

Human Rights and Protection of the Environment: A Mildly "Revisionist" View

GÜNTHER HANDL

I. Introduction

The concept of environmental rights as "new" human rights — "third generation", so-called "human needs" or "solidarity" rights⁽¹⁾ — is a relatively old one. So is the debate over whether such entitlements presently are, are about to be, or should be guaranteed in international law.⁽²⁾ However, the upcoming 1992

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- (1) For critical comments on the usefulness of these labels, see Alston, "A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law?", 29 *Netherlands Int'l L. Rev.* 307, at 316-19 (1982); Galenkamp, "Collective Rights: Much Ado about Nothing? A Review Essay", 3 *Netherlands Q. Human Rights* 291 (1991); and Meron, "On a Hierarchy of International Human Rights", 80 *AJIL* 1, at 2 (1986), who rightly criticizes that in the controversy over the ranking of the several generations of rights, "little attention is paid to the distinction between rights and claims".
 - (2) See, e.g., P. Gormley, *Human Rights and Environment: The Need for International Cooperation* (1976); Uibopuu, "The Internationally Guaranteed Right of an Individual to a Clean Environment," 1 *Comparative L.Yb.* 101 (1977); Jacobson, "The Extension of the European Convention on Human Rights to Include Economic, Social and Cultural Rights", 3 *Human Rights Rev.* 166, at 176-77 (1978); Dupuy, "Le droit à la santé et la protection de l'environnement", in R.-J. Dupuy, ed., *The Right to Health as Human Right* 340, at 403 (1979); Marks, "Emerging Human Rights: A New Generation for the 1980s?", 33 *Rutgers L. Rev.* 435 (1981); and Sohn, "The New International Law: Protection of the Rights of Individuals Rather than of States", 32 *American U.L.Rev.* 1, at 59-60 (1982). Among more recent analyses of these issues see, in particular, Gormley, "The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms", 3 *Georgetown Int'l Env. L. Rev.* 85 (1990); Alfredson & Ovsiouk, "Human Rights and the Environment", 60 *Nordic J.Int'l L.* 19 (1991); Cançado Trindade, "The Parallel Evolutions of International Human Rights Protection and of Environmental Protection and the Absence of Restrictions upon the Exercise of Recognized Human Rights", 13 *Revista del Instituto Interamericano de Derechos Humanos* 35, at 59 (1991); Kiss, "Le droit à la conservation de l'environnement", *ibid.* 77; Shelton, "Human Rights, Environmental Rights, and the Right to the Environment", 28 *Stanford J.Int'l L.* 103 (1991); and

United Nations Conference on Environment and Development which presents a potentially unique opportunity to write and refine basic international environmental law for the rest of the century and beyond, has again focussed attention on the concept of international environmental human rights.

For example, in September 1990, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1130 (1990) (1) which provides for a human right to "an environment...conducive to...good health, well-being and full development of the human personality".⁽³⁾ In October 1991, an ECE Experts Meeting in Oslo adopted a draft Charter on Environmental Rights and Obligations which proclaims among its fundamental principles everybody's "right to an environment adequate for his general health and well-being."⁽⁴⁾ This formulation follows closely Principle 1 of a text adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development in 1986.⁽⁵⁾ More recently, the meeting of Associations of Environmental Law adopted a "Declaration of Limoges," which, once again, recommends recognition of a "human right to the environment" (recommendation 4).⁽⁶⁾ These proposals have been made against the background of an on-going study by the United Nations Human Rights Commission's Sub-commission on Prevention of Discrimination and Protection of Minorities of the problem of the environment and its relation to human rights.⁽⁷⁾

Gros Espiell, "Introduction" [to "Community-Oriented Rights"], in M. Bedjaoui, *International Law: Achievements and Prospects* 1167, at 1171-72 (1991).

- (3) Art.1 of the Text of a European Charter and Convention on the Environment and Sustainable Development, Council of Europe, Parliamentary Assembly, Recommendation 1130 (1990) (1) on the Formulation of a European Charter and a European Convention on Environmental Protection and Sustainable Development, adopted 28 September 1990, Doc. AREC1130.1403-28/9/90-27-E; reprinted in 1 *Yb.Int'l Env.L.* 484 (1990).
- (4) Draft Charter on Environmental Rights and Obligations, reprinted in 21 *Env.Policy & L.* 81 (1991).
- (5) "All human beings have the fundamental right to an environment adequate to their health and well being": Experts Group on Environmental Law of the World Commission on Environment and Development, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* 25 (1986).
- (6) See Déclaration de Limoges - Extraits, 21 *Env.Policy & L.* 38, at 39 (1991).
- (7) See *Human Rights and Scientific and Technological Developments: Proposals for a Study of the Problem of the Environment and its Relation to Human Rights*, Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, U.N. ESCOR 42nd Sess., U.N. Doc. E/CN.4/Sub.2/1990/12 (1990); and *Human Rights and the Environment: Preliminary Report* prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, pursuant to Sub-Commission resolutions 1990/7 and 1990/27, [hereafter: *Ksentini Preliminary Report*] Comm. on Human Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1991/8, 2 August 1991. The decision to undertake the study was clearly influenced also by the desire to provide a direct input into UNCED. See *Review of Further Developments in Fields with which the Sub-Commission has been concerned*, Comm. on Human

During the meetings of Working Group III of the UNCED Preparatory Committee itself, a number of states submitted proposals for a similar entitlement for inclusion in the Conference's final document on general rights and obligations, the "Earth Charter": The Chairman's consolidated draft⁽⁸⁾ — now replaced by a set of draft principles proposed by the Chairman⁽⁹⁾ - contained several provisions that emphasized a human right to a "healthy environment."

Support for international environmental human rights thus cuts across a wide spectrum of international public opinion.⁽¹⁰⁾ We are witnessing not only a growing advocacy of environmental concerns as human rights issues. Increasingly, it is also being claimed that there exists already, or there is about to emerge, a broad generic entitlement to a healthy, decent or otherwise qualified environment. Indeed, often this entitlement is referred to simply as a "human right to the environment"⁽¹¹⁾ — unqualified.

The assumption that inspires a significant portion of the public discourse, namely that today the cause of environmental protection is furthered by the postulation of a generic human right to a decent or healthy environment,⁽¹²⁾ however, is a problematical one. While it should be self-evident that there is a direct functional relationship between protection of the environment and the promotion of human rights,⁽¹³⁾ it is much less obvious that environmental protection ought to be conceptualized in terms of a generic human right. Indeed, the emphasis on such a perspective on the interrelationship of human rights and environmental protection carries significant costs; it reflects a maximalist position that offers little prospect of becoming reality in the near term while its propagation diverts attention and efforts from other more pressing and promising environmental and human rights objectives. In short, a generic international environmental

Rights, Sub-Comm. on Prevention of Discrimination and Protection of Minorities, UN ESCOR, 42nd Sess., U.N. Doc. E/CN.4/Sub.2/1990/NGO/13 (1990).

- (8) *Principles on General Rights and Obligations, Chairman's Consolidated Draft*, Preparatory Committee for the United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/PC/WG.III/L.8/Rev.1, 30 August 1991.
- (9) *See Principles on General Rights and Obligations, Draft Principles Proposed by the Chairman, Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/PC/WG.III/L.33/Rev.1, 2 April 1992.
- (10) *See, generally, Alfredson & Ovsioyk, supra note 2, at 20-21.*
- (11) *See, e.g., Thorne, "Establishing Environment as a Human Right," 19 Denver J. Int'l L. & Pol'y 301 (1991).*
- (12) *Indeed, it is often claimed that the necessity for a "right to a healthy environment" itself is not disputed: see Hodkova, "Is There a Right to a Healthy Environment in the International Legal Order?", 7 Connecticut J. Int'l L. 65, at 79-80 (1991).*
- (13) *See generally, M. McDougal, H. Lasswell & L. Chen, Human Rights and World Public Order 38-44 (1980); and Ksentini, Preliminary Report, supra note 7. For an enlightening case study, see, e.g., A. Durning, Apartheid's Environmental Toll, World Watch Report No.95 (1990). See also infra TAN 62-64.*

entitlement, both as an already existing and an emerging human rights concept, is a highly questionable proposition.

