A CLEAN & HEALTHY ENVIRONMENT: 
THE BARRIERS & LIMITATIONS OF THIS 
EMERGING HUMAN RIGHT

ERIN EACOTT†

ABSTRACT

A human right to a healthy environment needs to be advocated by states, non-government organisations and the public. It can be argued that a human right to a healthy environment has slowly been emerging in international law over the past 20 years, but whether this right will ever become solidified in international law is not yet clear. A human right to a healthy environment needs to be advocated because it is an essential prerequisite to the fulfilment of many fundamental human rights, such as the rights to life, culture, liberty and security of the person, and an adequate standard of living. Furthermore, a human right to a healthy environment could be used as an umbrella over sustainable development in order to strengthen its effectiveness. While the implementation of such a broad right to a healthy environment faces a number of barriers, none of these barriers necessarily prohibit the establishment or effectiveness of the right.

“This we know: the earth does not belong to man: man belongs to the earth...”

Chief Seattle to U.S. President Pierce in 1855†

“Great minds of the past foresaw the consequences of man's unthinking 'subjugation' of nature. They warned: by destroying the plant and animal world and poisoning the soil, water, and air, the human race

† Erin Eacott graduated from Dalhousie Law School in Halifax, Nova Scotia, Canada in 2001 with a Marine and Environmental Law Certificate. She is articling at the Canadian Department of Justice in Edmonton, Alberta. After that, she will see where the world takes her.

Few people would disagree that a clean environment is crucial for human survival. For example, we cannot live without clean water and clean air. Few people would also disagree that all humans should have access to clean air and water. In these respects, the human right to a clean and healthy environment is recognized by almost everyone. However, what the world needs is an articulation of this right as a legal right. Only as a universal legal right can a right to a healthy environment be effectively used to protect the environment for the future of humankind.

Since a U.N. General Assembly resolution in 1968 there has been international recognition of a vital link between environmental protection and basic human rights, such as the right to a high standard of health. But is this recognition evolving into a universal legal right to a healthy environment?

Part I of this paper examines current international and domestic law and concludes that, while an international human right to a healthy environment appears to be emerging, it is unclear whether this nascent emergence will grow and solidify into an internationally recognized right. Part II argues that an internationally recognized right to a healthy environment is required because it is fundamental to the fulfilment of many other basic human rights and to the successful achievement of sustainable development. Part III examines the possible scope and components for an effective right to a healthy environment. The right has been described using many words other than healthy, such as: clean, quality, adequate, ecologically balanced and protected, safe and sustainable, or quite simply and vaguely as a right to environment. Finally, Part IV identifies possible barriers to the realization and implementation of this right, particularly the competing right to development. The paper concludes with some suggestions on how the right could be most effectively implemented.

In many ways, the world is already attempting to address a number

---


of the components of a right to a healthy environment advocated in this paper. Over the past 20 years in particular the world has begun to better recognize the importance of the environment. What the world has not recognized, however, is that many existing environmental and human rights concerns and actions are predicated upon the principle of a right to a healthy environment. For instance, access to clean water and prevention of ozone depletion are necessary because there is a belief that people should have a healthy environment in order to maintain adequate personal health. Climate change raises concerns of significant loss of land, dislocation of people, and loss of culture as a result of sea-level rises; such concerns can be translated into a need for a healthy environment. Thus a right to a healthy environment is the fundamental right by which broad environmental and human rights concerns and the principles of sustainable development can be tied together for more concerted action. Recognition and enforcement of this right would necessitate the creation and implementation of stronger, more comprehensive national and international laws to protect the environment. The human right to a healthy environment is *the* philosophy that the world should be following in order to safeguard the existence of humankind.

I. IS THERE AN EMERGING UNIVERSAL HUMAN RIGHT TO A HEALTHY ENVIRONMENT?

Article 38 of the *Statute of the International Court of Justice*\(^4\) indicates the sources of international legal obligations and thereby provides a guide to analyse whether the right to a healthy environment is emerging as a general principle of international law. The sources of law indicated by Article 38 are, in order of importance: treaties and international conventions, customary international law, general principles of law as recognized by civilized nations, judicial decisions and writings of scholars.\(^5\) Consequently, to determine whether there is an emerging international legal right to a healthy environment, this paper searches for


the existence of this right in international agreements, regional agreements, state constitutions, and case law.

1. International Agreements

Within the major international human rights agreements, such as the *U.N. Universal Declaration of Human Rights*,\(^6\) the *International Covenant on Economic, Social and Cultural Rights*,\(^7\) and the *International Covenant on Civil and Political Rights*,\(^8\) there is no explicit mention of a right to a healthy environment.\(^9\) The most recent U.N. Conference on Human Rights, the 1993 World Conference on Human Rights in Vienna, created the *Vienna Declaration and Programme of Action\(^10\)* in which there is no reference to a right to a healthy environment.\(^11\) All of these human rights instruments do, however, reference rights which are linked to a healthy environment, such as the right to life\(^12\) and the right to a standard of living adequate for health.\(^13\) Despite the lack of recognition in the major international human rights agreements, the human right to a healthy environment has not gone undiscussed and unrecognized by international bodies.

Principle I of the *Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)*,\(^14\) which was adopted by acclamation in 1972, is the first articulation of a human right to a healthy environment. Principle I states: "[m]an 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

---


\(^{11}\) Supra note 9 at 309.

\(^{12}\) For example, *International Covenant on Civil and Political Rights*, supra note 8 at Art. 6.

