

The Human Right to Sustainable Environment: The Conceptual Framework

The Need for a New Covenant on the Right to a Healthy Environment

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Abstract. As humanity is facing a “triple planetary crisis” of climate change, biodiversity loss, and pollution, it seems imperative to strive for an effective integration of new international legal principles, rights, and duties in international environmental law. Following the recognition of the right to a clean, healthy, and sustainable environment as a human right by the UN Human Right Council (2021) and the UN General Assembly (2022), a new Covenant on the Right to a Healthy Environment would reaffirm this right. It can also shape and strengthen new international environmental norms. In order to ensure the effectiveness of the right to a healthy environment, the proposed covenant need to recognize other environmental rights, duties, and principles inherent to the right to a healthy environment and provide for concrete implementation and monitoring measures. This article examines the need for adoption of the proposed new covenant on the right to a healthy environment, before addressing the fundamental environmental rights, duties, and principles inherent to the right to a healthy environment that should necessarily be included, and analyzing how the proposed new covenant can be implemented and monitored so as to ensure effective protection of the environment and our environmental rights.

Keywords: Environmental rights, environmental principles, human rights covenant, right to a healthy environment, international environmental law, international environmental governance

1. Introduction

As Alexander von Humboldt traveled to South America to describe the interconnections between species and their geographical, geological, and climatic habitat, the term “ecosystem” had not even been coined. Yet, his observations¹ became a milestone for environmentalists and inspired a strong conviction in our modern society. We, as humans, are not the center of our environment but fragile elements at the periphery of it. Every degradation of our environment is a threat to our lives and our rights.

Acknowledging these profound ties, the 1972 United Nations (UN) Stockholm Declaration brought environmental challenges in the frontline of international concerns. Calling for concrete commitments for the protection of human life through environmental regulations, the Stockholm Declaration recognized the right to live in “an environment of a quality that permits a life of dignity and well-being.”² Nevertheless, more than fifty years later, there is a clear consensus, drawing on scientific data, that the state of our environment is only

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- 1 Humboldt (von), A. and Bonpland, A., *Voyage aux régions équinoxiales du Nouveau Continent fait en 1799, 1800, 1801, 1802, 1803 et 1804*, Librairie grecque-latine-allemande, (1816-1831); available at <https://gallica.bnf.fr/ark:/12148/bpt6k972858/f8.item.html>.
- 2 UN (1972), Declaration of the United Nations Conference on the Human Environment, Principle 1 (emphasis added), *Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972*; available at: <https://www.un.org/en/conferences/environment/stockholm1972>.

worsening.³ As humanity is facing a triple planetary crisis of climate change, nature and biodiversity loss, as well as pollution;⁴ effective integration of new international legal principles, rights, and duties in international environmental law (IEL) has become imperative. International cooperation is crucial in light of the essence of climate and environmental issues shared by all nations and individuals as they cross national borders and thus affect all countries and regions.

The first noticeable effect of adopting a legally binding global instrument recognizing environmental rights and principles would be to unify IEL and governance.⁵ Although approximately 500 multilateral environmental agreements have been negotiated;⁶ IEL is failing, mainly because of the need for an ambitious and legally binding instrument protecting the environment as a whole. Addressing the triple planetary crisis will remain challenging without a global framework and coordinated action. Such an instrument would provide a legal foundation for countries to cooperate and work towards a shared goal of protecting the planet and citizens' environmental rights, but also establish standards, guidelines, and mechanisms for monitoring and enforcing environmental protection measures.

2. The Need for a New Human Rights Covenant

Following the recognition of the right to a clean, healthy, and sustainable environment (hereinafter “the right to a healthy environment”) as a human right by the UN Human Right Council (UNHRC)⁷ and the UN General Assembly (UNGA):⁸ a new *Covenant on the Right to a Healthy Environment* would reaffirm this right, but also shape and strengthen new international environmental norms. To ensure the effectiveness of the right to a healthy environment, such a Covenant must also recognize other environmental rights, duties, and principles inherent to the right to a healthy environment. In addition, a Covenant must provide concrete implementation and monitoring measures.

In this article, such a legally binding global instrument will be referred to as a “Covenant.” However, it could be called a “charter”, “treaty”, “convention”, or any other name as long as it is a legally binding instrument. This article examines the necessity to adopt a Covenant on the right to a healthy environment (I), before addressing the fundamental principles that should necessarily be included along the right to a healthy environment (II), and analyzing how such a Covenant should be implemented and monitored to ensure effective protection of the environment and our environmental rights (III).

IEL is fragmented by many multilateral environmental agreements (MEAs) on specific and technical aspects of the environment, such as climate, biodiversity, desertification, or chemicals.⁹ Each of these agreements is governed by its own set of rules and sometimes its Committee. In year 2018, the United Nations Secretary-General released a report entitled “Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment” (hereinafter “the UNSG report”)¹⁰, which analyzed IEL and the existing

3 IPCC (2022), *Climate Change 2022: Impacts, Adaptation, and Vulnerability*, Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, England; Maria-Antonia Tigre, *The Evolution of International Environmental Law amidst Political Gridlock: Environmental Rights as a Common Ground*, S.J.D., Elisabeth Haub School of Law at Pace University, (2022) at pp. 21-25.

4 UNSG (2020), Video message for the World Forum for Democracy; Strasbourg, France (16 November 2020) SG/SM/20422; available at: <https://press.un.org/en/2020/sgsm20422.doc.html>

5 UNSG (2018), *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment*, A/73/419, (30 November 2018) para. 102 p. 43; available at: UN Digital Library: “A comprehensive and unifying international instrument that gathers all the principles of environmental law could provide for better harmonization, predictability, and certainty.” (emphasis added)

6 *Ibid*, para. 2 p. 4.