II. *Environmental Rights as Human Rights*

A. *The Right to a Healthy Environment as an Existing or Emerging Human Right*

1. *The Probative Value of International Practice*

(i) *Some Theoretical Observations*

At the outset it might be advisable to point out that the international human rights discourse continues to suffer from an unresolved "contradiction between conceptions of human rights as either inherent in human beings by virtue of their humanity or as benevolently granted by the state..."⁽¹⁴⁾ This affects not just the perception of the burden of proof but the very nature of the argument regarding the existence of such rights in general international law. For example, some adherents of a natural law theory of human rights might be apt to view any "just claim" as an existing human right.⁽¹⁵⁾ Most international lawyers, however, are likely to agree that the process of international recognition of human rights evinces overlapping positive and natural law conceptions.⁽¹⁶⁾ They are also likely to insist, notwithstanding the relative dearth of traditional state practice in the sense of international claims and counterclaims involving human rights, on evidence of actual supportive state practice remains an essential element of any persuasive argument that a given human rights claim is recognized by general international law.⁽¹⁷⁾

This evidentiary requirement applies firstly, even if we assume that by now states implicitly recognize the United Nations General Assembly's special declaratory authority to determine the human rights nature of claims;⁽¹⁸⁾ and

(14) Alston, "Making Space for New Human Rights: The Case of the Right to Development", 1 *Harvard Human Rights Yb.* 3, at 31 (1988).

(15) See, e.g., O'Manique, "Human Rights and Development", 14 *Human Rights Q.* 78, at 86-88 (1992); and cf. Burgers, "The Function of Human Rights as Individual and Collective Rights", in J. Berting, et al., eds., *Human Rights in a Pluralist World: Individuals and Collectivities* 63, at 69-72 (1990).

(16) See, e.g., Sohn, *supra* note 2, at 19.

(17) On this point, see, for example, O. Schachter, *International Law in Theory and Practice* 336 (1991); and cf. Brownlie, "The Rights of Peoples in Modern International Law", in J. Crawford, ed., *The Rights of Peoples* 1, at 12-16 (1988).

(18) This view of the General Assembly's powers under the U.N. Charter, is most radically epitomized in Bilder's phrase "a claim is an international human right if the United Nations General Assembly says it is": Bilder, "Rethinking International Human Rights: Some Basic Questions" [1969]

secondly, notwithstanding the possibility that with respect to human rights claims, actual state practice may be less of an essential underpinning of international normativity than would be in the case in other claims contexts.⁽¹⁹⁾ After all, from the perspective of assessing allegedly new customary international legal norms, including human rights norms, deeds speak louder than words;⁽²⁰⁾ only actual practice endorsing a claimed entitlement may provide a realistic measure of states' determination to render the prescriptive standard effective. Absent a "credible communication" to that effect, the alleged human rights standard is a mere paper right.⁽²¹⁾

In any event, a diminished evidentiary standard regarding actual practice might be applicable only to human rights that are fundamental or inalienable ones. What can be said with confidence, therefore, is that the more attenuated the natural law basis of an alleged human right, the more important will be support of evidence of its reflection in positive international law, i.e., the practice of states and other relevant transnational actors.

Leaving aside for the moment the problem of its intrinsic relativity,⁽²²⁾ the so-called "right to environment", or the right to a "clean," even to a "healthy environment" would be difficult to conceptualize as an inalienable one, notwithstanding the important objectives it purports to serve. If "inalienability"

Wisconsin L. Rev. 171, at 173 (1969). For a strong advocacy of the "authoritative interpretation approach" to international human rights, see especially Alston, "The Fortieth Anniversary of the Universal Declaration of Human Rights: A Time More for Reflection than for Celebration", in *Human Rights in a Pluralist World: Individuals and Collectivities*, *supra* note 15, at 1, 4. However, Alston, in proposing specific procedural guidelines — as against substantive criteria — for the "designation" of new human rights or the expansion of old ones by the General Assembly or organs subordinate to it, clearly admits of the pivotal significance of state practice. See Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control", 78 *AJIL* 607, at 621-22 (1984).

- (19) See, e.g., Bernhardt, "Custom and Treaty in the Law of the Sea", 205 *RdC* 247, at 267-68 (1987).
- (20) It is true that in the case concerning *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v. United States*), [1986] *ICJ Reports* 14, at 109, para.207, the International Court of Justice, in assessing the legal significance of inconsistent state conduct, put special store by the absence of verbal affirmations contrary to the international standard in issue. However, unlike the present question of a generic environmental human right which would be a novel international legal concept, the *Nicaragua* case focussed on the evaluation of state practice in derogation from what the Court considered to be an established standard of international law, namely the principle of non-intervention.
- (21) As Prof. Reisman might say, it would "be delusory to call a statement in the subjective mood a prescription or law if it is not accompanied by a credible communication that those who are prescribing it intend to and can make it controlling." See Reisman, "International Lawmaking: A Process of Communication", [1981] *ASIL Proceedings* 101, at 111.
- (22) See instead *infra* TAN 70-84.

implies the impermissibility of derogations from the human right concerned,⁽²³⁾ it should be evident why any meaningful environmental entitlement⁽²⁴⁾ would not qualify: The evolution of environmental protection measures has involved a constant re-ordering of socio-economic priorities, of accommodating, adjusting, or off-setting mutually restrictive, if not exclusive, public policy objectives.⁽²⁵⁾ Environmental entitlements have been and will continue to be susceptible to restrictions for the sake of other, socio-economic objectives, such as ensuring continued "development" or "saving jobs". In short, since a generic environmental entitlement would not be inalienable,⁽²⁶⁾ it would not therefore share either a characteristic that is traditionally viewed as a hallmark of "natural" rights. Conceptually, it is instead squarely rooted in positive law.

Those who attempt to make the case for an existing or emerging generic environmental human right, therefore, would have to back up their claims by solid positive legal evidence. Alas, when analyzed in light of this evidentiary standard, the claims concerned are unpersuasive: Thus far, the idea of a generic entitlement — as against "sectoral" environmental rights of individuals — has not found express affirmation in any binding or effective international legal instrument.

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- (23) Note, for example, the prohibition in international human rights instruments, such as the United Nations Covenant on Civil and Political Rights or the European Convention on Human Rights, of derogations from certain fundamental, because inalienable, rights. See, e.g. Art.4, para.2 of the Covenant; and Art.15, para.2 of the European Convention. See, generally, Sohn, *supra* note 2, at 18.
- (24) "Meaningful" in the sense of an entitlement that is pegged at a level of environmental protection that does more than just ensure the physical survival of the holder of that right. The right to physical survival is, of course, a fundamental right. It is already guaranteed as the "right to life"; it need not be made to masquerade also as an "environmental human right".
- (25) Consider, for example, the pivotal role that the balancing-of-interests test has played in the determination of international environmental entitlements. See, e.g., Bourne, "The International Law Commission's Draft Articles on the Law of International Watercourses: Principles and Planned Measures, 3 *Colorado J. Int'l Env.L.* 65, at 72-90 (1992); and Handl, "National Uses of Transboundary Air Resources: The International Entitlement Reconsidered", 26 *Natural Res.J.* 405, at 413-427 (1986).
- (26) See, e.g., Dupuy, *supra* note 2, at 407, who referring to Principle 1 of the Stockholm Declaration, observes that "...le droit de l'homme à un environnement décent n'apparaît pas ici comme inhérent à la condition humaine..."

(ii) Past Trends

One of the earliest characterizations of an entitlement that sounds like an environmental human right can be found in Principle 1 of the 1972 Stockholm Declaration on the Human Environment⁽²⁷⁾ which emphasizes that "[m]an has the fundamental right to...adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being..."⁽²⁸⁾ However, at the time of its adoption, Principle 1 — like much of the Stockholm Declaration on the Human Environment — was not understood to reflect customary law.⁽²⁹⁾ In discussing the results of Stockholm, the General Assembly did not specifically proclaim such an entitlement,⁽³⁰⁾ although in a resolution adopted that same day it expressly endorsed Principles 21 and 22 of the Declaration as laying down "the basic rules [of international law] governing this matter."⁽³¹⁾ Finally, unlike, for example, Principle 21 of the Stockholm Declaration which already reflected significant preexisting international practice on the matter,⁽³²⁾ Principle 1 has not found express affirmation in subsequent state practice.

The present version of the "Rio Declaration on Environment and Development"⁽³³⁾ stipulates that human beings "are entitled to a healthy and productive life in harmony with nature".⁽³⁴⁾ Apart from the question whether this formulation does not actually signal a regressive development relative to the Stockholm Declaration, it is clear, however, that the document itself is not intended to be a formally binding one.

Some regional human rights regimes do endorse the notion of environmental entitlements. For example, the African Charter on Human and Peoples' Rights⁽³⁵⁾ stipulates all peoples' right to a "general satisfactory environment favorable to their development".⁽³⁶⁾ However, that article is hardly the kind of solid evidence of

(27) On this point, see, e.g., Sohn, "The Stockholm Declaration on the Human Environment", 14 *Harvard Int'l L.J.* 423, at 455 (1973).

