

# **A HEALTHY AND ECOLOGICALLY BALANCED ENVIRONMENT: AN ARGUMENT FOR A THIRD GENERATION RIGHT**

## **I. INTRODUCTION**

When the natural environment is damaged and contaminated to the extent that it threatens life, health, food, shelter, and minimum work standards, it also becomes a threat to established human rights.<sup>1</sup> When people must struggle to obtain the basic necessities of life, political freedoms and human rights may appear meaningless to them. The destruction of life-sustaining ecosystems, the pollution of the world's water, land, and air, the inability to control the world's wastes, and other related environmental problems prevent people from securing the minimum requisites for health and survival, thereby impeding and even prohibiting the effective exercise and enjoyment of human rights for much of the world's population.<sup>2</sup> The correlation between human rights and the environment has been recognized by the international community in such forums as the recent United Nations Conference on Environment and Development in Rio de Janeiro (UNCED), in proposed United Nations Resolutions and other multilateral agreements, and by writers in the field of international

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1. See generally David R. Downes, *Don't Blame It on Rio*, ENVTL. FORUM, May/June 1992, at 17, 21-23 (introducing the discussion of environmental degradation and its interaction with the human rights regime).

2. See REPORT OF THE UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT, at 3, U.N. Doc. A/Conf.48/14/Rev.1, U.N. Sales No. E.73.II.A.14 (1973) [hereinafter Stockholm Declaration] (noting that the protection and improvement of the human environment is necessary, and that we need citizens, communities, enterprises, and institutions at every level to accept responsibility); THE WORKING GROUP FOR ENVIRONMENTAL LAW, THE RIGHT TO A HUMANE ENVIRONMENT: PROPOSAL FOR AN ADDITIONAL PROTOCOL TO THE EUROPEAN HUMAN RIGHTS CONVENTION 28 (1973) (stating that there is a growing awareness of "the need for a right protecting [the] natural conditions of life at [the] international level, regardless of national regulations already in force or being prepared"). See generally *Will Earth Survive Man?*, U.N. CHRON., June 1988, at 40-50 (stating that there is an increasing amount of irreparable environmental damage on earth).

environmental law.<sup>3</sup> This Note proposes recognition of a new human right to a clean and ecologically balanced environment as a "third generation" human right, necessary to facilitate fulfillment of the first and second generations of human rights which already guarantee basic rights and freedoms to all people.<sup>4</sup>

The term "generation" distinguishes the various conceptual groups of human rights currently recognized in international law. Use of this term does not imply a hierarchical division of human rights, nor does it imply that succeeding generations preempt or gain primacy over earlier generations;<sup>5</sup> rather, it recognizes that the human rights regime is essentially dynamic and that additional human rights may be proclaimed as changing human needs are recognized and addressed. Maintaining an effective human rights regime presents the challenge of "balanc[ing] between the need to maintain the integrity and credibility of the human rights tradition, and the need to adopt a dynamic approach that fully reflects changing needs and perspectives and responds to the emergence of new threats to human dignity and well-being."<sup>6</sup>

As part of the recognition of an environmentally based human right, this Note proposes the drafting and ratification of an international covenant<sup>7</sup> as the most efficacious way of introducing the necessary protections into the existing human rights regime. Part II will begin by defining and identifying international human rights and discussing the role of the United Nations in that process. Part III examines the first and second generations of human rights, while Part IV examines the concept of a third generation of international human rights. Part

3. See *infra* notes 113-43, 150-52 and accompanying text.

4. See Karel Vasak, *Pour une Troisième Génération des Droits de L'homme*, in STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 837, 839 (Christophe Swinarski ed., 1984); see also JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 143-44 (1989). See *infra* notes 38-59 and accompanying text for a full discussion of first and second generation rights.

5. See UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, WORKING GROUP OF THE STANDING COMMITTEE OF INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS, SYMPOSIUM ON THE STUDY OF NEW HUMAN RIGHTS: THE "RIGHTS OF SOLIDARITY;" THE RIGHTS OF SOLIDARITY: AN ATTEMPT AT CONCEPTUAL ANALYSIS, at 2, U.N. Doc. SS-80/Conf.806/6 (1980) [hereinafter THE RIGHTS OF SOLIDARITY]. But see DONNELLY, *supra* note 4, at 144 (suggesting that "generation" is a disturbing metaphor because it "[f]lies in the face" of the idea of the interdependence of human rights by implying that newly proposed rights are either dependent upon, or replace, already established human rights).

6. Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 609 (1984).

7. See *infra* notes 174-85 and accompanying text.

V describes some of the environmental threats currently faced by the international community and explores the community's corresponding willingness to consider a new right to a healthy and ecologically balanced environment. Finally, Part VI outlines the means through which the proposed environmental right could arise under, or become part of, the accepted international law of human rights and suggests a structure for the proposed right.

## II. DEFINING AND IDENTIFYING INTERNATIONAL HUMAN RIGHTS

### A. The United Nations and its Role in Defining an International Human Right

In order to fully consider and evaluate a proposed right to a healthy environment, the basic contours of what constitutes an international human right need to be examined. An international human right may be thought of as one which "all States have the same duty to respect" as they do their own municipal legislation.<sup>8</sup> Nevertheless, no single precise definition of an international human right exists as a universally accepted standard, prompting one writer to state that "a claim is an international human right if the United Nations General Assembly says it is."<sup>9</sup> There is some truth in this assertion, given that human rights covenants, adopted by the General Assembly and subsequently ratified by states, are the primary source of binding international human rights law.<sup>10</sup> It is thus apparent that recognized international human rights are the result of pragmatic and political decisions rather than purely theoretical considerations.<sup>11</sup>

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8. Imre Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 11, 20 (Karel Vasak & Philip Alston eds., 1982).

9. Richard B. Bilder, *Rethinking International Human Rights: Some Basic Questions*, 2 HUM. RTS. J. 557, 559 (1969); see also DONNELLY, *supra* note 4, at 12-15 (discussing that while the concept can be explained, it is very difficult to refine to a single definition).

10. ALBERT P. BLAUSTEIN ET AL., HUMAN RIGHTS SOURCEBOOK 4 (1987) (stating that treaties and covenants evince international law when ratified and establish rules "expressly recognized" by the parties ratifying the covenant); see also Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1031, 1060 (instructing the court to apply international covenants).

11. Cf. DONNELLY, *supra* note 4, at 9-27 (setting out an analytic theory of universal human rights).

Louis Henkin points out that the United Nations Charter<sup>12</sup> and the Universal Declaration of Human Rights (Universal Declaration)<sup>13</sup> assume the existence of fundamental human rights and delineate their content on the basis of practical considerations; as a result, no extensive theoretical justification is required.<sup>14</sup> In efforts to formulate concepts and language that would appeal and apply to "diverse political systems governing diverse peoples, [the General Assembly] . . . eschewed philosophical exploration."<sup>15</sup> In fact, the United Nations has not articulated a specific justification for the human rights it has adopted and denoted as fundamental; rather, the General Assembly has merely agreed upon them. Nonetheless, by defining international human rights, assuming their incumbent obligations, and subjecting themselves to international scrutiny, the members of the United Nations implicitly and explicitly accepted human rights norms and demonstrated an international moral consensus.<sup>16</sup>

Some theorists argue that there is a distinction between fundamental human rights and general human rights.<sup>17</sup> The United Nations Charter stands for the proposition that some basic rights inhere in the very nature of humankind.<sup>18</sup> States are obligated to respect such rights even without the existence of a covenant or explicit acceptance of these rights.<sup>19</sup> Additionally, these fundamental human rights are "considered to be valid under all circumstances, irrespective of time and place, and no derogation[s] [are] allowed."<sup>20</sup>

In response to the argument in favor of differentiation among rights within the international human rights regime, many theorists contend that all human rights are part of one indivisible body and no

12. U.N. CHARTER arts. 1(3), 55.

13. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter *Universal Declaration*].

14. Louis Henkin, *International Human Rights as "Rights,"* in HUMAN RIGHTS 257, 264-65 (J. Roland Pennock & John W. Chapman eds., 1981).

15. *Id.* at 264.

16. *Id.*

17. See, e.g., Theodore van Boven, *Distinguishing Criteria of Human Rights*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 43, 43-48 (Karel Vasak & Philip Alston eds., 1982) (setting out arguments for and against distinguishing between fundamental human rights and other human rights).

18. "We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . . , have resolved to combine our efforts to accomplish these aims." U.N. CHARTER pmb1.

19. van Boven, *supra* note 17, at 48.

20. *Id.*

hierarchical distinction can be made within that body.<sup>21</sup> The controversy over a potential hierarchy of rights results from the difficulty of reconciling the international human rights regime with a more philosophical theory of human rights. Because this issue is beyond the scope of this Note, no attempt will be made to distinguish a hierarchy of rights other than to indicate differing levels of international recognition and legally binding force.

Appeals to moral values and philosophical precepts do not provide an adequate legal basis for litigation and resolution of international disputes. Ratified international agreements appear to be the most certain method of insuring that states will recognize and fulfill specific human rights obligations.<sup>22</sup> Often containing enforcement mechanisms, covenants are the most common instrument of agreement.<sup>23</sup> The fact that the international human rights regime is based on such covenants and agreements, rather than on philosophical grounds, further supports the claim that human rights are determined by the dictates of the General Assembly,<sup>24</sup> and that fundamental rights are those rights which the United Nations recognizes and which states are obliged to respect.<sup>25</sup> Although, theoretically, fundamental rights may need no formal recognition or ratification to be authoritative, as a practical matter the United Nations process is crucial to both the legitimacy and enforceability of all international human rights. Therefore, no functional distinction can be drawn between fundamental and other human rights for the purposes of enforcing international law.

What types of interests are so indispensable that they should be considered human rights? Susan Moller Okin suggests that "certain rights are human rights and should be recognized as such, because human beings have fundamental needs and capacities that make certain goods and freedoms essential to their continued existence."<sup>26</sup> Okin suggests a working definition of a human right as "a claim to something (whether a freedom, a good, or a benefit) of crucial importance for human life."<sup>27</sup> This definition is based on the asser-

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21. See PAUL SIEGHART, *THE LAWFUL RIGHT OF MANKIND* 81-84 (1985).

