

Examples 3 and 6 identify the need to integrate environmental protection with development processes to achieve sustainable development goals. While the principle is recognized the degree of integration called for by this provision is not. For example is every development proposal to be evaluated from the point of view of its impact on the environment? At what point is the impact of a development proposal on the environment so great that environmental protection considerations will prevail over development considerations? Laws that require a pre-decision assessment of the environmental impacts of development proposals serve a worthwhile purpose, but would their effectiveness be enhanced by a requirement that proposals must meet certain environmental protection requirements in order to be approved? It is not enough to identify the impacts before a decision is made without specifying how these impacts will affect the decision on a proposal being evaluated.

### **E. Comments on a variety of Issues and Conclusions**

In modern regulatory theory, much attention is being devoted to studies of the use and effectiveness of market force measures rather than the more direct application of government power to effect change. How will market forces influence sustainable development decision behavior on a significant scale?

Any normative rule designed to change behavior must be effective. How is "sustainability" measured to determine if the rule is effective? Is it measured at two points in time? Over periods of time? Based on a specific set of sustainability indicators? Is it measured locally, regionally or nationally? Which institutions are able to reliably measure sustainable performance at any level? An internal or external organization? A multi-lateral organization, such as the U.N.?

From the six examples described above in paragraph C, the following conclusions can be drawn. First, the most descriptive measures define individual rights to a clean environment as a fundamental human right. Second, individual enforcement of that right is a preferred provision as it gives all people an incentive to protect their interest. Individual enforcement can be in conjunction with parallel State obligations. Third, some measure of determining whether sustainable development standards are met should be incorporated to test its effectiveness in pre-decision assessment cases. Fourth, as a World Constitution, individual nations will commit to the principles of sustainable development by adopting a multi-lateral treaty. Within nations, the relationship between the national obligation and state and local commitments to the same obligation should be addressed.

*УДК 330.15    Доц. Пол Баррезі – Південний університет Нью-Хемпширу, США*

## **ПРАВА ЛЮДИНИ, ДЕРЖАВ ТА ЕКОЛОГІЧНА КОНСТИТУЦІЯ ЗЕМЛІ**

На конференції, присвяченій федералізму у США та колишньому Радянському Союзі, що проходила в Університеті Хофстра (м. Нью-Йорк) 1992 р., член української делегації професор Юрій Туниця вперше висунув ідею створення Екологічної Конституції Землі (ЕКЗ) саме під цією назвою.

Серед багатьох функцій ЕКЗ, вона гарантуватиме кожній людині, як громадянину світу, громадянське право на безпечне та здорове довкілля, яке у даній публі-

кації для зручності характеризується як екологічно непорушене навколишнє середовище. Найбільш ефективною і довготерміновою гарантією того, що це право буде визнаним предметом міжнародного законодавства, є наявність міжнародного культурного консенсусу відносно незаперечності даного права і необхідності його охорони.

Проте, як показує зміст та ефективність впровадження норм матеріальних екологічних прав людини у міжнародних юридичних документах і національних конституціях, такий консенсус, в найкращому випадку, є недосконалим і сильно географічно фрагментованим.

Протилежна ситуація спостерігається, коли справа стосується міжнародної культурної підтримки права держави вимагати компенсацію за екологічні збитки, спричинені діяльністю на її території інших держав. Це право тісно пов'язане із звичаєвим міжнародним правом, яке за визначенням, втілює в собі усі міжнародні культурні норми.

Як видно зі сказаного вище, норми матеріальних екологічних прав будуть належно прийняті та ефективно впроваджені як частина ЕКЗ, яка об'єднуватиме всі держави. Вони забезпечуватимуть обов'язковість дотримання міжнародно захищеного громадянського права держав-сторін ЕКЗ на екологічно непорушене навколишнє середовище перед іншими державами-сторонами ЕКЗ. Ці норми також передбачатимуть громадянське право окремих людей на екологічно непорушене навколишнє середовище перед державами. Проте вони не означатимуть визнання жодного з таких прав обов'язковими до виконання нормою міжнародного права.

*Assist. prof. Paul A. Barresi<sup>1</sup> – Southern New Hampshire University*

### **Human rights, states' rights, and the world environmental constitution**

At a conference on federalism in the states of the former Soviet Union and the United States held at Hofstra University in New York City in 1992, Professor Dr. Yuriy Tunytsya, a member of the Ukrainian delegation, first broached the idea of drafting a World Environmental Constitution (WEC) under that name. Among its many functions, the WEC would guarantee to every human being as a citizen of the world a civil right to live in a safe, healthy environment, which this analysis characterizes for convenience's sake as a civil right to an ecologically unimpaired environment. The most effective, long-term guarantee that this right would be respected as a matter of international law is an international cultural consensus that the right is real and must be protected. As the content and implementation of substantive environmental human rights provisions in international legal instruments and national constitutions reveals, however, any such consensus is an emerging one at best, and is very fragmented geographically. The opposite is true when it comes to international cultural support for the right of states to demand redress for environmental injuries caused to or on their territories by activities occurring on the territories of other states. This right of states is deeply rooted in customary international law, which by definition embodies international cultural norms. As the foregoing suggests, the substantive environmental rights provision with the best chance of being adopted and implemented effectively as part of a WEC that binds all states would recognize as enforceable an internationally protected civil right of state parties to the WEC to an ecologically unimpaired environment as against other state parties to the WEC. This provision also would imply a civil right of individual human beings to an ecologically unimpaired environment as against states, including their own, but would not purport to recognize any such right as enforceable as a matter of international law.

At a conference on federalism in the states of the former Soviet Union and the United States held at Hofstra University in New York City in 1992, Professor Dr. Yuriy Tunytsya, a member of the Ukrainian delegation, first broached the idea

<sup>1</sup> © 2007 by Paul A. Barresi. B.S., Cornell University, 1984; J.D. with Highest Honors, The George Washington University National Law Center, 1988; M.A.L.D., The Fletcher School of Law and Diplomacy, Tufts University, 1994; Ph.D., Boston University, 1999. The author is Associate Professor of Political Science and Environmental Law at Southern New Hampshire University (SNHU) in Manchester, New Hampshire, U.S.A.

of drafting a World Environmental Constitution (WEC) under that name.<sup>1</sup> This comprehensive international legal instrument would bind all states, and would subsume all existing international environmental agreements.<sup>2</sup> Among its many functions, it would guarantee to every human being as a citizen of the world the right to live in a safe, healthy environment, as well as the right to use the world's natural resources in a responsible manner.<sup>3</sup>

This analysis explores some of the practical issues of relevance to codifying and implementing the first of these proposed rights, which for convenience's sake I will characterize as a right to an ecologically unimpaired environment. Part I explores the effectiveness of constitutions in guaranteeing rights, using the Constitution of the United States as an illustrative example. Part II applies the lessons learned in Part I to the challenge of formulating an effective, internationally protected right to an ecologically unimpaired environment. This chapter concludes with a specific proposal for the phrasing of such a right.

