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Earth Rights, Human Rights- Can International Environmental Human Rights Affect Corporate Accountability?

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EARTH RIGHTS, HUMAN RIGHTS: CAN INTERNATIONAL ENVIRONMENTAL HUMAN RIGHTS AFFECT CORPORATE ACCOUNTABILITY?

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INTRODUCTION

In the last fifty years, transnational corporations ("TNCs") have dominated the global economy. Today, approximately half of the top economies worldwide belong to such corporations.[1] The gross domestic product ("GDP") of many TNCs dwarf the GDPs of many small nations around the globe.[2] Some of these smaller, capital-starved nations have turned to TNCs to improve their economies.[3] These countries flaunt low labor costs and meager environmental

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1. *See* Douglas S. Morrin, Book Review, *People before Profits: Pursuing Corporate Accountability for Labor Rights Violations Abroad Through the Alien Torts Claims Act*, 20 B.C. THIRD WORLD L.J. 427 (2000).

2. *See* Lisa Lambert, *At the Crossroads of Environmental and Human Rights Standards: Aguinda v. Texaco, Inc. Using the Alien Tort Claims Act to Hold Multinational Corporate Violators of International Laws Accountable in U.S. Courts*, 10 J. TRANSNAT'L L. & POL'Y 109, 110 (2000).

3. *See* Morrin, *supra* note 1, at 428.

standards to attract TNCs from the United States and Western Europe to begin operations on their turf. Regrettably however, the boost to developing nations' economies comes at a high price.[4]

Topping the list of abuses cited by various advocacy groups are the exploitation of child labor and the degradation of the environment. For example, in Ecuador, TNCs that extract oil from the ground have poisoned ecosystems, thereby endangering the welfare of indigenous people who are dependent on those ecosystems.[5] These problems are of growing concern worldwide. As a result, environmental pundits are posing questions regarding the links among human rights violations, enforcement of environmental protection measures and international law. This Note addresses these issues and suggests a framework for the development of environmental protection as an international human right. The increasing relationship between one's human rights and the state of the environment, gives rise to several theories exploring the redress of environmental damages through a human rights schema. Part I of this Note briefly outlines the history of the human rights movement. Part II describes the evolution of international environmental law within the context of human rights. Part III discusses the debate over environmental rights, and explores whether they should fall within the existing human rights framework or whether an entirely new environmental human right should be created. Part IV of this Note focuses on two methods of corporate accountability: voluntary codes of conduct and the Alien Tort Claims Act[6], and explores whether international environmental human rights can affect corporate accountability.

I. HISTORY OF THE HUMAN RIGHTS MOVEMENT

Since World War II, TNCs have controlled the global economy. As a result, awareness and value of human rights has become a significant international policy issue. Theories of human rights have

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4. *Id.*

5. *See, e.g.*, Aquinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y. 1996) (demonstrating the greed of globalization could eventually eradicate an entire culture). This case is discussed in greater detail *infra* Part III.B.3.

6. 28 U.S.C. § 1350 (1994).

been around for centuries[7], but it was not until the "international community witnessed the appalling humanitarian atrocities of the Second World War"[8] that it became possible for the international community to agree on a coherent set of universally recognized principles.[9] Clearly the protection of human rights could no longer lie with individual states alone.[10]

The first step toward international recognition of human rights principles after the war was in the creation of the United Nations ("UN"). In the 1945 UN Charter, all signatory states pledged themselves to "international co-operation in solving international problems . . . of humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language, or religion . . . ."[11] First Lady, Eleanor Roosevelt advanced the principles of human rights when she organized the drafting and signing of the Universal Declaration of Human Rights in 1948.[12] Although this document did not legally bind the signatory states, it laid the groundwork for several human rights documents.[13]

The next two documents to contribute significantly to the body of international human rights law were the 1966 International Covenant

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7. Prudence Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law*, 10 GEO. INT'L ENVTL. L. REV. 309, 314 (1998).

8. *Id.*

9. *See* Klaus Bosselmann, *Human Rights and the Environment: Redefining Fundamental Principles*?, ENVTL. JUST. (1997) (paper prepared for the Environmental Justice of Melbourne, Australia), *available at* http://www.arbld.unimelb.edu.au/envjust/papers/allpapers/bosselmann/home.htm (last visited May 20, 2002).

10. *Id.*

11. U.N. CHARTER art. 1, para. 3.

12. *Universal Declaration of Human Rights*, *adopted* Dec. 10, 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/81 (1948). When this document was adopted, it was not legally binding, but many now argue that "subsequent state practice has transformed it into a document considered by many to be a statement of customary international law." Taylor, *supra* note 7, at 315 n.18.

13. *See* Taylor, *supra* note 7, at 315.

on Civil and Political Rights ("ICCPR")[14] and the 1966 International Covenant on Economic, Social and Cultural Rights ("ICESCR").[15] These covenants were originally conceived as one document that would "transform the Universal Declaration into legally binding rights and [] establish mechanisms and institutions for enforcement and implementation. . . ."[16] A dispute arose among the drafting committees,[17] however, and the two documents were created to cover the two categories of rights: the ICCPR for negative rights and the ICESCR for positive rights.[18]

Since the creation of the ICCPR and ICESCR, there have been a number of other human rights conventions and declarations dealing with specific aspects of human rights, such as the rights of indigenous people[19] and children.[20] Just as the need for the international community to address human rights concerns became evident after the World War II, so too has the need to address environmental degradation become evident in our modern global society. Although there is a significant link between human rights

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14. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, G.A. Res. 2200A (XXI), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (ratified by the U.S. June 8, 1992) [hereinafter ICCPR].

15. International Covenant on Economic, Social and Cultural Rights, *adopted and opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

16. Taylor, *supra* note 7, at 315.

17. *See id.* at 315. The dispute was over the relationship between each of the categories of rights as well as implementation procedures, supervision and enforcement. *Id.*

18. *See* Glen Kelley, Note, *Multilateral Investment Treaties: A Balanced Approach to Multinational Corporations*, 39 COLUM. J. TRANSNAT'L L. 483, at 521 (2001) (discussing the political reasons for dividing human rights between ICCPR and ICESCR). The United States has only signed the ICCPR, which is based upon negative rights, as is our Bill of Rights.

19. *See, e.g.*, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 28 I.L.M. 1382.

