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ARTICLE: The Right to a Healthy Life or the Right to Die Polluted?: The Emergence of a Human Right to a Healthy Environment Under International Law

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SUMMARY:
... Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. ... It must be stressed at the outset that this discussion of a possible human right to a healthy environment should not be viewed as advocating an anthropocentric approach to environmental protection. ... Similarly, the realization that environmental problems have serious consequences for human health and well-being and could even threaten the very existence of human life on earth, has led to the current debate on a right to a healthy environment. ... Indeed, some commentators take the view that to speak of a human right to a healthy environment detracts from the ecocentric approach to environmental protection and, instead, endorses the rather narrow and selfish anthropocentric approach. ... Next came the World Commission on Environment and Development which coined the now famous phrase "sustainable development" in a bid to reconcile the increasingly polarized debate on environmental protection and economic development. ... Thus, this resolution, while recognizing the relationship between human rights and environmental protection, cannot be taken as endorsing a human right to a healthy environment. ... The Draft Principles on Human Rights and the Environment specifically link environmental protection with human rights and also recognize that sustainable development links the right to development with the right to a healthy environment. ...

TEXT:
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Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights - even the right to life itself.

- Preamble to the Declaration of the
United Nations Conference on
the Human Environment, 1972
(Stockholm Declaration) [n1]

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I. Introduction

A. Overview

In an era that has witnessed much environmental destruction, as well as many strides taken to protect the environment, whether a new fundamental right to a clean environment should be recognized has become a hotly debated issue. Second perhaps only to the debate on sustainable development, the debate on the right to a healthy environment has attracted much jurisprudential debate with sharply divided views. [n2]

It must be stressed at the outset that this discussion of a possible human right to a healthy environment should not be viewed as advocating an anthropocentric approach to environmental protection. Environmental issues encompass a much wider range of actors, affecting a much larger category of species than human rights violations. While advocating an ecocentric approach, this author argues that recognizing a distinct right to a healthy environment gives the victims of environmental abuse another avenue to seek redress, complementing the ecocentric approach. At no point should the anthropocentric approach override or replace an ecocentric approach to environmental protection.

The human rights debate emerged in the aftermath of the Second World War. Environmental concerns were not a priority then. Hence, the Universal Declaration of Human Rights (UDHR) adopted in 1948 makes no reference to environmental protection. [n3] The subsequent covenants on the subject, adopted almost twenty years later, also make no reference to [*68] environmental protection, although environmental concerns were emerging at the time of their adoption. [n4]

The environmental movement which began in the late 1960s culminated in the adoption of the Stockholm Declaration on the Human Environment in 1972. [n5] While not a binding instrument, it references some form of "environmental right" in Principle 1. [n6] Thus, the Preamble recognized the intimate relationship between environmental protection and the enjoyment of human rights and indeed noted that a healthy environment is necessary for the enjoyment of human rights. [n7]

Despite this recognition in 1972, the progress towards accepting a human right to a healthy environment has been slow.

On the other hand, the progress in relation to civil and political rights embodied in international instruments has been steady. The rights embodied in the International Covenant on Civil and Political Rights (ICCPR) have received attention internationally. [n8] However, the economic, social, and cultural rights embodied in the International Covenant on Economic, Social and Cultural Rights (ICESCR) have been less fortunate and have received less attention. This is partly because of the provision in the latter Covenant that those rights are to be realized to the extent that resources are available. [n9] No such limitation is stipulated in relation to civil and political rights. This is often seen as giving civil and political rights a higher place than economic, social, and cultural rights. While the official UN position as reflected in the 1993 Vienna Declaration on Human Rights is that "all human rights are universal, inter-dependent and indivisible," the reality has been different. [n10] Increasingly, however, and partly due to the debate on the right to development, and the inescapable relationship between civil and political rights and economic, social, and cultural rights, the debate about these latter rights has come to the forefront.

Similarly, the realization that environmental problems have serious consequences for human health and well-being and could even threaten [*69] the very existence of human life on earth, has led to the current debate on a right to a healthy environment. While the highest human right accorded to a person is the right to life, [n11] that right could become meaningless if the environment in which the person is living is so degraded that, in effect, the right to life is threatened. The right to life does not mean the right to any kind of life. There is no denying the clear relationship between certain human rights and environmental protection. [n12] Whether this means that a right to a healthy environment should also be recognized and is a sine qua non for the enjoyment of other rights is discussed below.

An important development is the convergence of the environmental movement with the human rights movement at the national level, particularly in developing countries. Many environmental problems give rise to human rights violations. [n13] While the debate continues whether a right to a clean and healthy environment exists and, if so, whether it is a third-generation right (also called a solidarity right), [n14] one thing is clear: [*70] the very existence of life on this planet could be jeopardized if timely action is not taken to arrest global environmental problems. Due to the lack of enforcement machinery for environmental issues, the human rights machinery has been used to seek redress for environmental problems. [n15] Thus, right to life and right to health are frequently invoked in relation to environmental issues. [n16]

The concept of sustainable development [n17] - the solution proposed by the World Commission on Environment and Development (WCED) to reconcile environmental protection with economic development - also has human rights implications. It embodies the right of the present and future generations to develop in a sustainable manner. [n18] Despite criticisms that this is a vague term, the concept of sustainable development has influenced the evolution of international environmental law to a great extent and is a significant development of recent years. [n19] While sustainable development may not have attained the status of a customary international law principle, and its legal status remains questionable, almost all recent international environmental instruments make specific reference to it and states seem to have accepted it as a norm

which should be taken into account when making decisions on the environment. [n20] This concept has at least encouraged states to evaluate the environmental impact of development activities by adopting the environmental impact assessment (EIA) process which is participatory, transparent, and provides access to information. [n21]

An intimate relationship exists between human rights, environ-mental protection, and economic development. Environmental problems [*71] can give rise to human rights abuse; economic development can, and often does, give rise to environmental problems; and human rights abuse and human rights violations can take place because of environmental issues. Often, these issues must be discussed together.

Unlike human rights issues, which are often individual in nature (except, of course, issues such as genocide, apartheid and slavery), environmental violations often involve groups and communities, are global in dimension, and sometimes affect even future generations. [n22] Environmental violations also involve the right of other species to survive. This is referred to as the "ecocentric approach." [n23] The human rights machinery obviously cannot deal with such issues. The debate regarding the creation of a specific environmental right continues and is likely to become one of the major issues in the years to come.

Given this interrelationship, it is not surprising that these concepts have collectively received the attention of the World Court. [n24] Justice Weeramantry, former Vice President of the Court, not only recognized the link between environmental protection and human rights, but also placed environmental protection within the human rights doctrine. [n25] In his separate opinion in the Case Concerning the Gabcikovo-Nagymaros Project, Justice Weeramantry noted:

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a sine qua non for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments. [n26]

While there is no doubt that environmental damage can jeopardize the enjoyment of human rights, whether environmental protection forms part of the human rights doctrine is doubtful. While there is an obvious convergence between the two, there is no doubt that environmental protection encompasses a much wider group of actors and consequences than the human rights movement. Indeed, some commentators take the view that to speak of a human right to a healthy environment detracts [*72] from the ecocentric approach to environmental protection and, instead, endorses the rather narrow and selfish anthropocentric approach. [n27]

B. Definition of Terms

Before we proceed any further, a few terms used in this Article need to be defined and clarified. The term "environmental rights" is used to denote those procedural rights that are found in international human rights instruments (which have found their way into international environmental instruments as well) and are being applied to seek redress for environmental issues. Thus, the freedom of

information, the right to participate in the decision-making process, and other due process rights are being increasingly used in relation to environmental issues. [n28] Such application, however, is not a recognition of a separate right to a clean environment. It is simply the application of existing procedural rights to environmental issues and the use of the existing human rights machinery for the vindication of environmental disputes.

These procedural rights must also be distinguished from substantive rights recognized in international human rights instruments such as the right to life, the right to health, or the right to an adequate standard of living. [n29] The violation of an existing substantive right as a result of an environmental problem sets the human rights machinery in motion. Here too, reliance is placed on existing human rights and does not denote the acceptance of a new right to a clean environment. At the national level (as well as at the regional level) existing human rights machinery has been used to vindicate environmental disputes, or in relation to violations of human rights as a result of an environmental problem. [n30] Thus, in the absence of specific machinery regarding environmental disputes, invocation of human rights standards has become popular at the national level. In India, the right to life clause in the Indian Constitution has been interpreted in a broad manner to include the right to a clean environment and the right to an adequate standard of life. [n31]

[*73] The right to a healthy environment, on the other hand, denotes the identification of a separate, independent human right, not dependent on the existing protected rights recognized in the international covenants. Thus, for example, a victim does not have to prove that his or her right to life (or any other right) has been violated as a result of an environmental problem. A victim should be able to vindicate a violation of a right to a clean environment, assuming that the parameters of this right can be laid down. [n32] In the event that a distinct right is recognized, whether that right should be to a healthy, clean, or an adequate environment is also subject to debate. [n33]

C. The Structure of the Article

Having defined various terms used in this Article, the evolution of the right to environment will be surveyed from the Stockholm Declaration - widely considered as the foundation of modern international environmental law - to the present time. It will discuss the main milestones in the evolution of international environmental law - the Stockholm Declaration, the Report of the World Commission on Environment and Development and the Rio Declaration - in relation to the present topic as well as developments since the Rio Declaration. This Article also discusses the Ksentini reports on Human Rights and the Environment and the IUCN Draft Articles on Environment and Development. Part III discusses environmental rights, both procedural and substantive, while Part IV focuses on the human rights provisions which are relevant for environmental protection in international human rights law as well as developments at the national level. Part V discusses the ongoing debate on third-generation rights and whether the emerging right to environment forms part of this debate. Whether there is a conflict between the right to environment and the ongoing debate on the right to development is analyzed in Part VI, and, finally, Part VII concludes by discussing whether a right to sustainable development should be recognized in light of the ongoing debate on the right to environment and the right to development.

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II. Evolution of the Right to Environment

A. Evolution from Stockholm to Rio and Beyond

The Stockholm Declaration adopted in 1972 recognizes the link between environmental protection and human rights in several of its provisions. The Preamble, for example, states that both the natural and man-made environment are "essential to his [man's] well-being and to the enjoyment of basic human rights - even the right to life itself." [n34] This is a clear recognition of the fact that, to enjoy human rights, the natural and man made environment is essential, although the formulation does not refer to a healthy or clean environment. [n35]

Principle 1 of the Declaration also embodies similar language, although it is generally envisioned that it falls short of recognizing a right to a clean environment; nor does it embody rights language employed in UN human rights instruments. [n36] According to Principle 1:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations. [n37]

This formulation recognizes the fundamental right of man to freedom, equality, and adequate conditions of life and not a right to a healthy environment per se. [n38] In other words, it recognizes that an environment of a particular quality is necessary for man to enjoy his fundamental rights to freedom, equality, and adequate conditions of life. This is different from recognizing an independent right to a clean environment. This formulation falls within the second distinction made above, namely, a healthy environment being necessary to enjoy other basic human rights. Therefore, the Stockholm Declaration falls short of recognizing an independent fundamental right to a clean environment.

It is ironic that at the time of the Stockholm Conference, the United States - which vehemently opposed the inclusion of a similar right twenty years later in the Rio Declaration - proposed the inclusion of a specific right to a clean environment in the Stockholm Declaration. [n39] The [*75] formulation proposed by the United States reads as follows: "**Every human being has a right to a healthful and safe environment, including air, water and earth, and to food and other material necessities, all of which should be sufficiently free of contamination and other elements which detract from the health or well-being of** man." [n40] The conference participants, particularly those from developing countries, however, preferred the indirect formulation in Principle 1; therefore, the American formulation was rejected. [n41]

The next milestone in the evolution of international environmental law was the World Charter for Nature adopted in 1982. [n42] **This instrument is unique in that it is the first, and so far the only, of its kind which recognizes the rights of nature, distinct from the rights of human beings. [n43] Most other instruments recognize the need for** environmental **protection because of its utility to man, not because it needs protection in its own right. In other words, most instruments approach** environmental **protection in an anthropocentric manner, while the World Charter for Nature was the first instrument, albeit nonbinding, to adopt an ecocentric approach. [n44]**

As such, it does not embody the rights of man in human rights parlance. On the contrary, it endorses the right of every form of life, "warranting respect regardless of its worth to man." [n45]

Additionally, the World Charter for Nature embodies certain environmental rights: it provides for the right of all persons to participate in the decision-making process and to "have access to ... redress when their environment has suffered damage." [n46] It also provides for the EIA process, which, as shall be discussed later, provides access to information and the right to participate in the decision-making process. Thus, the World Charter endorses environmental procedural rights; recognizing a fundamental right to a healthy environment would go against the very nature of the Charter.

Next came the World Commission on Environment and Development which coined the now famous phrase "sustainable development" in a bid to reconcile the increasingly polarized debate on [*76] environmental protection and economic development. [n47] There is no doubt that sustainable development is anthropocentric in nature and provides for the rights of present and future generations to develop in a sustainable manner. The draft principles on sustainable development appended to the report contain a provision on human rights; it provides that "all human beings have the fundamental right to an environment adequate for their health and well-being." [n48] This formulation is clearly drafted in "rights language," although the language itself is rather ambiguous. The Report of the Legal Experts accepts this when it says that, although this formulation is better than the Stockholm formulation for several reasons, "the requirement that the environment must be "adequate for [human] health and well-being' is extremely vague." [n49] Apart from being endorsed by the U.N. General Assembly, along with the WCED report, [n50] these draft articles have not received much attention.