## I. The Effectiveness of Constitutions in Guaranteeing Rights

### A. Constitutionally Protected Rights as Civil Rights

Constitutions define the basic structure and function of governments, and the basic parameters of the relationship between citizens and the state.<sup>4</sup> They often purport to guarantee specific civil liberties and civil rights.<sup>5</sup> What distinguishes civil liberties and civil rights from other sorts of rights and liberties, such as natural rights or liberties or contractual rights, is the conceptualization of the former as inherent attributes of citizenship in a civilized society.<sup>6</sup> This conceptualization owes

<sup>1</sup> For an English-language summary of this meeting and the subsequent history of the idea, see Yuriy Yu. Tunytsya & Ihor P. Soloviy, *The World Environmental Constitution as an Instrument of International Environmental Governance* (2007), which was presented at the 13th Annual Conference on the Environment (Interdisciplinary Environmental Association) in Portland, Maine, U.S.A., June 30-July 3, 2007, and is on file with the author. For an English-language exploration of "ecological federalism" as the guiding principle of this constitution, see Yuriy Tunytsya, *Ecological Federalism in the Context of Regional and World Development*, in INTERNATIONAL INSTITUTE-ASSOCIATION OF REGIONAL ECOLOGICAL PROBLEMS, *WORLD ECOLOGICAL CONSTITUTION* 127, 129-32, 137 (Yuriy Tunytsya ed., 2002).

<sup>2</sup> Tunytsya & Soloviy, *supra* note 2, at 6-7.

<sup>3</sup> Tunytsya & Soloviy, *supra* note 2, at 6. These rights would be tempered by a duty to maintain the ecological health of the environment for future generations. *See id.*

<sup>4</sup> *See* S.E. FINER, VERNON BOGDANOR & BERNARD RUDDEN, *COMPARING CONSTITUTIONS* 1 (1995) ("Constitutions are codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and officers of government, and to define the relationship between these and the public.").

<sup>5</sup> *See, e.g.*, CONSTITUCION DE COSTA RICA tit. VII, ch. 2, art. 98, para. 1 (right to organize political parties); NIHON-KOKU KENPO [Constitution] art. 26, para. 1 (Japan) (right to receive an equal education corresponding to ability); GRONDWET VOOR HET KONINKRIJK DER NEDERLANDEN [Constitution] ch. 1, art. 11 (Kingdom of the Neth.) (right to inviolability of the person); KONSTITUTSIYA UKRAYNI [Constitution] art. 34, para. 1, cl. 1 (Ukr.) (right to freedom of thought and speech).

<sup>6</sup> In this context, citizenship means citizenship in a political theoretical sense, but not necessarily a legal sense. The Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, for example, guarantee certain civil rights to "all persons", not just to citizens of the United States. U.S. CONST. amend. XIV, § 1, cls. 3-4.

Natural rights or liberties and contractual rights are conceptualized differently. In common law jurisdictions, for example, contractual rights are created by the agreement of the contracting parties. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981) (requirement of a bargain between parties for the formation of a contract). In Western liberal democratic political theory, natural rights or liberties are inherent in the nature of things, and are ontologically prior to the civil liberties and civil rights of citizens living in civil society. For the most influential Western account of the source and implications of natural rights or liberties, see JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* paras. 4, 128 (C.B. Macpherson ed. 1980) (6th ed. 1764). For a less influential but still historically important account, see THOMAS HOBBS, *LEVIATHAN* 189-90 (C.B. Macpherson ed., Penguin Classics 1985)

a great deal to the concept of natural rights and liberties, however, insofar as particular civil liberties and civil rights are conceived of as being derived from their natural counterparts.<sup>1</sup>

Despite their common features, civil liberties and civil rights work in different ways. Civil *liberties*, such as freedom of speech or religion, require the state to leave citizens alone in some respect.<sup>2</sup> Civil *rights*, such as the right to be treated equally under the laws, give citizens the right to demand that the state or, in some cases, private parties, take some affirmative action with respect to them.<sup>3</sup> In its current form, the WEC's proposed right would be a civil right because it would empo-

---

(printed from copy 101397 of the "Head" edition, published in London by Andrew Crooke in 1651, which is located in the University of Toronto Library). In other political or legal cultures, certain rights or liberties (or obligations, which imply rights or liberties on the part of the party or parties to whom the obligations are owed) have been conceptualized in similar ways. See Anver M. Emon, *Natural Law and Natural Rights in Islamic Law*, 20 J. L. & RELIGION 351-95, 353 (2005) ("The rights of individuals involved personal, individual rights that [premodern Muslim jurists] believed attached to the individual by virtue of his presumed nature."); cf. Steven Greer & Tiong Piow Lim, *Confucianism: Natural Law Chinese Style?*, *RATIO JURIS* 80, 82, 86, 88 (1998) (the social and political rights and obligations imposed by the Confucian concept of *li* as "natural").

<sup>1</sup> For example, the civil liberties and civil rights protected by the first ten amendments to the Constitution of the United States, U.S. CONST. amends. I-X, are more precise expressions of the natural rights and liberties described in the American Declaration of Independence, which proclaimed, "We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." THE DECLARATION OF INDEPENDENCE paras. 2-3 (U.S. 1776). Similarly, the French constitutions of 1791, 1793, and 1795, and the constitution of the Fifth Republic, were inspired by the French Declaration of the Rights of Man and of the Citizen. HUMAN RIGHTS SOURCEBOOK 742 (Albert P. Blaustein, Roger S. Clark & Jay A. Sigler eds., 1987); see also LA CONSTITUCION DE 1958 pmb. (Fr.) ("Le Peuple français proclame solennellement son attachement aux droits de l'homme et aux principes de la souveraineté nationale tels qu'ils ont été définis par la Déclaration de 1789....").

<sup>2</sup> For example, the Establishment and Free Exercise Clauses of the First Amendment to the Constitution of the United States declare, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I, cls. 1-2. As interpreted by the Supreme Court of the United States, the Establishment Clause requires the federal legislature (in which the Constitution vests all federal law-making power, U.S. CONST. art. I, § 1) and, through the Due Process Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, cl. 3, the state governments, to remain neutral with respect to religion, neither advancing nor inhibiting any particular religion or religion in general. See, e.g., *School Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). The Free Exercise Clause prohibits the federal legislature and, through the Due Process Clause of the Fourteenth Amendment, the state governments, from denying individuals the freedom to practice their legitimate religious beliefs. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Thus, both clauses require the state to leave citizens alone with respect to religious matters.

In Western liberal democratic political theory, civil liberties are the natural liberties retained by individuals after the creation of civil society. This Western conception is deeply rooted in the contract theory of government, according to which individuals living in a state of nature created government by entering into a contract with each other, primarily in order to create a sovereign that would protect their lives, liberty, and possessions from the depredations of everyone else. For the most influential account of the contract theory of government, see LOCKE, *supra* note 7, at paras. 20-21, 95-99, 123-31.

<sup>3</sup> For example, the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States declares, "No State shall... deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1, cl. 4. This clause recognizes the right of any person within the territorial jurisdiction of any state within the American federation to demand that the government of the state in question treat them equally under its laws. See, e.g., *Brown v. Board of Education*, 347 U.S. 483 (1954). As interpreted by the Supreme Court of the United States, the Due Process Clause of the Fifth Amendment recognizes the right of any person within the territorial jurisdiction of the United States to make similar demands as against the federal government. See, e.g., *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954); see also *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) ("Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment"). Federal statutes recognize the right of any person to make similar demands of private parties whose activities place them under the jurisdiction of Congress, or whose alleged civil rights violations are either supported by state government action or required by state law. See, e.g., *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (provisions of the Civil Rights Act of 1964); see also, e.g., Civil Rights Act of 1964, §§ 201-03, 42 U.S.C. §§ 2000 a to 2000 a-2 (2000).

wer human beings in their capacity as citizens of the world to demand that states take affirmative action to provide them with an ecologically unimpaired environment. Moreover, it would be a substantive civil right, entitling its beneficiaries to more than merely procedure.

