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HUMAN RIGHTS' APPROACH TO ENVIRONMENTAL PROTECTION – PRACTICE OF THE HUMAN RIGHTS COMMITTEE

ABSTRACT: The consequences of environmental degradation and pollution have raised the issue of the significance of the link between human rights and environmental protection. Since the International Covenant on Civil and Political Rights does not explicitly recognize the right to a healthy environment, the Human Rights Committee has accepted the possibility that a State Party can violate a number of civil and political rights by its acts or failures in the field of environmental protection. The main purpose of the paper is to analyze the practice of the Committee in order to define the standards in the context of violation of human rights by environmental degradation. The paper will address regular reports submitted by State Parties, as well as general comments and concluding observations of the Committee. A special attention will be paid to the views of the Committee regarding the individual complaints received under the First Optional Protocol to the ICCPR. On the basis of the analytical discussion, the authors will provide a conceptual clarity to the interpretation of standards that might be useful in articulating the civil and political rights related to environmental protection.

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Key words: *The International Covenant on Civil and Political Rights, the Human Rights Committee, human rights in relation to environment*

1. Introduction

Human security must be viewed through the prism of human rights and contemporary threats, of which environmental endangerment is dominant (Bjelajac, 2017). People face challenges and new environmental problems every day. Modern man needs to understand that his environment is constantly changing. As the environment changes more and more, he needs to become aware of the problems that surround him as well (Bjelajac, 2018). The consequences of environmental degradation and pollution have raised the issue of the significance of environmental protection to human well-being (Marković & Ditrih, 2018, p. 16). The recognition of the international community that environmental harm can interfere with the full enjoyment of human rights confirmed by the provisions of the Stockholm Declaration caused a debate among scholars regarding the proclamation of new substantive right to a healthy environment or involvement of environmental dimensions to already recognized human rights (Arsić, Matijašević & Berber, 2011, p. 25). There is no unanimously accepted definition for the right to a healthy environment. Theoretical meaning given by scholars is that it is the right to an ecologically balanced, sustainable, healthy, clean, or satisfactory environment that permits healthy living for human (and sometimes non-human) entities on Earth (Kotzé, 2018, p. 136). It is worthwhile to mention that the proliferation of the right is dependent on solutions produced both on the international level and national, through constitutional embedding. The latter, represents an effective way to achieve constitutional objective, while, at the same time, offering protection to fundamental rights and aligning constitutional cultures (Guceac & Serotila, 2014, p. 67). Despite the fact that more than 80 countries have adopted a constitutional "right to a healthy environment", this right is still not protected by international human rights treaties (Boyd, 2012, p. 47; Mladenov, 2017, p. 77).

The International Covenant on Civil and Political Rights (hereinafter: the ICCPR) does not explicitly recognize the human right to a healthy environment. Therefore, the attention of the Human Rights Committee (hereinafter: Committee) has been at the examining the linkage between human rights and the environment within the framework of already proclaimed civil and political rights human rights (Shelton, 2006, p. 144).

The main purpose of the paper is to analyze the practice of the Committee in order to define the standards in the context of violation of human rights

by environmental degradation. First of all, the subject of the research will refer to the statements of the Committee regarding the specific human rights that could be affected by environmental impacts. The paper will address regular reports submitted by State parties, as well as General Comments and Concluding Observations of the Committee. On the basis of the analytical discussion, the authors will provide conceptual clarity to interpretation of standards that might be useful in articulating the civil and political rights related to environmental protection as well as their own contribution to the development of environmental aspect of human rights.

2. Practice of the Human Rights Committee

The Committee has acknowledged that environmental harm may threaten the following rights protected by the ICCPR: rights of minorities, the right of peoples to self-determination, right to life and right to privacy.

2.1 Rights of minorities

The influence of environmental factors on the rights of minorities to enjoy their culture, especially indigenous people in accordance with Article 27 of the ICCPR has been frequently recognized by the Committee (ICCPR, 1966, Article 27). According to the General Comment No. 23, on the rights of minorities, Article 27 includes rights which may be closely associated with the land, natural resources and the environment thereof, especially in the context of the rights of indigenous minority population. Furthermore, General Comments No. 23 adds that “that right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law” (General Comment No. 23, 1994, par. 7). Therefore, environmental harm or some measures taken in the field of the environment, that affect or interfere with those rights could represent the violation of Article 27.

The fact that the rights of the minorities could be threatened by environmental degradation is also recognized within the “jurisprudence” of the Committee. The Committee addressed numerous communications regarding the violation of the indigenous peoples’ rights to enjoy their culture caused by environmental harm (Ward, 2011, p. 56). Many of the cases brought by the members of the indigenous communities in accordance with Article 27 of the ICCPR challenge natural resource exploitation by the state or companies. The Committee concluded that economic development of the state based on the exploitation of the natural resources should be

in compliance with the obligations under Article 27 (MacKay, 2001, pp. 12–13).