According to the Legal Experts' Report, both mental and physical health and well-being must be protected and the use of the word "adequate" denotes that the right to environment is not unlimited. [n51] Potential limits include regional factors, the human beings themselves, and the means at the disposal of the public authorities. [n52] In other words, what is adequate in one situation may not be so interpreted in another because adequacy depends on the circumstances in each case. While this gives some leeway to the judiciary to give "adequate" a flexible meaning, it does not provide any guidance to the court which may have to rely, inter alia, on expert evidence to decide whether the "threshold" established by this formulation has been crossed. The Experts Group further provides that the emphasis in Draft Article 1 on individual rights is not advocating an anthropocentric approach to environmental protection. [n53]

The Hague Declaration on the Environment adopted in 1989 also recognizes the link between human rights and the environment and [*77] explicitly endorses the right to live in dignity in a viable environment. [n54] Its preamble provides:

The right to live is the right from which all other rights stem. Guaranteeing this right is the paramount duty of those in charge of all States throughout the world. Today, the very conditions of life on our planet are threatened by the severe attacks to which the earth's atmosphere is subjected. [n55]

Referring to the phenomena of global warming and ozone depletion, the

Declaration urges a global response to them:

Because of the nature of the dangers involved, remedies to be sought involve not only the fundamental duty to preserve the ecosystem, but also the right to live in dignity in a viable global environment, and the consequent duty of the community of nations vis-a-vis present and future generations to do all that can be done to preserve the quality of the atmosphere. [n56]

While the duty to preserve the ecosystem is cast in terms of a fundamental duty, no corresponding term is used in relation to the word "right", making one wonder whether the omission was deliberate or whether the word was implied.

In 1990, the General Assembly, welcoming the decision of the Commission on Human Rights and of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to study the problems of the environment and its relation to human rights, explicitly endorsed that "all individuals are entitled to live in an environment adequate for their health and well-being." [n57] The General Assembly resolution refers to the right of everyone to an adequate standard of living for their own health and well-being enshrined in the UDHR and the ICESCR and points out that "a better and healthier environment can help contribute to the full enjoyment of human rights by all." [n58] Moreover, it emphasizes that "environmental degradation can endanger the very basis of life." [n59] Although this resolution specifically endorses the relationship between environmental degradation and the enjoyment of human rights, it does not embody rights language stricto sensu: It provides that all individuals are entitled to, rather than have the right to, live in an [*78] environment adequate for their health and well-being. [n60] Thus, this resolution, while recognizing the relationship between human rights and environmental protection, cannot be taken as endorsing a human right to a healthy environment.

The Rio Declaration of 1992, the most recent instrument on the subject, while embodying a provision linking human beings with the environment, does not strictly contain a provision on a human right to the environment. [n61] It simply provides in Principle 1 that "human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature." [n62] This formulation, heavily criticized for its manifestly anthropocentric nature, [n63] does not recognize a human right to a healthy environment, even though policy-makers had ample opportunity to do so at the conference. [n64] Instead, the Rio Declaration places human beings at the center of development, and while sustainable development underlies the entire Declaration, there is no further recognition of a fundamental right to a clean environment. The debates at the conference suggest that the omission was deliberate and not a mere oversight. [n65] Marc Pallemaerts, comparing the Stockholm Declaration with the Rio Declaration, states: "By contrast, the first principle of the Rio Declaration, where it clamors that "human beings are at the center of the concerns for sustainable development,' sounds like the triumph of a delirious anthropocentrism." [n66]

B. The Appointment of a Special Rapporteur on Human Rights and the Environment

An important development at the international level was the appointment in 1990 by the Sub-Commission on Prevention of Discrimination and Protection of

Minorities of the UN Commission on Human Rights of a Special Rapporteur to study the relationship between human rights and the environment.

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1. Ksentini Reports [n67]

Appointed formally as Special Rapporteur in 1990 pursuant to decision 1989/108 of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, [n68] Ms. Fatma Zohra Ksentini submitted four reports to the Sub-Commission in 1991 (Preliminary Report), [n69] 1992 (First Progress Report), [n70] 1993 (Second Progress Report), [n71] and 1994 (Final Report), [n72] including a note in 1990. [n73] Her reports contain a wealth of material on the subject, and the Draft Articles on Human Rights and the Environment appended to the Final Report reflect both lex lata and lex ferenda. Certainly, the fundamental right to a healthy environment is not part of lex lata. [n74]

In a note prepared in 1990, Ms. Ksentini, tracing the emergence of a right to environment, cites the Stockholm Declaration as recognizing the link between "the environment, man and his basic rights, even the right to life itself." [n75] She noted further that "the demand for a healthy and balanced environment has facilitated the transition from environmental law to the right to the environment." [n76] It must be noted, however, that this does not reflect the actual state of affairs. Even today, more than 10 years after the Special Rapporteur prepared the note, there is no recognition of a distinct right to environment. Thus, the basic premise on which her reports is based seems flawed.

In her First Progress Report, the Special Rapporteur surveyed the provisions in national constitutions on environmental protection which either recognize the right of people to live in a healthy environment or impose a duty on the state or people to protect the environment. [n77] She also surveyed the provisions in regional instruments and decisions and comments of UN human rights bodies. [n78] Similarly, the Second Progress [*80] Report records the developments that had taken place since the preparation of the First Progress Report.

In her Final Report, submitted in 1994, the Special Rapporteur noted that the environment, development, democracy, and human rights have been the key issues of the twentieth century that will continue to pose challenges to the international community. [n79] She is of the view that by recognizing a right to a healthy environment and by giving it a legal framework and means of expression, a new dimension would be added to human rights: "In addition, they should make it possible to go beyond reductionist concepts of "mankind first' or "ecology first' and achieve a coalescence of the common objectives of development and environmental protection." [n80]

With regard to the legal foundations of the right to a satisfactory environment, the Special Rapporteur notes that:

International environmental regulations, which emerged from a worldwide movement and a collective realization of the dangers threatening our planet and the future of mankind, were initially sectoral and essentially envisaged within the traditional framework of inter-State relations; they have finally attained a global dimension, which has made possible the shift from environmental law to the

right to a healthy and decent environment. [n81]

Thus, according to the Special Rapporteur, it is the global dimension of environmental protection that has paved the way for the recognition of a right to a healthy and decent environment. [n82] Whether the issue is this simple is doubtful. Environmental issues gained a global dimension in the 1980s when global environmental problems such as the depletion of the ozone layer and the greenhouse effect - as opposed to regional problems like acid rain - began to emerge. This does not necessarily mean that a right to a clean environment also emerged with that development. The recognition that certain environmental problems affected the entire international community which, in turn, led to the realization that such problems required the concerted effort of the entire international community, resulted in environmental responses becoming global in dimension. This does not, however, necessarily mean that this development also led to the recognition of an individual right to a clean environment.

[*81] Citing Michel Prieur, the Special Rapporteur identifies a range of relevant principles which may be considered binding on states:

. Assessing the environmental impact of activities likely to cause damage to other states;

. Providing information and details of the project to the would-be affected state(s);

. Consulting with states if activities are likely to cause damage to them;

. Urgently informing states likely to be affected, providing mutual assistance, and taking preventive measures and, where necessary taking mitigatory measures or repairing the damage;

. Allowing residents in affected states recourse to administrative and judicial remedies in the state where the activity took place; and

. Applying the principle of nondiscrimination. [n83]

Having surveyed the provisions in the Stockholm Declaration, the Special Rapporteur concludes that:

The relationship, established by the Stockholm Declaration between the environment, development, satisfactory living conditions, dignity, well-being and

individual rights, including the right to life, constitute recognition of the right to a healthy and decent environment, which is inextricably linked, both individually and collectively, to universally recognised fundamental human rights standards and principles, and which may be demanded as such by their beneficiaries, i.e. individuals alone or in association with others, communities, associations and other components of civil society, as well as peoples. [n84]

Here again, the general consensus is that the Stockholm Declaration does not explicitly recognize a right to a healthy environment. [n85] While there is no doubt that the Declaration clearly recognized the link between human rights and environmental protection, it falls short of recognizing a distinct right to a healthy environment. Principle 1 does not embody this right; as noted above, it merely provides that an environment of a particular quality is necessary for man to enjoy his fundamental rights to freedom, equality, and adequate conditions of life. Principle 1 of the Rio [*82] Declaration is even less specific and does not contain rights language: it merely provides that human beings are entitled to, rather than have a right to, a healthy and productive life in harmony with nature. [n86]

Thus, while the Special Rapporteur was correct in concluding that international law recognizes the inextricable link between environmental protection and the enjoyment of human rights and fundamental freedoms, she seems to have erred in concluding that this development also means that international law recognizes a right to a healthy environment. As the discussion here shows, while this right seems to be emerging, it is clearly not de lege lata.

2. The Draft Principles on Human Rights and the Environment

The following fundamental principles underscore the Draft Principles on Human Rights and the Environment prepared by a team of experts convened by the Sierra Club at the request of the Special Rapporteur on Human Rights and the Environment:

1**. Human rights, an ecologically sound environment, sustainable development and peace are interdependent and indivisible.**

2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.

3. All persons shall be free from any form of discrimination in regard to actions and decisions that affect the environment.

4. All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs. [n87]

The Draft Articles have integrated the right to environment with other protected rights: the right to health, the right to food, the right to a safe and healthy working environment, and the right to adequate housing. [n88] In addition, the Draft Articles embody, as a corollary of the right to environment, the right to be free from pollution and environmental degradation, and the right to protection, inter alia, of air, water, soil, biological diversity, and ecosystems. [n89] These can be [*83] considered the substantive environmental rights embodied in the Draft Articles.

The procedural rights included in the Draft Articles are the right to information, the right to hold and express opinions, the right to environmental **and human rights education, the right to participate in the decision-making process in relation to activities that may have an impact on environment and development, the freedom of association, and the right to effective remedies. [n90] It is notable that, although reference is made to the Declaration on the Right to Development in the Preamble, no reference is made to it in the text. [n91] Moreover, given the important role played by sustainable development in reconciling** environmental **protection with economic development, it is regrettable that the Draft Articles do not embody a right to sustainable development despite the reference made to it in the Preamble. [n92] It is also notable that Draft Principle I links human rights, environment, sustainable development, and peace, but makes no specific reference to economic development which seems to signify that development must take place in a sustainable manner. [n93]**

C. IUCN Draft Articles on Environment and Development [n94]

The International Union for the Conservation of Nature and Natural Resources (IUCN), which has been working in the field of environmental protection and environmental law for many years, drafted a set of articles on environment and development in 1995. [n95] Given the important provisions embodied therein, a brief discussion of them is necessary. Although to date, they remain in draft form, many of the provisions therein reflect lex lata on the subject. Totaling seventy-two articles, the text ranges from fundamental principles and general obligations of states to responsibility and liability and implementation. [n96] The concept of sustainable development underlies the Draft Articles. [n97]

[*84] The Draft Articles clearly recognize the link between development, environmental protection, and human rights as well as peace and democracy. [n98] Its Preamble refers to "the need to integrate environmental and developmental policies and laws in order to fulfill basic human needs, improve the quality of life, and ensure a more secure future for all." [n99] The Preamble also states that "respect for human rights and fundamental freedoms contributes to sustainable development." [n100] It further notes that "the right to development must be fulfilled so as to meet the developmental and environmental needs of present and future generations in a sustainable and equitable manner." [n101] The first part of this provision reflects the wording in the Rio Declaration. [n102]

The commentary to the Preamble "emphasizes" that in relation to the principle of integration, "neither environmental protection nor long-term economic development can be achieved independently of each other. In contrast to a common misunderstanding, the two fields are interdependent and mutually

reinforcing. This is the true meaning of the term "sustainable development.'" [n103]

One of the fundamental principles underscoring the Draft Articles reflects the interrelationship between the environment and human rights, providing that "peace, development, environmental protection and respect for human rights and fundamental freedoms are interdependent" (Draft Article 4). [n104] With regard to the right to development it provides in Draft Article 8 that "the exercise of the right to development entails the obligation to meet the developmental and environmental needs of humanity in a sustainable and equitable manner." [n105] In the commentary, however, it is noted that international consensus on the content of the right to development is yet to crystallize but that "full consensus [would] emerge over time." [n106]

With respect to the right to a healthy environment, the Draft Articles embody a unique formulation combining the right to environment with [*85] the right to development. [n107] It also embodies language similar to economic, social, and cultural rights: the right to a healthy environment is to be achieved progressively. Draft Article 12(1) provides that: "Parties undertake to achieve progressively the full realization of the right of everyone to an environment and a level of development adequate for their health, well-being and dignity." [n108] Draft Article 12 also embodies the right to receive and disseminate information, the right to participate in the decision-making process, and the right to effective judicial and administrative remedies as well as the duty of everyone to protect and preserve the environment. [n109] The commentary to Draft Article 12 provides that "because sustainable development includes both environmental conservation and economic development, both are guaranteed [in Draft Article 12]." [n110] It further provides that "the right to environment is explicitly guaranteed and proclaimed in human rights treaty law," including the African Charter on Human and Peoples' Rights and the Additional Protocol to the American Convention on Human Rights. [n111] It must be noted that this statement is erroneous, as human rights treaty law does not guarantee a right to environment. The mere fact that it is included in the African Charter and the Additional Protocol, both of which are regional, does not make it a universally accepted right. [n112] While it is true that certain human rights, such as the right to life or the right to health, have been invoked in relation to environmental issues, this does not make it, by itself, a recognition of a distinct right to environment. Not a single human rights treaty of universal application adopted to date embodies this right. [n113] While it is true, as mentioned in the commentary, that many national constitutions (at least fifty of [*86] them) [n114] make reference to environmental protection (either as a duty of states or as an individual right), many of such provisions are found not in the Bill of Rights but in the Directive Principles Chapter, meaning that they are not justiciable in a court of law. [n115]

Draft Article 12 embodies two procedural rights, viz access to information and public participation. [n116] The commentary notes that "public participation in the decision-making process concerning the environment is now considered to be a fundamental ingredient of sustainable development ... and, more generally, to be a necessary component of a democratic society." [n117] It must be stressed that both of these procedural rights are essential to achieve sustainable development and are intrinsically interrelated: public participation would be meaningless if the law did not provide for access to information and similarly, access to information would be meaningless if no forum is provided for the public to participate in the decision-making process. The environmental impact assessment process (EIA) recognized in many national laws is a good tool to realize these procedural rights.