For analytical purposes, the most useful way to express the content of any given civil right is as follows: A Z-protected civil right to Y as against X. X is the unit of government or private party that the civil right requires to take affirmative action. Y is the outcome of the affirmative action that the civil right requires that unit of government or private party to take. Z is the unit of government (presumably, a unit different from the unit above) to which citizens may appeal to remedy violations of the civil right. In the case of the WEC's proposed right to an ecologically unimpaired environment, X would be any state party to the WEC. Y would be the ecologically unimpaired environment that the right requires every state to take affirmative action to provide. Z would be the international community, acting through appropriate international institutions.<sup>1</sup> Thus, the right proposed by the WEC would be an internationally protected civil right to an ecologically unimpaired environment as against state parties to the WEC.

Note that this formula for expressing the content of any given civil right leaves unidentified the citizens with respect to whom a given civil right requires the state or private party to take affirmative action. As currently conceived, the WEC's right to an ecologically unimpaired environment would identify these citizens as individual human beings in their capacity as citizens of the world, at least in the first instance.<sup>2</sup> After exploring the relative effectiveness of codification, coercion, and culture in guaranteeing constitutionally protected civil rights, this analysis takes up of this feature of the proposed WEC in Part II.

### **B. The Relative Effectiveness of Codification, Coercion, and Culture**

The Constitution of the United States, which was ratified in 1788,<sup>3</sup> is the world's oldest written, national constitution still in force.<sup>4</sup> During the ratification debates, leading proponents of the Constitution – known as "federalists" – repeatedly pointed out that mere documents are insufficient to restrain the behaviour of

<sup>1</sup> The WEC would provide for both an International Environmental Monitoring and Enforcement Council and an International Environmental Court. Tunitsya & Soloviy, *supra* note 2, at 10. Presumably, the International Environmental Court would have jurisdiction over claims of violations of the civil right in question.

<sup>2</sup> Tunitsya & Soloviy, *supra* note 2, at 6. Parts of the discussion of the WEC concept to date have implied that both nations and nationalities and future generations would enjoy similar rights. See Tunitsya & Soloviy, *supra* note 2, at 5-6 (suggesting that the WEC should require every country to respect the interests of all nations and nationalities, and referring to a proposed constitutional duty of national governments and citizens to maintain the natural conditions of ecosystems and resources for future generations).

<sup>3</sup> See Cong. of the U.S., Res. of Cong., Dated July 2, 1788, Submitting Ratifications of the Const. to a Comm. (1788), reprinted in 2 Documentary History of the Constitution of the United States 161-62 (U.S. Bureau of Rolls and Library 1894) (after the reading of the ninth state ratification of the Constitution transmitted to Congress, ordering that the ratifications be referred to a committee to examine and report an Act to Congress to put the Constitution into operation).

<sup>4</sup> Although the British constitution is older, legal scholars usually describe it as "unwritten" because it consists largely of normative traditions, but also is rooted in legislation and judicial decisions. See, e.g., Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 TEX. INT'L L.J. 329, 333-34, 336 (2002). Some scholars even dispute the existence of a British constitution. See, e.g., F.F. Ridley, *There Is No British Constitution: A Dangerous Case of the Emperor's Clothes*, 41 PARLIAMENTARY AFF. 340 (1988); Elizabeth Wicks, *A New Constitution for a New State? The 1707 Union of England and Scotland*, 117 LAW Q. REV. 109, 114 (2001) ("Within the United Kingdom... the existence of a 'Constitution' remains an issue of heated debate...")

government officials.<sup>1</sup> They could have said the same about the effectiveness of mere documents in compelling government officials to act, as they must act if any civil right is to be respected. The most effective, long-term guarantee that government officials will take the affirmative action that a given civil right requires is a society-wide cultural consensus that the right is real and must be protected.<sup>2</sup> The only other option is coercion, which in the absence of a society-wide cultural consensus in support of the right is inherently difficult to mount or maintain for long.

Ironically, the history of the civil rights guaranteed by the Constitution of the United States illustrates both points. The current Constitution is the second constitution of the United States. The first was the Articles of Confederation, which were ratified in 1781,<sup>3</sup> and remained in effect until the formation of the first government under the current Constitution in 1789.<sup>4</sup> The Articles established a loose confederation of the thirteen original American states.<sup>5</sup> As a result of the inability of the weak central government to cope with the many challenges faced by the infant American nation, the states called a convention of delegates to Philadelphia, Pennsylvania, in the summer of 1787 to propose amendments to the Articles.<sup>6</sup>

<sup>1</sup> See THE FEDERALIST NO. 25, at 167 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Th[e] State [of Massachusetts] (without waiting for the sanction of Congress, as the articles of the Confederation [in effect before the Constitution] require) was compelled to raise troops to quell a domestic insurrection, and still keeps a corps in pay to prevent a revival of the spirit of revolt. The particular constitution of Massachusetts opposed no obstacle to the measure; but the instance... teaches us... how unequal parchment provisions are to a struggle with public necessity."); THE FEDERALIST NO. 48, at 308-09, 313 (James Madison) (Clinton Rossiter ed., 1961) ("Will it be sufficient to mark, with precision, the boundaries of [the legislative, executive, and judicial] departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power?... [E]xperience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government.... [A] mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands."); THE FEDERALIST NO. 49, at 317 (James Madison) (Clinton Rossiter ed., 1961) ("[M]ere declarations in the written Constitution are not sufficient to restrain the several departments within their legal rights."); THE FEDERALIST NO. 73, at 442 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments has been already more than once suggested. The insufficiency of a mere parchment delineation of the boundaries of each has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defense has been inferred and proved."). In most cases, these federalists were highlighting the value of the checks and balances that the Constitution proposed as means to preserve the separation of powers among the three branches of the federal government. Cf. THE FEDERALIST NO. 51, at 321-23 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he greatest security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means [i.e., checks] and personal motives [i.e., balances] to resist encroachments of the others.").

<sup>2</sup> By culture, I mean the set of descriptive and prescriptive beliefs and associated behaviors that together define a distinct way of life for the members of a given social group in a given domain of experience, and are transmitted socially between generations. This definition falls squarely within the scope of the ordinary usage of the term. For an exploration of the boundaries of the culture concept as demonstrated by the ordinary usage of the term, see John Gerring & Paul A. Barresi, *Putting Ordinary Language to Work: A Min-Max Strategy of Concept Formation in the Social Sciences*, 15 J. THEORETICAL POL. 201 (2003).

<sup>3</sup> Merrill Jensen, *The Articles of Confederation* 238 (1966).

<sup>4</sup> See Cong. of the U.S., Res. of the Cong., of Sept. 13, 1788, Fixing Date for Election of a President, and the Org. of the Gov't Under the Const., in the City of New York (1788), *reprinted in* 2 *Documentary History of the Constitution of the United States* 262-64 (U.S. Bureau of Rolls and Library 1894) (setting certain dates in 1789 as the dates for electing the first President of the United States and commencing the proceedings of Congress under the new Constitution).

<sup>5</sup> The Articles described this confederation as a mere "firm league of friendship" among the states. ARTS. OF CONFED., art. III.

<sup>6</sup> For a comprehensive account of this convention, its prelude, and its aftermath, see CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* (1966).