(28) Text in 11 *ILM* 1416, at 1417 (1972).

(29) Thus even as staunch a defender of a "human right to the environment" as Prof. Kiss, readily admits that the Stockholm Declaration — obviously including Principle 1 — did not constitute a legally binding text. See Kiss, *supra* note 2, at 78.

(30) See GA res. 2994 (XXVII), GAOR 27th Sess., Suppl. No.30 (A/8730), 42 (1972).

(31) See *International Responsibility of States in Regard to the Environment*, GA res. 2996 (XXVII), UN GAOR 27th Sess., Suppl. No.30 (A/8730) 42 (1972).

(32) Note, for example, its explicit endorsement as expressing a "common conviction" in the preamble to the 1979 ECE Convention on Long-Range Transboundary Air Pollution, 18 *ILM* 1442 (1979).

(33) Principles on General Rights and Obligations, Draft Principles proposed by the Chairman, Preparatory Committee for the United Nations Conference on Environment and Development, U.N. Doc.A/CONF.151/PC/WG.III/L.33/Rev.1, 2 April 1992.

(34) Principle 1, *ibid.*

(35) Text in 21 *ILM* 59 (1982). The Charter entered into force on 21 October 1986.

(36) Art. 24 of the African Charter.

positive international law that is required to prove the existence of a generic entitlement in general international law: not only does this provision suffer from an excessive vagueness that is apt to raise *a priori* legitimate questions about the true legislative intent of the drafters given the absence of an effective international review mechanism.⁽³⁷⁾ To date this provision, like much of the remainder of the Charter, has for all practical purposes also remained dead-letter law.⁽³⁸⁾

In the Americas, the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights⁽³⁹⁾ has broken new ground by including a basic environmental right. Its Article 11 provides for everyone "to have the right to live a healthy environment"... So far, however, the Protocol has attracted only two ratifications (Suriname and Costa Rica) and thus has not entered into force.

Within the context of the Council of Europe, on the other hand, efforts to establish a human right to a healthy environment have stalled ever since a proposal to this effect was first made in the 1970s.⁽⁴⁰⁾ As noted before, in 1990, the Parliamentary Assembly, in recommending the preparation of a European charter and convention on environmental protection and sustainable development, called for the establishment of an environmental human right.⁽⁴¹⁾ However, to date, this recommendation has not been acted upon by the Committee of Ministers.

There are, to be sure, other international instruments that feature provisions on the protection of the environment for the specific benefit of all human beings or individual groups or peoples. For example, the ILO Convention on Indigenous and

(37) For a very critical view of the African Charter in general, on account of the vagueness of its provisions, its "clawback" clauses and the lack of adequate supervision, see Gittleman, "The Banjul Charter on Human and Peoples' Rights: A Legal Analysis", in C. Welch & R. Meltzer, eds., *Human Rights and Development in Africa* 152 (1984); see also Scoble, "Human Rights Non-Governmental Organizations in Africa: Their Problems and Prospects in the Wake of the Banjul Charter, *ibid.* 177.

(38) For recent pessimistic assessments of the Charter's effectiveness and an analysis of underlying reasons, see van Walraven, "Human Rights Developments in Africa: The Banjul Commission, Multipartyism and the Battle for Democracy," 9 *Netherlands Q. Human Rights* 192 (1991); and Welch, "The African Commission on Human and Peoples' Rights: A Five Year Report and Assessment", 14 *Human Rights Q.* 43 (1992).

(39) Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) of 14 November 1988, reprinted in 28 *ILM* 161, at 165 (1989).

(40) See Council of Europe, *Proceedings of the European Ministerial Conference on the Environment*, Vienna, 28-30 March 1973, 122; and Draft Protocol to the European Convention on Human Rights and Fundamental Freedoms, reproduced in A. Rosas et al., eds., *Human Rights in a Changing East-West Perspective* 229 (1990).

(41) See *supra* note 3.

Tribal Peoples⁽⁴²⁾ requires states to adopt special measures "as appropriate for safeguarding the...environment of the peoples concerned".⁽⁴³⁾ Similarly, in the 1991 Arctic Environmental Protection Strategy, the Arctic countries commit themselves to ensure the protection of the Arctic environment while protecting the culture of indigenous peoples.⁽⁴⁴⁾ But, once again, such instruments could hardly be relied upon as evidence supporting the existence of "international" environmental entitlements of individuals or groups, let alone of human rights.⁽⁴⁵⁾ Without regard to the merits or demerits of a dualistic conception of the relationship of international and domestic law, it must be said that these, or similar instruments, detail obligations of states arising among states parties. While these state obligations may enure to the benefit of individuals, they do not create individual rights,⁽⁴⁶⁾ the critical point being, of course, that the states parties cannot be said to have intended to create such individual entitlements.⁽⁴⁷⁾

In short, there is no hard evidence to suggest that states generally might have accepted a generic environmental human right. Its proponents must, therefore, base their case on evidence that is indirect⁽⁴⁸⁾, normatively "soft", or often exceedingly

(42) Convention Concerning Indigenous and Tribal Peoples in Independent Countries, ILO Covention 169, 1989, *text in* 28 *ILM* 1384 (1989).

(43) *Id.* art. 4, para.1.

(44) See Part 1 of the Arctic Environmental Protection Strategy, June 14, 1991, *text in* 30 *ILM* 1627 (1991).

(45) As to the distinction between "human rights" and other internationally guaranteed "individual rights" and "group" or "collective rights", *see infra* TAN 118.

(46) On the critical need to distinguish between "benefits" and "rights" flowing from an international agreement, *see also* A. Verdross & B.Simma, *Universelles Volkerrecht* 255-56 (3rd.ed. 1984). Thus, the issue of whether international obligations of states on behalf of individuals or groups can be viewed as establishing international individual or human rights, is of course, related to, but must be distinguished from, the question of whether such obligations are directly invocable by the individuals or groups concerned either on the international plane or in domestic proceedings. As to the need for distinguishing the existence of an individual's international right and his/her capacity to assert it in the international sphere, *see* H. Lauterpacht, *International Law and Human Rights* 27-28 (1973). As to the policy considerations underlying direct domestic applicability and invocability of treaty provisions bestowing benefits on individuals, *see generally*, Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis, 86 *AJIL* 310, at 317-18 (1992).

(47) Thus, unlike the treaty situation giving rise to the *Danzig Railway Officials* case, [1928] PCIJ Ser.B, No.15, at 17, which according to the Permanent Court of International Justice clearly evinced the state parties' intention to create "individual rights and obligations and enforceable by the national courts", no such intention can be gleaned from the above instruments.

(48) It is, of course, correct, as Dinah Shelton points out, that United Nations organs themselves have used an indirect approach and have avoided explicitly endorsing a generic environmental human right. *See* Shelton, *supra* note 2, at 112. However, this fact hardly strengthens the case for a generic environmental human right. Quite the opposite is the case: practice within the United Nations clearly reflects states' latent ambiguities and concerns related to the postulation of such a right.

limited in scope relative to the broad normative concept claimed. Some proponents of a generic environmental human right thus point to the fact that it is "derivable" from United Nations legal instruments or other "previously recognized human rights" as evidence of its present existence in customary international law.⁽⁴⁹⁾ While it is self-evident that human rights are normatively interrelated, existing human rights and their enjoyment are "different" from the proposed new environmental entitlement.⁽⁵⁰⁾ In other words, the existence of an established human right that is conceptually related, perhaps in some way even logically antecedent, to the claimed environmental entitlement, cannot be invoked dispositively to establish the latter's international normativity as "derived from," or "subsumed under," the former's. It is thus worth noting, for example, that in *Rayner v. United Kingdom* the European Commission of Human Rights held that Article 1 of Protocol No.1 which guarantees the right to the peaceful enjoyment of possessions, "does not, in principle, [also] guarantee a right to the peaceful enjoyment of possessions in a pleasant environment."⁽⁵¹⁾

Another illustration of this point involves the right to health. The fact that states have committed themselves internationally to recognize a human right to the protection of health, cannot be taken to imply that individuals also have a corresponding human right to a healthy environment. Much is being made in this context of practice under the European Social Charter of 1961⁽⁵²⁾ as supporting the validity of such a normative extension.⁽⁵³⁾ Article 11 of the Charter implies a right to the protection of health.⁽⁵⁴⁾ Over time, the Charter's Committee of Independent Experts has come to suggest that states be deemed to have discharged their obligation under Article 11, if they provide evidence of having taken *inter alia* "general measures aimed...at the prevention of air and water pollution, protection from radio-active substances, [and] noise abatement..."⁽⁵⁵⁾

What the Committee thus — modestly — emphasizes is that the states concerned have a general, and at that, an essentially procedural obligation that extends to environmental factors that could impair individual health. Article 11 itself does not lay down a substantive health objective, however vaguely defined. And for good reason: states would not support the creation of such a right.⁽⁵⁶⁾ Nor

(49) See Thorne, *supra* note 11, at 319.