22. See LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW* 271-72 (1989).

23. *Id.* at 265.

24. Bilder, *supra* note 9, at 559.

25. van Boven, *supra* note 17, at 47-48.

26. Susan M. Okin, *Liberty and Welfare: Some Issues in Human Rights Theory*, in *HUMAN RIGHTS* 230, 231 (J. Roland Pennock & John W. Chapman eds., 1981).

27. *Id.* at 235.

tion that, in order to prove a certain human right exists, it must be shown that it confers some benefit or freedom sufficiently valuable to the individual to be called his or her moral right.<sup>28</sup> For example, the proposed right to a healthy environment benefits and preserves life itself for all persons and for future generations.<sup>29</sup> Therefore, it confers a benefit which is arguably valuable enough to be considered a moral imperative.

Henkin proposes an alternative definitional framework for human rights. He suggests that three statements form the basis for international human rights: (1) an assertion of fact about human psychology and emotion, that human beings cannot close their minds and hearts to mistreatment or suffering of other human beings; (2) a moral statement, that mistreatment or suffering of human beings violates a common morality and all humans are morally obligated to do something about such mistreatment or suffering, individually and through their political and social institutions; and (3) an international political statement, that governments will attend to such mistreatment or suffering in other countries through international institutions and will take account of them in their relations with other states.<sup>30</sup>

Under either Okin's or Henkin's framework the right to a healthy environment qualifies as a valid human right. The proposed right to a healthy environment protects a claim to something of crucial human importance, such as health and life, and thus satisfies Okin's definition of a human right. Likewise, the Proposal for an Additional Protocol to the European Human Rights Convention recognizes that the impairment of the environment presents a permanent threat to human health and life.<sup>31</sup> Moreover, increasing evidence of this threat has become apparent and has been recognized by international bodies.<sup>32</sup> Because the evidence of the threat to humanity caused by environmental harm can no longer be ignored and our increased awareness of these harms compels us to respond, Henkin's criteria for recognizing a human right have been satisfied. Thus, a human right to a healthy and ecologically balanced environment fulfills the theoretical guidelines of a legitimate and necessary human right.

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28. DAVID MILLER, *SOCIAL JUSTICE* 67 (1976).

29. See *THE RIGHTS OF SOLIDARITY*, *supra* note 5, paras. 62-64.

30. Henkin, *supra* note 14, at 257-59.

31. *THE WORKING GROUP FOR ENVIRONMENTAL LAW*, *supra* note 2, at 29.

32. *Id.*

## B. The Recognition of New Human Rights

New human rights come into existence not by fulfilling theoretical guidelines, but as a result of recognition and agreement by the United Nations. The United Nations can respond to changing world circumstances and reach agreements regarding newly proposed human rights. As world conditions change, the advocacy or protection of human rights which previously had been "for economic or technological reasons . . . impossible or perhaps too difficult, too costly, to justify imposing them as duties" becomes possible.<sup>33</sup> Another force in the recognition of new human rights emerges "because people have become sensitive to certain needs of all humans to which [they] were hitherto oblivious."<sup>34</sup> The environmental destruction wrought in the past three or four decades reflects how changes in industry and technology not only produce new threats to humanity, but also reveal the extent of, and possible remedies for, existing threats.<sup>35</sup> We have only recently become fully aware of the global scope and severity of the damage done to the world's environment.<sup>36</sup> As the consequences to life and health from environmental contamination and abuse become clear, new human rights protections become necessary to protect the interests of all humanity. However, new human rights protections are predicated on the readiness of the international community and the United Nations to consider and implement them.<sup>37</sup>

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33. J. Roland Pennock, *Rights, Natural Rights, and Human Rights—A General View*, in HUMAN RIGHTS 1, 7 (J. Roland Pennock & John W. Chapman eds., 1981); see also David D. Raphael, *The Rights of Man and the Rights of the Citizen*, in POLITICAL THEORY AND THE RIGHTS OF MAN 101, 117-18 (David D. Raphael ed., 1967).

34. Pennock, *supra* note 33, at 7.

35. This is due, in part, to the growing impact humanity has on the earth as population growth, industrialization, and fossil fuel consumption increase. Andrew Hurrell & Benedict Kingsbury, *The International Politics of the Environment: An Introduction*, in THE INTERNATIONAL POLITICS OF THE ENVIRONMENT 2 (Andrew Hurrell & Benedict Kingsbury eds., 1992); see also THE WORKING GROUP FOR ENVIRONMENTAL LAW, *supra* note 2, at 29 (discussing increasing evidence that indirect harms present a constant risk to life).

36. See Hurrell & Kingsbury, *supra* note 35, at 2-3 (listing global climate changes, the destruction of the ozone layer, and the threat to biodiversity as examples of a new category of worldwide environmental problems which we now face in addition to regional deforestation, salinization, and denudation); Bryn Jones, *Environmental Law—Too Little, Too Late*, in FRONTIERS ENVTL. L. 68, 71-73 (Owen Lomas ed., 1991) (setting out the types of and increases in serious environmental problems).

37. See *infra* text accompanying notes 113-38 for a discussion of the international readiness to take such action.

### III. THE CURRENT INTERNATIONAL HUMAN RIGHTS FRAMEWORK: THE FIRST AND SECOND GENERATIONS OF HUMAN RIGHTS

Because the goal of third generation human rights is to enhance and facilitate the fulfillment of first and second generation rights, understanding the basis for the first articulations of international human rights is essential to considering a third generation. Human rights, as they emerged in the eighteenth century, generally consisted of those rights which could be invoked against the state.<sup>38</sup> Among those rights, now known as first generation rights, are the freedoms of expression and the press, of religion and conscience, of assembly, and of movement, as well as the freedoms from torture, arbitrary arrest, and interference in private communication and the right to due process of law.<sup>39</sup>

The attention of the international community began to focus on individual human rights as a result of the atrocities of World War II, as revealed during the Nuremberg Trials.<sup>40</sup> An international system previously concerned with states alone began recognizing individuals as both the holders and the potential violators of international human rights. The United Nations Charter<sup>41</sup> was the first manifestation of this concern for individual human rights, and the Universal Declaration later enumerated specific human rights which were agreed upon by the international community of nations. Finally, certain of these human rights obligations were made explicitly binding under international law through the International Covenant on Civil and Political Rights (Covenant on Civil and Political Rights), which was adopted in 1966.<sup>42</sup> These documents represent consensus among the signatories that the rights they describe are significant and deserving of deference.

38. See SIEGHART, *supra* note 21, at 26-29.

39. *International Covenant on Civil and Political Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, 53-55, U.N. Doc. A/6316 (1966) [hereinafter *Covenant on Civil and Political Rights*].

40. At the trial, individuals were held responsible for violations of international law committed on behalf of their country and legitimized by national laws. The court held that "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." *The Nuremberg Trial*, 6 F.R.D. 69, 110 (1946). See also SIEGHART, *supra* note 21, at 36-38.

41. U.N. CHARTER arts. 1, 55.

42. *Covenant on Civil and Political Rights*, *supra* note 39, pmb1.



Often referred to as fundamental or inalienable rights, these rights constitute the first generation of human rights.<sup>43</sup>

Under international law, the Universal Declaration, adopted in 1948 by the General Assembly of the United Nations, has become the keystone of the existing human rights regime.<sup>44</sup> It exists alongside the United Nations Charter as the principle authoritative source on human rights worldwide.<sup>45</sup> At the time of its adoption, however, the Universal Declaration did not represent the existing state of international human rights law;<sup>46</sup> rather, it represented a standard that the adopting states would strive to achieve.<sup>47</sup> As the Universal Declaration gained recognition and stature as a source of customary international law, human rights became firmly grounded institutions of positive international law.<sup>48</sup>

Arguments that the United Nations Charter and the Universal Declaration create binding international law take two forms. First, the Universal Declaration and subsequent Covenants created binding obligations which gave detail to the general human rights objectives of the United Nations Charter, and solidified the commitments to create positive law initiated in the Charter.<sup>49</sup> Second, the United Nations Charter and the Universal Declaration, along with their progeny, established a customary international law of human rights.<sup>50</sup> Customary international law is established by the consistent general practice of states over time, and the acceptance of such action as binding law upon the states; such "collective practices should . . . reflect widely held opinions and represent a broad consensus" in order to be regarded as customary law.<sup>51</sup>

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43. See Vasak, *supra* note 4, at 839 (identifying the first generation as entailing political and civil rights).

44. CHEN, *supra* note 22, at 207-09 (1989); Szabo, *supra* note 8, at 23.

45. CHEN, *supra* note 22, at 209. The Universal Declaration has been said to be "almost . . . legally binding," although this is not technically accurate. Szabo, *supra* note 8, at 33. The Universal Declaration is no more than a statement of United Nations thinking and is not binding on states. States may express their adherence and devotion to the principles of the Universal Declaration by including it in their own constitutions; however, this does not make the Universal Declaration itself binding on those states. *Id.*

46. See LOUIS HENKIN ET AL., *INTERNATIONAL LAW* 114-15 (2d ed. 1987).

47. *Universal Declaration*, *supra* note 3, pmb. A declaration should have only slightly more authority in international law than a simple recommendation. See Szabo, *supra* note 8, at 23-24.

48. See Szabo, *supra* note 8, at 23-28; see also HENKIN ET AL., *supra* note 46, at 982-83.

49. HENKIN ET AL., *supra* note 46, at 985.

50. *Id.*

51. Theodore van Boven, *Survey of the Positive International Law of Human Rights*, in 1 *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* 87, 106 (Karel Vasak & Philip Alston eds., 1982).

For many individuals, however, the adoption of binding agreements guaranteeing first generation rights made little substantive difference in their lives. The first generation rights as proclaimed in these documents inhere in all individuals as human beings.<sup>52</sup> Nevertheless, deleterious social conditions such as hunger, poverty, inadequate health care, the lack of educational opportunity, and hazardous workplaces inhibit the individual realization and enjoyment of first generation rights and freedoms.<sup>53</sup> For example, individuals may not be free in the sense guaranteed by first generation rights if they must labor for long hours at low wages which still fail to meet their subsistence needs. Similarly, freedom of expression and the right to life may not be realistic without education and proper health.