Meeting behind closed doors, these delegates went far beyond their instructions, ultimately proposing to replace the confederation with a federation, and the Articles with the Constitution.<sup>1</sup>

In the convention, the delegates drafted a document that detailed the powers of the proposed federal government, but rejected a proposal for a bill of rights that would have specified the rights and liberties of citizens.<sup>2</sup> Opponents of ratification – known as "antifederalists" – later seized on the lack of a bill of rights as the Constitution's biggest flaw,<sup>3</sup> and nearly scuttled it.<sup>4</sup> What saved the day was a federalist proposal, first broached in the Massachusetts state ratification convention, to ratify the Constitution without a bill of rights, but also to recommend amending it after ratification.<sup>5</sup> The first Congress to meet after ratification proposed twelve amendments,<sup>6</sup> of which ten were ratified by 1791 as the Bill of Rights.<sup>7</sup>

The most revealing feature of this debate is that both sides agreed that the rights and liberties in question were real and must be protected. Their only disagreement was how best to do it. The anti-federalists argued that the new, stronger central government that the Constitution would create would trample on the people's rights and liberties without the protective bulwark that a bill of rights would provide.<sup>8</sup> The federalists argued that a bill of rights was unnecessary because the Constitution did not authorize the federal government to infringe on fundamental rights and liberties in the first place.<sup>9</sup> They also argued that drafting a bill of rights would be impractical, because human beings enjoyed too many civil liberties and civil rights to list in any single document.<sup>10</sup> Federalists and anti-federalists alike agreed on the general content of the civil liberties and civil rights that ultimately ended up in the Bill of Rights,<sup>11</sup> all of them federally protected civil liberties and civil rights as against the federal government.<sup>12</sup> The widespread cultural consensus that this basic agreement reflected was rooted in an even older, peculiarly English

<sup>1</sup> Fifty years later, U.S. President Martin Van Buren (1837-41) would describe the drafting of the Constitution as "an heroic and lawless act." *Id.* at 62.

<sup>2</sup> *Id.* at 243-45.

<sup>3</sup> *Id.* at 245; *see also id.* at 247, 279.

<sup>4</sup> *See id.* at 288-91 (recounting the events of the Massachusetts state ratification convention, in which the federalists prevailed by nineteen votes out of 355, and noting that if Massachusetts had not ratified the Constitution, then it never would have been ratified by the other states); *see also id.* at 302-05 (recounting the events of the ratification convention in Virginia, the last required state to ratify, including the fate of proposals to amend the Constitution later with a bill of rights).

<sup>5</sup> *See id.* at 272, 288-90.

<sup>6</sup> Cong. of the U.S., Res. of the First Cong. Submitting Amends. to the Const., March 4, 1789 (1789), *reprinted in* 2 Documentary History of the Constitution of the United States 321-24 (U.S. Bureau of Rolls and Library 1894).

<sup>7</sup> *See* H.R. Doc. No. 94-508, at 17-19 (1976); *see also* BOWEN, *supra* note 20, at 304-05 (recounting a capsule history of the Bill of Rights).

<sup>8</sup> *See* BOWEN, *supra* note 20, at 247-48.

<sup>9</sup> BOWEN, *supra* note 20, at 245, 248; *see also* THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[Bills of rights] have no application to constitutions, professedly founded upon the power of the people and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything they have no need of particular reservations, 'WE, THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.")

<sup>10</sup> BOWEN, *supra* note 20, at 245-46 (quoting James Wilson and Noah Webster).

<sup>11</sup> *Cf. id.* at 302-03, 304-05 (recounting the fate of competing proposals for bills of rights in the Virginia state ratification convention).

<sup>12</sup> *See* U.S. CONST. amends. I-X.

cultural commitment to the preservation of traditional English rights and liberties,<sup>1</sup> and has been at the center of American political and legal culture since the founding of the United States.<sup>2</sup> Even today, many Americans mistake the language of the Bill of Rights for the language of the Constitution *per se*.<sup>3</sup>

Three-quarters of a century later, in the aftermath of the American Civil War (1861-65),<sup>4</sup> Congress proposed and the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution.<sup>5</sup> The framers of these amendments intended them primarily to protect the African-American slaves effectively freed by the war from the governments of the states under the laws of which they previously had been enslaved.<sup>6</sup> The Thirteenth Amendment abolished slavery

<sup>1</sup> For a revealing exploration of this link between these phenomena, see GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 13-14 (1991).

<sup>2</sup> A number of the "repeated injuries and usurpations" for which the American founding fathers denounced George III, the British king, in the American Declaration of Independence anticipated provisions that would appear later in the Bill of Rights. Compare THE DECLARATION OF INDEPENDENCE paras. 3, 17, 21, 22 (U.S. 1776) (counting the "quartering of large bodies of armed troops" among the people, depriving the people of the "benefits of trial by jury", and the transport of persons "beyond seas, to be tried for pretended offenses" as among the "repeated injuries and usurpations" to which the British king had subjected the American colonists) with U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.") and *id.* amend. VI, cl. 1 ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law....") and *id.* amend. VII, cl. 1 ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....").

<sup>3</sup> BOWEN, *supra* note 20, at 244.

<sup>4</sup> The American Civil War pitted the federal government against eleven Southern states that seceded from the United States in 1861 to form the Confederate States of America. Although the causes of the war are complex, the event that precipitated the secession of the Southern states was the election of Abraham Lincoln, a Northerner and prominent figure in the newly-formed, anti-slavery Republican Party, to the presidency. The Southern states believed that the new Republican Administration intended to interfere with the institution of slavery as it existed in the South, as well as in the North-South border states and the District of Columbia, although the newly elected president repeatedly denied any intention of doing so. For a summary of this aspect of the secession crisis, see GEORGE C. RABLE, *THE CONFEDERATE REPUBLIC* 27-28 (1994). For Lincoln's response to Southern fears, see President Abraham Lincoln, First Inaugural Address (March 4, 1861), in *AMERICAN HISTORICAL DOCUMENTS* 269, 270 (Harold C. Syrett ed., 1960).

<sup>5</sup> Congress proposed the Thirteenth Amendment before the end of the war, and the other two amendments afterward. See FindLaw, U.S. Constitution: Thirteenth Amendment Annotations p. 1, <http://caselaw.lp.findlaw.com/data/constitution/amendment13/01.html#2> (last visited Sept. 3, 2007) (describing the amendment being forwarded to the states on February 1, 1865); FindLaw, U.S. Constitution: Fourteenth Amendment Annotations p. 38, <http://caselaw.lp.findlaw.com/data/constitution/amendment14/38.html#2> (last visited Sept. 3, 2007) (proposal of the Fourteenth and Fifteenth Amendments by Congress to the states "[i]n the aftermath of the Civil War"). The states ratified all three amendments by 1870, see H.R. Doc. No. 94-508, at 21-22 (1976), while federal troops still occupied the South. Cf. C. VAN WOODWARD, *REUNION & REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION* (1966) (telling the story of the political compromise that led to the withdrawal of federal troops from the South).

<sup>6</sup> In the United States, the legal status of slaves as slaves was a function of state law, not federal law. The federal Constitution merely provided that a slave did not become free merely by escaping from a slave state into a free state, and that the masters of escaped slaves were entitled to their return. See U.S. CONST. art. IV, § 2, cl. 3 ("No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service of Labour may be due."). The Emancipation Proclamation, which President Abraham Lincoln issued during the war in his capacity as commander-in-chief of the army and navy, merely purported to free the slaves who were living in states or parts of states that were then in rebellion against the United States. Emancipation Proclamation para. 2 (Jan. 1, 1863), in JOHN HOPE FRANKLIN, *THE EMANCIPATION PROCLAMATION: JANUARY 1, 1863* (1995). Thus, it did not even claim to free the slaves living in states occupied by United States troops, the slaves living in the North-South border states that remained loyal to the United States during the war, or the slaves living in the District of Columbia. In any case, the constitutionality of the Emancipation Proclamation has been disputed. See J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 371-78, 382-85 (rev. ed. 1951).

nationwide.<sup>1</sup> The Fourteenth Amendment affirmed the state and federal citizenship of all persons born or naturalized in the United States and subject to its jurisdiction,<sup>2</sup> and prohibited the states from abridging the privileges or immunities of citizenship of any citizen of the United States.<sup>3</sup> The Due Process Clause of the Fourteenth Amendment prohibited the states from depriving any person of life, liberty, or property without due process of law,<sup>4</sup> and the Equal Protection Clause prohibited them from denying to any person within their jurisdiction the equal protection of the laws.<sup>5</sup> The Fifteenth Amendment prohibited the denial or abridgement of the right to vote of any citizen of the United States on the basis of color, race, or previous condition of servitude.<sup>6</sup> Thus, all three amendments recognized federally protected civil rights as against the states.