(50) See Alfredsson & Ovsjouk, *supra* note 2, at 23.

(51) Appl. 9310/81, 47 D & R 5, at 14 (1986).

(52) 529 UNTS 89; Eur. T.S. No.35

(53) See, e.g., Cançado Trindade, *supra* note 2, at 59.

(54) "Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable".

(55) See Council of Europe, Committee of Independent Experts on the European Social Charter, *Conclusions I*, 1969-70, 59, para.3.

(56) Note in this context, the continued lack of action by the Committee of Ministers of the Council of Europe on the recommendations of the Parliamentary Assembly, *supra* note 3.

does the Committee's interpretation imply the existence of such an objective which clearly would mark a qualitatively different, much more stringent obligation for states. It might be noted, moreover, that the Committee's determinations of states' compliance with the Charter are formally not binding.⁽⁵⁷⁾ In short, practice under Article 11 cannot be introduced in support of the existence of an environmental entitlement that contains a quality objective, such as the alleged "human right to a healthy environment".

As the evolution of human rights⁽⁵⁸⁾ is "gradual and largely incremental",⁽⁵⁹⁾ continuous promotion in various fora, by a variety of actors, is a characteristic aspect of the process by which international legal recognition of the claimed right is being secured. However, it is precisely because of the nature of this evolutionary process that international environmental and human rights observers must pay special attention to the normative dividing line and avoid misrepresenting mere aspirational environmental human rights concepts for "hard law". The burden of proof regarding international recognition of environmental human rights claims cannot be discharged by a talismanic invocation of non-binding resolutions or other documents or policy proposals. In the final analysis, what is required is, as pointed out before, evidence of unequivocal support by states. After all, international law is, as Ian Brownlie puts it, "about the real policies and commitments of governments, it is not about the incantations of secular or religious morality".⁽⁶⁰⁾ Thus, even if allowance is being made for the fact that today the international law-making process is more consensual, less consent-based,⁽⁶¹⁾ it would be disingenuous to propose the existence of a normative concept with such fundamentally important implications for the allocation of socio-economic and environmental decision-making, as a generic environmental human right, unless there is explicit state practice endorsing it.

(57) Besides, the Committee's responsibility, at least thus far, has been shared with the Charter's Governmental Committee. The 1991 Protocol Amending the European Social Charter, however, entrusts this determination exclusively to the Committee of Independent Experts while the Governmental Committee's function is reduced to one of primarily advising the Committee of Ministers with regard to recommendations to states in cases of non-compliance as determined by the Committee of Independent Experts. See Protocol Amending the European Social Charter, done at Turin, October 21, 1991, reproduced in 31 *ILM* 155 (1992).

(58) The idea that human rights are not hewn in stone but evolve and expand in response to social change, appears to be well accepted now. See, e.g., Bilder, *supra* note 18, at 175; Alston, *supra* note 18, at 607; Flintermann, "Three Generations of Human Rights" in *Human Rights in a Pluralist World*, *supra* note 15, at 75, 76. See generally, Fields & Narr, "Human Rights as a Holistic Concept", 14 *Human Rights Q.* 1, at 9-10 (1992).

(59) J. Donnelly, *Universal Human Rights in Theory and Practice* 223 (1989).

(60) Brownlie, "The Rights of Peoples in Modern International Law", 9 *Bull. Australian Soc'y Legal Phil.* 104, at 116 (1985), quoted in Alston, "Making Space for New Human Rights: The Case of the Right to Development", 1 *Harvard Human Rights Yb.* 3, at 5, fn.13 (1988).

(61) See, e.g. O. Schachter, *supra* note 17, at 10-14.

This is, of course, not to deny that human rights instruments may have significant operational implications for environmental protection purposes. After all, as a legal challenge, environmental protection is a cross-sectoral enterprise; it cuts across many different fields of law, including human rights law.⁽⁶²⁾ Thus, environmental concerns may well be redressed incidentally — par ricochet,⁽⁶³⁾ so to speak — by application of established human rights norms. For example, in *Arrondelle v. United Kingdom*, a case that was eventually settled amicably, the European Commission of Human Rights found admissible the applicant's claim that Article 8 of the European Convention — regarding the right to respect for privacy — might be violated on account of airport noise pollution.⁽⁶⁴⁾

But it is one thing to acknowledge that human rights provisions are amenable to being, and have been, utilized to secure incidental environmental objectives. It is something altogether to proceed from this evidence to the postulation of an existing fundamental human right to a clean environment.

In sum, international practice does not support the claim of an existing generic human right to a healthy environment. The evidentiary basis that proponents of such a right rely upon is simply too narrow or normatively too weak to lend itself to that major normative extrapolation that a human right to a healthy environment would undoubtedly represent.

2. *The Probative Value of Domestic Legislation*

In a second line of evidentiary argument, proponents of an existing human right to a clean environment, point to a trend towards enshrining environmental rights in national constitutions. There is no denying that the number of states which have already enacted or are seriously considering such constitutional provisions is rising.⁽⁶⁵⁾ However, this type of evidence, without more, i.e., without an indication

(62) In German, environmental law is thus appropriately referred as constituting a "Querschnittsmaterie".

(63) See G. Cohen-Jonathan, *La convention européenne des droits de l'homme* 84 (1989).

(64) Appl. 7889/77, *Arrondelle v. United Kingdom*, 19 D & R 186, at 198 (1980); and 26 D & R 5 (1982); and see Application No. 9310/81, *Baggs v. United Kingdom*, 43 D & R 13 (1985). But see, e.g., *Case of Powell and Rayner*, ECHR (3/1989/163/219), Judgment of 21 February 1990, another airport noise pollution case, in which the European Court declined to hold that the British government had violated Art.8 in respect of either applicant.

(65) Recent examples of this "constitutionalization" of environmental rights include Art.79 of the 1991 Constitution of Colombia which provides for "every person's right to a healthy environment"; Art.30 of South Africa's proposed Bill of Rights which would establish a far-reaching constitutional entitlement with regard to the environment; or Art.29 of the Declaration of Human Rights and Freedoms adopted by the former Soviet Congress of People's Deputies on September 5, 1991, which proclaimed *inter alia* a person's "right to a favorable natural environment...". For surveys of these constitutional developments, see Kiss, *supra* note 2, at 79; and Brandl & Bungert, "Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad", 16 *Harvard Env.L.Rev.* 1 (1992). See also

of actual domestic practice consistent with these provisions, remains largely irrelevant as to the existence of the basic environmental entitlement here under consideration: "[C]onstitutions with human rights provisions that are little more than window-dressing can hardly be cited as significant evidence of practice or 'general principles' of law".⁽⁶⁶⁾

An analysis of the effectiveness of constitutional environmental entitlements in domestic practice tends to show indeed that most of the provisions appear to be dead letter law:⁽⁶⁷⁾ while the formal constitutionalization of environmental entitlements is consistent with the myth of societal recognition of environmental protection as a priority, the underlying "operational code", as evidenced either in many of the environmental provisions' inherent ambiguities, or the absence of enforcement mechanisms, etc., tends to signal an unwillingness to enforce that standard or recognition of its socio-economic or political unsuitability as an operational legal concept.⁽⁶⁸⁾

In terms of both the present-day existence *vel non* of a corresponding international legal norm, or even as an indication of international public policy, little, if any, probative value can therefore be said to attach to the growing number of domestic constitutional environmental rights. If, therefore, the assumption must be that with regard to a generic environmental human right — at least in the sense of a customary international entitlement — we are still at the stage of advocacy,⁽⁶⁹⁾ it is not only advisable but essential to review again the intrinsic merits of postulating a human right to a "clean" or otherwise meaningfully qualified environment.

B. The Alleged Right from a Policy Perspective

1. The Normative Ambiguity of a Generic Environmental Entitlement.

One of the more problematical aspects of a proposal for a generic environmental human right is the latter's inherent normative ambiguity. Even as

Kromarek, "Quel droit à l'environnement? Historique et développements", in P. Kromarek, ed., *Environnement et droits de l'homme* 113 (1986).

(66) O. Schachter, *supra* note 17, at 336.

(67) For example, in their survey of 10 countries of the First and Third World, Brandl & Bungert conclude that the constitutions of only a minority of these actually recognize a "fundamental right to environmental protection", but that "even in these countries this 'right' is either unenforceable or enforceable only to a limited extent." See *supra* note 65, at 81-82.

