

Judicial implementation of rights based approaches to environmental governance: Regional Perspectives⁵⁶⁹

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1. Introduction

While it is widely accepted that there is a very close connection between human rights and the environment, what exactly the nature of that connection is, is not always clarified. Two fundamental aspects of the relationship are recognized by John Knox, in his Preliminary Report on human rights and the environment, namely that human rights and the environment are interdependent and secondly, that the relationship of interdependence is complex, involving multiple rights of multiple people and often whole communities.⁵⁷⁰

The question to be addressed in this paper is whether human rights law, as it is currently practiced, adequately recognizes and reflects the complex interdependence of human rights and the environment. In particular, do human rights courts take sufficient account of the complicated ways in which individuals, communities and the environment are interconnected when making decisions in cases concerning the human rights impacts of environmental harm?

2. Protecting the environment via human rights law

Growing evidence of the devastating impact of environmental degradation on a wide variety of human rights has, over the past few decades, led to increased legal recognition of the interface between human rights and the environment. This has taken the form of the 'greening' of human rights law, i.e. the recognition that environmental damage may lead to a violation of rights such as the right to health, the right to life and the right

569 For a more detailed discussion of some of the issues raised in this article, see E Grant, 'Re-imagining Adjudication: Human Rights Courts and the Environment' in A Grear and E Grant (eds), *Thought, Law, Rights and Action in the Age of Environmental Crisis* (Edward Elgar 2015) 155.

570 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, A/HRC/22/43, 24 December 2012, para 10.

to an adequate standard of living. There is also increasing recognition on the part of human rights courts of the important role of procedural rights, such as the right to information and participation, in providing support for individuals and organizations concerned with protecting the environment.⁵⁷¹ And there has been increased recognition of a substantive right to a healthy/sustainable environment, particularly in the constitutional context.⁵⁷²

In spite of this, the use of human rights law, particularly international human rights law, in seeking redress for environmental harm is often questioned. As Pederson argues:

From a legal point of view, the fact that a particular [environmental] event threatens the enjoyment of a right does not necessarily entail that the event violates the said right.⁵⁷³

Critics of a rights based approach to pursuing environmental protection, argue that human rights frameworks and adjudication are ill-equipped to deal with environmental claims. For example, it is often contended that human rights law is concerned with the rights of individuals, which severely limits the extent to which human rights claims can be used to address environmental problems, such as pollution, that affect whole communities or global environmental problems such

as climate change.⁵⁷⁴ It is therefore often argued that where environmental damage is considered in human rights cases, consideration is necessarily limited to how a **particular** right of a **particular** individual might have been affected, and a rights based approach is therefore not helpful in addressing the wider impact of environmental degradation on whole communities or the differential impact of environmental damage on multiple rights.

The articulation of rights in many international instruments reinforces an individualistic and disconnected understanding of human rights, defining rights in isolation from each other and from the environmental context. Separation of civil and political rights from social and economic rights by incorporation into separate treaties highlights the disconnection. Worse still, the potential to use social and economic rights adjudication to defend the environment is often further reduced because human rights courts commonly have only limited jurisdiction over social and economic rights.

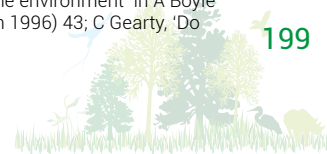
However, while critics of the use of human rights law in addressing environmental concerns undoubtedly have a point, human rights law is much more varied and less static than their account allows. Focusing on the jurisprudence of the

571 See D Shelton, 'Developing substantive environmental rights' (2010) 1 JHRE 89.

572 See D R Boyd, *The Environmental Rights Revolution* (UBC Press 2012).

573 O W Pedersen, 'Climate change and human rights: amicable or arrested development?' (2010) 1 JHRE 236, 244.

574 See for example, A Boyle, 'The role of international human rights law in the protection of the environment' in A Boyle and M Anderson (eds), *Human Rights Approaches to Environmental Protection* (Clarendon 1996) 43; C Gearty, 'Do human rights help or hinder environmental protection?' (2010) 1 JHRE 7.



three regional human rights tribunals, the European Court of Human Rights (ECtHR), the African Commission and Court on Human and Peoples' Rights and the Inter-American Commission and Court of Human Rights, this paper considers, first, how human rights courts approach arguments that environmental harm has led to a violation of human rights and whether these approaches are necessarily limited by a lack of understanding of the interdependence and complexity of the relationship between human rights and the environment. Secondly, it considers how existing practice might assist in developing a human rights approach to environmental protection which fully recognizes and ensures respect for the interdependence of human rights and the environment – in all its glorious complexity.