Although the post-war Congress enacted several statutes to implement these amendments,<sup>7</sup> by the 1890s the Southern states began to abrogate most of the civil rights that the amendments purported to guarantee.<sup>8</sup> Over time, these states created a system of laws known as "Jim Crow" – a racist reference to a popular character in the minstrel shows of mid-nineteenth century America<sup>9</sup> – which in many ways anticipated the system of *apartheid* that would emerge in South Africa a half century later.<sup>10</sup> Although the Thirteenth Amendment's abolition of slavery per se remained effective even under Jim Crow, the legislatures of the Southern states and a sympathetic United States Supreme Court eviscerated the Fourteenth and Fifteenth Amendments' guarantees of due process, equal protection, and the right to vote, thus returning African-Americans in the South to a legal status little better than slavery.<sup>11</sup>

It was not until the second half of the twentieth century that the promise of the Fourteenth and Fifteenth amendments finally were fulfilled. In 1954, the Supreme Court declared the segregation of public schools on the basis of race to be unconstitutional.<sup>12</sup> Beginning in 1957, Congress enacted a series of civil rights and voting rights statutes.<sup>13</sup> Most importantly, three successive presidents, from both major

<sup>1</sup> U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.")

<sup>2</sup> U.S. CONST. amend. XIV, § 1, cl. 1 ("All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.")

<sup>3</sup> *Id.* § 1, cl. 2 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States...")

<sup>4</sup> *Id.* § 1, cl. 3 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law...")

<sup>5</sup> *Id.* § 1, cl. 4 ("[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws.")

<sup>6</sup> U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.")

<sup>7</sup> *E.g.*, Civil Rights Act of 1875, ch. 114, 18 Stat. 335 (1875); Ku Klux Klan Act of 1871, ch. 22, 17 Stat. 13 (1871); Act of February 28, 1871, ch. 99, 16 Stat. 433 (1871); Enforcement Act of 1870, ch. 114, 16 Stat. 140 (1870); Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

<sup>8</sup> See Michael J. Klarman, *From Jim Crow to Civil Rights 10-11* (2004).

<sup>9</sup> For a brief summary of the origin of the term, see Ronald L.F. Davis, *Creating Jim Crow: In-Depth Essay*, <http://www.jimcrowhistory.org/history/creating2.htm> (last visited Aug. 3, 2007).

<sup>10</sup> For a concise summary of everyday life in South Africa under *apartheid*, see ROGER OMOND, *THE APARTHEID HANDBOOK* (2d ed. 1986).

<sup>11</sup> See Richard Kluger, *Simple Justice: The History of Brown v. Board of Education and Black America's Struggle for Equality 51-83* (1976).

<sup>12</sup> *Brown v. Board of Education* 347 U.S. 483 (1954).

<sup>13</sup> See, *e.g.*, NICK KOTZ, *JUDGMENT DAYS: LYNDON BAINES JOHNSON, MARTIN LUTHER KING JR., AND THE LAWS THAT CHANGED AMERICA* 50, 153, 336-37, 421 (2005) (describing the provisions of the Civil Rights Act of 1957,

political parties and different geographical regions, including the South, made clear that they were prepared to enforce the will of Congress and the Supreme Court, with military force if necessary.<sup>1</sup> As this history shows, in a region of the United States that was not culturally predisposed to respect the civil rights of African-Americans, only coercion made those rights effective in the period just after the American Civil War, and only the threat of coercion was sufficient to restore them decades later in the face of a white Southern culture that remained unchanged.<sup>2</sup>

With respect to the right to an ecologically unimpaired environment in the proposed WEC, coercion is not much of an option. Even in the face of the most barbarous crimes against humanity, the international community finds it difficult to act decisively.<sup>3</sup> The only viable option is the natural support provided by a society-wide cultural consensus that a substantive right to an ecologically unimpaired environment is real and must be protected. In this case, the society in question is the society of world leaders and international relations professionals whose behavior gives rise to international legal norms, and who implement those norms domestically. The next part of this analysis explores whether the necessary cultural consensus among these political and legal actors exists.

## II. International Legal Cultural and Substantive Environmental Rights

### A. Substantive Environmental Human Rights

As currently conceived, the WEC's right to an ecologically unimpaired environment would identify the citizens to which it would attach as individual human beings in their capacity as citizens of the world.<sup>4</sup> In accordance with the age-old dictum that states, and not individuals, are the subjects of international law, the international community paid little attention to the rights of its citizens as such until after World War I, when the League of Nations adopted the rights of ethnic and other minorities as a primary concern.<sup>5</sup> After World War II, the international community began to focus on "human rights," a universalization of the natural rights (and therefore civil rights) concept at the center of liberal political cultures since the American and French revolutions.<sup>6</sup> The United Nations General Assembly

---

and the presidential signing ceremonies for the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Civil Rights Act of 1968).

<sup>1</sup> See, e.g., DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965* 114 (1978) (President Lyndon Baines Johnson, a Southern Democrat, threatening to call the Alabama National Guard into federal service to protect peaceful African-American civil rights marchers in Selma, Alabama, in 1965); KLARMAN, *supra* note 46, at 395 (President Dwight D. Eisenhower, a Midwestern Republican, sending federal troops to protect African-American students integrating a whites-only public high school in Little Rock, Arkansas, in 1957); KLUGER, *supra* note 49, at 756 (President John F. Kennedy, a Northern Democrat, federalizing the Alabama National Guard in order to force the admission of two African-American students to a summer session at the University of Alabama in 1963).

<sup>2</sup> After signing the Civil Rights Act of 1964 into law, President Lyndon Baines Johnson, a member of the Democratic Party and a Southerner, remarked to an aide, "I think we just delivered the South to the Republican Party for a long time to come." KOTZ, *supra* note 51, at 154.

<sup>3</sup> See, e.g., Barbara Crossette, *Inquiry Says U.N. Inertia in '94 Worsened Genocide in Rwanda*, N.Y. TIMES, Dec. 17, 1999, at A1; Warren Hoge, *Bush and Sudan's Leader at Odds Over Sending U.N. Troops to Calm Darfur*, N.Y. TIMES, Sept. 20, 2006, at A14.

<sup>4</sup> Tunitsya & Soloviy, *supra* note 2, at 6.

<sup>5</sup> See John P. Humphrey, *The International Law of Human Rights in the Middle Twentieth Century*, in *THE PRESENT STATE OF INTERNATIONAL LAW AND OTHER ESSAYS* 75, 75-82 (Maarten Bos ed., 1973).

<sup>6</sup> Will Kymlicka, *Liberalism, Community and Culture* 210 (1989).

adopted The Universal Declaration of Human Rights – a soft law instrument – in 1948.<sup>1</sup> It clearly bears the stamp of the eighteenth-century rights declarations, especially the French Declaration of the Rights of Man and of the Citizen.<sup>2</sup>

The Universal Declaration does not mention substantive environmental rights, although two other major soft law instruments do.<sup>3</sup> The Stockholm Declaration of the United Nations Conference on the Human Environment declares that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, [and] an environment of a quality that permits a life of dignity and well-being."<sup>4</sup> The Rio Declaration on Environment and Development adopts a more restrained approach, asserting that "[h]uman beings... are entitled to a healthy and productive life in harmony with nature."<sup>5</sup> As soft law, these declarations are precatory, and therefore do not offer solid evidence of the existence of the sort of international cultural consensus required for effective implementation of a substantive right to an ecologically unimpaired environment as against states.