In the case *Ángela Poma Poma v. Peru* the Committee confirmed this approach.¹ The author of the communication claimed that Peru has violated Article 27 of the ICCPR by diversion the course of the river, which considerably reduced the water supply that caused the gradual drying out of the wetlands where author's indigenous community used to practice llama-raising as a part of their traditional customs. The author of the communication also emphasized that the appropriation of water destroyed the traditional way of life of the members of the indigenous community and interfere with their intention to continue to live on their traditional lands (McKay, 2009, pp. 92–93). Within its concluding remarks, the Committee stated that activities carried out by Peru represent significant interference with the author's rights and rights of her community to enjoy their culture under Article 27 of the ICCPR and that Peru has violated the obligation imposed by the ICCPR.

One of the first cases that provided indicators of the seriousness of environmental harm suffered by the indigenous community in the context of violation of Article 27 is *Lubicon Lake Band v. Canada*.² The author of the communication alleged violations by Canada of the Lubicon Lake Band's right of self-determination, as well as the right to dispose freely of their natural wealth and resources. The communication asserted that even though the Indian Act (1970) and Treaty 8 concerning aboriginal land rights in northern Alberta (1899) confirmed the traditional way of living of the original inhabitants of that area, their traditional land has been expropriated for commercial purposes. The Committee did not find the violation of most of the rights stated in communication, however, it recognized the breaches of the provisions of Article 27 of the ICCPR by saying that:

“Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue”.³

Moreover, implementation of Article 27 in the context of the rights of indigenous people affected by environmental impacts was the subject of consideration of the Committee in its Concluding Observations. Regarding the observations on Argentina, Australia, Columbia, Ecuador, Georgia,

¹ *Poma Poma Ángela v. Peru*, U.N. Doc. CCPR/C/95/D/1457/2006 (2009).

² *Lubicon Lake Band v. Canada*, Communication No. 167/1984, U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990).

³ *Ibidem.*, par. 33.

Guyana, Mexico, Nicaragua, Sweden and Venezuela, with respect to Article 27 of the ICCPR, the Committee expressed interest to receive additional information concerning the measures taken by states to ensure the enjoyment of the environmental dimension of collective rights adjudged to indigenous communities (Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, High Commissioner for Human Rights, 2013, p.15).

3. Right of self-determination

The Committee's statements on human rights which could be violated by acts or failures of the states in the field of environmental protection also referred to the right of self-determination protected by Article 1 Paragraph 2 of the ICCPR (ICCPR, 1966, Article 1 Paragraph 2). In General Comments No.12 on the right of self-determination, the Committee emphasized the importance of the environmental dimension of the economic aspect of this right as stipulated in Article 1 Paragraph 2. In addition, it is stated that according to Article 1 Paragraph 2 states should identify factors that "prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph" (General Comment No. 12, 1984, par. 5).

In its annual report regarding the initial report of France, the Committee concluded that right of self-determination could be threatened by the pollution and the exploitation of natural resources. The Report of the Committee identified the dilemma, how France reconciled the right of the people to freely dispose of their natural resources and "to protect themselves from atmospheric pollution with the carrying out of atomic weapon tests in the Murunoa Atoll" (Mapping Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, High Commissioner for Human Rights, 2013, p. 20).

The practice of the Committee regarding the right of self-determination does not include the "jurisprudence", since it is not possible to bring the claim of violation of Article 1 of the ICCPR under the First Optional Protocol to the Covenant (Jong, 2015, p. 83).⁴ In addition, this finding was confirmed in the Lubicon Lake Band case.

⁴ The Optional Protocol provides a procedure regarding the communications from individuals claiming to be victims of violations of the rights protected by articles 6 to 27 of the Covenant.

4. Right to life

According to the practice of the Committee the right that has been frequently addressed in the context of environmental degradation is the right to life protected by Article 6 of the ICCPR. In the light of the fact that the interpretation of the right to life includes entitlement of individuals to be free from acts of the State intended or expected to cause a deprivation of life, there is no doubt that this right can be directly impacted upon by environmental harms intentionally caused by State (Atapattu, 2002, p. 99). However, there is considerable uncertainty regarding the issue whether the right to life covers all environmental harms. "Jurisprudence" of the Committee points toward the four applicable criteria related to the assessment of complaints in the context of environmental harm as a violation of the right to life. These criteria include the following standards: the author of the communication must be under a real and imminent threat; the author of the communication must be personally affected by the alleged violation regarding the environmental harm; the author of the communication must submit the evidence indicating that environmental contamination has reached or will reach the human environment; the breach of Article 6 could not be based on a hypothetical risk (Li, 2013, p. 25).

