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**THE EVOLUTION OF INTERNATIONAL ENVIRONMENTAL LAW
AMIDST POLITICAL GRIDLOCK:
ENVIRONMENTAL RIGHTS AS A COMMON GROUND**

A dissertation submitted to the Faculty in partial fulfillment of the requirements for the degree of Doctorate in Judicial Studies (S.J.D.) in environmental law at the Elisabeth Haub School of Law at Pace University

By Maria Antonia Tigre

Under the supervision of Nicholas A. Robinson, University Professor on the Environment and Gilbert and Sarah Kerlin Distinguished Professor of Environmental Law Emeritus

February 2022

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ABSTRACT

In the leadup to the 50th anniversary of the Stockholm Conference and the global Covid-19 pandemic, nations and people have realized they have not lived up to the obligations of the U.N. Charter and the principles of international environmental law. In 2019, the U.N. General Assembly (UNGA) adopted Resolution No. A/RES/73/333, which set forth substantive and procedural recommendations for follow-up work for the progressive development of international environmental law, and specifically called for the adoption of a political declaration in 2022 to strengthen the implementation of international environmental law. The resolution derives from the proposed Global Pact for the Environment and significant discussions on gaps in international environmental law by the Secretary General and an *ad hoc* group of the UNGA which met in Nairobi during 2019. The thesis follows this process until January 2022. As the world prepares to adopt a new political declaration, this thesis analyzes the multiple roads that lead here and the way forward. The thesis analyzes the current ecological crises humanity faces and some possible ways to address them. These solutions are grounded on the bedrock of Earth Jurisprudence, exemplified here through religious and philosophical foundations of Earth conservation. Through this bedrock, the thesis analyzes the rights-based approaches to the Earth Emergency Crisis, following the pathway of development of the right to a healthy environment which led to its international recognition at the Human Rights Council in 2021. This discussion significantly contributes to the challenges we currently face in the Earth Emergency Crisis, while also critically evaluating possible innovations to promote effectiveness in international environmental law.

*To Nicholas & Theo,
May we bring your generation not only hope,
But also answers.*

ASA BRANCA
Luiz Gonzaga

When I heard the earth burning
Quando oiei' a terra ardendo
Which bonfire of Saint John
Qual fogueira de São João
I asked' to God in heaven,
Eu perguntei' a Deus do céu, uai
Why such judgment?
Por que tamanha judiação?
What a brazier, what a fornaia'
Que braseiro, que fornaia'
No weeping feet'
Nenhum pé de prantação'
I lost my cattle because of the water.
Por farta' d'água perdi meu gado
My sorrel died of thirst
Morreu de sede meu alazão
Even the white wing
Inté' mesmo a asa branca
flapped its wings
Bateu asas do sertão
Then' I said: goodbye, Rosinha
Entonce' eu disse: adeus, Rosinha
keep my heart with you
Guarda contigo meu coração
Today far, many leagues
Hoje longe, muitas légua
in a sad loneliness
Numa triste solidão
I wait for the rain to fall again
Espero a chuva cair de novo
For me to go back to my wilderness
Pra mim voltar' pro meu sertão
When the green of your eyes'
Quando o verde dos teus óio'
Will spread' in the prantation'
Se espaiar' na prantação'
I assure you, don't cry, no, see
Eu te asseguro, não chore, não, viu
That I will return', see, my heart
Que eu vortarei', viu, meu coração

ACKNOWLEDGMENTS

It takes a village.

When I decided to apply for an S.JD., I had a very misguided idea of what that process would look like. I knew I wanted to have a baby in the coming year and thought that would be the “perfect” time to start another academic project. In my mind, I would be home anyway, the baby would sleep a lot, I would be off work, so I might as well take on this massive endeavor, something I always wanted to do anyway, during that period of my life. Four years later, I am finally crossing the finish line. I could never have imagined everything that would come my way throughout this period: two pregnancies – one very challenging, with months on bed rest and a premature (but very healthy!) baby – and one very long pandemic. It was demanding and challenging, and I often felt in one of those video games where you just dodge one obstacle at a time and barely find a time to breathe before the next one comes towards you.

The challenges and the disruptions were all part of life; some of them delightful parts of life. And the delay in finishing the thesis was not all bad. One of the “advantages” was that it allowed me to see this project to fruition – not the thesis itself, obviously, but the still ongoing negotiations at the United Nations. When I chose to focus on the Global Pact for the Environment (GPE) as my thesis topic, I also did not know where the project itself would lead. As the GPE morphed into something else (we are now at the edge of the adoption of a political declaration by the United Nations Environmental Assembly in the first trimester of 2022), my thesis also changed. I wrote and rewrote several pieces of it, sometimes using what I had written and other times just scrapping it. That is all part of writing, which often feels frustrating. But the result is rewarding, and I can feel the thrill of getting to the finish line of a long marathon – even if a little out of breath.

Four years later, I write the last few pages of this thesis feeling as accomplished as ever. I am writing this acknowledgments section on the Monday after Christmas, December 2021. With a final deadline to submit the thesis in January 2022 – since I *definitely* do not want to extend this for another year –, I was glad to get the week “off” from work between Christmas and New Year’s Eve to actually sit down and write the last chapter. Even with my family coming from Brazil to spend the holidays, the plan was to write. But with yet another obstacle coming along and Omicron spreading throughout New York in yet another unprecedented way, most of us tested positive for Covid-19 on Christmas Day. But if these four years taught me anything, it was that we are much stronger and resilient than we ever thought. So, we kept pushing forward, and I kept writing, Omicron and all.

The challenges I mentioned were multiple, but so many great things happened in this period. Two kids and a (still ongoing) pandemic later, what was on my mind when I decided to take on this endeavor feels foreign. We grew so much; we aged so much! I became a mother, which somehow made this work even more critical. Professionally, I also took on new challenges, and unique opportunities came my way. Instead of passing them on to finish the thesis, I kept on adding even more things to my plate. I hoped the thesis would eventually be submitted and knew the opportunities might not circle back to me. So, despite often feeling stressed and overwhelmed, I also feel accomplished.

I became Deputy Director of Latin America for the Global Network of Human Rights and the Environment (GNHRE) – a volunteer network of scholars and practitioners in human rights and the environment – in 2019. A few months afterward, I became the regional director. Throughout the next three years, I had the opportunity to work with a brilliant group of people on so many meaningful and exciting projects. And for 2022, I decided to accept the invitation to

become Deputy Director of GNHRE, another opportunity that excites me and scares me at the same time. And if it does not scare you, what's the point of doing something worthwhile anyway?

The work at GNHRE was essential to the core themes of my thesis but also for the development of my career. As an immigrant who did not go to law school in the United States and yet chose to continue her career here, opportunities were often not easy to find. I knew I wanted to work in academia – and for me, that meant different things, not necessarily a tenure-track position at a law school – but had little flexibility to move outside New York. I had faith in my qualities – or I learned to believe in them as time went by and my career developed. In 2021, I finally got my dream job as Global Climate Litigation Fellow at the Sabin Center for Climate Change Law at Columbia Law School. And if that is not a testament of strength, persistence, and resilience, I don't know what is. The strength and the resilience came from within. From my upbringing, my parents and my brother, but also from everything I learned in life. My persistence and patience were learned through many disappointments and slammed doors. But eventually, it all paid off. And submitting this thesis is the cherry on top of a tough but rewarding couple of years.

It takes a village.

None of this would have been possible without a *lot* of help. Being able to work full time, pursue an S.JD., raise two children, take care of a house, and marriage, in the middle of a pandemic while also maintaining some shreds of sanity is not something one does alone. Thankfully, I was never afraid to ask for help or admit I needed it. And I was fortunate to have lots of people helping me along the way.

First and foremost, I am grateful to Prof. Nicholas Robinson, who supported me in every step of this process. As my thesis supervisor, he not only guided me towards the topic of my thesis but advised me every step of the way, making sure my research was current and valuable to other scholars, diplomats, and policymakers. Prof. Robinson has been a true mentor in the past nine years of my life, ever since I stepped foot at the Elisabeth Haub School of Law for the first time during my L.L.M. I feel so lucky to have had such a great mentor and am still in awe of his incredible mind and memory every time we meet to discuss a new chapter. He has advised me and guided me throughout many different stages of my career and had the patience to continue supporting me and advising me even when my personal life made it hard to focus. I am genuinely thankful and owe so much of my professional life to you!

The other “advantage” of this being a long process is that several parts of this thesis were published in the past years. A significant portion of the *travaux préparatoires* was published by ELI Press in January 2020.¹ The book covered the negotiations on the GPE until the end of 2019. An update to the negotiations, co-written with Victoria Lichet, was published by ELI's Environmental Law Reporter in October 2020.² I am grateful to ELI Press for being an excellent partner. In particular, I thank Scott Fulton, Jay Pendergrass, Rachel Jean-Baptiste, and Hunter Leigh Jones. I would also like to thank the International Council on Environmental Law (ICEL), represented by Victor Tafur and Prof. Robinson, for publishing the book jointly with ELI and their commitment to this project. Finally, chapter II of this thesis (Exploring the Bedrock of Earth Jurisprudence) will soon be published by the Rutgers University Journal of Law and Religion.

I was fortunate to modestly contribute to the development of the Global Pact since its launch in 2017. Several people were essential in this initiative and kindly accepted my participation

¹ Maria Antonia Tigre, *Gaps in International Environmental Law: Toward a Global Pact for the Environment* (ELI Press, 2020).

² Maria Antonia Tigre & Victoria Lichet, *Update on Negotiation of a New International Environmental Agreement*, 50(10) ENVTL. L. REP. 10818 (2020).

along the way. I am grateful to Yann Aguila, who championed this initiative, was available for interviews to help me gain better clarity on its inception, gave me access to early documents, and contributed his thoughts on the GPE's future. I am also highly grateful to Teresa Parejo, who became an inspiration and friend along this journey. As one of the early champions of the Global Pact, she always included me in the discussions and invited me to think creatively about where the Pact was headed. In addition, she organized incredible events on the Global Pact at the Columbia Center on Sustainable Investment, which significantly advanced discussions on its merits, and were a great source of information for this thesis. I am grateful to Victor Tafur. He supported this project as the UN Representative from ICEL and was always available to exchange ideas about the GPE and the Nairobi discussions. And finally, I am grateful to Victoria Lichet, who kept me constantly updated on every small advance and with whom I discussed many steps of the GPE's development.

To my brilliant colleagues – in academia, at GNHRE, at the Sabin Center –, who worked with me in multiple projects that helped improve my skills, enhance my research, advance my knowledge and my scholarship on the GPE and beyond: Alexandra Harrington, Erin Daly, Jimmy May, Melanie Murcott, Dina Lupin Townsend, Beatriz Garcia, Joana Setzer, and Lavinia Bhaskaruni. You have all helped with the thesis itself or multiple other projects, often while I chaotically tried to balance multiple little plates. And, especially Natalia Urzola and Victoria Lichet, for agreeing to come on different rides with me whenever I come up with a new project none of us had any time for. You are the best collaborators an academic could ask for!

On a personal level, there are many people I would like to extend my gratitude to. My sons, Nicholas and Theo, are now three and one years old. Despite all the challenges, it was a privilege to watch them grow from home, being just steps away rather than in an office missing so much. They brought me so much joy, always putting things in perspective when it felt like too much. The challenges of being an academic triple once one becomes a mother. In a pandemic, they are twenty times harder. My support system was essential to continue working while juggling multiple functions. I am eternally grateful to my husband Marcelo, who has always supported my academic career but was even more so during the last year. I feel so lucky to have found true love and a true partner. Thank you for providing me the structure to keep going and stepping in when it feels like too much. Thank you for believing in me, for betting on me, for reminding me of what matters, and for never letting me give up. None of this would have been possible without you. I couldn't think of someone better to endure a pandemic with.

To my mother, who is truly the best of the best. You were always ready to jump on a plane whenever I needed her. This often meant uprooting her own life to stay with us for months on end during this never-ending pandemic. We are so fortunate to have counted on you during three cycles of visits, for whichever time the pandemic and visa requirements allowed. We did it all: a special authorization from the consulate the first time (acquired through your relentless persistence), a quarantine in Mexico the second time, and a "normal" flight when the borders finally reopened. Like the lioness mother you are, you managed to come against all odds to care for your daughter, who was about to be admitted at the hospital to have a premature baby after months on bed rest. You convinced the American consulate that you needed to be here for your family, and I truly admire your strength. Thank you for always being here. For taking care of all of us, even when we are tired – physically and mentally – and not the best company. You are truly the best grandmother my kids could have.

To my magnificent mom support group – Karen, Liat, Mikaela, Taija, Taylor, and Florence. You have literally been through it all with me, for better or worse, every day, for over three years.

You are the best gift a new mom could get, and I am so thankful to have someone to vent to, to feel normal about all the things that go through my mind, through all the challenges, the laughter, the pain. The Peanuts are one of the best things that happened to me, and this thesis could never have been written without you. Thank you for bearing with me, always and forever.

To all the fantastic nannies and babysitters who helped us take care of our children while we worked – and sometimes tried to rest: Joyce (truly the sweetest who was by my side for months of bed rest and caring for my sweet preemie when we were all too scared to know what to do), Eli, Andréia, Pamela, Lúcia, Giovanna, Eva, and Cleide (who helped us through Covid-19 and went truly above and beyond). You were all such a big piece of the puzzle of making this work, and I will be eternally grateful.

To my New York family, Rachel, Pedro, Carol, Pedro, Soso, Toni, Ben, and Luca, thank you for all the joy. To my grandmother for being my greatest inspiration. To my family, especially Rodrigo, Cíça, and Maneco, for always being close-by, even if far away, and for enduring a Covid-19 outbreak with us when you were supposed to have a much-needed vacation. I love you.

This thesis ends without a proper ending – we are still awaiting a political declaration which will likely be agreed on in the early months of 2022. I hope this political declaration is meaningful; that it brings hope and induces real change. I hope this declaration marks a turning point: that it recognizes that we all have a right to a healthy environment, that it ensures we move forward without any regression, that it acknowledges our resilience. We need to do better. We need to improve solidarity with one another and harmony with nature. We need to better care for our environment, our climate, and our children. Our children deserve better. They deserve to live in a non-pandemic world, a healthy environment, and a safe climate. They deserve hope.

Here's to a better 2022.

Maria Antonia Tigre
Dec. 27, 2021

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INTRODUCTION

In the leadup to the 50th anniversary of the Stockholm Conference in 2022 and the aftermath of the 2020 global pandemic, nations and people realize that they have not lived up to the obligations of the charter of the United Nations (U.N.). The U.N. Charter, written in the 1940s, begins as a call from “we the peoples of the United Nations” and pleas for global cooperation.¹ However, because of the current ecological and health crises of the Earth systems, the “we” has moved beyond humans. The crises we are in are partly existential as nature shares them with humanity and future generations, who will suffer most of the consequences of our actions. As a result, our current “we” is all-inclusive: it encompasses future generations and nature. This change gives rise to an imperative: we all must act to protect the planet, and our responsibility extends beyond humans. This thesis describes the legal dimensions of doing so.

As we face this unprecedented environmental and health crisis, the world is at a crossroads. Scientists have, for long, alarmed us to growing environmental challenges, frequently with no environmental policy responses addressing their concerns. Moreover, legal and policy initiatives were generally piecemeal and fragmented. These often failed to consider the interlinkages between the environment and broader all-encompassing challenges. In 2019, the sixth Global Environment Outlook (GEO-6) report published by the U.N. Environment Program (UNEP) concisely summarized what has been intensely said by the Intergovernmental Panel on Climate Change (IPCC) and others. The report makes the case that the interconnected systems that make up the environment² lead to cascading damages, especially in light of transboundary environmental impacts.³

In 2020, a crisis of public health systems piled on to the ecosystem emergency. The 2020 global pandemic has shaken up our health, social, and economic foundations, bringing rapid changes to communities worldwide. Globalization and the development of transportation and trade systems have brought a unique aspect to the pandemic. Rather than slowly moving across the world like the 1918/1919 Spanish influenza, Covid-19 and its multiple variants instead move between continents in a day. The public health crisis and spillover effect for the economic crisis is the worst the world will have ever seen, which is part of a pattern of transcending planetary boundaries described later in this thesis. With the “developments” the world has pushed forward, we have eliminated our abilities to prevent a pandemic.

It is time to address those impacts through new international legal rights and duties pertaining to environmental law. The traditional pattern of human exploitation of ecological resources can no longer be sustained, as human health and well-being rely on a healthy environment.⁴ Ignoring environmental values has led to growing inequality and has sometimes deemed the change irreversible.⁵ These are human rights issues that we can no longer ignore. Either we fix our behaviors, or we suffer the consequences. Imperative in this is the need to recognize a human right to a healthy environment and a duty to protect the environment at the international level. This thesis tells us how to find a way forward. If we are to change the course of the Earth Emergency Crisis, we need fast and steady action that truly leads us towards an ecological

¹ U.N. Charter, preamble.

² I.e., air, land, water, oceans, and biodiversity. UNEP, Global Environment Outlook (GEO-6): Summary for Policymakers (2019).

³ Joyeeta Gupta, *What does UN environment’s GEO-6 mean for INEA?*, 19 INT’L ENVTL. AGREEMENTS: POL., L. AND ECON. 145 (2019).

⁴ Paul Ekins & Joyeeta Gupta, *Perspective: a healthy planet for healthy people*, 2 GLOBAL SUSTAINABILITY 1; 2 (2019).

⁵ *Id.*, at. 4.

transformation. This transformation can only be successful if grounded in a new body of transformative law, what I call the “the Anthropocene Law.” This thesis argues that Anthropocene Law can guide the next decade of change so that we can transform the way in which we interact with nature and truly reverse course.

In 2018, the United Nations Secretary-General (UNSG) released the first high-level report on international environmental law at the U.N., entitled “Gaps in international environmental law and environment-related instruments: towards a global pact for the environment.”⁶ The report was instigated by the proposed Global Pact for the Environment (GPE), which remains at the core of this thesis. The report reviewed and analyzed the corpus of international environmental law and environment-related instruments, promoting a dialogue between environmental principles, substantive gaps in multilateral environmental agreements (MEAs), environmental governance, and institutions. Surprisingly, it took the U.N. almost five decades to fully embrace international environmental law as a high-level debate, especially considering the substantial development in the field since 1972.

Although the report is highly conservative in its analysis and conclusions, and heavily grounded on older foundations of international environmental law, it is nevertheless meaningful. It marks a new era for the importance of environmental law and governance globally. By identifying significant gaps in international environmental law and making suggestions and recommendations on addressing them, the UNSG provided a roadmap for its progressive development. It may seem surprising that such a “seal of approval” is required to make the case that environmental action is needed to address the crisis we are currently in. However, at least at an official level, this was indeed the case. Despite the flaws of the UNSG’s report, the international community now has a roadmap for developing international environmental law. Yet, how can we best follow it? This underlying question is cross-cutting throughout this thesis. Recognizing the right to a healthy environment is the first step in that development.

After substantial discussions of the UNSG’s report by U.N. delegates through a series of meetings in Nairobi, the U.N. General Assembly (UNGA) adopted Resolution No. A/RES/73/333 in 2019.⁷ The resolution sets forth substantive and procedural recommendations for follow-up work for the progressive development of international environmental law and specifically calls for the adoption of a political declaration to strengthen the implementation of international environmental law. The declaration shall be adopted in the context of the commemoration of the landmark 50th anniversary of the U.N. Conference on the Human Environment in early 2022. The 50th anniversary of the Stockholm Declaration is the perfect opportunity to no longer put off environmental action.

Unless the world provides new legal responses to current environmental challenges, the interrelated and indivisible Sustainable Development Goals (SDGs) will be unattainable.⁸ The global vision and goals outlined in the SDGs are a good start, with positive impacts on the goal-setting strategy. However, broader legal commitment from States is still needed. In particular, the fragmented character of international environmental law halts implementation and is likely to retard the attainment of the SDGs.⁹ Moreover, the sectoral approach to treaty-making often

⁶ UN Secretary-General, Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment UN Doc A/73/419, 42 (30 November 2018).

⁷ UNGA, Resolution No. A/RES/73/333 (adopted Aug. 30, 2019).

⁸ Gupta, *supra* note 3, at 146.

⁹ International Council of Environmental Law (ICEL), Note on Options to Address Gaps Under Resolution 72/277 (10 May 2018) “Towards a Global Pact For The Environment,” submitted for consideration in the 2019 Nairobi Consultations (Feb. 19, 2019), https://wedocs.unep.org/bitstream/handle/20.500.11822/27609/ICEL_Report.pdf?sequence=1&isAllowed=y.

obscures the interconnectedness of the goals shared among different issue-specific regimes,¹⁰ while there is increasing scientific evidence that environmental problems are inextricably intertwined.¹¹

The linkage between environmental problems and human rights should guide the progressive development of international environmental law.¹² Adopting environmental principles is one way to support coherence in the global environmental legal system. As noted in the UNSG's Report, "[t]he proliferation of multilateral environmental agreements and the resultant distinct and separate mandates ignore the unity, interconnectedness, and interdependence of the Earth's ecosystem."¹³ There is a need to clarify the principles of environmental law in a "comprehensive and unifying law" that could provide for better harmonization, predictability, and certainty to enhance the coherence and coordination of global environmental governance.¹⁴

With a roadmap and timeline set forth by the U.N., the environmental community can now propose a new document that progressively responds to current challenges. This thesis discusses ways forward through a discussion of environmental rights and following the foundation for development established by the UNSG's report and Resolution 73/333. It argues that recognizing the right to a healthy environment is at the core of any way forward. The central argument and underlying thread of this thesis are twofold. First, fragmentation of international environmental law hinders the effective implementation of norms due to the lack of an interconnected agreement broadly applied. This issue was raised by the UNSG, bringing a long-standing academic concern into a practical discussion by the U.N. Member States. Secondly, international environmental law needs to evolve according to the Anthropocene and the novel concept of planetary boundaries.¹⁵

The chosen lens through which to analyze the foundations and effects of a new agreement is the right to a healthy environment and the duty to protect it. The draft of the GPE's first article recognizes the right of every person "to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfillment."¹⁶ The second article establishes that "[e]very state or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own level to the conservation, protection and restoration of the integrity of the Earth's ecosystem."¹⁷

The intersection of human rights and the environment is a territory well worked by scholars,¹⁸ but it nonetheless remains fertile soil for new insights into international environmental law, especially in light of a new political declaration and the recognition by the Human Rights Council (HRC).¹⁹ The scope and status of environmental principles remain contested, with only a few recognized as customary international law.²⁰ The Secretary-General noted a need to clarify the principles of environmental law to make them more productive, predictable and to strengthen their

¹⁰ *Id.*

¹¹ Harro van Asselt, Managing the fragmentation of international environmental law: Forests at the intersection of the climate and biodiversity regimes, 44 *J. OF INT'L L. AND POL.* 1205; 1213–1215 (2012) (using climate change, biodiversity loss and forests as an example).

¹² Nicholas A. Robinson, *IUCN's Proposed Covenant on Environment & Development*, 13 *PACE ENVTL. L. REV.* 133; 134; 138 (1995).

¹³ UN Secretary-General, *supra* note 6, at 34.

¹⁴ *Id.*, at 43.

¹⁵ These will be further explained in Chapter I.

¹⁶ Le Club des Juristes, Project Global Pact for the Environment, art. 1 (Jun. 24, 2017), <http://www.leclubdesjuristes.com/wp-content/uploads/2017/05/Project-Global-Pact-for-the-Environment.pdf>.

¹⁷ *Id.*, art. 2.

¹⁸ See the work of the GLOBAL NETWORK FOR HUMAN RIGHTS AND THE ENVIRONMENT, <https://gnhre.org/>.

¹⁹ Human Rights Council Res. 48/L.23/Rev.1, U.N. Doc. A/HRC/48/L.23/Rev.1 (Oct. 5, 2021).

²⁰ UN Secretary-General, *supra* note 6.

implementation. Since the international right to a clean and healthy environment remains underdeveloped at the international level, it offers the best possible vantage point from which to construct an informed opinion on whether the GPE could significantly strengthen international environmental law by codifying environmental principles.

Since the right to a healthy environment is not tangible and is often a concept difficult to grasp, the right to water is used as an underlying example across this thesis. Water plays into the themes of this thesis throughout, acting as a connecting thread across different chapters. Like the environment in general, humanity is not behaving towards water like we should, as we often take it for granted, not acknowledging that it is a limited resource. Religions worldwide have often addressed water specifically, and the human rights framework has further developed the right to water through different pathways. These are compared to the paths explored here regarding the right to a healthy environment.

Chapter I sets the stage by acknowledging our current earth emergency crisis. The Oxford dictionary defines crisis as a time of intense difficulty, trouble, or danger; a time when a difficult or important decision must be made; a turning point of a disease when an important change takes place, indicating either recovery or death.²¹ The term accurately depicts the danger of the situation we are in, in which the Earth can either recover or die from the harms we have imposed on it. We have, therefore, an important decision to make as a community. This thesis talks about ‘environmental crisis,’ or, more broadly, an ‘earth emergency crisis.’ We face, however, multiple crises, as singular environmental crisis all interrelate. Chapter I goes more in-depth into these environmental crises, providing a necessary background on the state of the world. The chapter heavily relies on reports published by trustworthy scientific organizations in the past years, which have grown the consensus on the environmental crisis. A call for legal remedies emerges through this scientific consensus on the Anthropocene and the planetary boundaries we have transcended.

After providing a broad overview of the scientific background, the thesis begins by answering the question of how to address it. By drawing on examples of religious, indigenous, and ideological foundations, this thesis shows that, at least from a philosophical perspective, the world has already agreed on a deep shared concern for the environment. Across the globe, communities have warned us about the need to respect nature and our shared responsibility for caring for it. Scholars have recently used the natural law foundation to develop an earth jurisprudence.

This philosophical bedrock provides the necessary grounds for finally adopting a human right to a healthy environment and a duty to protect it at the international level. How can we then draw on these centuries-old lessons to ensure the progressive development of international environmental law?²² How can we, as lawyers, recognize what religious leaders, scholars, and philosophers have long proclaimed? Which steps have been followed in similar earlier attempts to develop environmental law? Chapter II addresses these questions, drawing on the jurisprudential thinking to find ways forward.

As will be shown throughout this thesis, one of the teachings of scientists, religious scholars, and conservationists is that all things are connected, including the health of all planetary life. Humanity is deeply coupled to all aspects of nature, as its future directly reflects ours. Different cosmologies and ethical perspectives have accepted this knowledge, but the law has yet to embrace it. If we assume that all aspects of life are interwoven, it should not surprise that the

²¹ *Crisis*, LEXICO (powered by Oxford), at <https://www.lexico.com/en/definition/crisis>.

²² According to the U.N. Charter art. 13, para 1a, the General Assembly is mandated to encourage the progressive development of international law and its codification. The progressive development of international law encompasses the drafting of legal rules in fields that have not yet been regulated by international law or sufficiently addressed in State practice. UN Legal, *Codification and Progressive Development of International Law*, UNITED NATIONS (2020), <https://legal.un.org/cod/>.

Covid-19 pandemic came 100 years after the 1918 Spanish influenza. Robinson & Walzer observe that the Covid-19 outbreak starkly reminds us of a basic fact that cannot be ignored: human, animal, plant, and environmental health and well-being are intrinsically connected and profoundly influenced by human activities.²³ As this interconnectedness shows, the coronavirus pandemic is “spreading octopus tentacles into every crevice of society..., pitting the vanity of human assumptions against nature’s almost casual ability to destroy them.”²⁴ If we don’t protect nature, the virus will have no place to live and will come to humans once again, as these “zoonotic spillovers at the wildlife-human interface are neither one-off events nor only found in distant lands.”²⁵ As a result, the pandemic has had a lasting negative effect on environmental rights worldwide.²⁶

Chapter III draws on decades of legal research on the intersection of human rights and the environment, exemplifying multiple attempts at recognizing the right to a healthy environment at the international level or ensuring the link between both areas is legally implemented. The chapter analyzes the growing jurisprudence on the right to a healthy environment that was crystalized by decades of scholarship. At the core of this development is the work of the special rapporteur on human rights and the environment, which significantly advanced the field, leaving no doubt that environmental protection is a human rights issue.

This thesis explores this pathway while asking: Why is the right to a healthy environment essential to provide environmental protection? Should the right be extended to humans exclusively, or have we reached a threshold in environmental degradation which requires broadening the concept and extending rights to nature? The chapter also draws on the lessons from the recognition of the right to water as a human rights years earlier. In 2021, the HRC fully embraced the link between human rights and the environment by adopting the right to a healthy environment at the international level. The chapter analyzes this recognition, commenting on the resolution, while also looking at the following steps at the international level.

Chapter IV describes the process in which the Global Pact – as a potential solution to the fragmented state of international environmental law – unfolded, discussing its origins and development within the UNGA. It investigates arguments presented in the Nairobi sessions, considering the main issues and discussions brought by delegates. It brings forward the leading causes of inefficiency in international environmental law as presented by States, as well as the menu of options proposed to address them.

Evaluating *the travaux préparatoires* of the underlying negotiations towards such an agreement, Chapter IV follows its inception as a draft proposal for a GPE by French scholars through its drafting history and development of negotiations at the U.N. The preparatory work of mediation, discussions, and drafting to produce a final treaty text is essential to understanding the norms which States will ultimately adopt.²⁷ To help provide a historical reference and a guide to interpreting new rules in the future, an earlier version of this chapter, “Gaps in International Environmental Law: Toward a Global Pact for the Environment,” was published at the beginning of 2020 with the International Council of Environmental Law (ICEL) and the Environmental Law

²³ Nicholas A. Robinson & Christian Walzer, *How Do We Prevent the Next Outbreak?*, SCIENTIFIC AMERICAN (Mar. 25, 2020), <https://blogs.scientificamerican.com/observations/how-do-we-prevent-the-next-outbreak/>.

²⁴ Alan Cowell, *Photos From a Century of Epidemics*, THE NEW YORK TIMES (Mar. 20, 2020), <https://www.nytimes.com/2020/03/20/world/europe/coronavirus-aids-spanish-flu-ebola-epidemics.html>.

²⁵ Robinson & Walzer, *supra* note 23.

²⁶ Maria Antonia Tigre et. al., *Environmental protection and human rights in the pandemic*, 1(1-2-3) LEGAL POL’Y & PANDEMICS: THE J. OF THE GLOBAL PANDEMIC NETWORK 317 (2021).

²⁷ The Vienna Convention on the Law of Treaties includes the *travaux préparatoires* as a supplementary rule of interpretation (art. 32). Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

Institute (ELI).²⁸ An update to the *travaux préparatoires* was co-written with Victoria Lichet and published by ELI's Environmental Law Reporter in October 2020.²⁹ The chapter updates the negotiating process until the end of December 2021.

The thesis concludes in Chapter V that the concept of the Global Pact, as initially envisioned, has significantly shifted in light of the development of negotiations within the U.N.. Once the French delegation initiated that internal process, the fate of the Global Pact was out of their hands, and the debate thus became much broader. A proposed solution can no longer be limited to environmental principles. The Global Pact (or *a* global pact) could be a multi-pronged answer to enhance the implementation of international environmental law. The negotiation of a worldwide pact must remain current, avoiding reaching an already outdated agreement when born. How, then, can we best find our way forward? What type of instrument should we adopt, and what should be its content? In addressing these questions, the thesis provides a critical frame of reference to analyze a proposed new agreement that is expected to provide a new scaffold for international environmental law.

Through scientific, economic, jurisprudential, and legal arguments, this thesis shows that humanity has not lived up to its obligations towards the Earth and itself. The 2020 pandemic represents the latest wake-up call – one we hope the world will finally listen to. The planet, people, and nature are entering a fundamental transformative period. The existential crisis we currently face demands new legal responses to ensure the protection of the planet. This thesis shows how we can adapt through a series of legal steps that mature from society's ethical roots. It, therefore, provides a meaningful contribution to international environmental law. Following the publication of the *travaux préparatoires* on the debate on the Global Pact for the Environment, this thesis now looks at the past and the future to provide legal answers for resiliently moving forward.

²⁸ Maria Antonia Tigre, Gaps in International Environmental Law: Toward a Global Pact for the Environment (Environmental Law Institute, 2020).

²⁹ Maria Antonia Tigre & Victoria Lichet, *Update on Negotiation of a New International Environmental Agreement*, 50(10) ENVTL. L. REP. 10818 (2020).

I. STATE OF THE WORLD

Humanity is at the brink of an environmental collapse as the conditions of our environment are worsening by the second. United Nations (U.N.) Secretary-General António Guterres warned that “[w]e stand at a critical juncture in our collective efforts to limit dangerous global heating.”¹ A juncture further worsened by the Covid-19 pandemic.² Advances in climate and environmental science now forecast an uncertain and probably dire future. Guterres recently said that “Covid and climate have brought us to a threshold ... a moment of truth.”³ The effects of climate change are felt in every corner of the world.⁴ In Botswana, Southern Africa’s oldest baobab trees, some of them 2,500 years old, are suddenly dying. As Cyclone Harold hit Vanuatu in April 2020, it was the second Category 5 storm in five years. Ice loss in Greenland has accelerated by a factor of five over the past 30 years. In Kuwait, the temperature reached 127.7°F, the highest recorded on Earth in 2021. Mexico City is sinking as a result of the ancient aquifer below drying up through a combination of overpumping and climate change. Species are at the brink of extinction, and global temperatures continue to rise. “We speak about the warmth of Mother Nature, but nature can also be vicious and wild and unforgiving.”⁵

2019 may well have marked a turning point in our collective understanding of climate change’s effects and threats. Wildfires in Australia have devastated human development and natural areas. Australia burned for three months in the country’s most disastrous fire season ever.⁶ The wildfires were part of what scientists call “compound extremes:” first drought, then a devastating bush fire, followed by a foot of rain from a tropical storm, one intensifying the other.⁷ Impacts on human health were significant.⁸ In the United States alone, Californian wildfires recently killed 85 people. We further saw devastating fires in the Amazon, burning millions of acres and further contributing to greenhouse gas (GHG) emissions.

These extreme events and their impacts could likely have been mitigated, as scientists have long predicted what is happening. Australia had previously suffered its worst known wildfire in 2009. In 2015, to take one example among many, Australia’s Academy of Science declared that “for Australia, a warmer future will likely mean that extreme precipitation is more intense and more frequent, interspersed with longer dry spells.”⁹ We could also have learned from previous events, as we have seen a devastating fire season throughout the world before. From 1997 to 1999, massive wildfires burned in Mexico, Brazil, Guatemala, Honduras, Nicaragua, Russia, Tanzania,

¹ United Nations Secretary-General, *Secretary-General's remarks at opening ceremony of UN Climate Change Conference COP25 [as delivered]*, (Dec. 02, 2019), <https://www.un.org/sg/en/content/sg/statement/2019-12-02/secretary-generals-remarks-opening-ceremony-of-un-climate-change-conference-cop25-delivered>.

² Isabelle Gerretsen, *The state of the climate in 2021*, BBC FUTURE (Jan. 10, 2021), <https://www.bbc.com/future/article/20210108-where-we-are-on-climate-change-in-five-charts>.

³ United Nations Secretary General, *Secretary General's address at Columbia University: The State of the Planet*, UNITED NATIONS (Dec. 2, 2020), <https://www.un.org/sg/en/content/sg/speeches/2020-12-02/address-columbia-university-the-state-of-the-planet>.

⁴ Postcards from a World on Fire, THE NEW YORK TIMES (2021), <https://www.nytimes.com/interactive/2021/12/13/opinion/climate-change-effects-countries.html>

⁵ Damien Cave, *The Fires Are Out, but Australia's Climate Disasters Aren't Over*, THE NEW YORK TIMES (Feb. 23, 2020), <https://www.nytimes.com/2020/02/23/world/australia/climate-change-extremes.html>.

⁶ Jamie Tarabay, *Why These Australia Fires Are Like Nothing We've Seen Before*, THE NEW YORK TIMES (Jan. 21, 2021), <https://www.nytimes.com/2020/01/21/world/australia/fires-size-climate.html>.

⁷ Cave, *supra* note 5.

⁸ Nathaniel Gronewold, *Smoke from Australia's Bushfires Killed Hundreds*, SCIENTIFIC AMERICAN (Mar. 24, 2020), <https://www.scientificamerican.com/article/smoke-from-australias-bushfires-killed-hundreds1/>.

⁹ *How are extreme events changing?*, AUSTRALIAN ACADEMY OF SCIENCE, <https://www.science.org.au/learning/general-audience/science-climate-change/5-how-are-extreme-events-changing>.

Kenya, Rwanda, Congo, Senegal, Indonesia, Malaysia, and Papua New Guinea.¹⁰ The experience with wildfires was so vast that they could not be extinguished by human firefighting. Still, humanity failed to learn its lesson and better prepare for the future.

The wildfires are heightened by climate change, altering precipitation patterns, and leading to drier conditions in forests. With global temperatures increasing, wildfires have become more common, with fire risk seasons longer and more intense. In addition, the ‘megafires’ can potentially cause transboundary harm if they burn across national borders, which is an issue, for example, in the Amazon rainforest. However, States deal with wildfires at the domestic level in various ways. At most, regional and bilateral efforts at cooperation can be found, but are still inadequate to meet the challenge.¹¹ Collaboration on wildfires is yet another area where international cooperation is desperately needed, but States again fail to find policy solutions to address the problem.

These provide only a few examples of ways in which our environmental crises are unfolding. The implications are catastrophic for both the physical environment and human security. Globally, the language used by international organizations, scientists, and news organizations has shifted as conditions have worsened. While “environmental crisis” has been in customary use for decades, we now hear about “global environmental emergency,”¹² “dying oceans,”¹³ “biological annihilation,” and “mass extinction,”¹⁴ among others.¹⁵ The Guardian no longer recommends using “climate change,” as the term fails to reflect the seriousness of the situation accurately. Instead, it encourages the use of the words “climate emergency, crisis, or breakdown.”¹⁶

The language change reflects a sense of emergency, prompting humanity to reduce our myopia and paralysis and imagine a path forward.¹⁷ Margaret Atwood once wrote, “It’s not climate change, it’s everything change.”¹⁸ As Schneider-Mayerson and Bellamy note, citing the environmental critic Ursula Heise, the current crisis requires a new kind of global thinking that resists single languages or cultures.¹⁹ Greta Thunberg said: “It’s 2019. Can we all now call it what it is: climate breakdown, climate crisis, climate emergency, ecological breakdown, ecological crisis and ecological emergency?”²⁰

¹⁰ Nicholas A. Robinson, *Forest Fires as a Common International Concern: Precedents for the Progressive Development of International Environmental Law*, 18 PACE ENVTL. L. REV. 459, 460-61 (2001).

¹¹ *Id.* at 482.

¹² This language is particularly applied to climate change, biodiversity, and oceans. See various speeches and reports by the UN Secretary General António Guterres: see e.g., on oceans, UN News, ‘*We face a global emergency’ over oceans: UN chief sounds the alarm at G7 Summit event*, UNITED NATIONS (June 9, 2018), <https://news.un.org/en/story/2018/06/1011811>; see e.g., on climate change, UN News, ‘*Act now with ambition and urgency’ to tackle the world’s ‘grave climate emergency’*, UN chief urges UAE meeting, UNITED NATIONS (June 30, 2019), <https://news.un.org/en/story/2019/06/1041582>.

¹³ See i.e., Alister Doyle, *Dying oceans rising faster than predicted, UN warns in stark report*, CLIMATE HOME NEWS (Sep. 25, 2019), <https://www.climatechangenews.com/2019/09/25/dying-oceans-rising-faster-predicted-un-warns-stark-report/>.

¹⁴ Damian Carrington, *Earth’s sixth mass extinction event under way, scientists warn*, THE GUARDIAN (July 10, 2017), <https://www.theguardian.com/environment/2017/jul/10/earths-sixth-mass-extinction-event-already-underway-scientists-warn>.

¹⁵ Madhur Anand, *Language matters when the Earth is in the midst of a climate crisis*, THE CONVERSATION (June 6, 2019), <https://theconversation.com/language-matters-when-the-earth-is-in-the-midst-of-a-climate-crisis-117796>.

¹⁶ Carrington, *supra* note 14.

¹⁷ Hua Hsu, *The Search for New Words to Make Us Care about the Climate Crisis*, THE NEW YORKER (Feb 21, 2020), <https://www.newyorker.com/culture/cultural-comment/the-search-for-new-words-to-make-us-care-about-the-climate-crisis>.

¹⁸ Margaret Atwood, *It’s not Climate Change - It’s Everything Change*, MEDIUM (July 27, 2015), <https://medium.com/matter/it-s-not-climate-change-it-s-everything-change-8fd9aa671804>.

¹⁹ Matthew Schneider-Mayerson & Brent Ryan Bellamy, *An Ecotopian Lexicon* (University of Minnesota Press, 2019).

²⁰ Greta Thunberg, (@GretaThunberg, TWITTER (May 4, 2019, 1:14 PM), <https://twitter.com/gretathunberg/status/1124723891123961856?lang=en>.

Adding to the already dire state of our environment, the world faced what would become another pandemic at the end of 2019. Covid-19 is caused by infection with a new coronavirus (called SARS-CoV-2) and quickly spread around the globe only weeks after its initial detection. In a 2016 report,²¹ the WHO estimated that premature deaths and diseases could be prevented to a significant degree through healthier environments. As highlighted by the WHO, healthy environments contribute to the 17 Sustainable Development Goals (SDGs) and environmental health interventions could make “a valuable and sustainable contribution towards reducing the global disease burden and improving the well-being of people everywhere.”²² The zoonotic origins of the Covid-19 pandemic reinforce the links between human health and environmental health, leaving no doubt as to the need to protect our environment, if not for the sake of nature itself, for the sake of human health.

This chapter broadly looks at the current state of the world by summarizing the main existential crisis points the U.N. and other international research organizations have identified. Science shows that this is a wake-up call, and it is time humanity finally listens.

A. SCIENTIFIC CONSENSUS ON THE EARTH CRISIS

At the fourth session of the U.N. Environment Assembly (UNEA), held in Nairobi in March 2019, the U.N. Environment Programme (UNEP) warned policymakers that the world is not on track to achieve the environmental dimension of the SDGs and other internationally agreed on environmental goals by 2030, or to deliver long-term sustainability by 2050.²³ Our current development model is not sustainable. Moreover, progress made in the last two decades is in danger of being reversed through worsening social inequalities and potentially irreversible declines in the natural environment that sustains us.²⁴

The 2005 Millennium Ecosystem Assessment warned that the degradation of ecosystem services could grow significantly worse during the first half of this century and is a barrier to achieving the Millennium Development Goals (MDG) – now replaced by the SDGs.²⁵ Ecosystems are being degraded or used unsustainably. These ecosystem changes are increasing the likelihood of nonlinear modifications to ecosystems, with significant consequences for human well-being, and harmful effects of degradation are disproportionately borne by the poor.²⁶ Experts then warned that “[t]he challenge of reversing the degradation of ecosystems while meeting increasing demands for their services can be partially met, (...) but these involve significant changes in policies, institutions, and practices that are not currently under way.”²⁷ Unfortunately, since the Millennium Ecosystem Assessment was published, not much has changed.

²¹ Annette Prüss-Ustün et al., *Preventing disease through healthy environments: a global assessment of the burden of disease from environmental risks*, WORLD HEALTH ORGANIZATION (May 11, 2020), https://apps.who.int/iris/bitstream/handle/10665/204585/9789241565196_eng.pdf?sequence=1&isAllowed=y.

²² Dr. Maria Neira, *Environments should improve not harm our health*, WORLD HEALTH ORGANIZATION (March 15, 2016), <https://apps.who.int/mediacentre/commentaries/environments-should-improve-our-health/en/index.html>.

²³ United Nations Environment Assembly of the United Nations Environment Programme, GEO-6 Key Messages, UNEP/EA.4/INF.18, ¶ 4 (Feb. 12, 2019) [hereinafter GEO-6 Key Messages].

²⁴ *Global Sustainable Development Report 2019: The Future is Now – Science for Achieving Sustainable Development*, UNITED NATIONS (2019), https://sustainabledevelopment.un.org/content/documents/24797GSDR_report_2019.pdf [hereinafter Global Sustainable Development Report].

²⁵ Walter V. Reid et al., *Ecosystems and Human Well-Being*, MILLENNIUM ECOSYSTEM ASSESSMENT (2005).

²⁶ *Id.* at. 1-2.

²⁷ *Id.* at. 18.

The overall condition of the global environment has continued to deteriorate, despite environmental policy efforts across countries and regions.²⁸ Unsustainable production and consumption patterns and climate change have degraded the Earth's ecosystems, endangering the ecological foundations of society and hindering policy efforts.²⁹ With the global population reaching 7.5 billion in 2018, and median projections estimating nearly 10 billion by 2050, this scenario will likely worsen.³⁰ Urgent action and strengthened international cooperation are needed to reverse those negative trends and restore the planet and human health.

GHG emissions have already committed the world to an extended period of climate change with multiple and increasing environmental and society-wide risks.³¹ In 2019 GHG emissions reached a record high, but fell in 2020 due to the Covid-19 pandemic.³² However, GHG emissions already rose in 2021, relative to the 2019 figures.³³ Despite a decade of increasing political and societal focus on climate change and the milestone Paris Agreement, global GHG emissions have not been curbed.³⁴ The emissions gap is more significant than ever.³⁵ If GHGs emissions continue to increase at the current rate, global warming is likely to reach 1.5°C between 2030 and 2052,³⁶ although some predictions are even more disastrous.³⁷ The recent scientific Special Report on the impacts of 1.5°C of global warming of the Intergovernmental Panel on Climate Change (IPCC) concluded that “[l]imiting global warming to 1.5°C would require rapid, far-reaching and unprecedented changes in all aspects of society.”³⁸ In order to limit global to this target, current Nationally Determined Contributions (NDCs) need to be significantly more ambitious, with an overachievement of the latest NDCs.³⁹

Pollution touches all parts of the planet, including food, water, and air. Approximately 19 million premature deaths are estimated to occur annually due to how we use natural resources and impact the environment to support global production and consumption.⁴⁰ Air pollution is the world's single most significant environmental risk to health. It is currently the cause of 6 to 7 million premature deaths per year, which projected to continue to have substantial adverse effects on health.⁴¹ Nine out of ten people breathe outdoor air polluted beyond acceptable World Health

²⁸ GEO-6 Key Messages, *supra* note 23, at 4.

²⁹ *Id.* at 4.

³⁰ GEO-6 Key Messages, *supra* note 23, at 6.

³¹ Global Sustainable Development Report, *supra* note 24, at ¶ 5.

³² *Emissions Gap Report 2019*, UNITED NATIONS ENVIRONMENT PROGRAMME (2021), at 4-5, <https://wedocs.unep.org/bitstream/handle/20.500.11822/36990/EGR21.pdf>.

³³ *Id.* at 5

³⁴ Robert Watson et. al, *The Truth Behind the Climate Pledges*, FEU-US (Nov. 2019), at iii, 4-5, <https://feu-us.org/wp-content/uploads/2021/07/The-Truth-Behind-the-Climate-Pledges.pdf>.

³⁵ John Christensen and Anne Olhoff, *Lessons from a Decade of emissions of Gap Assessments*, UNITED NATIONS ENVIRONMENT PROGRAMME 18 (2019), <https://wedocs.unep.org/bitstream/handle/20.500.11822/30022/EGR10.pdf?sequence=1&isAllowed=y>.

³⁶ *Global Warming of 1.5 degrees Celcius: Summary for Policymakers*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 32 (2018), <https://www.ipcc.ch/about/>.

³⁷ Paul Voosen, New climate models forecast a warming surge, 364 SCIENCE 222 (2019).

³⁸ *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C approved by governments*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2018), <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>.

³⁹ *Nationally determined contributions under the Paris Agreement: Synthesis report by the secretariat*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE ¶15, 6 (2021), https://unfccc.int/sites/default/files/resource/cma2021_08_adv_1.pdf.

⁴⁰ *Towards a Pollution-Free Planet: Background Report*, UNITED NATIONS ENVIRONMENT PROGRAMME (2017).

⁴¹ *Global Sustainable Development Report*, *supra* note 24, at ¶ 6. 2019: The Future is Now – Science for Achieving Sustainable Development., *supra* note 6, ¶ 6.

Organization (WHO) guidelines.⁴² UNEP recently developed a real-time air quality databank to provide policymakers with adequate information to reach informed and efficient decisions.⁴³

Around 1 million animal and plant species are now threatened with extinction, many within decades, more than ever before in human history.⁴⁴ The American Association for the Advancement of Science reports that human activity has ‘contributed to a thousand-fold increase in global extinctions ... compared to the presumed pre-human background rate.’⁴⁵ As a result, a significant species extinction is unfolding, compromising the Earth’s ecological integrity and capacity to meet human needs.⁴⁶ The chair of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services warned that “[t]he health of ecosystems on which humans and all other species depend is deteriorating more rapidly than ever. We are eroding the very foundations of our economies, livelihoods, food security, health, and quality of life worldwide.”⁴⁷ Humans are living through the sixth great extinction of species, which scientists have termed a ‘biological annihilation.’⁴⁸

Oceans and coasts face increased threats, leading to ocean warming and acidification, ocean pollution, rising sea levels, coral bleaching, and the increasing use of oceans, coasts, deltas, and basins for food production, transportation, settlement, recreation, resource extraction, and energy production.⁴⁹ Land degradation, desertification, and deforestation remain an increasing threat to human well-being and ecosystems, especially for rural areas that are most dependent on land productivity.⁵⁰ In addition, population growth, urbanization, water pollution, and unsustainable development induce pressure on water resources, further exacerbated by climate change, increasing storms and floods, glacial and snowpack melt as a result of global warming.⁵¹

⁴² *Ambient air pollution: A global assessment of exposure and burden of disease*, WORLD HEALTH ORGANIZATION (WHO) (2016).

⁴³ What’s in the air? World Urban Forum 2020 launches world’s largest real-time air quality databank, UNITED NATIONS ENVIRONMENT PROGRAMME (Feb. 11, 2020), <https://www.unep.org/news-and-stories/story/whats-air-world-urban-forum-2020-launches-worlds-largest-real-time-air>.

⁴⁴ Summary for policymakers of the global assessment report on biodiversity and ecosystem services, INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVICES (2019).

⁴⁵ Kenneth V. Rosenberg, et al, *Decline in North American Avifauna*, 366(6461) SCIENCE 120 (2019).

⁴⁶ *Global Environment Outlook: GEO-6: Summary for Policymakers*, GLOBAL ENVIRONMENT OUTLOOK and UNITED NATIONS ENVIRONMENT PROGRAMME 2 (2019),

https://www.ipcc.ch/site/assets/uploads/sites/2/2019/05/SR15_SPM_version_report_LR.pdf; see also IUCN, *The IUCN Red List of Threatened Species* (2020), <https://www.iucnredlist.org/>. The mass extinction could be much worse. See Gerardo Ceballos, et al., *Accelerated modern human-induced species losses: Entering the sixth mass extinction*, 1 SCIENCE ADVANCES (2015); Gerardo Ceballos, et al., *Population losses and the sixth mass extinction*, 114 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA E6089 (2017).

⁴⁷ UN Sustainable Development Goals, *UN Report: Nature’s Dangerous Decline ‘Unprecedented’; Species Extinction Rates ‘Accelerating’*, INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM AND SERVICES (May 6, 2019).

⁴⁸ Gerardo Ceballos, et al., *Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population losses and declines*, 114 PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES (2017).

⁴⁹ UNITED NATIONS, *THE FIRST GLOBAL INTEGRATED MARINE ASSESSMENT: WORLD OCEAN ASSESSMENT I 10*; 14 (Cambridge University Press. 2017). GEO-6: Summary for Policymakers, *supra* note 2, at 9; 11-12. NATIONS, *The First Global Integrated Marine Assessment: World Ocean Assessment I. 2017*; Lijing Cheng Kevin E. Trenberth, Peter Jacobs, Yongxin Zhang & John Fasullo, *Hurricane Harvey Links to Ocean Heat Content and Climate Change Adaptation*, EARTH’S FUTURE 1 (2018).

⁵⁰ Global Sustainable Development Report, *supra* note 24, at ¶ 9.; GEO-6: Summary for Policymakers, *supra* note 2, at 11.

⁵¹ GEO-6: Summary for Policymakers, *supra* note 2, at 12.

GEO-6 presents all Earth's natural systems as interrelated.⁵² Still, through transformative change, nature can be conserved, restored, and used sustainably.⁵³ To further help provide information on the state of the environment, UNEP released other significant publications in 2020 detailing the future fate of the planet.⁵⁴ Nature is degrading rapidly, and SDGs are not comprehensive enough to aid this degradation. The Global Synthesis Report on Biodiversity recommends transformative options, such as increased economic incentives to help in the restoration of nature.⁵⁵

The post-2020 global diversity framework is to be used to improve biodiversity as well, and can be best implemented through expansion of protected areas, instituting more integrated approaches to conservation, and increasing transboundary cooperation.⁵⁶ The Global Seagrass Report details how a number of urgent actions must be taken to protect seagrasses, including increasing funding for their conservation and recognizing their value within NDCs and SDGs.⁵⁷ SDGs are currently being undermined due to the current negative trends in biodiversity. The State of the World's Forest Report states that to reverse these trends, agrobusiness needs to change significantly, and large-scale forest restoration must be immediately implemented.⁵⁸ Additionally, sand and dust storms are depositing large amounts of harmful microorganisms in oceans, a phenomenon that currently needs comprehensive research, according to the Impacts of Sand and Dust Storms on Oceans report.⁵⁹ The impact of pollution in oceans was further analyzed in the report, Human Health and Ocean Pollution, which found that ocean pollution can be curtailed by monitoring through marine control programs, and promoting effective waste management.⁶⁰ This pollution has also led to the degradation of coral reefs, which could be addressed by investing in coral reef management and implementing new methods of data control technology.⁶¹

⁵² GEO-6 reports: 'Providing a decent life and well-being for nearly 10 billion people by 2050, without further compromising the ecological limits of our planet and its benefits, is one of the most serious challenges and responsibilities humanity has ever faced. People worldwide rely on the smooth functioning of Earth's natural life-support systems, in different ways and in different contexts. A healthy planet is a necessary foundation for the overall well-being and further advancement of humanity'; GEO-6, Introduction, Chapter 1 <https://www.cambridge.org/core/services/aop-cambridgecore/content/view/CE2200F7AC9FCAE270A055C036A29A65/9781108627146c1_p2-19_CBO.pdf/introduction_and_context.pdf>.

⁵³ Transformative change means "a fundamental, system-wide reorganization across technological, economic and social factors, including paradigms, goals and values." *Id.*

⁵⁴ See UN Environment, *Ten biodiversity-related publications to look out for in 2020*, Mar. 10, 2020 (2020), available at <https://www.unenvironment.org/news-and-stories/story/ten-biodiversity-related-publications-look-out-2020>.

⁵⁵ *The Global Synthesis Report on Biodiversity and Ecosystem Services*, INTERGOVERNMENTAL SCIENCE-POLICY PLATFORM ON BIODIVERSITY AND ECOSYSTEM SERVICES (2019), at XIV-XX, https://zenodo.org/record/5657041/files/202111_2020%20IPBES%20GLOBAL%20REPORT_FULL_DIGITAL_NOV%202021.pdf?download=1.

⁵⁶ *Protect Planet Report 2020*, UNITED NATIONS ENVIRONMENT PROGRAMME (2020), <https://livereport.protectedplanet.net/chapter-11>.

⁵⁷ *Out of the Blue*, UNITED NATIONS ENVIRONMENT PROGRAMME 12-13 (2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/32636/seagrass.pdf?sequence=1&isAllowed=y>.

⁵⁸ *The State of the World's Forests 2020*, FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS xx-xxi (2020), <https://www.fao.org/3/ca8642en/ca8642en.pdf>.

⁵⁹ *Impacts of Sand and Dust Storms on Oceans: A Scientific Environmental assessment for Policy Makers*, UNITED NATIONS ENVIRONMENT PROGRAMME 27-8 (2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/34300/SDO.pdf?sequence=1&isAllowed=y>.

⁶⁰ Philip J. Landrigan et. al, *Human Health and Ocean Pollution*, ANNALS OF GLOBAL HEALTH 35-40 (2020), <https://www.annalsofglobalhealth.org/articles/10.5334/aogh.2831/>.

⁶¹ *Global Coral Reef Report: Conclusions*, AUSTRALIAN GOVERNMENT 4-5 (2020), <https://gcrmn.net/wp-content/uploads/2021/10/Conclusions.pdf>.

B. ANTHROPOCENE & TRANSCENDING PLANETARY BOUNDARIES

The combined environmental trends provide strong evidence that humankind is now rivaling nature in its impact on the functioning of the Earth system.⁶² The growing influence of human activity on Earth and the atmosphere emphasizes humankind's role in geology and ecology.⁶³ Humans have so irretrievably altered the Earth in the past centuries that the Anthropocene, a new geological epoch, has begun.⁶⁴ Anthropocene suggests that the Earth is now moving out of its current geological epoch, the Holocene, into a stage where human actions have global and local widespread ecological, geologic and other effects.⁶⁵ The Holocene represents an epoch in which the environment has been unusually stable.⁶⁶ Changes occurred naturally and according to the Earth's regulatory capacity. This shift from a period of stability has occurred primarily because of human activity since humankind has become a global geological force in its own right.⁶⁷

To meet the challenge of maintaining the Holocene state, some scholars at the Stockholm Resilience Centre have proposed a framework of planetary boundaries that defines borders in which human activities can take place without the risk of transgressing the Earth system's ecological thresholds.⁶⁸ The team, led by Rockström, identified the following nine Earth system biophysical processes that determine the planet's ability to auto-regulate and therefore maintain its Holocene-like conditions: climate change, stratospheric ozone depletion, land system change, global freshwater use, rate of biodiversity loss,⁶⁹ ocean acidification, interference with phosphorus and nitrogen cycles,⁷⁰ atmospheric aerosol loading and chemical pollution.⁷¹ These are interdependent, meaning that exceeding one's boundaries leads to a change of transgression in another. Four of these boundaries have already entered the uncertainty zone: climate change, land system change, biosphere integrity, and biogeochemical flows.⁷²

A proposed approach for the SDGs was suggested to maintain a stable functioning of the Earth system and thriving societies around the world. This approach introduces the implementation of a 'planetary boundaries' framework alongside the achievement of targets aimed at more immediate human needs, such as clean, affordable, and accessible energy and an adequate food supply.⁷³ While the framework is criticized for being incomplete, it provides an interesting perspective on where we are right now.⁷⁴ With successive warnings, scientists have assessed that we have transcended several boundaries. Nevertheless, what does that mean exactly? What can

⁶² Will Steffen, et al., *The Anthropocene: Conceptual and Historical Perspectives*, 369 *PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY* 842; 843 (2011); Paul J. Crutzen, *Geology of mankind: The Anthropocene*, 415 *NATURE* 23 (2002).