3. Regional Human Rights Tribunals

Among the three regional human rights systems, only the African Charter on Human and Peoples' Rights (ACHPR) expressly recognizes a substantive environmental human right (Article 24). The ACHPR is also the only regional human rights treaty that does not draw a distinction between civil and political rights and social and economic rights, protecting both categories of rights equally and explicitly acknowledging, in its preamble, that 'the satisfaction of

economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights'.

By contrast, the European Convention on Human Rights (ECHR) protects only civil and political rights. Social and economic rights are provided for separately in the European Social Charter (ESC). Neither instrument recognizes a substantive environmental right. While accession to the ECHR is a condition of Council of Europe membership, this is not required for the ESC and the ECtHR has no jurisdiction over the ESC. Within the Inter-American system, the American Convention on Human Rights (ACHR) similarly focuses on civil and political rights, while the San Salvador Protocol to the American Convention makes separate provision for social and economic rights including a right to a healthy environment (Article 11). However, the jurisdiction of the Inter-American Commission and Court of Human Rights over the rights protected under the San Salvador Protocol, including the right to a healthy environment, is limited.⁵⁷⁵

The picture that emerges from this brief summary of the three main regional human rights frameworks is very much - but fortunately not entirely - one of disconnection between civil and political rights and social and economic rights, limited access to legal redress for violation of social and economic rights and lack

575 See O R Ruiz-Chiriboga, 'The American Convention and the Protocol of San Salvador: Two Intertwined Treaties – Non-Enforceability of Economic, Social and Cultural Rights in the Inter-American System' (2013) 31 NQHR 159.

of specific provision for environmental rights. Only the African system explicitly incorporates features which clearly facilitate a human rights based approach to environmental protection. But this is, of course, far too limited a view of the operation of the regional human rights systems and of human rights adjudication in general. The meaning and scope of right are not determined by human rights treaties in the abstract, but through interpretation, elaboration and application by human rights institutions. The extent to which environmental harm can be redressed via human rights law is thus crucially dependent on the extent to which those institutions recognize the interdependence of human rights and the environment and the complex ways in which that interdependence plays out in practice.

4. Connecting the dots: Environment, Rights and Communities

Critics of a human rights approach to environmental protection often focus on a number of particular obstacles which, it is argued, limit the extent to which human rights law can provide redress for environmental damage. One of the obstacles often noted is that access to human rights tribunals is restricted due to standing rules that permit only certain individuals to bring claims to

human rights institutions and which therefore exclude many environmental claims. Another limitation is that human rights claims provide opportunities for vindication of individual rights only and that lack of recognition of collective or community rights means that the full impact of environmental damage on whole communities cannot be considered. A third inadequacy often highlighted is that human rights approaches tend to individualize rights by failing to recognize the interdependence of all human rights and the cumulative impact of environmental degradation on diverse rights. But what is the evidence on which these arguments are based? This section considers what the practice of the regional human rights institutions tells us about the perceived obstacles to bringing human rights claims in cases alleging environmental harm.

