

Do Europeans Have a Right to Environment?

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From space, we see a small and fragile ball dominated not by human activity and edifice but by a pattern of clouds, oceans, greenery and soils. Humanity's inability to fit its doings into that pattern is changing planetary systems, fundamentally. Many such changes are accompanied by life threatening hazards. This new reality, from which there is no escape, must be recognised – and managed.

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1. Introduction

Human beings have since time immemorial depended on and struggled against nature. No other species disposes of such extensive capability to pollute and destroy the environment. At the same time, no other living creature is so desperately depending on nature in the pursuit of our concept of 'good life', thereby being overtly vulnerable to any environmental change that occurs. Human activity in all its variations – in particular reckless exploitation of natural resources and rapid industrialisation – is leaving deep footprints on the face of the earth and seriously endangers the fragile ecological balance of nature. Pushed to the limits of her capacity to handle these man-made challenges, Mother Nature ever so often cries for help using the voice of natural disasters, such as floods, rising seas and severe droughts. To a large extent, human beings are both the cause and the victims of environmental degradation - we need to realise that, in many ways, we are also the agents of environmental conservation and protection.

In the face of environmental degradation, we need to do our utmost to reverse these damaging trends and change our negligent attitude of submitting the environment to our own benefit. The significant expansion of the body of international environmental law bears witness to the growing awareness that humankind cannot continue on this destructive path. But even though international environmental law has the potential to substantially contribute to the improvement of the global environment, it generally does not provide individuals with enforceable rights. Does this leave human beings entirely defenceless in the eve of environmental deterioration? One way to alter our collective harmful behaviour may be to vest individuals with a *right to environment* and thereby give the victims of environmental degradation a clear voice. Such a human right to environment would supplement traditional international environmental law and empower human beings in their quest for a sustainable and healthy environment.

¹ Participating in the International Environmental Law-agora session of the Inaugural Conference of the European Society of International Law was a great honour for me, being a young researcher (Ph.D.-candidate University of Vienna; Research Assistant at the Department of International Law, European Law and International Relations, University of Innsbruck). I am very grateful to ESIL for the opportunity to present some reflections emanating from my on-going Ph.D.-studies also in this written form, which is a slightly extended version of my agora-presentation.

The environment is a transboundary and worldwide concern, and we are faced with complex and intertwined environmental issues that affect us all in one way or the other. It will always be challenging to fully grasp the dimension of these global matters, and even more difficult to foresee satisfactory and all-encompassing solutions. While bearing the global dimension in mind, I shall in this paper seek to highlight the emergence of a human right to environment in the European context. Being a continent that has experienced centuries of massive industrial exploitation, Europe is today seeking to redress and to prevent further degradation. Moreover, as a region where human rights are largely respected, protected and fulfilled, Europe enjoys the luxury of being able to devote time and efforts to this emerging right.

2. The Interrelationship between Human Rights and the Environment

Every child knows that nature is at the very source of our well-being and livelihood. Clean air, fertile soils, potable water and preservation of the fragile ecological balance are crucial elements of our sheer survival. Hence, a safe and healthy environment is an important prerequisite for the enjoyment of our basic human rights, including and above all the rights to life and health.²

At the same time, a number of human rights play a pivotal role when it comes to environmental protection. Activists can mobilise around the cause of protecting the environment only if their right to information as well as their freedoms of expression and association³ are ensured.⁴

Concluding from above, we need to recognise that human rights and the environment are interdependent and of mutual importance to each other. In fact, the discussion of the interrelationship between human rights and the environment has been on the international agenda for decades – both in human rights and environment circles, as will be highlighted in the following paragraphs:

A. Human Rights seen from the Perspective of UN World Conferences on the Environment

In 1972, the 1st UN Conference on the Human Environment concluded with the Stockholm Declaration,⁵ which in its Principle 1 states that ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of

² The right to life is enshrined inter alia in Article 6 of the 1966 International Covenant on Civil and Political Rights (ICCPR). The right to the highest attainable standard of physical and mental health is contained in Article 12 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), cf. also infra note 13.

