Denver Journal of International Law & Policy

Volume 19
Number 2 *Winter*

Article 3

May 2020

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Recommended Citation
Melissa Thorme, Establishing Environment as a Human Right, 19 Denv. J. Int'l L. & Pol'y 301 (1991).

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Establishing Environment As a Human Right

MELISSA THORME*

I. INTRODUCTION

> It is hardly novel to assert that population pressure is growing, that the danger of nuclear war persists, that various forms of pollution are destroying our environment, and that resources upon which our affluence depends will not be able to satisfy the demands of future generations. These circumstances add up to a situation of unprecedented danger for the human race. Man is being confronted with the grim actuality of his contingent existence in a limited environment.[1]

A. *Statement of Purpose*

Human life and the human environment are inseparable. To survive, humans must have air to breathe, water to drink, food to eat, and a place in which to live and sleep. If these elements become polluted, contaminated, or are eliminated or destroyed, life will cease to exist. To protect human life, our environmental life support system must be maintained and protected. One way to accomplish this protection is through the enactment or recognition of a legal human right to environment.

For over two decades, scholars have debated the existence of a human right to environment. These debates have varied from generalized notions of what to include within the term "environment" to actual proposals for amendments to multinational human rights conventions. Unfortunately, the attention given to this subject over the years has not resulted in any substantial headway toward a legal recognition of the right.

This paper proposes a new avenue for establishing this international right, namely, by resolutions and actions by the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) and the United Nations Commission on Human Rights (Human Rights Commission). Establishing environment as a human right will make the right to environment as justiciable as other previously defined human rights. It will make human rights forums able, and more willing, to hear claims by individuals and non-governmental organizations. Claims alleging gross violations of this human right may then

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1. R. FALK, THIS ENDANGERED PLANET: PROSPECTS AND PROPOSALS FOR HUMAN SURVIVAL 4 (1971).

be brought whenever environmental degradation affecting human life, health, or well-being occurs.

B. *Background*

To understand the concept of environment as a human right, a brief background on international human rights is necessary. "A human right by definition is a universal moral right, something which all [people] everywhere at all times ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human."[2] Human rights are also legal rights which possess one or more of the following characteristics: appurtenance to the human person or group; essential for international order; essential to human life, security, survival, dignity, liberty, and equality; essential as a place within the conscience of mankind; essential for the protection of vulnerable groups; and universality.[3]

The human right to environment possesses all of the above characteristics. In addition, all the features of a right of the new generation are there: elaboration of a specialized body of international environmental law; an easily identifiable international legislative process; incorporation of the right as a human right within municipal legal systems; and the need for concerted efforts of all social actors.[4] These features will be elaborated upon in this paper.

Some authors describe international human rights as those human needs that have received formal recognition as rights through sources of international law.[5] Others say that they represent claims or demands which individuals make on society that are protected by law.[6] The concept of what constitutes a human right clearly varies over time. For example, early in U.S. history, some Americans argued that they had the right to keep slaves. The issue of human slavery was considered in a very different light than it is today. Today, there exists an international human right not to be enslaved, as codified in the Slavery Convention.[7]

Since the future meaning and content of human rights remains

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2. M. CRANSTON, WHAT ARE HUMAN RIGHTS? 36 (1973), *quoted in* Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 615 n.30 (1986).

3. Alston, *supra* note 2, at 615 n.30. *See also* Ramcharan, *The Concept of Human Rights in Contemporary International Law*, 1983 CAN. HUM. RTS. Y.B. 267, 280.

4. Marks, *Emerging Human Rights: A New Generation for the 1980's?*, 33 RUTGERS L. REV. 435, 442-43 (1981).

5. *Id.* at 436.

6. Eze, *Right to Health as a Human Right in Africa*, in THE RIGHT TO HEALTH AS A HUMAN RIGHT 77 (R. Dupuy ed. 1979).

7. *Slavery Convention*, Sept. 25, 1926, 60 L.N.T.S. 253. *See also Universal Declaration of Human Rights*, art. 4, G.A. Res. 217A, U.N. Doc. A/810, at 71 (1948). Human rights, such as the right not to be enslaved, which have become protected by international law are considered to be part of the *lex lata*. Others, such as the right to environment, remain aspirations yet to be attained, and are thus *lex ferenda*. *See* O.C. Eze, *supra* note 6, at 77.

open,[8] the possibility exists that "new" human rights may be established. As long as these emerging rights are not trivial or unrealistic, their recognition serves to enhance preexisting human rights by expanding them to include new values and to cover new threats to human life.[9] One of the greatest present threats to continued human existence comes from the deterioration of the human environment. Technological hazards upset the ecological balance of water, earth, and air and may eventually make our planet uninhabitable or the human species extinct.[10] For these reasons, a new human right to a safe, healthy, and ecologically-balanced environment must be established. Even if these claims about uninhabitability and extinction are exaggerated, legal recognition and enforcement of this right would improve the quality of human life.

1. History of Environment as a Human Right

The idea of environment as a human right first emerged in the international arena in 1968 when the General Assembly of the United Nations recognized that technological changes could threaten the fundamental rights of human beings.[11] Soon thereafter, the United Nations Education, Science, and Culture Organization (UNESCO) organized the Intergovernmental Conference of Experts on Scientific Bases for Rational Use and Conservation of the Resources of the Biosphere.[12] In 1969, the United Nations General Assembly adopted a Declaration on Progress and Development in the Social Arena which explored the interdependence between the protection of the environment and human rights.[13]

The United Nations formally recognized the right to a clean environment for the first time in 1972. In June 1972, the U.N. Conference on the Human Environment proclaimed the principle that "[m]an has a fundamental right to freedom, equality, and adequate conditions of life in an environment of quality that permits a life of dignity and well-being . . ."[14]

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8. H. Espiell, *The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches*, in HUMAN RIGHTS: 30 YEARS AFTER THE UNIVERSAL DECLARATION 42 (B. Ramcharan ed. 1979) [hereinafter HUMAN RIGHTS].

9. Marks, *supra* note 4, at 451.

10. R. FALK, *supra* note 1, at 10. *See also* Van Boven, *The Right to Health — Paper Submitted by the U.N. Division of Human Rights*, in THE RIGHT TO HEALTH AS A HUMAN RIGHT, *supra* at 6.

11. G.A. Res. 2398, U.N. Doc. A/L.553/Add. 1-4 (1968). *See also Problems of the Human Environment: Report of the Secretary-General*, 47 U.N. ESCOR (Agenda Item 50), U.N. Doc. E/4667 (1969); Makarewicz, *La Protection Internationale du Droit à l'environnement*, in ENVIRONNEMENT ET DROITS DE L'HOMME 79 (P. Kromarek ed. 1987).

12. UNESCO Res. 2.3131 and 2.34/4 (1968). *See also* Makarewicz, *supra* note 11, at 79.

13. G.A. Res. 2542, U.N. Doc. A/7833, A/L 583 (1969) (adopted by 119 states with 0 no votes and only 2 abstentions). *See also* Makarewicz, *supra* note 11, at 79-80.

14. *Report of the U.N. Conference on the Human Environment, Stockholm*, U.N. Doc. A/CONF.48/14/Rev. 1, at 4 (1974) [hereinafter *Stockholm Declaration*], *quoted in* 11 I.L.M. 1416 (1972). *See also* Alston, *supra* note 2, at 612.

On the regional level, the 1971 European Parliamentary Conference on Human Rights also paid attention to the right to a pure and healthy environment, often in relation to the right to life.[15] The 1972 Consultative Assembly of the Council of Europe recommended that the Committee of Ministers set up an *ad hoc* committee of experts. These experts were to,

> consider, in the light of the conclusions reached at the United Nations Conference in Stockholm and the Council of Europe Conference on the Human Environment, whether the right to an adequate environment should be raised to the level of a human right, and [to] devise an appropriate legal instrument to protect this new right.[16]

In 1973, the second conference of the Ministers of the Environment made a similar recommendation, which was endorsed by the Consultative Assembly.[17]

Also in 1973, the government of the Federal Republic of Germany proposed that the right to a healthy and balanced environment be incorporated into an additional protocol to the European Convention on Human Rights.[18] The fact that neither this protocol nor any other instrument has been adopted does not mean that this right has been rejected. On the contrary, the constitutions of numerous nations and states have already expressly affirmed it.[19] Other less explicit formulations exist in the constitutions of states such as Poland and Hungary.[20] Still other state constitutions stipulate that the government accepts an affirmative duty to protect the environment.[21]

In his 1974 Hague Academy lecture, Nobel Prize winner René Cassin advocated that existing concepts of human rights protection should be extended to include the right to a healthful and decent environment (i.e., freedom from pollution and the corresponding rights to pure air and water).[22] Cassin's proposal reflected ideas laid out by the Council of Europe at the 1970 Conservation Year conference in Strasbourg. Subsequent

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15. Gormley, *The Right of Individuals to be Guaranteed a Pure, Clean and Decent Environment: Future Programs of the Council of Europe*, 1975 LEGAL ISSUES IN EUR. INTEGRATION 23, 52.

16. *Id.* at 55.

17. *Id.*

18. *See* THE WORKING GROUP FOR ENVIRONMENTAL LAW (BONN), THE RIGHT TO A HUMANE ENVIRONMENT: PROPOSAL FOR AN ADDITIONAL PROTOCOL TO THE EUROPEAN HUMAN RIGHTS CONVENTION (1973).

19. For example, Spain, Portugal, Peru, and Yugoslavia. *See* E. WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY 297, App. B (1989) (sets out constitutional provisions on environmental rights and duties).

20. *Id.*

21. *E.g.*, those of Greece, Switzerland, Czechoslovakia, the former German Democratic Republic, the People's Republic of China, the U.S.S.R., Sri Lanka, and Bulgaria. *See* Marks, *supra* note 4, at 443-44. *See also* E. WEISS, *supra* note 19, App. B.

22. Cassin, *Introduction: The International Law of Human Rights*, 144 RECUEIL DES COURS (1974 IV), *cited in* W. GORMLEY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION 1 (1976).

to Cassin's speech, scholars pondered the possibility of codifying an additional human right "for the purpose of protecting private persons against the hazards of pollution, assuring an adequate supply of fresh water, and guaranteeing pure air to assure man's continued existence on our planet."[23]

2. Progress made at the U.N.

Richard Bilder, an American human rights scholar, once wrote that "[i]n practice a claim is an international human right if the United Nations General Assembly says it is."[24] Bilder's statement emphasizes how U.N. resolutions occupy a crucial role in the customary international norm-creating process.[25]

Because of the importance of United Nations' resolutions and because of the perceived receptiveness of human rights forums to planetary concerns such as environmental degradation,[26] the Sierra Club Legal Defense Fund, in conjunction with Friends of the Earth and the Association of Humanitarian Lawyers, brought two environmental cases before the forty-first session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities. This was the first step on the long road towards the establishment of an enforceable right.

The implementation machinery for environmental protection seems relatively primitive when compared with the procedures set up to protect existing human rights.[27] For example, the U.N. Environment Council and Secretariat are confined to information gathering, coordination of U.N. programs, and the issuance of non-binding environmental guidelines.[28] Consequently, the United Nations Environment Programme (U.N.E.P.) lacks the power to receive and act on environmental complaints.[29] The Sub-Commission, on the other hand, can study, comment, and make resolutions based on reports about violations of the right to environment submitted by states or individuals.[30] Because of these differences, the Sub-Commission was chosen by the Sierra Club Legal Defense Fund over U.N.E.P. as the appropriate forum.

Two other reasons existed for bringing the first environmental cases to the Sub-Commission. The first was to demonstrate to the Sub-Com-

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23. *Id.* at 1.

24. Bilder, *Rethinking International Human Rights*, 2 HUM. RTS. J. 557 (1969). *See also* Marks, *supra* note 4, at 436.

25. Marks, *supra* note 4, at 436.

26. *Id.* at 440-41; Additional evidence of this receptiveness is found in a previous draft resolution that dealt with the right to a healthy environment. It was stated that this was a right to which the Sub-Commission might, in the future, devote a study and appoint a Special Rapporteur. *See* U.N. Doc. E/CN.4/Sub.2/1985/L.11.

27. Teclaff, *The Impact of Environmental Concerns on the Development of International Law*, in INTERNATIONAL ENVIRONMENTAL LAW 252 (L.A. Teclaff ed. 1974).

28. *Id. See also Stockholm Declaration*, *supra* note 14, at 62-63.