\(^{13}\) For example, *Universal Declaration of Human Rights*, supra note 6 at Art. 25.

bears the solemn responsibility to protect and improve the environment for present and future generations." There are arguments as to whether Principle 1 explicitly recognizes the right to a quality environment, listing it together with other fundamental human rights, or whether Principle 1 implicitly recognizes the right, or simply comes close to recognizing the right. "Implicit" recognition of a right to a healthy environment means that a connection between environmental protection and human rights is recognized but there is no explicit statement that an actual right to a healthy environment exists.

In reaffirming the principles of the Stockholm Declaration, the Declaration of the United Nations Conference on Environment and Development (Rio Declaration) states at Principle 1: "[h]uman beings...are entitled to a healthy and productive life in harmony with nature." Some authors argue that Principle 1 of the Rio Declaration explicitly recognizes a human right to a healthy environment while others argue that it "captures the ideals of a human right to a healthy environment, if not explicitly recognizing such a right." No one appears to argue that Principle 1 of the Rio Declaration is not at least an implicit recognition of a human right to a healthy environment. As a result, it is significant that Principle 1 has been "reproduced verbatim, and accepted without reservation by 179 nations at the 1994 U.N. Conference on Population and Development; by 186 nations at the 1995 World Summit for Social Development; [and] by 175 nations at the 1996 Second Conference on Human Settlements...." None of these affirmations nor Principle 1 itself is legally binding. However, the fact

---

15 Ibid. [emphasis added].
16 See supra note 3 at 25.
18 See supra note 9 at 309.
21 Supra note 9 at 308.
22 Ibid. at 308-9.
that almost every nation has affirmed Principle 1 at least three times without reservation\textsuperscript{23} is evidence of widespread and consistent state belief and/or practice. Such belief and practice contributes to the emergence of a human right to a healthy environment as a principle of customary international law.

Two other international instruments that have been argued to at least implicitly recognize a human right to a healthy environment\textsuperscript{24} are the 1989 U.N. \textit{Convention on the Rights of the Child}\textsuperscript{25} and the 1989 International Labour Organization \textit{Convention Concerning Indigenous and Tribal Peoples in Independent Countries}.\textsuperscript{26}

In 1991, the U.N. Economic and Social Council approved of the U.N. Human Rights Commission undertaking a report on the human right to environment. The vote in favour of undertaking the report was 52-1-1 with Japan abstaining and the United States as the sole opposition. The United States' opposition may indicate its reluctance to recognize a right to a healthy environment. Denial of the right by such a major power could prevent the establishment of the right as an international obligation.\textsuperscript{27} The \textit{Report on Human Rights and the Environment} was undertaken by Ms. Fatma Zohra Ksentini, special rapporteur. The draft Report stated:

> the universal awareness of the scope, seriousness and complexity of environmental problems has encouraged the adoption at the national, regional and world level of measures which, although sometimes piecemeal and still inadequate to meet the challenges confronting mankind, the planet and our future generations, have nevertheless made it possible to develop a set of standards and principles that share the objective of protecting the environment and thereby the rights deriving from it.

\footnotesize\textsuperscript{23} Ibid.
\footnotesize\textsuperscript{24} See for example, A. Fijalkowski & M. Fitzmaurice, eds., \textit{The Right of the Child to a Clean Environment} (Aldershot, England: Ashgate Publishing, 2000) at 6, 19 and 229.
\footnotesize\textsuperscript{26} 27 June 1989, (1989) 28 I.L.M. 1382 at Article 29E, Art. 4 para. 1, Art. 7 para. 4, and Art. 15 para. 1.
\footnotesize\textsuperscript{27} Supra note 9 at 310-11. However, there is no U.S. State Department position on a right to healthy environment, and reluctance to recognize the right, at least by the former administration, may not be that great, as indicated by public remarks by President Clinton, Vice-President Gore, and Secretary of State Albright. See supra note 9, n. 136.
Those standards and principles are designed not merely to regulate the subject of the environment but also to confer veritable “ecological rights” on the holders of rights. The “right to the environment” which has been derived from them is still in gestation. There are grey areas still to be clarified, particularly with regard to the rights, duties and responsibilities involved in the recognition of such a right, whose essential characteristic is its dynamic and continually evolving nature.28

The final Report calls for U.N. adoption of a set of norms consolidating this evolving right to a satisfactory environment.29 It recommends adopting the Draft Principles on Human Rights and the Environment written in 1994 by a U.N. sponsored group of human rights and environment experts. The Draft Principles include:

...the right to a secure, healthy and ecologically sound environment,

...the right to freedom from pollution, environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood, well-being or sustainable development..., and

...the right to the protection and preservation of the air, soil, water, sea-ice, flora and fauna....30

Unfortunately, the U.N. has taken no action on the report or the draft principles beyond meeting discussions.

In sum, while no major international human rights agreements include an explicit right to a healthy environment, Principle 1 of the Rio Declaration, which has been widely reaffirmed, recognizes, at the very least, an implicit right. Thus, as Ms. Ksentini’s Report on Human Rights and Environment indicates, an international right to a healthy environment is beginning to emerge in international agreements, but no concrete action has been taken to legally recognize this right.