³ These rights are contained inter alia in Article 19 ICCPR.

⁴ One example demonstrating this point is the execution by the Nigerian Government of human rights activist Ken Saro-Wiwa, who had protested against serious environmental damage to the Ogoni homeland and people resulting from petroleum extraction activities by Shell. Another prominent example of an individual simultaneously committed to the promotion of human rights and the environment is Wangari Maathai, who was awarded the 2004 Nobel Peace Prize ‘for her contribution to sustainable development, democracy and peace’.

⁵ Stockholm Declaration of the United Nations Conference on the Human Environment, adopted on 16 June 1972, available at <http://www.unep.org/Documents> under ‘Milestones’.

dignity and well-being ... and he bears a solemn responsibility to protect and improve the environment for present and future generations’.

This strong rights-based perspective displayed in Stockholm did however not persevere. Two decades later at the 1992 Rio World Conference on Environment and Development, the mention of rights was avoided altogether. The Rio Declaration⁶ in its Principle 1 holds that ‘Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature’. This vague formulation is indicative of the perpetual uncertainty and debate about the proper place of human rights law in the development of international environmental law.

The Declaration emanating from the Johannesburg-World Summit on Sustainable Development⁷ in 2002 does not explicitly mention human rights, but repeatedly speaks of human dignity and the importance of ‘speedily increasing access to such basic requirements as clean water, sanitation, adequate shelter, ... , health care and food security...’. Hence, if only implicitly, the Johannesburg-Declaration addresses a number of human rights-concerns, and reaffirms the very core of human rights law, namely human dignity.

B. Environment through the Lens of the UN Commission on Human Rights

A glance at resolutions adopted by the UN Commission on Human Rights (CHR) gives some indication of the position of States as regards the link between human rights and the environment. The CHR has indeed adopted a number of resolutions related to the environment, but the outcome is rather discouraging. The most recent of these resolutions entitled ‘Human rights and the environment as part of sustainable development’⁸ in its preamble merely ‘*Recalls* that environmental damage can have potentially negative effects on the enjoyment of some rights’. This rather bland paragraph does little to advance the establishment of a genuine authoritative link between human rights and the environment.

In connection with the annually reoccurring CHR-resolution on toxic waste,⁹ several States – including the EU-countries – have repeatedly declared that they feel uneasy about framing action on the environment in a human rights-context, believing that the human rights bodies are not in a position to advance environmental matters. Neither could States agree with the suggestion contained in the toxic waste-resolutions that a human right to a sound environment exists on the global level.

These resolutions reveal that States are not particularly eager to embrace certain environmental human rights. Fearing duplication of efforts and the unwarranted expansion of mandates, they are cautious when it comes to entrusting human rights-bodies and institutions with environmental questions. However, on a more positive note, the CHR-resolutions are repeatedly reaffirming the Rio Declaration, and thereby stressing in particular its Principle 10.¹⁰

⁶ Rio Declaration on Environment and Development, adopted on 14 June 1992, available at <http://www.unep.org/Documents> under ‘Milestones’.

⁷ Johannesburg Declaration on Sustainable Development, adopted on 4 September 2002, available at <http://www.unep.org/wssd> under ‘Political Declaration’.

⁸ CHR Res. 2003/71 adopted on 25 April 2003.

⁹ CHR Res. 2004/17 ‘Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights’, adopted on 16 April 2004.

¹⁰ Cf. *infra* under C.3.

C. Joined Efforts of Human Rights and Environmental Circles

A joint expert meeting organised by the Office of the High Commissioner on Human Rights (OHCHR) and the United Nations Environment Program (UNEP) in January 2002 demonstrates the willingness of international bodies to merge their respective areas of expertise and to cooperate. At the meeting, the experts recognised that respect for human rights is a precondition for sustainable development, and that environmental protection constitutes a precondition for the effective enjoyment of human rights.¹¹ This clear statement indicates that the interdependence between human rights and the environment merits proper reflection in the international legal order.

