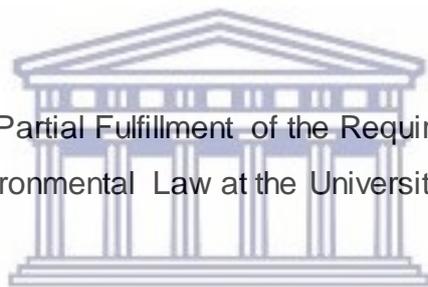


THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Human Rights and International Environmental Law: Towards the Development of
an International Environmental Right?

A Mini-thesis Submitted in Partial Fulfillment of the Requirements for a Masters of
Law (LLM) Degree in Environmental Law at the University of the Western Cape



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May 2018

Declaration

I declare that **Human Rights and International Environmental Law: Towards the Development of an International Environmental Right?** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all sources I have used or quoted have been indicated and acknowledged as complete references.

TW Motloung

Signed:.....

Professor W Scholtz



Signed:.....

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Keywords

International environmental right

Human rights

Environment

Environmental degradation

International law

Environmental protection

State sovereignty

International human rights law

Stockholm Declaration

Solidarity right



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Abstract

Human Rights and International Environmental Law: Towards the Development of an International Environmental Right?

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The global state of the environment is deteriorating daily because of challenges posed by environmental degradation, including climate change. In recognition of the mounting global environmental crisis and its detrimental impact on the enjoyment of human rights, there is a growing call for the recognition of what is generally referred to as a human right to a clean environment, otherwise referred to in this study as an international environmental right. Proponents of an international environmental right hold a firm view that such a right will prevent or mitigate actions that are responsible for environmental degradation and thus contribute to environmental protection.

This study seeks to determine the nature of the relationship between the environment and human rights and whether the proposal for the recognition of an international environmental right to address global environmental concerns that pose a threat to the enjoyment of human rights has merit. In determining the viability of recognising an international environmental right, a number of theories underpinning the recognition of new international human rights, the status of the right in existing international human rights agreements, political willingness and support of states, the notion of global constitutionalism, customary international law sources such as soft law instruments, international declarations etc., are considered. The study concludes that national and international developments reflect the growing interrelationship between approaches to guaranteeing human rights and environmental protection and that environmental protection is a prerequisite for the realisation of human rights. Furthermore, the study concludes that the proposal for the recognition of an international environmental right to address growing global environmental concerns faces insurmountable challenges, and should therefore not be pursued, at least at this juncture. Amongst the hurdles facing the recognition of the right are its failure to find expression in international

binding multilateral human rights agreements, except two regional agreements, the definitional ambiguity inherent in it, lack of support from states, inability of conventional human rights law notions of rights and duties, proof and causation to find application in the case of climate change.

The study recommends that instead of pursuing the recognition of an international environmental right, efforts should rather be directed towards understanding environmental dimensions of existing rights in order to maximise their use to tackle global environmental challenges, including climate change. In addition, more work ought to be done to clarify the obligations of states to respect, protect and fulfil human rights in the context of climate change, and in particular, to understand how human rights laws can accommodate the transnational and long impacts of climate change.



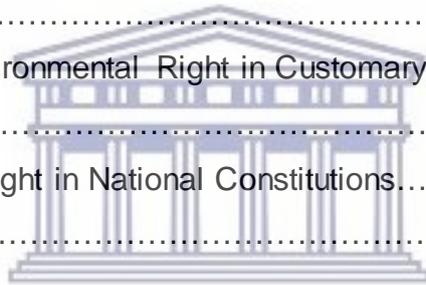
Acronyms

ACHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights
CESCR	Committee on Economic, Social and Cultural Rights
CESR	Centre for Economic and Social Rights
ECHRC	European Court of Human Rights Commission
GNHRE	Global Network for the Study of Human Rights and the Environment
IACHR	Inter-American Commission on Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OHCHR	Office of the High Commissioner for Human Rights
SERAC	Social and Economic Rights Action Centre
UDHR	Universal Declaration of Human Rights
UNCHR	United Nations Commission on Human Rights
UNHRC	United Nations Human Rights Council
UNFCCC	United Nations Framework Convention on Climate Change
UN	United Nations
US	United States

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1. CHAPTER ONE

RESEARCH FRAMEWORK

1.1 Background

The problems that are being experienced globally arising from environmental degradation, including climate change, are a clear indication of the deteriorating state of the global environment. Failure to take positive and constructive steps towards alleviating the current endemic environmental degradation threatens human health and human life.¹ The principle that recognises that a healthy environment is a necessary prerequisite for the enjoyment of a number of recognised human rights is well entrenched in international human rights law and was echoed by then Vice President Justice Weeramantry in the *Gabcikovo-Nagymaros* case before the International Court of Justice when he stated:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself.²

In recognition of the mounting global environmental crisis and its detrimental impact on the enjoyment of human rights, there is a growing call for the recognition of an international environmental right.³ The notion of an international environmental right has been a matter of scholarly debate in international environmental and human rights discourse for several decades.⁴ Some scholars hold a view that an international environmental human right is emerging at customary law level and ought to be included to existing rights contained in multilateral human rights treaties as a third

¹ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L* 103, 104.

² *Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Separate Opinion of Vice President Weeramantry)*, [1997] ICJ Rep 92.

³ Thorne M 'Establishing Environment As a Human Right' (1990-1991) 19 *Denv.J. Int'l L. & Pol'y* 301, 301.

⁴ Lewis B *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (Unpublished PHD thesis, Monash University), (2014) 1.

generation right which can be invoked against the state and demanded of it.⁵ Literature regarding such a right employs a wide range of language such as a right to a healthy environment, the right to a good environment, a healthful environment, a clean environment, a pure and decent environment; all of which essentially capture the notion of an international human right to environment of a particular quality.⁶ Proponents of an international environmental right hold a firm view that such a right will, on a global level, prevent or mitigate actions that are responsible for environmental degradation and thus contribute to environmental protection. Furthermore, recognition of an international environmental right offers the advantage of imposing a moral and legal obligation on nation-states to cooperate in addressing transboundary environmental issues, not only among themselves, but also internally.⁷

A human rights approach may employ three main approaches in order to advance the cause of environmental protection: first, using existing human rights such as the right to life and health to achieve environmental protection goals; secondly, re-interpreting existing rights to ensure that environmental concerns are catered for; thirdly, creating a new specific right to environment.⁸ The concept of an international environmental right or human right to environment made its debut appearance on the international law scene in 1972 in the form of Principle 1 of the Stockholm Declaration on the Human Environment which provides as follows:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁹

⁵ Atapattu S 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16 *Tulane Environmental Law Journal* 65, 109-106.

⁶ Lewis B 'Environmental Rights or a Right to the Environment? Exploring The Nexus Between Human Rights and Environmental Protection' (2012) 8(2) *Macquarie J. Int'l & Comp. Env'tl.L* 36, 40.

⁷ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective' (1992) 37 *New York Law School Law Review* 583,592.

⁸ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 4; and Shelton D 'Human Rights, Environmental Rights, and the Right to Environment': (1991-1992) 28 *Stan. J. Int'l.L.* 103, 105.

⁹ Principle 1 of the Declaration of the United Nations Conference on the Human Environment, Stockholm 05-16 June 1972.

It must be noted that the Stockholm Declaration does not necessarily proclaim a right to environment and United Nations texts subsequent to Stockholm have also steered clear of proclaiming a new human right to environment.¹⁰ Whilst an international environmental right does not find expression in any international instrument of universal application, two regional human rights instruments do recognise this right. The first one is Article 24 of the African Charter of Human and People's Rights, otherwise known as the Banjul Charter, which provides that all people shall have the right to a generally satisfactory environment favourable to their development.¹¹ The second one is Article 11(1) of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, also referred to as the Protocol of San Salvador, which provides that everyone shall have the right to live in a healthy environment and to have access to basic public services.¹² A human right to a good environment is also recognised in many domestic constitutions, notably, section 24 of the Constitution of South Africa provides that everyone has a right to an environment that is not harmful to their health or wellbeing.¹³

1.2 Problem Statement

The proposal for the recognition of an international environmental right to address mounting global environmental concerns and thus contribute to environmental protection is far from simplistic and as such does present legal, practical, political and theoretical challenges.¹⁴ Among the challenges facing the recognition of an international environmental right are the broad expansion of state liability that comes with such a right, the concern that it might devalue existing rights¹⁵, lack of consensus regarding the definition and scope of such a right¹⁶, who would hold such a right, how

¹⁰ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L*.103, 112.

¹¹ *African Charter of Human and People's Rights*, opened for signature June 27 1981, 21 ILM 58 (entered into force 18 July 1978).

¹² *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights*, opened for signature November 17 1988, OAS Treaty Series No 69 (entered into force November 16 1999).

¹³ Constitution of the Republic of South Africa, 1996.

¹⁴ Lewis B 'Environmental Rights or a Right to the Environment? Exploring The Nexus Between Human Rights and Environmental Protection' (2012) 8(2) *Macquarie J. Int'l & Comp. Env'tl.L* 36, 39.

¹⁵ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L*.103, 121,134.

¹⁶ Taylor P 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 *Georgetown International Environmental Law Review* 309,317.

would it be enforced,¹⁷ and lack of positive evidence pointing to existing or emerging generic environmental human right.¹⁸

Furthermore, the recognition of such a right will have to pass the hurdle of the right to development claimed by less developed countries and the principle of state sovereignty.¹⁹ Accordingly, less developed countries are very skeptical of the imperative to recognise an international environmental right because of fear that it may lead to diversion of aid from certain development projects and distrust of developed nations that have already exploited and degraded their own natural resources.²⁰ Similarly, the principle of state sovereignty that recognises a nation-state's right to control the people and resources within its territorial jurisdiction may be at odds with the obligations that may derive from an international environmental right.

1.3 Significance of the Problem

The problems that are being experienced globally arising from environmental degradation, including climate change, have spurred debate on the link between human rights and the environment, with particular attention on the notion of an international environmental right. The debate has largely centered on the merits of recognising such a right at international level, and how it should be defined as a mechanism to address the problems of global environmental deterioration. As indicated above, the notion of an environmental right does find expression in many domestic constitutions, but its appropriateness at international level remains a source of opposing debates from various scholars. The significance of the idea of an international environmental right is grounded on the premise that such a right, if recognised, would utilise the already established and well-functioning international human rights framework to address the global problem of environmental degradation.

¹⁷ Bratspies R 'Do We Need A Human Right to a Healthy Environment?'(2015) 13 *Santa Clara Journal of International Law* 31, 38.

¹⁸ Gunther H 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' View' 1992 *Human Rights, Sustainable Development and the Environment* (Inter-American Institute of Human Rights) 117, 125.

¹⁹ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,584.

²⁰ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,607.

1.4 Research Question

In light of conflicting views on the notion of an international environmental right, this research seeks to answer the primary question on whether the proposal for the recognition of an international environmental right to address global environmental concerns, including climate change, is feasible, having regard to various legal, practical, theoretical and political challenges it faces. In addition to the primary question, this thesis also seeks to answer the following secondary questions flowing directly from the primary question:

- 1.4.1 What is the current status of an international environmental right and its suitability in international human rights law, including international agreements and customary international law?
- 1.4.2 What are the benefits and limitations of using a human rights approach to address climate change?
- 1.4.3 What issues pertaining to climate change may be problematic for the idea of an international environmental right?
- 1.4.4 How are international courts and tribunals interpreting human rights for the protection of the environment, including conceptualising an international environmental right?

1.5 Hypothesis

After having considered theoretical, legal, political and practical implications of a proposal for the recognition of an international environmental right to address global environmental concerns, including climate change, this thesis moves from a premise that such a right or the objectives sought to be achieved by such a right will be best addressed by linking it with human rights that are already recognised and enforced under existing law, including procedural rights with respect to the environment .

1.6 Preliminary Literature Review

It is now established that environmental degradation has the inherent ability to undermine enjoyment of human rights, however, there is disagreement as to the nature and form of the relationship between human rights and the environment.²¹ Boyle captures it succinctly when he affirms that the exact nature of the relationship between the environment and human rights in international law is far from simple or straight forward and remains unresolved, particularly as it pertains to the notion of an international environmental right or human right to environment.²² In providing an overview on this issue, Anderson contends that one of the ways of looking at a relationship between human rights and environmental protection is by viewing it from the premise that environmental protection is merely a means of fulfilling human rights obligations.²³ The view is premised on the understanding that environmental degradation constitutes an infringement of human rights to life, health and livelihood, amongst others.²⁴ The other way of looking at a relationship between human rights and environmental protection is from an angle that legal protection of human rights creates a climate conducive for environmental protection.²⁵ Dinah Shelton refers to a third view which looks at human rights and environmental protection as each representing different but overlapping societal values and asserts that the third view in question finds resonance with current law and policy.²⁶

International environmental right in the context of the relationship between human rights and the protection of the environment has enjoyed a great deal of scholarly attention, including both support and criticism for the recognition of such a right.²⁷ Boyle was at some stage of the view that the recognition of an international environmental right as a collective or solidarity right in international law is not

²¹ Anton D and Shelton D *Environmental Protection and Human Rights* (2011) 118-119.

²² Boyle A 'Human Rights and the Environment: Where Next' (2002) 23 No.3 *European Journal of International Law* 613-642,613.

²³ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 3.

²⁴ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 3.

²⁵ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 3.

²⁶ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 105.

²⁷ Lewis B *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (Unpublished PHD thesis, Monash University), (2014) 7.

necessary because of, amongst others, its anthropocentric nature.²⁸ One should perhaps hasten to indicate that Boyle has since acknowledged that the argument for an international environmental right has merit and could be incorporated into the framework of economic, social and cultural rights which would have the positive effect of addressing the climate change challenge faced by the global community.²⁹

Shelton supports the notion of an international environmental right and consequently advances a view that a clearly and narrowly defined right emerging in international law can play a role in contributing to the attainment of both environmental and human rights law imperatives.³⁰ Shelton does recognise that such a right requires broad extension of state liability which may serve as a deterrent for other states to embrace its recognition.³¹ Furthermore, she also sees such a right imposing state obligations to protect the environment even if there are no consequences outside the territory of a given state.³²

Shelton's positive sentiments regarding the recognition of an international environmental right are echoed by Anderson who affirms that a substantive right is better placed to provide more protection and may possibly play a decisive role in defining and mobilising support for environmental issues.³³ Anderson goes further to suggest that new environmental rights moulded in procedural form such as a right to be informed in advance of environmental risks, and a right to participate in decision making on environmental issues, will not guarantee adequate environmental protection.³⁴

²⁸ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 4.

²⁹ Boyle AE 'Human Rights or Environmental Rights? A Reassessment' (2006-2007) 18 *Fordham Environmental Law Review* 471,509; A Boyle 'Human Rights and the Environment: Where Next' (2002) 23 No.3 *European Journal of International Law* 633.

³⁰ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L* 103, 106.

³¹ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L* 103, 134.

³² Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L* 103, 138.

³³ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 10.

³⁴ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 9-10.

Nickel also subscribes to the notion that a right to a safe environment, defined narrowly and implemented at international and national levels would offer human beings protection against environmental degradation.³⁵

MacDonald takes the positive aspects of a right to a good environment further by suggesting that such a right, if located within the broader human rights law framework would, amongst others, raise its profile and most notably underscore the fact that climate change has detrimental effects on humans.³⁶

For those who see justiciability of an international environmental right as a possible impediment towards its recognition, Lee makes a proposition that such a right can be narrowly defined so as to make it justiciable and will provide consistent legal basis to remedy environmental violations serious enough to be human rights violations.³⁷

Bratspies asserts that a human right to a healthy environment puts environmental protection as a priority concern for international law and stresses the obligation of states to respect, protect and fulfil the right in question, nationally and internationally.³⁸ Having analysed Bratspies' sentiments on the need for a human right to a healthy environment, Orellana expresses a view that the recognition of the right to a healthy environment would help to ensure accountability, preserve the ecosystems and assist in achieving sustainable development.³⁹

There is no unanimity on whether there are sufficiently compelling and convincing arguments for the recognition of an international environmental right. Lewis expresses sentiments that are critical of a notion of a so called international environmental right and argues that it is not possible to define the right in a manner that is consistent with

³⁵ Nickel JW 'The Human Right to a Safe Environment: Philosophical Perspectives on Its Scope and Justification' (1993) 18 *Yale Journal of International Law* 281,295.

³⁶ Macdonald KE 'A Right to a Healthful Environment – Humans and Habitat: Rethinking Rights in an Age of Climate Change' 2008 *European Energy and Environmental Law Review* 213,225.

³⁷ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,338.

³⁸ Bratspies R 'Do We Need A Human Right to a Healthy Environment?' (2015) 13 *Clara Journal of International Law* 31, 67.

³⁹ Orellana M 'Reflections on the Right to a Healthy Environment: Comments on Rebecca Bratspies' Do We Need a Human Right to a Healthy Environment?' (2015) 13 *Santa Clara Journal of International Law* 71, 79.

the principles of human rights which would render such a right justiciable under human rights law.⁴⁰

Anderson also highlights the fact that a human right to the environment is often criticised for the following reasons:

1. A right to environment may not address technical issues related to environmental management;
2. A right to environment may not address the relationships of political economy which is at the core of much environmental damage;
3. A right to environment will not necessarily guarantee benefit for disadvantaged groups because it does not come with economic and political reform;
4. A right to environment can displace other forms of legal remedy that are better suited to environmental issues; and
5. A right to environment will likely attract overt opposition from polluters and national governments.⁴¹

Rodriguez-Rivera is of the view that such criticism is flawed on at least two levels, one of which is that a human rights approach to environmental protection should not be seen as the only or best approach to environmental protection.⁴²

Another robust critique of the right to environment made by Handl relates to its intrinsic relativity or uncertainty due to its lack of definition.⁴³ Rodriguez-Rivera suggests that tribunals are in a position to effectively expand the content of the right to environment.⁴⁴ Handl goes further by suggesting that international practice does not

⁴⁰ Lewis B *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (Unpublished PHD thesis, Monash University), 2014) 7.

⁴¹ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 23.

⁴² Rodriguez-Rivera LE 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 *Colorado Journal of International Environmental Law And Policy* 1, 32.

⁴³ Gunther H 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' View' 1992 *Human Rights, Sustainable Development and the Environment* (Inter-American Institute of Human Rights) 117, 121.

