

# Constructing the Human Right to a Healthy Environment

John H. Knox

Wake Forest University School of Law, Winston-Salem, North Carolina 27109, USA;  
email: [knoxjh@wfu.edu](mailto:knoxjh@wfu.edu)

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## Abstract

Despite the absence of a right to a healthy environment in the Universal Declaration of Human Rights or any global human rights treaty, environmental human rights law has rapidly developed over the past 25 years along three paths: (a) the widespread adoption of environmental rights in regional treaties and national constitutions; (b) the greening of other human rights, such as the rights to life and health, through their application to environmental issues; and (c) the inclusion in multilateral environmental instruments of rights of access to information, public participation, and access to justice. After describing these developments, this review assesses the possible effects of UN recognition of the human right to a healthy environment, both on the environment and on human rights law itself.

## INTRODUCTION

Although the social and moral bases for individual rights are highly contested, the legal bases are relatively clear: Lists of rights are found in international human rights instruments and national constitutions, where they share similarities of function, substance, and structure (Gardbaum 2008).<sup>1</sup> At the international level, the foundational text is the Universal Declaration of Human Rights, adopted by the UN General Assembly on December 10, 1948. In 1966, the General Assembly adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), which elaborate on the Universal Declaration rights and add the right of self-determination of peoples. Other UN human rights treaties address the rights of members of racial minorities, women, children, and persons with disabilities or focus on specific abuses, including genocide, torture, and disappearances.

Whether the rights in the Universal Declaration are really universal has been the subject of an immense amount of debate. The dominance of colonial powers and the exclusion of much of the Global South, including all of sub-Saharan Africa, from the United Nations at the time of its adoption has given rise to criticism of the Declaration, and the human rights movement as a whole, as inherently Western and European (e.g., Mutua 1996). This narrative is complicated, if not refuted, by the substantial contributions of small and non-Western states to the negotiation of the Universal Declaration (Waltz 2001, 2002), the support of countries in the Global South for the early human rights treaties (Jensen 2015), and the inclusion by those countries of Universal Declaration rights in regional agreements and national constitutions.

The primary regional agreements are the European Convention on Human Rights (1950), the American Convention on Human Rights (1969), and the African Charter on Human and Peoples' Rights (1981). The European and American Conventions repeat only the civil and political rights of the Universal Declaration, but the European Social Charter (1961) and the San Salvador Protocol to the American Convention (1988) list economic, social, and cultural rights. The African Charter includes both types of rights and adds new rights of peoples and duties of individuals (Benedek 1985). The UN and regional human rights systems have also adopted declarations on human rights, such as the UN Declaration on the Rights of Indigenous Peoples (2007).

The inclusion of rights in national constitutions obviously predated the Universal Declaration, but the Declaration helped to fuel an enormous increase in the number and variety of constitutional rights (Elkins et al. 2013). Nearly all constitutions now share a "generic" set of rights, including the civil and political rights to freedom of religion, freedom of expression, nondiscrimination, and private property, but most constitutions also include some economic, social, and cultural rights, such as labor rights and rights to education (Law & Versteeg 2011). The characterization of rights across different constitutions and treaties shares so many similarities that it has been described as constituting a common language, albeit one with two dialects: a "universalist" dialect that draws heavily on international and regional treaties and a "positive-rights" dialect that also emphasizes economic and social rights (Law 2018).

Civil and political rights are sometimes characterized as first-generation rights and economic, social, and cultural rights as second-generation rights. These labels can be misleading, if they imply that civil and political rights entered the international canon first or must be given more weight there. The Universal Declaration includes both types of rights, the General Assembly negotiated and adopted the ICCPR and the ICESCR simultaneously, and the two Covenants have

<sup>1</sup>They also have important differences, including in legal effect and methods of enforcement, and international and domestic rights can interact in complex ways (Neuman 2003). This article focuses on the legal construction and implementation of rights; for their social construction, see, e.g., Stammers (2009) and Gregg (2013).

approximately the same number of parties.<sup>2</sup> United Nations resolutions and declarations regularly state that all human rights are universal, indivisible, interdependent, and interrelated (e.g., World Conference on Human Rights 1993, para. 5). However, the language of the Covenants does reflect the different nature of the rights: The ICCPR requires each of its parties “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant” [art. 2(1)], and the ICESCR requires only that each party “take steps, individually and through international assistance and co-operation. . .to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means” [art. 2(1)].

The legal structure created by what has been called the Age of Rights (Henkin 1990) can be conceptualized as a pyramid, with the highest places given to the instruments that have the broadest geographic scope. At the very top is the Universal Declaration, and below it are the two Covenants and then the other UN treaties and declarations. At the next level are regional agreements, and at the broad base are rights in national constitutions. In principle, new rights may enter at any level of this pyramid and spread vertically or horizontally. In practice, however, it has been unusual in recent decades for a new right to migrate upward from the national to the international level. The drafters of the Universal Declaration took almost all of its rights from national constitutions, but since then the directions of influence have tended to be downward, from international and regional agreements to national constitutions (Elkins et al. 2013), and lateral, from national constitutions to one another (Goderis & Versteeg 2014).