Scrutiny of the jurisprudence of the ECtHR provides some support for the view that the scope for bringing environmental claims is limited. In relation to standing, for example, the ECHR (art 34) specifies that in order for an applicant to bring a case to the ECtHR, he or she must be a 'victim' of a violation of one of the rights protected under the Convention. The ECtHR has interpreted this narrowly, saying that in order to bring a claim, an applicant or a group of applicants must be 'personally affected by an alleged violation of a Convention right'.⁵⁷⁶ The ECtHR has

576 Karner v Austria App no 40016/98 (ECtHR 24 July 2003) para 25.



also emphasized in a number of cases that the ECHR does not provide protection of the environment as such and that public interest claims seeking to protect the environment as a common good are not permitted.⁵⁷⁷

Despite its restrictive approach to standing, the ECtHR has increasingly been willing to examine complaints that environmental damage has had an adverse impact on particular rights protected under the ECHR and to consider arguments for broadening the scope of a number of ECHR rights to encompass environmental concerns. Thus the ECtHR has recognized that the impact of environmental damage on a number of specific rights, including the right to life (art 2), the right to private and family life (art 8) and the right to a fair trial (art 6), may lead to violation of those rights. For example, the ECtHR has recognized that if environmental pollution or excessive noise and smells have a negative impact on the wellbeing of individuals and prevent them from enjoying their homes, the right to private and family life may be breached.⁵⁷⁸ While not explicitly acknowledged by the ECtHR the jurisprudence does reveal an underlying appreciation of the connections between environmental harm and a number of different rights particularly between the right to private and family life, the right to health and the right to a healthy environment.

However, the ECHR jurisprudence remains rather narrowly focused on the rights of individual claimants. In order to engage article 8 (the right to private and family life), the key question for the ECtHR is whether a direct causal link can be established between the environmental harm complained of and the individual claimant's ability to enjoy his or her home. In *Kyrtatos v Greece*, for example, the applicants argued that their rights under article 8 had been breached because the Greek authorities had failed to prevent the destruction of a wetland situated close to their property and that their enjoyment of their home had been negatively affected as a consequence.⁵⁷⁹ The ECtHR rejected the claim, arguing that it had not been shown that the damage to the wetland and wildlife living there had a **direct** impact on the wellbeing of the applicants and their ability to enjoy their home. This case, arguably, demonstrates the limitations of a narrow approach that focuses exclusively on the extent to which it can be shown that a particular right of a particular individual has been affected and fails to acknowledge the full impact of environmental destruction. However, even in *Kyrtatos*, the majority judgment indicated that if, for example, the argument had been that the destruction of a forest had affected the quality of life of the applicants, they may have had a case. This suggests that if the applicants had

577 See Council of Europe, *Manual on Human Rights and the Environment* (2nd edn, Council of Europe Publishing 2012) 7; *Ilhan v Turkey* App no 22277/93 (ECtHR 27 June 2000) para 52-53.

578 *López Ostra v Spain* App no 16798/90 (ECtHR 9 December 1994); *Guerra v Italy* App no 116/1996/735/932 (ECtHR 19 February 1998); *Hatton v UK* App no 36022/97 (ECtHR 8 July 2003).

579 *Kyrtatos v Greece* App no 41666/98 (ECtHR 22 May 2003).

formulated their complaint more clearly in terms of the impact of deterioration of the environment on their quality of life, rather than in terms of protection of the environment itself, they may have been more successful.⁵⁸⁰

In spite of the narrow approach taken in *Kyratos*, the ECtHR has continued to widen the scope of article 8 in 'environmental' cases as demonstrated by the case of *Taşkin v Turkey*.⁵⁸¹ The applicants in *Taşkin* raised concerns about the risk to the environment posed by the use of sodium cyanide during the extraction process at a gold mine situated close to their properties, arguing that this posed a risk to their right to respect for private and family life (art 8) as well as their right to life (art 2). Prior to the granting of permits to operate the mine, an environmental impact report had been prepared for the Turkish government, which identified serious potential risks to the environment and human health. In spite of this, the Ministry of the Environment granted permission for the mine to begin operating. The Turkish authorities subsequently ignored court judgments that highlighted the risks and the judicial annulment of the decision to issue an operating permit. The Turkish government argued that article 8 was inapplicable as it had not been shown that the cyanidation process had in fact directly impacted the applicants' right to respect for private and family life and that in the absence of a 'serious and

imminent risk', there had been no breach of article 8. The Court disagreed, holding that article 8 applied if an environmental impact assessment had established a serious risk that was *likely* to affect the applicants in such a way as to affect their private and family life. The Court reasoned that this conclusion is in line with previous decisions holding that article 8 applies to situations in which environmental pollution affects individuals' wellbeing and enjoyment of their homes, even if there is no evidence of serious danger to their health.

