

ISSN (O): 2582-6646

4:1 | 2023

Journal of International Law and Comity

Centre for Peace, Justice and International Law
India





Journal of International Law and Comity (JILC) is published by Centre for Peace, Justice and International Law - *In Memoriam Judge Christopher Weeramantry* (Weera Centre), Lucknow, India. It is a double peer-reviewed, open-access, biannual journal; welcoming submissions related to the pressing issues of international law that carry high human and non-human impact. For further details, email at:

weeracentre@gmail.com | weerajilc@gmail.com
URL: <https://weeracentre.org/issues/>

Centre for Peace, Justice and International Law
C419, Mahanagar, Lucknow,
Uttar Pradesh, India – 226006.



COPYRIGHT POLICY

The copyright of the published works shall vest jointly with the contributor and Weera Centre. For activities that do not amount to monetization, the material can be shared as per respective territorial laws in force.

All contributors consent to indemnify the Weera Centre towards all claims, suits and consequences based on any claim of copyright infringement or unauthorized use arising as a result of their contribution being published in JILC.

Cite as:

[Volume : Number] J. Int'l Law & Com. [Page] [Year]

CSR Murthy

Formerly Professor, CIPOD, Jawaharlal Nehru University, New Delhi, India.

Daniel Rietiker

Senior Lawyer, European Court of Human Rights (Strasbourg) and
International Law Lecturer at the University of Lausanne, Switzerland.

Klaus Schlichtmann

Peace Activist, Environmentalist, Nobel Peace Prize Nominee and Former
Chairman, West-German World Federalists

Haider Ala Hamoudi

Professor and Vice Dean, School of Law, University of Pittsburgh, U.S.A.

Michael Fakhr

UN Special Rapporteur on the Right to Food and Associate Professor,
University of Oregon School of Law, U.S.A.

Obiora Chinedu Okafor

Professor, Osgoode Hall Law School, York University, Canada.

Paul Arnell

Reader in Law, Robert Gordon University, Aberdeen, U.K.

Ratna Kapur

Professor, Queen Mary University of London, U.K.

Selvi Ganesh

Associate Professor, Ambo University, Addis Ababa, Ethiopia.

Vasuki Nesiab

Professor, New York University - Gallatin, U.S.A.

Journal of International Law and Comity
Volume 4 /Number 1

TEAM

EDITOR IN CHIEF

Sabana Reddy

EDITORIAL BOARD

Sheela Rai

Harisankar Sathyapalan

Deepa Kansra

Mohammad Umar

Moumita Mandal

Niteesh K. Upadhyay

Neshan Gunasekera

Thamil Venthban Ananthavinayagan

Anwar Sadat

Nizamuddin Siddiqui

Neba Chauban

Anirudha Choudhury

ASSISTANT EDITORS

Naasba F. Ankelesaria

Matthew Shuck

ARTICLES

When Law Collides with Culture: Ending Corporal Punishment of Children in Sri Lanka

THIVANKA RATNAYAKE

1-31

Conservation of Himalayas: A TWAIL Perspective from Nepal

AMRITHA V. SHENOY & RACHIT MURARKA

32-54

Enforcement of Annulled Foreign Arbitral Awards: Perspectives from Domestic and International Law

ORIOLA O. OYEWOLE

55-77

Role of the UN Security Council in Maintaining Peace: Case Study of Georgia

EKA VARDIASHVILI

78-93

BOOK REVIEW

Dagmar Herzog. *Unlearning Eugenics: Sexuality, Reproduction and Disability in Post-Nazi Europe*. Madison: University of Wisconsin Press, 2020

SWARNA LATHA R

94-99

CONSERVATION OF HIMALAYAS: A TWAIL PERSPECTIVE FROM NEPAL

Amritha V. Shenoy[†]
Rachit Murarka^{††}

Abstract

It is hoped that International Environmental Law can be used to address the global climate crisis, but it may not prove adequate and much understanding is yet needed. The theoretical model of TWAIL ('Third-World Approaches to International Law') provides an alternative approach to international law. However, environmental concerns are of relatively recent origin and a TWAIL viewpoint on the conservation of the Himalayas is not easily visible in the existing literature. The problem of melting glaciers in the Himalayas, and the general depletion of biodiversity has repercussions for Nepal specifically, and for the South Asian region generally. Hence, it is imperative to explore the international, regional and local legal framework to find the vacuum and thereby suggest solutions. The present article offers a TWAIL perspective on the conservation of the Himalayas.

Keywords: Conservation, TWAIL, mountains, Himalayas, Nepal.

^{† ††} Assistant Professors,
Kathmandu School of Law, Nepal ✉ amy.shenoy@gmail.com

I. Introduction: Himalayas and Nepal

Etymologically, the word Himalayas derives from Sanskrit language meaning, 'The House of Snow'. These mountains covered in snow are situated at the highest altitude approximately 5000 metres above sea level. Therefore, scholars analogically consider these peaks as 'arctic desert or nival zone'.¹ After Antarctica and the Arctic, the third largest ice deposits in the world are in the Himalayas. Glaciers are a source of fresh water and many rivers in South Asia. Apart from the Himalayas, a broader range of mountains are included to constitute the Hindu-Kush Himalayas. Hindu-Kush Himalayas cross seven States viz. Afghanistan, Bangladesh, Bhutan, China, India, Myanmar, Nepal and Pakistan. The present paper addresses Hindu-Kush Himalayas at instances where research sources refer accordingly. Nepal has about 800 km. or one-third of the length of the Himalayan Mountain range. Eight out of the ten tallest mountains in the world lie in the abode of the Himalayan range situated in Nepal. The tallest among these peaks, Mount Everest, is in Nepal. Geographically, Toni Hagen classifies Nepal into seven regions.² The Himalayas and Inner Himalayas are the two regions that are part of the mountains. Himalayas are home to great biodiversity of flora and fauna. A glimpse of biodiversity in the Himalayan region in Nepal according to the classification of forests is as follows:

- i. Western Himalayan Subalpine Conifer Forests lie below 3500 metres in the Midhills and Himalayas to the West of the Kali Gandaki river. There are two national parks viz. Rara and

¹ Bhattarai et. al, 'An Overview of the Biodiversity in Nepal' in PAVEL KINDLMANN (ED), HIMALAYAN BIODIVERSITY IN THE CHANGING WORLD 1 (Springer, 2012).

² Toni Hagen classifies Nepal into Tarai, Siwaliks, Mahabharat, Midlands, Himalayas and Inner Himalayas and Tibetan Marginal Mountains. TONI HAGEN, NEPAL – THE KINGDOM IN THE HIMALAYA (Himal Books, 1998).

Khaptad, one hunting area Api Nampa and one hunting reserve Dhorpatan. A diversity of wildlife like Himalayan tahr, musk deer, brown bear, Himalayan serow and goral exist in these forests.

- ii. Eastern Himalayan Subalpine Conifer Forests are below 3500 metres in the Midhills and Himalayan physiographic region east of the Kali Gandaki River. Rhododendron, the national flower of Nepal is a prominent flora in this region. Red pandas, Himalayan musk deer, Himalayan tahr, barking deer, pheasants, and tragopans are a sight in these forests. There are two national parks Makalu-Barun and Langtang, and one conservation area, Annapurna.
- iii. Eastern Himalayan Alpine Shrubs and meadows are situated between 4000 and 5500 metres east of Kali Gandaki River. It is home to alpine plants, snow leopards, Himalayan tahr, and blue sheep. This area has three national parks namely, Langtang, Makalu-Barun and Sagarmatha. Annapurna and Gauri Shankar are the two conservation areas here.

These forests are not watertight divisions. Geographically, the national parks overlap each other. However, the Eastern Himalayas as a whole are mentioned as 'biodiversity hotspots'. The glaciers in the Himalayas are melting at an unprecedented rate thereby threatening the rich biodiversity and human lives of the region itself. It might affect a billion people broadly and about 270 million people in the riverside.³ The global climate crisis has repercussions on these issues

³ Eklabya Sharma et.al, *Transhimalayan Transects: An Approach for Long-Term Ecological Research and Environmental Monitoring to Enhance Climate Change Adaptation in the Hindu Kush-Himalayas*, BIODIVERSITY AND CLIMATE CHANGE: ACHIEVING THE 2020 TARGETS: TECHNICAL SERIES No. 51, (2010) 26-28; Alice Albinia, 'A Water Crisis looms for 270 million people as South Asia's glaciers shrink' *National Geographic*, 16 June 2020, <https://www.nationalgeographic.com/magazine/article/water-crisis-looms-for-270-million-people-south-asia-perpetual-planet-feature#:~:text=Perpetual%20Planet->

and therefore, the major role of International Environmental Law (IEL) is most significant. Mainstream international law rarely discussed the issue of Himalayan conservation and paid little attention to the TWAIL scholarship. This issue affecting international and regional spheres largely remains a local issue. In this regard, the present paper addresses the conservation of the Himalayas and its significance in the present times. The question is whether the existing legal framework on conservation addresses mountains and Himalayas particularly. As an alternative approach to international law from the Global South, does TWAIL bring this issue into the limelight? Considering the range of Himalayas that cross many States, the geographical consideration in conservation is challenging. Can a regional mechanism suffice in this regard? What are the local attempts to conserve the mountains? The paper attempts to answer these questions.

II. International Conservation Law: Does it address the Himalayas?

IEL is one of the largest fragments of international law due to the proliferation of Multilateral Environmental Agreements. These agreements are more than five hundred in number proving the multiplicity of areas that are covered by them.⁴ This process of the creation of Multilateral Environmental Agreements is called the 'greening of international law'.⁵ Conservation is one of the focal points of IEL. With the plethora of agreements on the conservation of

,A%20water%20crisis%20looms%20for%20270%20million%20people%20as%20South,agriculture%20and%20a%20growing%20population (Mar. 7, 2023, 7:00 AM).

⁴ See generally BHARAT H. DESAI, *MULTILATERAL ENVIRONMENTAL AGREEMENTS* (Cambridge University Press, 2010).

⁵ Bharat H. Desai, *Effectuation of International Environmental Law at the National Level: Some Comparative Trends in South Asia*, 5 *BANYAN: SPECIAL ISSUE ON THE ENVIRONMENT: POLICY AND PRACTICE* 55 (2007).

the environment, some scholars have recognised International Conservation Law as a Sub-discipline of International Law.⁶

Environment as a whole came into the limelight after the Stockholm Declaration of 1972. Before the declaration, the focus was on select species like whales. Conservation depended on the economic value of living resources. In addition, to conserve the wetlands, the Ramsar Convention was concluded in 1971. Gradually, the focus shifted to other species and thereby, various soft law and hard law instruments evolved in the field.

