Does a human rights-based approach to climate change lead to ecological justice?

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Introduction

The 2007 Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) clarifies with more than ninety per cent certainty that anthropogenic greenhouse gas (GHG) emissions have led to most of the global warming\(^1\) occurring in the course of the past fifty years.\(^2\) It reflects the scientific agreement that global warming is “unequivocal”\(^3\). At the same time, the consequences of climate change go beyond environmental harm and affect the enjoyment of a wide range of human rights.\(^4\) However, this burden is not equally shared around the world. Groups who are already vulnerable because of factors such as poverty and minority status will suffer most from the consequences of climate change\(^5\), albeit they contributed least to the problem. This divergence amounts to what can be described as ecological injustice.

States decided in the United Nations Climate Change Conference, Cancun 2010, to establish a green climate fund to finance mitigation and adaptation actions of developing countries and to constitute a technical mechanism in order to strengthen technology development and transfer\(^6\), thereby taking into account the “common but differentiated responsibilities” principle, as stipulated in Article 3 of the United Nations Framework Convention on Climate Change.\(^7\) The question arises as to whether this is sufficient to compensate for the fact that those countries contributed least but suffer most from the consequences of climate change and to reinstall ecological justice. It is submitted, that those measures are scarce. In order to achieve ecological justice, a human rights-based approach to climate change may pose a successful avenue.

\(^1\) Climate change is also referred to as global warming.
\(^3\) Ibid.
\(^5\) Ibid, at 15-18.
\(^7\) United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].
1. Ways of establishing a human rights-based approach to climate change

Three human rights-based approaches to climate change have been subject to debate: first, the application of procedural rights found in international human rights law; secondly, the invocation and reinterpretation of existing human rights to achieve environmental ends; and thirdly, the approval of a distinct and substantive right to environment and its addition to the human rights catalogue. The first approach comprises the right to information, participation and access to remedies and has been translated into the environmental field via the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. The second approach results in invoking protected rights such as the right to life and the right to health, in order to seek remedy for environmental violations. The third approach is very ambitious and contentious alike.

1.1 The “value added” of addressing climate change through a human rights lens

What does a human rights perspective offer in legal terms? How can a human rights approach contribute to the grasp of climate change? Do measures to address it become more effective? Do human rights procure an additional value within the international legal and policy discourse?

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10 Dinah Shelton, supra note 8, at 105; Susumu Atapattu, supra note 9, at 110.

11 Dinah Shelton, supra note 8, at 105.

Before analyzing the above mentioned three approaches, it is apposite to deal with those questions and to elaborate on the extent to which the discourse on climate change would benefit from a human rights-based approach.\textsuperscript{13}

Policies on climate change may be based on the framework of international human rights law by drawing upon its normative standards and incorporating decisions informed by goals of protecting and fostering human rights.\textsuperscript{14} This will fortify climate change policies, emphasizing the intersections of human rights and climate change and lead to a more coherent and integral policy which provides a concerted and effective answer to climate change.\textsuperscript{15} Furthermore, a human rights-based approach invests the debate on climate change with a human face.\textsuperscript{16} It tailors the discourse on climate change to the actual impacts on people’s lives.\textsuperscript{17} Moreover, it draws attention to the most vulnerable, marginal and excluded groups, and points to the needed defence of their protected rights.\textsuperscript{18} It also endorses participatory and democratic rights and, in this vein, strengthens individuals and communities. It emphasizes the importance of taking into consideration the views of those affected by climate change when taking political measures to respond to the causes and implications of this problem.\textsuperscript{19} Thus it provides for sustainable results by relying on the competence of central actors.\textsuperscript{20} Finally, a human rights-based approach entails an accountability framework, which holds states accountable to diminishing the vulnerability of their people to the adverse effects of climate change.\textsuperscript{21}

It is submitted that, next to these adaptation measures to address climate change, a human rights-based approach has the potential to establish an accountability

\footnotesize{\textsuperscript{13} Alan Boyle, \textit{The Role of International Human Rights Law in the Protection of the Environment, in Human Rights Approaches To Environmental Protection} 43, 45 (Alan E. Boyle & Michael R. Anderson eds. 1996).
\textsuperscript{16} Susumu Atapattu, supra note 14, at 45.
\textsuperscript{17} Panel Discussion on Climate Change and Human Rights, supra note 15, at 10.
\textsuperscript{18} ibid.
\textsuperscript{19} ibid.; see also Sumudu Atapattu, supra note 14, at 45.
\textsuperscript{20} Sumudu Atapattu, supra note 14, at 45.
\textsuperscript{21} ibid.; Panel Discussion on Climate Change and Human Rights, supra note 15, at 10.
framework which holds states liable for the failure to adopt mitigation measures and reduce GHG emissions.

1.2 Application of procedural rights found in international human right law

Numerous procedural rights within international human rights law have gained importance with respect to environmental issues. These rights comprise the freedom of information, the right to take part in the decision making progress and the right to seek remedy.22 These rights have now been translated into a separate convention: the Aarhus Convention.23 It is pointed out that these rights are applicable independently from a distinct environmental treaty as they already form part of international human rights law.24 On the contrary, it is argued that the convention differs from existing procedural rights in the International Covenant on Civil and Political Rights (ICCPR) and regional human rights treaties, as it has a specified environmental focus.25

1.2.1 Content of the Aarhus Convention

The treaty’s proclaimed objective is “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” by binding state parties to “guarantee” certain participatory rights.26 These participatory rights are manifested in the three pillars of the Convention. These are: access to information (first pillar), public participation in decision making (second pillar) and access to justice (third pillar).27

23 See Aarhus Convention, supra note 9.
24 Sumudu Atapattu, supra note 22, at 297.
25 Alan Boyle, supra note 13, at 61.
26 See Aarhus Convention, supra note 9, art. 1.
1.2.1.1 Access to information

Access to information is essential as effective public participation in decision making relies on precise, complete and up to date information. However, the right to access to information can also be exercised irrespective of the intention to participate in decision-making for numerous reasons. The access to information pillar has two components. The first one consists of the duty of public authorities to place the information at the public’s disposal in reply to an inquiry. This is called “passive access” to information. The second one comprises the duty of public authorities to distribute information irrespective of a distinct inquiry. This is called “active access” to information.