In the periodic reports submitted to the Committee during the 1990s, States parties for the first time refer to environmental issues within the implementation of Article 6 of the ICCPR. In its fourth periodic report, Belarus emphasized the contribution of the Environmental Protection Act to the protection of the right to life.⁵ The third Peru's periodic report to the Committee interpreted Article 6 to include measures regarding the reduction of environmental pollution in accordance with the provisions of the Peru Constitution which guarantees the right to enjoy a balanced environment.⁶

Furthermore, in its General Comment No. 36 on the right to life the Committee has continued to identify environmental degradation, climate change and unsustainable development as one of the most pressing and serious threats to the right to life under Article 6 of the ICCPR (General Comment No. 36, 2018, par. 62). The Committee has invoked Article 6 in connection with measures that State parties should take to ensure sustainable management of natural resources, to establish and implement environmental standards and provide procedures regarding the right to an access to environmental information.

⁵ Belarus' Periodic Report, UN Doc. CCPR/C/84/Add. 4 (1996).

⁶ Peru's Periodic Report, UN doc. CCPR/C/83/Add. 1 (1995).

In *Bordes and Temeharo v. France* the Committee considered a claim related to underground nuclear test in the South Pacific as a potential threat of violation of the right to life of French citizens in French Polynesia.⁷ The authors of the communication argued that the decision of the French government to conduct a series of underground nuclear tests caused environmental damage and violated their right to life under Article 6 of the ICCPR. The authors recalled the General Comments of the Committee on the right to life on account of the indirect effect of the radiation on human life through the environmental harm and contamination of the food chain (Selected Decisions of the Human Rights Committee under the Optional Protocol, 2005, p. 5). Furthermore, the authors claimed that French authorities did not take the positive measures due to Article 6 based on the fact that France was not able to prove that nuclear tests are not threat to the health of the citizens in French Polynesia. The State party argued that the authors could not be qualified as “victims” as required by Article 1 of the First Optional Protocol since they were not able to show that the nuclear tests caused the violation of their right to life, nor that there was a real treat of the violation. Despite the fact, that the Committee recognized the link between the environmental harm and the right to life, it had accepted the argument of the State regarding the status of the “victim” and therefore concluded that communication was inadmissible.

In *Susila Malani Dahanayake*, the Committee addressed a communication against Sri Lanka related to the road development project proposed by the State authority.⁸ The authors of the communication claimed that the environmental effects of the proposed routes of the road threatened their right to life due to Article 6 of the ICCPR, which, according to the interpretation of the Committee includes the right to live in a healthy environment. The State party responded that the intention of the project was not to violate the authors’ right to live in healthy environment indicated that this right could be observed as the part of the right to life (Turner et al. 2019, p. 26). In the Committee’s view, the authors had not sufficiently substantiated the claim that they had the status of “victims” on the basis of violation of the right to life in accordance with Article 6.

In the light of the facts of this case, as the previous one, it is hard to determine the standards related to the status of the “victim”. On the basis of the above consideration concerning the applicable criteria related to the

⁷ *Bordes and Temeharo v. France*, Communication No. 645/1995, U.N. Doc. CCPR/C/57/D/645/1995 (1996).

⁸ *Dahanayake et al. v. Sri Lanka*, Communication No. 1331/2004, U.N. Doc. CCPR/C/87/D/1331/2004 (2006).

assessment of complaints in the context of environmental harm as a violation of the right to life, it is unclear what were the evaluation standards of the Committee in these cases. Thus, imprecise requirements regarding the status of “victim” may pose serious doubts about invoking Article 6 in connection with the environmental degradation.

5. Right to respect for private and family life

According to the practice of the Committee, the right to respect for private and family life due to Article 17 of the ICCPR can also be directly impacted by environmental degradation. General Comments No 16 of the Committee did not refer to the linkage between right to privacy and environmental protection (General Comments No.16, 1988). However, the Committee has dealt with the environmental issues in several cases related to the right to a home free from arbitrary or unlawful interference under Article 17 of the ICCPR.

In the context of environmental degradation with regard to the right to privacy due to Article 17, the Committee has addressed communication in *Borde and Temeharo v. France*.⁹ The right to respect for private and family life was one of two rights that the authors contended were being violated by nuclear testing in French Polynesia. Despite the fact that the Committee recognized that environmental harm could constitute an unlawful interference with the right to family life, as previously stated in the paper, the Committee decided that the communication was inadmissible.