In order to enhance the protection of first generation rights, additional rights were enacted through the International Covenant on Economic, Social, and Cultural Rights (Covenant on Economic, Social, and Cultural Rights), which was adopted in 1966.<sup>54</sup> The rights promoted in this document, including the rights to work and a decent workplace,<sup>55</sup> health,<sup>56</sup> education,<sup>57</sup> and social insurance,<sup>58</sup> are termed second generation rights.<sup>59</sup>

First and second generation rights exist in a paradoxical yet symbiotic relationship. Guarantees of economic, social, and cultural rights *require* state intervention, and yet are necessary to secure effective enjoyment of the first generation rights which protect individuals *against* state intervention.<sup>60</sup> While such active government participation may appear antithetical to the freedoms articulated in the Covenant on Civil and Political Rights, the second generation is in fact necessary for the enjoyment of first generation rights by most of the world's population. In short, for the illiterate and impoverished, the

52. See U.N. CHARTER art. 55; *Covenant on Civil and Political Rights*, *supra* note 39, pmb1.; *Universal Declaration*, *supra* note 13, pmb1.

53. See generally *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, pmb1., U.N. Doc. A/6316 (1966) [hereinafter *Covenant on Economic, Social, and Cultural Rights*] (“[T]he ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”).

54. *Id.*

55. *Id.* arts. 6-7.

56. *Id.* art. 12.

57. *Id.* art. 13.

58. *Id.* art. 9.

59. See CHEN, *supra* note 22, at 211; Vasak, *supra* note 4, at 839.

60. See generally DONNELLY, *supra* note 4, at 143-44.

fruits of a free society simply are not accessible without the guarantees of the second generation human rights.

The acceptance of the first two generations of human rights into international law occurred through two mechanisms. The first, mentioned above, was the gradual increase in deference and authority accorded the Universal Declaration until the rights it enumerated became part of the customary international law of human rights.<sup>61</sup> The second mechanism was the adoption of the Covenant on Civil and Political Rights and of the Covenant on Economic, Social, and Cultural Rights by the United Nations General Assembly, the subsequent ratification of the Covenants, and their entry into force.<sup>62</sup> Each Covenant was opened for universal participation and each has been ratified by at least 100 states.<sup>63</sup> Unlike declarations, the ratification of a covenant creates an explicit binding obligation on states to guarantee the rights therein to all their citizens and to formulate their municipal law to incorporate the necessary human rights protections.<sup>64</sup> Both Covenants are now binding international law for the parties acceding to them.<sup>65</sup>

The Optional Protocol to the Covenant on Civil and Political Rights (Optional Protocol) further recognizes the individual as the holder of human rights by allowing individual victims to bring complaints against the state for violations of the human rights

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61. Compare Szabo, *supra* note 8, at 24 (“[T]he [Universal] Declaration has gradually come to command increasing authority throughout the world. . . .”) with *id.* at 33 (“[T]he Universal Declaration has acquired a moral authority such that it has almost become legally binding . . . [although it may have] a value no greater than that of custom.”).

62. Each Covenant required thirty-five ratifications to enter into force. *Covenant on Civil and Political Rights*, *supra* note 39, art. 49; *Covenant on Economic, Social, and Cultural Rights*, *supra* note 53, art. 27. The Covenant on Economic, Social, and Cultural Rights entered into force on January 3, 1976, as did the Covenant on Civil and Political Rights on March 23, 1976. UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL 122, 133 (1992).

63. As of 1991, the Covenant on Civil and Political Rights had been ratified by 100 states, while the Covenant on Economic, Social, and Cultural Rights had been ratified by 104 states. UNITED NATIONS, *supra* note 62, at 133. At present, a signature may indicate intent to be bound by an agreement more so than it did in the past, when lack of rapid international communications meant government officials other than the signing plenipotentiary might not have read or approved the provisions of the agreement. Now, legislators and other government officials not present at international negotiations can be intimately familiar with a document before it is signed, thus lending more authority and binding status to a mere signature. SIEGHART, *supra* note 21, at 34.

64. Szabo, *supra* note 8, at 33.

65. SIEGHART, *supra* note 21 at 25–26; see also Szabo, *supra* note 8, at 33–34.

protected by the Covenant on Civil and Political Rights.<sup>66</sup> More importantly, the Optional Protocol authorizes the United Nations Human Rights Committee<sup>67</sup> to investigate these complaints.<sup>68</sup> States which are parties to the Optional Protocol cede a portion of their sovereignty by consenting to international investigation of human rights violations committed within their borders or by their agents in other states.

Individual standing to bring claims as provided by the Optional Protocol, the first generation Universal Declaration and Covenant on Civil and Political Rights, and the second generation Covenant on Economic, Social, and Cultural Rights would appear to provide adequate articulation and protection of human rights. Many of the world's people, however, continue to live under conditions which impede or prohibit their exercise of basic human rights. For example, the right to a healthy environment is vital to the fulfillment of first and second generation rights; persons must have a viable, decent environment in which to live in order to provide and ensure sustenance, health, economic security, and other minimum living standards. A third generation of human rights, therefore, has been proposed to facilitate fuller exercise and enjoyment of those human rights currently embodied in international law.

#### IV. ADDING A THIRD GENERATION OF HUMAN RIGHTS TO THE EXISTING REGIME

Karel Vasak, Legal Adviser to the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and former director of the UNESCO Division of Human Rights and Peace, first used the term "third generation human rights" to describe a group of policy goals achievable through concerted international action.<sup>69</sup> Since then a debate has ensued over whether this group of proposals, also termed solidarity rights,<sup>70</sup> are in fact human rights.<sup>71</sup> Some theorists take

66. *Covenant on Civil and Political Rights*, *supra* note 39, Optional Protocol, art. 1, at 59 [hereinafter *Optional Protocol*].

67. The United Nations Human Rights Committee is established under articles 28-45 of the *Covenant on Civil and Political Rights*, *supra* note 39, arts. 28-45.

68. See *Optional Protocol*, *supra* note 66, art. 1; SEGHAART, *supra* note 21, at 25, 387.

69. Vasak, *supra* note 4, at 838.

70. THE RIGHTS OF SOLIDARITY, *supra* note 5, para. 8.

71. See DONNELLY, *supra* note 4, at 144-45. Solidarity rights, rather than necessarily being vested in groups or peoples, may be expressed and understood as individual rights exercised by individuals as group members. *Id.*

the position that human rights are static in number; any additional human rights must be inferred from existing rights rather than created or recognized outright.<sup>72</sup> Other critics have voiced concern that additional third generation rights will diminish the authority of existing human rights.<sup>73</sup> Theorists who favor a third generation of human rights argue for a dynamic view of human rights that considers and accommodates changing international situations and the increasing international capacity to cope with impediments to the enjoyment of freedoms and life by many of the world's people.<sup>74</sup> Such a pragmatic and flexible attitude toward human rights may be eminently reasonable with regard to urgent environmental problems as solutions which were previously inconceivable become technologically and politically possible.

A third generation may be characterized as the logical extension of a dynamic international human rights process. Vasak equates each of the three generations of human rights to a corresponding principle in the triumvirate of the French Revolution: *liberté, égalité, and fraternité*.<sup>75</sup> The first generation of political and civil rights, embod-

72. See *infra* notes 87-97 and accompanying text.

73. Richard B. Bilder, *An Overview of International Human Rights Law*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 1, 16 (Hurst Hannum ed., 1984).

74. One commentator states:

[T]here seems nothing inherently wrong in either changing concepts or expanding the list of human rights. As our societies, technology, problems, attitudes, and expectations change, there is bound to be a corresponding change in the claims we view as basic, in the order of importance in which we rank these claims, and in the things we expect governments to do or not to do. Moreover, there is perhaps something to be said for an increase alone in the number and types of broadly humanitarian claims we are prepared to call human rights, since this will hopefully increase the pressures for their practical achievement.

Bilder, *supra* note 9, at 561-62.

[T]he international community . . . may, and on certain occasions should, revise the rules of international law in force at the moment, including the . . . ones for the international protection of human rights, for the purpose of establishing new precepts that will correspond to the advances of science, to the teaching of experience, to the changing realities of social and international life, to the needs determined by the inevitable changes that new epochs create in the course of the years, and the aspirations that arise as generation follows generation. The international community . . . could not refuse to accept innovations that have a logical and just basis, because doing so would imply stopping the progress of the law and repudiating the principle contained in the [Universal Declaration] that the system of protection of the rights of man should be strengthened more and more in the international field as social and legal circumstances become more propitious.

ORGANIZATION OF AMERICAN STATES, ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: 1980-1981, at 54, OEA. Ser. L/V/II.54, Doc. 9, rev. 1 (1981) (Dissent of Dr. Luis Demetrio Tinoco Castro on Resolution No. 23/81); see also DONNELLY, *supra* note 4, at 26.

75. See Vasak, *supra* note 4, at 839.

ied in the Universal Declaration and the Covenant on Civil and Political Rights, are freedoms from state intrusion: *liberté*.<sup>76</sup> The second generation furthers realization of the first generation by guaranteeing minimum standards, demandable upon the state, of education and health, a liveable wage, decent working conditions, and social insurance for all persons: *égalité*.<sup>77</sup> Finally, the third generation consists of rights which may be *invoked against* and *demande*d of the state.<sup>78</sup> These rights require all the organs of society—individual, state, regional, and international—to cooperate in order for the rights to be realized: *fraternité*.<sup>79</sup> Third generation rights cannot be realized without shared objectives and commitment to concerted group action.<sup>80</sup> For this reason, Vasak termed third generation rights solidarity rights.<sup>81</sup> The solidarity concept is not new to environmental policymakers. In 1972 the United Nations Conference on the Human Environment (the Stockholm Conference) passed a resolution stating that a “growing class of environmental problems, because they are regional or global in extent or because they affect the common international realm, will require extensive co-operation among nations and action by international organizations in the common interest.”<sup>82</sup> The Stockholm Conference urged governments to work together to protect and enhance the environment for the benefit of all.<sup>83</sup> The notion of solidarity is simple: certain human rights cannot be achieved without concerted international action on all levels.<sup>84</sup>

The concept of solidarity is also relevant to first and second generation rights which depend upon a variety of regional and international courts, tribunals, and other bodies for their articulation, oversight, and enforcement. Solidarity, however, is particularly vital for the fulfillment of a third generation human right to a healthy and

76. See *id.* (stating that such rights liberated mankind from the political constraints of the old federal order); see also DONNELLY, *supra* note 4, at 143.

