

Littoral Indigenous Communities & Extra-territorial Jurisdiction: Identifying Theory for Group Rights & Transboundary Plastic Waste



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Abstract:

Recent scientific studies indicates that a large proportion of maritime plastic waste is washing back upon littoral areas, threatening the health and livelihoods of coastal communities. The paper looks to the potential for indigenous coastal communities in ASEAN states to exercise group rights within a state to deal with transboundary maritime plastic waste. Specifically, the analysis explores potential legal theories for under international environmental law and international human rights law approaches. While finding that there are relatively greater prospects for indigenous claims under international human rights law, the analysis identifies issues in substantive and procedural rights and the mechanisms to exercise those rights, particularly within the ASEAN region states. Hence, as much as it is may be possible for indigenous coastal communities in ASEAN states to use international human rights law approaches to pursue indigenous rights claims against the harms from transboundary maritime plastic pollution, such prospects are conditional upon the circumstances of each individual state.

International Law & Indigenous Rights re Environment

Legal Approaches

- Int'l environmental law (IEL) & indigenous peoples
 - ❖ Public – increasing recognition of indigenous rights in international environmental instruments, but issues (Banda 2019; Boyle 2018):
 - ✓ Lack of specific legal rights in int'l law for indigenous peoples re transboundary marine plastic pollution
 - ✓ State-state transboundary liability approaches, so limits facing non-state actors for transboundary env't harms
 - ❖ Private – non-state actors seeking redress for transboundary env't harms face issues (Percival 2010; Boyle 2005)
 - ✓ Seek sponsorship of home state against foreign state
 - ✓ Pursue civil action (nuisance or class action) in home state or foreign state
- Int'l human rights (IHR) & indigenous peoples
 - ❖ Developments
 - ✓ Recognition of indigenous rights (e.g., UNDRIP 2007), including indigenous rights that relate to the env't (Harris 2003; Metcalfe 2003; Watters 2001)
 - ✓ Recognition of human rights re env't (Knox 2020; Knox & Pejan 2018)
 - ✓ Recognition of transboundary state liability to non-state actors (Banda 2019; Lane 2018; Vinuales 2016)
 - ❖ Allows potential avenues for public and private actions to supplement int'l env't law approaches
- Possibility of additional legal strategies through int'l human rights, but what would an int'l human rights approach look like?
 - ❖ Substantive rights
 - ❖ Procedural rights
 - ❖ Mechanisms

Substantive Rights

Indigenous substantive rights against transboundary marine plastic pollution

- Constructing legal rights
 - ❖ Transboundary marine plastic pollution causes env't harm impacting indigenous communities
 - ❖ Indigenous communities hold relationship w env't (ecosystem services)
 - ❖ Int'l human rights instruments provide rights relevant to env't that address ecosystem services
 - ❖ Int'l human rights instruments impose transboundary state liability to non-state actors outside the state territory
 - ❖ Locate indigenous rights w/n int'l human rights instruments that relate to ecosystem services
 - ❖ Locate state parties obligated to implement the above int'l human instruments
- Examples re int'l human rights (IHR) sources for rights related to ecosystem services

<i>Human rights re ecosystem services</i>	<i>Example IHR instruments</i>
Right to subsistence	UNDRIP Art. 20; ICCPR Art. 1; ICESCR Art. 1
Right to adequate standard of living (housing, food, water)	UNDRIP Arts. 20-24; UDHR Art. 25; ICESCR Art. 11
Right to life & health (including personal liberty & security)	UDHR Art. 3; UNDRIP Art. 7, 20-24; ICCPR Arts. 6-10
Right to culture	UNDRIP Arts. 11-13; ICESCR Art. 15; ICCPR Art. 27; UDHR Art. 27

- Note: ICCPR/ICESCR are binding upon state parties, UNDRIP is non-binding, but overlap between UNDRIP & binding instruments such as ICCPR/ICESCR indicates types of indigenous rights that can be rendered though ICCPR/ICESCR as state obligations

Substantive Rights

Indigenous substantive rights against transboundary marine plastic pollution

- Availability in ASEAN?