With respect to sustainable development, the Draft Articles provide:

Parties shall pursue sustainable development policies aimed at the eradication of poverty, the general improvement of economic, social and cultural conditions, the conservation of biological diversity, and the maintenance of essential processes and life-support systems.

Parties shall ensure that environmental conservation is treated as an integral part of the planning and implementation of activities at all stages and at all levels, giving full and equal consideration to environmental, economic, social and cultural factors ... . [n118]

The commentary to Draft Article 13 notes that the article gives "substantive and procedural guidance for giving effect to ... sustainable development encompassing ... that environmental conservation and economic development are mutually supportive and should be pursued nationally and internationally." [n119]

The Draft Articles recognize the mutually reinforcing and interdependent concepts of peace, development, environmental [*87] protection, and respect for human rights. [n120] It is hoped that the Draft Covenant would be adopted in the near future which would, no doubt, consolidate the existing law on environmental protection, particularly in relation to environmental rights.

D. Regional Instruments

While no international instrument of universal application embodies a right to a healthy environment, two regional human rights instruments recognize this right in human rights terms, although their effectiveness at the international level to create a customary principle is doubtful. These are the African Charter on Human and Peoples' Rights (African Charter) and the Additional Protocol to the American Convention on Human Rights (Protocol of San Salvador). [n121] While several proposals have been made to include a similar provision to the European Convention on Human Rights, so far no progress has been made in this regard. However, the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998 (Convention on Access), adopted within the auspices of the UNECE, contain procedural rights that are relevant in this regard. No comparable counterpart exists in Asia.

1. African Charter on Human and Peoples' Rights, 1981

The African Charter is the first binding instrument, albeit regional, to explicitly endorse the fundamental right to a clean environment. [n122] It was also the first binding instrument to endorse the right to development. [n123] Article 24 provides that "all peoples shall have the right to a general satisfactory environment favourable to their development." [n124] In addition, Article 21 provides that "all peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it." [n125] Article 14 also endorses the right to property. [n126]

[*88] The Charter clearly links the right to environment with development and makes the latter almost a condition precedent for the right to environment. [n127] This can be interpreted as giving economic development preference in the event of a conflict between the two. [n128] The San Salvador Protocol, discussed below, has no such condition attached to the right to environment. [n129] The Charter also endows this right on "peoples" rather than on individuals, indicating that it is a collective right rather than an individual right. [n130] Similar to the provisions in the Charter on economic, social, and cultural rights, the environmental right is to be achieved "immediately." It is not subject to the progressive realization clause found in the ICESCR. [n131] Given, however, the huge economic and social problems in Africa, the utility of this provision has been viewed with skepticism. [n132] Despite having been adopted in 1981, the African Charter has no jurisprudence on the issue to further clarify its meaning and it is generally felt that the provisions will remain confined to paper for a long while yet. [n133]

2. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights

Also called the Protocol of San Salvador, it was adopted within the framework of the American Convention on Human Rights. [n134] It lays down economic, social, and cultural rights and specifically endorses an environmental right. Article 11 provides:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2. The States Parties shall promote the protection, preservation and improvement of the environment. [n135]

In addition, the Protocol contains a provision on the right to health: "Everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being." [n136] While the States Parties are obliged under Article 19 to submit [*89] periodic reports on the progressive measures taken to ensure due respect for the rights in the Protocol, [n137] the right of individual petition was not recognized in the Protocol. The Protocol entered into force in 1989, only ten years after it was adopted. [n138]

A note appended to the Protocol explains that Article 11 on the right to a healthy environment is much wider than its formulation in Article 12(2)(b) of the 1966 International Covenant on Economic, Social and Cultural Rights. [n139] It must be stressed here that the latter instrument does not endorse a human right to a healthy environment. It does provide:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to

achieve the full realization of this right shall include those necessary for, ... (b) the improvement of all aspects of environmental and industrial hygiene. [n140]

Again, it is too early to predict the success or otherwise of this provision. Despite being adopted more than ten years ago, it entered into force only two years ago, indicating the apathy of State Parties in relation to economic, social, and cultural rights, including the right to environment.

3. The Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998

Although this convention embodies mainly procedural environmental rights, discussed below, and is limited geographically, it does contain the right to an adequate environment both in the Preamble and in the operative part. The Preamble recognizes that "every person has the right to live in an environment adequate to his or her health and well-being, and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations." [n141]

[*90] The objective of the Convention on Access embodied in Article 1 is as follows:

In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention. [n142]

This provision makes it clear that the ultimate aim of the procedural environmental rights embodied in the Convention on Access is to contribute to the protection of the right to an adequate environment. This right is accorded to every person of present and future generations. [n143] The important link between human rights and environmental protection as well as between procedural environmental rights and the right to an adequate environment is recognized in the Convention on Access. [n144] This is an important development and warrants careful analysis; it will be discussed in Part III.

III. What Are Environmental Rights?

A. Environmental Procedural Rights

Several recognized procedural rights are increasingly applied in relation to environmental issues and are generally considered as forming part of environmental rights. [n145] These rights are found in international human rights law and reflected in most national constitutions. These rights include: freedom of information, the right to participate in the decision-making process, and the right to seek redress for violations of rights. [n146] The importance of these rights is that they contribute to the development of a decision-making process which is transparent and participatory and which holds the government entity in question accountable for its actions. [n147] Applied in relation to environmental issues these include: the right to have access to information affecting one's environment, the right to participate in decisions affecting the environment, and the right to seek redress in the event one's environment [*91] is impaired. [n148] While the former

two rights are clear cut, it is in relation to the latter that a separate right to a healthy environment can be invaluable. While recourse may be available at the national level for public nuisance, such as damage caused by pollution, etc., the acceptance of a distinct right to a healthy environment would elevate it to the status of other fundamental rights, according it with the same importance and allowing the victims to resort to the same machinery. Without such a right, victims have to rely on existing human rights such as the right to health, the right to an adequate standard of living, and the right to privacy. Additionally, the tribunal in question may or may not make the connection between the alleged human rights violation and the environmental problem in question. [n149]

Several international instruments, both binding and nonbinding, endorse environmental procedural rights. The provisions in the World Charter for Nature have already been noted. [n150] The Rio Declaration also contains several provisions on these rights. [n151] Principle 10, which recognizes the rights of participation, access to information, and redress, provides:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided. [n152]

The Declaration also contains a provision on environmental impact assessment (Principle 17) for activities that are likely to have a significant adverse impact on the environment. [n153] It should be noted, however, that the EIA process is usually followed in relation to activities of a certain magnitude (i.e., activities likely to have a significant impact on the environment) and not in relation to every activity. It is significant [*92] that the participatory rights embodied in Principle 10 are applicable in relation to any activity irrespective of the magnitude. Very often, participatory rights, including access to information, are tied to the EIA process; this means that these procedural rights are limited to those activities which are subject to the EIA process. This should not be the case. Irrespective of the magnitude of the activity and its impact on the environment, civil society should have the right to have access to information and to participate in the decision-making process.

The Draft Principles on Human Rights and the Environment appended to the Final Progress Report of the Special Rapporteur on Human Rights and the Environment, on the other hand, contain a comprehensive set of rights, both procedural and substantive. [n154] Only the procedural rights will be dealt with here.

The Draft Principles on Human Rights and the Environment specifically link environmental protection with human rights and also recognize that sustainable development links the right to development with the right to a healthy environment. [n155] The procedural rights incorporated in the Draft Declaration are wider than those which are found in instruments adopted by states. [n156] The provisions also specifically link existing human rights, such as freedom of expression and association, to environmental issues. [n157] Part III of the Draft

Principles on Human Rights and the Environment deals with procedural rights:

. Right to information concerning the environment; [n158]

. "Right to hold and express opinions and to disseminate ideas and information regarding the environment"; [n159]

. Right to environmental and human rights education; [n160]

. "Right to active, free and meaningful participation in planning and decision-making activities." [n161] This includes the right to prior assessment of activities for their [*93] environmental, developmental, and human rights consequences of proposed actions; [n162]

. Right to free and peaceful association for the purpose of protecting the environment or the rights of those affected by environmental harm; and

. "Right to effective remedies and redress in judicial or administrative proceedings for environmental harm or the threat of such harm." [n163]

This is the first time that prior assessment of activities (i.e., the EIA process) is embodied in rights language. In other words, the declaration provides that the prior assessment of activities is a right of everybody. This includes the assessment of environmental, developmental, and human rights consequences. [n164] As can be seen, these rights are wider than those in the instruments adopted so far by states in relation to environmental rights. They are not, however, alien to human rights law. The right to effective remedies is also wider than most formulations as it extends the right to threats of environmental harm. This right is invaluable as action can be taken before environmental harm actually takes place. [n165]

The preamble to the Convention on Access refers to Principle 1 of the Stockholm Declaration, Principle 10 of the Rio Declaration, the World Charter for Nature, the UN General Assembly Resolution of 1990 on the need to ensure a healthy environment for the well-being of individuals, and the European Charter on Environment and Health of 1989. [n166] The Convention recognizes that "adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself." [n167] More importantly, the Convention on Access explicitly endorses the right to an adequate [*94] environment and provides for the following procedural rights: information; public participation in the decision-making process; and access to justice. [n168]

The corresponding duties on the part of States Parties to the Convention are to ensure that officials assist the public in seeking information, facilitate participation in the decision-making process, and in seeking access to justice. [n169] Furthermore, the parties are required to promote environmental education and awareness in order to promote these rights. [n170] Access to information seems to be the core right among these, without which participation in the decision-making process would be meaningless and ineffective.

While the Convention endorses the right to have access to information and embodies a corresponding duty on states to facilitate that process, the long list of exceptions to this right makes one wonder whether the Convention on Access is giving with one hand and taking away with the other. [n171] The right to information can be refused in the following instances:

. Where "the request is manifestly unreasonable or formulated in too general a manner"; [n172]

. "The request concerns material in the course of completion or concerns internal communications of public authorities"; [n173]

. Where the disclosure would adversely affect the "confidentiality of the proceedings of public authorities"; [n174]

. Where it affects "international relations, national defense or public security"; [n175]

. Where it affects the "course of justice"; [n176]

. Where it affects the "confidentiality of commercial and industrial information"; [n177]

. Where it affects "intellectual property rights"; [n178]

[*95]

. Where it affects "confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure"; [n179]

. Where it affects the "interests of third parties which has supplied the information requested"; [n180] and

. Where it affects the "environment to which the information relates, such as breeding sites of rare species." [n181]

With regard to public participation, the States Parties are required to inform the public concerned "either by public notice or individually ... early in an environmental decision making procedure, and in an adequate, timely and effective manner, inter alia, of ... the proposed activity and the procedure for public participation, including the time and venue for the public hearing." [n182] The phrase "public concerned" has been interpreted in the Convention as those affected or likely to be affected by a particular decision and includes nongovernmental organizations promoting environmental protection. [n183]

The provisions in the Convention on Access relating to public participation are mandatory in relation to those activities listed in Annex 1 to the Convention. [n184] The parties are also required to follow the procedure with regard to those activities which may have a significant impact on the environment, but not falling within Annex 1, subject to the provisions of national law. [n185] The parties may, however, decide not to apply the provisions of the Convention to national defense activities, if the parties were of the view that such participation might have adverse effects. [n186]

There is no doubt that the Convention breaks new ground in international environmental law by embodying "environmental rights." Until the adoption of the Convention, these rights had remained in soft law documents, although they are established rights under international human rights law. The importance of the Convention on Access is that it extends these procedural rights to environmental issues. Despite being limited geographically, the ECE Convention has made a significant contribution to the development of environmental rights. Moreover, its [*96] significance is further enhanced because it specifically embodies a right to an adequate environment. It is widely believed that these environmental procedural rights are now part of contemporary international law. [n187]

The Ksentini reports also recognized the importance of the right to participation and noted its relevance to sustainable development:

The right to participation has both individual and collective dimensions; it covers economic, social, cultural and political aspects which give full meaning to the concept of democracy... . The Special Rapporteur wishes to emphasize the full importance of the concept, of participatory democracy in the context of the environment, without which the concept of sustainable development would be totally without substance. [n188]

The previous sections demonstrate that the right to receive information relating to the environment, the right to participate in the decision-making process and the right to seek redress for the vindication of environmental rights are recognized rights under international environmental law. [n189] These rights, particularly the right to information and the right to participate, promote principles of transparency and accountability which are essential in a democratic society. [n190] It is only fair that those who are going to be affected by a particular

activity be informed of such activity and that their voices be heard. The government then cannot be accused of making decisions behind closed doors and indeed, as the Sri Lankan Supreme Court noted in a recent case, public participation and transparency are essential if sustainable development is to be achieved. [n191] In other words, sustainable development cannot be achieved where secrecy reigns and where the fundamental rights of people are not respected.

B. Environmental Substantive Rights

As noted above, several existing substantive rights have been used in relation to environmental issues, notably, the right to life, the right to health, the right to an adequate standard of living, and the right to privacy. Since these rights are embodied in international human rights [*97] instruments, they will be discussed in the next section. None of the international human rights treaties, however, specifically adopt a distinct right to a healthy environment, except the regional instruments discussed above. [n192]

The Draft Principles on Human Rights and the Environment appended to the Ksentini Final Report also contain environmental substantive rights, in addition to the right to a healthy environment. [n193] These include the right to be free from pollution; the right to protection and preservation of the air, soil, water, sea-ice, flora and fauna and biological diversity and ecosystems; the right to safe and healthy food and water; the right to adequate housing, land tenure, and living conditions in a healthy environment; the right to a safe and healthy working environment; and the right to timely assistance in the event of natural or other catastrophes. [n194] In addition, the document recognizes rights of indigenous peoples. [n195]

It must be noted that except for the right to health, food, healthy working conditions, and housing, which are recognized under international human rights instruments, all the other rights in the Draft Principles on Human Rights and the Environment are new rights and are specific to the environmental field. [n196] They are clearly not part of lex lata and are not found in literature. While a human right to a clean environment seems to be emerging, it is doubtful whether the above rights have any status under contemporary international law.