20. *See, e.g.*, Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, 20 I.L.M. 1448 (entered into force Sept. 2, 1990).

and the environment, there is much debate as to how that link should be treated.[21] Current international human rights norms are no longer adequate. Since the Declaration and Covenants were created, there has been great change throughout our world. Certainly the drafters "did not foresee the enormity of our ecological degradation and the consequent necessity for human rights norms to encompass environmental considerations."[22]

II. EVOLUTION OF INTERNATIONAL ENVIRONMENTAL LAW

A. *The Human or Ecological Approach to the Environment?*

One important issue surrounding the formulation of an environmental right is whether such a right should be approached from an anthropocentric or ecological point of view.[23] The anthropocentric approach of individual environmental rights views the environment as "mere good or value to be added to the list of individual demands."[24] The ecological approach views "the environment [as] a condition of life, therefore requiring limitations to individual freedom."[25] Many environmentalists are concerned with the anthropocentricity of an environmental human right, because the environment becomes subjugated to the needs of humanity.[26] Those sharing this view worry that an anthropocentric approach will simply perpetuate "the values and attitudes that are at the root of environmental degradation."[27] In addition, because human life and health standards will be the goals of environmental

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21. *See* Taylor, *supra* note 7, at 337–38.

22. Kerry Kennedy Cuomo, Human Rights and the Environment: Common Ground (Apr. 3, 1992), *in* 18 YALE J. INT'L L. 227 (1993) (giving the Keynote Address at the Earth Rights and Responsibilities Conference at Yale Law School).

23. *See generally* Bosselmann, *supra* note 9.

24. *Id.*

25. *Id.*

26. *See, e.g.*, Taylor, *supra* note 7, at 352.

27. *Id.*

protection, "the environment is only protected as a consequence of, and to the extent needed to protect human well-being."[28]

Proponents of the anthropocentric view put forward the argument that a degree of anthropocentricity is necessary since humanity is the only species that has the consciousness to recognize the "morality of rights, [and because] human beings are themselves an integral part of nature."[29] Consequently, human rights can play a useful role in the protection of the environment, as well as human interests.[30]

This Note will focuses on the anthropocentric view of environmental rights. Both anthropocentric and ecological visions of environmental rights face significant hurdles. However, most developing international law, state constitutions and general environmental discourse center around an anthropocentric approach.[31] The ecological approach is, at present, beyond likelihood of succeeding.

> [W]hile the introduction of ecological limitations may be possible in theory, it will be demonstrated that significant political, social and economic hurdles stand in the way of such a development. In particular, the conflicts between international environmental protection, present significant difficulties. Emerging people's rights to development and economic self-determination illustrate this conflict.[32]

Partly because a greater conflict exists between economic self-determination and ecological rights rather than environmental human rights, developments in international environmental protection have been anthropocentric.[33]

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28. *Id.*

29. *Id.*

30. *See, e.g.*, James Nickel, *The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification*, 18 YALE J. INT'L L. 281 (1993) (demonstrating the right to a safe environment at the global level is compulsory).

31. *See* Taylor, *supra* note 7, at 329 (discussing the various international treaties in order to illustrate the prevailing anthropocentric approach to international environmental law). Critics contend this trend is "the root of all environmental problems." *Id.* at 337.

32. *Id.* at 310.

33. *See id.* at 311.

B. *International Developments Towards Environmental Human Rights*

An important indicator of the development of an international human right is the extent to which nations have incorporated such a right into their own constitutions. Several studies have shown that between fifty and sixty national constitutions include an environmental human right.[34] In addition, every constitution that has been revised or adopted since 1970 has addressed environmental issues.[35]

The Brazilian Constitution is well recognized and has often been cited for the provision which states, "[e]veryone has the right to an ecologically balanced environment, which is a public good for the people's use, and is essential for a healthy life. The Government and the community have a duty to defend and to preserve the environment for present and future generations."[36] The Portuguese Constitution[37] also contains notable provisions. Article 66 states that "everyone shall have the right to a healthy and ecologically balanced human environment and the duty to defend it."[38]

Various regional international documents recently recognize an environmental human right.[39] The 1981 African Charter provides a clear expression of this right.[40] Article 24 of the Charter states that, "all peoples shall have the right to a general satisfactory environment favo[]rable to their development."[41] Another regional document that demonstrates the trend toward the recognition of an environmental human right is the 1988 protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, also known as the San Salvador Protocol.[42] Article 11 of this document grants an environmental right entitled "Right to a Healthy

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34. *See id.* at 350.

35. *See id.*

36. *See id.* (citing chapter 6, article 225 of Brazil's Constitution).

37. *See id.* (citing the Portuguese Constitution).

38. *See id.* at 350 (citing chapter 6, article 66 of the Portuguese Constitution).

39. *See id.* at 346.

40. *See id.*

41. *Id.*

42. *See id.*

Environment," and states that, "[e]veryone shall have the right to live in a healthy environment and to have access to basic public services."[43]

At the European level, there are a number of documents that emphasize the right to a healthy environment. The Organization for Economic Cooperation and Development ("OECD") states that fundamental human rights should include a right to a "decent" environment.[44] Recently, the Charter on Environmental Rights and Obligations drafted by the United Nations Economic Commission for Europe (UNECE) supported the universal right to a healthy environment and proposed that the environment should be protected for present and future generations.[45] A number of proposals have also been considered by the Council of Europe to add an environmental right to the European Convention on Human Rights,[46] although none have been implemented.[47]

The largest European ministerial conference on health and the environment took place in London in June 1999.[48] This was the third conference of its kind, and the goal was "to put health and environmental issues high on the political agenda."[49] Many different sectors were represented, including governments, non-governmental organizations ("NGOs"), interest groups and private businesses.[50] Sustainable development[51] and the connection between a clean

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43. *Id.* (citing the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 17, 1988, O.A.S.T.S. 69).

44. *Id.* at 348.

45. *See id.*

46. *See id.*

47. *See id.*

48. *See* David Smith, *Clean Air and a Clean Environment as Fundamental Human Rights*, COLO. J. ENVTL. L. Y.B. 149 (1999).

49. *Id.* (citing Dr. Gro Harlem Brundtland, Address at the Third Ministerial Conference on Environment and Health- Healthy Planet Forum (June 16, 1999), *available at* http://www.who.int/director-general/speeches/1999/english/19990616_london_1.html (last visited May 20, 2002)).

50. *See* Smith, *supra* note 48, at 149.