<i>Country</i>	<i>ICCPR</i>	<i>ICESCR</i>	<i>UDHR</i>	<i>ILO No. 169</i>	<i>UNDRIP</i>
<i>Indonesia</i>	Ratified (2006)	Ratified (2006)	Member	-	Voted in favor
<i>Timor-Leste</i>	Ratified (2003)	Ratified (2003)	Member	-	Voted in favor
<i>Thailand</i>	Ratified (1996)	Ratified (1999)	Member	-	Voted in favor
<i>Cambodia</i>	Ratified (1992)	Ratified (1992)	Member	-	Voted in favor
<i>Philippines</i>	Ratified (1986)	Ratified (1974)	Member	-	Voted in favor
<i>Vietnam</i>	Ratified (1982)	Ratified (1982)	Member	-	Voted in favor
<i>Myanmar</i>	-	Ratified (2017)	Member	-	Voted in favor
<i>Malaysia</i>	-	-	Member	-	Voted in favor
<i>Brunei</i>	-	-	Member	-	Voted in favor
<i>Singapore</i>	-	-	Member	-	Voted in favor

Procedural Rights

Indigenous procedural rights against transboundary marine plastic pollution

- Antecedent legal rights allowing exercise of substantive rights
 - ❖ Legal rights allowing access to remedy procedures
 - ❖ Legal rights allowing legal personality as indigenous group
- Examples re IHR Sources for procedural rights (UNGA 2017)

<i>Procedural human rights</i>	<i>Example IHR instruments</i>
Rights to equality & non-discrimination	ICCPR Art. 14; ICESCR Art. 2; UDHR Art. 2; UNDRIP Art. 2
Right to information	ICCPR Art. 19; UDHR Art. 19
Right to free expression	ICCPR Art. 19; UDHR Art. 2
Right to free association	ICCPR Arts. 21 & 22; ICESCR Art. 8 (for trade unions); UDHR Art. 20
Right to participate in public decision	ICCPR Art. 25; ICESCR Art. 8 (for trade unions); UDHR Art. 21; UNDRIP Arts. 5 & 18

- Examples re IHR sources for indigenous legal personality (Boyle 2018; UNGA 2017)

<i>Procedural human rights</i>	<i>Example IHR instruments</i>
Rights to collective identity & nationality	ICCPR Arts. 2, 3, 24 (no discrimination based on identity); ICESCR Art. 15; UDHR Art. 15 (re cultural life); UNDRIP Arts. 2-6
Right to self-determination	ICCPR Art. 1; ICESCR Art. 1; UNDRIP Arts. 3-5
Right to free, prior, informed consent	UNDRIP Arts. 10, 11, 28-29

Mechanisms

Mechanisms for indigenous rights against transboundary marine plastic pollution

<p><i>Home state advocacy</i></p>	<ul style="list-style-type: none"> • Indigenous group can seek home state to advocate on its behalf in state-state actions • Home state advances environmental and human rights concerns upon state that is source of marine plastic debris
<p><i>Foreign state & home state domestic complaints</i></p>	<ul style="list-style-type: none"> • Indigenous group can pursue private claims in domestic courts of home state & foreign state <ul style="list-style-type: none"> ❖ Marine plastic polluter is foreign state: foreign state has transboundary liability for marine plastic debris violating indigenous rights ❖ Marine plastic polluter is non-state actor in foreign state: foreign state has transboundary liability for failing to prevent conduct of non-state actors in its jurisdiction that produced marine plastic debris violating indigenous rights • Issues: <ul style="list-style-type: none"> ❖ Sovereign immunity ❖ Particularity (causation)
<p><i>Int'l treaty complaint procedure</i></p>	<ul style="list-style-type: none"> • Indigenous group can exercise individual complaints procedure in IHR treaties • Issue: Complaints procedures are in separate protocols w their own state parties • Examples for ASEAN states: <ul style="list-style-type: none"> ❖ 1st Protocol ICCPR – only Philippines is a state party, Cambodia signed but did not ratify, the remainder did not sign nor ratify/accede ❖ Protocol ICESCR – none are state parties

Conclusions

Final comments & future directions

- Int'l env't law vs int'l human rights law
 - ❖ Int'l human rights law recognizes extra-territorial state liability to non-state actors, including indigenous groups, so relatively greater range of potential legal rights violations
 - ❖ Continuing issues for int'l human rights approaches re substantive rights, procedural rights, & mechanisms
- Future directions
 - ❖ Forum-specific details in exercising IHR approach
 - ❖ Empirical study of legal actions exercising IHR approach
 - ❖ Empirical study comparing legal vs non-legal actions
 - ❖ Access to recognition as indigenous
- Value of int'l human rights approach for ASEAN states – extensive coastlines w vulnerable populations in a region w extensive transboundary marine plastic debris, and int'l human rights approach facilitates remedies for such conditions