

Concept of Substantive Human Right to Environment under International Public Law

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Published: 12 March 2019

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Abstract:

This paper deals with the identification and analysis of the formal sources of international public law that enshrine the substantive human right to environment. The main goal of this paper is to identify the form how is this new human right enshrined in international public law, resp. in its branches international environmental law and international human rights law, and how it is dealt with in the case law of international courts.

Key words: International Public Law, International Environmental Law, International Human Rights Law, environmental human rights, substantive human right to the environment.

Foreword

Existing international public law allows us to identify international documents that enshrine many human environmental rights. One of them is the substantive human right to environment, which represents a relatively new element in international human rights catalogues. It is a human right that has gradually become established in international public law since the 1970s, with the mechanisms of its protection developing itself in the interaction of the relevant rules of two sectors (or, according to some opinions, subsections) of international public law – international environmental law and international human rights law. The main goal of this paper is to identify the form how is this new human right enshrined in international public law, resp. in its branches international environmental law and international human rights law, and how it is dealt with in the case law of international courts.

1. First steps in order to implement substantive human right to environment into international environmental law

With an increase of the importance of the status of an individual as one of the subjects of international public law, the individual was first established in international public law as a responsible subject with "passive legal legitimacy" after World War II, in the context of prosecuting crimes under international law. The first international tribunals acting in order to prosecute those crimes were the International Military Tribunal at Nuremberg and International Military Tribunal for the Far East at Tokyo. At the present times there are other tribunals and courts with the similar powers - the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court.¹

After the Second World War, however, the second level of the individual's active role at the international scene is developing in the position of the recipient of the rights and freedoms established by international normativity.² An immediate impetus for the development of this active role was the adoption of the Universal Declaration of Human Rights (1948) and, consequently, the adoption of binding conventions guaranteeing human rights and freedoms to all human beings or certain groups of persons.³ However, these documents contained only a minimum of human environmental rights. The relatively rapid socio-economic development, especially on the European continent, has led to the gradual expansion and enrichment of human rights catalogues, including human rights of an environmental nature. At present, it is possible to identify in international law the total of six purely environmental human rights, including three substantively understood environmental rights – the right to the environment, the right to water and the right to safe environmental health conditions and three procedural environmental rights - the right to access to environmental information, the

¹ Zástěrová, J. (2004) Jednotlivci: právo na životní prostředí. In: Šturma, P. a kol. Mezinárodní právo životního prostředí, I. část (obecná). Beroun: IFEC, 2004. p. 36.

² Zástěrová, J. (2004) Jednotlivci: právo na životní prostředí. In: Šturma, P. a kol. Mezinárodní právo životního prostředí, I. část (obecná). Beroun: IFEC, 2004. p. 36.

³ Klučka J. (2017) Mezinárodní právo veřejné (Všeobecná a osobitná část). Bratislava: Wolters Kluwer, 2017. p.79-80.

right to participate in environmental decision-making and the right to access to legal protection in environmental matters.

The first and crucial step in this direction was the creation of the concept of substantively understood human right to environment, which is the most widely understood environmental right. The first "whistleblower" indicating the creation of this right was the establishment of two articles of the International Covenant on Economic, Social and Cultural Rights (1966).⁴ Article 11 (1) of this covenant reads: "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent." The formulation "right of everyone ... to the continuous improvement of living conditions" already indirectly indicates the need to formulate right to environment. Article 12 (1) of the covenant reads: "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." Article 12 (2b) reads: "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: ... (b) The improvement of all aspects of environmental and industrial hygiene." These two provisions indicate the primary existence of human right to safe hygienic environmental conditions, but its formulation "improvement of all aspects of environmental hygiene" indirectly indicates the need to recognize the existence of the right to environment as well as the similar provision of Article 11 (1) pact.

Scientific discussion on the stabilization of the new human right to environment (further even shortened "right to environment"), understood as substantive right, also in line with the provisions of the *International Covenant on Economic, Social and Cultural Rights* (1966), strengthened in the mid-sixties of the twentieth century.⁵ The result of this discussion was the embodying of this right, according to some views of international public law science understood as a basic human right⁶ into an international document of a fundamental nature for the protection of the environment - *Declaration of the United Nations Conference on the Human Environment* adopted at the United Nations Conference on the Human Environment, June 5-16, 1972, Stockholm. *Declaration of the United Nations Conference on the Human Environment*.⁷ Principle 1 of this declaration reads: "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits

⁴ International Covenant on Economic, Social and Cultural Rights (1966), United Nations, Treaty Series, vol. 993, p. 3.