51. *Id.* at 150. Sustainable development is often defined as meeting the needs of the current generation while allowing future generations to meet their needs and wants. This idea recognizes that

environment and human rights were the major themes of the conference.[52] The Director General of the World Health Organization (WHO), Dr. Gro Harlem Brundtland argued "as long as health is seen as the responsibility of the health authorities alone, and not the shared responsibility of individuals, communities, employers, and all government agencies at all levels, sustainable development remains a lofty goal."[53]

Other prominent international conventions have addressed the relationship between sustainable development[54] and environmental protection, including the Stockholm Declaration [55] and the Rio Declaration.[56] These conventions, however, have sent some contradictory messages regarding the relationship among health, the environment and human rights.[57] For example, Principle 21 of the Stockholm Declaration states that nations have "the sovereign right to exploit their own resources pursuant to their own environmental policies . . . ."[58] However, the Declaration also states that "man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being . . . ."[59]

The Rio Declaration also addresses human rights and the environment. The non-binding Declaration does not specify that an individual has a "right" to a healthy environment, but states that, "[h]uman beings are the cente[r] of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."[60] "Significantly, the Rio Declaration does

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development is likely to fail in the long term if it leads to ruining the environment. *Id.*

52. *Id.* at 149.

53. *Id.* at 150 (citing Dr. Brundtland).

54. *See* Smith, *supra* note 48, at 150–51.

55. *See* Stockholm Declaration of the United Nations Conference on the Human Environment, June 6, 1972, U.N. Doc. A/CONF.48/14 (1973) [hereinafter Stockholm Declaration].

56. *See* Rio Declaration on Environment and Development, United Nations Conference on Environment and Development, U.N. Doc. A/CONF.151/5/Rev.1 (1992) [hereinafter Rio Declaration].

57. *See* Smith, *supra* note 48, at 151.

58. Stockholm Declaration, *supra* note 55, at prin. 21.

59. *Id.* at prin. 1.

60. *See* Rio Declaration, *supra* note 56, at prin. 1.

recommend that states develop national laws that provide for liability and compensation regarding environmental damage."[61] Like the Stockholm Declaration, the Rio Declaration sends a mixed message,[62] which is indicative of the dichotomy between the desire for developing countries to claim a sovereign right to exploit their own resources in accordance with their own policies versus the desire for environmentalists and international instruments to protect the environment at large.[63] These Declarations, although important, are ambiguous as to the status and scope of an environmental right.

The UN has not expressly recognized an environmental human right, but certain documents have made a connection between the environment and human rights.[64] For example, the 1989 United Nations Convention on the Rights of the Child expressly refers to environmental quality in Article 24 on the right to health.[65] In addition, the Special Rapporteur of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities has shown particular concern for the development of environmental human rights.[66] Although she has not advocated drafting a new international instrument which includes an environmental human right, the Rapporteur has supported "the further evolution of the right under customary international law."[67] The idea that until an express environmental right is created, existing human rights should be utilized for environmental protection is also presented.[68]

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61. Michelle Leighton Schwartz, *International Legal Protection for Victims of Environmental Abuse*, 18 YALE J. INT'L L. 355, 374 (1992) (citing Rio Declaration, *supra* note 57, at prin. 13).

62. *See* Smith, *supra* note 48, at 151.

63. *Id.*

64. *See* Taylor, *supra* note 7, at 347.

65. *Id.*

66. *Id.*

67. *Id.* at 347–48.

68. *Id.* at 348.

III. ENVIRONMENTAL RIGHTS: USE OF EXISTING SUBSTANTIVE HUMAN RIGHTS OR CREATION OF A NEW INDEPENDENT RIGHT?

There are two main visions of how human rights doctrine could be developed to help victims of environmental degradation, which can be obtained simultaneously. Given the current existence of an international human rights legal structure, the first and most immediate remedy would be to link environmental damage to an established or fundamental human right.[69] The second, long-term theory would be to broaden substantive human rights to include an environmental human right,[70] most likely the right to a safe environment.[71] Based past debates on the creation of a new environmental right,[72] it seems likely "that such a right will find expression in an international rights document in the near future."[73] In the meantime, however, existing human rights may be increasingly interpreted to allow for the protection of human environmental interests.[74]

A. *Linking an Environmental Injustice to a Substantive Human Right*

Arguments have been made that existing human rights mechanisms present a promising vehicle for the protection of victims who suffer as a result of environmental harms. What most recent environmental documents, such as the Stockholm and Rio Declarations attempt, is to link environmental concerns to existing international human rights. The right to life,[75] the right to health,[76]

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69. *See* Schwartz, *supra* note 61, at 359.

70. *See* Nickel, *supra* note 30; *see also* Taylor, *supra* note 7.

71. *See generally* Nickel, *supra* note 30.

72. Taylor, *supra* note 7, at 311.

73. *Id.*

74. *Id.*

75. *See* Universal Declaration of Human Rights, *supra* note 12, at art. 3. "[E]veryone has a right to life, liberty and security of person." *Id.*; *see also* ICCPR, *supra* note 14, at art. 6, para. 1. "Every human being has the inherent right to life. This shall be protected by law. No one shall be arbitrarily deprived of his life." *Id.*

and the right to an adequate standard of living[77] are three of the most important human rights that could serve as a basis for environmental claims. For example, the right to life is relevant because environmental risks that threaten lives fall under the scope of protecting that very right.[78]

There are concerns over using the existing human rights framework to enforce environmental rights. First, there is little jurisprudence on the rights that are implicated by environmental problems or the standards by which such environmental violations should be measured.[79] This is not a hindrance to the theory, but rather means that proponents will have to continue to push for a connection between existing human rights and environmental damage.

There are also direct criticisms of this approach.[80] One problem that has been noted is that the use of existing human rights laws fails to meet the "requisite standard of universality."[81] For example, although the right to life has been recognized as a universal human right that might conceivably support an environmental element, it is lacks a sense of universality. However, few countries and international organizations have openly acknowledged an

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76. *See* Universal Declaration of Human Rights, *supra* note 12, at art. 25, para. 1. "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services. . . ." *Id.*; *see also* ICESCR, *supra* note 15, at art. 12, para. 1. "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health." *Id.*

77. *See, e.g.*, ICESCR, *supra* note 15, at art. 11, para. 1. "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." *Id.*

78. *See* Schwartz, *supra* note 61, at 359–61.

79. *Id.* at 361.

80. *See, e.g.*, John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 290–91 (2000).