29. Teclaff, *supra* note 27, at 252.

30. *Id.*

mission and the member states present the relationship between environment and human rights. The second was to begin the process of studying and reporting on the concept of environment as a human right within the U.N. system. This process will hopefully result in the establishment of a permanent agenda item under which claims of violations of the human right to environment may be heard annually.

a. Cases brought before the Sub-Commission

The two cases brought to the Sub-Commission were carefully selected so that the alleged threats to the environment also threatened the human population. In this way, the tie to human rights was made clear. The first case explored two aerial fumigation programs in Guatemala which were jointly executed by the United States and Guatemalan governments.[31] The two governments defended these fumigation programs as necessary to eradicate the Mediterranean fruit fly and to eradicate drug crops allegedly being grown within Guatemala. Both fumigation programs raised serious human rights and humanitarian and environmental law concerns due to the use of chemicals (banned by the U.S. Environmental Protection Agency) with no notice to local residents. The allegedly irresponsible use of these and other chemicals caused sickness and death among Guatemalan Indians and severe environmental damage to the wildlife and forest plants in the El Petén rain forest.[32] The international law violations which were alleged in the Guatemala case included those of the right to life and security of the person; the rights of indigenous peoples; the right to the protection of food, water, and environment under humanitarian law; and violations of the fundamental principles of the World Charter for Nature.[33]

The second case brought before the Sub-Commission set out facts relating to a U.S. oil company's proposal to build a road in Ecuador in order to service its drill sites and transport oil. This road would inevitably result in colonization and would bisect Yasuni National Park and traditional Huaorani Indian territory in the Ecuadorian Amazon.[34] The report analyzed the facts and allegations from the perspective of international environmental law and the international law of human rights and indigenous peoples, all of which were found to be violated by the continued construction of oil roads.[35]

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31. *See* K. PARKER & M. THORME, FUMIGATION PROGRAMS IN GUATEMALA 1 (1989) (available from the Sierra Club Legal Defense Fund, San Francisco).

32. *Id.* at 17. El Petén is Central America's largest forested area. Great concern existed that the spraying programs caused a large forest fire that began in the Petén region in May 1987 and consumed over 1500 square kilometers of rain forest.

33. *Id.* at 2. *See also World Charter for Nature*, G.A. Res. 37/7, 37 U.N. GAOR Supp. (No. 51) at 17, U.N. Doc. A/37/51 (1982).

34. *See* K. PARKER & M. THORME, OIL ROAD CONSTRUCTION THROUGH ECUADOR'S YASUNI NATIONAL PARK 1 (1989) (available from Sierra Club Legal Defense Fund, San Francisco).

35. *Id.* at 2.

b. Results of the Cases

The representatives of Friends of the Earth orally intervened at the forty-first session of the Sub-Commission and urged the Sub-Commission to address the interdependence of human rights and the environment.[36] The intervenor recommended that the "Sub-Commission . . . begin by authorizing the preparation of a concise note, without financial implications, setting out methods and mechanisms to be undertaken by the Sub-Commission and Commission regarding human rights and the environment."[37] The intervenor, on behalf of Friends of the Earth and the Sierra Club Legal Defense Fund, stated that she was "convinced the Sub-Commission can play a significant role in stopping the deterioration of our environment and in safeguarding human life for ourselves and our future generations."[38]

The result of this intervention was a positive one. At the conclusion of the forty-first session of the Sub-Commission, the members accepted the draft decision submitted by ten of their fellow experts on the subject of environment as a human right.[39] The decision stated that the information on human rights and the environment, provided to the Sub-Commission by the Sierra Club Legal Defense Fund and by certain members, justified consideration of whether the Sub-Commission should study the problem of the environment and its relation to human rights.

The Sub-Commission then decided to ask Mrs. Fatma Zohra Ksentini to prepare for submission to the Sub-Commission at its forty-second session, a concise note setting forth methods by which such a study could be made. The Sub-Commission also decided to request the Secretary-General to invite governments, interested United Nations bodies, specialized agencies, intergovernmental organizations, and non-governmental organizations to submit relevant information and observations for preparation of the working paper.[40]

At the Spring 1990 meeting of the Human Rights Commission, the members discussed the progress that had been made at the Sub-Commission. On March 15, 1990, the Commission adopted a resolution applauding the Sub-Commission's acceptance of the idea of environment as a human right and encouraged the Sub-Commission to proceed with the

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36. *See* the written transcription of oral intervention of the Friends of the Earth, forty-first session of the Sub-Commission on Prevention of Discrimination and Protection of Minorities at 3 (August 18, 1989).

37. *Id.*

38. *Id.* at 4.

39. The draft decision was submitted by Mr. Miguel Alfonso Martinez (Cuba), Mr. Awn Shawkat Al-Khasawneh (Jordan), Mrs. Mary Concepcion Bautista (Philippines), Mr. Stanislav Valentinovich Chernichenko (U.S.S.R.), Mr. Leandro Despouy (Argentina), Mr. Asbjorn Eide (Norway), Mr. Aidid Abdillahi Ilkahanaf (Somalia), Mr. Louis Joinet (France), Mr. Eduardo Suescon Monroy (Alternate from Colombia), and Mrs. Halima Embarek Warzazi (Morocco).

40. U.N. Doc. E/CN.4/Sub.2/1989/L.23 (1989).

process.[41]

The process of establishing a human right to environment has now been set in motion; however, the work is far from done.[42] The next step will be to urge the Sub-Commission, as well as the Human Rights Commission, to ensure that the study and analysis process continues through to the appointment of a Special Rapporteur on Environment. The initial goal is for environmental violations to be added either as a new agenda item or be placed under an existing agenda item; one that allows for annual consideration of the problems caused to the human environment by environmental degradation.

II. ELEMENTS OF THE RIGHT TO ENVIRONMENT

A. *The Right Itself*

As people gain more knowledge about the natural world, delineating global cause and effect relationships and discovering the ecological consequences of human action becomes easier. Actions that can be shown, in the long run, to be destructive to human welfare and to life-support systems of the planet generally, may be held to be ethically wrong.[43] A human right to environment will prevent or at least mitigate these actions.

Proponents claim that if this new right is not soon recognized, our planet will become uninhabitable; there will be no human rights or human beings about which to worry.[44] Opponents argue that humanity has survived for many centuries without this new right, that new rights are not likely to be implemented in any reasonable way in the foreseeable future, and that this right will merely cause confusion because it is vague and exaggerated in scope.[45] These arguments over the right to environment should be compared to those made over the economic, social, and cultural rights before they were formally recognized.[46] The right to envi-

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41. *See* U.N. Doc. E/CN.4/1990/L.63/rev.1 (1990). This resolution passed 40 to 0 with two abstentions. The abstentions were entered by the United States and Japan. Both countries stated that environmental issues should be dealt with exclusively by environmental, not human rights, forums.

42. UNESCO emphasizes that while the full achievement of human rights presupposes patient efforts in the humanizing of the environment and the background to life, this does not mean that active measures for the protection, achievement, and extension of human rights can be put off until tomorrow. *See* HUMAN RIGHTS, *supra* note 8, at 5-6. The editor believes that the protection, consolidation, and extension of human rights urgently call for resolute, specific, and direct action. *Id.* at 6.

43. Caldwell, *Concepts in the Development of International Environmental Policies*, 13 NAT. RESOURCES J. 190, 195 (1973).

44. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV. 1, 62 n.332 (1982).

45. *Id.* at 62.

46. *See* G.A. Res. 32/130, 32 U.N. GAOR Supp. (No. 45) at 150-51, U.N. Doc. A/32/45 (1977). Various international institutions have specially emphasized the interdependence, complementariness, and indivisibility of human rights. Sohn, *supra* note 44, at 63 n.334.

ronment, even if not immediately attainable, will establish new goals and propose new solutions to human environmental problems that can be achieved progressively.[47]

1. Definition of the Right to Environment

Many proposals can be made for what to include within the human right to environment.[48] These include the right not to be exposed to man-made environmental contaminants injurious to health, the right not to be subjected to life-shortening influences, the right not to be subjected to extraordinary noise,[49] and the right to know that natural ecosystems containing wild flora and fauna still exist in our world. Despite these proposals, the precise meaning remains undefined.

Many different adjectives have been used over the years to describe the characteristics of the environment to which humans have a right. These adjectives include: decent, healthful, natural, pure, clean, ecologically-balanced, and safe. Questions have been raised over the differences between a "decent environment" and a "healthful environment." W. Paul Gormley believes that a decent environment might be something less than a "pure and clean environment."[50] He advocates that a decent environmental standard would probably represent a minimum that is essential to the preservation of life at a realistic level of healthy existence, whereas absolute purity would be the maximum level that could not politically or economically be realized.[51] Gormley emphasizes the need to secure a decent environment, especially in industrial areas, largely because of the perceived political need to temper environmental goals with the realities of industrial life.[52]

Besides the controversy over the descriptive words, the word "environment" itself evokes a secondary debate: What is included within this term? Does this term encompass the entire global biosphere, or simply areas in direct contact with human persons or communities?[53] The entire global ecosystem is so inextricably intertwined that policies which aim to protect inhabited areas alone will prove to be futile in the end. The right to environment should include not only the enjoyment of clean air, water,

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"All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of both civil and political, and economic, social and cultural rights." *Id.* at 63.

47. Sohn, *supra* note 44, at 63.

48. The term "right to environment" parallels terms such as "right to life" and "right to health." The latter terms are uniformly used without qualifying adjectives.

49. Roberts, *The Right to a Decent Environment: Progress Along a Constitutional Avenue*, in LAW AND THE ENVIRONMENT 134, 148 n.39 (Baldwin & Page eds. 1970).

50. Gormley, *supra* note 15, at 38.

51. *Id.*

52. *Id.*

53. Hardy, *The United Nations Environmental Program*, 13 NAT. RESOURCES J. 235 (1973). *See also* A. KISS, THE PROTECTION OF THE ENVIRONMENT AND INTERNATIONAL LAW (1975).

and fertile soil, but also the right to survive without starvation and disease caused by inadequate environmental hygiene and management.[54]

Life and health of the individual are the primary reference points, but other aspects of the environment also deserve protection under the right to environment. For example, the right to environment should include protection of the Earth's flora and fauna. Nature itself should have its own right to exist and deserves protection for its own sake.[55] Human needs may best be served by contact and interaction with certain types of domesticated or wild plants and animals. Therefore, the environmental conditions necessary for these species should also be preserved whenever possible.[56]

Any forum adopting a definition of the right to environment should keep in mind the purposes underlying that definition.[57] The ultimate purposes of a right to environment include the protection of human life and health, the preservation of the natural environment, and the creation of a duty to protect the global environment for the benefit of present and future generations.[58] Establishment of a right to a safe, healthy, and ecologically balanced environment would serve all of the above purposes.

2. Basis for the Right to Environment

A healthy and humane environment worth living in is essential to the physical existence of every citizen. This opinion, which studies have shown to be shared by all states throughout the world, also expresses itself in the legal rules of different states.[59] An analysis of the documents outlining the activities of the United Nations and other multilateral in-

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54. Wilson, *Environmental Policy and International Law*, in ENVIRONMENTAL POLITICS 104 n.5 (S. Nagel ed. 1974).

55. *See* Steiger, *The Fundamental Right to a Decent Environment*, in TRENDS IN ENVIRONMENTAL POLICY AND LAW 5 (M. Bothe ed. 1980); Stone, *Should Trees Have Standing? — Towards Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). The most powerful argument for the illegality of "speciecide" is that it will eventually deprive nature of its laboratory and thus may mortally endanger humanity itself. The members of the Stockholm Conference understood this argument and devoted substantial time and effort to formulating recommendations for the establishment of genetic pools. *See Stockholm Declaration*, *supra* note 14, at 24-31 (recommendations 39-45); Teclaff, *supra* note 27, at 261.

56. Almeida, *Economic Development and the Preservation of the Environment*, in DEVELOPMENT AND ENVIRONMENT 109 (1972) (report and Working Papers of a panel of experts convened by the Secretary General of the U.N. Conference on the Human Environment.

Unfortunately, in the past, standards for judging the adequacy of any environmental conditions were specifically limited by human needs and interests. *Id.* at 109-10. In the future, any cost/benefit analysis for projects or policies with environmental impacts should include educational, scientific, cultural, existence, aesthetic, and genetic values of wildlife protection within the benefit equation.

57. Steiger, *supra* note 55, at 5.

58. *Id.* at 7. In addition, a human right to environment could include claims to enjoin environmentally dangerous activities as well as to mandate affirmative actions to be taken to maintain an adequate quality of life. Uibopuu, *The Internationally Guaranteed Right of an Individual to a Clean Environment*, 1 COMP. L. Y.B. 101, 106 (1977).

59. Steiger, *supra* note 55, at 1-2.

ternational organizations, the domestic practices of the United States, and the resolution of international environmental disputes demonstrates that a consensus and custom regarding the right to environmental protection has emerged among states.[60]

With an implicit reference to the environment, the Universal Declaration of Human Rights proclaimed that everyone "has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing [and] housing."[61] The Universal Declaration is now considered to be an authoritative interpretation of the United Nations Charter. The Declaration spells out in considerable detail the meaning of the phrase "human rights and fundamental freedoms" which member states agreed in the Charter to promote and encourage.[62] The Universal Declaration has joined the Charter as part of the constitutional structure of the world community. The Declaration, as an authoritative listing of human rights, has also become a basic component of international customary law, binding on all states, not just members of the United Nations.[63]

The duty to protect the environment has arguably been part of international law for many years. Evidence of this duty can be found in customary international law by interpreting international cases and conventions. For example, the 1946 *Corfu Channel* case of the International Court of Justice involved the unannounced laying of mines by Albania within its territorial waters. These mines subsequently damaged British vessels which came in contact with the mines. The court found Albania at fault and held that "it is every state's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other states."[64] This holding could logically be extended to include transnational environmental pollution.