⁶³ Paul J. Crutzen & Eugene F. Stoermer, *The "Anthropocene"*, 41 *GLOBAL CHANGE NEWSLETTER* 17 (2000).

⁶⁴ Simon L. Lewis & Mark A. Maslin, *Defining the Anthropocene*, 519 *NATURE* 171 (2015); Jan Zalasiewicz, et al., *The Working Group on the Anthropocene: Summary of evidence and interim recommendations*, 19 *ANTHROPOCENE* 55 (2017).

⁶⁵ SIMON L. LEWIS & MARK A. MASLIN, *THE HUMAN PLANET—HOW WE CREATED THE ANTHROPOCENE* (Yale University Press, 2018).

⁶⁶ Johan Rockström, et al., *A safe operating space for humanity*, 461 *NATURE* 472 (2009).

⁶⁷ Steffen, et al., *supra* note 62, at 843.

⁶⁸ Rockström, et al., *supra* note 66 (The nine "planetary boundaries" represent thresholds in major planetary processes used to help define a "safe operating space for humanity"); See Stockholm Resilience Centre, *Planetary boundaries research*, STOCKHOLM RESILIENCE (2020), <https://www.stockholmresilience.org/research/planetary-boundaries/the-nine-planetary-boundaries.html>.

⁶⁹ Later revised to include genetic and functional diversity and renamed biosphere integrity.

⁷⁰ Later renamed biogeochemical flows.

⁷¹ Rockström, et al., *supra* note 66, at 473.

⁷² Will Steffen, et al., *Planetary boundaries: Guiding human development on a changing planet*, 347 *SCIENCE* 1259855-1 (2015).

⁷³ *Id.*

⁷⁴ Kirsty L. Nash, et al., *Planetary boundaries for a blue planet*, *NAT. ECOL. & EVOL.* 1625 (2017); Steven W. Running, *A Measurable Planetary Boundary for the Biosphere*, 21 *SCIENCE* 1458 (2012).

still be done? Bierman places the concept of planetary boundaries in the framework of earth system governance, exploring the policy and governance responses that may follow from the approach.⁷⁵ However, there is still much to be done from an international legal perspective.

The 2020 pandemic provides a clear example of what happens when we transcend planetary boundaries. The IPCC has, for long, warned about the adverse effects of climate change on human health.⁷⁶ Weather patterns associated with climate change are shifting the geographic range, seasonality, and intensity of transmission of selected climate-sensitive infectious diseases. Furthermore, climate-change-induced species redistribution could be far-reaching and extensive, with global consequences for food security and human health. In particular, specific pest and disease species will move into areas that become newly climatically suitable.

C. THE SCIENTIFIC ANALYSIS CALLS FOR LEGAL REMEDIES

On the 50th anniversary of Earth Day, the New York Times did a roundup on how the world is better and worse.⁷⁷ On the one hand, the waterways and air in the United States are cleaner. You no longer see smog over New York City as was constant in the 1970s. Oil spills are rarer, even though they can be catastrophic and much more extensive in scale when they happen.⁷⁸ Renewable energy has seen an incredible growth over the last few years. Pesticides like DDT are prohibited, and endangered species like the bald eagle are soaring again. Nature preserves are found worldwide, with protected areas as one of the main strategies to promote environmental conservation. The ozone hole is healing.

On the other hand, oceans are warming and becoming more acidic. Several countries like China and India still face significant pollution challenges. Humanity still heavily relies on oil for energy consumption, and clean energy is not yet growing fast enough. As dangerous chemicals are regulated, new ones emerge. We are still facing mass extinction, and fires are destroying our tropical forests. And, finally, there is climate change, an unprecedented challenge for which the world still has no solution.

The scientific data makes it clear that the state of the world is deteriorating. Scientists have already reached a consensus on the Earth crisis. In a few instances, the world has reached a tipping point. Governments have responded by enacting environmental laws and policies, always attempting to catch up with the new environmental problem. The same occurs at the international level, in which the international community negotiates new treaties to address global issues. From a policy perspective, UNEP was created to provide a comprehensive framework for environmental governance. Still, the world is in trouble. The current response is insufficient.

In an increasingly interdependent world, the climate and biodiversity crises are, more than ever, inextricably tied with human health and the transmission of infectious diseases.⁷⁹ The 2020 Covid-19 pandemic has shown us that the exploitation of wild species and deforestation

⁷⁵ Frank Biermann, Planetary boundaries and Earth system governance: exploring the links, 81 *ECOL. ECON.* 4 (2012).

⁷⁶ *The 1.5 Health Report: Synthesis on Health & Climate Science*, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2018); *Human health: impacts, adaptation, and co-benefits* 709-754, THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (2014).

⁷⁷ Brad Plumer & John Schwartz, *50 Years of Earth Day: What's Better Today, and What's Worse*, NEW YORK TIMES (Apr. 21, 2020), <https://www.nytimes.com/interactive/2020/climate/earth-day-history.html>.

⁷⁸ See *i.e.*, the recent oil spill in Peru. Mitra Taj, *Oil Spill Triggered by Tsunami Devastates Coast of Peru*, NEW YORK TIMES (Jan. 24, 2022), <https://www.nytimes.com/2022/01/21/world/americas/peru-oil-spill-tonga-tsunami.html?action=click&module=RelatedLinks&pgtype=Article>.

⁷⁹ Maria Antonia Tigre, Natalia Urzola & Victoria Lichet, Reframing Global Biodiversity Protection after COVID-19: Is International Environmental Law up to the task?, 23 *VERMONT ENV'T. L. J.* 123 (2022).

increasingly modifies the interface between people and wildlife. This leads to a spillover of diseases from wildlife to people.⁸⁰ The pandemic has brought all nations to understand that the entire planetary system is connected. By not protecting nature, humanity has unleashed not only an Earth crisis but, more specifically, a health crisis. As a result, all nations and their economies have been brought to their knees, with consequences still hard to grasp. Adding to the devastating health consequences of the pandemic, its environmental consequences are also still being grappled with.⁸¹

Although the international community has already responded to the environmental crisis through hundreds of multilateral environmental agreements (MEAs), these have obviously been insufficient. Despite decades of global advocacy, the world is no closer to a workable solution today than in 1972. The scientific consensus exposes the need for a new legal framework. As Speth has concluded:

The current system of international efforts to help the environment simply isn't working. The design makes sure it won't work, and the statistics keep getting worse. We need a new design... For twenty years thoughtful people and intelligent leaders should have known that we needed to get busy. Precious time has been wasted. And now a new generation has been given a climate problem that is deeper and more difficult.⁸²

However, this is not the time for despair. A far more optimistic future is still attainable, but only by drastically changing development policies, incentives, and actions.⁸³ As the world tries to recover from the Covid-19 pandemic, it is essential to pull back human behavior and reinforce our international legal framework by providing new tools to address environmental challenges. These should focus on nature-based solutions and rights-based approaches to environmental protection.

The Anthropocene calls for transformative law to respond to the socio-ecological crisis and promote human stewardship of natural systems.⁸⁴ Achieving internationally agreed environmental goals is crucial yet insufficient to achieve the SDGs. While adopting Agenda 21, the Rio Declaration, and the Johannesburg Declaration have been necessary steps, these were insufficient. They have not yet integrated environmental protection with social and economic goals, thus reaching the three pillars of sustainable development.⁸⁵ A more holistic answer is required. Urgent cross-sectoral policy actions are needed to address the challenges of sustainable development.⁸⁶ Transformative change is necessary to enable and combine long-term strategic and integrated policymaking while building bottom-up social, cultural, institutional, and technological innovation.⁸⁷ Adding to the progressive development of environmental principles, the use of common legal tools, such as environmental impact assessment (EIA), or sustaining ecological

⁸⁰ Raina K. Plowright et al., *Pathways to Zoonotic Spillover*, 15 NATURE REVIEWS MICROBIOLOGY 502 (2017); Christina L Faust et al., *Pathogen Spillover During Land Conversion*, 21 ECOLOGY LETTERS 471 (2018).

⁸¹ Maria Antonia Tigre et. al., *Environmental Protection and Human Rights in the Pandemic*, 1(1-2-3) LEGAL POLICY & PANDEMICS: THE JOURNAL OF THE GLOBAL PANDEMIC NETWORK 317 (2021).

⁸² JAMES GUSTAVE SPETH, *RED SKY AT MORNING: AMERICA AND THE CRISIS OF THE GLOBAL ENVIRONMENT* xii, 5-6 (Yale University Press. 2005).

⁸³ Global Sustainable Development Report 2019, *supra* note 24, at 29.

⁸⁴ Nicholas A. Robinson, *Keynote: Sustaining Society in the Anthropocene Epoch*, 41 DENV. J. INT'L L. & POL'Y 467 (2013).

⁸⁵ Nicholas A. Robinson, *Ecological Civilization and Legal Norms for Resilient Environmental Governance*, 4 CHINESE J. OF ENV. L 131, 138 (2020).

⁸⁶ Global Sustainable Development Report, *supra* note 24, at ¶ 14.

⁸⁷ *Id.* at ¶ 15.

systems in protected areas, ecological, economic, and social benefits will flow.⁸⁸ Because of the Earth's crises, we need to acknowledge the human rights to the environment, the rights of nature, and the duties towards the environment. Robust international cooperation is one of the key features of effective environmental policies for sustainable development.⁸⁹ This thesis shows us how to get there.

⁸⁸ Robinson, *supra* note 85, at 14.

⁸⁹ Global Sustainable Development Report, *supra* note 24, at ¶ 16 .

II. EXPLORING THE BEDROCK FOR EARTH JURISPRUDENCE¹

Given the Earth Emergency Crisis we face, it becomes apparent that our normal attitude towards nature needs to change. This chapter calls for a reassessment of our core beliefs on how we relate to the environment through a deep dive into the philosophical foundations of environmental protection. With this purpose, it shows how Earth-centered discourses have existed in human societies and civilizations for millennia. Different religious and philosophical underpinnings all share a view of humanity as an integral part of an organic whole, revering all living things. While recent developments in jurisprudence may appear novel, they are somewhat latent and emergent. Theories of land ethics, rights of nature, Earth-centered environmental ethics, wild law, and Earth jurisprudence all build on these philosophical crescendos and have proved influential at the international level. It is time to find new approaches to the law that rely on the value of nature. This chapter tells us the why and the how.

The chapter provides a survey of the jurisprudential background of environmental law and policy and asks what we can draw from religions,² Indigenous traditions, philosophy, natural law, ecological civilization, and emerging legal theories such as Earth Jurisprudence, ecological law, and harmony with nature. Some legal scholars might be skeptical of this research.³ However, it is essential in understanding the general agreement on legal concepts through philosophical foundations. This backdrop surpasses religions, geographies, and moralities. The purpose of this research is not to provide a comprehensive overview of all ideological approaches⁴ but to draw precise conclusions on the religious and philosophical foundations of environmental protection through specific examples of a jurisprudential crescendo. It draws on the philosophical foundations of human thoughts, which have, for centuries, afforded a moral compass for human behavior and the improvement of societies. Therefore, I ask: if citizens' commissions were convened to rethink our law and governance systems for the 21st century, where might the members begin? This chapter provides the answer to this question by showing that the foundation for shared legal principles already exists. This foundation can foster progressive development of international environmental law and a transition to a nature-guided future.

Since it was first reported to the World Health Organization (WHO), Covid-19 has altered lives and laws worldwide. Humanity, their social and environmental systems, have significantly

¹ This chapter will be published in the Rutgers Journal of Law and Religion (2022).

² The definition of 'religion' is highly contested. A traditional definition of 'religion' is 'a system of beliefs and practices that are relative to superhuman beings' JONATHAN Z. SMITH & WILLIAM SCOTT GREEN (EDS.), DEFINITION OF RELIGION (Harper Collins, 1995). This definition rejects the notion of religion as a special kind of experience or worldview, thereby excluding much in human experience that could be illuminated with the lenses of religious studies.

³ See scholars in positivist theory i.e., Maarten Boudry & Jerry Coyne, *Disbelief in belief: On the cognitive status of supernatural beliefs*, 29 PHILOSOPHICAL PSYCHOLOGY 601 (2016). HERMAN PHILIPSE, GOD IN THE AGE OF SCIENCE?: A CRITIQUE OF RELIGIOUS REASON (Oxford University Press 2012). Realpolitik policymakers might also look at this theory with skepticism, and outright reject any attempt at a new framework agreement based on these premises. See i.e., Susan Biniaz, *10 Questions to Ask About the Proposed "Global Pact for the Environment"* at <http://columbiaclimatelaw.com/files/2017/08/Biniaz-2017-08-Global-Pact-for-the-Environment.pdf> (for more on the immediate feedback to the draft Global Pact for the Environment, see MARIA ANTONIA TIGRE, GAPS IN INTERNATIONAL ENVIRONMENTAL LAW: TOWARD A GLOBAL PACT FOR THE ENVIRONMENT (Environmental Law Institute 2020).

⁴ For comprehensive overviews, see, i.e., the work of Mary Evelyn Tucker and John Grim.

shifted in 2020 because we failed to care for nature.⁵ As a zoonotic disease,⁶ ecological concerns are deeply interwoven with the Covid-19 pandemic.⁷ The pandemic has irrevocably taught us how human health and nature are interconnected. The coronavirus brings us to reconsider a new reality: it invites a holistic concept of peace that embraces present and future generations of humans and all other living beings.⁸ This reinvention needs to be grounded in moral underpinnings that perceive humans as part of nature. In this sense, what can we learn from our philosophical and religious roots about our relationship with the environment? How can law reflect this philosophical bedrock?

Amid the devastation caused by Covid-19, there has been an increasing awareness of the importance of a healthy environment in combating disease and preventing future pandemic outbreaks.⁹ The pandemic provides the opportunity to reflect on the nature-society relationship and analyze how constant pressure on the planet's limited resources has led to a planetary crisis (referred here as the Earth Emergency Crisis),¹⁰ facilitating the spread of new viruses once controlled by natural barriers now weaker due to nature's destruction.¹¹ The environment-related adverse consequences derived from the current crisis shone a light on a long-debated dichotomy. Should we continue with the same practices where nature is primarily a commodity? Or should we transition towards a new reality, where established concepts are further developed and strengthened to expand protection of natural resources?

These questions necessarily rely on embedding the right to a healthy environment as a matter of law.¹² The global environmental crises – now including the coronavirus pandemic – represent inescapable moral and ethical issues.¹³ As we consider how states can recover from the devastating effects caused by Covid-19, we can draw essential lessons from centuries of a

⁵ The concept of nature is abstract and has shifted throughout its history. Yet the ambiguity of the semantic diversity is at the core of policy debates and constitutes an obstacle to the global conservation of 'nature;' once definitions are clearly stated, these can be complimentary and enlighten future policies. Frédéric Ducarme & Denis Couvet, *What does 'nature' mean?*, 6 PALGRAVE COMMUN 1 (2020). Nature often refers to what is opposed to humans when used in public policies, conservation science, or environmental ethics. For the purposes of this thesis, nature refers to the natural environment that has not been significantly altered by humans or persists despite human intervention.

⁶ Environment is defined as the "circumstances, objects, or conditions by which one is surrounded" and "the complex of physical, chemical, and biotic factors (such as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival." Other definitions include "the natural world." MERRIAM-WEBSTER DICTIONARY, *Environment*, <https://www.merriam-webster.com/dictionary/environment>.

⁷ Thijs Etty, et al., *Indigenous Rights Amidst Global Turmoil*, 9(3) TRANS. ENV. L. 385 (2020).

⁸ Nicholas A. Robinson, *Global Health as a Foundation for World Peace: Preventing the "Next" Pandemic* (Apr. 15, 2020), <https://chairpeace.hypotheses.org/1365>.

⁹ Sonia Altizer, et al., *Climate change and infectious diseases: from evidence to a predictive framework*, 341 SCIENCE 514 (2013); Patricia L Farnese, *The prevention imperative: International health and environmental governance responses to emerging zoonotic diseases*, 3(2) TRANS. ENV. L. 285 (2014).

¹⁰ This article uses Earth Emergency Crisis as a term encompassing our multiple crises in biodiversity, pollution, climate, health, among others. Madhur Anand, *Language matters when the Earth is in the midst of a climate crisis*, THE CONVERSATION, Jun. 6, 2019 (2019), <https://theconversation.com/language-matters-when-the-earth-is-in-the-midst-of-a-climate-crisis-117796>; Damian Carrington, *Why the Guardian is changing the language it uses about the environment*, May 17, 2019, THE GUARDIAN (2019), available at <https://www.theguardian.com/environment/2019/may/17/why-the-guardian-is-changing-the-language-it-uses-about-the-environment>; MATTHEW SCHNEIDER-MAYERSON & BRENT RYAN BELLAMY, AN ECOTOPIAN LEXICON (University of Minnesota Press 2019).

¹¹ Valentina Durán Medina, et al., *Reflexiones sobre el derecho ambiental en tiempos de pandemia*, 13 REVISTA DE DERECHO AMBIENTAL 1 (2020).

¹² Esperanza Martínez & Alberto Acosta, *The Rights of Nature as a gateway to another possible world*, 8(4) REVISTA DIREITO E PRÁXIS 2927 (2017); Lidia Cano Pecharroman, *Rights of nature: Rivers that can stand in court*, 7(1) RESOURCES 23 (2018).

¹³ HAROLD G. COWARD & THOMAS HURKA, *ETHICS AND CLIMATE CHANGE: THE GREENHOUSE EFFECT* (Wilfred Laurier Press 1993); Donald A Brown, *White paper on the ethical dimensions of climate change*, WIDENER LAW SCHOOL LEGAL STUDIES RESEARCH PAPER 13-58 (2013).

jurisprudential crescendo of religious and philosophical thought. The debate surrounding a green recovery is the perfect time to advance existing environmental goals, both at an international and national level.¹⁴ The 2019 U.N. General Assembly (UNGA) Resolution No. A/RES/73/333¹⁵ set forth substantive and procedural recommendations for follow-up work for the progressive development of international environmental law and specifically called for adopting a political declaration to strengthen its implementation. The declaration shall be adopted in the context of the commemoration of the landmark 50th anniversary of the U.N. Conference on the Human Environment in 2022. The 50th anniversary of the Stockholm Declaration is the perfect opportunity to no longer put off environmental action. Yet while assessing our steps forward, it is essential to understand that environmental policy transcends the socio-political and economic processes and includes development, equity, sustainability, uncertainties, and risk. For example, the “One Health” approach provides a pathway to environmental stewardship through a multifaceted and multidisciplinary approach.¹⁶ The philosophical underpinnings noted in this chapter give us the moral reasoning to understand why we should care about environmental protection and how we should do it.

Without considering ethical questions, it is challenging to understand why our current actions in environmental degradation represent a problem.¹⁷ Western theories of law are predominantly anthropocentric. However, what is the influence of nature in legal theory? Ethics is at the center of environmental law and policy as it accounts for our moral responsibility towards our environment, ourselves, and future generations. Frank and transparent discussions of our current Earth Emergency Crisis’s ethical dimensions are essential. As this chapter shows, an in-depth analysis of these roots illustrates how virtually all civilizations have traditionally displayed a grave moral obligation to care for the Earth. They provide a basis for understanding that we have a right to the environment¹⁸ and, in some cases, that nature itself also has rights. Grim & Tucker further note:

The aim of the study of religious ecology is to retrieve, reexamine, and reconstruct these human-Earth relations that are present in all the world religions. This relationality with nature, both symbolically and practically, is one of the elements religions have in common as cosmological and ecological systems. Religions thus hold a promise of extending once again care and compassion to the planetary community of life.¹⁹

¹⁴ Medina, et al., *supra* note 11.

¹⁵ UNGA, Resolution No. A/RES/73/333 (adopted Aug. 30, 2019).

¹⁶ The World Health Organization, the UN Food & Agricultural Organization, and the World Organization for Animal Health issued guidelines similar to the Berlin Principles in 2019. See “A Tripartite Guide to Addressing Zoonotic Diseases in Countries.” <https://extranet.who.int/sph/docs/file/3524>. Robinson notes that “This guide re-enforces the consensus that all nations had attained in 2015, in the 15th UN Sustainable Development Goal: ‘Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests combat desertification, and halt and reverses land degradation and halt biodiversity loss.’ Until SGD 15 is attained, the world of humans will be at heightened risk from zoonotic diseases.” Robinson, *supra* note 8.

¹⁷ Stephen M. Gardiner, A perfect moral storm: climate change, intergenerational ethics and the problem of moral corruption, 15 ENVTL. VALUES 397; 398 (2006).

¹⁸ There are many adjectives used to qualify the type of environment protected. See JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2015). The U.N. Special Rapporteur on human rights and the environment investigates human rights obligations related to a “safe, clean, healthy and sustainable environment.” OHCHR, *About human rights and the environment*, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AboutHRandEnvironment.aspx>. For a geographic-specific discussion on the adjectives used to qualify the environment, see Maria Antonia Tigre, *Implementing Constitutional Environmental Rights in the Amazon Rainforest*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES (Erin Daly & James R. May eds., 2018).

¹⁹ John Grim & Mary Evelyn Tucker, *Ecology and Religion* 42 (Island Press 2014).

There are many advantages to inviting this ethical discussion. Philosophical debates attempt to provide answers that science still cannot postulate. For example, do we have a moral obligation to preserve the diversity of life forms on Earth? Do our unborn children have the right to hold us accountable for our failings in protecting the environment?²⁰ Can humanity be responsible for spreading disease due to increased deforestation and biodiversity destruction? Should environmental degradation be considered an international crime?²¹ Despite variations in personal morality, there are ‘trans-cultural overlapping values’ and principles that might be understood to constitute a universal – rather than culturally or religiously specific – ethic.²² Ethical considerations often help leaders seek common ground by identifying priorities and, more significantly, the reason why discussions can transcend parallel debates that fail to take into account core issues.²³ Additionally, vulnerable groups often lack a voice in significant policy negotiations and could arguably advance ethical arguments to pursue their often overlooked agenda.

To positively respond to the current state of the world in its environmental, social, and economic distress, we shall appreciate the Earth as the center of law and governance. Earth-centered philosophy relies on an ‘old,’ traditional thinking of human societies and nature. Nevertheless, it provides the necessary backdrop into new Earth-oriented concepts and rules of law that proactively respond to current and future crises. Only by delivering broad-ranging answers can we better prepare for imminent challenges. What are the fundamental principles of environmental ethics that govern the Earth? What can we learn from them to develop progressive new legislation? The jurisprudential reasonings that provide a moral standing on environmental protection are essential to comprehend the ‘why’ of international environmental law’s progressive development. For example, these different metaphysical approaches have overlapping appreciations of the right to the environment. More specifically, there is a deep care for water as a sacred symbol or ceremonial source, exemplified by how different religions celebrate water as integral to life.

This chapter is divided as follows. Section A underscores scholars’ significant expansion of religious texts’ theoretical contributions and traditions to the environment. While religions have had a role in aggravating the environmental crisis, a recent movement in their ‘greening’ has helped understand a common foundation that applies to all faiths. The section begins by acknowledging the role of religions in promoting environmental disruption. Before exploring how religions have guided humankind into ecological protection, it is essential to understand its negative influence. The promotion of environmentally destructive behavior by religions is vital to understand its then shift into the advancement of ‘greening’ theologies, contributing to spreading deep care for the Earth by reimagining traditional teachings. Through examples from a series of religious traditions, I draw on existing scholarship on religious ecology to illustrate the role of religion in environmental protection. The greening of religious thoughts is exemplified by using sacred water as a profound symbol of faith. Finally, I draw on the developments from early American

²⁰ Michael B. McElroy, Perspectives on Environmental Change: A Basis for Action, 130(4) DAEDALUS 31 (2001).

²¹ Philippe Sands, et al., *Defining Ecocide: An interview with Philippe Sands*, VOELKERRECHTSBLOG (2021), <https://voelkerrechtsblog.org/defining-ecocide/>.

²² Paula J. Posas, *Roles of religion and ethics in addressing climate change*, ETHICS IN SCIENCE AND ENVIRONMENTAL POLITICS 31 (2007). See UNESCO, UNIVERSAL ETHICS PROJECT (1999).

²³ *Id.* See the timeline of pertinent milestones to international climate change ethics. For an excellent early discussion of climate change ethics see Coward & Hurka, Ethics and climate change: the greenhouse effect. 1993. For a primer on climate change ethics that chronicles relevant historical context, see E. Wesley & F. Peterson, *The ethics of burden-sharing in the global greenhouse*, 11 J. AGRIC. & ENVTL. ETHICS 167 (1999); Stephen M Gardiner, *Ethics and Global Climate Change*, 114 ETHICS 555 (2004).

conservationists, who advanced the protection of nature from religious beliefs, leading to emerging legal theories. The section shows how religions have shaped views of nature by transforming interactions with landscapes and the life we can find there through religious cosmologies. These same teachings can propel us to a new era in environmental protection – one that is Earth-centric.

Section B looks explicitly at Indigenous beliefs, which reinforce the principle of ‘harmony with nature’ and has inspired innovative legal theories in environmental protection. The Indigenous cosmologies have, like most religions, a special relationship with water as a sacred way for spirituality. A recent attempt at restoring the traditional knowledge of Indigenous peoples and urban communities has led to the international recognition of their rights. The section identifies the foundations of Indigenous environmental cosmologies and how it has affected the environment in practice through the special protection of water. The section then shows how these cosmologies have furthered environmental protection through the advancement of Indigenous rights at the international level and the particular protection of their human rights in international courts and tribunals.

Section C discusses the ‘ecological civilization’ concept recently developed in China, rooted in traditional religious and philosophical thinking. The idea of ecological civilization practically shows how a country can build on philosophical thought to develop innovative legal protection of nature. Given its quick expansion throughout the Chinese legal system, the government is currently pushing for its adoption internationally.

The philosophical foundations illustrated here indicate how the anthropocentric discourse of nature as a service provider is now shifting to an Earth-centered dialogue of nature as a free and autonomous agent that is independent of humans. The reinterpretation of these traditional theories provides an innovative exchange that contributes to a different framing of human-Earth relationships in law and policy debate. Based on this jurisprudential crescendo, Section D addresses new emerging legal theories based on an ecosystem’s approach and an Earth-centered perspective. It invites a reinvention of international environmental law based on norms of ecological civilization and harmony with nature. The section begins with natural law as the underlying basis for the development of these theories. It then focuses on Earth Jurisprudence and ecological law as emerging legal theories that provide possible answers to the challenge of transforming these moral roots into progressive environmental law. Based on an ethical foundation with religious underpinnings, Earth Jurisprudence promotes a vision that reconfigures our legal system and governance structure to support the integrity of the Earth community. Ecological law favors ecocentrism and emphasizes alternative concepts such as eco-constitutionalism and the rights of nature. Finally, it addresses the U.N. Harmony with Nature (HwN) Programme, grounded in Indigenous cosmology.

Section E concludes that we now have the philosophical foundation to adopt an Earth-centered new agreement that provides Earth justice and relies on the lessons from the past decades to look into a green future. As diplomats gather to negotiate a new political declaration on environmental protection, this contribution provides a unique perspective: one that investigates how, despite all of our differences, we share deep care for our natural environment in ways that should finally be reflected in international environmental law.

A. RELIGIOUS FOUNDATIONS OF EARTH CONSERVATION

Over the past centuries, humanity has irreversibly changed the global environment without concern for the consequences to present and future generations. As we now grapple with the magnitude of this destruction, religions can help answer moral principles’ fundamental challenges.

As “key shapers of people’s worldviews and formulators of their most cherished values,” religions have traditionally acted as catalysts for coping with change.²⁴ Like its contribution to human rights development, religions can address the Earth Emergency Crisis by articulating and transmitting rituals and ethics based on virtues, values, duties, customs, compassion, or sacred law. Tucker & Grim, two of the most critical scholars in religious ecology, cite religions’ moral authority and institutional power as the attributes most likely to affect changes in attitudes, practices, and public policies by providing humankind with the most potent source of ethical guidance.²⁵

As we re-envision the role of international environmental law in responding to current global challenges, this article draws on the role of religions and spiritual traditions and asks: How can they offer moral and ethical values for reflecting environmental concerns? Additionally, why is this perspective relevant to the progressive development of the law? Spiritual teachings can help answer some of the most challenging questions related to the environmental crisis. These include how humans perceive nature, why the problem has reached its tipping point, and how to shape contemporary relations.²⁶ Theoretically, how has the interpretation and use of religious texts and traditions contributed to human attitudes regarding the environment? Furthermore, how do humans ethically value nature and create moral grounds for protecting the Earth for future generations?²⁷

In his 2015 encyclical on climate change, Pope Francis calls into question some of our ethical obligations using the right to water as an example. He posits that the human right value of water necessarily supersedes other values, such as the need for economic development.

In any discussion about a proposed venture, a number of questions need to be asked in order to discern whether or not it will contribute to genuine integral development. What will it accomplish? Why? Where? When? How? For whom? What are the risks? What are the costs? Who will pay those costs and how? In this discernment, some questions must have higher priority. For example, we know that water is a scarce and indispensable resource and a fundamental right which conditions the exercise of other human rights. This indisputable fact overrides any other assessment of environmental impact on a region.²⁸

Pope Francis’s interrogations bring a moral perspective to the previously unquestioned right to development, showing that we can no longer act without thinking about the consequences to the environment. His orientation proposes a change of perspective from previous teachings, one that Catholicism shares with several religious traditions. In the past, religions articulated their philosophies to further the disregard for nature. Understanding the harmful impact religions have had is an essential starting point of this examination. Subsection 1 begins by briefly acknowledging religion’s role in furthering the environmental crises we currently face. Through examples from religions of Abrahamic tradition,²⁹ the section draws on outstanding scholarship that relied on a traditional interpretation of the human-nature relationship and provocatively called out the promotion of anthropocentric attitudes and environmentally destructive behaviors.

²⁴ Mary Evelyn Tucker & John A. Grim, *Introduction: The Emerging Alliance of World Religions and Ecology*, 130(4) *DAEDALUS* 1; 13 (2001).

²⁵ *Id.*

²⁶ Mary Evelyn Tucker, *Religion and Ecology: Survey of the Field*, in *THE OXFORD HANDBOOK OF RELIGION AND ECOLOGY* 399 (Roger S. Gottlieb ed. 2006).

²⁷ *Id.*, at 406.

²⁸ Pope Francis, Encyclical Letter *Laudato Si'* of the Holy Father Francis on Care for Our Common Home ¶185 (2015).

²⁹ Abrahamic religions share a descent from Abraham and basic theological commitments. These designate Judaism, Christianity, and Islam. While several other religious traditions have also advanced the human-nature relationship, this analysis is limited to these religious traditions.

A recent ‘greening’ of religions has contributed to spreading more in-depth care for the Earth. Pope Francis’s teachings illustrate a profound concern related to the costs involved in each transaction, consolidating a progression of thought from previous decades. These transcend the economic aspects, encompassing social and environmental considerations for present and future generations. Pope Francis thus calls for a perspective based on the right to a healthy environment, following a movement that has spread worldwide through the adoption of environmental constitutionalism. Subsection 2 provides examples across religious traditions that refer to the care for nature and use religions as a moral compass for the human-nature relationship. Through a survey and comparative review of religions, it is clear that there is shared support for the right to the environment.

This survey illustrates religion’s role in environmental protection. It neither comprehensively engages with all religious traditions nor exhaustively analyzes the ones encompassed here. Multiple scholars have already extensively researched the relationship between religion and ecology, ensuring a vast bibliography on the topic.³⁰ A great deal could be said, for example, about Judaism, which links nature and the moral conduct of humans,³¹ or about Evangelicalism, which recently called for action on climate change.³² This selective analysis is narrowly focused on the hypothesis that most religions have congruent feelings about Earth’s care. In particular, the evolution of Catholicism is exemplified through the lens of Pope Francis and fundamental thinkers for religious ecology like Thomas Berry.

The section reinforces the argument made by Grim & Tucker on the recognition that religions have shaped views of nature for millennia while being simultaneously transformed by their interactions with landscapes and the life therein through religious cosmologies.³³ Religion grounds humans in nature’s rhythms and the Earth’s abundance.³⁴ Based on a call to protect God’s creation, religions’ moral authority and institutional power may alter attitudes, practices, and public policies through a ‘religious ecology.’³⁵ There is an awareness of the interdependence of life in religious ecology’s divine reality, as the natural world provides a source of teaching, guidance, creative inspiration, revelation, or power. Most spiritual traditions have developed attitudes of respect and reverence. They care for the natural world, thus providing a cross-cutting foundation that prescribes principles for the human relationship with a Supreme Power, other

³⁰ See i.e. *The Forum on Religion and Ecology at Yale* (2020), <http://fore.yale.edu/publications/>; Emerging Earth Community, Forum on Religion and Ecology at Yale, <http://emergingearthcommunity.org/forum-on-religion-and-ecology>; GRIM & TUCKER, *supra* note 19; WILLIS J. JENKINS, ET AL., *ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY* (Routledge 2017). See also the peer-reviewed journals, *Worldviews: Global Religions, Culture, and Ecology* and *Journal for the Study of Religion, Nature, and Culture*.

³¹ For an annotated bibliography, see Mark Jacobs, *Judaism and Ecology Bibliography* (2017), http://fore.yale.edu/files/judaism_annotations_11-3-2017.pdf. See also Rose Aubrey, *Judaism and Ecology* (Cassell 1992); Ellen Bernstein, *Ecology and the Jewish Spirit: Where Nature and the Sacred Meet* (Jewish Lights Publishing 1998); MANFRED GERSTENFELD, *JUDAISM, ENVIRONMENTALISM, AND THE ENVIRONMENT: MAPPING AND ANALYSIS* (Rubin Mass 1998); Hava Tirosch-Samuels, *Judaism and Ecology: Created World and Revealed Word* (Harvard University Press 2003).

³² See The Forum on Religion and Ecology at Yale, *Evangelical Environmental Network (EEN)* (2020), http://fore.yale.edu/religion/christianity/projects/evangelical_envt/; Shay Meinecke, *God and the earth: Evangelical take on climate change*, DW, Jul. 03, 2019. 2019; Katharine Jefferts Schori, *Comprehensiveness and the Middle Way: Anglican Perspectives on Religion and Ecology* (The Forum on Religion and Ecology at Yale, Aug. 12, 2015).

³³ GRIM & TUCKER, *supra* note 19, at 1-2.

³⁴ Tucker, *supra* note 26, at 400-401.

³⁵ Tucker & Grim, *supra* note 24, at 4. Tucker and Grim define ‘religious ecology’ as a cultural awareness of kinship with and dependence on nature for the continuity of all life, providing a basis for exploring diverse cultural responses to the varied earth processes of transformation. The study of religious ecology can give us insight into how particular environments have influenced the development of cultures. *Id.*, at 15. See also GRIM & TUCKER, *supra* note 19, at 35-37.

humans, the Earth's creatures, and the Earth itself.³⁶ This foundation relies on the spiritual protection of the elements of nature, the right to the environment, or the duty to care for it.

The hypotheses developed here are illustrated through the underlying use of water. Subsection 3 exhibits how religious beliefs have specifically fostered the care for water as a concrete example of environmental responsibility. Virtually all religions cherish water as a profound symbol of religious significance which requires special protection. Water best illustrates the religious foundations of policymaking and the law.³⁷ Subsection 4 depicts some of the developments from early conservationists in the United States, who, based on holy scriptures, have further advanced a philosophical ground for environmental protection. It draws on lessons from leading voices that called upon natural law to promote the preservation of nature, definitively coupling the theological argument with the practical conservation of ecosystems and species. Finally, Subsection 5 builds on these developments through the lessons from Thomas Berry and his legacy. Berry ultimately drew on Catholic teachings to rethink humanity's relationship with nature.

The current environmental crises show how the Earth is suffering from humanity's presence. Yet Grim & Tucker perceive a shared sensibility regarding our planetary future spreading around the globe.³⁸ The current challenge is to transform the ideological foundation prescribed here into gradual new laws. Have we arrived at a point "where we realize that more scientific statistics on environmental problems, more legislation, policy or regulation, and more economic analysis, while necessary, are no longer sufficient for the large-scale social transformations needed?"³⁹ Can religions provide leadership and embrace integral ecology at the level needed? Can we transform this knowledge into practical policies that bring real change? In answering these questions, this chapter provides examples of how religion significantly shaped attitudes toward nature worldwide while explaining how this wisdom can give a foundation to advance progressive international environmental law.

1. Religions as Environmental Disruptors

As a human paradigm, religion can function to construct or destruct the environment. These two countervailing points remain at the core of the study of religious ecology. With anthropocentric roots, religion is partly responsible for the environmental catastrophe, often ignoring facts or blindly supporting 'progress.'⁴⁰ Virtually all religious and cultural traditions have contributed to the gravity of the ecological crisis, ultimately leading us into the Anthropocene. Consumption and unquestioned faith in economic progress has led to the improper utilitarian assumption that decision-making choices are equally bright and measurable. Tucker & Grim note that the "human capacity to imagine and implement a utilitarian-based worldview on nature has undermined many ancient insights of the world's religious and spiritual traditions," including seizing on a material accumulation as containing divine sanction.⁴¹ This view has developed widely before the 1960s.

³⁶ Tucker & Grim, *supra* note 24, at 3.

³⁷ Other examples have also been proposed, including the use of food. See GRIM & TUCKER, *supra* note 19.

³⁸ *Id.*

³⁹ Mary Evelyn Tucker & John Grim, *The Movement of Religion and Ecology: Emerging field and dynamic force*, in ROUTLEDGE HANDBOOK ON RELIGION AND ECOLOGY (Willis J. Jenkins, et al. eds., 2017).

⁴⁰ Roger S. Gottlieb, *Introduction: Religion and Ecology – What Is the Connection and Why Does It Matter?*, in THE OXFORD HANDBOOK OF RELIGION AND ECOLOGY (Roger S. Gottlieb ed. 2006).

⁴¹ Tucker & Grim, *supra* note 39.

Those who live in secular states can be skeptical of religion's dominance in society. Yet religion has a historic role as a source of conflict and war and can advance violent radical acts. Looking at how religion influences development, Weber notably proposed that Protestantism was responsible for the rise of market-driven capitalism in the Western world and the rational-legal nation-state.⁴² Similarly, religion can be used to obstruct solutions to the environmental crisis. There is strong historical evidence that scientific, technological, and religious ideas precipitated anthropocentric attitudes that separated people from feelings of belonging to nature, suppressed animistic perceptions and beliefs, and fostered an indifference to the well-being of nonhuman organisms. These ideas contributed significantly, if not decisively, to the contemporary environmental crisis.⁴³

White, Jr's 'The Historical Roots of Our Ecologic Crisis'⁴⁴ has played a critically important role in environmental studies by advancing a multifaceted and provocative argument that the 'Judeo-Christian' tradition, especially Christianity, has promoted anthropocentric attitudes and environmentally destructive behaviors.⁴⁵ White maintained that the technological innovations in medieval times played an important role in a cultural transformation that changed the Western view of humanity as a part of nature to viewing people as exploiters of it. He hypothesized the role of religion in environmental decline through a historical analysis. He argued this decline related to Christianity's and Judaism's deep anthropocentrism and its disenchantment of nature. He posited that "human ecology is deeply conditioned by beliefs about our nature and destiny—that is, by religion" and especially by 'Christian teleology' with its "implicit faith in perpetual progress."⁴⁶

For the most part, the worldviews associated with the Western Abrahamic traditions of Judaism, Christianity, and Islam have created a dominantly human-focused morality, in which nature often has a secondary role.⁴⁷ Western monotheistic religions see humans as an exclusively gifted creatures with a transcendent soul that manifests God's divine image and likeness.⁴⁸ The biblical command "to fill the earth and subdue it" (Genesis 1:28) indicates that the Judeo-Christian tradition puts humans above the rest of creation and regards all other forms of life as subordinate.⁴⁹ Until recently, there was a consensus that nature was God's creation and ultimately God's ownership.⁵⁰

Given this divine ownership and humanity's 'special place' in creation, humans had the right to use property to their advantage.⁵¹ As a consequence, nature gradually disappeared from Christian consciousness.⁵² The perceived scriptural license to 'dominate the Earth' has arguably led to a great deal of environmental damage over time.⁵³ However, dominion implies stewardship, not domination. In Judaism, while God gave man dominion over every living thing, he did not

⁴² MAX WEBER, *THE PROTESTANT ETHIC AND THE "SPIRIT" OF CAPITALISM AND OTHER WRITINGS* (Penguin 2002).

⁴³ Bron Taylor, *The Greening of Religion Hypothesis (Part One): From Lynn White, Jr and claims that Religions can promote environmentally destructive attitudes and behaviors to assertions they are becoming environmentally friendly*, 10 *J. FOR THE STUDY OF RELIGION, NATURE AND CULTURE* 268; 274 (2016).

⁴⁴ Lynn White Jr., *The Historical Roots of Our Ecological Crisis*, 155 *SCIENCE* 1203 (1967).

⁴⁵ Taylor, *supra* note 43.

⁴⁶ White, *supra* note 44, at 1205.

⁴⁷ GRIM & TUCKER, *supra* note 19, at 22.

⁴⁸ Tucker & Grim, *supra* note 39, at 4.

⁴⁹ Hava Tirosh-Samuelson, *Nature in the Sources of Judaism*, 130 *DAEDALUS* 99 (2001).

⁵⁰ Gottlieb, *supra* note 40, at 3-4.

⁵¹ *Id.*, at 3-4.

⁵² Thomas Berry, *Earth: A New Context for Religious Unity*, in THOMAS BERRY AND THE NEW COSMOLOGY 16 (Anne Lonergan & Caroline Richard eds., 1987).

⁵³ White, *supra* note 44.

give man the right to destroy it.⁵⁴ At the same time, the idealism inherent in the traditional Jewish approach to life, including their economic reality, gave rise to a religious lifestyle that is primarily indifferent to nature.⁵⁵

The negative contribution is not solely the responsibility of Western Abrahamic traditions. Indeed, many civilizations have overused their environments. Each community uniquely contributed to the environmental catastrophe. Brunn & Kalland have similarly argued that Asian philosophies have done little to prevent environmental disasters.⁵⁶ Eastern traditions also lacked implementation of nature stewardship, even when they proclaimed respect for nature. Eastern religions did not share a deep tradition to galvanize adherents to socially critical responses to injustice to people or wildlife.⁵⁷ For example, through samsara, the endless round of birth and death and rebirth, and the goal to liberate oneself from this circling, India turned its gaze inward. Its environmental ethic remained implicit only.⁵⁸ Despite benevolent attitudes towards nature, India has shown a deplorable environmental record, exemplified paradoxically through its relationship with the Ganges, a river with religious significance that is nevertheless mistreated through sewage and waste dump. Therefore, it is indefensible to congratulate any tradition as consistently and effectively promoting a practical ecological orientation.⁵⁹ As seen in the next section, ecologically sensitive ideas in religions are not always evident. It took a greening religious movement to bring that reinterpretation towards a better sense of nature. Religions have been subject to interpretation, and there is still a disconnect between principles and practice.⁶⁰ Yet, as the next section shows, a redirection towards an environmental moral compass is slowly taking place in religions across the globe.

2. *Religions as an Environmental Moral Compass*

Suppose religion has indeed had a role in environmental destruction. In that case, reversing the ecological crisis requires a dramatic change in the collective consciousness that produces feelings of belonging to nature and kinship with nonhuman organisms and ethics and behaviors that cohere with such sentiments.⁶¹ The scope of the ecological crises is unprecedented, demanding new responses. While no religious tradition is fully prepared to address it, as original scriptures do not grasp our current reality,⁶² religions provide a stable foundation for new or revised answers. Religious traditions can marshal substantial resources for addressing environmental threats more effectively.⁶³

Religious ethics can ensure environmental protection, drawing from previous experiences in provoking social change. For example, religions have traditionally developed ethics for homicide, suicide, and genocide and can provide the moral compass for a fundamental societal change – including, possibly, for ecocide. In a parallel development that occurred through the ‘greening’ of human rights law, in which existing human rights were reinterpreted to establish its

⁵⁴ McElroy, *supra* note 20, at 52.

⁵⁵ Tirosh-Samuels, *supra* note 49, at 116.

⁵⁶ David L. Haberman, *Hinduism*, in *ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY* 35 (Willis J. Jenkins, et al. eds., 2017). (citing Ole Bruun & Arne Kalland, *Images of nature: an introduction to the study of man-environment relations in Asia*, in *ASIAN PERCEPTIONS OF NATURE* 2-3 (Ole Bruun & Arne Kalland eds., 1995).

⁵⁷ Gottlieb, *supra* note 40, at 4.

⁵⁸ Philip Novak, Tao how? Asian religions and the problem of environmental degradation, 9 *REVISION* 33 (1987).

⁵⁹ George Rupp, *Religion, Modern Secular Culture, and Ecology*, 130 *DAEDALUS* 23; 26 (2001).

⁶⁰ Tucker & Grim, *supra* note 39, at 5.

⁶¹ Taylor, *supra* note 43, at 274. White, *supra* note 44, at 1207.

⁶² Haberman, *supra* note 56, at 35 (citing Poul Pedersen, *Nature, religion, and cultural identity: the religious environmental paradigm in Asia*, in *ASIAN PERCEPTIONS OF NATURE* 226 (Ole Bruun & Arne Kalland eds., 1995).

⁶³ Rupp, *supra* note 59.

role in environmental protection, scholars have developed the role of religions in the well-being of people and the planet to a flourishing future.⁶⁴ In an address on World Peace Day, Pope John Paul II stated:

In our day, there is a growing awareness that world peace is threatened not only by the arms race, regional conflicts and continued injustices among people and nations, but also by a lack of due respect for nature, by the plundering of natural resources and by a progressive decline in the quality-of-life.⁶⁵

Based on a series of conferences on religion and ecology held at Harvard, Grim & Tucker identified seven common values that the world religions hold concerning the natural world: reverence, respect, reciprocity, restraint, redistribution, responsibility, and restoration.⁶⁶ These values are being resurfaced to guide a more nature-centered attitude towards the environment:

As religions move toward a broader understanding of their cosmological orientations and ethical obligations, these values are being retrieved and expanded in response to environmental concerns. As this shift occurs—and there are signs it is already happening—religions are calling for reverence for the Earth and its profound ecological processes, respect for Earth’s myriad species and an extension of ethics to include all life forms, reciprocity in relation to both humans and nature, restraint in the use of natural resources combined with support for effective alternative technologies, a more equitable redistribution of economic opportunities, the acknowledgment of human responsibility for the continuity of life, and restoration of both humans and ecosystems for the flourishing of life.⁶⁷

Throughout the years, the original religious interpretation based on human domination has changed. Religion entered an ecological phase in which “environmental concern takes its place alongside more traditional religious focus.”⁶⁸ This is partly due to the extent of the current environmental devastation, which grew from local to global. It also emphasizes how religions are flexible, changing from within and sparking change from without, inducing movements for social change.⁶⁹ As religions enter their ecological phase, they promise to enlighten the environmental crisis’s moral dimensions. As a result, major religious traditions have developed moral and ethical statements on the environment.⁷⁰

Religions are repositories of sacred-human relations, guiding human affairs and orienting human-Earth interactions. In the former, religious ecologies situate humans in the dynamic world of nature.⁷¹ Based on the notion of the “Earth is our home,” reflected in many religions,⁷² there is

⁶⁴ Tucker & Grim, *supra* note 39, at 5.

⁶⁵ Pope John Paul II, World Peace Day, January 1, 1990, quoted in Environment and the World of Work, Report of the Director-General of the I.L.O. 4 (1990).

⁶⁶ GRIM & TUCKER, *supra* note 19, at 8.

⁶⁷ *Id.*, at 8-9.

⁶⁸ Gottlieb, *supra* note 40, at 6.

⁶⁹ GRIM & TUCKER, *supra* note 19, at 24.

⁷⁰ *Id.*, at 25.

⁷¹ *Id.*, at 26.

⁷² EARTH CHARTER COMMISSION, THE EARTH CHARTER (2000). See “The Earth is the Lord’s” (Exodus 9:29; Psalm 24:1 in the Hebrew Bible); the earth and humans as God’s icons are interconnected in a communion of suffering and “hope for liberation (Paul’s letter to the Romans, Rom. 8.21). In Islam, Allah created humans as guardians of nature, within the concept of trusteeship (Khalifa) and the unity of Allah (Tawheed) and of humanity and nature emphasized as a central force. Buddhism rejects the

a vision of human life as a universal gift, revealing the complexity and interconnectedness of life systems in one single planetary space for all.⁷³ The new planetary awakening of religions seeks ways beyond our current unsustainable predicament to a healthier human presence on Earth. Religious traditions worldwide are increasingly contributing to this movement.⁷⁴

The word ‘environment’ in religious traditions includes the “biological, physiological, economic and cultural aspects, all linked in the same constantly changing ecological fabric.”⁷⁵ Elements of earth, air, fire, and water are essential symbols in religious ecologies, representing the Earth’s processes and the cosmos and corresponding to orienting, grounding, nurturing, and transforming humans.⁷⁶ Environmental problems are universal issues that need special attention from all humanity, regardless of race, religion, ideology, and country. Human beings and the environment each affect one another and are, in turn, affected by one another.⁷⁷

Humanity’s cultural values affect how the natural environment and resources are perceived, used, and managed. Principles that heed the local religious context are likely to be more effective than imported, foreign ones.⁷⁸ Along with this significant change came the perception that the environmental crisis is, among other things, a spiritual problem.⁷⁹ Religions thus perceived an obligation to contribute to reversing the state of environmental degradation. It became apparent that the traditional interpretation of religions was “if not irrelevant, then clearly insufficient by the environmental crisis.”⁸⁰ McElroy further called:

We must appreciate that human society, like nature itself, is dynamic. We need a global vision to recognize that there is a unity to life on Earth, that we are part of nature, not independent, that we have the potential to change our environment, but that we must exercise this power with discretion. We need a deeper appreciation for ourselves and nature, drawing on insights not only from science but also from the intellectual heritage codified in the world’s great philosophical and religious traditions.⁸¹

With this awareness, religious scholars advanced a profound ‘interpretive reevaluation’ of traditional teachings and classic texts. With the broad participation of religions in environmental discussions, multiple responses promoted their distinctive ecological vocation.⁸² Theologians, ethicists, and other scholars became aware of scientific studies that indicated a global ecological crisis and, in response, began to encourage respect for the Earth’s biosphere.⁸³ Several international religious leaders emerged as influential spokespersons for the importance of care for the environment, including Tibetan Buddhist leader, the Dalai Lama, and the Vietnamese Buddhist monk Thich Nhat Hanh. The Ecumenical Patriarch Bartholomew emerged as a prominent religious figure responding to the environmental crisis.⁸⁴ Reinforcing the link between scientific and

illusion of separateness and emphasizes the interconnectedness of all beings. See Sigmud Bergmann, *Developments in religion and ecology*, in ROUTLEDGE HANDBOOK ON RELIGION AND ECOLOGY (Willis J. Jenkins, et al. eds., 2017).

⁷³ *Id.*, at 17.

⁷⁴ Haberman, *supra* note 56, at 35.

⁷⁵ D. Vidart, Environmental education - Theory and practice, 8 PROSPECTS 466 (1978).

⁷⁶ GRIM & TUCKER, *supra* note 19, at 37.

⁷⁷ Gottlieb, *supra* note 40, at 5-6.

⁷⁸ Hussein A. Amery, *Islam and the environment*, in WATER MANAGEMENT IN ISLAM (Naser I. Faruqi, et al. eds., 2001).

⁷⁹ Gottlieb, *supra* note 40, at 11.

⁸⁰ *Id.*, at 4.

⁸¹ McElroy, *supra* note 20, at 56.

⁸² See Tucker, *supra* note 26, at 403-404 for a more in-depth analysis.

⁸³ John Hart, *Catholicism*, in THE OXFORD HANDBOOK OF RELIGION AND ECOLOGY (Roger S. Gottlieb ed. 2006).

⁸⁴ GRIM & TUCKER, *supra* note 19, at 101.

religious dialogue and the unique spiritual and ethical role of humans in the natural world, he called for an expanded view of the human-Earth relationship:

The Patriarch's enduring legacy will be his long-standing articulation of the environmental crisis as primarily a spiritual and moral crisis. He sees the limits of purely utilitarian responses to the Earth, as well as rational choice policies and arid intellectualism. Rather, he notes the need for an expanded understanding of the relationship of humans to the Earth and to the divine. His insistence on the spiritual and moral nature of the environmental crisis leads to fresh theological insights.⁸⁵

Contemporary scholars who wished to shape an ecologically sensitive attitude and sustainable practices relied on traditional ideas. According to their relevance to current circumstances, Swearer suggests reevaluating scriptures, doctrines, practices, hermeneutical and tactical strategies. Broadening the scope ensures that global environmental issues' religious dimensions positively impact decision-making and implications for public policy.⁸⁶ In doing so, scholars questioned ideas that could lead to inappropriate environmental practices and suggested ways to adapt teachings to modern circumstances creatively. The 'mining' of religious traditions was essential to search for new ethical resources for promoting a holistic, non-anthropocentric, egalitarian, and eco-friendly worldview.⁸⁷

Most religious traditions address environmental problems as they teach about the human-nature relationship, ethics, and morality. Every religion provides guidelines on obligations, rules, and values that set the criterion of correct actions for its adherents at a fundamental level, forming the normative foundation for religious ethics.⁸⁸ Similarly, universal law principles exist within civil law, common law, socialist law, Islamic law, and customary law regimes.⁸⁹ However, even where a set of shared religious values appears to exist, one should not assume that connectivity across groups and networks implies a stable epistemic community with a coherent focus on political ecology at a national level.⁹⁰

This reevaluation of ethical and environmental values has invited a broader debate on religious institutions' role and personal beliefs, informing spiritual and ecological values.⁹¹ As an emerging worldwide phenomenon, religious environmentalism is becoming increasingly visible and consolidated as a political and social movement. Pope Francis called for an 'ecological conversion' from within all the world religions. The World Council of Churches (WCC), a gathering of primarily Protestant and Orthodox Christian churches, has hosted sustained and significant high-level work on religion and ecology since the 1960s.⁹² The UK-based Alliance of Religion and Conservation (ARC), led by Martin Palmer, has been doing significant work with religious communities under Prince Philip's patronage.

⁸⁵ *Id.*, at 103.

⁸⁶ Donald K. Swearer, Principles and Poetry, Places and Stories: The Resources of Buddhist Ecology, 130 DAEDALUS 225 (2001).

⁸⁷ *Id.*

⁸⁸ Norah bin Hamad, Foundations for Sustainable Development: Harmonizing Islam, Nature and Law 7 (2017; S.JD. Thesis, Elisabeth Haub School of Law).

⁸⁹ Nicholas A. Robinson, *Evolved norms: A canon for the Anthropocene*, in RULE OF LAW FOR NATURE (Christina Voigt ed. 2013).

⁹⁰ Jeremy Kidwell, Mapping the field of religious environmental politics, 96 INT'L AFFAIRS 343 (2020).

⁹¹ *Id.*

⁹² Robert Booth Fowler, The greening of Protestant thought (University of North Carolina Press. 1995); Guillermo Kerber, *International advocacy for climate justice*, in How the world's religions are responding to climate change: social scientific investigations (Robin Globus Veldman, et al. eds., 2014).

As a result, “[i]nnovative liturgies and rituals are being practiced, and a unique sense of moral responsibility that stresses the interdependence of our treatment of nature and our treatment of other people has emerged as the strikingly new concept of ‘ecojustice.’”⁹³ World religions provide a wide-ranging orientation to the cosmos and the human roles. Tucker further summarizes:

It is now the case that most of the world’s religions have issued statements on the need to care for the earth and to take responsibility for future generations. These statements range from various positions within the Western monotheistic traditions to the different sectors within Asian traditions of Buddhism and Daoism. By no means monolithic, they draw on different theological perspectives and ethical concerns across a wide spectrum. They reflect originality of thought in bringing religious traditions into conversation with modern environmental problems, such as climate change, pollution and loss of biodiversity.⁹⁴

These efforts “are recovering a sense of place, which is clear in the environmental resilience and regeneration practices of indigenous peoples.”⁹⁵ As I expand later in this chapter, Indigenous peoples have long promoted deep care for nature central to their traditional beliefs. Similarly, the reevaluation of religious texts has made clear that promoting harmony and respect for nature is at the core of religious thinking.⁹⁶ For example, Buddhism sees the change in nature and the cosmos as a potential source of human suffering. On the other hand, Confucianism and Daoism affirm nature’s changes as the source of the Dao (Heaven’s Way). In Confucianism, humans are grounded in an expensive sense of community, which includes humans and nature.⁹⁷ Further, the death-rebirth cycle of nature serves as an inspiring mirror for human life, especially in the Western monotheistic traditions of Judaism, Christianity, and Islam. In fostering a relationship grounding the human, communities of several religious ecologies include humans in the past, present, and future generations. The expansion of the protection of humans in time has deep meaning for the development of intergenerational equity.⁹⁸

This protection extends to other living beings in some traditions, such as meadows, rivers, forests, and oceans, mimicking a moral compass deeply rooted in Indigenous rituals.⁹⁹ Comparably, the protection of all aspects of nature has found fertile ground in religious thoughts, further developed in this thesis. Gottlieb clarifies how religions share with environmental organizations the laudable goal of safeguarding life in all forms, reinforcing the value of nature in itself:

Most contemporary environmental organizations repeatedly stress that your goal is not just to save wilderness, but to protect all of life. At its best the religious spirit has a similarly inclusive goal. We are all, says the Bible, made in the image of God. We all, says Buddhism, suffer and deserve released from our pain. Each community, says the Qur’an, has its own purpose and value. Any

⁹³ Gottlieb, *supra* note 40, at 7.