81. *Id.*

environmental element to the right to life.[82] While the right to life expressed in Article 21 of the Indian Constitution advocates an environmental element, the right to life set forth in both the Fifth and Fourteenth Amendments to the U.S. Constitution fail to recognize such a right.[83] As scholars and activists continue to push for liability for environmental violations based on human rights law, the environmental duties imposed upon a state under such a right will become more clearly defined.[84]

B. *The Right to a Safe Environment*

Some environmentalists and human rights activists are in agreement that a universal standard linking the environment to human rights should exist.[85] Although the progressive argument has been made that "customary international law already recognizes a human right to a decent, healthy or sustainable environment,"[86] the view that international law should give express recognition of such a right offers significant advantages.[87] An important question, however, is how the scope of such a right should be defined. The concept of a safe environment is ambiguous, and will only be useful for protecting human environmental interests for purposes of justice if it is clearly defined.

Philosophy professor James Nickel[88] argues for a narrowly defined right to a safe environment ("RSE") as one that is free from

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82. *Id.*

83. *Id.* at 291 n.24. There are several examples of the lack of universality of recognizing environmental components in existing human rights. "The Inter-American Commission on Human Rights found that Brazil had violated the Yanomani Indians' right to life, liberty and personal security" by not preventing the environmental degradation that caused the loss of life and culture within the Yanomani tribe. The European Court of Human Rights, on the other hand, has not explicitly recognized a connection between right to life and the environment. *Id.*

84. *See, e.g.*, Schwartz, *supra* note 61.

85. *See, e.g.*, Nickel, *supra* note 30.

86. Taylor, *supra* note 7, at 345.

87. *See id.* at 346

88. James W. Nickel is a philosophy professor at the University of Colorado, Boulder.

contamination and pollution.[89] He opines an RSE should focus on threats to health because "the most severe effects of pollution, toxic wastes, and inadequately processed sewage are sickness and death."[90]

In order to determine if an RSE should reach the status of an internationally recognized human right, Nickel applies a four-pronged justificatory test.[91] Using the test, Nickel shows that a narrowly defined RSE can qualify as a human right under our current notions of international human rights law.[92]

The first prong of the test is to determine whether the right will benefit recognized individuals.[93] "Proponents must demonstrate that the proposed right-holders have a strong claim to the liberty, protection, or benefit in question by showing that this liberty, protection, or benefit is of great value to individuals and society and by showing that these values are frequently threatened by social and political abuses."[94] Nickel argues that fundamental interests are indeed threatened.[95] Therefore, the first step in the analysis is to determine which environmental abuses lead to substantial human harm.[96] For example, a number of studies demonstrate that each year, severe air pollution causes thousands of premature deaths and triggers chronic illnesses.[97] Thus, severe air pollution "frustrates the fundamental interests that human rights protect."[98] Such a right will shelter people from these horrifying consequences of pollution, and "should therefore be accorded a position equal to other human rights that seek to prevent these consequences."[99]

The second prong of the test states proponents of a RSE "must show that this claim cannot be adequately satisfied unless we grant

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89. *See* Nickel, *supra* note 30, at 284.

90. *Id.* at 284–85.

91. *See id.* at 288; *c.f.* Lee, *supra* note 80, at 299.

92. *See* Nickel, *supra* note 30, at 288.

93. *See* Lee, *supra* note 80, at 299.

94. Nickel, *supra* note 30, at 288.

95. *See id.* at 288–90.

96. *See id.* at 289.

97. *See id.* at 290 (illustrating the serious threat air pollution has on human health).

98. *Id.* at 290.

99. *Id.*

people rights rather than weaker forms of protection."[100] In other words, RSEs can only be justified if these proponents demonstrate weaker alternative measures would not adequately protect against serious environmental contamination.[101] Nickel argues that because large populations require large amounts of water and energy, they rely on advanced technologies, which inevitably create large amounts of sewage and waste.[102] Moreover, powerful economic interests hinder the environmental interest in reforming polluters.[103] Consequently, until lesser measures are successful at curbing pollution and contamination, society will benefit from an RSE.[104]

The third prong of the test requires that proponents of the right demonstrate that "the proposed addressees, the parties that bear duties under the right, can legitimately be subjected to the negative and positive duties required for compliance with and implementation of the right."[105] In essence, those who engage in and profit from activities detrimental to the environment should bear the burden of regulations, which demand restraint and compensation.[106] For example, citizens with cars have a duty to comply with the collective measures of their communities to reduce pollution, and to support and promote such measures.[107]

The last test is to determine whether an RSE would be "feasible given current institutional and economic resources."[108] Effectively regulating pollution and contamination often appears to be a fruitless endeavor, but setting the right at an adequate level would help keep pollution control affordable.[109] Additionally, because an RSE will prevent the devastation of health, life and property, the resources saved could help to finance it.[110] Developing countries could also implement such a right. They would be given "considerable

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100. *See id.* at 288.
101. *See id.* at 291.
102. *See id.* at 292.
103. *See id.*
104. *See id.*
105. *See id.* at 288.
106. *See id.* at 292.
107. *See id.* at 293.
108. *See id.* at 288.
109. *See id.* at 294.
110. *See id.*

discretion to give less demanding definitions to the notion of an adequate level of environmental safety through their own legislative and judicial processes."[111]

Nickel makes a strong case for a narrowly defined RSE that would address forms of contamination and pollution, which are the primary forms of environmental health threats.[112] An independent environmental human right or RSE may be created in the distant future and could help the international community in protecting human environmental interests.

IV. METHODS OF CORPORATE ACCOUNTABILITY

Thus far, this Note has discussed the trends in international instruments towards the recognition of an environmental human right and the theories behind advocating such a right. However, can these trends affect and improve corporate accountability? Corporations have yet to be signatories to binding international instruments, yet they often play a significant role in the destruction and degradation of the environment, which in turn harms human communities. Part IV of this Note explores two methods of corporate accountability, voluntary accountability and litigation, to discuss how current human rights norms and the potential creation of an environmental human right might affect accountability.

A. *Voluntary Codes of Conduct*

Voluntary corporate accountability has been a growing trend amongst TNCs.[113] While there is an ongoing debate as to the effectiveness of such voluntary codes, they do exist and have

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111. *See id.* at 295.

