CIFILE Canadian Institute for International Law Expertise

CIFILE Journal of International Law (2022), Journal Vol. 3, No.6, 109-116 (2022)

Print ISSN: 2563-6820
Online ISSN: 2563-3341

Instruments of Criminal Protection of the Right to a Clean Environment in the International Environmental Conventions

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DOI: 10.30489/CIFJ.2022.339657.1053

ARTICLE INFO

Article history:
Received: 28 April 2022
Revised: 22 June 2022
Accepted: 08 July 2022
online: 08 July 2022

Keywords:
International Law, Criminal Protection Instruments, Right to Environment, International Environmental Conventions, Crimes against Humanity

ABSTRACT

The right to the environment is viewed as one of the concepts of the third generation of human rights in the international arena. Since the environment has been recognized as a common heritage of humanity in international documents so that the lives of present and future generations are not endangered, it is necessary to prevent or reduce damage to this rich heritage by using explicit criminal law requirements in treaties and conventions. The present study depicts the criminal protection of the right to a clean environment through library tools with a descriptive-analytical method and intends to present the role of governments in international environmental conventions. Governments have had only civil liability for environmental degradation so far. However, considering the environment as a common heritage of humanity, crimes against it are considered crimes against humanity. On the other hand, these crimes jeopardize international peace and security; therefore, in addition to convicting the wrongdoing government to pay compensation, they can be prosecuted under Chapter 7 of the UN Charter.

Introduction

The right to the environment and its protection is one of the essential concerns of governments and nations. Its fundamental strategy can effectively support this right through the homogenization of cultures, especially in the regional scope. Therefore, the implementation of this right depends on recognizing and evaluating it.

The growth and development of industry and technology, along with population growth and the urgent human need for energy, have made modern humans cause irreparable damage to their environment. The increased greenhouse gas emissions, contamination of seas and rivers, global warming and climate change, etc. have sounded the alarm for governments and critical actors in international law to work together to solve these crises. Hence, in the system of international law, countless conventions on environmental protection were drafted, and an essential branch of international law in the world was dedicated to international environmental law. A significant issue is how the tools of criminal law as a guarantee of the implementation of legal rules in the field of environment can support this pillar of human rights. In principle, crime is a phenomenon contrary to international and societal norms and values as opposed to the general regulations and customs governing international law as well as the provisions of international conventions. From the criminological point of view, various cultural, economic, social and even religious factors can be explained. The urgent need to include criminal law requirements in the

conventions by the member states raises the question of what is the role of governments in protecting the right to the environment through the application of criminal law. In other words, the question is how governments can apply criminal law instruments in international environmental conventions to protect the right to the environment. However, the global responsibility of states in their international environmental law is unlike public international law to observe the principle of international cooperation with a preventive approach to environmental protection (Poorhashemi & Arghand, 2013).

1- The right to a clean environment is a common heritage of humanity

The environment is a fundamental value of human societies worldwide because human survival depends on its protection. However, one cannot firmly believe that environmental law can solve all environmental problems; on the other hand, these legal tools cannot be abandoned to accelerate the destruction of the environment. (Naderi, 2021)

Current legal rules emphasize that one of the fundamental human rights is the right to live in a healthy and clean environment. A polluted environment causes a grave violation of human rights, leading to poverty and the degradation of humanity. Nevertheless, the protection of the environment guarantees the establishment of peace (and vice versa), the establishment of order at the regional level, as well as genuine cooperation;(Naderi, 2021)