⁹⁴ Tucker, *supra* note 26, at 404-405.

⁹⁵ Tucker & Grim, *supra* note 39, at 10. Tucker & Grim provide several examples that illustrate an emerging alliance of religion and ecology around the world. See *id.*, at 10-11.

⁹⁶ See GRIM & TUCKER, *supra* note 19, at Chapter 3.

⁹⁷ *Id.*, at 92.

⁹⁸ Intergenerational equity provides a notion of partnership among all generations, as each generation has the right to inherit the same fundamental rights enjoyed by the previous generations and to equitable access to the use and benefits of these resources.

⁹⁹ *Id.*, at 40.

violence against one of us, teach the Jains, can only hurt us all. Looked at it in this light, then, the universal missions of truly compassionate religion in the first truly global environmental politics naturally converge, at least in the attempt to forge the widest possible social and ecological ethic. Both believe that life deserves a reverence that cannot be reduced to dollar value, that self-examination and spiritual practice makes the most important kind of sense, and that there is more to human well-being than money, power, and pleasure.¹⁰⁰

Tucker explains that “[b]y linking human life and patterns of nature, religions have provided a meaningful orientation to life’s continuity as well as to human diminishment and death. In addition, religions have helped celebrate the gifts of nature such as air, water, and food that sustain life.”¹⁰¹ For example, in Jewish tradition, nature is never an end in itself but rather points to the divine creator, who governs and sustains nature.¹⁰² When analyzed carefully, it became evident that religious rituals and symbols arise out of cosmologies and are grounded in nature’s dynamics. Nature provides resources for encouraging spiritual and ethical transformation in human life.¹⁰³ By observing and respecting nature in all of its forms and moments, religions provided it with a profound meaning, calling for its protection.

Eastern traditions similarly adopted an evolved interpretation of traditional texts to develop a care for nature. Daoism regards humans as an essential part of nature, avoiding any fixed distinction between the mind or soul and the body. Sikh scripture, *Guru Granth Sahib*, declares that “[c]reating the world, God has made it a place to practice spirituality” and that human beings’ purpose is to achieve a blissful state and be in harmony with the Earth and all creation.¹⁰⁴ In Hinduism, the entire universe is God. Noting the rich diversity of Hinduisms, Haberman has reinterpreted *bhakti* devotional texts and rituals.¹⁰⁵ Central to the *Bhagavad Gita*’s position is the vision of the universe as the body of Krishna.¹⁰⁶ The four terms *sarvatma-bhava* proclaims that everything is part of a unified and radically interconnected reality, referring to the primarily accepted viewpoint that all is sacred, a concept with deep roots in many Hindu scriptures.¹⁰⁷ Some natural entities, such as rivers (the Yamuna, Ganges, and Narmada), holy trees, and mountains, are favored through cultural selection.¹⁰⁸ This belief was recently grasped by an Indian court in a decision that granted rights of nature to rivers, showing how religious concepts are now being transferred to the legal frameworks.¹⁰⁹ As part of this exceptional protection conferred to nature, there is a growing conviction of the duty of care towards it.¹¹⁰

The Buddhist belief of reincarnation as an animal in a future life shows little distinction between beings. A Buddhist’s goal was to ease the suffering of ‘all sentient beings,’ not just people.

¹⁰⁰ Gottlieb, *supra* note 40, at 16.

¹⁰¹ *Id.*, at 400.

¹⁰² Tirosh-Samuelson, *supra* note 49, at 101.

¹⁰³ Tucker, *supra* note 26, at 400.

¹⁰⁴ Colin Millais, *Common belief: Australia’s faith communities on climate change* 34 (2006).

¹⁰⁵ Haberman, *supra* note 56, at 35.

¹⁰⁶ *Id.*, at 35.

¹⁰⁷ *Id.*, at 37.

¹⁰⁸ *Id.*, at 38.

¹⁰⁹ *See e.g.*, *Narayan Dutt Bhatt v. Union of India & others*, Writ Petition (PIL) No. 43 of 2014, 1, (India.); *T.N. Godavarman Thirumulpad v. Union of India* (2012). I.A. Nos. 1433 and 1477 of 2995 in Writ Petition No. 202 of 1995, Supreme Court of India. *Center for Environment Law and WWF-India v. Union of India* (2013). I.A. No. 100 in Writ Petition No. 337 of 1995, Supreme Court of India.

¹¹⁰ Yamuna as a Mother who cared for her human children, who now need to care for her in return. Haberman, *supra* note 56, at 38-39. *See also* DAVID L. HABERMAN, *RIVER OF LOVE IN AN AGE OF POLLUTION: THE YAMUNA RIVER OF NORTHERN INDIA* (University of California Press. 2006).

Jainism reflects an indigenous Asian perspective of nature, which inspires an ecologically sensitive response.¹¹¹ Jainism provides a comprehensive cosmology that integrates the human person's place within the continuum of the universe. Each living being houses a life force that occupies and enlivens the host environment. Like Buddhism, Jainism asserts the universe's eternity and rejects the notion of an initial creation moment. Things share a common root in their aliveness, which must be acknowledged and protected. As a living, dynamic process, nature requires protection and care in the context of contemporary environmental degradation.¹¹² The profound respect for the natural world distinguishes Jainism as potentially the most eco-friendly religion.¹¹³

Another essential aspect of the religious cosmologies relates to ecological diversity, which is evident in the varied environmental contexts and bioregions where religions have developed over time.¹¹⁴ For example, Jerusalem and Israel are in a broader sacred bioregion where three religious' traditions, Judaism, Christianity, and Islam, have shaped and shaped by the environment. While these religions developed from the same grounds, their formulation and expression of symbols, rituals, laws, and communal life to the urban, piedmont, hill country, and desert settings of the bioregion are historically different.¹¹⁵ The value each religion places on this ecological diversity represents a significant change in protecting the environment.

In comparison, interactions among Indigenous, Catholic, and African traditions in Latin America have generated a hybrid type of Catholic Christianity, incorporating mountains and rivers into myths and rituals.¹¹⁶ Significantly, this hybrid type of Catholicism has developed throughout one of the world's most biodiverse regions, the Amazon rainforest. By adapting to the natural characteristics of that environment, religion has responded to the connection with the land. This worldview has led to a "modest and respectful attitude toward nature."¹¹⁷ Some theologians, including the Brazilian Leonardo Boff, have incorporated ecological concerns into their work, connecting environmental and social justice.¹¹⁸ Following this trend, Pope Francis also recognized the value of species within itself, beyond their importance to human beings:

*"It is not enough, however, to think of different species merely as potential "resources" to be exploited, while overlooking the fact that they have value in themselves. Each year sees the disappearance of thousands of plant and animal species which we will never know, which our children will never see, because they have been lost for ever. The great majority become extinct for reasons related to human activity. Because of us, thousands of species will no longer give glory to God by their very existence, nor convey their message to us. We have no such right."*¹¹⁹

¹¹¹ Christopher Key Chapple, *The Living Cosmos of Jainism: A Traditional Science Grounded in Environmental Ethics*, 130 DAEDALUS 207 (2001).

¹¹² *Id.*, 214.

¹¹³ *Id.*, 215 (based on the rules on nonviolent behavior towards all living beings and a meditative advice on forest preservation, which represents a textual foundation for the development of an activist Jaina environmentalism).

¹¹⁴ GRIM & TUCKER, *supra* note 19, at 22.

¹¹⁵ *Id.*, at 22. See DANIEL HILLEL, *THE NATURAL HISTORY OF THE BIBLE: AN ENVIRONMENTAL EXPLORATION OF THE HEBREW SCRIPTURES* (Columbia University Press. 2006).

¹¹⁶ Anna Peterson, *Latin America*, in *ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY* 192-193 (Willis J. Jenkins, et al. eds., 2017).

¹¹⁷ *Id.*, at 194.

¹¹⁸ Leonardo Boff, *Cry of the Earth, Cry of the Poor* (Orbis Books. 1997).

¹¹⁹ FRANCIS, *supra* note 28, at 25, ¶33.

This recognition of the value of biodiversity and the loss for future generations is deeply connected with a growing call to recognize the rights of nature and intergenerational equity. In 2015, Pope Francis published an encyclical focused on the environment called *Laudato si'*, *On Care for Our Common Home*.¹²⁰ In it, as if responding directly to the criticism made by Lynn White decades before, Pope Francis acknowledged that Christianity is deeply anthropocentric, asserting that only human beings were created in the divine image. This confers on them a unique dignity and moral value.¹²¹ Nevertheless, he averred, Christianity demands loving care for the entire created order by God. In line with what was recognized by the Catholic Church, Thomas Berry, years before, called on religions to respond to biocide, ecocide, and genocide.¹²²

In choosing his papal name, Pope Francis honored Saint Francis of Assisi, explaining that he “reminds us that our common home is like a sister with whom we share our life and a beautiful mother who opens her arms to embrace us.”¹²³ His Holiness believes that “Saint Francis is the example par excellence of care for the vulnerable and of an integral ecology lived out joyfully and authentically. He is the patron saint of all who study and work in the area of ecology.”¹²⁴ As William French observed, Francis of Assisi was a “medieval friar; not an ecologist.”¹²⁵ Francis saw God’s presence in nature, but he was not advancing the idea that ecosystems and nonhuman organisms have intrinsic worth. His thinking first related the Earth’s value to humankind. Moreover, his spiritual priority was evangelical and intended to lead people toward a future life in heaven, and many of his ideas devalued the mortal world.¹²⁶ Yet, he became known for his appreciation of pristine nature and attitude toward nonhuman species, serving as an example to those later concerned with environmental issues. His teachings were reinterpreted to extend to Earth as a provider for a broader community until it was recognized for its intrinsic value.¹²⁷ Pope John Paul II declared him the ‘patron of ecology’ in 1980.

Similarly, Thomas Aquinas called for embracing the universe as a whole, saying that “the whole universe together participates in the divine goodness and represents it better than any single being whatsoever”¹²⁸ According to John Paul II, “God gave the [E]arth to the whole human race for the sustenance of all its members, without excluding or favoring anyone.”¹²⁹ Through these developing considerations, the Christian tradition is recovering its ancient creation story through a new ethical lens. These restore a focus on the common good as the flourishing of all creation. Siemen believes that understanding the common good and ‘the good of the commons’ – air, water, soil – is another vital thread in weaving a new jurisprudence.¹³⁰ At the core of this progress lies the right to a healthy environment.

¹²⁰ *Id.* See Mary Evelyn Tucker, *Laudato Si*, 91 THE QUARTERLY REV. OF BIOLOGY 261(2016). Mary Evelyn Tucker & John Grim, *Integrating ecology and justice: the new papal encyclical*, 6 SOLUTIONS 38 (2015).

¹²¹ Taylor, *supra* note 43, at 272.

¹²² Thomas Berry, *The Sacred Universe: Earth Spirituality and Religion in the 21st Century* (Columbia University Press. 2009).

¹²³ FRANCIS, *supra* note 28, at 3-4 (explaining that “[w]e have forgotten that we ourselves are dust of the earth (cf. Gen 2:7); our very bodies are made up of her elements, we breathe her air and we receive life and refreshment from her waters.”).

¹²⁴ *Id.* (explaining that “[t]he urgent challenge to protect our common home includes a concern to bring the whole human family together to seek a sustainable and integral development.”).

¹²⁵ William French, *Francis of Assisi*, in *Encyclopedia of Religion and Nature* 672 (Bron Taylor ed. 2005). See also Robert F. Kennedy, Jr. and Dennis Nolan, *Saint Francis of Assisi, A Life of Joy* (2005).

¹²⁶ John Hart, *supra* note 83, at 66.

¹²⁷ Émilien Vilas Boas Reis & Kiwonghi Bizawu, *A Encíclica Laudato Si à Luz Do Direito Internacional do Meio Ambiente*, 12 VEREDAS DO DIREITO 29; 66 (2015).

¹²⁸ Thomas Aquinas, *Summa Theologica* (Part I, Question 47, article 1), quoted by Berry, *supra* note 52, at 30. THOMAS BERRY, *THE GREAT WORK: OUR WAY INTO THE FUTURE* 77 (Harmony/Bell Tower 1 ed. 1999).

¹²⁹ Encyclical Letter *Centesimus Annus* (1 May 1991), 31: AAS 83 (1991), 831.

¹³⁰ Patricia Siemen, *Earth Jurisprudence: Toward Law in Nature’s Balance*, 11 BARRY L. REV. 1; 8 (2008).

Pope Francis specifically addressed the link between human rights and the environment, urging greater attention to international human rights law as a way of ensuring that basic human dignity is respected in the face of environmental burdens.¹³¹ The Catholic Church's message to adopt a new, sustainable development model is timely. It explicitly calls for ensuring that future generations – expressed as 'intergenerational solidarity' – also enjoy the right to a healthy environment. This renewed message calls, both directly and indirectly, for increased environmental protection by reinforcing human rights. As articulated by several legal scholars, human rights and the environment are intrinsically connected. This relationship is reciprocal: "to protect certain basic human rights, protection of the natural world is essential," since fundamental human rights rely on a healthy environment.¹³²

In a similar vein, Pope Francis shared his 'dreams for the Amazon region' in 2020.¹³³ His four grand visions are thus articulated: an Amazon region that (i) fights for the rights of the poor, (ii) preserves its distinctive cultural riches, (iii) preserves its overwhelming natural beauty, and lastly, (iv) that the Christian communities might be capable of generous commitment, incarnate in the Amazon region. The document highlights an authentic ecological approach that values the good living of Indigenous populations and warns against environmentalism concerned only with the environment.¹³⁴ The Pope explicitly calls for learning from Indigenous peoples, who have "developed a cultural treasure, interacting with nature," using diversity as a bridge rather than a wall.¹³⁵ Proposing 'an ecological dream,' the Pope underlines a close relationship between the human being and nature in the Amazon.¹³⁶ As such, in any project in the Amazon region, there is a need to respect peoples' rights. Pope Francis emphasizes that taking care of our brothers and sisters as the Lord takes care of us is "the first ecology that we need." Caring for the environment and caring for the poor are "inseparable." "It will be hard for them to remain unaffected," he adds, if the environment in which they are born and in which they have grown up "is damaged."¹³⁷ The Pope recalls that the health of the planet depends on its health, a statement that is ever more relevant in the Covid-19 pandemic.¹³⁸ Similarly, the climate crisis provides an overarching spirit of looking past differences, reaching out across faith communities to realize shared goals.

Using a different approach to advance the human-nature relationship, Bartholomew denounced the destruction of the environment as an 'ecological sin.' He called for an "ethical, legal recourse where possible, in matters of ecological crimes."¹³⁹ Because nature is seen as God's gift to humankind, humans are called upon to care for this gift – to preserve it and use it responsibly. To abuse nature is to sin against it.¹⁴⁰ In using the language of 'sin,' Bartholomew supported the highest importance of environmental protection.¹⁴¹ He reinforced our ethical duty

¹³¹ Lucia Ann Silecchia, "Social Love" as a Vision for Environmental Law: Laudato Si' and the Rule of Law, 371 LIBERTY U. L. REV. 371 (2016).

¹³² *Id.*, at 377.

¹³³ Pope Francis, Post-Synodal Apostolic Exhortation of the Holy Father Francis, "Querida Amazonia" ¶5-7 (Holy Press Office Feb. 12, 2020).

¹³⁴ *Id.*, ¶8.

¹³⁵ *Id.*, ¶36-38.

¹³⁶ *Id.*, ¶41-42.

¹³⁷ *Id.*, ¶39-40.

¹³⁸ See Vatican Covid-19 Commission, <https://www.humandevlopment.va/en/vatican-covid-19.html>.

¹³⁹ Address of His Holiness Ecumenical Patriarch Bartholomew at the Environmental Symposium, Santa Barbara, CA (Nov. 8, 1997) in ROGER S GOTTLIEB, THIS SACRED EARTH: RELIGION, NATURE, ENVIRONMENT 229-230 (Psychology Press. 1996). Bartholomew has held international symposia on "Religion, Science and the Environment" focused on water issues and made influential statements on this subject for 20 years.

¹⁴⁰ GRIM & TUCKER, *supra* note 19, at 106.

¹⁴¹ Gottlieb, *supra* note 100, at 13.

by looking at the attitude and existential orientation that leads to a particular ethical behavior.¹⁴² As the most severe contemporary problem facing us, Orthodox Christianity called for action on the ecological crisis while also acknowledging the Christian tradition's responsibility for causing it.¹⁴³ This rationale might provide an avenue to recognizing ecocide as an international crime.

This approach relies not on the right to a healthy environment but on the duty to protect it. Because humans can transcend nature, God also commanded them to preserve nature as a duty of care for what belongs to God.¹⁴⁴ Creation in the image of God entails human responsibility for the whole of humanity. Humans must, therefore, protect nature through their efforts, thereby becoming partners of God.¹⁴⁵ The current interpretation of religion has translated this notion of human stewardship and responsibility into conservationist policies. The religious principle of 'do not destroy' can provide spiritual support for a range of environmental policies that highlight human responsibility toward the physical environment.¹⁴⁶ Given the primacy of Catholicism in Latin America, this might explain the region's prevalence of environmental duties provisions in countries within the region.

This notion of human stewardship can take place in various forms. Orthodox theology posits a universal union among beings, a 'cosmic liturgy' that potentially makes all existence sacred.¹⁴⁷ The Christian ritual of Eucharist is seen as a sacrament of thanksgiving for the fruits of the Earth and God's blessings. In pursuing environmental consciousness, spiritual awareness, and ascetic practice, humans shall restrain and reduce excessive consumption.¹⁴⁸ During the Covid-19 pandemic, this approach is ever more critical and an essential aspect of environmental justice, something highlighted by Townsend.¹⁴⁹

Relatedly, writings from the *Qur'an* of Islam speak about human beings being appointed by God as a *khalifa*, 'viceroys' or guardians of the Earth and the heavens.¹⁵⁰ It is impermissible in Islam to abuse one's rights as *khalifa* because the notion of acting in 'good faith' underpins Islamic law.¹⁵¹ Humankind inherited the planet and "all its posterity from generation to generation... Each generation is only the trustee. No one generation has the right to pollute the planet or consume its natural resources in a manner that leaves for posterity only a polluted planet or one seriously denuded of its resources."¹⁵² In other contexts, the concept of *khalifa* refers to the fact that waves of humanity will continuously succeed each other and inherit planet Earth. As such, each generation should care for the Earth for following generations to also enjoy it.

In addition to establishing a duty of care, Sharia law also relies on the principle that all issues begin with a right rather than discretion or prohibition. Islam holds inalienable rights, including rights associated with the environment, that pre-exist jurisprudential foundations, and therefore implies a natural order commencing with permission.¹⁵³ Islamism also shares the moral

¹⁴² GRIM & TUCKER, *supra* note 19, at 105.

¹⁴³ Orthodox Christianity: John Pergamon, *Orthodoxy and the Ecological Problems: A Theological Approach*, on the Ecumenical Patriarchate of Constantinople, <http://www.patriarchate.org/>.

¹⁴⁴ Tirosh-Samuelson, *supra* note 49, at 101.

¹⁴⁵ *Id.*, 102.

¹⁴⁶ *Id.*, 116.

¹⁴⁷ GRIM & TUCKER, *supra* note 19, at 107.

¹⁴⁸ *Id.*, at 107.

¹⁴⁹ Maria Antonia Tigre, Webinar: Law at the Intersection of Human Rights and the Environment, GLOBAL NETWORK OF HUMAN RIGHTS AND THE ENVIRONMENT (Apr. 26, 2020), <https://gnhre.org/community/webinar-on-law-at-the-intersection-of-human-rights-and-the-environment/> (reflecting the main messages from the speakers).

¹⁵⁰ Fazlun Khalid, *Guardians of the natural order*, 8 OUR PLANET 18; 20 (1996).

¹⁵¹ Amery, *supra* note 78.

¹⁵² Christopher G. Weeramantry, *Islamic jurisprudence: an international perspective* 61 (Palgrave Macmillan. 1988).

¹⁵³ Hamad, *supra* note 88, at 17.

principle of environmental protection.¹⁵⁴ Ibn Jarir al-Tabari narrates the recommendations of the first Caliph, Abu Bakr as-Siddiq, to the commander of the Arab armies, Ussama Ibn Zeid, who led an expedition towards the ‘Sham’ (Syria): “Do not destroy palm trees, do not burn houses or fields of wheat, never cut down fruit trees and kill cattle only when you need to eat it.” In Islam, the natural environment is holistic, and everything is essential and interdependent.¹⁵⁵ All environmental media have rights, including a right to water.¹⁵⁶

In summary, new alliances are emerging, joining new ideas in social and environmental justice. In alignment with ecojustice concerns, religions can encourage values and ethics of reverence, respect, redistribution, and responsibility for formulating broader environmental ethics that includes humans, ecosystems, and other species.¹⁵⁷ Moral responsibility for the environment remains a significant part of human civilization, comparable to philosophy, law, and economics in the development of human thought. The support of religious beliefs strengthens an appeal to one’s environmental responsibility. Even in secular states, religion plays a significant role in individual politics. Religion still has an important educational role and can help educate people about the seriousness of the problem.¹⁵⁸ Therefore, knowledge of moral responsibility can help appeal for international cooperation on environmental issues.¹⁵⁹

A closer analysis shows similar ethical concerns for nature across all legal traditions. Religious teachings offer significant reference points because they provide knowledge in the development of environmental norms and laws.¹⁶⁰ Robinson has observed that “[s]ociety needs to embrace deeper principles that can breathe new strength into sustainable development.”¹⁶¹ Bin Hamad further clarifies that religious followers, such as Islam’s followers, will only embrace sustainability when they see how their faith requires it.¹⁶² The same is true for other religions. A missing vital component is identifying the cosmologies, symbols, rituals, and ethics that inspire changes in attitudes and actions for creating a sustainable future.¹⁶³ The next step in the ‘greening’ of religious beliefs is to transcend original traditions to practical efforts towards environmental protection and sustainability, including, most significantly, through the recognition of an international right to a healthy environment, as well as a duty to respect it.

In 2002, a Symposia on Water was held in Italy, bringing together Greek Orthodox and Roman Catholic Christian denominations and temporarily bridging Eastern and Western Christianity.¹⁶⁴ Signing a Common Declaration on the mutual concerns about the degradation of creation, leaders of both churches recognized a growing ecological awareness and the need to use science, technology, and natural law to provide ethical responses to the ecological crisis.¹⁶⁵ This type of ecumenical cooperation is essential in further advancing this common moral ground.

¹⁵⁴ U.N. Comm’n on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment, Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, ¶21; 26, U.N. Doc. E/CN.4/Sub.2/1994/9 (Jul. 6, 1994).

¹⁵⁵ *Qur’an*, 2:22.

¹⁵⁶ Amery, *supra* note 78.

¹⁵⁷ Tucker, *supra* note 26, at 401.

¹⁵⁸ Posas, *supra* note 22, at 8-9. See chart on ways religion supports ethical actions on climate change.

¹⁵⁹ *Id.*, at 8.

¹⁶⁰ Hamad, *supra* note 88, at 2.

¹⁶¹ Nicholas A. Robinson, *Keynote: Sustaining Society in the Anthropocene Epoch*, 41 DENV. J. INT’L L. & POL’Y 467 (2013).

¹⁶² Hamad, *supra* note 88, at 7.

¹⁶³ Tucker, *supra* note 26, at 401.

¹⁶⁴ Common Declaration on Environmental Ethics, Common Declaration of John Paul II and the Ecumenical Patriarch His Holiness Bartholomew I (Jun. 10, 2002), http://www.vatican.va/content/john-paul-ii/en/speeches/2002/june/documents/hf_jp-ii_spe_20020610_venice-declaration.html.

¹⁶⁵ GRIM & TUCKER, *supra* note 19, at 97-98.

3. *Religions and Sacred Waters*

The ‘greening’ of religions has broadened the traditional teachings’ scope by adapting them to the current environmental crisis. For example, religions offer interesting new constructs on how climate change affects faith, ethics, and God’s image.¹⁶⁶ Most religious traditions have developed sacramental sensibilities in which material reality mediates the sacred.¹⁶⁷ In particular, virtually all religions have a significant relationship with water as it represents the creation of the cosmos and permeates many cultures and traditions.¹⁶⁸ Many different religious rituals and cultural ceremonies worldwide celebrate water’s symbolic potency as an agent of life, rebirth, and destruction.¹⁶⁹ For this reason, water is a cultural source of religious significance.¹⁷⁰ Such affirmation of material reality is a critical component of how religion values nature.¹⁷¹ This section uses water to exemplify the reinterpretation of religious thought.

The history of water reveals a deeply rooted concept of water “as a common property resource rather than a traded commodity.”¹⁷² For example, customary Jewish law identifies water as common property.¹⁷³ When water originates from a natural source, ‘provided by God,’ commodification is prohibited.¹⁷⁴ However, when it derives from human labor, such as wells, water is a common property resource.¹⁷⁵ Exceptionally, drinking water has the highest priority access, regardless of whether it belongs to the well’s community of owners.¹⁷⁶

Likewise, traditional Islamic law imposes a holy duty to share water as a divine gift, based on the Right of Thirst.¹⁷⁷ The Arabic term for Islamic Law, Sharia, literally means ‘way to water.’¹⁷⁸ Islam is a rich source of spiritually derived water-conservation ethics. It is considered a blessing from God that gives and sustains life and purifies humankind and the earth.¹⁷⁹ In the Quran, water is the most precious creation after humanity, holding life-giving quality.¹⁸⁰ For Muslims, water enjoys particular importance for its use in *wudu* (ablution, washing before prayer)

¹⁶⁶ Bergmann, *supra* note 72. See also Sigmund Bergmann, *Climate change changes religion: Space, spiritual, ritual, technology - through a theological lens*, 63 *STUDIA THEOLOGICA - NORD. J. OF THEOLOGY* (2009).

¹⁶⁷ GRIM & TUCKER, *supra* note 19, at 16.

¹⁶⁸ Christiana Z. Peppard, *Water*, in *ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY* (Willis J. Jenkins, et al. eds., 2017).

¹⁶⁹ *Id.*, at 286.

¹⁷⁰ In addition to being a physical resource, a requirement for life, a social resource, showing status, a political resource, as the provision of water can help justify a regime, and an economic resource, as it becomes scarce. See James Salzman, *Thirst: A Short History of Drinking Water*, 18 *YALE J.L. & HUMAN* 97; 100 (2013); JAMES SALZMAN, *DRINKING WATER: A HISTORY* 32-33 (Overlook Duckworth and Peter Mayer Publishers, Inc. Revised ed. 2017) (noting that “water carries great symbolism throughout the Judeo-Christian tradition.”)

¹⁷¹ GRIM & TUCKER, *supra* note 19, at 16. Other sacramental practices include oil, food, flowers and lighting incense and candles.

¹⁷² See Salzman, *supra* note 170, at 99.

¹⁷³ SALZMAN, *supra* note 170, at 50.

¹⁷⁴ Talmud Bavli Shabbat, 121b (“Rivers and Streams forming springs, these belong to every man”); Beitza, 391; Eiruvin, 46a and 48a; Tosephta Baba Qama, 6, 15. See Salzman, *supra* note 170, at 99; SALZMAN, *supra* note 170, at 50.

¹⁷⁵ Salzman, *supra* note 170, at 100.

¹⁷⁶ See Melanne Andromedea Civic, *A Comparative Analysis of the Israeli and Arab Water Law Tradition and Insights for Modern Water Sharing Agreements*, 26 *DENV. J. INT'L L. & POL'Y* (1997).

¹⁷⁷ Salzman, *supra* note 170, at 100 (citing the *Qur'an*, “Anyone who gives water to a living creature will be rewarded . . . to the man who refuses his surplus water, Allah will say: “Today I refuse thee my favor, just as thou refused the surplus of something that thou hadst not made thyself”); See also SALZMAN, *supra* note 170, at 50-51 (“Islamic water law is quite similar to Jewish water law in both substance and significance.”).

¹⁷⁸ Salzman, *supra* note 170, at 100.

¹⁷⁹ Naser I. Faruqui, *Islam and water management: Overview and principles*, in *WATER MANAGEMENT IN ISLAM* (Naser I. Faruqui, et al. eds., 2001).

¹⁸⁰ See *Qur'an*, 16:65 and 21:30.

and *ghusl* (bathing) in the daily prayers.¹⁸¹ The Quran warns against unfair and inequitable water distribution,¹⁸² and it is against Islamic law to hoard excess water.¹⁸³

Islamic law provides for prioritization of water uses (1) human health; (2) domestic animals; and (3) irrigation. Islamism recognizes the rights of animals, in particular to water.¹⁸⁴ Nonhuman species have rights to sufficient water of ‘good’ quality because the water has to be suitable for ‘nourishing vegetation’ and drinking by animals. Flora also has the right to water, as rainwater sent by God nourishes these.¹⁸⁵ This effectively recognizes the rights of nature. Additionally, Islamic law protects water resources for ecological purposes. The recognition of water as a vital resource is emphasized by the following *hadith*, which effectively makes water a community resource to which all, rich or poor, have a right: “Muslims have common share in three things: grass (pasture), water and fire (fuel).”¹⁸⁶ The *hadith* effectively recognizes the right of everyone to a fair share of water.¹⁸⁷

The human desire to enter into the Earth’s nurturing processes promotes in-depth protection of food and water in many religious communities. These value water as sacred, using it for ceremonies of purification or initiation. Likewise, planting and harvest rituals and thanksgiving for food and drink are common in all religious ecologies.¹⁸⁸ Examples include the Seder in Jewish families, the Eucharist in Christian communities, and Ramadan dinners in the Muslim world. Offerings of food to the ancestors in Buddhist and Confucian communities bound humans to the long lineage of life. Grim & Tucker note that “nature’s fecundity is seen as a source of life, providing rich nourishment for individuals and communities.”¹⁸⁹

Water in religious contexts is full of symbolism. In the Hebrew Bible’s book of Genesis, the separation of waters is described before dry land appeared. The rite of baptism in Christianity evokes the baptism of Jesus on the Jordan River banks, where present-day pilgrims seek the holy associations of those waters. At the Hindu celebration of the Kumbh Mela, millions of people gather over a month for bathing and purification rituals at sacred river sites.¹⁹⁰ Besides all of its symbolism, drinking water is a physical resource, “one of the few truly essential requirements for life.”¹⁹¹ In his encyclical, *Laudato si’*, Pope Francis specifically addressed the human right to water, qualifying it as a “basic and universal human right”:

Even as the quality of available water is constantly diminishing, in some places there is a growing tendency, despite its scarcity, to privatize this resource, turning it into a commodity subject to the laws of the market. Yet access to safe drinkable water is a basic and universal human right, since it is essential to human survival and, as such, is a condition for the exercise of other human rights. Our world has a grave social debt towards the poor who lack access to drinking water, because they are denied the right to a life consistent with their

¹⁸¹ Prophet (pbuh) “The similitude of five prayers is like an overflowing river passing by the gate of one of you in which he washes five times daily.”

¹⁸² Faruqi, *supra* note 179, at 2-3.

¹⁸³ *Id.* One category of sinners expressly identified in the Qur’an is a man who “possessed superfluous water on a way and . . . withheld it from the travelers.” Al-Bukhari 3.838.

¹⁸⁴ *Id.* See note *Qur’an*, 6:38; Al-Bukhari 8.38; Al-Bukhari 5550 in *The Hadith Encyclopedia*; Al-Bukhari 4.538.

¹⁸⁵ See *Qur’an*, 6:99; 35:77.

¹⁸⁶ Abu-Dawood 3470.

¹⁸⁷ Faruqi, *supra* note 179, at 2-3.

¹⁸⁸ GRIM & TUCKER, *supra* note 19, at 40.

¹⁸⁹ *Id.*, at 40.

¹⁹⁰ Peppard, *supra* note 168, at 286.

¹⁹¹ Salzman, *supra* note 170, at 96.

inalienable dignity. This debt can be paid partly by an increase in funding to provide clean water and sanitary services among the poor. But water continues to be wasted, not only in the developed world but also in developing countries which possess it in abundance. This shows that the problem of water is partly an educational and cultural issue, since there is little awareness of the seriousness of such behaviour within a context of great inequality.¹⁹²

Although Judeo-Islamic perspectives focus on water as a property resource, the two reinforce a rights-based approach for quenching the global water crisis.¹⁹³ Another traditional view on the water crisis rests with the Catholic Church's teachings, which calls on people to follow the principles of solidarity and subsidiarity.¹⁹⁴ Given the deep symbolism of water for religions, the moral duty to protect water perfectly exemplifies how the underlying principles reflect a related legal obligation. The use of water by religions not only promotes a duty of care for daily use but reflects the environmental crises humanity now grapples with, including Covid-19 and climate change.

4. *American Conservationists: Transcendentalists*

Early spiritual conservationism has emerged of the Earth as God's creation, a 'temple' that we should not despoil. Grim & Tucker acknowledge these varied ecological perspectives, comparing them with traditional environmental knowledge in many religious and ethical systems.¹⁹⁵ Leading voices such as Ralph Waldo Emerson, Henry David Thoreau, John Muir, Robert Marshall, Sigurd Olson, and John Burroughs celebrated nature for its physical beauty, utility, and spiritual value.¹⁹⁶ These scholars called upon natural law theory to promote the preservation of nature, in a cross-over between the theological argument and finding in nature the presence of God. Sharing a similar appreciation of nature's complexity, beauty, and holism, scientists and religious communities call for the conservation and preservation of ecosystems and species.

As the fountainhead of public policy on nature conservation in the US, Emerson famously ignited the conservationism movement through his essay *Nature*.¹⁹⁷ Emerson projected the concept of transcendentalism, a belief system that espouses a non-traditional appreciation of nature. He

¹⁹² FRANCIS, *supra* note 28, at 24, para 30.

¹⁹³ Lori Beail-Farkas, *The Human Right to Water and Sanitation: Context, Contours, and Enforcement Prospects*, 30 WIS. INT'L L.J. 761; 769 (2013) ("Human rights are founded in the notion of human dignity and natural law. Natural law provides that all persons are inherently entitled to certain rights and freedoms, and it holds that there are immutable laws of nature that are and ought to be binding upon human society.").

¹⁹⁴ See generally, Pontifical Council For Justice And Peace, Chapter Ten: Safeguarding the Environment *in* Compendium Of The Social Doctrine Of The Church 197, 210 (2005); Pontifical Council For Justice And Peace, Water, An Essential Element For Life: An Update 44 (2003),

http://www.vatican.va/roman_curia/pontifical_councils/justpeace/documents/rc_pc_justpeace_doc_20060322_mexico-water_en.html (last visited Mar. 31, 2021) (calling for the concept of 'family of nations,' which acknowledges that

"responsibility for the destiny of the less favored countries rests also with those more richly blessed. In a family, every member is responsible for each and every other member; the suffering of one becomes the suffering of all." and declaring water to be a 'resource security,' which means that water is a strategic factor for establishing and maintaining world peace).

¹⁹⁵ GRIM & TUCKER, *supra* note 19, at 83.

¹⁹⁶ Gottlieb, *supra* note 40, at 15. The conservation movement also benefited from other literary and artistic works of the 19th century, including by Albert Bierstadt, Frederic Edwin Church, George Perkins Marsch, William Henry Jackson, and, later, the work of foresters Carl A. Schenck and Glifford Pinchot.

¹⁹⁷ RALPH WALDO EMERSON, NATURE (James Munroe and Company. 1836). See also Russell B. Goodman, *East-West Philosophy in Nineteenth Century America: Emerson and Hinduism*, 51 J. OF THE HISTORY OF IDEAS (1990); Russell B. Goodman, *The Colors of the Spirit: Emerson and Thoreau on Nature and the Self*, in NATURE IN AMERICAN PHILOSOPHY (Jean De Groot ed. 2004).

followed a unitarian view of God, arguing that God is in nature and all of creation. Emerson further suggested that the divine, or God, pervades nature. The reality, then, can be understood by the study of nature. Using spirituality as a central theme of his essay, Emerson reimagined the divine as nature, the ‘Universal Being,’ and promoted environmental care as a way to find one’s spirit. Through a powerful insight, Emerson connected a religious attitude to public policy to induce change, representing the fountainhead of nature conservation public policy in the U.S.

Emerson’s essay profoundly influenced Thoreau. Through a series of writings on natural history and philosophy, Thoreau anticipated the methods and findings of ecology and environmental history, prompting modern-day environmentalism.¹⁹⁸ Thoreau was an early advocate of conserving natural resources on private land and preserving wilderness as public land. His observations later persuaded the national park system.

Muir also drew on Emerson’s teachings and became an early advocate for preserving wilderness in the U.S.¹⁹⁹ Muir valued nature for its spiritual and aesthetic qualities, which inspired the preservation of natural areas.²⁰⁰ His experience with nature was religious; he saw natural landscapes as a primary source for understanding God.²⁰¹ His belief in the ‘Book of Nature’ led to his writings a sense of prophecy, seeking to change humanity’s angle.²⁰² He later co-founded the Sierra Club as a prominent conservation organization.

These conservationists have significantly shaped the development of environmentalism in the U.S. through an intrinsic spiritual human-nature relationship. While not directly religious, they have inspired a transcendent view of nature that demanded respect and shelter, leading to significant developments in environmental protection. They called upon it on natural law theory as a cross-over between theological arguments and finding God’s presence in nature.

5. *American Conservationists: Berry and his legacy*

Berry began where Muir ended and drew on Catholicism to find transcendent meaning in nature.²⁰³ Berry drew on studies of world religions and cultures to formulate a framework for rethinking the relationships of cosmology and ecology.²⁰⁴ Coining the term ‘Earth Community,’ he indicated our shared sense of belonging to something more splendid, humans and nature in continuity.²⁰⁵ As a true Renaissance man, Berry drew on Hindu, Buddhist, Chinese, and Japanese civilizations, Jewish, Muslim, and Christian traditions, the traditions of indigenous peoples, and other scientific knowledge of the modern western world to develop a historical perspective of the universe.²⁰⁶ He tried to understand these to situate humans in the more considerable diversity of culture and traditions embedded in human and Earth history. Berry’s lessons have positively influenced emerging new legal theories that provide an Earth-centered perspective, as will be shown below.

In 1999, Berry proposed in *The Great Work* that humanity’s challenge is to understand the underlying systemic reasons for the ecological crisis and transform our relationship with the

¹⁹⁸ HENRY DAVID THOREAU, *A WEEK ON THE CONCORD AND MERRIMACK RIVERS / WALDEN / THE MAINE WOODS / CAPE COD* (Library of America. 1989).

¹⁹⁹ JOHN MUIR, *JOHN MUIR: HIS LIFE AND LETTERS AND OTHER WRITINGS* (Terry Gifford ed., Mountaineers Books 1996). See also TIM FLINDERS, *JOHN MUIR: SPIRITUAL WRITINGS* (Orbis Books 2013).

²⁰⁰ John M. Meyer, *Gifford Pinchot, John Muir, and the Boundaries of Politics in American Thought*, 30 *POLITY* 267 (1997).

²⁰¹ DENIS C. WILLIAMS, *GOD’S WILDS: JOHN MUIR’S VISION OF NATURE* (Texas A&M Univ. Press. 2002).

²⁰² JOHN TALLMADGE, *MEETING THE TREE OF LIFE: A TEACHER’S PATH* (Univ. of Utah Press. 1997).

²⁰³ Mary Evelyn Tucker, et al., *Thomas Berry: A Biography* (Columbia University Press. 2019).

²⁰⁴ GRIM & TUCKER, *supra* note 19, at 89.

²⁰⁵ Tucker, et al., *supra* note 203.

²⁰⁶ *Id.*

natural world from one of destruction to one of mutually beneficial support.²⁰⁷ Based on his observations, we are moving “from human history to planetary history,” from “socio-political history to history of the biosystems of the planet.” He added that “[a] new perspective has evolved which is still too difficult for most historians and most scientists to deal with.”²⁰⁸

Berry used Catholicism to find transcendent meaning in nature and used nature to understand his religion. He employed apocalyptic language to describe the modern environmental dilemma, noting the supreme need of our time to heal the Earth.²⁰⁹ Thus, environmental degradation represents a call for reorienting the human community in awakening to a ‘New Story’ in which humans can willingly diminish their impacts for the community of life to flourish.²¹⁰

Berry argues that human society should broaden its present focus from human beings to recognize the supremacy of the existing Earth governance of the planet as a single, interconnected community.²¹¹ In his final book, he called on human society to enter a new covenant with nature. He writes, “history is governed by those overarching movements that give shape and meaning to life by relating the human venture to the larger destinies of the universe. Creating such a movement might be called the Great Work of a people.”²¹²

Based on the foundation of religious and indigenous traditions that honor the sacredness of creation and perceive the intrinsic value of nature, Berry advanced the idea of Earth jurisprudence.²¹³ As an emerging legal theory, Earth jurisprudence is closely aligned with environmental law and justice but goes a step further by bringing an innovative jurisprudential dimension. It attempts to live gently with the Earth, and all that life depends on by advancing an Earth-centered law and governance.²¹⁴

Berry fundamentally observed that “[t]he Universe is a communion of subjects not a collection of objects.”²¹⁵ Earth jurisprudence can thus be characterized as a ‘systems approach,’ in which the functioning of its whole primarily determines the behavior of a part of a system.²¹⁶ Based on this universal communion, Berry set the foundation for the rights of nature. He argued that the Universe is the ultimate source of meaning. Suppose human beings claim that our mere existence

²⁰⁷ BERRY, *supra* note 128, at 7.

²⁰⁸ Thomas Berry, Goldenrod: Reflections on the Twentieth Century (Harvard Archives) (cited in Tucker, et al., Thomas Berry: A Biography.)

²⁰⁹ Thomas Berry, *The Dream of the Earth* (Sierra Club Books. 1988).

²¹⁰ TUCKER, ET AL., *supra* note 203 at Loc. 191.

²¹¹ Thomas Berry, *Our Way into the Future: A Communion of Subjects*, in EVENING THOUGHTS: REFLECTING ON EARTH AS A SACRED COMMUNITY 20 (Mary Evelyn Tucker ed. 2006).

²¹² BERRY, *supra* note 128.

²¹³ Siemen, *supra* note 130, at 2. The term “Earth Jurisprudence” arose out of a meeting hosted by the Gaia Foundation with environmental thinker Thomas Berry in 2001. See CORMAC CULLINAN, *WILD LAW: A MANIFEST FOR EARTH JUSTICE* (Green Books. 2011). The major works of BERRY, *THE DREAM OF THE EARTH*. BRIAN SWIMME & THOMAS BERRY, *THE UNIVERSE STORY: FROM THE PRIMORDIAL FLARING FORTH TO THE ECOZOIC ERA - A CELEBRATION OF THE UNFOLDING OF THE COSMOS* (Harper San Francisco. 1992). BERRY, *supra* note 128. Earth Jurisprudence follows the philosophical thread of the environmental movement and takes the inquiry to a systemic level. While environmental legal approaches have advanced a number of changes in law, they generally have not questioned the basic assumptions of humanity's relationship to the natural world or the structure of the legal system that supports continued destruction of the environment. Earth Jurisprudence makes this deeper, and necessary, inquiry into the premises of our system of law and governance in which the environmental movement operates. See also KLAUS BOSSELMANN, *WHEN TWO WORLDS COLLIDE: SOCIETY AND ECOLOGY* (RSVP Publishing. 1995). Bosselmann presents an analysis of the intersection between law and environmental philosophy.

²¹⁴ Siemen, *supra* note 130, at 2.

²¹⁵ Thomas Berry, *The Origin, Differentiation and Role of Rights* (2001), available at <http://www.earthjuris.org/viewpointdocuments/origin.htm>. See also Thomas Berry, *Appendix 2: Ten Principles for Jurisprudence Revision*, in EVENING THOUGHTS: REFLECTING ON EARTH AS A SACRED COMMUNITY (Mary Evelyn Tucker ed. 2006). Principle 3 states that “The universe is composed of subjects to be communed with, not primarily of objects to be used. As a subject, each component of the universe is capable of having rights.”

²¹⁶ Cormac Cullinan, *Do Humans Have Standing to Deny Trees Rights*, 11 BARRY L. REV. 11; 12 (2008).

means that we have inalienable human rights. In that case, it follows that the presence of rivers, trees, birds, and bees means that they also have a form of inalienable, fundamental rights. These would not be the same for each member but must include the right to exist, have a place to inhabit, and continue to play a role in the ongoing co-evolutionary process.²¹⁷ Water is also part of Swimme and Berry's cosmology as water anthropomorphizes plants as "the first heroes to venture onto land" after eons of watery habitation.²¹⁸

In conclusion, Berry drew on religious traditions to further develop a philosophy based on the protection of nature. His work, in turn, inspired the development of Earth jurisprudence, showing a true crescendo of jurisprudential thought on environmental protection that builds on top of one another.

D. Indigenous Beliefs of Earth Conservation

From the top of the world at the Arctic Circle of Nunavut on Turtle Island (North America) to the tip of South America at Tierra del Fuego, Native Peoples assert their rights to land, culture, and a healthy future for generations to come and for all of the ecological life that creates sacred homelands.²¹⁹

Indigenous peoples have stewardship over the majority of the world's biodiversity. They have traditionally promoted an ideology that, contrary to Western civilizations, is not divorced from living with nature. Instead, they embrace nature fully. Their ways of living and value system hold the basic knowledge that many human beings have forgotten: the natural world is 'peopled' by beings with whom we must cultivate mutually respectful relationships. For example, Indigenous peoples carefully coordinate their ritual calendars with seasonal events such as the sounds of returning birds, the blooming of plants, the migrations of animals and fish, and cosmological events such as the shift of the constellations and the changes of the moon.²²⁰ The relationship between Indigenous peoples and the land has always been unique:

This we know, the Earth does not belong to man; man belongs to the Earth. This we know, all things are connected, like the blood which unites one family. Whatever befalls the Earth, befalls the sons of the Earth. Man did not weave the thread of life; he is merely a strand in it. Whatever he does to the web he does to himself.²²¹

Covid-19 reminded us that environmental awareness is not a luxury but a staple of social progress.²²² And yet Indigenous populations, who embody the most profound care of nature, with an ancestral connection with places and natural features, remain marginalized and often excluded from policies.²²³ Humanity finally needs to remember that we are supposed to live in balance, as

²¹⁷ Berry, *supra* note 215, at 149-150.

²¹⁸ SWIMME & BERRY, *supra* note 213, at 116.

²¹⁹ Melissa K. Nelson, *North America*, in ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY (Willis J. Jenkins, et al. eds., 2017).

²²⁰ GRIM & TUCKER, *supra* note 19, at 25.

²²¹ Letter from Chief Seattle, Patriarch of the Duwamish and Squamish Indians of Puget Sound to United States President Franklin Pierce (1855), quoted in U.N. Comm'n on Human Rights, *supra* note 154, ¶74. The message from Chief Seattle has been disputed by some scholars who note that the words attributed to him were not his own. However, the disputes over what he said and when he said it don't detract from the essence of his message, which is relevant here.

²²² Etty et. al., *supra* note 7, at 385.

²²³ *Id.*

caretakers.²²⁴ Indigenous modes of being have preserved living knowledge that might prove invaluable in the current era confronted with problems that challenge the sustainability of sentient flourishing, ecological integrity, environmental health, and interspecies ethics.²²⁵ This section looks at Indigenous environmental cosmologies as a foundation for the care for nature and this ideology's expansion at the international level. It does not provide a comprehensive view of Indigenous cosmologies but illustrates the Indigenous respect for nature through a few examples throughout different geographical regions.

Subsection 1 addresses the foundations of Indigenous environmental cosmologies, which rely on Mother Earth as a living entity that requires care. Drawing from ancient traditions, this Indigenous cosmology is now renewed and gains force beyond their territories to reinforce the need to protect a degraded environment. Subsection 2 illustrates the foundation of Indigenous environmental cosmologies through water as a sacred symbol and a ceremonial source. The protection of water is reflected in water management policies and the reliance on Indigenous lessons to develop laws on the rights of nature, especially rivers, worldwide. Subsection 3 further elucidates the expansion of Indigenous and peasant rights at the international level as their recognition slowly progresses worldwide. Finally, Section 4 uses some specific examples of furthering Indigenous rights through international courts and tribunals to boost environmental protection and their particular environmental cosmologies.

1. Foundations of Indigenous Environmental Cosmologies

Indigenous peoples' interactions with the environment represent a significant basis of their religious practices. For many Indigenous cultures, humanity is but one of many creatures, all of which are related. There is no reason to dominate nature. One can merely exist within nature, depending on it for survival and respecting it by maintaining wildlife and living sustainably. While this is a spiritual concept, it also led to preserving the ecosystem.²²⁶

For example, the Kurok, Hoopa, and Yurok peoples of northern California recognized particular spiritual presences in sacred mountains.²²⁷ The Lakota people speak of 'all my relations' as an expression of nature as a source of kinship and nurturance. Indigenous groups in Latin America have actively emphasized their traditional knowledge of and connection to non-human nature and their practical ties to the land.²²⁸ These complex interactions illustrate that religions are not static in their impacts on the environment. Instead, throughout history, they have interacted in myriad ways with natural settings. These can be called religious ecologies based on varied worldviews, ritual customs, and ethical practices.²²⁹

Land, in most Indigenous cultures, represents a living entity. The Inca civilization refers to the Earth as 'Pachamama,' which roughly translates to 'Earth Mother.'²³⁰ While 'Mother Earth' as a concept in the West was once meant literally, it has often taken on a symbolic meaning. In

²²⁴ Bill McKibben, *The Coronavirus and the Climate Movement*, THE NEW YORKER Mar. 18, 2020. "Nature helps me figure out what truly matters in the short lifetime I have. Out here, the simple truths of life are tangible, and priorities are clear. Everything is hard work, every being has both purpose and fluidity. Everything has a spirit and must be treated with respect. It is life in the circular."

²²⁵ Dan Smyer Yü, *Asia: An indigenous cosmopolitan turn in the study of religion and ecology*, in ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY (Mary Evelyn Tucker & John Grim eds., 2017).

²²⁶ Joseph Kowalski, *Environmentalism Isn't New: Lessons from Indigenous Law*, 26 BUFFALO ENVTL. L. J. 15; 27 (2019).

²²⁷ GRIM & TUCKER, *supra* note 19, at 22.

²²⁸ Peterson, *supra* note 116, at 196.

²²⁹ GRIM & TUCKER, *supra* note 19, at 22.

²³⁰ See Emilie Blake, *Are Water Body Personhood Rights the Future of Water Management in the United States*, 47 TEX. ENVTL. LJ 197 (2017).

Indigenous societies, the meaning is not metaphorical. Everything is alive, and Mother Earth should be cared for. Pachamama is an Earth goddess traditionally worshipped in the landscape herself. Earth as a literal mother has been found in many cultures throughout the world. The Lakota call her ‘Unci Maka,’ or ‘Grandmother Earth.’ The Lakota further view the concept of care for the Earth as a source of freedom.²³¹ These concepts are so old that they are often embedded in these cultures’ spirituality and original beliefs.²³²

Indigenous peoples in the Americas have often made their relationships with the non-human world particularly explicit in their rituals and narratives.²³³ Within Latin American cosmovision, objects in an interlinked universe are potentially powerful as they share vital ancestral essences spread throughout the world.²³⁴ The behavioral environment requires personal interaction, not demanding gods but person-like beings representing ecological powers. In many myths, landscape features and non-human animals play an essential role in religious belief and practice.²³⁵

Using Tibetans as an example, Smyer Yü depicts a folktale in which the Earth is a supernatural living being upon whom humankind is dependent. The Tibetan tale describes the Earth and humankind as two sentient species, bonded with each other based on mutual respect and affective expressions.²³⁶ Tibetans see the mountains as sacred sites distanced from humans, pillar-like high grounds reaching into the heavens where the gods reside. Smyer Yü compares the perspective with the Judeo-Christian image of the cosmos, God’s upwardness, and the downwardness of the profane human realm.²³⁷ Similarly, the sacredness of mountains for Tibetans is comparable to the sacredness of rivers for the Hindus.

Other Asian Indigenous communities share a similar spiritualized nature of traditional ecological knowledge. The Penan landscape in East Malaysia embodies gods and spirits’ supernatural presence in rivers and forests’ eco-geological features. The Eveny in Siberia deeply entwines human existence with reindeers, which offer human-earth relationships via shamanic visions through a deep partnership in their existential and spiritual connection. The Altaians in Siberia regard the Katun River and their forest as living beings. A similar cosmovision is found in India’s Vedic tradition, which reveals the Earth’s animated mode of being through contemporary rituals. These examples of Indigenous eco-religious practices attest to the vitality of their cosmovision.²³⁸

Identities connecting trees, cultures, and ecologies have shaped the cultures of people in the Pacific.²³⁹ In particular, the Maori are the people of the Pacific Ocean, the Great Ocean of Kiwa, who, in turn, is one of the children of Sky Father and Earth Mother and responsible for the domain of the oceans. The Maori’s cosmic religious worldview is based on the understanding that

²³¹ Russell Means, Free to be Responsible, Address at Navajo Community College (1995) (transcript available at <http://www.russellmeansfreedom.com/2009/free-to-be-responsible-a-russell-means-speech/>).

²³² Kowalski, *supra* note 226, at 25.

²³³ Peterson, *supra* note 116, at 191.

²³⁴ Miguel Astor-Aguilera, *Latin America*, in ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY 158 (Willis J. Jenkins, et al. eds., 2017).

²³⁵ Peterson, *supra* note 116, at 190-198.

²³⁶ Smyer Yü, *supra* note 225, at 122.

²³⁷ *Id.*, at 122.

²³⁸ *Id.*, at 125-126.

²³⁹ Manuka Henare, *Pacific Region: In search of harmony: Indigenous traditions of the Pacific and ecology*, in ROUTLEDGE HANDBOOK OF RELIGION AND ECOLOGY 129-137 (Willis J. Jenkins, et al. eds., 2017).

humanity and all-natural world things are continually emerging and unfolding.²⁴⁰ Maori do not see themselves as separate from Te Ao Marama, the natural world. As such, the world's resources do not belong to humankind. On the contrary, humans belong to the Earth, having user rights to harvest its resources.²⁴¹ Indigenous peoples in Australia have inhabited the continent for at least 30,000 years with a minimal negative impact on their environment.²⁴² Indigenous cultures tend not to have a separation of humanity and the environment as is found in Western culture: "As the late Western Shoshone spiritual leader Corbin Harney used to say, Native people are not separate from the environment. We are the environment!"²⁴³

Many Indigenous societies have totemic relationships, such as membership in a 'Bear Clan' or other animal groupings, where a member of that society must look after their totemic animal's well-being. The Yolngu of Australia, like many Indigenous cultures, have clan relationships with the animals that share their homelands.²⁴⁴ The Lakota pray with the phrase 'Mitakuye Oyasin,' indicating a relationship with all that is, as it translates to 'all my relations' but means every living thing.²⁴⁵

The Maori of New Zealand see themselves as part of their environment, "They were born out of it, for the land was Papatuanuku, the mother earth who conceived the ancestors of the Maori people."²⁴⁶ Indigenous peoples are intrinsically connected to their water taonga ('treasures' in the Maori language). They have wide-ranging practical, spiritual, environmental, cultural, and economic interests in, relationships with, obligations towards, and dependencies on water resources.²⁴⁷ For example, the Fitzroy River Declaration recognizes that the Martuwarra River in north-western Australia 'is a living ancestral being and has a right to life. It must be protected for current and future generations and managed jointly by the river's Traditional Owners.'²⁴⁸ The legal nature of Indigenous water rights recognized in western law is also complex,²⁴⁹ with rights and entitlements typically fragmented across a complicated 'patchwork' of tenures.²⁵⁰

²⁴⁰ See Catherine J Iorns Magallanes, *From rights to responsibilities using legal personhood and guardianship for rivers*, in RESPONSABILITY: LAW AND GOVERNANCE FOR LIVING WELL WITH THE EARTH, B MARTIN, L TE AHO, M HUMPHRIES-KIL (EDS) (ROUTLEDGE, LONDON & NEW YORK) (2018).

²⁴¹ Henare, *supra* note 239, at 131.

²⁴² Kowalski, *supra* note 226, at 23.

²⁴³ MELISSA K NELSON, ORIGINAL INSTRUCTIONS: INDIGENOUS TEACHINGS FOR A SUSTAINABLE FUTURE 42 (Simon and Schuster 2008).

²⁴⁴ Kowalski, *supra* note 226, at 25.

²⁴⁵ JOSEPH M MARSHALL III, THE LAKOTA WAY OF STRENGTH AND COURAGE: LESSONS IN RESILIENCE FROM THE BOW AND ARROW (Sounds True. 2012).

²⁴⁶ LAURELYN WHITT, SCIENCE, COLONIALISM, AND INDIGENOUS PEOPLES: THE CULTURAL POLITICS OF LAW AND KNOWLEDGE 44 (Cambridge University Press. 2009).

²⁴⁷ See, e.g., Amaya Alvez Martin, *Constitutional Challenges of the South: Indigenous Water Rights in Chile; Another step in the Civilizing Mission*, 33 WINDSOR YB ACCESS JUST. 87 (2016); VIRIGINIA MARSHALL, OVERTURNING AQUA NULLIUS (Aboriginal Studies Press. 2017); Jacinta Ruru, *Listening to Papatūānuku: a call to reform water law*, 48 JOURNAL OF THE ROYAL SOCIETY OF NEW ZEALAND 215 (2018); Linda Te Aho, *Te Mana o te Wai: An indigenous perspective on rivers and river management*, 35 RIVER RESEARCH AND APPLICATIONS 1615 (2019); Anne Poelina, et al., *Martuwarra Fitzroy River Council: an Indigenous cultural approach to collaborative water governance*, 26 AUSTRALASIAN JOURNAL OF ENVIRONMENTAL MANAGEMENT 236 (2019); Lara Bernadette Taylor, et al., *Ngā Puna Aroha: towards an indigenous-centred freshwater allocation framework for Aotearoa New Zealand*, AUSTRALASIAN JOURNAL OF WATER RESOURCES 1 (2020)..