If a right to a healthy environment is adopted, its corollary means that there exists a right to be free from pollution. In other words, a polluted environment would impair the enjoyment of the right to a healthy environment. Pollution, however, is only one aspect of the problem. Conservation, for example, cannot be included within pollution. Thus, the recognition of a right to a healthy environment is the wider formulation and would encompass both pollution and conservation. As the Supreme Court of the Philippines noted in the Minors Oposa case, large-scale deforestation can jeopardize the right to a [*98] healthy environment of not only the present generation but also of future generations. [n197]

IV. Survey of Human Rights Provisions That Are Relevant for Environmental Protection

This Part discusses the provisions in the human rights treaties that are relevant to the present discussion and that have been used in relation to environmental issues. While attention is given mainly to the developments at the international level, a few examples from national law, particularly from South Asia, will be discussed to illustrate the use of human rights mechanisms for the vindication of

environmental problems at the national level.

A. International Human Rights Law

As already noted, the International Bill of Human Rights contains no reference to environmental protection. Article 24 of the Convention on the Rights of the Child 1989 is the only international human rights convention of universal application which comes close to addressing the issue of environmental pollution. Article 24, dealing with the right of the child to the highest attainable standard of health, provides that "States Parties shall pursue full implementation of this right and, in particular," take appropriate measures with respect to, inter alia, the dangers and risks of environmental pollution. [n198] No other human rights treaty of universal application refers to environmental protection.

Perhaps due to this lacuna, environmentalists have begun invoking existing human rights to vindicate environmental injustices. Thus, the right to life, the right to health, the right to an adequate standard of living, and the right to privacy have been invoked in relation to environmental problems. [n199] This Part will discuss the instances where the human rights machinery has been used in the absence of a specific environmental right or the right to a healthy environment. The drawback of this approach is that the victim has to prove that the environmental issue in question has violated one of his human rights. [n200] If this link cannot be established, then the action will fail. [n201] Thus, for example, a victim of pollution [*99] caused by an industrial establishment must prove that, as a result of suffering pollution damage, his health has been impaired or his standard of living has been affected. [n202] It may not be easy to establish this link in every case. [n203] On the other hand, the recognition of a distinct right to a healthy environment would allow a victim to establish that the pollution level in his neighborhood has increased as a result of the industrial establishment and exceeds the permissible level for that particular pollutant(s) (assuming, of course, that such levels have been defined). In such a situation, establishing individual injury (which may be long term anyway) is not necessary, as the victim would be in a position to show that the environment in which he is living has been polluted by the activity of the industry in question. Establishing that because of the emission of a pollutant above a certain threshold, the environment is no longer healthy to live in, is all that is required. In order to proceed on this basis, however, thresholds and standards for the emission of pollutants have to be defined. This approach thus circumvents one major problem inherent in the litigation process, namely establishing injury. The other advantage of this approach is that timely action can be taken to remedy the environmental problem without waiting until significant injury to people has manifested itself. In some instances, establishing injury is not a problem, but by then, the environmental problem has persisted for so long that remedial action has become either impossible or too expensive.

Several cases have dealt with environmental issues under the human rights machinery.

1. Right to Life

Clearly, without the "services" provided by the environment, often conceived as "free of charge," such as air to breath, water to drink, food to eat, and a habitable climate, human beings cannot survive on this planet, let alone enjoy their rights. Without these basic amenities, life on earth cannot be sustained. Thus, protecting the environment means actually ensuring the survival of human

beings. In other words, in order for human beings to enjoy their rights guaranteed under international human rights law, such as the right to life, the right to health, etc., a good environment is imperative.

Many cases have relied on the right to life clause for the vindication of environmental rights. One such case dealt with the alleged violation [*100] of the right to life of the Yanomani Indians of Brazil which came up before the Inter-American Commission on Human Rights. [n204] It was contended that the Brazilian government constructed a highway through Indian territory causing, inter alia, environmental damage, and that the government violated their right to life under the American Declaration of the Rights and Duties of Man. [n205] The Commission decided in favor of the petitioners and held that the Brazilian government had violated the Indians' right to life, liberty, and personal security by failing to take measures to prevent environmental damage which led to loss of life. [n206]

Using the right to life clause for asserting environmental rights can also be seen at the international level. The UN Human Rights Committee established under the ICCPR has also noted in a case involving a radioactive waste dump in Ontario, Canada, brought against the Canadian government for its failure to clean this up, that the case raised "serious issues, with regard to the obligation of States parties to protect human life." [n207] The case itself was dismissed for the failure to exhaust local remedies. [n208]

The European Court of Human Rights has not been so forthcoming in interpreting the right to life clause. In X v. Austria, the court narrowly interpreted Article 2 of the European Convention on Human Rights (individual's right to life) and held, instead, that environmental harm may violate Article 8 of the Convention which deals with respect for private life and home. [n209] This right encompasses a person's privacy as well as physical well-being and guarantees a certain quality of life. [n210]

However, as noted above, in order to rely on this right in relation to environmental damage, the damage in question will have to assume serious proportions before the right to life can be invoked. To put it another way, when right to life itself is threatened as a result of an environmental issue, it may already be too late to seek redress. This is [*101] the danger of relying on the right to life clause to seek redress for environmental damage.

2. Right to Health

Another human right that has been invoked in relation to environmental issues is the right to health. There is no doubt that environmental problems cause various health problems which, depending on the nature and the gravity, can threaten even the right to life. The General Assembly has recognized the relationship between health and the environment. Entitled Need to Ensure a Healthy Environment for the Well-Being of Individuals, the General Assembly resolution recognizes that "all individuals are entitled to live in an environment adequate for their health and well-being." [n211] The WHO too has recognized this link and in its publication entitled Our Planet, Our Health, it calls upon states to take measures to protect people against threats to their health and environment. [n212]

In Arrondelle v. United Kingdom the applicant claimed that the intensity, duration, and frequency of noise from a British airport and a highway near which she lived affected her health and thus there was a violation of Article 8 of the

European Convention on Human Rights. [n213] This case was deemed admissible by the Commission; however, a settlement was reached by the parties. [n214]

The European Social Charter requires States to remove causes of ill-health and under Article 11, the Committee of Experts has been mandated to give special attention to air and water pollution, dangerous radioactive materials, noise pollution, and food contamination. While the Committee, in turn, has acknowledged that the right to health entails an obligation to prevent environmental degradation, their opinions are not binding. As noted, the right to health is protected under Article 8 of the European Convention.

3. Right to Privacy

The right to privacy has been invoked several times in relation to environmental issues, particularly before the European Commission of [*102] Human Rights. [n215] While recognizing that the right to privacy can be impaired as a result of an environmental issue, the court has, however, applied a balance of interests test: whether the infringement of the right is justified on account of the wider interests of the community. [n216] Thus, in the case of Powell and Rayner, it was decided that, although the aircraft noise from Heathrow Airport amounted to a violation of the applicant's right to privacy protected under Article 8 of the European Convention of Human Rights, it was justified on the ground of greater benefit to the community, as well as the contribution of Heathrow Airport to the national economy. [n217] This case highlights another "obstacle" that must be overcome by individual claimants - that of the benefit to society versus individual impairment.

Lopez Ostra v. Spain involved the petition by a Spanish national who claimed that her right to private and family life had been violated by a faulty water purification and treatment plant near her residence. [n218] The plant emitted noxious fumes and effluents, forcing the applicant to relocate. [n219] The European Court of Human Rights ruled for the applicant stating, "the consequences of environmental degradation may so affect an individual's well-being as to deprive her of the enjoyment of her private and family life." [n220] The court held that the public authorities had failed in their positive duty to take measures to protect these rights which resulted in a violation of Article 8. [n221]

4. Right to an Adequate Standard of Living/Quality of Life

Courts have also recognized that environmental degradation affects quality of life or the enjoyment of amenities. [n222] Thus, in S v. France, the European Commission on Human Rights observed that "noise of a considerable magnitude could not only affect the physical well-being of individuals, but also prevent them from enjoying the amenities of their [*103] home." [n223] Such disturbance can amount to interference with the enjoyment of rights, even though it may not affect the applicant's health.

Thus, in the absence of a specific right to a healthy environment, several human rights have been invoked to vindicate environmental abuses at the international level as well as the regional level. Environmental issues have been asserted through protected rights. This trend is likely to continue as long as a distinct right to a healthy environment is not recognized. As will be noted in the next section, such a trend is visible at the national level as well.

Some writers have contended that the right to a healthy environment can be

derived from existing human rights law. They cite the right to life, the right to health, and the right to an adequate standard of living as examples. [n224] As noted above, while these rights can be and have been invoked to seek redress for environmental abuses, they, by themselves, do not support the conclusion that a distinct right to a healthy environment can be derived from the existing protected rights. As correctly noted by Prudence Taylor:

How valid is the argument that a human right to a sound environment can be derived from existing rights to life, health and adequate standard of living? There is no logical rationale for this argument. These rights are obviously closely connected to the state of the environment because their realisation, in particular depends upon the protection of the environment. However, this connection alone does not justify recognition of a distinct human right to a sound environment. Protection of the environment is a prerequisite to assuring all human rights. Thus, failure to provide environmental protection can amount to a violation of basic human rights. But this may not be sufficient to protect the environment adequately. [n225]

B. National Level [n226]

The convergence between the human rights movement and the environmental protection movement was noted above. This is particularly apparent in relation to developing countries grappling with a [*104] host of problems ranging from poverty to environmental degradation, from hunger and malnutrition to corruption and civil strife. Faced with these adverse conditions, and with a deteriorating environment, those in developing countries have had an uphill task in trying to seek redress for their environmental problems.

While many states do not recognize a specific right to a healthy environment, they do have mechanisms in place to address human rights violations. These mechanisms have been used by environmentalists and victims of environmental injustices to vindicate their rights. Though not without their own problems, these human rights mechanisms have played an invaluable role in protecting environmental rights.

A pioneer in this field has been the Supreme Court of India, which has adopted an expansive interpretation of the right to life clause in the Indian Constitution. [n227] The Court has pointed out that the right to life does not mean the right to any kind of life and that it includes the right to live in a healthy environment. [n228] Thus, in Subash Kumar v. State of Bihar the Indian Supreme Court stated:

The right to life is a fundamental right under article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life. [n229]

This expansive interpretation has broken new ground in India, paving the way for an action to be brought under the Constitution for the violation of the right to

enjoyment of pollution-free water and air. [n230] In other words, the Indian Supreme Court has elevated the right to environment to the status of a fundamental right, a violation of which is actionable under the Constitution. [n231] The Court has also ordered tanneries to close down despite the economic loss, holding that fundamental environmental rights were more important. [n232] In another recent case, the Court ordered, as a direct implementation of the right of people to receive information, cinema halls to air messages on the environment in each [*105] show, and public radio and television networks to telecast programs on the environment. [n233]

In the neighboring Sri Lanka, the judiciary has not been so innovative, although it has, in its own way, contributed to the development of environmental law. One reason for the lack of innovation may perhaps be due to the fact that the Sri Lankan Constitution does not embody a right to life clause. [n234] Several environmental cases have been brought under the Constitution using the human rights mechanisms, and in one case, the petitioner - a reputed environmental lawyer - specifically invoked "right to life," which he claimed was inherent in the Constitution. [n235] He then extended this "inherent right" to include the right to a clean environment, but the Supreme Court was not persuaded by his argument. [n236] The petitioner may have had a better chance of success had he relied on international human rights law and the obligations Sri Lanka has undertaken by ratifying these conventions. Relying, however, on the equality clause that was also invoked by the petitioner, the Court directed the Minister of Forestry and Environment to promulgate the necessary regulations before a specified date, and the Minister complied. [n237]

While the Sri Lankan Constitution does not enshrine the right to life or a right to a healthy environment, the Directive Principles Chapter has a provision on environmental protection. [n238] Article 27(14) obliges the State to protect, preserve and improve the environment for the benefit of the community, while Article 28(f) imposes an obligation on every person in Sri Lanka to protect nature and conserve its riches. [n239] The provisions in the Directive Principles Chapter, however, are not justiciable in a court of law. [n240]

Invoking these provisions as well as the equality and equal protection of the law clause, freedom to engage in a livelihood of one's choice, and the freedom to live in a place of one's choice, the [*106] Environmental Foundation filed action in 1994 in relation to a public nuisance caused by a metal quarry. [n241] Although the case was subsequently settled by the parties, leave to proceed was granted by the Court, indicating that the Court is receptive to the idea of using the fundamental rights machinery to seek redress in relation to environmental issues. [n242] As noted earlier, however, the problem with this approach is that the victim must prove that the environmental problem in question violated his fundamental rights recognized in the Constitution. This may not always be feasible, particularly given the fact that the present Constitution does not recognize the right to life. [n243]

The Supreme Court of the Philippines also had the occasion to pronounce on this issue. In the celebrated Minors Oposa case, the plaintiffs, all minors, filed action against the government requesting an order to discontinue existing and future timber license agreements. [n244] They contended that deforestation is causing environmental damage not only to themselves, but also to future generations. The Supreme Court, deciding that the plaintiffs had established locus standi, stated:

The complaint focuses on one specific fundamental legal right - the right to a balanced and healthful ecology which, for the first time in our nation's constitutional history, is solemnly incorporated in the fundamental law. Section 16, Article II of the 1987 Constitution explicitly provides:

SEC 16. The State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.

This right unites with the right to health which is provided for in the preceding section of the same article:

SEC 15. The State shall protect and promote the right to health of the people and instill health consciousness among them.