112. *See id.*

113. *See, e.g.*, Andy Smith, *The CERES Principles: A Voluntary Code for Corporate Environmental Responsibility*, 18 YALE J. INT'L L. 307, 309 n.18 (1993) [hereinafter *CERES Principles*]; *see also* Meaghan Shaughnessy, *The United Nations Global Compact and the continuing Debate About the Effectiveness of Corporate Voluntary Codes of Conduct*, COLO. J. INT'L ENVTL. L. & POL'Y 159, 160 (2000).

become a recognized method of corporate accountability.[114] In the past, numerous industries have created their own sets of principles or codes. For example, both the Chemical Manufacturers Association[115] and the American Petroleum Institute[116] developed environmental initiatives for their respective members. An important set of voluntary principles developed to span across all industries were the Coalition for Environmentally Responsible Economies Principles ("CERES") announced in 1989, shortly after the Exxon-Valdez spill.[117] CERES had realized that "the existing legal regime, with its convoluted system of suits and counter suits, can neither adequately hold corporations publicly accountable for their actions nor respond to environmental disasters with the immediacy necessary to contain such crises."[118] A set of ten principles for corporate environmental conduct was announced, and corporations were asked to sign the principles and submit an annual report on their progress in implementing them.[119] The corporations involved in CERES raised strong objections to signing, and the principles remained voluntary.[120]

CERES principles still exist, but corporate codes gained renewed publicity more recently when, in July 2000, the UN created the Global Compact.[121] The Global Compact is "a voluntary coalition formed by nearly fifty corporate charter members to promote human rights and environmental standards in business."[122] The Global Compact has been highly criticized by NGOs and other human and

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114. *See CERES Principles*, *supra* note 113, at 309 n.18; *see also* Shaughnessy, *supra* note 113, at 159–60.

115. *See CERES Principles*, *supra* note 113, at 309 n.18.

116. *Id.* at 309–10.

117. *Id.* at 308. *See generally* CERES: Network for Change, *at* http://www.ceres.org (last visited May 20, 2002) (for links to additional information). After the Exxon disaster, environmental groups, public interest groups and leading social investors gathered to form CERES.

118. *See CERES Principles*, *supra* note 113, at 308.

119. *Id.* at 308–09.

120. *Id.* at 309.

121. *See* Shaughnessy, supra note 113, at 160. Interestingly, the Global Compact is remarkably similar to CERES, both in the principles and the structure of the organization.

122. *Id.* at 160.

environmental rights activists on a number of grounds,[123] but it still could benefit environmental human rights in the long term.

1. The Global Compact

The Global Compact asks world businesses to support nine principles in their corporate practices and report yearly on one principle the corporation has developed.[124] The nine principles are divided into three areas of improvement.[125] The first category is Human Rights, under which businesses are asked to: "(1) support and respect the protection of international human rights within their sphere of influence; and (2) make sure their own corporations are not complicit in human rights abuses."[126] The second category is concerned with labor issues, and corporations are asked to uphold the following: "(3) freedom of association and the effective recognition of the right to collective bargaining; (4) the elimination of all forms of forced and compulsory labo[]r; (5) the effective abolition of child labo[]r; and (6) the elimination of discrimination in respect of employment and occupation."[127] The third category relates to the environment and requests that corporations: "(7) support a precautionary approach to environmental challenges; (8) undertake initiatives to promote greater environmental responsibility; and (9) encourage the development and diffusion of environmentally friendly technologies."[128]

Although the Global Compact might inspire optimism because member corporations have pledged to abide by these principles, corporate executives have resisted enforcement of any mechanism.[129] They would not support the Global Compact if compliance or monitoring of their performances became mandatory.[130] The absence of enforcement mechanisms under the Compact remains one of the

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123. *See id.* at 161.

124. *See* The Global Compact, *available at* http://www.unglobal compact.org/un/gc/unweb.nsf/content/thenine.htm (last visited May 20, 2002).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *See* Shaughnessy, *supra* note 113, at 161.

130. *Id.*

greatest problems in using voluntary codes of conduct to solve international human rights and environmental abuses.

2. Concerns Over Codes and the Global Compact

The most significant problem with the voluntary codes of conduct is the lack of a legal mechanism to enforce compliance. Compliance with the codes and the Global Compact is left largely up to corporations.[131] Traditionally, the self-interest of a corporation and the need to enhance shareholder value takes precedence over concern for the community as a whole.[132] Consequently, public skepticism usually greets a corporation's announcement that it will follow principles of environmental care, yet refuses to make itself accountable to external oversight.[133] There is no threat of legal or industry sanctions if a corporation fails to follow the principles. The only performance review Global Compact corporations could face is their own.[134] There will be some external review from NGOs, but they lack the resources to ensure full compliance.[135]

A related concern over voluntary codes of conduct and the Compact is that the adoption of such codes may only amount to a public relations gimmick.[136] Specifically, corporations adopt them to improve their image or to follow the lead of other corporations, but do not intend to comply with their codes. A recent series of investigative articles published on the website of the NGO CorpWatch[137] identifies Global Compact companies that are in violation of the principles they have pledged to uphold.[138] A recent

131. *Id.* at 163–64.

132. *Id.*

133. *See CERES Principles*, *supra* note 113, at 312–13.

134. *See* Shaughnessy, *supra* note 113, at 164.

135. *Id.*

136. *Id.* at 163.

137. CorpWatch is a non-governmental organization working towards easing corporate-led globalization through making these corporations accountable. *See* CorpWatch, About CorpWatch, *at* http://www.corpwatch.org/about/PAM.jsp (last visited May 20, 2002).

138 *See* Tim Connor, *Still Waiting for Nike to Respect the Right to Organize*, GLOBAL EXCHANGE, June 28, 2001, *at* http://www.corpwatch.org/un/updates/2001/nike.html (last visited on Apr. 8, 2002).

article targets Nike, saying the company continually fails to uphold "freedom of association and the effective recognition of the right to collective bargaining."[139] Other companies such as Aventis[140] were identified as actively violating the Global Compact's nine principles.

Another criticism of the Global Compact lies specifically with the UN. Many NGO's, including UNICEF, are concerned that the UN creates business relationships with companies that do not deserve to avail themselves of the goodwill from the UN name.[141] Critics are also worried that corporate partnership programs at the UN will compromise its image, values and integrity.[142] Carol Bellamy, the Executive Director of UNICEF, has said "it is dangerous to assume that the goals of the private sector are somehow synonymous with those of the United Nations, because they most emphatically are not."[143] There is a fear that businesses will have an ever-greater impact on the affairs of the UN to the detriment of its mission.[144]

Despite concerns, the existence and development of voluntary corporate codes as a method of accountability does demonstrate a positive movement amongst TNCs. Many corporate executives are coming to realize that "ignoring human rights and environmental concerns can have a detrimental effect on their company's bottom line."[145] Consumers do care that their products are produced in a "socially responsible" manner, as Shell Oil discovered when a

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139. *Id.*

140. Aventis allegedly violates Compact Principle 7, which supports "a precautionary approach to environmental challenges." Their genetically engineered StarLink corn has "contaminated the food supply and seed stock." *See* Gabriela Flora, *Aventis: Global Compact Violator*, INST. FOR AGRIC. & TRADE POL'Y, June 14, 2001, *available at* http://www.corpwatch.org/campaigns/PCD.jsp?articleid=621 (last visited on Ma, 2002).