1.2.1.2 Public participation

While access to information is indispensable for an effective participation, the information itself is useless without having access to a forum for public participation. In other words, these two rights are interdependent and go hand in hand. In turn, the effectiveness of public participation depends on access to environmental justice, so that participation becomes reality and is not restricted to a mere promise. There are three different elements within the public participation pillar. The first one deals with the involvement of the public that is affected or likely to be affected or is interested in a special approach used in the environmental decision making process. The second one deals with the involvement of the public in the elaboration of plans and programmes concerning the environment. Its main purpose is to take the public’s opinion into account in the process of development of the final plan or programme. The third element

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28 Sumudu Atapattu, supra note 9, at 358.
30 Ibid.
31 Ibid.
32 Sumudu Atapattu, supra note 9, at 360.
34 Ibid.
35 Sumudu Atapattu, supra note 9, at 362; Aarhus Implementation Guide, supra note 27, at 6.
37 Sumudu Atapattu, supra note 9, at 374-5.
consists of the involvement of the public in the creation of laws and legally binding instruments. 38

1.2.1.3 Access to environmental justice

The pillar of access to justice incorporates the enforcement of the two former pillars as well as the implementation of domestic environmental law. 39 If the right to passive information is violated, there shall be a review procedure before a national independent body. 40 Similarly, any member of the public who questions the formal or material legacy of any decision, action or omission shall have access to a review procedure. 41

1.2.2 Significance of the Aarhaus Convention

The former UN Secretary-General Kofi Annan has described the significance of the Convention as follows: “Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen’s participation in environmental issues and for access to information on the environment held by public authorities. As such, it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations.” 42

Moreover, the quality of a decision may benefit from the involvement of the public in the decision making process. This will lead to a more credible outcome. 43 The participation of the civil society both in the development of policies and their implementation is regarded as a precondition for advancements in sustainability. 44 The convention acknowledges that the right to environment can be realized by drawing on participatory rights. Consequently, the convention

39 ibid.
40 ibid; Sumudu Atapattu, supra note 9, at 363.
41 ibid.
43 Sumudu Atapattu, supra note 9, at 374.
44 Aarhaus Implementation Guide, supra note 27.
implies that the fulfilment of the right to environment is down to public participation. This is a significant momentum. Moreover, the application of procedural rights circumvents the issue of anthropocentricity to the extent that those rights can also be invoked for the sake of the environment itself and not just for human virtue. In addition, it allows for the consideration of the interests of future generations. Furthermore, the focus on procedural rights may positively influence domestic environmental policy. Transboundary conflicts primarily affecting individuals may be resolved more easily.

The convention is seen as a notable accomplishment, not only with respect to environmental protection but also as to the furtherance of human rights protection. Indigenous people have especially emphasized the significance of integrating the stakeholders in the decision making process on climate change on the national as well as international stage and thereby taking into consideration their traditional knowledge. The IPCC stated in its report that “[i]ncorporating indigenous knowledge into climate change policies can lead to the development of effective adaptation strategies that are cost-effective, participatory and sustainable.”

**1.2.3 Difficulties**

However public participation faces difficulties. Given the fact that a plethora of different stakeholders may be engaged, it might become difficult to find an agreement. There is a risk that people only get involved if their immediate interests are impaired. Moreover, it could retard the decision making process and developing countries may not have the necessary resources. Public participation faces difficulties.

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47 *Ibid*.
48 Sumudu Atapattu, *supra* note 9, at 374.
49 OHCHR Report, *supra* note 4, at 52.
51 Sumudu Atapattu, *supra* note 9, at 372-3.
participation may also trigger resignation, when the public realizes that progress is not achieved as quickly as expected. It may also fail because of cultural conditions. Women in some societies, for instance, are deprived from involvement in public life. Moreover, there may be practical obstacles, such as illiteracy or linguistic difficulties which limit public participation. Furthermore, it appears to be unlikely that people who are exposed to more urgent problems, such as extreme poverty or grave human rights abuses, will show interest in sharing in decision-making processes concerning the environment. Yet the Aarhus Convention, as the most far reaching global instrument on participatory democracy, provides the foundation for meaningful participation as the described difficulties are not insurmountable.

1.3 The reinterpretation of existing human rights in the environmental context

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

It is generally acknowledged that the goal of environmental protection can be and is regularly achieved by invoking existing human rights, which themselves do not show an explicit connection to the environment. Positively, the entire range of human rights guarantees under international law may be impaired by climate change: civil and political rights; as well as economic, social and cultural rights; and potentially third generation rights, provided they are approved by the international community. The inducement for relying on remedies under international human rights law as to claiming redress for environmental degradations can be traced to two factors. On one hand, there is no acceptance of