In the decision published with regard to the case *Portillo Cáceres v. Paraguay*, the Committee emphasized that environmental factors could pose the threat to the right to respect for private and family life and the home.¹⁰ The author of the communication claimed that Paraguay failed to provide protection for individuals from environmental harm caused by agribusinesses which used illegal chemicals. On the basis of the failure of the State party to exercise an effective control over the agribusiness companies, the author argued that the State breached obligations due to Article 17. The Committee concluded that Paraguay has violated Article 17 of the ICCPR, noting that environmental degradation can pose a threat to the right to private and family life and home when the effects of pollution reach a certain level of severity.

⁹ *Bordes and Temeharo v. France*, Communication No. 645/1995, U.N. Doc. CCPR/C/57/D/645/1995 (1996).

¹⁰ *Cáceres Portillo v. Paraguay*, Communication No. 2751/2016, UN Doc. CCPR/C/126/D/2751/2016 (2019).

The decision in the *Portillo Cáceres v. Paraguay* is the first one in which the Committee clearly stated that according to Article 17 states are obliged to respect to the right to private and family life and home in the light of the protection against environmental harm. There is no doubt that this decision will be precedent cited in many subsequent cases.

6. Conclusion

Enjoyment of human rights can be seen as a milestone in the development of universal standards concerning the environmental protection. During the last three decades, in the absence of petition procedures according to environmental treaties, victims of environmental harm seek redress for human rights violations through relevant international forums. As this article indicates, the link between human rights and environment can be expanded to cover comprehensive approach by which environmental degradation may be challenged in the United Nations system as a violation of civil and political rights. In the decisions on the communications referred to environmental issues, the Committee concluded that a number of rights may be implicated by environmental degradation or exploitation.

According to the analysis of the Committee's jurisprudence, the right of minorities to enjoy their culture has been central to the most detailed discussion of duties under Article 27 of the ICCPR regarding environmental degradation and exploitation of natural resources. In this context, the Committee emphasized the importance of the obligations of the State parties to take measures to protect the rights of indigenous peoples in particular with regard to the fact that economic development of the state based on the exploitation of the natural resources should be in compliance with Article 27 and should involve the consultation with members of the indigenous community whose rights could be threatened. Despite the fact that claims regarding the right to life have been raised over the years in the Committee's jurisprudence, the Committee has not concluded in response to a communication that environmental harm has caused a violation of Article 6. With regard to the right to privacy in *Portillo Cáceres v. Paraguay* the Committee clearly stated that according to Article 17 states are obliged to respect the right to private and family life and home in the context of environmental degradation. Since this is the recent decision, it is expected to bring the new standards in the field of environmental protection regarding the interpretation of Article 17.

As the analytical discussion indicates, progressive enforcement of international environmental law may well depend upon human rights claim.

However, regarding the developing standards of the Committee in this context, there is still a lot to be done. The practice of the Committee should establish more precise standards for recognition of environmental degradation throughout the globe as human rights problems, but for remedial measures as well. An adequate groundwork for the more meaningful protection of the human rights and the environment would refer to the recognition of a distinct right to a healthy environment either by amending the ICCPR or by adding a protocol to the ICCPR.

Without proper action, as in the case of the right to healthy environment, victims of infringement of said right may face inefficient or lackluster instruments in order to protect themselves as well as face a disparity among the legal instruments at hand in comparison to the evolving challenges and complexity that progress ensues. The expansion of these phenomena in legal theory and practice underpins the significance in balancing human rights, identifying associated risks and benefits (Serotila, 2021).

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ZAŠTITA ŽIVOTNE SREDINE IZ UGLA LJUDSKIH PRAVA – PRAKSA KOMITETA ZA LJUDSKA PRAVA

REZIME: Posledice degradacije životne sredine i zagađenja postavile su pitanje važnosti veze između ljudskih prava i zaštite životne sredine. Budući da Međunarodni pakt o građanskim i političkim pravima izričito ne priznaje pravo na zdravu životnu sredinu, Komitet za ljudska prava je prihvatio da države ugovornice mogu svojim aktima u oblasti zaštite životne sredine povrediti brojna građanska i politička prava. Osnovni cilj rada odnosi se na analizu prakse Komiteta radi definisanja standarda u kontekstu povrede ljudskih prava usled degradacije životne sredine. U radu će se razmatrati periodični izveštaji koje su podnele države ugovornice,

kao i opšti komentari i zaključna zapažanja Komiteta. Posebna pažnja biće posvećena stavovima Komiteta iznetim u postupanju po pojedinačnim predstavkama podnetim u skladu sa Prvim fakultativnim protokolom uz Pakt. Na osnovu analitičke diskusije autori će pružiti konceptualnu jasnoću tumačenja standarda koji bi mogli biti korisni u pogledu sagledavanja građanskih i političkih prava iz ugla zaštite životne sredine.

Ključne reči: *Međunarodni pakt o građanskim i političkim pravima, Komitet za ljudska prava, ljudska prava u vezi sa životnom sredinom.*

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