Taşkin moves the jurisprudence forward, making provision for risks to the environment to be considered in the context of article 8, rather than requiring applicants to wait until actual damage has occurred. However, the court is clearly reluctant to consider the potential effect of environmental risks such as those at stake in *Taşkin* in the absence of the risk of impact on the rights of a particular individual or group of individuals who have standing to bring the matter before the court.

Although, as noted above, the ECtHR has explicitly stated that public interest claims are not permitted under the ECHR, there is one area in which the Court has demonstrated an understanding that protection of the environment is a matter of general interest, namely in cases which raise concerns about the environmental

580 See the partly dissenting opinion of Judge Zagrebelsky in *Kyratos*.
581 *Taşkin v Turkey* App no 46117/99 (ECtHR 10 November 2004).



consequences of developments on private property. While the right to property enjoys protection under the ECHR, the right is subject to the right of public authorities to 'enforce such laws as it deems necessary to control the use of property in accordance with the general interest' (art 1 of protocol 1 ECHR). In *Hamer v Belgium*, for example, the ECtHR upheld a decision of the Belgian authorities to order demolition of the applicant's holiday home, which had been built in a forest without planning permission.⁵⁸² The Belgian Government argued that the demolition order had been made in order to protect the environment, which was accepted by the court as a legitimate aim. The court concluded on that basis that interference with the applicant's right to property was justified and that there had therefore been no violation of the right. In the course of the judgment, the ECtHR noted that although the ECHR do not provide specific protection for the environment, the importance of environmental protection has become an increasingly important consideration in implementing rights under the Convention. More importantly, the Court indicated unequivocally that in the context of justifying restrictions on property rights, the collective interest of the public in protection of the environment can trump individual rights:

The environment is a cause whose defence arouses the constant and sustained interest of the public, and

consequently the public authorities. Financial imperatives and even certain fundamental rights, such as ownership, should not be afforded priority over environmental protection considerations, in particular when the State has legislated in this regard.⁵⁸³

While the ECtHR has made important progress in 'greening' rights, particularly in broadening the scope of the right to private and family life and acknowledging environmental concerns in counterbalancing private property rights, the overall assessment of the ECHR 'environmental' jurisprudence is that it provides grist to the mill of critics of a human rights approach to environmental protection. The ECtHR remains constrained by its individualistic focus which fails to acknowledge the interdependence of human rights and the environment, disconnects individuals from communities and turns a blind eye to the large-scale impact of environmental destruction.

In contrast, cases decided by both the African and Inter-American human rights institutions demonstrate far greater engagement with the complexity of the connection between human rights and the environment, moving beyond a focus on individual rights and individual applicants. One of the most significant characteristics of the environmental

582 *Hamer v Belgium* App no 21861/03 (ECtHR 27 November 2007).
583 *Hamer* para 79.

jurisprudence of the African and Inter-American institutions is the recognition of group claims. This is an important factor in the development of a broader approach to environmental human rights that recognizes that most environmental claims concern whole communities rather than isolated individuals and that the relationship between human rights and the environment is much more complex than 'one applicant, one right'.

Like the ECHR, the Inter-American system does not permit public interest claims and although the approach to standing of the Inter-American Commission is somewhat more flexible than that of the ECtHR, evidence of violation of the rights of particular, identifiable human victims remains a requirement.⁵⁸⁴ This was clearly articulated in the case of *Metropolitan Nature Reserve v Panama*, for example, where the Inter-American Commission ruled that a petition brought on behalf of the citizens of Panama challenging the construction of a road through a nature reserve was inadmissible.⁵⁸⁵ Significantly, however, the Commission confirmed that the need for identifiable human victims does not preclude group claims, as long as the group is clearly defined and the rights of individual members of the group are affected.⁵⁸⁶ The recognition of group

claims has opened up more possibilities for bringing environmental claims within the Inter-American system and much of the 'environmental' jurisprudence of the Inter-American Commission and Court of Human Rights has been developed in the context of group claims involving indigenous communities who are able to satisfy the requirement of being clearly identifiable groups.