⁴⁴ Rodriguez-Rivera LE 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 *Colorado Journal of International Environmental Law And Policy* 1, 32.

support the notion of an international environmental right, and that evidence relied on by proponents of such a right is too narrow or normatively too weak.⁴⁵

1.7 Chapter Outline

Chapter 1: Research Framework

Chapter 1 provides background to the subject matter of this mini-thesis, introduces the problem statement and the significance thereof, and outlines the research question and hypothesis.

Chapter 2: Human Rights and Environment

This chapter critically analyses the human rights and environment discourse in general.

Chapter 3: International Environmental Right

Chapter 3 analyses the concept of an international environmental right. The chapter also interrogates whether the idea of a recognition of such a right has merit, having regard to theoretical aspects underpinning recognition of new rights in international human rights law.

Chapter 4: Status of an International Environmental Right

Chapter 4 focuses on determining the current status of an international environmental right in international human rights law by considering a wide range of legal sources, including international and regional human rights agreements, customary international law and soft law instruments etc.

Chapter 5: Conclusion and Recommendations

Chapter 5 concludes that the noble and urgent need of the global community to wage an onslaught against environmental degradation, including climate change, can be

⁴⁵ Gunther H 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' View' 1992 *Human Rights, Sustainable Development and the Environment* (Inter-American Institute of Human Rights) 117, 128.

better achieved by employing existing human rights framework as opposed to creating another human right to a good environment.

1.8 Methodology

Given the nature of the research question, the study will proceed by way of an analysis of a number of both primary and secondary sources. An analysis of an international environmental right will of necessity require an examination of international and regional agreements, customary international law, a number of 'soft law' sources such as declarations, resolutions and reports from human rights institutions such as the United Nations Human Rights Council and the office of the United Nations High Commissioner for Human Rights. In addition, the research will also make use of scholarly literature in, amongst others, the human rights and environmental law, legal and environmental ethics disciplines.



2. CHAPTER TWO

HUMAN RIGHTS AND ENVIRONMENT

2.1 Introduction

The relationship between the environment and human rights can be traced back to Principle 1 of the Stockholm Declaration on the Human Environment which provides as follows:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.⁴⁶

The Stockholm Declaration emphasised synergies between human rights and environmental protection, thus affirming the principle that a satisfactory environment is a necessary condition for the enjoyment of human rights.⁴⁷ Twenty years after Stockholm, Rio Declaration echoed the same sentiments by affirming that 'human beings are entitled to a healthy and productive life in harmony with nature'.⁴⁸ The linkage between the environment and human rights was also echoed by then Vice President Justice Weeramantry in the *Gabcikovo-Nagymaros* case before the International Court of Justice when he stated:

The protection of the environment is ... a vital part of contemporary human rights doctrine, for it is *sine qua non* for numerous human rights such as the right to health and the right to life itself.⁴⁹

The environmental challenges that are being experienced globally have provided impetus for a discourse on human rights approaches to environmental protection. The momentum to link human rights and the environment has grown stronger, with an increasing focus on the effects of climate change on individuals, communities and countries. For example, the 2007 Malé Declaration on Human Dimensions of Global

⁴⁶ Principle 1 of the Declaration of the United Nations Conference on the Human Environment, Stockholm 05-16 June 1972.

⁴⁷ Dupuy PM & Viñuales JE *International Environmental Law* (2015) 298.

⁴⁸ Principle 1 of the Rio Declaration on Environment and Development, Rio de Janeiro, 03-14 June 1992.

⁴⁹ *Gabcikovo-Nagymaros Project (Hungary/Slovakia) (Separate Opinion of Vice President Weeramantry)*, [1997] ICJ Rep 92.

Climate Change states that 'climate change has clear and immediate implications for the full enjoyment of human rights', and calls on the United Nations to treat this as a matter of urgency.⁵⁰ In 2009, the United Nations Human Rights Council (UNHRC) declared that climate change has a range of implications, both direct and indirect, for the enjoyment of human rights.⁵¹ Subsequently, the Office of the United Nations High Commissioner for Human Rights (OHCHR) examined the relationship between climate change and human rights and came to the conclusion that climate change threatens the enjoyment a number of human rights.⁵² The world is therefore in agreement that the consequences of the global environmental crisis, including climate change, invariably have an impact on a number of values that humans rely on for the attainment of a life of dignity.

This chapter will analyse conceptual aspects and theories that underpin the relationship between the environment and human rights. The analysis will also delve into human rights and environment discourse at the United Nations (UN). The interface of climate change and human rights will also be analysed, including the limitations and benefits of using a human rights approach to address climate change. The notion of an International Environmental Right is introduced at the end of this chapter, but a more elaborate discussion of aspects related to the right is discussed in chapter 3.



2.2 Relationship Between Human Rights and the Environment

There is no doubt that there is a need for a global legal system that will stem the tide of global environmental degradation that threatens the enjoyment of a number of human rights such as human health and human life, however, the appropriate legal response remains unclear. As Shelton puts it, the issue is whether human rights and environmental protection are complimentary, such that each contributes to advancing the aims of the other, or whether the two concepts represent fundamentally different

⁵⁰ United Nations Secretary General (2005), *Human Rights and the Environment as Part of Sustainable Development* – Report of the Secretary-General, 4/CN.4/2005/96, 19 January 2005.

⁵¹ U.N Human Rights Council Res 10/4, *Human Rights and Climate Change*, 10th Sess, Mar. 2-27, 2009, U.N. GAOR, 64th Sess, Supp No. 53, A/64/58, at 29 (Mar.25, 2009).

⁵² *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, U.N Doc. A/HRC/10/61 (Jan. 15,2009)

social values.⁵³ Notwithstanding a prevalent view that human rights and the environment are interdependent, complimentary and indivisible,⁵⁴ the relationship between the two is still shrouded in confusion.⁵⁵

Scholarly literature, international practice, and the OHCHR⁵⁶ identify mainly four major approaches to the relationship between environmental protection and human rights. The first approach sees the overriding aim of environmental protection as a means to ultimately fulfil human rights obligations.⁵⁷ According to this approach, environmental matters should be located within the human rights category with a primary purpose of serving and protecting human beings. This prism implies that environmental protection has only an instrumental value of contributing to the respect of human rights.⁵⁸ Viewing environmental protection as an essential component of efforts to realise human rights posits environmental protection as a form of human rights protection, and thus invokes normative values associated with human rights, and becomes part of the legal obligations states incur by ratifying bilateral and multilateral human rights agreements.⁵⁹ The significance of the first approach lies in the undeniable fact that life and human dignity are only possible where people have access to an environment with certain basic qualities.⁶⁰ The focus on the centrality of human beings in environmental protection and conservation, otherwise known as anthropocentrism, is therefore a defining feature of the first approach.

The second approach is premised on a view that legal protection of human rights is primarily aimed at achieving the ends of conservation and environmental protection.⁶¹

⁵³ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 103.

⁵⁴ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 3.

⁵⁵ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 43.

⁵⁶ Office of the High Commissioner for Human Rights (OHCHR), *Analytical Study on the Relationship Between Human Rights and the Environment*, 16 December 2011, UN Doc.A/HRC/19/34('OHCHR Analytical Study').

⁵⁷ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 3.

⁵⁸ Dupuy PM & Viñuales JE *International Environmental Law* (2015) 299.

⁵⁹ Bratspies R 'Do We Need A Human Right to a Healthy Environment?' (2015) 13 *Clara Journal of International Law* 31, 53.

⁶⁰ Office of the High Commissioner for Human Rights (OHCHR), *Analytical Study on the Relationship Between Human Rights and the Environment*, 16 December 2011, UN Doc.A/HRC/19/34('OHCHR Analytical Study'), Par 7.

⁶¹ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 3.

Put differently, this approach views human rights as a legal technique to ensure a certain level of environmental protection.⁶² The essential attribute of the second approach is that it is ecocentric, in other words, it is concerned with protecting the environment for its own sake, rather than as secondary benefit arising from protecting human rights as espoused in the first approach. The approach of using human rights to protect the environment for its own sake is informed by three considerations: first, holders of human rights are individuals who can be identified, whereas the protection of the environment outside of the human rights framework does not have a clear right holder; secondly, individuals can bring claims before a growing number of adjudicatory and quasi-adjudicatory bodies; thirdly, human rights are perceived as a higher value and thus have a stronger social and political pull than pure environmental considerations.⁶³ Human rights law is essentially premised on personal injury based approach to legal protection, which puts it at odd with the notion of ecocentric environmental protection. Accordingly, the use of human rights to protect the environment is only possible when there is a direct causal link between environmental degradation and violation of a protected human right, the absence of which renders human rights approach to protecting the environment impotent.⁶⁴

The third approach sees human rights as an integral component of the concept of sustainable development, thus stressing a need to integrate economic, environmental and social justice issues to pursue societal objectives.⁶⁵ This integrative approach finds expression in the Banjul Charter, the regional treaty which anticipates the reconciliation of environmental and developmental considerations under the auspices of sustainable development.⁶⁶ The third approach could possibly give rise to conflict, as observed by Anderson, where the three pillars of sustainable development do not

⁶² Office of the High Commissioner for Human Rights (OHCHR), *Analytical Study on the Relationship Between Human Rights and the Environment*, 16 December 2011, UN Doc.A/HRC/19/34('OHCHR Analytical Study'), Par 8.

⁶³ Dupuy PM & Viñuales JE *International Environmental Law* (2015) 299.

⁶⁴ Dupuy PM & Viñuales JE *International Environmental Law* (2015) 300.

⁶⁵ Office of the High Commissioner for Human Rights (OHCHR), *Analytical Study on the Relationship Between Human Rights and the Environment*, 16 December 2011, UN Doc.A/HRC/19/34('OHCHR Analytical Study'), Par 9.

⁶⁶ Scholtz W, 'Human Rights and the Environment in the African Union Context', in Scholtz W and Verschuuren J *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (2015) 126.

interact harmoniously, such as the extraction of mineral resources where environmental, economic and environmental issues are not necessarily aligned.⁶⁷

Shelton adds a fourth approach which she says best reflects current law and policy and can be viewed as a hybrid of the first two aforementioned approaches. According to Shelton's fourth approach, human rights and environmental protection represent different but overlapping societal values, and both of them can contribute to achieving their common objectives.⁶⁸ Shelton asserts that both human rights and environmental protection share a core of common interests and objectives, although not all human rights violations are necessarily linked to environmental degradation.⁶⁹

2.3 Human Rights and the Environment at the United Nations

Human rights and environment discourse has not only been confined to scholarly debates, the UN has also been seized with the debate. Although the UN Charter does not have explicit reference to the aim of conserving the environment (which is understandable given the fact that there was little awareness in 1945 of any need to protect the environment), the evolution of the UN's power to adopt policies directed at environmental objectives are derived from a broad interpretation of its charter and of the implied powers of the organisation.

The UN General Assembly pronounced in 1990 that a better and healthier environment can help contribute to the full enjoyment of human rights by all.⁷⁰ This pronouncement heralded the recognition of the right of all individuals to 'live in an environment adequate for their health and well-being'.⁷¹ In 1994, the UN Sub-commission on the Prevention of Discrimination and Protection of Minorities commissioned a study on the connections between human rights and the environment. Presenting the final report of the study, referred to as the 'Ksentini Report' (after the

⁶⁷ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 3.

⁶⁸ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L*.103, 105.

⁶⁹ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L*.103, 105.

⁷⁰ G.A Res. 45/94. 68th plen.mtg, Need to Ensure a Healthy Environment for the Well-being of Individuals, U.N GOAR, 45th Sess, U.N Doc. A/RES/45/94 at 178 (Dec.14, 1990).

⁷¹ G.A Res. 45/94. 68th plen.mtg, Need to Ensure a Healthy Environment for the Well-Being of Individuals, U.N GOAR, 45th Sess, U.N Doc. A/RES/45/94 at 178 (Dec.14, 1990) Par 1.

special Rapporteur, Ms Fatma Zohra Ksentini) to the Sub-commission in 1994, Ms Ksentini recognised the reciprocal relationship between human rights and the environment-that environmental damage affects enjoyment of human rights and that human rights affect environmental conditions-and that the protection of each requires the protection of the other as well.⁷² Furthermore, Draft Declaration of Principles on Human Rights and the Environment produced by a group of international experts on human rights and international environmental law was annexed to Ms. Ksentini's final report as an annex.⁷³ The Draft Declaration essentially lays the framework for a holistic, rights based approach to environmental protection. The adoption of a rights based approach to environmental protection by the Sub-commission was grounded on the fact that it would recognise the vital character of the environment as a basic condition of life necessary to the promotion of human dignity and welfare, and to the fulfilment of other human rights.⁷⁴

In 2002, a Joint Expert Seminar was convened by the UN Commission on Human Rights (UNCHR) and the UN Environment Programme to assess progress in promoting and protecting human rights in relation to environmental questions since the Rio Declaration. The conclusion of experts was that national and international developments reflect the growing interrelationship between approaches to guaranteeing human rights and environmental protection and that environmental protection constitutes a precondition for the effective enjoyment of human rights.⁷⁵ Another significant development that advanced human rights and environment discourse at the UN was initiated on the 24th of March 2011 when the UNHRC passed resolution 16/11 in terms of which the OHCHR was requested to conduct a detailed analytical study on the relationship between human rights and the environment. A report on the outcome of the study was presented to the Human Rights Council on 16 December 2011.⁷⁶ The report noted that environmental degradation has the potential

⁷² U.N. ECOSOC, *Human Rights and the Environment, Final Report* (1994) UN Doc E/CN 4/Sub 2/1994/9(1994), par 248,251 & 252.

⁷³ Draft Principles on Human Rights and the Environment, in U.N. ECOSOC, *Human Rights and the Environment, Final Report* (1994) UN Doc E/CN 4/Sub 2/1994/9 (1994) Annex 1.

⁷⁴ Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) 278.

⁷⁵ Office of the High Commissioner for Human Rights (OHCHR), *Report of the joint OHCHR-UNEP Seminar of Human Rights and the Environment*.16 January 2002. UN Doc E/CN.4/2002/WP. Par 3 & 12.

⁷⁶ Office of the High Commissioner for Human Rights (OHCHR), *Analytical Study on the Relationship Between Human Rights and the Environment*,16 December 2011, UN Doc.A/HRC/19/34('OHCHR Analytical Study'),

to affect the realisation of human rights and identified a number of key environmental threats which include, amongst others, the following:

1. Atmospheric-related environmental impacts as a result of increasing human activity, population growth and continued economic growth which exacerbate atmospheric emissions, leading to air pollution, climate change and ozone-layer depletion;
2. Land-based environmental activities which include land degradation, deforestation and desertification; and
3. Degradation in water quality, freshwater scarcity and stresses on oceans, such as fisheries collapse.⁷⁷

The outcome of the study finds resonance with prevalent legal literature regarding the linkage between human rights and the environment in respect of the following conclusions:

1. Environmental damage can have negative implications, both direct and indirect, for the effective enjoyment of human rights;
2. By establishing the relationship between human rights and the environment, human rights and environmental instruments contribute significantly to ensuring the enjoyment of human rights and a healthy environment; and
3. Sustainable development and the protection of the environment can contribute to human well-being and the enjoyment of human rights.⁷⁸

In January 2017, the UN Special Rapporteur on Human Rights and the Environment presented a report on biodiversity and human rights to the UNHRC.⁷⁹ The report underscores the importance of biodiversity as one of the cornerstones of healthy ecosystems and thus a necessary requirement for the enjoyment of human rights.⁸⁰ Furthermore, the salient conclusion emerging out of the report point to a general obligation on states to protect ecosystems and biodiversity to ensure the full enjoyment

⁷⁷ OHCHR, *Analytical Study on the Relationship Between Human Rights and the Environment*, 16 December 2011, UN Doc.A/HRC/19/34('OHCHR Analytical Study'), Par 15,16,17 & 18.

⁷⁸ OHCHR, *Analytical Study on the Relationship Between Human Rights and the Environment*, 16 December 2011, UN Doc.A/HRC/19/34('OHCHR Analytical Study'), Par 24,75 & 76.

⁷⁹ Office of the High Commissioner for Human Rights (OHCHR), *Human Rights Obligations Relating to the Conservation and Sustainable Use of Biological Diversity*,19 January 2017, UN Doc. A/HRC/34/49.

⁸⁰ Office of the High Commissioner for Human Rights (OHCHR), *Human Rights Obligations Relating to the Conservation and Sustainable Use of Biological Diversity*,19 January 2017, UN Doc. A/HRC/34/49, Par 4.

of a wide range of human rights, including the rights to life, health, food, water and culture.⁸¹

These early expressions and international discussions on the linkages between the environment and human rights facilitated by the UN, echo an emerging global view affirming the indivisibility of the environment and fundamental human rights.

2.4 Human Rights, Climate Change and the United Nations

Cameroon describes climate change as being 'virtually unrivalled as the most problematic global challenge with potentially catastrophic consequences' and the 'most immediate and far reaching danger to our natural and social systems'.⁸² Climate change, at worst, is a challenge of pervasive proportions that not only endangers the present generation, but also generations to come.⁸³

The United Nations Framework Convention on Climate Change⁸⁴ (UNFCCC) defines climate change to mean 'a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods'.⁸⁵ The UNFCCC definition has been adopted precisely because it is compatible with the notion of human rights. Three binding international instruments comprise the international framework governing climate change, the UNFCCC, Kyoto Protocol⁸⁶, and the recent Paris Agreement.⁸⁷ The UNFCCC adopted at the Rio Conference on Environment and Development in 1992 recognises the need to protect human health and welfare, in addition to protecting the environment from the adverse effects of

⁸¹ Office of the High Commissioner for Human Rights (OHCHR), *Human Rights Obligations Relating to the Conservation and Sustainable Use of Biological Diversity*, 19 January 2017, UN Doc. A/HRC/34/49, Par 65 & 71.

⁸² Cameroon E 'Human Rights and Climate Change: Moving from an intrinsic to an instrumental approach' (2010) 38 Georgia Journal of International and Comparative Law 673, 675 and 679.

⁸³ Atapattu S 'Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?' (2008-2009) 20 Colorado Journal of International Environmental Law and Policy 35, 60.

⁸⁴ *United Nations Framework Convention on Climate Change* (UNFCCC), opened for signature 03 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

⁸⁵ *United Nations Framework Convention on Climate Change* (UNFCCC), opened for signature 03 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), Art 1.

