to environment" in K. Mahoney-P. Mahoney (eds.), *Human rights in the 21st century. A global challenge* (Print Book, 1993), 551.

centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."

On the other hand, the Rio Declaration contained the first explicit recognition of procedural environmental rights – access to information, participation in decision-making, and access to justice for environmental matters. Principle 10 states that: "Environmental issues are best handled with the 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." Although not binding *per se*, Principle 10 has served as an international benchmark, guiding the development of a new range of procedural rights which may be granted to individuals by international law, and which would be exercised at the national or possibly international level.[6] Its influence can also be traced in certain provisions in multilateral environmental agreements of global application, including the 1992 UN Convention on Biological Diversity and its 2000 Cartagena Protocol on Biosafety. Principle 10 has further induced legal developments at the regional level, including the Aarhus Convention and, more recently, the Escazú Agreement.

The 1998 Aarhus Convention of the UN Economic Commission for Europe is a far-reaching and detailed environmental treaty on procedural environmental rights. Together with its 2003 Protocol on Pollutant Release and Transfer Registers and the 2018 Escazu Agreement of the UN Economic Commission for Latin America and the Caribbean, which is addressed below, they are the only legally binding international instruments that put into effect Principle 10 of the Rio Declaration. Adopted in the framework of the UN Economic Commission for Europe, but open for ratification to all UN member states, the Aarhus Convention is a multilateral environmental agreement that takes a rights-based approach to environmental protection: it links environmental and human rights, as well as government accountability and intergenerational equity, by awarding procedural rights to members of the public, for present and future generations to live in an environment adequate to their health and well-being. The Convention provides for the right of everyone to have access to environmental information that is held by public authorities; the right to participate in environmental decision-making; and the right of access to justice with regard to decisions that appear to have contravened environmental law. It specifically requires parties to inform the public concerned, early in the decision-making process, of proposed activities listed in Annex I and other activities which

[6] See Shelton, D., "What Happened in Rio to Human Rights?" Yearbook of International Environmental Law 3(1) (1993), pp. 75–93; United Nations Environment Programme, *Keeping Track of Our Changing Environment: From Rio to Rio+20 (1992–2012)* (2011).

may have a significant effect on the environment, and to ensure early public participation in decision-making.[7]

One of the most advanced features of the Aarhus Convention is its Compliance Committee, which was established in 2002. The Committee is composed of nine members serving in their personal capacity, nominated by Parties, Signatories and NGOs, and elected by the Meeting of the Parties. It considers any submission, referral or communication brought before it by Parties, the Secretariat or the public. This way the Convention goes well beyond other international environmental agreements in providing access to a review procedure for members of the public. The Committee is not competent to take decisions that are legally binding on Parties. However, it adopts independent findings of non-compliance and may recommend measures to be taken by the non-compliant states. Upon the Committee's recommendations, the Meeting of the Parties may decide upon any appropriate measures to bring about full compliance with the Convention: providing advice and facilitating assistance to the Party concerned; making recommendations; issuing declarations of non-compliance or cautions.[8]

Although the Convention has no enforcement mechanism against a failing Party, decisions on compliance are used to exert political pressure on the failing State to comply, and could also be used as additional argumentation in domestic and regional judicial procedures. The EU policies on renewable energy for instance, particularly with regard to wind energy, have given rise to a series of cases. For instance, the Committee found the UK in non-compliance for violation of the Convention's provisions on public participation, as the UK National Renewable Energy Plan was approved in a 'fast track' manner and was not subject to public participation.[9]

The much more recent Escazú Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, was adopted in 2018 under the auspices of the UN Economic Commission for Latin America and the Caribbean. Emerging from the 2012 UN Conference on Sustainable Development (Rio+20), it includes the same three pillars on procedural rights as the Aarhus Convention. Importantly however, it is the first legally binding instrument in the world to include provisions on environmental human rights defenders. This is crucial, as according to reports by Global Witness, the most dangerous countries for

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[7] See UN Economic Commission for Europe, *The Aarhus Convention: An implementation* guide (2014); Hey, E., "The Interaction between Human Rights and the Environment in the European 'Aarhus Space,'" in Grear, A. and Kotzé, L. (eds.), Research Handbook on Human Rights and the Environment (Edward Elgar, 2015); Ryall, Á., The Aarhus Convention: Standards for Access to Justice in Environmental Matters. In S. Turner et al (Eds.), *Environmental Rights: The Development of Standards*, 116-146 (Cambridge University Press, 2019); Ryall, Á. "A Brave New World: The Aarhus Convention in Tempestuous Times" *Journal of Environmental Law*, 35, 1 (2023) 161–166.