77. See DONNELLY, *supra* note 4, at 143-44; Vasak, *supra* note 4, at 839 (stating that people need equal access to economic, social, and cultural opportunities).

78. Vasak, *supra* note 4, at 839.

79. See DONNELLY, *supra* note 4, at 144 (noting that new forms of international cooperation are required); Vasak, *supra* note 4, at 839.

80. Vasak, *supra* note 4, at 839.

81. *Id.*

82. Stockholm Declaration, *supra* note 2, at 4.

83. *Id.*

84. See Vasak, *supra* note 4, at 839; see also THE RIGHTS OF SOLIDARITY, *supra* note 5, para. 23 (noting that solidarity rights have “various dimensions: individual, group, national and international”).

ecologically balanced environment.<sup>85</sup> While one nation can assure that its citizens are provided due process of law, adequate health care, or minimum foodstuffs and living conditions, it cannot regulate air and water quality, acid rain, radioactive fallout, and other threats to the health and welfare of its citizens in a comprehensive manner because these hazards transcend political and jurisdictional boundaries.<sup>86</sup> Concerted international action is therefore imperative to surmount these boundaries and protect all individuals.

The debate over the validity of third generation rights often focuses on the alleged "collective" quality of such rights. Critics assert that third generation rights are illegitimate because they are collective, whereas first and second generation rights are held by individuals.<sup>87</sup> Advocates claim that distinctions between individual and group rights are spurious and inaccurate.<sup>88</sup> They claim third generation rights should be understood as individual human rights<sup>89</sup> not meaningfully different from first and second generation rights, and that in all three generations the individual remains the cardinal subject of the human rights.<sup>90</sup> Notably, the first provision of each of the Covenants, which set forth the first and second generations of rights, contains the "collective" right to self-determination<sup>91</sup> despite the fact that this right is usually considered a third generation right.<sup>92</sup> Louis Sohn explains that although certain human rights, such as self-determination, may

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85. See Vasak, *supra* note 3, at 839.

86. Constance O'Keefe, *Transboundary Pollution and the Strict Liability Issue: The Work of the International Law Commission on the Topic of International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, 18 DENV. J. INT'L L. & POL'Y 145, 146 (1990).

87. See, e.g., DONNELLY, *supra* note 4, at 143-49 (setting out the major arguments against third generation rights based on their allegedly collective nature).

88. See van Boven, *supra* note 17, at 53-54 (suggesting that delineating too strictly between individual and collective rights is artificial and that most currently accepted rights and proposed third generation rights have both collective and individual aspects).

89. See DONNELLY, *supra* note 4, at 150.

90. See THE RIGHTS OF SOLIDARITY, *supra* note 5, paras. 10, 12 (stating that third generation rights [solidarity rights] would give effect to "the creative development of every nation, every community, and every individual"); Richard N. Kiwanuka, *The Meaning of "People" in the African Charter on Human and Peoples' Rights*, 82 AM. J. INT'L. LAW 80, 84 (1988).

91. *Covenant on Civil and Political Rights*, *supra* note 39, art. 1; *Covenant on Economic, Social, and Cultural Rights*, *supra* note 53, art. 1; see also van Boven, *supra* note 17, at 56 (explaining that "the very first article of both the International Covenants on Human Rights sets out a collective right").

92. See Heinhard Steiger et al., *The Fundamental Right to a Decent Environment*, in TRENDS IN ENVIRONMENTAL POLICY AND LAW 1, 2-3 (Michael Bothe ed., 1980) (introducing the right as an individual right and discussing the importance of enforcement for the protection of the individual's environment).

devolve directly upon groups, "because collective rights are always ultimately destined for individuals, they are ipso facto . . . individual rights."<sup>93</sup> Thus, each generation of rights has both individual and collective elements.<sup>94</sup> For example, the freedoms of religion, association, and expression,<sup>95</sup> while considered individual in nature, clearly have a collective aspect and may be bestowed upon groups made up of individual holders of the rights. Similarly, second generation social, economic, and cultural rights necessarily have collective aspects although they are also characterized as solely individual rights.

Criticism based on the supposed collective nature of third generation human rights is thus rendered moot: first and second generation rights have collective aspects, and therefore any theoretical framework loathe to accommodate collective elements was subverted long ago. Nonetheless, the foremost concern in evaluating any proposed right, whether characterized as individual or collective, should be its ability to complement the individual rights contained in both the Universal Declaration and the Covenants.<sup>96</sup> The right to a clean and healthy environment, while clearly inured with a collective quality, can be understood as an individual right because it is ultimately the individual who enjoys the benefits of a healthy environment.<sup>97</sup>

The debate over third generation rights also reveals confusion and imprecision as to the constituents of a third generation.<sup>98</sup> Despite a

93. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 48 (1982) ("[T]he effective exercise of collective rights is a precondition to the exercise of other rights, political or economic or both.").

94. See SIEGHART, *supra* note 21, at 125.

95. *Covenant on Civil and Political Rights*, *supra* note 39, arts. 18, 19, 22.

96. The preambles of the Universal Declaration and the Covenants specifically state that the rights therein vest in individuals and derive from the inherent dignity of each human person. *Universal Declaration*, *supra* note 13, pmbl.; *Covenant on Civil and Political Rights*, *supra* note 39, pmbl.; *Covenant on Economic, Social, and Cultural Rights*, *supra* note 53, pmbl.

97. Steiger et al., *supra* note 92, at 2-3.

98. See THE RIGHTS OF SOLIDARITY, *supra* note 5, paras. 5, 23, 34, 46, 52, 62, 71 (including as potential third generations rights the rights to development, peace, the common heritage of mankind, communication, environment, and international humanitarian assistance); CONSULTATIVE ASSEMBLY, COUNCIL OF EUROPE, PARLIAMENTARY CONFERENCE ON HUMAN RIGHTS 24 (1972) [hereinafter PARLIAMENTARY CONFERENCE] (determining that there should be new rights to a healthy and clean environment, to social security, and to self-determination); SIEGHART, *supra* note 21, at 368-78 (discussing self-determination, liberation, international peace and security, use of natural wealth and resources, development, and the protection of minority group rights); Vasak, *supra* note 4, at 840 (listing rights to development, peace, environment, communication, and the common heritage of mankind). It is interesting to note that self-determination is included in two of these "proposals for new rights," as the right to self-determination is a collective, not an individual, right. The right to self-determination has been



mistaken tendency to view the many proposed third generation rights as homogenous, they are, in most cases, very different from and not obviously related to each other.<sup>99</sup> Effective consideration of third generation rights requires that each proposed right be considered independently because each differs fundamentally. For example, a healthy, ecologically balanced environment may be necessary for achieving human rights to decent work conditions, minimum standards of living, food, health, economic subsistence, and life itself. However, the proposed right to peace or, more obscurely, the right to tourism, may be neither legitimate nor advisable as human rights.<sup>100</sup> Likewise, the criticism that third generation rights are "group" rights subverting individual rights may apply to some proposed rights, such as the so-called right to development. However, this criticism is inapplicable to proposed environmental rights, which are ascribed to the individual.

## V. ACKNOWLEDGING THE NEED FOR A HUMAN RIGHT TO A HEALTHY AND ECOLOGICALLY BALANCED ENVIRONMENT

### A. The Environmental Threat to Human Rights

Any argument for a human right to a healthful environment rests on the presumption that a contaminated environment does in fact threaten human rights.<sup>101</sup> Threats to recognized human rights from environmental damage are clear. Carcinogens and other toxins carried in the air and water contaminate drinking water; cause cancer, birth defects, and other diseases; poison arable land, sea life, and other food sources; and, as a result, threaten the rights to life, health, and general

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declared a human right in both Covenants. *Covenant on Civil and Political Rights*, *supra* note 39, art. 1; *Covenant on Economic, Social, and Cultural Rights*, *supra* note 53, art. 1.

99. For example, compare the right to communication (involving, *inter alia*, the right to publish, to reply to mass media reports, and to have access to information sources) with the right to international humanitarian assistance and the right to peace. See generally THE RIGHTS OF SOLIDARITY, *supra* note 5, paras. 34-45, 51-61, 70-78.

100. THE RIGHTS OF SOLIDARITY, *supra* note 5, paras. 34-45 (claiming a human right to peace).

101. See THE WORKING GROUP FOR ENVIRONMENTAL LAW, *supra* note 2, at 29; see also *Parliamentary Conference*, *supra* note 98, at 26 (stating that all persons should be granted the right to a clean and healthy environment).

welfare.<sup>102</sup> Cross-frontier and internal pollution<sup>103</sup> decimate forest resources, create toxic workplaces, poison meat and dairy products, and make property worthless, all of which cause economic catastrophe to individuals who can no longer subsist on what they grow and sell, and thereby violate the rights to a safe workplace, work, and property ownership.

Strong evidence exists that the international community is cognizant of these environmental problems and ready to consider a human right to a healthy environment. Over the past two decades, as environmental problems have become increasingly complex and widespread,<sup>104</sup> numerous international colloquia and symposia conducted under the auspices of the United Nations and other organizations have demonstrated the international community's recognition that a healthy environment is necessary for human rights and survival.<sup>105</sup> Formal written recognition of these threats and of the environment's role in human rights can be found in United Nations documents,<sup>106</sup> the African Charter on Human and Peoples' Rights,<sup>107</sup> and national constitutions.<sup>108</sup> The United Nations Conference on the Human Environment stated in a declaration over twenty years ago:

We see around us growing evidence of man-made harm in many regions of the earth: dangerous levels of pollution in water, air, earth, and living beings; major and undesirable disturbances to the

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102. See generally VED P. NANDA & BRUCE BAILEY, CHALLENGES FOR INTERNATIONAL ENVIRONMENTAL LAW—SEVESO, BHOPAL, CHERNOBYL, THE RHINE AND BEYOND *passim* (1987) (Work Paper for the Seoul Conference on the Law of the World).