2. Regional Agreements

While a number of major regional human rights agreements do not include a human right to a healthy environment, other regional agreements include it either as a non-binding or as a legally binding obligation. Some regional human rights agreements which do not articulate a human right to a healthy environment include the *European Convention for the Protection of Human Rights and Fundamental Freedoms* 31 and the *European Social Charter*. 32 These treaties were created years before the idea of a right to a healthy environment began to be discussed. 33 However, the right was also not included in the recent 1999 *Treaty of Amsterdam* "despite considerable discussion in favour of such an inclusion" and the inclusion of the right in a draft version of the Treaty. 34

The *Declaration of Santa Cruz*, a non-binding regional agreement adopted by 34 states at the Hemispheric Summit on Sustainable Development in Bolivia in 1996, recognizes the right to a healthy environment in so much as it reaffirms Principle 1 of the *Rio Declaration*: "[w]e reaffirm that human beings are entitled to a healthy and productive life in harmony with nature...." 35

The most significant regional agreements are the three which recognize a legally binding right to a healthy environment. The earliest recognition of the right is in the *African Charter on Human and People’s Rights (Banjul Charter)* which states at Article 24 that "[a]ll peoples shall have the right to a general satisfactory environment favourable to their development." 36 The *Banjul Charter* was adopted in 1981 and came into force in 1986. The language "shall" makes Article 24 legally binding. By March 2000, almost all African states were party to the Charter and no reservations on Article 24 have been taken. 37

---

31 4 November 1950, 213 U.N.T.S. 221. See also *supra* note 9 at 307.

32 18 October 1961, 529 U.N.T.S. 89. See also *supra* note 9 at 307.

33 The first discussions of a right to a healthy environment appear in the 1970s, while the *European Convention for the Protection of Human Rights and Fundamental Freedoms* was created in 1950 and the *European Social Charter* was created in 1961.

34 *Supra* note 9 at 307.


37 *Supra* note 9 at 306.
The Organization of American States' Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights (Protocol of San Salvador) states at Article 11: "1. Everyone shall have the right to live in a healthy environment...2. The States Parties shall promote the protection, preservation and improvement of the environment."38 The Protocol was adopted in 1988 and entered into force in 1999. The Protocol has been signed by 18 American nations but not by the United States. None of the 18 states has taken a reservation on Article 11; however, the right is somewhat limited by Article 1 which states that a nation's available resources and degree of development are to be taken into account in the implementation of the right.39

The most recent explicit recognition of a right to a healthy environment in a binding regional instrument is in the U.N. Economic Commission for Europe's Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). Article 1, the 'Objective' of the Convention, reads: "[i]n 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 right of access to information, public participation in decision-making, and access to justice in environmental matters...."40 The Aarhus Convention was adopted in 1998. It has been signed by the European Community and 39 other members of the ECE; however, as of November 2000, it has been ratified by only 9 members.41

39 Supra note 9 at 306-7, n. 109.
41 Ibid. Note: While the Aarhus Convention does not pronounce that the right to environment itself is a legal right, it can be assumed that a legal right is implied because Article 1 would not otherwise make sense. It would not make sense to legally bind parties to actions, such as public participation, that are intended to help protect a right if that right was not also legally protected.) Unlike international instruments, in regional instruments, a growing number of states over the past 20 years have recognized a legal right to a healthy environment. A number of these states have reflected their legal obligations under regional agreements in their state constitutions.
3. State Constitutions

Articulation of a right to a healthy environment in state constitutions could indicate that the right is recognized by civilized nations as a general principle of international law. Unfortunately, while the number is increasing, only slightly more than 50 of 203 nations have currently recognized the right in their state constitutions, and less than 20 of these states have an explicit recognition of the right.\textsuperscript{42} The earliest constitutional recognitions of an explicit right to a healthy environment were in Yugoslavia (1974), Portugal (1975), and Peru (1979).\textsuperscript{43} Current states with explicit recognition of the right include: South Africa, Bulgaria, Burkina Faso, Chile, Korea, Hungary, Poland, Sweden, and the Philippines.\textsuperscript{44} As an example of an explicitly recognized constitutional right to a healthy environment, Article II s.16 of the Philippines' constitution reads: "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."\textsuperscript{45} Most state constitutions that recognize a right to a healthy environment do so implicitly. These constitutions include the right as a statement of intent or a national goal to protect the environment for the people, rather than as a justiciable right.\textsuperscript{46} States that include the right as such a national goal often do not have comprehensive state legislation implementing the goal.\textsuperscript{47} The majority of states (approximately three-quarters of the world's nations), however, do not either implicitly or explicitly recognize the right to a healthy environment. These include many influential nations such as the United States, most of the European Community, Mexico, Canada\textsuperscript{48} and India.\textsuperscript{49}

\textsuperscript{42} See supra note 24 at 343-9, and supra note 9 at 314.
\textsuperscript{43} Supra note 3 at 27.
\textsuperscript{44} Supra note 24 at 343-9.
\textsuperscript{45} Supra note 24 at 7 [emphasis added].
\textsuperscript{47} See generally supra note 3 at 38.
\textsuperscript{48} Supra note 9, n. 158.
4. Case Law

The following international tribunal decisions implicitly recognize a human right to a healthy environment. The cases have been used to argue that an independent legal right to a healthy environment should exist. However, they have also been used to argue that a healthy environment can be achieved through the protection of existing human rights, thereby making a new human right to a healthy environment unnecessary.50

In *Lopez Ostra v. Spain*, a water purification and waste treatment plant was improperly erected near a woman’s home resulting in the emission of noxious fumes and effluent, forcing her family to relocate.51 The European Court on Human Rights found a strong link between environment and human rights. While the *European Convention for the Protection of Human Rights and Fundamental Freedoms* does not include a right to a healthy environment, the court found that environmental degradation can affect an individual’s well-being so as to deprive them of the right to enjoyment of private life and family life in Article 8.52