7 UNHRC (2022), *The human right to a clean, healthy and sustainable environment*, (18 October 2021); available at: A/HRC/48/13.

8 UNGA (2022), *The human right to a clean, healthy and sustainable environment*, (28 July 2022); available at: A/RES/76/300.

9 Aguila, Y. (2016), *Adopting an International Covenant for the Protection of the Environment: Taking Environmental Rights Seriously*, (22 February 2016); available at: Global Pact Coalition Blog.

10 UNSG (2018), *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment*, (30 November 2018) para. 102 p. 43; available at: A/73/419

gaps in MEAs, environmental governance, and institutions.¹¹ The report highlights that “[t]he proliferation of multilateral environmental agreements and the resultant distinct and separate mandates ignore the unity, interconnectedness, and interdependence of the Earth’s ecosystem.”¹² The report underlines that principles of IEL could be strengthened by a “comprehensive and unifying” international instrument that enshrines all the principles of environmental law.¹³ Adopting a Covenant on the right to a healthy environment would embody the much-needed cornerstone of IEL.

While the Universal Declaration of Human Rights (UDHR),¹⁴ the International Covenant on Economic, Social, and Cultural Rights (ICESCR),¹⁵ and the International Covenant on Civil and Political Rights (ICCPR),¹⁶ drafted and adopted before the environmental challenges that humanity is facing today, do not expressly recognize the right to a healthy environment as a human right, the interlinkage between human existence and a healthy environment is “beyond debate.”¹⁷ As John H. Knox, former Special Rapporteur on Human Rights and the Environment, stated, “[w]ere the [UDHR] to be drafted today, it is hard to imagine that it would fail to include the right to a healthy environment, a right so essential to human well-being and so widely recognized in national constitutions, legislation and regional agreements.”¹⁸ The right to a healthy environment is, indeed, essential to human well-being as it encompasses fundamental human rights elements, both substantive and procedural. The substantive elements of the right to a healthy environment include the right to clean air, a safe climate, access to safe drinking water and adequate sanitation, safe and sustainably produced food, non-toxic environments in which to live, work, study, and play, and healthy biodiversity and ecosystems.¹⁹ The right also entails the respect of procedural rights, such as the right to access environmental information, to participate in decision-making on environmental issues, and to have access to environmental justice.²⁰

The right to a healthy environment has developed gradually since the 1972 Stockholm Declaration, whose (Principle 1) states that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.” This Declaration was the first milestone on the path to the recognition of the right to a healthy environment. The (Principle 1) of the 1992 Rio Declaration provides that “Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”²¹ Principle 18 of the 2002 Johannesburg Declaration on sustainable development also indirectly elevates the right, aiming to increase “access to such basic requirements as clean water, sanitation, adequate shelter, energy, health care, food security, and the protection of biodiversity.”²² The right to a healthy environment is now also included in regional human rights or environmental agreements,²³

11 UNSG Report, n.10, para 42.

12 *Ibid*, para 80 (emphasis added).

13 *Ibid*, para 43 (emphasis added).

14 UNGA (1948), *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, available at UNGA Resolution 217A.

15 UNGA (1966), *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, 16 December 1966, available at UNGA Resolution 2200A.

16 UNGA (1966), *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, available at UNGA Resolution 2200A.

17 OHCHR (2018), *Report of the Special Rapporteur on Human Rights and the Environment, Promotion and Protection of Human Rights: Human Rights Questions, including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, A/73/188*, (19 July 2018, para 37, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/231/04/PDF/N1823104.pdf?OpenElement.html>).

18 *Ibid*, para 37.

19 OHCHR (2019), *Report of the Special Rapporteur on Human Rights and the Environment, Right to a Healthy Environment: Good Practices, A/HRC/43/53*, (30 December 2019, para 2; available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/355/14/PDF/G1935514.pdf?OpenElement>).

20 *Ibid*.

21 UNGA (1992), *Rio Declaration on Environment and Development*, Principle 1 (emphasis added), 12 August 1992, available at A/CONF.151/26.

22 UNGA (2002), *Johannesburg Declaration on Sustainable Development*, 4 September 2002; available at A/CONF.199/20.

23 See, Article 24 of the African Charter on Human and People’s Rights (1981); Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (1988); Article 1 of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (1998); Article 38 of the Arab Charter of Human Rights (2004); Article 1 of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (2018).

binding 126 States.²⁴ In total, 156 States, representing 80 percent of States, legally recognize the right to a healthy and sustainable environment.²⁵

Yet, the right to a healthy environment remains essentially devoid of legal force at the international level. States have shown reluctance to adopt a legally binding instrument recognizing the right. More recently, however, the right has been recognized in two fundamental resolutions adopted by the UNHRC (resolution 48/13) and the UNGA (resolution 76/300).

In October 2021, the UNHRC adopted a historic resolution, wherein the first article recognizes the right to a healthy environment as a human right “that is important for the enjoyment of human rights.”²⁶ The resolution then emphasizes that the right is not isolated but rather “related to other rights and existing international law.” Finally, the resolution calls for States to fully respect their human rights obligations. While not legally binding, its near-unanimous adoption showed consensus on this human right’s formulation, content, and importance. The Special Rapporteur on Human Rights and the Environment highlighted that it was “marking a turning point in the evolution of human rights” and predicted that resolution 48/13 would be “a catalyst for accelerated action to address the global environmental crisis.”²⁷ In July 2022, the UNGA adopted resolution 76/300²⁸ reaffirming the right to a healthy environment as a human right for all by a vote of 161 in favor, 0 against, and 8 abstentions. This resolution also notes that the right is related to other rights and existing international law and calls upon States, international organizations, and relevant stakeholders to scale up efforts to ensure a healthy environment for all. The adoption of both resolutions 48/13 and 76/300 outlines that a consensus is strengthening in favor of environmental rights. While they are not legally binding, they represent a symbolic message and could have far-reaching implications for environmental and human rights.²⁹ They should incite more governments to recognize the right to a healthy environment in their domestic legislation and lead to its reinforced implementation in countries where it is already recognized.³⁰ Finally, these resolutions should become the bedrock of a legally binding global instrument reaffirming the right to a healthy environment and other fundamental rights and principles.