103. Helmut Schreiber, *The Threat from Environmental Destruction in Eastern Europe*, 44 J. INT'L AFF. 359, 359-60 (1991) (warning that pollution in Eastern Europe will increase pollution levels throughout the entire continent).

104. See Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations*, 20 ENVTL. L. 321, 323 (1990).

105. THE RIGHTS OF SOLIDARITY, *supra* note 5, paras. 62-64; Stockholm Declaration, *supra* note 2, at 5; THE WORKING GROUP FOR ENVIRONMENTAL LAW, *supra* note 2, pmb.; see also Alston, *supra* note 6, at 610 ("In the framework of the 'Armand Hammer Conference,' proposals for a third international human rights covenant featuring a range of 'third generation solidarity rights' have been strongly advocated.").

106. "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." Stockholm Declaration, *supra* note 2, at 4.

107. "All people shall have the right to a general satisfactory environment favourable to their development." UNITED NATIONS, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS art. 24, U.N. Doc. HR/PUB/90/1 (1990).

108. See *infra* notes 131-34, 158-60 and accompanying text.

ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental, and social health of man, in the man-made environment, particularly in the living and working environment.<sup>109</sup>

This declaration was recently reaffirmed in the Rio Declaration on Environment and Development (Rio Declaration).<sup>110</sup> The Rio Declaration further asserts that human beings "are entitled to a healthy and productive life in harmony with nature," and that states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."<sup>111</sup> The rapidly expanding field of environmental law, as well as the deluge of recent publications on international environmental problems, the need for redress, and proposed solutions, indicate widespread awareness that the problems threatening individuals and their environment are both immediate and significant.<sup>112</sup>

#### B. International Readiness to Consider A New Human Right

The ability and, arguably, the inclination of the current international community to consider a new human right to a healthy and ecologically balanced environment are the result of twenty-five years of almost constant international activity. A 1973 Proposal for an Additional Protocol to the European Human Rights Convention, recommending the right to a clean environment, appears to have been the first step toward promoting the new right on the international level.<sup>113</sup> Other steps followed, such as preparing the Preliminary

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109. Stockholm Declaration, *supra* note 2, at 3, para. 3.

110. *Proposal by the Chairman of the Preparatory Committee on the Rio Declaration on Environment and Development*, in UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, ADOPTION OF AGREEMENTS ON ENVIRONMENT AND DEVELOPMENT: RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, at 1, pmbl., U.N. Doc. A/Conf.151/5 (1992) [hereinafter Rio Declaration] (reaffirming the Declaration adopted at the Stockholm Conference and seeking to build upon it).

111. *Id.* at 2, princs. 1-2.

112. See, e.g., Hurrell & Kingsbury, *supra* note 35, at 2 (stating that environmental problems can be solved by cooperation of all states of the world); Sheldon Kamieniecki, *Political Mobilization, Agenda Building and International Environmental Policy*, 44 J. INT'L AFF. 339, 339 (1991); Karl-Göran Mäler, *International Environmental Problems*, 6 OXFORD REV. ECON. POL'Y 80 *passim* (1990) (constructing economic theorems to promote transnational environmental efficiency).

113. W. PAUL GORMLEY, HUMAN RIGHTS AND ENVIRONMENT: THE NEED FOR INTERNATIONAL CO-OPERATION 4 (1976) (stating that the Council of Europe was the first international body to propose legislating a legal right to a healthy environment); THE WORKING

### Draft of a Third International Human Rights Covenant on Solidarity Rights.<sup>114</sup>

The Council of Europe, rather than the United Nations, was the most instrumental of the international bodies in developing early environmental policy,<sup>115</sup> although very recently the United Nations has taken the initiative.<sup>116</sup> In the 1960s and 1970s the Council of Europe embarked on a number of programs to focus attention and discussion on the state of the world environment and on environmental control mechanisms in Europe.<sup>117</sup> Although the Council of Europe advocated environmental protection as early as the 1960s, it was not until the 1970s that the Council of Europe began to promote proposed amendments to the European Convention on Human Rights.<sup>118</sup> Thus, many of the problems which were discussed at UNCED and which are currently being considered by the European Community were considered by the Council of Europe even before the Stockholm Conference in 1972.

The Parliamentary Conference on Human Rights held in Vienna, Austria, in 1971 was another significant step toward establishing environmental protection as a human right.<sup>119</sup> While the environment was not the sole topic of the conference, the discussion pertained to human rights as they were to evolve in the latter portion of the twentieth century.<sup>120</sup> The right to a clean and ecologically balanced environment was one of the central evolving rights meriting discussion.<sup>121</sup> The Parliamentary Conference adopted language reflecting

GROUP FOR ENVIRONMENTAL LAW, *supra* note 2, at 28-29 (crediting the European Council with creating the first international agreements which have actually taken effect and can be enforced).

114. See Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?*, 29 NETH. INT'L L. REV. 307, 309 (1982) (tracing the evolution of the rights of solidarity within the United Nations).

115. GORMLEY, *supra* note 113, at 4.

116. See Postiglione, *supra* note 104, at 322 (enumerating conferences on environmental issues held by the United Nations). United Nations efforts include the Rio Declaration, *supra* note 110, pmb. (stating the goal of establishing a new global partnership as to environment and development).

117. See, e.g., GORMLEY, *supra* note 113, at 1 (stating that the Council of Europe sponsored a program declaring 1970 the Conservation Year).

118. See *id.* at 4-6; see, e.g., PARLIAMENTARY CONFERENCE, *supra* note 98, at 110-11.

119. The Parliamentary Conference was attended by approximately ninety delegates from fifteen countries, members of the European Court and Commission on Human Rights, the Committee of Experts on Human Rights, observers from non-governmental organizations, and others. PARLIAMENTARY CONFERENCE, *supra* note 98, Explanatory Memorandum by Mr. Max van der Stoel, at 126, para. 5 [hereinafter Explanatory Memorandum].

120. *Id.* at 126, para 4.

121. *Id.* at 127-28, paras. 10, 14, 21.

favorably on the codification of new human rights and suggesting that the ramifications of proposed new rights be explored.<sup>122</sup> The central goal of the Parliamentary Conference was the investigation of mechanisms for strengthening human rights protections in Europe.<sup>123</sup> In order to further this goal, the Parliamentary Conference made suggestions for a program of action to protect these rights which was to be carried out by both the Council of Europe and by member states at the national level.<sup>124</sup> At four working sittings, the participants considered human rights protections and how they could be extended, intensified, and consolidated, and examined how human rights abuses might be prevented.<sup>125</sup> At the close of the Parliamentary Conference, the Consultative Assembly adopted an order which called for a study of the human rights questions which would be raised by guaranteeing individuals a healthy and liveable environment.<sup>126</sup>

The European Economic Community (EC) has also taken concrete steps towards progressive, internal environmental legislation. For example, the EC has implemented regulations and controls on water pollution, including both groundwater and navigable hydrosystems.<sup>127</sup> Hazardous chemical transport and importation and air pollution are also addressed in specific legislation applicable to all member states.<sup>128</sup> Such regulatory guidelines and rules are further enhanced by more general programs regarding long-term sustainable development and administration of EC environmental policy.<sup>129</sup>

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122. *Id.* at 4.

123. *Id.* at 125.

124. *Id.*

125. Explanatory Memorandum, *supra* note 119, at 131, paras. 41–46.

126. The Consultative Assembly set forth proposals for short-term and medium-term programs of the Council of Europe in the field of human rights, listing the environment as one of eight areas to be protected. See PARLIAMENTARY CONFERENCE, *supra* note 98, at 110.

127. See, e.g., Commission Decision 92/446 of 27 July 1992 Concerning Questionnaires Relating to Directives in the Water Sector, 1992 O.J. (L 247) 10; Council Directive 80/68 of 17 December 1979 on the Protection of Groundwater Against Pollution Caused by Certain Dangerous Substances, 1980 O.J. (L 20) 43; Council Directive 76/464 of 4 May 1976 on Pollution Caused by Certain Dangerous Substances Discharged into the Aquatic Environment of the Community, 1976 O.J. (L 129) 23.

128. See, e.g., Council Directive 92/72 of 21 September 1992 on Air Pollution by Ozone, 1992 O.J. (L 297) 1; Council Regulation 2455/92 of 23 July 1992 Concerning the Export and Import of Certain Dangerous Chemicals, 1992 O.J. (L 251) 13.

129. See Commission Proposal for a Council Resolution on a Community Action Programme of Policy and Action in Relation to the Environment and Sustainable Development, COM(92)23 final.

In addition to regional and international efforts,<sup>130</sup> national legislation has been enacted which specifically addresses environmental issues. Many nations have included the right to a clean environment in their national constitutions. The Constitution of Portugal states that "[e]veryone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it," and establishes specific duties of the state in safeguarding and developing the natural environment.<sup>131</sup> The Spanish Constitution articulates that all persons have the right to enjoy an environment "suitable for the development of the person as well as the duty to preserve it."<sup>132</sup> In addition, Spanish public authorities are charged with using natural resources rationally, improving the quality of living conditions, and maintaining and restoring the natural environment.<sup>133</sup> Sri Lanka and Austria also have specific constitutional provisions for environmental rights.<sup>134</sup>

Additionally, new opportunities for international cooperation have arisen in the aftermath of the fall of the Soviet bloc. Revelations of the environmental degradation and destruction in Eastern Europe and the former Soviet republics have encouraged and facilitated international efforts to identify and confront environmental problems.<sup>135</sup> This process of identification is once again gaining in intensity.<sup>136</sup> After two decades of continued international discussion and debate regarding the necessity of a liveable environment for all persons on the

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130. See Organization of African Unity: Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, *opened for signature* Jan. 29, 1991, 30 I.L.M. 773; Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 22, 1989, 28 I.L.M. 657.