[8] See UN Economic Commission for Europe, *Guide to the Aarhus Convention Compliance Committee* (2019); Jendrośka, J. "Aarhus Convention Compliance Committee: Origins, Status and Activities" *Journal for European Environmental & Planning Law*, *8*(4) (2011) 301-314; Samvel, G. "Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice" *Transnational Environmental Law*, *9*(2) (2020), 211-238; Tsioumani, E., Public Participation in Environmental Decision-making, in Faure, M. (ed) *Elgar Encyclopedia of Environmental Law. Volume VI: Principles of Environmental Law*, 366–378 (Elgar, 2018).

[9] Communication ACCC/C/2012/68 concerning compliance by the UK and the EU, case documentation and findings available at: https://unece.org/env/pp/cc/accc.c.2012.68_european-union-and-united-kingdom.

environmental defenders in the world are currently Colombia, Brazil, Mexico, Guatemala, and Honduras.[10] The Agreement aims not only to offer legal tools to citizens to hold governments accountable for breach of rights, but also hope in the face of increasing intimidation, harassment, and murders of environmental defenders in the region.[11]

Substantive environmental rights on the other hand have been progressively enshrined in constitutional provisions around the globe. The right to a healthy environment is already formulated with various phraseologies in more than 50 constitutions, while more than 150 constitutions recognize the link between the state of the environment and the well-being of humankind.[12]

When it comes to regional human rights instruments,[13] the African Charter on Human and People's Rights states that "All peoples shall have the right to a general satisfactory environment favourable to their development," while the Additional Protocol on economic, social and cultural rights to the American Convention on Human Rights contains a provision establishing both an individual right and a state obligation. It declares that "Everyone shall have the right to live in a healthy environment and to have access to basic public services", and that the States Parties shall promote the protection, preservation, and improvement of the environment. These provisions have given rise to a significant body of case law, including with regard to the rights of Indigenous Peoples and tribal communities in these regions to continue customary use of natural resources, be involved in decisions affecting their territories, and be compensated in case of adverse effects. The European Convention on Human Rights on the other hand contains no provision linking human rights and the environment. The European Court on Human Rights has instead developed considerable case law linking environmental degradation with violations of rights protected in the Convention, including the right to life, the right to property, the right to private and family life, and the right to an effective remedy.[14] In addition, in September 2021, the Parliamentary Assembly of the Council of Europe

[10] Global Witness, *Decade of Defiance* (2022).
[11] See López-Cubillos, S. et al "The landmark Escazú Agreement: An opportunity to integrate democracy, human rights, and transboundary conservation" *Conservation Letters* 2022; 15:e12838
[12] See Bosselmann, K., "Global Environmental Constitutionalism: Mapping the Terrain," Widener Law Review 21 (2015), 171; Boyd, D. R., *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (University of British Columbia Press, 2012); Jeffords, C. and Minkler, L., "Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Performance," Kyklos 69(2) (2016), 295–334.
[13] See Amechi, E. P., "Enhancing Environmental Protection and Socio-Economic Development in Africa: A Fresh Look at the Right to a General Satisfactory Environment under the African Charter on Human and Peoples' Rights," *Law, Environment and Development Journal* 5(1) (2009); Ebeku, K. S. A., "The Right to a Satisfactory Environment and the African Commission," *African Human Rights Law Journal* 3 (2003), 165; Rodríguez-Garavito, C., "Beyond the Courtroom: The Impact of Judicial Activism on Socioeconomic Rights in Latin America," *Texas Law Review* 89 (7) (2011); UN Environment Programme and Center for International Environmental Law, *Compendium on Human Rights and the Environment* (2014).
[14] See Pedersen, O., "The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law," European Public Law 16(4) (2009), 571; Pedersen, O., The European Court of Human Rights and International Environmental Law. In Knox J. and Pejan, R. (Eds.), *The Human Right to a Healthy Environment*, 86-96 (Cambridge University Press, 2018).

recommended an additional protocol to the European Convention on Human Rights on the right to environment.[15]

At the international level, the 2007 UN Declaration on the Rights of Indigenous Peoples was the first one to recognize environmental rights for a particular category of population, Indigenous Peoples around the globe. The rationale is linked broadly speaking to their right to self-determination in a post-colonial context, their dependence on natural resources, their close cultural relationship with their territories, as well as, in a more utilitarian argument, their customary conservation practices. Although it is non-binding, the UN Declaration on the Rights of Indigenous Peoples is considered to codify binding international law of relevance to Indigenous Peoples, and is arguably part of customary international law.[16]