141. *See* Campaigns: Alliance for a Corporate-Free UN, *at* http://www.corpwatch.org/un (last visited May 20, 2002).

142. *Id.*

143. Jonathan Cohen, *The World's Business: the United Nations and the Globalisation of Corporate Citizenship, in* PERSPECTIVES ON CORPORATE CITIZENSHIP: RIGHTS, RESPONSIBILITIES, ACCOUNTABILITY 185–97, 194–95 (Jorg Andriof & Malcolm McIntosh eds., 2001).

144. *Id.*

145. Shaughnessy, *supra* note 113, at 162.

consumer boycott caused sales to drop by about 50% after Shell announced plans to dump an oil platform into the sea.[146] Voluntary codes are positive simply because they demonstrate a recognition of human rights, and one might argue it is better to have recognition without compliance as opposed to nothing at all.

3. Can Environmental Human Rights Affect Codes?

Whether protection for the environment becomes an accepted part of the existing human rights structure or a new environmental human right is created, such developments will not directly affect the existing structure of voluntary codes. However, if the movement for environmental human rights continues to gain ground, then the connection created by the Global Compact between the UN and businesses could be affected positively. First of all, environmental rights, however manifested, would have greater international legal significance under customary international law.[147] This could make it harder for TNC environmental violations to go unnoticed, even if TNCs are not legally bound to international law.[148] In addition, the current principles of the Global Compact only suggest a cautionary approach to the environment,[149] or the undertaking of "initiatives to promote greater environmental responsibility."[150] These principles are vague and weak. If there was an international right to a safe environment, then environmental principles in future compacts could and should be strengthened.

Finally, cooperation between the UN and TNCs could ultimately improve environmental human rights because of the greater relationships amongst states, NGOs and TNCs. The strength of the UN is "its global reach, its constellation of agencies, which cover a vast array of issues related to a progressive mission, its inter-governmental nature, numerous communication vehicles in the

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146. *See id.*

147. *See, e.g.*, Joanna E. Arlow, Note, *The Utility of ATCA and the "Law of Nations" in Environmental Torts Litigation: Jota v. Texaco, Inc. and Large Scale Environmental Destruction*, 7 WIS. ENVTL. L.J. 93, 96-97 (2000).

148. *Id.*

149. *See* The Global Compact, *supra* note 124, at prin. 7.

150. *Id.* at prin 8.

world's major languages as well as institutional credibility, particularly with the developing world."[151] The UN may be the only international organization that can effectively institutionalize relationships with socially responsible businesses to ultimately bring about the humanization of globalization.[152]

B. *The Alien Tort Claims Act*

Over the past two decades, foreign nationals have increasingly brought suit in U.S. courts seeking relief for human rights violations committed abroad by both foreign and U.S. entities under the Alien Tort Claims Act ("ATCA").[153] Several cases have been won based upon human rights violations such as genocide and torture.[154] However, foreign plaintiffs claiming injuries from large-scale environmental torts have had a difficult time getting their cases heard. Obstacles include combinations of motions to dismiss, as well as dismissal based upon a failure to demonstrate a violation of the "law of nations."[155] Despite these hurdles, the ATCA could be an important legal method for holding TNCs accountable for their environmental human rights abuses in two particular ways: either through the use of the jus cogen[156] norm of genocide which would apply to TNCs,[157] or by a federal court eventually recognizing international environmental doctrines as part of the "law of nations."[158] The creation of a new environmental human right would

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151. Cohen, *supra* note 143, at 197.

152. *Id.* at 197.

153. 28 U.S.C. § 1350 (1994).

154. *See* Arlow, *supra* note 147, at 94.

155. *Id.* at 94–95.

156. "The term *jus cogens* is defined as a 'mandatory norm of general international law from which no . . . nations may exempt themselves or release each other,' and which refer to the 'obligations of the state towards the international community as a whole.'" Arlow, *supra* note 147, at 108 n.61.

157. *See* Gregory G. A. Tzeutschler, *Corporate Violator: The Alien Tort Liability of Transnational Corporations for Human Rights Abuses Abroad*, 30 COLUM. HUMAN RIGHTS L. REV. 359, 393 (1999).

158. *See* Arlow, *supra* note 147, at 96.

contribute significantly to customary international environmental law.

1. History of ATCA

The U.S. Congress passed the ATCA, which grants courts extraterritorial jurisdiction over alien tort claims, as part of the First Judiciary Act of 1789.[159] This legislation specifically grants federal courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[160] The Act has only recently been used to litigate human rights claims.[161] The controversial Second Circuit decision in *Filartiga v. Pena-Irala* opened the door for a stream of human rights claims.[162] Recently, aliens have sought to use the ATCA to hold TNCs accountable for environmental violations.[163]

In 1980, the Second Circuit ruled in favor of Paraguayan national Dr. Joel Filartiga, who sued Ameriao Norberto Pena-Irala, a Paraguayan police official, for the torture and subsequent wrongful death of his son.[164] The Second Circuit concluded that the defendant's actions violated customary international law in the form of torture by an official state actor.[165] As a result of this decision, both academics and U.S. courts began debating "the intended purpose and scope of the ATCA."[166]

When the ATCA was enacted in 1789, "the law of nations was very different from modern customary international law ("CIL").[167] Generally, modern CIL human rights litigation encompasses the

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159. *See* Anastasia Khokhryakova, *Beanal v. Freeport-McMoran, Inc.: Liability of a Private Actor for an International Environmental Tort Under the Alien Tort Claims Act*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 463, 465 (1998).

160. 28 U.S.C. § 1350 (1994).

161. *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

162. *See id.* at 878.

163. *See* Khokhryakova, supra note 159, at 466.

164. *See Filartiga*, 630 F.2d at 878.