As we all know, declarations, resolutions and reports of this kind are indeed very important on a political level, but are void of legally binding obligations. Consequently, we need to look elsewhere for a legal foundation of a human right to environment. So where do we actually stand today? Are we witnessing the dawn of a universally recognised human right to environment? While little tangible progress has been made towards the international legal recognition of such a right at the global level, there is reason for hope at the regional level.

3. The Establishment of a Human Right to Environment

Time and space does not permit the entrance into a theoretical discussion of the necessity of a right to environment, neither to counter the arguments that such a right would be anthropocentric, uncertain and maybe even redundant.¹² At this stage, the different manners of connecting human rights and the environment will be briefly touched upon in the subsequent paragraphs.

A. 'Greening' existing Human Rights

One option is the 'greening' of existing human rights, which signifies that environmental matters are subsumed under inter alia the rights to life, health, adequate living conditions and information.¹³ Such environmental interpretation of established human rights can be observed in a number of human rights institutions.

The European Court of Human Rights serves as a good example in this regard, having gone to great lengths in subsuming environmental concerns under the European Convention of

¹¹ UNEP-OHCHR Expert Seminar January 2002, Final Report of 16 January 2002, available at <http://www.unhchr.ch/environment/conclusions.html>.

¹² For an in-depth discussion of these elements cf. Boyle and Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996).

¹³ As regards the right to health established by Article 12 (1) ICESCR cf. the clarification contained in paragraph 4 of General Comment No. 14 – The Right to the highest attainable standard of health: 'The drafting history and the express wording of Article 12.2. acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health, such as ... access to safe and potable water and adequate sanitation, ... , and a healthy environment'.

Human Rights (ECHR), in particular in relation to the right to privacy and family life¹⁴ and to the right to information.¹⁵ However, the most recent environmental case decided by the Grand Chamber - namely *Hatton v. United Kingdom*¹⁶ - shattered the hopes that a green interpretation of the ECHR had been firmly established. While the Chamber-judgement had applied a rule of 'minimum-interference with human rights' and had held that airport noise constitutes a breach of the right to privacy and family life, the Grand Chamber was of a different opinion and reversed the judgement. Thereby, the Grand Chamber re-established the wide margin of appreciation of Governments when it comes to striking a fair balance between competing interests - in this case as regards weighing economic interests of the State versus the rights of individuals to privacy and family life.

Greening existing rights has the advantage of drawing upon established principles and functioning institutions and mechanisms. However, it will always remain punctual in scope and will ultimately depend on environmentally-friendly Courts willing to subsume environmental matters under existing human rights.

B. Introduction of a Substantive Right to Environment

The second option - which can be found in some regional human rights treaties¹⁷ as well as in several national constitutions - is the establishment of a substantive right to environment. The environment has a bearing upon all categories of human rights, and does not fit squarely into any particular one – accordingly, the corresponding State obligations would come to include several different elements of classical obligations under human rights law, i.e. to respect, protect and fulfil. A right to environment in its own capacity would under all circumstances imply the promotion of a certain level of environmental quality. Accordingly, a substantive right to environment would essentially be of a programmatic nature, and hence require progressive realisation on behalf of the State to fulfil such a right, subject to the availability of sufficient resources.

A substantive right places the environment on a par with other important goals of society, and can serve as pertinent guidance in national decision-making and jurisdiction. But it suffers from an almost irreconcilable problem of definition – the complexity of environmental processes and the great variety in environmental circumstances make it very difficult to answer the question on the content and scope of a right to 'the environment'. Adding a qualifying adjective such as 'decent', 'healthy' or 'viable' does not solve this deficiency either. In addition, the treaties and constitutions containing such a substantive right often lack satisfactory legal mechanisms of enforcement, and hence have little more than declaratory value.