131. PORT. CONST. § III, ch. 2, art. 66, *reprinted in* 15 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 54-55 (Albert P. Blaustein & Gilbert H. Flanz eds., 1992).

132. SPAIN CONST. tit. I, ch. III, art. 45(1), *reprinted in* 16 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 52 (Albert P. Blaustein & Gilbert H. Flanz eds., 1992).

133. *Id.* art. 45(2).

134. AUS. CONST. art. 10(1)(12), *reprinted in* 1 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 5 (Albert P. Blaustein & Gilbert H. Flanz eds., 1992); SRI LANKA CONST. ch. VI, art. 27(14), *reprinted in* 17 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gilbert H. Flanz eds., 1992).

135. See generally Schriber *supra* note 103, at 360-69 (sketching the environmental dilemmas facing the nations of Eastern Europe).

136. For example, one commentator has recently argued for an international court for the environment, and for other institutions to support and coordinate international environmental policies. See Postiglione, *supra* note 104, at 321-24.

planet,<sup>137</sup> international efforts to specifically articulate a human right to a healthy environment are underway.<sup>138</sup>

### C. Initial Attempts at Environmental Standards and Enforcement

In addition to attempts to define and flesh out the content of a right to a healthy and ecologically balanced environment, efforts to construct international consensus and design feasible programs for the implementation and enforcement of environmental rights are ongoing. In 1989 an International Congress on Efficient Environmental Law and Setting Up an International Court for the Environment Within the United Nations (International Congress) brought twenty-seven nations together to discuss potential international claims enforcement procedures.<sup>139</sup> The International Congress recommended approval of a Universal Convention for the Environment as a Human Right and set out guidelines for an International Court and procedures for individuals and states to bring claims before the tribunal.<sup>140</sup> The International Congress explained:

[w]e must have an International Court for the Environment that draws moral and legal strength not from countries, but from individuals who are the real holders of a universal human right . . . . They must have a court at their disposal that has the power to impose itself on all individuals and countries because it judges in the name of the international community—i.e., for the whole of mankind today and for future generations.<sup>141</sup>

Progress made in recent years towards solving the problems of the deteriorating ozone layer, global climate change, ocean pollution, and

137. See Rio Declaration, *supra* note 110, para. 2 (stating the progress of the discussion as of 1992); *Protection of the Global Climate for Present and Future Generations of Mankind*, G.A. Res. 169, U.N. GAOR, 46th Sess., Supp. No. 49, at 130, U.N. Doc A/46/49 (1991); *Protection of the Global Climate for Present and Future Generations of Mankind*, G.A. Res. 212, U.N. GAOR, 45th Sess., Supp. No. 49A, at 147 U.N. Doc A/45/49 (1990); THE RIGHTS OF SOLIDARITY, *supra* note 5, paras. 62–64; Stockholm Declaration, *supra* note 2, at 4, princ. 1; Explanatory Memorandum, *supra* note 119, at 126, para. 2; THE WORKING GROUP FOR ENVIRONMENTAL LAW, *supra* note 2, at 32.

138. The right to a healthy environment is stated numerous ways: the right to an environment, to a clean environment, to a liveable environment, to a humane environment, to a decent environment, to a clean, balanced, and protected environment, etc. See, e.g., THE RIGHTS OF SOLIDARITY, *supra* note 5, at 10; THE WORKING GROUP FOR ENVIRONMENTAL LAW, *supra* note 2, *passim*; GORMLEY, *supra* note 113, at 1.

139. Postiglione, *supra* note 104, at 321.

140. *Id.* at 325–26.

141. *Id.* at 325.

transboundary pollution suggest that international agreement regarding specific environmental problems and solutions can be reached.<sup>142</sup> Agreements this year by EC member states on proposed environmental regulations are encouraging, demonstrating that specific international standards, while controversial, may be set with regard to a wide range of environmental issues and which tackle both immediate and long-term problems.<sup>143</sup>

## VI. A THIRD GENERATION RIGHT TO A HEALTHY AND ECOLOGICALLY BALANCED ENVIRONMENT AS PART OF POSITIVE INTERNATIONAL LAW

It is important to consider not only the readiness of the international community to consider a right to a healthy environment, but also whether mechanisms exist through which such a right could become part of the international legal regime. There are three different processes through which the right to a healthy and ecologically balanced environment might be recognized at the level of international law.<sup>144</sup> The first process consists of the emergence under customary international law, as evidenced by recurring state practice, of such a right.<sup>145</sup> The second process involves deriving the right to a healthy environment from existing international human rights law. Finally, the third process entails the introduction of such a right, not currently existing within international law, into the international legal regime through a covenant. This section will discuss each of these three processes and their likelihood of success.

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142. See United Nations Conference on Environment and Development: Framework Convention on Climate Change (UNCED), *opened for signature* May 9, 1992, 31 I.L.M. 849; Helsinki Declaration on the Protection of the Ozone Layer, May 2, 1989, 28 I.L.M. 1335; United Nations Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541; Protocol to the 1979 [Geneva] Convention on Long-Range Transboundary Air Pollution, on Financing the Monitoring and Evaluation of Air Pollutants in Europe, Sept. 28, 1984, 24 I.L.M. 484; Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft (MARPOL), Feb. 15, 1972, 11 I.L.M. 262.

143. See *supra* notes 127-29 and accompanying text.

144. Alston states that maintaining the integrity of the current human rights regime and recognizing new rights carrying similar authority requires adherence to a process of quality control. Recognition of human rights under such a process should proceed in three general stages: (1) identification of a particular problem and the needs which must be met to eradicate or ease the problem; (2) legislation by the proper national or international body to turn the needs into "specific legal norms;" and (3) implementation by promotion and enforcement of the new norm. Alston, *supra* note 114, at 315-16.

145. See U.N. CHARTER art. 38(1)(b) (defining international custom).



### A. Customary International Law

Customary international law looks to legal custom, as evinced by bilateral and multilateral state practice, for its norms.<sup>146</sup> Legal customs become binding under international law only when states subjectively believe that they are legally bound to obey them.<sup>147</sup> This subjective belief usually arises after an extended period of time, during which the practice is followed extensively and consistently on the international level.<sup>148</sup> Compelling and consistent state practice is documented through United Nations General Assembly resolutions, state statutes, international conferences, statements from intergovernmental bodies, judicial decisions, and other public statements of policy and practice.<sup>149</sup>

Some proponents of the right to a healthy environment argue that this new right is already accepted under customary international law.<sup>150</sup> The basis of this argument is the assumption that an obligation on the part of states to protect the environment can be inferred from the United Nations Charter, the Universal Declaration, and/or the Covenants.<sup>151</sup> This argument is weakened, however, by the fact that the nations participating in UNCED failed to agree on an accepted international legal norm of a healthy environment. There appears to be a lack of international consensus regarding specific standards for protection of the environment, natural resources, and human rights,<sup>152</sup> thus suggesting that a clearly articulated right will not emerge under customary international law in the near future.

Customary international law may not be a reliable source for an environmental right for additional reasons. First, although numerous documents evidence growing concern for the environment over the past twenty-five years, they fail to articulate a single, clear, internation-

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146. Patricia Birnie, *International Environmental Law: Its Adequacy for Present and Future Needs*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 51, 57 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

147. This doctrine is called *opinio juris*. *Id.* at 57.

148. *Id.*

149. *Id.* at 57-58.

150. *E.g.*, Sohn, *supra* note 93, at 61. Given that this argument was at least colorable over a decade ago, it is probably stronger today; however, there has not been a careful, documented analysis of the evidence of international acceptance of a legal norm to verify that the right is progressing toward international acceptance or is actually accepted as part of customary international law.

151. *Id.*

152. See Michael Grubb, *The Climate Change Convention: An Assessment*, 15 Int'l Env't. Rep. (BNA) No. 16, at 540, 540-41 (Aug. 12, 1992) (noting ambiguities after the framework Convention on Climate Change).

al legal norm.<sup>153</sup> Second, environmental problems are urgent, widely varied, and dynamic, and thus would not be adequately addressed by a broad international legal norm which could require years to establish. Given that customary international law norms change only over time, additional difficulties would arise when amendments were required to reflect changing regulatory needs.<sup>154</sup> Instead, volatile environmental circumstances might be better addressed by a flexible regulatory regime which could be made binding through an international covenant.

Customary international law appears to be neither a likely nor a highly desirable source for a human right to a healthy and ecologically balanced environment. Nonetheless, the fact that leaders from over 165 states met at UNCED to discuss international environmental responsibilities, development, and human rights does reflect international readiness to consider a new right.<sup>155</sup> This high level of international interest is vital to the articulation of this right and to its successful addition to the international human rights regime.

## B. Deriving a Third Generation from Accepted Human Rights

Some theorists argue that carefully considering the theoretical legitimacy of proposed new rights is not enough. Maintaining the integrity of the existing human rights regime, they claim, requires that new rights, if any, may only be found within the context of already recognized human rights.<sup>156</sup> Because the proposed right to a healthy environment is well-grounded in the current human rights regime, it

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153. See, e.g., Additional Protocol to the American Convention on Human Rights (1988), art. 12, reprinted in *ENCYCLOPEDIA OF HUMAN RIGHTS* 54 (Edward Lawson ed., 1991) ("Everyone shall have the right to live in an environment free of pollution and to have access to urban services, especially . . . safe water. . ."); *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, G.A. Res. 40/34, U.N. GAOR, 40th Sess., Supp. No. 53, Annex, at 214, para. 10, U.N. Doc A/40/53 (1985) (granting restitution to victims of substantial environmental harm); *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 55, art. 30, U.N. Doc. A/9631 (1975) (giving all states the responsibility to protect the environment, to establish policies that enhance development and prevent transboundary damage, and to cooperate in formulating international environmental norms); Stockholm Declaration, *supra* note 2, at 4, princ. 1 (stating that a fundamental right to live in an environment that "permits dignity and well-being" exists).

