Recent decades have witnessed a progressive integration of international human rights law and international environmental law. Environmental human rights have been widely recognized in international environmental policy, domestic constitutions, and the decisions of international tribunals. A review of existing scholarship and jurisprudence reveals three discernible approaches to environmental human rights. The first is the recognition that environmental degradation may result in the violation or deprivation of existing human rights such as the right to life, the right to health, or the right to culture. A second approach, which has been codified internationally in at least two important treaties, recognizes procedural environmental rights, including the right to environmental information, the right to participate in environmental decision-making, and the right of access to justice in environmental matters. Finally, commentators, states, and tribunals are increasingly recognizing a free-standing “right to environment” which overlaps with, but extends beyond, other existing human rights. This Article will evaluate the content and current status of these three categories of environmental human rights in international law, and in the law of one of the most environmentally progressive regions of the world – Europe.

Dans le courant des dernières décennies, le droit international a vu apparaître l’intégration progressive des droits de la personne et du droit de l’environnement. D’ailleurs, les différentes politiques environnementales, constitutions domestiques et décisions des tribunaux internationaux reconnaissent maintenant la jonction des droits environnementaux et de la personne. La doctrine et de la jurisprudence révèle, à cet égard, trois approches distinctes. Une première observation suggère que la dégradation de l’environnement entraîne la violation ou la destitution de droits de la personne tels le droit à la vie, le droit à la santé ou encore le droit à la culture. Une seconde approche, d’ailleurs codifiée au sein d’au moins deux traités majeurs, concerne l’émergence de droits procéduraux de l’environnement, incluant le droit à l’information sur l’environnement, le droit à la participation lors de prises de décisions environnementales, ainsi que le droit à la justice quant aux enjeux environnementaux. Finalement, un nombre grandissant d’auteurs, d’États et de tribunaux reconnaît l’existence d’un droit à l’environnement en tant que sphère autonome du droit, qui coïncide avec certains droits de la personne mais ayant une étendue plus large. Cet article évaluera la substance et le statut actuel de ces trois catégories découlant de la jonction des droits environnementaux et de la personne au sein du droit international, et plus précisément telle que véhiculée par l’une des régions les plus progressistes au niveau environnemental - l’Europe.

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For better or worse, the consensus goal of environmental decision-making worldwide is that of “sustainable development.” Defined by the Brundtland Report as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” sustainable development has now achieved widespread acceptance as a guiding principle of international environmental law and policy. One com-


3 Ibid. at 43.

mentator suggests that sustainable development is supported by three interconnected pillars: international human rights law, international environmental law, and international economic law. Further, given the ambiguity and malleability of the concept of sustainable development itself, “it is the more specific international law principles and rules that lie within the three pillars that must [be] develop[ed].”

This article is an attempt to clarify and elaborate on the intersection between the human rights and environmental foundations for sustainable development. The article will analyze the development and current status of environmental human rights in international law and European law, the latter including both European Union law and the law of the European Convention on the Protection of Human Rights and Fundamental Freedoms. The analysis begins, in Part 2, with a brief discussion of the context in which the debate regarding environmental human rights arises. Part 3 examines the potential sources of environmental human rights in international law, and provides a brief analysis of the tension between the traditional statist approach to international law and the new norms created by both human rights law and international environmental law.

Part 4 considers the current status of environmental human rights in international law. Part 4.1 discusses international legal recognition of environmental deprivations of existing human rights (notably the rights to life and health). Part 4.2 introduces the category of procedural environmental rights (access to environmental information, participation, and access to justice) which have been widely recognized in international instruments. Part 4.3 turns to the development and current status of the substantive right to environment in international law, and also examines the kind of environment that is protected under the right (e.g. a “healthy”, “decent”, “adequate”, or “ecologically balanced” environment). Part 5 traces the reception and development of environmental human rights in European Union law and the law of the European Convention, examining in turn the treatment of environmental deprivations of existing rights (5.1), procedural environmental rights (5.2), and the free-standing right to environment (5.3).

In Part 6.1, the argument is made that instead of fragmenting environmental human rights into three alternative approaches, scholars and jurists should conceptualize the right to environment as i) encompassing both procedural and substantive environmental rights, and ii) overlapping with other human rights (both existing and emergent). Part 6.2 explores the unique content of the “pure” right to environment, that is, that part of the right to environment that goes beyond procedural environmental rights and existing human rights. The

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5 McGoldrick, supra note 4 at 796-797.
6 Ibid. at 803.
7 The term “environmental human rights” will be used herein as an overarching catch-all category encompassing all manifestations of the application of human rights approaches in the realm of environment.
8 The European Union, created by the Treaty of Maastricht (effective November 1, 1993), is the successor to the European Economic Community, a supranational entity formed by the Treaty of Rome in 1957. The European Union consists of three pillars: the European Community, a common foreign and security policy, and cooperation in justice and home affairs. For an introduction to European Union Law, see P.S.R.F. Mathijsen, A Guide to European Union Law, 8th ed. (London: Sweet and Maxwell, 2004).
paper proposes intergenerational equity, aesthetic protection, and the precautionary principle as potential components of the pure right to environment.

Part 7 presents a brief conclusion arguing that the evidence for the right to environment as an existing rule of customary international law (both globally and within Europe specifically) is very strong, and that the development of a robust, justiciable formulation of this right is an important tool in the collective effort to protect our global environment. In particular, I will argue that as a worldwide leader in sustainable development, the European Union should amend its proposed constitutional recognition of environmental protection to include explicit rights language.

2. BACKGROUND

2.1 A brief historical overview

Although ecological thinkers have been sounding the alarm regarding industrial society’s unsustainable relationship with the natural world since (at least) the nineteenth century,10 the modern environmental movement did not emerge until the early 1960s. With the exponential growth in the use of synthetic chemicals in the wake of the Second World War, industrialized society faced a crisis of pervasive environmental contamination previously unknown in human history. As Rachel Carson wrote:

For the first time in the history of the world, every human being [was] now subjected to contact with dangerous chemicals, from the moment of conception until death. In the less than two decades of their use the synthetic pesticides [had] been so thoroughly distributed throughout the animate and inanimate world that they occur[red] virtually everywhere…[T]hese chemicals [were] stored in the bodies of the vast majority of human beings…They occur[red] in the mother’s milk, and probably in the tissues of the unborn child.11

The 1962 publication of Carson’s pivotal book *Silent Spring*, highlighting the hazards of chemical pesticides and fertilizers, “delivered a galvanic jolt to public consciousness.” 12 *Silent Spring* was highly influential in both North America and Europe,13 and is credited with catalyzing the birth of both grassroots environmentalism and modern environmental law.14

In the early 1970s, theorists such as E.F. Schumacher and the eminent Norwegian philosopher Arne Naess nurtured the emergent environmental movement, advocating a radical

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restructuring of human relations with the natural world. A series of high-profile disasters in the late 60s and 70s further raised public consciousness regarding the dangers of environmental pollution. At the same time, major international environmental organizations were created, successfully focusing media attention on the environmental crisis, and lobbying governments at all levels to take effective action. The early environmental movement culminated in the birth of international environmental law with the 1972 Stockholm Declaration on the Human Environment. The Stockholm Declaration introduced the notion of a human right to environment into international law for the first time.

2.2 Controversy regarding the role of human rights in environmental protection

It should be noted at the outset that the notion of environmental human rights has stirred some controversy among ecological ethicists and environmental activists. Bosselmann explains that “[r]ights talk” is not very popular among non-legal ecologists. Deep ecologists and ecofeminists tend to perceive rights as absolute, static, individualistic and deeply embedded in the anthropocentric (male) paradigm.”

Critics argue that placing an emphasis on human rights “tend[s] to perpetuate the values and attitudes that are at the root of environmental degradation.” Proponents of the human rights approach counter that these criticisms are themselves influenced by an anthropocentric worldview that incorrectly sees humans as separate from the rest of the natural environment. As Dinah Shelton has observed, however, “humans are not separable members of the universe. Rather, humans are interlinked and interdependent participants [in the natural world]…” Thus, a rights-based approach that protects humans from environmental degradation necessarily entails the protection of the ecosystems and species upon which human well-being depends. Once the fallacy of human separation from nature is abandoned, it becomes clear that a human rights approach is capable of encompassing a high level of environmental protection.