Where is the right to a healthy environment in this pyramid?<sup>3</sup> Neither the Universal Declaration nor any other UN human rights instrument has explicitly recognized it. Nevertheless, the last 25 years have seen the development of detailed environmental human rights norms, along three main paths: (a) the widespread adoption of environmental rights in regional treaties and national constitutions; (b) the greening of other human rights, such as the rights to life and health, through their application to environmental issues; and (c) the inclusion in multilateral environmental instruments of rights of access to information, public participation, and access to justice in environmental matters.

This rapidly developing constellation of norms has been described as constituting a new human right to a healthy environment, even without formal recognition by the United Nations (Rodríguez-Rivera 2018). However, global recognition is still considered worth pursuing. In 2018, the outgoing and incoming UN special rapporteurs on human rights and the environment urged the General Assembly to recognize the right through a treaty or resolution (Knox & Boyd 2018). The proposal has received enough interest that it seems likely, although far from certain, that the General Assembly will consider recognition of the right in the foreseeable future.

One way of looking at this possibility is that a great deal is at stake. The right could be seen as the missing jewel in the crown of environmental human rights, critical to the fight to protect humans from global environmental challenges such as climate change, the loss of biological diversity, and pervasive air and water pollution. Given the scale of the challenges, advocates could understandably believe that the right would be one of the most important additions ever made to international human rights law. Conversely, one could argue that the very environmental human

<sup>2</sup>The ICESCR has 170 and the ICCPR has 173.

<sup>3</sup>The right of humans to enjoy an environment of some minimal quality can be, and has been, expressed in many different forms (May & Daly 2015, pp. 67–70). For convenience, this article refers to the right to a healthy environment as a catch-all term for the range of human-centered environmental rights. Ecocentric rather than anthropocentric rights—that is, rights of, rather than to, the environment—are much less common in national law and absent entirely from international law.

rights norms that may already be constructing a right to a healthy environment also make formal UN recognition of that right less important.

What, if anything, would UN recognition add to the existing body of international and domestic environmental human rights law? This article reviews the rapid evolution of environmental human rights norms and then forecasts some possible effects of UN recognition of an autonomous human right to a healthy environment, both on the environment and on human rights law itself.

### THREE CONVERGING PATHS TO THE RIGHT TO A HEALTHY ENVIRONMENT

The right to a healthy environment has not taken the straightforward road to international recognition that Bilder (1969, p. 173) succinctly described 50 years ago: “In practice, a claim is an international human right if the United Nations General Assembly says it is.” Its absence from the International Bill of Rights can be attributed to bad timing: The modern environmental movement began just after the General Assembly adopted the Covenants. Fifty years later, however, the United Nations has still not recognized it.

It nearly did so in the 1972 Stockholm Declaration, adopted by the first UN conference on the environment. The first principle in the Declaration states, “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.” This language seems to have been intended to express support for the right to a healthy environment (Sohn 1973), perhaps in response to a call for such a right from Jacques Cousteau, the famous French oceanographer (Houck 2008, p. 305).

The United Nations has never again come as close to endorsing the right. When the 1992 UN Conference on Environment and Development endorsed the concept of sustainable development and adopted the Rio Declaration, it avoided mentioning rights (Shelton 1993). Two years later, an independent expert on a subsidiary body to the UN Human Rights Commission proposed a draft declaration on human rights and the environment that included “the right to a secure, healthy and ecologically sound environment,” but the Commission refused to adopt it (Conca 2015).

In the absence of UN recognition, the development of environmental human rights law has nevertheless proceeded down three other paths: recognition of an autonomous right to a healthy environment at the regional and national levels, the application of other rights to environmental issues, and the inclusion of procedural rights in environmental treaties.

#### National and Regional Recognition

In 1981, the African Charter became the first human rights treaty to include an environmental right, providing in Article 24 that all peoples have the right to “a general satisfactory environment favourable to their development.” Seven years later, the San Salvador Protocol was the first treaty to present the right “to live in a healthy environment” as an individual right. Two later instruments, the 2004 Arab Charter on Human Rights and the 2012 ASEAN Human Rights Declaration, include the right to a “healthy” (Arab Charter) or “safe, clean, and sustainable” (ASEAN Declaration) environment as an element of the right to an adequate standard of living.

