

Adopting an International Covenant for the Protection of the Environment

Taking environmental rights seriously

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International environmental law is characterized by a profusion of technical norms with the environment or sustainable development as their main or secondary focus, backed by many international institutions and organizations.

The adoption of an **authentic binding treaty** encompassing all the basic principles would give international environmental law the cornerstone it needs. A universal binding document would strengthen the protection of human rights related to the right to a healthy environment. In 2016, fifty years after the adoption of **the two international covenants of 1966** (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights), it is now time to supplement the structure with the **third generation of human rights** and the adoption of the **International Covenant on the Protection of the Environment**.

The adoption of such a treaty is a major proposal from the recent Environment Committee Working Paper. This report is the product of a long work with the prospect of having an overview of the discipline to identify its weaknesses and its potential¹.

I. Unify International Environmental Law in a Founding Treaty

The first benefit of a treaty on environmental principles is its totemic value to structure the discipline. International environmental law has a need for unity. Characterized by its fragmentation, it includes many important treaties on various subjects related to technical aspects of the protection of the environment, such as climate, biodiversity, desertification, chemicals, etc. Each convention governs by its own set of rules and, as a consequence, the system as a whole is characterized by its lack of unity. Adopting a single document containing all general environmental law principles would be a significant step forward. Specific agreements would then be considered as derogating from these general principles in some areas of environmental law.

The second benefit of such a text is to create a case law dynamic. Similar to what occurred in France following the adoption of the Constitutional Environment Charter in 2004, a catalogue of principles might well have an profound impact on the legal system. Experience shows that adopting such a basic law stimulates case law in “putting these principles in action, ramifying them, extending them, applying

¹ This report put forward twenty-one proposals to « strengthen the efficiency of international environmental law ». Available at : <http://www.leclubdesjuristes.com/rapport-renforcer-lefficacite-du-droit-international-de-lenvironnement-devoirs-des-etats-droits-des-individus/>

them in a wise and reasonable way, to all hypotheses”, Portalis wrote². A founding text feeds case law. It creates a jurisprudential force which inspires all judicial bodies.

II. Structuring the Discipline with a Binding Treaty

There are many international declarations – **and as such non-binding** – asserting environmental law principles. They have been adopted either during environmental conferences (Stockholm Declaration 1972, Rio Declaration 1992) or under the aegis of the General Assembly of the United Nations (World Charter for Nature 1982, A/RES/37/7).

International declarations are nonetheless non-binding. It is time now to integrate the principles for the environmental protection into an authentic binding treaty.

The difference between a mere declaration and a treaty is fundamental: **treaties are invocable by parties in courts, such as the two international covenants**³. It would enable a national court to review laws and regulations in light of environmental principles, which is not currently possible in respect of simple declarations without legal force. Certainly, some countries have already enshrined these principles in texts with constitutional value, such as France with the constitutional Environment Charter in 2004. However, this is not the case with many countries which, at best, have confined themselves to establishing one sole principle in their constitution - the right to a healthy environment. Having a true catalogue of the mandatory founding principles will usefully supplement the legal structure.

This treaty would be to the Rio Declaration what the two covenants were to the Universal Declaration of 1948: a complementary document bringing binding legal force to the principles previously established in the form of a simple declaration.

Indeed, the **Universal Declaration of Human Rights of 1948** is non-binding: it was a mere **resolution** of the General Assembly of the United Nations. **On 16th December 1966** were adopted the **two international covenants**, the Covenant on **Civil and Political Rights**, and the Covenant on **Economic, Social, and Cultural Rights**, to give legal effect to the declaration. These two treaties are the legal transposition, with binding legal force, of the Universal Declaration.

The same process could be undertaken on environmental matters. From a legal perspective, we have to take environmental rights seriously.

III. A Third International Covenant, a Third Generation of Human Rights

The adoption of such a covenant would complete the corpus of human rights instruments.

Over the last thirty years, a **third generation** of human rights has emerged. Following the recognition of civil and political rights (first generation), economic and social rights (second generation), as referred to in the two covenants of 1966, a new concern is rising: the rights and duties of humans on environmental matters. The Stockholm Declaration and the Rio Declaration have already marked a step forward.