Some commentators argue that what is required is the integration of human rights approaches into a broader, polycentric framework for environmental decision-making which is capable of accounting for the intrinsic value of nature (among other values). Thus, at a

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16 In Europe, key incidents included the 1967 Torrey Canyon oil spill in the English Channel and the 1969 chemical spill in the Rhine River. Burchell & Lightfoot, supra note 13 at 18.
17 Ibid. at 18-19.
19 Ibid. at 125.
21 See Bosselmann, supra note 18 at 125, citing P.W. Birnie and A.E. Boyle, International Law and the Environment (Oxford: Oxford University Press, 1992). See also Collins, “Revisiting the Doctrine of
minimum, the human rights approach constitutes an important additional tool in the project of environmental protection. The recognition of environmental human rights gives advocates access to human rights machinery in their efforts to arrest environmental degradation, and this is highly significant given the absence of other binding enforcement mechanisms in international environmental law.22

3. SOURCES

As noted by scholar Luis E. Rodriguez-Rivera, “it is imperative that an analysis of the existence of a human right to environment focus on the sources from which [the right] purportedly derives…”23 Article 38 of the Statute of the International Court of Justice recognizes two primary sources of international law: treaties,24 and customary law (as evidenced by a generalized state practice flowing from a perceived legal obligation).25 If the matter at hand is not readily resolvable by reference to either of these sources, the Court may also refer to “the general principles of law recognized by civilized nations,”26 and, as an interpretive aid, judicial decisions and scholarly opinions.27 In its classical formulation, both the subjects and objects of international law are states, and state consent is the sinister non of international legal norms.28

The emergence of international human rights law in the aftermath of the Second World War introduced the “radical premise that a state’s treatment of its own citizens, its internal governance on many significant matters, is subject to the norms of international [law].”29 Thus, human rights law intruded on traditional values of state sovereignty,30 and, for the first time, gave individual humans a voice in international law. Concomitantly, the emergence of human rights law created a tension in the doctrine of sources. Although human rights were specifically delimited in written declarations and conventions consented to by the States party,31 it may

Intergenerational Equity”, supra note 1 (on the need to balance environmental human rights with the principle of responsibility to future generations).

25 Ibid., art. 38(b).
26 Ibid., art. 38(c).
27 Ibid., art. 38(d).
28 Rodriguez-Rivera, supra note 23 at 2-3.
be argued that the very notion of universal human rights is conceptually inconsistent with a requirement of state consent.\textsuperscript{32} Indeed, human rights are rooted philosophically in the Western traditions of natural law and natural rights, which explicitly hold that universal principles of morality, including certain individual rights, trump human-made law.\textsuperscript{33} Judge Higgins captures the dynamic well:

A human right is a right held vis-à-vis the state, by virtue of being a human being. But what are those rights? The answer to that question depends...on the approach you take to the nature and sources of international law. Some will answer that the source of human-rights obligation is to be found in the various international instruments; and that whatever rights they contain and designate as human rights are thereby human rights, at least for the ratifying parties...Others will say that the international instruments are just the vehicle for expressing the obligations and providing the detail about the way in which the right is to be guaranteed...\textsuperscript{34}

In common with human rights law, international environmental law has also challenged the traditions of international law, though in a different manner. In the field of international environmental law, non-binding, or “soft law” approaches\textsuperscript{35} have assumed a substantially greater importance than is the case in classical international law. Because of the difficulty and delay involved in reaching consensus on the language of binding environmental treaties, soft law instruments predominate in international environmental law.\textsuperscript{36} “The basic role of soft law is to raise expectations of conformity with legal norms, and to create uniformity in the interpretation of these norms.”\textsuperscript{37} Soft law can mature into hard law when these “expectations of conformity” bring about state practice (“accepted as law”)\textsuperscript{38} or through inclusion in binding conventions, and this has become a significant pattern in international environmental law.\textsuperscript{39} Thus, the numerous soft law provisions addressing the human right to environment that will be examined herein have more than mere rhetorical force. Rather, they are the likely precursors to binding international legal obligations in this area.

4. RECOGNITION OF ENVIRONMENTAL HUMAN RIGHTS IN INTERNATIONAL LAW

Scholars have described at least three possible outputs of the application of human rights to environmental harm: the recognition of environmental deprivations of existing human rights, the entrenchment of procedural environmental rights, and the recognition of a free-
standing right to environment. These three formulations are conceptually distinct and have received different treatments in international instruments and judicial decision-making; each will be discussed in turn.

4.1 Environmental deprivations of recognized human rights

Because the biophysical environment underlies all aspects of human existence, serious environmental degradation affects all human rights. Although some advocates of environmental human rights argue for the “reinterpretation” or “expansion” of existing rights, or the recognition of “environmental components” of existing rights, in my view it is more helpful to think in terms of environmental deprivations of existing rights. By “deprivation”, I mean simply a violation or infringement of a recognized human right. As Justice Weeramantry, of the International Court of Justice, explained in his separate opinion in the Case Concerning the Gabcikovo-Nagymaros Project:

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

Taking the right to life, for example, it is not necessary to formulate a new “environmental component” of the right to life in order to address lethal environmental harm. Instead, courts need only recognize that environmental harm may cause loss of life just as surely as other means. If a citizen is asphyxiated by noxious gases emanating from a government-operated incinerator, she is equally dead as if she had been shot or beaten by government agents. It would be irrational for human rights law to provide less protection in the latter scenario than it does in the former; this would, in a sense, create an environmental exemption from the right to life. Thus, recognition of environmental deprivations of existing rights does not require the creation of any new doctrine, but merely an ecologically literate reading of existing

40 Terminology varies among authors. In her pivotal 1991 article, international law scholar Dinah Shelton described the categories as “human rights,” “environmental rights” and the “right to environment”. See Shelton, “Human Rights, Environmental Rights”, supra note 20 at 105.


42 See e.g. Rodriguez-Rivera, supra note 23 at 18-20; Shelton, “Human Rights, Environmental Rights”, supra note 20 at 117.


44 Gabcikovo-Nagymaros Project, supra note 4 at 91-92.

45 Contra Lee, supra note 43 at 291: “Claiming an environmental component to a recognized human right is to give a new component of a presently-recognized right the same legal footing as the recognized definition. For this recognition to be accepted, the new component must develop as a principle of customary international law, or else be accepted through a convention or binding multilateral treaty”.

46 Cf. Richard Desgangne, “Integrating Environmental Values into the European Convention on Human Rights” (1995) 89 A.J.I.L. 263 at 269: “In view of the fact that the obligation to respect the right to life encompasses avoidance of serious risks to human life, the source of such risks should not be relevant.”
human rights. A number of international, regional and domestic judicial decisions support this proposition.

The United Nations Human Rights Committee acknowledged the potential for environmental contamination to violate existing human rights in *EHP v. Canada.* 47 In that case, a citizens’ group alleged that the storage of nuclear waste in the community threatened their right to life, and the Committee found that a valid *prima facie* claim had been articulated. Although the claim was found inadmissible due to failure to exhaust national remedies, the Committee stated that, “the present communication raises serious issues [under article 6(1)] with regard to the obligation of States parties to protect human life.” 48 In *Yanomami Indians v. Brazil,* 49 the Inter-American Commission on Human Rights found that Brazil had violated the Yanomami people’s rights to life, liberty, and personal security by failing to prevent serious environmental damage caused by resource companies. The European Court of Human Rights recognized a violation of the right to life caused by a preventable explosion at a waste site in *Oneryildiz v. Turkey* 50 (discussed in greater detail in Part 5.1, below).

In addition to the right to life, commentators and tribunals have also recognized that environmental degradation may result in deprivations of the rights to health, 51 privacy and family life, 52 property, 53 suitable working conditions, 54 adequate standard of living, 55 indigenous rights 56 and/or culture. 57 A number of “soft law” instruments have also explicitly acknowledged the potential of environmental harm to violate existing rights. 58 At the national level, courts.

48 Ibid. at para. 8.
52 Atapattu, *supra* note 22 at 101-102.
54 Shelton, “Human Rights, Environmental Rights”, *supra* note 20 at 112.
55 Ibid. See also Atapattu, *supra* note 22 at 102.
58 See e.g. *Draft Declaration of Principles on Human Rights and the Environment*, infra note 90; Council of Europe, P.A., 24th sitting, Texts Adopted, Recommendation 1614 (2003), online: Parliamentary Assembly
in India, Pakistan, several Latin American countries, and the Philippines have similarly found environmental deprivations of the rights to life and/or health enshrined in their respective constitutions.\(^59\)

In sum, the proposition that existing human rights may be violated through severe environmental degradation has been accepted by courts at the international, regional, and domestic levels. Although there is no “hard law” evincing specific state consent to this proposition, states did consent to be bound by the established human rights through the foundational Conventions,\(^60\) and courts appear willing to recognize environmental mechanisms of deprivation just as they would any other.