²⁴⁸ Fitzroy River Council, *Fitzroy River Declaration* (Nov. 3, 2016), <https://static1.squarespace.com/static/5e86add4e98f7421bace70f1/t/5e9fcc157dedb86cbb06a2e9/1587530798453/fitzroy-riverdeclaration.pdf>.

²⁴⁹ This complexity is compounded by the general complexity of trans-jurisdictional water law and governance. See JANICE GRAY, ET AL., TRANS-JURISDICTIONAL WATER LAW AND GOVERNANCE (Routledge. 2016).

²⁵⁰ For a discussion of the problem of a 'patchwork' of Indigenous water rights in the US context, see Philip Womble, et al., *Indigenous communities, groundwater opportunities*, 361 SCIENCE 453 (2018).

While these traditions are often ancient, there is currently a call for renewing Indigenous cosmovision to protect our degraded environment. The Native Peoples of North America are in a time of renewal and resurgence regarding their ‘treaties with creation,’ based on traditional and revered teachings. For example, the Anishinaabeg heritage of the Northern Great Lakes regions promotes ethical relations with the more-than-human world, including sophisticated values that bring together law, religion, art, science, and governance in a holistic vision and practice of regeneration. Similar examples are found in the great Haudenosaunee (Six Nations Iroquois) peoples of the Northeast. They have shared their ethical wisdom to address some of our time's most pressing ecological problems, including water scarcity and biodiversity loss.²⁵¹ Integral to these revitalization efforts is an understanding that people and place, nature and culture, biodiversity, and cultural diversity, are inextricably linked and must be addressed together and holistically.²⁵²

In Asia, Indigenous peoples’ modes of being have preserved living knowledge that might prove invaluable in the current environmental crises. Yü proposes a rethinking and creative revisioning in the study of Indigenous religion and ecology in the region. He questions whether we can go beyond the sacred and profanes’ dichotomy to address the linkages between Indigenous cosmovision and sustainable modes of living. He thus re-identifies ‘the Indigenous’ as an inclusive term encompassing people with knowledge of the Earth as a living being in ethical and spiritual terms, regardless of whether their understanding is space-specific or whether they no longer live on their native land due to migration.²⁵³

Pope Francis’ *Dear Amazon*, on the fate of the Amazon biome and its Indigenous people,²⁵⁴ brought for the first time hundreds of Catholic bishops, Indigenous leaders, and environmental activists from the nine Amazon countries. Recognizing the ecological importance of Amazonia, especially its potential in climate mitigation via carbon storage, Pope Francis argued that those best suited to protect the Amazon are the Indigenous people.²⁵⁵ His plea in defense of the rainforest is scientific, humanistic, political, and spiritual: “If the care of people and the care of ecosystems are inseparable, this becomes especially important in places where the forest is not a resource to be exploited; it is a being, or various beings, with which we have to relate,”²⁵⁶ Pope Francis writes in the ecological section. “When indigenous peoples remain on their land, they themselves care for it best, provided they do not let themselves be taken in by the siren song and self-serving proposals of power groups.” The particular care for nature by Indigenous groups is exemplified through water as a sacred and ceremonial source.

In parallel, the Colombian Constitutional Court’s decision in *Atrato River* – a landmark decision which recognized the rights of nature to the Atrato River – particularly noted the constitutional relevance of rivers, forests, food sources, the environment and biodiversity as part of the nation’s natural and cultural wealth and protected within the context of Colombia’s ‘ecological constitution.’²⁵⁷

²⁵¹ Nelson, *supra* note 219, at 138.

²⁵² *Id.*

²⁵³ Smyer Yü, *supra* note 225, at 120-128.

²⁵⁴ Francis, *supra* note 133.

²⁵⁵ Justin Catanoso, *The Pope Makes Plea to Save the Amazon — Will the World Listen?* (Mongabay, EcoWatch, Feb. 18, 2020).

²⁵⁶ Francis, *supra* note 133, ¶42.

²⁵⁷ Constitutional Court of Colombia, Judgment T-622/16, 10 November 2016, at 5.2 (Atrato River Case), <https://delawarelaw.widener.edu/files/resources/riveratratodecisionenglishdrpdellaw.pdf>. See also Héctor Herrera-Santoyo, *The Rights of Nature (Rivers) and Constitutional Actions in Colombia*, GLOBAL NETWORK FOR HUMAN RIGHTS AND THE

2. *Water as an Indigenous Sacred and Ceremonial Source*

In most Indigenous spirituality, water represents a sacred symbol and a ceremonial source.²⁵⁸ Water retains an honored and indispensable place, an actual force and symbolic image of life and death, creation and destruction, nourishment and deprivation: water exists as an autonomous and primeval element to be encountered with humility, respect, joy, and caution.²⁵⁹ Given its profound religious meaning, water is used as an object of worship more than any other natural resource.²⁶⁰ To the Hopi of North America, water is understood as the first existing substance. The Lakota say “Mní wičhóni,” or “Water is life.” The Blackfoot tribe in Montana believed in water as a separate realm of existence and a special and sacred place.²⁶¹ The Indigenous peoples’ unique relationship with water is often manifested in religious worship on particular geographic features, including rivers.²⁶² Their very cosmology is built on the intricate knowledge of and connection to their ancestral land and its relations to animals, plants, and water. This deep connection reflects Indigenous peoples’ role in protecting water around the world.

Indigenous peoples have a strong spiritual connection with their traditional land and waters, which allows them to develop valuable conventional ecological knowledge.²⁶³ Different forms of water, such as rain, lakes, streams, ponds, rivers, oceans, and seas, and the animal and plant life associated with those aquatic reservoirs have sustained prominence as sacred signifiers for Native American nations. As a result, Indigenous religious practices have become essential to effective water management, conservation, and preservation.²⁶⁴ For example, the Amazon River is sacred to the Indigenous tribes within that watershed.²⁶⁵ Besides, Australian aboriginal water law identifies most water sources as sacred; knowledge of their location is crucial for survival.²⁶⁶ Ultimately, Indigenous peoples claim a right to water through a religious-rights-based perspective. Indigenous peoples continue to contest for water governance, ownership, and sovereignty across the globe.²⁶⁷ In Australia, given the scarcity of water, there is no distinction between the different purposes. Most water sources are sacred, and knowledge of their location is vital to a group’s

ENVIRONMENT (Jul. 8, 2019), https://gnhre.org/2019/07/08/the-rights-of-nature-rivers-and-constitutional-actions-in-colombia/#_ftn3.

²⁵⁸ Rhett B. Larson, *Holy Water and Human Rights: Indigenous Peoples' Religious-Rights Claims To Water Resources*, 2 ARIZ. J. ENVTL. L. & POL’Y (2011). Despite the overlap, some indigenous Muslim communities claim that any use of treated sewage effluent (“reclaimed water”) is ceremonially impure. See generally Shaukat Farooq & Zafar I Ansari, *Wastewater reuse in Muslim countries: An Islamic perspective*, 7 ENVIRONMENTAL MANAGEMENT 119 (1983).

²⁵⁹ June-Ann Greeley, *Water in Native American Spirituality: Liquid Life—Blood of the Earth and Life of the Community*, 2 GREEN HUMANITIES 156 (2017).

²⁶⁰ See Larson, *supra* note 258, at 81.

²⁶¹ Rosalyn R. LaPier, *Why is water sacred to Native Americans?*, 8 OPEN RIVERS (2017).

²⁶² See GREGORY CAJETE, LOOK TO THE MOUNTAIN: AN ECOLOGY OF INDIGENOUS EDUCATION (ERIC. 1994).

²⁶³ See Larson, *supra* note 258, at 97 (explaining that traditional ecological knowledge is embodied in religious ceremonies and teachings that promote sustainable water management, and traditional ecological knowledge is defined as a “body of knowledge, practice and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment.”). See also FIKRET BERKES, SACREDECOLOGY (Routledge 4th ed. 2018).

²⁶⁴ See Larson, *supra* note 258, at 84; see also Cathleen Flanagan & Melinda Laituri, *Local cultural knowledge and water resource management: The Wind River Indian Reservation*, 33 ENVTL. MGMT. 262; 269 (2004).

²⁶⁵ See Larson, *supra* note 258, at 85; see also Brij Gopal, *Holy Ganga and the Mighty Amazon*, 16 AMAZONIANA 337; 338 (2001). Peter Gow, *River People: Shamanism and History in Western Amazonia*, in SHAMANISM, HISTORY AND THE STATE (Nicholas Thomas & Carline Humphrey eds., 1994) (noting that indigenous groups depend on practicing ayahuasca shamanism in the Amazon river for ceremonial purposes).

²⁶⁶ Salzman, *supra* note 170, at 101. Since Australia is the driest inhabited continent, Australian aboriginal water law does not distinguish between water uses. Instead, these rules function within a predominant access system labeled as “always ask.”

²⁶⁷ Elizabeth Macpherson, *Indigenous Water Rights in Comparative Law*, 9(3) TRANSNAT’L. ENVTL. L. 393 (2020).

survival.²⁶⁸ Following the rule of ‘always ask,’ sharing plays a crucial role in water management. In India, the Bihar consider the upper castes as sacred source waters. Water is believed to be a medium that transmits pollution when in contact with a person who himself is in a “state of pollution.”²⁶⁹

In comparative law, some encouraging examples of recognition of Indigenous rights in river co-management,²⁷⁰ Indigenous customs, and cultures tend towards the ‘greening of water laws’ worldwide.²⁷¹ However, Western laws typically fail to recognize and provide for the full extent of Indigenous rights to water, denying Indigenous peoples procedural rights in water planning and management frameworks and substantive water use rights and allocations.²⁷² It is still often the case that Indigenous claims are excluded and obscured even by legal interventions designed to enhance their visibility.²⁷³ As a consequence of the increasing recognition of this gap in the legal framework, there have been several examples of the recognition of the rights of rivers in comparative law in the past years.²⁷⁴

For example, while the rights of nature concept followed an attempt to codify Indigenous perspectives into modern legal frameworks, its success or failure as a legal strategy and embodiment of environmental justice largely relies on how litigants assert the newly created rights, how the legislatures develop them, and how the courts endorse and apply them.²⁷⁵ Additionally, it is essential to acknowledge that Indigenous cultures differ from each other, and genuine intercultural engagement, especially within legal structures, “can never be a simple cut-and-paste task across disparate contexts.”²⁷⁶

Traditional ecological knowledge (TEK) embodied in religious ceremonies and teachings may promote sustainable water management. Religious claims to water rights reinforce the legitimacy of Indigenous religious-based TEK. For example, in the Katun River Basin of Siberia, the Altaians’ religious beliefs, which prohibit the subjugation of the natural world, formed the basis for their opposition to constructing a dam on the Katun River, which holds particular religious significance for the Altaians.²⁷⁷ A religious-rights-based claim to water would provide legally cognizable claims to protect the type of TEK employed by the Altaians—TEK that successfully influenced water policy and informed scientific knowledge.²⁷⁸

The legal challenges associated with the relationship between water and worship are particularly complex for Indigenous communities. This is due to four reasons: (i) the spiritual

²⁶⁸ Salzman, *supra* note 170, at 101.

²⁶⁹ *Id.*, at 102.

²⁷⁰ See Karen Fisher & Meg Parsons, *River Co-governance and Co-management in Aotearoa New Zealand: Enabling Indigenous Ways of Knowing and Being*, 9(3) *TRANSNAT’L. ENV’T L.* 455 (2020).

²⁷¹ See Stefano Burchi, *The future of domestic water law: trends and developments revisited, and where reform is headed*, 44 *WATER INT’L.* 258 (2019).

²⁷² See, e.g., Lana D Hartwig, et al., *Trends in Aboriginal water ownership in New South Wales, Australia: The continuities between colonial and neoliberal forms of dispossession*, 99 *LAND USE POL.* (2020). Katherine Selena Taylor, et al., *Australian Indigenous Water Policy and the impacts of the ever-changing political cycle*, 20 *AUSTRALASIAN J. OF WATER RESOURCES* 132 (2016).

²⁷³ Mihnea Tănăsescu, *Rights of Nature, Legal Personality, and Indigenous Philosophies*, 9(3) *TRANSNAT’L. ENV’T L.* 429 (2020). Elizabeth Macpherson, et al., *Constitutional Law, Ecosystems, and Indigenous Peoples in Colombia: Biocultural Rights and Legal Subjects*, 9(3) *TRANSNAT’L. ENV’T L.* 521 (2020).

²⁷⁴ See Lidia Cano Pecharroman, *Rights of nature: Rivers that can stand in court*, 7 *RESOURCES* 13 (2018); ERIN O’DONNELL, *LEGAL RIGHTS FOR RIVERS: COMPETITION, COLLABORATION AND WATER GOVERNANCE* (Routledge. 2018).

²⁷⁵ Eddy et. al., *supra* note 7, at 388-389. Laura Schimmöller, *Paving the Way for Rights of Nature in Germany: Lessons Learnt from Legal Reform in New Zealand and Ecuador*, 9(3) *TRANSNAT’L. ENV’T L.* 569 (2020).

²⁷⁶ Eddy et. al., *supra* note 7, at 388.

²⁷⁷ Kheryn Klubnikin, et al., *The sacred and the scientific: traditional ecological knowledge in Siberian river conservation*, 10 *ECOLOGICAL APPLICATIONS* 1296; 1299-1300 (2000).

²⁷⁸ Larson, *supra* note 258, at 98.

connection of Indigenous communities is mainly linked to their traditional lands and rivers, providing challenges to property rights and natural resources; (ii) Indigenous communities make ceremonial or spiritual uses of water, triggering religious rights with other water-related rights and uses; (iii) Indigenous religious practices through traditional knowledge often promote ecological conservation of the watershed; (iv) Indigenous religions often center spirituality within the context of the natural world and on particular geographic features, including water bodies.²⁷⁹ Therefore, religious water use is a delicate matter and provides a strong starting point to understanding the human right to water.²⁸⁰ As a result, western laws are still inadequate in articulating and developing water rights for Indigenous peoples.²⁸¹ Issues of jurisdiction – recognizing Indigenous rights amidst ill-fitting, externally imposed legal regimes – and distribution – the substantive provision of rights to water – remain widespread.²⁸²

One legal argument for Indigenous rights ties into the universal human right to water. Activists are now forming views and advocating to have the spiritual use of water be considered part of the human right to water, as Indigenous people often have formal ties to waterways.²⁸³ The Wind River Reservation in the United States has incorporated spiritual use as a “beneficial use” under their Water Code.²⁸⁴ Another avenue is recognizing the rights of nature. The rights of nature embody the Indigenous belief of living in harmony with nature, which is being progressively adopted at the U.N., as explained in the next section.

3. International Recognition of the Rights of Indigenous Peoples and Peasants

Recognizing Indigenous rights and protecting Indigenous lands provide successful ways of ensuring environmental protection in their territories.²⁸⁵ The rights of Indigenous peoples have slowly advanced at the international level. The International Labour Organisation (ILO) broadly promoted the rights of Indigenous peoples. ILO Convention No. 169 (ILO C169), concerning Indigenous and Tribal Peoples in Independent Countries, binds member states who have ratified it (art. 38). ILO 169 contains a provision on environmental protection, Article 7:

[Indigenous peoples] shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control [...] over their own economic, social and cultural development [...]. Governments shall take measures [...] to protect and preserve the environment of the territories they inhabit.

The Committee on the Elimination of Racial Discrimination (CERD) lays the groundwork for recognizing the collective rights of Indigenous people, particularly for religious and cultural rights and rights to own property in association with others.²⁸⁶ Activities that deprive Indigenous groups of access to resources force such groups to leave their territory, or negatively affect their

²⁷⁹ *Id.*, at 83-85.

²⁸⁰ Leonard Hammer, *Indigenous peoples as a catalyst for applying the human right to water*, 10 INT’L J. ON MINORITY & GRP. RIGHTS 131 (2004).

²⁸¹ Etty et. al., *supra* note 7, at 387.

²⁸² See Macpherson, *supra* note 267, at 393–402.

²⁸³ Larson, *supra* note 258.

²⁸⁴ Kowalski, *supra* note 226.

²⁸⁵ Rights and Resources Initiative, *Cornered by Protected Areas: Replacing ‘Fortress’ Conservation with Rights-based Approaches Helps Bring Justice for Indigenous Peoples and Local Communities, Reduces Conflict, and Enables Cost-effective Conservation and Climate Action* (2018).

²⁸⁶ See i.e. General Recommendation No. 23: Indigenous Peoples (Aug. 8, 1997).

religious practices or traditional way of life, implicate these economic, social, and property rights.²⁸⁷ Special Rapporteur Mrs. Ksentini discerns that human rights violations detected in cases brought to the HRC and the IACHR by or on behalf of Indigenous peoples almost always arise due to land rights violations and environmental degradation.²⁸⁸ The right to self-determination, the right to cultural expression, and the right to religion can be understood to include environmental aspects.²⁸⁹

The ICCPR affirms the right of self-determination. All peoples can freely determine their political status and pursue their economic, social, and cultural development and dispose of their natural wealth and resources.²⁹⁰ This grant of a collective right to control over natural resources is particularly relevant for Indigenous groups who environmentally damaging development activities may deny access to natural resources.²⁹¹ The U.N. Human Rights Committee has stated that Article 27 of the ICCPR protects a “particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.”²⁹²

The Indigenous Rights movement has recently advanced a series of recognitions at the international level, reinsuring their right to traditional lands and worldviews. Native Peoples are regaining their rights and responsibilities to protect Mother Earth.²⁹³ Since 2009, states and civil society alike have progressively acknowledged the interdependence between humans and nature under the umbrella of HwN.²⁹⁴ Appreciation of both, the intrinsic value of nature, regardless of her usefulness to humans and her role in sustaining human wellbeing and complementing human rights, is expressed as the Rights of Nature. Since the UNGA adopted the first resolution on HwN (A/RES/64/196) in 2009 along with UNGA Resolution declaring 22 April International Mother Earth Day (A/RES/63/278), there have been annual intergovernmental negotiations rooted in the principle of Harmony with Nature: twelve UNGA Resolutions on Harmony with Nature have been adopted, eleven Secretary-General (UNSG) reports on Harmony with Nature have been published, including the 2016 Experts Report,²⁹⁵ requested by UNGA Resolution (A/RES/70/208) and a Supplement²⁹⁶ to the 2020 UNSG Report.

The U.N. has acknowledged the importance of Indigenous peoples and traditional communities and peasants in two significant declarations. The U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP) has significantly advanced Indigenous rights internationally.²⁹⁷ UNDRIP outlines Indigenous peoples’ collective rights, including their right to practice religion,

²⁸⁷ UNEP Compendium on Human Rights and the Environment: Selected international legal materials and cases. pt. 158 (2014). At 11.

²⁸⁸ U.N. Comm’n on Human Rights, *supra* note 154, ¶88.

²⁸⁹ UNEP Training Manual on International Environmental Law. pt. 392 (2006). See also Maria Antonia Tigre & Sarah Slinger, *A Voice in Development: The Right to Participation of Indigenous Groups in Amazon Countries*, in *INDIGENOUS AMAZONIA, REGIONAL DEVELOPMENT AND TERRITORIAL DYNAMICS: CONTENTIOUS ISSUES* (Walter Leal Filho, et al. eds., 2020).

²⁹⁰ ICCPR, art. 1(1).

²⁹¹ UNEP & CIEL, *supra* note 287, at 12.

²⁹² General Comment No. 23, ¶7; 9.

²⁹³ Nelson, *supra* note 219, at 142.

²⁹⁴ UN HARMONY WITH NATURE PROGRAMME, www.harmonywithnatureun.org.

²⁹⁵ Harmony with Nature – Note by the Secretary-General, 71st sess, Provisional Agenda Item 19(h), UN Doc A/71/266 (1 August 2016), available at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/71/266.

²⁹⁶ Harmony with Nature – Supplement, 75th sess, Provisional Agenda Item 18(g), UN Doc A/75/266 (2020), <http://files.harmonywithnatureun.org/uploads/upload1019.pdf>.

²⁹⁷ United Nations Declaration on the Rights of Indigenous Peoples, Sept. 13, 2007, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (2007) [hereinafter UNDRIP].

live on, and maintain their homelands, language, and collective human rights. It consists of a substantive provision on the environment, although it does not refer to a quality level.²⁹⁸ Article 25 acknowledges the deep relationship and responsibility of Indigenous peoples to the land.

More recently, the Third Committee (Social, Humanitarian and Cultural) of the UNGA voted in favor of the U.N. Declaration on the rights of peasants and other people working in rural areas (UNDRIP).²⁹⁹ UNDRIP aims to protect the rights of all rural populations, including peasants, fisherfolks, nomads, agricultural workers, and Indigenous peoples, improve living conditions, and strengthen food sovereignty, the fight against climate change, and the conservation of biodiversity. The endorsement of the U.N. Declaration also constitutes an essential contribution to the international community's effort to promote family farming and peasant agriculture. These declarations grew out of respect for the people they address and are distinct from human rights instruments. They generally recognize human rights broadly granted to humans and specific human rights characteristics of these people. Therefore, these are closer to Indigenous definitions of what they see as rights than universal rights of all people.

4. *Indigenous Claims in Human Rights Courts and Tribunals*

Additionally, Indigenous people have ensured the protection of their rights through human rights instruments and international courts. The Inter-American Court of Human Rights (IACtHR) has been particularly active in ensuring Indigenous rights to lands, water, and nature.³⁰⁰ In *Sawhoyamaxa Indigenous Community v. Paraguay*, the Court demanded Paraguay to return land stolen from the Sawhoyamaxa community, as it cut off the Sawhoyamaxas' source of water.³⁰¹

In its 2020 decision in *Indigenous Communities Members of the Lhaka Honhat Association vs. Argentina*, the Inter-American Court of Human Rights (IACtHR) held that Argentina violated an autonomous right to a healthy environment, Indigenous community property, cultural identity, food, and water.³⁰² For the first time in a contentious case, the IACtHR analyzed the rights above autonomously based on Article 26 of the American Convention and ordered specific reparation measures to their restitution, including actions for access to adequate food and water, the recovery of forest resources, and Indigenous culture.³⁰³ The ruling marks a significant milestone for protecting Indigenous peoples' rights and, more specifically, their right to water and a healthy environment.³⁰⁴ The Court relied heavily on its interpretation of the right to a healthy environment in its Advisory Opinion 23/17 of 2018, mainly as it refers to the content and scope of the right to a healthy environment.³⁰⁵ Indigenous claims based on environmental damage, lack of access to

²⁹⁸ Art. 29(1), UNDRIP.

²⁹⁹ UNGA, Resolution no. A/C.3/73/L.30 (Oct. 30, 2018), United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.

³⁰⁰ See Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights Over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, 35 AM. INDIAN L. REV. 263; 356 (2017).

³⁰¹ Case of the Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, 117 (Mar. 29, 2006).

³⁰² IACtHR, *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina* (Feb 6, 2020).

³⁰³ See Press release: http://www.corteidh.or.cr/docs/comunicados/cp_24_2020_eng.pdf.

³⁰⁴ Maria Antonia Tigre, *Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment*, 24 ASIL INSIGHTS (2020); Maria Antonia Tigre, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, 115 AM. J. OF INT'L L. 706 (2021).

³⁰⁵ *Lhaka Honhat vs. Argentina* ¶203. See Inter-American Court of Human Rights, The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity), interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights). Advisory Opinion OC-23/17 (15 November 2017). Series A No. 23. Solicitada por la República de Colombia, Medio Ambiente y Derechos

water, or the effects of climate change could soon be brought based on the Court's evolving jurisprudence.

Climate change has disproportionately affected Indigenous people, leading them to forced displacement. On January 15, 2020, five U.S. tribes in Alaska and Louisiana submitted a complaint to multiple U.N. special rapporteurs, claiming that the U.S. government is violating its international human rights obligations by failing to address climate change impacts that result in forced displacement.³⁰⁶ The complaint is the first to address internal displacement as a result of climate-related effects specifically.³⁰⁷ Framing climate displacement as a human rights issue, the complaint joins a growing number of legal challenges that use international human rights law to hold governments accountable for climate change. Tribal leaders claim that climate change compromises their human rights, including rights to life, health, housing, water, sanitation, and a healthy environment, and point to various impacts as evidence, such as their lost ability to trap, fish, and farm; increased flooding and saltwater intrusion; and exceedingly high rates of coastal erosion in Louisiana.

The Alaska and Louisiana Tribes call on the U.N. special rapporteurs to pressure the U.S. to recognize climate-forced displacement as a human rights crisis and take actions to address displacement; including by acknowledging self-determination and inherent sovereignty of all of the tribes, funding the tribal-led relocation processes for the native village of Kivalina and Isle de Jean Charles, and granting federal recognition to the named tribal nations in Louisiana so they can access federal resources for adaptation and disaster response. The complaint also asks the special rapporteurs to recommend that the federal, Alaska, and Louisiana state governments set up an institutional relocation framework that guarantee the protection of the right to culture, health, safe drinking water, and adequate housing. The case provides an additional avenue for the claim that grows out of Indigenous relationship to nature.

The recognition of the rights of nature, which will be further developed in Section E, has grown from Indigenous traditions and cosmologies. These religious ideas from Indigenous people have been taken up by modern legal systems, including under the U.N., as will be referenced later. The U.N. HwN Programme has studied the development of legislation and policies on the Rights of Nature throughout the world. The rights of nature theory shows how Indigenous cultures can be successfully incorporated into international and national law, upholding environmental values like communities have done for centuries. For this reason, ICEL has called for fully adopting the ideology of living in harmony with nature at the international level by granting it a place in the Political Declaration mandated by UNGA Resolution 73/333.³⁰⁸

E. China and Ecological Civilization

Language about how to tackle specific types of environmental problems can be equally dramatic. Language matters for many reasons. There is an inherent understanding of nature that crosses boundaries of nations and societies, religion

Humanos, ¶56-68. See Maria Antonia Tigre & Natalia Urzola, *The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene*, 12 J. HUM. RTS. & ENV'T. 24 (2021).

³⁰⁶ Complaint, The Alaska Institute for Justice, Rights of Indigenous People in Addressing Climate-Forced Displacement, http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200116_NA_complaint-1.pdf.

³⁰⁷ Ama Francis, *U.S. Tribes Claim U.S. Government Violates Human Rights Obligations by Failing to Address Climate-Forced Displacement*, CLIMATE LAW BLOG, SABIN CENTER FOR CLIMATE CHANGE LAW (Feb. 28, 2020).

³⁰⁸ ICEL, Note: Recognition of Harmony with Nature (Mar. 15, 2021).

and culture. It is embedded in our lives as forces that we appreciate, respect and fear. Much has been made about the need to live in harmony with nature and of the dangers of efforts to control, dominate, or otherwise interfere with nature. Often these points are made to contrast views of Eastern and Western civilizations or to contrast ecological Marxianism and capitalism viewpoints.³⁰⁹

China has traditionally relied on mitigating the negative environmental impacts of industrialization rather than ensuring prevention. Yet, decades of rapid industrialization have led to a profound ecological crisis. Facing noncompliance and lack of enforcement of environmental law, China acknowledged a deeper cultural obstacle, leading to a search for a revised environmental protection system that relies on an underlying ideology of living harmoniously with nature.³¹⁰ The country then redirected its modernization efforts into ‘ecological civilization,’ a new standard of human existence to ensure long-term sustainability.³¹¹ The fundamental distinction between ecological civilization and China’s previous focus on high gross domestic product (GDP) growth is putting nature and people first.³¹² This section introduces the Chinese concept of ecological civilization as a potential pathway for relying on an environmental foundation for the progressive development of international environmental law.

Subsection 1 defines the concept of ecological civilization by explaining its origins and practical implementation in environmental laws. Ecological civilization relies on respect for nature to realize ecological justice in a drastic reorientation of traditional beliefs. Subsection 2 explains the religious underpinnings of ecological civilization. Like the previous sessions, it does not offer a deep dive into the philosophical traditions and maturity of the concept. Briefly, it illuminates how a reorientation of traditional teachings allowed for translating the concept into progressive environmental laws. Subsection 3 further develops this practical side, showing how the concept was adopted by Chinese environmental law and policy. Subsection 4 notes the current attempt at broadening the geographical scope of the concept towards international recognition.

1. Defining Ecological Civilization

Ecological civilization (shēngtài wénmíng 生态文明) first emerged in scientific literature in the 1980s.³¹³ The concept did not see widespread practical use until the mid-2000s when translated and adopted by the Communist Party of China (CPC) as an explicit goal.³¹⁴ The CPC put forward the concept of ‘eco-civilization’ in 2012 as an expression of sustainable development with deeper roots on the ethical basis of the human relationship to nature and the use of Earth’s resources.³¹⁵ Since then, it has been embraced at the highest levels of the Chinese State and the

³⁰⁹ Ecological Civilization in the People’s Republic of China: Values, Action, and Future Needs. pt. 35 (2019). at 3.

³¹⁰ Paul A. Barresi, *The Role of Law and the Rule of Law in China’s Quest to Build an Ecological Civilization*, 1 CHINESE JOURNAL OF ENVIRONMENTAL LAW 9; 9-12 (2017) (arguing that the traditional cultural clash between Confucianism of the Chinese legal tradition and modern rule-of-law concept plays a crucial role in undermining the effectiveness of environmental laws in China).

³¹¹ Arran Gare, *China and the struggle for ecological civilization*, 23 CAPITAL. NAT. SOCIAL. 10 (2012). Jean-Yves Heurtebise, *Sustainability and ecological civilization in the age of Anthropocene: an epistemological analysis of the psychosocial and “culturalist” interpretations of global environmental risks*, 9 SUSTAINABILITY 1331 (2017).

³¹² Hanson, *supra* note 309, at vi.

³¹³ Ben Boer, et al., *Introduction to the Special Issue on Ecological Civilization and Environmental Governance*, 4(2) CHINESE J. OF ENVTL. L. 121 (2020).

³¹⁴ Gare, *supra* note 311.

³¹⁵ Boer, et al., *supra* note 313, at 122.

CPC. It has been affirmed in the Chinese constitution³¹⁶ and enshrined as a goal in the newest version of China's Environmental Protection Law.³¹⁷ Eco-civilization is now a key driver in the country's transition to high-quality development for the 'New Era.'³¹⁸

Ecological civilization is an evolving conceptual framework that provides for adjustments to development that meet the challenges of the 21st century.³¹⁹ It is a way of approaching social and ecological reform through a fundamental shift in world view from the prevailing belief that humans must exhibit dominance over nature to a more eco-centric vision in which humans are one component of an extensive system in a dynamic equilibrium.³²⁰ The underlying goals of eco-civilization indicate a radical difference when compared with the industrial civilization. It relies on respect for nature to realize ecological justice instead of utilitarian, profit-driven, and technology-innovation-oriented functionalism.³²¹ By reconsidering its relationship with nature and recognizing that drastic changes to protect the ecological systems are necessary to ensure humans' long-term health and well-being, China has found a new way of approaching social and environmental reform. The ideology relies on a change in individual behavior for national development and a commitment from the CPC to take ecological responsibility and reevaluate the traditional ecological wisdom.³²²

Ecological civilization is simultaneously a philosophy, a vision, and a compass for a green and prosperous future.³²³ It is based on the notion that humanity can both benefit from nature and act in its interest.³²⁴ One of its most important features is that it acts as a catalyst for bringing together related components for green development, including economic, political, demographic, and educational transformations.³²⁵ As a result, there is now a growing emphasis on re-balancing the economy, promoting sustainable growth, and accepting the 'New Normal (xin changtai):' a vision of a qualitatively different developmental pattern within the context of a softer and more sustainable growth pace.³²⁶

2. *Religious Underpinnings of Ecological Civilization*

Based on a proposal from an agricultural economist,³²⁷ the concept of ecological civilization embraces ancient and enduring philosophical traditions to share insights with China's legal tradition.³²⁸ Its emergence is not a novel creation but rather a reaffirmation of long-held, traditional values.³²⁹ The term 'unity of human and nature' dates back thousands of years and

³¹⁶ See Constitution of the Communist Party of China (revised and adopted at the 18th Nat'l Cong of the Communist Party of China, Nov 14, 2012), at General Program ¶9, 18, translated at China.org.cn (The 18th National Congress of the Communist Party of China (CPC)) <www.china.org.cn/china/18th_cpc_congress/2012-11/16/content_27138030.htm>.

³¹⁷ See Amended PRC Environmental Protection Law (n 4) pmbl, art 1.

³¹⁸ Hanson, *supra* note 344, at vi.

³¹⁹ *Id.*, at vi.

³²⁰ Amy E. Frazier, et al., *Ecological civilization: perspectives from landscape ecology and landscape sustainability science*, 34 *LANDSCAPE ECOLOGY* 1; 3 (2019).

³²¹ Maurizio Marinelli, *How to Build a 'Beautiful China' in the Anthropocene. The Political Discourse and the Intellectual Debate on Ecological Civilization*, 23 *J. OF CHIN. POLIT. SCI.* 365 (2018).

³²² Geall Sam Geall & Adrian Ely, *Narratives and pathways towards an ecological civilization in contemporary China*, 236 *CHINA Q.* 1175 (2018).

³²³ Hanson, *supra* note 344, at vi.

³²⁴ Marinelli, *supra* note 321, at 373.

³²⁵ Hanson, *supra* note 344, at 10. See Fred Magdoff, *Ecological civilization*, 62 *MONTHLY REV.* 1 (2011).

³²⁶ Marinelli, *supra* note 321, at 370.

³²⁷ Prof. Ye Qianji was the first to use the concept and emphasize its importance for sustainable agriculture in China.

³²⁸ Barresi, *supra* note 310, at 13-15. See e.g. Yue Pan, *Evolution of an ecological civilization*, 9 *BEIJING REVIEW* 18-19 (2006);

Yue Pan, *Looking Forward to an Ecological Civilization*, 57 *CHINA TODAY* 29 (2008).

³²⁹ Frazier, et al., *supra* note 320, at 3.

forms the core of several traditional Chinese religions, including Taoism, Confucianism, and Buddhism.³³⁰ The Chinese Academy of Social Sciences conducted a study in rescuing the three religious traditions of China as a response to pressing realities of environmental damage.³³¹

Pan Yue, the Deputy Vice Minister for the Environment in China, had for long studied the history of religions and valued the importance of traditional beliefs responding to modern environmental problems.³³² In one of his speeches, he reinforced a core principle of traditional Chinese culture: harmony between humans and nature and the political wisdom of a balanced environment. These include the Confucian idea of humans and nature becoming one, the Daoist view of the Dao reflecting nature, or the Buddhist belief that all living things are equal. Chinese philosophy can be a powerful weapon in preventing an environmental crisis and building a harmonious society.³³³ He soon then realized that an environmental culture was necessary to enforce environmental laws.³³⁴

Unlike other Western religions, Confucians do not view hierarchy as leading to domination. Instead, they trust that everything in nature and society has its appropriate role and place and should thus be treated accordingly. As a result, the use of nature for human ends must recognize each element of nature's intrinsic and broader value in the context of the environment as interrelated beings. For Confucians, human flourishing is thus dependent on fostering nature in its variety and abundance; going against nature's processes is self-destructive. Grim & Tucker further explain:

In Confucianism, nature is not only inherently valuable, it is morally good. Nature thus embodies the normative standard for all things; it is not judged simply from an anthropocentric perspective. There is not a fact-value or is-ought division in the Confucian worldview, for nature is seen as an intrinsic source of value. In particular, value lies in the ongoing transformation and productivity of nature. A term repeated frequently in Neo-Confucian sources is sheng-sheng, reflecting the ever-renewing fecundity of life itself. In this sense, the dynamic transformation of life is seen as emerging in recurring cycles of growth, fruition, harvesting, and abundance. This reflects the natural processes of flourishing and decay in nature, human life, and human society. Change is thus seen as a dynamic force that humans should harmonize and interact with rather than withdraw from.³³⁵

There is renewed interest in China for developing a broader environmental ethic drawing on Confucian values.³³⁶ Confucianism manifests a religious ecology in its cosmological orientation, which is "realized in the connection of the microcosm of the self to the macrocosm of the universe through grounding oneself in natural and human communities, nurturing oneself in ritual relatedness, and transforming oneself through cultivation."³³⁷ The care for family motivates

³³⁰ *Id.*, at 3.

³³¹ GRIM & TUCKER, *supra* note 19, at 110.

³³² *Id.*, at 111.

³³³ Pan Yue, "Green China and Young China," in *China Dialogue* (July 2007), <http://www.chinadialogue.net/article/show/single/en/1168-Green-China-and-young-China-part-two->. *China Dialogue* is one of the best Internet sites for information on China (www.chinadialogue.net). See also http://english.mep.gov.cn/Ministers/Speeches/201107/t20110704_214385.htm.

³³⁴ GRIM & TUCKER, *supra* note 19, at 111.

³³⁵ *Id.*, at 123.

³³⁶ *Id.*, at 92.

³³⁷ *Id.*, at 113.

the respect for the Earth community.³³⁸ These ethical principles are now being retrieved in ecological civilization. Traditional Chinese religions have emphasized deep value systems and human dependence on nature, contrasting to other historical transitions in which people ‘conquered nature,’ especially during the evolution of agricultural to industrial civilizations.³³⁹

What makes ecological civilization different from existing dialogues and actions for sustainable development? Ecological civilization can easily be compared to the ‘ecological law’ that developed from the concept of ‘ecological culture’ (экологической культуры) in the Soviet Union in the 1980s.³⁴⁰ The Russian system of strictly protected areas exemplifies what ecological law supports.³⁴¹ Socialist legal frameworks later reversed the progressive development of ecological law in the 1980s. While Russia continued to support sustainable development concepts, sustainability did not become a management priority in the absence of ecological law as a foundation.³⁴² The Russian example shows the impact of having an ecological foundation in developing (inter)national environmental law.

3. *Ecological Civilization to Ecological Law*

Ecological civilization introduces two significant elements to the existing environmental, economic, and social components of sustainable development: politics and culture. This is described as the ‘five-in-one approach.’³⁴³ Redefining the relationship between people and nature enables living well within the environmental boundaries of the Earth.³⁴⁴ Additionally, the call for eco-civilization is much more than a version of the Anthropocene ‘with Chinese characteristics:’ the concept could situate understandings of the political and socio-economic system with alternative ways of exploring eco-social prosperity in China.³⁴⁵

The concept of ecological civilization has become part of Chinese environmental law and policy over the past eight years.³⁴⁶ Developing from the goal of ecological civilization, ecological law offers a “juridical foundation for the laws and policies that aim to maintain a healthy environment for people and nature that embodies the duty to respect and restore the integrity of Earth’s natural systems that sustain life.”³⁴⁷ It implies a pervasive duty shared by a wide range of stakeholders that relies on the core duty to give precedence to environmental stewardship.³⁴⁸

In the 2016 13th Five-Year Plan (2016-2020), China has set out a “green is gold” top-level policy path with the declared aim of supporting the country’s transition to an ecological

³³⁸ *Id.*, at 114.

³³⁹ Hanson, *supra* note 344, at 4.

³⁴⁰ Nicholas A. Robinson, *Ecological Civilization and Legal Norms for Resilient Environmental Governance*, 4 CHINESE J. OF ENVTL. L. 131; 144 (2020).

³⁴¹ Nicholas A. Robinson, *Perestroika and Priroda: Environmental Protection in the USSR*, 5 PACE ENVTL. L. REV. 351 (1987); Tatiana Zaharchenko, *The Environmental Movement and Ecological Law in the Soviet Union: The Process of Transformation*, 17 ECOLOGY L.Q. 455 (1990).

³⁴² Robinson, *supra* note 340, at 145-146.

³⁴³ Hanson, *supra* note 344, at 4.

³⁴⁴ *Id.*, at vi.

³⁴⁵ Marinelli, *supra* note 321, at 383.

³⁴⁶ Boer, et al., *supra* note 313, at 122. See ‘The 13th Five-Year Plan for Economic and Social Development of the People’s Republic of China (2016–2020)’ (Central Compilation & Translation Press 2016), <https://www.un.org/development/desa/disabilities/wp-content/uploads/sites/15/2019/10/China_13th-Five-Year-Plan-for-Economic-and-Social-Development-Chapter-66.pdf>. Constitution of the People’s Republic of China as amended in 2018, Preamble and art 89(6) <http://www.gov.cn/guoqing/2018-03/22/content_5276318.htm>.

³⁴⁷ Robinson, *supra* note 340, at 148.

³⁴⁸ *Id.*

civilization.³⁴⁹ Still, creating a robust legal framework for ecological civilization remains a challenge. The expansion of eco-civilization remains as the risk that the concept might only be incorporated as a piece of teleology and political rhetoric. While there is strong interest in the Supreme People's Court for strengthening environmental law, including enforcement efforts, there is no defined approach for ecological civilization law.³⁵⁰ Essential in the development of ecological civilization is the translation of the underlying principle into ecological law implementation.

An ecological civilization cannot be seen as a simple technological or modernizing response to the immense ecological challenges of Great Climacteric associated with the Anthropocene. Rather it requires changes in the forces and relations of production and in the state and society: a massive shift, but necessarily occurring in stages, toward realized socialism/communism, i.e., a social formation aimed at substantive equality and ecological sustainability, emphasizing sustainable human development—one that involves collective action and planning. It requires that cultural resources, the long heritage of humanity in its many social formations, be brought to bear on the need to create a bridge to a sustainable future.³⁵¹

These lessons are essential in transforming “old” values into legislation.

4. *International Recognition of the Ecological Civilization*

Relying on a traditional ideology in a communist state is essential to guide states with strong ideological foundations towards a new pathway that supports the right to a healthy environment. By refining a communist doctrine to have an environmental dimension, the path toward an ecological civilization could easily be envisioned. The next step is to forge a route to eco-civilization by scaling down humanity's impact while pulling back our excessive presence and interference with the natural world.³⁵² Based on China's experience, other communist states such as Cuba and Vietnam could similarly craft an ideological foundation based on nature. Rather than relying on religion, as other countries exemplified earlier in this article, China has found its evolving perspective on an ideological premise that relies on an ethical, moral, and economic foundation to protect the environment within China. Yet, the underlying foundation of ecological civilization is similar to other religious philosophies' objectives.

Ecological civilization represents a novel way of approaching environmental protection and sustainability when transformative change is urgently needed. A rationale is emerging for the roles that ecological civilization can play at the regional and global levels. China is pushing for the concept to be adopted at the international level, especially in a post-Covid-19 recovery scenario that relies on green recovery.³⁵³ For example, the 2021 U.N. Biodiversity Conference's theme,

³⁴⁹ Marinelli, *supra* note 321, at 370. See UNEP, *Green Is Gold: The Strategy and Actions of China's Ecological Civilization*, UNEP: NAIROBI, KENYA (2016).

³⁵⁰ Hanson, *supra* note 344, at 10-11.

³⁵¹ John Bellamy Foster, *The Earth-system crisis and ecological civilization: a Marxian view*, 7(4) INT'L CRITICAL THOUGHT 439; 450 (2017).

³⁵² EILEEN CRIST, *ABUNDANT EARTH: TOWARD AN ECOLOGICAL CIVILIZATION* 186 (University of Chicago Press. 2019).

³⁵³ Chloé Farand, China is expanding its UN presence, in belt and road push (2019). Xi Jinping's speech at the General Debate of the 75th session of the United Nations General Assembly, (Sep. 23, 2020), <<https://news.cgtn.com/news/2020-09-23/Full-text-Xi-Jinping-s-speech-at-General-Debate-of-UNGA-U07X2dn8Ag/index.html>>.

which will frame the 15th meeting of the Conference of the Parties to the CBD, is “Ecological Civilization: Building a Shared Future for All Life on Earth.”³⁵⁴

Can ecological civilization bring about new ways of thinking and additional opportunities to address the projected gaps and development needs? And if so, will there be a receptive audience in other countries and those involved in South-South cooperation?³⁵⁵ Boer notes that comprehensive law reform is needed concerning the implementation of international environmental conventions.³⁵⁶ This would mainly entail revising laws at the international and national levels and recommending reform of their objectives, scope, definitions, and implementation mechanisms to assess whether they can achieve ecological civilization's ideas.³⁵⁷ He further clarifies:

“If the concept of ecological civilization were to be more widely adopted around the world, it would demand a critical examination of all aspects of international environmental law to ensure that more holistic integrated and consistent legal frameworks are generated with a view to drafting much more robust ‘green legislation.’”³⁵⁸

Recalling the development of international principles of environmental law, Robinson asks whether States can agree on a new set of legal principles to build resilience and effectiveness into implementing the SDGs and whether such a declaration can guide nations to cooperate through a transition into global ecological civilization.³⁵⁹ Korten argues that an expanded vision of international environmental law would involve, among other things, granting legal rights to nature, shifting ownership of productive assets from transnational corporations to nation-states and self-governing communities, and prioritizing life-affirming, rather than wealth-affirming, values.³⁶⁰

The duty to cooperate to safeguard Earth's environment can be enhanced through a shared understanding of the norms contained in the concept of ‘ecological civilization.’³⁶¹ Ecological civilization can improve environmental governance by clarifying the imperative to observe the laws entirely for environmental stewardship so that States fully acknowledge their responsibility to operate within the ecological limits of Earth's Biosphere.³⁶² Norms such as those arising from ecological civilization can contribute principles of law that build reciprocity between the human species and all other species and ecosystems and help shape consensus about restating environmental legal principles generally.³⁶³

F. Fundamental Principles of Natural Law and Earth Jurisprudence

Despite the apparent consensus on the relevance of nature for human lives, we keep polluting it. We are exploiting it to tipping points, which will soon irreversibly alter our natural environment. Yet, how can we turn this philosophical foundation of our shared love for nature towards legal norms that prioritize it? Nations require coherent and consistent systems to sustain

³⁵⁴ UNEP, Building an ecological civilization: Theme for 2020 UN Biodiversity Conference announced (Sep. 10, 2019), <https://www.unep-wcmc.org/news/building-an-ecological-civilization--theme-for-2020-un-biodiversity-conference-announced>

³⁵⁵ Hanson, *supra* note 344, at 15-16.

³⁵⁶ Boer et. al., *supra* note 313, at 124.

³⁵⁷ *Id.*, at 125.

³⁵⁸ *Id.*, at 124.

³⁵⁹ Robinson, *supra* note 340.

³⁶⁰ David Korten, *China and the Ecological Civilization* (2016).

³⁶¹ Robinson, *supra* note 340, at 144.

³⁶² *Id.*, at 144; 154.

³⁶³ *Id.*, at 149; 154.

Earth's ecosystems.³⁶⁴ Sustainability has often proven to be declarative and aspirational, and governments have struggled to elaborate and give substantive content to its concept.³⁶⁵

Yet just filling in the gaps in international environmental law is a flawed premise. Human laws must first be grounded in the laws of nature, of ecology. Norms of ecological civilization can contribute principles of law that build reciprocity between the human species and all other species and ecosystems.³⁶⁶ The rise of ecosystem regimes, understood as regimes where 'the science of ecology is applied through environmental laws,'³⁶⁷ can represent a crucial step in transforming environmental law from anthropocentrism to ecocentrism.³⁶⁸ This recalibration of environmental law in an ecocentric sense has led to emerging legal theories that build on natural law and ethical principles to indicate a moral position where nature is recognized as having intrinsic value and an epistemological position reflecting ecology's relational and holistic understanding of nature and its ecosystems, of which humans are but apart.³⁶⁹ Bosselmann indicates the convergence of ecological principles and legal ethics reform through an ecocentric approach in law.³⁷⁰ These emerging theories are further rooted in crucial ecological concepts, which despite having gained prominence and legal instruments and shaping environmental law, still often lack a defining legal concept. This section delves into some of these emerging theories, showing the importance of this reshaping of environmental law from a nature-based ethical perspective.

Subsection 1 grounds these emerging legal theories in natural law as the moral foundation for developing rights and duties. Natural law relies on an inherent law for which formal recognition is dispensable. Subsection 2 relies on Earth jurisprudence, which emphasizes the interconnectedness of the environment and promotes a legal paradigm shift. Earth Jurisprudence draws from natural law and the teachings of Berry, illustrating the moral, philosophical and religious background of emerging legal theories. Subsection 3 addresses another line of development of redefining environmental law: ecological law. Ecological law questions the inherent anthropocentric limitations of environmental law and proposes an Earth-centered approach to law and governance. Subsection 4 focuses on the international progression of the concept of harmony with nature within the U.N. system.

1. Natural Law

Natural law provides a moral foundation that allowed reason and morality to serve as the touchstones for civil authority, rather than relying on force, pedigree, or religion.³⁷¹ The law of nature school addresses law from a moral standpoint. These perceive a moral duty to do what the moral ideal indicated and the precept of the political lawgivers as an attempt to realize that ideal.³⁷² Conceptually, rights are fundamentally moral claims related to human beings' intrinsic worth and

³⁶⁴ *Id.*, at 141.

³⁶⁵ *Id.*, at 146.

³⁶⁶ *Id.*, at 153.

³⁶⁷ RICHARD O BROOKS & ROSS JONES, *LAW AND ECOLOGY: THE RISE OF THE ECOSYSTEM REGIME* (Taylor & Francis. 2017).

³⁶⁸ Vito De Lucia, *Beyond anthropocentrism and ecocentrism: a biopolitical reading of environmental law*, 8(2) J. OF HUM. RTS. AND THE ENV'T. 181 (2017).

³⁶⁹ *Id.*, at 186. See Rakhyn E Kim & Klaus Bosselmann, *Operationalizing sustainable development: ecological integrity as a grundnorm of international law*, 24 REV. OF EUR., COMP. & INT'L ENVTL. L. 194(2015). Klaus Bosselmann, *The rule of law grounded in the Earth: ecological integrity as a grundnorm*, in *THE EARTH CHARTER, ECOLOGICAL INTEGRITY AND SOCIAL MOVEMENTS* (Laura Westra & Mirian Vilela eds., 2014).

³⁷⁰ KLAUS BOSSELMANN, *THE PRINCIPLE OF SUSTAINABILITY: TRANSFORMING LAW AND GOVERNANCE* 93 (Taylor & Francis. 2016).

³⁷¹ Sam Kalen, *An Essay: An Aspirational Right to a Healthy Environment*, 34 UCLA J. ENVTL. L. & POL'Y 156; 164 (2016).

³⁷² ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW*, BY ROSCOE POUND 17 (Boston: Little, Brown and Company, 1938). ROSCOE POUND & MARSHALL L DE ROSA, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* § 10; 15-19 (Yale University Press. 1954).

the importance of the prerogatives they protect to a dignified life.³⁷³ Human rights are seen as an approach to ethics, asserting the intrinsic ethical role of certain basic human entitlements.³⁷⁴ MacCormick believes that “it is morally important that we should recognise the moral importance and the significance of moral rights.”³⁷⁵

As Rodríguez-Garavito points out, law-centered conceptions of rights fail to hold up to empirical scrutiny, as exemplified by rights-based demands pushed forward before acknowledging any entitlement in a formal legal document.³⁷⁶ Movements from the abolitionists, women’s rights, socio-economic rights, and the Indigenous peoples preceded international recognition. Yet, these movements have used the language of natural law and natural rights as the basis for progressive campaigns throughout history.³⁷⁷ US Supreme Court Justice Kennedy clarified that “individuals need not await legislative action before asserting a fundamental right.”³⁷⁸ Following this rationale, civil society and state actors have invoked a right to the environment regardless of formally incorporated in an international legal instrument.³⁷⁹

Some scholars look to natural law as the basis for the development of Earth Jurisprudence, expanding its broad framework for ecocentric goals.³⁸⁰ Natural law can bolster the argument that environmental protection goes beyond serving the interests of humans. It relies on the premise that there is a coherent right irrespective of written law or a binding legal obligation. Conceptually, rights are fundamentally moral claims that relate to the intrinsic worth of human beings and the importance of the prerogatives they protect to a dignified life.³⁸¹ Invoking a right to the environment entails a strong ethical assertion about the central role of a livable natural environment to a dignified human existence.

Since natural law provides a moral foundation that allows reason and morality to serve as the touchstones for civil authority, it supports the expansion of nature rights.³⁸² The right to the environment would not only be relevant for the enjoyment of other human rights but have an intrinsic ethical significance.³⁸³ Berry recognized Earth itself as the referent for human affairs.³⁸⁴ The natural law tradition represents the most significant jurisprudential legacy left by Aquinas and has inspired neo-Thomist theorists.³⁸⁵ It is based on a duty to follow the moral ideal and the precept of the political lawgivers to realize said ideal.³⁸⁶ From a naturalist perspective, environmental ethics – and the right to a healthy environment – would be binding because of its intrinsic reasonableness.

³⁷³ Cesar Rodriguez-Garavito, *A Human Right to a Healthy Environment? Moral, Legal and Empirical Considerations*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 155 (John H. Knox & Ramin Pejan eds., 2018).

³⁷⁴ Amartya Sen, *Elements of a theory of human rights*, 32(4) PHILOSOPHY & PUBLIC AFFAIRS 315 (2004).

³⁷⁵ Neil MacCormick, *Children’s Rights: a Test-Case for Theories of Right*, in LEGAL RIGHT AND SOCIAL DEMOCRACY: ESSAYS IN LEGAL AND POLITICAL PHILOSOPHY 158-59 (Neil MacCormick ed. 1984).

³⁷⁶ Rodríguez-Garavito, *supra* note 373, at 160.

³⁷⁷ Kalen, *supra* note 382, at 168.

³⁷⁸ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2605 (2015).

³⁷⁹ Rodríguez-Garavito, *supra* note 373, at 158.

³⁸⁰ Peter D. Burdon, *A Theory of Earth Jurisprudence*, 37 AUSTL. J. LEG. PHIL. 28 (2012). CULLINAN, *supra* note 213, at 74-79.

³⁸¹ Rodríguez-Garavito, *supra* note 373, at 162.

³⁸² Kalen, *supra* note 382, at 164.

³⁸³ Rodríguez-Garavito, *supra* note 373, at 160.

³⁸⁴ Thomas Berry, *The Nation-State in the Twenty-first Century*, in EVENING THOUGHTS: REFLECTING ON EARTH AS A SACRED COMMUNITY 81, 84 (Mary Evelyn Tucker ed. 2006).

³⁸⁵ Burdon, *supra* note 401, at 36.

³⁸⁶ ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 17 (1938); ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 15-19 (1954).

A known example of natural law to develop the right to the environment is found in the Philippines. In *Oposa vs. Factoran*,³⁸⁷ the Supreme Court of the Philippines relied on natural law as the basis of the right to a balanced and healthful ecology. The Court said that the right “concerns nothing less than self-preservation and self-perpetuation, [the] advancement of which may even be said to predate all governments and constitutions.”³⁸⁸ The Court further stated that such fundamental rights “need not even be written in the Constitution for they are assumed to exist from the inception of humankind.”³⁸⁹ The Court uses natural law as the premise of the concept of “generational genocide.” Killing an entire succeeding generation is inherently wrong as it would counter the nature of humanity to preserve and perpetuate itself.³⁹⁰ No statute is necessary for society to grasp the inherent wrongfulness of generational genocide through environmental degradation. Thus, the Court declared that the right to the environment is founded in natural law, imposing a ‘solemn obligation’ to preserve a healthy ecology and protect public health for present and future generations.³⁹¹

2. *Earth Jurisprudence*

For the vast majority of Western history, law has reflected an anthropocentric human-earth relationship. Scholars are now asking: How can law, as an evolving social institution, shift to reflect the modern understanding that human beings are interconnected and dependent upon a comprehensive Earth Community? For Berry, two points are critical in this evolution towards the recognition of a community of living.³⁹² First, that human law reflects and is bound by the laws of nature.³⁹³ Second, to provide legal recognition to the rights of all beings.³⁹⁴ Therefore, ecological principles shall reflect the design parameters within which Earth Jurisprudence must operate,³⁹⁵ recognizing nature as the ultimate referent.³⁹⁶

Developing from natural law, Earth Jurisprudence is an emerging theory of law that emphasizes human interconnectedness with the environment as a prerequisite for ecological sustainability.³⁹⁷ It thus promotes a legal paradigm shift toward the ecocentric concept of ‘Earth community,’ an idea traced to Berry. As an ecocentric concept of law, Earth Jurisprudence promotes a vision for radically reconfiguring our legal system and governance structures to support rather than undermine the health and integrity of the Earth community.³⁹⁸ Still in its infancy,³⁹⁹ it

³⁸⁷ *Minors Oposa v. Factoran*, a case from the Republic of the Philippines. See 224 S.C.R.A. 792 (S.C. July 30, 1993) (Phil.), reprinted in 33 I.L.M. 173 (1994).

³⁸⁸ *Id.* at 805.

³⁸⁹ *Id.*

³⁹⁰ Herbert A. Loja, *From Pronouncement to Enforcement: Bridging the Gap in Law to Promote and Protect the Right to a Decent Environment*, 58 ATENEO L.J. 740 (2013).

³⁹¹ Michael C Blumm & Mary C Wood, *The public trust doctrine in environmental and natural resources law*, 45 U.C. DAVIS L. REV. 741 (2021).

³⁹² BERRY, *supra* note 128, at 58.

³⁹³ PETER BURDON, *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* (Wakefield Press. 2011).

³⁹⁴ Peter Burdon, *The Jurisprudence of Thomas Berry*, 15(2) WORLDVIEWS: GLOBAL RELIGIONS, CULTURE, AND ECOLOGY 151; 158 (2011).

³⁹⁵ CULLINAN, *supra* note 442, at 84-85.

³⁹⁶ Burdon, *supra* note 394, at 159.