(68) For an exposition of the crucial role of *lex imperfecta* and *simulata* in expressing the distinction between myth system and operational code, see M. Reisman, *Folded Lies: Bribery, Crusades and Reforms* 29-33 (1979).

(69) See also Klein, "Recht auf Umweltschutz als völkerrechtliches Individualgrundrecht?", in J. Schwarze & W. Graf Vitztum, eds., *Grundrechtsschutz im nationalen und internationalen Recht* 251 (1983); Dupuy, *supra* note 2, at 404-05, 413; Shutkin, "International Law and the Earth: The Protection of Indigenous Peoples and the Environment", 31 *Va.J.Int'l L.* 479, at 505 (1991).

refined a formulation as the one adopted in the draft ECE Charter,⁽⁷⁰⁾ — "every person's right to an environment adequate for his general health and well-being" — fails to reduce significantly, let alone to eliminate, the normative relativity intrinsic to such a concept.

The point of this observation is not to suggest that this lack of precision might render the proposed environmental entitlement non-justiciable and thereby to call into doubt such a provision's basic suitability as an effective international legal standard. After all, in international law in general, and human rights law in particular,⁽⁷¹⁾ formal justiciability cannot be equated with "international enforceability" or, for that matter, with international normativity. Rather, the point here is that, on top of "normative indeterminacy" per se, any generic environmental human right "suffers" from the fact that it signals a very broad entitlement, one that might turn into an extremely effective legal platform for internationalizing national decision-making in areas that represent the core of traditional state sovereignty. Given these implications, it is safe to assume that states in general would be reluctant to support policies or measures promoting implementation of such an "intrusive" human rights standard. Without such steps, however, a generic environmental human right is bound to fall short as an operationally meaningful international standard against which to assess state conduct. At the same time, it is, somewhat paradoxically, this very normative ambiguity that may well provide an incentive for states to formally recognize a generic environmental entitlement as a new human rights standard.⁽⁷²⁾

The exact limits of any given right or obligation, of course, will depend on context. This is, perhaps, more generally evident in the case of international legal norms than domestic ones. However, a context-dependent human right to a healthy environment — without further qualification — implies an entitlement of potentially widely varying contents. Indeed, one's "environmental human right" is likely to be of a different nature altogether, depending on where one is located, in the North as against the South, in a developing country or a developed nation, etc. This inherent relativism renders the claimed human right also potentially meaningless as an international normative standard:⁽⁷³⁾ The standard turns into an

(70) See *supra* note 4.

(71) On this point, see, e.g., Kiss, "Définition et nature juridique d'un droit de l'homme à l'environnement", in P. Kromarek, ed., *supra* note 65, at 13, 24.

(72) States might well agree to formally recognize a generic environmental human right in the safe knowledge that, without more, their action would not create an effective standard of states' international accountability while, at the same time, they would be seen as championing both environmental and human rights causes.

(73) For an illustration of the problem of asymmetrical rights and obligations with regard to core provisions of an international legal regime, see Handl, "Environmental Security and Global Change: The Challenge to International Law", 1 *Yb.Int'l Env.L.* 3, at 8-10 (1991).

empty formal shell. At the same time it loses a fundamental defining characteristic of a human right, i.e., universal validity.⁽⁷⁴⁾

Many commentators are acutely aware of this problem. For example, Alfredson and Ovsiouk acknowledge that "[c]urrent work on the right to a clean and healthy environment as a human right is still vague and inadequate as to the formulation of standards and practical methods of implementation."⁽⁷⁵⁾ Some proponents, however, might counter by pointing to the fact that problems of interpretation and application arise also with regard to established human rights, for example over such terms as "due process", "ordre public", "national security", etc.⁽⁷⁶⁾ Yet, normative variations due to context-dependent interpretations of these concepts represent "limitations" on or "derogations" from human rights, i.e., exceptional restrictions that are not "to swallow or vitiate the right itself."⁽⁷⁷⁾ In other cases, and unlike the situation involving a generic environmental entitlement, the contextually determined human right is a narrowly focussed one, a case in point being the "right to primary education".⁽⁷⁸⁾

There are, admittedly, other human rights claims of a seemingly similarly indeterminate nature which are commonly assumed to be on the point of gaining formal international legal recognition as, for example, the "right to development".⁽⁷⁹⁾ But the legal status of these entitlements does not augur well for a generic environmental human rights proposal. Consider the right to development: its lack of normative precision⁽⁸⁰⁾ coupled with its broad socio-economic

(74) Notwithstanding the implications of cultural relativism for a context-sensitive application of human rights standards, there is general agreement that the basic concept of human rights is one of universal applicability. For example, Fields & Narr observe that "to the extent that the human being is naturally a social and political animal, human rights have a universal applicability": see *supra* note..., at 20. Similarly, An-Nam admits that "despite their apparent peculiarities and diversity, human beings and societies share certain fundamental interests, concerns, qualities, traits and values that can be identified and articulated as the framework for a common "culture" of universal human rights": An-Nam, "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights", in A. An-Nam, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* 19, at 21 (1992). See also J. Donnelly, *supra* note 59, at 124. Thus McDougal, Lasswell and Chen's conception of human rights is one that "transcend[s] all differences in the subjectivities and practices of peoples, not merely across nation-state lines, but as between the different cultures of the larger community": *supra* note 13, at xvii.

(75) See *supra* note 2, at 25.

(76) See Kiss, *supra* note 2, at 83-84; and Shelton, *supra* note 2, at 135.

(77) See Kiss, "Permissible Limitations on Rights", in L. Henkin, ed., *The International Bill of Rights: The Covenant on Civil and Political Rights* 290 (1981).

(78) This example is given by Alston, *supra* note 18, at 614; and is approvingly cited by Cañado Trindade as an illustration of the inevitability, indeed normalcy of a contextual application of broad human rights concepts. See Cañado Trindade, *supra* note 2, at 63.

(79) See, e.g., I. Brownlie, *Principles of Public International Law* 579 (4th ed., 1990).

(80) Thus Philip Alston notes that notwithstanding the 1986 Declaration, "[f]urther precision as to the rights and obligations which are entailed is clearly required": Alston, *supra* note 14, at 37.

implications, continues to be viewed by many as a serious obstacle to accepting its international legal, as against moral, validity. Indeed, the right to development remains highly controversial, notwithstanding its specific endorsement and amplification by the General Assembly.⁽⁸¹⁾ Thus, even staunch supporters of its formal recognition in present international law acknowledge that the right to development remains essentially ineffective.⁽⁸²⁾ The same fate is likely to await a generic human right to a healthy environment.

There is another, already alluded to, negative aspect to the fact that any operationalization of a generic environmental human right would be highly context-dependent: the concept's inevitably normative relativity would undermine the notion of human rights generally. It devalues the symbolic value of the traditional human rights label that implies a core notion of a universally valid legitimate claim.⁽⁸³⁾ Human rights lawyers therefore should be, and many are indeed, concerned about the proposed extension of the concept — in generic fashion — to the environmental agenda and the resulting debasing of the human rights "currency".

Moreover, as a matter of strategy, an effective promotion of both human rights and environmental protection objectives would imply that efforts be focussed on securing new, and expanding on existing, narrowly defined environmental rights of individuals or groups. Those who call instead for recognition of a broad generic environmental human right are putting the cart before the horse: for the reasons alluded to above, formal international recognition of a generic environmental entitlement cannot evolve into an effective environmental human rights standard, until and unless its specific normative implications, both procedural and substantive, have been authoritatively clarified;⁽⁸⁴⁾ or states entrust the task of putting flesh on the skeletal, because indeterminate, generic environmental human right to an institutionalized international process. But such a surrender of sovereignty is an unlikely prospect at best.

(81) See General Assembly resolution 41/128 of December 1986, adopting the Declaration on the Right to Development.

(82) Thus Bedjaoui admits that "[i]t is clear...that a right which is not opposable by the possessor of the right against the person from whom the right is due is not a right in the full legal sense. This constitutes the challenge which the right to development throws down to contemporary international law...": Bedjaoui, "The Right to Development", in A. Bedjaoui, *International Law*, *supra* note 2, at 1177, 1193.

(83) See Bilder, *supra* note 18, at 174-75.

(84) For example, Prof. Shelton, who in principle supports the idea of a generic right to a healthy environment, acknowledges that ultimately specific substantive environmental standards are indispensable to render such an entitlement operational. See Shelton, *supra* note 2, at 135 & 138; and Dupuy, *supra* note 2, at 410-11.