Similarly, in *Yanomani Indians v. Brazil*, the Inter-American Commission on Human Rights found that Brazil violated the right to life, liberty and personal security of the Yanomani Indians by not taking measures to prevent environmental damage that resulted in their loss of life and cultural identity.53 Thus the commission found “a violation of the right to life within the context of environmental protection, but not a violation of human rights in regard to the environment.”54 An explicit recognition of a legal right to a healthy environment by the Inter-American Commission on Human Rights is likely to occur in the future as a result of the recent coming into force of the *Protocol of San Salvador* which includes such a legal right.55

50 See generally *supra* note 9 at 290.


52 *Supra* note 31 at Art. 8. For a discussion of this decision see *supra* note 24 at 16, and *supra* note 9, n. 23.


54 *Supra* note 17 at 731.

The most important international tribunal decision on the right to a healthy environment is the International Court of Justice (ICJ) *Case concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia).* 56 While the majority decision did not recognize a legal right to a healthy environment, it did assert that new environmental norms are developing and that states must take these norms into consideration when contemplating economic development projects. 57 Most importantly, Judge Weeramantry, then Vice-President of the ICJ, while agreeing with the majority decision, issued a separate opinion. This separate opinion is not legally binding, but it does indicate that a leading member of the ICJ recognizes a universal human right to a healthy environment. Judge Weeramantry explains: “the right to development and the right to environmental protection – are principles of current international law” and people “are entitled to the preservation of their human right to the protection of their environment.” 58 Hopefully, recognition of this right by a Vice-President of the ICJ will spread to future ICJ decisions.

Unlike international tribunals in which majority decisions have, as of yet, only implicitly recognized the right to a healthy environment, five national tribunals have explicitly upheld such a right. The Supreme Courts of Chile, 59 South Africa 60 and the Philippines have each found a violation of and upheld the right to a healthy environment articulated in their state constitutions. The Supreme Court of the Philippines stated in its decision in *Minor Oposa v. Department of Environment and Natural Resources* that, “these basic rights [to a balanced and healthful ecology] need not even be written in the Constitution for they are assumed to exist from the inception of humankind.” 61

---

57 Ibid. at paragraphs 112 & 114.
60 Wildlife Society of Southern Africa and Others v. Minister of Environmental Affairs and Tourism of the Republic of S. Africa and Others, Supreme Court of South Africa, Transkei Provincial Division, 27/06/1996, 1996 (9) BCLR 1221 (Tk); see supra note 9 at 319.
Two states' courts have recognized and upheld a right to a healthy environment when there is no such legal recognition in their state constitutions. The Constitutional Court of Columbia in *Fundepublico v. Mayor of Bугагранде and Others* in 1992 recognized the right to a healthy environment as a fundamental human right. Subsequent Columbian Constitutional Court decisions in 1995 and 1996 have confirmed this right. In India, where there is neither an explicit nor implicit recognition of a right to a healthy environment, the Supreme Court declared in *Subhash Kumar v. State of Bihar* that the right to a wholesome environment is an integral part of the right to life in Article 21 of the Indian Constitution.

Since there is only a handful of court decisions both internationally and nationally that implicitly or explicitly recognize a right to a healthy environment, case law does not point to a universally recognized legal right. However, the few cases that have recognized such a right are all relatively recent, within the past 15 years, indicating that case law on the right may just now be emerging, albeit slowly. The fact that a judge of the ICJ has ruled that the right exists may indicate an increased future recognition of the right by courts.

In conclusion, while a large number of states have recognized and reaffirmed a right to a healthy environment as it is expressed in the non-binding *Rio Declaration*, the right is not recognized in any binding international agreements. A right to a healthy environment is slowly becoming more recognized in binding regional instruments, in state constitutions, and in tribunal decisions. However, as the regional instruments and constitutions indicate, less than one-quarter of the world's states recognize the right. A more widespread acceptance of the right is necessary before it is recognized as a general principle of international law. Furthermore, particularly because the right has few explicit recognitions, a more widespread acceptance of the right is necessary before it is even clear that this nascent emergence of the right will grow and solidify into a general principle of international law. Greater acceptance of the right to a healthy environment needs to be strongly advocated because this right is an important approach to protecting the environment for our current and future survival.

---

62 See *supra* note 24 at 17, para. 2. See also *supra* note 9 at 318.
63 *Supra* note 9 at 318.
64 See Ksentini Report, *supra* note 49.
II. Why a Universal Human Right to a Healthy Environment Is Required

As mentioned earlier, some people argue that existing human rights, such as the right to life and the right to a high standard of health, can be used to achieve the objective of a healthy environment without the introduction of a new right to a healthy environment. For instance, William Shutkin argues that the right to life can be used to protect those who suffer serious risk of or loss of life due to harm from environmental degradation.\(^65\) However, this approach has some serious problems.

First, it is not obvious that broadening a current human right, let alone several, to include a new environmental component has a greater likelihood of becoming a general principle of international law than would the creation of an independent human right to a healthy environment.\(^66\) There has not yet been widespread use of existing human rights to protect the environment. Second, if human rights are to be used to protect the environment, it is better to develop a universal independent right that can be more easily recognized and hence implemented. As one author suggests, an independent right is more likely to result in the development of domestic environmental legislation and in international cooperation to protect the environment.\(^67\) The creation of an independent right to a healthy environment would not, however, preclude the use of other human rights to help protect people against harm due to environmental degradation. Most importantly, an independent right to a healthy environment is fundamental to the fulfilment of many other basic human rights and to the achievement of sustainable development.