Among the soft law instruments, one can name, the World Conservation Strategy of 1980, the World Charter for Nature of 1982, the Caring for Earth Strategy of 1991, and Forestry Principles of 1992. World Conservation Strategy, 1980⁷ defines conservation as ‘the management of human use of the biosphere so that it may yield the greatest sustainable benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations. Thus, conservation is positive, embracing preservation, maintenance sustainable utilization, restoration, and enhancement of the natural environment.’⁸

The definition of conservation is very broad in this instrument. The significance of this document is the primary focus on conservation. It is the first instrument to discuss conservation in detail. The document was further revised in the form of the Caring for the Earth Strategy in

⁶ Arie Trouwborst, *International Nature Conservation Law and the Adaptation of Biodiversity to Climate Change: A Mismatch?*, 21(3) JOURNAL OF ENVIRONMENTAL LAW 419-442 (2009); ED COUZENS, WHALES AND ELEPHANTS IN INTERNATIONAL CONSERVATION LAW AND POLITICS: A COMPARATIVE STUDY (Routledge, 2014); ROB AMOS, INTERNATIONAL CONSERVATION LAW: THE PROTECTION OF PLANTS IN THEORY AND PRACTICE (Taylor and Francis, 2020).

⁷ WORLD CONSERVATION STRATEGY: LIVING RESOURCE CONSERVATION FOR SUSTAINABLE DEVELOPMENT (IUCN 1980).

⁸ *Id.* 18.

1991.⁹ It helps various stakeholders like policymakers to plan policies, laws and other measures towards sustainable living. The significance of this strategy is that it stands 'for a kind of development that provides real improvements in the quality of human life and at the same time, conserves the vitality and diversity of the Earth.'¹⁰

In the World Charter for Nature, the United Nations General Assembly reminds the resolution on Permanent Sovereignty over Natural Resources. The Charter calls for ecological education, funds for conserving nature, scientific research etc. It puts the onus on States, international organisations, individuals, groups and corporations to conserve nature.¹¹ The document is remarkable because of the different stakeholders mentioned who are responsible for conserving nature. Nevertheless, back then, the third-world States were actively participating in the General Assembly discussions, they viewed nature as an economic asset over the conservation of the environment itself. They wanted economic independence and control over their natural resources rather than conserving nature as such.

Additionally, one of the outcomes of the United Nations Conference on Environment and Development, 1992 was the Forestry Principles.¹² These principles are aimed at combating deforestation. The document is neither legally binding nor demands to set targets with regard to forests as suggested by the name itself. However, it expects the States to frame policies keeping these principles in mind.¹³ Forestry

⁹ Caring for the Earth: A Strategy for Sustainable Living (IUCN, 1991).

¹⁰ *supra* note 8, at 8.

¹¹ World Charter for Nature, UNGA Resolution, A. Res. 37/7, 1982.

¹² United Nations Conference on Environment and Development, *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, UN Doc A/Conf 151/126 (14 August 1992).

¹³ ROWENA MAGUIRE, GLOBAL FOREST GOVERNANCE: LEGAL CONCEPTS AND POLICY TRENDS 107 (Edward Elgar, 2013).

Principles were again laid down in a new form in 2007.¹⁴ The 2007 principles were formulated 'in order to try and strengthen global political commitment to implementing sustainable forest management.'¹⁵

Conservation has been a central theme of various hard law instruments like the Ramsar Convention of 1971, the World Heritage Convention of 1972, the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 1973, the Convention on Migratory Species, 1979, the Convention on Biological Diversity of 1992, United Nations Convention to Combat Desertification of 1994. The Ramsar Convention of 1971 has the central theme of the conservation of wetlands. Wetlands according to the convention 'are areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres.'¹⁶

World Heritage Convention of 1972 encourages the protection of natural and cultural heritage. The State parties are supposed to nominate sites to be included in the World Heritage List.¹⁷ In 1973, States entered into the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The Convention puts restrictions on trade in specified species mentioned in the

¹⁴ United Nations Forum on Forestry, *Non-Legally Binding Instrument on All Types of Forests*, Second Comm, 62nd Session, Agenda Item 54, UN Doc A/C.I.2/62/L.5 (22 October 2007).

¹⁵ Maguire, *supra* note 14, at 46.

¹⁶ Article 1(1) of Convention on Wetlands of International Importance Especially as Waterfowl Habitat: Opened for Signature 2 February 1971, 996 U.N.T.S. 245 (entered into force 21 December 1975).

¹⁷ Article 11 of Convention for the Protection of the World Cultural and Natural Heritage: Opened for Signature 16 November 1972, 1037 U.N.T.S. 151 (entered into force 17 December 1975).

appendices.¹⁸ The 1979 Convention on Migratory Species centres around the conservation of migratory species. It aims at saving species from endangerment and saving the endangered migratory species from extinction.¹⁹

A comprehensive hard law on conservation is the Convention on Biological Diversity. The objectives of the Convention on Biological Diversity of 1992 'are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding.'²⁰

Article 2 of the Convention defines biological diversity as 'The variability among living organisms from all sources, including inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'. The convention's focus on developing nations (especially least developed countries), and transfer of technology are laudable aspects.