⁵ Zástěrová, J. (2004) Jednotlivci: právo na životní prostředí. In: Šturma, P. a kol. Mezinárodní právo životního prostředí, I. část (obecná). Beroun: Eva Rozkotová - IFEC, 2004. p. 36.

⁶ Zástěrová, J. (2004) Jednotlivci: právo na životní prostředí. In: Šturma, P. a kol. Mezinárodní právo životního prostředí, I. část (obecná). Beroun: Eva Rozkotová - IFEC, 2004. p. 37.

⁷ Declaration of the UN Conference on the Human Environment, Stockholm, 5-16 June 1972, UN Doc. A/Conf. 48/14/Rev. 1 (1972)

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

The enactment of human right to environment in the Declaration of the Stockholm Conference on the Human Environment has influenced next international public law normativity. This right was implemented in various other international instruments and conventions adopted within the framework of the United Nations, conferences organized by the United Nations, international organizations associated to the United Nations as well as conventions and documents international regional organizations.

Almost twenty years after the Stockholm Conference, in resolution 45/94 (1990) , the UN General Assembly recalled the language of the Stockholm Declaration, stating that it: *“Recognizes that all individuals are entitled to live in an environment adequate for their health and well-being; and calls upon Member States and intergovernmental and non-governmental organizations... to enhance their efforts towards ensuring a better and healthier environment.”.*⁸

2. European, American a Asian Documents Enshrining Substantive Human Right to Environment

The right to environment was then anchored even at the European regional level in the binding form by the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (1998, the Aarhus Convention), which was adopted by the UN Economic Commission for Europe.⁹

The Aarhus Convention is a new type of convention on international environmental law, which links international environmental law and international human rights law. Right to environment is primarily enshrined in the preamble to the Convention in the wording of *“...every person has the right to live in an environment adequate to his or her health and well-being...”*. Furthermore, this right is referred to in Article 1 of the Convention, entitled *“Purpose”*, within the formulation *„in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.“* For the first time, right to environment has been explicitly recognized in the Aarhus Convention in the operative provisions of the international legal instrument at the European level.¹⁰ Article 1 of the Aarhus Convention creates a very specific form of protection of substantive right to environment. In the second part of the article there is evident a clear recognition of the substantive right to environment.

⁸ Resolution „Need to Ensure a Healthy Environment for the Well-Being of Individuals“, G.A. Res. 45/94, at paras. 1-2, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/94 (Dec. 14, 1990).

⁹ Convention on Access to Information, Public Participation on Decision-making and Access to Justice in Environmental Matters (1998), United Nations, Treaty Series , vol. 2161, p. 447.

¹⁰Déjant-Pons,M. –Pallemaerts,M. (2002) Human Rights and the Environment. Strasbourg: Council of Europe, 2002. p.16-17.

However, it is clear from the first part of this article that the protection of this right will be exercised through three procedural rights, which can be called procedural environmental rights between which there is a unique relationship.¹¹

As far as the other regional conventions are concerned, an internationally binding *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights* (1969),¹² to the *American Convention on Human Rights* (1969),¹³ which was adopted within the framework of the Organization of American States, is significant. That additional protocol in Article 11 enshrines the wording "... everyone has the right to live in a healthy environment ...". This article establishes right to environment, but this right cannot be invoked under the procedure of individual complaints, given that this protocol only establishes a reporting procedure in relation to the control of application of its content. The Protocol as such enshrines the right to complain about violations of the right to education and the right to freedom of labour only.¹⁴ However, the right to environment can be protected, in particular, by a wider interpretation of other rights enshrined in the American Convention on Human Rights (1969).

Human right to environment is enshrined even in the ASEAN Human Rights Declaration.¹⁵ Article 28 of this Declaration sets out a number of human environmental rights, including human right to the environment. According to the diction of Art. 28 Sec. f) "*Every person has the right to an adequate standard of living for himself or herself and his or her family including...The right to a safe, clean and sustainable environment...*".