The pathway from a non-legally binding resolution (“soft law”) to a convention (“hard law”) is not uncommon in international law. The most illustrative example is the UDHR of 1948, a part of the UN resolution on the International Bill of Human Rights and resulted in two fundamental human rights instruments adopted in 1966, the ICESCR and the ICCPR. Both covenants are the legal transposition of the UDHR and have been adopted to give legal effect to the ‘Declaration’. As such, a Covenant on the Right to a Healthy Environment would also embody and bring binding legal force to previously established principles, for instance, in the Stockholm and Rio Declarations and UNGA resolutions 18/13 and 76/300. While it took 18 years to incorporate the Declaration into two legally binding texts, the triple planetary crisis calls for States to urgently negotiate and adopt a new Covenant. This third Covenant would recognize a third generation of human rights. After our civil and political rights, and our economic, social, and cultural rights, it would recognize our environmental rights.

However, an additional step between the adoption of resolutions 48/13 and 76/300 and a Covenant could be necessary. Similar to the right to safe and clean drinking water and sanitation, which illustrates the challenges of recognizing a new human right at the UN level;³¹ the adoption of an additional UNGA resolution specifically on the implementation of the right to a healthy environment could be useful. In year 2010, the UNGA adopted a resolution recognizing “the right to safe and clean drinking water and sanitation as a human right that is essential

24 OHCHR 2018 Report, n.14, para 11.

25 *Ibid*, para 13.

26 UNHRC (2021), *The human right to a clean, healthy and sustainable environment*, Res. 48/13, (8 October 2021), available at: A/HRC/RES/48/13

27 OHCHR (2022), *Report of the Special Rapporteur on Human Rights and the Environment, The Right to a Clean, Healthy, and Sustainable Environment: Non-toxic Environment*, (12 January 2022), A/HRC/49/53, para 1; available at A/HRC/49/53.

28 UNGA (2022), *The human right to a clean, healthy and sustainable environment*, (28 July 2022); available at <https://daccess-ods.un.org/tmp/8229292.03510284.html>.

29 David Boyd (2022), *Why the UN General Assembly must back the right to a healthy environment*, (22 July 2022); available at <https://news.un.org/en/story/2022/07/1123142#:text=David%20Boyd%3A%20There%20will%20likelyof%20international%20human%20rights%20law.html>.

30 OHCHR 2021 Report, n. 12, para 54.

31 Maria-Antonia Tigre, n.3 at p. 123.

for the full enjoyment of life and all human rights.”³² Subsequently, the UNHRC adopted a resolution recognizing the existence of a human right to access safe drinking water and sanitation,³³ and a 2011 resolution calling on States to ensure enough financing for sustainable delivery of water and sanitation services, taking the human right to safe drinking water and sanitation a step further.³⁴ Then, in December 2015, the UNGA adopted a new resolution distinguishing the right to water from the right to sanitation to ensure better implementation of both rights.³⁵ Since then, the Committee on Economic, Social, and Cultural Rights has become competent to receive individual, collective, and interstate complaints.³⁶ The UNGA and UNHRC resolutions have notably influenced States’ commitments to ensure access to safe drinking water and sanitation and thus marked a milestone in developing these rights.³⁷ Negotiating a similar UNGA resolution on the implementation of the right to a healthy environment, as an intermediate phase, could be less burdensome than negotiating a Covenant and would lay the foundation of such a Covenant.

3. The Structure and Content of the Proposed Covenant

A Covenant on the Right to a Healthy Environment would reaffirm the right to a healthy environment as a human right and recognize fundamental environmental rights, duties, and principles inherent to this right. Firstly, the Covenant should reaffirm and affirm all the substantive and procedural rights directly implied by the right to a healthy environment. These rights include the rights to clean air, a safe climate, access to safe drinking water and adequate sanitation, safe and sustainably produced food, non-toxic environments in which to live, work, study, and play, and healthy biodiversity and ecosystems as well as the rights to access environmental information, to participate in decision-making on environmental issues and to have access to environmental justice. Secondly, the Covenant should enshrine other rights, duties, and principles that are indispensable for the effective implementation of the right to a healthy environment, including the duty to take care of the environment, but also the principles of sustainable development, intergenerational equity, prevention, precaution and the principle of non-regression and polluter-pays.³⁸ In addition to being inherent to the right to a healthy environment, these environmental rights and principles would be intertwined with already affirmed human rights that cannot be fully enjoyed nor enforced without them. For example, the protection of health and the right to safe drinking water and adequate sanitation are undetachable from the right to health and to a healthy environment.³⁹

A few international instruments already recognize the most important environmental law principles. These instruments have been adopted during environmental conferences, such as the Stockholm and Rio Declarations, or by the UNGA, such as the 1982 World Charter for Nature⁴⁰. Unfortunately, these international instruments are not legally binding.

Several initiatives have sought to enshrine the right to a healthy environment and its inherent rights in a legally binding global instrument. First, in 1987, the World Commission on Environment and Development

32 UNGA (2010), Resolution 64/292, *The human right to water and sanitation*, (28 July 2010); available at A/RES/64/292.

33 UNHRC (2010), Resolution A/HRC/15/L.14, *Human rights and access to safe drinking water and sanitation*, (24 September 2010); available at: A/HRC/15/L.14.