Neither the European Convention on Human Rights nor the European Social Charter includes a right to a healthy environment. However, in 1998, the UN Economic Commission for Europe adopted the Aarhus Convention, which sets out rights of access to information, public participation, and remedy and states that its parties shall guarantee these rights “[i]n order to

contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”

The number of countries with a constitutional environmental right depends on how the constitutional language is characterized. Boyd (2018, pp. 19–23) lists 100 countries that provide “direct constitutional protection” to environmental rights, and May & Daly (2015, appendix A) list 76 countries that explicitly provide for an individual right to some form of a “quality” environment. In addition, some countries include the right in national legislation, and the courts of at least 12 other countries, including India and Pakistan, have held that the right is inherent in the constitutional right to life (Boyd 2011).

The average number of rights in a constitution has more than doubled since the Second World War (Goderis & Versteeg 2014, p. 5), but the right to a healthy environment has done more than just ride the wave; it has been the most popular new right since its arrival in the mid-1960s. Included in only 1% of national constitutions in 1966,<sup>4</sup> it had been adopted into 63% by 2006 (Law & Versteeg 2011, p. 1201). The reason for its rapid spread may seem obvious: With the rise of modern environmental consciousness came calls for constitutional recognition of the importance of environmental protection to human well-being. But why have some countries adopted the right and others have not?

Gellers (2015) finds that the adoption of an environmental right has been more likely in countries with more international civil society organizations, a history of insufficient protection of human rights (such as the former Soviet-Bloc states in Eastern Europe), or higher levels of democracy, on the basis of which he suggests that adoption is best explained by theories of domestic politics and norm socialization. Imhof et al. (2016) report that countries with “future-orientated preferences” are more likely to adopt constitutional environmental protections, although they recognize the challenge of measuring something as abstract as the future-orientation of a society.

Law & Versteeg’s (2011, p. 1164) monumental study of national constitutions concludes that 90% of all variation in constitutional rights can be explained by just two variables: a constitution’s comprehensiveness, “which refers simply to the tendency of a constitution to contain a greater or lesser number of rights provisions,” and its ideological character. Relatively libertarian constitutions mainly include rights that protect against freedom from abuses by the government, whereas what Law & Versteeg call “statist” constitutions “both presuppose and enshrine a far-reaching role for the state.” One would therefore expect to see more economic, social, and cultural rights in constitutions that have more rights of all kinds and that reflect a more statist view. Because statist constitutions nearly always also include a core of civil and political rights, many of those rights, including freedom of religion and expression and the right to private property, have become “generic” rights present in the constitutions of virtually every country (p. 1199).

The rapid growth of the right to a healthy environment might suggest that it is well on its way to joining the list of generic rights. Boyd (2018, p. 18) states that at least 155 countries have accepted it in legally binding instruments, including treaties as well as constitutions, and only 38 have not. However, not all recognitions are equal. Becoming a party to the Aarhus Convention, for example, evidences less commitment to the right than adding it to a constitution. Relying on a data set of the prevalence of 17 economic, social, and cultural rights, May & Daly (2015) find that countries are more likely to add a constitutional environmental right if they have already recognized multiple other economic, social, and cultural rights in their constitutions, which indicates that the right to a healthy environment has joined the ranks of statist rights but has not yet attained genericity.

<sup>4</sup>Apparently, Guatemala was the first to adopt the right, in 1965 (Goderis & Versteeg 2014, p. 8).

## Greening Human Rights

With the exception of the International Labor Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989) and the UN Declaration on the Rights of Indigenous Peoples (2007), which protect the rights of indigenous peoples to conserve their traditional lands and natural resources (Anaya 2004), global human rights instruments almost never mention the environment explicitly. And of the regional treaties that recognize an environmental right, only the African Charter makes it reviewable by an international body. Neither the Arab Charter nor the ASEAN Declaration creates an oversight mechanism, and the San Salvador Protocol does not make its right to a healthy environment reviewable by the Inter-American Commission or Court of Human Rights.

Where the right to a healthy environment has not been adopted, or where its adoption has not been accompanied by institutional avenues of enforcement, advocates have sought to green other rights. International human rights institutions have long held that states have obligations not only to refrain from violating human rights directly but also to protect their enjoyment from interference by others (Knox 2008). Claimants have successfully argued that environmental harm interferes with the full enjoyment of a wide range of human rights and that states have failed to meet their obligations to protect against such interference.

The first case to illustrate this approach was *López Ostra v. Spain* (1994), in which the European Court of Human Rights held that pollution that prevented an individual from living in her home could interfere with her right to respect for private and family life protected by Article 8 of the European Convention, even if the pollution did not endanger her health. The Court held that states have a duty to take reasonable and appropriate measures to protect against such interference, including by corporations. Later decisions construing Article 8 have allowed governments discretion in setting substantive standards but have imposed stricter procedural requirements, including that states assess the environmental effects of proposed activities, make environmental information public, and provide access to judicial remedies (Boyle 2012). Similarly, the Court has held that to protect the right to life (recognized in Article 2 of the Convention) from environmental harm, states must establish legal frameworks to deter violations and investigate and punish violations if they nevertheless occur [e.g., *Öneryıldız v. Turkey* (2004)].