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a [*107] different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation - aptly and fittingly stressed by the petitioners - the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. n245

The Court further noted that the "right to a balanced and healthful ecology carries with it the correlative duty to refrain from impairing the environment ... and the right implies, inter alia, the judicious management and conservation of the country's forests. Without such forests, the ecological or environmental balance would be irreversibly disrupted." n246 The Court also held that the petitioners had the right to sue on behalf of succeeding generations because "every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthy ecology." n247 This is a clear articulation of the inter-generational equity principle, widely accepted as a component of sustainable development. n248

It must be noted that Justice Feliciano appended a separate opinion; while concurring in the result of the judgment, he did not agree with some of the reasoning of the majority judgment. n249 While agreeing that the right to a balanced and healthful ecology is fundamental, he nonetheless considered that it cannot be considered as being ""specific' without doing excessive violence to language. It is in fact very difficult to fashion language more comprehensive in scope and generalized in character than a right to a "balanced and healthful ecology.'" n250 He was also of the view that the petitioners had failed to establish a

specific right which has been violated. [n251] He concurred with the majority judgment because "the protection of the environment, including the forest cover of our territory, is of extreme importance for the country." [n252] The majority judgment has significant implications for the present discussion. It means that the provisions in the Directive Principles can be considered binding on States and even in the absence of a specific recognition of a [*108] fundamental right to a healthy environment, the Directive Principles Chapter can be invoked in relation to environmental issues. The success of this approach would, of course, depend on an innovative judiciary.

In Bangladesh, too, the judiciary has extended the right to life to encompass the right to environment. In Dr. Mohiuddin Farooque v. Bangladesh, Represented by the Secretary, Ministry of Irrigation, Water Resources and Flood Control and Others, the Supreme Court of Bangladesh stated:

Although we do not have any provision like Article 48A of the Indian Constitution for protection of environment, Articles 31 and 32 of our Constitution protect right to life as a fundamental right. It encompasses within its ambit, the protection and preservation of environment, ecological balance free from pollution of air and water, sanitation without which, life can hardly be enjoyed. Any act or omission contrary thereto will be violative of the said right to life. [n253]

The Court also gave an expansive interpretation to locus standi and stated that the test of "any person aggrieved" would be satisfied if the petitioner demonstrates sufficient interest in the matter being litigated. [n254]

The Supreme Court of Pakistan has also dealt with the issue. In Ms. Shehla Zia and others v. WAPDA, the Court stated that the word "life' in the Constitution does not mean only a vegetative or animal life. [n255] It was held that a wide meaning should be given to it to enable a man not only to sustain life, but also to enjoy it. [n256] It further noted:

Where life of citizens is degraded, the quality of life is adversely affected and health hazards are created affecting a large number of people, the Supreme Court in exercise of its jurisdiction under Art. 184(3) of the Constitution of Pakistan may grant relief to the extent of stopping such activities which create pollution and environmental degradation. [n257]

While many national constitutions recognize the importance of environmental protection, these are mainly confined to the Directive [*109] Principles Chapter. [n258] The new South African Constitution adopted in 1994, a remarkable document adopted through an even more remarkable process of public participation, is one of the few constitutions which embodies a specific right to environment in its Bill of Rights. [n259] Article 29 stipulates that "Every person shall have the right to an environment which is not detrimental to his or her health or well-being." [n260]

V. A Third-Generation Right to a Clean Environment?

The reference to human rights in terms of the "generation" it belongs is a common practice in international law. Thus, civil and political rights are termed first-generation rights, while economic, social, and cultural rights are termed

second-generation rights. [n261] More recently, a case has been made for third-generation rights which encompass solidarity rights. [n262] Although the reference to generations is not intended to denote the importance attached to each right - the official UN position being that all human rights are indivisible, interdependent, and universal, as reflected in the 1993 Vienna Declaration on Human Rights - in practice it has given rise to a hierarchy of human rights. Thus, economic, social, and cultural rights are often seen by states as being subordinate to civil and political rights despite the fact that deprivation of socio-economic rights can and does give rise to a violation of civil and political rights. For people in developing countries, in particular, socio-economic rights have assumed a much greater significance than civil and political rights.

The recognition that certain rights affect groups of people rather than individuals has led certain commentators to argue for third-generation rights. Karel Vasak, generally considered as the architect of third-generation rights, argued for the recognition of third-generation rights, which in his view, could not be accommodated within the first-and second-generation rights and could only be achieved through the solidarity of all states concerned. [n263] Minority rights, the right to peace, [*110] the right to development, and the right to a healthy environment are some of the rights grouped under this generation. [n264]

According to Karel Vasak, third-generation human rights may both be invoked against the state and demanded of it; and they can be realized only through the concerted efforts of all the actors on the social scene: the individual, the state, public and private bodies, and the international community. [n265]

Thus, according to him, it is the feature of realization through the concerted effort of all actors which distinguishes the third generation from the first two generations. [n266] According to Stephen Marks, who discusses possible "new" human rights for the 1980s, the case of the environment demonstrates all the features of a third-generation human right:

. A body of environmental law has developed at both national and international level;

. Environment is referred to in human rights terms in international legislation;

. Environmental rights have been incorporated into a variety of national constitutions; and

. Environmental protection requires the concerted effort of all social factors. [n267]

Not everybody, however, agrees with the notion of third-generation rights. [n268] They argue that there are problems inherent in this approach as human rights are individual rights. [n269] They fear that the recognition of new rights would detract attention from the existing rights, resulting in the new rights submerging the existing ones. [n270] This argument, however, overlooks the dynamic nature of

human rights. Even some of those who advocate for a third-generation right are against the inclusion of the right to development and the right to a healthy environment as third-generation [*111] rights. [n271] Many in developed countries are opposed to the recognition of the right to development as a human right; they argue that it is a goal to aspire to, not a human right. [n272] They also question that, if it is recognized as a human right, to whom should the right accrue? To individuals, to a particular group or the country as a whole? And, likewise, who has the obligation to ensure the right? [n273]

Similarly, several problems arise with the recognition of the right to environment as a third-generation right, although they are not necessarily insurmountable: what is meant by a healthy/clean/adequate environment? Is it an individual right or a group right (or perhaps, encompassing a particular society or country)? Who has the obligation to ensure the right? It is submitted that with regard to the debate on the right to environment, the answers to these questions are easier to provide, unlike in relation to the debate on the right to development.

A. Defining the Right

With regard to the parameters of the right, it is submitted that the right to a healthy environment provides the better formulation. Besides being easier to establish, it has the advantage of being flexible to suit each situation. Claimants need only establish that the activity in question resulted in creating an unhealthy environment for him/her to live in. They do not need to establish damage to their health or well-being at that point. In order to establish an unhealthy environment, they would rely on the threshold limits created by the Environment Authority in their country, assuming, of course, that such limits have been established, or they may rely on generally accepted international standards, defined, for example, by the World Health Organization. The advantage of this approach is that victims do not have to wait until damage to their health materializes, which could take years in some instances. Instead, they could take action to stop a polluting activity from continuing and causing catastrophic damage later on by merely showing that the emissions have crossed the threshold levels established by law. This formulation also allows evidence of the potential victim's own health, if his health is in a worse condition than others, and would also relax the principle of locus standi where the victim must show that he has suffered damage over and above others. This proposal also circumvents the problem of establishing [*112] causation between the polluting activity and damage to health (if damage to health is not contended), which is one of the most difficult issues to prove in relation to harm caused by pollution, where the harm is often long-term and cumulative.

While this approach would be advantageous in relation to polluting activities and perhaps deforestation, whether it can also be used in relation to issues such as species loss is questionable. Thus, as pointed out earlier, an anthropocentric approach to environmental protection clearly has its limitations and should be used to complement an ecocentric approach.

With respect to the difficulty in defining this right, Alan Boyle contends that although a similar problem arose in relation to sustainable development, it did not prevent UN efforts at promoting sustainability: "Indeterminacy is thus a problem, but not necessarily an insurmountable one." [n274] G<um u>nther Handl is less optimistic and argues that "it is misconceived to assume that the cause of environmental protection is furthered by postulating a generic human right to the environment in whatever form." [n275]

There are several approaches that can be adopted. The above formulation - the right to a healthy environment - would give courts much leeway and flexibility in defining the right and applying it to the facts of each case. It must be noted that human rights law evolved primarily as a result of judicial interpretation and refinement without which it would not have achieved the level of sophistication that it now enjoys. [n276] Given a similar opportunity, there is no doubt that the judiciary would rise to the occasion and refine environmental rights, as indeed the trend on the national and international level shows. [n277]

The Ksentini Reports adopt a much more specific approach and lay down the rights which flow from the right to environment, such as the right to be free from pollution, access to safe water and food, etc. [n278] It is also possible to tie it up with health and well-being as the above formulation proposes: right to a healthy environment or the right to an environment adequate for the well-being of people. While there is no [*113] doubt that there will be teething problems, as pointed out by Boyle, these problems are by no means insurmountable. [n279]

B. Beneficiaries of the Right

With regard to the second issue - the beneficiary of the right - it should be considered an individual right and if many individuals are affected, it should be considered a collective right. It should not be considered a third-generation right due to the controversial nature of it. Human rights are individual in nature and if many are affected by the same problem, then all the victims have a cause of action against the perpetrator. That, by itself, should not make it a solidarity right.

C. Perpetrator?

Like with all human rights, the State is the main protector of the right to a healthy environment. However, the State becomes liable, through its own failure to control, for the activities of private entities where the latter violates the rights of others. Thus, in order to discharge its due diligence obligation towards the environment, the State must take positive action to establish an environmental authority, enact proper laws and regulations, instruct the environmental authority to lay down emission standards and threshold levels, oversee implementation of these standards, and ensure that effective remedies are available for the victims of environmental abuse. In addition, the State must disclose information on activities that affect the environment, ensure public participation in the decision-making process, and provide for the assessment of the environmental impact of development activities. Thus, the substantive right to a healthy environment must be complemented by the procedural environmental rights discussed above; it is only when such complementarity is achieved and coupled with an ecocentric approach that environmental protection can be effectively achieved.

D. Other Criticisms

The main argument against the recognition of a right to a healthy environment is its anthropocentric approach. [n280] Many commentators believe that, given the various species that exist within an ecology, vesting an environmental right in humans alone is morally incorrect. [*114] Noralee Gibson, in particular, believes that the human rights label is unsuitable in relation to the environment for three reasons:

. The right to environment cannot be considered as vested in humans alone. A clean environment is not a right because we are members of the human race; it is a right because we are within an ecology; [n281]

. An environmental right is not based on morality but on the need for survival, a need shared by all members of the ecosystem; and

. The element of universality or cultural legitimacy did not exist as it cannot be said that all cultures in the world would demand the right whatever the economic cost. [n282]

Marc Pallemaerts, while believing that Article 1 of the Rio Declaration "sounds like the triumph of a delirious anthropocentrism," considers, however, that on the issue of human rights the Rio Declaration is highly disappointing. [n283] This is seemingly a contradiction in terms: adopting a human right to a healthy environment is no doubt anthropocentric in nature and Pallemaerts believes that Article 1 is the height of such anthropocentrism, yet he feels that the Rio Declaration did not provide sufficiently for a human right in relation to the environment. [n284]

As noted above, however, a human rights approach to environmental protection is not proposed to the exclusion of other approaches or species within an ecology. Rather, it is proposed as a tool to complement other approaches and mechanisms on environmental protection. Its advantage lies in the fact that individuals would have an additional tool to seek redress for wrongs committed towards them. It will also provide the environmental movement with legitimacy and seriousness of purpose which are still lacking at both national and international levels. Moreover, it will open the activities of states for international scrutiny which, although available now under certain international environmental instruments, is not subject to the individual complaints procedure available under international human rights law.

For Boyle, who believes that international environmental law has clearly moved from an anthropocentric approach to an ecocentric one, [*115] citing Conventions such as World Heritage Convention, Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES), and the Biodiversity Convention, the issues are whether the existing human rights supervisory institutions would be in a position to appreciate the ecocentric approach and whether it will have the right focus to achieve integration and balance competing interests. [n285]

Dinah Shelton, noting that a growing number of global and regional human rights instruments as well as national constitutions include a right to environment among their guarantees, categorizes the debate on the right to environment into three groups:

. Those who argue that "environmental issues belong within the human rights

category, because the goal of environmental protection is to enhance the quality of human life." [n286]

. Those who argue that "human beings are only one element of a complex, global ecosystem, which should be preserved for its own sake." [n287]

. Those who contend that "human rights and environmental protection ... [represent] different, but overlapping, societal values." This school of thought "best reflects current law and policy" on this issue. [n288]

This suggests several alternatives, as noted above:

. Using existing human rights to vindicate environmental wrongs; [n289]

. Adopting environmental procedural rights; [n290] and

. The recognition of a specific right to environment. [n291]

Handl, on the other hand, believes that a right to environment would be difficult to conceptualize as an inalienable right:

While it should be self-evident that there is a direct functional relationship between protection of the environment and the promotion of human rights, it is much less obvious that environmental protection ought to be conceptualized in terms of a generic human right... . In short, a generic [*116] international environmental entitlement, both as an already existing and an emerging human rights concept, is a highly questionable proposition. [n292]

Handl's main reason for arguing against a right to environment is because, in his opinion, such a right will not be an inalienable one in the sense of being subject to derogation. [n293] He contends that environmental entitlements will continue to be susceptible to restrictions for the sake of other socio-economic objectives. [n294] It must, however, be pointed out that except for a few human rights - like right to life or right against torture - all other human rights can be derogated from in times of emergency or in the interests of a democratic society. Socio-economic rights, for instance, are to be achieved progressively subject to the available resources. Does this mean that socio-economic rights are not human rights? Hardly so. On the same token, it is not contended that the right to environment should be framed in absolute terms or be a nonderogable right. It is understood that, like the right to privacy or an adequate standard of living, a balancing of competing interests test will have to be applied in relation to the right to environment. This approach would not be departing from standard practice in

relation to human rights.

VI. Right to Development Versus the Right to Environment

Another question that has arisen is whether the ongoing debate on the right to development is incompatible with that of the right to environment. Given the intimate relationship that exists between environmental protection and economic development, some discussion of the ongoing debate on the right to development is necessary. The UN General Assembly adopted in 1986 the Declaration on the Right to Development in which the General Assembly reiterated that:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the [*117] exercise of their inalienable right to full sovereignty over all their natural wealth and resources. [n295]

Several elements are embodied here:

. It affirms the right to development as an inalienable human right;

. This right is vested in every person as well as all peoples;

. Development is necessary to ensure the fulfillment of all human rights and fundamental freedoms; and

. The right to development also implies the realization of the right of self-determination, which includes the inalienable right to full sovereignty over natural resources.