³⁹⁷ Peter D Burdon, *Earth Jurisprudence and the project of Earth democracy*, in *WILD LAW-IN PRACTICE* 24 (Michelle Maloney & Peter Burdon eds., 2014).

³⁹⁸ *Id.*, at 20.

³⁹⁹ See EARTH CHARTER, *supra* note 72, at 1. See THE GAIA FOUNDATION & UK ENVIRONMENTAL LAW ASSOCIATION, *WILD LAW: IDEAS INTO ACTION-WHERE CAN WE FIND EXAMPLES OF EARTH JURISPRUDENCE IN PRACTICE* 6 (2008) (noting infancy of Earth Jurisprudence in Draft Initial Findings); see also Ame Naess & George Sessions, *Platform Principles of the Deep Ecology Movement*, in *THE DEEP ECOLOGY MOVEMENT: AN INTRODUCTORY ANTHOLOGY* (Alan Drengson & Yuichi Inoue eds., 1995).

promotes an interdisciplinary dynamic that evolves, becoming more complex and changing shape as many minds put their energies into identifying its development.⁴⁰⁰

The starting point of Earth Jurisprudence is denouncing the ecological crisis caused by anthropocentrism. In contrast to anthropocentric legal philosophies, Earth Jurisprudence represents an ecological theory of law.⁴⁰¹ At the heart of this dimension lies the premise of a necessary shift in thinking from a purely human-centered to an Earth-centered system of law and governance.⁴⁰² Burdon questions the efficacy of our existing environmental laws and regulations, arguing that their impact has always been limited to the extent they challenge the facilitation of economic growth.⁴⁰³ Despite the careless way humans have interacted with the Earth, nature is a subject and not a collection of objects.⁴⁰⁴ This necessitates a shift from the anthropocentric notion that nature exists for human use and toward the facilitation of ‘mutually enhancing’ human-Earth interactions.⁴⁰⁵ Without such a jurisprudential shift, Earth and humanity remain at peril.⁴⁰⁶

Two significant legal consequences emerge out of the Earth Jurisprudence and the concept of Earth community. Natural law and legal positivism are ultimately concerned with relations between individuals, communities, and states. The environment is thus rarely considered. Legal positivism considers only human beings and corporations as subjects. Legal positivism, describing law from an objective perspective, posits a conceptual or purely descriptive theory of law, free from moral evaluation. Nature does not possess any inherent value and receives instrumental value and protection from property rights.⁴⁰⁷ Berry critiques western law in this regard, which, he argues, is framed for the advancement of human beings, with “no significant referent to any other power in heaven or on Earth.”⁴⁰⁸ In this sense, law has little understanding of the greater context and governing principles of the universe or the planet.⁴⁰⁹ Rather than maintain this system of exploitation, Berry contends that we must evolve our system of law to recognize “the supremacy of the already existing Earth Governance of the Planet.”⁴¹⁰

Berry is not alone in making the connection between a shift in paradigm and its consequence for ethics and our broader social institutions.⁴¹¹ Teilhard de Chardin writes of this relationship, noting that “all the elements of the universe touch each other by that which is most inward and ultimate in them.”⁴¹² Importantly, because Berry characterizes our environmental crisis as a ‘cultural crisis,’ he is under no delusion that it can be corrected simply by legislative amendment, introducing a new law, or a restructure of current governance systems.⁴¹³ Indeed, while the changes are vital, Berry argues that they must be underpinned and driven by a more profound shift in culture and worldview. He terms this shift a “reinvention of the human at the species level”⁴¹⁴ and notes that the “great work” before the present generation is to “carry out the

⁴⁰⁰ Siemen, *supra* note 130, at 1.

⁴⁰¹ Burdon, *supra* note 380, at 29.

⁴⁰² BERRY, *supra* note 128, at 56-57, 80-81 (reasoning that Earth is the context and normative basis for human existence).

⁴⁰³ Burdon, *supra* note 397, at 23-24.

⁴⁰⁴ Judith E. Koons, *What Is Earth Jurisprudence: Key Principles to Transform Law for the Health of the Planet*, 18 PENN ST. ENVTL. L. REV. 47 (2009), *supra* note 406, at 55. See CULLINAN, *supra* note 213, at 115 (quoting Berry, *supra* note 215).

⁴⁰⁵ BERRY, *supra* note 128, at 3. Thomas Berry, *Legal Conditions for Earth's Survival*, in *EVENING THOUGHTS: REFLECTING ON EARTH AS A SACRED COMMUNITY* 107 (Mary Evelyn Tucker ed. 2006). Berry, *supra* note 215.

⁴⁰⁶ Koons, *supra* note 406.

⁴⁰⁷ Burdon, *supra* note 397, at 25.

⁴⁰⁸ CULLINAN, *supra* note 213, at 13.

⁴⁰⁹ Burdon, *supra* note 394.

⁴¹⁰ Berry, *supra* note 211, at 19.

⁴¹¹ Burdon, *supra* note 394, at 158.

⁴¹² PIERRE TEILHARD DE CHARDIN, *THE DIVINE MILIEU: AN ESSAY ON THE INTERIOR LIFE* 92 (Harper & Row. 1965).

⁴¹³ Burdon, *supra* note 394.

⁴¹⁴ BERRY, *supra* note 128, at 159.

transition from a period of human devastation of the Earth to a period when humans would be present to the planet in a mutually beneficial manner.”⁴¹⁵ To achieve this transition, Berry uses the medium of story. He asks, what is the best story we can tell, and how can we re-orientate the human community toward the Earth? That is a great starting point, and because of its importance to our broader discussion on law, I would like to spend a few moments outlining some of its pertinent themes.

Picking up on Berry’s thesis, Cullinan called for people to remake our legal system to support the planet by enforcing laws that promote the environment.⁴¹⁶ Since then, a small body of theoretical work on environmental justice has emerged within academic legal literature.⁴¹⁷ To shift the focus of jurisprudence from a narrow, anthropocentric perspective to an eco-centered viewpoint recognizing humankind as part of the broader Earth community, Koons explores a vision of Earth Jurisprudence through three principles: (i) the intrinsic value of Earth; (ii) the relational responsibility of humanity toward Earth; and (iii) the democratic governance of the Earth community. This shift requires a clarity of vision to embrace our relationship with Earth as a trust and a breadth of vision to support Earth Democracy in all forms of governance.⁴¹⁸

These jurisprudential principles are illustrated through a legal framework of rights, responsibilities, duties, representative legal doctrines of standing, public trust doctrine, and intergenerational equity.⁴¹⁹ Despite the many challenges of adjudicating and legislating Earth’s legal status, it remains unaltered that nature, having intrinsic value, is worthy of legal consideration.⁴²⁰ Our legal system must be able to consider the rights and obligations of other-than-human animals and ecological entities.⁴²¹ Subjectivity may be translated into Earth Jurisprudence as the principle of the intrinsic worth of nature. This claim stands on the premise that beings, systems, and entities in nature warrant moral consideration.⁴²² The declaration of the inherent value of nature also assumes that beings, systems, and entities in nature deserve legal consideration and should be given legal recognition.

Further, it considers the principle of Earth community as both relevant and necessary to our idea of law.⁴²³ Earth jurisprudence will necessarily reflect the interconnectedness of nature’s laws and incorporate standards of respect and care for the other community members.⁴²⁴ By incorporation, the Earth’s entire community is defined beyond what has been thought of as a human-centered planet. It embraces Berry’s definition, referring to all human and non-human life forms and components of the planet as Earth’s community.⁴²⁵ The concept of the interdependence of all things in the magnificently tangled web of life is a *sine qua non* of Earth jurisprudence.⁴²⁶ As subjects, members of the Earth community hold certain intrinsic rights to exist and to flourish. How we humans perceive our relationship with the other members of the larger community of

⁴¹⁵ BERRY, *supra* note 128, at 3.

⁴¹⁶ CULLINAN, *supra* note 213. See generally MICHELLE MALONEY & PETER BURDON, *WILD LAW-IN PRACTICE* (Routledge, 2014).

⁴¹⁷ Jamie Murray, *Earth Jurisprudence, Wild Law, Emergent Law: The Emerging Field of Ecology and Law—Part 1*, 35 LIVERPOOL L. REV. 205 (2014); Jamie Murray, *Earth jurisprudence, wild law, emergent law: The emerging field of ecology and law-part 2*, 36 LIVERPOOL L. REV. 105 (2015).

⁴¹⁸ Koons, *supra* note 406, at 69.

⁴¹⁹ *Id.*, at 51.

⁴²⁰ *Id.*, at 59.

⁴²¹ See i.e., *Lujan v. Defenders of Wildlife*, 504 U.S. at 563 (the case is a prototypical allegation to support standing as it focuses on the injury to humans rather than the endangered species in question).

⁴²² Koons, *supra* note 406, at 57.

⁴²³ Burdon, *supra* note 401, at 32.

⁴²⁴ Siemen, *supra* note 130, at 5.

⁴²⁵ MALONEY & BURDON, *supra* note 416, at 105.

⁴²⁶ Siemen, *supra* note 130, at 7.

beings, and our duties to protect their viability for future generations, is what shapes the formulation of law.⁴²⁷ Since Earth jurisprudence is essentially an ecocentric philosophy of law, awe and wonder are indispensable qualities needed for creating new laws and governance that respect nature's right to exist.

Based on the idea that humans are part of a whole (Earth community), Koon argues for the principle of relational responsibility, in which humanity's relationship to Earth is expressed as a trust and our responsibility as a trustee. The public trust doctrine gives legal effect to the notions of communion and relational responsibility.⁴²⁸ The principle of Earth community refers to the idea that human beings are interconnected to a broader community that includes both living and non-living entities. The Earth is a subject and not a collection of objects for human use and exploitation.⁴²⁹

Finally, the principle of differentiation is based on the knowledge that nature never makes two things alike. Through Earth Democracy and approach to governance, humanity's role is recontextualized within the Earth family and girded with a purpose that safeguards the wider Earth community.⁴³⁰ Earth Democracy encourages governance at the local level and is based on ecosystems. This type of collaborative governance brings together actors at different levels for a common purpose, demonstrating how an ecosystem focus has the potential for renewing democracy.⁴³¹ At the global and nation-state level, Earth Democracy can recognize our duty to future generations.⁴³²

Burdon contends that the focus of Earth Jurisprudence should be on the ecological integrity of the Earth community, retaining a strong connection between law and science.⁴³³ Ecological integrity originated as an ethical concept as part of Aldo Leopold's 'land ethic'⁴³⁴ and has been recognized in legislative instruments such as the Clean Water Act U.S. (1972).⁴³⁵ Leopold was influential in developing modern environmental ethics and wilderness conservation, having a profound impact on the environmental movement with his ecocentric and holistic ethics on land. Because of the extent of human exploitation of the environment, wild nature provides the paradigmatic example of ecological integrity.⁴³⁶

Leopold notes the extension of the ethical criteria to more fields of conduct, including ethics in ecological and philosophical terms, moving away from the view of land as mere property. The Ecological Conscience advocates for a qualitative change in the content of conservation education and its philosophy of values, including obligations to the land above those dictated by self-interest.⁴³⁷ "A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."⁴³⁸ Leopold explains that all religions

⁴²⁷ *Id.*, at 1.

⁴²⁸ Koons, *supra* note 406, at 63.

⁴²⁹ Burdon, *supra* note 401, at 29. This concept is informed by BERRY, *supra* note 128; ALDO LEOPOLD, SAND COUNTY ALMANAC 11 (Oxford University Press. 1949). NICHOLAS AGAR, LIFE'S INTRINSIC VALUE: SCIENCE, ETHICS, AND NATURE (Columbia University Press. 2001). LAWRENCE E JOHNSON, A MORALLY DEEP WORLD: AN ESSAY ON MORAL SIGNIFICANCE AND ENVIRONMENTAL ETHICS (Cambridge University Press. 1993).

⁴³⁰ See VANDANA SHIVA, EARTH DEMOCRACY: JUSTICE, SUSTAINABILITY AND PEACE 1, 9-11, 88-89 (Zed Books. 2006).

⁴³¹ Koons, *supra* note 406, at 68.

⁴³² *Id.*, at 68.

⁴³³ Burdon, *supra* note 401, at 43-44.

⁴³⁴ LEOPOLD, *supra* note 429 ("a thing is right when it tends to preserve the integrity, stability and beauty of the biotic community" and "wrong when it tends to do otherwise.").

⁴³⁵ Section 101(a) has its objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

⁴³⁶ Burdon, *supra* note 401, at 44.

⁴³⁷ LEOPOLD, *supra* note 429, at 11.

⁴³⁸ *Id.*, at 11.

respect life as a basis for his land ethic. If given appropriate legal status, ‘ecological integrity’ recognizes the intrinsic value of ecosystems and can help curb the excess of human development and exploitation of nature.⁴³⁹

Aldo Leopold provided a holistic perspective on land as an interdependent organism that required higher ethics than simply pragmatic use.⁴⁴⁰ Leopold further explained: “We abuse land because we see it as a commodity belonging to us. When we see land as a community to which we belong, we may begin to use it with love and respect.”⁴⁴¹ His ‘land ethic’ expands the boundaries of the human community to include soils, waters, plants, and animals, or, collectively, the land.

On the other hand, wild law is a groundbreaking approach to laws that stress human interconnectedness and dependence on nature. Wild law expresses Earth jurisprudence. It recognizes and embodies the qualities of the Earth system within which it exists. As an approach, it seeks both to foster intimate connections between people and nature and deepen our relationship with the wild aspect of our own natures. It protects wilderness and the freedom of the communities of life to self-regulate. Wild law opens spaces within which different and unconventional approaches can emerge, perhaps to flourish. Wild laws regulate what humans can do in and to the wild in ways that creates freedom for all the members of Earth’s community to play a role in the continuing evolution of the Planet.⁴⁴²

Where environmental issues or concerns are pursued,⁴⁴³ Earth Jurisprudence provides one set of answers. Earth jurisprudence helps identify problems with the current legal system and society as a whole and seeks ways to revolutionize to see the situation through a different and powerful lens. This approach relies significantly on the axiom that many of society’s problems stem from the almost universally held anthropocentric view, which assumes human beings reside at the center and are the entire purpose of existence, without recognizing the rights of nature.⁴⁴⁴ Earth jurisprudence turns this notion on its head and relies heavily on the idea that humans are only one part of a broader community on Earth rather than its center.⁴⁴⁵ Through this view, the concept of wild laws can be captured, incorporated, and promoted. Since wild law seeks to capture the importance of preserving the natural environment for the benefit of all Earth’s ecosystems and natural entities, these two theories meld nicely.⁴⁴⁶ Wild laws recognize the right of all beings to exist and to fulfill their respective roles.⁴⁴⁷

The framework of natural law provides a useful way to understand the nature and function of the Great Jurisprudence.⁴⁴⁸ However, natural law philosophy has an inherently anthropocentric footing.⁴⁴⁹ Burdon notes that language is a significant barrier to those engaged with articulating Earth Jurisprudence, given the two thousand years baggage of concepts such as ‘nature’ and ‘natural law.’⁴⁵⁰ Cullinan maintains that one of the reasons for the waning of natural law is the

⁴³⁹ Burdon, *supra* note 401, at 45.

⁴⁴⁰ GRIM & TUCKER, *supra* note 19, at 75.

⁴⁴¹ LEOPOLD, *supra* note 429.

⁴⁴² CULLINAN, *supra* note 213.

⁴⁴³ *Id.*, at 231.

⁴⁴⁴ Judith E Koons, *At the tipping point: Defining an earth jurisprudence for social and ecological justice*, 58 LOY. L. REV. 349 (2012).

⁴⁴⁵ *Id.*

⁴⁴⁶ CULLINAN, *supra* note 442, at 10.

⁴⁴⁷ *Id.*, at 291.

⁴⁴⁸ Burdon, *supra* note 394, at 160.

⁴⁴⁹ BOSSELMANN, *supra* note 213, at 236.

⁴⁵⁰ Burdon, *supra* note 401, at 33. Legal positivism presents another significant challenge to the construction of Earth Jurisprudence. See Brian Bix, *On the dividing line between natural law theory and legal positivism*, in LAW AND MORALITY (2017). Following this analysis, if (1) Earth Jurisprudence is reduced to the claim that objective scientific evidence regarding our

tendency of various groups “to claim that their beliefs are ‘natural’ and therefore inherently superior to competing beliefs, which they pillory as ‘unnatural.’”⁴⁵¹ In light of modern scientific insights, Cullinan contends that ‘common good’ must be extended to include humans and the broader community of life.⁴⁵² Earth Jurisprudence, in contrast, questions laws that contradict the standard of ecological integrity. Burdon clarifies that “purported laws that undermine the health and future flourishing of the Earth community are not binding and citizens are justified in engaging in non-violent acts of civil disobedience to amend or repeal the law.”⁴⁵³ If given legal status, ‘ecological integrity’ recognizes the intrinsic value of ecosystems and can help curb the excess of human development and exploitation of nature.⁴⁵⁴ Earth jurisprudence can offer a cohesive framework within which law, politics, science, economics, ethics, traditional wisdom, and human spirituality can be woven together to create a more effective governance approach to nurturing the Earth.⁴⁵⁵

Further, Earth Democracy corresponds to a significant aspect of Earth Jurisprudence as an attempt to fuse ecocentric ethics with more profound forms of democracy and public participation.⁴⁵⁶ The Earth Charter provides a solid example of these entangling ideas by promoting democracy as a means for achieving social and environmental goals.

3. *Ecological Law*

Based on these principles of interdependence and relational partnership between humans and nature, a group of scholars developed the foundation of ecological law. According to them, environmental law is an expression of the dominant cultural hegemony that has failed to mitigate or navigate the conditions of the Anthropocene. Environmental law presents inherent limitations that impede genuinely transformative change in achieving mutually enhancing relationships with the more-than-human and the governance of socioecological systems.⁴⁵⁷ It perceives nature as an object of the human subject.⁴⁵⁸ As the Covid-19 pandemic reminded us, humans and their existence are not the most important and central fact of the universe.⁴⁵⁹

Ecological law, in turn, seeks to overcome the limitations of our anthropocentric legal system and reimagine an Earth-centered approach to law and governance.⁴⁶⁰ It recognizes that the human sphere is a part of, is inherently connected and embedded in the Earth’s ecological systems, and bound by the limits of these systems.⁴⁶¹ The transformation of the semantics of the environment naturally reflects in the institutions of law and governance.⁴⁶² Ecological law favors

interconnectedness with nature should be used to evaluate our political and legal institutions and (2) legal positivism reduces to the claim that there is a possibility of, and value to, a descriptive or conceptual theory of law separated from any such scientific date, then there would seem no reason why one could not support or advocate both positions.

⁴⁵¹ CULLINAN, *supra* note 416, at 76.

⁴⁵² Burdon, *supra* note 394, at 161.

⁴⁵³ Burdon, *supra* note 397, at 25.

⁴⁵⁴ *Id.*, at 25.

⁴⁵⁵ Michelle Maloney & Patricia Siemen, *Responding to the Great Work: The Role of Earth Jurisprudence and Wild Law in the 21st Century*, EARTH JURISPRUDENCE & ENVTL. JUST.J. 6 (2015).

⁴⁵⁶ Burdon, *supra* note 397, at 25.

⁴⁵⁷ Anna Grear, *Towards new legal futures? In search of renewing foundations*, in THOUGHT, LAW, RIGHTS AND ACTION IN THE AGE OF ENVIRONMENTAL CRISIS (Anna Grear & Evadne Grant eds., 2015).

⁴⁵⁸ Anna Grear, ‘Anthropocene, Capitalocene, Chthulucene’: *Re-encountering environmental law and its ‘subject’ with Haraway and new materialism*, in ENVIRONMENTAL LAW AND GOVERNANCE FOR THE ANTHROPOCENE (L. Kotzé ed. 2017).

⁴⁵⁹ Klaus Bosselmann, *Foreword*, in FROM ENVIRONMENTAL TO ECOLOGICAL LAW (K. Anker, et al. eds., 2020).

⁴⁶⁰ Emille Boulot, *Restoring land, restoring law: Theorizing ecological law with ecological restoration*, in FROM ENVIRONMENTAL TO ECOLOGICAL LAW (K. Anker, et al. eds., 2020).

⁴⁶¹ Ecological Law and Governance Association (ELGA), Oslo Manifesto (2016), <https://www.elgaworld.org/oslo-manifesto>.

⁴⁶² Boulot, *supra* note 460.

ecocentrism and emphasizes alternative concepts with other legal concepts that are on the rise, such as Earth jurisprudence, Wild Law, Earth law, ecoconstitutionalism, and rights of nature.⁴⁶³ Its approaches to law are based on holism and intra-/intergenerational and interspecies justice so that the law no longer favors humans over nature and individual over collective rights.⁴⁶⁴

This transformation requires multiple perspectives, disciplines, and knowledges. Deepening the understanding of ecological law, Boulot proposes a culturally aware practice of ecological restoration to transform and define a law and governance system that envisions ongoing and mutual human and more-than-human flourishing.⁴⁶⁵ Ecological restoration seeks to restore degraded ecosystems to a historical ecological reference point or ecological trajectory.⁴⁶⁶ Given the state of our environment, the UNGA has declared 2021-2030 as the decade of ecosystem restoration. These initiatives aim to contribute to achieving a resilient ecosystem that articulates the different natural elements, including the interdependency between human and environmental health. Restoring nature and culture provides an opportunity to envision a legal system that is ecologically grounded.

The values and principles of ecological law are expressed in contemporary legal scholarship in ecocentric jurisprudence (e.g., rights of nature, Mother Earth rights, Earth law, eco-feminism, and ecological legal theory), eco-constitutionalism, and global law in the Anthropocene. It provides a comprehensive new approach that takes elements from different legal theories, including natural law, based on a historical grounding, to take the next step in environmental protection.

4. *UNGA's Harmony with Nature (HwN) Programme*

Nature as a subject has recently emerged as a discourse and become embedded in legal frameworks, most notably in the Americas. This legal framework is reflected in the dialogues of the UNGA's HwN Programme at the international level. In 1982, the UNGA affirmed the importance of the intrinsic value of Nature in The World Charter for Nature (Res. 37/7), which stated that "Every form of life is unique, warranting respect regardless of its worth to man, and, to accord other organisms such recognitions, man must be guided by a moral code of action."⁴⁶⁷

In 2009, the UNGA adopted Resolution 64/196 titled "Harmony with Nature," designating HwN as a sustainable development sub-item in UNGA's sixty-fifth session agenda and reporting.⁴⁶⁸ The 2030 Agenda, adopted in 2015, incorporated this language in seeking to "ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature."⁴⁶⁹ The UNGA further adopted Resolution 63/278, which specified the necessity of promoting harmony with nature and declaring April 22nd the International Mother Earth Day.⁴⁷⁰ In 2010, the Plurinational State of Bolivia presented to the UNSG the conclusions adopted at the first Peoples' World Conference on Climate Change and the

⁴⁶³ K. ANKER, ET AL., FROM ENVIRONMENTAL TO ECOLOGICAL LAW (Taylor & Francis. 2020).

⁴⁶⁴ Bosselmann, *supra* note 459.

⁴⁶⁵ Boulot, *supra* note 460.

⁴⁶⁶ ANASTASIA TELESITSKY, ET AL., ECOLOGICAL RESTORATION IN INTERNATIONAL ENVIRONMENTAL LAW (Taylor & Francis. 2016).

⁴⁶⁷ "Every form of life is unique, warranting respect regardless of its worth to men, and, to accord other organisms such recognitions, man must be guided by a moral code of action", World Charter for Nature, G.A. Res. 7, 36 U.N. GAOR Supp. (No. 51) at 17, U.N. Doc. A/51, ¶2(a) (1982), reprinted in 22 I.L.M. 455 (1982).

⁴⁶⁸ UNGA Res/A/64/420, 12 February 2010, ¶3-4.

⁴⁶⁹ UNGA Res. 70/1, 25 September 2015. Target 12.8 of SDG Goal 12 seeks to "ensure that people everywhere have the relevant information and awareness for sustainable development and lifestyles in harmony with nature," available at https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E.

⁴⁷⁰ UNGA Res/A/RES/63/278, 1 May 2009, "...in order to achieve a just balance among the economic, social, and environmental needs of present and future generations, it is necessary to promote harmony with nature and the Earth.", Preamble, ¶4.

Rights of Mother Earth, held in 2010 Cochabamba, Bolivia. The Conference adopted the Universal Declaration on the Rights of Mother Earth.⁴⁷¹

A significant step in recognizing the Rights of Nature took place in June 2012 at the U.N. Conference on Sustainable Development (U.N. Rio+20), held in Rio de Janeiro, Brazil, where Heads of State and Governments adopted the outcome document, entitled *The future we want*. This document recognized that the Earth and its ecosystems are our home and that some countries recognize the rights of nature in the context of the promotion of sustainable development. To achieve a just balance among the needs of present and future generations, it is necessary to promote harmony with nature,⁴⁷² and called “for holistic and integrated approaches to sustainable development that will guide humanity to live in harmony with nature and lead to efforts to restore the health and integrity of the Earth’s ecosystem.”⁴⁷³

The U.N. HwN Programme provides a platform for promoting these goals.⁴⁷⁴ Since its creation, there have been annual intergovernmental negotiations rooted in the principle and interactive dialogues of the UNGA⁴⁷⁵ between international experts to inform its work. The programme has sought to bring the diversity of Earth laws and knowledge into global debates on sustainable development and recognize the connections between Earth jurisprudence and Indigenous cosmivision. The 2017 Dialogue specifically linked Earth Jurisprudence to the U.N. Sustainable Development Goals, recognizing harmony with nature as an essential contribution to attaining the SDGs.⁴⁷⁶ As a result, twelve UNGA Resolutions on harmony with nature have been adopted, and eleven UNSG reports on harmony with nature have been published.

The 2016 Experts Report (a UNSG report in response to a UNGA’s request for an expert report on the topic) provided information and recommendations in Earth-centered governance, also known as Earth Jurisprudence, acknowledging the fundamental legal rights of ecosystems and species to exist, thrive and regenerate.⁴⁷⁷ It specifically stated that the first step for Earth-centered law and policy is:

“to include the rights of Nature in our governance systems, not by advancing its interests within the capital system as resources to be exploited, but by recognizing the fundamental legal rights of ecosystems and species to exist, thrive and regenerate. Nature is regarded as the source of basic “Earth rights” and these rights cannot be validly circumscribed or abrogated by human jurisprudence. These rights are not in opposition to human rights: as part of Nature, our rights are derived from those same rights. The human right to life is meaningless if the ecosystems that sustain us do not have the legal right to exist.

The 2017 UNSG’s report (A/74/236) highlighted that the U.N. is committed to remaining conversant with recent and forthcoming transformations and actions in law, policy, education, and public engagement to a just transition to an Earth-centered paradigm. It is recommended that the Member States consider engaging in a formal dialogue among academics, non-governmental

⁴⁷¹ UNGA Res. A/64/777, 7 May 2010, available at <https://undocs.org/en/A/64/777>.

⁴⁷² “The Future We Want,” ¶39, available at: https://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E

⁴⁷³ *Ibid.*, ¶40.

⁴⁷⁴ UN HwN Programme, *supra* note 294.

⁴⁷⁵ UN HwN Programme, Dialogues, <http://harmonywithnatureun.org/dialogues/>.

⁴⁷⁶ *Id.*

⁴⁷⁷ UN Doc. A/71/266, Secretary-General’s Note on Report on Harmony with Nature (A/75/266), 1 August 2016, describing the experts’ reports on Harmony with Nature as requested by the UNGA in its resolution 70/208 of 22 December 2015, available at https://www.un.org/en/ga/search/view_doc.asp?symbol=A/71/266.

organizations, and civil society organizations regarding the drafting of a universal declaration of the rights of Mother Earth, reflecting the growing worldwide commitment and calls to protecting the Earth, future generations, and all species. Such a universal declaration will provide an international moral compass to understand life in harmony with nature better. Earth Jurisprudence legislation adopted worldwide may serve as a framework for such dialogue, further supported through the HwN website.⁴⁷⁸

The 2020 Supplement to the UNSG's Report further noted the growing participation of academic institutions designing and delivering programmes and projects that focus on an Earth-centered paradigm, as well as an increasing jurisprudence worldwide.⁴⁷⁹ Many of these advances are led by expert members of the U.N. HwN Knowledge Network. This year also saw the UNGA's adoption of the twelfth resolution on HwN.⁴⁸⁰

The recognition of nature as a subject of law under different legal systems worldwide has shifted perceptions, attitudes, and behaviors from anthropocentric or human-centered, to non-anthropocentric or Earth-centered.⁴⁸¹ Through the Rights of Nature, human beings recognize that we are an inseparable part of nature and that we cannot damage her without severely damaging ourselves.⁴⁸² This change of paradigm in which the planet is not considered to be an inanimate object to be exploited, but as our typical home, alive and subject to a plethora of dangers to its health, has led to a serious reconsideration of our interaction with nature as well as support for Earth Jurisprudence in-laws, ethics, institutions, policies, and practices, including fundamental respect and reverence for the Earth and its natural cycles.⁴⁸³ For the past decade, the U.N. HwN has documented and analyzed legislation, policies, constitutional, legislative, and judicial rulings on the Rights of Nature.⁴⁸⁴ The U.N. HwN Programme has also reported and examined collaboration among non-governmental organizations (NGOs), civil society organizations, legislators, and legislative bodies working together to draft, adopt and implement laws or policies recognizing nature as a subject of rights and/or a legal "person," protected by law.⁴⁸⁵

The Covid-19 pandemic reflects such human behaviour hence the urgency to embrace an Earth-centred paradigm to further the Decade of Action through the Rights of Nature. At the fifth session of the UNEA, the medium-term strategy for 2022–2025 adopted, called "For people and planet," rests on the recognition of three planetary aspirations: (a) "Climate stability," where net-zero greenhouse gas emissions and resilience towards climate change are achieved; (b) "Living in harmony with nature," where humanity prospers in harmony with nature; (c) "Towards a pollution-free planet," where pollution is prevented and controlled and good environmental quality and improved health and well-being are ensured for all.⁴⁸⁶

Given UNEA's acceptance of the medium-term strategy and the developing recognition of HwN by the UNGA, ICEL recommended that the HwN is reflected in the political declaration

⁴⁷⁸ UN Doc. A/74/236, Secretary-General's Note on Report on Harmony with Nature, 26 July 2019, available at <https://undocs.org/en/A/74/236>, ¶134

⁴⁷⁹ UN Doc. A/75/266, Supplement to Secretary-General Report on Harmony with Nature, 28 July 2020, available at <http://files.harmonywithnatureun.org/uploads/upload1019.pdf>.

⁴⁸⁰ UN Doc. A/RES/75/220, Harmony with Nature, 30 December 2020, <https://undocs.org/en/A/RES/75/220>.

⁴⁸¹ The goal of this section is to briefly present the Harmony with Nature paradigm at the UN system, not analyze all the developments of the rights of nature.

⁴⁸² HARVARD MEDICAL SCHOOL CENTER FOR HEALTH AND THE GLOBAL ENVIRONMENT, BIODIVERSITY: ITS IMPORTANCE TO HUMAN HEALTH (Eric Chivian ed. 2002).

⁴⁸³ UN Doc. A/71/266, *supra* note 477, ¶6.

⁴⁸⁴ HARMONY WITH NATURE, *Rights of Nature*, <http://harmonywithnatureun.org/rightsOfNature/>.

⁴⁸⁵ UN Doc. A/75/266, *supra* note 479.

⁴⁸⁶ UNEP/EA.5/L.3, 17 February 2021, Medium-term strategy for the period 2022–2025 and programme of work and budget for the biennium 2022–2023 (Advance Copy), K2100697 - UNEP-EA-5-L-3 - Reissue - ADVANCE.pdf.

mandated by UNGA Resolution No. 73/333.⁴⁸⁷ The acknowledgment of HwN by States and civil society reflects the intrinsic value of nature in sustaining human well-being for present and future generations. The growing recognition by the UNGA on the HwN contributes to a change in paradigm in which the planet is not considered to be an inanimate object to be exploited, but as our common home. ICEL notes that a consequence of this paradigm shift is reconsideration of human interactions with Nature.⁴⁸⁸

G. Concluding Thoughts

It is undeniable that nature is deteriorating, and humanity shares the responsibility for its state. Given the effects of our actions towards nature, we are now at risk. Every decision we make has ethical underpinnings, and “the way we choose to structure ourselves in governance, law, policy, and economics, and how we address the issues of justice, equality, equity, and integrity, have implications for the natural world.”⁴⁸⁹ Despite our religion or philosophical belief, humanity can find moral ground in knowing that the Earth is our home. As our home, this interconnected space should be cherished and treasured, and our cultural values are at the core of this change of belief. Through the same principles that permeate different bedrock foundations, it is time to take care of our home.

The attempts to create links between the ethics debate and law reform have populated recent developments in international environmental law in the past decades. Scholars in religious ecology understood there to be a common ground in which the Earth is revered and respected despite our different ideologies. This chapter illustrated that the underlying foundation for environmental care already exists worldwide, and our cultural values provide the fundamental moral principles on which our legal principles should be grounded. The ethics to change our behavior are already out there to help us bridge the gap between how the world is and how we want it to be. Ignited by the moral worth of nature, these religious, philosophical, and legal discussions are fundamental in creating new legal obligations.

Common to the religious and ideological foundation illustrated here is that the care for the Earth reflects a right to a healthy environment and a duty to care for it. The right and the duty represent the first step into propelling us into a sustainable future that finally addresses the Earth Emergency Crisis. In light of universal environmental problems, we need universal environmental solutions. A global vision shall recognize the unity in nature and draw from our cultural heritage grounded in philosophical and religious traditions. If we are to revert the current path, we need all nations on board. Yet despite the urgency of the Earth Emergency Crisis, several nations are still reluctant to agree to additional environmental commitments.⁴⁹⁰ It is time for States to declare the state of our environment and act towards reverting it.

This notion is recently finding recognition in national courts. For example, the German Constitutional Court (the Bundesverfassungsgericht, or GCC) recently rendered a ground-breaking judgement requiring the German government to establish specific plans to achieve its mid-century

⁴⁸⁷ ICEL, *supra* note 308, at 1.

⁴⁸⁸ *Id.*, at 3.

⁴⁸⁹ Kathryn A Gwiazdon, *From stardust to sacred sands: protecting life on Earth through a human story of ethics, care and the cosmos*, in *THE CRISIS IN GLOBAL ETHICS AND THE FUTURE OF GLOBAL GOVERNANCE* 52 (Peter D. Burdon, et al. eds., 2019).

⁴⁹⁰ See Maria Antonia Tigre & Victoria Lichet, *Update on Negotiation of a New International Environmental Agreement*, 50 ENVTL. L. REP. 10818 (2020).

GHG emissions goal.⁴⁹¹ The ruling renders Germany's current climate legislation unconstitutional as it fairly limits the rights of younger people. The court found that the protection of life and physical integrity encompasses protection against the adverse consequences of climate change, including future generations in case of irreversible developments. If the government only achieves reduction targets after 2030, fundamental rights could be jeopardized.⁴⁹² Following an intergenerational equity argument, the GCC ruled that one generation should not be allowed to consume large portions of the carbon budget while bearing a relatively minor share of the reduction effort, if this would leave subsequent generations with a drastic reduction burden and expose their lives to comprehensive losses of freedom.⁴⁹³ The court thus recognized the challenge of striking a balance between the diverging interests of the present and future generations and showed the importance of constitutional amendments that support planetary integrity and global sustainability.⁴⁹⁴

Several scholars now argue that we need an alternate worldview to guide international environmental law.⁴⁹⁵ Yet Taylor notes that one of the primary challenges that ecological concerns present for rights theory is whether entirely new approaches need to be developed or whether existing ideas can be reformed or re-interpreted to consider the limits of ecosystems and allow for a new ethical relationship between humanity and nature.⁴⁹⁶ For example, the SDGs provide an accepted parameter to guide our laws and policies into the future and aim to sustain the environmental integrity needed for the health of the Earth. However, as Robinson notes, adopting the SDGs does not equate with implementing its content.⁴⁹⁷ Similarly, past efforts to encourage bolder action brought by civil society have failed. The closest States have come to an agreement in the past decade is the Paris Agreement, and there is still weak political will from States to embrace it. Can we complement our existing legal system with progressive new rules that reflect a more ambitious approach to environmental problems and is grounded on a share ethics? It is time for States to commit to more. Foundational concepts such as 'ecological civilization,' if they became a unified field of jurisprudence, could serve to support the SDGs and other existing agreements while encouraging bolder action.⁴⁹⁸

Now that the right to a healthy environment and the complementing duty for the environment have been adopted at the international level, we can introduce additional progressive new rights and duties that take us even further in environmental protection. For example, the deep care for the Earth shared across religious and Indigenous beliefs promotes harmony with nature, which is already reflected in international environmental law. It reinforces that every person has a right to a healthy environment and relatedly shares a duty to care for the environment. These beliefs can similarly provide the pathway for evolving or emerging concepts such as intergenerational equity, ecojustice, rights of nature, and ecocide.

⁴⁹¹ Bundesverfassungsgericht, *Neubauer, et al. v. Germany*, 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (Order of Mar. 24, 2021), available at http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210429_11817_judgment-2.pdf (unofficial translation).

⁴⁹² *Id.*, ¶246

⁴⁹³ Jaap Spier, *Guest Commentary: A Ground-Breaking Judgement in Germany*, CLIMATE LAW BLOG, SABIN CENTER FOR CLIMATE CHANGE LAW (May 10, 2021), <http://blogs.law.columbia.edu/climatechange/2021/05/10/guest-commentary-a-ground-breaking-judgment-in-germany/>.

⁴⁹⁴ Frank Bierman, *Germany's climate law ruled unconstitutional: First reflections* (Mar. 30, 2021), <https://www.frankbiermann.org/post/germany-s-climate-law-ruled-unconstitutional-first-reflections>.

⁴⁹⁵ NAOMI KLEIN, *THIS CHANGES EVERYTHING: CAPITALISM VS. THE CLIMATE* 462 (Simon and Schuster. 2015).

⁴⁹⁶ Prudence E. Taylor, *From Environmental to Ecological Human Rights: A New Dynamic in International Law?*, 10 GEO. INT'L ENVTL. L. REV. 309 (1998).

⁴⁹⁷ Robinson, *supra* note 340, at 146.

⁴⁹⁸ *Id.*, at 146.

Several religions and Indigenous beliefs already recognize the foundation of the rights of nature by broadening environmental ethics to include the value of ecosystems and other non-human species. Yet, how do we translate these underlying ideologies into practical efforts towards environmental protection and sustainability? Given that the foundation for shared legal principles already exists, how can we adopt a more progressive new international environmental declaration in 2022 that reflects a higher moral ground towards nature? The Covid-19 pandemic has reinforced the need to care for the health of our planet.⁴⁹⁹ The climate crisis similarly highlights the fragility of the environment and the urgency to adopt swift measures that reflect an ethical understanding of the human-nature relationship.

Restating environmental legal principles is essential as human laws have proven to be manifestly at variance with the natural systems of Earth's biosphere. Further steps can integrate environmental protection with social and economic goals, fulfilling the three pillars of sustainable development. Given the global consensus on the SDGs and the moral underpinnings shared worldwide as portrayed in this chapter, what kind of principles and policy declarations can humanity agree on? The UNGA called for a new political declaration to be adopted by 2022. We now have an opportunity to analyze our past and look into the future with fresh eyes. Through this research, my goal is to contribute to the understanding that States already share the same moral understanding that we need to do more. Can we agree on a progressive new declaration that ensures environmental justice for people and nature? Can Earth justice be at the center of new commitments? With lessons learned in the past decade through the biodiversity crisis, climate crisis, and Covid-19 health crisis, it is essential to come together and develop an Earth-centered approach that ensures our environmental future.

Dancer argues that we need deep legal pluralist approaches that decenter anthropocentric thinking on the environment and decenter the state in the development of Earth-law, which places responsibility for the environment and the equitable sharing of power at the heart of legal frameworks on human-Earth relations and recognizes the diversity of ontologies that shape these relationships in law and practice.⁵⁰⁰ This chapter shows how Earth-centered discourses have existed in human societies and civilizations for millennia. Different religious and philosophical underpinnings all share a view of humanity as an integral part of an organic whole, revering all living things. While recent developments in jurisprudence may appear novel, they are somewhat latent and emergent.⁵⁰¹ Theories of land ethics, rights of nature, Earth-centered environmental ethics, wild law, and Earth jurisprudence all build on these philosophical crescendos and have proved influential at the international level through the HwN Programme. It is time to find new approaches to the law that rely on the value of nature. This chapter tells us the why and the how.

⁴⁹⁹ Maria Antonia Tigre, *COVID-19 and Amazonia: Rights-based approaches for the pandemic response*, 30(2) REV. OF EUR., COMP. & INT'L ENVIRON. L. 162 (2021). Maria Antonia Tigre, et al., *COVID-19 and "New" Human Rights Symposium: Introductory Remarks*, VOLKERRECHTSBLOG (Mar. 22, 2021), <https://voelkerrechtsblog.org/covid-19-and-new-human-rights-symposium/>.

⁵⁰⁰ Helen Dancer, *Harmony with Nature: towards a new deep legal pluralism*, THE J. OF LEGAL PLURALISM AND UNOFFICIAL L. 1; 3 (2020).

⁵⁰¹ *Id.*, at 5.

III. ENVIRONMENTAL RIGHTS AT THE EDGE OF THE EARTH EMERGENCY CRISIS

The philosophical underpinnings of environmental protection provide a foundation for the moral argument for the adoption of a human right to a healthy environment. As we now understand the “why,” it is time to ask “how.” Chapter III delves deeper into human rights law as a foundation for environmental rights and the pathway towards increased environmental protection. The topic of human rights and the environment has been extensively analyzed by scholars.¹ This chapter does not attempt to provide a comprehensive view of the subject. Instead, it uses the lens of human rights and the environment as a legal framework for the progressive development of international environmental law. It analyzes the different theories to adopt the right to a healthy environment from a substantive aspect and asks: How has the right to a healthy environment developed at the international level? What are its origins, and what does its future look like?

Human beings depend on ecosystems services, such as food, water, clean air, disease management, and climate regulation. Conversely, environmental degradation leads to adverse effects on human life, including water shortages, fisheries depletion, natural disasters, and unsafe disposal of toxic and dangerous waste. The healthy functioning of natural ecosystems is thus inherently linked to basic human survival, as a decent physical environment is a precondition of a healthy life. With the environmental challenges faced in the Anthropocene, and the failure of the international community to adequately address them, fundamental human rights to the environment are increasingly relevant.

The fundamental human right to live in a healthy and sustainable environment is at the heart of the proposed Global Pact for the Environment (GPE). Ideally, it will also be at the core of the new political declaration to be adopted in 2022. The GPE comes at a time when humanity faces unprecedented environmental challenges. Adopting a rights-based approach can reverse ecological degradation and catalyze progress towards a sustainable future as it connects the adverse effects of environmental destruction to human rights. According to the special rapporteur on human rights and the environment (hereinafter ‘special rapporteur’), David Boyd, environmental rights could provide the spark required to rethink our priorities, re-orient society, and repair our relationship with the planet.² The recognition of a stand-alone right to a healthy environment could provide a more balanced reconciliation of economic, social, and environmental rights. Boer argued that to ensure that this is understood juridically, States should “agree on a legal instrument that reflects the current regional agreements which include recognition of the right to a quality environment, with focus both on the substantive elements as well as on robust means of implementation. The barriers to proclaiming a clearly articulated and unambiguous right to a quality environment at a global level are falling away. The question is now not if, but when, a global instrument containing such a right will be opened for signature and eventually enter into force.”³ In 2021, the Human Rights Council (HRC) adopted Resolution No. 48/23,⁴ recognizing the right to a safe, clean, healthy, and sustainable environment as a human right (hereinafter ‘the right to a healthy

¹ See *i.e.*, Dinah Shelton, James R. May, Erin Daly, John Knox, Annalisa Savaresi, David Boyd, Alan Boyle, Sumudu Atapattu, among several others.

² David R. Boyd, *The Right to a Healthy and Sustainable Environment*, in A GLOBAL PACT FOR THE ENVIRONMENT - LEGAL FOUNDATIONS 30 (Yann Aguila & Jorge E. Viñuales eds., 2019).

³ Ben Boer, *Environmental Principles and the Right to a Quality Environment*, in PRINCIPLES OF ENVIRONMENTAL LAW 73 (Ludwig Kramer & Emanuela Orlando eds., 2018).

⁴ Human Rights Council Res. U.N. Doc. A/HRC/48/L.23/Rev.1 (Oct. 5, 2021).

environment’). This recognition proves that the barriers noted by Boer are indeed falling. In 2022, the U.N. General Assembly (UNGA) will consider adopting a similar resolution at a broader level.

This chapter follows the journey towards such recognition, analyzing its origins, the content of the resolution, and the path forward. The chapter is divided as follows. Section A begins with the historical moment of the HRC’s 2021 recognition of the right to a healthy environment. It briefly explains the road to such recognition and its significance. Section B provides an overview of the development of environmental rights in international law. It explains the slow and steady growth of the human right to a healthy environment at the international, regional, and national levels, leading to its crystallization in human rights law. Section C then returns to the HRC’s resolution by commenting on its content. Given how recent the resolution is, this commentary is the first in legal scholarship. The section then briefly debates the next steps in this growing development at the international level, including the potential adoption of a similar resolution at the UNGA. Section D then provides a comparative analysis by briefly analyzing the development of the right to water at the international level. Section E then analyzes the rights of nature as a related evolution of the adoption of the right to a healthy environment. Section F concludes.

A. The recognition of the right to a healthy environment by the HRC

From September 13th to October 9th, 2021, the UNHRC,⁵ an inter-governmental body made up of 47 States responsible for promoting and protecting human rights worldwide, held its 48th regular session.⁶ On October 8th, 2021, forty-three nations adopted A/HRC/48/L.23/Rev.1 (HRC Resolution No. 48/23),⁷ recognizing the right to a safe, clean, healthy, and sustainable environment as a human right. This is the first time that the United Nations (U.N.) recognized that having a safe, clean, healthy and sustainable environment is a human right. As will be further explained in Section B, the international recognition of the right to a healthy environment by the HRC follows decades of scholarly debate and political uncertainty regarding the links between human rights and the environment.

The resolution is a landmark moment in a years-long evolution: at the HRC,⁸ within the Office of the High Commissioner of Human Rights (OHCHR),⁹ in the work of the special rapporteur,¹⁰ elsewhere around the U.N.,¹¹ and in advocacy and legal scholarship.¹² While the resolution is not legally binding, it represents a significant political statement shaping global

⁵ *Human Rights Council Home*, UNITED NATIONS HUMAN RIGHTS COUNCIL, <https://www.ohchr.org/en/hrbodies/hrc/pages/home.aspx> (last visited October 19, 2021) [UNHRC]

⁶ Human Rights Council Res 48/1, U.N. Doc. A/HRC/48/1 (Aug. 10, 2021).

⁷ HRC, Resolution No. 48, *supra* note 4.

⁸ *Human Rights Council resolutions on human rights and climate change*, UNHCR, <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Resolutions.aspx> (last visited Oct. 19, 2021),

⁹ OHCHR and Climate Change, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER,, <https://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx> (last visited October 19, 2021) [OHCHR].

¹⁰ *Special Rapporteur on Human Rights and the Environment*, OHCHR, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SREnvironmentIndex.aspx> (last visited Oct. 19, 2021)

¹¹ *Climate Change and Human Rights*, UNITED NATIONS ENVIRONMENT PROGRAMME (Dec. 2015), https://wedocs.unep.org/bitstream/handle/20.500.11822/9530/-Climate_Change_and_Human_Rightshuman-rights-climate-change.pdf?sequence=2&%3BisAllowed.

¹² *Journal of Human Rights and the Environment*, ELGARONLINE, <https://www.elgaronline.com/view/journals/jhre/jhre-overview.xml> (last accessed Oct. 19, 2021).

standards. In particular, the recognition can further embolden stakeholders and courts to adopt a rights-based approach to environmental and climate change litigation.¹³

This section goes over the development of the right to a healthy environment at the international level, noting the significance of the 2021 recognition by the HRC. Specifically, it covers the pathway that led to the recognition of the right at the HRC and its significance.

1. *The road to the recognition of the right to a healthy environment as a human right*

The path to recognizing the right to a healthy environment at the international level was anything but linear. At the U.N., the HRC has considered the matter of human rights and the environment since 2012, adopting seven resolutions¹⁴ and appointing first an independent expert,¹⁵ and then two consecutive special rapporteurs to study the issue of human rights and the environment.¹⁶ Historically, three special rapporteurs have been appointed to study the connections between human rights and the environment: Mme. Fatma Zohra Ksentini,¹⁷ Prof. John Knox,¹⁸ and Prof. David Boyd.¹⁹ These contributions have been integral to advancing the field, making evident that environmental harm can and does interfere with the full enjoyment of human rights. The work and leadership of the special rapporteurs were crucial in furthering the debate regarding the need to recognize the right to a healthy environment.

From 1989 to 1994, Ksentini presided over a group of experts and jointly produced a pioneer study of the connections between human rights and the environment. Her investigation culminated in the Draft Principles on Human Rights and the Environment.²⁰ The Draft Declaration recognized the right to a healthy environment as such:

¹³ Maria Antonia Tigre, *Major Developments for Global Climate Litigation: The Human Rights Council Recognizes the Right to a Healthy Environment and the Committee on the Rights of the Child Publishes its Decision in an International Youth Climate Case*, SABIN CENTER FOR CLIMATE CHANGE LAW: CLIMATE LAW BLOG (Oct. 12, 2021), <http://blogs.law.columbia.edu/climatechange/2021/10/12/major-developments-for-global-climate-litigation-the-human-rights-council-recognizes-the-right-to-a-healthy-environment-and-the-committee-on-the-rights-of-the-child-publishes-its-decision-in-an-inter/>.

¹⁴ *About the Mandate of the Special Rapporteur on Human Rights and the Environment*, OHCHR, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Mandate.aspx> (last visited Oct. 19, 2021).

¹⁵ *John Knox, former Special Rapporteur on Human Rights and the Environment (2012-2018)*, OHCHR, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/JohnKnox.aspx> (last visited Oct. 19, 2021).

¹⁶ *Special Rapporteur on Human Rights and the environment*, *supra* note 14.

¹⁷ *U.N. Comm'n on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities*, Decision 1989/108, UN Doc. E/CN.4/Sub.2/1989/58 (Aug. 31, 1989); *U.N. Comm'n on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Review of Further Developments in Fields with which the Sub-Commission has been Concerned, Human Rights and the Environment*, Final report prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, ¶¶ 3-4; Annex I (Draft Principles on Human Rights and the Environment), U.N. Doc. E/CN.4/Sub.2/1994/9, (Jul. 6, 1994). *See also* Neil A. F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487 (1996).

¹⁸ Human Rights Council Res. 19/10, ¶ 2, U.N. Doc A/HRC/RES/19/10 (Mar. 22, 2012); Human Rights Council Res. 28/11, U.N. Doc. A/HRC/RES/28/11 (Mar. 26, 2015); U.N. Independent Expert, Human Rights Council, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: preliminary report, U.N. Doc. A/HRC/22/43 (Dec. 24, 2012) (by John H. Knox); U.N. Independent Expert, Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Mapping Report*, U.N. Doc. A/HRC/25/53, ¶¶ 17-22 (Dec. 30, 2013) (by John H. Knox) [hereinafter Mapping Report].

¹⁹ David R. Boyd, *Special Rapporteur on human rights and the environment*, OHCHR, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/DavidBoyd.aspx> (last visited Oct. 19, 2021).

²⁰ ECOSOC, Draft Declaration of Principles on Human Rights and the Environment, in Human Rights and the Environment, Final Report (1994) UN Doc E/CN.4/Sub.2/1994/9. *See* Neil A.F. Popovic, *In Pursuit of Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487 (1996).

Recognizing that sustainable development links the right to development and the right to a secure, healthy and ecologically sound environment,

2. All persons have the right to a secure, healthy and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political and social rights, are universal, interdependent and indivisible.

4. All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.

The declaration was ambitious but politically controversial, and the U.N. Human Rights Commission refused to adopt it.²¹ In 2009, the OHCHR returned to the connection between human rights and the environment, emphasizing that “[w]hile the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the U.N. human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights, such as the right to life, to health, to food, to water, and to housing.”²² Three theoretical approaches were subsequently identified: (i) the environment as a “precondition to the enjoyment of human rights,” (ii) human rights as “tools to address environmental issues, both procedurally and substantively,” (iii) integrating human rights and the environment under the concept of sustainable development.²³

Subsequent work was done by the special rapporteurs to further understand what the right to a healthy environment entails. For example, the special rapporteur’s 2021 report underlined the necessity to recognize the right to a healthy environment to protect people’s health, deliver cleaner air, improve access to safe water and sustainably-produced food.²⁴ The reports of the special rapporteurs also recall States’ obligation to respect, protect and promote human rights, including measures to address environmental challenges. Moreover, the special rapporteur’s 2020 report provides a study on good practices related to the implementation and promotion of the right to a healthy environment that should constitute a map to efficiently implement the right to a healthy environment around the world.²⁵ This investigation was essential to understanding what the right entails, leading to a growing consensus on its content.

Several other special rapporteurs appointed by the HRC have encompassed the relationship between human rights and the environment within their mandates.²⁶ In 2019, the HRC issued a

²¹ Alan Boyle, *Climate Change, The Paris Agreement and Human Rights*, 67 THE INT’L AND COMP. L. QUART. 759 (2018).

²² OHCHR, *Report on Climate Change and Human Rights*, UN Doc A/HRC/10/61 (2009) ¶ 18.

²³ OHCHR, *Analytical Study on the Relationship between Human Rights and the Environment*, UN Doc A/HRC/19/34 (2011) ¶ 2, 6–9.

²⁴ Human Rights Council Res. 37/59, U.N. Doc. A/HRC/37/59 (Jan. 24, 2021).

²⁵ David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Safe, Clean, Healthy and Sustainable Environment), *Right to a healthy environment; good practices*, U.N. Doc. A/HRC/43/53 (2020).

²⁶ See *i.e.*, Report of the Rights of the Child and Hazardous substances and wastes, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Aug. 2, 2016) (citing Human Rights Council, Special rapporteur to investigate the effects on human rights of illicit dumping of toxic products in developing countries, including the management and disposal of hazardous substances and wastes, U.N. Doc. A/HRC/33/41 (Aug. 2, 2016); James Anaya, Report of the Special Rapporteur on the rights of indigenous peoples, Human Rights Council, U.N. Doc. A/HRC/18/25, (July 11, 2011) (extractive activities in indigenous territory); Michel Forst, Situation of Human Rights Defenders, UNGA, U.N. Doc. A/71/281 (Aug. 3, 2016) (environmental human rights defenders); *Report on pesticides and the right to food*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (Jan. 24, 2017), <https://www.ohchr.org/EN/Issues/Environment/SRToxicsandhumanrights/Pages/Pesticidesrighttofood.aspx> (citing Human Rights Council, *Report of the Special Rapporteur on the right to food*, U.N. Doc. A/HRC/34/48, (Jan. 24, 2017) (pesticides and the right to food); Climate Change, extreme poverty and human rights: Report, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH

General Comment on the right to life, imposing on the State parties the obligations to “take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity [including *inter alia*] degradation of the environment [and] deprivation of indigenous peoples’ land, territories and resources.”²⁷ Through these recognitions, barriers were slowly lifted.

The support of civil society organizations positively contributed to adopting the right to a healthy environment by the HRC. In September 2020, a Core Group of States on Human Rights and the Environment (Costa Rica, Morocco, Slovenia, Switzerland, and the Maldives) started informal discussions on the possible international recognition of the right to a safe, clean, healthy and sustainable environment. The Core Group’s initiative gathered thundering support. 1,350 NGOs and Indigenous Peoples rallied behind their clarion call.²⁸ These include renowned organizations such as Birdlife International, Greenpeace, and Amnesty International, or specialized organizations like the Center for International Environmental Law and the Global Pact Coalition.²⁹ Fifteen U.N. Agencies issued a letter of endorsement.³⁰ This prodigious mobilization owes much to the tremendous leadership of U.N. Special Rapporteur on Human Rights and Environment David R. Boyd and his predecessor John Knox. In October 2021, the HRC adopted resolution A/HRC/RES/45/30,³¹ urging States to adopt effective measures to ensure children’s rights through a healthy environment and, in particular, the recognition of a right to a healthy environment in their national legislation.³² This further opened doors to expansion of the right to all people.

In March 2021, 69 States (among which figured previously reluctant States such as Germany) endorsed a statement unequivocally calling for the recognition of this right.³³ With the endorsement of over 20 organizations, the Right to a Healthy Environment Campaign supported the Core Group’s statement.³⁴ In June 2021, the Core Group delivered a joint message inviting governments to recognize the right to a healthy environment for all as “key to address[ing] the environmental crisis and protect[ing] human rights.”³⁵ However, despite significant support from several countries, a positive outcome was far from guaranteed. On the eve of adopting the resolution, several states, including the U.S. and the U.K., expressed a lack of enthusiasm for the

COMMISSIONER, (JAN. 24, 2017), <https://www.ohchr.org/EN/Issues/Poverty/Pages/ClimateChange.aspx> (citing Human Rights Council, *Report of the Special Rapporteur on extreme poverty and human rights*, U.N. Doc. A/HRC/41/39 (July 17, 2019)).

²⁷ U.N. Int’l Covenant on Civ. and Pol. Rts. Hum. Rts. Comm., General Comment No. 36, Article 6: Right to Life, ¶ 26, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019) (Adopted by the Committee at its 124th session (8 Oct. to 2 Nov. 2018)).

²⁸ *Joint Statement: Human Rights and the Environment*, HUMAN RIGHTS COUNCIL (March 9, 2021), <https://insideclimatenews.org/news/07102021/human-rights-panel-right-to-clean-sustainable-environment/>.