2. *The Appropriateness of a Generic Human Rights Platform for Vindicating Collective Environmental Interests.*

Enjoyment of human rights is, of course, premised on a modicum of environmental stability. This axiomatic relationship, however, cannot mask the fact that, as the focal point of a human rights campaign, a generic environmental entitlement is an ill-considered proposition for a number of additional reasons.

Narrowly defined environmental objectives may, of course, be vindicated through the assertion of individual human rights as in a situation in which environmental conditions pose a threat to life or health.⁽⁸⁵⁾ Likewise, as mentioned before, environmental protection objectives may be incidentally vindicated in human rights complaints.

The proposed generic environmental human right, by contrast, would make broad environmental policy decisions, such as standard-setting — the determination of what is a "healthy environment" or what constitutes an "adequate margin safety", etc. — , a central concern of an individual-right-based process. Thus, while its various formulations clearly bespeak an individual right,⁽⁸⁶⁾ the thrust of a generic entitlement to a clean or healthy environment is to vindicate a collective interest. Conversely speaking, while the environmental interests/rights to be protected work primarily to the benefit of the collectivity,⁽⁸⁷⁾ its operationalization would occur at the level of individual rights complaints.⁽⁸⁸⁾ The nature of the proposed "right to a healthy environment" is thus indeed, as Prof. Cançado Trindade acknowledges, "multifaceted".⁽⁸⁹⁾ Its inherent conceptual tension, however, very much calls into

(85) See, e.g. the case involving the storage of nuclear waste near residential areas, Communication No. 67/1980 on behalf of the present and future generations of Port Hope, Ontario, to the U.N. Human Rights Committee, alleging a violation of Art.6 (1) of the U.N. Covenant on Civil and Political Rights. See 2 *Selected Decisions of the Human Rights Committee under the Optional Protocol*, U.N. Doc. CCPR/C/OP2, 20 (1990). At times, individual and group rights perspective might, of course, merge entirely with environmental concerns as, for example, in the context of siting waste dumps or hazardous industrial facilities, or of the forced migration of indigenous people as a result of environmentally intrusive development projects.

(86) See *supra* TAN 3-6 & 35-39.

(87) This is also why the right to a healthy environment has frequently been viewed as falling into the "collective rights" category. See, e.g., Vasak, "Le droit international des droits des hommes", 140 *RdC* 333, at 344-45 (1974).

(88) Thus many commentators view the "right to a healthy environment" as an individual right. See Galenkamp, *supra* note 1, at 300-01. Prof. Kiss, in defining the entitlement as a "right to the conservation of the environment", concludes that, as regards its implementation, "[a]insi conçu, il peut être assimilé à la plupart des autres droits garantis": Kiss, *supra* note 2, at 84. Bugers notes that, in principle, the "right to an unspoiled environment" is held by the individual, not collectivities: Bugers, *supra* note 15, at 73. Cf. also Cançado Trindade, *supra* note 2, at 64.

(89) Cançado, *supra* note 2, at 66.

doubt the appropriateness or usefulness of the proposed entitlement as a basis for vindicating environmental protection objectives.

(i) *The Individual Claimant and the Focus of the Process*

Generally speaking, the role of an individual as a claimant in a situation where his/her legal interest/right merges with, indeed is overshadowed by the interests of society at large, is a limited one. This is not only typical of domestic legal proceedings,⁽⁹⁰⁾ but is also true of proceedings on the international plane, including proceedings which involve claims that, at least *lato sensu*, fall into the human rights category.⁽⁹¹⁾ For example, the United Nations Human Rights Committee recently accepted Canada's contention that under the Optional Protocol a complainant, as an individual, did not have standing to claim to be a victim of an alleged violation of the right to self-determination, a collective right, enshrined in Article 1 of the Covenant.⁽⁹²⁾ The fact that individuals are capable of playing only a limited role with regard to situations of overlapping individual and collective interests/rights is highlighted also by the recommendation of the recent Council of Europe Conference on the European Social Charter that a system of collective complaints be established,⁽⁹³⁾ a step which, in the words of Prof. Harris, "would do as much as anything to enhance the impact of the Charter".⁽⁹⁴⁾

Limitations upon an individual's role as a claimant in this sense, are especially common in the context of environmental protection proceedings. Thus, domestic environmental decision-making — and there is little experience with how the above mentioned generic constitutional entitlements might be operationalized at the level of individual claims⁽⁹⁵⁾ — shows that in these types of cases, the invocation of broad-based individual entitlements is discouraged.⁽⁹⁶⁾

(90) See *infra* TAN 95-98.

(91) Thus, some commentators formally classify the "right to self-determination" as a human right": See Burgers, *supra* note 15, at 73.

(92) See Communication No.167/1984, Bernard Ominayak, Chief of the Lubicon Band v. Canada (Views adopted on 26 March 1990 at the Thirty-Eighth Session), in *Report of the Human Rights Committee*, Volume II, Annex IX, 9, para. 13.3, GAOR, 45th Sess., Suppl. No.40 (A/45/40) (1990).

(93) See Council of Europe Ministerial Conference on the European Social Charter, Turin, 21-22 October 1991, Final Resolution of the Conference, text in 31 *ILM* 161, at 162 (1992).

(94) Harris, "Introductory Note", *ibid.* 155, at 156.

(95) See Brandl & Bungert, *supra* note 65.

(96) Instead, the role of individuals tends to be limited to ensuring compliance by the public (as well as possibly the government itself) with *a priori* well-defined environmental protection standards. Examples of such recently enacted limited, functional entitlements of individuals include the citizen suit provision of the 1990 U.S. Clean Air Act, § 304(a)(1-2), 42 U.S.C. § 7604(a)(1-2). See also Article 88 of the 1991 Colombian constitution: see Sarmiento, "Colombia", 2 *Yb.Int'l' Env.L.*

One obvious reason for this is that the focus of inquiry in a case involving an individual complainant is by definition too limited to ensure consideration of all societal interests at stake in the disposition of the claim. Thus, in an exemplary decision, *Boomer v. Atlantic Cement Company*,⁽⁹⁷⁾ a United States court found that a nuisance-type approach to determine an individual plaintiff's degree of protection against ambient air pollution was ill-suited: its structure of the process failed to make allowance for taking into account evolving national policy on the scope of air pollution rights.⁽⁹⁸⁾ A further consideration was, of course, that a case-by-case development of general environmental standards in response to individual complaints would be a very inefficient process.

The proposed generic human rights concept must be faulted on both these counts in that it offers exactly the prospect of a too narrowly focussed, piece-meal approach to setting general environmental policy. Thus, as an individual's entitlement, the concept does not offer a platform from which to push the general environmental agenda, nor does it provide individuals with access to international fora to enable them, at the international level, to offer a balancing perspective, a counterweight, as it were, to official governmental positions on environmental matters.

Whether or not, as some suggest, such an entitlement might give rise only to claims that can be asserted collectively through political means,⁽⁹⁹⁾ the fact is that many of the objectives that it might be intended to serve, can already be realized through alternative processes. Consider for example, the insertion of nonstate perspectives into the international environmental decision-making process: non-governmental organizations (NGOs) already successfully utilize existing *de-facto* avenues to international fora for that purpose. Indeed, today, NGOs fulfill an enormously important function in the application and enforcement of international environmental legal standards. They have become involved in the gathering and dissemination of environmental information, policy advocacy and the appraisal of failure or success of policies in the light of avowed public policy objectives. Most

260 (1991); and *id.* "Popular Action and the Defense of the Environment in Colombia", in S. Bilderbeek, ed., *Biodiversity and International Law* 184 (1992).

(97) 257 N.E. 2d 870 (1970).

(98) "A Court should not try to...[redress air pollution] as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit. It is a direct responsibility for government and should not thus be undertaken as an incident to solving a dispute between property owners and a single cement plant...": *Id.* at 871.

(99) To this effect, see, e.g., Burgers, *supra* note 15, at 73.

significant among their activities, is monitoring states' compliance with international environmental obligations.⁽¹⁰⁰⁾

States, in general, have shown a disposition towards accepting NGOs as partners in international environmental protection efforts.⁽¹⁰¹⁾ These patterns of cooperation need to be strengthened and further refined. This could be achieved through procedural steps, such as the formal granting of access to decision-making bodies, etc.⁽¹⁰²⁾ Moreover, the prospect of a post-UNCED global environmental authority, such as a Commission on Sustainable Development,⁽¹⁰³⁾ which would assume the monitoring and review of national policies as to their consistency with international guidelines on "sustainability", diminishes significantly the case for a separate human rights-based environmental review process. While to date the parameters of these UNCED proposals remain vague, it is entirely conceivable that, apart from states, NGOs and others, possibly also individuals, might be granted standing to make representations before such a Commission.⁽¹⁰⁴⁾ In such a case, because they would focus on narrowly defined issues, claims by individuals would be qualitatively different from any generic environmental human rights claims. As a matter-of-fact, an international system of environmental supervision of his kind would resemble closely what has proved to be a politically acceptable, because workable, approach to protecting collective environmental interests domestically.