The much more recent UN Declaration on the Rights of Peasants and Other People Working in Rural Areas, adopted in 2018 by the UN Human Rights Council, is a particularly novel international instrument, because of its comprehensive, substantive approach regarding existing and new rights of rural populations, their contribution to global food security, and their relationship with land, seed and natural resources. For instance, when it comes to seed, which is a particularly controversial topic in international law due to the linkages both to the conservation of agricultural biodiversity but also to intellectual property rights and other trade-related policies, it establishes seed rights for peasants and other people working in rural areas, accompanied by a range of obligations for states, including measures to respect, protect and fulfil the right to seeds, recognize peasants' rights to rely on their own seeds and to decide on the crops they wish to grow, and support peasant seed systems.[17]

The adoption of the UN resolution on the right to a clean, healthy and sustainable environment by the Human Rights Council in 2021 and the UN General Assembly in 2022 is the culmination of this lengthy road and the first international legal instrument to establish a substantive right to a healthy environment for all. The resolution acknowledges the damage inflicted by climate change and environmental destruction on millions of people across the world, and underlines that the most vulnerable segments of the population are more acutely impacted.[18]

While not legally binding, its value should not be underestimated. The resolution supports the idea that the right to environment should be universally protected; and could bolster efforts for formal

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[15] See Parliamentary Assembly news release "The right to a healthy environment: PACE proposes draft of a new protocol to the European Convention on Human Rights (29 September 2021).

[16] See Champagne, D. "UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples): Human, Civil, and Indigenous Rights" *Wicazo Sa Review* 28 1 (2013) 9-22; Short, D., Lennox, C., Burger, J., and Hohmann, J. (Eds.) *The United Nations Declaration on the Rights of Indigenous Peoples: A Contemporary Evaluation* (Routledge, 2020); Lenzerini, F. Implementation of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples, *The International Journal of Human Rights* 23:1-2 (2019), 51-62.

[17] See Alabrese, M., Bessa, A., Brunori, M., and Giuggioli, P. F. *The United Nations' Declaration on Peasants' Rights* (Routledge, 2022).

[18] See UN news release "The right to a healthy environment: 6 things you need to know" (15 October 2021); UN Environment Programme news release "In historic move, UN declares healthy environment a human right" (28 July 2022).

recognition by the Council of Europe for instance, or by states that do yet not explicitly provide it in their domestic legal order. But more importantly, it provides an additional tool to challenge state and corporate actors for failing to take prompt and adequate action to address the triple environmental challenges of climate change, pollution, and nature loss.

Court battles invoking the right to a healthy environment are already frequent, and may become even more so. There has been a dramatic increase in use of domestic litigation in the last few years, as citizens find avenues to hold national governments accountable in relation to climate commitments. Across the world, climate litigation increases dramatically, and concerns judicial cases usually relating to climate-related human rights, domestic enforcement of international commitments, keeping fossil fuels in the ground, corporate liability and responsibility.[19]

There is every reason to expect rising filings and decisions in the coming years, in the context of international law developments, such as the adoption of the resolution on the human right to environment. To provide some illustrations, in the *Urgenda* case, the Dutch Supreme Court found an obligation of the Dutch government to reduce carbon emissions in line with its human rights obligations, noting that the European Convention on Human Rights protects the rights to life, private and family life from the threat of climate change. In *Royal Dutch Shell*, the Hague District Court ordered Shell to reduce its emissions by 45% by 2030, relative to 2019, across all activities, including its subsidiaries and both its own emissions and end-use emissions, and made its decision provisionally enforceable. The decision marks the first time that a company was held responsible for mitigating climate change in accordance with the commitments made by a state at the international level. In the US, a federal judge invalidated the Department of Interior's decision to offer 80 million acres in the Gulf of Mexico for oil and gas leasing. The court held that the Interior failed to accurately disclose and consider the greenhouse gas emissions that would result from the lease sale, violating a bedrock environmental law.

Concluding remarks

Increased societal awareness when it comes to environmental risk has finally been reflected on law and governance, as witnessed by the recognition of environmental rights globally. This awareness is expressed through increased public participation in environmental matters, both through protest and advocacy and through legal and judicial action. It is also reflected in a rights-turn when it comes to climate action and in a larger trend towards environmental sustainability in the human rights machinery. Whether these legal tools will be successful in reversing the current catastrophic environmental trends, remains to be seen.

[19] See UN Environment Programme, *Global Climate Litigation Report: 2023 Status Review* (2023); Sabin Center for Climate Change Law, Climate Change Litigation Databases, available at: https://climatecasechart.com/.