⁸⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, December, 11, 1997, FCC/CP/1997/L.7 (entered into force February, 16, 2005).

⁸⁷ Conference of the Parties, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 Dec. 12, 2015 (entered into force on 04 November 2016).

climate change. To that end, its primary objective is to achieve the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropocentric interference with the entire climate system.⁸⁸ However, the UNFCCC lacks specific emission reduction targets for individual states, thus, the Kyoto Protocol and subsequent Paris Agreement were developed to address that gap. The Kyoto Protocol, adopted in 1997, has binding emission reduction targets for the developed countries (in recognition of the common but differentiated responsibility principle).⁸⁹ The Protocol expired at the end of 2012 but participating countries gave it a new lease of life at the Doha Conference when they voted to extend it until 2020. The Paris Agreement adopted by 195 countries and the European Union (EU) on 12 December 2015, represents a pledge by nations of the world, after the expiry of the Kyoto Protocol, to reduce their greenhouse gas emissions to prevent a global rise in temperature beyond 1.5 degrees Celsius and thus address the impact of climate change on the enjoyment of human rights.

Notwithstanding a clear link between climate change and human rights, it was not until recently that the debate on climate change was framed within the human rights discourse.⁹⁰ The Inuit living in the Arctic were the first ones to trigger a human rights and climate change relationship debate when they filed a petition with the Inter-American Commission on Human Rights (IACHR), accusing the United States (US) of violating its human rights obligations by failing to reduce its greenhouse gas emissions and thus violating the American Declaration of the Rights and Duties of Man (American Declaration).⁹¹ The petition detailed the effects of rising Arctic temperatures on the ability of the Inuit to enjoy a wide variety of human rights, including the rights to life (melting ice and permafrost make travel more dangerous), property (as permafrost melts houses collapse and residents are forced to leave their traditional homes), and health (nutrition worsens as animals on which the Inuit depend for sustenance decline in number).⁹² Limon correctly observes that the Inuit case managed to put climate

⁸⁸ *United Nations Framework Convention on Climate Change* (UNFCCC), opened for signature 03 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), Art 2.

⁸⁹ Kyoto Protocol to the United Nations Framework Convention on Climate Change, December, 11, 1997, FCC/CP/1997/L.7 (entered into force February, 16, 2005).

⁹⁰ Atapattu S 'Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?' (2008-2009) 20 *Colorado Journal of International Environmental Law and Policy* 35, 37.

⁹¹ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec.07,2005).

⁹² Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec.07,2005), 79-95.

change within a human rights framework of responsibility, accountability, and justice.⁹³ In response to the petition, the IACHR advised the petitioner's lawyer that it would 'not be possible to process your petition at the moment' because the information provided in the petition 'does not allow us to determine whether the alleged facts would tend to characterise a violation of rights protected by the American Declaration'.⁹⁴ In spite of the unfavourable response from the IACHR, the petition managed to draw attention to the link between the rising temperatures and increasing levels of greenhouse gases, and in particular, the omission on the part of the United States to take positive steps to reduce its emissions, and the enjoyment of human rights, however, it failed to obtain a decision by the IACHR.⁹⁵

The Maldives community, also vulnerable to climate change, has also been pivotal in the human rights and climate change discourse. The Maldives convened a November 2007 meeting of representatives of small island states which adopted the Male' Declaration on Human Dimension of Global Climate Change. The Declaration petitioned the OHCHR to prepare a study of the effect of climate change on human rights which is referred to in detail below.⁹⁶ Another significant contribution to the human rights and climate change discourse came in the form of a Draft Declaration on Human Rights and Climate Change, drafted by the Global Network for the Study of Human Rights and the Environment (GNHRE) scholars.⁹⁷ In the preamble, the Declaration affirms the link between the fulfilment of human rights and a secure, healthy and ecologically sound environment, which includes human rights related to climate harms. Furthermore, the Declaration proposes a number of key principles which essentially encapsulate the way that states should respond to climate change and include, amongst others, the following:

1. The right of all human beings to a planetary climate suitable to meet current and future generation needs;

⁹³ Limon M 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) *Harvard Environmental Law Review* 439,441.

⁹⁴ Keim S, 'Climate Change and Human Rights' (2013) 19 *The Journal Jurisprudence Juris* 305-318, 311.

⁹⁵ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States (Dec.07,2005), 103-112.

⁹⁶ Knox JH 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477,483.

⁹⁷ GNHRE, Draft Declaration on Human Rights and Climate Change, (May 2016) (www.gnhre.org) – accessed on 11 September 2017).

2. The right of all human beings to environmental information and to participate in decision making related to the physical environment they rely upon for health and survival, including activities that may have an impact on climate, otherwise known as the principle of environmental democracy;
3. The obligation of all states to respect and ensure the rights to an environment that enhances health and well-being, including a right to a stable climate and the obligation to ensure international cooperation with other states and international organisations; and
4. The obligation of non-state actors to observe the rights and duties of the Declaration.⁹⁸

The most comprehensive examination by an international human rights body to probe the effects of climate change on human rights is found in a 2009 OHCHR Report emanating from a request of the Male' Declaration on Human Dimension of Global Climate Change pioneered by the Maldives.⁹⁹ The OHCHR Report, along with other recent scholarship, devoted specifically to the question of human rights and climate change, has helped to advance the conceptual understanding and legal underpinnings of this area. The OHCHR Report made the following key conclusions:

1. Climate change threatens the enjoyment of a number of human rights such as the right to life, the right to adequate food, the right to health;
2. Climate change does not, however, necessarily violate human rights;
3. Human rights places duties on states concerning climate change; and
4. Those duties include an obligation of international co-operation.¹⁰⁰

The OHCHR Report noted that the effects of climate change pose direct and indirect threats to human lives as a result of events such as floods, storms, and drought as well as an increase in hunger and malnutrition.¹⁰¹ The OHCHR Report also flags the issue of segments of the population that are already vulnerable to climate change such as women, children, and indigenous people whose rights are protected by specific

⁹⁸ GNHRE, Draft Declaration on Human Rights and Climate Change, (May 2016) (www.gnhre.org – accessed on 11 September 2017), Principle 3,4,10,14 & 15.

⁹⁹ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61.

¹⁰⁰ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 20 to 41, 70, 72 to 77 and 99.

¹⁰¹ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 22.

human rights treaties.¹⁰² Furthermore, the report draws attention to the disproportionate impact of climate change affecting poorer regions and countries which also suffer from a low capacity to adapt.¹⁰³ Unfortunately, the report fails to place these observations within the context of climate justice or climate injustice - the recognition that those states that are the most vulnerable to climate change and have the lowest adaptive capacity, are also the same countries that have contributed least (in terms of greenhouse gas emissions) to the problem.¹⁰⁴ This unequal burden is the subject of express provision in the UNFCCC where article 3 notes that countries should respond to the need to protect the climate 'on the basis of equity' and that certain developing countries are 'particularly vulnerable to the adverse effects of climate change'.¹⁰⁵

In response to the OHCHR Report, the UNHRC adopted resolution 10/4 in March 2009 to the effect that 'climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights'.¹⁰⁶ The Cancún Agreements, in noting resolution 10/4 of the UNHRC, underscores the significance of human rights in the context of climate responses by affirming that 'parties should, in all climate related actions, fully respect human rights'.¹⁰⁷ It can therefore be argued that after years of advocacy by communities vulnerable to climate change, the adoption of human rights concepts in the Cancún Agreements signifies the recognition of a link between human rights and climate change and affirmation that rights have become a relevant part of this discourse.¹⁰⁸ The human rights dimension in the climate change context is also echoed in the Paris Agreement by way of acknowledgement that 'climate change is a common concern of human kind, parties should, when taking

¹⁰² OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 42 to 54.

¹⁰³ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 10.

¹⁰⁴ Limon M 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) Vol 38 *Georgia Journal of International and Comparative Law* 543,553.

¹⁰⁵ *United Nations Framework Convention on Climate Change* (UNFCCC), opened for signature 03 May 1992, 1771 UNTS 107 (entered into force 21 March 1994), Par 11.

¹⁰⁶ U.N. Human Rights Council Res. 10/4, 3 in U.N. Human Rights Council, *Draft Report of the Human Rights Council on its Tenth Session* 13,15 U.N Doc. A/HRC/10/L.11 (March, 31, 2009).

¹⁰⁷ Decision 1/CP.16, The Cancún Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (UN Doc. FCCC/CP/2010/7/ADD.1, 15 March 2011), Par 2.

¹⁰⁸ Cameron E & Limon M 'Restoring the Climate by Realizing Rights: The Role of the International Human Rights System' 21 (2009) 3 *Review of European Community & International Environmental Law* 204,204.

action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health'.¹⁰⁹

Notwithstanding the eloquence with which the OHCHR Report describes the many ways that climate change threatens the enjoyment of human rights, which should logically lead to a conclusion that climate change violates human rights, the report concludes that 'while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense'.¹¹⁰ That conclusion informs the basis for analysis of challenges inherent in a rights-based framework to climate change in the next paragraph.

2.5 Challenges of a Human Rights Approach to Climate Change

Climate change is essentially a type of environmental harm with its own peculiar attributes which present challenges to the traditional view of human rights duties, thus complicating the task of identifying violations of human rights. The scope for environmental protection in all existing human rights, as interpreted by the respective adjudicative bodies, is conditioned upon the establishment of a 'link' between environmental degradation and the impairment of a protected right.¹¹¹ It is particularly challenging to bring climate change under the 'link' requirement because climate change related actions take place in a global context, which human rights law can only address through the assertion of extraterritorial human rights obligations.¹¹² The cumulative nature of greenhouse gas emissions makes it difficult to construct their consequences as a human rights violation according to traditional human rights models which look at localised environmental threats or degradation.¹¹³ The cumulative effect of global greenhouse gas emissions and its impact on the causal relationship between the state's action and possible human rights impacts was also

¹⁰⁹ Conference of the Parties, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 Dec. 12, 2015 (entered into force on 04 November 2016) 2.

¹¹⁰ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 70.

¹¹¹ Dupuy PM & Viñuales JE *International Environmental Law* (2015) 320.

¹¹² Dupuy PM & Viñuales JE *International Environmental Law* (2015) 328.

¹¹³ Dupuy PM & Viñuales JE *International Environmental Law* (2015) 328.

flagged by the OHCHR Report when it identified the following three obstacles that pose a challenge to treating the effects of climate change as human rights violations:

1. It is virtually impossible to disentangle the complex causal relationship linking the emissions of a particular country to a specific effect;
2. Global warming is often one of several contributing factors to climate change-related effects, such as hurricanes or environmental degradation, which makes it often impossible to establish how such an event is attributable to global warming; and
3. The adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred.¹¹⁴

Knox argues that these problems are not insurmountable, in fact he surmises that the primary difficulty is not causation but assigning responsibility to specific states for climate change. Regarding the first obstacle, Knox argues that it is not necessary to link the emissions of a particular state to a particular harm in order to assign responsibility for the harm; since all greenhouse gases contribute to climate change, it is possible to assign responsibility for a climate change-induced harm according to state's share of global emissions of greenhouse gases.¹¹⁵ Knox does of course accept that precise allocations of responsibility would be controversial and also flags the difficulty of whether and how to take into account past emissions.¹¹⁶ Another solution suggested by the Inuit Petition to the IACHR which sought to hold one state responsible for activities undertaken in several different states, involves invocation of both criminal law principles of joint liability, and more innovatively, the UNFCCC's own principle of 'common but differentiated responsibilities'.¹¹⁷ Regarding the applicability of human rights law to future projections, the OHCHR Report acknowledges that an effect on a human right does not have to have occurred in order to indicate a violation;

¹¹⁴ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 70.

¹¹⁵ Knox JH 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477,489.

¹¹⁶ Knox JH 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477,489.

¹¹⁷ Limon L 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) Vol 38 *Georgia Journal of International and Comparative Law* 543,555.

the effect may be imminent.¹¹⁸ One could therefore argue, on the basis of scientific agreement that many of the foreseeable effects of climate change are imminent because their causes are occurring now and they will soon be difficult or impossible to forestall.¹¹⁹

In addition to the aforementioned obstacles facing the designation of climate change a violation of human rights, there are political difficulties. For instance, the US argued in response to the OHCHR request for information that moving toward a human rights based approach to climate change would be impractical and unwise, suggesting rather that climate change would be effectively addressed through traditional systems of international cooperation.¹²⁰

Notwithstanding the challenges mentioned above, the OHCHR Report identifies a number of duties that states have regarding climate change, thus giving the climate change and human rights discourse the necessary impetus.

2.6 State's Human Rights Obligations Concerning Climate Change

The discussion above has aptly demonstrated that climate change has the potential to interfere with the enjoyment of a wide range of human rights, however, interference with a recognised human right does not necessarily translate to violation of a legal duty.¹²¹ Put differently, in order for interference with the enjoyment of human rights to be escalated to the level of violation of human rights, the interference must arise from an action or inaction by an entity with legal obligations with respect to human rights, whose action or inaction was inconsistent with those obligations. Most human rights treaties do not refer to environmental protection, and therefore do not reference legal obligations in respect of environmental protection. However, international human right bodies have thus far derived norms of environmental protection from the rights that

¹¹⁸ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 70 & 104.

¹¹⁹ Knox JH 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477,489.

¹²⁰ Submission of the United Nations to the OHCHR under Human Rights Council Res.7/23, Par 16 (2008)(Accessed on 19.07.2017 at <http://www2.ohchr.org/english/issues/climatechange/docs/submission/USA.pdf>).

¹²¹ Knox J 'Climate Change and Human Rights Law' (2009-2010) Vol 50 *Virginia Journal of International Law* 163,165.

the treaties do protect, including rights to life and health, which in principle give rise to different types of duties.¹²²

International law typically entails three levels of obligations owed by states in accordance with relevant human rights treaty - duty to respect, protect and fulfil human rights.¹²³ In the context of environmental degradation, such duties require a state to ensure that actions within their jurisdiction, including actions of private actors, do not cause environmental harm at levels that would infringe the enjoyment of the protected rights.¹²⁴ Furthermore, such duties, as derived from environmental jurisprudence on human rights, impose both procedural and substantive obligations with respect to environmental threats to human rights.¹²⁵ Having said that, the two pronged environmental human rights jurisprudence does not apply well to transboundary environmental harm. In order for human rights law to require states to address the extraterritorial harm occasioned by climate change, it must impose duties with respect to those living outside their territory.¹²⁶ Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) limits the state's duties to 'all individuals within its territory and subject to its jurisdiction'. However, it can be argued that as climate change causes sea levels to rise and low-lying areas to become uninhabitable, that imposes a duty for other states to avoid that outcome, thus providing a basis for extension of the environmental human rights jurisprudence.¹²⁷ Unlike the ICCPR, the International Covenant on Economic, Social and Cultural Rights (ICESCR) seems to impose extraterritorial duties through Article 2(1) which provides that each state party must 'take steps, individually and through international assistance and co-operation... with a view to achieving progressively the realisation of the rights' recognised in the Covenant. In every General Comment it has adopted on particular rights such as the right to health, the Committee on Economic, Social and Cultural Rights (CESCR) has

¹²² Knox J 'Climate Change and Human Rights Law' (2009-2010) Vol 50 *Virginia Journal of International Law* 163,189.

¹²³ Steiner H, Alston P & Goodman R *International Human Rights in Context* 3rd ed (2007) 185-189.

¹²⁴ Knox J 'Climate Change and Human Rights Law' (2009-2010) Vol 50 *Virginia Journal of International Law* 163,171.

¹²⁵ Margaux J & Weiss D 'Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law' (2012) Vol 37 *Yale Journal of International Law* 309, 330-331 & Knox J 'Human Rights Principles and Climate Change' (2009-2010) Vol 50 *Virginia Journal of International Law* 163,168.

¹²⁶ Knox J 'Climate Change and Human Rights Law' (2009-2010) Vol 50 *Virginia Journal of International Law* 163,200.

¹²⁷ Knox J 'Climate Change and Human Rights Law' (2009-2010) Vol 50 *Virginia Journal of International Law* 163,206.

relied on the reference to 'international assistance and cooperation' to set out extraterritorial obligations.¹²⁸

The OHCHR Report on human rights and climate change, inspired by a number of different General Comments by the CESCR, proposes four distinct types of international or extraterritorial human rights obligations that states are enjoined to observe:

1. Refrain from interfering with the enjoyment of human rights in other countries;
2. Take measures to prevent third parties over which they hold influence from interfering with the enjoyment of human rights in other countries;
3. Take steps through international assistance and cooperation, depending on the availability of resources, to facilitate fulfilment of human rights in other countries; and
4. Ensure that human rights are given due attention in international agreements and that such agreements do not adversely impact upon human rights.¹²⁹

The significant outcome of the OHCHR Report is found in the application of human rights norms to impose extraterritorial duties on states concerning climate change, even in the absence of clear answers to issues of causation.¹³⁰ As indicated before, the OHCHR Report stresses that climate change is a global phenomenon and can be effectively addressed only through cooperation of all members of the international community.¹³¹ Accordingly, all states that are party to the ICESCR have a legal obligation through international cooperation to reduce emissions to levels consistent with the full enjoyments of human rights in all other countries.¹³² Furthermore, human rights obligations, as they pertain to climate change, exist at both national and

¹²⁸ Knox J 'Climate Change and Human Rights Law' (2009-2010) Vol 50 *Virginia Journal of International Law* 163,206-207.

¹²⁹ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 86.

¹³⁰ Knox JH 'Linking Human Rights and Climate Change at the United Nations' (2009) 33 *Harvard Environmental Law Review* 477,492.

¹³¹ OHCHR, *Report on the Relationship Between Climate Change and Human Rights*, 15 January 2009, UN Doc.A/HRC/10/61, Par 84.