53 Sumudu Atapattu, supra note 9, at 373.
54 See Ron Bisset, Methods of Consultation and Public Participation in Environmental Assessment in Developing and Transitional Countries: Principles, Methods and Practice, 149, 154.
55 Michael Burger, supra note 8, at 371.
56 Sumudu Atapattu, supra note 9, at 374.
59 Sumudu Atapattu, supra note 14, at 45; see also OHCHR Report, supra note 4, at 8.
an explicit right to environment in international law and the international bill of human rights does not include any reference to environmental protection.\textsuperscript{60} On the other hand, international environmental law does not allocate procedures of seeking redress comparable to those found in international human rights law.\textsuperscript{61} In the following, the focus will be on the right to life, health and culture with special consideration of the Inuit case. The Inuit are an indigenous community living in the arctic regions of Canada and Alaska, who presented a petition before the Inter-American Commission on Human Rights in 2005, claiming redress for purported human rights violations stemming from climate change generated by GHG emissions from the United State of America (U.S.A.).\textsuperscript{62}

1.3.1 Right to life

According to the Human Rights Committee, the right to life is a “supreme right” and “basic to all human rights”.\textsuperscript{63} It forms part of the few rights from which no derogation is admissible even in times of public emergency.\textsuperscript{64} It is protected under the ICCPR, the Convention on the Rights of the Child as well as regional human rights treaties.\textsuperscript{65} The right to life comprises not only the state’s commitment to refrain from intentional or negligent interference with life, but also, as the Human Rights Committee has pointed out,\textsuperscript{66} to take positive measures to diminish infant mortality, epidemics and malnutrition, in short, to provide all necessary means for survival.\textsuperscript{67} Numerous impacts of climate change will menace human lives directly as well as indirectly. It is considered very likely that storms, flooding, heat waves,
droughts and fires will lead to higher mortality rates. At the same time, climate change will impair the right to life by worsening undernourishment, hunger and other deficiency symptoms, affecting child growth.\(^68\) Climate change will aggravate weather-related catastrophes which by now have fatal impacts on people’s life, especially in developing countries. Approximately 262 million people, for instance, had to suffer from climate catastrophes yearly from 2000 to 2004, the vast majority of those affected living in developing countries.\(^69\) Approximately 250,000 people lost their life as a result of tropical cyclones between 1980 and 2000.\(^70\)

The Inuit case brought before the Inter-American Commission of Human Rights depicts very clearly the capacity of climate change to undermine the right to life. The Inuit, living in the arctic regions of the U.S.A. and Canada, claimed that their very survival is at risk and that they are confronted with extinction due to climate change.\(^71\) Scientists and journalists documented the gravity of the implications of global warming on Inuit life and existence. The consequences of global warming include the alteration of weather patterns, a reduction of snowfall and sea ice, melting permafrost and the loss of flora and fauna.\(^72\) This has caused the death of many Inuit and turns life for the indigenous into a more and more difficult and hazardous struggle.\(^73\) Moreover, the inhabitants of small island states are exposed to the threat of being deluged, as climate change causes sea level rise.\(^74\) In a joint declaration on the Human Dimension of Global Climate Change Small Island, developing states expressed their concern that climate change had a clear and immediate impact on their right to life.\(^75\) However, the environmental damage in question must be of an extreme magnitude in order to plead the right to life.\(^76\) Moreover, to seek remedy, when climate change puts life at risk, may not succeed

\(^{68}\) IPCC AR4 WGII Report, supra note 50, at 393.
\(^{69}\) OHCHR Report, supra note 4, at 23.
\(^{70}\) IPCC AR4 WG II Report, supra note 50, at 31.
\(^{71}\) Sumudu Atapattu, supra note 14, at 46.
\(^{73}\) Ibid.
\(^{74}\) See Sumudu Atapattu, supra note 14, at 47.
\(^{76}\) Sarah C. Aminzadeh, supra note 8, at 251; Sumudu Atapattu, supra note 22, at 298; Sumudu Atapattu, supra note 60, at 100.
in a timely manner.\textsuperscript{77} As climate change can also affect the right to health adversely, it appears to be easier to establish an infringement of the latter rather than a breach of the right to life.\textsuperscript{78}

\subsection*{1.3.2 Right to health}

Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes the right to health as the “right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”\textsuperscript{79} This right implies the equal access to, and the enjoyment of goods, services and conditions which allow a person to live a healthy life. Other aspects underlying health involve adequate sanitation, adequate food and nutrition, safe drinking water, housing, and a healthy environment.\textsuperscript{80} The right to health is not only a fundamental right in itself, but is also essential to the enjoyment of other rights.\textsuperscript{81} If a person’s health is prejudiced, he or she may be deprived of the ability to enjoy the right to work, the right to an adequate standard of living or the right to education.\textsuperscript{82} In turn, a healthy environment is deemed a \textit{sine qua non} for the right to health to be meaningful.\textsuperscript{83} The survey of human health impacts provides the strongest interface between climate change and human rights.\textsuperscript{84} Climate change is projected to impair the health status of millions of people through increased undernourishment and increases in diseases and injury because of extreme weather events.\textsuperscript{85} Warmer temperatures may also affect the transmission of malaria and other vector borne diseases.\textsuperscript{86} The Special Rapporteur on the right to health pointed out that a failure of the international community to counteract the health threats posed by global warming will jeopardize the lives of millions of