3. African Documents and Case Law concerning Substantive Human Right to Environment

The Special Dimension of the Protection of the Rights of the Environment is developed by the *African Charter on Human and Peoples' Rights* (1981, hereinafter referred to as the African Charter),¹⁶ adopted within the framework of the African Unity Organization, later transformed into the African Union. African Charter states in Article 24, "*All peoples shall have the right to a general satisfactory environment favourable to their development.*". In the case of this Convention, however, it is rather a collective right belonging to all nations, although its individual dimension is not excluded. The African Charter allows for the filing of

¹¹Déjant-Pons, M. – Pallemaerts, M. (2002) Human Rights and the Environment. Strasbourg: Council of Europe, 2002. p.18.

¹²Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (1988), O.A.S. Treaty Series No. 69 (1988) reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 67 (1992).

¹³American Convention on Human Rights (1969), O.A.S. Treaty Series No. 36 (1969).

¹⁴Anton, D.K. – Shelton, D.L. (2011) Environmental Protection and Human Rights. Cambridge: Cambridge University Press, 2011. p.519.

¹⁵ Association of Southeast Asian Nations (ASEAN), ASEAN Human Rights Declaration, 18 November 2012, available at: <https://www.refworld.org/docid/50c9fea82.html> [accessed 21 January 2019]

¹⁶ African Charter on Human and Peoples' Rights (1981), OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

a complaint on this right to the African Commission on Human and Peoples' Rights,¹⁷ as a quasi-judicial body with a non-binding investigative and conciliation power, which may in certain circumstances also refer the case to the African Court on Human and Peoples' Rights.¹⁸ This court can decide on referred cases in a binding manner.

From the practice of the African Commission on Human and Peoples' Rights, the case concerning the protection of the right to environment, abbreviated as *Ogoni against Nigeria* (2001), is already known. In the context of this case, in March 1996, two non-governmental organizations filed a complaint. It was the Social and Economic Rights Action Centre (Nigeria) and the Centre for Economic and Social Rights (USA). This complaint dealt with a relatively large number of alleged serious violations of the human rights of the indigenous people of Ogoni, understood as an ethnic minority in the Nigerian state of Rivers. The complaint alleged that the military government of Nigeria was directly involved in irresponsible oil mining practices in the Ogoni region.

The Complainants allege that the Nigerian Government violated e.g. the right to clean environment as recognised under Article 24 of the African Charter by failing to fulfil the minimum duties required by this right. This, the Complainants allege, the government has done by directly participating in the contamination of air, water and soil and thereby harming the health of the Ogoni population, by failing to protect the Ogoni population from the harm caused by the NNPC Shell Consortium but instead using its security forces to facilitate the damage and by failing to provide or permit studies of potential or actual environmental and health risks caused by the oil operations.

African Commission on Human and Peoples' Rights found that the Federal Republic of Nigeria violated e.g. Article 24 of the African Charter in this case. This Commission appealed to the government of the Federal Republic of Nigeria to ensure protection of the environment, health and livelihood of the people of Ogoni, by stopping all attacks on Ogoni communities and leaders by the Rivers State Internal Securities Task Force and permitting citizens and independent investigators free access to the territory, by conducting an investigation into the human rights violations described above and prosecuting officials of the security forces, NNPC and relevant agencies involved in human rights violations, by ensuring adequate compensation to victims of the human rights violations, including relief and resettlement assistance to victims of government sponsored raids, and undertaking a comprehensive clean-up of lands and rivers damaged by oil operations, by ensuring that appropriate environmental and social impact assessments are prepared for any future oil development and that the safe operation of any further oil development is guaranteed through effective and independent oversight bodies for the petroleum industry and by providing

¹⁷ As for the activity of this body look Jankuv, J. et al. (2016) *Medzinárodnéprávoverejné. Druháčast'*. Plzeň: AlešČeněk, 2016. p.214-215.

¹⁸ As for the activity of this body look Jankuv, J et al.(2016) *Medzinárodnéprávoverejné. Druháčast'*. Plzeň: AlešČeněk, 2016. p.215.

information on health and environmental risks and meaningful access to regulatory and decision-making bodies to communities likely to be affected by oil operations.

This decision, for the first time in history, ruled directly that certain state violated substantive right to environment and ordered extensive environmental clean-up measures to be taken by this state.¹⁹ The African Charter is thus the only regional mechanism that allows direct access to environmental protection from the quasi-judicial authorities, but also from the international court.