¹³² Limon M 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) *Harvard Environmental Law Review* 439,455.

international level, moreover, both sets of obligations are interdependent and interrelated.¹³³

2.7 Benefits of a Human Rights Approach to Climate Change

Human rights approach to climate change enables those who are on the receiving end of climate change to use international, regional or domestic human rights laws and institutions to bring claims against those responsible for global warming, provided it has led to violations of their legally guaranteed human rights. A less formal approach involves an increased incorporation of human rights principles into climate negotiations and policy development.¹³⁴ Literature proposes a range of interconnected and overlapping benefits that human rights approach can usher to climate change discourse. Human rights approaches to issues of environmental protection imbue environmental issues with the normative value associated with human rights.¹³⁵ Kiss and Shelton are of the view that the benefits of using human rights to effect environmental protection are generally applicable to climate change as well, chief amongst which is the moral weight which has an important compliance pull.¹³⁶ Accordingly, the moral force of human rights concepts and the legal infrastructure which supports them, offer benefits for those seeking action on climate change, thus prompting action by states.

Limon argues that in addition to the force of human rights to prompt greater action by states, it also:

Has critical implications for the importance and urgency attached to climate change negotiations. It is far harder for world governments to remain ambivalent in the face of human suffering, especially when that suffering is on a global scale and is man-made, than is the case with physical phenomena such as melting icecaps or bleaching coral.

¹³³ Limon L 'Human Rights Obligations and Accountability in the Face of Climate Change' (2010) Vol 38 *Georgia Journal of International and Comparative Law* 543,558.

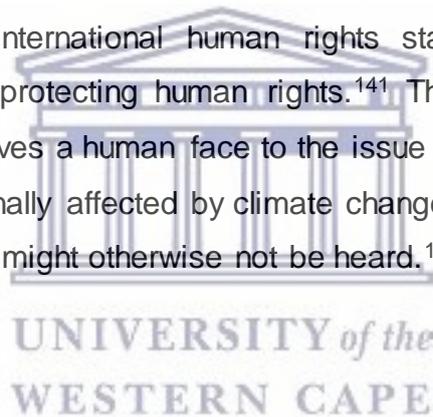
¹³⁴ Lewis B *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (Unpublished PHD thesis, Monash University), (2014) 250.

¹³⁵ Bratspies R 'Do We Need A Human Right to a Healthy Environment?'(2015) 13 *Santa Clara Journal of International Law* 31, 41.

¹³⁶ Kiss A and Shelton D *Guide to International Environmental Law* (2007) 238.

Humanizing climate change thus creates an ethical imperative to act that can with time translate into legal obligation.¹³⁷

Dialogue at the Human Rights Council's Panel Discussion on Human Rights and Climate Change affirmed that the human rights perspective on climate change introduces an accountability framework, holding governments accountable for reducing the vulnerability of their populations to global warming.¹³⁸ The extraterritorial dimension of human rights obligations in the context of climate change strengthens the capacity of an individual to take action against a foreign state, thus securing accountability and redress for damage caused by climate change.¹³⁹ Showing violation of human rights opens the way to accountability and legal redress, whether through domestic mechanism such as the courts, or through international mechanism such as treaty bodies or special procedures.¹⁴⁰ Atapattu sees a human rights approach to climate change providing a conceptual framework for policies on climate change which is normatively based on international human rights standards and is practically directed to promoting and protecting human rights.¹⁴¹ The added value of a rights based approach is that it gives a human face to the issue and amplifies the voices of those who are disproportionately affected by climate change – the poor, marginalised, and vulnerable people who might otherwise not be heard.¹⁴²



¹³⁷ Limon M 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) *Harvard Environmental Law Review* 439,451.

¹³⁸ Human Rights Council, *Panel Discussion on the Relationship Between Climate Change and Human Rights*, Executive Summary,1 ('HRC Panel Discussion')

¹³⁹ Cameron E & Limon M 'Restoring the Climate by Realizing Rights: The Role of the International Human Rights System' 21 (2009) 3 *Review of European Community & International Environmental Law* 204,212.

¹⁴⁰ Cameron E & Limon M 'Restoring the Climate by Realizing Rights: The Role of the International Human Rights System' 21 (2009) 3 *Review of European Community & International Environmental Law* 204,212.

¹⁴¹ Atapattu S 'Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?' (2008-2009) 20 *Colorado Journal of International Environmental Law and Policy* 35, 45.

¹⁴² Limon M 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) *Harvard Environmental Law Review* 439,451 & Atapattu S 'Global Climate Change: Can Human Rights (and Human Beings) Survive this Onslaught?' (2008-2009) 20 *Colorado Journal of International Environmental Law and Policy* 35, 45.

2.8 Human Rights Approaches to Environmental Protection

One of the avenues available to address the current global ecological crises lies in expanding the human rights concept to include the environment.¹⁴³ Simply put, the idea is to employ a human rights based approach to address the global environmental crisis threatening to diminish the ability of mankind to enjoy all civil, political, economic and social human rights. Treating abusive environmental practices as a human rights issue raises the stakes against those who are responsible for plunging the world into global environmental crisis.¹⁴⁴ Indeed a human rights approach to tackle environmental challenges facing the world would recognise the character of the environment as a basic condition of life, indispensable to the promotion of human dignity and welfare and to the fulfilment of other human rights.¹⁴⁵

Scholarly literature generally identifies four human rights approaches to issues of the environment: first, using existing human rights such as the right to life and health to achieve environmental protection goals; secondly, re-interpreting existing rights to ensure that environmental concerns are catered for; thirdly, bringing democratic governance into the realm of ecological sustainability through environmental procedural rights; fourthly, creating a new specific human right to environment.¹⁴⁶



2.8.1 Employing Existing Rights

The idea of using established human rights, often referred to as 'derivative rights', to protect the environment, is premised on the understanding that such rights incorporate environmental protection and can therefore be invoked in an environmental context.¹⁴⁷ It is for that reason that some argue that human right norms protected under international instruments and national constitutions are detailed and comprehensive

¹⁴³ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 71.

¹⁴⁴ Weston BH 'Toward a Recalibrated Human Right to a Clean and Healthy Environment: Making the Conceptual Transition' (2013) Vol 4 No.2 *Journal of Human Rights and the Environment* 123.

¹⁴⁵ Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) 278-279.

¹⁴⁶ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 4; and Shelton D 'Human Rights, Environmental Rights, and the Right to Environment': (1991-1992) 28 *Stan. J. Int'L.* 103, 105.

¹⁴⁷ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 71-72.

enough to provide for protection of the environment.¹⁴⁸ Accordingly, it is asserted that perhaps much effort should be directed at securing additional ratification and effective implementation of existing international instruments to ensure higher levels of environmental protection, rather than promoting the idea of a new substantive environmental right.¹⁴⁹ The scope of existing human rights, from civil and political, economic, social and cultural rights, and rights of indigenous peoples impact on the efficacy of mobilising such rights for environmental protection.¹⁵⁰

(a) Civil and Political Rights

The realisation of civil and political rights such as the right to life, information, expression, and political participation, creates a conducive environment for citizens to openly voice their dissatisfaction with environmental damage.¹⁵¹ Civil and political rights are thus able to contribute to environmental protection through guarantees of process and participation in decision-making process involving environmental matters. Absence of political freedom will inevitably lead to absence of active citizenry that will voice their dissatisfaction against environmental excesses and hold both private and public institutions to account.¹⁵²

(b) Economic, Social and Cultural Rights

Second generation human rights such as the right to decent living conditions, and the right to health, contribute to environmental protection through standards of human well-being.¹⁵³ Adequate standard of living and the state of the environment are linked since a healthful environment is a necessary requirement for human health and well-being.¹⁵⁴ Article 11 of the ICESCR recognises the right of everyone to an adequate standard of living, including adequate food, clothing and housing. The right to health

¹⁴⁸ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 4.

¹⁴⁹ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 4.

¹⁵⁰ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 4.

¹⁵¹ Anton D and Shelton D *Environmental Protection and Human Rights* (2011) 135.

¹⁵² Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 5.

¹⁵³ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 5.

¹⁵⁴ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 78.

imposes an obligation on states to take active measures to protect its citizens from environmental hazards such as exposure to radioactive material, water pollution etc. which ultimately bodes well for environmental protection. The same paradigm applies to cultural rights in terms of which states are obliged to protect physical environments upon which certain cultures depend.¹⁵⁵

(c) Rights of Indigenous Peoples

The examination of existing international instruments reveals two alternative approaches underlying the recognition of indigenous peoples' environmental rights. The first approach relates to the notion of permanent sovereignty over natural resources, cultural, social and economic development, otherwise known as self-determination model.¹⁵⁶ This model does not necessarily propagate that absolute sovereignty be granted, but instead advances the idea of ethnically distinct groups to be afforded a degree of political and economic autonomy within existing borders, which provides a solid basis for recognising the rights of indigenous peoples.¹⁵⁷ Accordingly, self-determination model is anchored on the principle that the indigenous peoples must exercise control over their own cultural, economic, and social development, which supports a right of control over their lands and resources. Article 3 of the Rights of Indigenous Peoples makes it patently clear that indigenous people have the right to freely determine their political status and freely pursue their economic, social and cultural development. In addition, the self-determination model enables the full participation of indigenous peoples in international environmental policy development and standard setting.¹⁵⁸ This model of indigenous peoples' environmental rights creates substantive, enforceable rights for indigenous people in relation to their land and resources, which in a way limits state sovereignty. In addition, Anderson avers that self-determination model provides states with the ability to only allow foreign investment projects that are aligned with the ideals and imperatives of preventing environmental degradation in accordance with national environmental

¹⁵⁵Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 6.

¹⁵⁶ Metcalf C 'Indigenous Rights and the Environment: Evolving International Law' (2003-2004) 35 *Ottawa Law Review* 13,125.

¹⁵⁷ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 6.

¹⁵⁸ Metcalf C 'Indigenous Rights and the Environment: Evolving International Law' (2003-2004) 35 *Ottawa Law Review* 13,106.

legislation.¹⁵⁹ Of course one must always be mindful of the scepticism of previously colonised nations towards environmental initiatives, who view them as a possible guise for interfering in their sovereignty.¹⁶⁰ The second model, known as the cultural integrity model, extends environmental rights to indigenous peoples as a necessary means to the protection and preservation of indigenous culture.¹⁶¹ This model recognises a more holistic framework for situating environmental concerns, which is not confined to the consideration of the consequent effects to physical damage to the environment.¹⁶² Perhaps the most significant aspect of the cultural integrity model lies in its unique position to allow for the development of international environmental law based on a human rights approach to environmental quality.¹⁶³ It should however be borne in mind that the most significant aspect of employing the right of self-determination to indigenous peoples is finding an effective procedural remedy under existing legal regimes.¹⁶⁴ As a matter of fact, Metcalf asserts that within the cultural integrity framework, indigenous peoples' rights are largely confined to the procedural realm.¹⁶⁵

2.8.2 Re-interpreting Existing Rights

The mobilisation of existing human rights such as the right to life, health, and adequate standard of living etc., through conventional interpretation and application is inadequate to effect optimum environmental protection.¹⁶⁶ Existing human rights were conceived at a time when the world was not anywhere near grappling with current environmental concerns. For that reason, existing human rights were originally never intended to be deployed to assist in tackling the global challenge of environmental degradation, including climate change, however, as Anderson succinctly contends,

¹⁵⁹ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 6.

¹⁶⁰ Bratspies R 'Do We Need A Human Right to a Healthy Environment?' (2015) 13 *Santa Clara Journal of International Law* 31, 46.

¹⁶¹ Metcalf C 'Indigenous Rights and the Environment: Evolving International Law' (2003-2004) 35 *Ottawa Law Review* 13, 10.

¹⁶² Metcalf C 'Indigenous Rights and the Environment: Evolving International Law' (2003-2004) 35 *Ottawa Law Review* 13,105.

¹⁶³ Metcalf C 'Indigenous Rights and the Environment: Evolving International Law' (2003-2004) 35 *Ottawa Law Review* 13,105.

¹⁶⁴ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 6.

¹⁶⁵ Metcalf C 'Indigenous Rights and the Environment: Evolving International Law' (2003-2004) 35 *Ottawa Law Review* 13,105.

¹⁶⁶ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 7.

'established human rights which do not directly touch upon environmental issues may house an implicit relevance capable of juridical development'.¹⁶⁷ Accordingly, a need to actively pursue environmental protection necessitates the expansion of the interpretation to established human rights such as the right to life, to include environmental interpretation in what is known as the greening of human rights.¹⁶⁸ A reformulation or expansion of existing human rights would be necessary as attempts to make use of existing formulations in addressing environmental issues have met with little success.¹⁶⁹ Reinterpretation of existing human rights to include the environmental dimension when environmental degradation prevents full enjoyment of such rights is one of the approaches to emerge post Stockholm to present.¹⁷⁰ A number of international cases of the European Commission and Court confirm the view that environmental harm may violate existing human rights that do not directly touch on environmental concerns, even though the scope of protection for the environment under such circumstances remains narrow.¹⁷¹ That environmental harm may violate existing human rights is attested to by substantial case law on the greening of existing human rights, especially in Europe but also in Africa and Latin America. ¹⁷² The application of the greening of rights interpretation methodology may see states being held in breach of the right to life if they fail to halt the pollution of drinking water by toxic substances.¹⁷³ On the basis of a greening of existing human rights approach, other rights that do not have a direct environmental link may also play a role in the environmental protection agenda. The right to freedom of speech may be extended to include the right to voice objections against environmental degradation, and the right to equality may include the right of the less privileged and indignant societies not to be

¹⁶⁷ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 7.

¹⁶⁸ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 71.

¹⁶⁹ Rodriguez-Rivera LE 'Is the Human Right to Environment Recognised Under International Law? It depends on the Source' (2001) 12 *Colorado Journal of International Environmental Law and Policy* 1, 18.

¹⁷⁰ Shelton D 'Human Rights and the Environment: What Specific Environmental Rights Have Been Recognised?' (2006-2007) 35 *Denver Journal of International Law and Policy* Stanford 129,130.

¹⁷¹ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stanford Journal of International Law* 103,116.

¹⁷² Boyle AE 'Human Rights or Environmental Rights? A Reassessment' (2006-2007) 18 *Fordham Environmental Law Review* 471,472.

¹⁷³ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 7.

exposed to a harmful environment.¹⁷⁴ While the reinterpretation of existing human rights can be invoked for vindication of environmental rights, they, by themselves, do not support the conclusion that a distinct environmental right can be derived from such internationally recognised human rights.¹⁷⁵

2.8.3 Environmental Procedural Rights

Environmental democracy theory advances a view that environmental procedural rights such as the right to environmental information, participation in environmental decision-making processes and remedies in the event of environmental harm, empower citizens to influence environmental decisions and policies, which is central to environmental protection.¹⁷⁶ The case for procedural rights, including environmental justice, is premised on the understanding that environmental protection and sustainable development cannot be left to governments alone but require civic participation to encourage democratic decision making, which in turn yields environmentally friendly policies.¹⁷⁷ Procedural rights already find expression in a number of international human rights instruments, most notably, the Universal Declaration of Human Rights (UDHR), and the ICCPR. Article 8 of the UDHR affirms that everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted to him by the constitution or by law. Article 19 of the UDHR confers on everyone the right to freedom of opinion and expression, which includes the right to seek, receive and impart information, whilst the right of public participation is anchored on Article 21 which affirms the right of everyone to take part in governance of his or her country. The right of access to environmental information, the right to participate in environmental decision-making procedures and the right of access to justice are also captured in the landmark agreement known as the Aarhus Convention, whose participation include the EU States and most of the

¹⁷⁴ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 8.

¹⁷⁵ Atapattu S 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16 *Tulane Environmental Law Journal* 65, 103.

¹⁷⁶ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 81.

¹⁷⁷ Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) 288-289.

former soviet states but open to any states to participate.¹⁷⁸ The human rights essence of the Aarhus Convention is captured in its preamble which states that ‘everyone has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations’. The following paragraph after the preamble provides that to be able to assert the right and observe the duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, which expressly reflects the procedural rights aspect of the human rights approaches to issues of the environment. Article 4 of the Aarhus Convention provides that anyone is entitled to environmental information covered by the convention in accordance with national law. Environmental information is broadly defined by Article 2(3) and includes amongst others, information concerning the physical elements of the environment such as water and biological diversity, as well as information about activities that are likely to affect the environment, human health, safety, or conditions of life. The Aarhus Convention is a human rights treaty because of the following three points: first, it builds from the established human right access to justice on procedural elements that serve to protect the rights to life, health, and family life; secondly, it confers rights directly on individuals and not simply on states; thirdly, its three pillars have been incorporated into the European human rights law through the jurisprudence of the European Court of Human Rights Commission (ECHRC).¹⁷⁹ Furthermore, human rights principles do establish procedural obligations that make environmental decision making more transparent, better informed, more responsive to the public, and more effective.¹⁸⁰

It is clear that environmental procedural rights have the much needed attribute to address the difficulty of formulating the concept of a substantive right to a decent environment that will find application in all countries, cultures, communities etc. Procedural rights afford people in different cultures and communities with an opportunity to address this matter by taking into account conditions specific to their

¹⁷⁸ *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001).

¹⁷⁹ Boyle A ‘Human Rights and the Environment: Where Next?’ (2012) 23 *European Journal of International Law* 613-642,622-623.

¹⁸⁰ Knox JH ‘Human Rights, Environmental Protection and the Sustainable Development Goals’ (2015) 24 *Washington International Law Journal* 523.

conditions.¹⁸¹ Boyle highlights the fact that procedural rights are better placed to enable claims to be brought on behalf of the environment, thus making them preferable to other anthropocentric human rights.¹⁸² Furthermore, he also argues that the extent to which procedural rights are embedded in treaties and domestic laws, makes the case for the recognition of a substantive environmental right redundant.¹⁸³

Notwithstanding the positive aspects of procedural rights highlighted above, a counter argument is that they may not be better positioned to adequately provide for environmental protection in the same way a new substantive environmental right would.¹⁸⁴ A point echoed by Anderson that democratic processes may still result in policies that are not aligned with the imperative of environmental protection.¹⁸⁵

2.8.4 New Substantial International Environmental Right

The most robust case for environmental rights comes by way of claims to a substantive environmental right involving the promotion of a certain level of environmental quality.¹⁸⁶ Renewed calls for the recognition of an international environmental human right for the protection of environmental values is gaining momentum. A view that the recognition of such a right would provide a moral and legal basis on nation states to cooperate in coming up with solutions to solve the ever deepening environmental crisis is finding traction among a number of scholars.

Established human rights, including environmental procedural rights, may be of limited use in addressing environmental challenges because they do not address environmental issues directly and with precision.¹⁸⁷ Procedural rights also give rise to a view that a fully informed public with rights of participation in environmental decision-making, and access to remedies for environmental harm would lead to environmental

¹⁸¹ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 9-10.