### 4.2 Procedural environmental rights

In *Silent Spring*, Rachel Carson articulated the imperative of informed public participation in environmental decision-making as follows:

> We urgently need an end to…false [environmental] assurances, to the sugar coating of unpalatable facts. It is the public that is being asked to assume the risks [of synthetic chemicals]…The public must decide whether it wishes to continue on the present road, and it can only do so when in full possession of the facts… “The obligation to endure gives us the right to know.”\(^61\)

Procedural environmental rights include access to environmental information, meaningful participation in environmental decision-making, and access to legal redress for environmental wrongs (whether procedural or substantive).\(^62\) Although procedural environmental rights involve the application of existing participatory rights\(^63\) to the environmental context, and therefore could have been treated in subsection (a) above, most commentators accord such rights their own conceptual category, probably because a substantial specialized body of law has developed regarding participatory rights in the environmental context specifically.

For example, Principle 23 of the *World Charter for Nature* states that “[a]ll persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and

\(^{59}\) See Rodriguez-Rivera, *supra* note 23 at 20; Atapattu, *supra* note 22 at 108.

\(^{60}\) See *supra* note 31.


\(^{62}\) See Shelton, “Human Rights, Environmental Rights”, *supra* note 20 at 117. Shelton and a number of later commentators use the term “environmental rights” to refer to these procedural entitlements. See e.g. Atapattu, *supra* note 22 at 72. I find the use of the generic term “environmental rights” to refer to rights that are strictly procedural in nature to be counter-intuitive; thus, I will use the more specific term “procedural environmental rights” herein.

shall have access to means of redress when their environment has suffered damage or degrada-
tion.”64 Agenda 21 recognized that “one of the fundamental prerequisites for the achievement of Sustainable Development is broad public participation in decision-making.”65 Principle 10 of the Rio Declaration on Environment and Development,66 articulates procedural environmental rights as follows:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.67

Both Agenda 21 and the Rio Declaration were adopted by at least 178 countries at the 1992 United Nations Conference on Environment and Development.68

In addition to the substantial body of soft law regarding the existence and content of procedural environmental rights, there is significant binding international law in this area. Paragraph 8 of Article 3 of the Espoo Convention on Environmental Impact Assessment in a Transboundary Context, requires the Parties to:

ensure that the public of the affected Party in the areas likely to be affected be informed of, and be provided with possibilities for making comments or objections on, the proposed activity, and for the [transmittal] of these comments or objections to the competent authority of the Party of origin, either directly to this authority or, where appropriate, through the Party of origin.69

Forty-one countries have ratified or acceded to the Espoo Convention thus far.70 In Europe, the Aarhus Convention (discussed below in Part 5.2) has also codified procedural environmental human rights in “hard law” as to the parties thereto. Further, many post-Rio multilateral and bilateral treaties also contain provisions relating to procedural environmental rights.71

67 See McGoldrick, supra note 4 at 805.
68 See UN Department of Economic and Social Affairs, Division of Sustainable Development: Documents, online: <http://www.un.org/esa/sustdev/documents/agenda21/index.htm>.
71 Alexandre Kiss, “The Right to the Conservation of the Environment” in Picolotti & Taillant, Linking Human Rights and the Environment, supra note (53) at 37-38. At the national level, 16 countries have
Thus, procedural environmental rights have been widely recognized in binding international and regional instruments, as well as key non-binding international instruments that may have given rise to a rule of customary international law. Moreover, in many cases procedural environmental rights may also be arrived at through the “environmental deprivation of existing rights” approach. Thus, one way or another, these rights have emerged as binding legal entitlements entailing correlative duties on the part of states.

4.3 The free-standing right to environment

4.3.1 Development of the right to environment in international law

“The right to a healthy environment… denotes the identification of a separate, independent human right, not dependent on the existing protected rights recognized in the international covenants.” The human right to environment first appeared on the international law scene in Principle 1 of the 1972 Stockholm Declaration on the Human Environment. That Principle states:

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

constitutional provisions recognizing the right to environmental information. See Mollo, infra note 100 at 38.

72 In Marcel Claude Reyes et al. v. Chile, for example, the Inter-American Court of Human Rights held that the Chilean government’s refusal to grant access to information concerning a major logging project violated section 13 of the American Convention on Human Rights. The Court held that Article 13 protects citizens’ rights to seek information and imposes a positive obligation on States party to supply such information or provide an adequate justification (in accordance with the Convention) for its refusal. Case of Claude Reyes et al. v. Chile, (2006) Inter-Am. Ct. H.R. (Ser. C) No. 151, at para. 59, online: Corte Interamericana de Derechos Humanos <http://www.corteidh.or.cr/docs/casos/articulos/seriec_151_ing.pdf>. See also Open Society Justice Initiative, Transparency and Silence: A Survey of Access to Information Laws and Practices in 14 Countries (New York: Open Society Institute, 2006), online: <http://www.soros.org/resources/articles_publications/publications/transparency_20060928>.

73 Atapattu, supra note 22 at 73.


Atapattu observes:

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

Supra note 22 at 74-75 (internal citations omitted).
Although a number of commentators argue that the *Stockholm Declaration* recognized only a link between environment and existing human rights, the Travaux Preparatoires of the Committee of the United Nations Conference on the Human Environment indicate that the draft of the *Stockholm Declaration* “was based on the recognition of the rights of individuals to an adequate environment.”76

Since Stockholm, the human right to environment has been recognized in numerous soft law international reports, communications, and instruments, as well as in national constitutions and domestic judicial decisions. Thus, the draft principles on sustainable development appended to the report of the Brundtland Commission (submitted in 1987) state that “[a]ll human beings have the fundamental right to an environment adequate for their health and well-being.”77 Similarly, the 1989 *Hague Declaration on the Environment*, signed by twenty-four states, declared that environmental degradation threatens “the right to live in dignity in a viable global environment.”78 The following year, the United Nations General Assembly passed resolution 45/94 “[r]ecogniz[ing] that all individuals are entitled to live in an environment adequate for their health and well-being; and call[ing] upon Member States and intergovernmental and non-governmental organizations to enhance their efforts towards ensuring a better and healthier environment.”79

The declaration produced at the 1992 UN-sponsored Rio Conference on Environment and Development echoed this language of entitlement, stating in Principle 1 that “[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”80 A number of commentators have argued that this language represents a retreat from the overt rights-based approach taken in the *Stockholm Declaration*,81 but Lee asserts that Rio’s Principle 1 still “captures the ideals of a human right to a healthy environment, if not explicitly recognizing such a right.”82 If this is correct, then the *Rio Declaration* provides strong evidence of a rule customary international law recognizing the right to environment. Lee explains:

> The Conference on Environment and Development was held at Rio de Janeiro in 1992 and attended by 178 nations and 100 heads of state…The language of Principle 1 of the Rio Declaration was reproduced *verbatim*, and accepted without reservation by 179 nations at the 1994 UN Conference on Population and Development; by

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80 See *Rio Declaration*, *supra* note 66.


82 Lee, *supra* note 43 at 308.
186 nations at the 1995 World Summit for Social Development; by 175 nations at the 1996 Second Conference on Human Settlements (Habitat II); and by 17 nations at the OAS-sponsored 1997 Hemispheric Summit on Sustainable Development … While each of these reaffirmations is legally non-binding, the fact that almost every nation made this reaffirmation without reservation – at least three times – is evidence of a widespread and consistent state practice. Such practice can contribute to the creation of a right to a healthy environment as a principle of customary international law.\textsuperscript{83}

Of course, the key question here is whether the assertion that Principle 1 captures the “ideals of a human right” is valid. It is true that the notion of a legal entitlement is coextensive with that of a right.\textsuperscript{84} At the same time, it will no doubt be argued that had the signatories to Rio intended to recognize a human \textit{right} to environment, they would have been plain about it. At the very least, however, the very widespread and repeated acceptance of Rio Principle 1 described above indicates that the human entitlement to “a healthy and productive life in harmony with nature” has become a principle of customary international law. Given the very close relationship between rights and entitlements, this principle of environmental entitlement strongly suggests a trend toward recognition of the human right to environment.