Land conservation has become one of the pressing needs and was addressed in 1994 by the United Nations Convention to Combat Desertification. As per Article 1(b) of the Convention 'combating desertification' includes activities which are part of the integrated development of land in arid, semi-arid and dry sub-humid areas for sustainable development which are aimed at:

¹⁸ Articles III-V of the Convention on International Trade in Endangered Species of Wild Fauna and Flora: Opened for Signature 3 March 1973, 993 U.N.T.S. 243 (entered into force 1 July 1975) ('CITES').

¹⁹ Article I and Article III, Convention on the Conservation of Migratory Species of Wild Animals: Opened for Signature 6 November 1979, 1651 U.N.T.S. 333 (entered into force 1 November 1983) ('CMS').

²⁰ Article 1, Convention on Biological Diversity: Opened for Signature on 5 June 1992, 1760 U.N.T.S. 69 (entered into force 29 December 1993) ('CBD').

- i. Prevention and/or reduction of land degradation;
- ii. Rehabilitation of partly degraded land; and
- iii. Reclamation of desertified land.²¹

Besides these instruments, the International Union for Conservation of Nature plays a crucial role in the conservation of nature in a sustainable manner. IUCN was founded in October 1948. The headquarters of the organisation is in Gland, Switzerland.

Assessing the wide range of international instruments, another fragmentation of international law seems apparent here i.e. international conservation law. Fragmentation helps in specialisation on various issues.²² On the flip side, it leads to a lack of coordination among states, INGOs and other entities involved.

Due to the multiplicity of instruments on conservation, Alexander Gillespie opines that ‘the laws, policies and principles’ in international conservation ‘are often scattered, lost, or seen in isolation’.²³ Be that as it may, the point to moot here is that conservation is an integral part of addressing the environment in international law. It is manifest through the aforementioned international legal framework on conservation. The question that arises here is despite the multiplicity of issues discussed in these instruments on the environment and particularly, conservation, are there any instruments that particularly mention the conservation of mountains, specifically, the Himalayas?

²¹ United Nations Convention to Combat Desertification: Opened for Signature 26 December 1996, 1954 U.N.T.S 3 (entered into force 26 December 1996) (‘CCD’).

²² For detailed understanding of fragmentation see Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law*, 25:4 MICHIGAN JOURNAL OF INTERNATIONAL LAW 849, 859 (2004); Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, REPORT OF THE STUDY GROUP OF THE INTERNATIONAL LAW COMMISSION, ILC 58th Session 2006, A/CN/4/L682.

²³ ALEXANDER GILLESPIE, CONSERVATION, BIODIVERSITY AND INTERNATIONAL LAW (Edward Elgar, 2011) 1.

III. International Law and Mountains

Justice Ananda Mohan Bhattarai wrote the treatise *Protection of Himalayan Biodiversity: International Environmental Law and a Regional Legal Framework* in the same year as the International Year of Biodiversity in Asia i.e. 2010. The issue to be mooted as raised by him is that International Environment Law Scholars in the West neglect Asia and the rich biodiversity in the region. His argument is similar to the arguments raised by TWAIL scholars Mickelson, Natarajan and others.

Justice Bhattarai calls for the adoption of an international legal regime to govern biodiversity in the Himalayan region. Mountains, and particularly, the Himalayas are rarely mentioned in international instruments. Four decades ago, the IUCN at Ashkhabad in its Fourteenth General Assembly, 1978 discussed about 'Conservation of the Himalayan Region'.²⁴ The Seventh Meeting of the Conference of Parties (COP-7) to the Convention on Biological Diversity discussed mountain biodiversity as one of the themes and adopted 'Programme of Work on Mountain Biodiversity' in 2004. It aimed at minimising the loss of mountain biodiversity by 2010. Almost two decades passed since these discussions. As aforementioned in the first section, the melting glaciers of the Himalayas is a climate emergency that needs to be addressed immediately.

Among the existing international treaties, the Convention on Biological Diversity plays a significant role in conservation strategies. Bharat H. Desai and Krishna Prasad Oli opine that since the Himalayas cross a range of five states, it is difficult to assess the implementation of the Convention on Biological Diversity (CBD).²⁵

²⁴ Resolution 19, *IUCN*, 14th General Assembly.

²⁵ Bharat H. Desai and Krishna Prasad Oli, 'Analysis of Implementation of the Convention on Biological Diversity in the Hindu Kush- Himalayan Countries' in *Biodiversity and Climate Change: Achieving the 2020 Targets* (Technical Series No. 51, 2010) 80-82.

Specific to the conservation of biodiversity, certain developments are noticed like ‘national biodiversity strategies, biodiversity action plans, promulgation of new policies, national legal instruments and institutional structures to help promote the goals of CBD.’²⁶

The role of the International Centre for Integrated Mountain Development (ICIMOD) in the implementation of CBD is crucial for the Himalayas. The studies conducted by ICIMOD are very specific to the Himalayas and are referred to in the present study too. Despite these efforts, the international community is required to look at the issue more carefully. Involvement of INGOs, NGOs, academicians, scientists, lawyers, and politicians, in educating the young (keeping in mind inter-generational equity) is imperative. In this regard, the critical international law scholarship dealing with the developing world is the TWAIL scholarship. The article is a significant attempt to draw the attention of TWAIL scholars towards the necessity of Himalayan conservation.