¹⁸² Boyle A 'The Role of International Human Rights Law in the Protection of the Environment' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 62.

¹⁸³ Boyle A 'The Role of International Human Rights Law in the Protection of the Environment' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 62-63.

¹⁸⁴ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 10.

¹⁸⁵ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 9.

¹⁸⁶ Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) 277.

¹⁸⁷ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 88.

protection, but such an outcome cannot always be assured.¹⁸⁸ Deployment of established human rights to address environmental concerns has the distinct disadvantage of placing an onerous burden on the complainant to establish a causal connection between the undesirable environmental behaviour and the violation of the specific human right, which might hamper environmental activism.¹⁸⁹ To that end, it is argued by other scholars that the recognition of a substantive environmental right that obviates the requirement to establish direct causation between the environmental incident and personal harm is of paramount importance to advancing the cause of protecting the environment for present and future generations.¹⁹⁰ In the same vein, other scholars argue that such a right should not be recognised, drawing on a number of reasons to advance their arguments.

Weston on the other hand introduces a slightly different concept of a substantive international environmental right by imploring on all of us to 'reimagine and establish the human right to environment in a form and substance different from current incarnation'. Accordingly, Weston proposes a recalibrated human right to a clean and healthy environment in the form of 'the Human Right to Commons- and Rights-based Ecological Governance' which emphasises the imperative of achieving the following three attributes or pillars:

1. Embrace anew the power of human rights to effect progressive change;
2. Persuade State Law to adopt vernacular law (socially negotiated values, principles, and rules that a particular community develop from their everyday ecological life); and
3. Promote new policy structures and procedures that encourage self-organised ecological governance by commons or communities as opposed to State Law administered by centralised legislatures, regulators and courts. ¹⁹¹

Knox argues that it is not clear how strategies envisaged by Weston can lead to effective large scale commons that would address climate change, marine pollution,

¹⁸⁸ Shelton D 'Developing Substantive Environmental Rights' (2010) *Journal of Human Rights and the Environment* Vol 1, No.1, 91.

¹⁸⁹ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 88.

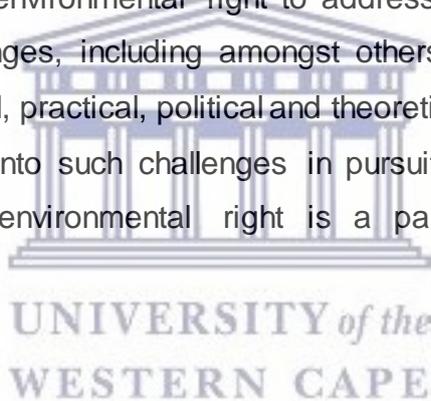
¹⁹⁰ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 88.

¹⁹¹ Weston BH 'Toward a Recalibrated Human Right to a Clean and Healthy Environment: Making the Conceptual Transition' (2013) Vol 4 No.2 *Journal of Human Rights and the Environment* 119-120.

or other massive transboundary environmental problems.¹⁹² Knox goes further to say that even if the evolution envisioned by Weston was feasible, it seems highly doubtful that it would occur quickly enough to address global environmental problems such as climate change before they cause the catastrophes that Weston predict.¹⁹³

An international environmental right does not find expression in any international instrument of universal application except two regional human rights agreements. The Banjul Charter provides that all people shall have the right to a generally satisfactory environment favourable to their development,¹⁹⁴ and the Protocol of San Salvador provides that everyone shall have the right to live in a healthy environment and to have access to basic public services.¹⁹⁵ These two provisions will be unpacked further in the next chapter when I interrogate the status of an international environmental right in international human rights law.

The idea of a substantive environmental right to address environmental challenges has its fair share of challenges, including amongst others, the inability to define its scope,¹⁹⁶ and presents legal, practical, political and theoretical challenges.¹⁹⁷ The next chapter will delve deeper into such challenges in pursuit of ultimately determining whether an international environmental right is a panacea for tackling global environmental problems.



¹⁹² Knox JH 'Green Governance: Ecological Survival, Human Rights, and the Law of the Commons' (2014) Vol 108 *American Journal of International Law* 131, 134.

¹⁹³ Knox JH 'Green Governance: Ecological Survival, Human Rights, and the Law of the Commons' (2014) Vol 108 *American Journal of International Law* 131, 134.

¹⁹⁴ *African Charter of Human and People's Rights*, opened for signature June 27 1981, 21 ILM 58 (entered into force 18 July 1978), Article 24.

¹⁹⁵ *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights*, opened for signature November 17 1988, OAS Treaty Series No 69 (entered into force November 16 1999), Article 11(1).

2.9 Conclusion

As early as the 1972 Stockholm Conference on the Human Environment, there has been extensive scholarly work probing the relationship between human rights and the environment. The global problems that are being experienced arising from environmental degradation have led to a common consensus that there is a direct relationship between human rights such as the right to health, life etc. and the environment. Synergies between human rights and environmental protection have undoubtedly illuminated the reality that a satisfactory environment is a necessary condition for the enjoyment of human rights. Indeed a prevalent view is that human rights and the environment are interdependent, complimentary and indivisible. The UN has pronounced that a better and healthier environment can help contribute to the full enjoyment of human rights by all, thus affirming a direct relationship between human rights and the environment. In addition, climate change was also brought into the human rights framework on a global scale when the OHCHR made it crystal clear that the effects of climate change pose direct and indirect threats to human lives. Providing the necessary impetus to the climate change and human rights discourse was the adoption of human rights concepts in the Cancún Agreements, which signifies the recognition of a link between human rights and climate change. The Paris Agreement also enjoins parties to respect, promote and consider their respective obligations on human rights when taking action to address climate change, thus solidifying the linkage between human rights and climate change. Notwithstanding the linkage between human rights and climate change, the lingering challenge, in the context of climate change, relates to treating the effects of climate change as human rights violations, owing to, amongst others, the complex causal relationship linking the emissions of a particular country to a specific effect. Put differently, the usual human rights law principles relating to the content and extent of state's obligation and the manner of proving a violation are severely hampered by the intergenerational, transnational and cumulative impact of greenhouse gas emissions. Accordingly, a human rights approach to climate change that is premised on conventional human rights law notions of rights and duties, proof and causation, has limited prospects of success. That said, the moral force of human rights concepts and the legal infrastructure which supports them, offer benefits for those seeking action on climate change, thus prompting action by states.

Having observed that human rights and the environment, including climate change, are interdependent, the next chapter unpacks the notion of an international environmental right and the viability of deploying it to tackle environmental challenges that pose a threat to the enjoyment of human rights.



3. CHAPTER THREE

INTERNATIONAL ENVIRONMENTAL RIGHT

3.1 Introduction

The discussions in the previous chapter have led to the establishment of a correlation between the environment and human rights, thus affirming global consensus that environmental degradation, including climate change, threatens the enjoyment of human rights. Accordingly, the proposition for the recognition of an international environmental human right to address global challenges arising from environmental degradation and climate change is finding traction from some quarters. That being the case, the proposal for the recognition of an international environmental right to vindicate environmental excesses that effectively equate to violation of human rights has not taken off owing to a number of legal, practical, political and theoretical challenges. It has already been indicated in the previous chapter, albeit very briefly, that an international environmental right currently finds expression in only two regional human rights agreements. This chapter will evaluate broader issues intended to unpack the very notion of an international environmental right such as its conceptualisation and how it may possibly be constructed, having regard to the existing international human rights architecture. Furthermore, analysis of the merits or demerits of recognising and possibly deploying such a right to address global environmental degradation, including climate change, having regard to a number of theoretical aspects underpinning recognition of new rights in international human rights law will be undertaken.

3.2 Conceptualisation of an International Environmental Right

3.2.1 Definition of an International Environmental Right

The proposition for the adoption of an international environmental right is undoubtedly diminished by definitional ambiguity and vagueness inherent in the concept. Literature employs a wide range of language when referring to an international environmental right such as a right to a healthy environment, the right to a good environment, a clean,

pure and decent environment; all of which refer to the notion of an international human right to environment of a particular quality.¹⁹⁸

Boyle illuminates the definitional ambiguity inherent in the definition of the right by indicating that what constitutes a decent environment is a value judgement, on which reasonable people will differ.¹⁹⁹ What constitutes satisfactory, decent or ecologically sound environment is bound to suffer from uncertainty, may result in cultural relativism, particularly from a north-south perspective and may lack the universal value inherent in human rights.²⁰⁰ Indeed one of the criticisms levelled against the claim for a human right to environmental quality relates to its inability to be enforced on account of the inherent variability of environmental conditions.²⁰¹ Even though the proposal for the recognition of an international environmental right suffers from definitional problems, what cannot be contested is the fact that the primary intention of such a right is to protect the environment, and to create a duty to protect the global environment for the benefit of present and future generations.²⁰² Furthermore, the broader formulation of the international environmental right will also have to ensure legal redress for victims of environmental harm.²⁰³

3.2.2 Treatment of an International Environmental Right

The call for the recognition of a substantive environmental human right creates a dilemma regarding how it should be constructed in the context of existing fundamental human rights framework. The dilemma arises because the proposal for a human rights based approach has the shortcoming that environmental rights do not fit neatly into any single category or generation of human rights. Boyle asserts that environmental rights could in fact fit within any of the different generation of rights and in so doing

¹⁹⁸ Lewis B 'Environmental Rights or a Right to the Environment? Exploring The Nexus Between Human Rights and Environmental Protection' (2012) 8(2) *Macquarie J. Int'l & Comp. Env'tl.L* 36, 40.

¹⁹⁹ Boyle A 'Human Rights and the Environment: Where Next' (2002) 23 No.3 *European Journal of International Law* 613-642,626.

²⁰⁰ Boyle AE 'Human Rights or Environmental Rights? A Reassessment' (2006-2007) 18 *Fordham Environmental Law Review* 471,507.

²⁰¹ Shelton D 'Developing Substantive Environmental Rights' (2010) *Journal of Human Rights and the Environment* Vol 1 No.1, 91.

²⁰² Thorne M 'Establishing Environment As a Human Right' (1990-1991) 19 *Denv.J. Int'l L. & Pol'y* 301, 310.

²⁰³ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 94.

serve different functions. ²⁰⁴ Shelton echoes Boyle's sentiments in his observation that the proposal gaining traction among a few authors is one of classifying existing and evolving rights into 'generations' according to historical evolution and theoretical differences.²⁰⁵ In terms of the generation of rights framework, civil and political rights are first generation rights conferring personal liberties on individuals that government cannot interfere with.²⁰⁶ The role of first generation rights in the context of advancing the cause of environmental protection would be one of enabling individuals to access information and therefore facilitate participation in the process of environmental decision making.²⁰⁷ Economic and social rights on the other hand are then classified as second generation rights which require government action.²⁰⁸ Treatment of environmental right as a second generation right would confer environmental quality comparable status to other economic and social rights by, amongst others, treating environmental quality as a value, and would be programmatic and in most cases enforceable, albeit through relatively weak international supervisory mechanism.²⁰⁹ The prevalent view among a number of authors is to place environmental rights in the new category of 'third generation rights', also termed solidarity rights, which would have the benefit of ensuring mobilisation of resources, skills and technology from all actors to achieve environmental objectives.²¹⁰ Karel Vasak, considered as the architect of third generation rights, argued for the recognition of third generation rights such as the right to development, and the right to a healthy environment, which in his view, could not find expression in both first and second generation rights and could only be achieved through the solidarity of all states concerned.²¹¹ It is therefore clear that Vasak's construction of the notion of third generation human rights is intended to acknowledge a continuing evolution of human rights doctrine. The idea that

²⁰⁴ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 48.

²⁰⁵ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 122.

²⁰⁶ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 122.

²⁰⁷ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 48.

²⁰⁸ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 122.

²⁰⁹ Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) 272.

²¹⁰ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 48.

²¹¹ Atapattu S 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16 *Tulane Environmental Law Journal* 65, 110.

enforcement of environmental rights is dependent on the concerted efforts of all actors at all levels of the international community means that such rights are sometimes classified as one of several 'third generation solidarity rights' that might be seen to have emerged under international law during the 1980s.²¹² Gravelle also subscribes to the construction of environmental rights as third generation rights on the basis that the implementation of such rights is several steps removed from those fundamental rights which individuals can vindicate.²¹³ Marks also affirms that environmental rights have met the following key attributes of a third generation human right:

1. Specialised body of law (environmental) has developed at both national and international law;
2. Environment is referred to in human rights terms in international legislation;
3. Environmental rights have been incorporated into a variety of national constitutions as a human right.; and
4. Environmental protection requires the concerted effort of all social factors.²¹⁴

Notwithstanding the prevalent view that places environmental rights in third generation rights, such a view is criticised because of its potential to trivialise existing human rights doctrine.²¹⁵ The other aspect that renders the third generation rights paradigm susceptible to criticism relates to its alleged collective aspect, which puts it at odd with both the natural and the will rights theory that require rights to inhere to an individual, as is the case with first and second generation of human rights held by individuals.²¹⁶ Downs retorts to the criticism by pointing out the fact that all generation of rights have both collective and individual elements but the individual remains the cardinal subject of human rights.²¹⁷ Some forms of environmental degradation must be understood as

²¹² McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective' (1992) 37 *New York Law School Law Review* 583,591.

²¹³ Gravelle RK 'Enforcing the Elusive: Environmental Rights in Eastern European Constitutions' (1996) 16 *Virginia Environmental Law Journal* 636.

²¹⁴ Marks SP 'Emerging Human Rights: A New Generation for the 1980's' (1980-1981) 33 *Rutgers L. Rev.* 435, 442-443.

²¹⁵ Thorne M 'Establishing Environment As a Human Right' (1990-1991) 19 *Denv.J. Int'l L. & Pol'y* 301, 318.

²¹⁶ Downs JA 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1992-1993) 3 *Duke.J. Comp. & Int'l L. & Pol'y* 351, 365.

²¹⁷ Downs JA 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1992-1993) 3 *Duke.J. Comp. & Int'l L. & Pol'y* 351, 365-366.

group claims, but even in such cases, the underlying legal foundation for the group claims lies intrinsically in the possession of the human right by the individual.²¹⁸

Another alternative to treating environmental right as a third generation right is to conceive it as a generalist or umbrella right that uses the concept of sustainable development to preserve the environment whilst simultaneously pursuing development.²¹⁹ The rationale for the proposal is that the right to development is couched in human rights terms, therefore, there is no plausible reason why environmental rights should also be left outside the human rights realm.²²⁰ Scholtz echoes that view by suggesting that environmental protection becomes an integral part of the development process through reconstruction of the right to development.²²¹

3.3 A Case for Recognition of an International Environmental Right

It has already been established that a contaminated environment threatens the ability of humans to enjoy human rights. Downs, like many other authors, is of the opinion that the international community is ready to embrace the idea that an environmental human right represents the only option to reverse the danger that environmental degradation poses to the enjoyment of the right to life, health, and general welfare.²²² Lee expresses a view that the acceptance of an environmental human right is necessary because it will offer a remedy to an environmental situation that amounts to a violation of an individual's fundamental rights.²²³ The close link between protection of the environment and rights such as rights to health, life, including decent quality of life, clearly shows that a right to environment can easily be incorporated into the human

²¹⁸ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,297.

²¹⁹ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives) Vol 3* (2011) 160.

²²⁰ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives) Vol 3* (2011) 160.

²²¹ Scholtz W, 'Human Rights and the Environment in the African Union Context', in Scholtz W and Verschuuren J *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (2015) 118.

²²² Downs JA 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1992-1993) 3 *Duke.J. Comp. & Int'l L. & Pol'y* 351, 367-368.

²²³ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,287.

rights protection framework whose ultimate purpose is to ensure the dignity of all human beings.²²⁴ The argument that the use of existing human rights is in a position to achieve the same goal is rendered impotent by a counter argument that existing human rights employ a clumsy approach to environmental concerns.²²⁵

3.4 Advantages for Recognition of an International Environmental Right

3.4.1 Transboundary Environmental Concerns

The nature of the current global environmental crisis requires cooperation of all participants in the international community. The recognition of a universal environmental right is well positioned to tackle transboundary environmental challenges, and also to encourage implementation of environmental polices within nation-states.²²⁶

3.4.2 Individuals and International Law

Recognition of an environmental human right enables individuals to be both the subjects and the objects of international human rights framework.²²⁷ Traditionally, only nation states were considered appropriate subjects of international law, whilst individuals were considered objects, having no access to transnational tribunals except indirectly through the nation state.²²⁸ Turner also affirms the principle that recognising a specific right in an international instrument would allow for claims by individuals or groups, where domestic laws have failed to offer adequate remedies for harms resulting from environmental degradation.²²⁹

²²⁴ Cullet P 'Definition of an Environmental Right in a Human Rights Context' (1995) 13 *Neth. Q. Hum. Rts.* 25, 26.

²²⁵ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 8-9.

²²⁶ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective' (1992) 37 *New York Law School Law Review* 583,592.

²²⁷ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective' (1992) 37 *New York Law School Law Review* 583,592.

²²⁸ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective' (1992) 37 *New York Law School Law Review* 583,592.

²²⁹ Turner S 'The Right to a Good Environment -The sword in the stone' (2004) 4 *Non State Actors and International Law* 277,294.

3.4.3 Environmental Right and other Human Rights

Conferring environmental rights human rights status has the added benefit of elevating environmental quality to the same plane as other human rights.²³⁰ A specific environmental right would help the dialogue in respect of environmental protection and make it more personal by giving it human face, thus winning the hearts and minds of people.²³¹

3.4.4 Inadequate Remedies from National Environmental Laws

A number of nations have varying environmental laws, which can possibly mean uneven access to judicial or civil remedies among nations.²³² The recognition of an environmental human right which possesses an attribute of universal standard, will certainly go a long way in providing adequate remedies for environmental violations that are also human rights violations.²³³ The procedural dimension of an environmental right can provide access to justice where bureaucratic regulation simply cannot.²³⁴

3.4.5 Environmental Activism

A robust human rights approach is likely to stimulate political activism on environmental issues by concerned citizens and non-governmental organisations bolstered by a general statement of a right claim.²³⁵

3.4.6 Inadequate Existing Laws/Human Rights Framework

A recognition of an environmental human right is sometimes premised on the argument that there is an established link between human rights and the environment,

²³⁰ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 49.