The common heritage of humanity is derived from the old theory of "belonging to all." According to this theory, the areas in question belong to all governments and using them is not subject to any restrictions for all. Acceptance of this theory led to the consequence that generally developed countries had more opportunities for exploitation with the use of advanced technologies, leading to a monopoly on shared resources. However, according to the concept of the common heritage of humanity, in addition to the fact that resources belong to all, no one has the right to exclusive use of resources, and the exploitation of shared resources is legitimate to the extent that it does not prevent the use of others. On the other hand, due to the impossibility of delegating the management of shared resources to the people, it is necessary to create an independent institution to coordinate the common management of these areas. Moreover, all governments must actively participate in the sharing of resources and in any exploitation, the interests of future generations must be taken into account (Shackelford, 2009). Therefore, a strong relationship exists between the environment and the common heritage of humanity because the seas and oceans, the Antarctic continent and the resources beyond the atmosphere belong to the present and future generations, and they must be exploited in such a way that the lives of the present and future generations are not endangered. This concept is enshrined in many conventions, including Articles 136, 137, and 140 of the 1982 Convention on the Law of the Sea, which cite the resources of the seabed as the common heritage of humankind. Furthermore, in Resolution 1958 of the UN, international law on aerospace, space, and the moon is considered a common heritage of humanity. Hence, this great heritage must be protected by relying on criminal protection tools, leading to harm reduction.

2- The role of governments in protecting the environment

Sovereignty is the supreme authority of a state in making and implementing decisions concerning that land (Andrews, 2011). Sovereignty has two internal and external dimensions: The internal dimension of sovereignty is that a government must be able to manage the country's affairs without external interference. In the external size, the government has the sovereignty to act freely in its decisions and foreign relations so that it does not follow others. As the sovereign role of governments as crucial actors and drafters of international law has diminished in recent decades, their concerns about their diminishing political authority on the world stage have increased. Significantly, the issue becomes a bit more complicated in the field of the environment because not only do governments have to be vigilant about their actions in relation to the environment under their control, but they also need to take the necessary precautions to prevent actions that they fear to harm the environment of other countries. However, it is worth mentioning that damage or adverse

environmental effects on other countries may also occur. However, it should be noted that although minor environmental crimes are a fundamental problem, large-scale environmental crimes committed by governments or international organizations and even their affiliated multinational corporations can be further analyzed. We know that today many governments have a great desire to strengthen themselves in the field of military and military strategy, thus resorting to various tools. An essential tool for the international community today is the use of nuclear facilities. Industrial waste and that from the enrichment of such materials and chemicals, as well as in the field of electromagnetism, has made a large part of poor countries a place for exploitation and testing, in addition to diverting international public opinion and diverting environmental pollution to developing countries, exonerating themselves domestically and even internationally.Especially today, the world is witnessing the propaganda of countries that have introduced themselves as civilized and far from committing domestic and international anomalies at the international level, while in their economic and military activities, both domestically and internationally, they cause environmental degradation and every year in the UN General Assembly, they try to cover up their illegal and immoral actions by addressing environmental issues, eventually ending their discussions with a few letters of recommendation or more to the extent that they condemn criminal acts against the environment. Not only does such thinking not help preserve the environment as a common heritage of humanity, but it will gradually lead to the destruction of this divine deposit, the environment that man can enjoy to the fullest from his birth. Criminologists also believe that the development of criminal law should prevent crime in the first place. The criminal policy of any country should be based on the formulation of criminal laws and the executive power of those laws. Failure to enforce codified laws increases the courage of criminals and destroys public confidence in the ruling power.

The protection and preservation of the international environment is a commitment to the international community as a whole (Shelton, 2009), and as a result, governments shall not only adhere to the principle of non-harm to others but also the principle of non-harm to public commonalities (Like cases of common concern). (Hunter, Salzman and Zaelke, 2002)

International responsibility to protect the environment is clearly reflected in principle 21 of the Stockholm Declaration (1972) and principle 2 of the Rio Declaration (1992). (Khalatbari & Poorhashemi, 2019) In a situation where all states, whether members or non-members, have a duty under customary international treaties and law that activities under their control or jurisdiction do not harm the environment of other states or territories outside their national territory, it seems that this commitment to prevent harm to the global environment includes the government's commitment to protect the environment within the jurisdiction of other governments or areas outside national jurisdiction and to pursue the unauthorized activities of individuals or entities under its jurisdiction or control. (International Court of Justice, 1949)

In these circumstances, the duty to prevent damage to the region's environment is evident in the practice of governments that have accepted it as their customary international law and practice (International Court of Justice, 1996). It is obvious that governments are obligated to pay compensation for negligence. However, the payment of compensation will not, in principle, cause the destroyed environment to return to its previous state. Article 11 of the Rio Declaration obliges governments to enact effective environmental laws. For example, when a government fails to make the necessary environmental regulations and, as a result of such a legislative vacuum, pollution is caused by a private person, and that polluting activity can be attributed to the government.