165. *Id.*

166. Khokhryakova, supra note 159, at 466.

167. *Id.*

manner in which a nation treats its citizens.[168] In contrast, the law of nations in 1789 dealt with issues such as the rights of ambassadors, piracy and violations of safe conduct.[169] This difference raises the question, should the ATCA only be used relative to the law of nations as it was understood in 1789, or can it authorize civil actions based on violations of the law of nations as it is understood today?[170]

Although these two competing theories on the purpose and scope of this legislation exist, the court's treatment of the ATCA in *Filartiga* prevails.[171] Judge Irving R. Kaufman clearly stated that "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."[172] Under this theory, any violation of CIL will come within the purview of the ATCA.[173] On the other hand, the minority view narrowly interprets the statute and contends it only authorizes civil suits for conduct that violates the law of nations in 1789.[174] "The First Congress intended to give protection to aliens for certain violations of the law of nations that occurred in the United States, or that had sufficient nexus to it, such as attacks on foreign ambassadors in the United States."[175] Contemporary human rights suits could not be brought under the ATCA according to this reading, because "in 1789 there was no concept of international human rights."[176] Despite this argument, the prevailing view is the Second Circuit's belief that CIL should be interpreted relative to the evolving world.

2. Analysis of a Genocide Claim

As a method for holding TNCs accountable for environmental destruction, the ATCA will prove to be a difficult route. Assuming

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168. *See* Curtis A. Bradley & Jack L. Goldsmith III, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 359 (1997).

169. *Id.*

170. *Id.* at 359–60.

171. *See* Khokhryakova, *supra* note 159, at 466.

172. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

173. *See* Khohryakova, *supra* note 159, at 466.

174. *Id.*

175. *Id.* at 466–67.

176. *Id.* at 467.

plaintiffs can get beyond the various motions for dismissal[177] and have their cases heard on the merits, the ATCA has thus far only held private actors accountable under certain circumstances. Traditionally, the norms of international law are only considered binding to the entities that create those norms.[178] "States were viewed as the only 'subjects' on international law, the only entities capable of bearing legal rights and duties."[179]

The traditional view that the ATCA can apply only to states and their officials is changing.[180] A number of recent decisions since *Filartiga* demonstrate that a more liberal interpretation of the ATCA has developed to include non-state actors based on a number of theories,[181] most importantly that the jus cogens norms of international law are binding on all actors, TNCs included.[182] There can be no derogation from these norms and any actor that breaches them violates international law.[183] Before the twentieth century, the primary prohibitions were piracy, slave-trading, and slavery in any form.[184] More recently, as defined by the Genocide Convention,[185] genocide and war crimes were included. Consequently, any victim

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177. Dismissal has been based on a number of doctrines such as failure to join an indispensable party, forum *non conveniens*, and international comity. A detailed discussion of grounds for dismissal is beyond the scope of this Note, but an example of the use of these motions can be seen in *Aguinda v. Texaco*, when the plaintiffs case was originally dismissed for all three of these grounds. *See* Memorandum of Law Supporting Renewed Motions to Dismiss Based on Forum Non Conveniens and International Comity, Aguinda v. Texaco, Inc., 945 F. Supp. 625 (S.D.N.Y 1996).

178. *See* Tzeutschler, *supra* note 158, at 387.

179. The Harvard Law Review Association, *Developments in the Law, International Criminal Law: Corporate Liability for Violations of International Human Rights Law*, 114 HARV. L. REV. 2025, 2030 (2001).

180. *See* Tzeutschler, *supra* note 157, at 387.

181. *Id.* at 388.

182. *Id.* at 393.

183. *Id.*

184. *Id.*

185. Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, 78 U.N.T.S. 277 (1951) [hereinafter Genocide Convention].

of one or more of these crimes, can bring a claim against the responsible actor. [186]

Drawing from these universal norms, only genocide might sufficiently relate to environmental abuses to raise a cognizable environmental claim.

The Genocide Convention prohibits:

> any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial, or religious group, as such:
> (a) Killing member of the group;
> (b) Causing serious bodily or mental ham to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.[187]

The activities of a TNC might be deemed genocidal when they "destroy the ecosystem upon which an indigenous or ethnic group relies for survival."[188] This type of environmental degradation is usually caused by TNCs industries, such as energy[189] and mining.[190]

In order for a TNC to commit genocide, however, there must be intent to destroy the group, in whole or in part.[191] This element is required and will likely be the most difficult element of genocide to prove.[192] The drafters of the Genocide Convention purposefully

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186. *See* Tzeutschler, *supra* note 157, at 393.

187. Genocide Convention, *supra* note 185, at art. II.

188. Tzeutschler, *supra* note 157, at 413.

189. *See, e.g.*, Jota v. Texaco, Inc., 157 F.3d 153, 155–56 (2nd Cir. 1998) (alleging that Texaco improperly disposed of hazardous waste causing lasting health problems within the local indigenous community).

190. *See, e.g.*, Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999) (alleging Freeport-McMoran committed human rights violations, environmental degradation and genocide while mining in Indonesia).

191. *See* Genocide Convention, *supra* note 185, at art. II.

192. *See* Tzeutschler, *supra* note 157, at 413.

included the partial destruction of a group rather than the entire group so that acts of genocide that were interrupted, ill-planned or otherwise incomplete could still be "genocidal" for accountability purposes.[193] However, the "destruction of the group that [does] occur [has] to be intentional."[194]

The United States has affirmed the requirement of intent. The U.S. attached an "understanding"[195] to its ratification of the Genocide Convention, "which distinguished between the crime of genocide and other acts . . . by requiring that an act be aimed at destroying the group as a viable entity . . . A distinction was . . . maintained [by the framers of the convention] between acts committed with the purpose of destroying a group and all other acts, whatever their consequences."[196] Another important characteristic of the requirement of intent is the definition of intent. Based on U.S. criminal law, if a TNC were to be found liable for genocide, it would not suffice for them to have *negligently* caused the partial destruction of the group, nor could they have acted in a way that *recklessly* disregarded the significant possibility of the destruction of the group.[197] A TNC must intend the result of the destruction or partial destruction of the group. Considering this requirement, a plaintiff will likely have a difficult time proving this intent. The preference of most TNCs would be to relocate these groups of people, rather than destroy them and their culture.[198] In the case of environmental degradation causing injury, TNCs have a strong argument that this damage merely resulted from their work in extracting natural resources from the earth, not from ill will towards a particular group of people.[199]

A claim of genocide has been brought under the ATCA, but the plaintiffs claimed cultural genocide rather than genocide. In *Beanal v. Freeport-McMoran*, Freeport was mining in eastern Indonesia and had allegedly subjected the Amungme people to health threats through environmental degradation, along with violations of their

193. *Id.* at 414.
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 415.
198. *Id.* at 414.
199. *Id.* at 414–15.

physical security.[200] Freeport paid to relocate the Amungme to another location, away from their homes.[201] Upon relocation, a number of the group members died due to different strains of diseases flourishing in the area.[202] Based on these allegations, the plaintiffs argued for cultural genocide however, the court dismissed because Beanal had not pled the requisite intent to destroy the group rather than their culture.[203]