²³¹ Glazebrook JS 'Human Rights and the Environment' (2009) 25 *40 Victoria U. Wellington L. Rev.* 321.

²³² Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,290.

²³³ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,290.

²³⁴ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 21.

²³⁵ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 22.

however, existing laws do not adequately recognise the link.²³⁶ It therefore follows that the lack of recognition of a link between the environment and human rights in existing laws can only be cured by explicit recognition of an environmental human right which will affirm the significance of the environment as a *sine qua non* to the enjoyment of human rights.

Building on the relationship between the environment and human rights, there is another argument that existing human rights are inadequate to achieve meaningful environmental protection, thereby leaving human rights at risk.²³⁷ Downs seems to agree with that argument when she asserts that many people continue to live under conditions which impede the exercise of human rights, notwithstanding the existence of human rights such as the right to life, which should provide adequate protection against environmental harm.²³⁸ Shelton also argues that procedural rights are not enough to ensure a safe, healthy and ecologically sound environment.²³⁹

3.5 A Case Against Recognition of an International Environmental Right

The proposal for the recognition of an international environmental right to address mounting global environmental concerns and thus contribute to environmental protection is far from simplistic and as such does present legal, practical, political and theoretical challenges.²⁴⁰ Failure to address a number of challenges which are addressed below, puts the recognition of an international environmental right project at risk and may result in it being stillborn.

3.5.1 The Right to Development

Recognition of an international environmental right will have to pass the hurdle of the right to development claimed by less developed countries and the corresponding

²³⁶ Lewis B *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (Unpublished PHD thesis, Monash University), 2014) 34.

²³⁷ Lewis B *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (Unpublished PHD thesis, Monash University), 2014) 34.

²³⁸ Downs JA 'A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right' (1992-1993) 3 *Duke J. Comp. & Int'l L. & Pol'y* 351, 362.

²³⁹ Shelton D 'Developing Substantive Environmental Rights' (2010) 1 *Journal of Human Rights and the Environment*, 91.

²⁴⁰ Lewis B 'Environmental Rights or a Right to the Environment? Exploring The Nexus Between Human Rights and Environmental Protection' (2012) 8(2) *Macquarie J. Int'l & Comp. Env'tl.L* 36, 39.

principle of state sovereignty over natural resources.²⁴¹ At international level, a right to development finds expression in the Declaration on the Right to Development which provides that:

The Right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.²⁴²

At a regional level, the Banjul Charter provides that states shall have a duty, individually or collectively, to ensure the exercise of the right to development.²⁴³ The other element to the right of development is the principle of sovereignty on natural resources as expressed in Article 1 of the Resolution on Permanent Sovereignty Over Natural Resources which provides that 'the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned'.²⁴⁴ Less developed countries are very sceptical of environmental protection regimes that may possibly inhibit their efforts to improve the standard of living of their citizens, and distrust of developed nations that have already exploited and degraded their own natural resources.²⁴⁵ Furthermore, the principle of state sovereignty that recognises a nation-state's right to control the people and resources within its territorial jurisdiction may be at odds with the obligations that may derive from an international environmental right. In fact, it is argued that the idea of environmental rights might weaken the role of sustainable development in reconciling developmental and environmental objectives.²⁴⁶

McClymonds argues that the right to development should not act as a barrier to the recognition of an environmental right because the interrelationship between

²⁴¹ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,584.

²⁴² Article 1, Paragraph 1. Declaration on the Right to Development, GA. Res. 41/128, U.N. GAOR, 41st Sess, Supp. No. 53, at U.N Doc. A/41/53 (1987).

²⁴³ Article 22, Paragraph 2. *African Charter of Human and People's Rights*, opened for signature June 27 1981, 21 ILM 58 (entered into force 18 July 1978).

²⁴⁴ Resolution on Permanent Sovereignty Over Natural Resources, G.A. Res. 1803 (XVII), U.N. GAOR, 17th Sess, Supp. No.17, at 15, U.N. Doc. A/527 (1963).

²⁴⁵ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,607.

²⁴⁶ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives) Vol 3* (2011) 95.

development and ecological health has resulted in the incorporation of environmental-protection policies into development.²⁴⁷ The solution to reconciling what appears to be two diametrically opposed ideals, is for international environmental law to recognise special circumstances of less developed countries, and the developed countries must remain willing to assist less developed countries with financial and other resources, so that the two opposing rights may continue to develop in tandem.²⁴⁸ Scholtz echoes that sentiment in affirming that sustainable development appears to offer a promising route towards reconciling the tensions between the rights to development and to environment in the context of the African Charter on Human and Peoples' Rights.²⁴⁹

3.5.2 State Sovereignty

State sovereignty is the claim of sovereign nations to exercise exclusive control over the people and resources within their territorial jurisdiction.²⁵⁰ The principle as contained in Article 2, paragraph 7 of the Charter of the UN provides that the UN has no authority to intervene in matters which are within the domestic jurisdiction of any state.²⁵¹ Implementation of international environmental obligations is generally left to domestic legislatures on the basis of state sovereignty, and that makes the recognition of a binding global agreement on environment virtually difficult if not impossible.²⁵²

3.5.3 Anthropocentrism

A human right proposal to tackle environmental concerns is often criticised on the basis that it is inherently focused on the human being (Anthropocentric) to the exclusion of other living species.²⁵³ Environmental degradation as such is not sufficient

²⁴⁷ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,584-585.

²⁴⁸ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,633.

²⁴⁹ Scholtz W, 'Human Rights and the Environment in the African Union Context', in Scholtz W and Verschuuren J *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (2015) 116.

²⁵⁰ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,608.

²⁵¹ McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,608.

²⁵² McClymonds J T 'The Human Right to a Healthy Environment: An International Perspective (1992) 37 *New York Law School Law Review* 583,608.

²⁵³ Anderson MR 'Human Rights Approaches to Environmental Protection: An Overview' in Boyle AE & Anderson MR *Human Rights Approaches to Environmental Protection* (1996) 14.

cause for complaint unless it is linked to human well-being.²⁵⁴ Therefore, if the environmental loss does not affect a person's health, private life, and property or civil rights, then the victim will not have standing to lodge a claim on the basis of environmental loss.²⁵⁵ Anthropocentricity is a problem because it essentially goes to the heart of whether protection of the environment is for the benefit of humans only, or whether it also takes into account the intrinsic value of other species and the environment in general.²⁵⁶ To many, the very existence of environmental human rights simply confirms the idea that the environment exist only for human benefit and as such does not have intrinsic worth.²⁵⁷ Those who view anthropocentric approach with scepticism go as far as suggesting that anthropocentric attitudes lead to ecological disasters, and ecological change must of necessity involve ecocentric change.²⁵⁸ At the heart of the concept of ecocentrism is to affirm the intrinsic value of nature and removing humanity from the centre of the universe by replacing it with nature.²⁵⁹ Boyle identifies with a critical view of the anthropocentric nature of the environmental human right on the basis that by looking at the environmental challenges 'in moral isolation may reinforce the assumptions that the environment and its natural resources exist only for human benefit and have no intrinsic worth in themselves'.²⁶⁰

A number of suggestions are proposed to mitigate anthropocentric concerns related to an environmental human right. It is suggested that some degree of anthropocentricism is a necessary part of environmental protection, and the interests and duties of humanity cannot be separated from environmental protection.²⁶¹ Shelton advances that point convincingly by arguing that humans should not be seen as inseparable members of the universe but are interlinked and interdependent

²⁵⁴ Taylor P 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 *Georgetown International Environmental Law Review* 309,352.

²⁵⁵ Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) 301.

²⁵⁶ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 51.

²⁵⁷ Taylor P 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 *Georgetown International Environmental Law Review* 309,351.

²⁵⁸ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 27.

²⁵⁹ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 28.

²⁶⁰ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 51.

²⁶¹ Taylor P 'From Environmental to Ecological Human Rights: A New Dynamic in International Law?' (1997-1998) 10 *Georgetown International Environmental Law Review* 309,352.

participants with duties to protect and conserve elements of nature.²⁶² Shelton goes on to argue that an environmental human right could be complimentary to a wider protection of the biosphere which recognises the intrinsic value of nature, independent of human needs.²⁶³ The implications of the argument for anthropocentricity is pointing to a need for the integration of human rights claims within a broader decision-making framework capable of taking into account, among other factors, intrinsic values, the needs for future generations and the competing interests of states.²⁶⁴

3.5.5 Redundancy/Proliferation of Rights

Another objection to the recognition of an environmental human right relates to the fact that it doesn't add value to what already exists in international environmental law, thus rendering it redundant.²⁶⁵ Glazebrook echoes the concern that new rights could, in some circumstances, devalue existing rights, but hastens to warn that the unwillingness to adapt existing instruments and expand rights to meet evolving circumstances would have the same effect.²⁶⁶ Boyle questions the necessity for a substantial human right to environmental quality in the presence of an extensive body of international environmental rules and principles and concludes that not much will be added from reformulating these rules in explicit human right terms.²⁶⁷ Post 1972 Stockholm conference has seen the conclusion of a number of agreements on a wide range of topics including, amongst others, marine pollution, protection of the atmosphere, and preservation of biodiversity, thus marking the evolution of international environmental law.²⁶⁸ The concern for proliferation of rights is also discussed later in the context of the requirement that new rights must be independently justifiable and not merely repetitive of existing rights.²⁶⁹ International organisations

²⁶² Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 110.

²⁶³ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 110.

²⁶⁴ Birnie P, Boyle A & Redgwell C *International Law and the Environment* 3 ed (2009) 272.

²⁶⁵ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 53.

²⁶⁶ Glazebrook JS 'Human Rights and the Environment' (2009) 25 40 *Victoria U. Wellington L. Rev.* 317.

²⁶⁷ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 53-54.

²⁶⁸ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 53.

²⁶⁹ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 60.

have also played a role in facilitating the development of international and national law through a number of 'soft' law instruments.²⁷⁰ Furthermore, the interplay of treaty law, soft law and customary obligations has become a significant feature of the development of a vibrant system of international environmental law than before.²⁷¹ Accordingly, Boyle argues convincingly that international law already incorporates rules and principles for ensuring environmental quality, thus, he fails to see what would be added if such rules and principles were to be reformulated in explicit human right terms.²⁷² Shelton also questions whether a recognised and explicit environmental human right would add to the existing protections and further international values represented by environmental law and human rights.²⁷³

Perhaps linked to the redundancy argument, is a concern that the adoption of a substantive right to environment will lead to proliferation of new rights which will undoubtedly undermine and devalue the credibility of existing rights.²⁷⁴

3.5.6 Definitional Uncertainty

As already indicated, literature regarding an environmental human right employs a wide range of language such as a right to a healthy environment, the right to a good environment, a healthful environment, a clean environment, a pure and decent environment; all of which essentially capture the notion of an international human right to environment of a particular quality.²⁷⁵ Principle 1 of the Stockholm Declaration refers to an 'environment of a quality that permits a life of dignity and well-being', while Article 24 of the Banjul Charter refers to a 'general satisfactory environment favourable to their development'. Some have proposed a much narrower formulation of the right to environment that is centred on the protection of human health and well-being from

²⁷⁰ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 53.

Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 53.

²⁷¹ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 53-54.

²⁷² Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 56.

²⁷³ Shelton D 'Human Rights and the Environment': Jurisprudence of Human Rights *Bodies*' 2002 *Paper presented at the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment, Geneva* 14-16.

²⁷⁴ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives) Vol 3* (2011) 98.

²⁷⁵ Lewis B 'Environmental Rights or a Right to the Environment? Exploring The Nexus Between Human Rights and Environmental Protection' (2012) 8(2) *Macquarie J. Int'l & Comp. Env'tl.L* 36, 40.

environmental hazards on the basis that such a formulation stands a chance of being accepted as a valid human right.²⁷⁶ Definitional problems are bound to emerge from any attempt to formulate environmental rights in qualitative terms.²⁷⁷ What constitutes satisfactory, decent, viable or healthy environment is bound to trigger uncertainty and ambiguity.²⁷⁸ In addition, the determination of any of those expressions is largely a subjective value judgement which may differ from one country to the other.²⁷⁹ Accordingly, there is almost a unanimous position in literature that the single and perhaps biggest challenge to the postulation of an international environmental right revolves around defining its scope and content. That sentiment finds resonance among both advocates and critics of the right, which leads to critics arguing that the inability to agree on the parameters of the scope and content of the right is in fact a fundamental reason for the idea to be abandoned. Boyle captures the concern succinctly by pointing that the proposal of an environmental human right is undesirable because it, amongst others, is too uncertain a concept to be of normative value.²⁸⁰ Handl also argues that it is misconceived to assume that environmental protection will be furthered by a generic human right because of, amongst others, the difficulty of definition.²⁸¹

Notwithstanding the definitional ambiguity inherent in the concept of an international environmental right, other scholars hold the view that the core of the human rights concept is well defined as any social and legal norm, as proven by numerous accepted human rights increasingly enforced.²⁸² Weston thus affirms that his 'unorthodox' proposal for a recalibrated human right to a clean environment in the form of a Human Right to Green Governance is anchored in 'a cognizably well-defined, rich history of

²⁷⁶ Leib LH *Human Rights and the Environment (Philosophical, Theoretical and Legal Perspectives)* Vol 3 (2011) 92.

²⁷⁷ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 50.

²⁷⁸ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 50.

²⁷⁹ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 53-50.

²⁸⁰ Boyle AE 'Human Rights or Environmental Rights? A Reassessment' (2006-2007) 18 *Fordham Environmental Law Review* 471,484.

²⁸¹ Gunther H 'Human Rights and Protection of the Environment: A Mildly 'Revisionist' View' 1992 *Human Rights, Sustainable Development and the Environment* (Inter-American Institute of Human Rights) 117, 142.

²⁸² Weston BH & B David *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (2013) 98.

both substantive and procedural justice'.²⁸³ Shelton also advances a convincing argument that human rights tribunals have in fact given effect to various human rights that are linked with environmental protection by reference to international environmental principles, standards and norms.²⁸⁴ To that end, it is suggested that as with any human system, incomplete and imperfect, one must make use of those elements that are established and effective while working to improve those that seem vague or incomplete.²⁸⁵ While it is not essential for the right to be defined or spelled with absolute precision, some consensus in relation to the scope and content of a right and the concomitant minimum standards are necessary.²⁸⁶

3.6 Theoretical/Legal Requirements for Recognising an International Environmental Right

There is nothing that prevents states from recognising a new international environmental right, provided that a number of guiding principles informed by the theoretical foundations of human rights as well as a range of legal, pragmatic and political consideration are observed. Below is a discussion of some of the key theoretical/legal requirements for recognising a new international environmental right.

3.6.1 New Rights Must be Independently Justifiable

The requirement for new rights to be independently justifiable flows from the fact that the purpose of a new right is to avoid unnecessary proliferation of rights. Accordingly, an appropriate candidate for recognition must be something new which is not simply a repetition of existing rights and is independently justifiable.²⁸⁷ Furthermore, the right must have some inherent value and must not just be instrumental in fulfilling other related rights, a notion described by Donnelly as 'instrumental fallacy'. Donnelly argues that new rights must be capable of justification in their own right, not on the

²⁸³ Weston BH 'Toward a Recalibrated Human Right to a Clean and Healthy Environment: Making the Conceptual Transition' (2013) Vol 4 No.2 *Journal of Human Rights and the Environment* 119.

²⁸⁴ Shelton D 'Developing Substantive Environmental Rights' (2010) *Journal of Human Rights and the Environment* Vol 1, No.1, 97.

²⁸⁵ Weston BH & B David *Green Governance: Ecological Survival, Human Rights, and the Law of the Commons* (2013) 99.

²⁸⁶ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law* 55-80, 74-75.

²⁸⁷ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 60.

grounds that they facilitate the enjoyment of other rights.²⁸⁸ Given that existing rights have application in situations of environmental degradation, any definition of a right to a good environment which is defined by reference to human well-being would not satisfy the requirement for independent justification, as it would merely duplicate rights which are already protected.²⁸⁹

3.6.2 New Rights Must be Compatible with the Theoretical Foundations of Human Rights

Assessment of the appropriateness of recognising a proposed international environmental right in international human rights law should have regard to philosophical underpinnings of human rights in order to ensure that the rights which are recognised in legal instruments are consistent with the theoretical rationale for human rights.²⁹⁰ A number of theories attempt to explain the philosophical justification of rights, and in so doing, provide various tests for whether a particular object ought to be called a right.

3.6.2.1 Natural Rights Theory

Natural theory posits that each individual person is entitled to a number of fundamental rights which simply derive from their existence as human beings and consists of things that are essential for the protection and realisation of human dignity.²⁹¹ In the context of analysing the concept of a human right to development, Donnelly argues strongly that human rights can only be individual rights as they derive from human nature and consists of such things as are necessary to the protection and realisation of human nature and dignity.²⁹² Donnelly goes further to indicate that the proposal for the recognition of a third generation of 'solidarity rights' which would include a right to a healthy environment, is based on membership of a particular community and therefore doesn't meet the standard of natural theory because they do not accrue to an individual. It therefore follows that a right to a good environment can be justified in

²⁸⁸ Donnelly J 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development' (1985) 15 *California Western International Law Journal* 473,485.

²⁸⁹ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 62.

²⁹⁰ Merrills J G, 'Environmental Protection and Human Rights: Conceptual Aspects', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 25.

²⁹¹ Finnis J *Natural Law and Natural Rights* 2nd ed (2011) 272-273.

²⁹² Donnelly J 'Human Rights as Natural Rights (1982) 4 *Human Rights Quarterly* 391,497.

terms of the natural theory only if a good environment is seen as something necessary to advance human dignity in a way that does not merely reiterate the relationship between the environment and other rights which are already recognised. We must be able to identify some independent and indispensable contribution that a good environment makes to the pursuit of human dignity.

From the discussion above, one can infer that that natural rights theory imposes three requirements on a new environmental human right:

1. The right must be necessary to advance human dignity;
2. The right must be an individual right deriving from individual dignity not social membership; and
3. The right must be independently worthy in that it is not merely a restatement of existing rights and must avoid instrumental fallacy.

The challenges of articulating a proposed international environmental right in the context of the three requirements are bare. The environment is a *sine qua non* for our well-being, however, it is not possible to establish a good environment as something essential to human dignity without relying on some recognised right as an intermediate link, which makes it impossible for the natural theory to support it.²⁹³ It has already been established in chapter 2 that the prevalent view among a number of scholars of placing environmental human right in the new category of third generation rights, also referred to as solidarity rights, possibly falls foul of the requirement for a right to belong to an individual.