The Declaration, which falls into the category of soft law, does not contain a definition of the right to development, nor does it state what kind of development it envisages apart from its reference to economic, social, cultural, and political development. [n296] This is dangerous as it seems to approve any kind of development as long as the objectives in the Declaration are met. Nowhere in the Declaration is there a reference to environmental protection, which is rather surprising given the fact that the General Assembly itself appointed in 1983 the

World Commission on Environment and Development with the mandate of reconciling economic development with environmental protection. [n297] Under the Declaration, States are also required to eliminate obstacles to development, [n298] making one wonder whether environmental regulation is also one such obstacle! The nonreference to environmental protection is indeed unfortunate as it undermines the developments that have taken place in relation to international environmental law. This surely could not have been an oversight as it was precisely at the time the Declaration was adopted that the whole debate on economic development versus environmental protection was taking place, as evidenced by the appointment of the WCED by the General Assembly. [n299] By omitting a reference to environmental protection in its crucial and perhaps controversial Declaration on the Right to Development, the General Assembly has given the wrong signal to the international community.

[*118] Despite this, however, it must be stressed that the right to development - whatever it may mean - is not unlimited. It cannot be said that individuals or states - as contended in the Declaration - have the right to develop in any manner they wish. The right to development - if such a right indeed exists under international law and many believe that it does not - must take place with due regard to other accepted rights and within the framework of international law itself, of which environmental protection is an important component. In other words, the debate on environmental protection must be reconciled with the debate on the right to development and, in the opinion of the author, the concept of sustainable development provides the answer.

There are several problems with the right to development:

. It lacks a proper definition. It is not clear what kind of development the Declaration envisages.

. It is not clear who the beneficiaries of the right are. The Declaration lists individuals, peoples, and states as the beneficiaries of this right.

. While states are required to ensure the right to development and eliminate obstacles to it, states are also considered beneficiaries of the right. The question arises whether states can be beneficiaries as well as the guardians of the right.

. How can a violation of this right be established?

The doctrinal debate on the issue is also divided. While there are those who advocate that such a right indeed exists under international law, others are not so optimistic. Some even deny that development can be expressed in terms of a human right. While many other human rights can be denied in a society which lacks economic development, whether development per se can be expressed in terms of a human right is questionable. Human rights are generally individual in nature, and the question arises whether we can accept the right to development as an individual right. In the absence of a specific definition of development, it is

difficult to see how it can be considered an inalienable human right, despite the General Assembly pronouncement to that effect. It is also not clear what is meant by "peoples" in the Declaration. [n300] The African Charter on Human and Peoples' Rights remains the only binding instrument, albeit regional, to incorporate the right to development. [n301] Given, however, the fact that there is virtually no jurisprudence under the [*119] Charter and much of it remains "deadletter law," the significance of this provision is rather limited.

The Rio Declaration on Environment and Development of 1992, on the other hand, is the first international instrument of universal application, adopted by consensus, to endorse the right to development. However, the Rio Declaration, similar to the General Assembly Declaration on the Right to Development, falls within the realm of soft law. [n302] According to Principle 3, "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations." [n303] It further provides in Principle 4 that "In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it." [n304] Principle 3 has avoided the controversy that has arisen in the General Assembly resolution in relation to the beneficiaries of the right by simply providing that "the right to development must be fulfilled." [n305] This formulation has, however, been criticized by some for not referring to the right to sustainable development. [n306] Inasmuch as the debate has been on the right to development and not the right to sustainable development (and indeed, as noted above, the General Assembly Declaration does not even refer to the need to protect the environment or to develop in a sustainable manner), on a reading of Principle 3 with Principle 4, it is clear that the Rio Declaration refers to the right to sustainable development. [n307] Given that the concept of sustainable development seeks to bridge the gap between environmental protection and economic development, and the reference to developmental and environmental needs in Principle 3 and the reference to sustainable development and the principle of integration in Principle 4, [n308] it is clear that the right to development, as embodied in the Rio Declaration, is limited by environmental concerns. The Rio Declaration makes it clear that the right to development is not unlimited and must be pursued within a framework of sustainable development. This is an important development as it seeks to remedy the lacuna in the General Assembly Declaration wherein no reference was made to environmental protection.

[*120] The Vienna Declaration on Human Rights of 1993 also endorses the right to development. [n309] Noting that "democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing," [n310] it reaffirms the right to development as established in the Declaration on the Right to Development and, reflecting the wording in the Rio Declaration, stresses that the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. [n311]

The World Summit for Social Development, held in Copenhagen in 1995, also references the right to development in the Declaration and the Program of Action adopted at the World Summit. [n312] The Copenhagen Declaration provides as follows: "We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people." [n313]

Reiterating Principle 1 of the Rio Declaration, the Copenhagen Declaration acknowledges that "people are at the centre of our concerns for sustainable development and ... they are entitled to a healthy and productive life in harmony with the environment." [n314] The Heads of States have pledged, inter alia, to promote universal respect for, and observance and protection of all human rights including the right to development. [n315]

Paragraphs 15 and 17(c) of the Program of Action are also relevant:

15. It is essential for social development that all human rights and fundamental freedoms, including the right to development as an integral part of fundamental human rights, be promoted and protected ... .

17(c) ... The international community should promote effective international co-operation, supporting the efforts of developing countries, for the full realization of the right to development and the elimination of obstacles to development, through, inter alia, the implementation of the provisions of the Declaration on the Right to Development as reaffirmed by the Vienna Declaration and Programme of Action. Lasting progress [*121] towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level. The right to development should be fulfilled so as to equitably meet the social, developmental and environmental needs of present and future generations. [n316]

The wording here is very similar to the Rio and Vienna Declarations, the only addition being the reference to social needs of present and future generations. It is noteworthy that the Program of Action of the Social Summit balances the developmental needs with environmental and social needs, which is lacking in the General Assembly Declaration on the Right to Development. It also places emphasis on sustainable development, lacking, yet again, in the General Assembly Declaration, which is not surprising given that sustainable development gained momentum only after the publication of the WCED report Our Common Future in 1987. [n317] Its lack of reference to environmental protection, however, is a cause for concern. While the Social Summit Declaration does seem to include the right to development among human rights, being embodied yet again in a soft law instrument does not elevate its status to a binding norm.

Commentators are divided on the issue of third-generation rights, in general, and of the right to development, in particular. While agreeing that there are no inherent reasons why new human rights, both individual and collective, should not be recognized under international human rights law, Philip Alston posits that "much work remains to be done before the concept [of the right to development] can attain the degree of specificity or concreteness which would enable it to be operationally significant at either the national or international levels." [n318] He believes that normative precision and an effective implementation machinery are necessary to recognize new rights. [n319] Moreover, he believes that the General Assembly Declaration did little to put an end to the great controversy that resulted from the lack of focus of the right to development: "While the Declaration reflects a range of political compromises hammered out, it has

succeeded more in restating and enshrining the competing and often contradictory visions of the different groups than in resolving them." [n320]

[*122] Anja Lindroos, in a study of the right to development, notes that no progress in this regard can be made unless the right is acceptable to both the North and the South; since the debate is politically so important to the South it can hardly be ignored by the North. [n321] Referring to the General Assembly Declaration on the Right to Development, she states that the text remained vague and inconsistent and that its adoption did not imply the existence of a political consensus among states. [n322] She further notes:

During the past decades it [the right to development] has been transformed from a concept focused on the economic development of states to a multi-dimensional human right which aims at contributing to the promotion of economic, social and cultural rights as well as civil and political rights. Right to development is recognised as a comprehensive economic, social, cultural and political process which pursues constant improvement of the well-being of human beings. It has links to a variety of global issues, such as peace and security, disarmament policy, the protection of the environment and sustainable development as well as rights of indigenous people, women and children. [n323]

What is important in the present context is Lindroos' discussion of the relationship between sustainable development and the right to development. [n324] Noting that the concept of sustainable development has received endorsement from all sections of the international community and at all levels, she questions whether these two notions can be viewed as integrative or exclusive concepts. [n325] She points out that their mutual interdependence has been recognized and that "there is today nearly universal acceptance that economic growth should incorporate sustainable development. Nevertheless, a clash between economic development and environmental sustainability cannot always be excluded." [n326] She concludes that working out a "credible and accepted way of implementing the two concepts" will be one of the future challenges. [n327]

[*123] It is submitted here that Lindroos seems to confuse environmental protection with sustainable development and uses the two synonymously. What seems to be clashing with the right to development is not sustainable development but rather environmental protection. Sustainable development - in the sense of reconciling environmental protection with economic development - provides the answer to the apparent clash between the right to development and the right to environment.

Those in favour of the right to development include Justices Christopher Weeramantry and the late Nagendra Singh, both former justices of the World Court. Justice Weeramantry, for example, believes that as a result of the linkages between economic development and human rights, all states, developed and developing, are under a legal obligation to work towards achieving this right. [n328] He further notes that "human rights and economic development should not be treated as belonging to different categories of study but are clearly complementary to each other." [n329] Ronald Rich, too, believes that the right to development "is at the threshold of general acceptance as positive international law." [n330] He believes that it is designed to benefit individuals, peoples, and nations in a holistic and inter-connected manner. [n331] Arguing that this has both an individual and collective dimension, he posits that it would operate in a

manner similar to the right of self-determination. [n332] Stating that it has added a new dimension to human rights law, he summarizes three theories in literature to include the right to development into human rights law, but notes that none of them can completely define the nature of the right to development:

. Indispensable theory - that it is indispensable to the exercise of other human rights. [n333]

. Generational theory - that the right to development is a new human right, belonging to the third generation. [n334]

[*124]

. Synthesis theory - that the right to development is a synthesis of existing individual and collective human rights. [n335]

While there is no denying that many of the world's problems are caused as a result of under-development, and rapid development is necessary in many countries, whether the recognition of a right to development in human rights terms would facilitate this process is questionable. Several problems remain with this approach:

. Its definition is not clear - does it mean only economic development, or does it mean development which is socially, economically, culturally, and environmentally sound? In other words, does it mandate a holistic approach to development?

. Who are the beneficiaries of the right - individuals, peoples, or states? Like other human rights can we consider this also to be an individual right? What if the kind of development that one person wants differs from another? Or should we consider this a collective right and hold that the right vests in the state? [n336]

. If the right to development is, like other rights, an individual one, then the state in question is the protector/guardian of the right. But, if the right vests in the state itself, can the state also become its guardian?

How is this right implemented? An important right that individuals have, in relation to other rights, is the right to rely on the implementation mechanisms for that right. Thus, in the face of a violation under the ICCPR, the victim can petition the UN Human Rights Committee in Geneva. It is questionable whether a similar mechanism can be established in relation to the right to development. Moreover, the legal status of this right is also not clear. The universal instruments on the subject - the General Assembly Declaration, the Rio Declaration, the Copenhagen Declaration on Social Development, and the Vienna

[*125] Declaration on Human Rights - all fall into the realm of soft law. [n337] Despite various discussions, scholarly writings, and symposia held on the topic, it is clear that the right to development has not achieved the status of a legal norm. Having said that, however, the evils of under-development are clear enough and the developed members of the international community should assist their less fortunate members to achieve development. There is at least a moral obligation for them to do so. It must be made clear, however, that the kind of development that is envisaged is sustainable development.

VII. Conclusion: The Right to Sustainable Development?

The foregoing discussion surveyed the ongoing debate and the developments that have taken place in relation to a right to a healthy environment and the right to development. While there seems to be some consensus regarding the former, at least to the extent of utilizing the existing human rights machinery for the vindication of environmental wrongs, the debate is highly divided in relation to the latter. While no North-South divide is apparent in relation to the former, with regard to the latter, it is very much in evidence. The question has also arisen whether the right to environment is inconsistent with the right to development. It must be noted that these rights are not unlimited, rather they should be regarded as mutually reinforcing. In other words, the time has come to think of a right to sustainable development in order to reconcile the debate on the right to environment and the right to development. There is no doubt that there is merit to this argument given that development has to be sustainable in order to accommodate the rights of future generations; however, sustainable development suffers from some of the defects that are inherent in the debate on the right to development, the most notable being the lack of a precise definition. [n338]

Sustainable development integrates environmental protection into the development process. It also encompasses the right of future generations to achieve development in a sustainable manner. Several tools have been developed to achieve sustainable development, including [*126] the environmental impact assessment process, the precautionary principle, the polluter pays principle, and the "common but differentiated responsibility principle." [n339] Moreover, the procedural components of sustainable development - the right to information and the right to participate in the decision-making process - coincide with environmental procedural rights. These procedural rights are principles of good governance - transparency and accountability and upholding the rule of law, indicating that in order to achieve good governance, sustainable development is necessary. It has the potential to forge a link between environmental protection and the right to development and it is in this light that a right to sustainable development is proposed here. While a right to a healthy environment would go a long way in protecting the right of aggrieved persons, its utility is limited as it is anthropocentric in nature. A right to sustainable development would be wider as it seeks to reconcile environmental protection, economic development, and the rights of future generations. As noted above, already the national courts are showing progress in this respect. Admittedly, this will pose definitional problems, as well as legal problems, as the normative status of sustainable development evolves. This has not, however, prevented the UN and other bodies from promoting and applying this concept worldwide. It may be a matter of time before it achieves normative status but it is a concept with much potential and should not be dismissed lightly. It is thus hoped that the international community will strive to refine this concept and apply it in their national systems.