Additional evidence of the customary environmental law can be found in Protocol I of the 1949 Geneva Convention, which requires combatants "to protect the environment against widespread, long-term and severe damage," and prohibits "methods or means of warfare which are intended or may be expected to cause such damage to the natural environment."[65]

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60. Schafer, *The Relationship Between the International Laws of Armed Conflict and Environmental Protection: The Need to Reevaluate What Types of Conduct are Permissible During Hostilities*, 19 CAL. W. INT'L L.J. 287, 291 (1989).

61. *Universal Declaration of Human Rights*, *supra* note 7, art. 25(1). There is a similar provision in Article 11 of the Covenant on Economic, Cultural and Social Rights. *See International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A, U.N. Doc. A/6546/art. 11 (1966).

62. U.N. CHARTER, art. 1, ¶ 3.

63. Sohn, *supra* note 44, at 16-17.

64. Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4 (judgment of Apr. 9). *See also* Schafer, *supra* note 60, at 297.

65. Protocol Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), arts. 55 and 35(3),

Another significant source of the customary humanitarian law against devastation of the environment was the Nüremburg Tribunal. There, a number of the accused were tried for massive environmental devastation. For instance, the Tribunal denounced the "scorched earth" policy followed by the German forces in their retreats from the Soviet Union, the Balkans, and Norway. Although acquitted, the willingness of the tribunal to subject the accused to trial, and the holding by the tribunal that "devastation prohibited by the Hague Rules and the usages of war that is not warranted by military necessity," make it clear that mindless destruction of the environment is not tolerated under customary law of armed conflict.[66]

The United States initially led the way toward recognition of a right to environment. In 1960, the House of Representatives proposed a joint resolution containing environmental rights. Although never enacted, the resolution proposed that the people of the United States had a collective right to clean air, pure water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and aesthetic qualities of their environment. The resolution stated that these rights shall not be abridged.[67]

The United States Congress finally codified the nation's policy regarding the environment in the National Environmental Policy Act (NEPA) of 1969. NEPA's statement of purpose creates a national policy encouraging productive and enjoyable harmony between man and his environment, promoting efforts to prevent or eliminate damage to the environment and the biosphere, and stimulating the health and welfare of man.[68] This policy was the first of its kind to textually recognize "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances," as well as the critical importance of restoring and maintaining environmental quality to aid in the "overall welfare and development of man."[69] Although with the passage of NEPA, Congress also recognized that "each person should enjoy a healthful environment,"[70] this wording did not create a judicially enforceable right.[71]

1977 U.N. JURID. Y.B. 95, U.N. Doc. A/32/144 (1977), *reprinted in* 16 I.L.M. 1391 (1977).

66. Schafer, *supra* note 60, at 310-11. *See also* Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614.

67. H.R.J. Res. 1321, § 1, 91st Cong., 1st Sess., 115 CONG. REC. 112 (1969).

68. The National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 2, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4331, 1969) [hereinafter NEPA]. *See also* Caldwell, *supra* note 43, at 196.

69. NEPA, *supra* note 68, § 101(a).

70. *Id.*, § 101(c).

71. In 1969, the editorial writers of the New York Times applauded the idea of a judicial ruling which would "arrest the continued destruction of the environment, surely where it is done with government sanction." N.Y. Times, July 15, 1969, at 34, col. 2.

One author argued that Congressional bills and resolutions such as previously discussed were extraneous, as there already existed an implicit constitutional right to a decent environment.[72] He analogized this right to the right to privacy and said that all that was necessary was "a ringing decision to ratify this existential fact of life."[73] Whether or not such a federal or penumbral constitutional right exists, many states have amended their state constitutions to include the right to environment.[74]

United States involvement in the establishment of the right to environment continued with the passage of the following resolution by the U.S. Senate in October 1970:

> Whereas human ecology is global in nature and human survival depends ultimately upon the cooperative effort of the entire human species; and whereas worldwide pollution of man's common resources — the air, the water, and the soil — poses a threat to all peoples; and whereas environmental problems caused by technological and population growth are common to all nations alike; . . . knowledge of such problems must be shared among all nations to insure the survival and well-being of the human species.[75]

In the early 1970's, the environmental protection impetus returned to the international arena. In the 1971 Convention of the International Environment Protection Agency, the states party to this convention recognized that a liveable earth environment is fundamental to human life and expectations; that basic environmental resources are essential factors in a livable earth environment; and that these basic environmental resources are endangered by the activities of man. The Convention also recognized that states are responsible not only to other states, but also to the world community as a whole, for all activities occurring within their territory or subject to their control which endanger basic environmental resources.[76]

The modern idea of an actual right to environment can be traced to

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72. Roberts, *supra* note 49, at 165.

73. *Id.* at 165. It has also been argued "that the right to a reasonably non-hazardous environment is fundamental and implicit in our Constitution." Kirchick, *The Continuing Search for a Constitutionally Protected Environment*, 4 ENVTL. AFF. 515, 540 (1975).

74. For example, the constitutions of Hawaii and Illinois explicitly guarantee the right to environment:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation protection, and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulations as provided by law.

HAW. CONST. art. XI, § 9. *See also* ILL. CONST. art. XI, § 2; the constitutions of California, Florida, Massachusetts, Montana, Pennsylvania, Rhode Island, and Virginia; E. WEISS, *supra* note 19, at 317-25.

75. S. Res. 399, 91st Cong., 2nd sess. (1970). *See also* W. MAGNUSON, THE NEED FOR A WORLD ENVIRONMENTAL INSTITUTE 21 (1972).

76. E. HULL & A. KOERS, INTRODUCTION TO A CONVENTION ON THE INTERNATIONAL ENVIRONMENT PROTECTION AGENCY 7 (1971).

the following basic principle of the 1972 Stockholm Declaration on the Human Environment:[77] "Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations . . . ."[78] Thus, the right of all people to a quality environment can clearly be derived from the principles of the 1972 Stockholm Conference.[79] The right can also be derived from interpretations of the Human Rights Conventions. The pledge for this basic human right is found in the Universal Declaration on Human Rights, Article 3 (right to life and security of the human person), and Article 25(1) (right to adequate standard of living to ensure health and well-being); in the Covenant on Economic, Social, and Cultural Rights, Article 11(1) (right to continuous improvement of living conditions), and Article 12(2)(b) (the right to improvement of all aspects of environmental and industrial hygiene as relates to the right to health); and in the International Covenant on Civil and Political Rights, Article 6 (inherent right to human life).[80]

Although the General Assembly endorsed the Stockholm Declaration in general terms,[81] it has never specifically proclaimed the existence of a right to a clean environment, despite proposals that it do so.[82] Absence of a large segment of U.N. membership prevented the Stockholm Conference from arriving at global consensus, and thus from becoming customary international law at that time.[83] It can be argued, however, that in the last eighteen years, principles of environmental protection have become

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77. *Stockholm Declaration*, *supra* note 14, at 3.

78. *Id.* at 4, Principle 1. *See also* Sohn, *supra* note 44, at 59-60. This principle can be traced to the even more explicit principle proposed by the United States: "Every human being has a right to a healthful and safe environment, including air, water and earth, and to food and other material necessities, all of which should be sufficiently free of contamination and other elements which detract from the health or well-being of man." U.N. Doc. A/CONF.48/PC/WG.1/CRP.4, at 65 (1971), *quoted in* Sohn, *supra* note 44, at 59-60.

79. The text of the Stockholm Declaration does not state explicitly that there is a human right to a clean and ecologically balanced environment, but it does express the issue in human rights terms. Marks states that this is typical of the emergence of human rights. *See* Marks, *supra* note 4, at 443-44.

80. *See Universal Declaration of Human Rights*, *supra* note 7, arts. 3, 25(1); *International Covenant on Economic, Social and Cultural Rights*, *supra* note 61, arts. 11(1), 12(2)(b); *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, art. 6 (1966). *See also* Wilson, *supra* note 54, at 118-19.

Article 12(b) of the U.N. Covenant on Economic, Social and Cultural Rights may also implicitly include the duties of States to refrain from certain environmentally hazardous conduct, to compensate victims of this conduct if it occurs, and to improve living conditions of its inhabitants through the maintenance of, at least, an adequate human environment. *See* Uibopuu, *supra* note 58, at 107.

81. G.A. Res. 2994, 27 U.N. GAOR Supp. (No. 30) at 19, U.N. Doc. A/8730 (1972).

82. Alston, *supra* note 2, at 612. *See also* Dupuy, *Le droit a la sante et la protection de l'environnement*, in THE RIGHT TO HEALTH AS A HUMAN RIGHT, *supra* note 6, at 340, 413, and W. GORMLEY, *supra* note 22, at 40.

83. W. GORMLEY, *supra* note 22, at 173.

entrenched in municipal *opinio juris* and in customary international law through "the general principles of law recognized by civilized nations" and by "the teachings of the most highly qualified publicists of the various nations."[84]

Evidence of the general principles of environmental rights law can be found in the Draft Additional Protocol to the 1950 Council of Europe Convention on Human Rights. This Draft Protocol was based on the resolution adopted on January 27, 1973, by the Working Party on Environmental Law. The Protocol considered protection of the life of individuals an integral part of the original goals of human rights and declared that "the protection of life essentially requires the existence of a natural environment favorable to human health."[85]

The crucial problem with the Draft Protocol was the fact that there was no clear legal definition of the right to a proper environment established.[86] Also, the protocol did not emphasize the increasing importance of the indirect threat to life caused by the impairment of natural conditions, the pollution of the air, land, and sea, the various forms of landscape destruction, and the never-ending avalanche of waste products. The physical, psychological, and social conditions of health — and, therefore health itself — would continue to be threatened and impaired. Critics claim that the Protocol should be expanded to keep up with the needs and circumstances of our day.[87]

The Council of Europe hoped this initiative would stimulate similar developments in the rest of the world. For other industrialized countries, the existence of this human right will be an inducement to undertake efforts to protect the human environment. The hope was that third world countries would see that Europe's industrial nations were prepared to act in their own region, and thus would lend aid and support to the similar efforts of the other states in the United Nations.[88]

The Additional Protocol stressed that "it [did] not contain an en-

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84. Statute of the International Court of Justice, 1945, 59 Stat. 1055, T.S. No. 993, arts. 38(1)(b), (c), (d).

85. *See* Working Group, *supra* note 18, at 27. The text states in pertinent part:

> Art. 1 (right to health) — (1) No one should be exposed to intolerable damage or threats to his health or to intolerable impairment of his well-being as a result of adverse changes in the natural conditions of life. (2) An impairment of well-being may, however, be deemed to be tolerable if it is necessary for the maintenance and development of the economic conditions of the community and if there is no possible way of making it possible to avoid this impairment.
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> Art. 2 (protection against private persons) — (1) If adverse changes in the natural conditions of life are likely to occur in his vital sphere as a result of the action of other parties, any individual is entitled to demand that the competent agencies examine the situation, and that they remedy such situation in all cases where article 1 applies.

86. *Id.* at 29.

87. *See, e.g.*, Statement of Monsieur Grieve, in Working Group, *supra* note 18, at 29.

88. *See* Working Group, *supra* note 18, at 31.

tirely new human right but that it [gave] concrete content to the right to life in a particularly jeopardized area, that of health."[89] The Protocol proposed further political integration and increased individual recourse.[90] The Protocol prohibited changes in the natural conditions of life that affected the health and well-being of individuals.[91] Remedies existed only when adverse changes in the natural conditions damaged or threatened an individual's health or unreasonably impaired an individual's well-being.[92]

Gormley expressed some concerns over the language of the Draft Protocol. For example, he queried: What are "adverse changes in the natural conditions of life?" What circumstances constitute "intolerable damage or threats to health?"[93] Gormley stated that in Article I of the Draft Protocol, only the protection of life is contemplated, not the protection of aesthetic conditions or of the quality of life.[94] He opined that more specific areas should have been addressed, such as the right to breathe clean air and the right to drink water which is reasonably unpolluted.[95] Gormley further argued that the language of the Protocol should have been stronger and advocated a concrete right to a pure and clean environment, rather than only speaking of "tolerable conditions" in the context of "the maintenance and development of economic conditions of the community."[96]

Possibly because of the weakness of the language or the leeway given to economics over environment, the Deputy Ministers ultimately rejected the Draft Protocol following the conclusion of the Conference. Nevertheless, the work to draft appropriate environmental agreements to protect the individual in Europe continued.[97]

The 1980's saw continued international progress made toward the recognition of the right to environment. In 1980, UNESCO's colloquium on new human rights, held in Mexico City, discussed "the right to a healthy and ecologically balanced environment."[98] Two years later, the International Association of Democratic Lawyers, in the context of a

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89. *Id.*

90. *Id.*

91. *Id.* at 33.