34 UNHRC (2011), Resolution A/HRC/RES/18/1, *The Human Right to Safe Drinking Water and Sanitation*, (28 September 2011), available at: A/HRC/RES/18/1.

35 UNGA (2015), Resolution 70/169, *The Human Rights to Safe Drinking Water and Sanitation*, (17 December 2015); available at: A/RES/70/169.

36 Tigre, M. A., n.3 at 125, citing Beail-Farkas, L. (2013), *The Human Right to Water and Sanitation: Context, Contours, and Enforcement Prospects*, 30 *WIS. INT’L L.J.* 794.

37 Tigre, M.A. and Lichet, V. (2011), *Historic Breakthrough for Environmental Justice: The UNHRC Recognizes the Right to a Healthy Environment as a Human Right, Opinio Juris*, (20 October 2021); available at: <http://opiniojuris.org/2021/10/20/historic-breakthrough-for-environmental-justice-the-unhrc-recognizes-the-right-to-a-healthy-environment-as-a-human-right.html>.

38 For length restriction reasons, the authors focused on the duties and principles they believe are the most important for effectively implementing the right to a healthy environment. However, this list is not exhaustive, and many other rights, duties, and principles could be included.

39 OHCHR (2009), *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, A/HRC/12/24, (1 July, 2009), Para 23–29; available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/144/37/PDF/G0914437.pdf?OpenElement.pdf>.

40 UNGA (1982), *World Charter for Nature*, 9 November 1982; available at: A/RES/37/7

(WCED) published the Brundtland Report⁴¹, which develops guiding principles for sustainable development. Then, the International Union for Conservation of Nature (IUCN) Draft International Covenant on Environment and Development (hereinafter “the IUCN Draft Covenant”) was drafted to provide a template of a treaty “consolidating and developing existing legal principles related to environment and development.”⁴² It is the outcome of twenty years of collaboration among eminent environmental jurists that was launched in 1995 at the UN Congress on Public International Law.⁴³ More recently, the draft Global Pact for the Environment (hereinafter “the Global Pact”) proposed to enshrine the right to a healthy environment and other guiding principles of international environmental law.⁴⁴ The Global Pact is a draft environmental treaty drafted by more than a hundred eminent jurists from all over the world in year 2017. The Global Pact aims to recognize IEL’s founding principles and rights in a short and straightforward text that simplifies negotiations by focusing on fundamental rights, duties, and principles. On May 10th, 2018, the UNGA adopted by 142 votes in favor, 5 votes against (United States, Russia, Syria, Turkey, and the Philippines) and 7 abstentions, Resolution A/72/L.51 “Towards a Global Pact for the Environment” which formally launched international negotiations on the adoption of such a Pact. However, in June 2019, the open-ended working group tasked with discussing whether the IEL gaps addressed in the UNSG report would be solved by the adoption of the Pact as a new international treaty, instead opted for adopting a political declaration. On August 30th, 2019, the UNGA adopted resolution 73/333 which agreed with these recommendations, resulting in the adoption of a High-Level Political Declaration by the UN Environment Assembly in March 2022.

In order to effectively enforce the right to a healthy environment, negotiations of a legally binding global instrument should be guided by these initiatives and non-legally binding and incorporate the following essential principles:

3.1. *The duty to take care of the environment*

While only partially or incidentally affirmed in a few IEL instruments, the duty to take care of the environment is crucial for protecting the right to a healthy environment. Principle 2 of the Stockholm Declaration states that natural resources “must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate;” while the Rio Declaration declares in Principle 7 that States must cooperate to “conserve, protect and restore the health and integrity of the Earth’s ecosystem.” Yet, such a duty should not only be imposed on States, but also on non-State stakeholders, including corporations and individuals. A Covenant should be inspired by Principle 1 of the IUCN World Declaration on the Environmental Rule of Law, which states that “All people, states and private entities have a universal responsibility to care and promote the well-being of other species and ecosystems, regardless of their worth to humans, and to place limits on their use and exploitation. All life has the inherent right to exist.”⁴⁵

3.2. *Democratic rights in environmental matters*

These procedural rights must become guiding principles of such a Covenant as they are interlinked and indispensable civil rights that will help ensure democratic and effective governance of the environment.

The right to access environmental information is a widely recognized human right, which is necessary to protect other human rights from potentially harmful environmental impacts.⁴⁶ This right is indispensable for adequately

41 WCED (1987), *Report of the World Commission on Environment and Development: Our Common Future*, Transmitted to the General Assembly as an Annex to document A/42/427 - Development and International Co-operation: Environment, 4 August 1987, available at: <http://www.un-documents.net/wced-ocf.htm>.

42 IUCN Environmental Law Programme (2017), *Draft International Covenant on Environment and Development*, Fifth Edition: Updated Text, at p.xiii; available at: https://sustainabledevelopment.un.org/content/documents/2443Covenant_5th_edition.pdf.

43 *Ibid.*

44 IUCN (2017), *Preliminary Draft of the Group of Experts, Draft Global Pact for the Environment*, Article 1: “Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture, and fulfillment;” available at: <https://globalpactenvironment.org/uploads/EN.pdf>.

45 IUCN (2016), *World Declaration on the Environmental Rule of Law*, drafted by the IUCN World Commission on Environmental Law at the 1st IUCN World Environmental Law Congress, April 2016, Rio de Janeiro, Brazil.