IV. TWAIL and the Environmental Concerns of Global South

Third World Approaches to International Law, succinctly TWAIL, offers an alternative perspective to international law.²⁷ It calls for justice for third-world states in the discipline and functioning of international law. Over the years, TWAIL has been seen as a ‘political movement’²⁸ as well as a disciplinary challenge with a plethora of literature on various fragments of international law. However, it largely focuses on international economic, historical and political aspects over others. The primary reason for such emphasis is its

²⁶ *Id.*

²⁷ For further understanding of TWAIL see Bhupinder Singh Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INTERNATIONAL COMMUNITY LAW REVIEW 3-27 (2006).

²⁸ Makau Mutua & Antony Anghie, *What is TWAIL?*, 94 PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 31 (2000).

genesis in the active participation of third-world states in the General Assembly during the era of decolonisation. Pondering over the crux of TWAIL, it calls for more research and discussion of third-world issues.

It is argued that the term third world was an outcome of the Cold War era and that it has no relevance in the present times. The scholars who are part of the scholarship, have drawn attention to various problems of third-world peoples that is now common to those of the first world. Poverty and violation of basic rights (housing, food and basic standard of living) is a common issue of the developed world today. This has been exacerbated by the pandemic that hit the world in 2020. Therefore, the voice of critical and TWAIL scholarship is heard in the Global North. The author agrees that the issues during the genesis of TWAIL were different from those of the present times. And there arises the need for change in the scholarship itself. Nevertheless, TWAIL has gained more significance and recognition over time.²⁹

Despite raising the voices of third world (States and at present, peoples), TWAIL did not pay much attention to environmental concerns.³⁰ Its advocates viewed the emphasis on the environment by the Global North as opposing the development craved by third-world states just after decolonisation.³¹ Developing nations shifted the onus of environmental protection on the developed States. Therefore, the Rio Earth Summit, 1992 includes two principles necessary for the developing world viz. Common but differentiated responsibility and

²⁹ Obiora Chinedu Okafor, *Newness, Imperialism and International Legal Reform in Our Time: A TWAIL Perspective*, 43: 1, 2 OSGOODE HALL LAW JOURNAL 171,174 (2005).

³⁰ Usha Natarajan, 'Third World Approaches to International Law (TWAIL) and the Environment' in ANDREAS PHILIPPOPOULOS-MIHALOPOULOS AND VICTORIA BROOKS (ED), *RESEARCH METHODS IN ENVIRONMENTAL LAW: A HANDBOOK* 207, 208 (Edward Elgar, 2017).

³¹ Usha Natarajan cites Ram P. Anand, 'Valedictory Address' in RAM P. ANAND, RAHMATTULAH KHAN AND BHATT (ED.), *LAW, SCIENCE AND ENVIRONMENT* 266-267 (Lancer 1987).

the principle of sustainable development. These principles ask for the active participation of the developed states in solving the issues of the developing States. Be that as it may, in recent times, environmental issues have gained the attention of TWAIL scholars; namely, Karin Mickelson³², Usha Natarajan³³ and others. Environment is an integral part of human existence itself, along with the pressing issues of global warming and climate change. Their repercussion is felt around the globe. Earth is facing a climate crisis with recurring incidents of floods, droughts, landslides, pandemics and natural calamities.

Not understanding the imperatives of solving them, IEL largely focuses on the problems of European nations. As evident from the previous section, international law does not take into account the conservation of the Himalayas. Considering the vastness of IEL, the Himalayas with the highest peaks and rich biodiversity is rarely brought to the notice of the international law-making community because it is considered as an agenda for the Global South. The present article draws the attention of international lawyers and for that matter, TWAIL scholars to expand the literature on Himalayan conservation and ultimately, achieve its preservation, one of the most pressing environmental concerns at present. Simultaneously, regional cooperation and local efforts call for support from the Global North.

V. Regional Cooperation in Conserving Himalayas

The South Asian region is so interconnected that the repercussions of floods, earthquakes, drought etc. are felt throughout the region. Understanding this interconnectedness, the South Asian Association for Regional Cooperation conducted two regional studies in 1987 and 1988. SAARC also adopted the Plan of Action on Environment, Malé

³² Karin Mickelson, South, North, International Environmental Law and International Environmental Lawyers', (2000) 11 YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 52.

³³ Natarajan, *supra* note 31, at 209.

in 1997 and the Declaration for a Common Environment Programme, Colombo in 1998.

In 1982, the organisation established the South Asian Cooperative Environment Programme for regional cooperation in the field of environment. In this regard, the South Asian States have established ministries to take care of the environment.³⁴ In Nepal, the Ministry of Forests and Environment deals with the portfolio of the environment.

Additionally, the Convention on Cooperation on Environment³⁵ was convened in 2010 wherein the best practices of South Asian states concerning the environment were discussed. The regional organisation's efforts in the area of environment are significant but not enough, especially about the Himalayas.

Similar to the Hindu Kush Himalayas are the Alps covering a region in Europe. The urgency to conserve the Alpine region was realised in the 1980s and the Convention on the Protection of the Alps was entered in 1991. The implementation of the convention does face challenges,³⁶ like differences of the State parties. However, it remains a good initiative with biannual meetings of the parties and emulating best practices. The primary focus of the Convention is sustainable development. SAARC can cooperate with the Alpine region to adopt similar good practices in South Asia according to the special needs of Himalayan conservation.