Another significant event in the international development of the right to environment was the appointment in 1990 of Ms. Fatma Ksentini as Special Rapporteur on Human Rights and the Environment.\textsuperscript{85} In her Final Report to the Sub-Commission on Prevention of Discrimination and Protection of Minorities,\textsuperscript{86} Ms. Ksentini recognized the reciprocal link between the protection of human rights and the protection of the environment, that serious environmental harm can violate existing human rights, and that the recognition and implementation of procedural environmental rights is crucial to both human rights and environmental protection.\textsuperscript{87} However, she went beyond this, finding that the right to environment itself had already been recognized at the national, regional, and international levels.\textsuperscript{88} She wrote that recognizing and operationalizing the right to a healthy environment “should make it possible to go beyond reductionist concepts of ‘mankind first’ or ‘ecology first’ and achieve a coalescence of the common objectives of development and environmental protection.”\textsuperscript{89} Appended to the Special Rapporteur’s 1994 report was a \textit{Draft Declaration of Principles on Human Rights and the Environment}.\textsuperscript{90} Principle 2 of that declaration states that “All persons have the right to a secure, healthy and ecologically sound environment” while Principle 5 provides that: “All persons have

\textsuperscript{83} Ibid. at 308-309 [internal citations omitted].

\textsuperscript{84} See e.g. Jack Donnelly, \textit{Universal Human Rights in Theory & Practice} (Ithaca: Cornell University Press, 2003) at 9 (“To have a right to x, is to be specially entitled to x”).


\textsuperscript{87} See Ksentini Final Report, \textit{ibid}.

\textsuperscript{88} Ibid. at 58.

\textsuperscript{89} Ibid. at 3.

\textsuperscript{90} See Ksentini Final Report, supra note 86 at Annex I [\textit{Draft Declaration of Principles on Human Rights and the 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 within, across or outside national boundaries.”

Most recently, under the auspices of UNESCO and the United Nations High Commissioner for Human Rights, an International Seminar of Experts on the Right to the Environment was convened, resulting in the February 12, 1999, issuance of the *Bizkaia Declaration on the Right to the Environment*. Article 1 of the *Bizkaia Declaration* recognizes that “everyone has the right, individually or in association with others, to enjoy a healthy, ecologically balanced environment...[which] may be exercised before public bodies and private entities...” As significant as the content of the *Bizkaia Declaration* itself is the Preamble, which collects the evidence of an emerging right to environment, citing: Principle 1 of the *Stockholm Declaration*, the *Rio Declaration*’s recognition of environmental entitlement, regional recognition of the right to environment, UN General Assembly Resolution 45/94, incorporation of the right to environment in national constitutions, and the Institute of International Law’s 1997 declaration that “all human beings have the right to live in a healthy environment”.

At the regional level, two important instruments recognize the right to environment. Article 24 of the *African Charter on Human and Peoples Rights* states that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.” There are more than fifty states party to the Charter, which entered into force on October 21, 1986.

Turning to the Americas, the *Additional Protocol to the American Convention on Human Rights in the area of Economic Social and Cultural Rights* (the *Protocol of San Salvador*) recognizes the right to a healthy environment in Article 11. Article 2 requires States to promote the protection, preservation, and improvement of the environment. The *Protocol of San Salvador*...
entered into force on November 16, 1999; thirteen states in total have now ratified or acceded to the Protocol.97

In addition to international and regional instruments (both soft and hard law) explicitly recognizing the human right to environment, Rodriguez-Rivera argues persuasively that the existence of a burgeoning multitude of international environmental law instruments (covering subjects ranging from biodiversity conservation to air pollution) constitutes state practice evidencing customary international law. In particular, he argues that this widespread state practice does indeed arise from a perceived legal obligation, even if this obligation is not explicitly acknowledged:

…I[] the proliferation of international environmental law instruments during the last three decades must be explained by something more than a mere assertion that states’ participation in this process has been motivated by economic or political self-interest. Most international environmental law instruments do not offer states obvious economic or political gains. On the contrary, most of these instruments impose economic and political liabilities, which are the inevitable trade-offs associated with global environmental protection. States are not in the practice of entering into international legal instruments that limit their sovereignty in the absence of recognized legal or moral duties to do so. Therefore, the exponential growth of international environmental law instruments, in and of itself, evinces the existence of the right to environment.98

State practice and opinio juris with respect to the right to environment may also be seen at the national level. The vast majority of domestic constitutions promulgated since 1970 recognize some form of the right to environment, and/or correlative state duties to protect the environment.99 In its 2005 report to the 61st Session of the United Nation Commission on Human Rights,100 the American environmental NGO Earthjustice Legal Defense Fund summarized the data:

Of the approximately 193 countries of the world, there are now 117 whose national constitutions mention the protection of the environment or natural resources.101 Of these, 56 constitutions explicitly recognize the right to a clean and healthy envi-

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98 Rodriguez-Rivera, supra note 23 at 27.
101 Ibid., Appendix 1.
National constitutional provisions may be evidence of general principles of law common to major legal systems. In the realm of human rights specifically, provisions of national constitutions enacted pursuant to a perceived international legal obligation may also constitute state practice giving rise to customary international law. The prevalence of environmental rights in domestic constitutions is strong evidence of the emergence of the right to environment as a principle of customary international law. In addition to domestic constitutional provisions, the widespread promulgation of domestic environmental protection legislation may also constitute evidence of customary international law (where such laws are enacted in response to a perceived international legal obligation), or a general principle of law (where opinio juris is lacking).

In conclusion, the right to environment has become binding international (or at least supranational) law in Latin America and Africa through inclusion in written conventions. Further, the right to environment has been recognized in a number of highly significant soft law instruments which guide international environmental law and policy (e.g. the Rio Declaration). Finally, the “abundance of state action in the form of national [and international] environmental laws”, including constitutional provisions recognizing the right to environment, provide strong evidence of the emergence of the right to environment as a principle of customary international law.

### 4.3.2 What level of protection is afforded?

The phrase “right to environment” has been used to this point in an unmodified form for the purpose of allowing a preliminary inquiry into whether international human rights law recognizes a right to any particular level of environmental quality. As the above survey of existing provisions makes clear, the emerging right to environment has been modified by a variety of adjectives: clean, healthy, ecologically balanced, sound, healthful, adequate, viable.

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102 Angola, Argentina, Azerbaijan, Belarus, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Cape Verde, Chad, Chechnya, Chile, Colombia, Congo, Costa Rica, Croatia, Cuba, Czech Republic, Democratic Republic of Congo, Ecuador, El Salvador, Ethiopia, Finland, France, Georgia, Honduras, Hungary, Kyrgyzstan, Latvia, Macedonia, Mali, Moldova, Mongolia, Mozambique, Nicaragua, Niger, Norway, Paraguay, Philippines, Portugal, Russia, Sao Tome and Principe, Seychelles, Slovakia, Slovenia, South Africa, South Korea, Spain, Tajikistan, Togo, Turkey, Ukraine, Yugoslavia. In addition to these, the constitutions of Comoros and Guatemala recognize a right to health that is not explicitly tied to the state of the environment. *Ibid.* at 37, n. 172


104 See *Statute of the ICJ*, supra note 24, art 27(c).


106 See *Lee*, supra note 43 at 339.


Given that the environmental human rights agenda has developed as a response to environmental harm, it is helpful in analyzing this question to recall that such harm generally falls into one of two interconnected categories: i) contamination (including for example, radiation, the contamination of drinking water sources with hazardous chemicals, and air pollution) and ii) the destruction of natural habitats (encompassing the loss of biodiversity, wilderness, aesthetic values, and eco-cultural spaces). As a result, this author supports the adoption of the modifier “healthy and ecologically balanced” in discussions of the right to environment. The term “healthy” responds most directly to environmental contamination causing direct human health effects, while “ecologically balanced” responds to the second category of environmental harm.

As noted at the outset, there is a live debate regarding the utility and desirability of an international human right to environment, because of the concern that “to speak of a human right to a healthy environment detracts from [an] ecocentric approach to environmental protection and, instead, endorses the rather narrow…anthropocentric approach.” The phrase “healthy and ecologically balanced” responds to this concern as the health component addresses human-centered needs directly, while the phrase “ecologically balanced” is an ecocentric concept consistent with the notion of “ecosystem integrity”, which has been suggested as the basis for a new human relationship with nature.

The formulation “healthy environment” has been widely used, and should in any event be understood as encompassing both human-centred and eco-centric aspects - as in an environment that is both “healthy” for humans and healthy in its own right (e.g. a healthy lake, a healthy forest, a healthy ecosystem).