The first important environmental case in the African regional system concerned massive oil pollution in the Niger delta region by the Nigerian government and Royal Dutch Shell (Chenwi 2018). The African Commission found that the exploitation violated the human rights of the Ogoni people living in the delta, including their right to a satisfactory environment and their right to health, and held that Nigeria had duties to take “reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources” [*Social and Economic Rights Action Centre v. Nigeria* (2001), para. 52].

The Inter-American Court of Human Rights has held that states have obligations to consult with indigenous and tribal peoples regarding any proposed concessions or other activities that may affect their traditional lands and natural resources, ensure that no concession will be issued without a prior environmental and social impact assessment, and guarantee that they receive a “reasonable benefit” from any such plan if approved. A state may proceed with a development project that would have a major impact in their territory only if it obtains “their free, prior, and informed consent, according to their customs and traditions” [*Saramaka People v. Suriname* (2007), paras. 121, 122]. In 2017, the Court issued a far-reaching advisory opinion on human rights and the environment, stating among other things that the responsibility of states under the American Convention extends to actions within their territory or control that cause transboundary

environmental harm and that the rights to information, public participation, and access to justice are integral to the rights of life and personal integrity in the environmental context (Banda 2018).

At the United Nations, the principal intergovernmental human rights organ is the Human Rights Council, which replaced the Human Rights Commission in 2006. In addition to adopting resolutions and overseeing the Universal Periodic Review (UPR) of the human rights records of all UN member states, the Commission and Council have appointed independent experts to report on particular issues. In 1995, the Commission appointed a special rapporteur to investigate the effects on human rights of illicit dumping of toxic products in developing countries. That mandate has expanded to include the management and disposal of hazardous substances and wastes more generally (see Tuncak 2016 on the effect of pollution and toxics on children). Many other special rapporteurs have addressed environmental issues within the scope of their mandates [e.g., Anaya 2011 (extractive activities in indigenous territory), Forst 2016 (environmental human rights defenders), Elver 2017 (pesticides and the right to food), and Alston 2019 (climate change and extreme poverty)].

In 2012, the Council created a new mandate for an independent expert to study the human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment and appointed the present author to the mandate.<sup>5</sup> He issued a series of reports mapping how human rights bodies have applied human rights norms to environmental issues (Knox 2013). In 2015, the Council renewed the mandate for another three-year term, changed the title of the mandate-holder to special rapporteur, and requested that he promote the realization of the obligations. To that end, he prepared Framework Principles on Human Rights and the Environment, which summarize the existing human rights obligations relating to the environment as defined by human rights tribunals and other international bodies (Knox 2018). In 2018, the Council renewed the mandate for another three years, appointing David R. Boyd as the special rapporteur.

Every UN human rights treaty creates a committee of experts that reviews the parties' reports on their compliance. These treaty bodies can also receive individual complaints of violations, if the country concerned has accepted their jurisdiction over such communications. Although treaty bodies have lagged behind regional tribunals in issuing environmental decisions, they are beginning to catch up. In August 2019, the Human Rights Committee, which oversees the ICCPR, held for the first time that a state had violated the right to life by failing to protect individuals from environmental harm—specifically, the fumigation of toxic chemicals on agricultural fields, which caused injury and death [*Portillo Cáceres v. Paraguay* (2019)]. The Committee held that the government had an obligation to investigate and sanction those responsible, provide full reparation to the victims, and take measures to prevent similar violations in the future. More cases are pending, including two claims concerning climate change: a petition by Torres Strait Islanders against Australia before the Human Rights Committee and a claim by Greta Thunberg and 15 other youths and children against Argentina, Brazil, France, Germany, and Turkey before the Committee on the Rights of the Child.

The legal and practical effects of cases like these are variable and often indeterminate. Decisions of regional courts are legally binding, but states do not always comply with them. Reports of special rapporteurs and statements of treaty bodies are not binding as a matter of international law, but some states have given treaty body decisions legal effect within their domestic systems (Nollkaemper & van Alebeek 2012). A recent, high-profile example of how the greening of international human rights may resonate domestically is the 2019 decision by the Dutch Supreme Court that the Netherlands violated its obligation to protect the rights to life and family life under

<sup>5</sup> Limon (2018) describes the background and adoption of the mandate.

Articles 2 and 8 of the European Convention by not striving to reduce emissions at least 25% from 1990 levels by the end of 2020 [*Netherlands v. Urgenda Foundation* (2019)]. Several pending cases seek to convince courts in other European countries to follow the *Urgenda* precedent.

## Rights in Multilateral Environmental Agreements

Multilateral environmental agreements almost never refer to human rights, although the Paris Agreement on climate change (2015) is a prominent exception: Its preamble states that its parties “should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights” (cited in Rajamani 2018). However, many environmental treaties do encourage or require their parties to provide access to information or to promote public participation on issues within their scope.<sup>6</sup> Principle 10 of the 1992 Rio Declaration goes further, stating,

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.