\begin{thebibliography}{9}
\bibitem{77} Sumudu Atapattu, \textit{supra} note 22, at 298; Sarah C. Aminzadeh, \textit{supra} note 8, at 252; Sumudu Atapattu, \textit{supra} note 60, at 100.
\bibitem{78} See Susumu Atapattu, \textit{supra} note 22, at 298.
\bibitem{80} OHCHR Report, \textit{supra} note 4, at 31.
\bibitem{81} Sarah C. Aminzadeh, \textit{supra} note 8, at 253; Sumudu Atapattu, \textit{supra} note 22, at 285.
\bibitem{82} \textit{Ibid}.
\bibitem{83} Sumudu Atapattu, \textit{supra} note 22, at 287.
\bibitem{84} Sarah C. Aminzadeh, \textit{supra} note 8, at 252.
\bibitem{85} OHCHR Report, \textit{supra} note 4, at 33.
\bibitem{86} Sarah C. Aminzadeh, \textit{supra} note 8, at 252-3.
\end{thebibliography}
Climate change puts at particular risk individuals and communities who lack the resources to fully adapt within a specific time frame. For the Inuit, the connection between their health and the environment is especially close, because of their unique relationship with the Arctic environment. The climate changes in the Arctic have led to hazardous travel conditions, changing disease patterns, lower and less secure quality of food and shelter, alterations in plants and insects and the pollution of water supplies. This has impaired the Inuit’s physical and mental health. Due to melting permafrost, traditional ices cellars used as store room for food have become less efficient and have led to the spoilage of food enlarging the danger of disease. As the protecting permafrost has melted down, lakes and wetlands outflow and run dry, thus reducing available drinking water for the Inuit. The Inuit are constrained to purchase food from stores, which is less nutritious because the quality and quantity of animals and plants has decreased.

1.3.3 Right to culture

Article 15 of the ICESC states the right of everyone to participate in cultural life. Despite being not binding, it is also worth mentioning Article 11 of the UN Declaration on Indigenous peoples, which proclaims: “Indigenous peoples have the right to practice and revitalize their culture traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures.”

The aptitude of the Inuit to perpetuate their unique traditional culture is intrinsically tied to snow and ice, which dictates the Inuit’s way to travel, fish and

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87 OHCHR Report, supra note 4, at 33.
88 Ibid.
89 Linking Global Warming to Inuit Human Rights, supra note 72, at 189.
90 Ibid., at 189-90.
91 Ibid., at 190.
92 Ibid.
93 ICESCR, supra note 79, art. 15.
sustain homes. The deterioration of the Inuit’s environment is inevitably attended by the deterioration of their culture, which is inseparably linked with the environment. The Inuit’s practices to guarantee their livelihood have been sapped by climate changes in the Arctic, making their traditional knowledge less reliable and impairing their way of life. The calculability of snow fall, see ice and weather is starting to collapse due to dramatic climate changes. Sheila Watt-Cloutier, Chair of the Inuit Circumpolar Conference, summarized the situation at the 2005 Conference of Parties of the United Nations Framework Convention on Climate Change as follows:

What is happening affects virtually every facet of Inuit life - we are a people of the land, ice, snow, and animals. Our hunting culture thrives on the cold. We need it to be cold to maintain our culture and way of life. Climate change has become the ultimate threat to Inuit culture.

1.3.4 Arguments for and against environmental protection by virtue of reinterpretting existing human rights

Critics fear that underlining environmental aspects of existing human rights might distract attention from more crucial human rights goals. This concern is however misplaced, as the impacts of climate change on human rights vary from quite severe to disastrous. Others state that “existing right[s] must be reinterpreted with imagination and rigor in the context of environmental concerns which were not prevalent at the time existing rights were first formulated.” This demur is not shared. As demonstrated by the OHCHR Report, climate change affects the enjoyment of a wide range of human rights and by now it does not take a lot of imagination to interpret existing human rights within an environmental context.

95 Linking Global Warming to Inuit Human Rights, supra note 72, at 184.
96 Ibid., at 189.
97 Ibid.
99 Sarah C. Aminzadeh, supra note 8, at 263.
100 Luis E. Rodriguez-Rivera, supra note 67, at 19.
101 OHCHR Report, supra note 4, at 8-15.
The advantage of aiming for environmental protection by relying on human rights is that it reveals the adverse impacts of climate change on internationally protected values.\(^ {102}\) Moreover this approach circumvents the problem of defining a right to environment, and is covered by the competence of existing human rights treaty bodies.\(^ {103}\)

### 1.4 Efforts to establish a distinct right to environment

Proponents of a distinct right to environment emphasize that its establishment would foster the conservation and protection of the environment.\(^ {104}\) Furthermore, the law’s focus would shift from the impact of the environment on other human rights to the quality of the environment itself.\(^ {105}\) Before turning to the challenges of its establishment, a delineation of its historical background appears useful.

#### 1.4.1 Historical introduction

The first indications of a potential right to environment arose in the Stockholm declaration of 1972, which has been described as a milestone towards the acceptance of a distinct right to environment.\(^ {106}\) It is asserted that the declaration provides a firm basis for the general acceptance and for the approval of this right by national governmental institutions.\(^ {107}\) Principle 1 proclaims that “[m]an 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.” \(^ {108}\)

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102 Alan Boyle, *supra* note 13, at 63.
103 *Ibid.*.
Acknowledged as establishing a relationship between human rights and the environment, there seems to be some ambiguity whether this formulation provides for a specific right to environment. Some interpret it as an expression of a right to environment; others point out that it falls short of recognizing such a right. Construing the formulation leads to the conclusion that principle 1 stipulates the right to freedom, equality, and adequate conditions of life, but not the right to environment *par excellence*. It rather clarifies that a certain environmental quality is a precondition for men to enjoy the above-mentioned rights. This differs from articulating a specific right to environment.