³⁴ Bharat H. Desai, *Effectuation of International Environmental Law at the National Level: Some Comparative Trends in South Asia*, 5 BANYAN: SPECIAL ISSUE ON THE ENVIRONMENT: POLICY AND PRACTICE 55-64 (2007).

³⁵ SAARC Convention on Cooperation on Environment, Opened for Signature 29 April 2010, <https://www.saarc-sec.org/index.php/resources/agreements-conventions/47-saarc-convention-on-cooperation-on-environment/file>, (Oct. 7, 2022, 8:00 PM).

³⁶ Werner Bätzing, Paul Messerli & Thomas Scheurer, *Proceedings: The Alp Convention between international law and implementation in federal structures: obstacles and perspectives*, REVUE DE GEOGRAPHIE ALPINE 118-126 (2004).

VI. Local Steps Towards Conservation

International law or IEL for that matter cannot come into operation without the consent of States. States have to take positive steps, suitable to their domestic situations for proper implementation of international law. In this regard, Nepal has taken a few positive steps towards conservation.

National Parks and Wildlife Conservation Act, 1973 provides legal protection for the conservation of wildlife. It includes in Schedule I a list of mammals, birds and reptiles prohibited from hunting. It prescribes protected areas that are safe habitat for endangered plants and animals. The Act enlists protected areas as national parks, strict nature reserves, wildlife reserves, hunting reserves, conservation areas and buffer zones. Implementing the Act, Nepal formed twelve national parks, one wildlife reserve, one hunting reserve and six conservation areas.

For special conservation and compliance with international law, the protected areas are classified as per IUCN. IUCN Category I protected area is a Strict Nature Reserve. Makalu Barun National Park in Eastern Nepal is a strict nature reserve. IUCN Category II protected area is a national park that is broadly regulated. National Park is defined in Section 2(a) of the National Parks and Wildlife Conservation Act, 1973 as ‘an area set aside for the conservation, management and utilization of flora, fauna and scenery along with natural environment.’ National Park not only includes the natural environment but also ‘ecological, socio-cultural, biological and geomorphologic associations of aesthetic importance.’³⁷ IUCN Category IV is a wildlife reserve. IUCN Category VIII protected area is a hunting reserve. It allows legal recreational hunting of blue sheep and Himalayan Tahr. IUCN Category VI protected area is a

³⁷ Bishnu Prasad Bhattarai et. al, *Conservation of Biodiversity: An Outline of the Challenges* in PAVEL KINDLMANN (ED), HIMALAYAN BIODIVERSITY IN THE CHANGING WORLD 45 (Springer).

conservation area. An area surrounding a national park or a reserve is known as a buffer zone. A Buffer Zone falls in the IUCN Category VI protected area. It was introduced in Nepal through the amendment of the NPWC Act, 1973. The purpose of introducing a buffer zone is to regulate the use of forest products and involve people in conservation and vice-versa the people in a buffer zone also benefit from eco-tourism.

In pursuance of accession to the Ramsar Convention on Wetlands on 17th April 1988, there are ten Ramsar sites namely, Beeshazari and associated lakes, Lake Ghodaghodi, Gokyo and associated lakes, Gosainkunda and associated lakes, Jagadishpur reservoir, Koshi Tappu, Mai Pokhari, Lake Phoksundo, Lake Rara, lake cluster of Pokhara valley.

There are two conservation attempts in Nepal, viz. the Tarai Arc Landscape and the Sacred Himalayan Landscape. The above-mentioned laws are generally applicable to the conservation of biodiversity in Nepal. Be that as it may, the Sacred Himalayan Landscape is significant in the light of this paper. It is a transboundary conservation area of 39,021 Sq. Km. It is a collaboration of three States viz. Nepal, Bhutan and India according to the area of the Himalayas situated in these States. It is a collaboration of Nepal with INGOs like WWF and ICIMOD. Apart from the above two attempts, the Transboundary Landscape³⁸ initiative of ICIMOD between 2007 and 2019 helped the States further regional cooperation in conservation and sustainable development.³⁹

³⁸ Transboundary landscapes approach of ICIMOD 'adopt the landscape approach across boundaries to manage biodiversity and ecosystems, defining the landscapes by ecosystems rather than administrative boundaries'. <https://www.icimod.org/regional-programme/transboundary-landscapes/> (Dec. 21, 2023, 9:00 PM).

³⁹ Rajan Kumar Kotru et. al, *Biodiversity Conservation and Management in the Hindu Kush Himalayan Region: Are Transboundary Landscapes a Promising Solution?*, 40:2 MOUNTAIN RESEARCH AND DEVELOPMENT 15-A23 (2020).

The efforts of the State are met with successful programs where people are directly involved, namely the community forestry in Nepal. It began in the 1970s and was legalised under the Forest Act, 1993 and Forest Regulation, 1995. Local communities are known to have benefited from this program.⁴⁰

Like many States, the conservation of biodiversity remains a big challenge. It is pertinent to note that these efforts are minute compared to the mammoth task of conservation of the Himalayas. Nepal is one of the least developed nations with minuscule resources to look into environmental issues. Climate change and global warming are transboundary. Global efforts are required to mitigate these pressing issues. Therefore, one of the focal points of international conservation law should be the conservation of the Himalayas.