At the regional level, the Aarhus Convention (1998), which has 47 parties in Europe and central Asia, and the Escazú Agreement (2018), adopted by (but not yet in force for) countries in Latin America and the Caribbean, each set out detailed requirements that their parties collect and provide environmental information, facilitate public participation in environmental decision making, and ensure that members of the public have access to legal remedies. Under the Aarhus Convention, a compliance committee composed of independent experts receives communications from members of the public, issues findings, and makes recommendations for compliance. The parties to the Escazú Agreement will address compliance mechanisms after it enters into force, which requires 11 states to ratify or otherwise join it.

## THE MISSING HUMAN RIGHT

Given the widespread adoption of the right to a healthy environment at the national and regional levels, and the greening of human rights at the regional and global levels, why has the United Nations not already recognized the right? Recognition could come in several forms, including a new treaty, a protocol to an existing one, or a new declaration or resolution. Politically, the simplest and fastest vehicle would be a resolution, such as General Assembly Resolution 42/292 (2010), which recognized the rights to water and sanitation.

Insofar as the United Nations has set standards for prospective human rights, the right to a healthy environment seems to meet them. In its Resolution 41/120 (1986), the General Assembly stated that international human rights instruments should, among other things,

1. Be consistent with the existing body of international human rights law;
2. Be of fundamental character and derive from the inherent dignity and worth of the human person;

<sup>6</sup>See, for example, the UN Framework Convention on Climate Change (1992), art. 6(a); the Stockholm Convention on Persistent Organic Pollutants (2001), arts. 7(2) and 10(1); and the Minamata Convention on Mercury (2013), art. 18(1).



3. Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
4. Provide, where appropriate, realistic and effective implementation machinery, including reporting systems; and
5. Attract broad international support.

Some scholars have argued that the right to a healthy environment is too vague to give rise to practicable rights and obligations (Hannum 2019, Ruhl 1999). However, many fundamental rights are codified in imprecise language whose interpretation depends on judicial or other bodies. It is not obvious why the right to a healthy environment is inherently vaguer than the right to due process, say, or to be free from cruel, inhuman, or degrading treatment. Some object that the adjudication of economic, social, and cultural rights invites courts to interfere in policy decisions better left to legislatures (Dennis & Stewart 2004), but the right to a healthy environment is no differently situated in this respect than the right to health or the right to an adequate standard of living (Rodríguez-Garavito 2018). And, in any event, the litigation of economic and social rights at the national level appears to have had some concrete, positive effects (Gauri & Brinks 2008).

The fact that environmental rights have already been adjudicated hundreds, if not thousands, of times by national courts around the world (Boyd 2012, May & Daly 2015) is powerful evidence that a new human right to a healthy environment would not necessarily be too vague to implement. At the same time, the multiplicity of the decisions may call into question exactly what the right would mean at the international level. Moreover, many countries have yet to apply, or even adopt, the right.<sup>7</sup>

To inform the content of the right in international human rights law, the decisions of national courts may be less relevant than the environmental jurisprudence of international and regional bodies. Although that jurisprudence has applied a wide range of human rights, it has reached a remarkably detailed and consistent set of obligations, summarized in the Framework Principles on Human Rights and the Environment (Knox 2018). Whatever the right threatened by environmental harm, the obligations of states to protect against that harm require them to take steps to provide information to those who may be affected, facilitate their participation in decision making, and provide for effective remedies for harm. Although states have some discretion to adopt substantive environmental standards, they must ensure that their standards are not retrogressive and take into account international health standards, among other factors. And states must take additional steps to ensure the protection of those most at risk from environmental harm.

In the words of Orellana (2018, p. 176),

This normative *acquis*, as derived from the environmental dimensions of existing protected rights and fundamental human rights principles, would be brought together under the umbrella of the right to a healthy environment. The normative content of human rights in respect of the environment would thus no longer be dispersed or fragmented across a range of rights, but would come together under a single normative frame.

Reading the right as integrating existing norms would not foreclose future evolution, but it would immediately provide a minimum basis of interpretation, a hermeneutic floor, that would enable its promotion and implementation.

Of course, as Alston (1984, p. 617) has said, the decision regarding whether to recognize a particular right “cannot be realistically be resolved through the application of standardized

<sup>7</sup> Boyd (2012, p. 241) states that as of 2012, decisions based on the right had been made in at least 44 countries, including 20 of 28 countries surveyed in Europe and 13 of 18 in Latin America and the Caribbean, but only 6 of 14 countries in Asia and 5 of 32 in Africa.

criteria; it is, after all, a quintessentially political issue.” As a political matter, the reason why the United Nations has not recognized the right appears to be that some powerful countries that have not accepted it internally have also opposed it at the international level. For example, the United Kingdom and the United States blocked the proposal in the early 1990s to convince the Human Rights Commission to consider a declaration on human rights and the environment.