¹⁴ *Lopez Ostra v. Spain*, Judgement of 9 December 1993, 20 EHRR 277.

¹⁵ *Guerra v. Italy*, Judgement of 19 February 1998, 26 EHRR 357.

¹⁶ Judgement of 8 July 2003, 37 EHRR 611.

¹⁷ Article 24 of the African Charter on Human Rights (1981) as well as Article 11 of the Additional Protocol to the Inter-American Convention on Human Rights (1988) contain references to the right to environment. For further details see Churchill, 'Environmental Rights in Existing Human Rights Treaties', in Boyle and Anderson (eds), *Human Rights Approaches to Environmental Protection* (1996) 108; Kiss, 'The Right to the Conservation of the Environment', in Picolotti and Taillant (2003), 31.

C. Procedural Rights to Environment – Environmental Democracy

A third option is the promotion of procedural or participatory rights in connection with environmental concerns - a concept which has come to be referred to as 'environmental democracy'. The underlying assumption of this claim is –to name it with a catch phrase of our times- good governance. Environmental democracy assumes that governments operating with openness, accountability and civic participation will make better environmental decisions. Giving the public a voice in environmental decision-making is likely to improve the formulation, implementation and enforcement of environmental policies. Moreover, raising the awareness for environmental matters in the broader public can in turn also contribute to compliance with existing international environmental obligations. Applying a long-term perspective, public participation contributes to the promotion of environmental justice and is beneficial to the delicate act of balancing the needs of present and future generations. In displaying a greater specificity and environmental focus, participatory environmental rights distinguish themselves from existing procedural rights under human rights law.

It is this third option that has gained significant approval and consent in the past decade. The source and foundation of environmental democracy emanates from Principle 10 of the Rio Declaration, which reads:

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 the decision-making process. 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.

The most prominent example of putting Principle 10 into practice is the so-called Aarhus Convention, which was elaborated under the auspices of the UN Economic Commission for Europe (UNECE), and is the *first legally binding instrument* linking human rights and the environment. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters¹⁸ (hereinafter 'Convention') was adopted on 25th of June 1998 in Aarhus, Denmark, and entered into force on the 30th of October 2001. As of today, the Convention counts 40 signatories, of which 30 have fully ratified and thus become full-fledged Parties by now.

It is interesting to note that –in addition to the individual Member States of the European Union- the European Community is a signatory to the Convention. Accordingly, a participatory approach must be established also at the level of the European Community institutions. Legislative proceedings are still underway to transpose the requirements of the Convention into the European Community legal system at both Member State and EC-institutional level. The adoption and amendment of a number of Directives has been necessary to transpose the requirements of the Convention into the EC-legal system at all levels.¹⁹ It appears that the

¹⁸ United Nations Treaty Series, Vol. 2161, p. 447.

¹⁹ For further information cf. <http://europa.eu.int/comm/environment/aarhus/>.

majority of EU-countries are awaiting the complete transposition of these Directives before their ratification of the Aarhus Convention. Moreover, the transposition and implementation of the Convention in federal States (such as Austria and Germany) poses a great challenge given that all administrative levels need to meet the requirements of the Convention. This explains why the majority of 'old' EU-countries have signed, but not yet ratified the Convention.