92. *Id.* at 38. In sum, the intent was to grant individuals the following degrees of protection: 1) prohibition of damage to health; 2) prohibition of an unreasonable threat to health (excluding economic needs from the assessment of what may or may not be accepted); and 3) prohibition of an unreasonable impairment of well-being (allowing, *inter alia*, for the consideration of economic reasons in the assessment of what may or may not be accepted, if an impairment is required in the interest of the community, and provided no alternative is available). *Id.* at 35.

93. Gormley, *supra* note 15, at 31.

94. *Id.*

95. *Id.* at 32.

96. *Id.*

97. *Id.* at 56.

98. *UNESCO Symposium on New Human Rights: The Rights of Solidarity*, U.N. Doc. 55.81/CONF.806/4 at 3 (1981). *See also* Sohn, *supra* note 44, at 59.

Draft Declaration of Human Rights and the Rights of Peoples to Peace and Disarmament, proposed immediate recognition by the General Assembly of the right of all individuals and peoples to an environment of such quality as to enable them to live with dignity and enjoy a state of well-being.[99]

In 1982, the World Charter for Nature was passed.[100] This resolution called upon all nations to respect nature and avoid impairing its essential processes; not compromise the genetic viability of the earth's life forms (e.g., protect endangered species); protect the habitats of all creatures great and small; subject all areas of the earth to the principles of conservation; and manage all ecosystems, organisms, and land, marine and atmospheric resources to maintain optimum sustained productivity.[101] The World Charter for Nature passed by a vote of 111 to 1, with 18 abstentions.[102]

Of all the international human rights instruments, only the 1982 African Charter on Human and Peoples' Rights expressly refers to a human right to environment. Article 24 of the Charter provides that "[a]ll peoples shall have the right to a general satisfactory environment favorable to their development."[103] More recently, the World Commission on Environment and Development proposed that, as a fundamental legal principle, "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being." [104]

3. Treatment of the Right to Environment

Edith Brown Weiss has aptly observed that, "[i]f there is to be a human right to a decent environment, there is disagreement over how to treat it."[105] Different scholars place the right to environment in different human rights categories. Some include it as a fundamental human right. Others claim it falls within the basic human needs doctrine. Still others classify it as a "third generation" human right.

The fundamental rights approach identifies universally recognized human rights that withstand reproach by competing political ideologies. Recent fundamental rights compilations by a number of scholars either implicitly or explicitly mention the right to a decent environment.[106] For example, Richard Falk bases his version of a right to a decent environ-

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99. Alston, *supra* note 2, at 611.

100. *World Charter for Nature*, *supra* note 33.

101. Schafer, *supra* note 60, at 293.

102. The one "no" vote was cast by the United States. *See* 1982 U.N.Y.B. 1023.

103. African Charter on Human and Peoples' Rights, Art. 24, O.A.U. Doc. CAB/LEG/67/3 Rev.5, *reprinted in* 21 I.L.M. 58, 59 (1982). *See also* E. WEISS, *supra* note 19, at 115; Alston, *supra* note 2, at 611; Sohn, *supra* note 44, at 59.

104. WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 348 (1987). *See also* E. WEISS, *supra* note 19, at 115.

105. E. WEISS, *supra* note 19, at 116.

106. *Id.*

ment on mankind's right to be secure against ecological hazards. He declares that any list of fundamental human rights that does not condemn conduct that imperils the environment is incomplete. Additionally, Falk likens "ecocide" to genocide, torture, and other acknowledged gross abuses of human rights.[107]

The right to environment has also been treated as a basic human need. Examples of other basic needs include food, water, air, housing, clothing, etc. Weiss states that this approach demands positive State action to guarantee the minimum requirements for human existence, and she contends that several covenants reflect this approach.[108] In fact, a new covenant on the emergent human right to development was adopted under the basic human needs framework.[109]

Finally, the right to environment has been classified as a third generation human right.[110] These rights belong neither with the first generation of civil and political rights nor with the second generation of economic and social rights. Instead, they are deemed "collective rights," intended to acknowledge a continuing evolution of human rights doctrine.[111] The existence of generations of rights, however, is strongly contested.[112] Critics are concerned that new rights will trivialize existing human rights doctrines. The striking disagreements over the treatment of a right to environment are unlikely to be resolved quickly.[113]

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107. R. FALK, HUMAN RIGHTS AND STATE SOVEREIGNTY 67 (1981), *cited in* E. WEISS, *supra* note 19, at 116 n.56.

108. E. WEISS, *supra* note 19, at 116.

109. *Declaration on the Right to Development*, Dec. 4, 1986, G.A. Res. 41/128, U.N. Doc. E/CN.4/SR26 (1986). *See also* LE DROIT AU DEVELOPPMENT AU PLAN INTERNATIONAL (R.J. Dupuy ed. 1978); Pellet, *The Functions of The Right to Development: A Right to Self-Realization*, in HUMAN RIGHTS AND DEVELOPMENT 129 (1984).

110. Theodore Meron includes the right to a protected environment in his hierarchy under third generation solidarity rights. Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT'L L. 1, 2 (1986). Other identified third generation rights include the right to food, the right to communicate, and the right to benefit from or share in the common heritage of mankind. *See* Sohn, *supra* note 44, at 60.

111. Karel Vasak distinguished the three generations of human rights as corresponding successively to each of the elements of the motto of the French revolution: liberté, egalité, fraternité. Vasak predicated third generation human rights on brotherhood and global solidarity. Vasak, in fact, called these rights "solidarity rights." *See* Marks, *supra* note 4, at 441.

This notion of solidarity proclaimed by third generation human rights advocates a sharing of purpose and an agreeing on modes of action among various elements of society. This solidarity is arguably essential to the realization of the rights of the first and second generations as well. Solidarity and a broad sharing of objectives and commitment are required for some forms of action relating to certain planetary concerns, such as ecological balance. *See id.*

112. Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307 (1982). *See also* E. WEISS, *supra* note 19, at 116.

113. E. WEISS, *supra* note 19, at 117.

B. *Deriving the Right to Environment as a Corollary Right*

The human right to environment may already exist as a part of customary international law, or the law of the United Nations, because this right can be easily derived from the U.N. Charter, the Universal Declaration and the Human Rights Covenants.[114] The emerging human right to environment is also derivable from several previously recognized human rights.[115] Examples of these derivations are given below.[116]

1. The Right to Life

Life and the welfare of the human species depend upon the proper interaction of humanity and environment. Unfortunately, the advance of human technology threatens the destruction of the natural resources that humans have only recently begun to understand and appreciate. Progress also potentially threatens the destruction of the health and welfare of humanity itself.[117]

The most fundamental human right which the right to environment promotes is the right to life. The right to environment has its basis in the U.N. Charter insofar as one of the Charter's fundamental goals is the promotion and respect of all human rights, especially the right to life.[118]

The right to environment may also be derived from the Universal Declaration of Human Rights. Article 3 of the Universal Declaration of Human Rights declares that "[e]veryone has the right to life, liberty and security of person."[119] The International Covenant on Civil and Political Rights echoes this right in Article 6(1), which states that "[e]very human being has the inherent right to life. This right shall be protected by law . . . ."[120] The authors of the Stockholm Declaration also understood the relationship between human life and the environment, when they wrote that "[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights —

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114. Sohn, *supra* note 44, at 61; Interview with Karen Parker, November 11, 1989.

115. Preservation of the remaining ecology and environment is included within the scope of the inalienable human rights of humanity as determined by a careful reading and interpretation of human rights documents. The right to a sound environment is a fundamental or inalienable human right and, therefore, is included within the existing conventions, including the United Nations Charter, in Articles 1 and 2. *See* W.P. GORMLEY, *supra* note 22, at 41. *See also* Sohn, *supra* note 44; UNESCO, ENVIRONNEMENT ET DROITS DE L'HOMME (P. Kromarek ed. 1988); *Stockholm Declaration*, Principle 1; E. WEISS, *supra* note 19, at 115.

116. "The duty of a lawyer after all is not only to show the existing law but also to make proposals for its future development. The right to life seems a good starting point for further development, if States fail to accept specific individual rights to environmental protection." Uibopuu, *supra* note 58, at 109.

117. R. MALVIYA, ENVIRONMENTAL POLLUTION AND ITS CONTROL UNDER INTERNATIONAL LAW 9-10 (1987).

118. Makarewicz, *supra* note 11, at 77.

119. *Universal Declaration of Human Rights*, *supra* note 7, art. 3.

120. *International Covenant on Civil and Political Rights*, *supra* note 61, art. 6(1).

even the right to life itself."[121]

The right to life applies to situations other than the intentional or arbitrary deprivation of life by governments. The norm also requires governments to protect life by assuring a safe and healthy environment, and to promote policies that ensure the continued existence of its people and its environment.[122] Essential functions of any government include safeguarding life and protecting human beings from physical damage and environmental hazards.[123]

The right to life also includes the right to survival and well-being.[124] This right should be interpreted to prevent even indirect threats to human life, including ecological dangers.[125] The right to life should be extended to implicitly include a right to a healthy and decent environment. This extension is necessary because without adequate protection of this right, the quality of life will be eroded, economic progress will become slower and more costly, and, worst of all, the basic ability of our planet to support life could be destroyed.[126]

The relationship between environment and the right to life is most visible in the case of indigenous peoples that rely solely on the environment for their livelihood. Some examples include forest dwelling tribes in Latin America and Malaysia, African bushmen, and Arctic Eskimos. The issue of the intricacy of this relationship arose in a study on genocide prepared for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities. It arose under the subject of ecocide, or measures of devastation and destruction which damage and destroy the ecology of geographic areas to the detriment of human, animal, and plant life. Attention was drawn especially to inferences of destruction of the natural surroundings or environment where ethnic groups live which might prevent them from following their traditional way of life.[127] Because of the clear ties between environmental and human rights, the Sub-Commission determined that this question deserves closer study.[128]

One author summed up the foregoing argument in one question:

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121. *Stockholm Declaration*, *supra* note 14, ¶ 1; Uibopuu, *supra* note 58, at 109.

122. K. PARKER & M. THORME, *supra* note 31, at 19. *See also* Ramcharan, *The Concept and Dimension of the Right to Life*, in THE RIGHT TO LIFE IN INTERNATIONAL LAW 1, 8 (B. Ramcharan ed. 1985).

123. K. PARKER & M. THORME, *supra* note 31, at 19; Ramcharan, *supra* note 122, at 13. *See also* Lallah, HUMAN RIGHTS IN CHILE, *U.N.E.S.C. Comm. on Human Rights*, U.N. Doc. E/CN.4/1983/9, at 18 (1983).

124. *See* E. WEISS, *supra* note 19, at 23. The environment is not separable from other human problems, but is an organizing aspect of human life in which almost every sector of social behavior is somehow involved. L. CALDWELL, MAN AND HIS ENVIRONMENT 151 (1975).

125. Uibopuu, *supra* note 58, at 108.

126. E. HULL & A. KOERS, *supra* note 76, at 1.

127. *See* U.N. Doc. E/CN.4/Sub.2/L.623, ¶¶ 286-98.

128. Van Boven, *United Nations Policies and Strategies: Global Perspectives?*, in HUMAN RIGHTS, *supra* note 8, at 65-66.

"What use are the other rights if life itself ceases to be worth living?"[129] The purpose of human society must be to realize and protect the welfare and well-being of every generation. This requires sustaining the life-support systems of the planet, the ecological processes, environmental conditions, and cultural resources important for the survival and well-being of the human species, and a healthy and decent environment.[130]

2. The Right to Health

The right to health and well-being is closely linked to the right to life and security of the person. Although a state is unable to guarantee the health of any individual, states possess an affirmative obligation to refrain from implementing policies that adversely affect the health of their citizens.[131]

If the goal of the right to health is to protect health, one way to do this is to enforce the right to a healthy environment. The right to a healthy environment includes protection from environmental hazards, such as radioactive release, which may produce long-term health effects.[132] Humanity's right to be free from illness and suffering requires not only the organization of better health care services and a more complete supply of medicines but also the raising of the human standard of living, the improvement of the human social setting, and the protection of the human environment.[133]

This idea has been reflected in international conventions and recommendations. Article 12 of the 1966 U.N. Convention on Economic, Social and Cultural Rights states that steps should be taken by the parties to the covenant to achieve a full realization of the right to health which shall include those necessary for the improvement of all aspects of environmental hygiene.[134] In addition, resolution 23.61 of the World Health Assembly made recommendations regarding how to attain the highest possible level of health. Among these are "the establishment of effective control over the condition of the environment as a source of health and life to present and future generations."[135]

So strong is the tie between health and environment that many people criticized the European Social Charter for recognizing only the right

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129. Roberts, *supra* note 49, at 163.