² From Portalis’ Preliminary address on the first draft of the French Civil Code (1801).

³ It is always possible before international courts since a treaty is binding over the States Parties. Regarding domestic courts, it depends on whether States have a monist or a dualist approach to the international legal order.

An **historical process of incremental enhancement** of human right is at work. By comparison, in France, The Constitutional Charter for the Environment in 2004 has completed the diptych constituted by the Declaration of the Rights of Man and of the Citizen of 1789 (on civil and political rights) and the Preamble of the 1946 Constitution (on economic and social rights). The third pillar to protect fundamental rights in France, the Environmental Charter, could be a useful example for the protection of the environment at the international level.

Nonetheless, conclusions of such an evolution have not been drawn yet. The corpus of environmental treaties remains incomplete: there is no treaty in which are enshrined the fundamental principles of environmental law.

IV. The Architecture of the International Covenant for the Protection of the Environment

A treaty of universal scope on environmental matters would be the cornerstone of environmental law protection. It would lay down in a single document all the founding principles. The set of specific conventions would be thus considered as a declination of these principles and their application in specific matters. We could even imagine an interpretative clause in the Covenant for the specific conventions to be interpreted in line with the founding principles enshrined in the Covenant.

It is not necessary, at this stage, to debate over its title. For convenience, we have used the term “Covenant”, but the text could just as well be called a “Charter” or a “Convention”.

The same applies to its content which remains to specify and to discuss. We will nonetheless outline the basic structure.

The keystone of the text should be the recognition of the right to a healthy environment to which everyone is entitled. This fundamental right implies the right of citizens to hold governments accountable for their environmental policies. The benefit of this recognition is also to give a legal basis to the mobilization of civil society on the international plane. We know this is absolutely necessary in order to tackle the climate crisis effectively⁴.

This text could then encompass the fundamental principles referred to in existing declarations and charters, either **substantial principles** (prevention principle, effective redress) or **procedural rights** (information principle, public participation, access to courts on environmental matters). It would then codify these principles. The Covenant would encompass all existing, consensual principles in a single binding agreement.

Furthermore, it could be useful to have **control mechanisms ensuring compliance with the Covenant**.

To that purpose, it is necessary to provide for the creation of a Monitoring Committee, responsible for assessing the implementation of the principles it establishes, as for the Human Rights Committee regarding the International Covenant on Civil and Political Rights. Every State would submit a periodical report (every 4-5 years) on the implementation of the Covenant, and more broadly, on the protection of the environment on its territory. The Committee’s examination of the report will represent an

⁴ The proposals of the Environmental Commission Working Paper of the Club des Juristes rely on a major idea: civil society must be involved to render international law of the environment more effective. The recognition of substantial rights is the logical conclusion of these proposals. The role of civil society must be reasserted on a clear legal basis: the right to a healthy environment which belongs to every single citizen.

opportunity to proceed with, for the country concerned, a comprehensive assessment of the state of the environment and the measures taken by the State in this field.

Finally, a chapter could concern **access to justice** to provide remedies. The Covenant would be invocable in domestic courts, as is the case under Article 13 of the European Convention on Human Rights⁵. The possibility to invoke international conventions in the domestic legal order is necessary, in particular regarding conventions related to human rights.

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Fifty years ago, in 1966, two international covenants were opened for signature, within the UN framework, to integrate, first, civil and political rights and, second, economic, social and cultural rights. It is now time to complement the current diptych with an international covenant on the protection of the environment. **This text shall continually remind citizens and States their respective rights and duties to protect the planet.**

⁵ Article 13: «Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority ». The European Convention on Human Rights specifically provides that individuals must have an effective remedy before domestic courts to exercise the rights protected by the Convention. The same applies to the Aarhus Convention, whose Article 9 is related to « access to justice ». The Convention lays down the right to be informed and the participation of the public, before ensuring that each person whose rights have been violated « has access to a review procedure before a court of law or another independent and impartial body established by law ».