The opposition of these countries is consistent with their cool attitude toward other economic and social rights, as well as so-called third-generation rights, such as the right to development. The United States was the only state to vote against adoption of the Declaration on the Right to Development in 1986, and the United Kingdom was one of eight to abstain. Both were also among the 41 countries to abstain from voting on the 2010 resolution recognizing the rights to water and sanitation. Their lack of support for new economic, social, and cultural rights is unlikely to change in the near future. The question is whether other states will decide to pursue recognition of the right over their objection.

## POSSIBLE EFFECTS OF A HUMAN RIGHT TO A HEALTHY ENVIRONMENT

Some studies have indicated that human rights law does not have a positive effect on state compliance; in fact, ratification of some treaties is associated with worse practices than otherwise expected (e.g., Hathaway 2002, Smith-Cannoy 2012). Other studies, using more nuanced methodologies, have found positive, but conditional, results (e.g., Cole 2012, Neumayer 2005). Reviews of multiple studies conclude that human rights treaties can have positive effects but that the effects are contingent on factors other than ratification itself (Cope et al. 2019, Dai 2014, de Búrca 2017, Hafner-Burton 2012). Ratification is unlikely to have much influence on stable democracies that already respect and protect human rights, or autocracies that are relatively immune to pressure from elites, courts, or the public as a whole (Simmons 2009). Positive effects are much more likely where domestic constituencies can employ treaty commitments to press for positive change (Simmons 2009), including, at times, by forming transnational advocacy networks (Graubart 2008, Keck & Sikkink 1998). Examining only the effect of ratification of a human rights treaty can overlook the positive effects of such longer-term engagement (Cope & Creamer 2016). Treaty bodies and other monitoring mechanisms may provide focal points for ongoing interaction between global and local levels to promote compliance (Creamer & Simmons 2020, de Búrca 2017).

Nearly all of these studies focus on civil and political rights, perhaps because of difficulties in measuring progress toward the full realization of economic, social, and cultural rights (Cope et al. 2019). As a result, it is unclear how relevant they are to the effectiveness of recognition of the right to a healthy environment. Nevertheless, it seems plausible, at least, that international review mechanisms and domestic and transnational civil society engagement would be critical to any efforts to rely on the right to promote positive environmental outcomes.

Does it matter whether global recognition is by treaty or resolution? The difference in legal effect is less distinct than it might first appear, because resolutions can affect human rights law by providing evidence of emerging customary norms, showing subsequent practice or agreement relevant to the interpretation of existing treaty obligations, or creating a template for later treaties. The degree to which a resolution may influence human rights law in any of these respects likely depends, at least in part, on whether it is presented as clarifying, rather than adding to, existing human rights norms and on whether it is adopted by consensus. For example, lack of unanimous support would undermine arguments that the resolution is a subsequent agreement or practice to be given interpretive weight [*Whaling in the Antarctic* (2014), para. 83)]. A benefit of recognition by a UN resolution is that it would allow compliance to be overseen by the UPR and the UN

special rapporteurs, whose scope extends to all UN members. The jurisdiction of a treaty body is limited to parties to the treaty.

If the General Assembly does recognize the right, what would it add to the existing constellation of environmental human rights norms? No one should—or, probably, does—imagine that the adoption of a global right to a healthy environment would solve all environmental problems. But would it have any effect at all? The following section evaluates some areas where the right has been predicted to have a positive effect on environmental protection. The subsequent (and final) section asks whether considering environmental issues through a human rights lens might change the way that we think not only about the environment but also about the lens itself.

## Potential Effects on Environmental Protection

Global recognition of the right to a healthy environment has been predicted to benefit environmental protection in several ways, including by (a) highlighting the importance of the environment to human rights; (b) using human rights norms to fill gaps in international environmental law; (c) strengthening legal bases for international enforcement; and (d) improving environmental performance at the country level.

**Adding to the language of human rights.** Perhaps the most immediate benefit of recognition would be that it would confirm that the global language of rights applies to environmental issues. Although the value of having a common language to talk about moral issues is difficult or impossible to measure, it seems significant that the language has rapidly spread around the world and that many advocates continue to believe that translating human interests into human rights is worth their time and effort. Describing an interest as a right expresses a shared, collective sense of its fundamental importance (Gardbaum 2008), which may in turn “energize movements and coalitions advocating for the right” (Rodríguez-Garavito 2018, p. 159).

Treating environmental protection as a human right announces that it is at the same level of importance as other rights considered necessary to human dignity, equality, and freedom, and helps to foreground the human beings most affected by environmental harm, who are often marginalized and disempowered. Advocates often frame environmental harm in human rights terms to put a human face on what might otherwise seem abstract or technical problems (Gonzalez 2015). For example, in 2008, when the Maldives became the first country to portray climate change as a threat to the human rights of its people, it explicitly did so to “show the world the immediate and compelling human face of climate change” (Knox 2014, p. 24, quoting then-Foreign Minister Abdulla Shahid).