1. The Right to a Healthy Environment is Fundamental to the Fulfilment of Many Basic Human Rights

The environment must be protected because any serious damage to it threatens our life, health, and often our culture and livelihood. Thus a right to a healthy environment is an essential prerequisite to the fulfilment of fundamental human rights embodied in international in-

---


\(^{66}\) Supra note 9 at 291.

\(^{67}\) Supra note 3 at 39.
struments, such as the rights to: life, physical and mental health, livelihood, culture, property, liberty and security of the person, an adequate standard of living, and development. The *Stockholm Declaration* recognizes this principle in its preamble: "[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights – even the right to life itself."  

As one author has stated, "we live in an era in which humankind’s sharp distinction between human rights and environmental protection has ceased to exist." There are many examples of the necessity of a right to a healthy environment to protect other fundamental human rights. One example is President Gorbachev’s decision not to provide information on the Chernobyl explosion until many days after the accident, thus negatively effecting the health of tens of thousands of people. In India, the Sardar Sarovar dam and irrigation projects were developed without government consideration of the inevitable consequences of displacing thousands of people from their homes. If humans have rights, such as the rights to life, health, culture, and adequate standards of living, then they must also have a right to the natural conditions necessary to fulfil these rights.

2. The Right to a Healthy Environment Should be the Umbrella Right of the Principle of Sustainable Development

Rights are often linked to other rights. Sometimes rights are also ‘umbrella’ rights with other obligations falling under them. For instance, obligations under the right to sustainable development include the right to public participation and the right to access information. It can be argued that the right to a healthy environment should be the umbrella right over sustainable development. Sustainable development is devel-

---

68 *Supra* note 14 at Preamble.  
69 *Chapman, supra* note 46 at 215.  
71 Note: The writer recognizes that a right to a healthy environment can sometimes conflict with other basic human rights, for example the right to health. In some countries, pesticides negatively impact the environment but are necessary to protect people from diseases such as malaria.  
opment that balances environmental considerations with developmental considerations so as to ensure that both the developmental and environmental needs of current and future generations are met. Thus, as an umbrella right of sustainable development, the right to a healthy environment can ensure that the balance is not lost in favour of development, as is often the case. Balancing easily favours development, to the detriment of our future, because development is the key to immediate economic gain and often to immediate solutions to human problems, such as inadequate standards of living. The right to a healthy environment as an umbrella right could also shift the balancing in sustainable development to make environmental protection the foremost consideration. It is arguably more difficult to anticipate environmental impacts of economic development than other consequences and thus a shift to make the environment the foremost consideration of sustainable development would be in accordance with the precautionary principle. The right to sustainable development is still an evolving right. Consequently, as states further recognize the need for a healthy environment, it may be possible to successfully advocate the right to a healthy environment as the umbrella right of sustainable development. The right to a healthy environment would be the new principle to guide decision making when numerous rights and concerns need to be balanced.

In her report to the United Nations, special rapporteur Ms. Ksentini, summarizes the above approaches to the right to a healthy environment when she defines the right "in terms of a series of obligations designed to protect the environment and to safeguard the fundamental rights of human beings and the interest of future generations." 

III: The Scope and Components of a Right to a Healthy Environment

In order for a right to a healthy environment to be an effective tool to protect the environment and other basic human rights, what should the scope and components of the right be? This Part discusses whether the emerging right is an individual or a group right, how broadly the right

73 See for e.g. Rio Declaration, supra note 19 at Principles 3 & 4.
74 Supra note 17 at 699.
should be defined, and the duties and responsibilities that should be components of this right at both the national and international level.

1. Individual or Group Right?

Since "environment" can be defined anywhere from surroundings affecting an individual to the earth's total ecology, should a human right to a healthy environment be an individual or a group right?75 The Universal Declaration of Human Rights refers to human rights as individual rights,76 and this view is the most prominent in the international legal community.77 However, African and Islamic cultures define human rights as group rights.78 While most current instruments define the right to a healthy environment as an individual right, stating "[e]veryone shall have the right...",79 some instruments define the right as a group right.80 A few authors believe that a right to a healthy environment can be an individual right and, at the same time, protect people collectively.81 Thus, the right can be claimed by a group, but "[t]he underlying legal foundation for the group claim is the universal possession of the human right by the individual."82 A right to a healthy environment will be most effective using this articulation of the right as both an individual and a group right. In some cases the right is more convenient as a group right, for example when environmental impact is on a distinct ethnic group or on a large number of people, such as with global warming. On the other hand, it is also important that the right is an individual right so that individuals are guaranteed protection and can bring claims in court.

A right to a healthy environment has been further discussed as a third generation right, in other words, a right of future generations to a healthy environment. A third generation right requires that our actions today preserve the circumstances necessary for the right to exist in future generations. Any action contrary to preserving the future existence of the right is illegal. Legal claims against such action would have to be

---

75 For an in-depth discussion on this question, see supra note 9 at 293-301.
76 Supra note 6.
77 Chapman, supra note 46 at 225.
78 Supra note 9 at 296.
79 See for example Protocol of San Salvador, supra note 38 at Art. 11(1).
80 See for example Constitution of Yugoslavia (1974) in supra note 3 at 27.
82 Supra note 9 at 297.
brought on behalf of people not yet born. While we should strive for a third generation right to a healthy environment, there is little precedent for granting legal rights to members of future generations. It may be best, for the present, to view the right to a healthy environment as an obligation to, not a right of, the third generation. 83

2. How Broadly Should the Right Be Defined?

A healthy environment cannot be defined as an ideal environment. A certain degree of pollution is inevitable. 84 A healthy environment should be defined as one that is satisfactory for health, and thus free from pollution that would endanger health. However, the definition of a right to a healthy environment does not stop there.