²⁹ *Call for the Global Recognition of the Right to a Healthy Environment*, HEALTHY ENVIRONMENT IS A RIGHT, <http://healthyenvironmentisaright.org/> (last visited Jan. 19, 2022).

³⁰ *Joint Statement of the United Nations entities on the right to a healthy environment*, UNITED NATIONS ENVIRONMENT PROGRAMME (March 8, 2021), <https://www.unep.org/news-and-stories/statements/joint-statement-united-nations-entities-right-healthy-environment>.

³¹ Human Rights Council Res. 45/30, U.N. Doc. A/HRC/Res/30 (Oct. 13, 2021).

³² Maria Antonia Tigre & Victoria Lichet, *The Human Rights Council urges States to Realize the Rights of the Child Through a Healthy Environment*, THE GLOBAL NETWORK FOR HUMAN RIGHTS AND THE ENVIRONMENT (Oct. 19, 2021), <https://gnhre.org/environmental-rights-2/the-human-rights-council-urges-states-to-realize-the-rights-of-the-child-through-a-healthy-environment/>.

³³ *Joint Statement: Human Rights and the Environment*, HEALTHY ENVIRONMENT IS A RIGHT (March 2021), <http://healthyenvironmentisaright.org/wp-content/uploads/2021/04/Core-Group-Joint-Statement.pdf>.

³⁴ *Joint NGO Statement at HRC46*, HEALTHY ENVIRONMENT IS A RIGHT, http://healthyenvironmentisaright.org/wp-content/uploads/2021/03/R2E-joint-statement-for-endorsement_Web_English.pdf.

³⁵ *Joint Statement by UN human rights experts for World Environment Day*, UNHCR (June 5, 2021), <https://www.ohchr.org/EN/HRBodies/HRC/Pages/NewsDetail.aspx?NewsID=27130&LangID=E>.

proposal.³⁶ Nevertheless, on the day of the vote, Members bridged their differences. The resolution was adopted with 43 votes in favor and four abstentions from China, India, Japan, and Russia.³⁷ Despite these abstentions and the absence of the U.S. from the Council, the adoption of this resolution reveals near-unanimous support from the international community in favor of the right to a healthy environment.³⁸

2. *Advantages of the global recognition of the right to a healthy environment*

The recognition of the right to a healthy environment at the international level has indisputable advantages that scholars have widely enumerated. International recognition of a human right to a healthy environment puts to rest a decades-long debate on its status in international law. This recognition includes environmental protection as a core aspect of human rights protection. It crystallizes and integrates the human rights norms relating to the environment, ensuring that they “continue to develop in a coherent, consistent and integrated manner.”³⁹ Although Knox clarifies that the absence of a universally acknowledged right has not prevented the evolution of environmental human rights law, the presence of the right provides a kind of capstone to that body of law, giving it a more unified and integrated presence.⁴⁰ Indeed, confirming that the global language of rights applies to environmental issues is the most immediate benefit of recognition.⁴¹ Finally, describing an interest as a right expresses a shared, collective sense of its fundamental importance, which may in turn “energize movements and coalitions advocating for the right.”⁴²

The recognition also reinforces the inextricable link between human rights and the environment. It provides cohesion and uniformity to two interlinked regimes, and gives rise to a baseline for a fresh perspective on environmental protection from a rights-based approach. As Knox noted in 2018, “while there is no shortage of statements on human rights obligations relating to the environment, the statements do not come together on their own to constitute a coherent set of norms.”⁴³ Without an explicit recognition, the inclusion of environmental rights within other human rights laws relies upon a case-by-case interpretation by judges, which often renders imprecise and unbalanced.⁴⁴ Orellana notes that the recognition would allow the normative content of human rights regarding the environment to no longer be dispersed or fragmented across a range of rights but rather come together under a single normative frame.⁴⁵ The resolution thus raises

³⁶ Emma Farge et. al, *Clean Environment could become U.N. Human Rights. Not so fast, say U.S., Britain*, REUTERS (Oct. 5, 2021), <https://www.reuters.com/business/environment/clean-environment-could-become-un-human-right-not-so-fast-say-us-britain-2021-10-05/>.

³⁷ Katie Surma, *The U.N.'s Top Human Rights Panel Votes to Recognize the Right to a Clean and Sustainable Environment*, INSIDE CLIMATE NEWS (Oct. 7, 2021), <https://insideclimatenews.org/news/07102021/human-rights-panel-right-to-clean-sustainable-environment/>.

³⁸ Victoria Lichet & Maria Antonia Tigre, *Historic Breakthrough for Environmental Justice: The UNHRC Recognizes the Right to a Healthy Environment as a Human Right*, OpinioJuris (Oct. 13, 2020), <http://opiniojuris.org/2021/10/20/historic-breakthrough-for-environmental-justice-the-unhrc-recognizes-the-right-to-a-healthy-environment-as-a-human-right/>.

³⁹ John H. Knox, *The Global Pact for the Environment: At the crossroads of human rights and the environment*, 28 REV. OF EUR., INT'L & COMP. ENV. L. 40 (2019).

⁴⁰ *Id.*

⁴¹ John H. Knox, *Constructing the Human Right to a Healthy Environment*, 16 ANNUAL REV. OF L. AND SOC. SCIENCE 79 (2020).

⁴² Cesar Rodriguez-Garavito, *A Human Right to a Healthy Environment? Moral, Legal and Empirical Considerations*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 155 (John H. Knox & Ramin Pejan eds., 2018).

⁴³ Knox, *supra* note 18, ¶ 38.

⁴⁴ Dinah Shelton, *Background paper 2: Human Rights and the Environment: Jurisprudence of Human Rights Bodies*, UNEP-OHCHR Expert Seminar on Human Rights and the Environment (2002).

⁴⁵ Marcos Orellana, *Quality Control of the Right to a Healthy Environment*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 176 (John H. Knox & Ramin Pejan eds., 2018).

awareness of and reinforces the understanding that human rights norms require protection of the environment and that environmental protection depends on the exercise of human rights. Furthermore, the recognition highlights that “environmental protection must be assigned the same level of importance as other interests that are fundamental to human dignity, equality and freedom.”⁴⁶

ICEL notes that “[a]greement on the principles, such as the right to a healthy environment, and clarification of the other principles, can equip States to build resilience and capacity amidst present and future environmental adversity.”⁴⁷ Hey argues that the advent of the Anthropocene calls on us to rethink how we interact with each other and with nature and, more specifically, reinterpret existing human rights instruments such as the Universal Declaration of Human Rights (UDHR).⁴⁸ Recognizing the right to the environment brings human rights to the Anthropocene, just as emerging forms of “new Earth politics”⁴⁹ are revising political thought and action in light of the conditions of our epoch.⁵⁰ Of course, reading the right as integrating existing norms would not foreclose future evolution. Still, it would immediately provide a minimum basis of interpretation, a hermeneutic floor, that would enable its promotion and implementation.

The recognition further places greater attention on those more vulnerable to the effects of environmental harm⁵¹ as it provides for greater predictability.⁵² Treating environmental protection as a human right would help foreground human beings most affected by environmental damage and put a human face on what might otherwise seem too abstract or technical.⁵³ When applied by the judiciary, the right helps provide a safety net to protect against gaps in laws and creates opportunities for better access to justice. To further increase the protection, a future declaration could strengthen individual or collective citizens’ rights. Potentially, it could include the protection of environmental rights defenders and whistleblowers, the rights of environmentally displaced persons, the victims of sudden- or slow-onset disasters. Issues related to environmental justice, the rights of indigenous peoples, access to justice and administrative documents for citizens and NGOs, and the rights of stakeholder groups in international negotiations could also be covered by specific provisions.⁵⁴

Additionally, the recognition raises “the profile and importance of environmental protection.” It provides a basis for enacting stronger laws, standards, regulations, and policies, thus improving the overall effectiveness of international environmental law.⁵⁵ Boyd argues that legal recognition of the right to a healthy environment usually spurs governments to review and strengthen environmental laws and policies, improve implementation and enforcement, provide

⁴⁶ UN Secretary-General, Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment, UN Doc A/73/419, ¶39 (Nov. 30, 2018).

⁴⁷ International Council of Environmental Law (ICEL), Note on Options to Address Gaps Under Resolution 72/277 (10 May 2018) “Towards a Global Pact For The Environment,” submitted for consideration in the 2019 Nairobi Consultations (Feb. 19, 2019), available at https://wedocs.unep.org/bitstream/handle/20.500.11822/27609/ICEL_Report.pdf?sequence=1&isAllowed=y, at 22.

⁴⁸ Ellen Hey, *The Universal Declaration of Human Rights in “The Anthropocene”*, 112 AJIL UNBOUND 350 (2018).

⁴⁹ SIMON NICHOLSON AND SIKINA JINNAH (EDS.), *NEW EARTH POLITICS: ESSAYS FROM THE ANTHROPOCENE* (MIT Press, 2016).

⁵⁰ Rodriguez-Garavito, *supra* note 42, at 160.

⁵¹ UN Secretary-General, *supra* note 46, at ¶45.

⁵² Sumudu Atapattu, *The Right to a Healthy Environment and Climate Change: Mismatch or Harmony?*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* (John H. Knox & Ramin Pejan eds., 2018).

⁵³ Knox, *supra* note 41, at 12.

⁵⁴ Lucien Chabason et. al, *What to expect from a Global Pact for the Environment?*, Institute for Sustainable Development and International Relations (Jan. 2019), <https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20iddri/D%C3%A9cryptage/201901-IB0119EN-pacte%20mondial%20env.pdf>.

⁵⁵ UN Secretary-General, *supra* note 46, at ¶40.

more significant opportunities for public participation, and address environmental injustices.⁵⁶ Nations with the right to a healthy environment in their constitutions have smaller ecological footprints, rank higher on comprehensive indices of environmental indicators, and are more likely to ratify international environmental agreements. Additionally, these nations have made faster progress in reducing emissions of sulfur dioxide, nitrogen oxides, and greenhouse gases (GHG) than nations without such provisions.⁵⁷

Additionally, it would fill gaps in international environmental law. A new human right might increase attention to transboundary environmental harm, a topic still underexploited by international law. As human rights law focuses on internal obligations, recognizing a new human right could support advocacy for a global agreement or new regional treaties. It could further provide more robust rights for the public to receive environmental information from their government, participate in environmental decision-making, and access domestic remedies for environmental harm.⁵⁸ Almost all environmental claims brought to human rights tribunals involve internal harm not regulated by international environmental law.

The resolution should instill further global environmental cooperation and more decisive environmental action by national governments. At the national level, the resolution might further encourage States that have not explicitly adopted the right to a healthy environment to join more than 150 States that formally recognize such right in their legal frameworks. Similarly, it could bolster efforts to officially acknowledge the right at the regional level, such as by the Council of Europe.⁵⁹ The recognition of the right to a healthy environment, when associated with a robust implementation framework at the national level, undeniably improves environmental and human health outcomes.⁶⁰ But, more importantly, the right provides an additional tool to challenge state and corporate actors for failing to take prompt and adequate action to address the triple environmental crises of climate change, pollution, and nature loss.⁶¹

One instrumental function of the international human rights regime is to fill gaps left by constitutional rights. The potential influence of U.N. recognition on a particular country might be limited by how far the government has already committed to codifying and implementing environmental rights in its legal system. Countries such as Costa Rica, which already has recognized the right in its constitution and implemented it through hundreds of judicial decisions, would have less room for positive influence than countries that have not realized the right or implemented it. On the other hand, qualitative studies illuminate how governments fall short of what their constitutions seem to promise and describe many cases that have successfully relied on environmental rights.⁶² For example, rights-based claims are increasingly prevalent in climate

⁵⁶ Boyd, *supra* note 2, at 35.

⁵⁷ See Chris Jeffords & Lanse Minkler, *Do Constitutions Matter? The Effects of Constitutional Environmental Rights Provisions on Environmental Outcomes*, 69(2) KYKLOS 294 (2016); Christopher Jeffords, *On the temporal effects of static constitutional environmental rights provisions on access to improved sanitation facilities and water sources*, 7(1) J. HUM. RTS. & ENV'T. 74 (2016).

⁵⁸ Knox, *supra* note 41, at 16.

⁵⁹ Annalisa Savaresi, *The UN HRC Recognizes the Right to a Healthy Environment and Appoints a New Special Rapporteur on Human Rights and Climate Change. What does it all Mean?*, EJIL:TALK! (Oct. 12, 2021), <https://www.ejiltalk.org/the-un-hrc-recognizes-the-right-to-a-healthy-environment-and-appoints-a-new-special-rapporteur-on-human-rights-and-climate-change-what-does-it-all-mean/>.

⁶⁰ See James. R. May, *The Case for Environmental Rights: Recognition, Implementation and Outcomes*, 42 CARDOZO L. REV. 983 (2021).

⁶¹ Press Release, Secretary General, Alongside Pandemic, World Faces 'Triple Planetary Emergency', Secretary-General Tells World Forum for Democracy, Citing Climate, Nature, Pollution, U.N. Press Release SG/SM/20422 (Nov. 16, 2020).

⁶² ERIN DALY & JAMES R. MAY (EDS.), *IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM* (Cambridge Univ. Press, eds, 2018).

litigation in the Global South.⁶³ The enactment of “implementation laws,” in which States promote effective integration in national laws and procedures, is essential for the right to a healthy environment to realize its full potential. If U.N. recognition influences more countries to adopt and enforce environmental rights in their domestic law, what effect could those rights be expected to have on their environmental performance? Intuitively, one might believe that rights enable advocates and courts to bring more pressure on their governments to protect the environment. This will strengthen support for states at the national level to improve their performance on environmental issues, including formal recognition of the right to a healthy environment in their national legislation.

Based on a more rigorous methodology that uses cross-sectional instrumental variables, Jeffords and Minkler report that countries with a constitutional environmental right have, on average, a higher score on the comprehensive Yale Environmental Performance Index.⁶⁴ Focusing on procedural rights, Jeffords and Gellers find that countries with constitutional rights to environmental information have higher rates of access to improved water sources and sanitation facilities. They examine the intersection of environmental rights with states’ coercive and administrative capacity and find that, in general, greater economic wealth and adherence to the rule of law are associated with higher levels of environmental performance in countries that have adopted substantive environmental rights.⁶⁵

Another benefit of explicit recognition of the right to a healthy environment is providing civil society new tools to hold governments accountable.⁶⁶ Some scholars have argued that the right to a healthy environment is too vague to give rise to practical rights and obligations.⁶⁷ However, the jurisprudence has already led to a remarkably detailed and consistent set of State obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, including States that have not yet recognized the right to a healthy and sustainable environment. The scope of the HRC’s resolution is even broader as it provides an additional tool to challenge state and corporate actors for failing to take timely and appropriate measures to address the triple environmental crisis. Given the rights-based approach often followed by national courts, the resolution may encourage progressive judges in adjudicating environmental disputes worldwide, even in countries where the right is not explicitly recognized in domestic law. The environmental jurisprudence of international and regional bodies is particularly relevant to inform the content of the right in international human rights law. These obligations are outlined in extensive detail in the framework principles presented to the HRC by the former special rapporteur.⁶⁸

Raising awareness to the link between human rights and the environment might further encourage claimants to bring more environmental claims. Human rights claims of environmental harms could more easily be argued and litigated within the human rights system with a recognized right. While there is no explicit consideration of the environment in most international human

⁶³ Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT’L L. 679 (2019).

⁶⁴ Jeffords & Minkler, *supra* note 57, at 294.

⁶⁵ Chris Jeffords & Joshua C. Gellers, *Implementing Substantive Constitutional Environmental Rights: A Quantitative Assessment of Current Practices Using Benchmark Rankings*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES 34 (Erin Daly & James R. May eds., 2018).

⁶⁶ Rebecca Bratspies, *Do We Need a Human Right to a Healthy Environment?*, 13 SANTA CLARA J. INT’L L. 31 (2015).

⁶⁷ See *i.e.*, J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don’t Measure Up*, 74 NOTRE DAME L. REV. 245 (1999); HURST HANNUM, RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH (Cambridge University Press, 2019).

⁶⁸ John Knox, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, *Framework Principles on Human Rights and the Environment*, U.N. Doc. A/HRC/37/59, ¶ 6 (Jan. 24, 2018) [hereinafter Framework Principles].

rights treaties, courts have recognized the implicit importance of environmental health on human rights on many occasions.⁶⁹ The jurisprudence elaborated by international human rights bodies is particularly interesting given the lack of mechanisms of the environmental treaties to enforce the right to a healthy environment.⁷⁰ Recognizing the right provides a lever to overcome classical hurdles in human rights-based environmental litigation, reduce costs, decrease delays, and minimize risks associated with pursuing other judicial remedies.⁷¹

It can further define the specific content of the right to a healthy environment. The substantive component of the right to a healthy environment has allowed national and regional courts to impose duties on States to implement the right effectively. For example, in *Indigenous Communities Members of the Lhaka Honhat Association vs. Argentina*,⁷² the Inter-American Court of Human Rights (IACtHR) held that Argentina had violated the right of the indigenous groups to a healthy environment due to the lack of effective measures to stop activities harmful to them, thus recognizing that States must prevent violations of the right to a healthy environment.⁷³

The human rights system already provides a structure for raising concerns of human rights' violations associated with environmental issues. The existence of international petition procedures allows those harmed to bring international pressure to bear when governments lack the will to prevent severe pollution that threatens human health and well-being.⁷⁴ As a result, petitioners are often afforded redress, forcing governments to remedy the violations. Enforcement of human rights law is more developed than the procedures of international environmental law. The availability of individual complaints procedures to denounce human rights violations has given rise to extensive jurisprudence in which specific obligations of states to protect and preserve the environment are detailed.⁷⁵

Thus, the explicit recognition of the right to a healthy environment is predicated on enabling individuals, groups, civil society organizations, and the judiciary to contribute to the improved implementation and enforcement of environmental laws. A more substantial effect would be to strengthen efforts to raise environmental issues at the Universal Periodic Review (UPR) of countries by the HRC. Recognition of the right to a healthy environment would provide the basis for more rigorous review and facilitate raising environmental concerns without showing clear causal links between the environmental harm and the interference with a particular human right.⁷⁶

The emphasis on rights encourages the integration of democratic values and the promotion of the rule of law into broad-based governance structures.⁷⁷ By linking environmental and human rights, the environment is less likely to be disregarded when balanced against other considerations

⁶⁹ See e.g., 83rd plenary meeting, 20 December 1988 or Resolution U.N. Doc. A/RES/45/94, 68th plenary meeting (Dec. 14, 1990); Report of the Human Rights Council, Thirty-first session, Agenda item 3. "Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development", U.N. Doc. A/HRC/31/52 (Feb. 1, 2016).

⁷⁰ Dinah Shelton, *Human Rights, Health and Environmental Protection: Linkages in Law and Practice: A Background Paper for the WHO*, 8 (November 2017), http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf.

⁷¹ DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION* (University of British Columbia Press, 2011).

⁷² *Caso Comunidades Indígenas Miembros de la Asociación Lhaka Honhat (Nuestra Tierra) vs. Argentina, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C. 400), (Feb 6, 2020).

⁷³ See Maria Antonia Tigre, *Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment*, 24 ASIL INSIGHTS (2020); Maria Antonia Tigre, *Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina*, 115 AM. J. OF INT'L L. 706 (2021).

⁷⁴ Dinah Shelton, *Human rights and the environment: substantive rights*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 278 (Malgosia Fitzmaurice, et al. eds., 2013).

⁷⁵ *Id.* at 266.

⁷⁶ Knox, *supra* note 41, at 17.

⁷⁷ Shelton, *supra* note 74, at 278.

such as the right to development. Indeed, human rights bodies' jurisprudence has consistently balanced the government's desire for economic growth with the environmental impacts of projects and activities on individuals and groups.⁷⁸ The balance is often found considering a series of factors, such as (i) whether the government has complied with laws and regulations on environmental protection; (ii) the seriousness of the harm, according to the health consequences and the proportionality of the measures taken by the government; and (iii) whether the State has complied with procedural duties.⁷⁹

Finally, the resolution is crucial for environmental human rights defenders who work, often at significant personal risk, to safeguard the land, air, water, and ecosystems we all depend on.⁸⁰ It is also vital for the people and communities who suffer disproportionate impacts of environmental degradation, including women, children, indigenous people, and other potentially vulnerable and marginalized populations. These advantages are now well comprehended globally. Nonetheless, the field of human rights and the environment developed over decades of study by scholars and practitioners. Furthermore, the right to a healthy environment has been adopted worldwide at the national and regional levels. The following section looks to the past to understand where we got to where we are now.

B. Development of Human Environmental Rights

The human right to a healthy environment is deeply rooted in Anglo-Saxon law and legal traditions.⁸¹ The 1215 Magna Carta Libertatum drew a direct link between the environment and individual liberties.⁸² The Magna Carta produced the Carta de Foresta, or "Forest Charter," in 1217. The Forest Charter guaranteed the "liberties of the forest and free customs traditionally had, both within and without the Royal Forests," and obliged all "to observe the liberties and customs granted in the Forest Charter."⁸³ It has contributed to establishing the rule of law and launching eight centuries of legislation conserving forest resources and landscapes, shaping foundations of sustainable natural resources law and the regimes for protection of natural areas.⁸⁴ The Charter made several references to customary rights of the commoners, such as herbage, estover, pannage, pasturage, and other usufructs. By confirming those rights, it has "set society on a path for ensuring public rights generally."⁸⁵

Robinson notes that when the Charter established "liberties of the forest" for all, rights that sustain their economic and social lives, the Charter also anticipated what today is expressed in human rights instruments.⁸⁶ By designing new legal means to foster justice and sustain relations

⁷⁸ *Id.* at 278.

⁷⁹ *Id.* at 278-279.

⁸⁰ Rebecca L. Root, *What can stop environmental activism from being so deadly?*, DEVEX (Oct. 13, 2021), <https://www.devex.com/news/what-can-stop-environmental-activism-from-being-so-deadly-101705>.

⁸¹ Nicholas A. Robinson, *The Most Fundamental Right*, 36 ENV'T F. 46, 48 (2019).

⁸² MAGNA CARTA, cl. 40 (1215).

⁸³ DANIEL BARSTOW MAGRAW, ANDREA MARTINEZ & ROY E. BROWNELL II, MAGNA CARTA AND THE RULE OF LAW 423 (2014) (translating the FOREST CHARTER). William Blackstone celebrated "these two sacred charters" in his Commentaries and his other writings, upon which the courts at Westminster (and throughout England) relied heavily. WILLIAM BLACKSTONE, THE GREAT CHARTER AND THE CHARTER OF THE FOREST WITH OTHER AUTHENTIC INSTRUMENTS, TO WHICH IS PREFIXED AN INTRODUCTORY DISCOURSE CONTAINING THE HISTORY OF THE CHARTER (Oxford at the Clarendon Press 1759). See generally WILLIAM BLACKSTONE, COMMENTARIES.

⁸⁴ Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights in Nature*, 311; 314 in DANIEL BARSTOW MAGRAW, ANDREA MARTINEZ & ROY E. BROWNELL II, MAGNA CARTA AND THE RULE OF LAW (2014).

⁸⁵ *Id.* at 344.

⁸⁶ *Id.*

between people and natural resources, the Charter became a foundation for intergenerational justice.⁸⁷ The open-ended provisions of Chapter 17 of the Forest Charter, which guaranteed the ‘liberties of the forest’ and ‘free customs,’ has allowed future generations to elaborate and evolve new definitions of these liberties and shared rights.⁸⁸ These have set the foundation for recognizing the right to a healthy environment. Interpretation of the provisions in the Charter have adapted to historical periods in which it applied, evolving through the increasing knowledge of ecology and natural sciences and the social movements that accompanied it.⁸⁹

One of the most significant features of the Forest Charter lies in how it linked rights to procedures for vindicating those rights. It established recourse to the procedures which provided avenues to seek justice.⁹⁰ While these were often not fully implemented – much like the right to a healthy environment today – it allowed for commoners and barons to win the Crown’s observance of their Forest Charter ‘liberties’ over time through hearings of competing claims. The pleas of the forest were procedural means to invoke and apply rights of the Charter in specific instances.⁹¹ The Charter provided rights with remedies, laying the foundation that one does not exist without the other.

When the 1948 UDHR⁹² was adopted, the world was a much different place. After the horrors of World War II, nations throughout the globe craved a universal charter that specified individual human rights and freedoms. The declaration provided a common standard of achievement for all states and cultures. Environmental concerns were then not widespread, and governments failed to understand the environmental crisis that unfolded. While the conservation movement existed, States consciously decided not to include environmental rights in the Universal Declaration, even though the U.N. took a view almost from the outset that the ‘conservation of resources’ had “to be regarded as an end itself.”⁹³ This early disagreement of the development of human rights set the stage for the battle between human rights and environmental protection as two distinct and detached fields.

The early days of the environmental movement realized that human rights and environmental protection were closely linked, as scholars and activists observed the relevance of implementing both fields to realize the aims of the other.⁹⁴ Environmental protection emerged as a matter of international concern in the 1960s, leading to the first major conference on international environmental issues. At the emergence of global environmental protection in the 1970s, the connection between damage to the natural environment and the enjoyment of human rights was perceived.⁹⁵ However, human rights were already firmly established at the rise of environmental consciousness.⁹⁶ The acknowledgment of an environmental aspect to human rights came too late

⁸⁷ *Id.* at 315.

⁸⁸ *Id.* at 344.

⁸⁹ *Id.* at 316.

⁹⁰ *Id.* at 345.

⁹¹ *Id.*

⁹² Universal Declaration on Human Rights, G.A. Res. 217 (III) A, art. 3 (Dec. 10, 1948) [*hereinafter* Universal Declaration on Human Rights].

⁹³ See U.N. Scientific Conference on the Conservation and Utilization of Resources, Aug. 17-Sep. 6, 1949, U.N. Doc. E/CONF.7/7, Foreword (1950); See Louis B. Sohn, *A Short History of United Nations Documents on Human Rights*, in THE UNITED NATIONS AND HUMAN RIGHTS (1968) (Given the protest from scientists over the lack of recognition of environmental problems then, the IUCN was created shortly thereafter).

⁹⁴ John Knox, *Human Rights and Environmental Protection*, 24 WASH. INT’L L. J. 519 (2015).

⁹⁵ Human Rights and the Environment, *Rio+20: Joint Report OHCHR and UNEP*, pt. 49 at 10 (2012),

https://wedocs.unep.org/bitstream/handle/20.500.11822/9970/JointReport_OHCHR_HRE.pdf?sequence=1&isAllowed=y.

⁹⁶ Dinah Shelton, *Whiplash and Backlash - Reflections on a Human Rights Approach to Environmental Protection*, 13 SANTA CLARA J. INT’L L. 12 (2015).

to include the right to a healthy environment in major international human rights agreements. As a result, environmental rights are primarily ignored in law.⁹⁷ When these does reference the environment, it is done on a limited basis.⁹⁸

Some have argued that the right to a healthy environment has a powerful ‘ethical’ influence on global governance.⁹⁹ Invoking a right to the environment entails a strong ethical assertion about the central role of a livable natural environment to a dignified human existence. The right to the environment would not only be relevant for the enjoyment of other human rights but also have an intrinsic ethical significance as essential for sustaining individual life for present and future generations.¹⁰⁰

In *Minors vs. Oposa Factoran*, Justice Hilario Davide Jr. of the Supreme Court of the Philippines delivered a unanimous judgment that recognized the right to a balanced and healthful ecology as a coherent natural right that exists irrespective of written law.¹⁰¹ The Supreme Court argued that the constitutional recognition of the right to a balanced and healthful ecology was necessary to ensure the obligation to protect the environment for present and future generations. It recognized that right that has always existed:

While the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Such a right belongs to a different category of rights altogether for it concerns nothing less than self-preservation and self-perpetuation — aptly and fittingly stressed by the petitioners — the advancement of which may even be said to predate all governments and constitutions. As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to a balanced and healthful ecology and to health are mandated as state policies by the Constitution

⁹⁷ See Universal Declaration on Human Rights, *supra* note 96; International Covenant on Civil and Political Rights, UNGA Res 2200 (XXI) (Annex), 16 December 1966 (999 U.N.T.S. 171 and EMuT 966:93) [*hereinafter* ICCPR]; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3 [*hereinafter* ICESCR].

⁹⁸ Shelton, *supra* note 96, at 12; The ICESCR guarantees the right to safe and healthy working conditions (art. 7(b)) and the right of children and young persons to be free from work harmful to their health (art. 10.3). The right to health expressly calls on States Parties to take steps for “the improvement of all aspects of environmental and industrial hygiene” (art. 12(b)) and “the prevention, treatment and control of epidemic, endemic, occupational and other diseases” (art. 12(c)). See also U.N. Convention on the Rights of the Child, 1577 U.N.T.S. 52 (Nov. 20, 1989) (referring to aspects of environmental protection in respect to the child’s right to health (art. 24 (1)), providing that “States Parties shall take appropriate measures . . . to combat disease and malnutrition . . . through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution” (art. 24(2)(c)), and ensuring parents and children are informed and educated on hygiene and environmental sanitation (art. 24(2)(e)); International Labour Organization, Convention on Indigenous and Tribal Peoples, No. 169, 72 I.L.O. Off. Bull. 59, 28 I.L.M. 1382 (June 27, 1989), reprinted in A Manual 93-98 (rev. ed. 2003) [*hereinafter* ILO Convention] (The ILO Convention contains numerous references to the lands, resources, and environment of indigenous peoples at arts. 4, 7, 13-19. It also requires governments to ensure that adequate health services are available or provide resources to indigenous groups “so that they may enjoy the highest attainable standard of physical and mental health” (art. 25(1)) and to make known to the peoples concerned their rights and duties (art. 30(1)).

⁹⁹ Earth Charter Commission, EARTH CHARTER (2000), https://earthcharter.org/wp-content/uploads/2020/03/echarter_english.pdf?x90724 (A clear example of this influence); Jeffrey QC, *M.I. Environmental Ethics and Sustainable Development: Ethical and Human Rights Issues in Implementing Indigenous Rights*, 2 MACQUARIE J. OF INT’L AND COMP. ENV’T L. 107 (2005).

¹⁰⁰ Rodriguez-Garavito, *supra* note 42, at 155.

¹⁰¹ PHILIPPINES CONSTITUTION, Feb. 2, 1987, §16, art. II.

itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come — generations which stand to inherit nothing but parched earth incapable of sustaining life.¹⁰²

The court's interpretation shows that the right to the environment has always existed in the essence of human beings irrespective of an explicit international acknowledgment. Nonetheless, the mounting concern over the environmental crisis and its effect on humankind has slowly changed the scenario of a lack of official recognition. May notes that “[w]hile initially resistant, human rights-based thinking about the environment emerged nonetheless, and has enjoyed increasing prominence at the table of human rights.”¹⁰³ This concern and growing development culminated in the recent recognition by the HRC. As a result, the last 25 years have seen the development of detailed environmental human rights norms, with the recognition of the right to a healthy environment in constitutions and by courts, as well as an increasing cognizance under international governance regimes.¹⁰⁴

1. Early development of human rights and the environment

In 1968, the U.N. held its first international human rights conference in Tehran, concluded with a declaration that reaffirmed the universality and proclaimed the indivisibility of all human rights.¹⁰⁵ It drew attention to the fact that, while scientific discoveries and technological advances had opened vast prospects for economic, social, and cultural progress, these might nevertheless endanger the rights and freedoms of individuals.¹⁰⁶ In a resolution adopted in its aftermath, the UNGA underscored the effect of impairment of the quality of the human environment on the condition of man and his enjoyment of fundamental human rights, including their physical, mental, and social well-being and dignity.¹⁰⁷ The resolution called for the first international environmental conference within the U.N.¹⁰⁸

At the proposal of the government of Sweden, the U.N. convened an environmental summit on the human environment in 1972. The Stockholm Conference was a turning point in developing international environmental politics. It raised awareness for environmental concerns and laid the foundation for global environmental governance worldwide. As the first significant international agreement on the environment, the Stockholm Declaration acknowledged the effects of the environment on the well-being of people and the enjoyment of fundamental human rights.¹⁰⁹ It proclaimed an environmental right and duty in its first principle based on the assumption that the

¹⁰² *Minors Oposa v. Factoran*, a case from the Republic of the Philippines. See 224 S.C.R.A. 792 (S.C. July 30, 1993) (Phil.), reprinted in 33 I.L.M. 173, 9 (1994).

¹⁰³ May, *supra* note 60, at 999.

¹⁰⁴ *Id.* at 985.

¹⁰⁵ United Nations International Conference on Human Rights, Tehran, Iran, Apr. 22-May 13, 1968, Proclamation of Teheran, U.N. Doc. A/Conf.32/41 at 3-4 (Sept. 1968) (reaffirming that the UDHR is the common standard of achievement for all mankind and that “human rights and fundamental freedoms are indivisible”).

¹⁰⁶ United Nations International Conference on Human Rights, *supra* note 109, at ¶18. See also U.N. Comm'n on Human Rights, *supra* note 17, ¶ 26.

¹⁰⁷ Problems of the human environment, U.N.G.A. 23rd session, 1733rd Plen. Mtg., U.N. Doc A/RES/2398 (XXIII) (Dec. 3, 1968).

¹⁰⁸ *Id.* at 1.

¹⁰⁹ U.N. Conference on the Human Environment, Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF G.48/14/rev.1, preamble (June 16, 1972) [hereinafter Stockholm Declaration].

Earth's environment was stable and capable of being sustained.¹¹⁰ The declaration recognized that “[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹¹¹

Stockholm paved the way for countries to internalize the right to a quality environment as it recognized the relationship between the environment, man, and his basic rights.¹¹² As the first international document to realize what later became known as the right to a healthy environment, this language introduced the notion of a human right to the environment into international law¹¹³ and has changed the world.¹¹⁴ ICEL notes that the “1972 Stockholm Declaration embraces the right to the environment as a fundamental principle, as well as the principles associated with the duties of States to care for the environment and to enact effective laws to safeguard the environment.”¹¹⁵ As the backbone of the declaration, subsequent principles rely on its achievement.¹¹⁶ For example, Boer notes that “the principle of sustainable development suggests that the right to development is to be balanced with and constrained by the right to a clean, safe, healthy and sustainable environment.”¹¹⁷ Nonetheless, some scholars still argue that the initiative fell short of recognizing an express individual right to an adequate environment, while others reason that its real-world impact has been relatively modest.¹¹⁸

Ksentini clarifies the role of the Stockholm Declaration in establishing the right to the environment:

The relationships established by the Stockholm Declaration between the environment, development, satisfactory living conditions, dignity, well-being and individual rights, including the right to life, constitute recognition of the right to a healthy and decent environment, which is inextricably linked, both individually and collectively, to universally recognized fundamental human rights standards and principles, and which may be demanded as such by their beneficiaries, i.e. individuals alone or in association with others, communities, associations and other components of civil society, as well as people.¹¹⁹

After Stockholm, the international legal framework on environmental protection proliferated, advancing a fragmented system of overlapping principles, norms, and rules. In 1982, the UNGA approved the World Charter for Nature.¹²⁰ As a guide for regulating international environmental development, the Charter was sponsored by thirty-four developing nations.¹²¹ It

¹¹⁰ Boer, *supra* note 3, at 57; Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT'L L.J. 4231 451-54 (1973) (arguing Principle 1 creates an individual human right).

¹¹¹ Stockholm Declaration, *supra* note 109, Principle 1.

¹¹² See JAMES R. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* 67 (Cambridge Univ. Press, 2015); U.N. Comm'n on Human Rights, *supra* note 17, ¶26.

¹¹³ Lynda Collins, *Are We There Yet? The Right to Environment in International and European Law*, 3(2) MCGILL INT'L J. OF SUSTAINABLE DEVELOPMENT L. AND POL. 119; 124 (2007).

¹¹⁴ May, *supra* note 60, at 98.

¹¹⁵ ICEL, *supra* note 47, at 12.

¹¹⁶ Boer, *supra* note 3, at 75.

¹¹⁷ *Id.* at 73.

¹¹⁸ Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471 (2006).

¹¹⁹ U.N. Comm'n on Human Rights, *supra* note 17, ¶31.

¹²⁰ World Charter for Nature, G.A. Res. 7, 36 U.N. GAOR Supp. (No. 51) at 17, U.N. Doc. A/51 (1982), reprinted in 22 I.L.M. 455 (1982).

¹²¹ *Id.* (Other co-sponsors included Benin, Burundi, Cape Verde, the Central African Republic, Chad, Comoros, Costa Rica, Djibouti, Egypt, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Haiti, the Ivory Coast, Kenya, Mali, Malta,

was based on the underlying premise that the global environment needs substantive and procedural protection from the adverse impacts of social and economic development. While stating unenforceable general principles, the Charter established the baseline to persuade developing countries to adopt environmentally sound development strategies.¹²²

In 1987, the World Commission on Environment and Development (WCED) published “Our Common Future,” also known as the Brundtland Report, which directed the world to a sustainable development path.¹²³ The report placed environmental concerns on the political agenda, linking environment and development. The work of the Commission laid the groundwork for the 1992 Earth Summit, the adoption of Agenda 21, the Rio Declaration, and the establishment of the Commission on Sustainable Development. In addition to the vital contribution of defining the concept of sustainable development, the Brundtland Report included a legal appendix, which outlined essential legal principles relevant to furthering the idea. Annex 1, entitled “Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development Adopted by the WCED Experts Group on Environmental Law,” included general principles, rights, and responsibilities. Paragraph 1 specifically embraced the right to a healthy environment as a fundamental human right: “All human beings have the fundamental right to an environment adequate for their health and well being.”¹²⁴

A few early multilateral environmental agreements expressly note the human right to a healthy environment. The 1989 Hague Declaration, signed by twenty-four states, declared that environmental degradation threatens “the right to live in dignity in a viable global environment.”¹²⁵ The fundamental right to “an environment adequate for [human beings’] health and well-being” was acknowledged in 1986 by the Legal Experts Group on Environmental Law of the WCED.¹²⁶ The 1999 Bizkaia Declaration on the Right to Environment also recognizes that “[e]veryone has the right, individually or in association with others, to enjoy a healthy, ecologically balanced environment...[which] may be exercised before public bodies and private entities...”¹²⁷

The UNGA has further endorsed the right to the environment, albeit with divided votes. Clearly showing how the language developed over time, the UNGA noted in 1990 that individuals are “entitled to live in an environment adequate for their health and well-being,” using the language later endorsed in the Rio Declaration.¹²⁸ Twenty years later, it recognized the “right of every person and all peoples to a healthy environment ...” as a pre-requisite to the realization of “a democratic

Mauritania, Morocco, Mozambique, Niger, Pakistan, Rwanda, Senegal, Singapore, Somalia, Swaziland, Thailand, Togo, the United Republic of Cameroon, Upper Volta, and Zaire, Belgium and Yugoslavia).

¹²² Harold W Wood, *The United Nations World Charter for Nature: The Developing Nations’ Initiative to Establish Protections for the Environment*, 12 *ECOLOGY L. QUARTERLY* (1985). See WOLFGANG E BURHENNE & WILL A IRWIN, *WORLD CHARTER FOR NATURE* (E. Schmidt. 1983).

¹²³ Special Working Session, *World commission on environment and development, OUR COMMON FUTURE*; WCED, ED.; OXFORD UNIVERSITY PRESS: OXFORD, UK (1987) [hereinafter Brundtland Report].

¹²⁴ WCED, Legal Experts Group on Environmental Law of the World Commission on Environment and Development, *Legal Principles for Environmental Protection and Sustainable Development*, A/42/427, ¶1 (1987) .

¹²⁵ Hague Declaration on the Environment, 28 *INT’L LEGAL MATERIALS* 1308 (1989)

¹²⁶ WCED Legal Principles, *supra* note 124.

¹²⁷ Declaration of Bizkaia on the Right to the Environment and follow-up resolution, adopted by a group of international experts during a seminar promoted by the Provincial Council of Bizkaia and sponsored by UNESCO and the United Nations High Commissioner for Human Rights, at Bilbao (Portugal) on 12 February 1999

¹²⁸ G.A. Res. 45/94, ¶ 1, U.N. Doc. A/RES/45/94 (Dec. 14, 1990).

and equitable international order.”¹²⁹ In addition, several U.N. bodies have further advanced the link between human rights and the environment.¹³⁰

The 1992 Rio Declaration fell short of an explicit endorsement of the right.¹³¹ Principle 1 reads that “[human beings] are entitled to a healthy and productive life in harmony with nature.”¹³² Arguing that ‘entitled’ does not have the same connotation as the word ‘right,’ some scholars have interpreted Rio as a retreat from the rights-based approach taken in Stockholm.¹³³ ‘Entitlement’ is defined as “a right to benefits specified especially by law or contract” or as “the fact of having a right to something.”¹³⁴ Others have worried that the failure to provide further emphasis on human rights is indicative of continuing uncertainty and debate.¹³⁵ Nonetheless, some have asserted that Principle 1 still “captures the ideals of a human right to a healthy environment, if not explicitly recognizing such a right.”¹³⁶

Still, principle 1 in the Stockholm and Rio Declarations highly influenced the adoption of the right to a healthy environment in State constitutions. States legitimized the right through national recognition in hard law, thus reinforcing their tacit acceptance. Kalen notes that “a fundamental, or universally transcendent, right to a clean, healthy, and safe environment seems elemental.”¹³⁷ He further explains, highlighting the impact of the Stockholm and Rio Declarations in defining such a right, along with national constitutions throughout the world:

And today, it seems almost axiomatic that a right to enjoy access to a sustainable level of our natural surroundings is firmly imbued within human rights, whether for clean air, a climate not so disrupted by greenhouse gas emissions, access to clean and sufficient water supplies, or enjoyment of native fish, fauna, and unimpaired landscapes.¹³⁸

In 2012, at the U.N. Conference on Sustainable Development (UNCSD), also known as Rio+20, the international community renewed its commitment “to ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations.”¹³⁹ While the conference’s outcome document, “The Future We Want,” did not bring anything new, it relaunched the participating countries’ political commitment to sustainable development, as well as endorsed commitments made in Stockholm and Rio. Still, the right can be

¹²⁹ G.A. Res. 64/157, U.N. Doc. A/RES/64/157 (Mar. 8, 2010). See also G.A. Res. 45/94, ¶ 1, U.N. Doc. A/RES/45/94 (Dec. 14, 1990); G.A. Res. 35/8, ¶ 8, U.N. Doc. A/RES/35/8 (Oct. 30, 1980).

¹³⁰ See, e.g., Proposals for a study of the Problem of the Environment and its Relation to Human Rights: Note Prepared by Ms. Fatma Zohra Ksentini Pursuant to a Sub-Commission Decision 1989/108, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Human Rights and Scientific and Technological Developments, U.N. Doc. E/CN.4/Sub.2/1990/12 (1990); Comm’n on Hum. Rts. Res. 1990/41, *Human rights and the environment*, U.N. Doc. E/CN.4/RES/1990/41 (Mar. 6, 1990); Comm’n on Hum. Rts. Res. 2005/60 (Apr. 20, 2005); Human Rights Council (HRC) Resolution 16/11; HRC Resolution 31/8, Human Rights and the Environment, U.N. Doc. A/HRC/RES/31/8 (Mar. 23, 2016). For resolutions relating to the environment, see <http://ohchr.org/EN/Issues/Environment/SREnvironment/Pages/Resolutions.aspx>.

¹³¹ Boer, *supra* note 3, at 4.

¹³² UN Conference on Environment and Development, 14 June 1992, U.N. Doc. A/CONF.151/5/Rev.1 (1992), 31 I.L.M. 874 (1992) (hereinafter Rio Declaration).

¹³³ See e.g., Collins, *supra* note 113, at 132; Boer, *supra* note 3, at 7; Mariana T. Acevedo, *The Intersection of Human Rights and Environmental Protection in the European Court of Human Rights*, 8 N.Y.U. ENVTL. L.J. 437; 451 (2000).

¹³⁴ *Entitlement*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/entitlement> (last visited Oct. 19, 2021).

¹³⁵ Boyd, *supra* note 71, at 90.

¹³⁶ 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; 308 (2000).

¹³⁷ Sam Kalen, *An Essay: An Aspirational Right to a Healthy Environment*, 34 UCLA J. ENVTL. L. & POL’Y 156, 162 (2016).

¹³⁸ *Id.* at 163.

¹³⁹ United Nations Conference on Sustainable Development, Resolution I: The future we want, A/CONF.216/16, ¶1 (endorsed by the UNGA Resolution 66/288) (Jul. 27, 2012).

implicitly recognized as a requirement to the fulfillment of the “right to develop and the right to an adequate standard of living” and the “full realization of the right to the enjoyment of the highest attainable standard of physical and mental health,” linking its legal status to human rights law.

The Sustainable Development Goals (SDGs) built upon this progression, replacing the Millennium Development Goals (MDGs) as a framework for social and economic development issues in 2015.¹⁴⁰ Organized in 17 goals and 169 targets reflecting moral values and ethical norms, they provide a guideline to promote human rights obligations, as well as a solid foundation for environmental rights and obligations and the definition of the necessary policies to address current world challenges.¹⁴¹ The SDGs include an imperative to protect the environment, with substantive and procedural obligations to avoid environmental damage. For example, SDG No. 16 addresses the rule of law, including the environmental rule of law, central to sustainable development.

The 2015 Paris Agreement marks the first multilateral environmental agreement to explicitly introduce human rights language in its preamble.¹⁴² Several prior initiatives emphasized the linkages between climate change and human rights.¹⁴³ The Paris Agreement acknowledged that parties should, when taking action to address climate change, respect, promote, and consider their obligations on human rights, including the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities, and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.¹⁴⁴ While the document has been criticized for referencing human rights only in its preamble, rather than in operative provisions of the legal agreement, the importance of ensuring that the implementation of vital operative provisions of the Paris Agreement follows a right-based approach cannot be overstated.¹⁴⁵ This crescendo of recognitions at the international level has been a slow but steady process that ignited a global movement. This movement is reflected at the regional and national levels.

¹⁴⁰ UNGA, “Resolution adopted by the General Assembly on 25 September 2015. Transforming our world: the 2030 Agenda for Sustainable Development”, Seventieth Session. Agenda Items 15 and 116. A/RES/70/1, 21 October 2015, http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (last visited May 7, 2018).

UNEP, *Sustainable Development Goals*, UNITED NATIONS DEVELOPMENT FUND, <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (last visited Jan. 17, 2022).

¹⁴² Daniel Magraw, et al., *Human Rights, Labour and the Paris Agreement on Climate Change*, 46 ENVIRONMENTAL POLICY AND L. 313 (2016).

¹⁴³ See e.g., Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, UNHRC, 31st Sess, UN Doc A/HRC/31/52 (2016); International Bar Association, *Climate Change Justice and Human Rights Task Force, Achieving Justice and Human Rights in an Era of Climate Disruption* (London, International Bar Association, 2014); Global Network for the Study of Human Rights and the Environment, *Draft Declaration on Human Rights and Climate Change* (2015); Oslo Principles on Global Climate Change Obligations (2015).

¹⁴⁴ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, Preamble; See Ellen Hey & Federica Violi, *The Hard Work of Regime Interaction: Climate Change and Human Rights*, Report for the Royal Netherlands Society of International Law in CLIMATE CHANGE: OPTIONS AND DUTIES UNDER INTERNATIONAL LAW, (2018). UN Office of the High Commissioner on Human Rights, Report of the OHCHR on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

¹⁴⁵ Patricia G. Ferreira, *Did the Paris Agreement Fail to Incorporate Human Rights in Operative Provisions? Not If You Consider the 2016 SDGs* (2016).

2. The recognition of the right to a healthy environment in national and regional legal frameworks

Currently, 156 countries legally recognize a human right to a healthy environment, representing more than 80 percent of U.N. member states.¹⁴⁶ This number considers the ratification of regional human rights agreements and environmental treaties, constitutions, and national legislation. Considering the countries who voted in favor of the HRC's resolution, I counted four additional countries not included in the list of countries already recognizing the right to a healthy environment, bringing the total number to 160.¹⁴⁷ Additionally, with the ratifications from the Escazú Agreement, I counted four additional countries that were not included in the list of countries already recognizing the right to a healthy environment, bringing the total number to 164.¹⁴⁸

To date, the right to a healthy environment has been recognized in regional human rights treaties in Africa and Latin America and 'sectoral' treaties concerning access to information, justice, and public participation in environmental matters in Europe and Latin America. The regional treaties have been ratified by 129 States.¹⁴⁹ This number includes 54 States that are parties to the African Charter on Human and Peoples' Rights,¹⁵⁰ 45 States that are parties to the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention),¹⁵¹ 16 States that are parties to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (San Salvador Protocol)¹⁵² and 16 States that are parties to the Arab Charter on Human Rights.¹⁵³

As of December 2021, twelve States had ratified the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement).¹⁵⁴ Five of those had not ratified the San Salvador Protocol, bringing the number of regional recognition to 134.¹⁵⁵ In addition, ten States adopted the non-binding Declaration on Human Rights of the Association of South-East Asian Nations (ASEAN

¹⁴⁶ See David R. Boyd, *Catalyst for change: evaluating forty years of experience in implementing the right to a healthy environment*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* (John H. Knox and Ramin Pejan ed. 2018); Boyd, *supra* note 149, ¶13. This number is contested: May counts 136 countries legally subject to a right to a healthy environment. May, *supra* note 60, at 1004; Appendix.

¹⁴⁷ Based on the list by Boyd, *supra* note 146, Table 1. These include the Bahamas, Czechia, Marshall Islands, and Uzbekistan, countries which had not yet recognized the right to a healthy environment in the national constitution, international convention (including the African Charter, San Salvador Protocol, Aarhus Convention, and Arab Charter), or national legislation.

¹⁴⁸ *Id.*, considering the ratifications as of Jan. 20, 2022. See Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, OBSERVATORIO PRINCIPLE 10, CEPAL, <https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental>. These include Antigua and Barbuda, Saint Vincent and the Grenadines, Saint Kitts and Nevis, and Saint Lucia.

¹⁴⁹ Boyd, *supra* note 25.

¹⁵⁰ Organization of African Unity, *African (Banjul) Charter on Human and Peoples' Rights*, June 27, 1981, Doc. OAU/CAB/LEG/67/3/Rev.5, 21 ILM 59 (1982), art. 24 [hereinafter *African Charter*].

¹⁵¹ Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters, Jun. 25, 1998, 2161 U.N.T.S. 447 [hereinafter *Aarhus Convention*].

¹⁵² Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69 [hereinafter *San Salvador Protocol*].

¹⁵³ League of Arab States, Arab Charter on Human Rights, adopted in Cairo on Sep. 15, 1994, *reprinted in* 12 INT'L HUM. RTS. REP. 893, art. 35 (2005) [hereinafter *Arab Charter*].

¹⁵⁴ Escazú Agreement on Access to Information, Participation and Justice in Environmental Matters, April 22, 2021 C.N.195.2018 [hereinafter *Escazú Agreement*].

¹⁵⁵ Including Antigua and Barbuda, Guyana, Saint Vincent and the Grenadines, Saint Kitts and Nevis, and Saint Lucia.

Declaration).¹⁵⁶ Neither the European Convention on Human Rights nor the European Social Charter includes an express right to a healthy environment. However, in September 2021, the Parliamentary Assembly of the Council of Europe passed a resolution¹⁵⁷ supporting adopting an additional protocol to the European Convention on Human Rights to anchor the right to a safe, clean, healthy and sustainable environment in the European human rights system.¹⁵⁸ The Council of Europe's Committee of Ministers will consider the Assembly's draft in 2022. While this initiative shows promise, the Council took no action on a similar request from the Assembly in 2009. Nevertheless, there is broad adoption of the right to a healthy environment at the regional level, which continues to grow and fill the regional gaps.

At the national level, recognition of the right to a healthy environment has grown substantially since 1976, when Portugal first embedded a right to a healthy environment in its constitution.¹⁵⁹ May notes that the world has turned slowly toward recognizing a right to a healthy environment, most significantly at the constitutional level by recognizing an express or implied substantive right to a healthy environment.¹⁶⁰ As of 2020, 110 U.N. member states have expressly recognized a substantive constitutional right to a healthy environment.¹⁶¹ The list includes nations from the four corners of the world: Africa, the Middle East, Western Europe, the former Soviet Bloc, Latin America, and Oceania and archipelago.¹⁶² These encompass countries from different backgrounds and legal traditions, including civil law, common law, Islamic, Native American, and other traditions.¹⁶³ This expansion coherently follows the philosophical analysis in Chapter II. In addition, some national courts have recognized an implied right to a healthy environment that can be derived from other fundamental human rights. For example, courts in Bangladesh, India, Pakistan, Sri Lanka, Guatemala, and Panama have recognized an implied right to a healthy environment.¹⁶⁴

The right to a healthy environment has also been adopted at the subnational constitutional level in Brazil, Germany, Iraq, the United States, and Bosnia and Herzegovina.¹⁶⁵ More recently, the State of New York adopted the right to the environment.¹⁶⁶ The new "green amendment" or "Environmental Rights Amendment" (ERA) places New York alongside six other states in the U.S. with similar provisions in their state constitutions.¹⁶⁷ These amendments may introduce new

¹⁵⁶ Declaration on Human Rights of the Ass'n of South-East Asian Nations, Nov. 12, 2012, THE ASS'N OF SOUTHEAST ASIAN NATIONS, <https://asean.org/asean-human-rights-declaration/>.

¹⁵⁷ EUR. CONSULT. ASS. DEB. 27th Sess. 2396 (Sept. 29, 2021).

¹⁵⁸ See *The Right to a Healthy Environment: PACE proposes draft of a new protocol to the European Convention on HR*, PARLIAMENTARY ASSEMBLY (Sept. 29, 2021), https://pace.coe.int/en/news/8452/the-right-to-a-healthy-environment-pace-proposes-draft-of-a-new-protocol-to-the-european-convention-on-human-rights-?__cf_chl_jschl_tk__=RNDMcCpX6QrEOaLFu9R_0wEYLwBZPVFX2m8lnFQI_Fk-1642968808-0-gaNycGzNCRE.

¹⁵⁹ See JOSHUA C. GELLERS, *THE GLOBAL EMERGENCE OF CONSTITUTIONAL ENVIRONMENTAL RIGHTS* (2017).

¹⁶⁰ May, *supra* note 60, at 989.

¹⁶¹ Boyd, *supra* note 149, at ¶10. See annex II for an updated list of States that legally recognize the right to a safe, clean, healthy and sustainable environment. This number is contested, May counts 84 countries in this list. May, *supra* note 60, at 992.

¹⁶² May, *supra* note 60, at 992.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 996.

¹⁶⁵ James R. May & William Romanowicz, *Environmental Rights in State Constitutions*, in *PRINCIPLES OF CONSTITUTIONAL ENVIRONMENTAL LAW* 306 (James R. May ed., 2011); MAY & DALY, *supra* note 112, at 209–35 (2015); JAMES R. MAY & ERIN DALY, *Standards in Subnational Environmental Constitutionalism*, in *ENVIRONMENTAL RIGHTS: THE DEVELOPMENT OF STANDARDS* 367, 367–75 (Stephen J. Turner et. al., eds., 2019). See also Boyd, *supra* note 149, at annex VI (2020).

¹⁶⁶ New York State Constitution's Bill of Rights, art. 1, Sec. 19. See Nicholas A. Robinson, *New York's Constitutional Right to the Environment*, ACOEL, <https://acoel.org/wp-content/uploads/Robinson-blog-2021.11.24.pdf>.

¹⁶⁷ Pennsylvania, Montana, Hawaii, Illinois, Massachusetts and Rhode Island. Several states have proposed green amendments, including Iowa, Kentucky, Maine, Maryland, New Jersey, New Mexico, Oregon, Vermont, Washington, and West Virginia. See Stacey Halliday et. al, *New York Becomes the Third State to Adopt a Constitutional Green Amendment*, BEVERIDGE & DIAMOND

avenues for those aiming to enforce environmental laws in anticipation of harm and invite novel environmental protection litigation claims.

The special rapporteur reports that an additional 23 countries recognize a right to a healthy environment under domestic legislation that do not do so constitutionally.¹⁶⁸ The special rapporteur also notes the importance of enacting and implementing legislation to respect, protect and fulfill the right to a safe, clean, healthy and sustainable environment.¹⁶⁹ Especially good practices can be seen in Argentina, Brazil, Colombia, Costa Rica, France, the Philippines, Portugal, and South Africa, where the right to a healthy environment serves as a unifying principle that permeates legislation, regulations, and policies.

While recognizing the right to a healthy environment is incredibly significant, its efficacy relies on judicial implementation. Courts remain essential to giving environmental rights practical effects.¹⁷⁰ A growing body of national and international case law and practice has defined the content and scope of the right to a healthy environment and its relationship with other human rights. This practice has been amply documented in the literature¹⁷¹ and has been thoroughly mapped by the special rapporteur.¹⁷² The case law engaging with environmental rights includes an exponential number of climate litigation cases.¹⁷³

For example, in 2017, the IACtHR issued an Advisory Opinion recognizing the right to a healthy environment as fundamental to human existence.¹⁷⁴ The IACtHR reaffirmed the principle of human rights interdependence and indivisibility, noting the ‘unquestionable’ link between environmental protection and the realization of other human rights, including environmental degradation and the adverse effects of climate change.¹⁷⁵ The IACtHR makes clear that a wide range of rights could be affected by environmental degradation, including the rights to life, personal integrity, privacy, health, water, food, housing, participation in cultural life, property, and the right not to be forcibly displaced.¹⁷⁶ Additionally, it acknowledged the right to the environment as “fundamental to the existence of humanity,” as it can cause irreparable damage to human beings.¹⁷⁷ The right was defined as ‘autonomous’ under the American Convention on Human Rights (ACHR), separate from the environmental implications of other human rights.¹⁷⁸ It protects the components of the environment as legal interests within themselves, regardless of certainty or

(Dec. 10, 2021), <https://www.bdlaw.com/publications/new-york-becomes-the-third-state-to-adopt-a-constitutional-green-amendment/>.