46 OCHCR 2021 Report, n.14, para 14.

protecting individual rights, including the right to a healthy environment. It has been recognized in Principle 10 of the Rio Declaration, which affirms that “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.” The 2015 Paris Agreement⁴⁷ on Climate Change also states, in Article 12, that “Parties shall cooperate in taking measures (. . .) to enhance (. . .) public access to information.” The Aarhus Convention, mostly applicable in Europe, provides that authorities must make requested environmental information available within one month, keep this information up-to-date and reasonably accessible to the public, and can only withhold them in strictly-defined circumstances (articles 3, 4, 5).

The right to public participation entails the individual’s right to form an opinion when a new administrative decision or normative act is likely to affect the environment. While everyone should have the right to participate in the preparation of public authorities’ decisions, measures, or programs, forming an opinion can only be done with transparent information. Hence, the necessity to recognize these rights together. Principle 10 of the Rio Declaration states that “environmental issues are best handled with the participation of all concerned citizens at the relevant level” while the World Charter for Nature makes it a right for all “to participate [. . .] in the formulation of decisions of direct concern to their environment.” The Aarhus Convention⁴⁸ calls for public participation in decisions to approve some specific activities (article 6), the development of programs and policies relating to the environment (article 7), as well as developing legally binding regulatory or normative instruments for general application (article 8).

Finally, the right to access environmental justice means effective and affordable access to administrative and judicial procedures to challenge acts or omissions of public authorities or private persons who breach environmental law. This right is a necessary and strategic condition for the effectiveness of adopted environmental norms. Principle 10 of the Rio Declaration affirms that “effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.” However, it has yet to be enacted in international law.

The right to information, public participation, and access to justice are utterly crucial as they acknowledge the importance of the role of non-state stakeholders.

3.3. *Sustainable development and integration*

Sustainable development and integration principles are also critical for environmental protection and the effective enforcement of the right to a healthy environment. The 1987 Brundtland Report adopted by the World Commission on Environment and Development established the need to achieve sustainable development. Since then, sustainability has been included in international texts such as the Rio Declaration (Principles 4 and 8) to the 17 Sustainable Development Goals adopted by the UN in year 2015. The clear consensus on the need to achieve sustainable development must be reaffirmed in a Covenant that requires States to find integrated solutions while considering environmental, economic, political, and social issues. Non-State actors should necessarily be involved, including corporations (sustainable patterns of production) and individuals (sustainable consumption). Additionally, the principle of integration aims to make sustainable development effective by ensuring it is considered in the decision-making process. For example, Principles 4 and 8 of the Rio Declaration imply that States should integrate concern for environmental protection into all public policies, particularly those relating to economic development. Article 11 of the Treaty on the Functioning of the European Union⁴⁹ also recognizes that “environmental protection requirements must be integrated into the definition and implementation of the Union’s policies and activities, in particular with a view to promoting sustainable development.”

47 Parties of the UNFCCC (2015), *COP21 Paris Agreement*, 12 December 2015, adopted by the UNFCCC Report (2016), FCCC/CP/2015/10/Add.1, 29 January 2016; available at: https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

48 *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters* (1998); available at: <https://unece.org/DAM/env/pp/documents/cep43e.pdf>.

49 EU Member States (1957), *Treaty on the Functioning of the European Union*, 25 March 1957; available at: 2012/C 326/01.

3.4. Intergenerational equity

In the first section of its preamble, the United Nations Charter states: “We, the peoples of the United Nations, determined to save succeeding generations.”⁵⁰ It is of utmost importance that present generations ensure that their decisions and actions do not compromise the ability of future generations to meet their own needs. By taking into consideration the interests of future generations now, harmful consequences of the actions carried out by present generations will be better addressed if not avoided. Therefore, intergenerational equity should also be recognized in a Covenant to guide all decisions that may impact the environment. This principle is a universal human value widely affirmed by international texts. The UN Framework Convention on Climate Change⁵¹ (UNFCCC) and the Aarhus Convention,⁵² both legally binding, refer to intergenerational equity. Principle 1 of the Stockholm Declaration defined intergenerational equity as a “solemn responsibility to protect and improve the environment for present and future generations.” The 1997 Declaration on the Responsibilities of the Present Generations towards Future Generations⁵³ adopted by the UN Educational, Scientific and Cultural Organization (UNESCO) also states in its first article that present generations have a “responsibility of ensuring that the needs and interests of present and future generations are fully safeguarded.” The 2017 UNESCO Declaration of Ethical Principles in Relation to Climate Change also states, in article 4§2, that “[i]t is important for all to take measures to safeguard and protect Earth’s terrestrial and marine ecosystems, for present and future generations.”⁵⁴

3.5. Principle of prevention

Due to the often-irreversible nature of environmental damage, the principle of prevention, whose objective is to avoid such damages, should necessarily be one of the guiding principles of this Covenant. This principle entails preventing cross-border damage and, consequently, the obligation to conduct an impact assessment when an activity may harm the environment. It should also imply the State’s obligation to prevent environmental damage within its borders. For example, Principle 24 of the Stockholm Declaration affirms that States should “prevent, reduce, and eliminate adverse environmental effects resulting from activities conducted in all spheres.” The 1982 World Charter for Nature also affirms that “[t]he status of natural processes, ecosystems, and species shall be closely monitored to enable early detection of degradation or threat, ensure timely intervention and facilitate the evaluation of conservation policies and methods” (para. 19). Finally, the Earth Charter states that preventing harm is “the best method of environmental protection.”⁵⁵

3.6. Principle of precaution

The principles of prevention and precaution should not be confused as the former implies preventing known risks, while the latter prevents unknown risks. A Covenant should require that when there is a risk of severe or irreversible damage, a lack of scientific certainty cannot be used to avoid taking effective and proportionate measures to prevent environmental degradation. In this spirit, Article 3 of the UNFCCC states explicitly that “[t]he Parties should take precautionary measures to anticipate, prevent, or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific

50 UN Member States (1945), *The Charter of the United Nations*, 26 June 1945; available at <https://www.un.org/en/about-us/un-charter/full-text>.