(100) See Handl, *supra* note 73, at 16-19; Sachariew, "Promoting Compliance with International Environmental Standards: Some Reflections on Monitoring and Reporting Systems", 2 *Yb.Int'l Env.L.* ____ (1991); and Wirth, "Legitimacy, Accountability, and Partnership: A Model for Advocacy on Third World Environmental Issues", 100 *Yale L.J.* 2645 (1991). On the role of NGOs in the Latin American context, see, e.g., F. Tudela, *Hacia un nuevo pacto internacional para el desarrollo sostenible: Perspectivas de América Latina y el Caribe*, 8-11 (Banco Interamericano de Desarrollo, 1992).

(101) See, for example, the recent statement on NGOs in the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (para.43), in 30 *ILM* 1670, at 1690-91 (1991); Rules 76-77 — on consultations with NGOs and representation of these organizations — of the Rules of Procedure of the African Charter on Human and Peoples' Rights, *text in 9 Human Rights L.J.* 333, at 342 (1988). Admittedly, attempts at gaining formal international recognition of the role of NGOs, may have been set back recently in that the present version of the Rio Declaration, *supra* note 9, dropped an earlier version's explicit reference to the role of NGOs in ensuring sustainable environmental management.

(102) See, generally, Sands, "The Environment, Community and International Law", 30 *Harvard Int'l L.J.* 393, at 412-17 (1989); and "The Role of NGOs in the Effectiveness of International Environmental Law", in S. Bilderbeek, *supra* note 96, at 157-183.

(103) See, e.g., *Elements for Chapter V of Agenda 21: Institutional Arrangements, Draft Proposal prepared by the Issue Coordinator Ambassador Razali Ismail (Malaysia), for Working Group III, Preparatory Committee for the United Nations Conference on Environment and Development, Fourth Sess., New York, 2 March-3 April 1992, Working Group III, Agenda Item 4, U.N. Doc. A/CONF.151/PC/WG.III/CRP.3, 4-5, 23 March 1992.*

(104) See *id.* at 4, para.13 (d), which envisages that the Commission would "receive relevant feedback from competent non-governmental organizations..."

In conclusion, the proposal of a generic environmental human right, to the extent that it is driven by a desire to "open up" the international environmental decision-making process, or to ensure better monitoring and supervision of states' environmentally sensitive activities at home, diverts attention from the task of building upon already existing structures and mechanisms or institutionalizing a cross-sectoral global environmental review mechanism; it would result in duplicative efforts without ever coming close to bringing about the same environmental benefits as would, for example, efforts spent on enhancing the formal status of NGOs within existing fora and processes, or on establishing a global environmental review process.

(ii) The Adequacy of Human Rights Decision-Making Bodies

There is a second, independent consideration related to the nature of the interest involved, that militates against conceptualizing environmental rights from a generic human rights viewpoint, namely the possibility that its implementation could overtax any international human rights body likely to face a generic environmental right-based complaint.

On the domestic level, specific environmental policy-making tends to be delegated to special technical bodies, given the intrinsic complexity of environmental issues. For example in the United States, basic outlines of environmental policy might be set by the legislature while detailed implementing regulations might be entrusted to administrative agencies which, in carrying out this mandate, enjoy wide discretion not subject to judicial review.⁽¹⁰⁵⁾ A similar functional specialization appears to be evolving on the international plane: states increasingly resort to environmental framework conventions and implementing protocols, delegating significant operational decisions to the respective conference of the parties, etc.⁽¹⁰⁶⁾ Fact-finding, the application and, even adaptation, of legal standards, as well as dispute settlement functions become internalized within the regime.⁽¹⁰⁷⁾

In short, there is general recognition that in the field of environmental protection, decision-making — except as it regards basic policy parameters — is best entrusted to specialized or technical fora — the administrative agencies, domestically, the conferences of the parties, as repositories of specialized

(105) See *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, at 843-44 (1984).

(106) For a discussion, see, e.g., Handl, *supra* note 73, at 5-7.

(107) See, e.g., Gehring, "International Environmental Regimes: Dynamic Sectoral Legal Systems", 1 *Yb.Int'l Env.L.* 35 (1990).

knowledge, in the case of international environmental regimes.⁽¹⁰⁸⁾ By contrast, the generic environmental human right proposal would presumably imply that alleged violations be dealt with in international human rights fora, few, if any of which might be able to discharge efficiently the task of deciding whether a human right based on the generic entitlement has been violated or not.

3. The Appropriateness of the "Human Rights" Label

Apart from the previously noted undesirability of overextending the "human rights" label and the resulting devaluation of the legal-political signalling function of human rights designations in general,⁽¹⁰⁹⁾ there are a couple additional reasons for why the use of the notion "environmental human rights" is problematical.

Firstly, the term epitomizes a conceptualization of environmental protection objectives as part of the human rights agenda. This in turn fosters an anthropocentric view of the environment which offers no guarantee against global environmental degradation and instability. For a human rights-based approach to the environment — even one that reflects sensitivity to intergenerational concerns — may well be strictly instrumentalist in the sense of subordinating all aspects of nature to the human enterprise.⁽¹¹⁰⁾ Besides, the very label of "human rights" connotes "species chauvinism",⁽¹¹¹⁾ no matter how enlightened the underlying definition of the "human right". The legitimacy of, indeed the moral obligation to espouse, a more discriminating environmental point-of-view, i.e., one that recognizes the intrinsic merit of protecting nature for nature's sake, has not only been endorsed in the literature,⁽¹¹²⁾ but has also found express recognition in several international legal documents.⁽¹¹³⁾

Secondly, in the past the use of the human rights label was, at least to some extent, inspired by the need to highlight "unsystematic" entitlements in an interstate legal system. As individuals, as well as other actors, increasingly come into their own rights, the very nature of the "international" legal system is undergoing change.

(108) See *id.* at 38-42; and cf. Sachariew, *supra* note 100.

(109) See *supra* TAN 83.

(110) See, e.g., Handl, "Remarks" in *Contemporary International Law Issues: Sharing Pan-European and American Perspectives, Proceedings of the Joint ASIL/NVIR Symposium, July 4-6, 1991*, 41-42 (1992).

(111) See D'Amato & Chopra, "Whales Their Emerging Right to Life", 85 *AJIL* 21, at 22 (1991).

(112) See, e.g., C. Stone, *Earth and Other Ethics: The Case for Moral Pluralism* (1987); and D'Amato & Chopra, *supra* note 111. Cf. also Shelton, *supra* note 2, at 109.

(113) For example, the World Charter for Nature stipulates that "[e]very form of life is unique, warranting respect regardless of its worth to man": GA res. 37/7, U.N. Doc. GAOR, 37th Sess., Supp.51 (A/37/51) 31. Emphasis added.

Thus individual and group entitlements, such as those of indigenous peoples,⁽¹¹⁴⁾ are an increasingly common phenomenon of "international law".⁽¹¹⁵⁾ The "human rights" designation, therefore, should not be used indiscriminately to mark any and all instances and forms of such novel empowerment of individuals. Indeed, if we are experiencing a general reversal of the mediate position of individuals in what for the lack of a better word we continue to call "international law,"⁽¹¹⁶⁾ it might be important to distinguish between state and group or collective rights as well as individual rights,⁽¹¹⁷⁾ not all of which are or will be "human rights" in the narrow sense, i.e., fundamental rights of individuals.⁽¹¹⁸⁾

C. Informational and Participatory Rights

Internationally guaranteed, specific environmental rights of individuals, such as informational and participatory rights can be understood as a refinement of established political or civil human rights or as novel human rights. Perhaps they should be called "individual rights", plain and simple. Whatever the terminology,