¹⁶⁸ These countries are Armenia, Bhutan, Bosnia-Herzegovina, Cyprus, Djibouti, Eretria, Gambia, Guatemala, Guinea-Bissau, Haiti, Kazakhstan, Lebanon, Liberia, Lithuania, Madagascar, Monaco, Nigeria, Palau, Panama, Saudi Arabia, Tajikistan, Tanzania, and Uruguay. See Boyd, *supra* note 149, at 22–27.

¹⁶⁹ Boyd, *supra* note 25, at ¶XX.

¹⁷⁰ May, *supra* note 60, at 1008.

¹⁷¹ See *i.e.*, DALY & MAY (EDS.), *supra* note 62 (generally).

¹⁷² Knox, *supra* note 18 and Boyd, *supra* note 25.

¹⁷³ Pau de Vilchez Moragues and Annalisa Savaresi, *The Right to a Healthy Environment and Climate Litigation: A Mutually Supportive Relation?* (April 28, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3829114; Michael Burger & Jessica Wentz, *Climate Change and Human Rights*, in *ENCYCLOPEDIA OF HUMAN RIGHTS AND THE ENVIRONMENT: LEGALITY, INDIVISIBILITY, DIGNITY AND GEOGRAPHY: CURRENT GLOBAL CHALLENGES* (2019).

¹⁷⁴ Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶62 (Nov. 15, 2017).

¹⁷⁵ *Id.* at 21, ¶ 47, 54, 55, 57; See also OAS General Assembly, *Derechos Humanos y Cambio Climático en las Américas* (Jun. 3, 2008), AG/RES. 2429 (XXXVIII/O/08). See *Lagos del Campo v. Peru*, Preliminary Exceptions, Merits, Reparations, and Costs, Judgment, (ser. C) No. 340, ¶141 (Aug. 31, 2017) (where it used the principle to adjudicate on socio-economic rights).

¹⁷⁶ Advisory Opinion OC-23/17, *supra* note 174, at 30-31, ¶ 66.

¹⁷⁷ *Id.* at 27, ¶ 59.

¹⁷⁸ *Id.* at 29, ¶ 63.

evidence about the risks to individual people.¹⁷⁹ This interpretation follows an ecocentric perspective and goes as far as to acknowledge the rights of nature as a legal trend.¹⁸⁰

The recognition of the right to the environment in the Americas is regulated explicitly in Article 11 of the Additional Protocol of San Salvador. However, only 16 countries have ratified it.¹⁸¹ Among these, the majority has recognized a constitutional right to the environment.¹⁸² Even with an express legal provision, the jurisprudence of the Inter-American system remained limited. Apart from references to the environment in indigenous cases, through the right to life and the concept of a ‘dignified life’ (*vida digna*), the IACtHR had yet to address environmental rights directly.¹⁸³ The 2018 Advisory Opinion changed these circumstances. Following the Court’s 2017 decision in *Lagos del Campo v. Peru*,¹⁸⁴ the right to the environment becomes directly justiciable, falling under the ACHR-based contentious jurisdiction of the San José tribunal.¹⁸⁵

In the 2020 *Lhaka Honhat* case, the IACtHR issued its first contentious judgment recognizing an autonomous right to the environment.¹⁸⁶ The IACtHR held Argentina liable for violations of an autonomous right to a healthy environment, indigenous community property, cultural identity, food, and water. Relying heavily on the interpretation set out in the Advisory Opinion, the IACtHR incorporated the right to a healthy environment among those protected by Art. 26 and noted the right as a ‘universal interest’ and a ‘fundamental right for the existence of humanity.’¹⁸⁷ The autonomous character of the right to the environment protects features of nature as interests in themselves, regardless if there is evidence of risk to individual people, thus adopting the legal trend on rights of nature.

This shows that the Advisory Opinion is already influencing current litigation and will most likely influence future litigation on environmental protection and climate change, as it opens a door for transboundary litigation. As a new potential pathway for climate lawsuits, this decision will be used as a tool to strengthen ongoing rights-based climate litigation.¹⁸⁸ Still, many of the thresholds and specific requirements of the standards indicated by the IACtHR will need to be developed in future cases to reduce the legal uncertainty brought by the new standards. Further

¹⁷⁹ *Id.* at 29, ¶ 62.

¹⁸⁰ Maria Antonia Tigre & Natalia Urzola, *The 2017 Inter-American Court’s Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene*, 12 J. HUM. RTS. & ENV’T. 24 (2021).

¹⁸¹ See A-52: *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, Inter-American Commission on Human Rights, <https://www.cidh.oas.org/Basicos/English/Basic6.Prot.Sn%20Salv%20Ratif.htm>.

¹⁸² CONSTITUCIÓN POLÍTICA DEL ESTADO PLURINACIONAL DE BOLIVIA, Feb. 7 2009, art. 33; CONSTITUIÇÃO FEDERAL, Oct. 5, 1988, art. 225 (Braz.); CONSTITUCIÓN POLÍTICA DE COLOMBIA, July 4, 1991, art. 79; CONSTITUCIÓN POLÍTICA DE COSTA RICA, Nov. 7, 1949, art. 50; CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, Jan. 15, 1978, art. 14; CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR, Dec. 20, 1984, art. 117; CONSTITUCIÓN DE HONDURAS, Jan. 11, 1982, art. 145; CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Feb. 5, 1917, art. 4; CONSTITUCIÓN POLÍTICA DE NICARAGUA, Jan. 1, 1987, art. 60; CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE PANAMÁ, 1972, art. 118; CONSTITUCIÓN NACIONAL DE PARAGUAY, Aug. 25, 1967, art. 8; CONSTITUCIÓN POLÍTICA DEL PERÚ, Dec. 31, 1993, art. 2(22); CONSTITUCIÓN DE LA REPÚBLICA ORIENTAL DEL URUGUAY, July 18, 1985, art. 47; CONSTITUCIÓN DE LA REPÚBLICA BOLIVARIANA DE VENEZUELA, Nov. 17, 1999, art. 127.

¹⁸³ See e.g., *Case Comunidad Indígena Yakye Axa Vs. Paraguay*; Marina Brilman, *Environmental Rights and the Legal Personality of the Amazon Region*, EJIL:TALK! (Apr. 24, 2018), <https://www.ejiltalk.org/environmental-rights-and-the-legal-personality-of-the-amazon-region/>.

¹⁸⁴ *Lagos del Campo v. Peru*, *supra* note 175.

¹⁸⁵ Tigre & Urzola, *supra* note 180, at 44.

¹⁸⁶ *Lhaka Honhat vs. Argentina*, *supra* note 72. See Tigre (2021), *supra* note 73 (generally).

¹⁸⁷ The IACHR and IACtHR have traditionally relied on constitutional guarantees of a particular quality of environment in enforcing the rule of law. Argentina has recognized a constitutional right to a quality environment.

¹⁸⁸ Maria Antonia Tigre, *Developing a Green Jurisprudence at the Inter-American System: A Pathway to Climate Litigation*, 28 HASTINGS ENV’T. L. J. (forthcoming 2022)

defining this will likely disperse the shadow over the legitimacy of the Court to create new rights and obligations.¹⁸⁹

Grounded in comparative constitutional law and international practice, the right to a healthy environment has arguably reached the status of customary international law.¹⁹⁰ For a wide range of scholars, and as recognized by courts worldwide, it is an overarching norm that allows for further development of international environmental law in the face of present environmental problems and future unforeseen challenges. Although not all States have adopted it, its broad acceptance at the national and regional levels evidence greater uniformity and certainty in understanding human rights obligations relating to the environment. These trends are further supported by State practice, including in international environmental instruments and before human rights bodies.¹⁹¹

Despite the rapid growth of environmental rights, not all recognitions are equal.¹⁹² May contends that mentioning a right to a healthy environment is not the same as conferring one.¹⁹³ For example, a Nigerian court has held that the African Charter is not enforceable there.¹⁹⁴ Furthermore, recognizing something akin to a right to a healthy environment does not make it legally enforceable. For example, neither the Preamble nor Article I are of the Aarhus Convention, which recognize the right to a healthy environment, are enforceable.¹⁹⁵ Knox also notes that not all recognitions are equal, as adopting a regional agreement shows less commitment than adding the right to a national constitution.¹⁹⁶ Likewise, the UNSG highlights that “[e]xisting regional and international instruments on this subject do not universally or completely define the scope and content of the right. Regional agreements that recognize the right to a healthy environment generally pertain to human rights law and do not consider the specificities of environmental issues. Several such agreements do not allow individuals or groups to file individual or public interest claims.”¹⁹⁷ This reality is deeply rooted in Latin America and the Caribbean, a region facing serious challenges in the implementation of environmental rights.¹⁹⁸

This remains a glaring and intolerable gap in the international human rights system, as it means the right is protected for some people but not for others.¹⁹⁹ The UNSG noted that “[i]nternational treaties have not defined the threshold below which the level of environmental quality must fall before a breach of a person’s human rights has occurred. Arguably, that threshold differs depending on the human right in question.”²⁰⁰ While these strategies have helped advance human rights and the environment, a significant gap remains.²⁰¹ Without an explicit human right

¹⁸⁹ Tigre, *supra* note 186.

¹⁹⁰ Rodriguez-Garavito, *supra* note 42, at 156.

¹⁹¹ Knox, Framework Principles, *supra* note 68, at ¶ 6 (Jan. 24, 2018).

¹⁹² Knox, *supra* note 41, at 83.

¹⁹³ May, *supra* note 60, at 1001.

¹⁹⁴ See generally James R. May & Tiwajopelo Dayo, *Dignity and Environmental Justice in Nigeria: The Case of Gbemre v. Shell*, 25 WIDENER L. REV. 269 (2019).

¹⁹⁵ May, *supra* note 60, at 1002.

¹⁹⁶ Knox, *supra* note 41, at 7.

¹⁹⁷ UN Secretary-General, *supra* note 46, at 10-11 (¶19). See European Court of Human Rights (ECtHR), *López Ostra v. Spain*, Application No. 16798/90, Judgment, 9 December 1994, ¶51. In other cases, the Court has felt that the right to life protected by article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms includes the right to be protected against risks resulting from hazardous industrial activities. See *Öneryildiz v. Turkey*, Eur. Ct. H.R., No. 48939/99.

¹⁹⁸ Maria Antonia Tigre, Natalia Urzola and Alexandra Goodman, *Climate Litigation in Latin America: Is the region quietly leading a regional revolution?*, J. HUM. RTS. & ENVT. (forthcoming 2022)

¹⁹⁹ David R. Boyd, *The Right to a Healthy and Sustainable Environment*, in A GLOBAL PACT FOR THE ENVIRONMENT – LEGAL FOUNDATIONS 30 (Yann Aguila & Jorge E. Viñuales eds., 2019).

²⁰⁰ UN Secretary-General, *supra* note 46, at 10 (¶18).

²⁰¹ Shelton, *supra* note 240.

to a healthy environment established in international environmental law, its legal status and scope continue to be contested.²⁰²

Noting the large implementation gap between legal recognition or expression of support for the right and the implementation of measures to respect, protect, fulfill and promote the right effectively, the special rapporteurs called on the U.N. to formally recognize the human right to a healthy environment.²⁰³ They specifically noted how it is now beyond debate that human beings are wholly dependent on a healthy environment to lead dignified, healthy, and fulfilling lives.²⁰⁴ While states may have been reluctant to adopt a ‘new’ right without fully understanding its content, the special rapporteur’s mandate under the HRC was precisely to clarify what human rights law requires for environmental protection. This was demonstrated through extensive reports and culminated with the adoption of the right by the HRC. Their work has crystallized the right to a healthy environment.

C. A Commentary to HRC’s Resolution

After understanding the road to get to the 2021 recognition, this section goes over the content of the resolution. The HRC’s recognition of the right to a healthy environment is a historic victory that undeniably constitutes a remarkable milestone in human rights and the environment. It is a powerful message to everyone worldwide that living in a safe, clean, healthy, and sustainable environment is a human right that deserves to be protected. While not legally binding and thus lacking the strength of implementation of regulatory measures and judicial enforcement at the national level, the value of Resolution 48/13 should not be underestimated. As demonstrated in the previous section, the resolution is the testimony of a growing worldwide consensus on the universal protection of the right to a healthy environment. In addition, it represents a step towards affirming the human rights basis for environmental rights around the world. The resolution represents a breakthrough for environmental justice as it provides ‘a shield for individuals and communities’ against risks to their health and livelihoods. The resolution includes a preamble that notes the development of human rights and the environment and has four operative paragraphs before deciding to seize on the matter. This section provides a commentary on these provisions, highlighting a few aspects of the content worth of further debate.

1. *The relationship between a healthy environment and fundamental human rights*

The resolution recognizes the right to a healthy environment as “*a human right that is important for the enjoyment of human rights*” and further notes that it is not an isolated right but rather “*related to other rights and existing international law.*”²⁰⁵ The fundamental interconnection between the protection of the environment and the effective preservation of human rights is at the center of these formulations. Through these statements, the HRC definitively linked human rights and the environment, putting to rest decades of debate over the relationship of these separate fields.

In its preamble, the HRC further noted how intricate human rights are to the recognition of the right to a healthy environment by:

²⁰² Bridget Mary Lewis, *The Human Right to a Good Environment in International Law and the Implications of Climate Change* (2014, Monash University).

²⁰³ Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, ¶37, U.N. Doc. A/73/188 (July 19, 2018).

²⁰⁴ *Id.*

²⁰⁵ HRC, Resolution No. 48, *supra* note 4, at ¶ 1; 2.

1. reaffirming relevant international human rights treaties and other relevant regional human rights instruments;²⁰⁶
2. reaffirming that all human rights are universal, indivisible, interdependent, and interrelated,
3. recalling further all its resolutions on human rights and the environment,²⁰⁷ and relevant resolutions of the General Assembly,
4. recognizing that, conversely, the impact of climate change, the unsustainable management and use of natural resources, the pollution of air, land, and water, the unsound management of chemicals and waste, the resulting loss of biodiversity, and the decline in services provided by ecosystems interfere with the enjoyment of a clean, healthy and sustainable environment, and that environmental damage has negative implications, both direct and indirect, for the effective enjoyment of all human rights;
5. recognizing that, while individuals and communities around the world feel the human rights implications of environmental damage, the consequences are felt most acutely by those segments of the population that are already in vulnerable situations, including indigenous peoples, older persons, persons with disabilities, and women and girls;
6. recognizing that environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy human rights, including the right to life,
7. recognizing that the exercise of human rights, including the rights to seek, receive and impart information, to participate effectively in the conduct of government and public affairs and environmental decision-making and to an effective remedy, is vital to the protection of a clean, healthy and sustainable environment,
8. reaffirming that States have an obligation to respect, protect and promote human rights, including in all actions undertaken to address environmental challenges, and to take measures to protect the rights of all, as recognized in different international instruments and reflected in the framework principles on human rights and the environment, prepared by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,²⁰⁸ and that additional measures should be taken for those who are particularly vulnerable to environmental harm,
9. recalling the Guiding Principles on Business and Human Rights,²⁰⁹ which underscore the responsibility of all business enterprises to respect human rights, including the rights to life, liberty, and security of human rights defenders working in environmental matters, referred to as environmental human rights defenders,
10. acknowledging the importance of a clean, healthy and sustainable environment as critical to the enjoyment of all human rights,

²⁰⁶ See e.g., the Universal Declaration of Human Rights, *supra* note 96 ; *Vienna Declaration and Programme of Action, the Declaration on the Right to Development*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (June 25, 1993), <https://www.ohchr.org/Documents/ProfessionalInterest/vienna.pdf>.

²⁰⁷ See e.g., Human Rights Council Res. 45/17 (Oct.6, 2020); Human Rights Council, Res. 45/30 (Oct. 7, 2020); Human Rights Council, Res.46/7 (Mar. 23, 2021).

²⁰⁸ Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment*, annex 3, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018).

²⁰⁹ *Guiding Principles on Business and Human Rights*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf.

11. recalling all of the reports of the Special Rapporteur (formerly the Independent Expert) on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,²¹⁰
12. noting “The highest aspiration: a call to action for human rights,”²¹¹ in which the Secretary-General called upon the U.N. to increase support to Member States at the field level for laws and policies that regulated and promoted the right to a safe, clean, healthy and sustainable environment, and for effective individual access to justice and effective remedies for environment-related concerns,

By delineating these interlinkages, the HRC has put to rest decades of debate on the interaction between these regimes. The international legal system is characterized by a high level fragmentation, in which different fields such as human rights and environmental law were dealt with separately. However, widespread degradation and the inadequacy of state responses prompted change, and recourse was often found in the powerful language of human rights.²¹² Special procedures established under the U.N. human rights system have clarified several aspects concerning these linkages, leading to increased regime interaction.²¹³ The UNSG has affirmed unequivocally an interdependence between the natural environment and fundamental human rights.²¹⁴ IUCN resolutely added that this interdependence is “firmly established in international law.”²¹⁵ The HRC has now joined these bodies and organizations in this assessment.

²¹⁰ UNGA, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment U.N. Doc. A/73/188 (July 18, 2018); UNGA, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment U.N. Doc. A/74/161 (July 15, 2019); David R. Boyd, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, U.N. Doc. A/75/161, UNGA, (July 15, 2020); David R. Boyd, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, U.N. Doc. A/76/179, UNGA (July 19, 2021); John H. Knox, Report of the Independent Expert on the issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and Sustainable Environment, U.N. Doc. A/HRC/22/43, Human Rights Council, (Dec. 24, 2012); John H. Knox, Report of the Independent Expert on the issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and Sustainable Environment, U.N. Doc. A/HRC/25/53, Human Rights Council, (Dec. 30, 2013); John H. Knox, Report of the Independent Expert on the issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy and Sustainable Environment, U.N. Doc. A/HRC/28/61, Human Rights Council (Feb. 3, 2015); Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016); Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, U.N. Doc. A/HRC/31/53 (Dec. 28, 2015); Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, U.N. Doc. A/HRC/34/49 (Jan. 19, 2017); Human Rights Council, *supra* note 218, at general; Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, U.N. Doc. A/HRC/37/58 (Jan. 24, 2018); Human Rights Council, Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/HRC/40/55 (Jan. 8, 2019); Human Rights Council, Good Practices of States at the National and regional levels with regard to human rights obligations relating to the environment, U.N. Doc. A/HRC/43/54 (Jan. 23, 2020); Human Rights Council, Human Rights and the global water crisis: water pollution, water scarcity, and water related disasters, U.N. Doc. A/HRC/46/28 (Jan. 19, 2021); Boyd, *supra* note 149.

²¹¹ António Guterres, *The Highest Aspiration: A Call to Action for Human Rights 2020*, UNITED NATIONS SECRETARY-GENERAL (Dec. 10, 2020), <https://reliefweb.int/report/world/highest-aspiration-call-action-human-rights-2020#:~:text=I%20also%20look%20forward%20to,highest%20aspiration%E2%80%9D%20of%20all%20humankind.&text=Human%20rights%20are%20universal%20and%20indivisible>.

²¹² Boyd, *supra* note 71, at 3.

²¹³ See MARGARET A YOUNG, REGIME INTERACTION IN INTERNATIONAL LAW: FACING FRAGMENTATION (Cambridge University Press. 2012).

²¹⁴ UN Secretary-General, *supra* note 46, at 10, ¶18.

²¹⁵ IUCN World Commission of Environmental Law (WCEL), Written Opinion by the World Commission of Environmental Law of the International Union for the Conservation of Nature, Request by the Republic of Colombia for an advisory opinion

The right to the environment is based on an expanding body of analysis concerning environmental harm as it relates to human rights, which can be drawn upon when considering the potential for human rights breaches in the context of environmental harms. In March 2014, the former special rapporteur presented to the HRC a mapping report examining human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment.²¹⁶ The mapping project considered human rights as they concern the environment in fourteen human rights sources. For example, the Committee of the ICESCR²¹⁷ has recognized that the enjoyment of a broad range of economic, social, and cultural rights, as well as the right to development, with the sustainability of environmental protection and development efforts,²¹⁸ depends on a healthy environment.²¹⁹ Former special rapporteur Mrs. Ksentini notes that many human rights are suited to being applied from an ecological perspective, whether political, civil, social, economic, or cultural, and whether exercised individually or collectively.²²⁰ Another example lies in the norms regarding indigenous peoples, in which the rights to self-determination, cultural expression, and religion can be understood to include environmental aspects.²²¹

Treaty bodies, regional tribunals, special rapporteurs and other human rights bodies have thus applied ‘traditional’ human rights, such as the rights to life, health and property, to environmental issues.²²² This understanding relies on the clear overlap between human rights and environmental rights, especially as these relate to health concerns due to pollution and water.²²³ The right to the environment is thus interpreted as a synthesis of the environmental aspects of other existing human rights.²²⁴ This ‘greening’ of human rights follows a similar approach to the ‘greening’ of religious thoughts,²²⁵ and uses traditional laws as a basis for the development of current approaches to environmental protection. It thus allocates environmental problems within the human rights category, as it limits the goal of environmental protection to the enhancement of the quality of human life.²²⁶ Claimants in environmental and climate litigation have successfully argued that environmental harm interferes with the full enjoyment of a wide range of human rights and that states have failed to meet their obligations to protect against such interference.²²⁷

from the Inter-American Court on Human Rights concerning the interpretation of Article 1(1), 4(1) and 5(1) of the American Convention on Human Rights 19 (Jan. 19, 2017).

²¹⁶ Knox, *supra* note 18.

²¹⁷ For a full analysis of the ICESCR with respect to the enjoyment of a safe, clean, healthy and sustainable environment, *see* John H. Knox, U.N. Human Rights Council on its Twenty-Fifth Session, Mapping Human Rights Obligations Relating to the Enjoying of a Safe, Clean, Healthy and Sustainable Environment, Individual Report on the International Covenant on Economic, Social and Cultural Rights, Report No. 1 (Dec. 30, 2013) [hereinafter ICESCR Report].

²¹⁸ *See* Statement in the context of the Rio+20 Conference on “the green economy in the context of sustainable development and poverty eradication”, adopted by the Committee at its forty-eighth session, 30 April–18 May 2012, 4 June 2012, U.N. Doc. E/C.12/2012/1, ¶ 5.

²¹⁹ *See, e.g., Concluding Observations of the Committee on Economic, Social and Cultural Rights: Uzbekistan*, 24 January 2006, U.N. Doc. E/C.12/UZB/CO/1, ¶ 9 (“the effects of the Aral Sea ecological catastrophe in the State party have posed obstacles to the enjoyment of economic, social and cultural rights by the population in the State party”).

²²⁰ U.N. Comm’n on Human Rights, *supra* note 17, ¶ 243.

²²¹ *See also* U.N. Comm’n on Human Rights, *supra* note 17, ¶ 161-234.

²²² John Knox, *supra* note 94, at 520; *See, e.g., Öneriyildiz v. Turkey*, *supra* note 197 (right to life); *Marangopoulos Foundation for Human Rights v. Greece*, Eur. Comm. Soc. Rts., No. 30/2005 (right to health); *Saramaka People v. Suriname*, Int-Am. Ct. H.R. (ser. C), No. 172 (Nov. 28, 2007) (right to property).

²²³ Boyd, *supra* note 71, at 83.

²²⁴ Lewis, *supra* note 202, at 7.

²²⁵ Maria Antonia Tigre, *Exploring the Bedrock for Earth Jurisprudence*, 22 RUTGERS J. OF L. AND RELIGION (2022, forthcoming).

²²⁶ Dinah Shelton, Human Rights, Environmental Rights, and the Environment, 28 STAN. J INT’L L. 103 (1991).

²²⁷ Knox, *supra* note 41, at 7. *See e.g., López Ostra v Spain*, App. No. 16798/90 Eur. Ct. H.R. (Dec. 9, 1994); *Öneriyildiz v Turkey*, App. No. 48939/99, (Nov. 30, 2004); African Commission, *Social and Economic Rights Action Centre v Nigeria* 2001

Vast jurisprudence shows how courts worldwide have applied human rights in an environmental context.²²⁸ As a result, environmental human rights jurisprudence has emerged even without a universally recognized human right to a healthy environment.²²⁹ Courts interpreting and enforcing these rights have acknowledged that violations may result from a degraded environment, with complaints often relying on the rights to life, property, health, family, and home life.²³⁰ International human rights tribunals, in particular, have come to view environmental protection as essential for the enjoyment of certain internationally guaranteed human rights.²³¹ For example, in the ICJ's *Gabčíkovo–Nagyymaros*, Judge Weeramantry clarified that “[t]he protection of the environment is... a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.”²³²

In particular, the case law on rights-based environmental and climate change claims has significantly developed in U.N. treaty bodies. In 2019, the HRC held for the first time that a state had violated the right to life by failing to protect individuals from environmental harm – specifically, the fumigation of toxic chemicals on agricultural fields, which caused injury and death (*Portillo Cáceres v Paraguay*).²³³ The Committee held that the government had an obligation to investigate and sanction those responsible, provide full reparation to the victims, and prevent similar violations in the future. In 2020, the HRC dismissed the *Teitiota Petition* on procedural grounds but recognized that environmental degradation and climate change constitute serious threats to the ability of present and future generations to enjoy the right to life.²³⁴ In 2021, the Committee on the Rights of the Child rejected the cases in *Sacchi v. Argentina*²³⁵ for a failure to exhaust local remedies. Still, it recognized that the youth plaintiffs are victims of foreseeable threats to their rights to life, health, and culture and that a sufficient causal link was established between the harm they alleged and the acts or omissions of the five defendant States.²³⁶ A rights-based petition by Torres Strait Islanders against Australia before the HRC is still pending.²³⁷ These

(¶52); *Saramaka People v Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶121, 122 (Nov. 28, 2007).

²²⁸ Knox, Framework Principles, *supra* note 68, at ¶¶ 11; 12.

²²⁹ See generally Knox, *supra* note 18.

²³⁰ Dinah Shelton, *Human rights and the environment: substantive rights*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW (Malgosia Fitzmaurice, et al. eds., 2013).

²³¹ *Id.* at 265.

²³² *Gabčíkovo–Nagyymaros Project (Hungary/Slovakia)* (Danube Dam Case), Judgment, (1997) ICJ Rep. 7 at 88.

²³³ Human Rights Committee, *Views adopted by the Committee under article 5(4) of the Optional Protocol, governing communication No. 2751/2016* (Sept. 20, 2019),

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f126%2fD%2f2751%2f2016&Lang=en; See Greta Reeh, *Human Rights and the Environment: The UN Human Rights Affirms the Duty to Protect*, EJIL:TALK!, (Sept. 9, 2019), <https://www.ejiltalk.org/human-rights-and-the-environment-the-un-human-rights-committee-affirms-the-duty-to-protect/>.

²³⁴ H.R.C., *Views adopted by the Committee under article 5(4) of the Optional Protocol, governing communication No. 2728/2016*, U.N. Doc. CCPR/C/127/D/28278/2016 (2020).

²³⁵ Committee on the Rights of the Child, *Decision Adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 104/2019*, U.N. CRC/C/88/D/104/2019 (2021).

²³⁶ See Maria Antonia Tigre & Victoria Lichet, *The CRC Decision in Sacchi v. Argentina*, 25(26) AM. J. INT’L L. INSIGHTS (Dec. 13, 2021), <https://www.asil.org/insights/volume/25/issue/26>; Maria Antonia Tigre, *Major Developments for Global Climate Litigation: The Human Rights Council Recognizes the Right to a Healthy Environment and the Committee on the Rights of the Child Publishes its Decision in an International Youth Climate Case*, CLIMATE LAW BLOG (Oct. 12, 2021), <http://blogs.law.columbia.edu/climatechange/2021/10/12/major-developments-for-global-climate-litigation-the-human-rights-council-recognizes-the-right-to-a-healthy-environment-and-the-committee-on-the-rights-of-the-child-publishes-its-decision-in-an-inter/>

²³⁷ *Torres Strait FAQ*, CLIENT EARTH (May 13, 2019), http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190513_Not-Available_press-release.pdf.

cases, while often lacking a favorable outcome, have significantly developed the environment and climate change case law within the U.N. treaty bodies, furthering the scope of cases within their jurisdiction. The recognition of the right to a healthy environment by the HRC could potentially boost this broadening of the HRC's environmental and climate change case law, opening the door to future cases.

Nonetheless, while this strategy of relying on traditional human rights has advanced the field of human rights and the environment, it has several limitations. First, it addresses each problem individually, with decisions rendered on a case-by-case scenario. Knox notes that cases' legal and practical effects are variable and often indeterminate.²³⁸ Existing jurisprudence on human rights was not designed to address the particularities of environmental violations.²³⁹ As a result, some regions are more advanced than others, further contributing to the fragmentation of environmental law.

While there is no doubt that the failure to alleviate environmental degradation threatens health and human life, the international legal response to this problem remains flawed.²⁴⁰ Complaint procedures exist in particular human rights treaties, but only vis-à-vis States that have accepted the competence of the relevant body to examine individual complaints.²⁴¹ Moreover, human rights treaties frequently lack binding enforcement mechanisms necessary to hold states accountable for human rights violations. For example, while decisions of regional courts are legally binding, compliance by states is often elusive.²⁴² Even those systems, such as the Inter-American system, that present an enforcement mechanism (the Inter-American Commission on Human Rights and Inter-American Court of Human Rights), can have limited power to compel states to comply. Still, the formal recognition of this right represented a significant lacuna in the progressive development of international environmental law.

2. *The Phrasing of the Right to a Healthy Environment*

The Resolution's first article recognizes "*the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights.*" There are two meaningful aspects of this recognition: (a) the phrasing chosen by the HRC to qualify the environment and (b) the relationship between this right and the enjoyment of other human rights. These deserve some unpacking.

(a) The Adjective Qualifying the Environment

To elucidate what kind of environment shall be protected when defining the right to the environment, constitutions, regional agreements, and now international agreements make use of adjectives. These can help clarify priorities and purposes in establishing environmental protection and make implementation more effective as there is a level of protection to be achieved.²⁴³ The

²³⁸ Knox, *supra* note 41, at 10.

²³⁹ Evadne Grant, *International human rights courts and environmental human rights: re-imagining adjudicative paradigms*, 6 J. OF HUMAN RTS. AND ENV. 156 (2015).

²⁴⁰ Shelton, *supra* note 226.

²⁴¹ Certain treaties, for example, the ICCPR, ICESCR, CEDAW, CRC, and Convention on the Rights of Persons with Disabilities ("CRPD") have optional protocols to which States can accede; others require States to make declarations under a particular provision of the treaty, for example, the ICERD. The United States is a party only to the ICCPR and ICERD.

²⁴² Knox, *supra* note 41, at 10.

²⁴³ Maria Antonia Tigre, *Implementing Constitutional Environmental Rights in the Amazon Rainforest*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES 64 (Erin Daly & James R. May eds., 2018).

adjectives used purport to set a goal of environmental quality and can facilitate implementation.²⁴⁴ The choice of adjective is important, but any iteration may still lead to substantial ambiguity on its legal meaning. More often, however, they exacerbate the problem by adding a level of vagueness, sometimes with compound adjectives that create further confusion.²⁴⁵

Critics have argued that the language used to qualify the environment is vague, leading to much uncertainty about the level of environmental quality to be protected.²⁴⁶ As a result, environmental rights leave a wide range of interpretation to judges, who ultimately decide what a ‘right’ to a ‘quality’ ‘environment’ means, to whom it applies, and what to do about it.²⁴⁷ Boyd argues, however, that such vagueness is intentional, allowing for interpretation to develop over time.²⁴⁸ As such, the language – and the right to be protected, as a result – can be shaped by the legal, political, social, and cultural context of a particular nation, remaining dynamic rather than static and evolving with human values. This is especially important in an international recognition, whose implementation is done at the national level and therefore adapted to different legal frameworks.

Several other iterations of the right exist: the right to a healthy environment or one that is clean, safe, adequate, harmonious, balanced, favorable, ecologically sound, wholesome, or otherwise desirable. The denominations may refer to different levels of protection. While the adjectives provide the courts with some guidance on interpreting constitutional environmental rights, it is still vague enough to give room for interpretation. The HRC resolution does not define a ‘clean,’ ‘healthy’ or ‘sustainable’ environment. As such, its implementation can lead to a wide range of questions relating to its enforcement. For example, how ‘clean’ must the environment be to satisfy the resolution’s requirement? How can an international or national court determine whether an environment is ‘healthy’? Daly recalls that the challenge increases when one remembers that “almost no environment starts out in pristine condition but already bears the marks of use and possible degradation even before the defendants’ actions began.”²⁴⁹

A ‘healthy’ environment is a commonly used iteration of the right. International texts predominantly refer to a right to a ‘healthy environment’ or ‘to live’ in a healthy environment. For example, the San Salvador Protocol and the Escazú Agreement refer to a right ‘to live’ in a healthy environment,²⁵⁰ while the Arab Charter refers to ‘the right to a healthy environment as a part of the right to an adequate standard of living that ensures well-being and a decent life.’²⁵¹ Similarly, about two-thirds of national constitutions that recognize the right refer to a ‘healthy environment.’²⁵² A healthy environment can either mean an environment that maintains human health (an anthropocentric perspective linking environmental health to its usefulness to humans) or an environment that is itself healthy (an ecocentric perspective).²⁵³ The latter refers to the protection of nature’s health as an ecosystem. If healthy modifies the environment, the right extends to any case involving environmental degradation, with the requirement to show that the

²⁴⁴ Erin Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, 17 INT’L J. OF PEACE STUDIES 71 (2012).

²⁴⁵ May & Daly, *supra* note 112, at 93.

²⁴⁶ Boyd, *supra* note 71, at 33.

²⁴⁷ May & Daly, *supra* note 112, at 91.

²⁴⁸ Boyd, *supra* note 71, at 34.

²⁴⁹ Daly, *supra* note 244, at 74.

²⁵⁰ San Salvador Protocol, *supra* note 152, art. 11, ¶ 1. Escazú Agreement, *supra* note 154, art. 4.

²⁵¹ Arab Charter on Human Rights, art. 38, Sept. 15, 1994, 70 U.N.T.S 237.

²⁵² Boyd, *supra* note 2, at 32.

²⁵³ Tigre, *supra* note 243, at 65.

environment is not healthy and therefore not capable of generating life.²⁵⁴ As such, an unhealthy environment could mean a polluted environment, which would affect the surrounding people and nature itself. In theory, as an interconnected system, any changes to its *status quo* could lend it unhealthy, regardless of its effect on human beings.²⁵⁵ However, standard definitions tend towards a more anthropocentric approach, as a healthy environment is usually defined by the quality of environmental factors, such as pollutants in the air, water, soil, or food that affect human health.²⁵⁶ Courts tend to see a violation of a right to a healthy environment when actions have harmful health effects on the local population.²⁵⁷ If so, which remedy can be inferred? These questions will likely be discussed by courts in the future.

On the other hand, a clean environment is often defined as one void of any form of pollution. A clean environment has clean air, clean water, and clean energy. It encompasses the concepts of safe and healthy. The 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs) reflect the common understanding that a ‘healthy’ environment is integral to the full enjoyment of basic human rights, including life, health, food, water, and sanitation and quality of life. By referring to sustainability, the HRC has also linked the quality of the environment with the achievement of the SDGs. UNEP has recommended an integrated approach to achieving a healthy environment, including addressing priority areas such as unsafe water, inadequate sanitation or insufficient hygiene, poor diet composition and quality, degraded ecosystems, and climate change.²⁵⁸

(b) What does a clean, healthy and sustainable environment entail?

Overall, the scope and content of the right to a healthy environment still need to be defined through the application and interpretation of the courts. Given different regional and local environmental circumstances, there is no ‘one-size-fits-all’ definition or concept of the right to a healthy environment. Yet, despite the variety of denominations, the core content of this right is generally common to all these national, regional, or international texts.²⁵⁹ In addition, there are common core elements independent of these circumstances. In 2019, the HRC recognized that the obligations related to the enjoyment of a safe, clean, healthy and sustainable environment required clarification.²⁶⁰ In response, the special rapporteur defined what a safe, clean, healthy and sustainable environment entails in several reports. These include clean air,²⁶¹ a safe climate,²⁶² a healthy ecosystem and biodiversity,²⁶³ clean water and adequate sanitation,²⁶⁴ healthy and

²⁵⁴ Daly, *supra* note 244, at 74.

²⁵⁵ Tigre, *supra* note 243, at 64-65.

²⁵⁶ JONATHAN M. LINKS, *Introduction to Environmental Health Johns Hopkins*, Bloomberg School of Public Health (2006), <http://ocw.jhsph.edu/courses/environmentalhealth/PDFs/Lecture1.pdf>.

²⁵⁷ Daly, *supra* note 244, at 74.

²⁵⁸ *Healthy Environment, Healthy People*, UNITED NATIONS ENVIRONMENT PROGRAMME (May 23-27, 2016),

<https://wedocs.unep.org/bitstream/handle/20.500.11822/17602/K1602727%20INF%205%20Eng.pdf?sequence=1&isAllowed=y>

²⁵⁹ Yann Aguila, *The Right to a Healthy Environment*, INTERNATIONAL UNION FOR CONSERVATION OF NATURE (Oct. 29, 2021), <https://www.iucn.org/news/world-commission-environmental-law/202110/right-a-healthy-environment>.

²⁶⁰ Human Rights Council, Res. 19/10, U.N. Doc. A/HRC/Res/19/10, at 2 (Apr. 19, 2012).

²⁶¹ H.R.C., Issue of Human Rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, U.N. Doc. A/HRC/50/44 (Jan. 8, 2019).

²⁶² David R. Boyd, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/74/161 (July 15, 2019).

²⁶³ David R. Boyd, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/74/161 (July 15, 2020).

²⁶⁴ H.R.C., Human Rights and the global water crisis: water pollution, water scarcity, and water related disasters, U.N. Doc. A/HRC/46/28 (Jan. 19, 2019).

sustainably produced food,²⁶⁵ and non-toxic environments in which to live, work, study and play.²⁶⁶ These elements are informed by commitments made under international environmental treaties.²⁶⁷ In 2018, the special rapporteur presented to the Council the framework principles on human rights and the environment.²⁶⁸ These human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment significantly inform its content.

The right to breathe clean air is one of the vital elements of the right to a healthy and sustainable environment.²⁶⁹ Air quality is degraded by ambient and household air pollution and derives from various sources. Exposure to air pollution causes many health effects, affecting both children and adults.²⁷⁰ Vulnerable groups are especially affected.²⁷¹ Furthermore, since GHG emissions are a form of air pollution, there are significant linkages with climate change.²⁷² Therefore, fulfilling the right to breathe clean air requires action at the household, local, national, regional, and international levels, as well as addressing transboundary pollution.²⁷³

Poor air quality has implications for a wide range of human rights, including the rights to life, health, water, food, housing, and an adequate standard of living, while clearly violating the right to a healthy and sustainable environment.²⁷⁴ However, although the UNGA has adopted the right to water, no similar resolution has been adopted on the right to clean air. Boyd notes that obligations related to clean air are implicit in several international human rights instruments²⁷⁵ and have expressly been stressed in resolutions of the High Commissioner for Human Rights, the HRC,²⁷⁶ and the UNGA.²⁷⁷ The HRC's special procedures have urged States to tackle the scourge of air pollution.²⁷⁸ Human rights are a vital element of the SDGs, and improving air quality is

²⁶⁵ David R. Boyd, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/76/179 (July 19, 2021).

²⁶⁶ This topic will be covered in the special rapporteur's upcoming report (2022).

²⁶⁷ Boyd, *supra* note 262, at ¶43.

²⁶⁸ H.R.C., Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, U.N. Doc. A/HRC/37/59, 7 (Jan 24, 2018).

²⁶⁹ Boyd, *supra* note 261, at ¶17.

²⁷⁰ *Id.*

²⁷¹ Boyd, *supra* note 261, at ¶1-36 (Legally, vulnerable groups refer to those persons “who are exposed to, or at risk of suffering, violations of human rights to a greater extent than other persons in comparable situations.” Examples of groups that have thus been identified as vulnerable are women, children, persons with disabilities, older persons, ethnic and linguistic groups and their individual members, low income persons and Indigenous Peoples, among others. The concept of “vulnerable groups” thus should not be mistaken as referring to numerical minorities or as leading to the misconception that the rest of the population is not susceptible to suffer human rights violations); See INGRID NIFOSI-SUTTON, *THE PROTECTION OF VULNERABLE GROUPS UNDER INTERNATIONAL HUMAN RIGHTS LAW 270* (Routledge, ed., 2017).

²⁷² Boyd, *supra* note 261, ¶39.

²⁷³ *Id.* at ¶22.

²⁷⁴ *Id.* at ¶44.

²⁷⁵ Boyd, *supra* note 261, ¶45.

²⁷⁶ Boyd, *supra* note 261, at ¶ 46; A/HRC/19/34 and Corr.1 and HRC, resolution 35/24.

²⁷⁷ G.A. Res. 71/256, annex, New Urban Agenda (Jan. 25, 2017).

²⁷⁸ *I.e.*, Human Rights Council, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment*, U.N. Doc. A/HRC/37/58 (Jan. 24, 2018); Human Rights Council, *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal hazardous substances and wastes*, U.N. Doc. A/HRC/33/41 (Aug. 2, 2016); Human Rights Council, *Report of the Independent Expert on the enjoyment of all human rights by older person*, U.N. Doc. A/HRC/39/50 (July 10, 2018), Baskut Tunak, *Report of the Special Rapporteur on the implications for human rights of the environmentally sound management and disposal of hazardous substances and wastes*, Human Rights Council, U.N. Doc. A/HRC/30/40/Add.1 (Sept. 15, 2015); John H. Knox, *Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment on his mission to Mongolia*, Human Rights Council, U.N.Doc. A/HRC/37/58/Add.2 (May 2, 2018).

essential to achieving several targets within the Goals.²⁷⁹ Boyd further notes that “[a]pproaching air quality from a human rights perspective highlights the principles of universality and non-discrimination, under which human rights are guaranteed for all persons, including persons living in vulnerable situations. A human rights perspective can also catalyze accelerated action to achieve clean air, empower those working to improve air quality and serve as a North Star or Southern Cross to guide our actions as we navigate towards a healthy and sustainable future.”²⁸⁰ The special rapporteur delineated significant human rights obligations relating to clean air, including monitoring air quality and health effects, assessing sources of air pollution, publicly reporting on air quality, establishing air quality legislation, regulations, and standards, adopting air quality action plans, implementing and enforcing air quality rules, and evaluating and revising air quality standards and plans.²⁸¹

The special rapporteur also analyzed the impacts of climate change on a wide range of human rights.²⁸² The former special rapporteur had previously investigated the relationship between climate and human rights.²⁸³ Among the human rights being threatened and violated are the rights to life, health, food, water and sanitation, a healthy environment, an adequate standard of living, housing, property, self-determination, development, and culture. Addressing climate change raises justice and equity issues, both between and within nations and generations.²⁸⁴ Climate change has many direct and indirect effects on the full enjoyment of the right to life, through climate-related deaths caused by extreme weather events, heatwaves, floods, droughts, wildfires, water-borne and vector-borne diseases, malnutrition, and air pollution.²⁸⁵ Similarly, it threatens the right to health through increased incidences of respiratory disease, cardiovascular disease, malnutrition, stunting, wasting, allergies, heat stroke, injuries, water-borne and vector-borne diseases, and mental illness, as well as health effects of climate-related displacement, migration, and reduced access to health-care services.²⁸⁶

In turn, food production, food security, and the enjoyment of the right to food are affected by shifting precipitation patterns, higher temperatures, extreme weather events, changing sea ice conditions, droughts, floods, algal blooms, and salinization. Climate change also exacerbates food insecurity and malnutrition drivers, such as conflict and poverty.²⁸⁷ The right to food represents another substantive element of the right to a healthy environment.²⁸⁸ Boyd notes that while food is essential for life, today’s food systems are major drivers of the climate emergency, biodiversity crisis, pervasive pollution, soil degradation, water depletion and the rising risk of infectious diseases that spill over into humans from wildlife and livestock.²⁸⁹ Transforming food systems is critical to fulfilling human rights and achieving multiple SDGs related to poverty, hunger, inequality, health, water, good work, sustainable production and consumption, climate action and

²⁷⁹ *I.e.*, target 3.9 on reducing deaths and illnesses from pollution; targets 7.1 on universal access to modern energy services; 7.2 on increasing the use of renewable energy; target 11.6 on reducing the per capita environmental impact of cities; target 12.4 on environmentally sound management of chemicals and wastes.

²⁸⁰ Boyd, *supra* note 261, at ¶50.

²⁸¹ Boyd, *supra* note 261, at ¶57-80.

²⁸² Boyd, *supra* note 262.

²⁸³ H.R.C, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, U.N. Doc. A/HRC/31/52 (Feb 1, 2016).

²⁸⁴ Boyd, *supra* note 262, at ¶26.

²⁸⁵ *Id.* at ¶ 28-29.

²⁸⁶ Boyd, *supra* note 262, at ¶31.

²⁸⁷ *Id.* at ¶34.

²⁸⁸ Boyd, *supra* note 265, ¶2.

²⁸⁹ *Id.* at ¶1.

biodiversity.²⁹⁰ Boyd notes the work done by the special rapporteurs on the right to food²⁹¹ and specifically focused on the human rights implications and obligations related to the environmental consequences caused by current food systems.²⁹² The environmental impacts caused by industrial food systems interfere with the enjoyment of a wide range of human rights, including the rights to life,²⁹³ health,²⁹⁴ water,²⁹⁵ food,²⁹⁶ a healthy environment,²⁹⁷ development, an adequate standard of living, cultural rights, the rights of the child²⁹⁸ and Indigenous rights.²⁹⁹ The special rapporteur specifically delineated human rights obligations relating to healthy and sustainable food for states and businesses.³⁰⁰

Furthermore, climate change affects precipitation patterns worldwide, threatening the availability, accessibility, acceptability, and quality of water and sanitation.³⁰¹ The rights of the child are particularly threatened, as children are particularly vulnerable to health problems exacerbated by climate change.³⁰² People and communities whose vulnerabilities are caused by poverty, gender, age, disability, geography, and cultural or ethnic background are especially vulnerable to climate change.³⁰³ The special rapporteur specifically delineated human rights obligations relating to climate change,³⁰⁴ including state obligations (substantive and procedural)³⁰⁵ and business responsibilities.³⁰⁶ The special rapporteur notes explicitly that a failure to fulfill international climate change commitments is a *prima facie* violation of the State's obligations to protect the human rights of its citizens.³⁰⁷

Healthy ecosystems and biodiversity are vital elements of the right to a healthy environment.³⁰⁸ The Covid-19 pandemic represents the most striking example of the impacts of human damage to the biosphere on health, livelihoods, and rights. Boyd notes that the pandemic illustrates the interconnectedness of human rights: to life, health, food, water, freedom of association, an adequate standard of living, and a healthy, sustainable environment.³⁰⁹ The damage humanity is inflicting on Earth has led to a global nature emergency. Despite the advancement of several MEAs, there is a huge implementation and enforcement gap as actions fall short of commitments made through treaties and legislation.³¹⁰ Healthy ecosystems and biodiversity are

²⁹⁰ Boyd, *supra* note 265, at ¶8.

²⁹¹ See *Special Rapporteur on the right to food*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx.

²⁹² Boyd, *supra* note 265, at ¶ 9.

²⁹³ Boyd, *supra* note 265, at ¶¶30-35.

²⁹⁴ *Id.* at ¶36-40.

²⁹⁵ *Id.* at ¶41-43.

²⁹⁶ *Id.* at ¶44-47.

²⁹⁷ *Id.* at ¶48-56.

²⁹⁸ *Id.* at ¶57-59.

²⁹⁹ *Id.* at ¶ 60-67.

³⁰⁰ *Id.* at ¶68-78.

³⁰¹ Boyd, *supra* note 262, ¶38.

³⁰² *Id.* at ¶41.

³⁰³ *Id.* at ¶45.

³⁰⁴ *Id.* at ¶52

³⁰⁵ *Id.* at ¶¶62-70.

³⁰⁶ *Id.* at ¶¶71-72.

³⁰⁷ Boyd, *supra* note 262, at ¶74.

³⁰⁸ John H. Knox, Biodiversity Report: Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment U.N. Doc. A/HRC/34/49 (Jan. 19, 2017).

³⁰⁹ Boyd, *supra* note 263, ¶10.

³¹⁰ *Id.* at ¶27.

substantive elements of the right to a healthy environment, as recognized by regional tribunals, national laws and national jurisprudence.³¹¹

Boyd notes that courts in all regions of the world have determined that failure of States to take adequate action to protect healthy ecosystems and biodiversity can violate the right to a healthy environment.³¹² The current and foreseeable adverse effects of the global nature crisis on the enjoyment of a wide range of rights give rise to extensive legally enforceable obligations of States to take immediate actions to prevent those harms.³¹³ Businesses and conservation organizations also have significant obligations.³¹⁴

Intrinsic to the right to a healthy environment is also the right to water and adequate sanitation.³¹⁵ Noting the significant work done by the special rapporteur to safe drinking water and sanitation,³¹⁶ the special rapporteur recalls that people depend on freshwater for drinking, cooking, cleaning, sanitation, growing food, fishing, generating energy, navigation, recreation, and tourism. Safe, sufficient water and healthy aquatic ecosystems are essential for protecting health, achieving food security, and ending poverty. Balancing human needs for water with the health of marine ecosystems is one of the twenty-first century's key challenges, especially considering the worsening of the current water crisis.³¹⁷ Water pollution, water scarcity, and water-related disasters have significant impacts on a wide range of human rights, including the rights to life,³¹⁸ health,³¹⁹ water, sanitation,³²⁰ food,³²¹ a healthy environment,³²² education, an adequate standard of living, development and culture, and on the rights of the child.³²³ It especially impacts vulnerable populations.³²⁴ The special rapporteur specifically delineated human rights obligations relating to clean, safe, and sufficient water for states and businesses.³²⁵ As these investigations continue, the content of the right to a healthy environment will continue to be defined.

3. *What are the implications of such a recognition?*

It is pivotal to remember that the HRC's decisive action in recognizing the human right to a safe, clean, healthy and sustainable environment is about protecting people and the planet through the substantive elements identified by the special rapporteur: the air we breathe, the water we drink, the food we eat, a safe climate. It is also about protecting biodiversity as a fundamental precondition for the life and livelihood of all people. By definition, the right to a healthy environment, regardless of its precise formulation, protects the elements of the natural environment that enable a dignified life. The resolution calls for states to implement the newly

³¹¹ Boyd, *supra* note 263, para. 33; *See i.e.*, Advisory Opinion OC-23/17, *supra* note 174; *Lhaka Honhat vs. Argentina*, *supra* note 72.

³¹² Boyd, *supra* note 263, at ¶ 35. *See i.e.*, Supreme Court of Justice, Colombia, STC No. 3872-2020, 18 June 2020 (Parque Isla Salamanca). Supreme Court of Colombia, *Demanda Generaciones Futuras v. Minambiente*, STC No. 4360-2018, decision of 5 April 2018; Supreme Court of Mexico, First Chamber, *Amparo en Revisión*, No. 307/2016, decision of 14 November 2018.

³¹³ Boyd, *supra* note 263, at ¶¶66-74.

³¹⁴ *Id.* at ¶78-79.

³¹⁵ Boyd, *supra* note 264.

³¹⁶ *See Special Rapporteur on the human rights to safe drinking water and sanitation*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/SRWaterIndex.aspx.

³¹⁷ Boyd, *supra* note 264, at ¶4; 21.

³¹⁸ *Id.* at ¶26.

³¹⁹ *Id.* at ¶27-30.

³²⁰ *Id.* at ¶31.

³²¹ *Id.* at ¶32-34.

³²² *Id.* at ¶35-42.

³²³ Boyd, *supra* note 264, at ¶43-45.

³²⁴ *Id.* at ¶46-51.

³²⁵ *Id.* at ¶52-83.

recognized right. At the core of implementation is the requirement to fulfill the obligations delineated by the special rapporteur in the reports described, specifically through the obligations of states and businesses and the framework principles of human rights and the environment.³²⁶

By referring to the work of the special rapporteur, the HRC adopted the recommendations from the reports and the specific obligations of states and businesses. Furthermore, the HRC specifically delineated some of the duties of states in fulfilling the right to a healthy environment:

- (a) build capacities to protect the environment, cooperate with each other, the U.N. system, and other bodies and actors, including civil society, business, and national human rights institutions, on implementing the right;
- (b) share good practices in fulfilling the right, and build synergies between protecting human rights and protecting the environment;
- (c) consider that efforts to protect the environment must fully respect other human rights obligations, including those related to gender equality;
- (d) adopt policies for the enjoyment of the right, including with respect to biodiversity and ecosystems;
- (e) account for human rights obligations related to this right in implementing the SDGs.

Additional guidance in the implementation of the right to a healthy environment lies in the resolution's preamble, as the HRC reaffirmed the principles previously adopted in the Stockholm and Rio Declarations. The HRC further referred to environmental principles under MEAs. Through these explicit references, the adoption of the right to a healthy environment by the HRC also tacitly adopts a broad range of principles in international environmental law, including most of the principles referred to in the Global Pact.

Indeed, the formal recognition at the U.N. level of the right to a healthy environment as a universal human right makes it crystal clear that all states have an obligation to protect, respect, and fulfill this right, which includes respecting principles adopted in international environmental law. The adoption of the HRC's resolution is a resounding first step that could have far-reaching implications for human rights and the environment and for the progressive development of international environmental law.

4. *Next Steps: Recognition by the UNGA*

The text of the resolution affirms that it is not a final step but a springboard for more ambitious measures. At the international level, it bolsters environmental efforts as it invites the UNGA to consider the matter and formally recognize the right to a healthy environment. Debates and negotiations regarding the necessity to recognize the right to a healthy environment at the General Assembly will broaden the recognition and protection of the right to a healthy environment. A future resolution could reach a more comprehensive range of countries since it involves all 193 U.N. nations instead of the forty-seven members of the HRC. If adopted, the resolution could further catalyze global recognition and potentially lead to an international covenant on the right to a healthy environment.

While the next steps are still unclear, the core group will most likely keep its leadership role at the UNGA and be joined by more States. Abdulla Shahid of Maldives was elected President of the UNGA 76th session from September 2021 to September 2022 and could play a supportive role. The upcoming negotiations at the UNGA will reveal if governments worldwide are ready to recognize, protect and enforce the right to a healthy environment at the national level.

³²⁶ H.R.C., *supra* note 279.

Besides the letter of the text, the adoption of this resolution outlines that a consensus is building up in favor of environmental rights. While it does not legally bind States, its symbolism could propel reluctant governments to recognize the right to a healthy environment in their domestic legislation.³²⁷ Moreover, momentum behind the right may lead to its reinforced implementation in countries where it is already recognized. Finally, it could build up speed for the recognition of the right in an international and legally binding text.

Still, questions remain as to the value of such a recognition. There has been a long-standing debate over the legal status of UNGA resolutions. Some resolutions may acquire binding legal character as elements of a treaty-based regulatory regime,³²⁸ constitute a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,”³²⁹ or influence the development and application of treaties or general international law.³³⁰ The UNGA resolutions which have demonstrated the greatest likelihood of becoming future conventions are often termed “declarations.” Declarations operate under a pseudonym because obligation-wise, they are merely recommendations and not legally binding in nature.³³¹ Some scholars deem these resolutions as treaty law. This argument is strongest for unanimous declaratory resolutions, accepting the caveat that members clearly intimated that they were willing to enter into such a treaty-like obligation.³³² In this regard, the UDHR, adopted as a resolution, offers the best case in point when acknowledging how the UNGA can be used to reinforce norms or rules of customary law. Although the declaration is not legally binding, its influence on national constitutions, treaties or international laws since 1948 is undeniable. A UNGA resolution such as a declaration on global environmental rights could produce similar momentous effects.

The context within which the resolutions are negotiated and accompanying statements of delegations are also relevant, along with the degree of support, the time at which the resolution was passed, the fundamental issues that ground it, the vote taken or the resolution’s language.³³³ Widespread acceptance of soft law instruments will tend to legitimize conduct and make the legality of opposing positions harder to sustain. When delegates representing almost all the world’s national governments cast votes on a resolution, they are in effect providing a common confirmation (or rejection) of the presence and acceptance of that issue in international law.³³⁴ A resolution adopted by consensus or by unanimous vote will necessarily carry more weight than one supported by a two-thirds majority. Other resolutions are adopted without any vote or passed by an overwhelming margin but not supported by certain blocs of countries.³³⁵ Still, some scholars argue that attaining a unanimous vote on a resolution or even having the same recommendation

³²⁷ Aguila, *supra* note 270.

³²⁸ See e.g., 1982 UN Convention on the Law of the Sea, arts. 210-11, or the 1994 Nuclear Safety Convention.

³²⁹ Vienna Convention on the Law of Treaties art. 31(3)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

³³⁰ *Gabčíkovo-Nagymaros Project*, *supra* note 232, at 7, para. 140; Alan Boyle, *Soft Law* in INTERNATIONAL LAW-MAKING IN INTERNATIONAL LAW 199 (Malcolm Evans, ed., 5th ed., 2018).

³³¹ United Nations Office of Legal Affairs, *Use of the Terms “Declaration” and “Recommendation”* U.N. Doc. E/CN/4/L.610 (1962) (In U.N. practice, a declaration is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration on Human Rights. A recommendation is less formal).

³³² Christopher Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm Creation*, 11 CAL. W. INT’L L. J. 445, 457 (1981).

³³³ Gabriella Rosner Lande, *The Changing Effectiveness of General Assembly Resolutions*, 58 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW AT ITS ANNUAL MEETING 162, 165-66 (1964).

³³⁴ A caveat is necessary here, as certain factors such as realpolitik, the membership composition of the UNGA and its coalition politics can and obscure the real reasons motivating votes for or against resolutions. UNGA resolutions do not always accurately reflect the genuine opinion of individual states voting on an issue; Joyner, *supra* note 332, at 460-61.