While a narrowly defined right is more likely to be accepted, a broad right to a healthy environment is necessary for the right to be most effective. A right that simply protects human health from pollution would not ensure an ecologically balanced environment or protect sustainable development, nor would it protect the environment to ensure fulfilment of human rights such as the rights to livelihood and culture. Consequently, the right to a healthy environment should include the right to protection of clean air, water, soil and essential processes necessary to maintain biological diversity. It should also include the right to uncontaminated food, the right not to be evicted from homes or land as a result of actions affecting the environment, and the right to an environment which can support adequate living conditions. 85

A number of authors advocate “a narrowly and rigorously defined” right as the most successful way for the right to gain acceptance. 86 For instance, John Lee defines the violation of the right as follows: “as a result of a specific course of state action, a degraded environment occurs with either serious health consequences for a specific group of people or a disruption of a people’s way of life”. 87 While this definition recognizes environmental impacts beyond health consequences, the definition

84 Supra note 13 at 432; supra note 3 at 28.
85 For a list of such rights that should be protected by a right to a healthy environment see the Draft Declaration of Principles on Human Rights and the Environment, supra note 30.
86 See for example supra note 83 at 284; supra note 9 at 285.
87 Supra note 9 at 285.
has three significant weaknesses. First, violations of a right to a healthy environment should not be limited to state action. Everyone should have a duty not to violate the right. Second, health consequences should be defined as "significant" and not as the higher standard of "serious". Third, this definition does not protect an individual right to a healthy environment.

A possible broad and effective definition for the violation of a right to a healthy environment, incorporating the suggestions in the above two paragraphs, is the following:88

A right to a healthy environment is violated when land, water, and/or air is polluted to the extent that present and future individuals suffer or will likely suffer disruption of their quality or way of life, or significant health problems, including death. Injury or destruction of the plants, animals or ecological balance upon which humans depend also violates the right to a healthy environment. Such a strong right is necessary for sustainable development where a healthy environment must be balanced against the equally strong pressure to development.

3. Duties and Responsibilities of a Right to a Healthy Environment

As an umbrella right of sustainable development and in fulfillment of the above definition, an effective right to a healthy environment would incorporate the duties and responsibilities of sustainable development but would also include broader duties and responsibilities.

The duties and responsibilities of sustainable development which would be incorporated in a right to a healthy environment include the following. There should be public participation in decisions that affect the right to a healthy environment. In intergovernmental decision-making, those affected by environmental projects should have as much voice as government participants because they can insert less politically motivated viewpoints and increase the credibility of decisions.89 The public should also have access to information on the environment. Access to information is necessary to allow meaningful participation. Access to information would also include a duty on states and corporations to inform those directly affected when environmental degradation has

88 For other less narrow definitions see supra note 51 at 300; supra note 1 at 583.
89 Schwartz, supra note 46 at 369.
occurred that may influence their right to a healthy environment. The right to a healthy environment should further include the principle of generational equity. A number of soft law and hard law international instruments, as well as the International Court of Justice, have already linked the environment with obligations to future generations. Other components of sustainable development relating to a right to a healthy environment are environmental impact assessments and the use of the precautionary principle in decision-making.

There are a number of duties and responsibilities beyond those of sustainable development that should be incorporated into a right to a healthy environment. First, an effective right to a healthy environment must include a corresponding individual and collective duty to protect and improve the environment. The Stockholm Declaration, Protocol of San Salvador, and a number of state constitutions provide for the right in conjunction with a duty to protect the environment. Such a duty is in accordance with other international human rights: "[i]nternational human rights law imposes upon states both the duty to abstain from..."
violating human rights world wide and the positive duty to prevent violations of human rights within their jurisdiction."98 Thus a state is "responsible for violations by private actors if it fails to exercise due diligence to prevent the violations or to respond to them."99 These failures to protect the rights result in the state’s responsibility for the action on an international level. The duty to protect the environment would require protection sufficient to fulfill the definition of a right to a healthy environment, such as the one outlined in Part B above.

Second, since human rights are applied equally to everyone regardless of economic situation, geographical location or ethnicity, the right to a healthy environment would require that no one be discriminated against in their access to a healthy environment.100 For example, hazardous facilities could not be located in less politically powerful communities inhabited by minorities and the poor. Further, while contentious, equal access to a healthy environment would prohibit lower environmental standards for poorer and developing countries.101 Finally, as evidenced by the virtual non-existence of environmental issues on the platforms of Canadian political parties in the recent federal election, there is a lack of government and public concern on the environment. The right to a healthy environment should include a duty on the state to educate itself, as well as the public and corporations, on the importance of a healthy environment and on the right and its corresponding obligations.