At the Rio Conference on Environment and Development, celebrated twenty years later rights language was avoided totally. The Rio Declaration solely states that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.” A considerable momentum in the emergence of a right to environment occurred, when a Special Rapporteur was appointed in 1990 to carry out a study on human rights and the environment. She was appointed by the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities and submitted four reports. The final report (“Ksentini Report”) incorporates a notion of human rights and the environment, which points more to Principle 1 of the 1972 Stockholm declaration than to principle 1 of the 1992 Rio declaration. It enumerates in its appendix, “Draft Principles on Human Rights and the

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113 Alan Boyle, *supra* note 13, at 43.
117 Alan Boyle, *supra* note 13, at 44.
Environment” that “[a]ll persons have the right to a secure, healthy and ecologically sound environment” and that “[a]ll persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.”118 The most remarkable conclusion of the report notes a “shift from environmental law to the right to a healthy and decent environment”. The report further asserts that this right formed part of existing international law and was susceptible to immediate enforcement by human rights bodies.119 This assumption is however contentious and has been even described as flawed.120

Indeed, the Special Rapporteur’s rationale that such a right had merely evolved from the global significance of environmental problems is not based on legal grounds. The Convention on the Rights of the Child is the only international human rights treaty of universal application which recognizes the link between environmental quality and the enjoyment of human rights and comes close to addressing the issue of environmental protection, albeit not embodying a distinct right to environment.121 Article 24 proclaims that states have to take appropriate measures “[t]o combat disease and malnutrition, ... taking into consideration the dangers and risks of environmental pollution.”122 At the regional level, the European Human Rights system does not acknowledge a substantive right to environment, neither explicitly nor implicitly.123 There are, however, other regional human rights instruments stipulating the right to environment: the African Charter on Human and Peoples’ Rights, the Protocol of San Salvador to the American Convention on Human Rights and the Aarhus Convention.124 The African Charter states that “[a]ll peoples have the right to a general satisfactory environment favorable to their development.”125 The protocol of San Salvador

118 Ibid.
119 Ibid.
120 Günther Handel, supra note 58, at 303; Sumudu Atapattu, supra note 22, at 299.
121 Sumudu Atapattu, supra note 60, at 98.
123 Günther Handel, supra note 58, at 308.
124 Richard Desgagné, supra note 111, at 263.
provides that “[e]veryone shall have the right to live in a healthy environment.”

Even though the Aarhaus Convention mainly embodies procedural rights, discussed above, it comprises the right to environment both in the Preamble and in Article 1. The Preamble states that “[e]very person has a 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.” Furthermore, Article 1 stipulates that the procedural rights are guaranteed in order to assure every person of present and future generations the right to an adequate environment. Even though these treaties do not amount to establishing a right to environment under international customary law, such a right seems to be emerging. However, it faces problems, including definition, relativity and anthropocentricity.

1.4.2 Defining a right to environment

The practical relevance and effective implementation of the right to environment depends decisively on defining the content of this right. In this effort you can find numerous formulations, such as “clean”, “decent”, “viable”, “sustainable” and “healthy”. The actual meaning of these terms remains quite nebulous. They suffer from ambiguity and uncertainty. Even the “Ksentini Report” is inconsistent as to the correct terminology. It uses the terms “healthy and flourishing environment”, “satisfactory environment” or “secure, healthy and ecologically sound environment”. The phrase healthy is deemed to be the most expedient. It allows for a more specific assessment of the situation, as opposed to the vaguer and more subjective terms of satisfaction, decency or viability.

127 Aarhaus Convention, supra note 9, preamble.
128 Ibid., art. 1.
129 Sumudu Atapattu, supra note 22, at 300.
130 Ibid., at 299.
131 Michael R. Anderson, supra note 8, at 4.
132 Ibid., at 10.
133 Michael Burger, supra note 8, at 7; Luis E. Rodriguez-Rivera, supra note 67, at 10.
134 Alan Boyle, supra note 13, at 50.
135 Ibid.
However, this approach requires scientific evidence. Scientists would need to establish environmental quality standards and threshold levels for polluting activities, which characterize a healthy environment.\textsuperscript{136} Although the establishment of these threshold levels demands comprehensive international regulation of environmental domains predicated on ramification studies such regulation is not unfeasible.\textsuperscript{137} The adoption of threshold levels for polluting activities necessitates ample research and discourse, including public participation, as described in the previous section, but will ensure an effective prevention of severe environmental harm.\textsuperscript{138} The threshold levels for the emission of GHG need to be consistent with the main objective of the UNFCCC to accomplish “the stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”\textsuperscript{139}

It is questionable whether national or international institutions are better able to stipulate threshold levels for polluting activities. Sumudu Atapattu suggests national environmental agencies as well as the World Health Organization (WHO).\textsuperscript{140} As to climate change, as an inherently global issue of transboundary dimension,\textsuperscript{141} a national body would not have the foresightedness and the expertise to oversee the global implications of local emissions of GHG. Accordingly, a national agency could not set up threshold levels for the emission of GHG which ensure a healthy environment for people living outside national borders. On the other hand, the WHO as an international organization has the capacity to assess the global impact of GHG emissions on a healthy environment. It is an organization which can take into account the quick amendments of environmental threats to human health stemming from increased scientific knowledge and altering environmental conditions.\textsuperscript{142} In this regard, it is important to note that the accordingly changing threshold levels, which underpin the right to

\textsuperscript{136} Sumudu Atapattu, supra note 60, at 111; Susumu Atapattu, supra note 22, at 302.
\textsuperscript{138} Ibid.
\textsuperscript{139} UNFCCC, supra note 7, at art. 2.
\textsuperscript{140} Sumudu Atapattu, supra note 60, at 111; Sumudu Atapattu, supra note 22, at 302.
\textsuperscript{141} Luis E. Rodriguez-Rivera, supra note 67, at 6.
\textsuperscript{142} See Dinah Shelton, supra note 137, at 164.
a healthy environment, would not undermine the establishment of the right, but solely demonstrate its dynamic character.\textsuperscript{143}