VII. Challenges for Conservation

Conservation despite the division of forests or ecoregions or any other criteria of classification has to confront various challenges. The primary challenge is anthropogenic interference.⁴¹ Especially in the context of developing nations, more so in the South Asian region, subsistence farming (terrace farming in hilly regions) accompanied by the grazing of domestic animals affects the conservation of biodiversity. This threat continues due to the growing population. Wildlife survives on grasslands and grazing by domestic animals threatens the wildlife habitat. Awareness about climate change and sustainable development can help in mitigating such interferences.

The second challenge is deforestation. In the context of Nepal, in the Tarai and Siwalik regions, deforestation is a major issue. People from hilly regions migrate due to the difficult terrain to live. To accommodate the mass migrations, deforestation occurs. Sometimes,

⁴⁰ Keshav R. Kanel & Bala Ram Kandel, *Community Forestry in Nepal: Achievements and Challenges*, (2004) 4(1) JOURNAL OF FOREST AND LIVELIHOOD 55 (2004).

⁴¹ Bhattarai, *supra* note 1, at 41.

new laws lead to negative consequences. The Private Forests Nationalisation Act of 1957 in Nepal exemplifies such legislation. People believed that the government would confiscate their land in the process of forest nationalisation.⁴² Farmers stopped planting trees. The situation continued till the 1980s.⁴³ The problem lay with the very definition of forests that gave the impression that any area with trees is classified as forest.⁴⁴

The third challenge is concerning the wetlands. Loss and alteration of wetlands is due to 'threat from encroachment, unsustainable harvesting, industrial pollution, agricultural runoff, silting, and the

⁴² *Id.* at 42.

⁴³ Swoyambhu M. Amatya and Prakash Lamsal, *Private Forests in Nepal: Status and Policy Analysis*, 15(1) JOURNAL OF FOREST AND LIVELIHOOD 121 (2017).

⁴⁴ Section 2, Private Forests Nationalisation Act, 1957 states:

(1) For the purposes of this Act, private forests shall mean forest in all types of lands being owned and possessed by individuals upon the remission of revenue on the whole or some parts thereof or in any manner prior to the commencement of this Act and include the barren lands within the boundary of the said forests.

Provided that,

a. Some sporadic trees in some distances in the cultivated lands or fruits garden within or outside house compound and other trees inside the same shall not be considered as forests.

b. Trees planted and grown by any person with his or her own efforts in a maximum of Twenty Five Ropanis of land in the valley and hills and a maximum of Five Bigaha of land in Terai shall not be considered as forests.

(2) If there arises any question as to whether any land falls in the private forests or not or whether private forests fall in any land or not or as to the borders or area of that forests or whether any forests are private forests or not, that matter shall be decided by the officer designated by the Government of Nepal for that purpose.

(3) A person who is not satisfied with the decision of the officer designated under Sub-section (2) may make an appeal to the Government of Nepal within thirty-five days; and the right of the forest officer to make such appeal shall also be reserved.

introduction of exotic and invasive species'.⁴⁵ Pollution results in eutrophication or the growth of algae as a challenge to the conservation of wetlands. With these one can name environmental pollution as a major challenge resulting from untreated domestic and industrial waste, pesticides, smoke etc. Tourism attracts many people to enjoy the beauty of the Himalayas. Recently, a news report along with pictures depicted a 'traffic jam' in Mount Everest, killing climbers.⁴⁶ The plastic waste, residue of food and faeces left in the Himalayas by climbers threatens mountains.⁴⁷

Despite the plethora of laws and policies, any steps taken by humans to resolve the issues related to conservation, climate change remains a hindrance. Regarding the Himalayas, climate change manifests in the form of melting glaciers, changes in rainfall patterns, drought etc. This is dangerous because the environment of the Himalayan region is vulnerable. The environment is heterogeneous because of the variation in height, region etc. In this way, the global climate crisis affects the Himalayas and the South Asian region. Thus, to solve the issue of climate change and its particular repercussions on the Himalayas, the attention of international lawyers and TWAIL scholars is necessary.

The specific issue that poses a challenge to conserving wildlife is poaching. Earlier, states were least bothered to conserve wildlife. In the case of Nepal, the Rana regime helped in hunting tigers and rhinoceros resulting in a shrinking population of these animals. In the 1960s conservation in Nepal began with declaring certain areas as protected areas. National Parks and Wildlife Conservation Act, of 1972 prohibited poaching and trading in wildlife. These were some positive steps but poaching and hunting continue illegally.

⁴⁵ Bhattarai et. al, *supra* note 1, at 50.

⁴⁶ Sangam Prasain, *Despite assurances from expeditions and government, a 'traffic jam' on Everest kills climbers again*, KATHMANDU POST, 23 May 2019.

⁴⁷ *Trash and Overcrowding at the top of the World*, NATIONAL GEOGRAPHIC, 1 October 2019.