---

98 Supra note 51 at 301.
99 Ibid.
100 Supra note 9 at 287-8.
101 As a result of their lack of finances, resources and infrastructure, developing countries sometimes refuse to sign agreements unless there are provisions allowing for lower environmental standards for developing countries. Consequently, some agreements include such provisions. For instance, the Convention on Biological Diversity, 5 June 1992, Rio de Janeiro, (1992) 31 I.L.M. 822 at Art. 6, requires that each Party act "in accordance with its particular conditions and capabilities...." The use of differential standards for developing countries can be combated through the transfer of funding and technology from industrialized to developing countries (infra at note 113).
IV. POSSIBLE BARRIERS TO THE REALIZATION AND IMPLEMENTATION OF THE RIGHT TO A HEALTHY ENVIRONMENT

The existence of effective means of implementation is crucial to the recognition of a new human right. The effective establishment and implementation of a human right to a healthy environment may be thwarted primarily, but not exclusively, by the existence of a strong right to development, states’ lack of financial and structural resources, and the inability to bring legal claims.

1. The Right to Development v. The Right to a Healthy Environment?

The Declaration on the Right to Development was passed by the U.N. General Assembly in 1986. Article 1 states that the right to development is an inalienable universal human right. While a right to development may initially appear to be somewhat at odds with a right to a healthy environment, a closer look at the right to development indicates a strong potential for the coexistence of these two rights. The 2000 United Nations' Report of the Independent Expert on the Right to Development, by Dr. Ajan Sengupta, states that “realization of the Right to Development goes much beyond improving human development. Indeed, the concept of human development is itself a substantial improvement of the earlier concept of development based on the expansion of wealth and material output or gross domestic product.” Article 1 of the Declaration on the Right to Development requires that the right be exercised to allow all other fundamental human rights to be fully realized. Article 9(2) says the exercise of the right to development cannot

---

102 Supra note 81 at 628.
104 Ibid. at Art. 1.
106 Supra note 103 at Art. 1, para. 1:
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,
violate the rights in the *U.N. Declaration of Human Rights* and the International Conventions on Human Rights.\(^{107}\) Consequently, if the right to a healthy environment was added to these human rights instruments, the right to development would be subservient to it, as it is to all human rights.

Furthermore, in 1996, the Economic and Social Council of the U.N. Commission on Human Rights established an intergovernmental working group of experts to elaborate a strategy to implement the right to development, bearing in mind the conclusions of conferences such as the U.N. Conference on Environment and Development.\(^{108}\) The working group’s 1998 report concludes that the right to development should be implemented in a way that promotes sustainable development and protects human health, access to productive land, and cultural identity.\(^ {109}\) This view of the right to development is not at odds with a right to a healthy environment. The view is bolstered by the independent expert’s report by Sengupta which states that a development process which does not improve environmental protection “would not be regarded as a part of the process of development protected by the 1986 Declaration on the Right to Development.”\(^ {110}\) Hence, the right to development need not obstruct the recognition and implementation of a right to a healthy environment nor the recognition of the right as an umbrella right of sustainable development.

2. Lack of Resources to Implement the Right

Some countries lack the financial and structural resources to protect the environment and thus to implement an effective right to a healthy environment. While a country can create laws to protect the environment, it may lack resources to enforce these laws. For instance, in cultural and political development, in which all human rights and fundamental freedoms can be fully realized.

\(^{107}\) Ibid. at Art. 9(2).


\(^{110}\) *Supra* note 105 at paragraph 15.
Ecuador, extensive environmental laws have not prevented the work of Texaco and Petroecuador from producing ongoing environmental harm and human rights abuses affecting the indigenous population.¹¹¹ Lack of resources may be financial, such as insufficient funds to employ enforcement officers, and/or structural, such as lack of public access to information, education and legal recourse. Moreover, resources will often necessarily be focussed on development rather than environmental protection. When people in a country are starving or without shelter or jobs, a country will often take actions for development to fulfil these immediate needs without considering the future impacts of an unclean environment.¹¹² A convention on a right to a healthy environment could include a duty on industrialized countries to transfer funding and technology to developing countries.¹¹³ These transfers could be used to facilitate environmentally sound development, enforcement of environmental protection measures, and implementation of environmental assessment. While such a duty would help, it would not necessarily solve these resource and structural problems, because they are related to other problems, such as political corruption. Consequently, despite the fact that human rights are to be applied equally to all people, it may be necessary to vary environmental standards for a right to a healthy environment in developing countries in order for the right to be recognized by these countries.

¹¹¹ Schwartz, supra note 46 at 289.


> Persons living on the abyss of privation...customarily crave greater economic activity and growth than martyrdom to forestall some fanciful possibility of global warming or the potential health hazards of ozone depletion at some distant time when they, their children, and grandchil-
> dren will all be dead.

¹¹³ Legal duties on states to transfer funds, technology and knowledge to other states, and particularly to developing states, is becoming increasingly prevalent in international environmental agreements. See for instance, Convention on Biological Diversity, supra note 101 at Arts. 12, 16-18, 20(2); Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, Montreal, (1987) 26 I.L.M. 1550 at for instance Arts. 5 &10.
3. Inability to Bring a Legal Claim

For a right to a healthy environment to be effective, it must be justiciable. However, there are three impediments against individuals bringing legal claims on a violation of a recognized right to a healthy environment. First, individuals often do not have easy access to legal recourse in their own countries. Individuals may not have legal access because they cannot afford legal representation, because the legal system in their country is undeveloped, or because of discrimination in access to the legal system.