3.6.2.2 Will Theory

The will or choice theory assumes that rights flow from each individual's ability to choose and exercise free will.²⁹⁴ Explaining the will theory, Finnis indicates that 'the point and unifying characteristic of rules which entail or create rights is that such rules specifically recognise and respect a person's choice, either negatively by not impeding or obstructing it ... or affirmatively by giving legal effect to it'.²⁹⁵ As already observed

²⁹³ Lewis B *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (Unpublished PHD thesis, Monash University), (2014) 147.

²⁹⁴ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 66.

²⁹⁵ Finnis J *Natural Law and Natural Rights* 2nd ed (2011) 204.

earlier, the prevalent view among a number of authors is to place environmental rights in the new category of 'third generation rights'.²⁹⁶ The essential attribute of the will theory, human autonomy, seems to be at odds with any form of collective or solidarity right, suggesting that the will theory will only accept rights which flow from an individual's inherent will.²⁹⁷ The common concern we all have in the environment, and the nature of our relationship with the environment suggests that the right to a good or satisfactory environment cannot be satisfactorily sustained through the will theory.²⁹⁸

3.6.2.3 Interest Theory

Interest theory explains rights as those things that human beings are entitled to claim because they are necessary for their well-being and can impose obligations on others.²⁹⁹ We ascribe rights to protect highly valued interests such as liberty conscience, association and expression.³⁰⁰ For the right to an environment of a particular quality to pass the interest theory test, it must be shown that a good or satisfactory or healthy environment is in the human interest for some reason other than its instrumental value in achieving other human interests such as health. It may seem obvious that humans have an interest in maintaining a good environment, however, it is difficult to explain the precise nature of the interest without resorting to arguments which rely on the importance of environment to the enjoyment of other human rights.³⁰¹ Furthermore, arguments which rely on a general concern for the natural world seem to lack the universal character or specificity necessary to escalate them into a human right.

The analysis of the right to a good environment from different theoretical perspectives suggest that the two factors - the need for some link to essential human qualities or needs, and the imperative to avoid repetition of existing rights - combine to present a significant challenge to the task of justifying an international environmental right on the

²⁹⁶ Boyle A, 'The Role of International Human Rights Law in the Protection of the Environment', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 48.

²⁹⁷ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 66

²⁹⁸ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 66

²⁹⁹ Raz J *The Morality of Freedom* (1986) 166.

³⁰⁰ Caney S 'Cosmopolitan Justice, Rights and Global Climate Change' (2006) 19 *Canadian Journal of Law and Jurisprudence* 255, 259.

³⁰¹ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 70.

basis of current human rights theory.³⁰² The challenge lies in explaining how a good environment is essential to human dignity, autonomy or well-being without describing our relationship to the environment by reference to existing rights.

3.6.3 New Rights Must be Capable of Sufficiently Precise Definition

A new right recognised within international human rights law must be capable of definition precise enough to enable it to be attainable and capable of enforcement. We observed earlier that literature identifies a single and perhaps biggest challenge to the postulation of an international environmental right as defining its scope and content. In his proposal for quality control in the development of human rights law, Alston argues that rights must be sufficiently precise as to give rise to identifiable rights and obligations.³⁰³ Without normative precision, specific human rights may offer little practical benefit and may ultimately amount merely to symbolic statements of aspiration.³⁰⁴ Alston notes that new rights typically start off in a generalised form and then gradually, through jurisprudence and expert interpretation, greater specificity emerge.³⁰⁵ In the same vein, a new right must be defined clearly such that it is capable of implementation, however, it is not essential that the right be defined so precisely that it is justiciable in a court or tribunal.³⁰⁶ A number of key issues need to be addressed to satisfy the requirement of precise definition, including amongst others, the following:

1. What standard of environmental health or well-being is meant by a good environment?
2. To whom would states owe obligations? Is the right to be enjoyed by individuals or groups or both? and
3. Does the right only relate to an individual's/group's immediate environment or are they entitled to a good environment more broadly?

³⁰² Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 71.

³⁰³ Alaston P 'Conjuring Up New Rights: A Perspective for Quality Control' (1984) 78(3) *American Journal of International Law* 607,615.

³⁰⁴ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 71.

³⁰⁵ Alaston P 'Making Space for New Human Rights: The Case of the Right to Development' (1988) *Harvard Human Rights Yearbook* 3, 37.

³⁰⁶ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 72-73.

Analysis of literature indicates that most of these issues remain largely unsettled. Another related issue is the need to ensure precise definition which will enable enforcement. Ultimately, questions of enforcement and justiciability of a right to a good environment depend on how that right is defined, the obligations which it imposes and the standards which apply in discharging those obligations.³⁰⁷

3.6.4 New Rights Must Have Identifiable Rights-Holders and Duty-Bearers

A key feature of a legal right is that it is accompanied by corresponding duties, which are borne by a particular entity against whom the right can be claimed. A duty, in the absence of a multilateral treaty or convention, is supplied by customary international law which binds the states to uphold a right to a healthy environment.³⁰⁸ Right holders under international law are in most cases individuals, although some rights are considered to be possessed by groups collectively. Where the right to a good environment is defined independently of other existing right in order to be compatible with a number of human rights theories discussed above, then the class of potential claimants is very broad, making it difficult to identify a person or group with a sufficient interest to bring a claim in the case of the environmental harm.³⁰⁹ Atapattu is of the view that human rights are individual in nature and if many are affected by the same problem, then all victims have a cause of action against the perpetrator and that, by itself, should not make it a solidarity right.³¹⁰ Furthermore, the cumulative nature of environmental harms arising from climate change can make it difficult to identify the appropriate duty-bearer and to describe the geographic and temporal scope of their obligations.

3.6.5 New Rights Must be Capable of Attracting Sufficient Political Support

The requirements for admitting new rights to international human rights law cannot be considered in isolation from the political context in which those laws are created.

³⁰⁷ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 74.

³⁰⁸ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,335.

³⁰⁹ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 76.

³¹⁰ Atapattu S 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16 *Tulane Environmental Law Journal* 65, 113.

Alston suggests that the likelihood of receiving broad support from states must be a requirement for the recognition of new rights.³¹¹ Without strong support from states, new rights will not progress far in international law, and in practical sense there may be little point in pursuing new rights which have only a minimum chance of attaining adequate level of support. Weston and Bollier have identified that the attitudes of states towards the right to environment, and towards the environment generally, represent the principal barrier to the recognition of the right.³¹² Lewis cautions that a lack of political support is by no means fatal to a proposal to recognise a new right, and where there is a potential for states' attitude to shift over time, then advocates for new rights ought not to be discouraged.³¹³

Given that environmental protection can be advanced through the use of existing rights which are already recognised by states, the lack of political support for a new right, leads to a conclusion that our efforts should instead focus on better implementation of existing law.



3.7 Conclusion

The notion of an International environmental right and its benefits appeals to many authors and academics. On the other side there are those who even question the merit of even considering such a proposal, owing to a number of challenges mentioned above. A preliminary assessment of arguments for and against the recognition of an explicit international environmental right above indicates that an environmental human right proposal faces an insurmountable challenge before it can ever be realised. Furthermore, a cursory analysis undertaken above of a number of theories underpinning the recognition of new international human rights law seems to find the proposal for a new international environmental right not possible on the basis that it is linked to existing rights, or it seeks to protect things which are already recognised as rights. In addition, most of the other critical issues such as a need to ensure precise

³¹¹ Alaston P 'Conjuring Up New Rights: A Perspective for Quality Control' (1984) 78(3) *American Journal of International Law* 607, 77.

³¹² Weston BH 'Toward a Recalibrated Human Right to a Clean and Healthy Environment: Making the Conceptual Transition' (2013) Vol 4 No.2 *Journal of Human Rights and the Environment* 118.

³¹³ Lewis B 'Quality Control for New Rights in International Human Rights: A Case Study of the Right to a Good Environment' (2015) Vol 33 *Australian Year Book of International Law*, 55-80, 77.

definition and political support for the new right remain unsettled. The tentative conclusion thus far points to a need to rather focus attention on solidifying the use of existing human rights framework that is equally up to the task of tackling environmental concerns facing humanity. To that end, a better understanding of environmental dimensions of existing rights, and the mutually beneficial interactions between environment and human rights may be a worthwhile alternative, than a new right which arguably has limited prospects of achieving consensus.

The following chapter expands on the notion of an international environmental right by interrogating its status in international human rights framework.



4. CHAPTER FOUR

STATUS OF AN INTERNATIONAL ENVIRONMENTAL RIGHT

4.1 Introduction

Notwithstanding the touting of an international environmental right as a vehicle through which global environmental challenges could be addressed, the right itself has not managed to gain much traction. The right finds expression in only two regional binding agreements. This chapter interrogates the current status of the right by examining various sources of international human rights law such as international treaties, customary international law etc., to determine whether the various formulations of a new international environmental human right can be found.

4.2 International Environmental Right in International Human Rights Treaties

The international environmental right does not find expression in any international agreement except in two regional binding agreements. Instead, there are references to rights which have some indirect bearing on a healthy environment, such as the right of all people to an adequate standard of living and a continuous improvement in living conditions as recognised by the ICESCR,³¹⁴ the right to life in the ICCPR,³¹⁵ and the right of all people to a standard of living adequate for health in the UDHR.³¹⁶ Furthermore, other scholars argue that linkages between the rights to life and health and the environment, as developed in some UN Conventions such as the Rio Declaration and judicial decisions, could perhaps provide evidence that an international environmental right is developing as a principle of customary law.³¹⁷

³¹⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 3 (entered into force 3 January, 1976) Art 11.

³¹⁵ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS (entered into force 23 March 1976) Art 6.

³¹⁶ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810(10 December 1948) Art 25.

³¹⁷ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,305.

Handl asserts that there is no positive legal evidence that points to an existing or emerging generic environmental right.³¹⁸ As already indicated, there are two regional human rights instruments that recognise environmental human right, the Banjul Charter and the Protocol of San Salvador.

4.2.1 Banjul Charter

Banjul Charter provides that ‘all peoples shall have the right to a general satisfactory environment favourable to their development’.³¹⁹ The task of promoting and ensuring the rights enshrined in the Charter is bestowed on the African Commission on Human and Peoples’ Rights (ACHPR).³²⁰ Scholtz describes Article 24 as ‘the most explicit normative statement of an environmental right in any binding human right instrument’.³²¹ Article 24 of the Banjul Charter links the right to environment with development, which potentially runs the risk of it being negatively balanced by the right to development.³²² Churchill echoes the concern that such a link may lend credence to the idea that it is possibly biased in favour of development in case of conflict between the two.³²³ The Banjul Charter model of linking the right to environment with development is perhaps preferable in order to alleviate concerns by the less developed countries that are very sceptical about environmental protection at the expense of development, as indicated in the previous chapter. The charter also confers the right on ‘peoples’ rather than on individuals, indicating that it is a collective rather than an individual right.

The charter itself does not give an indication of what is meant by ‘a general satisfactory environment’ or the range of issues it might embrace. The Social and Economic Rights

³¹⁸ Gunther H ‘Human Rights and Protection of the Environment: A Mildly ‘Revisionist’ View’ 1992 *Human Rights, Sustainable Development and the Environment* (Inter-American Institute of Human Rights) 117, 133.

³¹⁹ *African Charter of Human and Peoples’ Rights*, opened for signature June 27 1981, 21 ILM 58 (entered into force 18 July 1978) Art 24.

³²⁰ *African Charter of Human and Peoples’ Rights*, opened for signature June 27 1981, 21 ILM 58 (entered into force 18 July 1978) Art 30.

³²¹ Scholtz W, ‘Human Rights and the Environment in the African Union Context’, in Scholtz W and Verschuuren J *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (2015) 107.

³²² Van der Linde M Louw L ‘Considering the Interpretation and Implementation of Article 24 of the African Charter on Humans and Peoples’ Rights in the Light of the SERAC Communication’ (2003) 3 *AHRLJ* 149,176.

³²³ Churchill R.R, ‘Environmental Rights In Existing Human Rights Treaties’, in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 106.

Action Centre (SERAC) decision³²⁴ by the ACHPR provides the most far-reaching interpretation of Article 24. SERAC and the Centre for Economic and Social Rights (CESR) brought a complaint before the ACHPR on behalf of the Niger Delta people of Nigeria (specifically Ogoniland) that the exploitation of oil reserves in Ogoniland infringed Article 24. The ACHPR stated that Article 24 requires a government to ‘take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources’, and accordingly found that the Federal Republic of Nigeria was in violation of, amongst others, Article 24.³²⁵ In commending the decision of the ACHPR, Scholtz indicates that the ACHPR effectively recognises both the procedural and substantive aspects of Article 24 and has ‘strengthened the general (vague) right with more specific elements, elucidating the parameters of Article 24’.³²⁶ In the same vein, Scholtz laments the failure of the ACHPR to unpack the conceptual or definitional elements of the ‘peoples’, and to provide clarity on the implications of the linkage between the right to a satisfactory environment and favourable development.³²⁷ Notwithstanding the silence of the SERAC case in providing clarity on the linkage between the right to a satisfactory environment and favourable development, Scholtz offers the following two interlinked perspectives on the matter:

1. Sustainable development reconfigures the right to development in order to ensure that environmental protection constitutes an integral part of the development process; and
2. The Banjul Charter anticipates the reconciliation of environmental and developmental considerations under the auspices of sustainable development,

³²⁴ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, communication No 155/96 (2002).

³²⁵ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, communication No 155/96 (2002) Par 22 & 60.

³²⁶ Scholtz W, ‘Human Rights and the Environment in the African Union Context’, in Scholtz W and Verschuuren J *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (2015) 107

³²⁷ Scholtz W, ‘Human Rights and the Environment in the African Union Context’, in Scholtz W and Verschuuren J *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (2015) 109-110.

and human rights can be at the centre of the integration of economic, social and ecological concerns.³²⁸

As Van der Linde puts it, the ACHPR gave clarity on the fact that although the right to a satisfactory environment can be balanced against development, 'the right to a satisfactory environment will not necessarily take a back seat if it impacts negatively on economic development'.³²⁹ One can therefore surmise that the notion of sustainable development should be able to reconcile the seemingly competing interests of those who advance the urgency of environmental protection through an environmental human right, and those who have the concern that such a right may come at the expense of development.

4.2.2 Protocol of San Salvador

The Protocol of San Salvador, adopted within the framework of the American Convention on Human Rights (ACHR) provides that:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation and improvement of the environment.³³⁰

The Protocol contains no definition or other indication of what is meant by a 'healthy environment' nor of what kind of measures are contemplated in the second paragraph. The inclusion of the additional guarantee relating to access to basic services seem to confirm that the quality of the environment contemplated is one which is linked to human well-being, as opposed to health of the environment per se. Churchill also asserts that in view of the heading of Article 11, the second paragraph should be read as referring only to measures which promote a healthy environment for humans.³³¹

³²⁸ Scholtz W, 'Human Rights and the Environment in the African Union Context', in Scholtz W and Verschuuren J *Regional Environmental Law: Transregional Comparative Lessons in Pursuit of Sustainable Development* (2015) 118 & 126.

³²⁹ Van der Linde & M Louw L ' Considering the Interpretation and Implementation of Article 24 of the African Charter on Humans and Peoples' Rights in the Light of the SERAC Communication' (2003) 3 *AHRLJ* 149,179.

³³⁰ *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights*, opened for signature November 17 1988, OAS Treaty Series No 69 (entered into force November 16 1999) Art 11.

³³¹ Churchill R.R, 'Environmental Rights In Existing Human Rights Treaties', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 99..

The provision of Article 1 and 2 of the Protocol simply require state parties to do what they can to promote a healthy environment as far as their resources allow, which ultimately renders the environmental right as encapsulated in Article 11 weak.³³² The Protocol limits the availability of individual petitions to specific alleged breaches (trade union rights and the right to education) with the result that individuals and groups cannot bring complaints to the commission based solely on alleged violations of Article 11.³³³ Notwithstanding the lack of specific justiciability, the commission has confirmed links between the environment and other human rights. For instance, Victor Abramovich, the Commission's Rapporteur on the Rights of Indigenous Peoples from 2008 to 2009, has remarked that:

Several fundamental rights require, as a necessary precondition for their enjoyment, a minimum environmental quality and are profoundly affected by the degradation of natural resources and that member States of the Organisation of American States must prevent the degradation of the environment in order to comply with their human rights obligations in the framework of the Inter-American System.³³⁴

One can conclude without hesitation that the work of the IACHR and the Protocol do not necessarily support the notion of a separate and independent substantive right, but instead affirm that Article 11 operates to expand and clarify the environmental dimensions of existing rights.

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4.3 International Environmental Right in Customary International Law

There is a suggestion from some scholars that an independent substantive environmental right is emerging in customary international law. As with treaties, customary international law is listed in Article 38(1)(b) of the *Statute of International Court of Justice* as a primary source of international law. Customary international law

³³² Churchill R.R, 'Environmental Rights In Existing Human Rights Treaties', in Boyle AE and Anderson MR (eds) *Human Rights Approaches to Environmental Protection* (1996) 99-100.

³³³ *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights*, opened for signature November 17 1988, OAS Treaty Series No 69 (entered into force November 16 1999) Art 19.6 & *La Oraya Community v Peru (Admissibility)*, Inter-American Commission on Human Rights Petition 1473-06, Report No. 76/09 (2009).

³³⁴ Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II Doc 56/09/(30 December 2009)[193].

is derived from consensus among states and can be deduced from general and consistent state as well as a sense of legal obligation (*opinion juris sive necessitas*).³³⁵ In assessing the degree of state practice to determine the emergence of an independent substantive environmental right, it is relevant to look at various sources such as treaties, domestic legislation and case law, decisions of international organisations and international judicial bodies, the statements of ministers or diplomatic representatives, soft law instruments and international declarations.

4.3.1 Soft Law Instruments

The link between human rights and environment is articulated in a number of soft law instruments, although lacking the binding force of international law, but can have a persuasive effect on the development of law. Below is a high level cursory analysis of some of the key soft law instruments to determine if there is any support for an international environmental right.