The “Ksentini Report” illustrates another approach to defining a right to environment.\textsuperscript{144} In the Draft Principles of Human Rights and the Environment, it specifies rights which derive from the right to environment, such as the access to safe water and food or the right to be free from pollution and environmental degradation, in order to draw a clearer picture of its content.\textsuperscript{145} The drawback is however that many of the rights mentioned are not established in contemporary international law.\textsuperscript{146}

Another avenue consists of accepting the forlornness to find a clear definition by virtue of abstract terms and to rely on courts and supervisory bodies to evolve their own interpretations, as already repeatedly exercised with respect to other human rights.\textsuperscript{147} The legal establishment of the term “healthy” in connection with threshold limits set up by the WHO, is however considered to provide for more consistency than differing juridical interpretations of an environmental right, which is not otherwise specified. Finally, definitional difficulties will not necessarily hinder the right to a healthy environment to emerge.\textsuperscript{148} The UN has fostered sustainability, although sustainable development is facing similar definitional problems. “Indeterminacy is thus a problem but not necessarily an insurmountable one.”\textsuperscript{149}

\textbf{1.4.3 Anthropocentricity}

The most severe argument put forward against the approval of a distinct right to a healthy environment is based on its anthropocentricity.\textsuperscript{150} To many, such a right implies that the protection of the environment is for the benefit of humans only and does not acknowledge the inherent value of the environment and other species

\textsuperscript{143} Ibid.
\textsuperscript{144} Alan Boyle, supra note 13, at 50; Sumudu Atapattu, supra note 60, at 112.
\textsuperscript{145} Ibid.
\textsuperscript{146} Sumudu Atapattu, supra note 60, at 97.
\textsuperscript{147} Alan Boyle, supra note 13, at 50.
\textsuperscript{148} Richard Disgagné, supra note 111, at 3.
\textsuperscript{149} Alan Boyle, supra note 13, at 51.
\textsuperscript{150} Sumudu Atapattu, supra note 60, at 113.
living within ecology.\textsuperscript{151} It is regarded as entailing a form of “species chauvinism”.\textsuperscript{152} Such an approach is deemed as providing neither direct nor comprehensive protection of the environment. Merely human interests, such as standards of living, would give reasons for the extent of environmental conservation.\textsuperscript{153} In this vein, the needs and values of humanity are ranked superior to those of other members of the natural community, thus implying a certain hierarchy. Environment is not protected for its own sake but only if human well being is affected.\textsuperscript{154}

Furthermore, it is asserted that any redress for a violation of the right may be used to meet human needs only rather than benefiting the nature beyond those needs. The environment is perceived as a victim. Finally, environmental protection would also depend on the human invocation of such a right.\textsuperscript{155} Noralee Gibson criticizes the anthropocentricity from a conceptual perspective, emphasizing the rationale that human rights are based on human dignity and are bestowed to humans simply because they are humans.\textsuperscript{156} A right to environment is not considered as deriving from human dignity but from the need of survival of all creatures in the ecosystem. The right, therefore, misses the moral legitimacy to be vested in humans alone.\textsuperscript{157}

However, philosophical or conceptual objections may be estimable, but lack pragmatic significance.\textsuperscript{158} Humans are the only species which damages the environment, but at the same time the only species which is capable of taking measures to stop the environmental destruction.\textsuperscript{159} Once the issue of climate change begins to be tackled effectively, the different approaches to the problem become meaningless.\textsuperscript{160} Mitigation measures by states following a right to a

\begin{footnotes}{
\begin{enumerate}
\item Prudence E. Taylor, \textit{supra} note 60, at 351.
\item Alan Boyle, \textit{supra} note 13, at 49.
\item Prudence E. Taylor, \textit{supra} note 60, at 351-2.
\item \textit{Ibid}.
\item Prudence E. Taylor, \textit{supra} note 60, at 352.
\item \textit{Ibid}.
\item Prudence E. Taylor, \textit{supra} note 60, at 352.
\item Sumudu Atapattu, \textit{supra} note 22, at 296.
\item See Sarah C. Aminzadeh, \textit{supra} note 8, at 263.
\end{enumerate}
healthy environment will perforce go about the general problem and will eventually benefit the environment and all its members.\textsuperscript{161}

Moreover, the approval of such a right to environment would entail a “fortuitous spill-over effect to non-humans”, since a healthy environment for humans inevitably means a healthy environment for non-humans.\textsuperscript{162} Human interests cannot be separated from the protection of the environment.\textsuperscript{163} Given the fact that a bestowal of rights to animals or the environment would face the insurmountable obstacle that they are unable to exercise those rights you may even call the approach of a human right to environment instrumentalist rather than anthropocentric.\textsuperscript{164} “Since a pig cannot vote, it is meaningless to talk of its right to vote”.\textsuperscript{165} By virtue of the mechanisms existing in international human rights law to seek remedy, the environment may be more efficiently protected than merely by international environmental law which increasingly recognizes the inherent value of the ecosystem and its components, but lacks equal mechanisms.\textsuperscript{166} In other words, the outcome sanctifies the anthropocentric approach. It is therefore submitted that an efficient curtailment of climate change necessarily requires an anthropocentric approach.

And notably, even if the intrinsic value of species and habitat are valued as in international environmental law, the question rises, whether the incentive for the regulation differs in its ends.\textsuperscript{167} The preoccupation with the protection of ecosystems and species may be merely the result of the realization that the existence of humans is endangered by the demolition of the environment and species rather than the demonstration of a sincere care about the environment and its members for their own sake.\textsuperscript{168} To illustrate this mind-set, the comment of Gormley is significant. He notes that whereas the goal of environmental law “is to guarantee an environment free from contamination, along with the protection of

\textsuperscript{161} Ibid.
\textsuperscript{163} Dinah Shelton, supra note 8, at 109.
\textsuperscript{164} Catherine Redgwell, supra note 162, at 74, 85.
\textsuperscript{165} Ibid., at 85
\textsuperscript{166} Ibid., at 73.
\textsuperscript{167} Ibid., at 74.
\textsuperscript{168} Ibid.
fauna and flora, ultimately, it is mankind that must be protected.” Others rebut the criticism of anthropocentricity by emphasizing that a right to a healthy environment is merely considered to complement an ecocentric approach to environmental protection, which recognizes the inherent value of nature, irrespective of human needs. A human right to a healthy environment, if replenished by other norms that are concerned with other issues, is considered to pose a useful part of the “normative repertoire of environmentalism”.