51 UNFCCC (1992), Article 3 includes an obligation to “protect the climate system for the benefit of present and future generations of humankind, on the basis of equity (. . .).”

52 Aarhus Convention (1998), Article 1 provides that “[i]n order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.”

53 UNESCO (1997), *Declaration on the Responsibilities of the Present Generations Towards Future Generations*, 12 November 1997; available at <https://unesdoc.unesco.org/ark:/48223/pf0000260889.page=127>.

54 UNESCO (2017), *Records of the General Conference, 39th session, Paris*, 30 October-14 November 2017; available at <https://unesdoc.unesco.org/ark:/48223/pf0000260889.page=127>.

55 The Earth Charter Initiative (2000), *The Earth Charter*, para. 11.6; available at: Earth Charter.

certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective to ensure global benefits at the lowest possible cost.” The preamble of the Convention on Biological Diversity also provides that “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.” While a strong critique is that this principle could impede innovation, it is a principle of positive environmental action when rightfully understood and implemented.

3.7. *The Polluter-Pays Principle (PPP)*

Complementing the prevention and precautionary principles, the PPP aims to ensure that the originator of environmental damages and pollution bears prevention, mitigation, and remediation costs. The PPP was first affirmed as an economic principle in a 1972 recommendation of the Organisation for Economic Cooperation and Development (OECD) regarding the responsibility of the polluter to bear the expenses of carrying out the “measures decided by public authorities to ensure that the environment is in an acceptable state.”⁵⁶ Principle 22 of the Stockholm Declaration requires States to

“co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.”⁵⁷

Likewise, Principle 16 of the Rio Declaration states that:

“[n]ational authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

Although the polluter-pays principle is currently included in several binding instruments, these are all international agreements of a sectoral nature. While many listed principles already appear in non-legally binding instruments, adopting a legally binding text in international environmental law and governance is still necessary.

4. **Implementation of the Proposed Covenant**

The aforementioned rights and principles should be incorporated in a Covenant along with procedural principles inspired by national practices that aim to tackle the challenge of implementing such an ambitious text (3.1). Including these principles in a legally binding document would have concrete applications both at the international and national level, with clear pathways for domestic implementations (3.2) and a strong protective value for collateral principles and treaties (3.3).

4.1. *Enhancing Participation and Monitoring Effectiveness*

The fundamental principles integrated in a Covenant can stay without effect if not structurally protected by a corpus of processual principles to guide their implementation by States and non-State actors. Ensuring an effective and robust implementation at the international and national level necessarily requires a range of principles inspired by international treaties, including cooperation, non-regression, and monitoring.

56 OECD (1972), *Recommendation of the Council on Guiding Principles concerning International Economic Aspects of Environmental Policies*, OECD/LEGAL/0192, (26 May, 1972); available at: <https://legalinstruments.oecd.org/public/doc/4/4.en.pdf>.

57 UN (1972), n. 2 Principle 22 (emphasis added).

4.2. *Principle of the Effectiveness of Adopted Norms*

The principle of effectiveness of adopted norms is an indispensable requirement as the efficiency of a Covenant is conditioned on States' essential duty to adopt effective environmental laws and take all necessary measures to ensure their effective implementation and enforcement. In this spirit, Principle 11 of the Rio Declaration asserts that States must "enact effective environmental legislation" while mentioning the necessity of considering each State's situation, particularly for emerging countries, thus introducing an element of differentiation into the principle of effectiveness. This principle conveys that States are responsible for formulating policies that are efficient, sufficiently accessible, and understandable, but also to take all measures to ensure that these policies are effectively applied. States should provide appropriate administrative, scientific, and technical capacity, including appropriate sanctions for States and non-State actors' violation of domestic environmental regulations. While crucial, IEL does not clearly state this requirement yet.

4.3. *Principle of Cooperation*

The principle of cooperation is also an indispensable requirement for achieving this Covenant's objectives. States should have an obligation to cooperate in good faith for the implementation of the provisions of the Covenant. Given the international nature of the triple planetary crisis, States must act together to preserve, protect, and restore the health and integrity of the environment. This guiding principle should be an obligation to cooperate towards specific goals as well as the general objective of protecting the environment. For instance, Principle 24 of the Stockholm Declaration states, "International matters concerning the protection and improvement of the environment should be handled in a cooperative spirit by all countries, big and small, on an equal footing. Cooperation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States."

4.4. *Non-State Stakeholders Participation*

Civil society organizations, economic stakeholders, cities, and regions, play an essential role in transmitting good practices. Considering that environmental protection is partly due to the work of non-State stakeholders, it is crucial to highlight their role and responsibility in protecting the environment.⁵⁸ In some respects, it is a corollary of the principle of public participation, with the additional express recognition of the rights and duties of civil society in protecting the environment. This implies the mutual solidarity of the actors. For example, Article 10 of the Convention on Biological Diversity requires the Parties to encourage "cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources." Non-State actors can be precious in the fight against environmental deterioration and must not be neglected.