Legal Topics:

For related research and practice materials, see the following legal topics: Environmental LawGeneral OverviewHealthcare LawTreatmentEnd-of-Life DecisionsGeneral OverviewInternational LawSovereign States & IndividualsHuman RightsGeneral Overview

FOOTNOTES:

n1. Declaration of the United Nations Conference on the Human Environment, Pmbl. U.N. Doc. A/CONF.48/14 (1972), reprinted in 11 I.L.M. 1416 [hereinafter Stockholm Declaration].

n2. There is a wealth of literature on the subject. See generally, Patricia Birnie & Alan Boyle, International Law and the Environment (2d ed. 2002); Human Rights Approaches to Environmental Protection (Alan Boyle & Michael Anderson eds., 1996); International Environmental Law and Policy 100 (Hunter, Salzman, & Zaelke eds., 1998); International Law and Sustainable Development: Past Achievements and Future Challenges (Alan Boyle & David Freestone eds., 1999); Sustainable Development and Good Governance (K. Ginther et al. eds., 1995); Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity (1989); World Comm'n on Env't & Dev., Our Common Future (1987); Fernanda de Piva Durante, The Environment and Development Debate: Paradoxes, Polemics and Panaceas, 8 Griffith L. Rev. 258 (1999); M. Michael McCloskey, The Emperor Has No Clothes: The Conundrum of Sustainable Development, 19 Duke Envtl. L. & Pol'y F. 153 (1999); Dominic McGoldrick, Sustainable Development and Human Rights: An Integrated Conception, 45 Int'l & Comp. L.Q. 796 (1996); Marc Pallemaerts, The Future of Environmental Regulation: International Environmental Law in the Age of Sustainable Development: A Critical Assessment of the UNCED Process, 15 J.L. & Com. 623 (1996); Philippe Sands, International Law in the Field of Sustainable Development, 65 Brit. Y.B. Int'l L. 303 (1994).

n3. See E.A. Res. 217A, U.N. GAOR, U.N. Doc. A/810 (1948).

n4. See International Covenant on Economic, Social and Cultural Rights, 1967, 6 I.L.M. 360, 363; International Covenant on Civil and Political Rights, 1967, 6 I.L.M. 360, 368.

n5. See Stockholm Declaration, supra note 1.

n6. See id. at 1417.

n7. See id. at 1416.

n8. See Alan Boyle, The Role of International Human Rights Law in the Protection of the Environment, in Human Rights Approaches to Environmental Protection, supra note 2, at 46-47.

n9. See International Covenant on Economic, Social and Cultural Rights, supra note 4, at 361.

n10. Vienna Declaration and Programme of Action, June 25, 1993, 32 I.L.M. 1661,

1665.

n11. Ironically, this is not guaranteed under the 1978 Constitution of Sri Lanka.

n12. These are: the right to life, right to an adequate standard of living, right to health and right to privacy. See infra Part IV.A.

n13. See Gabcikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. 7 (Sept. 25), reprinted in 37 I.L.M. 168, 206.

n14. There is a considerable amount of literature on the subject. See Human Rights, Sustainable Development and the Environment (Antonio Trindade ed., 1992); Fatma-Zohra Ksentini, Human Rights, Environment and Development, in Unep's New Way Forward: Environmental Law and Sustainable Development 96 (Sun Lin & Lal Kurukulasuriya eds., 1995); Aaron Sachs, Eco-Justice: Linking Human Rights and the Environment, Worldwatch Paper 127 (1995); Prudence E. Taylor, An Ecological Approach to International Law: Responding to Challenges of Climate Change (1998); Antonio Augusto Cancado Trindade, Human Rights and the Environment, in Human Rights: New Dimensions and Challenges, 117 (Janusz Symonides ed., 1998); Gudmundur Alfredsson & Alexander Ovsiouk, Human Rights and the Environment, 60 Nordic J. Int'l L. 19 (1991); Jenifer A. Downs, A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right, 3 Duke J. Comp. & Int'l L. 351 (1993); Malgosia Fitzmaurice, The Right of the Child to a Clean Environment, 23 S. Ill. U. L. J. 611 (1999); Paul Gormley, The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms, 3 Geo. Int'l Envtl. L. Rev. 85 (1990); Iveta Hodkova, Is There a Right to a Healthy Environment in the International Legal Order?, 7 Conn. J. Int'l L. 65 (1991); John Lee, The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law, 25 Colum. J. Envtl. L. 283 (2000); James T. McClymonds, The Human Right to a Healthy Environment: An International Legal Perspective, 37 N.Y.L. Sch. L. Rev. 538 (1992); Ali M. Qazilbash, Human Rights, Environment and Development in South Asia, 6 ILSA J. Int'l & Comp. L. 423 (2000); Dinah Shelton, Human Rights, Environmental Rights and Right to Environment, 28 Stan. J. Int'l L. 103 (1991); David Smith, Human Rights and the Environment: Clean Air and a Clean Environment as Fundamental Human Rights, Colo. J. Int'l Envtl. L. & Pol'y 149 (1999); Symposium, Earth Rights and Responsibilities: Human Rights and Environmental Protection, 18 Yale J. Int'l L. 215 (1993); Prudence E. Taylor, From Environmental to Ecological Human Right: A New Dynamic in International Law?, 10 Geo. Int'l Envtl. L. Rev. 309 (1998); Melissa Thorme, Establishing Environment as a Human Right, 19 Denv. J. Int'l L. & Pol'y 301 (1990-91); Office of the U.N. High Commissioner for Human Rights, Human Rights and the Environment, available at http://www.unhchr.ch/environment/index.html (last visited July 3, 2002); Human Rights Approaches to Environmental Protection, supra note 2.

n15. See Michael R. Anderson, An Overview, in Human Rights Approaches to Environmental Protection, supra note 2, at 7.

n16. See Boyle, supra note 8, at 44.

n17. Defined by the World Commission on Environment and Development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." See World Comm'n on Env't & Dev., Our Common Future 43 (1987).

n18. See id.

n19. See Gabcikovo-Nagymaros Project (Hung. v. Slouk.), 1997 I.C.S. 7 (Sept. 25), reprinted in 37 I.L.M. 168, 206-07.

n20. See id. at 205-06.

n21. See Marceil Yeater & Lal Kurukulasuriya, Environmental Impact Assessment Legislation in Developing Countries, in Unep's New Way Forward: Environmental Law and Sustainable Development 257, 258 (Sun Lin & Lal Kurukulasuriya eds., 1995).

n22. The depletion of the ozone layer and the greenhouse effect are good examples of environmental problems which can have consequences for future generations.

n23. See Catherine Redgewell, Life, the Universe, and Everything: A Critique of Anthropocentric Rights, in Human Rights Approaches to Environmental Protection, supra note 2, at 71-75.

n24. See Gabcikovo-Nagymaros Project, 37 I.L.M. at 206.

n25. See id.

n26. Id.

n27. See Boyle, supra note 8, at 48-49.

n28. See Anderson, supra note 15, at 9.

n29. See Boyle, supra note 8, at 48.

n30. See generally R.R. Churchill, Environmental Rights in Existing Human Rights Treaties, in Human Rights Approaches to Environmental Protection, supra note 2, at 90-98 (providing an overview of cases using human rights machinery for redress of an environmental problem).

n31. See Michael R. Anderson, Individual Rights to Environmental Protection in India, in Human Rights Approaches to Environmental Protection, supra note 2, at 199.

n32. See discussion infra Part III.B.

n33. See Boyle, supra note 8, at 48-51.

n34. Stockholm Declaration, supra note 1, at 1416.

n35. See id.

n36. See id.

n37. See id.

n38. The use of the word "man" here instead of "person" has been interpreted as using nonrights language.

n39. See Dinah Shelton, What Happened at Rio to Human Rights?, 3 Y.B. Int'l Envtl. L. 75, 76-77 (1992).

n40. Id.

n41. See id.

n42. See G.A. Res. 37/7, U.N. GAOR, 37th Sess., U.N. Doc. A./RES/37/7 (1982), reprinted in 22 I.L.M. 455.

n43. See id. at 457.

n44. See id.

n45. Id. at 456.

n46. Id. at 460.

n47. See World Comm'n on Env't & Dev., Our Common Future 4-5 (1989).

n48. Experts Group on Envtl. Law of the World Comm'n & Dev., Environmental Protection and Sustainable Development, Legal Principles and Recommendations 25 (R.D. Munro & J.G. Lammers eds., 1987) [hereinafter Experts Group].

n49. Id. at 39.

n50. See G.A. Res. 42/87, U.N. GAOR, U.N. Doc. A/Res/42/187 (1987).

n51. See Experts Group, supra note 48, at 39.

n52. See id.

n53. See id. at 40.

n54. See Hague Declaration on the Environment, Mar. 11, 1989, 28 I.L.M. 1308.

n55. Id.

n56. Id. at 1309.

n57. G.A. Res. 45/94, U.N. GAOR, 45th Sess., at 2, U.N. Doc. A/RES/45/94 (1991).

n58. Id. at 1.

n59. Id. at 2.

n60. See id.

n61. See U.N. Conference on Environment and Development: Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992), reprinted in 31 I.L.M. 874 [hereinafter Rio Declaration].

n62. Id. at 876.

n63. See Pallemaerts, supra note 2, at 642.

n64. See Shelton, supra note 39, at 82.

n65. See id. at 89.

n66. See Pallemaerts, supra note 2, at 642.

n67. See Neil Popovic, In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment, 27 Colum. Hum. Rts. L. Rev. 487 (1996).

n68. See U.N. Doc. E/CN.4/Sub.2/1991/8,1 (1990).

n69. See U.N. Doc. E/CN.4/Sub.2/1991/8 (1991) [hereinafter Preliminary Report].

n70. See U.N. Doc. E/CN.4/Sub.2/1992/7 and Add. 1 [hereinafter First Progress Report].

n71. See U.N. Doc. E/CN.4/Sub.2/1993/7 (1993) [hereinafter Second Progress Report].

n72. See U.N. Doc. E/CN.4/Sub.2/1994/9 (1994) [hereinafter Final Report].

n73. See U.N. Doc. E/CN.4/Sub.2/1990/12 (1990).

n74. See Boyle, supra note 8, at 44.

n75. See U.N. Doc. E/CN.4/Sub.2/1990/12.

n76. Id. at 4.

n77. See First Progress Report, supra note 70, at 7.

n78. See id. at 22-27.

n79. See Final Report, supra note 72, at 3.

n80. Id.

n81. Id. at 8.

n82. See id.

n83. See Final Report, supra note 72, at 9.

n84. Id. at 10-11 (emphasis added).

n85. Cf. Popovic, supra note 67, at 504 (contending that the Stockholm Declaration contains an expansive statement of environmental rights).

n86. Cf. id. ("Principle 1 of the Rio Declaration supports the right to a satisfactory environment."). But see supra notes 61-66 and accompanying text.

n87. Final Report, supra note 72, at 74-75.

n88. See id.

n89. See id. at 75.

n90. See id. at 76.

n91. See id. at 74.

n92. The Preamble recognizes that "sustainable development links the right to development and the right to a secure, healthy and ecologically sound environment." Id.

n93. See id.

n94. See Sumudu Atapattu, Sustainable Development: Myth or Reality? A Survey of Sustainable Development Under International Law and Sri Lankan Law, 14 Geo. Int'l Envtl. L. Rev. 265 (2001).

n95. See IUCN, Draft International Covenant on Environment and Development xi (2d ed. 2000).

n96. See id. at 2-25.

n97. See id. at 2.

n98. See id.

n99. Id. at 1.

n100. Id.

n101. Id.

n102. See Rio Declaration, supra note 61, at 877.

n103. IUCN, supra note 95, at 29.

n104. Id. at 2.

n105. Id.

n106. Id. at 42.

n107. Id. at 2.

n108. Id. at 4.

n109. See id.

n110. See id. at 52.

n111. Id. at 52 n.88.

n112. See African Charter on Human and Peoples' Rights, art. 24, reprinted in Basic Documents on Human Rights 557 (Ian Brownlie ed., 1992) [hereinafter African Charter]; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, Nov. 14, 1988, 28 I.L.M. 156, 165 [hereinafter Protocol of San Salvador].

n113. Even the Convention on the Rights of the Child, the only human rights treaty of universal application to refer to environmental protection, makes only a passing reference to it and does not embody a distinct right to a healthy

environment. See G.A. Res. 44/25, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/44/25 (1989), reprinted in 28 I.L.M. 1448, 1466 [hereinafter Convention on the Rights of the Child].

n114. See IUCN, supra note 95, at 52 n.86; Richard Desgagne, Integrating Environmental Values into the European Convention on Human Rights, 89 Am. J. Int'l L. 263, 263 n.7 (1995).

n115. But see Minors Oposa v. Sec'y of the Dep't of Env't & Natural Res., July 30, 1993, 33 I.L.M. 173, 187 discussed infra at notes 244-252 and accompanying text.

n116. See IUCN, supra note 95, at 4.

n117. Id. at 57.

n118. Id. at 5.

n119. Id. at 57.

n120. See id. at 2.

n121. See African Charter, supra note 112, at 557; Protocol of San Salvador, supra note 112, at 165.

n122. See Churchill, supra note 30, at 104.

n123. See id.

n124. African Charter, supra note 112, at 557.

n125. Id. at 556.

n126. See id. at 555.

n127. See Churchill, supra note 30, at 106.

n128. See id.

n129. See Protocol of San Salvador, supra note 112.

n130. See Churchill, supra note 30, at 105-06.

n131. See id. at 104-05.

n132. See id. at 105.

n133. Id. at 104.

n134. See Protocol of San Salvador, supra note 112, at 161.

n135. Id. at 165.

n136. Id. at 164.

n137. Id. at 168.

n138. See Churchill, supra note 30, at 100.

n139. See Domingo E. Acevedo, Introductory Note, 28 I.L.M. 156, 157.

n140. International Covenant on Economic, Social and Cultural Rights, (1967) 6 I.L.M. 360, 363.

n141. Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 5l7, 518 [hereinafter Convention on Access].

n142. Id. (emphasis added).

n143. See id.

n144. See id. at 517.

n145. See Desgagne, supra note 114, at 266.

n146. See Anderson, supra note 15.

n147. See Atapattu, supra note 94, at 285.

n148. See id.

n149. See, e.g., S. Douglas-Scott, Environmental Rights in the European Union - Participatory Democracy or Democratic Deficit, in Human Rights Approaches to Environmental Protection, supra note 2, at 109, 111-12.

n150. See infra p. 11.

n151. See Rio Declaration, supra note 61, at 878.

n152. See id.

n153. Id. at 879.

n154. See Final Report, supra note 72, at 74-77; see also supra notes 91-98 and accompanying text.