While the recognition of communal claims is important in itself, it is the understanding of the complex relationship of indigenous communities with the land traditionally occupied by such groups and the broad ranging impact of environmental degradation on multiple rights that has given impetus to environmental claims within the Inter-American system. In the case of *Maya Indigenous Communities of the Toledo District v Belize*, for example, the Inter-American Commission held that the State of Belize had violated the right to property (art 21 ACHR) of the Maya people by its failure to recognize and protect their communal right to traditional lands.⁵⁸⁷ However, as the quote below amply demonstrates, it was not merely the recognition that their traditional lands were owned by the Maya community as a group that is significant - the particular relationship of the Maya people with

584 Inter-American Court of Human Rights, International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts 1 and 2 of the American Convention on Human Rights) Advisory Opinion OC-14/94 of 9 December 1994, para 45.

585 *Metropolitan Nature Reserve v Panama*, Inter-American Commission on Human Rights, Case 11.533, Report No 88/03 (22 October 2003) para 34.

586 *Metropolitan Nature Reserve*, para 32.

587 *Maya Indigenous Communities of the Toledo District v Belize*, Inter-American Commission on Human Rights, Case 12.053, Report No 40/04 (12 October 2004) para 151-153. The failure to consult with the Maya people was considered to be an aspect of the violation of the right to property.



the land plays an important part in the recognition that their rights had been violated:

[T]he organs of the inter-American human rights system have acknowledged that indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the indigenous community as a whole and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly.⁵⁸⁸

The Inter-American Court of Human Rights subsequently extended recognition of communal rights to property to non-indigenous groups.⁵⁸⁹ In the case of *Saramaka People v Suriname*, for example, it was argued that although the Saramaka people are not indigenous to the area they inhabit, but are descended from African slaves, they are a distinct social, cultural and economic group who have the same cultural, spiritual and material relationship with their lands as indigenous communities.⁵⁹⁰ The Inter-

American Court of Human Rights agreed, holding that the Saramaka people were entitled to the same protection of their communal lands as indigenous groups.⁵⁹¹ Further elaborating on the scope of the communal right to property of indigenous and non-indigenous communities, the court specified that the right to property of indigenous communities encompasses ownership of the natural resources necessary to enable communities to continue their traditional way of life. The court emphasized that protecting the environment was a vital aspect of protecting the right of communities to use and enjoy their traditional lands and that independent environmental and social impact assessments must be carried out before permission is granted for resource exploitation on traditional lands.

While the refusal to permit public interest claims under the Inter-American human rights system continues to inhibit environmental claims, the recognition of group rights to property begins to open up other possibilities for the wider recognition of communal rights to a sustainable and healthy environment. Moreover the recognition that protecting the right to property includes protection of the environment as well as related rights such as the collective right to cultural identity,⁵⁹² challenges many of the arguments put forward by critics of

588 Maya Indigenous Communities, para 114.

589 *Moiwana Village v Suriname*, Inter-American Court of Human Right, Series C No 124 (15 June 2005).

590 *Saramaka People v Suriname*, Inter-American Court of Human Rights, Series C No 172 (28 Nov 2007).

591 *Saramaka*, para 86.

592 See eg *Kitchwa Indigenous People of Sarayaku v Ecuador*, Inter-American Court of Human Rights, Series C No 245 (27 June 2012).

rights based approaches to environmental protection. The Inter-American approach demonstrates an understanding of the interdependence of human rights and the environment and an appreciation of the complex interaction between a range of rights and the environment. Although recognition of communal rights by the Inter-American institutions remains limited to indigenous and quasi-indigenous communities, the extension of recognition of communal rights to property from indigenous to non-indigenous groups suggests that there may be scope for further broadening of communal rights arguments in the environmental context.