Without being able to enter into detail at this point, the Convention consists of the following three pillars:

1. Access to Information

The first pillar of the Aarhus Convention establishes the right of individuals to be informed about environmental matters.²⁰ This entails not only *passive* obligations on behalf of the public authorities to hand out available information upon request (without the party having to state a particular interest for requesting the information), but also obliges States to *actively* disclose and disseminate environmental information. This can be done inter alia through state-of-the-environment reports, product information as well as national pollutant inventories or registers.²¹

2. Public Participation

The second pillar contains detailed requirements for public participation²² at all levels of decision-making, whether regarding specific decisions or broader plans and programmes, but also concerning the preparation of environmental legislation.²³

3. Access to Justice

Access to justice²⁴ is provided for in the third pillar of the Convention, which is closely linked to the first two pillars: access to justice must be granted where a person deems that his/her rights concerning information or participation have not been respected. Moreover, members of the public shall have access to legal remedies to challenge acts and omissions by private persons and public authorities that contravene national environmental law.

As for the Parties and Signatories to the Convention, efforts now focus on the practical implementation of the obligations contained in the Convention – and we have to bear in mind that

²⁰ Article 4 - access to environmental information, Article 5 - collection and dissemination of environmental information.

²¹ In this regard, the Convention is supplemented by the Kiev Protocol on Pollutant Release and Transfer Registers (PRTR), which was adopted on 21 May 2003 at the meeting of Parties to the Aarhus Convention. Signed by 36 States and the European Community, the Kiev Protocol has not yet entered into force, but will eventually establish Europe-wide PRTRs facilitating the flow of information on noxious substances.

²² Article 6 - decisions on specific activities, Article 7 - plans, programmes and policies, Article 8 - executive regulations and normative instruments.

²³ In addition, the Convention establishes that public participation shall be ensured also at the international level - Prof. Atila Tanzi, the Chairman of the Task Force on Public Participation in International Fora, was one of the co-presenters at the agora-session.

²⁴ Article 9 of the Convention.

this concerns States with a wide variety of political backgrounds, including societies that have only rather recently become democracies. Apart from the technical implementation at all relevant administrative, executive and judiciary levels, it is crucial to promote awareness-raising and capacity-building among the populations concerned. I believe that non-governmental organisations (NGOs) will come to play an important role as regards actually invoking the rights provided under the Convention. NGOs dispose of the necessary expertise and experience to deal with often rather technical environmental issues, something that the ordinary citizen may not have at his disposal.

A word of caution is called for at this stage: environmental information may not always turn out to be welcome. The information campaign entitled ‘What’s in your backyard?’ carried out by the British governmental environment agency provides a wide range of environmental data on England and Wales.²⁵ The campaign disclosed that certain homes had been constructed on a previous waste disposal site, which led to a significant decline of property value and correspondingly to very displeased proprietors. But would we not always prefer knowing about environmental conditions detrimental to our well-being rather than being kept in ignorance and suffer the dire consequences? Only when we are informed do we have the opportunity to tackle these issues in a comprehensive manner, instead of continuing on our path of slowly destroying our planet, our immediate living conditions – and ourselves.

4. Conclusion

So returning to the question of whether a human right to environment is coming into being, I would conclude that yes, there is wide-spread recognition of *procedural* rights to environment. The Aarhus Convention has established an explicit link between human rights and the environment that can no longer be denied or ignored by States. Inspired by the success of this landmark Convention in Europe, other regions are seeking to establish similar mechanisms to implement Article 10 of the Rio Declaration in their spheres of influence.

In addition, the Aarhus Convention itself is not geographically limited to European States, but is open for accession by any State willing to introduce environmental democracy.²⁶ Learning from the mistakes of our negligent past and seeking to redress our damaging behaviour, Europe can indeed serve as a guiding light on the path to a more sustainable future. In time, the human right to environment will hopefully take on a truly universal dimension, just like it has reached wide-spread recognition in the European context with the Aarhus Convention. Like any other human right, we now need to make use of it wherever possible, in order to make the most of its protection capacity – both in the name of human rights and the environment.

²⁵ For further details see: www.environment-agency.gov.uk.

²⁶ The Convention is open for accession to all UNECE-Member States and those States having been granted consultative status with the UNECE, such as USA and Canada. Moreover, Article 19(2) foresees the admission of any other State subject to the approval by the Meeting of Parties.