130. E. WEISS, *supra* note 19, at 23.

131. K. PARKER & M. THORME, *supra* note 31, at 21.

132. Jacqué, *La protection du droit à l'environnement au niveau européen ou régional*, in ENVIRONNEMENT ET DROITS DE L'HOMME, *supra* note 115, at 65, 72; Dupuy, *supra* note 82, at 413.

133. Lachs, comment in THE RIGHT TO HEALTH AS A HUMAN RIGHT, *supra* note 6, at 493-94.

134. *See International Covenant on Economic, Social and Cultural Rights*, *supra* note 61, art. 12(b). *See also* Eze, *supra* note 6, at 83.

135. W.H.O., HEALTH ASPECTS OF HUMAN RIGHTS: WITH SPECIFIC REFERENCE TO DEVELOPMENTS IN BIOLOGY AND MEDICINE 10 (1976). *See also* Eze, *supra* note 6, at 82.

to health and not the right to environment.[136] Critics stated that the Charter should be modified to declare that "every person has a right to have a satisfying existence in an environment that doesn't imperil health," and that the state is obliged to take measures necessary to protect the individual from anything that will threaten health as a result of environmental degradation.[137] Examples given of environmental degradation included atmospheric pollution, water pollution, radioactive releases, noise pollution, food contamination, and habitat destruction.

Establishment of a right to environment safeguards the right to life and the right to clean air, water, and food, all of which are essential to human health.[138] This right to environment, once established, could be used to advocate the protection of vegetation and animal species that may prove to have future medicinal or scientific value. Conversely, the right to health can and has been used to safeguard the environment. Advocates of aesthetic reform in the human environment have found that abuses could often be successfully attacked upon grounds of health and safety by claiming environment to be part of the right to health. Courts that would have rejected qualitative or aesthetic grounds for public action often sanction such an action if the complaint alleges that the health and physical well-being of the people are at stake.[139]

3. The Right to Property

Article 17(1) of the Universal Declaration states that "[e]veryone has the right to own property alone as well as in association with others." Possibly the concept of the word "property" should be expanded to include the common property found in the world's precious, and often nonrenewable, natural resources. The world's resources should not be considered the exclusive property of any single nation. All nations should have an inherent right to take part in their exploitation and protection, and all nations must exercise these rights with due regard for the corresponding rights of others.[140]

Unfortunately, these arguments run directly converse to the international principle of a state's permanent sovereignty over its natural resources. This principle is codified in Article 1(2) of the Covenant on Civil and Political Rights, and in Principle 21 of the Stockholm Declaration.[141] The Stockholm Declaration sets forth that states have, in accordance with the Charter of the United Nations and principles of international

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136. Jacqué, *supra* note 132, at 70.

137. *Id.*

138. Gormley claims that the main requirement for maintaining life and preserving health is the assurance of a supply of pure water. Gormley, *supra* note 22, at 7-8.

139. L. CALDWELL, *supra* note 124, at 27.

140. Fleischer, *The International Concern for the Environment: The Concept of Common Heritage*, in TRENDS IN ENVIRONMENTAL POLICY AND LAW 337 (M. Bothe ed. 1980).

141. *See also* Declaration on Social Progress and Development, G.A. Res. 2542, art. 3(d) (1969); *Permanent Sovereignty over Natural Resources*, G.A. Res. 1803 (1962).

law, the sovereign right to exploit their own resources pursuant to their own environmental policies, as well as the responsibility to ensure that activities within their own jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.[142]

In the 1970's, the concept of national sovereignty over natural resources seemed to be as strongly entrenched as ever. Many countries vehemently defended the concept at the Stockholm Conference in 1972.[143] But Principle 21 coupled the concept of permanent sovereignty with a state's responsibility for damage to resources and to the environment outside of its territory. An expansive interpretation of this Principle could reflect the thought that sovereignty over resources was beginning to shrink. More credence perhaps was being given to the recognition that at least some resources belong to the international community, to be kept in trust for all mankind, rather than to individual nations.[144]

Clearly the wording of Principle 21 conceals an inherent tension between the concept of "permanent" sovereignty of a state over its own territory including the natural resources and the concept of the indivisibility of the human environment.[145] Additionally, the wording of Principle 21 conflicts with its own Principle 5, which states that "[t]he non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are *shared by all mankind*,"[146] In the latter principle, the word "exploited" is avoided by the keen substitution of the word "employed," which conveys a much more positive image.

World attitudes must move away from the position taken in 1895 by the Attorney General of the United States who declared that: "The fundamental principle of international law is the absolute sovereignty of every nation, as against all others, within its own territory."[147] The world must recognize this doctrine's irrationality and ineffectiveness in protecting a nation and its people from the consequences of environmental abuse by other nations. National sovereignty remains a poor barrier against marine resource destruction, atmospheric contamination, and environmental deterioration.

A continued insistence on the arbitrary right of a government to de-

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142. *Stockholm Declaration*, *supra* note 14, Principle 21. "It must regrettably be conceded that Principle 21 recognizes practically complete freedom by States to exploit, or even abuse, their resources as they see fit, provided that only internal consequences result." W. GORMLEY, *supra* note 23, at 36.

143. Teclaff, *supra* note 27, at 257.

144. *Id.*

145. Riphagen, *The International Concern for the Environment as Expressed in the Concepts of the "Common Heritage of Mankind" and of "Shared Natural Resources,"* in TRENDS IN ENVIRONMENTAL POLICY AND LAW 343 (M. Bothe ed. 1980).

146. *Stockholm Declaration*, *supra* note 14, Principle 5 (emphasis added).

147. 21 Op. Att'y Gen. 281 (1895).

termine its own internal environmental policies contradicts the principle of international law illustrated in the International Court of Justice's *Corfu Channel* case and in the *Trail Smelter* arbitration between the U.S. and Canada.[148] This principle holds that a state may not legitimately permit its territory to be used in ways directly injurious to another state. No nation today is really free to neglect, or to regulate, its environment-affecting activities without regard to the rights and interests of other nations.[149] The United Nations endorsed this principle in several resolutions adopted at the United Nations Conference on the Human Environment.[150]

Upon reflection of the meaning of "permanent sovereignty over resources," one author concluded that the main thrust of the idea of permanent sovereignty over natural resources, both in rhetoric and in practice, is "to justify either the nationalization of foreign firms or their transfer of ownership to nationals of the host countries, especially in the extractive industries."[151] Oscar Schachter opines that on the international level, this principle has been used by states to justify their right to exercise control over production and distribution arrangements without being hampered by the international law of state responsibility as it had traditionally been interpreted by the capital-exporting countries.[152] Schachter believes that countries have emphasized their sovereignty over natural resources in order to reveal their concern over the excessive economic penetration by transnational companies.[153] If this meaning is accepted, then the possibility of common global property may not be forgone.

If this meaning is not universally accepted, then perhaps the whole concept of national sovereignty must be rethought. For example, Edith Brown Weiss suggests that "the concept of national sovereignty, which developed in response to conditions three centuries ago, has in some respects become obsolete."[154] Of particular interest when discussing the dismantling of this concept is the Convention on the Protection of the Environment.[155] This convention abolished altogether terms advancing such ideas as "national frontiers" and "exclusive sovereignty."[156]

The "common" property interest of mankind in the oceans and in

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148. *See Corfu Channel*,1949 I.C.J. at 4; Trail Smelter Case (U.S. v. Canada), 3 R. Int'l. Arb. Awards 1905, 1911 (1941).

149. E. WEISS, *supra* note 19, at 3.

150. *See* Principles 3, 37, 48, 51, 70 and 92 of the U.N. Conference on the Human Environment; *See also* Caldwell, *supra* note 68, at 21-22.

151. O. SCHACTER, SHARING THE WORLD'S RESOURCES 124 (1977).

152. *Id.* at 125.

153. *Id.*

154. Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495, 581 (1984).

155. The Nordic Environmental Convention concluded in Stockholm, Feb. 19, 1972, between the Nordic states.

156. Theutenberg, *The International Environmental Law: Some Basic Viewpoints*, in THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT 240 (R.J. Dupuy ed. 1984).

the atmosphere is now sufficiently threatened by the inadequacy of human behavior and institutions that concerted remedial action by nations and peoples has become necessary.[157] We, as the citizens of the earth, must decide whether the need of a state to use, deplete, and destroy its natural resources overrides the human race's need for unpolluted water, clean air, and a healthy environment. The awareness of world heritage in respect of certain resources is a precursor of the emergence of a new concept of international trust over all resources which would replace national ownership or sovereignty.[158]

a. Global Property Interests

Certain of the earth's resources, renewable or otherwise, can be said to be part of the "common heritage of mankind" or a global property interest. The "common heritage" means that the present generations of humanity have received the resources as a legacy or inheritance.[159] As legatees, our duty is to conserve these resources so that we may pass this inheritance on to future generations.[160]

The concept of world heritage has begun to find legal expression in instruments such as the draft conventions concerning wetlands, islands, and historic sites, and in the conventions on the protection of endangered species and nature itself.[161] The 1972 Convention for the Protection of the World's Cultural and Natural Heritage gives international recognition to the need to protect unique aspects of the environment, both man-made and natural.[162] One of the goals of this treaty is historic preservation which promotes the transmission of the world's cultural and scenic heritage to future generations.[163]

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157. E. WEISS, *supra* note 19, at 150.

158. Teclaff, *The Impact of Environmental Concern on the Development of International Law*, 13 NAT. RESOURCES J. 357, 385 (1973). "It can safely be stated that to an increasing extent the General Assembly of the U.N. has tended to attach greater importance to considerations of human rights than to the assertion of the state's independent jurisdiction in its own domestic affairs." Castberg, *Natural Law and Human Rights: An Idea — Historical Survey*, in INTERNATIONAL PROTECTION OF HUMAN RIGHTS 31 (A. Eide & A. Schou eds. 1968).

159. From an environmental point of view, one must ask how the reserves can best be protected, preserved, developed, and used for the benefit of present and future generations. *See* Fleischer, *supra* note 140, at 331.

160. A substantial number of international agreements already give effect to some aspects of the duty to conserve resources. They include: the Convention Concerning the Protection of World Cultural and Natural Heritage, 27 U.S.T. 37, T.I.A.S. No. 8226, *reprinted in* 11 I.L.M. 1358 (1972); The Convention on the Conservation of Wetlands and Waterfowl, 996 U.N.T.S. 245 (1971); and the Convention on International Trade in Endangered Species of Wild Flora and Fauna, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243 (1973). E. WEISS, *supra* note 19, at 53.

161. Teclaff, *supra* note 27, at 257.

162. Convention for the Protection of the World's Cultural and Natural Heritage, 27 U.S.T. 37, T.I.A.S. No. 8226, *reprinted in* 11 I.L.M. 1358 (1972).

163. Schafer, *supra* note 60, at 290.

The world's heritage encompasses all of the world's common property. Common property, or *res communis*, is something belonging to all nations in common.[164] It is a question of resources belonging to the world in its entirety, resources which should not be appropriated or used for the exclusive benefit of one single state or company.[165] As to these resources, such as the rain forests and the atmosphere, humans should take on a role of environmental stewardship.[166]

A practical expression of the stewardship concept was the recommendation of the General Conference of UNESCO at the 12th session concerning the safeguarding of the beauty and character of landscapes of states:[167] "But man's obligations as Earth's custodian have been re-enforced by the demands of his fellows that they not be required to suffer from the Earth-destroying activities of other men."[168] In order to warrant such enforcement, a recognized duty must be breached. The duty to protect the human right to environment is such a duty.

The establishment of a right to environment will aid those that seek a rationally ordered community in which the right to existence of all, or almost all, species is recognized, limited only by the similar rights of others. In such a community, human beings would cease to be destroyers and would become benevolent stewards with the responsibility of assuring the survival of other species within the limitations imposed by the life-sustaining capacity of the environment and within a legal system enlarged to encompass interests other than those purely human.[169]

The environmental problem is truly global in nature and transcends political boundaries and stages of economic growth. Only if the biosphere is preserved can humanity survive; national boundaries are no barriers to carbon monoxide, sulphur dioxide, pesticides, and other noxious substances. International environmental policies must flow both from international and municipal action related to the "common heritage of mankind" and must curb ecological destruction that both directly and indirectly affects neighboring states and the global ecosystem.[170]

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164. Fleischer, *supra* note 140, at 325.

165. *Id.* at 330.

166. In addition, the human race should adopt a new way of thinking about cultural property. Cultural property should include rare collections and specimens of fauna and flora as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831 (1986). Cultural objects and environmental treasures, including natural and artificial landscapes and ecological areas, and urban structures and panoramas, are treated as fundamentally related to each other in some nations. *Id.* at 831 n.1.