### 1.4.4 Relativity

Does a right to a healthy environment meet the condition of universality for being a human right? Critics note that the value attributed to a healthy environment varies nationally depending on economical and cultural parameters. Identical environmental conditions may lead to different social and economical policies. They claim that this missing cross-cultural validity prevents the right from being universal. It is suggested that such a right is better located on the national level as “questions of substantive environmental quality are inherently relative, value based and capable of determination only in competition with other values such as economic development and intergenerational equity.” This interpretation of universality is however regarded as flawed. Universality does not mean that the right has to be absolute or non-derogable. A plethora of human rights are derogable. Even if a right to a healthy environment was established, it is likely to be balanced with other interests, as already demonstrated by jurisprudence involving environmental issues. The European Court of Human Rights, for instance, held in Powel and Rayner v. UK that the plaintiff’s right to privacy was infringed by the noise of the aircrafts being processed in Heathrow airport, but eventually rejected the claim by regarding the interests of the community as more

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174 *Ibid*.
175 Sumudu Atapattu, *supra* note 9, at 111.
176 *Ibid*.
significant. \textsuperscript{177} Universality rather stems from the global awareness and concern about common values and environmental protection. \textsuperscript{178} Another criticism by Handl points to a similar argumentation. He contends that such a right could not be phrased as inalienable as it will be subject to derogation. \textsuperscript{179} This view is however not comprehensible, since nearly all human rights are derogable, apart from exceptions, such as the right to life or the right against torture. \textsuperscript{180}

\textbf{1.4.5 Further arguments for and against a distinct right to a healthy environment}

The strongest argument for adopting a right to healthy environment is that it emphasizes the crucial character of the environment as a fundamental condition of life and its inalienability for human well-being and dignity and the fulfilment of other human rights. \textsuperscript{181} Governmental action to protect the environment is necessary for the realization of other human rights. \textsuperscript{182} It is countered that what matters is environmental protection and this protection can be achieved by international environmental law and does not require the application of international human rights law. \textsuperscript{183} It is even argued that a substantive right to environment would contribute very little to foster environmental protection beyond that what international environmental law already achieves on its own. \textsuperscript{184} In other words the approval of such a right would be “largely redundant”. \textsuperscript{185}

This view, however, ignores an essential advantage of the human rights machinery. International human rights law does provide the individual with remedies unlike international environmental law. \textsuperscript{186} The acknowledgement of a distinct right to a healthy environment would grant the individual far-reaching

\textsuperscript{178} See Richard Desgagné, supra note 111, at 263.
\textsuperscript{180} Sumudu Atapattu, supra note 9, at 111.
\textsuperscript{181} Alan Boyle, supra note 13 , at 49.
\textsuperscript{182} Ibid., at 63.
\textsuperscript{183} Ibid.
\textsuperscript{184} Günther Handel, supra note 58, at 305.
\textsuperscript{185} Alan Boyle, supra note 13, at 53.
\textsuperscript{186} Sumudu Atapattu, supra note 22, at 302.
possibilities to seek redress. In addition, the approval of a right to a healthy environment would subject states’ environmental policies to international scrutiny and give environmental protection the same attention as other human rights. International human rights treaties conceptually allow for higher standards of international scrutiny than international environmental treaties. They provide for the submission of country reports and the First Optional Protocol to the ICCPR warrants the possible use of the individual complaint procedures.

Moreover, a right to a healthy environment circumvents difficulties to establish the causal connection between the concrete polluting activity, namely the emission of GHG, and its impacts on health. It might not always be possible to prove that the health implications are based on the climate change related impact, since the harm to health is often long-term and cumulative. The victim solely needs to prove that the environment is no longer healthy for him to live in. It does not need to wait until his health is actually affected or the environment is irreversibly damaged. Thereby the claimant will need to rely on the above mentioned threshold levels for the emission of GHG. It is suggested that once the emissions have crossed the permissible threshold levels, the victim can take action to stop the polluting activity.

However, this envisaged advantage of avoiding causation problems ceases to apply in cases where the perpetrator of the polluting activity is not identifiable. This problem especially occurs in the context of GHG emissions. Nearly every state is emitting GHG and it is impossible to determine and to hold accountable one single offender. This complex problem of causation also hinders the evidence that the GHG emissions of a particular country led to the violation of human rights and will be examined in the following section.