Since the environment is a transboundary issue, a single country's effort is not enough, but all countries have to collaborate. In this regard, the solution may be twofold: either work together on having an international instrument or at least give similar concern to environmental problems in domestic environmental law. As we all are living together on this planet, the best way is, yet, working together on implementing international environmental law. (Poorhashemi, 2020).

3- The need to include criminal law in environmental conventions

In the new era, the growing spread of criminal phenomena with the emergence of new dimensions of crimes and offences underlines the problem of inefficiency of the criminal justice system in using criminal enforcement sanctions. Therefore, from a criminological point of view, it is necessary to determine criminal policy with an economic, political, and social approach, as well as the participation of civil society in the development of criminal justice. One of the basic requirements for establishing a criminal regime in any legal system is to identify, formulate and create a hierarchical system among the legal values of societies (Abdullahi, 2007). The environment, which is the distinctive point of the continuation of human life and the environmental ecosystem, including all aspects, is the only passage and place of human survival along with other living things. Hence, the great need for the phenomenon of criminalizing the damage to the environment and preventing its violation through criminal law is evident to us. Perhaps this is the starting point for spreading the culture of environmental protection through this tool, which is a step in favour of protecting the right to a clean environment. However, the ineffectiveness of the laws mentioned above should not be a reason for Dejudicialization. Non-criminalization of damages and the fact that some of them have a cross-border aspect, and the fact that there is a multiplicity of domestic and international decision-making and judicial institutions is one of the major problems in this regard.

An example is the Convention on the Protection of the Marine Environment of the Caspian Sea, concluded between the littoral states of the Caspian Sea. According to Article 24 of the Convention, "Any Contracting Party may propose protocols to this Convention. These Protocols shall be adopted unanimously at the Security Meetings of the Contracting Parties. Unless otherwise specified in the text of the Protocols for ratification, the Protocols shall enter into force upon ratification or approval by all Contracting Parties in accordance with their respective constitutional requirements. "Protocols will be an integral part of this convention." The problem is that if the protocols are not ratified in accordance with the constitution of that country, the implementation of this regional Convention will be suspended. This also applies to international conventions so that when a state concedes to that conditionally, or when a state does not have that ratified by the legislature, or basically refuses to sign it; international regulations sometimes cannot guarantee full implementation because international environmental and regional laws are weak in developing countries and are often general, vague, contradictory, and too lenient. As the exploitation of natural resources has led to environmental degradation, no effective measures have been taken to protect these resources. This is due to the inadequacy of environmental rules, the inadequate treatment of judicial authorities, and the ease of court rulings. Today, the international community is concerned about the planet's future and seeks solutions to the damage that potentially or actually threatens the environment and the future of humanity. But the problem is that although the international community seeks to recognize environmental crime as the fifth transnational crime, the short-term interests of governments and other existing international challenges have prevented this from happening to date. In fact, governments, on the other hand, seek to exercise absolute sovereignty at the international level and on the other hand, by accepting international treaties and rules, they try to maintain the balance of only the inhabited sphere (Jam Bozorg et al., 2019).

Despite the growing awareness of environmental issues in both developed and developing countries, environmental degradation is continuing, and new environmental problems are emerging.(Zarei & Mosavi Madani, 2020) Criminal prosecution is the best hope for people who believe the government must redouble its efforts to preserve natural resources and protect public health. (Steinzor, 2016) Environmental protection should therefore be considered in a broader context than criminal protection. Undoubtedly, appropriate and effective criminal tools must be used to provide comprehensive environmental protection.