Hard law is more revealing. What it reveals is that any such consensus is an emerging one at best, and is very fragmented geographically. Only two human rights conventions purport to recognize substantive environmental rights per se.<sup>6</sup>

<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3 d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>2</sup> See Johannes Morsink, *The Philosophy of the Universal Declaration*, 6 HUM. RTS. Q. 309, 310-11 (1984).

<sup>3</sup> A third soft law declaration -- The World Charter for Nature -- refers to procedural environmental rights, which are not relevant here. See World Charter for Nature, G.A. Res. 37/7, ¶ 23, U.N. Doc. A/Res/37/7 (Oct. 28, 1982) ("All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.").

<sup>4</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, princpl. 1, in DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 4, 6 (Philippe Sands & Paolo Galizzi eds., 2 d ed., 2004).

<sup>5</sup> Rio de Janeiro Declaration on Environment and Development, adopted June 14, 1992, princpl. 1, in DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 18, 19 (Philippe Sands & Paolo Galizzi eds., 2 d ed., 2004).

<sup>6</sup> The lack of substantive environmental rights provisions in other human rights conventions has not stopped petitioners from seeking to vindicate such rights under provisions intended on their face to protect other things, and sometimes from succeeding. For example, the European Convention on Human Rights and Fundamental Freedoms ostensibly protects the "right to respect for private and family life." European Convention on Human Rights and Fundamental Freedoms, art. 8, ¶ 1, Nov. 4, 1950, Europ. T.S. No. 005. The European Court of Human Rights has interpreted this provision as a source of substantive environmental rights in certain factual contexts. See, e.g., *Lopez-Ostra v. Spain*, 303 Eur. Ct. H.R. (ser. A) (1994); but see Judith Hippler Bello & Richard Desgagne, *Lopez Ostra v. Spain*, 89 AM. J. INT'L L. 788, 791 (1995) (arguing that the heart of the decision in *Lopez-Ostra* is procedural, not substantive). In 2005, a group of Inuit petitioned the Inter-American Commission on Human Rights under the Declaration of the Rights and Duties of Man, seeking relief from global warming allegedly caused by acts and omissions of the United States. Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States Submitted by Sheila Watt-Cloutier, with the Support of the Inuit Circumpolar Conference, on Behalf of All Inuit of the Arctic Regions of the United States and Canada (Dec. 7, 2005), available at [http://www.earthjustice.org/library/legal\\_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf](http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf). In 2007, the Commission invited the lead petitioner and lawyers for the group to a "hearing of a general nature" to address matters related to global warming and human rights. Letter from the Inter-American Commission on Human Rights to Sheila Watt-Cloutier, Martin Wagner, Managing Attorney, Earthjustice, and Daniel Magraw, Ctr. for Int'l Env'tl. Law (Feb. 1, 2007), available at [http://www.earthjustice.org/library/legal\\_docs/inter-american-commission-on-human-rights-inuit-invite.pdf](http://www.earthjustice.org/library/legal_docs/inter-american-commission-on-human-rights-inuit-invite.pdf); see also Deborah Zabarenko, *Climate Ills, Rights Linked: Global Warming Endangering Inuit "Sentinels," Nobel Nominee Argues*, TORONTO STAR, March 5, 2007, at A07. As of this writing, the Commission has not issued any report on the matter.

For a survey of jurisprudence of this type by international human rights bodies, see Dinah Shelton, *Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, in JOINT UNEP-OHCHR EXPERT SEMINAR ON HUMAN RIGHTS AND THE ENVIRONMENT (Office of the United Nations High Comm'r for Human Rights ed., 2002), <http://www.ohchr.org/english/issues/environment/envIRON/bp2.htm>. This jurisprudence, although an interesting

The African Charter on Human and Peoples' Rights (hereinafter the "African Charter") declares, "All peoples have the right to a generally satisfactory environment favourable to their development."<sup>1</sup> The Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (hereinafter the "Protocol of San Salvador") states, "Everyone shall have the right to live in a healthy environment...."<sup>2</sup> Although the mere presence of these provisions in hard law instruments provides some support for the proposition that the international cultural consensus necessary for effective implementation of substantive environmental rights exists, the lack of adjudication affirming these provisions as enforceable requirements of international law suggests that any such consensus is weak. Environmental petitions submitted to the African Commission on Human and People's Rights under the African Charter typically invoke the right to health protected by Article 16, not the substantive environmental right supposedly protected by Article 24.<sup>3</sup> The Protocol of San Salvador does not even permit the submission of individual petitions alleging violations of the substantive environmental right that it purports to protect.<sup>4</sup>

The extent to which national constitutions protect substantive environmental rights in Africa, Latin America, and elsewhere point to a similar conclusion. About sixty national constitutions purport to protect substantive environmental rights.<sup>5</sup> Most of these provisions are no more than thirty years old, with the majority of this group being no more than fifteen years old.<sup>6</sup> The list of states with national constitutions that purport to protect substantive environmental rights include at least fifteen of the forty-eight or more states that have ratified or acceded to the African Charter,<sup>7</sup> and eight of the fourteen Latin American states that have ratified or acceded to the Protocol of San Salvador.<sup>8</sup> It also includes several states in Western and Eastern Europe, some in the Middle East, and a few in Asia and the Indian subcontinent.<sup>1</sup>

---

exercise in the creative interpretation of treaty language that the signatories apparently did not intend to have environmental implications, is only peripherally relevant to the proposed WEC, which calls for codification of a substantive right to an ecologically unimpaired environment per se.

<sup>1</sup> African [Banjul] Charter on Human and Peoples' Rights, art. 24, June 27, 1981, OAU Dec. CAB/LEG/67/3 Rev. 5 (1981).

<sup>2</sup> Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, ¶ 1, Nov. 17, 1988, <http://www.oas.org/juridico/english/Treaties/a-52.html> (hereinafter "Protocol of San Salvador").

<sup>3</sup> See Shelton, *supra* note 63. For the impact of Article 24 on Nigerian municipal law, which provides some support that a cultural consensus exists in Nigeria that substantive environmental rights are real and must be protected, see *infra* note 74.

<sup>4</sup> The Protocol of San Salvador permits the submission of individual petitions only for alleged violations of certain labor and educational rights. See Protocol of San Salvador, *supra* note 65, art. 19, § 6. The Protocol seeks to guarantee the other rights that it purports to protect primarily by requiring the state parties to submit periodic reports describing the measures that they have taken to ensure respect for the rights in question, and by permitting certain intergovernmental bodies to make observations and recommendations in that regard. See *id.* art. 19, §§ 1-5, 7-8.

<sup>5</sup> James R. May, *Constituting Fundamental Environmental Rights Worldwide*, 23 PACE ENVTL. L. REV. 113, 129 (2006). For example, Ukraine's constitution states, "Everyone has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right." KONSTITUTSIYA UKRAYNI [Constitution], art. 50, para. 2 (Ukr.).

<sup>6</sup> May, *supra* note 68, at 129.