187 Sumudu Atapattu, supra note 9, at 111; Sumudu Atapattu, supra note 22, at 302.
188 Sumudu Atapattu, supra note 9, at 111.
189 Sumudu Atapattu, supra note 60, at 111-2.
190 Ibid., Sumudu Atapattu, supra note 22, at 301-2.
191 Ibid.
192 Sumudu Atapattu, supra note 60, at 111.
2. Causation

Does climate change violate human rights law? The OHCHR Report negates this question, by pointing out that it is impossible to unscramble the complex causal nexus between past GHG emissions of a particular country and a specific climate change related impact. The Inter-American Commission of Human Rights dismissed the petition by the Inuit, but expressed similar concerns during a hearing. The Inuit would have had to prove that the U.S.A. was responsible for the damage to the arctic regions. Thus, it would have been necessary to bring forward evidence that the GHG emissions by the U.S.A. caused the environmental degradation in the Arctic, which in turn led to the violation of their human rights. However, it may be impossible under current liability principles to hold the USA liable for its GHG emissions, as there are 200 emitting countries and it is infeasible to attribute one specific climate change related impact to one of them. Yet, it does not seem just to leave indigenous people, who did not contribute to the problem of climate change or benefited from it, without any possible remedy. The problem of causation is compound by the issue of allocation. Even if the U.S.A had been found responsible, the “common but differentiated responsible principle”, as stipulated in Article 3 of the UNFCCC, would have made it necessary to determine the portion of GHG emitted by the U.S.A. In response, a new accountability regime will be delineated, enabling affected persons to seek remedy by addressing the problems of causation and allocation. This innovative regime draws upon the market share liability principle, which has already been applied at the national level.

194 OHCHR Report, supra note 4, at 70.  
195 Sumudu Atapattu, supra note 14, at 58.  
196 Ibid., at 65.  
197 Sumudu Atapattu, supra note 14, at 65-6; see also Richard S. J. Tol, Richard S. J., Roda Verheyen, supra note 193, at 1112.  
198 Sumudu Atapattu, supra note 14, at 65.  
199 Ibid., at 66.
3. Analogue application of the market share liability principle

The analogue application of the market share liability principle could derive from two factors: an existing legal loophole; and comparable circumstances. The legal loophole consists of the infeasibility to hold the U.S.A. liable for its GHG emissions as illustrated above. In order to evaluate the comparable circumstances, it is necessary to examine the national decision that formulated the market share liability principle.

It was the Supreme Court of California in *Sindell v. Abbott Laboratories* which created the market share liability theory. The Court was confronted with cases of recovery for injuries caused by a drug called diethylstilbestrol (DES), which was used to prevent miscarriages. The problem consisted of the difficulty to prove causation, as the manufacturer of the particular drug which caused the plaintiffs’ harm was not identifiable. The developed market share liability theory allowed the plaintiffs to seek remedy from DES manufactures without the need to identify the manufacturer which produced the particular drug the plaintiff absorbed. The plaintiff had however to unite a sufficient number of manufactures in his action, which were considered to represent a “substantial share” of the market. Provided the plaintiff had fulfilled this duty, the burden of proof shifted to each of the accused to bring forward evidence that it was not the drug it produced which led to the damage in question. Consequently, every accused who could not convince the court of its innocence was held accountable for the plaintiff’s damages. However, due to this relaxation of common law causation standards, the diverse defendants were not convicted to recover the entire damage in question, but only a certain part of it, which was determined by drawing on each defendant’s relative market share.
Now the question arises, whether the parameters of the *Sindell v. Abbott Laboratories* case are similar to those in the Inuit case. There was a plethora of manufacturers of DES. Likewise nearly every state is emitting greenhouse gases. Furthermore, as in *Sindell v. Abbott Laboratories*, where it was impossible to identify the manufacturer who produced the particular drug causing harm to the plaintiff, it was impossible in the Inuit case to identify one country out of the 200 which caused the damage in the Arctic leading to the violations of the Inuit’s human rights. Thus, the parameters are comparable.

However, it is more complicated to transfer the market share theory to the Inuit case. What are the consequences of applying the market share liability principle in the Inuit case? The outcome could be as follows: First the Inuit would need to join a representative number of GHG emitting countries in their petition. The United States and China together emit more than one-third of current emissions. Along with the European Union, they generate more than half of the emissions. Together with Russia, India, Japan, and Brazil, they are responsible for more than two-thirds of all emissions. Thus, the compliance with this precondition seems feasible. Subsequently, it would be the duty of every country to prove that it was not its GHG emissions which caused the damage in the Arctic and led to the violation of Inuit human rights. This may pose a scientifically insurmountable obstacle. Consequently, every country would be responsible and held liable according to the amount of GHG the country in question has emitted until the date of the petition.

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Conclusion

The aim of restoring ecological justice could be well achieved by applying a human rights based-approach to climate change. Whereas environmental law only contains obligations of states against each other, human rights law grants the individual rights against the state. As a logical consequence, unlike environmental law, human rights law conceptually grants the individual remedy mechanisms, which poses an essential element of ecological justice.

The establishment of procedural rights at the international level, namely the right to access to information and public participation in decision-making as well as the corresponding enforcement of these rights, would guarantee the consideration of the knowledge and competence of the affected groups while taking international measures to address climate change. This would substantially contribute to just outcomes. The regional Aarhaus Convention could serve as an orientation.

A major step towards restoring ecological justice would be the adoption of the proposed accountability regime, which could overcome the problem of proving the causation between past GHG emissions of a particular country and a specific climate change related impact as well as solve the issue of allocation and consequently allow already vulnerable groups affected most by climate change to hold the largest emitters accountable.

Since, as opposed to the Inuit case, it may not always be possible to prove the causation between a climate change related impact and the violation of human rights, the incorporation of a right to a healthy environment in the human rights regime should be the ultimate goal. This would also circumvent the difficulty the Human Rights Council had in concluding that a particular effect on human rights results from a climate change related impact rather than other possible causes, in particular before the effect has taken place.  

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209 Iveta Hodkova, supra note 106, at 80.

210 See OHCHR Report, supra note 4, at 23.
To conclude it is recommended that the Ad Hoc Working on the Durban Platform for Enhanced action should overcome political obstacles and apply a human rights-based approach while preparing the new, global and legally binding climate change agreement to be adopted in 2015. This kind of policy is essential in order to restore ecological justice.
Table of international legal instruments

i. International conventions


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ii. Other documents


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