n155. See Final Report, supra note 72, at 74.

n156. See id.

n157. See id. at 76.

n158. See id.

n159. See id.

n160. See id. This is not a procedural right.

n161. Id.

n162. Id.

n163. Id.

n164. This is wider than the process usually adopted in relation to EIAs. While it encompasses sociological and economic consequences of a proposed activity, an EIA document does not usually embody human rights consequences (although it could be argued that sociological consequences are really human rights consequences). While some have proposed the preparation of a human rights impact assessment of development activities, this is usually not combined with the EIA process, and some states require the preparation of a separate social impact assessment. The above provision is unique as it combines all these impacts in one document.

n165. Many constitutions provide for the right to take action for the infringement or imminent infringement of fundamental rights. See First Progress Report, supra note 70, at 10-17.

n166. See Convention on Access, supra note 141, at 517.

n167. Id.

n168. See id.

n169. See id. at 519.

n170. See id.

n171. See id. at 510-20.

n172. Id. at 520.

n173. Id.

n174. Id.

n175. Id.

n176. Id.

n177. Id.

n178. Id.

n179. Id.

n180. Id.

n181. Id.

n182. Id. at 522.

n183. See id. at 519.

n184. See id. at 522.

n185. See id.

n186. See id.

n187. See Boyle, supra note 8, at 43-44; Maria Gavouneli, Access to Environmental Information: Delimitation of a Right, 13 Tul. Envtl .L. J. 303 (2000).

n188. See Second Progress Report, supra note 71, at 17.

n189. See Boyle, supra note 8, at 44.

n190. See Atapattu, supra note 94, at 285.

n191. V.D.S. Gunaratne v. Homagama Pradeshiya Sabha & Five Others, 5(2) & (3) S. Asian Envtl. L. Rep. 28 (1998) (Sri Lanka).

n192. African Charter, supra note 112, at 557; Protocol of San Salvador, supra note 112, at 165.

n193. See Final Report, supra note 72, at 74-77.

n194. See id.

n195. See id.

n196. See James T. McClymonds, The Human Right to a Healthy Environment: An International Legal Perspective, 37 N.Y.L. Sch. L. Rev. 583, 595 (1992).

n197. See Minors Oposa v. Sec'y of the Dep't of Env't & Natural Res., July 30,1993, 33 I.L.M. 173, 185.

n198. See Convention on the Rights of the Child, supra note 113, at 1466.

n199. See Douglas-Scott, supra note 149, at 111-12.

n200. See id.

n201. See id.

n202. See id.

n203. See id.

n204. See Case 7615, Inter-Am. C.H.R., OEA/ser. L/V/II.66, doc. 10 rev. 1 (1985), reprinted in 1985 Inter-Am. Y.B. on H.R. 264, 279.

n205. See id. at 29-30.

n206. See id. at 33; see also Desgagne, supra note 114. See generally Joshua P. Eaton, The Nigerian Tragedy, Environmental Regulation of Transnational Corporations, and the Human Right to a Healthy Environment, 15 B.U. Int'l L. J. 261, 299 (1997).

n207. Eaton, supra note 206, at 299.

n208. Under Optional Protocol I to the International Covenant on Civil and Political Rights (ICCPR) individuals are given the right to petition the UN Human Rights Committee established under the ICCPR, provided, however, local remedies have been exhausted. See International Covenant on Civil and Political Rights, supra note 4, at 383.

n209. See Desgagne, supra note 114.

n210. See id. at 269, 271.

n211. G.A. Res. 45/94, U.N. GAOR, 45th Sess., at 2, U.N. Doc. A/RES/45/94 (1990).

n212. World Health Org., Our Planet, Our Health - Report of the WHO Commission on Health and Environment (1992).

n213. See Arrondelle v. United Kingdom, App. No. 7889/77, 5 Eur. H.R. Rep. 118 (1983).

n214. Id.

n215. See Desgagne, supra note 114, at 272-74.

n216. See Douglas-Scott, supra note 149, at 111.

n217. Powell & Rayner v. U.K., 172 Eur. Ct. H.R. (ser. A) (1990). A similar conclusion was reached in Skarby. See Skarby Case, 180-B Eur. Ct. H.R. (ser. A) (1990); see also Arrondelle v. United Kingdom, 1980 Y.B. Eur. Conv. on H.R. 166.

n218. See Lopez Ostra v. Spain, App. No. 16798/90, 20 Eur. H.R. Rep. 277 (1995).

n219. See id.

n220. Id. at 295.

n221. See id.

n222. See, e.g., S. v. France, 172 Eur. Ct. H.R. (Ser. A) (1990); see also Desgagne, supra note 114, at 275.

n223. S. v. France, 172 Eur. Ct. H.R. (Ser. A) (1990).

n224. See Desgagne, supra note 114, at 275.

n225. See Taylor, supra note 14, at 199.

n226. It is not the aim of this section to discuss each and every instance in which a national court has pronounced on environmental rights. Rather, this section will note a particular trend at the national level which could, if consistent and coupled with opinio juris, give rise to the emergence of a customary international law principle on the issue. For an excellent survey of the relevant provisions on national law relating to environmental protection, see the Ksentini Reports. See sources cited supra notes 69-72.

n227. See Anderson, supra note 31, at 199.

n228. Subash Kumar v. State of Bihar, A.I.R. 1991 SC 420 (India).

n229. Id.

n230. See Anderson, supra note 31, at 199, 217.

n231. See id. at 199.

n232. See id. at 219.

n233. M.C. Mehta v. Union of India, S.C. of India Writ Petition (Civil) No. 860 (1991), reprinted in 1(1) S. Asian Envtl. L. Rep., 46, 46-52 (1994).

n234. See Atapattu, supra note 94, at 292-93.

n235. See de Silva v. Minister of Environment and others, SC (1998) (Sri Lanka).

n236. While the Court did not actually hold that the right to life clause was not inherent in the Constitution, sensing its reluctance to pronounce on the issue, the petitioner withdrew his arguments on the "inherent" right to life clause. His main contention was that all other rights in the Constitution would be meaningless if the right to life were denied. Id.

n237. See Atapattu, supra note 94, at 292-93 n.96.

n238. See id. at 292-93.

n239. See id.

n240. See id. at 293.

n241. See Envtl. Found. Ltd. & Others v. Attorney-General & Others, 1(1) S. Asia Envtl. L. Rep., 17 (1994).

n242. See id.

n243. In another recent case, by far the most important case handed down to date on environmental protection, the Supreme Court of Sri Lanka had the occasion to deal with the application of fundamental rights to environmental issues. The Court in this case held that due regard must be paid by the decision-makers to the concept of sustainable development and also referred to international environmental law principles. See Bulankulama v. Sec'y, Ministry of Indus. Dev., 7 S. Asian Envtl. L. Rep. 1 (2000).

n244. See Minors Oposa v. Sec'y of the Dep't of Env't & Natural Res., July 30, 1993 33 I.L.M. 173, 178.

n245. Id. at 187 (emphasis added).

n246. Id. at 187-88.

n247. Id. at 185; see also Sumudu Atapattu, Environmental Rights and Human Rights, in Sri Lanka: State of Human Rights 1997, 151 (Kanagananda Dharmananda & Lisa M. Kois eds., 1997).

n248. For the seminal work on this topic, see Brown Weiss, supra note 2.

n249. See Minors Oposa, 33 I.L.M. at 200 (Feliciano, J., concurring).

n250. Id. at 201 (Feliciano, J., concurring).

n251. See id. at 203 (Feliciano, J., concurring).

n252. Id. (Feliciano, J., concurring).

n253. Mohiuddin Farooque v. Bangladesh, 48 D.L.R. 413 (1996) (Supreme Court of Bangladesh, App. Div. (Civ.)), reprinted in Compendium of Summaries of Judicial Decisions in Environment Related Cases 5 (1997).

n254. Id. at 414.

n255. Shehla Zia and Others v. WAPDA, P.L.D. 1994 SC 693, 712 (1994) (Pakistan). See also, Martin Lau, Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan, in Human Rights Approaches to Environmental Protection, supra note 2, at 285.

n256. See Shehla Zia and Others, P.L.D. 1994 SC, at 714.

n257. Id. at 715.

n258. See First Progress Report, supra note 70, at 2-17.

n259. See Jan Glazewski, Environmental Rights and the New South African Constitution, in Human Rights Approaches to Environmental Protection, supra note 2, at 181.

n260. Id. at 187.

n261. See Phillip Alston, A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?, 29 Neth. Int'l L. Rev. 307 (1985).

n262. See id.

n263. Id.

n264. Id.

n265. See Jennifer A. Downs, A Healthy and Ecologically Balanced Environment: An Argument for a Third Generation Right, 3 Duke J. Comp. & Int'l L. 351, 364 (1993).

n266. See id.

n267. Stephan Marks, Emerging Human Rights: A New Generation for the 1980s?, 33 Rutgers L. Rev. 435, 442-43 (1980-81).

n268. See Downs, supra note 265, at 363.

n269. See id.

n270. See id.; see generally Philip Alston, Conjuring Up New Human Rights: A Proposal for Quality Control, 78 Am. J. Int'l L. 607 (1984); Alston, supra note 261; Rights of Peoples (James Crawford ed., 1988).

n271. See Downs, supra note 265, at 363.

n272. See id.

n273. See id.

n274. See Boyle, supra note 8, at 51.

n275. See G<um u>nther Handl, Human Rights and Protection of the Environment: A Mildly "Revisionist" View, in Human Rights, Sustainable Development and the Environment, supra note 14.

n276. See Eaton, supra note 206, at 299.

n277. Kiss and Shelton prefer this approach. See Alexander Kiss & Dinah Shelton, International Environmental Law (2d ed. 2000).

n278. See Final Report, supra note 72, at 42-48.

n279. See Boyle, supra note 8, at 50-55.

n280. See id. at 51.

n281. This argument could, in effect, distinguish a possible right to a healthy environment from other human rights. Latter rights accrue to human beings simply by being humans.

n282. Noralee Gibson, The Right to a Clean Environment, 54 Sask. L. Rev. 5 (1990).

n283. See Pallemaerts, supra note 2, at 630.

n284. See id.

n285. Boyle, supra note 8, at 52.

n286. Shelton, supra note 14, at 104.

n287. Id.

n288. Id. at 105.

n289. See supra Part I.A.

n290. See supra Part III.A.

n291. See supra Part III.B.

n292. See Handl, supra note 275, at 119-20.

n293. Id. at 121-22.

n294. Id.

n295. G.A. Res. 41/128, U.N. GAOR, 41st Sess., at 3, U.N. Doc. A/RES/41/128 (1987) [hereinafter Declaration on the Right to Development].

n296. See id.

n297. See Atapattu, supra note 94, at 288.

n298. See Declaration on the Right to Development, supra note 295.

n299. Atapattu, supra note 94, at 288.

n300. See Rights of People, supra note 270.

n301. See African Charter, supra note 112, at 557.

n302. See Rio Declaration, supra note 61.

n303. Id. at 877.

n304. Id.

n305. Id.

n306. See Pallemaerts, supra note 2, at 630.

n307. See Rio Declaration, supra note 61, at 877.

n308. See id.

n309. Vienna Declaration and Programme of Action, supra note 10, at 1666.

n310. Id. at 1666 (Principle 8). It is of concern that environmental protection is not mentioned here, given that the largest ever conference on the environment - the Rio Conference on Environment and Development - was concluded only the year before.

n311. See id. (Principle 11).

n312. See Report of the World Summit for Social Development, Copenhagen, 6-12 Mar., 1995, U.N. Doc. A/CONF. 166/7/Annex (1995).

n313. Report of the World Summit for Social Development, supra note 312.

n314. Id.

n315. See id. at 10.

n316. Id. at 38-39 (emphasis added).

n317. World Comm'n on Env't & Dev., Our Common Future 43 (1987).

n318. Philip Alston, Making Space for New Human Rights: The Case of the Right to Development, Harv. Hum. Rts. J. 3, 39 (1988).

n319. Id. at 20.

n320. Id. at 21.

n321. Anja Lindroos, The Right to Development 2 (1999); see also Upendra Baxi, The Development of the Right to Development, in Human Rights: New Dimensions and Challenges 99 (Janusz Symonides ed., 1998).

n322. Lindroos, supra note 321, at 18.

n323. Id. at 7.

n324. Id.

n325. Id. at 63.

n326. Id.

n327. Id. at 64.

n328. Christopher Weeramantry, Right to Development, Ind. Int'l & Comp. L. Rev. 482, 483 (1985).

n329. Id.

n330. Ronald Rich, The Right to Development as an Emerging Human Right, 23 Va. J. Int'l L. 287 (1983) [hereinafter The Right to Development as an Emerging Human Right]. He seems to contradict himself five years later when he acknowledged that the right to development "remains a putative right not fully accepted into the body of generally accepted international law" and that it is part of lex ferenda. See Ronald Rich, Right to Development: A Right of Peoples?, in Rights of Peoples, supra note 270.

n331. See The Right to Development as an Emerging Human Right, supra note 330, at 295.

n332. See id. at 319.

n333. See id. at 322.

n334. Id.; cf. James Paul, Human Right to Development: Its Meaning and Importance, 25 John Marshall L. Rev. 235 (1992) (arguing against the view that the human right to development is an emerging, third generation right).

n335. The Right to Development as an Emerging Human Right, supra note 330, at 323.

n336. Some have argued that it is an individual right as well as a collective right, similar to the right of self-determination. See Hector Gros Espiell, The Right of Development as a Human Right, 16 Tex. Int'l L. J. 189, 191 (1981).

n337. See Boyle, supra note 8, at 53.

n338. There is a wealth of material on sustainable development. See generally, sources cited in supra note 2. It is generally thought that sustainable development encompasses both substantive and procedural components, similar to the discussion in relation to environmental rights and the right to environment. The substantive components include the principle of integration, the rights of future generations, and the principle of equity while the procedural components include the right to information, the right to participation, and the environmental impact assessment procedure. See Atapattu, supra note 94.

n339. See Final Report, supra note 72, at 19.