154. See generally Birnie, *supra* note 146, at 59-60 (noting that once part of customary international law, norms are very difficult to modify and thus precipitate a situation in which states feel the need to violate the accepted norm in order to establish a new norm better suited to their circumstances).

155. See Emily T. Smith & Geri Smith, *The Long Road From Rio*, *BUS. WK.*, June 8, 1992, at 29.

156. See, e.g., Explanatory Memorandum, *supra* note 119, at 127, para. 13.

does not directly conflict with this point of view. The rights to life and health implied in the Universal Declaration, as well as the rights to adequate food, health, a safe workplace, and other civil, economic, and social provisions enumerated in the Covenants, provide a solid basis from which an environmental right may be derived.<sup>157</sup>

Japan follows this interpretive method and uses general constitutional provisions to protect the individual's environment. For this purpose, language in the Japanese Constitution not specifically addressing the environment is interpreted to include environmental interests.<sup>158</sup> "[a]ll people shall have the right to maintain the minimum standards of wholesome and cultured living."<sup>159</sup> In Germany the emphasis is on maintaining the environment and bringing the former East Germany in line with western ideals of environmental protection. To this end, the German Unification Treaty states that the government is bound "to promote uniform ecological conditions of a high standard at least equivalent to that reached in the Federal Republic of Germany,"<sup>160</sup> thus inferring a standard from existing law.

Vasak also recognized the necessity of protecting the integrity and legitimacy of the major conventions governing the international law of human rights. Consequently, Vasak asserts that the new human rights included in the third generation can be attached, by way of interpretation, to the rights already included in existing conventions: "[t]hus, the unity of the field of human rights would be better protected, and at the same time the so-to-speak constitutional character of the major Conventions on human rights would be emphasized."<sup>161</sup> Although it may be difficult to derive some of the more obscure third generation rights proposals from existing rights, the right to a healthy and ecologically balanced environment is a highly reasonable derivative of the specifically enumerated rights to life and health.

157. See *Universal Declaration*, *supra* note 13, art. 25(1); *Covenant on Civil and Political Rights*, *supra* note 39, arts. 12(1), 18(1), 19(2), 22(1); *Covenant on Economic, Social, and Cultural Rights*, *supra* note 53, arts. 6(1), 7, 11(1).

158. Steiger et al., *supra* note 92, at 7.

159. JAPAN CONST. ch. III, art. 25, *reprinted in* 8 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 17 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992). Japan also has a Basic Law for Environmental Pollution Control which allows individuals to sue corporations for injuries arising out of environmental hazards created by their factories. Hiroko Yamane, *Asia & Human Rights*, in 2 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 651, 658 (Karel Vasak & Philip Alston eds., 1982).

160. F.R.G. CONST., Unification Treaty Ch. VII, art. 34, *reprinted in* 6 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 33 (Albert P. Blaustein & Gisbert H. Flanz eds., 1992).

161. Karel Vasak, *The Distinguishing Criteria of Institutions*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 215, 215 (Karel Vasak & Philip Alston eds., 1982).

The argument that interpretation from existing rights is the most effective way to maintain the integrity of the international human rights system *and* allow new rights to address new problems is intuitively satisfying because it allows change without disturbing the status quo.<sup>162</sup> However, as a merely interpreted right, a right to a healthy and balanced environment would carry neither the clout nor the binding legal status necessary for the effective enforcement and implementation of environmental programs and standards.<sup>163</sup>

The necessity of recognizing an *independent* human right is urgent due to the pace at which the environmental threat to life and other human rights is advancing.<sup>164</sup> Recognizing this right independently in a binding covenant, rather than inferring it from the penumbra of existing rights, makes a crucial difference in its international legal status. A binding covenant creates such independent legal status while providing additional legal recourse for individuals by allowing them to protect their individual environmental interests.<sup>165</sup> Recognizing and expressing a fundamental right in a covenant elevates individual environmental rights to a plane with other individual rights protected under international human rights law. Without this status, individual environmental claims would be required to give way to higher ranking, legally binding human rights.<sup>166</sup> Legal protection of the individual's environment entails protection of the environment in general, because guaranteeing a healthy and ecologically balanced environment to an individual benefits everyone who shares his or her environment. Thus, the "protection of the individual serves the common interest as well."<sup>167</sup> Therefore, it is vital that both the individual and the common good be protected through the creation and ratification of a new covenant by the United Nations General Assembly.<sup>168</sup>

162. See generally Birnie, *supra* note 146, at 51-52 (noting the difficulty in drafting a binding treaty because there is no guarantee that states will ever ratify or enforce the treaty).

163. See *id.* at 53 (stating that states often feel little pressure to implement resolutions or declarations); Janusz Symonides, *The Human Right to a Clean, Balanced and Protected Environment*, 20 INT'L J. LEGAL INFO. 24, 34 (1992) (explaining that without legal recourse for enforcement, any environmental right would be a simple declaration without legal meaning).

164. See *supra* text accompanying notes 102-04 (discussing the scope of the threat).

165. See *infra* text accompanying notes 184-85.

166. See van Boven, *supra* note 17, at 43-48 (cautioning against any ranking of rights, but noting that, as a practical matter, there does seem to be an elementary group of fundamental rights from which there can be no derogation).

167. Steiger et al., *supra* note 92, at 14.

168. See *infra* notes 172-86 and accompanying text.

### C. Creating a Covenant Guaranteeing a Healthy and Ecologically Balanced Environment

Because the recognition of a human right to a healthy and ecologically balanced environment under customary international law is unlikely in the near future, and the derivation of the new right from existing rights is highly susceptible to the whims of interpretation, the creation and adoption of a covenant is essential.

The successful implementation of environmental protections at the international level will require countries to make difficult fiscal and political choices which they would otherwise be unlikely to make unless required by law.<sup>169</sup> The right to a healthy environment should therefore be codified in the most secure international legal form possible. Most efficacious would be the specific recognition of the right and its concurrent obligations through an international treaty in the form of a covenant.<sup>170</sup> Once an independent right is recognized and drafted in the form of a binding covenant, adopted by the United Nations General Assembly, and ratified by member nations, international censure will require nations to take the steps necessary to halt the degradation of the environment.<sup>171</sup>

Furthermore, the proposed third generation right to a healthy and ecologically balanced environment should allow individuals to call upon state and international institutions for enforcement of the right.<sup>172</sup> The inherent qualities of environmental problems demand that individuals be able to secure guarantees from their governments that environmental rights are protected through local and national programs. These types of environmental threats also require that individuals have recourse to international bodies for failure of their

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169. See generally Grubb, *supra* note 152, at 541-43 (suggesting that, for example, minimum emissions reduction goals under the Climate Change Convention may be inadequate because of insufficient binding commitments and procedures).

170. See *supra* notes 62-65 and accompanying text (regarding the binding effect of covenants in international law).

171. See generally Stockholm Declaration, *supra* note 2, at 4 (stating that the environment must be safeguarded); THE RIGHTS OF SOLIDARITY, *supra* note 5, paras. 62-64 (stating that the environment is "part of the common heritage of mankind" and should be protected).

172. This individual right of action could be similar to that provided by the Optional Protocol to the Covenant on Civil and Political Rights. Optional Protocol, *supra* note 66, art. 1; see also Rio Declaration, *supra* note 110, princ. 10 (requiring access to judicial and administrative proceedings for redress and remedy of environmental claims).

own governments and those of other nations to fulfill their obligations under the new covenant.<sup>173</sup>

1. *The Structure of the Right.* The proposed human right to a healthy environment should be expressed in a covenant with at least four basic parts. First, the covenant should articulate a basis for the new right grounded in the fundamental human rights already accepted as international positive law. Such an articulation would include a statement stipulating that a healthy and ecologically balanced environment is necessary for human life and for the lives of future generations. This statement might also include references to the rights to health,<sup>174</sup> food,<sup>175</sup> and a safe working environment.<sup>176</sup>

Second, the covenant should include a definitional framework for the right to a "healthy and ecologically balanced environment." The definitional framework would probably be the most contentious of the issues raised in efforts to articulate the right. Given the lack of definitive scientific information regarding the extent and causes of environmental damage, and due to differing opinions regarding whether one should proceed cautiously or with optimism in the face of imperfect or conflicting information, it may be extremely difficult to determine the meaning and expansiveness of the terms "healthy" and "ecologically balanced."<sup>177</sup> Efforts thus far have been unable to produce even a specific standard for what constitutes a "liveable environment."<sup>178</sup> Once a definition is reached, however, it should include criteria for determining when the environment is so unhealthy that it warrants complaint by the victim.<sup>179</sup>

173. See generally Postiglione, *supra* note 104, at 325-26 (suggesting the need for an International Court for the Environment).

174. See, e.g., *Universal Declaration*, *supra* note 13, art. 25(1).

175. *Id.*

176. See, e.g., *Covenant on Economic, Social, and Cultural Rights*, *supra* note 53, art. 2(1).

177. The ongoing debate among scientists regarding the time frame and potential impact of greenhouse gases provides one example where environmental regulation has been delayed as economists and policy makers try to decide how to proceed in the face of inadequate and contradictory information. See Wilfred Beckerman, *Global Warming and International Action: An Economic Perspective*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 253, 256-59 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

178. A major obstacle in defining the right is setting a minimum standard of liveability to which all countries will agree. See *supra* notes 152-53 and accompanying text.

179. The Proposal for an Additional Protocol to the European Human Rights Convention suggested that individuals be granted the following degrees of protection: "prohibition of damage to health," "prohibition of an unreasonable threat to health," and "prohibition of an unreasonable impairment of well-being." *THE WORKING GROUP FOR ENVIRONMENTAL LAW*, *supra* note 2, at 35.

Third, the covenant should provide for a Court for Environmental Claims which would be open to claims by states and individuals.<sup>180</sup> Enforcement is perhaps the weakest aspect of the current international human rights regime.<sup>181</sup> In order to assure that the right to a healthy environment is enforced, an independent body should be established with jurisdiction over violations of that right. Such a tribunal would have special expertise in environmental matters and would determine whether states were properly applying international environmental standards and guidelines by adjudicating individual and state claims for violations of covenant obligations.<sup>182</sup> The existence of such a tribunal might also require the creation of internal agencies to oversee implementation of environmental policies.