5. RECEPTION AND DEVELOPMENT OF THE RIGHT TO ENVIRONMENT IN EUROPEAN LAW

Despite the absence of any environmental provisions in the Treaty of Rome, environmental protection has been a central issue in the European Community (and later the European Union) since the early 1970s. The 1972 Paris Conference of the Heads of State (held in association with the Stockholm Conference) symbolically adopted environmental protection into EC policy, and since then, the EU has accorded preeminent importance to environmental protection, EU environmental law and policy has grown exponentially, and Europe has

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110 See Downs, supra note 41. This phrase is used in several national constitutions, see Mollo, supra note 100 at 86 ff.

111 Atapattu, supra note 22 at 71-72 (internal citation omitted).


113 The Declaration states, in part: “Economic expansion is not an end in itself...It should result in an improvement in the quality of life as well as in standards of living. As befits the genius of Europe, particular attention will be given to...protecting the environment so that progress may really be put at the service of mankind.” See E.C. Commission, 6th General Report (1972) at 8. See also Dinah Shelton, “Environmental Rights in the European Community” (1993) 16 Hastings Int’l & Comp. L. Rev. 557 [Shelton, “Environmental Rights in the European Community”].
become an acknowledged world leader in sustainable development. At the same time, other pan-European organizations, including the European Court of Human Rights and the United Nations Economic Commission for Europe, have taken an active role in promoting environmental protection and sustainable development. All three of these organizations, as well as individual European nations, have accorded significant recognition to environmental human rights.

5.1 Recognition of environmental deprivations of existing human rights

The European Court of Human Rights has repeatedly recognized that environmental harm may result in the deprivation of human rights protected under the European Convention. In the recent case of Oneryildiz v. Turkey, the Court had occasion to consider the impact of an environmental disaster on a number of Convention rights. Relying on Convention Articles 2 (right to life), 8 (right to private and family life) and 13 (right to effective remedy for violation of Convention rights) and on Article 1 of Protocol No. 1 (right to peaceful enjoyment of possessions), the applicants alleged that Turkey was responsible for the deaths of their close relatives and the destruction of their property resulting from a methane explosion at a nearby municipal waste dump. They further asserted that the administrative proceedings conducted in their case violated the requirements of fairness and promptness set forth in Article 6(1) (right to a fair hearing) of the Convention. The Court found violations of Articles 2 and 13 of the Convention, and of Article 1 of Protocol No. 1. (In view of these findings it was not necessary to consider the alleged violations of Articles 6 and 8.)

The decision is particularly significant in its analysis of the right to life. In considering the alleged violation of the right to life, the Grand Chamber reiterated that Article 2 imposes “a positive obligation on States to take appropriate steps to safeguard the lives of those within their jurisdiction.” In particular:

The positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2…entails above all a primary duty on the State to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life…

This obligation indisputably applies in the particular context of dangerous activities, where, in addition, special emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those


115 Supra, note 50.

116 Ibid. at para. 2.

117 Ibid. at para. 71.
concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks.\footnote{Ibid. at paras. 89-90.}

Furthermore, the Court held that where the loss of life is the result of reckless or intentional conduct on the part of State authorities, “the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy which individuals may exercise on their own initiative.”\footnote{Ibid. at para. 93.} On the evidence before it, the Court found that the public authorities in question were fully aware of the serious risk of methane explosion (with resultant loss of life and property damage) and failed to take adequate preventative measures.\footnote{Ibid. at paras. 100-107.} As a result, the substantive component of the Article 2 right to life was violated.\footnote{Ibid. at para. 110.} Further, the failure to bring criminal proceedings against those responsible for the deaths in question represented a violation of the procedural component of Article 2.\footnote{Ibid. at paras. 116-118.}

In a number of earlier cases the Court had found that “Article 8 applies to severe environmental pollution which may affect individuals’ well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely…”\footnote{López Ostra v. Spain, (1994) 303 C. E.C.H.R. (Series A) 51 [López Ostra] cited in Taskin and Others v. Turkey, no. 46117/99 X E.C.H.R. 621 at para. 113 [Taskin]. See also Powell and Rayner v. United Kingdom (1990), 172 E.C.H.R. (ser. A). See also Arrondelle v. United Kingdom, No. 7889/77 (13 May 1982), 5 E.H.R.R. 118, 119 (friendly settlement).} This holding was reiterated in the recent, ground-breaking case of \textit{Taskin and Others v. Turkey}.\footnote{See Taskin, \textit{ibid.}} In \textit{Taskin}, a gold mine was allowed to continue using a cyanide leaching process despite numerous scientific reports indicating that the mine’s use of cyanide “represented a threat to the environment and the right to life of the neighbouring population, and that the safety measures which the company had undertaken to implement did not suffice to eliminate the risks…”\footnote{Ibid. at para. 112.} The applicants also alleged that several tons of explosives had been used in the gold mine’s operations, resulting in considerable noise pollution.\footnote{Ibid. at para. 105.} The Court found violations of both Article 8 and Article 6 in connection with the issuance of the mine’s operating permit and the associated decision-making process.\footnote{Ibid. at para. 110.} The Court also commented on the free-standing right to a healthy environment; this portion of the Court’s judgment will be addressed in Part 5.3, below.

5.2 Procedural Environmental Rights: Europe Leads the Way

Since the 1970s, the European Union has recognized the importance of procedural environmental rights through a series of Directives requiring increasing levels of transparency and
public participation in environmental matters. In 2001, procedural environmental rights became binding international law in much of Europe, through the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (the “Aarhus Convention”). The Aarhus Convention was an initiative of the United Nations Economic Commission for Europe (UN/ECE), and the Convention has been signed by thirty-nine European states and the EU, and ratified by 40 states. In addition to the EU itself, all EU member countries except Ireland have signed the convention, although only 19 have ratified it. The EU ratified the Aarhus Convention in February of 2005. Violations of the Convention are justiciable before the Aarhus Convention Compliance Committee, which is the first environmental treaty commission established on a human rights model. As of October 23, 2003, members of the public are permitted to communicate grievances directly to the Committee. Public submissions were considered for the first time by the Committee in its fourth meeting in May of 2004.

As its full name implies, the Aarhus Convention is concerned with procedural environmental rights, as defined above. In particular, the Convention codifies the right to promptly receive environmental information held by public bodies (and the latter’s duty to actively disseminate environmental information), the right to meaningfully participate in environmental decision-making (which includes notification, information, and an opportunity to comment on matters of environmental significance), and the right to challenge environmental decisions on procedural or substantive grounds before a court or quasi-judicial body.

The “Aarhus rights” have enjoyed a significant degree of implementation throughout Europe. Stephen Stec notes that many former Soviet-block countries had already embraced the notion of “environmental democracy” prior to Aarhus as an aspect of transition to democracy more generally. Indeed, Stec argues that as a result of these transition-driven advances in Eastern European countries, “the Convention has had a comparatively bigger impact on the legislation of Western Europe than that of Eastern Europe.” The EU itself has already made substantial progress in amending its environmental legislation to accord with the Aarhus

131 Ibid.
133 Ibid. at 19.
134 Aarhus Convention, supra note 129 at art. 4.
135 Ibid. at art. 5.
136 See ibid. at arts. 6, 7, 8.
137 Ibid. at art. 9.
138 Stec, supra note 132 at 2-9.
139 Ibid. at 8.
Article 6 of Directive 2003/4/EEC on public access to environmental information gives effect to Article 9(1) of the Aarhus Convention, requiring the establishment of a review process in cases of refusal to provide environmental information. Article 3(7) of Directive 2003/35/EC on providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment, brings EU law into conformity with Article 9(2) of the Aarhus Convention concerning public participating in environmental decisions. The Proposed Directive on Access to Justice in Environmental Matters responds to Article 9(3) of the Aarhus Convention, regarding citizen enforcement of environmental laws. Finally, the Commission adopted a proposal for a regulation applying the Aarhus Convention to EU institutions, and the Ministers of Environment agreed to this proposal in December, 2004.

The European Court of Human Rights has also acknowledged the importance of procedural environmental rights. In Vides Aizsardzibas Klubs v. Latvia, for example, the Court found a violation of freedom of expression under Article 10 of the European Convention when a Latvian court upheld a defamation suit by a mayor based on public allegations of impropriety made by an environmental NGO. In its decision, the court acknowledged that the NGO acted...
as an environmental “watch dog” (“chien de garde”) and that this function was an essential one in a democratic society.\footnote{Vides Aizsardzibas Klubs, ibid. at para. 42 [translated by author].}

Thus, Europe as a region has led the way in codifying procedural environmental rights through the \textit{Aarhus Convention}, the EU and European nations have recognized and operationalized these rights, and the European Court of Human Rights has also acknowledged them.