<sup>7</sup> These states are Algeria, Angola, Benin, Burkina Faso, Cameroon, Cape Verde, Chad, Comoros, Ethiopia, Mali, Mozambique, Niger, Seychelles, South Africa, and Togo. Compare May, *supra* note 68, at 132 with University of Minnesota Human Rights Library, Ratification of International Human Rights Treaties (Ilhan Isik ed., 2004), <http://www1.umn.edu/humanrts/research/ratification-index.html> (country-by-country list of treaty signatures, ratifications, accessions, successions, and entries into force).

<sup>8</sup> These states are Argentina, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, and Paraguay. Compare May, *supra* note 68, at 131 with Additional Protocol to the American Convention on Human Rights in the

Despite the proliferation of these constitutional provisions, the courts in only a tiny minority of states have held them to be enforceable.<sup>2</sup> Of the states that have ratified or acceded to the African Charter, only South Africa appears to be among this much smaller group.<sup>3</sup> Of the states that have ratified or acceded to the Protocol of San Salvador, only Argentina, Colombia, and Costa Rica are among them.<sup>4</sup> The courts of few if any other states with national constitutions that purport to protect substantive environmental rights per se have held them to be enforceable.<sup>5</sup>

---

Area of Economic, Social and Cultural Rights at A-52, Nov. 17, 1988, available at <http://www.oas.org/juridico/english/sigs/a-52.html> (last visited Aug. 22, 2007) (Office of International Law of the Organization of American States list of protocol signatures, ratifications or accessions, and deposits).

<sup>1</sup> For a complete list, see May, *supra* note 68, at 129-33.

<sup>2</sup> This analysis makes no distinction between substantive constitutional environmental rights provisions that courts have held to be self-executing, and those that courts have held to be otherwise enforceable. Historically, the legal traditions of many states, especially those with civil law traditions, did not consider constitutional rights to be self-executing. Carl Bruch, Wole Coker & Chris Van Arsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*, 26 COLUM. J. ENVTL. L. 131, 141 (2001)

<sup>3</sup> See May, *supra* note 68, at 136; see also Bruch et al., *supra* note 73, at 139-40, 150, 162; cf. Jona Razzaque, *Human Rights and the Environment: The National Experience in South Asia and Africa* § 9.1, in JOINT UNEP-OHCHR EXPERT SEMINAR ON HUMAN RIGHTS AND THE ENVIRONMENT (Office of the United Nations High Comm'r for Human Rights ed., 2002), <http://www.ohchr.org/english/issues/environment/environ/bp4.htm> ("Section 24 [of the South African Constitution, which is quoted *infra*] demonstrates that [a] right to a healthy environment is part of the socio-economic right of South Africa [sic]. This second generation right is often applied by the court[s] to give a meaningful interpretation of [the] right to life."). The South African Constitution declares, "Everyone has the right (a) to an environment that is not harmful to their [sic] health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development." S. AFR. CONST. 1996 § 24.

In an interesting twist on the link between international and municipal law, a Nigerian intermediate appellate court has held that Nigerians may rely domestically on the substantive environmental right described in Article 24 of the African Charter, which Nigeria has ratified, as a substitute for the provision in the Nigerian constitution that requires the state to protect the environment, which is unenforceable. Razzaque, *supra*, at § 9.2. The Nigerian Constitution states, "The State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria." CONSTITUTION, Art. 20 (1999) (Nigeria).

<sup>4</sup> See May, *supra* note 68, at 134-35; see also Adriana Fabra & Eva Arnal, *Review of Jurisprudence on Human Rights and the Environment in Latin America*, in JOINT UNEP-OHCHR EXPERT SEMINAR ON HUMAN RIGHTS AND THE ENVIRONMENT (Office of the United Nations High Comm'r for Human Rights ed., 2002), <http://www.ohchr.org/english/issues/environment/environ/bp6.htm>. The Argentinian constitution declares, "Todos los habitantes gozan del derecho a un ambiente sano, equilibrado, apto para el desarrollo humano y para que las actividades productivas satisfagan las necesidades presentes sin comprometer las de las generaciones futuras...." CONST. ARG. pt. 1, ch. II, art. 41, para. 1, cl. 1. For an English-language translation, see ARGENTINA CONSTITUTION pt. 1, ch. II, § 41(1), cl. 1 (International Constitutional Law (ICL) Project, University of Bern (Switzerland) Institute of Public Law trans., 1998), [http://www.servat.unibe.ch/law/icl/ar00000\\_.html](http://www.servat.unibe.ch/law/icl/ar00000_.html) ("All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations....").

The Colombian constitution states, "Todas las personas tienen derecho a gozar de un ambiente sano." CONSTITUCION POLITICA DE COLOMBIA tit. II, ch. 3, art. 79, para. 1, cl. 1. For an English-language translation, see TEXT OF THE CONSTITUTION OF COLOMBIA tit. II, ch. 3, art. 79, para. 1, cl. 1, [http://confinder.richmond.edu/admin/docs/colombia\\_const2.pdf](http://confinder.richmond.edu/admin/docs/colombia_const2.pdf) ("Every person has the right to enjoy a healthy environment.") (last visited Aug. 25, 2007).

The Costa Rican constitution declares, "Toda persona tiene derecho a un ambiente sano y ecológicamente equilibrado. Por ello, está legitimada para denunciar los actos que infringan ese derecho y para reclamar la reparación del daño causado." CONSTITUCION POLITICA DE LA REPUBLICA DE COSTA RICA tit. V, art. 50, para. 2. For an English-language translation, see CONSTITUTION OF THE REPUBLIC OF COSTA RICA tit. V, art. 50, para. 2, <http://usembassy.or.cr/engcons5.htm> ("Every person has the right to a healthy and ecologically balanced environment, being therefore entitled to denounce any acts that may infringe said right and claim redress for the damage caused.") (last visited Aug. 25, 2007).

<sup>5</sup> See May, *supra* note 68, at 136. Courts in some other states have interpreted constitutional provisions that do not purport to protect substantive environmental rights per se to be implicit sources of such rights in certain factual contexts. See, e.g., Razzaque, *supra* note 74, at § 2.1 (the constitutionally protected "right to life" in India, Bangla-

## B. The Substantive Environmental Rights of States

If there is one substantive environmental right that a broad cultural consensus of world leaders and international relations professionals has embraced, then it is the right of states to demand redress for environmental injuries caused to or on their territories by activities occurring on the territories of other states. This implied right is rooted historically in the *Trail Smelter Case*,<sup>1</sup> a transboundary air pollution arbitration between the United States and Canada. In *Trail Smelter*, private citizens growing apples in the State of Washington, U.S.A., alleged damage to their property caused by sulfur dioxide emissions from a smelter in Canada owned by a Canadian corporation. The governments of the United States and Canada entered into a convention that provided for binding arbitration of the dispute. In holding Canada responsible under international law for the conduct of the privately owned smelter, and enjoining the smelter from causing any further damage within Washington state, the arbitrators concluded that "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."<sup>2</sup>

Because the *Trail Smelter Case* was an arbitration undertaken pursuant to a bilateral convention entered into by the United States and Canada for the purpose of resolving a particular dispute, it has little precedential value per se.<sup>3</sup> Its reasoning has become firmly embedded in international environmental law, however, and ultimately inspired Principle 21 of the Stockholm Declaration.<sup>4</sup> Principle 21 declares, "States have, in accordance with the... principles of international law,... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States."<sup>5</sup> International legal scholars consider this passage to be an accurate restatement of customary international law,<sup>6</sup> which by definition embodies international cultural norms.<sup>7</sup> The duty of states that Principle 21 describes necessarily implies the right of other states to de-

---

desh, and Pakistan as a source of substantive environmental rights). This jurisprudence is only peripherally relevant to the proposed WEC, however, which calls for codification of a substantive right to an ecologically unimpaired environment per se. The same holds true for national constitutions that purport to impose environmental duties on the state, either explicitly or implicitly, even to the extent that courts have held those duties to be enforceable. *See, e.g.*, Bruch et al., *supra* note 73, at 147-48, 156-58 (environmental duties imposed on the state either explicitly or implicitly by the Indian constitution).