4. Concept of Substantive Human Right to Environment under International Public Law

The abovementioned legal arrangements allow us to state that the enactment of the substantive right to environment is visible in international public law. Given the enshrining of this right in the Stockholm Declaration, the Aarhus Convention, within the American, African and Pacific regions in binding, non-binding and soft law documents, it is clear that more detailed mechanisms for protection of this right are being developed in practice. This process is also supported by the practice of many states that incorporate this right into their legal orders and create scope for the customary enactment of this right.²⁰ This reality enables us to think about the concept of substantive human right to environment under international public law.

Coming up from the evaluation of relevant international public law documents and case law we take the view that the individually perceived substantive human right to the environment is now widely recognized²¹ and may, in a relatively short time, be embedded in the customary form binding *erga omnes*. There are even opposite views in the science of international public law presented by mainly by G. Handl considering the concept of substantive human right to the environment highly questionable because of various reasons.²² Arguments of this author are relative clearly and precisely denied by L.E. Rodriguez-Rivera by our opinion²³ and we are leaning towards his point of view.

¹⁹ See Boer, B. (2015) Human Rights and the Environment: Where Next? In: Boer, B. (ed.) Environmental Law Dimensions of Human Rights. Oxford: Oxford University Press, 2015. p.224.

²⁰ Cullet, P. (2016) Human Rights and Climate Change. Broadening the Right to Environment. In: Carlane, C.P. - Gray, K.R. - Tarasofsky, R.G. (2016) The Oxford Handbook of International Climate Change Law. Oxford: Oxford University Press, 2016. s. 507.

²¹ Zástěrová, J. (2014) Jednotlivci: právo na životní prostředí. In: Šturma, P. a kol. Mezinárodní právo životního prostředí, I. část (obecná). Beroun: Eva Rozkotová - IFEC, 2004. s. 37.

²² Anton, D.K. - Shelton, D.L. (2011) Environmental Protection and Human Rights. Cambridge: Cambridge University Press, 2011. s.139-141 and Handl, G. (2001) Human Rights and Protection of the Environment. In: Eide, A.-Krause, C. - Rosas, A. (eds.) (2001) Economic, Social and Cultural Rights. Nijhoff, 2001. p.303-315.

²³ Rivera – Rodriguez, L.E. Is the Human Right to Environment Recognized under International Law? In: Colorado Journal of International Environmental Law and Policy, Vol. 12, No.1, (2001) p. 31-37.

The views of L.E. Rodriguez-Rivera and other international public law scientist are strongly supported by recent report *Framework Principles on Human Rights and the Environment (2018)*²⁴ of professor J.H. Knox - Special Rapporteur on human rights and the environment of the United Nations Human Rights Council.

Under this report *“Human rights and environmental protection are interdependent. A safe, clean, healthy and sustainable environment is necessary for the full enjoyment of human rights, including the rights to life, to the highest attainable standard of physical and mental health, to an adequate standard of living, to adequate food, to safe drinking water and sanitation, to housing, to participation in cultural life and to development, as well as the right to a healthy environment itself, which is recognized in regional agreements and most national constitutions. At the same time, the exercise of human rights, including rights to freedom of expression and association, to education and information, and to participation and effective remedies, is vital to the protection of the environment.”*²⁵

Further prof. Knox emphasizes that *“The obligations of States to respect human rights, to protect the enjoyment of human rights from harmful interference, and to fulfil human rights by working towards their full realization all apply in the environmental context. States should therefore refrain from violating human rights through causing or allowing environmental harm; protect against harmful environmental interference from other sources, including business enterprises, other private actors and natural causes; and take effective steps to ensure the conservation and sustainable use of the ecosystems and biological diversity on which the full enjoyment of human rights depends. While it may not always be possible to prevent all environmental harm that interferes with the full enjoyment of human rights, States should undertake due diligence to prevent such harm and reduce it to the extent possible and provide for remedies for any remaining harm.”*²⁶