\section*{5.3 The free-standing right to environment}

There has been clear and substantial recognition of the right to environment by European regional organizations, courts, and individual European nations.

\subsection*{5.3.1 Recognition of the Right to Environment by the EU}

Since the late 1990s, the institutions of the European Union have accorded significant recognition to the right to environment. In November, 1999 the Parliamentary Assembly of the Council of Europe stated that “in the light of changing living conditions and growing recognition of the importance of environmental issues, it considers that the [European] Convention [on Human Rights] could include the right to a healthy and viable environment as a basic human right”\footnote{Council of Europe, Standing Committee acting on behalf of P.A., 4 November, 1999, Texts Adopted, Recommendation 1431, online: Parliamentary Assembly <http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Documents/AdoptedText/TA99/EREC1431.HTM>.

\footnote{See Shelton, “Human Rights, Environmental Rights”, \textit{supra} note 20 at 132, citing Jean-Paul Jacque, “La protection de l’environnement au niveau européen ou régional,” in P. Kromarek, ed., \textit{Environnement et droits de l’homme} (1987) at 70-71.}} and recommended investigating the feasibility of amending the Convention to include such a right.\footnote{\textit{Supra}, note 58.} Following up on this recommendation, on 27 June 2003, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1614 (2003) on Environment and Human Rights, which addressed environmental deprivations of recognized rights and procedural environmental rights, as well as the free-standing right to environment:

The Assembly recommends that the Governments of member States:

\begin{itemize}
\item[i.] ensure appropriate protection of the life, health, family and private life, physical integrity and private property of persons in accordance with Articles 2, 3 and 8 of the \textit{European Convention} on Human Rights and by Article 1 of its Additional Protocol, by also taking particular account of the need for environmental protection;
\item[ii.] recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level;
\item[iii.] safeguard the individual procedural rights to access to information, public participation in decision making and access to justice in environmental matters set out in the Aarhus Convention…\footnote{\textit{Supra}, note 58.}
\end{itemize}

Most significantly, on December 7, 2000, the European Parliament, Council and Commission “solemnly proclaimed” a \textit{Charter of Fundamental Rights of the European Union}
which included, in section 37 a codification of the duty to achieve a high level of environmental protection. Section 37 of this original Charter was reproduced in its entirety in section 97 of the Charter of Fundamental Rights of the Union, Part II of the proposed European Union Constitution. Article 97 accords constitutional recognition to environmental interests, in the following language:

A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.

The phrasing of this provision appears to skip directly to the “duty” component of the “right-duty” equation, but its inclusion within the Charter of Fundamental Rights arguably indicates that the obligation to achieve a high level of protection is indeed connected to a correlated right. Interestingly, the ambiguity as to the rights aspect of this provision would presumably allow courts to adopt either an anthropocentric or an eco-centric approach, since the provision does not specify the source of the duty. What does appear clear from the provision, however, is that it endorses a notion of obligation that is consistent with the substantive, free-standing right to environment, as opposed to mere procedural rights, or the right to be free of environmental conditions that violate other recognized rights. Although the European constitutional process has faltered, Article 97 is nonetheless, a revealing indicator of pan-European perspectives on environmental human rights.

5.3.2 Recognition of the Right to Environment at the European Court of Justice

In Case C-176/03 the European Commission sought annulment of a Council Framework Decision requiring member states to criminalize certain serious environmental offences. The Commission had itself put forward a proposed Directive on this issue, which, though rejected

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The issue was whether the power to require criminal sanctions for environmental offences lay with the Commission, the Council, or both. The Court held that both the Council and the Commission had the power to require criminalization of environmental offences, but the Council was under a duty to refrain from doing so in deference to the primacy of the Commission’s powers in the environmental field. In the course of its decision, the Court had occasion to reiterate that “protection of the environment constitutes one of the essential objectives of the Community.” Although the Court did not specifically allude to the right to environment in its Judgment, Advocate General Ruiz-Jarabo Colomer devoted substantial consideration to this concept.

In a section of the Opinion titled “The right to an acceptable environment and public responsibility for its preservation,” the Advocate General stated:

In the geophysical medium which our natural surroundings represent, quality of life asserts itself as a citizenship right emanating from various factors, some of them physical (the rational use of resources and sustainable development) and some more intellectual (progress and cultural development). It is a matter of attaining dignity of life in qualitative terms, once the threshold sufficient for subsistence has been passed.

There thus emerges a right to enjoy an acceptable environment, not so much on the part of the individual as such, but as a member of a group, in which the individual shares common social interests. A number of constitutions of Member States of the Community at the time the contested Framework Decision was approved recognize that right. Accordingly, Article 20a of the Basic Law of the Federal Republic of Germany provides that ‘the State, assuming responsibility for future generations, shall also protect the natural conditions of life in the framework of the constitutional order.’ In Spain…Article 45 of the Constitution declares the right of all ‘to enjoy an environment appropriate for personal development’. Article 66(1) of the Portuguese Constitution reads similarly. In Sweden, Article 18(3) of [the statute] amending the Instrument of Government, reiterates the right of access to nature.

The Advocate General went on to consider correlative state duties to protect the environment, as well as the inclusion of environmental protection within the European Union’s Charter of Fundamental Rights of 7 December 2000 (Article 37) and the proposed European Charter of Fundamental Rights of 7 December 2000 (Article 37) and the proposed European

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158 Commission v. Council - Judgment, supra note 156 at paras. 46-53. In particular, the Court held that the “framework decision […] infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community.” Ibid at para. 53.

159 Commission v. Council - Judgment, supra note 156 at para. 41.

160 The Opinions of Advocates General are not binding, but, when followed by the Court, may offer evidence of the reasoning behind the Court’s decision, and have some persuasive value. See generally Stephen Weatherill and Paul Beaumont, EU Law, 3rd ed. (London: Penguin, 1999) at 178-181.

161 Ibid. at para. 68.
Constitution.\textsuperscript{163} Finally, he noted that the right to environment is also “linked” with other human rights, as recognized by the European Court of Human Rights in cases such as \textit{Lopez Ostra}, supra.\textsuperscript{164}

5.3.3 Recognition of the Right to Environment by the European Court of Human Rights

In \textit{Taskin and Others v. Turkey}, discussed in Part 5.1 above, the European Court of Human Rights addressed environmental deprivations of existing rights, but also recognized the \textit{per se} right to a healthy environment. It did so on two levels: First, the judgment includes a number of references to the applicants’ right to a healthy environment under the Turkish Constitution,\textsuperscript{165} and the court appears to rely on this constitutional right on a number of key issues. For example, in considering whether the alleged violation of Article 8 could be supported under the “margin of appreciation” generally granted to states, the Court notes that a Turkish domestic court had annulled the gold mine’s operating permit “based…on the applicants’ effective enjoyment of the right to life and the right to a healthy environment… In view of that conclusion, no other examination of the material aspect of the case with regard to the margin of appreciation…is necessary.”\textsuperscript{166}

In determining whether a civil right was implicated for the purposes of Article 6,\textsuperscript{167} the Court found that “[t]he right relied on before the [Turkish] courts…was the right to obtain adequate protection of…physical integrity against the risks entailed by …the gold mine” and “[t]he Court considers that such a right is recognised in Turkish law, as is clear, in particular, from the right to live in a healthy and balanced environment…”\textsuperscript{168} Thus, the \textit{Taskin} judgment indicates that a domestic guarantee of the right to environment may have substantial legal significance at the supranational level.