4.5. *Principle of Non-regression*

The effectiveness of a Covenant and the domestic regulatory frameworks it would inspire should also be strengthened by the principle of non-regression. This principle structurally protects the States' commitments as it prevents them from allowing activities or adopting new norms that would reduce the level of environmental protection guaranteed by their legislation. Non-regression can be linked to the duty to adopt effective legislation and to ensure an effective legislative and regulatory framework. The principle has been indirectly referred to in a few instruments.^{59,60} In practice, this principle corresponds to the stand-still principle. Article 5 of the 1966

58 Garnett, E.E. and Balmford, A. (2022), 'The Vital Role of Organizations in Protecting Climate and Nature', 6 *Nat. Hum. Behav.*, 319–321.

59 UNGA, (2012), *Outcome Document of the Rio+20 United Nations Conference on Sustainable Development: The Future We Want*, 20-22 June 2012, A/CONF.216/L.1; available at: A/CONF.216/L.1: "it is critical that we do not backtrack from our commitment to the outcome of the United Nations Conference on Environment and Development." (emphasis added); available at:

60 UNGA (1972), Resolutions Nos. 2994/XXVII, 2995/XXII, and 2996/XXII, 15 December, 1972.

ICCPR states, “nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.” While the principle of non-regression does not necessarily imply a requirement to improve, it can be closely tied to such a requirement.⁶¹ In this spirit, Principle 1 of the Stockholm Declaration states that “[m]an bears a solemn responsibility to protect and improve the environment.” Article 4 of the Paris Agreement is even more explicit, stating that nationally determined contributions “will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition.”

4.6. *Monitoring*

Above all, the Covenant must anticipate and enforce a monitoring mechanism to facilitate the implementation of and promote compliance with the provisions of this Covenant. At the very least, this monitoring mechanism could take the form of a flexible body such as a “compliance committee.” For example, the project of a Global Pact for the Environment defines such a compliance committee as a “Committee of independent experts [which] focuses on facilitation. It operates in a transparent, non-adversarial, and non-punitive manner. The Committee shall pay particular attention to the respective national circumstances and capabilities of the Parties.” Article 15 of the 2015 Paris Agreement insisted on the importance of monitoring to facilitate the concrete application of States’ commitments into their domestic contexts. Specifically, Article 15 calls for this monitoring system to be guaranteed by a committee of independent experts focused on facilitation and operating in a transparent, non-adversarial, and non-punitive manner. Such a monitoring mechanism should be independent of any sanctioning mechanism and rather dedicated to exchanging information and serve an interpretative function to clarify and give substance to the principles enshrined in the Covenant. The Covenant should require that all States report to the Committee on their progress in implementing the provisions of the Pact within a specific time frame. Finally, the Covenant should either specify the modalities and procedures according to which such a Committee will exercise its functions or require the States parties to meet within the first year of adoption of the Covenant to define such functions.

It would then be essential to open the matter up to citizens and NGOs on the model of the Aarhus Convention. Better still, an international jurisdictional body could be set up to ensure that States respect the right to a healthy environment. Adopting a Covenant on the right to a healthy environment could be accompanied by the creation of an international environmental court to ensure its respect.

Inserting these five procedural principles into a legally binding covenant would be a strong guarantee against backtracking from States’ commitments. It would pave the way for domestic implementations of the rights and principles integrated in this Covenant.

4.7. *Implementing the Covenant at the National Level*

One of the foremost virtues of a Covenant on the right to a healthy environment would be its legally binding nature. Legally binding instruments are invocable in courts; therefore, this Covenant would enable any competent national court to review laws and regulations in light of the principles enshrined in the Covenant. The Stockholm and Rio Declarations enshrine most of the aforementioned principles. However, their non-legally binding status makes it impossible to invoke them in courts. While some countries have enshrined these principles in constitutional norms, such as the French Constitutional Environment Charter of 2004: many countries do not or only recognize the right to a healthy environment. Moreover, some States that recognize this right constitutionally or through regional treaties do not implement it legislatively. Effective integration into national laws and procedures allows the right to a healthy environment and other interrelated environmental rights to be fully enforced. To date, many States are not nationally implementing their international obligations

61 For instance, Article L. 110-1 II, 9°, of the French Environment Code : “la protection de l’environnement, assurée par les dispositions législatives et réglementaires relatives à l’environnement, ne peut faire l’objet que d’une amélioration constante, compte tenu des connaissances scientifiques et techniques du moment.” (*The protection of the environment, ensured by the laws and regulations relating to the environment, can only be the subject of constant improvement, considering current scientific and technical knowledge*).

in a manner that respects, protects, and fulfills the right to a healthy environment. With the adoption of a Covenant, both national legislators and judges will be able to play critical roles in creating and enforcing laws that protect the environmental principles enshrined in the Covenant.

Firstly, national legislators will be able to introduce and pass legislation on a wide range of environmental issues and provide funding and support for environmental protection initiatives, such as renewable energy and conservation programs. In addition, they will be able to establish environmental institutions, agencies, and regulatory bodies responsible for enforcing environmental laws and regulations. They will have the authority to investigate and penalize individuals or companies that violate environmental laws. They will also provide guidance and support to industries and organizations working to reduce their environmental impact.

Secondly, national judges will play an essential role in interpreting and enforcing the principles recognized in a Covenant. They will interpret the scope and meaning of the Covenant and, as such, guide government agencies, organizations, and individuals on how to comply with these laws. In addition, judges will be able to issue injunctions, court orders, fines, and other penalties that require the government, individuals, and companies to stop engaging in certain activities that are harmful to the environment. National judges are the “guardian of the promises” of the States.⁶² They safeguard the international rights and duties that States adopted and ratified. For instance, in the *Urgenda v. Netherlands* case,⁶³ the Supreme Court of the Netherlands upheld the decision of the Hague Court of Appeal, which concluded that by failing to reduce, by the end of 2020, the emission of greenhouse gas (GHG) originating from Dutch soil by at least 25% compared to 1990, the Dutch government was acting unlawfully in violation of its duty of care under Articles 2 and 8 of the European Convention of Human Rights, which protect the rights to life, private life, family life, home, and correspondence. Likewise, in the *Grande-Synthe* case,⁶⁴ the French Council of State ruled that the French government failed to take the necessary measures to reduce GHG emissions and thus violated domestic and international law, including the Paris Agreement. Additionally, the French Constitutional Council stated in a decision on pesticides (2020)⁶⁵ that national judges must consider the extraterritorial impact of the State’s activities outside its borders. National judges can therefore act as the first guardian of the respect of international law by the States.