The African system demonstrates and even greater capacity to overcome the supposed limitations of a rights-based approach to environmental protection than either the European or Inter-American systems. First, the ACHPR takes a much more generous approach to standing than either of the other regional human rights instruments discussed. It imposes no 'victim' requirement, no requirement that applicants prove that they have been directly affected by the alleged breach or any need, even, for applicants to be citizens of countries that are party to the Charter.⁵⁹³ The African Commission on Human and Peoples' Rights (African Commission), moreover, does not require

that applicants specify which provisions of the Charter are alleged to have been breached, only requiring that enough information is provided to enable it to determine the factual basis of the alleged violation and that sources of information may include media reports.⁵⁹⁴

The progressive procedural framework and the fact that the ACHPR –uniquely among the regional systems –incorporates a substantive environmental human right specifically formulated as a group right greatly facilitates environmental claims. In spite of the fact that the number of environmental cases brought within the African system is regrettably small, important lessons can be learned from the approach of the African institutions.

In the well-known *Ogoni* case, two NOGs filed complaints on behalf of the Ogoni people, a minority community, who live in the Niger Delta, alleging that the Government of Nigeria had violated a number of rights under the ACHPR, including the right to a 'satisfactory' environment (art 24), the right to health (art 16), and the right to life (art 4).⁵⁹⁵ The claim arose from devastating environmental damage, including oil spills and soil and water contamination resulting from oil extraction operations in the Niger Delta, which, it was argued, the

593 Article 55 and 56 ACHPR. In *Maria Baes v Zaire*, African Commission on Human and Peoples' Rights, Communication 31/89 (1995) a Danish national submitted a communication to the Commission which was declared admissible. Access to the African Court on Human and Peoples' Rights is more limited, see art 5 of the Protocol to the ACHPR on the African Court.

594 *Jawara v The Gambia*, African Commission on Human and Peoples' Rights, Communication 147/95 and 149/96 (2000).

595 *Social and Economic Rights Action Centre (SERAC) and the Centre for Economic and Social Rights (CESR) v Nigeria*, African Commission on Human and Peoples' Rights, Communication 155/96 (2001) (*Ogoni* case).



Nigerian Government failed to regulate or monitor satisfactorily.

There are a number of significant features of the decision of the African Commission in the *Ogoni* case which challenge the view that human rights law provides only limited scope to protect the environment. First, the African Commission had no difficulty in recognizing the communication as a public interest claim, or *actio popularis*, which, in its view, was 'wisely allowed under the African Charter'.⁵⁹⁶ This demonstrates very clearly that there is nothing inherent in the nature of human rights law preventing human rights courts from providing an avenue for consideration of claims of environmental damage affecting human rights brought on behalf of the wider community. Perhaps the reluctance on the part of the ECtHR and the Inter-American Commission and Court to permit public interest claims has more to do with fears of opening floodgates than any fundamental characteristic of human rights adjudication.

Secondly, as we have already seen in relation to the Inter-American jurisprudence, the *Ogoni* case demonstrates that there is scope for recognition of communal rights as an aspect of human rights law. This is established by the ACHPR itself, as both the right to a 'satisfactory' environment (art 24) and the right to free disposal of wealth and natural resources (art 21) are expressed as communal rights in

the Charter. The African Commission upheld the complaints in relation to both rights, concluding that 'the Ogoni people' as a distinct community are protected by the peoples' rights provided for in the ACHPR.⁵⁹⁷

The third noteworthy aspect of the decision is the extent to which the Commission acknowledged the interdependence of environmental protection and a range of rights. Rather than focusing on the impact of environmental destruction on a particular individual right, the Commission directed attention to the wider impact of pollution and other environmental damage, linking this to a number of rights - rights which the court clearly viewed as being interdependent. For example, the Commission paid particular attention to the connection between the right to health and the right to a healthy environment, resulting in a wide interpretation of both rights and, more importantly, an interpretation that takes the relationship between those rights into account. In the view of the Commission, compliance with its obligations in relation to both rights required the State to take action to prevent ecological damage, promote conservation and 'secure an ecologically sustainable development and use of natural resources'.⁵⁹⁸ In the view of the Commission, this requires the State to take positive action to protect the environment, including the obligation to carry out environmental and social impact

596 Ogoni case para 51.
597 Ogoni case para 56.
598 Ogoni case, para 54.

assessments, or to permit independent assessments, in relation to all proposals for industrial development as well as ongoing monitoring of the impacts of such developments.