Generally, taking the global south into account, Maren and Sharma state that 'people reside within the boundaries in 70% of the protected areas'.⁴⁸ Other problems like 'poverty, access rights and environmental degradation' further hinder the conservation of biological diversity.⁴⁹

Conservation seems to be a major attempt made by the State along with INGOs. However, the research and funding is largely confined to species like tigers and rhinos. The funding agencies argue that conserving such flagship species would indirectly protect other species.⁵⁰ However, it leads to a lack of research and thereby conservation of species that might require special attention due to endangerment. This results in denial of the rich bio-diversity of the Himalayas that is inexplicably diverse and rich. Due to a lack of research on the Hindu-Kush Himalayan region, IPCC in 2007 named it as a 'data-deficit region'.⁵¹ It continues to remain so.⁵²

Scientific uncertainty exists at several levels. Apart from the lack of data, the issue of nomenclature⁵³ of fauna and especially, flora is of great concern. In 1895, the International Commission on Zoological Nomenclature was created. The Commission is responsible for the

⁴⁸ Inger Elizabeth Maren & Lila Nath Sharma, *Managing Biodiversity: Impacts of Legal Protection in Mountain Forests of the Himalayas*, 9 *FORESTS* 1 (2018).

⁴⁹ *Id.* at 1.

⁵⁰ PAVEL KINDLMANN (ED.), *HIMALAYAN BIODIVERSITY IN THE CHANGING WORLD* 215 (Springer 2011).

⁵¹ IPCC SUSAN SOLOMON ET. AL (ED.), *CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS: CONTRIBUTION BY WORKING GROUP I TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* (Cambridge University Press, 2007).

⁵² Surendra P. Singh & Rajesh Thadani, *Complexities and Controversies in Himalayan Research: A Call for Collaboration and Rigor for Better Data*, 35(4) *MOUNTAIN RESEARCH AND DEVELOPMENT* 401-409 (2015).

⁵³ 'In science, it is used for technical terms, with zoological nomenclature in particular, being the application of distinctive names to each group recognised within a classification'- Gillespie, *supra* note 23, at 18.

stability of the nomenclature of animals by creating an International Code of Zoological Nomenclature. Concerning flora, there is no such nomenclature body. Therefore, inconsistencies arise. A central register for the nomenclature of flora does not exist leading to variation of flora species from convention to convention. An estimate of species of flora is between 5 to 120 million.⁵⁴ According to Alexander Gillespie despite the progress in science, there lack of coordination between science and law.⁵⁵

Studies establishing climate change on biodiversity are undertaken that prove the adverse effects of climate change on biodiversity. Undoubtedly, climate change has serious impacts on mountains. Research focussing on the Hindu-Kush-Himalayan region and the effects of climate change is inadequate.⁵⁶ Furthermore, reports as mentioned earlier in this paper prove that glaciers are melting due to climate change. However, research analysis does not differentiate between seasonal and permanent snow.⁵⁷

VIII. Solutions for Better Conservation

For better conservation of bio-diversity, Wikramanayake et al suggest a division of regions namely ecoregions:

An ecoregion is a large area of land or water that contains a geographically distinct assemblage of natural communities that 1. share the majority of their species and have similar ecological dynamics; 2. share similar environmental

⁵⁴ *Id.* at 17.

⁵⁵ *Id.* at 570.

⁵⁶ *Biodiversity in the Eastern Himalayas: Status, Trends and Vulnerability to Climate Change*, CLIMATE CHANGE IMPACT AND VULNERABILITY IN THE EASTERN HIMALAYAS- TECHNICAL REPORT 2 (ICIMOD 2010) 1.

⁵⁷ *Id.* at 9.

conditions, and 3. interact ecologically in ways that are critical for their long-term persistence'.⁵⁸

The authors also suggest 'inter-ecoregion level research-based conservation program' for ensuring 'long-term conservation of the Himalayan hotspot'.⁵⁹ However, they do not discuss in detail how such a program would operate or be successfully implemented.

ICIMOD proposes the Trans-Himalayan Transect Initiative with the involvement of States, the region as a whole and local actors in research and monitoring the Hindu Kush Himalayan Region.⁶⁰ Transects are selected to be representative of environmental conditions and inclusive of important selected parameters such as biodiversity hotspots, agricultural production systems, and socio-economic, cultural and institutional diversity.⁶¹

IX. Conclusion

The climate crisis is haunting the world today. Therefore, international lawyers as well as alternative approaches to international law proponents are also looking into solutions for the protection of the environment. In this sense, TWAIL scholars realised the importance of the environment quite recently. Viewing the environment from a TWAIL perspective, the issues of the Global South needs to receive more attention. The present paper is a call for Himalayan conservation to save the South Asian region from a catastrophe in the future, *not so far*. Various solutions are suggested in the paper that are mostly from a legal perspective. The primary focus is international conservation law and support of Global North in this matter is necessary. Regional laws complement international laws and therefore, regional cooperation is also suggested here, similar to the Alpine region

⁵⁸ ERIC D. WIKRAMANAYAKE ET AL, TERRESTRIAL ECOREGIONS OF THE INDO-PACIFIC: A COMMUNITY ASSESSMENT (Island Press 2002) 24.

⁵⁹ *Id.* at 36.

⁶⁰ Sharma, *supra* note 3, at 26.

⁶¹ *Id.* at 27.

cooperation for conserving the Alps. Domestic laws of Nepal are pointed out that facilitate conservation. However, the State machinery fails at times due to limited resources in the case of Least Developed Nations. The point is not to blame the Global North for issues on our side of the globe, but also to self-introspect on how better solutions can be applied for better conservation. Himalayan transects, ecoregions, etc. are a few suggestions for better conservation. Foremost amongst these should be to lessen the anthropocentric intrusions in the Himalayas. Human presence cannot be negated totally but can be controlled sustainably with more awareness and education. Further awareness of the Himalayas' significance and threat to their preservation need to be discussed more and implemented with rigour.