167. Caldwell, *supra* note 43, at 196; General Conference of UNESCO, U.N. Doc., CPG., 63/VI.12/A (1963).

168. Caldwell, *supra* note 43, at 200.

169. Teclaff, *supra* note 158, at 390.

170. Wilson, *supra* note 54, at 103.

b. Intergenerational Equity

If the environment and its component resources are to be considered as common property, or public treasures at everyone's disposal, then the environment must be safeguarded in the interest of the life and health of this generation as well as future generations. Environmental protection serves two purposes: serving the benefit of today's society, and protecting the environmental inheritance of future individuals.[171]

The present generation holds the natural and cultural heritage of our planet in trust for future generations. As trustees, we have a fiduciary obligation to adeptly manage and conserve this heritage. Edith Brown Weiss described two duties involved in this fiduciary obligation: the duty to conserve options by preserving natural and cultural diversity; and the duty to conserve the quality of the trust's corpus by leaving the planet in no worse condition than we received it.[172] We must avoid being a society that,

> squanders and uses up many of these resources within the short span of a few generations, converting them into waste and pollution, thus depriving the next generations of the riches to which they are supposed to have equal title, and leaving them instead the legacy of an unspeakable mess to clean up.[173]

Weiss claims that the administration of the planetary trust would be easier if certain "planetary rights" were established.[174] Planetary rights are said to represent minimum interests, shared by all generations, and may include many aspects of the right to environment[175] or the related right to health.[176] She advocates drafting a Declaration of Planetary Obligations and Rights which could eventually be transformed into customary international law.[177] This Declaration could spark a new awareness of world heritage regarding certain resources and could represent a precursor to a new concept of international trust over all resources which would replace national sovereignty.[178]

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171. Steiger, *supra* note 55, at 8.

172. Weiss, *supra* note 154, at 581.

173. W. ROWLAND, THE PLOT TO SAVE THE WORLD 18 (1973) *quoting*, Peccei, speech entitled "Human Settlements," *given at* Stockholm (1972).

174. Weiss, *International Law, Common Patrimony and Intergenerational Equity: Research in Progress*, in THE FUTURE OF THE INTERNATIONAL LAW OF THE ENVIRONMENT, *supra* note 156, at 447.

175. While planetary rights are definitionally intergenerational rights, they may also apply in the intragenerational context. For example, Weiss declares that the right to environment represents the intragenerational manifestation of some more expansive planetary right. E. WEISS, *supra* note 19, at 117.

176. *Id.* at 117. These planetary rights have their doctrinal base in the temporal relationship between generations. They complement existing human rights and may create new rights and obligations as part of our planetary citizenship.

177. *Id.* at 105.

178. Teclaff, *supra* note 27, at 257.

4. The Right to Food

The right to environment is easily derived from a right to food. The majority of foods, including grains, meat animals, vegetables, and fruits, are grown or raised in our global environment. This will remain so until science progresses to the point that all life-sustaining nutrients can be derived from chemically-formulated food substitutes. For now, the environment in which food is grown must be protected and preserved in order to feed the ever-increasing human masses. This protection proves to be especially crucial to third world countries that lack the capital to import food staples and that can no longer produce enough food in their inadequate environments. A case in point is the Sahelian drought which focused world attention on the chronic problems of human survival in the drought margins.[179]

In 1971, the World Health Conference "stressed the importance of conservation of natural resources for maintaining both the quality of the environment and the development of agriculture, forestry and fisheries" and "recommended that the Food and Agricultural Organization (FAO) take a leading role in the protection of the environment and in the conservation of natural resources . . . particularly in developing countries."[180] To assure the proper conservation of natural resources being utilized for food production, a declaration was drafted mandating that all countries collaborate in order to facilitate the preservation of the environment, including the marine environment.[181] The importance of rational management of natural resources gained a new dimension at the Stockholm Conference, namely through greater protection of natural resources,[182] wildlife,[183] and genetic diversity.[184] The Conference members also emphasized agrarian reform measures which are necessary to increase the surface area of arable land, achieve soil conservation and improvement, and to increase crop productivity.[185]

5. The Right to Culture and Indigenous Rights

For good or bad, humans are the most adaptable animal on this

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179. Dobbert, *The Right to Food*, in THE RIGHT TO HEALTH AS A HUMAN RIGHT, *supra* note 6, at 204.

180. *Cf.* C71/REP, ¶¶ 306-307; Dobbert, *supra* note 179, at 213 n.42. *See also* Doc. C 73-21-Sup. 1; C71/REP, ¶¶ 292-297; C77/INF/19/C75/27/Conf. Res. 15/75.

181. *Universal Declaration on the Eradication of Hunger and Malnutrition, endorsed by* G.A. Res. 3348 ¶ 9 (1974).

182. Dobbert, *supra* note 179, at 193; Art. I.2 of FAO's Constitution.

183. Some advocate the protection of wildlife habitat to maintain the potential of wildlife for "ecotourism" while others see wildlife solely as source of revenue from hunting, meat production, and sale of products. Dobbert, *supra* note 179, at 205; *cf.* Conf. Res. 11/75 (stressing the need for wildlife conservation and management).

184. The loss of genetic diversity may be a loss of future food crops or animals suitable for differing local environments. Dobbert, *supra* note 179, at 197.

185. *Id.* at 199.

planet. We, as a species, have established residences in polar areas, drought-ridden deserts, and seemingly impenetrable forests. This adaptability has its drawbacks. Humans, in general, believe that if they destroy the environment in which they are presently living that they can move on to a new area and begin again. Unfortunately, the exponential population growth that the world is presently experiencing will quickly deplete the earth of available unscathed environments.[186] Additionally, the current techniques of environmental destruction no longer contain themselves within a restricted area. For example, pesticides invade the food chain occupied by migratory birds, thus affecting two or more continents. Chemical wastes contaminate ground water, oceans, and transnational waterways. Smoke, carbon monoxide, and aerosol propellants threaten our global atmosphere. A right to environment would help to protect and preserve the world's environment as well as its cultural integrity.[187]

The most extreme threat to culture is seen in the destruction of indigenous peoples by the advance of civilization. In the case of indigenous peoples, the right to environment is inextricably tied to the right to culture, for if their environment is destroyed or seriously damaged, so too will be their culture and existence as a people.

Aside from a deliberate policy of genocide, the serious modification of forest ecology has led to the destruction of numerous native tribes and their cultures.[188] As seen from the extermination of Indians in South and Central America, the destruction of forest cover and wildlife has reduced the habitat of these native tribes.[189] They have fled into more remote regions only to be bombed and napalmed.[190]

The destruction of indigenous peoples, caused by the destruction of their natural ecology, teaches a new lesson — humanity can become an endangered species.[191] No longer can we speak exclusively of the preservation of nature or the continued existence of the flora and fauna. Humanity as well as its institutions, may vanish as have several thousand species

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186. W. ROWLAND, *supra* note 173, at 18.

187. Culture could be defined as the customs, ideas, skills, arts, and ways of life of a given people in a given period or environment. In turn, a human environment can be defined as all the conditions, circumstances, and influences surrounding and affecting the development of a human being or a group of people. From these two definitions, the tie between environment and human life and culture is seen. The destruction of the environment in which a culture survives may also destroy the base of this culture because of its intricate and inseverable ties to the environment. In sum, all cultures require an environment to exist.

188. W. GORMLEY, *supra* note 22, at 18.

189. In a study on discrimination against indigenous peoples prepared for the Sub-Commission, problems were identified concerning the need for prevention of harm to the natural environment of forest dwelling populations and for protection of the existing balance of the flora and fauna on which such populations exist. Van Boven, *supra* note 10, at 67; E/CN.4/Sub.2/L.566, ¶ 22; E/CN.4/Sub.2/L.584, ¶ 156; E/CN.4/Sub.2/L.596, ¶ 48.

190. W. GORMLEY, *supra* note 22, at 18. *See also* C. PARKER & M. THORME, *supra* at 31.

191. W. GORMLEY, *supra* note 22, at 18.

of animals and plants.[192] The destruction of humanity, as a species in the global environment, all too clearly demonstrates the need for the world community to devote greater attention to the right of all peoples to a sound environment.[193]

In the extreme case of ecological destruction aimed at minority groups (constituting genocide or ecocide), international environmental law clearly overlaps with the international law of human rights. Environmental destruction creates the clearest legal precedent of a violation of humanity's natural law right to life. Life itself and the mere physical existence of humanity clearly shows the need for greater recognition of the human right to environment.[194]

A potential convergence of ideals arises for protecting the environment while simultaneously protecting minority rights. For example, clear-cutting forests for conversion to other uses can cause environmental degradation and destroy tribal peoples, cultures, and habitats. A right to a decent environment, if enforced, could protect these ethnic groups.[195] This is exactly the reasoning behind the bringing of the first two environmental cases to the Sub-Commission. In the Guatemala case, Karen Parker argued that,

> indigenous peoples have at least the rights to the protection of their tribal lands from unwarranted taking or damage, the protection of their tribes or clan groups as viable entities, and the sufficient ownership of lands and unhindered land use to allow the full functioning of their customs and culture.[196]

6. The Right to Development

The idea of a human right to environment persistently evokes controversy. This controversy primarily exists due to the perceived tension between economic development and environmental protection.[197] While this conflict appeared prominently at the U.N. Conference on the Human Environment in 1972, it has much less force today. Increasingly, all countries have come to realize that sound economic development requires development on the basis of the sustainable use of the planet's resources.[198]

From a broad standpoint, the ultimate goals of economic development allow for the maintenance of a healthy, pleasant, desirable environment. Any actual or potential conflict between the two processes could

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192. *Id.*
193. *Id.* at 19.
194. *Id.* at 20.
195. E. WEISS, *supra* note 19, at 116.
196. K. PARKER & M. THORME, *supra* note 31, at 23. *See also* Indigenous and Tribal Peoples Convention, I.L.O. (1989); First Revised Text of the Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989).
197. E. WEISS, *supra* note 19, at 115.
198. *Id.*

disappear if all mitigation done to protect the environment was simply computed as economic development.[199]

III. COMPELLING THE RIGHT TO ENVIRONMENT

Specific violations of human rights take many forms in our present day world. These include violations of which the international community has only recently become conscious, such as those involved in the unjustified appropriation of natural and cultural resources or the despoiling of the environment.[200] The problem of the protection and application of these human rights is immense since it covers every aspect of individual and group life.[201]

As new international human rights emerge, rules of international law concerning these emergent human rights must be established as a condition precedent to their enforcement. These rules are formed by the law-creating process defined in international law.[202]

To enforce a new legal right to a pure, healthful, and ecologically-balanced environment, it is essential that binding international law be created or derived in the form of codified guarantees. International forums must be sought which allow individual as well as group petitions. Legal enforcement and protection of the right to environment requires that individuals have legally guaranteed access to a procedure, if possible before independent and neutral authorities. A citizen must be able to claim his rights and to achieve a decision based upon objective considerations.[203]

Obviously, the world's complex environmental problems cannot be solved by any amount of international institutional reforms if such changes are not fully supported by participating nations.[204] Therefore, the forums sought must have the competence to communicate with governments and negotiate settlements.[205] If no settlement can be reached, the

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199. Almeida, *supra* note 56, at 109.

200. HUMAN RIGHTS, *supra* note 8, at 5.

201. *Id.*

202. *See* Statute of the International Court of Justice, *supra* note 84, art. 38; Marks, *supra* note 4, at 436. There are two primary sources of international law: conventions and customs. Conventional international law consists of multilateral and bilateral treaties that set out in detail the responsibilities of the signing parties. Customary international law is more difficult to define. It is said to be "international custom, as evidence of a general practice accepted as law." Statute of the I.C.J., *supra* note 84, art. 38(1)b. It consists of two elements: general practice among nations; and *opinio juris*, which shows that these nations have accepted this practice as international law. When both of these elements can be established by treaties, the customary law created can be binding even on nonsignatories. North Sea Continental Shelf (W.Ger. v. Den. & Neth.), 1969 I.C.J. 12, ¶ 71 (1969). More frequently, however, the elements are established by State declarations, proclamations, programs, and activities. Schafer, *supra* note 60, at 289.