4.3.1.1 Stockholm Declaration

The 1972 *Stockholm Declaration*, considered to be the first statement at the international level to refer to a human right to an environment of quality provides as follows:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.³³⁶

However, it is important to note that the language reflecting the environment as part of a fundamental right was never repeated in subsequent international instruments of similar standing.³³⁷

³³⁵ Glazebrook JS 'Human Rights and the Environment' (2009) 25 40 *Victoria U. Wellington L. Rev.* 293,295.

³³⁶ Principle 1 of the Declaration of the United Nations Conference on the Human Environment, Stockholm 05-16 June 1972.

³³⁷ Knox, John, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Preliminary Report to the Human Rights Council, UN Doc A/HRC/22/43(24 December 2012) 6.

4.3.1.2 Report of the World Commission on Environment and Development: 'Our Common Future'

The World Commission on Environment and Development, also known as the *Brundtland Commission*, was formed in 1983 to investigate issues relating to environment and development. In 1987 the commission released a report entitled '*Our Common Future Report*' which argues that economic and environmental issues are linked. Furthermore, the Annex to the report includes legal principles, the first of which includes a fundamental right to an environment adequate for health and well-being.³³⁸

4.3.1.3 Rio Declaration

The outcome of the UN Conference on Environment and Development, convened in Rio de Janeiro in 1992 was the *Rio Declaration* which does not refer to an environmental right of a particular quality, instead it states that human beings are at the center of concerns for sustainable development and that they are entitled to a healthy and productive life in harmony with nature.³³⁹ Even though the *Rio Declaration* doesn't conceptualise the environment as a human right per se, other instruments built primarily on the statements contained in the Stockholm Declaration have emerged.

4.3.1.4 Special Rapporteur for Human Rights and the Environment and Draft Declaration of Human Rights and the Environment

In her final report to the Sub-Commission in 1994, the Special Rapporteur on Human Rights and the Environment appointed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities recognises the reciprocal relationship between human rights and the environment.³⁴⁰ Furthermore, the Draft Declaration of Principles on Human Rights and the Environment annexed to Ms. Ksentini's final report, specifically Article 2 and 6, provides for a stand-alone environmental right described as the right 'to a secure, healthy and ecologically sound environment'.³⁴¹

³³⁸ Our Common Future, Report of the World Commission on Environment and Development, UN GAOR 42nd sess, Agenda Item 83(e), UN Doc A/42/427,(04 August, 1987) annex (' Our Common Future').

³³⁹ United Nations Environment Programme, *Rio Declaration on Environment and Development, Rio de Janeiro*, UN Doc A/Conf.151/26 (14 June 1992) (Rio Declaration) principle 1.

³⁴⁰ U.N. ECOSOC, *Human Rights and the Environment, Final Report* (1994) UN Doc E/CN 4/Sub 2/1994/9(1994), par 248,251 & 252.

³⁴¹ Draft Principles on Human Rights and the Environment, in U.N. ECOSOC, *Human Rights and the Environment, Final Report* (1994) UN Doc E/CN 4/Sub 2/1994/9 (1994) Annex 1.

However, the influence of the Draft Declaration has been limited because it was never adopted or endorsed by the Human Rights Commission.³⁴²

4.3.1.5 Johannesburg Declaration for Sustainable Development

The outcome of the United Nations World Summit on Sustainable Development in Johannesburg in 2002 was the *Johannesburg Declaration*, which, like the Rio Declaration, avoids the use of human rights language.³⁴³ For instance, the Declaration identifies the impact that environmental degradation has on communities such as loss of fertile land due to desertification, but does not construct a good environment as a human right.³⁴⁴

4.3.1.6 Rio +20 and 'The Future We Want'

The outcome of the United Nations Conference on Sustainable Development in 2012 in Rio de Janeiro dubbed 'Rio +20' in 2002 was a report entitled '*The Future We Want*'.³⁴⁵ The report addresses a number of themes which point to the links between human rights and the environment such as undernourishment, overpopulation, dependency of the people on ecosystems for their livelihood. However, the declaration also steers clear of human rights language in addressing those problems, except in paragraph 121 where the 'human right to safe drinking water' is addressed.³⁴⁶

4.3.1.7 Summary of Soft Law

The discussion above indicates that state support for an international substantive environmental right, at least from a soft law perspective, ended with the *Stockholm Declaration*. Accordingly, in terms of the emergence of a customary right, there has been very little in the way of consistent state practice.³⁴⁷ The struggle for the

³⁴² Knox, John, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Preliminary Report to the Human Rights Council, UN Doc A/HRC/22/43(24 December 2012) 6-7.

³⁴³ *Johannesburg Declaration on Sustainable Development*, UN Doc A/Conf.199/20 (04 September 2002).

³⁴⁴ *Johannesburg Declaration on Sustainable Development*, UN Doc A/Conf.199/20 (04 September 2002, 13).

³⁴⁵ The Future We Want, GA Res 66/288, UN GACIR, 66th sess, 123rd plen mtg, Agenda Item 9, UN Doc A/RES/66/288(27 July 2012) annex 'The Future We Want'.

³⁴⁶ The Future We Want, GA Res 66/288, UN GACIR, 66th sess, 123rd plen mtg, Agenda Item 9, UN Doc A/RES/66/288(27 July 2012) annex 'The Future We Want'.30.

³⁴⁷ Lewis B *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (Unpublished PHD thesis, Monash University), (2014) 117.

development of an international environmental right to gain credence as a universally accepted right has been hampered by the fact that the right to environmental is generally seen as falling within the less well accepted (at least with regard to justiciability) economic, social and cultural rights.³⁴⁸ Furthermore, it has also been hampered by the fact that it is premised primarily on soft law instruments which is not recognised by legal traditionalists as sufficient evidence of international customary law.³⁴⁹

4.4 Environmental Right in National Constitutions

More countries are beginning to move towards constitutional entrenchment of the right to environment, a phenomenon known as environmental constitutionalism or global environmental constitutionalism. Environmental constitutionalism can generally be described as the protection of environmental rights and the way constitutions world over employ a rights based approach to address issues of environmental care.³⁵⁰ According to Kotzé, environmental constitutionalism in the thick sense could provide, among other things, for a rights based approach to environmental governance, including a right to a healthy environment.³⁵¹ The inclusion of environmental rights or duties in national constitutions may well reflect an emerging customary norm if it can establish consistent practice and *opini juris*.³⁵² Lee is also of the view that the extent and composition of national environmental laws is indeed an indication of state practice for customary law purposes, provided the laws in question are enacted with a sense of international obligation.³⁵³ In spite of the suggestion by some scholars that constitutional entrenchments of environmental rights may reflect customary norm, the

³⁴⁸ Glazebrook JS 'Human Rights and the Environment' (2009) 25 40 *Victoria U. Wellington L. Rev.* 293,310.

³⁴⁹ Rodríguez-Rivera LE 'Is the Human Right to Environment Recognized Under International Law? It Depends on the Source' (2001) 12 *Colorado Journal of International Environmental Law And Policy* 1, 40-41.

³⁵⁰ Kotzé LJ 'The Conceptual Contours of Environmental Constitutionalism' (2015) 21:87 *Widener Law Review* 187.

³⁵¹ Kotzé LJ 'The Conceptual Contours of Environmental Constitutionalism' (2015) 21:87 *Widener Law Review* 195.

³⁵² Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 128.

³⁵³ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,315.

OHCHR in a recent study alluded to the fact that such practice by states may well set the stage for a renewed debate on the status of customary law on an international environmental right, but fell short of suggesting that indeed a customary right is emerging.³⁵⁴ It is therefore submitted that the assertion by some scholars that the significance of constitutional entrenchments of environmental rights by a number of states is evidence of a customary international environmental right has not translated into practical actions by the global community in furthering environmental protection by way of an international environmental right. Be that as it may, environmental constitutionalism, to the extent that it manifests consistent state practice, has the potential to grow into an influential field that provides a basis for the development of an international environmental right.

4.5 Conclusion

It is now an established fact that an international environmental right does not find expression in any international agreement, except in only two binding regional instruments, the Banjul Charter and the Protocol of San Salvador, applicable in Africa and Latin America respectively. The very recognition of an international environmental right in regional binding human rights instruments is encouraging, however, a more widespread acceptance is necessary before any claim to universal development can be made.³⁵⁵ Handl echoes that fact when he asserts that Article 24 of Banjul Charter is 'hardly the kind of solid evidence of positive international law that is required to prove the existence of a generic entitlement in general international law'.³⁵⁶ The discussion above has also demonstrated that state support for an international substantive environmental right, at least from a soft law perspective, has disappeared since the 1972 *Stockholm Declaration*. The practice of inclusion of environmental rights or duties in national constitutions is indeed touted by some scholars as an indication of state

³⁵⁴ Office of the High Commissioner for Human Rights (OHCHR), *Analytical Study on the Relationship Between Human Rights and the Environment*, 16 December 2011, UN Doc.A/HRC/19/34('OHCHR Analytical Study').

³⁵⁵ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,307-308.

³⁵⁶ Atapattu S 'The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law' (2002-2003) 16 *Tulane Environmental Law Journal* 65, 87.

practice for customary law purposes, thus supporting the customary international environmental right. However, the adoption of constitutional environmental rights by a number of states, seen as evidence of a customary international environmental right by others, must be augmented by concrete and progressive measures by the international community towards crystallising the recognition of an international environmental right.



5. CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Global challenges arising from environmental degradation, including climate change, the impact thereof on the enjoyment of human rights, and the quest to find a solution that will galvanise the global community is at the heart of this thesis. The primary research question sought to be explored and answered as determined in chapter 1 is whether the idea of using a human rights based approach by recognising an international environmental right to address global environmental concerns, including climate change, has any merit, having regard to legal, practical, theoretical and political considerations. To that end, chapter 2 commenced by delving into the environment and human rights discourse that can be traced back to Principle 1 of the 1972 Stockholm Conference on the Human Environment. Analysis of scholarly literature and studies commissioned by the UN pointed to the existence of a common consensus that there is a direct relationship between human rights such as the right to health, life etc. and the environment. The most significant affirmation of the synergy between the environment and human rights finds expression in the pronouncement by the UN that a better and healthier environment can help contribute to the full enjoyment of human rights by all.³⁵⁷ Notwithstanding the fact that human rights and the environment are interdependent, complimentary and indivisible, not all human rights violations are necessarily linked to environmental degradation.

The secondary research question sought to be answered by this thesis relates to the benefits and limitations of a rights based approach for climate change. The key finding by the OHCHR that the effects of climate change pose direct and indirect threats to human lives, thus affirming a link between climate change and human rights was established in chapter 2. Notwithstanding the linkage between human rights and climate change, the key limitation of a rights based approach in the context of climate change, relates to treating the effects of climate change as human rights violations, owing to, amongst others, the complex causal relationship linking the emissions of a

³⁵⁷ G.A Res. 45/94. 68th plen.mtg, Need to Ensure a Healthy Environment for the Well-being of Individuals, U.N GOAR, 45th Sess, U.N Doc. A/RES/45/94 at 178 (Dec.14, 1990).

particular country to a specific effect. What remains uncontested is the fact that the benefits of human rights approaches to issues of environmental protection, including climate change, imbue environmental issues with the normative value associated with human rights. Chapter 2 concluded that the national and international developments reflect the growing interrelationship between approaches to guaranteeing human rights and environmental protection and that environmental protection is a prerequisite for the realisation of human rights.

Having concluded in chapter 2 that human rights and the environment, including climate change, are interdependent, chapter 3 went further to examine broader issues intended to unpack the notion of an international environmental right, how it can possibly be constructed, having regard to the existing international human rights framework, and the feasibility of deploying such a right to address global environmental degradation, including climate change, having regard to a number of theoretical aspects underpinning recognition of new rights in international human rights law. The proposal for the formulation and recognition of a substantive international environmental human right to address global environmental challenges is recommended by some scholars as a solution, particularly having regard to the limitations inherent in other human rights approaches to tackle climate change. However, assessment of arguments for and against the recognition of a substantive international environmental right reveals that the recognition of such a right is not likely to be achieved, having regard to a number of unresolved issues such as how it is to be constructed and treated in the existing human rights framework, the definitional ambiguity associated with attempts to define its scope, the fact that it is inherently anthropocentric, lack of political support from other nations etc. Analysis of the characteristics of the proposed right seems to point to a fact that it already exists in other expressly recognised human rights, thus rendering it duplicative. Accordingly, the difficulty of defining a good environment as something which has sufficient value to humans to justify its inclusion as a human right, without referencing it to the rights which are already recognised in international human rights law seems to be illusive. In addition, existing scholarship analysed in chapter 3 points to a range of other challenges facing the proposal for an international environmental right, including amongst others, the concern that it might devalue other existing human rights, lack of positive evidence pointing to existing or emerging environmental human right, and its

inability to find foundational support with human rights theories. Accordingly, chapter 3 concluded that the proposal for the recognition of an international environmental right, noble as it is, faces insurmountable challenges and may not be realised, at least in the near future, until the challenges are satisfactorily addressed.

Against the backdrop of serious headwinds facing the proposal for the recognition of an international environmental right, chapter 4 assessed if there is a way the proposal could possibly be salvaged by examining whether the right finds expression in various sources of international human rights law such as treaties, customary international etc. What transpired is that notwithstanding the touting of an international environmental right as a vehicle through which global environmental challenges could be addressed, the right itself has not managed to gain much traction. The right has not been explicitly recognised in a multilateral treaty or convention that legally binds the nations of the world to that recognition except two regional binding agreements, the Banjul Charter (Africa) and the Protocol of San Salvador (Latin America). To that end, it was indicated that some scholars argue that the Banjul Charter and the Protocol of San Salvador is indicative of an international environmental right as a developing regional principle of customary international law.³⁵⁸ Notwithstanding such assertions, both the Banjul Charter and the Protocol of San Salvador cannot be seen as representative of global consensus of the existence of an international environmental right. A more widespread acceptance is clearly a prerequisite before it can be convincingly argued that there are indications of global development of an international environmental right.

Analysis of various soft law instruments, though lacking the binding force of international law, but have persuasive influence on the development of law, was undertaken in chapter 4. The analysis revealed that state support for an international substantive environmental right, at least from a soft law perspective, has disappeared since the 1972 *Stockholm Declaration*. The work of the UN on the relationship between the environment and human rights indicates that so far, states have been reluctant to respond positively to the suggestion of recognising a new independent environmental human right, including the idea of expanding the use of human rights to address climate change. As a matter of fact, to date, the proposal has not even progressed to

³⁵⁸ Lee J 'The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law' (2000) 25 *Columbia Journal of Environmental Law* 283,307.

the diplomatic stage where it could be included within a declaration or treaty representing global consensus. As already pointed out, without strong support from states, there is absolutely no impetus in pursuing new rights which have only a minimum chance of attaining adequate level of support.

The growing phenomenon of global environmental constitutionalism as evidence of a customary international environmental right was also examined in chapter 4. Regrettably, one is bound to agree with the findings of the OHCHR Report Study that environmental constitutionalism merely provides the necessary impetus for a renewed debate on the status of customary law on an international environmental right. If the study had gone a step further by affirming that a customary international environmental right is emerging from codification of constitutional environmental rights by a growing number of states, that would have marked significant progress towards the recognition of an international environmental right.

There is absolutely no doubt that the relationship between environment and human rights is interlinked and interrelated, and that provides a solid foundation for addressing global environmental challenges, including climate change, which impact negatively on the lives of many people. The proposal to recognise an international environmental right as a solution to addressing such environmental challenges faces a number of hurdles. It has not managed to find express affirmation in a multilateral agreement except only two regional agreements. The definitional challenge plaguing the proposal has not assisted in taking the proposal forward. The task of constructing the right in a precise manner that will make it justiciable and practically feasible, particularly in the climate change context, seems to be illusive.

Undoubtedly, there are benefits to be gained from a human rights approach, but such benefits can be accessed under existing human rights without having to recognise a new international environmental right. All indications point towards a need to rather focus attention on solidifying the use of existing human rights such as the right to life and health that are equally up to the task of tackling environmental concerns facing humanity. To that end, a better understanding of environmental dimensions of existing rights, and the mutually beneficial interactions between environment and human rights may be a worthwhile alternative than a new right, which arguably has limited prospects of achieving consensus in terms of its scope and implementation.

In spite of the view that attempts to recognise an international environmental right have little prospect of success, at least at this juncture, the future outlook is not absolutely bleak. Formulations of an environmental right in international agreements, albeit regionally, attest to the viability of furthering environmental protection as a fundamental right on an international level.³⁵⁹ Indeed as asserted by some scholars, there is strong evidence that an environmental right has attained the status of a rule of regional customary international law in Latin America and Africa. Furthermore, the growing number of states that have codified environmental rights in their constitutions suggest that an international environmental right is developing as a general principle of international law. Accordingly, the global environmental constitutionalism phenomenon, to the extent that it manifests consistent state practice, has the potential to grow into an influential field that shapes and influences the development and ultimate realisation of an international environmental right. Having said that, it is submitted that more still needs to be done, particularly in the area of defining the scope of the right, attracting sufficient political support, and resolving complex causal relationships linking the emissions of a particular country to a specific effect, in the context of climate change.

Finally, after careful consideration of scholarship and current status of an international environmental right, having regard to hard and soft law, theories of human rights, practical considerations, this thesis concludes that the notion of an international environmental right is not a viable option to be pursued, at least at this juncture, within the human rights law because it has limited prospects of achieving consensus in terms of its scope and implementation. International law already incorporates rules and principles for ensuring environmental quality, thus, it is not clear what would be added if such rules and principles were to be reformulated in the form of an explicit international environmental right.

³⁵⁹ Shelton D 'Human Rights, Environmental Rights, and the Right to Environment' (1991-1992) 28 *Stan. J. Int'L.* 103, 138.

5.2 Recommendations

Rather than pursue the option of the recognition of an international environmental right to tackle environmental problems, including climate change, facing humanity, it is recommended that:

5.2.1 All efforts be directed towards understanding of environmental dimensions of existing rights in order to maximise the use of existing human rights to tackle global environmental challenges, including climate change; and

5.2.2 More work be done to clarify the obligations of states to respect, protect and fulfil human rights in the context of climate change, and in particular to understand how human rights laws can accommodate the transnational and long impacts of climate change.

[Final word count (chapters and footnotes only) = 30 222]



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