4.8. *Covenant as a Constitution for the Environment*

The triple planetary crisis⁶⁶ compels humanity to redefine its relationship with the environment in a Covenant on the Right to Healthy Environment. Such a Covenant would serve as a social contract and define necessary principles, favoring a coexistence between humanity and the environment.⁶⁷ It would serve as a Constitution for the Environment as comprehensive and unifying instrument to protect the environment for current and future generations and require ambitious environmental action from States and private actors. It would define the basis of a “global general interest”, external and superior to the particular national interests of each State⁶⁸ It would legally affirm new human rights in every part of the world and embody citizens’ will to create an unbreakable bond between human societies and the environment through law. Proclaiming new rights and a new social contract based on principles that have already made their way into the minds is an inspiration to take up the challenge of making these principles part of our political, social, and cultural systems.

62 Aguila, Y. (2019), *Petite typologie des actions climatiques contre l’État*, AJDA 1853; available at <https://www.dalloz.fr/lien?famille=revues&doctype=AJDA%2FCHRON%2F2019%2F2708>.

63 Supreme Court of the Netherlands, *State of the Netherlands v. Urgenda Foundation*, 20 December 2019.

64 French Council of State, *Commune de Grande-Synthe v. France*, Decision N° 427301. 1 July 2021.

65 French Constitutional Court, Decision No.2019-823, *QPC* 31 January 2020, Union des industries de la protection des plantes [Prohibition on the production, storage, and circulation of certain plant protection products].

66 Desai, B. (2023), ‘Global Climate Change as a Planetary Concern: A Wake-up Call for the Decision-makers’, *Green Diplomacy*, 14 February 2023; available at: https://www.greendiplomacy.org/article/wake_up.call/.

67 Aguila, Y., and Chami, L. (2020), ‘A New Environmental Charter for the Future’, 50 *Envir. Pol. and Law* 533–541.

68 Aguila Y., and de Bellis, M-C (2022), ‘On the Concept of a Global Public Interest: Some Reflections’, *Envir. Pol. and Law*, issue 1 vol. 52, no. 1, 13-20. See also Aguila Y., and de Bellis, M-C (2021), *A Martian at the United Nations or Naive Thoughts on Global Environmental Governance*, published in French in *Revue Européenne du Droit, March 2021, 113-123*; available on line in English here: <https://geopolitique.eu/en/articles/a-martian-at-the-united-nations-or-naive-thoughts-on-global-environmental-governance/>.

Former U.S. President Barack Obama summed up this extra-legal function of fundamental texts when asked what motivations one should have to get involved in changing society:

“When we come together to do important things, it’s usually because we told a good story about why we should be working together. You think about the United States of America. We have a really good story called the Declaration of Independence. We hold these truths to be self-evident that all men are created equal; that we’re endowed with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness. That’s a wonderful story. When the Declaration was made, there really was no United States. It was just a good story that they were telling about what could be. And then people were attracted to that story.”⁶⁹

The legal weight of a Covenant seen as a constitution for the environment would be compelling. Fundamental laws, which constitute the highest hierarchical level of any legal structure, serve as a standard for the whole pyramid of norms. The lower echelons are only valid insofar as they respect and are inspired by the higher principle.⁷⁰

This Covenant would become the cornerstone of international environmental law and be distinct from and complementary to sectoral conventions. Based on the fundamental human right to live in a healthy environment, such a Covenant would provide guidance to all incoming sectoral treaties. As specific sectoral negotiations are negotiated, new standard environmental policies will necessarily incorporate the common purposes, values, and principles enshrined in the Covenant. Specific treaties in international environmental law will, indeed, remain necessary to provide a framework for international cooperation on specific environmental issues, such as the treaty on plastic pollution, which is currently being negotiated. For instance, addressing global environmental problems such as GHG emissions, biodiversity loss, or marine pollution requires coordinated and specific international action. These sectoral treaties provide a forum for countries to work together to develop new solutions and obligations tailored to specific environmental issues. While staying “under the umbrella” of the Covenant, these sectoral treaties will help ensure that countries are working towards common goals and implementing best practices for each specific environmental issue.

5. Conclusion

While the Stockholm and Rio Declarations recognize the general principles of environmental law that are now the subject of consensus, these texts, which have significant political and symbolic significance, lack legal force. An international text with legal force to enshrine fundamental environmental rights and principles is crucial to fill the gaps in international environmental law and effectively address the triple planetary crisis. This Covenant would, therefore, recognize a third generation of fundamental rights as the rights related to the protection of the environment or ‘*green rights*’. It would thus complete the legal edifice of fundamental norms that includes the two International Covenants (CPR and ESCR) of 1966.

69 Obama, B. (2016), Q&A Session after remarks by President Obama at YSEALI Town Hall, Ho Chi Minh City, 25 May 2016, The White House Office of the Press Secretary Office; available at <https://obamawhitehouse.archives.gov/the-press-office/2016/05/25/remarks-president-obama-yseali-town-hall.html>.

70 Kelsen, Hans (1960), *Pure Theory of Law*; Translated by Knight; Berkeley, University of California Press.