<sup>1</sup> *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. (1941). For an analysis of the arbitration and the events surrounding it, see J. Read, *The Trail Smelter Dispute*, 1 CAN. Y.B. OF INT'L L. 213 (1963).

<sup>2</sup> *Trail Smelter Case* (U.S. v. Can.), 3 R.I.A.A. 1905 (1941).

<sup>3</sup> David Hunter, James Salzman & Durwood Zaelcke, *International environmental law and Policy* 511 n. 3 (2 d ed. 2002).

<sup>4</sup> *Id.*

<sup>5</sup> Stockholm Declaration of the United Nations Conference on the Human Environment, *adopted* June 16, 1972, princpl. 21, in DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 4, 9-10 (Philippe Sands & Paolo Galizzi eds., 2 d ed., 2004). Principle 21 also declares that it is the responsibility of states to ensure that these activities do not cause environmental damage to "areas beyond the limits of national jurisdiction" generally. *Id.* at 10. Thus, it also refers to damage that ultimately has no effect to or on the territories of states, a type of damage not at issue in the *Trail Smelter Case*. This analysis leaves for another day the legal issues raised by this second type of damage, including the issue of standing to seek redress for it in international legal tribunals.

<sup>6</sup> *See* HUNTER ET AL., *supra* note 79, at 373.

<sup>7</sup> *See* Daniel Bodansky, Customary (and Not So Customary) International Environmental Law, 3 IND. J. GLOBAL LEGAL STUD. 105, 108-09 (1995).

mand that this duty be fulfilled, and the right to redress when it is not, both of which rights have become just as deeply embedded in customary international law as the duty itself.<sup>1</sup>

## VII. A Modest Proposal

As the foregoing analysis suggests, the substantive environmental rights provision with the best chance of being adopted and implemented effectively as part of a WEC that binds all states would be a provision phrased as follows:

No state or group of states shall deny to any other state the fundamental right of its citizens to an ecologically unimpaired environment.

As a legal matter, this provision would recognize as enforceable an internationally protected civil right of state parties to the WEC to an ecologically unimpaired environment as against other state parties to the WEC, including in the latter group states acting in concert, such as through the European Union. Thus, this provision would identify states as the "citizens" with respect to which the civil right guaranteed by the WEC would require other states to take affirmative action. It also would imply a civil right of individual human beings to an ecologically unimpaired environment as against states, including their own, whether as citizens of the world or otherwise, but would not purport to recognize any such right as enforceable as a matter of international law.

This proposed provision would have at least three practical advantages over a provision that would purport to protect a civil right of individual human beings in their capacity as citizens of the world to an ecologically unimpaired environment as against state parties to the WEC. First, the substantive environmental right that the WEC would recognize as enforceable as a matter of international law – the right of states as against other states – is deeply rooted in international legal culture. Since the *Trail Smelter Case*, the duty of states to refrain from causing environmental damage to or on the territory of other states, and the right of states to demand that other states fulfill this duty, have become central principles of customary international environmental law, which by definition embodies widespread international cultural norms.<sup>2</sup>

Second, although the proposed provision refers to a fundamental right of citizens to an ecologically unimpaired environment, it does so in a way that is consistent with the tentative and geographically fragmented international cultural consensus that such a right exists and must be protected. In the absence of a much broader, deeper international consensus, any WEC provision that purported to protect a civil right of individual human beings to an ecologically unimpaired environment

<sup>1</sup> Cf. International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts art. 42, ILC 53rd Sess. (2001), in DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 1226, 1235 (Philippe Sands & Paolo Galizzi eds., 2 d ed., 2004) (restating the right of an injured state under customary international law to invoke the responsibility of states under customary international law to refrain from and redress internationally wrongful acts); see also *id.* arts. 28-39, in DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW 1226, 1232-34 (Philippe Sands & Paolo Galizzi eds., 2 d ed., 2004) (restating the content of the duty of states under customary international law to refrain from and redress internationally wrongful acts, as well as the manner of reparation required under customary international law for injuries caused by the wrongful acts committed).

<sup>2</sup> For a brief comment about the legal implications of environmental damage that ultimately has no effect on the territories of other states, and thus no effect on the individual human beings who live there, see *supra* note 81.

most likely would be unenforceable as a practical matter with respect to most states. By expressing this right in predatory language, the proposed provision would offer positive reinforcement to the few states with legal cultures that already recognize such a right, but not threaten the sovereignty of the many states with legal cultures that do not.<sup>1</sup> The proposed provision skirts the issue of whether the civil right in question attaches to individuals by virtue of their status as citizens of the world, or merely as citizens of states. The concept of global environmental citizenship is at least as contested culturally as is the idea of substantive environmental human rights,<sup>2</sup> making international legal recognition of the one at least as problematic as international legal protection for the other.

Third, the general contours of the relationship between the substantive environmental rights of states and the fundamental rights of citizens that the proposed provision implies is consistent with the legal cultures of many of the world's states. The proposed provision implies an expanded version of the public trust doctrine, which is rooted historically in the Roman civil law and has been absorbed into both civil law and common law traditions.<sup>3</sup> The public trust doctrine imposes an obligation on the state to protect certain types of natural resources, such as navigable waters and the land beneath them, so that they remain fit for certain public uses.<sup>4</sup> Even in its more robust forms, the doctrine does not amount to a substantive right to an ecologically unimpaired environment.<sup>5</sup> Nevertheless, its absorption into both common law and civil law traditions offers some cultural precedent in most of the world's states for the type of fiduciary relationship between a state and its citizens that the proposed provision implies. The proposed provision thus could help to forge the international cultural consensus that would be necessary to protect a civil right of individual human beings to an ecologically unimpaired environment as a matter of international law by encouraging the transformation of the municipal legal cultures of states that currently do not recognize such a right.

Adoption and effective implementation of a WEC that would protect a substantive right to an ecologically unimpaired environment, whether of citizens, of states, or of both, would be a giant step forward in the ongoing struggle to reform modern human societies along environmentally sustainable lines. Perhaps the world will be ready soon to take this giant step.

---

<sup>1</sup> Proponents of the WEC recognize the pitfalls of infringing on the sovereignty of states. *See, e.g.,* Tunitsya & Soloviy, *supra* note 2, at 5 ("The contents and structure of the WEC must be prepared in such a way that a new unprecedented international legal act does not threaten the sovereignty of any single country....").

<sup>2</sup> *See* Elizabeth Jelin, *Towards a Global Environmental Citizenship?*, 4 *CITIZENSHIP STUD.* 47 (2000).

<sup>3</sup> *See* Bruch et al., *supra* note 73, at 159-60.

<sup>4</sup> *See, e.g., Ill. Cent. R.R. v. Illinois*, 146 U.S. 387 (1892) (the leading U.S. Supreme Court case on the public trust doctrine in the United States). For a brief survey of recent public trust doctrine jurisprudence in states with common law traditions, *see* Bruch et al., *supra* note 73, at 160-62.

<sup>5</sup> *See, e.g., Nat'l Audubon Soc'y v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (a California, U.S.A., Supreme Court Case holding under the public trust doctrine that California water law does not bar a government agency from reconsidering the diversion of water from certain navigable waters in the light of the negative impact of the diversion on scenery, ecology, and human uses of those waters).