The extent to which the Commission took the interdependence of a number of human rights seriously is a fourth aspect of the case that transcends the traditional narrow approach to protecting individualized rights. The applicants alleged violation of a wide variety of rights protected under the ACHPR. Rather than focus on each right individually, the African Commission paid particular attention to not only the complicated interplay between environmental degradation and rights but also the extent to which rights interrelate. This approach led the Commission to read into the ACHPR two new rights – rights that are not explicitly protected under the Charter - namely the right to food and the right to shelter. This quote in relation to the right to housing, illustrates the Commission's thoughtful and nuanced analysis:

Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to

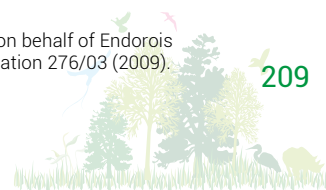
property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated.⁵⁹⁹

The African Commission's unequivocal recognition of communal rights and its innovative approach to the interdependence of all human rights is further elaborated in *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya*.⁶⁰⁰ The communication arose from the removal of the Endorois community from their tribal land by the Kenyan authorities to make way for a game reserve. The communication alleged that the Endorois community considered the land in question to belong to the community as a whole and that their livelihood, cultural traditions, religion and health were intimately bound up with their ancestral lands on the shores of Lake Bogoria in the Rift Valley Province. Relying on the Ogoni case and on the recognition of the importance of community and collective identity throughout the ACHPR,⁶⁰¹ they argued that they were entitled to bring collective

599 Ogoni case para 54.

600 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Kenya*, African Commission on Human and Peoples' Rights, Communication 276/03 (2009).

601 *Endorois*, para 75



claims relating to violation of a number of rights under the AHCHR, including rights that are not specifically defined as group rights in the ACHR such as the right to practice religion (art 8), right to property (art 14) and right to culture (art 17). The Commission agreed that the Endorois were as 'a distinct tribal group whose members enjoy and exercise certain rights, including the right to property, in a distinctly collective manner'⁶⁰² and upheld their complaint in full.

The *Ogoni* and *Endorois* cases clearly demonstrate that the African Commission understands the importance and the complexity of the interconnections between environmental degradation and the **multiple** rights of **whole communities** and provides significant scope for enhancing environmental protection via human rights law within ACHR framework.

5. Conclusion

At the commencement of this conference on 'New Frontiers in Global Environmental Constitutionalism', Sam Adelman challenged us to be **innovative, imaginative and insurgent** in how we conceive of and argue about human rights and the environment. There are, of course, many different ways of looking at the current practice of human rights courts and tribunals in environmental cases. My aim in this paper has been to explore whether the perceived limitations of a human rights

approach to protecting the environment are real, by examining the jurisprudence of the three regional human rights tribunals. The analysis has shown that critics of a human rights approach are right, but only in some cases. There are clear examples of an individualistic approach and a lack of understanding of the complexity of the connection between human rights and the environment, particularly when looking at the environmental jurisprudence of the ECtHR. However, the analysis has also shown that there are, perhaps even more, examples of arguments and approaches that transcend those limitations and recognize and give effect to a much more complex and nuanced understanding of the relationship between human rights and the environment.

While the limitations of a rights based approach should not be ignored, there is clearly a much more optimistic story to be told. The case law of the African and Inter-American judicial institutions, in particular, demonstrate that creative and progressive approaches are already part and parcel of their jurisprudence. The small selection of cases examined begin to show some of the ways in which human rights law is being used in an innovative, imaginative and insurgent way to address environmental concerns. They provide us with important examples or models to assist us in the important task of further developing a human rights based approach to the environment that is able to take account of the rich complexity of

the relationship between human rights and the environment and the interdependence of all human rights. It is for us as scholars,

lawyers and activists to extend and mobilize those arguments in both national and international fora.



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