4- Duties of States to environmental criminalization in international and regional conventions

The responsibilities of states to criminalize have been regarded in international conventions, and violation of some environmental commitments has been considered grave crimes of global importance. The related regulations are as follows:

4.1 The Basel Convention

This Convention, which aims to establish a comprehensive rule on the transport and disposal of hazardous waste to protect human health and the environment from adverse effects of unprincipled management, is binding on member states.

The Convention shall, as far as possible, prevent the transboundary transfer and disposal of harmful wastes against the environment and humankind in order to reduce such anti-biological and anti-human effects. In this regard, Article 9, Clause5 of the Convention obliges the member states to impose punishments in national regulations. The Basel Convention has taken various measures to prevent the transport of hazardous waste. However, hazardous wastes are still transferred to countries that do not have the capacity to properly dispose of waste, leading to the doubt that international mechanisms are ineffective for environmental protection (Sonak & Giriyan, 2008). Although, at the beginning of this article, governments are obliged to determine the legislative policy on pollution caused by the transport of hazardous waste, their obligation, as set forth below the same article, is only in the form of cooperation in order to achieve the goals of this article, without any specific sanction, neutralizing the effect of the obligation.

On the other hand, the most critical problem is determining the person responsible for claiming damages, which is as arduous as a nightmare because the illegal transport of hazardous waste is usually performed by shadow companies on ships registered in obscure ways. In addition, waste brokers set up companies to export waste and dissolve such companies immediately after the transaction, while if the government's responsibility were acknowledged, the government would be liable for damages in the event of a breach of international obligations. The unauthorized transport of hazardous waste from one country to another (In accordance with Article 18 of the Draft International Liability of States for International Violations) and even the refusal of a country to prohibit its citizens from violating international norms are examples of violations of international obligations, ending up with the liability of the government (Rurinwa, 1997).

4.2 The International Convention for the Prevention of Pollution from Ships (MARPOL), adopted in 1973

Each member state of the MARPOL Convention and its annexes must implement a regular and detailed program called the Rapid Reaction Program to collect oil spilled into the sea by ships. Any violation of the requirements of the Convention is prohibited, and the penalties must be carried out under the rules of the executive body of the offending ship. Moreover, any violation in the area under the sovereignty of each member state is prohibited and punishments must be enforced under the regulations of the same member state. In this regard, governments are required to enact domestic laws relating to the responsibility to compensate for environmental pollution. In order to prevent maritime accidents and oil spills, this Convention has detailed regulations on the design and operation of ships as well as emission standards. Despite the adoption of such an instrument, oil-based environmental pollution continued; The reason was that like most international conventions, the MARPOL Convention lacks effective international oversight and proper enforcement sanctions. According to the second Clause of Article 235 of the 1982 Convention on the Law of the Sea, states must ensure that there is a right of recourse to prompt and sufficient compensation under that country's legal system for the various natural and legal persons under their jurisdiction.

4.3 EU Convention on the Protection of the Environment through Criminal Procedure

The ratification of the Strasbourg Convention in 1998 is of importance. The introduction of the Convention seeks to protect the environment by recalling former international instruments by recourse to criminal law

and emphasizes the following: 1. Belief in the need for criminal protection of the environment; 2. The necessity for criminalizing the violations significantly affects the environment and punishment of criminals; 3 The necessity and importance of criminal and administrative punishment of legal entities.

The Convention provides for arrangements in its regional response to violations of its rules which require the establishment of a national and international criminal regime, including the provision of universal jurisdiction with an emphasis on the rule of "either punish or extradite" to prosecute the defendants in a continental fashion in committing environmental crimes, anticipating imprisonment and restoring the environment to the state before destruction, identifying legal and criminal liability for legal entities, identifying the several liabilities of natural and legal persons for committing crimes covered by the Convention, identifying environmental groups including environmental NGOs as stakeholders to file environmental claims and establish a national and transnational cooperation mechanism to comply with the convention regulations, which is of a unique nature and undoubtedly plays a significant role in development of international criminal law in protecting the environment. Most European countries, either because of their political systems or perhaps because of their social characteristics or exceptional circumstances, have adopted different degrees of criminal sanctions to protect the environment. (The Use of Criminal Law for the Protection of the Environment in Europe: Council of Europe Resolution (77) 28, p.456) However, since the ultimate aim of environmental law is the protection of ecological resources, its role must not only be punishment for the offender's past misconduct but primarily harm prevention (deterrence). (Pereira, 2007)