**Filling gaps in international environmental law.** At the domestic level, one potential benefit of constitutional environmental rights is that they lead to new environmental statutes and provide a basis for courts to address environmental issues in the absence of legislation. Boyd (2012) states that in at least 78 of 92 surveyed countries, environmental laws were strengthened after the addition of an environmental right to the constitution. Such effects may appear to be less likely at the international level, in light of the dozens of multilateral agreements already in force, which tackle a wide range of environmental problems, from trade in endangered species to marine pollution to climate change.

A new human right might, however, increase attention to a shortcoming of international environmental law that is so pervasive it is often overlooked: its focus on transboundary harm. International law has traditionally had little to say about environmental harm that does not cross borders, even though local air and water pollution causes millions of deaths every year. This

dichotomy between transboundary and internal harm is codified in Principle 21 of the Stockholm Declaration (repeated almost verbatim as Rio Principle 2), which provides that states have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction” and “the sovereign right to exploit their own resources pursuant to their own environmental policies.” International instruments such as Agenda 21 (1992), the Millennium Development Goals (2000), the Aichi Targets (2010), and the Sustainable Development Goals (2015) have encouraged, but not required, improvement of domestic environmental policies.

Human rights law has the opposite orientation: It focuses on internal obligations, not extraterritorial ones. As a result, almost all of the environmental claims brought to human rights tribunals involve internal harm not regulated by international environmental law. In this sense, human rights institutions have already begun to address this gap in international environmental law. Although it may seem unlikely that recognition of a new human right would spur new regulatory agreements on internal environmental protection, it might support advocacy for a global agreement (or new regional treaties) providing stronger rights for the public to receive environmental information from their government, to participate in environmental decision making, and to have access to domestic remedies for environmental harm. These access rights are particularly clear and widely recognized, with roots in Principle 10 of the Rio Declaration as well as human rights law, and the Aarhus Convention and the Escazú Agreement provide models for future agreements.

**Strengthening bases for international enforcement.** Another possible benefit of explicit recognition of the right to a healthy environment would be to give civil society new tools to hold governments accountable (Bratspies 2015). Recognition by resolution would not add to the powers of treaty bodies or regional tribunals, whose jurisdiction is set by the treaties that they review. However, by raising awareness of the link between human rights and the environment, global recognition might encourage more claimants to bring more environmental claims to them.

A more concrete effect would be to strengthen efforts to raise environmental issues at the UPR, the process through which the Human Rights Council regularly reviews the human rights records of UN member states. Despite early criticisms of the UPR, studies have found that it can have positive effects (Milewicz & Goodin 2018, White 2018). Environmental issues have been raised during the UPR process, but on an ad hoc basis, in connection with a variety of rights and types of environmental harm. Recognition of the right to a healthy environment would provide the basis for more rigorous review. Recognition might also facilitate raising environmental concerns without having to show clear causal links between the environmental harm and the interference with a particular human right.

**Improving environmental performance at the country level.** One instrumental function of the international human rights regime is to fill gaps left by constitutional rights (Gardbaum 2008). The potential influence of UN recognition on a particular country might be limited by how far the country has already committed to the codification and implementation of environmental rights in its own legal system: Countries such as Costa Rica, which already has recognized the right in its constitution and implemented it through hundreds of judicial decisions, would have less room for positive influence than countries that have not recognized the right or implemented it.

If UN recognition influences more countries to adopt and implement environmental rights in their domestic law, what effect could those rights be expected to have on their environmental performance? Intuitively, one might believe that rights enable advocates and courts to put more pressure on their governments to protect the environment, even that, as Gore (1992, p. 179) has said, “an essential prerequisite for saving the environment is the spread of democratic

governance to more nations of the world.” However, empirical studies looking for connections between democracy and levels of environmental protection have shown mixed results. Stronger democratic institutions may be correlated with lower levels of urban air pollution (Winslow 2005) and land degradation (Li & Reuveny 2007), but also with higher levels of deforestation (Li & Reuveny 2007, Midlarsky 1998). Complicating factors include levels of corruption and of economic development; Pellegrini & Gerlagh (2006) find weak evidence that the effect of democracy on the environment is more positive at higher income levels.

Reviewing studies of the effects of constitutional rights, Cope et al. (2019) suggest that a key variable is the degree to which “organic constituencies” especially interested in particular rights, such as labor unions, media organizations, and religious groups, are able to mobilize to promote enforcement. As with respect to international human rights, such constituencies are likely to be much better placed than individuals to seek partnerships and publicity, finance litigation and lobbying, and diffuse the risks of confronting the government. In the environmental context, then, countries with active environmental advocacy organizations seem more likely to see positive effects from constitutional environmental rights. However, environmental defenders are at risk of harassment, threats, and violence in many countries, and approximately three are killed, on average, every week because of their work (Glob. Witn. 2019). As a result, increasing the space for civil engagement by protecting freedom of expression and association, as well as rights of access to information, participation, and remedy, is vital to making progress on environmental protection.