203. Steiger, *supra* note 55, at 3.

204. Johnson, *The U.N. System and the Human Environment*, ISIO MONOGRAPHS, 1st Series, No. 5, at 35 (1971).

205. W. GORMLEY, *supra* note 22, at 40.

availability of a multinational tribunal becomes essential. This is true for both international environmental law and the international law of human rights.[206]

Regrettably, a potentially favorable forum, the Stockholm Conference, rejected proposals for a Universal Declaration on the Protection and Betterment of the Environment that would have served as a counterpart to the Universal Declaration of Human Rights.[207] Such a declaration would have compelled a restructuring of our conventional wisdom in favor of the pursuit of a quality environment rather than the contemporary involvement in quantity consumption which is undercutting our global environment.[208]

The Stockholm Declaration failed to expressly and concretely enumerate a right to environment. By doing so, the drafters failed to realize that the recognition of the right to environment does not merely right wrongs done to a segment of society, it can save the whole society.[209] The recognition of a right to environment would have made certain that the nations party to the conference were prepared to enter the technologically-oriented twenty-first century.[210]

A. *Jus Cogens Argument*

Few examples underlie the fundamental legal norm of *jus cogens* defined in Article 53 of the Vienna Convention on the Law of Treaties as being ". . . a peremptory norm of general international law [that a norm is] accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[211] The right to life is universally accepted as *jus*

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206. *Id.*

207. *Id.*

208. Roberts, *supra* note 49, at 164.

209. *Id.*

210. *Id.* "We need, after all is said and done, to fashion some new viable foothold from which the common man can assert that, as a free individual, he has some personal claim to a decent environment in which to live." *Id.* at 161.

> The enunciation of such a right would require every agency of the government, whether a local zoning board or a federal home mortgage lending agency, to review their plans to make certain that their activities did not actually exacerbate the deteriorating environment. A strip mining operation could not be certified as safe unless the entrepreneur had begun to implement plans to restore the area destroyed by his operations. An off-shore drilling operation could not be licensed unless it was manifest that immediate steps could be taken to remedy any accident which threatened neighboring shores. No oil tanker [e.g., Exxon Valdez] could enter territorial waters unless its owners could guarantee to set right any damage to nature that a navigational accident might occasion. Indeed, it is impossible to adumbrate in detail the day by day impact to be caused by such a declaration.

Id. at 163.

211. U.N. Doc. A/CONF.39/27 (1969), art. 53; W. GORMLEY, *supra* note 23, at 42.

cogens.[212] At its most fundamental level, international environmental law safeguards the right to life. From this most basic human right, the legal obligation arises.[213] Because the right to life is *jus cogens*, then so should be the right to environment.

This writer, as well as others, contends that certain aspects of environmental law, as they become merged with human protection, are *jus cogens*. Of course not every legal issue involving environmental protection is *jus cogens*, nor is the concept of a "pure and decent environment" absolute.[214] Only the most serious instances, such as the deliberate destruction of the environment or ecocide that endangers life, the destruction of indigenous peoples, and nuclear testing, will be included within the norm. A preliminary decision or advisory opinion from the International Court of Justice would be required to determine if indeed this area of law is *jus cogens*.[215] If litigation is required to determine if a claim of *jus cogens* is valid, an individual without state backing would experience great difficulty in obtaining standing before a multinational judicial forum.[216]

B. *Erga Omnes Argument*

International law clearly recognizes the existence of universally owed obligations. In the *Barcelona Traction* case, the International Court of Justice (I.C.J.) asserted the existence of such obligations.[217] The I.C.J. drew a distinction between the obligations of a state towards the international community as a whole and those arising with other states in the field of diplomatic protection. The former were held to be of concern to all states. All states can be held to have a legal interest in their protection. These obligations are termed *erga omnes*. Such obligations derive from the principles and rules concerning the basic rights of the human person.[218]

The International Court of Justice's famous dictum in the *Barcelona Traction* case stated that "basic rights of the human person" create obligations *erga omnes*. This dictum has been construed by the International Law Commission to mean that there is "a number, albeit a small one, of international obligations which, by reason of their subject-matter for the international community as a whole, are — unlike the others — obligations in whose fulfillment all states have a legal interest."[219] All states are

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212. Parker & Neylon, *Jus Cogens: Compelling The Law of Human Rights*, 12 HASTINGS INT'L & COMP. L. REV. 411, 431 (1989).

213. W. GORMLEY, *supra* note 22, at 215.

214. *Id.* at 43.

215. *Id.*

216. *Id.*

217. Case Concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), Second Phase, 1970 I.C.J. 3 (1970).

218. *Id.* at 33-34; Goldie, *Legal Restraints of Injurious Acts*, in THE PROTECTION OF ENVIRONMENTAL AND INTERNATIONAL LAW 103-04 (A. Kiss ed. 1975).

219. 2 Y.B. INT'L L. COMM'N, pt.2 at 99; U.N.Doc. A/CN.4/SER.A/1976/Add.1(pt.2); Meron, *supra* note 110, at 1.

deemed to be injured by a breach of these obligations which exist to protect human rights and fundamental freedoms.[220]

Since the obligations of customary law of human rights are generally regarded as obligations *erga omnes*, any state may enforce them, whether or not their nationals were involved in the violation. The Restatement of the Foreign Relations Law (Revised) included environmental protection under the category of customary law obligations.[221] In addition, the revised Restatement of the foreign relations laws of the United States expressly notes that in these cases any state may make a claim for violations of these norms.[222]

The limitations of a state's capabilities to assert their *erga omnes* claims in the context of human rights are even more recognizable in terms of global environmental interests.[223] By 1975, international law had recognized a state's interest in the protection of their own territories, in the preservation of their local environments, and in the right of their citizens to exercise the freedom of the high seas without interference from atmospheric nuclear testing,[224] or from marine pollution. But, as of 1989, few state claims have been made to vindicate the general interest of all peoples in the integrity of the global environment.[225]

Despite initial reaction that these claims effectively grant interventionary rights to some states and allow interference in the domestic affairs and economies of others, this concept is not necessarily contrary to basic principles of international law.[226] To a large extent this will turn not

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220. I.L.C. Rep. 54-59 (1985).

221. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 902.

222. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW § 703(3), and reporters' note 3; E. WEISS, *supra* note 19, at 110. Although the existence of the norms embodied in human rights documents cannot be denied, controversy has raged over their binding character and effect. Sohn, *supra* note 44, at 12. Some argue that they are "soft law," rather than "hard law." The argument is that these documents contain no more than mere guidelines which states need not follow. Furthermore, according to this view, there are no effective means of implementing these documents, and violators go unpunished. Sohn argues the better view is that these documents have become part of the international customary law and, as such, are binding on all states. *Id.* He believes the documents provide appropriate means of implementation and often lead to a proper condemnation of violators. "Although a punishment does not always result, international law as a whole suffers from the same shortcoming because methods of enforcement are still deficient." *Id.*

223. Goldie, *supra* note 218, at 104.

224. It should be noted that the Australian and New Zealand counsel's written submissions and oral arguments in the *Nuclear Test* cases should not be slighted or overlooked as legal precedent for the human right to a pure and clean environment. W. GORMLEY, *supra* note 22, at 147. These arguments can also be used as precedent that environmental protection is an obligation *erga omnes*. *Id.* at 153.

225. Goldie, *supra* note 218, at 104.

226. *Id.*; This view is in direct conflict with the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, adopted unanimously by the General Assembly in 1970, which makes clear that no state or group of states "has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other state." G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121,

on the existence of a public international law environmental *actio popularis*, but on the scope and limits of such a right of action.[227]

C. *Organs for Enforcement*

1. The United Nations

Institutions and agencies, seemingly able to deal with such issues as environmental degradation, are numerous internationally. Foremost among them is the United Nations along with its "galaxy of associated bodies."[228] The largest problem facing the United Nations is the implementation of emerging international law, specifically human rights law and the right to environment.[229]

The United Nations clearly can make resolutions regarding environmental protection, but do the General Assembly's resolutions have the force of binding international law? One author suggests that resolutions passed by the General Assembly are neither binding on member states of the United Nations, nor under international law.[230] Justice Schwebel of the International Court of Justice believes that the United Nations Charter provides the fundamental authorization for the General Assembly. He states that the I.C.J. merely has "the broadest powers to discuss and to

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U.N. Doc. A/8028 (1970). The prohibition against intervention "for any reason whatever" was designed to make clear that even the best possible reason, such as protection of human rights, does not justify unilateral intervention in the affairs of another state. Sohn, *supra* note 44, at 8-9; *Cf.* Fonteyne, *Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations*, in HUMANITARIAN INTERVENTION AND THE UNITED NATIONS 197, 216 (R. Lillich ed. 1973). But, note that a few representatives on the Special Committee on the Principles of International Law Concerning Friendly Relations and Cooperation Among States explicitly claimed that intervention to remedy gross violations of human rights was lawful as an implicit exception to Charter principles prohibiting use of force and intervention. *See* Sohn, *supra* note 44, at 9 n.28.

227. Goldie, *supra* note 218, at 104-105.

228. Gormley, *supra* note 15, at 24. Professor Richard N. Gardner is of the opinion that only the United Nations can deal effectively with global environmental issues. He maintains: "The U.N. is the only framework available for cooperation on both an East-West and a North-South basis. While environmental cooperation through forums like the North American Treaty Organization (NATO) and the Organization For Economic Cooperation and Development (OECD) can be a useful supplement to U.N. efforts, it is no substitute for them." *Id.* at 24-25.

Another possible forum would be the Organization of American States. Human rights protection may, in the future, extend to some aspects of the human right to environment through interpretations of the Inter-American Convention on Human Rights. The Latin American system is advantageous because the right of individual petition is mandatory. W. GORMLEY, *supra* note 22, at 54.

229. W. GORMLEY, *supra* note 22, at 215; Rienow, *International Relations and the Environment*, in ENVIRONMENTAL POLITICS 99 (S. Nagel ed. 1974). It has been suggested that it may be "appropriate to propagate within the framework of the United Nations a further codification of international environmental law, including the right of an individual to a sound environment." Uibopuu, *supra* note 58, at 116.

230. Schwebel, *The Effect of Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. INT'L SOC'Y L. PROC. 301 (1979).

recommend" and that no phrase of the U.N. Charter empowers it to enact or alter international law.[231] Another author states that although General Assembly recommendations embrace and affect varying aspects of international law, "they remain [only] recommendations, which the states are legally free to accept and implement, or oppose and disregard."[232] A final opinion, accepted by this author, submits that U.N. resolutions passed unanimously (or nearly unanimously) have the force of customary international law.[233]

During the last decade, the U.N. Commission on Human Rights initiated several innovative procedures for implementing international human rights norms.[234] Governments and non-governmental organizations (NGOs) already recognize the importance of working groups and special rapporteurs for protecting against particularly grievous violations of human rights throughout the world.[235] This writer recommends the assignment of a working group, in addition to a special rapporteur, which is able to further analyze the interdependence of human rights and environment, and discuss gross violations of the right to environment.

An Economic and Social Council (ECOSOC) resolution, passed in 1970, established new procedures for dealing with states that have a consistent pattern of gross violations of human rights.[236] The procedures established are complex. Discussions, held in public sessions of the Human Rights Commission, debate and judge the most glaring violations of human rights that are occurring in any part of the world.

Some question the effectiveness of these procedures as applied to countries with major human rights violations. However, at the very least, public announcement of these violations may compel the violating governments to justify their acts to the outside world. Investigation and reporting also expose the situation, on the basis of objective evidence, to the world. These procedures may encourage the accused government to introduce reforms in order to save face internationally.[237]

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231. *Id.*

232. Smith, *The U.N. and the Environment: Sometimes a Great Notion?*, 19 TEX. INT'L L.J. 335, 339 (1984).

233. W. GORMLEY, *supra* note 22, at 56.

234. Among these are the Working Group on Enforced or Involuntary Disappearances, the Special Rapporteur on Summary or Arbitrary Executions, the Special Rapporteur on Torture, and most recently, the Special Rapporteur on Religious Intolerance. The special rapporteur, as a single individual of recognized international standing, is ordinarily less expensive, less visible, and more efficient than multi-member working groups in achieving similar objectives. Weissbrodt, *The Three "Theme" Rapporteurs of the U.N. Commission on Human Rights*, 80 AM. J. INT'L L. 685 (1986).

235. Despite their noticeable gains, these procedures still require further improvement and refinement. To improve their effectiveness, these procedures deserve more attention, support, and constructive criticism from governments, human rights activists, scholars, and the media. *Id.* at 699.

236. ECOSOC Res. 1503 (XLVIII) (1970).

237. It is doubtful that any government in the world exists that is not to some extent concerned about its image within the international community generally. All wish to avoid

Gross violations and human rights abuses may also be addressed by the Sub-Commission.[238] Special resolutions by ECOSOC and the Human Rights Commission entrusted the Sub-Commission with certain lawmaking powers.[239] Additionally, the Sub-Commission has the authority to prepare drafts of human rights instruments. However, the Sub-Commission devotes the majority of its time to studying particular violations of human rights and situations prevailing in countries accused of infringing upon human rights.[240]

Perhaps the most important way in which such studies exert influence, at least over the long term, is that they establish a new, different international standard. They also clarify the standard of conduct which the international community in general expects of governments. This legal clarification slowly influences individual thinking. Individuals then form groups of concerned citizens who demand reforms from their government. Eventually, the position of the governments in violation may be influenced and may effectuate corresponding changes.[241]

The Sub-Commission was selected as the forum of choice to introduce the human right to environment because the Sub-Commission permits individuals to bring petitions alleging human rights violations.[242] The recognition of individuals or organized groups was the most important criteria used for selecting a proper international forum. This dual recognition is crucial since, like other solidarity rights, the right to environment has both a collective and an individual dimension.