Even more significant than its consideration of the Turkish right to environment is the Court’s recognition of the right to environment in international law. In its analysis of “Relevant Law” (Part II of the Judgment), the Court devotes a specific subsection to “The relevant international texts on the right to a healthy environment”.\textsuperscript{169} It then considers the procedural environmental rights enshrined in the \textit{Rio Declaration}\textsuperscript{170} and the \textit{Aarhus Convention},\textsuperscript{171} describing in some detail the major components of these rights (access to information, participation, and access to justice). Finally, the Court excerpts the relevant portion of the Parliamentary Assembly of the Council of Europe’s Recommendation 1614 (2003), discussed above, recommending that member states i) ensure the protection of existing Convention rights by taking

\begin{itemize}
\item \textsuperscript{163} \textit{Ibid.} at para. 69.
\item \textsuperscript{164} \textit{Ibid.} at 70.
\item \textsuperscript{165} See \textit{Taskin}, supra note 123 at paras. 26, 90, 117, 121, 129, 132, 133.
\item \textsuperscript{166} \textit{Ibid.} at 117.
\item \textsuperscript{167} The Article 6 right to a fair and timely hearing is limited to “the determination of civil rights and obligations”. See \textit{ibid.} at paras. 127-130.
\item \textsuperscript{168} \textit{Ibid.} at paras 131-132.
\item \textsuperscript{169} \textit{Ibid.} at para. 98 ff.
\item \textsuperscript{170} \textit{Ibid.} at para 98.
\item \textsuperscript{171} \textit{Ibid.} at para. 99.
\end{itemize}
particular account of the need for environmental protection ii) “recognise a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level” and iii) safeguard procedural environmental rights.

Although the Court stopped short of commenting on the current status of the right to environment, it seems highly significant that the Court refers to the “right to environment” without any qualification (such as emergent, purported, etc.), particularly when consideration of supranational law was unnecessary on this point because of the domestic constitutional provision. The Court appears to have gone out of its way to draw attention to the existence of a right to environment in international legal texts. Also interesting is the fact that the Court includes procedural environmental rights, the right to environment, and the preservation of existing rights through environmental protection all within the rubric of the “right to a healthy environment”. Without overstating the case, the Court may be approaching the right to environment as one unitary right, encompassing both substantive and procedural components. This “unitary approach” to the right to environment will be discussed in further detail in Part 6, below.

5.3.4 National Constitutions

In addition to Turkey, twenty-two other European nations explicitly recognize some form of the right to environment in their domestic constitutions.172 The Belgian Constitution, for example, recognizes the “right to the protection of a sound environment.”173 The Hungarian Constitution provides that the “Republic of Hungary recognizes and implements everyone’s right to a healthy environment.”174 The Constitution of Spain provides that “everyone has the right to enjoy an environment suitable for the development of the person”,175 while Portugal’s Constitution states that “all have a right to a healthy and ecologically balanced environment.”176 Not surprisingly, Norway’s constitution provides one of the broadest guarantees of environmental rights, recognizing “the right to an environment that is conducive to health and to natural surroundings whose productivity and diversity are preserved.”177 Most recently, France joined the ranks of European nations possessing constitutional guarantees of the right to environment in February of 2005. It adopted a constitutional amendment denominated the “Environment Charter” (“Charte de l’environnement”) which declares that the French people have a right to “live in an environment which is balanced and respects their health.”178

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172 Mollo, supra note 100 at n. 171 (“Belgium, Bulgária, Chechnya, Croatia, Czech Republic, Finland, France, Georgia, Hungary, Latvia, Macedonia, Moldova, Norway, Portugal, Russia, Sao Tome and Principe, Seychelles, Slovakia, Slovenia, Spain, Tajikistan, Ukraine”).


174 Mollo, supra note 100 at 96.

175 Ibid. at 105.

176 Ibid. at 102.

177 Ibid. at 100.

178 See Charte de l’environnement, online: Government of France <http://www.ecologie.gouv.fr/IMG/pdf/affiche_charte_environnement.pdf> (“Chacun a le droit de vivre dans un environnement équilibré et respectueux de la santé.”). See also Mollo, ibid. at 39. See also Loi n°2006-1772 du 30 décembre 2006 sur
In addition to those countries whose constitutions protect a right to environment, the constitutions of Albania, Andorra, Greece, Germany, Lithuania, Malta, the Netherlands, Poland, Romania, Sao Tome and Principe, and Switzerland, establish state responsibility for the protection of the natural environment. Moreover, the European Union and all of its member states have promulgated an immense body of environmental protection legislation which may constitute state action motivated by an implicit recognition of the right to environment and a corresponding state duty of environmental protection.

In sum, European law has gone far beyond the recognition of environmental deprivations of recognized human rights. In addition to codifying and implementing procedural environmental rights, European law has begun to recognize an independent and substantive human right to environment. Organs of the European Union have repeatedly and explicitly acknowledged that an independent right to environment exists, and a plethora of European nations have codified this right in their domestic constitutions. The European Court of Human Rights has similarly recognized this right under international law and has also shown its willingness to implement and enforce domestic constitutional guarantees of the right to environment.

The next step in the evolution of the right to environment in Europe would be the inclusion of such a right in the European Convention on Human Rights and/or in a European Constitution. However, even in the absence of binding convention law on point, the evidence taken as a whole indicates that the right to environment has emerged or is on the brink of emerging as a rule of customary international law in Europe.

6. A UNITARY RE-FORMULATION OF THE RIGHT TO ENVIRONMENT

6.1 Re-conceptualizing environmental human rights

As noted in Part 4, there is a tendency in the literature to conceptualize the three approaches to environmental human rights discussed above (environmental deprivations of recognized rights, procedural environmental rights, and the right to environment) as alternative formulations. However, as a practical matter, the selection of one or two of these approaches as the definitive formulation of environmental human rights is no longer a viable option. Of necessity, petitioners will continue to ask international human rights tribunals and domestic courts to recognize environmental deprivations of existing rights (such as the right to life) whose legitimacy is beyond question. Procedural environmental rights, in turn, have become firmly established in both soft and hard law instruments, and are clearly here to stay. With respect to the human right to water, article 1 of the recently promulgated loi sur l'eau et les milieux aquatiques provides that “chaque personne physique, pour son alimentation et son hygiène, a droit d'accéder à l'eau potable à des conditions économiquement supportables.”

See Atapattu, supra note 22 at 69-70: “Due to the lack of enforcement machinery for environmental issues, the human rights machinery [will continue to be] used to seek redress for environmental problems…” [internal citations omitted].
to the substantive right to environment, the evidence described above strongly indicates the actual or imminent emergence of a substantive right to environment as a principle of customary international law.

In this author’s view, what is required is a conceptual framework that explains the interrelationship between the three categories, recognizing that “[a]ll human rights are universal, inter-dependent and indivisible.”182 The unitary reformulation of the right to environment recognizes that the right to environment encompasses both the substantive right to environmental quality and the procedural environmental rights discussed above, and overlaps with other recognized human rights.183

From an advocacy perspective, an approach that recognizes the right to environment as independent but overlapping with existing rights allows petitioners to rely on the most clearly established rights while still applying continued pressure for the recognition of a right to environment. Consider, for example, the situation of residents of a rural area subjected to intensive, government-permitted mining activities resulting in ecological devastation, water contamination, and resulting loss of human lives. In this hypothetical, the petitioners could rely on the violations of the right to life, including the well-established duty of the state to protect and promote life, but could also argue that the right to environment had been infringed.184 What value would the right to environment add in this scenario? Is the right to environment merely the right to life (property, culture, etc.) by another name? These questions point to the need to articulate the specialized content of that area of the right to environment that goes beyond existing rights, which, for purposes of this discussion will be referred to as the “pure” right to environment.

6.2 Content of the “pure” right to environment

Since the right to environment is itself a relatively new addition to international environmental law and policy, it is not surprising that the unique content of the right is decidedly uncertain. Judicial decisions addressing environmental deprivations of existing rights are generally unhelpful in this regard, and soft law instruments articulating a right to environment have taken a variety of approaches.185 This ambiguity surrounding the “pure” right to environment is troublesome. International and domestic tribunals faced with claims based on the right to environment will need to understand the precise contours and content of that right, and, in particular, the aspects of the right that create entitlements beyond those contained in other existing rights. Similarly, in order to be effective as an aspirational principle or policy goal, the right to environment must be more clearly delineated.


183 Rodriguez-Rivera describes the unitary, or in his terms “expansive”, right to environment as including “qualitative environmental standards (substantive and intergenerational formulation of the right to environment), intrinsic value of the environment (expansive formulation of the right to environment that incorporates this fundamental element of the right of environment), and procedural guarantees (expansive formulation of the right to environment that incorporates the concept of environmental rights).” Supra note 23 at 16.

184 This is analogous to a situation in which the representative of a prisoner who was tortured to death asserts overlapping violations of the right to life and the right to be free from cruel or degrading treatment.

185 See Parts 4.3 and 5.3, above.
In my view, it is most helpful to take a purposive approach in developing the content of the pure right to environment. If the goal of the right to environment is to protect human dignity and well-being from environmental harm, then it makes sense to expand our understanding of that right to include the interests of future generations and the protection of aesthetic values (as suggested by Professor Shelton in her pivotal early article on environmental human rights). Similarly, since it is impossible to protect human well-being from many poorly understood environmental threats unless a precautionary approach is adopted, the right to environment should also incorporate the Precautionary Principle of international environmental law.