Conclusion

Protecting and preserving the environment is one of the fundamental principles governing international environmental law. Criminal protection of environmental rights is possible only by drafting laws and incorporating them into international conventions. This compensates for the inadequacy of governments' global responsibility rules to ensure compliance with environmental rules. The purpose of these regulations is to ensure that individuals and governments are committed to maintaining the general ecological balance and prioritizing the protection of the environment. Therefore, criminal protection of the environment is one of the effective mechanisms for environmental protection. However, assessing the economic damage of such accidents is often difficult due to limited information, especially since damage to biological resources may appear years after the accident. Therefore, the existence of rules of responsibility is necessary in international law. Although the criminal liability of States was removed in the 2001 draft of the United Nations Commission on International Law, Articles 1, 34 and 35 of the International Law Commission on the Responsibility of States to guarantee heavy enforcement in terms of compensation and restitution, the responsibility of the government for violation of international regulations cannot be ignored. Hence, the principle of international cooperation requires that governments consider a single way to protect the environment through the tools of criminal law and strong sanctions. Accordingly, there will be no choice but to impose restrictively and even depriving regulations (sanctions) on some of the rights recognized in international relations for the offending government, the result of which may be contrary to the principle of national sovereignty. Moreover, governments, citing their ruling political power and the principle of national sovereignty, as well as the principle of government immunity, did not easily welcome strong sanctions to protect the environment, which in the long run has seriously damaged shared environmental resources in such a way that there will no longer even be a ground for the implementation of the mentioned principles for them.

With regard to what was mentioned above, though there are no explicit criminal law tools to protect the environment, and this may bring to mind the impossibility of imposing sanctions on governments and subjects of international law, the point is that, according to the UN Charter, as the essential binding international instrument that most countries have accepted by acceding to the UN, various regulations

have been laid down for dealing with countries that endanger international peace and security. These include the imposition of sanctions or regulations under Chapter VII of the Charter mentioned above. Moreover, suppose governments, by accepting the right to a clean environment as the third generation of human rights, consider its protection as a matter of international interest and security. In that case, violators will be prosecuted and punished according to the charter. Supporting it results in protecting the whole of humanity, and its destruction is regarded as harmful to the whole of humanity. This is called a crime against humanity in criminal law, and it is time for governments to redesign international rules that even govern countries' domestic laws. At the same time, the obligations that the United Nations imposes on states are so important and influential that Article 103 of Chapter 16 of the Charter of the United Nations emphasizes the importance of the obligations of the members of the United Nations and their primacy over other international agreements and their obligations. Hence, historically, at the international community level, the International Criminal Court is the only judicial authority with general and broader jurisdiction over the sovereignty of states. Although the Court's jurisdiction over specific crimes is enshrined in the Rome Statute, given its key and practical role in maintaining world peace and security as enshrined in the UN Charter, for which the Security Council has been appointed, it seems that adding the topic of international environmental crimes or environmental crimes with authority listed in the above statute, governments can be held responsible for the consequences of acts of environmental degradation.

Suggestions

The environment begins human life and the human interface to maintain its survival and existence. In other words, the preservation and survival of the environment mean the conservation and survival of the entire humanity, and its destruction and annihilation mean the destruction of every human. When society is endangered by endangering the environment, the issue is directly linked to international peace and security. Based on the results of this study, the following suggestions for criminal protection of the environment seem to be very important and practical:

1. Using international rules and pressures per the United Nations Charter is easy and has a legal and international dimension.
2. Using international obligations and the prevailing custom to formulate international criminal regulations and using the jurisdiction of international criminal authorities to restrain environmentally degrading governments.

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