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- (114) See, e.g., the Convention Concerning Indigenous and Tribal Peoples in Independent Countries of 1989, *text in 28 ILM* 1384 (1989). For further references see J. Crawford, ed., *supra* note 17, at 178-212.
- (115) See, e.g. the reference to "indigenous people" in Principle 21 of the Rio Declaration, *supra* note 9. See, generally, J. Crawford, ed., *supra* note 17; Barsh, "Indigenous Peoples: An Emerging Object of International Law", 80 *AJIL* 369 (1986); and Torres, "The Rights of Indigenous Populations: The Emerging International Norm", 16 *Yale J.Int'l L.* 127 (1991).
- (116) These new unsystematic rights may well signal a process of a return to the pre-19th century Blackstonian, the then traditional notion of the "law of nations", i.e. *ius gentium* ("a generalized system of municipal law") vs. "international law," or *ius inter gentes* — the statist conception of international law. Note that a classic definition of "*ius gentium*" is "a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes....in that intercourse that must frequently occur between two or more independent stes, and the individuals belonging to each:" W. Blackstone, *Commentaries on the Laws of England* 67 (1765-1769, University of Chicago ed. 1979), quoted in Janis, "Jeremy Bentham and the Fashioning of 'International Law'", 78 *AJIL* 405, at 407 (1984). See also Parry, "Some Considerations Upon the Protection of Individuals in International Law", 90 *RdC* 653, at 698 (1956). Bentham deliberately changed Blackstone's fundamental (and correct) observation that the "law of nations" applied to individuals as well as states. See, e.g., Janis, *supra*, at 405.
- (117) See also Galenkamp, *supra* note 1, at 295-96.
- (118) This is not to suggest the existence of a hierarchy of human rights in present international law. Prof. Meron's critical comments in this respect are well taken: See Meron, *supra* note 1, at 7-8. Rather the use of the term "fundamental" rights as advocated here, is reserved for those positive human rights that conceptually have, as, for example, van Boven implies, a natural law foundation. See van Boven, "Dinstinguishing Criteria for Human Rights", in K. Vasak & P. Alston, eds., *The International Dimensions of Human Rights* (vol.1) 43, at 44 (1982). Without pretending to suggest criteria to determine which rights might fall into which category, it can argued that international human rights law is likely to evolve towards the an eventual differentiation — with clear normative implications — between fundamental and other individual/human rights.

these rights represent the pivot in a trilateral relationship of individual/human rights, democracy and environmental protection.⁽¹¹⁹⁾ As such they warrant our unreserved endorsement as internationally protected rights: their normative reach is well defined, their claim to potential universal validity believable.

It is a truism that environmental degradation, and in particular non-sustainable development practices, constitute a social problem, whose resolution requires the cooperation of society at large. It cannot be resolved by governmental *fiat* but instead presupposes broad public participation, the realization, at least to a substantial degree, of an open society. Citizens must have access to pertinent environmental information as well as to relevant environmental decision-making fora.

The various UNCED preparatory texts call for recognition of such informational and participatory rights of the public in the final Conference documents.⁽¹²⁰⁾ So does the present version of the Rio Declaration.⁽¹²¹⁾ International public policy on this issue has been authoritatively defined as, for example, in General Assembly resolution 42/186,⁽¹²²⁾ or Article 23 of the World Charter for Nature.⁽¹²³⁾ All these documents signal recognition in principle of the fundamental importance of extending participatory democracy to local and national environmental decision-making processes to ensure success at protecting the global ecological system as a whole.

In many countries citizens, indeed any individual as well as interest group irrespective of nationality, enjoy unrestricted access to public decision-making processes related to the environment. Similarly, as regards access to environmental information — at least to the extent such information is in the possession of public authorities — is already available as a matter of right in many of the same countries. By the end of 1992, freedom of access to information on the environment, should become a legal reality throughout the European Community.⁽¹²⁴⁾

On the international plane itself, the traditional principal focus on ensuring "equal right of access" of foreign residents to domestic decision-making processes

(119) On this interrelationship, see, e.g., Fields & Narr, *supra* note 58, at 12.

(120) See, e.g., the 1990 Bergen Ministerial Declaration on Sustainable Development in the ECE Region, para.16(g), reprinted in *1 Yb. Int'l Env.L.* 430 (1990).

(121) See Principle 10, *supra* note 9.

(122) See para. (h) of General Assembly resolution 42/186 of December 11, 1987, relating to the *Environmental Perspective to the Year 2000 and Beyond*.

(123) "All persons...shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment...": see *supra* note 113.

(124) This will be largely due to the 1990 EC Council Directive that will have to be implemented by that time. See EC Council Directive on Free Access to Environmental Information, EC *O.J.* 1990 No L 158/56, 23.6.1990.

and to information held by public authorities,⁽¹²⁵⁾ has shifted to guaranteeing these rights vis-à-vis domestic and foreign residents alike.⁽¹²⁶⁾ Thus far, this development appears sectorally limited.⁽¹²⁷⁾

However, there is no denying the emergence of at least regional community expectations to the effect that such access amounts to an internationally guaranteed right,⁽¹²⁸⁾ even though, now and then, there occur unexpected set-backs in the legal development towards realization of these "procedural rights" of individuals.⁽¹²⁹⁾

Human rights and environmental lawyers ought to strive to fully secure these rights regionally and to work towards their recognition as globally invocable entitlements. This ought to be a matter of priority. For it is these individual rights as well as other group rights, such as those of indigenous peoples, that are located at a crucial juncture of environmental protection and respect for human dignity. It is the securement of these rights that international lawyers ought to direct their efforts to, because attention paid to these entitlements are likely to produce the biggest environmental (and human rights) advances in the shortest period of time.

(125) For a recent detailed analysis, see G. Handl, *Grenzüberschreitendes nukleares Risiko und volkerrechtlicher Schutzanspruch* 87-112 (1992).

(126) For example, a 1989 OECD Council Decision commits member countries to ensure local hazard communication: the public must be provided with and have access to pertinent information about local industrial hazards. The Decision also obliges member states to ensure the affected public of an opportunity to participate in decisions concerning hazardous installations and the development of community emergency preparedness plans. See Decision-Recommendation of the Council concerning Provision of Information in Decision-Making Processes Related to the Prevention of, and Response to, Accidents Involving Hazardous Substances, OECD Doc. C(88)85(Final), 2, paragraph 1.

(127) An example in point is the Council of Europe draft Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (establishing "any natural or legal person[']s" right of access to environmental information). See Articles 15-16 of the draft Convention, reprinted in *21 Env. Policy & L.* 270 (1991).

(128) See also Shelton, *supra* note 2, at 117-120. See generally, Steiner, "Political Participation as a Human Right", *1 Harvard Human Rights Yb.* 77 (1988).

(129) A case in point is a relatively recent decision by the Austrian Supreme Administrative Court, dated January 29, 1991, ZI. 90/07/0174, in which the Court denied standing to the foreign plaintiff on the grounds that, notwithstanding the allegation of transboundary environmental harm, the applicable Austrian statute did not apply extraterritorially in the sense of creating such a procedural entitlement.

III. Conclusions

Undoubtedly, international legal norms for the protection of the environment evolved initially as a vindication of states' sovereignty-based mutual rights and obligations. International law has developed beyond this stage. Today, we have some internationally, although at this stage probably only regionally, guaranteed individual rights bearing on the environment. Whether or not these rights constitute "human rights" proper, they should be enacted as global standards and further strengthened.

There exists presently no generic "human right to a clean or healthy environment". Nor should we postulate such a normative concept *de lege ferenda*. Although the proposal for such right might have a certain attractiveness in that it may (temporarily) give a high profile to environmental issues⁽¹³⁰⁾, in the end, it would amount to little more than legal window-dressing. The notion that a generic environmental human right — as against narrowly defined, sectoral individual rights — could be used as a lever by which to accelerate the international environmental legal agenda is misleading. It grossly underestimates the difficulties involved in operationalizing such a normative concept. Moreover, it entails significant costs of its own in terms of debasing the human rights currency and in diverting attention away from the pursuit of more promising avenues to solving pressing environmental problems.⁽¹³¹⁾ In short, it is unlikely to promote realistic environmental or human rights objectives. Realism calls instead for a more modest, yet focussed campaign which aims at gaining general international recognition of specific or well-defined environmental rights and at strengthening or building upon existing international environmental review procedures.

As global human rights and environmental regimes evolve in parallel fashion and indeed have come to overlap in many — sometimes contradictory — ways, there is a need for coordination between two systems. But such coordination must be inspired by a clear understanding as to the respective approaches' suitability with regard to vindicating the environmental interests at stake, i.e., as to which approach can accomplish what objectives more effectively.

(130) It is true, of course, as Lynton Caldwell points out, that "rhetoric is often a necessary precursor of action". See Caldwell, "The Case for an Amendment to the Constitution of the United States for Protection of the Environment", 1 *Duke Env. L. & Policy Forum* 1, at 6 (1991). However, the point being made in this paper is that, at present, the costs of such rhetoric, i.e., the postulation of a generic human right to the environment, outweigh the benefits it might carry in terms of dramatizing the existence of serious threats to environmental stability and the need for remedial countermeasures.

(131) These and other points have been made forcefully early on in the debate about the growth of "human rights" norms by Bilder, *supra* note 18, at 205.