6.2.1 Intergenerational equity

Human rights discourse and jurisprudence typically focus exclusively on the rights of existing humans. However, given the profound vulnerability of future generations to harm resulting from our current environmental decision-making, this present-focus may be inappropriate in the field of environmental human rights. Professor Shelton argues that the recognition of a free-standing right to environment “implies significant, constant duties toward persons not yet born” for the following reasons:

A depleted environment harms not only present generations, but future generations of humanity as well. First, an extinct species and whatever benefits it would have brought to the environment are lost forever. Second, economic, social, and cultural rights cannot be enjoyed in a world where resources are inadequate due to the waste of irresponsible prior generations. Third, the very survival of future generations may be jeopardized by sufficiently serious environmental problems.

Indeed, if human rights exist to protect the vulnerable from the powerful, it is difficult to imagine a demographic more in need of environmental human rights protection than future generations. I have argued elsewhere that a strictly present-focused right to environment would fail to achieve environmental protection sufficient to safeguard the interest of future humans, since some activities that cause little or no immediate environmental harm may be devastating to the future (e.g. groundwater mining). Thus, in order for the right to environment to protect the interests of both present and future generations, it is necessary to interpret that right as including an intergenerational component.

Professor Edith Brown Weiss, the leading proponent of intergenerational equity, has articulated three sub-parts that help to elaborate the concept:

First, each generation should be required to conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict the options available to future generations in solving their problems and satisfying their own values, and should also be entitled to diversity comparable to that enjoyed by previous generations. This principle is called “conservation of options.” Second, each generation should be required to maintain the quality of the planet so that it is passed on in no worse condition than that in which it was received, and should also be entitled to planetary quality comparable to that enjoyed by previous generations. This is

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187 Ibid. at 134.
188 Ibid. at 133.
the principle of “conservation of quality.” Third, each generation should provide its members with equitable rights of access to the legacy of past generations and should conserve this access for future generations. This is the principle of “conservation of access.”

A number of domestic constitutions and judicial opinions have recognized the principle of intergenerational equity. Moreover, at least one important international formulation of the right to environment already includes an intergenerational component. Special Rapporteur Ksentini has articulated the right to environment as “the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.” Recognizing an intergenerational equity component of the right to environment would substantially (and appropriately) expand the range of interests that can be protected within the rubric of environmental human rights.

6.2.2 Aesthetic protection

Shelton explains that the freestanding right to environment could add protection for the aesthetic value of natural spaces, which is “a substantive area not protected under current human rights law or existing [procedural] environmental rights.” The right to aesthetic protection would give legal effect to the moral duty “not to turn a beautiful landscape into a moonscape.” While recognized human rights such as the right to life may preserve the basic biological inputs necessary for survival (e.g. clean air and water), aesthetic protection is aimed at preserving that which makes life worth living. By including aesthetic protection, the right to environment would protect the intangible, quality-of-life values inherent in natural environments.

6.2.3 Precautionary Principle

As in other areas of environmental decision-making, courts and policy makers evaluating claims based on the right to environment will frequently face the challenge of scientific uncertainty. As an example, community members may object to the emission of a poorly understood air contaminant from a government-permitted facility, arguing that its emission violates the right to environment. How would a court or regulator assess such a claim? The Precautionary

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191 See e.g. Mollo, supra note 100 at 94 (German Constitution); see also The Philippines: Supreme Court Decision in Minors Oposa v. Secretary of the Department of Environment and Natural Resources (Denr), (1994) 33 I.L.M. 173 at 185 (WL); See generally Collins, “Revisiting the Doctrine of Intergenerational Equity”, supra note 1.


194 Bosselmann, supra note 18 at 129.

195 Note that there is significant overlap with Indigenous spiritual and cultural rights in traditional lands and waters.
Principle is a principle of international environmental law that directs environmental decision-makers to err on the side of caution where scientific uncertainty exists.  

As articulated in the Bergen Declaration, the Precautionary Principle holds that:

Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.

Put another way, “[w]hen there is substantial scientific uncertainty about the risks and benefits of a proposed activity, policy decisions should be made in a way that errs on the side of caution with respect to the environment and the health of the public.”

As part of the human right to environment, the precautionary principle would include both interpretive and substantive components. On the interpretive level, it would dictate how claims of environmental violations should be adjudicated, and provide a specific standard by which state efforts to protect environmental human rights should be measured. Specifically, it requires states to take pro-active measures to ensure that its citizens’ environmental rights are protected, even in the presence of scientific uncertainty. To use a concrete example, the precautionary principle may compel a state to require the manufacturers of synthetic chemicals to prove their safety before exposing members of the public to them. This example also points to the substantive aspect of the precautionary principle as a component of the human right to environment: people have a right not to be exposed to poorly understood and potentially harmful substances.

Further development of the unique content of the right to environment by commentators and jurists will assist international actors in understanding the right, and perhaps more importantly, the correlative state duties. The three sub-components addressed above are suggested as a starting point in this dialogue. An analysis of the extent to which these three sub-components

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198 Ibid. Some definitions of the principle import an economic element; see e.g. Rio Declaration, supra note 66, Principle 15:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.


201 For an excellent discussion of this issue, see Joe Thornton, Pandora’s Poison: Chlorine, Health, and a New Environmental Strategy (Cambridge, Massachusetts: MIT Press, 2000) at 353: “People, not chemicals, have the right to be presumed innocent until proven guilty. People also have the right not to be experimented on without informed consent; no one has ever had the opportunity to grant or deny their consent before being exposed to the [toxic] burden that now contaminates us all.”
have already been recognized as aspects of the right to environment is beyond the scope of this Article, but should be fertile ground for future research.

7. CONCLUSION

I have argued that environmental human rights have become firmly entrenched in the international legal order and in European law specifically. Environmental deprivations of existing rights have been repeatedly recognized by international and regional tribunals, as well as in numerous soft law instruments both internationally and in Europe. Moving to the right to environment itself, the procedural aspects of the right have been codified in the Espoo and Aarhus conventions and have also been widely recognized in important soft law instruments such as the Rio Declaration.

The substantive right to environment has also been enshrined in two binding regional conventions – the African Charter and the Protocol of San Salvador – and in a multitude of soft law instruments. Further, there is copious state practice in the environmental area (both in domestic legislation and in international environmental law) that seems to reflect opinion juris regarding state obligations to protect the right to environment. Given that the majority of states have affirmed at least three times that “all individuals are entitled to live in an environment adequate for their health and well-being,” there is a strong argument that this widespread state practice in the environmental area arises from the perceived legal obligation to provide individuals with a healthy environment. In addition, a majority of states have recognized the right to environment and/or state duties to protect the environment in their domestic constitutions. In sum, the evidence that the right to environment has now emerged as a principle of customary international law is very strong.

In Europe specifically, the right to environment has been recognized at both the European Court of Justice and the European Court of Human Rights, European “soft law” instruments have repeatedly acknowledged the right to environment, and European Union Institutions have been quite pro-active in seeking codification of the right in regional legal instruments. Most notably, the European Constitution would have included a high level of environmental protection under the rubric of fundamental rights. The likely demise of the Constitution in its current form may provide an opportunity to revise this provision to include a clear and explicit reference to the right to a healthy environment. For the sake of clarity, this revision should be actively pursued. The European Union should also begin to include an explicit evaluation of respect for the right to environment in its consideration of candidate countries.

Finally, I have suggested that the right to environment should be conceptualized as overlapping with, but going beyond, existing human rights and further that this approach, in turn, requires the development of some unique content for the “pure” right to environment. Taking the lead from Professor Shelton, I propose that intergenerational equity, aesthetic protection, and the Precautionary Principle represent areas of the right to environment extending beyond the interests protected by pre-existing human rights.

In the long run, universal acceptance of the right to environment may provide helpful guidance for the formulation of environmental law and policy worldwide, creating increased momentum in the drive towards sustainable development and environmental protection. “In the interim…people [threatened by environmental harm] are entitled to confidence that for them there will be a long run.”203 A robust and justiciable right to environment would also respond to this pressing human need by providing access to redress through the international human rights machinery. In short, the right to environment is an important and desirable addition to the tool-kit of legal advocates, policy-makers and jurists, and has become a reality in international and European law.