Fourth, the covenant should contain a provision creating standing for individual victims to bring claims against their own state or a foreign state for failure to fulfill obligations under the covenant.<sup>183</sup> Aside from articulation of the right itself, a provision allowing individual victims to bring claims against their own or other states would be the most significant step toward realizing the human right for all people. There is little value in ratifying a new covenant if it will languish as a statement of principle without enforcement. If individuals are not granted broad standing to bring claims for actions against states,<sup>184</sup> enforcement will only occur in the context of one state against another. While this might work in the case of catastrophic

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180. Postiglione, *supra* note 104, at 321 (the Honorable Amedo Postiglione of the Italian Supreme Court arguing for an environmental claims court).

181. Compare SIEGHART, *supra* note 21, at 21 (noting that, because governments which are formally obligated to uphold the current international human rights covenants do not always act, bodies which supervise compliance and render decisions regarding violations are essential to the continued vitality of the human rights regime) with Szabo, *supra* note 8, at 37-38 (explaining that while the complaint provision of the Optional Protocol is important in principle, it has not been adopted by many states and is thus unlikely to be used often—implying that another, more effective, grievance system is required).

182. See generally Postiglione, *supra* note 104, at 325-26 (sketching a form for an International Court for the Environment and stating that such a court would be authorized under the Charter of the International Court of Justice, art. 26).

183. This provision would be analogous to the Optional Protocol to the Covenant on Civil and Political Rights. See Optional Protocol, *supra* note 66, art. 1.

184. Individuals should have standing to bring claims against projects and activities funded by national governments but carried out by private entities and other state sponsored or licensed activities in order to prevent states from avoiding their obligations by sheltering state projects under the guise of private enterprises. See generally *id.* (providing an analogous procedure which allows for individual claims against states but not against private companies receiving government funding or carrying out government programs); see also Yamane, *supra* note 159, at 658-59 (explaining the citizen suit provision of Japan's Basic Law for Environmental Pollution Control).

damage or when there is a public outcry, consistent enforcement would be unlikely because no state has a completely clean environmental record, and would therefore be hesitant to initiate reciprocal scrutiny.<sup>185</sup>

Although custom and general principles are valid sources of international law,<sup>186</sup> they do not create immediate, specific, and binding obligations on states to the same extent as a signed and ratified covenant. The need for a healthy and ecologically balanced environment cannot be addressed intermittently or only when it is convenient or expedient; rather, it requires the commitment of governments to stand firm in the face of industry opposition, tight national budgets, and the demand for low cost goods dependent on environmentally unsound production methods. The nature of environmental problems, which are frequently transboundary and require long-term solutions, are such that they can only be adequately remedied through an enforceable international covenant.

*2. Potential Problems.* The proposal for a new covenant guaranteeing a healthy and ecologically balanced environment will face significant obstacles. One such difficulty will be arriving at international consensus regarding the appropriate level of environmental protection and in specifying guidelines for the substance of the right. Establishing standards for health can be very difficult, in part because information regarding the health hazards presented to human beings by environmental pollutants, energy generation, and depletion of resources is very difficult, costly, and time consuming to obtain.<sup>187</sup>

As with international legal issues generally, questions of state sovereignty will also arise in the consideration of an environmental human right. If a state were to sign an environmental convention containing a provision analogous to the Optional Protocol, it would become subject to complaints by injured nationals, aliens, and other

185. No country wants to open the floodgate to costly suits against themselves or their private industry. As a general rule, nations involved in transboundary environmental damage are very reluctant to sue each other or private companies located within foreign countries for environmental liability or violation of regulations. See Hurrell & Kingsbury, *supra* note 35, at 26; see also GORMLEY, *supra* note 113, at 84 (noting that states are concerned about the possibility of being sued for the damaging actions of private companies).

186. See HENKIN ET AL., *supra* note 46, at 35.

187. See J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 142-43 (11th ed. 1991); John D. Graham, *Science and Environmental Regulation*, in HARNESSING SCIENCE FOR ENVIRONMENTAL REGULATION 1, 4-5 (John D. Graham ed., 1991).



governments.<sup>188</sup> Yet pollution and environmental contamination are not always caused by governmental bodies; much of it is caused by private industry. In theory, therefore, the "accused State would often not be in a position to remedy the wrong."<sup>189</sup> The remedy in such cases, however, might be expanded domestic legislation allowing state governments to prosecute private companies and persons for claims by injured states and foreign nationals.

One of the most troublesome problems faced by the proposed right to a healthy and ecologically balanced environment is its potential conflict with the right to development. The right to development is often discussed as part of a third generation of human rights along with environmental and other proposed rights.<sup>190</sup> It has enjoyed initial success and acceptance on the international level.<sup>191</sup> Environmental regulations that require state-of-the-art technologies, cutbacks in industrial production, or significant monetary resources conflict with the right to develop, which some argue should have priority over an environmental right.<sup>192</sup> Restrictive international environmental standards could therefore slow development in many countries whose economies expand largely through industries unwanted by more technologically advanced countries. On the other hand, underdevelopment poses a significant threat to the environment because developing countries are unable to dispose properly of waste, tend to invest in environmentally unsound industries, and lack the communication and scientific technologies, as well as the capital resources, to provide adequate environmental safeguards.<sup>193</sup>

The issues raised by development<sup>194</sup> are too numerous and complex to examine in this Note. There are, however, convincing arguments suggesting that it is manifestly unjust to allow developed nations, which have spent the last century building an industrial power

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188. See Optional Protocol, *supra* note 66, art. 1.

189. GORMLEY, *supra* note 113, at 84.

190. See Karel Vasak, *A 30-Year Struggle: The Sustained Efforts to Give Force of Law to the Universal Declaration of Human Rights*, UNESCO COURIER, Nov. 1977, at 31.

191. See, e.g., *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., 97th mtg., Supp. No. 53, Annex, at 186, U.N. Doc A/41/53.

192. See *id.* at 193 (noting that when funds for development are scarce, underdeveloped states cannot reasonably be expected to finance environmental programs intended to remedy the damage done by developed nations in the past).

193. Peter S. Thacher, *The Role of the United Nations*, in *THE INTERNATIONAL POLITICS OF THE ENVIRONMENT* 183, 188 (Andrew Hurrell & Benedict Kingsbury eds., 1992).

194. See generally F.V. GARCIA-AMADOR, *THE EMERGING INTERNATIONAL LAW OF DEVELOPMENT passim* (1990) (discussing the claims made by developing countries to international financial and technological assistance, and other economic issues).

base and creating the current environmental problems, to impede the progress in underdeveloped states in order to curb environmental damage and maintain world output of wastes and consumption of resources at the current level.<sup>195</sup> Some level of compromise and cooperation must be reached in order to mediate between these two competing interests, giving special consideration to developing states and their need for continued development. One possible solution may be that, through the increased exchange of technology and other assistance, developing nations can bypass or temper the traditional pattern of moving first to dirty heavy industry before progressing to cleaner, more modern industrial and high technology enterprises.<sup>196</sup> Through greater cooperation, developing states could also benefit from the state-of-the-art environmental techniques and technologies developed by more advanced nations. Such cooperation could help developing states to avoid following the same pattern of overusing nonrenewable resources and polluting at will for the early years of their industrialization.

A final cautionary note is necessary regarding this new right. States may use the nonachievement of environmental rights by other states or intergovernmental organizations as a justification for ignoring first and second generation rights at home.<sup>197</sup> For example, a government might attempt to curry favor with other states and claim to be in compliance with international human rights by pursuing a vigorous environmental program eliminating transboundary pollution or discharges into international waters; while simultaneously oppressing its own people in violation of other international human rights. While this anticipates a possible misuse of third generation rights and thus serves as a sound warning, it should not prohibit consideration of protections necessary in a dynamic world order where environmental problems seriously threaten life, health, food supplies, workplace, and other human rights. If one is alarmed, as are an increasing number of nations and world organizations, by the potential human rights violations caused by carcinogen-emitting coal plants, dead lakes and rivers, and radioactive potato fields, guaranteeing individuals the right to a healthy environment and providing effective enforcement mechanisms for that right are both necessary and urgent.

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195. See Thacher, *supra* note 193, at 193.

196. See generally *id.* at 194-203.

197. See A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD 255-57 (1989).

## VII. CONCLUSION

The proposed human right to a healthy and ecologically balanced environment must be carefully considered and its feasibility examined before it may be authoritatively declared. When it is determined that this right warrants inclusion in the body of international human rights, it should be adopted formally by the United Nations General Assembly and ratified universally. Legitimacy and authority inure through respect for the United Nations process by which the Covenants were adopted.<sup>198</sup> Maintaining and reaffirming the integrity of the human rights recognition process is crucial to the perceived authority of any new human right.<sup>199</sup> Such integrity depends upon the General Assembly's consistent exercise of the powers it has been granted<sup>200</sup> and its ability to maintain its role "as a responsible and discerning arbiter and as a weather vane of the state of world public and governmental opinion."<sup>201</sup> Thus, regardless of the numerous international organizations and bodies which support a human right to a healthy and ecologically balanced environment, it will not be accepted into the international legal regime until the General Assembly reaches consensus on an environmental covenant, articulates its specific content, and presents it for ratification.

Vasak's notion of solidarity is uniquely suited to the right to a healthy and ecologically balanced environment. The health of the world environment cannot be influenced to any significant degree by the actions of a single nation; yet the environmental transgressions of a single nation, unlike other human rights violations, may affect the life and health of persons all over the world. International recognition of the right to a healthy and ecologically balanced environment is fully warranted. New human rights may and have been recognized, and the proposed right fits the definitional framework of a human right. Most importantly, its implementation is essential to secure the first and second generation rights that the Universal Declaration and the Covenants have established and guaranteed.

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198. See *supra* text accompanying notes 28-31.

199. See Alston, *supra* note 6, at 62-65.

200. *Id.* at 618

201. *Id.* at 609.