A very important moment as for the protection of substantive right to environment is to identify the legal boundaries and the obstacles to the enforcement of this public subjective right in practice and to create relevant legal regulations. In this context, it is very useful to reflect on its content. In its most basic form, right to environment could be associated with the existence of an environment that is suitable for sustaining a human life that is a "viable" environment in a literal sense. From the point of view of the content of substantive human right to environment, it is also interesting to look at the definition of the term "environment". In our view, it is appropriate to draw attention to the definition of the environment in the *Convention on Civil Liability for Environmental Damage (1993)* which defines the environment as "natural and non-living natural resources such as air, water, soil, fauna and flora, and interactions between these factors, as well as the objects that form part of the cultural heritage and the characteristics of the earth's surface. " In the context of full securing of right to environment, in connection with this definition, it is necessary to ensure that natural and non-living resources such as air, water, soil, fauna and flora are of such a quality

²⁴ Knox, J.H. (2018) *Framework Principles on Human Rights and the Environment*, UN Doc. A/HRC/37/59(2018). 24p.

²⁵ Knox, J.H. (2018) *Framework Principles on Human Rights and the Environment*, UN Doc. A/HRC/37/59(2018). p.6.

²⁶ Knox, J.H. (2018) *Framework Principles on Human Rights and the Environment*, UN Doc. A/HRC/37/59(2018). p.6.

as to enable the full and healthy life of the individual or community of the people. In the context of the interpretation of the content of right to environment, it must be borne in mind that the objective of international environmental law is to achieve sustainable development. From this point of view, right to environment can also be defined as the right of the person to live in the environment, which allows him to satisfy his or her basic living needs and to use it in his favour, so as not to reduce the diversity of nature and preserve the natural functions of ecosystems. The right of an individual to environment has the character of a subjective public right, which enables to meet to human being basic living needs. This right must also be ensured through the obligations of the States. The international legal arrangement in the area should reflect even the fact that the state not only guarantees, but also provides realistically (with the use of legal and economic instruments) the state where its territory or the environment is not burdened by human activity beyond the limit values for permissible levels of environmental pollution laid down in a standard of international law and related national generally binding legislation or laid down by a decision of the competent national authority. States should take even measures to prevent the risk of irreversible or serious damage to the environment. In order to ensure the protection of right to environment, it is also necessary to resolve its relation to the right to water and the right to sanitation. Both of these rights are, in our opinion, part of right to environment in the scope of its wider interpretation. It is also necessary to address the question of the nature of the right to environment, since in its international arrangements in the area contains both its individual and collective understanding

Conclusion

Scientific discussion on the stabilization of the new human right to environment, understood as substantive right, strengthened in the mid-sixties of the twentieth century. The result of this discussion was the embodying of this right, according to some views of international public law science understood as a basic human right into an international document of a fundamental nature for the protection of the environment - Declaration of the United Nations Conference on the Human Environment adopted at the United Nations Conference on the Human Environment, June 5-16, 1972, Stockholm. Declaration of the United Nations Conference on the Human Environment. Principle 1 of this declaration reads: "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."

The enactment of human right to environment in the Declaration of the Stockholm Conference on the Human Environment has influenced next international public law normativity. This right was implemented in various other international instruments and conventions adopted within the framework of the United Nations, conferences organized by the United Nations, international organizations associated to the United Nations as well as conventions and documents international regional organizations.

Leading document enshrining right to environment at the European regional level is Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998, the Aarhus Convention). Aarhus convention contains the declaratory recognition of the existence of substantive right to environment. But in fact, does not protect this right directly since protects this right through three procedural environmental rights. American and Asian mechanisms of protection of human rights does not protect this right directly either.

Therefore, the leading mechanism as far as the direct protection of this right is concerned is the African Charter on Human and Peoples' Rights (1981, hereinafter referred to as the African Charter), adopted within the framework of the African Unity Organization, later transformed into the African Union. African Charter states in Article 24, "All peoples shall have the right to a general satisfactory environment favourable to their development.". In the case of this Convention, however, it is rather a collective right belonging to all nations, although its individual dimension is not excluded. The African Charter allows for the filing of a complaint on this right to the African Commission on Human and Peoples' Rights, as a quasi-judicial body with a non-binding investigative and conciliation power, which may in certain circumstances also refer the case to the African Court on Human and Peoples' Rights. This court can decide on referred cases in a binding manner.

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²⁷ See Boer, B. Human Rights and the Environment: Where Next? In: Boer, B. (ed.) Environmental Law Dimensions of Human Rights. Oxford: Oxford University Press, 2015. p.224.

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