The broader human right of "cultural genocide" has been contemplated by the United Nations. A Draft U.N. Declaration on the Rights of Indigenous Peoples has suggested the broadening of prohibitive acts and culpability for those acts, "regardless of the mental state behind those acts."[204] However, this is just a draft declaration, and if adopted would add to customary international law and not to the claim of genocide.[205]

3. Human Right to a Safe Environment and Implications for the ATCA

Courts hearing claims brought under the ATCA have determined that, at present, there are no clear CIEL substantive norms that define what conduct may constitute an international environmental tort.[206] Some scholars have argued, and certain courts have agreed that current international environmental declarations are "soft law" and not the law of nations.[207] The Second Circuit had the opportunity in 1991 to dispute the status of international environmental law in *Amlon Metals, Inc. v. FMC Corp.*[208] In *Amlon Metals*, a United Kingdom Corporation, Wath, sued the Delaware Corporation FMC for violating its contract by sending four tons of material for reclamation, that instead contained hazardous waste.[209]

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200. Beanal v. Freeport-McMoran, Inc., 197 F.3d 161, 163 (5th Cir. 1999)

201. *See* Tzeutschler, *supra* note 157, at 413.

202. *Id.*

203. *Id.*

204. *Id.* at 415.

205. *Id.*

206. *See* Khokhryakova, *supra* note 159.

207. Arlow, *supra* note 147, at 114.

208. 775 F. Supp. 668 (S.D.N.Y. 1991).

209. *See id.* at 669–70.

Wath claimed the barrels posed "imminent and substantial" health hazards through the evaporation or leaking of the chemicals and contamination of the water supply.[210]

The plaintiffs argued that the defendants had violated the "law of nations" in the form of the 1972 Stockholm Declaration and the Restatement (Third) of Foreign Relations Law.[211] Principle 21 of the Stockholm Declaration says that the signatory states have "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."[212] The court in this case declared that the Stockholm Principles were not sufficiently prescriptive regarding the plaintiff's claim, and therefore, there was not a violation of the law of nations.[213]

Since *Amlon*, a more recent case stands poised on the threshold of expanding the scope of the ATCA. The plaintiffs in *Aguinda v. Texaco, Inc.*[214] were the Huarani of Ecuador, an indigenous group whose land was allegedly destroyed by the Texaco Oil Company. The Ecuadorian plaintiffs alleged that Texaco, during its oil extraction and refining operations in Ecuador, spilled approximately 17 million gallons of oil.[215] The pollution of their land led to the alleged contamination of their drinking water, the erosion of their rivers and streams, and profound cancerous growths amongst their children.[216] For all the alleged destruction occurring between 1964 and 1990, the plaintiffs sought equitable relief in two separate class action suits filed in U.S. federal court under the ATCA.[217]

The case was at one point dismissed on grounds for forum *non conveniens*, international comity and failure to join an indispensable party.[218] However, the Second Circuit held that federal courts may

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210. *See id.* at 669, 670, 672.

211. *See id.* at 671

212. *See* Stockholm Declaration, *supra* note 55, at prin. 21.

213. *See* Amlon Metals, Inc. v. FMC Corp., 775 F. Supp. 668, 671 (S.D.N.Y. 1991).

214. 945 F. Supp. 625 (S.D.N.Y. 1996).

215. *See* Arlow, *supra* note 147, at 98.

216. *Id.*

217. Aguinda v. Texaco, 945 F. Supp. 625 (S.D.N.Y. 1996), *vacated* by Jota v. Texaco, 157 F.3d 153 (2d. Cir. 1998).

218. *See Jota*, 157 F.3d at 153.

have the power to hear the case. The court vacated the district court's judgment and remanded the case for further proceedings, not inconsistent with its decision.[219]

Aguinda is significant in that it represents two issues vital to the future of foreign plaintiffs bringing suit against TNCs for environmental degradation. The first issue is the possibility of the court recognizing international environmental doctrine as the "law of nations." Absent an express treaty, courts have had difficulty determining that there is an accepted and recognized set of principles of international environmental law. However, litigants such as the Huarani will continue asking courts to adjudicate the question of whether there is a law of nations with respect to the environment, given the growing list of international treaties, conventions and protocols. If and when a court does determine environmental torts violate the "law of nations," other environmental victims will have an avenue through which to seek redress for their suffering. The creation of an independent human right however, would facilitate the courts decision to recognize the "law of nations" in CIEL. If the courts are close to recognizing the "law of nations" in CIEL, then the creation of environmental human right would serve to validate this recognition.

The second issue *Aguinda* represents is the possibility of a TNC being bound to international legal principles and norms in the same manner as states. Currently, under the ATCA, unless a TNC violates one of the seven jus cogens norms,[220] the TNC is only liable if the plaintiff can prove that the private actor's conduct was a state action or action under "color of law."[221] However,

> there is significant scholarly and judicial disagreement over whether claims under ATCA must have been perpetrated by state actors rather than individual actors, a disagreement that has occurred within the larger debate

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219. *Id.* at 163.

220. There are seven widely accepted jus cogens norms according to the Restatement and adopted in ATCA litigation: 1) prohibitions against genocide; 2) slavery; 3) causing the murder or disappearance of individuals; 4) torture or other 'cruel, inhuman or degrading' treatment; 5) arbitrary detention; 6) systematic racial discrimination or; 7) a general pattern of 'gross violations' of internationally recognized norms. Arlow, *supra* note 147, at 108–09.

221. *See id.* at 117–18.

> over whether or not international law governs only conduct between states, and whether declarations and treaties are binding on individuals."[222]

Although this debate will continue, it is more likely at present that courts will not hold TNCs privately liable.[223]

CONCLUSION

The destruction of the global environment is of imminent concern. States are seeking to develop and exploit their natural resources, companies are seeking profits; populations are growing and technology is advancing at an extraordinary rate. But in the midst of all this growth and "progress," we are causing not only ecological destruction, but also the destruction of human health and lives. Equally important is the fact that much of this damage is caused by corporations, which are not presently within the reach of international law. No real mechanism exists to hold corporations accountable for their violations of human rights and destruction of the environment. The international community needs to continue to develop clear standards of liability for environmental abuses that would apply across nations and to both states and private actors. The creation of an independent environmental human right would be a valuable tool in developing such standards of liability. In the meantime, we can continue to look to voluntary codes of conduct and creative legal paths such as the use of the ATCA to help bring awareness and some degree of accountability to corporations.

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222. *Id.* at 117.

223. *See id.* at 118.