Second, individuals and non-government organizations have traditionally lacked standing in international tribunals, including for human rights violations. They have been “thought of as objects and not subjects of international law, and as such, they have not enjoyed rights or had duties under international law.” Consequently, a violation of a right to a healthy environment could only be brought to international tribunals, such as the International Court of Justice, by states and not by individuals or groups of individuals. In order for effective individual remedies for violations of the right, standing is needed for individuals in international tribunals. Fortunately, there has been a recent trend in some international tribunals, such as the European Commission on Human Rights and the Inter-American Commission on Human Rights, to allow individuals to bring human rights claims. Some authors recommend that, as an effective way to screen complaints, human rights and environmental claims should be brought to international tribunals using a system similar to that of the International Labour Office (ILO). At the ILO, individuals cannot personally petition for standing, but recognized non-government associations can plead cases on individuals’ behalf.

Unfortunately, even if individuals have access to international courts, there are not yet fully developed international legal norms/standards on liability and compensation for environmental harm. A

---

114 See for e.g. Rio Declaration, supra note 19 at Principle 10; Paul Gormley, Human Rights and Environment: the need for international cooperation (Leyden: Sijthoff, 1976) at 225.
115 See supra note 81 at 629; Schwartz, supra note 46 at 383; supra note 9 at 294.
116 Supra note 81 at 629.
117 Schwartz, supra note 46 at 383.
118 See for example Gormley, supra note 114 at 225.
number of agreements have called for the development of such law, for example the *Stockholm* and *Rio Declarations*\textsuperscript{119} and the *Convention on the Law of the Sea*,\textsuperscript{120} but its creation has been slow. For instance, the International Law Commission began codification of the principles of international law governing state responsibility in 1955 and those governing state liability in 1978. Neither of these projects has been completed. The draft articles currently appear not to support a right to a healthy environment.\textsuperscript{121}

In sum, while the right to a healthy environment may be impeded by the *Declaration of a Right to Development*, lack of state resources, and the inability of individuals either to bring legal claims or to be effectively compensated, these impediments should not be seen as barriers to the recognition and implementation of a right to a healthy environment. As discussed, each of these impediments can be countered to some degree and thus need not prohibit an effective right to a healthy environment. The right to development is required to be exercised in a manner that protects human rights and improves environmental protection. States lacking resources to effectively implement the right can be transferred funds and technology from more industrialized states. And, while individuals may not always be able to bring legal claims in their own countries, international human rights tribunals have begun to recognize claims by individuals. Finally, the law on liability and compensation for environmental harm, though currently lacking, is in the process of being codified. International recognition of a right to a healthy environment would likely force the International Law Commission to draft articles on state responsibility and liability that are more in accordance with the right.

\textsuperscript{119} *Stockholm Declaration*, supra note 14 at Principle 22; *Rio Declaration*, supra note 19 at Principle 13.


\textsuperscript{121} Further elaboration is beyond the scope of this paper. Information taken from: David Vanderzwaag, 'Classical' International Environmental Law: Co-existence and State Responsibility, International Environmental Law Course, Dalhousie Law School, lecture on 20 September 2000.
V. CONCLUSION

States, non-government organizations and the public need to advocate a right to a healthy environment. As indicated in Part I, the right is slowly emerging in some regional agreements, tribunals and state constitutions. It is also implicitly recognized in the *Stockholm* and *Rio Declarations*. However, explicit recognition of the right is not yet widespread enough to determine whether the right will ever fully develop. Because the right is fundamental to the fulfilment of many other basic human rights and could be used as an umbrella right to strengthen the effectiveness of sustainable development, a *broad* right to a healthy environment should be advocated. As a broad right, the right would include obligations associated with sustainable development as well as other obligations such as the duty to protect and improve the environment and the duty to educate. Part IV explained that impediments to the right should not be seen as absolute barriers either to advocating or implementing the right.

Ideally, the right should be adopted in an international hard law agreement that, similar to the *Draft Declaration of Principles on Human Rights and the Environment* (1994),\(^ {122}\) recognizes and defines the right and establishes duties for both state and private actors. An effective right requires remedies, and thus international human rights tribunals and national courts would have to expand to facilitate claims of the right. An international agreement on the right could also include the establishment of a new United Nations Court for the Environment with standing for individuals, groups and states, as advocated by the Rome Conference, a meeting of 27 states in 1989.\(^ {123}\)

Even without an international agreement or environmental court, recognition and incorporation of an international legal right to a healthy environment in existing human rights instruments is necessary. Such incorporation is necessary because the right is one of the most important overarching fundamental human and environmental rights; it is a key right underlying life, health, culture and livelihood. Furthermore, while

\(^{122}\) *Supra* note 30.

it is self evident that a healthy environment is necessary for human survival, many states encounter significant disagreements in attempting to negotiate agreements on the environment. An internationally recognized right to a healthy environment can be a principle or theory to unify why states attempt to negotiate international agreements to protect the environment. As such a unifying principle, the right may bring greater solidarity among states in actions to protect the environment.

Few industrialized countries have yet recognized the right to a healthy environment. This lack of recognition in industrialized countries likely extends from the fact that people in these countries today rarely face serious and immediately life-threatening problems associated with an unclean environment. Perhaps industrialized countries need to suffer more drastic problems, such as recently occurred in Walkerton, Ontario, in order for these countries to realize the need for a legally protected right to a healthy environment. Chief Seattle, quoted at the beginning of this paper, would perhaps tell us today that the belief that we have the power to act as if the world is ours is an illusion. An international legal right to a healthy environment may help us recognize this illusion and thus prevent the earth from reminding us, at a terrible cost, that “earth does not belong to man: man belongs to the earth....”

124 Supra note 1.