The collective dimension implies the duty of the state to contribute through international cooperation to resolving environmental problems at a global level. The collective aspect means that the state and all other appropriate social actors have the duty to place the interest of the human environment before the national or individual interest.[243]

The individual right is the right of any victim or potential victim of an environmentally damaging activity to obtain the cessation of the activ-

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condemnation if they can. Sometimes the only way to do this effectively may be to abolish the practices which have aroused concern. Luard, *Foreword — The International Protection of Human Rights: Thirty Years after the Universal Declaration*, in HUMAN RIGHTS, *supra* note 8, at xiii.

238. The Sub-Commission is composed of 26 members and their alternates who are elected by the Commission as individuals and not as representatives of states. Their selection is made in consultation with the Secretary-General and was originally subject to the consent of the governments of the states of which they were nationals. The latter requirement is now obsolete, however, since ECOSOC Resolution 1334(XLIV) of May 31, 1968, provides for the nomination of experts by their governments. Meron, *Reform of Lawmaking in the U.N.: The Human Rights Instance*, 79 AM. J. INT'L. L. 664, 668 (1985).

239. *See, e.g.*, U.N. Doc. E/CN.4/1984/47 and Adds. 1-7; U.N. Doc. E/CN.4/1985/SR.37, ¶ 3.

240. Meron, *supra* note 238, at 668.

241. Luard, *supra* note 237, at xiii, xiv.

242. ECOSOC Res. 1503 (XLVII) (1970).

243. Marks, *supra* note 4, at 444.

ity and reparation for the damage suffered.[244] Historically, when one state treated the individuals of another state in a manner violating international law, it was regarded as a legal offense committed against the state of which that individual was a subject. It was not considered an offense committed against the individual who suffered the injury. More recently, however, individuals in their own right have been regarded as having certain rights and obligations according to the various norms of international law.[245]

In both civil and common law countries, private citizens have traditionally sought recourse for pollution damage by bringing actions against polluters for monetary compensation or injunctive relief. In some countries, citizens have more recently been allowed to bring actions designed to protect the public's interest in environmental quality even though they have not sustained an individual or personal injury.[246]

International law is slowly developing a rudimentary protection system for individuals. Scholars recognize that there is still a long way to go, but the trend is clear enough.[247] Theutenberg draws parallels between human rights law and international environmental law since both areas are developing the trend toward greater individual protection. He believes, therefore, that the "consumers" of international law are increasing in the field of international environmental law and human rights.[248]

The position of individuals must continue to be strengthened to ensure the future of international environmental law. Any individual affected, or potentially affected, by nuisance from environmentally harmful activities must be given the right to challenge the permissibility of such activities before an appropriate court or administrative authority of that state, regardless of whether he is a citizen of that state.[249] Individuals must also be given the right to appeal any decision to a higher authority, such as the U.N. or an international judicial tribunal.[250]

2. The International Court of Justice

"If the rights of individuals and non-governmental entities to a pure

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244. *Id.*

245. Castberg, *supra* note 158, at 30.

246. AN INTERNATIONAL SYMPOSIUM XVIII (S. McCaffrey & R. Lutz eds. 1978).

247. Theutenberg, *supra* note 156, at 241.

248. *Id.*

249. *Id.* at 240. Individuals should also be allowed to bring their State before municipal forums as a defendant. As such, these individuals should be able to rely upon rights guaranteed by international conventions and customs, and thus invoke their rights with regard to a clean, safe, and ecologically-balanced environment. Uibopuu, *supra* note 58, at 115. In the United States, The *Paquete Habana* case expressly incorporated international customary law into federal common law. The Paquete Habana (The Lola), 175 U.S. 677, 20 S. Ct. 290, 44 L.Ed. 320 (1900). "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination." *Id.* at 700.

250. Theutenberg, *supra* note 156, at 240.

and healthful environment are to be protected by international supervisory or judicial machinery, it is essential that an institution capable of protecting human rights be selected for the task."[251] Currently, states may bring actions before international judicial tribunals. The problem with bringing environmental protection litigation before the International Court of Justice is "justiciability."[252] Before a state can bring such an action in the International Court of Justice, the Court must be satisfied that it can pronounce upon a justiciable issue.[253]

In addition to the requirement that the matter in contention be justiciable, other requirements exist. For example, the moving party must also assert a concrete interest in the outcome of the suit. A mere gratuitous desire to litigate the claim is not sufficient.[254] Also, the party must have exhausted all local remedies.[255]

A state might be able to assert a claim for transboundary environmental injury by citing the *Corfu Channel* case. In that case, the International Court of Justice held that a state is under an "obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states."[256] Another ground for state claims exists by establishing

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251. W. GORMLEY, *supra* note 22, at 111.

252. Goldie, *supra* note 218, at 106.

253. *Id.* at 106. The Court in the *South West Africa* case said the rights the applicants claimed as amounting to:

> [A] plea that the court should allow the equivalent of *actio popularis*, or the right resident in any member of a community to take legal action in vindication of a public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at the present: nor is the Court able to regard it as imported by the 'general principles of law' referred to in Article 38, ¶ 1(c), of its statute.

South West Africa (2d Phase), 1966 I.C.J. 4, 47; Goldie, *supra* note 218, at 107-08. This decision has been widely criticized. *See* dissenting opinion of Judge Jessup, 1966 I.C.J. 6, 325-441. The merits of the dissent are outside the scope of this paper.

254. This is a similar requirement to the one espoused in Sierra Club v. Morton, 405 U.S. 727, 92 S. Ct. 1361, 31 L.Ed.2d 636 (1972); Goldie, *supra* note 218, at 108.

255. The burden of exhausting local remedies remains with the private claimant. Until he had exhausted the local remedies, his state is not entitled to bring an international claim. In the words of the International Court of Justice: "[T]he state where the violation has occurred should have the opportunity to redress it by its own means, within the framework of its own legal system." Interhandel (Switz. v. U.S.), 1959 I.C.J. 6, 27 (1959) (because of Swiss company's failure to exhaust U.S. judicial remedies, court dismissed claim brought by Swiss government on behalf of the company). This principle of exhaustion of remedies has been incorporated into the law of human rights: a claimant must exhaust local remedies without being adequately satisfied before seeking redress on the international plane. Sohn, *supra* note 44, at 4.

256. Corfu Channel Case, 1949 I.C.J. 4, 22. The state's obligation "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or areas beyond the limits of national jurisdiction" was reiterated in the Declaration of the U.N. Conference on the Human Environment. Principle 21 of the Declaration, *reprinted in* 11 I.L.M. 1420 (1972). This was considered by the Canadian delegate as corresponding to general international law in force. *See* U.N. Doc. A/Conf. 48/14 at 125. Furthermore, a 1972 General Assembly resolution reaffirms the international obligation not to cause substantial damage to zones outside the bounds of national jurisdiction. G.A. Res. 2995

that an international crime had been committed. In 1979, the International Law Commission provisionally adopted article 19 of its Draft Articles on State Responsibility which stated that an international crime may result, *inter alia*, from "*a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment*, such as those prohibiting massive pollution of the atmosphere or of the seas . . . ."[257]

Above and beyond the cases brought by states, the single most important factor in guaranteeing the effective protection of the human right to environment is that private individuals and groups be capable of maintaining a judicial action against any sovereign state causing them injury. Thus, individuals must possess the necessary *locus standi* at both regional and international levels. Recently, non-governmental entities achieved *locus standi* before international courts.[258] To achieve the same standing for individuals, Article 34 of the Statute of the International Court of Justice must be changed so that individuals, and even the U.N. itself, can participate in contentious proceedings.[259] Theoretically, the Statute of the International Court of Justice can be amended as was the United Nations Charter. Many academics have advocated this enlargement of the Court's jurisdiction.[260]

Supplementally, greater attention should be given to the possibility of according *locus standi* to interested groups of environmentalists. Such a practice of recognizing interest groups of private citizens would, at least at the early stages of development, reflect the inspiration of the International Labor Organization's practices which recognized that associations of workers have the competence to submit complaints.[261] In effect, individuals would be allowed to petition through a duly recognized organization. Such a procedure would eliminate trivial complaints, because the organization could exercise a screening function.[262]

3. Multilateral Treaties

Environmental treaties are numerous in form and kind, but these treaties are usually regional at best. On the other hand, human rights are recognizably of global concern and covered by more universal covenants

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(XXVII) (1972); Gaja, *River Pollution in International Law*, in THE PROTECTION OF ENVIRONMENTAL AND INTERNATIONAL LAW, *supra* at 218.

257. *See* Riphagen, *supra* note 145, at 343 n.1 (emphasis added).

258. One improvement, which should be encouraged, is a liberal approach to *locus standi* since certain standards of environmental conservation have come to be regarded as binding *erga omnes*. Brownlie, *A Survey of International Customary Rules of Environmental Protection*, 13 NAT. RESOURCES J. 179, 183 (1973). *See also Barcelona Traction*, 1970 I.C.J. at 2, 32 (1970).

259. W. GORMLEY, THE PROCEDURAL STATUS OF INDIVIDUALS BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS, Preface (1966).

260. W. GORMLEY, *supra* note 22, at 165.

261. Gormley, *supra* note 15, at 36.

262. *Id.*

and norms. For this reason, it was decided that, initially, it would be better to set forth the right to environment as a human right. At some later time, codification in a declaration of environmental rights or in amendments to existing human rights documents may be sought.

Despite the decision not to pursue a treaty initially, the importance of treaties should not be ignored. At the least, multilateral conventions create standards that could be linked to the concept of *actio popularis*.[263] Any means to an end of environmental protection cannot be left untapped, especially if it can help to create stronger customary international norms. Eventually, it is hoped that a human right to a clean, safe, and ecologically-balanced environment can be enforced by treaty as well as by petition to the U.N. or the International Court of Justice.

IV. CONCLUSION

> Nature has a vast capacity to recover from minor modifications of environment. There is, however, a limit to the ability of nature to recover from continuous abuse. Because of our ignorance of the fundamental laws which govern and control the ability of natural populations to grow and survive under adverse conditions and also because the use of our environment has commonly become governed by immediate expediency and a very short range economic point of view, we are now faced with heavily polluted rivers, streams and estuaries, with contaminated air, and with devastated landscape. Earth's environment is becoming further and further removed from the ideal of fitness. Most societies are willing to sacrifice environmental quality at the altar of economic wealth and political power. With the advancement of technological development, the earth is losing not only its ecological balance and pristine beauty, but also its fitness for biological and mental health.[264]

As it becomes evident that some human actions might be disastrous to all human life, protection against this kind of action becomes a universal human concern.[265] As these dangers become more threatening, people tend to seek laws, institutions, and procedures to forestall disaster.[266] It was for this reason that the General Assembly of the United Nations convened the Conference on the Human Environment.[267] It was also for this reason that the right to environment was introduced to the forty-first session of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.

This author hopes that by the presentation of environmental cases at human rights forums, a viable and justiciable human right to environment can be created. At the very least, useful and incremental progress

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263. Brownlie, *supra* note 258, at 183.
264. R. MALVIYA, *supra* note 117, at 10-11.
265. Caldwell, *supra* note 43, at 201.
266. *Id.*
267. *Id.*

can be made by lobbying the existing international legal community concerned with human rights to gain a greater recognition of the human rights aspects of environmental protection and preservation. The hope remains that an international legal right to environment will be defined, accepted, and enforced.

Although this may seem a tall order, its size is reduced at a rate directly proportional to the rapid increase in the size of the human population. Hand in hand with this exponential population increase is a growth of urban sprawl encompassing and eliminating the previously natural, unspoiled environment. In addition to population growth, there has been a similar exponential expansion of toxic waste, sewage, and atmospheric pollution.

No other species on Earth has engaged in such a tremendous depletion of natural resources or created such a spoilage of the earth's surface and atmosphere. Fortunately, not all of these actions have brought about irreversible results. With proper planning and early detection, resources can be rationed or recycled, and, in most cases, polluted areas may be reclaimed with various pollution abatement techniques. Another fortunate fact is that our species *is* human, and is therefore capable of compassion, caring, and intelligent, rational thought. If humans, as a race, become correctly motivated in a certain direction, startling results are possible. It is hoped that this article can spark the necessary motivation and direction to enable the world to work together to establish a human right to environment.[268]

268. I would like to thank Mr. Frederic Sutherland and Mr. Vawter Parker of the Sierra Club Legal Defense Fund as well as Ms. Karen Parker of the Association of Humanitarian Lawyers for allowing me to accompany them to the Sub-Commission in Geneva. I enjoyed being able to help with the introduction of this idea at the United Nations. Karen Parker also deserves special thanks for encouraging me to write this paper and for giving me technical assistance. Finally, I would like to thank Kim Kralowec (U.C. Davis School of Law, Class of 1992) for her help in translating documents.