Some studies have looked more specifically at the effects of constitutional environmental provisions. Using a simple correlation study, Boyd (2012) finds that countries with environmental provisions in their constitutions have better environmental records across several measures, including ratification of environmental treaties and reduction of air pollution. Based on a more rigorous methodology that uses cross-sectional instrumental variables, Jeffords & Minkler (2016) report that countries with a constitutional environmental right have, on average, a higher score on the comprehensive Yale Environmental Performance Index. Focusing on procedural rights, Gellers & Jeffords (2018) find that countries with constitutional rights to environmental information have higher rates of access to improved water sources and sanitation facilities. Jeffords & Gellers (2018) examine the intersection of environmental rights with states’ coercive and administrative capacity and find that, in general, greater economic wealth and adherence to the rule of law are associated with higher levels of environmental performance in countries that have adopted substantive environmental rights.

Looking for evidence of large-scale effects should not obscure that, in particular cases, a right to a healthy environment has undoubtedly provided individuals and communities remedies that would not otherwise exist. For example, a growing number of cases in the Global South are pursuing a rights-based approach to climate litigation (Peel & Lin 2019). Qualitative studies describe many examples of cases that have successfully relied on environmental rights, but also illuminate many ways that governments fall short of what their constitutions seem to promise (Daly & May 2018).

## Effects on Human Rights

The ongoing construction of a human right to a healthy environment may also affect human rights law itself, in several ways. First, it may contribute to the debate over whether human rights are inherently and irredeemably tainted by colonialism (Gonzalez 2015). UN recognition of the right would come not as the first step in a top-down imposition of Western ideology on others but as the last step of a gradual diffusion throughout the pyramid of rights, much of which has

been led by countries in the Global South. In particular, the first regional treaties to recognize the right were the African Charter and the San Salvador Protocol. Many powerful countries in the Global North, including the United States and the United Kingdom, have opposed the right at the international level and refused to adopt it at home.

Second, the right may contribute to efforts to confirm the extraterritorial scope of human rights law. Human rights advocates have long argued that the duties of states under human rights treaties, especially the ICESCR, extend to the rights of people in other countries (de Schutter 2012), but some countries, especially in the Global North, have resisted this interpretation (Craven 2007). Because of the transboundary nature of many types of environmental harm, and the pervasive attention to transboundary harm in international environmental law, environmental claims will test the willingness of international bodies to expand the extraterritorial reach of human rights norms (Boyle 2012, Gonzalez 2015). Indeed, the Inter-American Court of Human Rights has already signaled its willingness to do so (Banda 2018).

Another way that the marriage of human rights and the environment may change human rights law is in its treatment of future generations. International environmental instruments often echo the Brundtland Commission's famous definition of sustainable development as development that meets the needs of the present without compromising the ability of future generations to meet their own needs (World Comm. Environ. Dev. 1987). Human rights law has generally avoided trying to identify the rights of those who have not yet been born. However, another way to define a future generation is as those people who will be alive at a specific time in the future, such as the year 2100. Many people who will be living then have already arrived and inherited their full allotment of human rights. Claims based on long-term environmental harm, such as climate change, urge human rights bodies to clarify the rights of children to be able to live in a healthy environment throughout their lives.

Last but not least, a long-standing criticism of a human rights-based approach to environmental protection is its inherent anthropocentrism (Gearty 2010, Handl 1995). Some environmental advocates may object to the right to a healthy environment because it seems to foreclose an ecocentric approach that recognizes the inherent value of natural ecosystems and the many other living beings on this planet. The more we learn about human dependence on biological diversity, the smaller the gap between anthro- and ecocentric approaches to environmental protection appears. Still, there does remain a gap. One way to close it is by enshrining rights of, as well as to, the environment, as a few countries have done: Ecuador added the right of nature to its constitution in 2008, Bolivia enacted it into national legislation in 2010, and New Zealand granted legal personhood to the Whanganui River in 2014 (Kotzé & Villavicencio Calzadilla 2017).

Another approach is to interpret the right of humans to live in a healthy environment to include the right of the environment itself to be healthy. The only international human rights body to move in this direction so far is the Inter-American Court, which stated in its 2017 advisory opinion that the right to a healthy environment “protects the components of the environment, such as forests, rivers, seas and others, as legal interests in themselves, even in the absence of certainty or evidence about the risk to individual persons” (Inter-Am. Court Hum. Rights 2017, para. 62). Like other living languages, the language of human rights is continually changing; an extension to rights to nature may be a future step in its evolution.

## DISCLOSURE STATEMENT

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