³³⁵ Gregory J. Kerwin, *The Role of the United Nations General Assembly Resolutions in Determining Principles of International Law in the United States Courts*, 1983 DUKE L. J. 876, 895 (1983).

redundantly recited in subsequent resolutions cannot obviate the fact that such recourses fail to alter its legal station.³³⁶

Nonetheless, Grnchalla-Wesierski contends that the procedure by which the norm was adopted makes it legally binding on the UNGA in its internal law, regardless of the procedure used to approve it. While adopting a norm by consensus would not change its status as soft law, it nevertheless binds the members of the organization if the procedure prescribed by the constituting treaty was followed. The caveat is that the resolution may be legally binding on the organization but not on the organization's members.³³⁷

D. The Human Right to Water

The significance of a potential recognition of the UNGA's right to a healthy environment is exemplified by the adoption of a similar resolution on the right to water. The various perspectives on water elicit tensions concerning its availability, accessibility, provision, and protection. Billions of individuals still lack access to basic water and sanitation services despite their necessity for human survival.³³⁸ Similar to the right to a healthy environment, the right to water was not recognized in 'traditional' human rights instruments. Yet the legal basis for the right to water slowly developed in international law, leading to its recognition as a human right. This section briefly summarizes the development of its international recognition within a comparative perspective to the evolution of the international right to a healthy environment.

Water is a "prerequisite for the realization of other human rights."³³⁹ Given water and sanitation's vital role in sustaining life – from hydration to food to sanitary measures – these issues are genuinely cross-cutting and holistically linked to nearly every aspect of international human rights law. Nevertheless, despite its essential nature, 2.2 billion people still lack access to safely managed drinking water services.³⁴⁰ The development of a broadly accepted and enforceable human right to water is not merely a practice in an interpretive expansion of rights, but an essential component of expanding critical water services to underserved communities, thereby improving health, economic development, educational opportunities, and political liberties.³⁴¹ The Covid-19 pandemic has further raised the importance of water as a human right, as handwashing was quickly identified as one of the most effective practices to confront the virus.³⁴² However, approximately 3 billion people do not have a place in their homes to wash their hands. Three-quarters of those without handwashing capacity live in the world's poorest countries. They are amongst the most vulnerable populations, such as children and families living in informal settlements, migrant and refugee camps, or in areas of active conflict.³⁴³

³³⁶ Joyner, *supra* note 332, at 460-61.

³³⁷ Tadensz Grnchalla-Wesierski, *A Framework for Understanding "Soft Law"*, 30 MCGILL L.J. 37, 52-53 (1984).

³³⁸ Brett A Miller, *Navigating the Confluence: Sources of Reconciliation Flowing Between the Human Right to Water and Economic Efficiency*, 28 DUKE ENVTL. L. & POL'Y F. 105 (2017).

³³⁹ Office of High Commissioner for Human Rights, UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), U.N. Doc. E/C.12/2002/11 (Jan. 20, 2002).

³⁴⁰ WHO, *Drinking-water fact sheet*, <https://www.who.int/news-room/fact-sheets/detail/drinking-water> (last visited Jul. 14, 2021).

³⁴¹ Anna F.S. Russell, *International Organizations and Human Rights: Realizing, Resisting or Repackaging the Right to Water*, 9 J. HUM. RTS. 1, 3-4 (2010).

³⁴² Maria Antonia Tigre et al., *Environmental Protection and Human Rights in the Pandemic*, 1(1-2-3) LEGAL POLICY & PANDEMICS: THE JOURNAL OF THE GLOBAL PANDEMIC NETWORK 317 (2021).

³⁴³ World Health Organization and UNICEF, *Hand Hygiene for all*, https://www.who.int/water_sanitation_health/publications/200626-unicef-who-hand-hygiene-global-initiative.pdf (last visited Dec. 23, 2021).

The right to water provides an interesting case study to understand the challenges of recognizing a ‘new’ human right at the U.N. level. Water conflicts involve various players. On one side, these include decision-makers, politicians, international trade and financial institutions, economic advisors and academics, and transnational corporations who view water as a commodity. On the other side, people actually affected by the water crisis, including local communities, slum dwellers, the poor, women, indigenous peoples, peasants, and small farmers, working with environmentalists and human rights activists, progressive public water managers, and experts who see water as a common heritage and public trust to be conserved and managed for the public good.³⁴⁴

The international legal recognition of the rights to water, much like that of the right to a healthy environment, has followed a long pathway. International human rights law requires States to act as the primary guarantor of human rights and respect, protect, and fulfill the human right to water and sanitation for all.³⁴⁵ Yet, whether water is a human right or an economic good is still an ongoing debate.³⁴⁶ The development of a broadly accepted and enforceable human right to water is not merely a practice in the interpretive expansion of rights, but an essential component of expanding critical water services to underserved communities, thereby improving health, economic development, educational opportunities, and political liberties.³⁴⁷

Water as a human rights issue was mostly left out of the debate until the 1970s.³⁴⁸ International recognition of the importance of the human right to water dates to 1977, when the U.N. highlighted the importance of water at a global level.³⁴⁹ Several conventions further acknowledged its existence.³⁵⁰ The Dublin Statement, a non-binding U.N. document, declares that it is “vital to recognize the basic right of all human beings to have access to clean water and sanitation at an affordable price.”³⁵¹ However, the right remained primarily implied.³⁵² Its implicit normative content was linked to the deployment of other fundamental guarantees such as the right to health, food, housing, and self-determination.³⁵³ For example, the ICCPR arguably requires States to ensure access to adequate water for all people.³⁵⁴ This strategy, however, has several limitations. For example, commentators view this right to life as a liberty right, which does not

³⁴⁴ MAUDE BARLOW, *BLUE FUTURE: PROTECTING WATER FOR PEOPLE AND THE PLANET FOREVER* 67 (The New Press, ed., 2014).

³⁴⁵ Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water As a Human Right and the Duties and Obligations It Creates*, 331 NW. J. INT’L HUM. RTS. 349 (2005); See also Peter H. Gleick, *The human right to water*, 1 WATER POLICY 487 (1998); Malgosia Fitzmaurice, *The Human Right to Water*, 18 FORDHAM ENVTL. L. REV. 537 (2007).

³⁴⁶ Imad Antoine Ibrahim, *Water as a human right, water as a commodity: can SDG6 be a compromise?*, THE INT’L J. OF HUM. RIGHTS 1 (2021) (noting that despite the division, ensuring people have access to water seems mostly related to good or bad governance practices rather than its status as a human right).

³⁴⁷ Russell, *supra* note 366.

³⁴⁸ Benjamin Mason Meier et al., *Translating the Human Right to Water and Sanitation into Public Policy Reform*, 20 SCI. ENG. ETHICS 833 (2014).

³⁴⁹ UNGA, Follow-up to and implementation of the Mar del Plata Action Plan of the United Nations Water Conference, A/RES/34/191 (Dec. 18 1979).

³⁵⁰ Jootaek Lee and Maraya Best, *Attempting to Define the Human Right to Water with an Annotated Bibliography & Recommendations for Practitioners*, 1 GEO. ENV’T L. J. 30, 75, 88 (2017).

³⁵¹ U.N. Int’l Conference on Water & the Env’t, Dublin Statement on Water and Sustainable Dev., Princ. No. 4, U.N. Doc. A/CONF.151/PC/112 (Mar. 12, 1992).

³⁵² Some international legal instruments did recognize the right in specific situations *see e.g.*, the Convention on Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child; Stephen C McCaffrey, *A human right to water: Domestic and international implications*, 5 GEO. INT’L ENVTL. L. REV. 1, 7 (1992); Thorsten Kiefer & Catherine Brölmann, *Beyond State Sovereignty: The Human Right to Water*, 5(3) NON-ST. ACTORS & INT’L L. 183, 185 (2005).

³⁵³ Elena Valdés de Hoyos, Isabel Patricia and Enrique Uribe Arzate, *El derecho humano al agua: Una cuestión de interpretación o de reconocimiento*, 34 CUESTIONES CONSTITUCIONALES 3 (2016).

³⁵⁴ See International Covenant on Civil and Political Rights, G.A. Res. 2200(A) (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316, at 52 (Dec. 16, 1966). Art. 6.

impose an affirmative obligation on governments to provide adequate water.³⁵⁵ The ICESCR recognizes a right to “an adequate standard of living,” which implies a right to water. However, given its requirement of progressive realization, it is practically not binding on states.³⁵⁶

In 2002, General Comment No. 15 by the CESCR (hereinafter G.C. No. 15) explicitly acknowledged the right to water and provided a powerful impetus for later developments.³⁵⁷ It established the normative content associated with the human right to water and sanitation, considering water essential for guaranteeing an adequate standard of living.³⁵⁸ G.C. No. 15 alone did not support an international legal claim to water as it does not constitute a legally binding interpretation of the ICESCR.³⁵⁹ Yet, it provided the first authoritative interpretation of the human right to water.³⁶⁰ Nevertheless, the soft nature of G.C. No. 15 and the criticisms against the interpretations of this right meant that more developments were needed.³⁶¹ Since then, the U.N. has brought this right increasingly to the forefront of international human rights law.³⁶²

The significant development of the right to water can be traced to the meaningful work developed by U.N. bodies, the Commission on Human Rights, and the HRC. Several Special Procedures’ reports mandated by the Commission on Human Rights and the HRC are noteworthy.³⁶³ The former Sub-Commission on the Promotion and Protection of Human Rights, a subsidiary body of the former Commission on Human Rights, established a Special Procedure in this context, asking El Hadji Guissé to explore the relationship between the enjoyment of economic, social, and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation.³⁶⁴ In 2008, the HRC established a new mandate on water and

³⁵⁵ Rhett B. Larson, *Holy Water and Human Rights: Indigenous Peoples' Religious-Rights Claims To Water Resources*, 2 ARIZ. J. ENVTL. L. & POL’Y 81, 91, 95 (2011).

³⁵⁶ ICESCR, *supra* note 97, art. 2(1).

³⁵⁷ G.C. No. 15, *supra* note 339.

³⁵⁸ Lee and Best, *supra* note 377, at 90.

³⁵⁹ Erik. B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L. Q. 957, 972 (2004).

³⁶⁰ Malcolm Langford, *The United Nations Concept of Water as a Human Right: A New Paradigm for Old Problems?*, 21. INT’L J. OF WATER RESOURCES DEV. 273, 275 (2005).

³⁶¹ Dinara Ziganshina, *Rethinking the Concept of the Human Right to Water*, 6 SANTA CLARA J. OF INT’L L. 113, 116 (2008).

³⁶² Lori Beail-Farkas, *The Human Right to Water and Sanitation: Context, Contours, and Enforcement Prospects*, 30 WIS. INT’L L.J. 761, 780-81 (2013) (The impetus of bringing water to the forefront of global politics and international human rights discourse and leading to developments in the human rights framework can be traced to the Johannesburg Declaration and the creation of UN-Water).

³⁶³ In addition to reports on the right to water, reports on the right to food, health and housing are also relevant. Since these are Charter-based, as opposed to treaty-based, they are not limited to States Parties of the Social Covenant like General Comment 15. See INGA T. WINKLER, *THE HUMAN RIGHT TO WATER: SIGNIFICANCE, LEGAL STATUS AND IMPLICATIONS FOR WATER ALLOCATION* 37 – 99 (Hart Publishing, ed., 2012) (Chapter 3 specifically provides an overview of the legal foundations of the human right to water).

³⁶⁴ El-Hadji Guissé was the Special Rapporteur on the relationship between the enjoyment of economic, social, and cultural rights and the promotion of the realization of the right to drinking water supply and sanitation between 1997 and 2004. He published the following reports: Comm’n on Human Rights, SubComm’n on Prevention of Discrimination & Prot. of Minorities, *The Realization of Economic, Social and Cultural Rights: The Right of Access of Everyone to Drinking Water Supply and Sanitation Services*, U.N. Doc. U.N. E/CN.4.Sub.2/1998/7 (Jun. 10, 1998); Comm’n on Human Rights, Sub-Comm’n on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights: *Relationship Between the Enjoyment of Economic, Social and Cultural Rights and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, U.N. Doc. E/CN.4/Sub.2/2002/10 (Jun. 25, 2002). On his final report, he explored the legal basis of the right to water, as well as the rights and obligations regarding this right and its implementation. See Comm’n on Human Rights, *Relationship Between the Enjoyment and the Promotion, El Hadji Guissé (Special Rapporteur) Final Report to the Sub-Comm’n on the Promotion & Prot. of Human Rights, Economic, Social and Cultural Rights, Relationship Between the Enjoyment of Economic, Social and Cultural Right and the Promotion of the Realization of the Right to Drinking Water Supply and Sanitation*, U.N. Doc. E/CN.4/Sub.2/2004/20 (Jul. 14, 2004). Moreover, he developed a set of draft guidelines for the realization of the right to drinking water supply and sanitation. See Sub-Commission on the Promotion and Protection of Human Rights, *Realization of the right to drinking water and sanitation, Report of the Special Rapporteur, El Hadji Guissé, Draft Guidelines for the Realization of the Right to Drinking Water and Sanitation*, E/CN.4/Sub.2/2005/25 (Jul. 11, 2005).

sanitation, appointing Catarina de Albuquerque as Independent Expert, later changing the title to that of Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation.³⁶⁵ Léo Heller, the second special rapporteur, was appointed in 2014; Pedro Arrojo-Agudo was appointed in 2020.³⁶⁶

The work developed by U.N. bodies culminated in the adoption of resolutions by the UNGA and the.³⁶⁷ In 2010, the UNGA adopted Resolution 64/292 recognizing the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights.³⁶⁸ Following on the heels of the UNGA, the HRC adopted by consensus Resolution 15/9 on human rights and access to safe drinking water and sanitation.³⁶⁹ The HRC resolution is more specific and “affirm[ed] that the human right to safe drinking water and sanitation is derived from the right to an adequate standard of living and inextricably related to the right to the highest attainable standard of physical and mental health, as well as the right to life and human dignity.”³⁷⁰ Since HRC Resolution 15/9 details State responsibilities to take specific positive actions to respect, protect, and fulfill the right to water, it adds context and force to the UNGA’s resolution and the general recognition of the right to water. The resolution also has several clauses that address head-on the debate around privatization, affirming that states may opt to involve non-state actors provided that they maintain primary responsibility for ensuring the realization of human rights.³⁷¹ In 2015, the UNGA adopted a new resolution separating the right to water from the right to sanitation.³⁷² In this context, the Committee on Economic, Social and Cultural Rights (CESCR) gained the competencies of receiving the individual and collective complaints as well as inter-state complaints.³⁷³

While U.N. policy statements do not have the binding force of international law, these ‘soft law’ pronouncements reaffirmed in the UNGA and HRC give political legitimacy to these rights

³⁶⁵ Catarina de Albuquerque, the first UN Special Rapporteur on the right to safe drinking water and sanitation, was appointed in September 2008, and fulfilled her mandate until 2014. She published a series of thematic reports, including HRC, Catarina de Albuquerque, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, submitted to the Human Rights Council, A/HRC/10/6 (Feb. 25, 2009); Catarina de Albuquerque *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, A/HRC/12/24 (Jul. 1, 2009); HRC, Catarina de Albuquerque, Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, submitted to the Human Rights Council, A/HRC/15/31 (Jun. 29, 2010); HRC, Catarina de Albuquerque, Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Report on the Human Right to Safe Drinking Water and Sanitation*, U.N. Doc. A/66/255 (Aug. 3, 2011).

³⁶⁶ See Mr. Léo Heller, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/LeoHeller.aspx>; For a full list of reports adopted by the special rapporteurs, see *Annual Reports*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/AnnualReports.aspx>; For a list of resolutions adopted by the HRC and UNGA, see <https://www.ohchr.org/EN/Issues/WaterAndSanitation/SRWater/Pages/Resolutions.aspx>.

³⁶⁷ For an overview of the development of the right to water at the international level, with regional and national examples, see Beail-Farkas, *supra* note 362; Julian Montoya, *Global Water Crisis and Human Rights: A Glass Half Empty*, 13 INTERCULTURAL HUM. RTS. L. REV. 175 (2018).

³⁶⁸ UN General Assembly, *The human right to water and sanitation*, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (Aug. 3, 2010).

³⁶⁹ Human Rights Council, Resolution Adopted by the Human Rights Council 15/9: Human Rights and Access to Safe Drinking Water and Sanitation at 1–2, U.N. Doc. A/HRC/RES/15/9 (Oct. 6, 2010).

³⁷⁰ *Id.* at 3, Clause 6.

³⁷¹ Sharmila L. Murthy, *The Human Right(s) to Water and Sanitation: History, Meaning, and the Controversy over-Privatization*, 31 BERKELEY J. INT’L L. 89, 104 (2013).

³⁷² UN General Assembly, Seventieth Session; Third Committee Agenda Item 72 (b). The Human Rights to Safe Drinking Water and Sanitation, U.N. Doc. A/C.3/70/L.55/Rev.1, 4 (Nov. 18, 2015).

³⁷³ Beail-Farkas, *supra* note 362, at 794.

across the global community.³⁷⁴ The Independent Expert trusts that Resolution 15/9 officially recognizes the U.N.'s position that the right to water and sanitation exists in human rights treaties and is thus legally binding, having adopted the obligations outlined in Albuquerque's 2009 report.³⁷⁵ Moreover, the UNGA Resolution has solidified political support for evolving standards, recognizing international consensus on a distinct human right to water and sanitation.³⁷⁶ With the resolutions, States have created an international legal imperative to implement human rights to safe drinking water and adequate sanitation. However, the contours of the right to water and sanitation are still being defined, bringing more relevance to the work of the special rapporteurs, which remains significant in its continued progression.³⁷⁷

E. Rights of Nature

As we debate the development of the right to a healthy environment, it is also essential to consider the advancement of the rights of nature. The rights of nature were proposed in the Western legal world in the 1970s and further expanded more recently.³⁷⁸ Scholars have argued that human beings are merely one element of a complex, global system, which should be preserved for its own sake. The primary objective of environmental protection would be thus to protect nature as a whole.³⁷⁹ The rights of nature, also called Pachamama, go beyond a human rights approach to the environment. The rights of nature recognize standing for the natural environment, based on the notion that non-humans (including trees, rivers, and mountains, among other living beings) should also have legal rights. It thus invokes a rights-based approach that recognizes the ecosystem as a right-bearing entity that holds value in itself, apart from its human use.

The rights of nature movement originates from two sources: customary indigenous jurisprudence, which emphasizes the living and indivisible qualities of nature; and more recently-developed Western philosophical conceptions, linked explicitly to substantive and procedural jurisprudential doctrines. Philosophically, it is a pushback from the anthropocentric view of the environment as an instrument for providing human health and well-being.³⁸⁰ There is an important moral dimension to supporting the broader case for environmental entities as rights bearing

³⁷⁴ See Rebecca Bates, *The Road to the Well: An Evaluation of the Customary Right to Water*, 19 REV. EUR. COMMUNITY & INT'L ENVTL. L. 282, 284-85 (2010) (arguing that the right to water, following from the UN resolutions, has now achieved international legal status as customary international law).

³⁷⁵ Press Release, A Landmark Decision to Make the Right to Water and Sanitation Legally Binding, OHCHR (Oct. 6, 2010), <http://www.ohchr.org/EN/NewsEvents/Pages/RightToWaterAndSanitation.aspx> (last visited Mar. 31, 2018). Press Release, Right to Water and Sanitation is Legally Binding, Affirms Key UN Body, UN NEWS (Oct. 1, 2010), <http://www.un.org/apps/news/story.asp?NewsID=36308#.WhJTcGhSxPY> (last visited Mar. 31, 2018).

³⁷⁶ Benjamin Mason Meier, et al., *Implementing an Evolving Human Right Through Water and Sanitation Policy*, 15 WATER POL. 116, 122 (2013) ("This Resolution has given political recognition to the establishment of an independent right to water and sanitation, supporting the reasoning of General Comment 15 and declaring a state obligation that many now consider to bind all nations under customary international law"). See Paula Gerber & Bruce Chen, *Recognition of the Human Right to Water: Has the Tide Turned?*, 36 ALTERNATIVE L.J. 21 (2011) (concluding that "the debate about the existence of a human rights to water is now at an end").

³⁷⁷ See i.e. Human Rights Council, Res. 7/22, ¶2(b), Human Rights and Access to Safe Drinking Water and Sanitation, 41st meeting (Mar. 28, 2008), available at http://ap.ohchr.org/Documents/E/HRC/resolutions/A_HRC_RES_7_22.pdf (seeking to "further clarif[y] . . . the content of human rights obligations, including nondiscrimination obligations, in relation to access to safe drinking water and sanitation.")

³⁷⁸ See Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972) (this article encourages a broader view of Earth Jurisprudence than simply granting rights to Nature. Rights-based approaches can be seen as reductive and deflecting attention away from deeper structural inequities in law).

³⁷⁹ Shelton, *supra* note 240, at 104.

³⁸⁰ BOYD, *supra* note 72, at 40.

subjects: that as a matter of justice and socially agreed upon rights, the environment is entitled to certain claims regarding the nature of its existence.

Historically, rights of nature have featured in many systems of indigenous customary law.³⁸¹ The widely-held notion of Mother Earth or Pachamama evokes the idea of nature as having legal personality and rights. Many indigenous communities recognized nature as a subject with personhood deserving of protection and respect, rather than a commodity over which a property right could be exercised.³⁸² Such systems often identify humans as part of a larger, indivisible natural order, rather than masters over it. In this model, human beings are subsumed by the natural environment and owe duties towards it as stewards of natural resources searching for a harmonious relationship with nature.³⁸³ For example, the New Zealand Māori concept of kaitiakitanga emphasizes stewardship, rather than ownership, over natural resources.³⁸⁴ The South American Kichwan notion of Sumak Kawsay renders a harmonious relationship with nature essential to leading a good life, and rejects the need for continuous accumulation and exploitation of resources.³⁸⁵ Indigenous legal systems provide an important precedent for the development of the modern-day rights of nature movement.

The rights of nature mean that justice is owed to nature due to a set of characteristics it possesses.³⁸⁶ The view fits with the rights-reasoning and has been used by advocates to justify why anything is owed to the environment. Similarly, indigenous and wisdom-traditions have been brought in to substantiate the claim of our moral debt to nature. This has deep indigenous and philosophical roots.³⁸⁷ The idea that we are all in an ecologically interconnected web is also seen to support the idea of owing nature its own demands.³⁸⁸

Those who recognize rights of nature seek to promote a world view whereby human rights are dependent on, and cannot be realized without, the recognition and defense of the rights of Mother Earth. The relationship between rights of nature and human rights is thus seen not as one of equivalence but one whereby rights of nature trump those of the humans with the latter proscribed by the former.³⁸⁹ As evidence that our legal systems have failed to prevent us from destroying our habitat continues to mount and the prospects for industrial civilization begin to look bleak, more and more people are beginning to question the wisdom of continuing to refuse to expand the scope of legal rights to encompass rights for nature.³⁹⁰

³⁸¹ Lidia Cano Pecahrroman, *Rights of Nature: Rivers That Can Stand in Court*, 7 RESOURCES (2018).

³⁸² See e.g. Kiana Herold, *Rights of Nature: Indigenous Philosophies Reframing Law*, INTERCONTINENTAL CRY MAGAZINE, <https://intercontinentalcry.org/rights-nature-indigenous-philosophies-reframing-law/>.

³⁸³ See e.g. the New Zealand Te Awa Tupua (Whanganui River Claims Settlement) Act 2013 s 13(d) (“Te Awa Tupua is a singular entity comprised of many elements and communities, working collaboratively for the common purpose of the health and well-being of Te Awa Tupua”); the UNESCO definition of Sumak Kawsay, *Rethinking Education: Toward a Common Good?*, UNESCO, <http://www.unesco.org/new/fileadmin/MULTIMEDIA/FIELD/Cairo/images/RethinkingEducation.pdf>; “the concept of sumak kawsay ... connotes a harmonious collective development that conceives of the individual within the context of the social and cultural communities and his or her natural environment.”

³⁸⁴ New Zealand Law Commission, *Maori Customs and Values in New Zealand Law*, (2001) at ¶163-66.

³⁸⁵ Rickard Lalander, *Rights of Nature and Indigenous Peoples in Bolivia and Ecuador: A Straitjacket for Progressive Development Politics?*, 3 IBEROAMERICAN J. OF DEV. STUDIES 148, 153-54 (2014).

³⁸⁶ MIHNEA TANASESCU, ENVIRONMENT, POLITICAL REPRESENTATION, AND THE CHALLENGE OF RIGHTS: SPEAKING FOR NATURE 80 (Palgrave Macmillan. 2016).

³⁸⁷ See Chapter II.

³⁸⁸ *Id.*

³⁸⁹ David Humphreys, *Know your rights: Earth jurisprudence and environmental politics*, 10 IN'T J. OF SUS. POL. AND PRAC. 1(2015).

³⁹⁰ Cormac Cullinan, *Do Humans Have Standing to Deny Trees Rights*, 11 BARRY L. REV. 11, 17 (2008).; *Missing International Crime: Ecocide Crime*, Polly Higgins, <https://pollyhiggins.com>.

The modern rights of nature movement is often traced to Christopher Stone's 1972 article, *Should Trees have Standing?*³⁹¹ The starting point of Stone's analysis is that it was no more absurd for nature to have rights than any other routinely recognized nonhuman legal persons, such as ships or corporations.³⁹² Stone analyzed the history of the rights bearing subject, noting that the line of who or what is legally a person has always shifted. From slaves to women, African-Americans, fetuses, animals, and corporations, Stone argued that the answer to the question 'who is entitled to rights?' has changed over time. Based on this rationale, there is no intrinsic reason why environmental entities could not lay claim to legal rights.³⁹³ For Stone, the need for such a right was clear: in the absence of at least a right of standing, neither environmental groups nor nature itself could defend itself in court. Stone argued that the right incorporated due process and planning rights found in traditional environmental protection law,³⁹⁴ as well as a substantive right to protection against irreparable damage.³⁹⁵ Procedurally, he argued that a right of nature must be more than symbolic. Rather, the right must include powers to bring legal proceedings, receive relief for injury, and have that relief applied for nature's benefit.³⁹⁶ Stone thus conceived of the right as incorporating a right of standing, to be exercised by a 'friend' of the natural object through an application for guardianship who could claim relief for the injury incurred by nature as a consequence of human activity.³⁹⁷

Stone's conception of a right of nature as a right for others to litigate on its behalf has been influential in the U.S. and abroad. His 1972 article was cited with approval by Justice Douglas in the U.S. Supreme Court, dissenting in the case of *Sierra Club v. Morton*.³⁹⁸ His ideas were further developed by the environmental historian Roderick Nash in 1989.³⁹⁹ Drawing heavily on parallels to the antislavery movement, Nash maintained that rights of nature were the logical extension of a gradual movement to extend the scope of natural rights within humankind, and then to nonhuman phenomena.⁴⁰⁰ For Nash, rights of nature are the inevitable culmination of the rights project.

Other scholars have developed different theoretical explanations for the right. For example, Leimbacher adopts a utilitarian approach, arguing that a right of nature is necessary to avoid global environmental catastrophe.⁴⁰¹ Bosselman's influential 1992 work argued for a complete redesign of the state to recognize equivalence between human and natural rights, shifting away from the anthropocentric nature of law and providing a radical alternative to Stone's modest conceptualization of rights of standing.⁴⁰² Some constitutional theorists have argued that rights of nature are necessary to preserve conditions to allow future generations to participate in the constitutional project.⁴⁰³ There is now a developed body of scholarship promoting rights of nature on a range of philosophical justifications.

³⁹¹ Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

³⁹² *Id.* at 452.

³⁹³ *Id.*

³⁹⁴ *Id.* at 482-85.

³⁹⁵ *Id.* at 485-86.

³⁹⁶ *Id.* at 458.

³⁹⁷ *Id.* at 464-65; 475-80.

³⁹⁸ *Sierra Club v. Morton*, 405 U.S. 727 (1972).

³⁹⁹ RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (University of Wisconsin Press, ed., 1989).

⁴⁰⁰ *Id.* at 4-9.

⁴⁰¹ See *Harmony with Nature: United Nations*, <http://www.harmonywithnatureun.org/>; H. Leimbacher, *Gender and Nature in Comparative Legal Cultures*, in *COMPARING LEGAL CULTURES* 146 (D. Nelken, ed. 2016).

⁴⁰² Klaus Bosselmann, *Im Namen der Natur: Der Weg zum ökologischen Rechtsstaat* (Scherz, ed., 1992).

⁴⁰³ See e.g., Joel Colón-Rios, *Constituent Power, the Rights of Nature, and Universal Jurisdiction*, 60 MCGILL L. J. 127 (2014); A. T. Brei, *Rights & Nature*, 26 J. AGRIC. ENVIRON. ETHICS 393 (2013).

Berry's jurisprudence also expanded the rights of nature. Because the universe is "a communion of subjects and not a collection of objects" he contends that "each component of the universe is capable of having rights."⁴⁰⁴ Berry's approach to the debate is unique and his use of the term 'rights' is wider than commonly employed in law, as it relies on the principle that other natural entities are entitled to fulfill their role within the Earth Community.⁴⁰⁵ In this sense, Berry differentiates the type of rights granted to nature from that granted to humans.⁴⁰⁶

An important question, however, is which specific rights each member of the 'earth community' is entitled to.⁴⁰⁷ Stone clarifies that "to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have. Nor is it to say that everything in the environment should have the same rights as every other thing in the environment."⁴⁰⁸ Tanasescu clarifies that the idea of nature rights rests on a cluster of related concepts, which, from a theoretical and practical point of view can be applied to the environment as such without formal contradiction.⁴⁰⁹

The foundational concept is that natural – non-human – entities should count as more than mere objects and claim, through guardians, damages in their own name. This, besides being generally implied by the concept of rights, is also explicitly granted in the Ecuadorian constitution under the right to remediation (Art.72). Inasmuch as a right (whether moral or legal) is fundamentally a claim, it is indeed the case that its granting secures, at least in principle, a kind of automatic representation. Going further, it is supposed that natural entities have a vested interest in existing in a particular form, usually one preferred by their representatives (it would be hard to check whether other, 'non-representative' preferences, exist). Whether pointed out from the perspective of an earth-centered jurisprudence⁴¹⁰ or deep ecology,⁴¹¹ the central concept is that natural entities – importantly, not primarily animals in this case – have a set of interests and preferences that, if we recognize their juridical existence, can be politically expressed and legally enforced. So, for instance, a river is thought to have the right to flow uninterrupted, or a forest to continue existing in its current – 'unspoiled' – form. In terms of how one is to judge such things, the answer of the nature rights advocates seems to rest on the idea that the function of a natural entity is discernible and, once discernible, can constitute, by itself, a standard.⁴¹²

There are three basic rights that Cullinan, following Berry, proposes: "the right to be, the right to habitat, and the right to fulfill [one's] role in the ever-renewing process of the Earth Community."⁴¹³ The Ecuadorian constitution granted precisely these rights to nature in 2008.⁴¹⁴ Ecuador was the first country to establish the constitutional rights of nature.⁴¹⁵ By recognizing that

⁴⁰⁴ THOMAS BERRY, *EVENING THOUGHTS: REFLECTIONS ON EARTH AS SACRED COMMUNITY* 149 (Sierra Club Books. 2006).

⁴⁰⁵ CORMAC CULLINAN, *WILD LAW: A MANIFEST FOR EARTH JUSTICE*, 108 (Chelsea Green Publishing, ed, 2d ed, 2011).

⁴⁰⁶ Tanasescu, *supra* note 386, at 77.

⁴⁰⁷ Cullinan, *supra* note 390, at 16.

⁴⁰⁸ Stone, *supra* note 378.

⁴⁰⁹ Tanasescu, *supra* note 386, at 77.

⁴¹⁰ Cullinan, *supra* note 405, at 122.

⁴¹¹ ALDO LEOPOLD, *SAND COUNTY ALMANAC* (Oxford University Press. 1949).

⁴¹² Tanasescu, *supra* note 386, at 78-79.

⁴¹³ Cullinan, *supra* note 390, at 22.

⁴¹⁴ Tanasescu, *supra* note 386, at 78.

⁴¹⁵ ECUADOR, *CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR*, 2008, art. 71.

nature has the fundamental and inalienable right as a valuable entity in and of itself, the constitution opened the possibility to assign liability for damage and hold the government responsible for any reparations.

Defining the rights of nature require identifying its practical meaning. The holder of rights is entitled to call upon the courts to enforce that right in relation to others. Additionally, having rights mean that there is a corresponding duty – from someone else, or the world – not to infringe on that right.⁴¹⁶ A distinguishing feature of a legal right is that the law provides a remedy to rectify any breach of that right. The existence of a remedy is essential to transform an abstract expression of social value such as a right into specific, tangible consequences.⁴¹⁷ This remains the main challenge in the development of the rights of nature, since it still lacks implementation in several jurisdictions that have recognized it.

1. *Harmony with Nature Framework*

Although no rights of nature exist at the level of international law, there is growing acknowledgment within the U.N. system. In 1982, the UNGA recognized the value of nature in the World Charter for Nature, which proclaimed that “every form of life is unique, warranting respect regardless of its worth to man.”⁴¹⁸ Since 1992, resolutions of the UNGA have increasingly acknowledged these rights, developing from Principle 1 of the Rio Declaration, which provides that “[human beings] are entitled to a healthy and productive life in *harmony with nature*.”⁴¹⁹ This paradigm of “harmony with nature” as a condition of human development has provided the touchstone for international recognition.⁴²⁰

Since 2009, under the leadership of Bolivia, the UNGA has adopted a series of resolutions on “Harmony with Nature.”⁴²¹ In 2010, the Secretary-General issued a first report at the request of the UNGA, transmitting views, experiences and proposals on promoting life in harmony with nature, addressing how sustainable development approaches and initiatives have allowed communities gradually to reconnect with the Earth.⁴²² Several reports were subsequently adopted. Additionally, several Interactive Dialogues on Harmony with Nature were hosted by the UNGA.⁴²³ In “The Future We Want”, the UNGA reaffirmed the rights of nature at the international level.⁴²⁴ In 2019, the UNGA encouraged experts of the Harmony with Nature Knowledge Network to carry out a study of the evolution over the past decade of regional, national and local initiatives on the protection of Mother Earth to be considered by the Secretary-General.⁴²⁵ The preamble to the 2015

⁴¹⁶ Cullinan, *supra* note 390, at 17.

⁴¹⁷ Tracy A. Thomas, *Ubi Jus, ibi Remedium, The Fundamental Right to a Remedy Under Due Process*, 41 SAN DIEGO L. REV. 1633, 1636-638 (2004).

⁴¹⁸ World Charter for Nature, *supra* note 120, pmb., ¶3(a).

⁴¹⁹ Rio Declaration, *supra* note 132.

⁴²⁰ Maria Antonia Tigre, *Living in Harmony with Nature in a Post-Pandemic Scenario: Elevating Indigenous Knowledge for Pandemic and Epidemic Prevention*, The Law and Nature Dialogue (Sep. 7, 2021),

<https://lawandnaturedialogue.wixsite.com/macquariecel/post/living-in-harmony-with-nature-in-a-post-pandemic-scenario>.

⁴²¹ See United Nations, *Harmony With Nature*, <http://www.harmonywithnatureun.org>. G.A.Res.63/278, International Mother Earth Day (Apr. 22, 2009). See further *Interactive Dialogues of the General Assembly*, HARMONY WITH NATURE,

<http://www.harmonywithnatureun.org/dialogues/>. See e.g., G.A.Res.69/224, *Harmony with Nature* (Dec. 19, 2014);

G.A.Res.70/208, *Harmony with Nature* (Dec. 22, 2015); G.A. Res.71/232, *Harmony with Nature* (Dec. 21, 2016);

G.A.Res.72/223, *Harmony with Nature* (Dec. 20, 2017).

⁴²² Report of the Secretary-General, *Harmony with Nature*, 65th session, U.N. Doc. A/65/314 (Aug. 9, 2010), pursuant to UNGA Res. 64/96.

⁴²³ See *Chronology*, HARMONY WITH NATURE, <http://www.harmonywithnatureun.org/chronology/>

⁴²⁴ *The Future we Want*, *supra* note 139, ¶39.

⁴²⁵ G.A. Res. 74/224, *Harmony with Nature* (Jan. 17, 2020) (the drafting of this report was again encouraged in 2020, G.A. Res. 75/220, *Harmony with Nature* (Dec. 21, 2020)).

Paris Climate Agreement notes “the protection of biodiversity recognized by some cultures as Mother Earth”.⁴²⁶ Thus, although rights of nature have not been formally enshrined at the international level, there is a growing recognition that they are gaining force across several jurisdictions.

Additionally, several soft law agreements proposed by civil society acknowledge this paradigm of special care of nature. The IUCN’s Draft Covenant includes “respect for life” as a basic principle, establishing that “[n]ature as a whole warrants respect. The integrity of the Earth’s ecological systems shall be maintained and restored. Every form of life is unique and is to be safeguarded independent of its value to humanity.”⁴²⁷ At the 2012 World Conservation Congress, IUCN members recognized nature’s rights in Resolution 100, “Incorporation of the Rights of Nature as the organizational focal point in IUCN’s decision making.”⁴²⁸ As an ethical foundation based on general principles, the Earth Charter promotes a comprehensive vision of the interconnections of cosmology, ecology, justice, and peace, pointing towards an integrated framework of ecology, justice, and peace as a context for sustainable development.⁴²⁹ The Earth Charter recognizes “that all beings are interdependent and every form of life has value regardless of its worth to human beings”⁴³⁰ and further accepts “that with the right to own, manage, and use natural resources comes the duty to prevent environmental harm and to protect the rights of people.”⁴³¹ The provision is elaborated in the initial principles of the Earth Charter obligations of “I. Respect and Care for the Community of Life” and “II. Ecological Integrity.”⁴³²

At the domestic level, the rights of nature movement have developed through different frameworks: constitutional amendments, national, state and local level legislation, and judicial rulings.⁴³³ Ecuador was the first country to establish the rights of nature in its 2008 national constitution.⁴³⁴ Based on the indigenous concept of *Pacha Mama*, a goddess revered in the Andes region that means Mother Earth, Ecuador granted nature the right to exist, persist, maintain itself, and regenerate its vital cycles, structure, functions and evolutionary processes.⁴³⁵ The Ecuadorian experience is significant because it marks the most comprehensive attempt to incorporate rights of nature within a national constitutional order.⁴³⁶ The Constitution combines the two strands of the rights of nature movement: the holistic values inherited from indigenous law and the more formal rights of standing advocated by Western theorists such as Stone. The substance of the rights, which includes both restitutive and preventive measures, is potentially wide-ranging, and suggests the possibility of extensive remedies.

⁴²⁶ Paris Agreement, *supra* note 144.

⁴²⁷ *Draft International Covenant on Environment and Development: implementing sustainability*, INTERNATIONAL UNION FOR CONSERVATION OF NATURE, https://portals.iucn.org/library/sites/library/files/documents/EPLP-031_rev2.pdf, 2 (2004).

⁴²⁸ *Incorporation of the Rights of Nature as the organizational focal point in IUCN’s decision making*, INTERNATIONAL UNION FOR CONSERVATION OF NATURE (2012), https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2012_RES_100_EN.pdf.

⁴²⁹ MARY EVELYN TUCKER, ET AL., THOMAS BERRY: A BIOGRAPHY 172 (Columbia University Press. 2019).

⁴³⁰ Earth Charter Commission, EARTH CHARTER (2000), https://earthcharter.org/wp-content/uploads/2020/03/echarter_english.pdf?x90724.

⁴³¹ *Id.* at princ. 2a.

⁴³² See Nicholas A. Robinson, *Earth Law into the Anthropocene*, in THE CRISIS IN GLOBAL ETHICS AND THE FUTURE OF GLOBAL GOVERNANCE: FULFILLING THE PROMISE OF THE EARTH CHARTER (Peter Burdon, et al. eds., 2019).

⁴³³ *Rights of Nature and Policy*, HARMONY WITH NATURE, <http://www.harmonywithnatureun.org/rightsOfNature/> (Full catalogue of rights of nature laws and jurisprudence can be found online at the website of the United Nations’ “Harmony with Nature” initiative).

⁴³⁴ CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 415, at arts. 71-72.

⁴³⁵ *Id.* art. 71.

⁴³⁶ For a general overview of environmental constitutionalism, see MAY & DALY, *supra* note 112, at 93.

The provisions were strongly influenced by indigenous Kwecha concepts, including *Sumac Kawsay* (Living Well).⁴³⁷ The Constitution asserts that nature “has the right to integral respect for its existence and for the maintenance and regeneration of its life cycles, structure, functions and evolutionary processes.”⁴³⁸ Importantly, rather than vest the legal custodianship of nature to any specific group of people, Ecuador disperses that right among all citizens of Ecuador. The rights of nature are enforced through three constitutional provisions.⁴³⁹ In theory, nature rights are immediately enforceable and directly applied regardless of specific enforcement or other laws that expand it.⁴⁴⁰ In addition, citizens can demand that the rights of nature are respected.⁴⁴¹ In this sense, any person, community, town or nation has standing to ensure that the rights of nature are being properly enforced.⁴⁴² Lastly, it is incumbent upon authorities to enforce it when there’s a request for its protection.⁴⁴³ The initiative was highly acclaimed internationally, as it broke away from the traditional environmental regulatory system and represented a turning point in the debate by transforming abstract concepts into legally binding rights.⁴⁴⁴

Bolivia used a broad constitutional language and extended the right to a healthy environment to other living things, so they may develop in a normal and permanent way.⁴⁴⁵ As with many other South American and postcolonial states, Bolivian rights of nature measures find their conceptual grounding in indigenous Kwecha jurisprudence, particularly the concepts of *Pacha Mama* (Mother Earth) and *Sumac Kawsay* (Living Well). Bolivia enacted the Law of the Rights of Mother Earth.⁴⁴⁶ As in the case of Ecuador, nature is presented as a personified mother, to whom respect and reverence is due, and which is unified in such a way as to have purposes and plans, ‘a common destiny.’ As a collective subject of public interest,⁴⁴⁷ Mother Earth and other life-systems, a combination of human communities and ecosystems, are titleholders of inherent rights.⁴⁴⁸

The Bolivian law exemplifies a full variety of the possible rights of nature, as seven different rights are granted to Mother Earth.⁴⁴⁹ Some are familiar, like the right to life, while others are usually human rights that are given to nature itself: to water, clean air, and freedom from pollution. As in Ecuador, nature also has the right to be restored (article 7.6). In addition, nature has the right to the diversity of life (article 7.2), which in effect bans genetic experimentation, and the right to equilibrium (article 7.5). The claims on behalf of a nature with rights have an unmistakable theological flavor.⁴⁵⁰ Framed against a menacing background, nature’s representation assumes a theological character that makes the moral dimension of our relation to nature central.⁴⁵¹

⁴³⁷ Louis J. Kotze and Paola Villavicencio Calzadilla, *Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador*, 6 TRANSNATIONAL ENV. L. 401, 415-17 (2017).

⁴³⁸ CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 415, at art 71.

⁴³⁹ Maria Antonia Tigre, *Environmental Law of Ecuador*, in COMPARATIVE ENVIRONMENTAL LAW AND REGULATION 35 (Elizabeth Burleson, et al. eds., 2013).

⁴⁴⁰ CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 415, at art. 11(3).

⁴⁴¹ *Id.* at art. 71(2).

⁴⁴² See Tigre, *supra* note 439, at 38.

⁴⁴³ CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, *supra* note 415, at art. 11(1).

⁴⁴⁴ BOYD, *supra* note 72, at 41.

⁴⁴⁵ CONSTITUCIÓN POLÍTICA DEL ESTADO PLURINACIONAL DE BOLIVIA (2009), art. 33.

⁴⁴⁶ Ley de Derechos de la Madre Tierra, Ley No. 071, de noviembre de 2010, art. 3 (Boliv.).

⁴⁴⁷ *Id.* at art. 5.

⁴⁴⁸ *Id.* at art. 4.

⁴⁴⁹ *Id.* at 7.

⁴⁵⁰ See Chapter II.

⁴⁵¹ Tanasescu, *supra* note 386, at 117-20.

Bolivia's 2010 Law was followed in 2012 by the Framework Law of Mother Earth and Holistic Development for Living Well ("Living Well/Sumac Kawsay").⁴⁵² The 2012 Law reflects an approach inherited from indigenous law that human flourishing depends on the rights of nature being upheld and establishes mechanisms for the enforcement of the rights of nature. Article 53 creates a Plurinational Authority of Mother Earth, responsible for setting policies on climate change. Significantly, art. 4.2 establishes an enforceable right to climate justice, which can be brought by victims of climate change who have been denied their right to 'live well.' To enforce those rights, the creation of a *Defensoría de la Madre Tierra*, an ombudsman office for the protection of nature, was established.⁴⁵³ In addition, all citizens can enforce the rights of nature, either individually or collectively.⁴⁵⁴ However, although years have passed since the law's promulgation, no ombudsman office was created.⁴⁵⁵ The lack of implementation shows that the rights are more symbolic than practical, and are often not enforced.

Beyond Latin America, the rights of nature movement has expanded significantly in the U.S., coming primarily from the local government level. As noted, the first case in the history of the rights of nature resulted in the U.S. from Stone's theory.⁴⁵⁶ In *Sierra Club v. Morton*, Justice Douglas wrote a famous dissent stating that "public concern for protecting nature's ecological equilibrium should lead to the conferral of standing upon environmental objects to sue for their own preservation."⁴⁵⁷ Although his suggestion to allow a suit to prevent the development of the Mineral King Valley to be brought in the name of the valley itself as early as 1972, judges have not taken up this possibility and cases brought to courts are limited.⁴⁵⁸

Stone's ideas, along with the work of other lawyers, eventually resulted in some fairly important successes. In 2006, Tamaqua Borough in Pennsylvania became the first U.S. municipality to recognize the rights of nature to "exist, thrive, and evolve."⁴⁵⁹ Other examples include Halifax, Virginia,⁴⁶⁰ Santa Monica, California,⁴⁶¹ Lafayette, Colorado, which includes the right to a healthy climate,⁴⁶² Grant Township, located in Indiana County, Pennsylvania, which led to significant litigation⁴⁶³ and Pittsburgh.⁴⁶⁴ Many of these ordinances are near-identical, and were drafted on the advice of the Community Environmental Legal Defense Fund (CELDF), which also advised on the drafting of the Ecuadorian constitutional amendment.⁴⁶⁵ Furthermore, at least two

⁴⁵² Gaceta Oficial del Estado Plurinacional de Bolivia, Ley No. 300 del 15 de octubre de 2012.

⁴⁵³ *Id.* at art. 10.

⁴⁵⁴ *Id.* at art. 6.

⁴⁵⁵ Gabriel Diez Lacunza, *Tras 6 años de la 071, aún no hay Defensoría de la Madre Tierra*, PAGINA SIETE (Feb. 29, 2016), <http://www.paginasiete.bo/nacional/2016/2/29/tras-anos-071-defensoria-madre-tierra-88232.html>.

⁴⁵⁶ Tanasescu, *supra* note 386, at 76.

⁴⁵⁷ *Sierra Club*, *supra* note at 441, at 741-42 (1972) (citing Stone, *supra* note 378.)

⁴⁵⁸ Cullinana, *supra* note, 460, at 11.

⁴⁵⁹ COM Tamaqua Borough, Schuylkill County, Pennsylvania, Ordinance No. 612 of 2006. *Tamaqua Borough, Pennsylvania*, Community Environmental Legal Defense Fund (Aug. 31, 2015), <https://celdf.org/2015/08/tamaqua-borough/>.

⁴⁶⁰ See e.g. Halifax Code amend. §30-81-30-150.

⁴⁶¹ Santa Monica Municipal Code, ch. 4.75 Sustainability Rights, 4.75,040 (Apr. 9, 2013).

⁴⁶² Lafayette City Council, Colo., Climate Bill of Rights and Protections, Ordinance 2017-02 (Mar. 21, 2017).

⁴⁶³ See further Justin Nobel, *How a Small Town is Standing Up to Fracking*, ROLLING STONE (May 22, 2017), <https://www.rollingstone.com/politics/politics-news/how-a-small-town-is-standing-up-to-fracking-117307/>; Ellen M. Gilber, *Speaking for the trees, lawyer pushes unconventional doctrine*, ENERGYWIRE (Jan. 7, 2015), <https://www.eenews.net/stories/1060011209>; *Pennsylvania Gen. Energy (PGE) v. Grant Twp.*, (W.D. Pa., Aug. 8, 2014); *Pennsylvania Gen. Energy (PGE) v. Grant Twp.*, 139 F.Supp.3d 706 (W.D. Pa., Oct. 14 2015); *Pennsylvania Gen. Energy (PGE) v. Grant Twp.*, 658 Fed.Appx.37 (3rd Cir., Jul. 27, 2016); Some of PGE's challenges remain to be determined. See *Pennsylvania General Energy (PGE) v. Grant Twp.*, 2017 WL 1215444 (W.D. Pa., Mar. 31, 2017) (rejecting PGE's application for summary judgment).

⁴⁶⁴ Tanasescu, *supra* note 386, at 107.

⁴⁶⁵ *The Community Environmental Legal Defense Fund*, <https://celdf.org/>.

Native American tribal jurisdictions have also given effect to rights of nature.⁴⁶⁶ Several other countries have further pursued to recognize the rights of nature.⁴⁶⁷

In the 2017 Advisory Opinion, the IACtHR recognized an autonomous right to the environment, which protects different elements of nature regardless of their usefulness to human beings.⁴⁶⁸ This interpretation from the Court follows an ecocentric perspective and goes as far as to acknowledge the rights of nature as a legal trend.⁴⁶⁹ The statement shows the Court as open to a favorable outcome if cases are brought based on the rights of nature.

The Court considers it important to stress that, as an autonomous right, the right to a healthy environment, unlike other rights, protects the components of the environment, such as forests, rivers and seas, as legal interests in themselves, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of the importance to the other living organisms with which we share the planet that also merit protection in their own right. In this regard, the Court notes a tendency, not only in court judgments, but also in Constitutions, to recognize legal personality and, consequently, rights to nature.⁴⁷⁰

On a global level, it is true that compared to just a few decades ago tremendous progress has been made in the path towards ensuring that environmental entities – particularly rivers – are granted legal personhood. As many of these cases have also shown, however, there are also significant obstacles that have yet to be adequately addressed. Although the rights of nature represent a breakthrough and an innovative way to establish environmental protection, it remains to be seen whether it is indeed successful. Since cases are still limited, it is open to argument whether they are effective.

2. *The Rights of Rivers*

More recently, the rights of nature have gained increasing support worldwide through the recognition of the rights of rivers.⁴⁷¹ In various countries, courts or lawmaking bodies have declared rivers to be legal entities in hopes of improving their environmental health. These attempts have had varied success, ranging from meaningful steps taken by a government to address previous environmental contamination and including local communities in preventing further contamination, to instances where the designation of legal personhood had little to no effect on the river's health due to larger political, economic, or bureaucratic issues.

There are two main justifications for granting legal rights to rivers. The first is based on indigenous or religious traditions, which have been extremely influential in most cases in which

⁴⁶⁶ DAVID R BOYD, *THE RIGHTS OF NATURE: A LEGAL REVOLUTION THAT COULD SAVE THE WORLD*, 13 (ECW Press, ed, 2017). The Navajo Nation, Navajo Tribal Council, Navajo Nation Code, 2003, Title I § 205 and the Ho-Chunk Nation

⁴⁶⁷ For an updated list of legal provisions recognizing the Rights of Nature, see United Nations, *Harmony With Nature, Rights of Nature*, <http://www.harmonywithnatureun.org/rightsOfNature/>.

⁴⁶⁸ Advisory Opinion OC-23/17, *supra* note 174, ¶62.

⁴⁶⁹ See Tigre & Urzola, *supra* note 180.

⁴⁷⁰ *Id.* at 29, ¶ 62.

⁴⁷¹ James D. K. Morris, and Jacinta Ruru, *Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water*, 14 AILR 49 (2010); Eleanor Ainge Roy, *New Zealand river granted same legal rights as human being*, THE GUARDIAN (March 16th, 2017), <https://www.theguardian.com/world/2017/mar/16/new-zealand-river-granted-same-legal-rights-as-human-being>.

rivers were granted legal personhood.⁴⁷² For example, in the case of New Zealand, the local Māori tribe of Whanganui argued that because of their understanding of the river Te Awa Tupua as their ancestor, the river should be legally entitled to the same right as a person.⁴⁷³ The second theory comes from a re-evaluation of the traditional understanding of who or what is a rights bearing subject – an argument which follows the same reasoning of the rights of nature in general. By recognizing the value of the river as more than just a physical entity but also as part of a broader unit which carries its own metaphysical properties, indigenous laws have been vital in reshaping legal codes to account for rivers as individuals.⁴⁷⁴

Over time, rivers were extensively exploited to support a wide range of industries, disrupting its normal flow. Rivers were disregarded for its ecosystem services for human purposes, overriding the needs of non-human species and indigenous communities. Groups such as the Kogi in South America, the Yu'pik in the Arctic, Sioux tribes in northern Dakota, Aboriginal communities in Australia, and Māori in New Zealand have all been forthright in articulating their cultural ideas and values, sharing common concerns about environmental destruction. Indigenous groups thus generated the debate on establishing legal rights for nature, often focusing on rivers and their well-being. This philosophical movement promotes a worldview of shared independence of living beings and intersects contemporary efforts by indigenous communities to re-establish the notion of rivers as persons.⁴⁷⁵

Strang questions how we can re-imagine our relationships with rivers in more ethical and sustainable ways.⁴⁷⁶ Humankind went from worshipping rivers to bringing them to the brink of collapse. As the essence of life and its most powerful element, water had a central role in different societies, and rivers were often personified as important deities. Temples were built on the beds of rivers. Major rivers such as the Ganges, the Volga, and the Huang Ho (Yellow River) were described as the 'Great Mother,' or the Tiber and the Irrawaddy as the 'Great Father.'⁴⁷⁷

In Colombia, the rights of nature have been recognized through strategic litigation pursued in appellate courts and recognized by Colombia's two highest courts, the Constitutional Court and the Supreme Court. In the Atrato River Case, the Constitutional Court found that the river's pollution threatened the rights to water, food security, the healthy environment, and the culture and the territory of the ethnic communities that inhabit the Atrato River basin.⁴⁷⁸ The Court found that the rights violated were not only those of the local communities, but also those of the river itself.⁴⁷⁹ Such an approach was demanded by the constitutional precautionary principle, which had the effect of rendering Colombia's constitutional arrangements to be an 'ecological constitution.'⁴⁸⁰ Furthermore, the Court found support for its finding in the South American constitutional model of plurinationalism: the recognition of indivisible legal personality for nature could be found in indigenous custom.⁴⁸¹ The Court consequently adopted what it described as

⁴⁷² Herold, *supra* note 423.

⁴⁷³ Roy, *supra* note 471.

⁴⁷⁴ Morris and Ruru, *supra* note 471, at 49.

⁴⁷⁵ Veronica Strang, *Re-imagining the River: New Environmental Ethics in Human Engagements with Water*, 2 ONE EARTH 204, 205 (2020).

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.* at 204.

⁴⁷⁸ Colombia Constitutional Court Ruling T-622 of 2016, Expediente T-5.016.242. CORTE CONSTITUCIONAL, ¶2 (Nov. 10, 2016), <http://www.corteconstitucional.gov.co/relatoria/2016/t-622-16.htm> (hereinafter Colombia Constitutional Court Ruling T-622 of 2016).

⁴⁷⁹ *Id.* at ¶5.9.

⁴⁸⁰ *Id.* at ¶7.35-7.41.

⁴⁸¹ *Id.* at ¶9.27.

‘biocultural rights,’ reflecting “the relationship of profound unity between nature and human species”.⁴⁸²

In April 2018, the Supreme Court, Colombia’s highest court of ordinary jurisdiction, applied the Constitutional Court’s jurisprudence to the protection of the Amazon rainforest.⁴⁸³ The case was brought by a group of children who argued that over the course of their lifetime their health would be impacted by rising temperatures resulting from climate change.⁴⁸⁴ The Court found that the Colombian state authorities had failed to combat deforestation, thus violating these constitutional guarantees as construed as obligations under domestic and international law, to future generations and the environment itself as an entity in its own right.⁴⁸⁵ The Court formally recognized the Amazon rainforest as a an entity in its own right, “a holder of rights to protection, conservation, maintenance and restoration by the State and the territorial entities that comprise it.”⁴⁸⁶ Other cases were subsequently brought in regional tribunals in Colombia, reaching similar recognitions of the rights of nature.⁴⁸⁷ The Colombian experience remains one of the most promising international developments in the rights of nature movement.⁴⁸⁸

As in Colombia, recognition of the rights of nature in India has been driven primarily by the judiciary. Over time, Indian appellate courts have developed a significant body of jurisprudence recognizing the legal rights of sentient animals.⁴⁸⁹ Courts have declared rivers to be independent legal personae and that humans have obligations of guardianship towards them.⁴⁹⁰ In a 2014 case related to the Yamuna and Ganges Rivers, a Court halted mining near the Ganges River ordered that a river management body be created.⁴⁹¹ With a deep foundation on the religious teachings of Hinduism, the Court pointed out that the rivers held an important place in Hindu belief systems, observing the Ganges’s power to “wash away all the sins.”⁴⁹² In Hindu tradition, Krishna is said to have walked and played along it, becoming personified as a goddess, as Krishna’s lover. In the stories of Krishna, the Yamuna River is sacred. The Court thus analogized the status of the rivers to earlier Supreme Court decisions which had determined that Hindu idols could hold legal personality in the same way as trusts and corporations, being capable of bringing suit, holding property and being taxed via their human guardians.⁴⁹³

⁴⁸² *Id.* at ¶5.17,5.19.

⁴⁸³ Supreme Court of Colombia, STC4360-2018, radicación no 11001-22-03-000-2018-00319-01 <http://www.cortesuprema.gov.co/corte/index.php/2018/04/05/corte-suprema-ordena-proteccion-inmediata-de-la-amazonia-colombiana/>.

⁴⁸⁴ *Id.* at ¶2.1.

⁴⁸⁵ *Id.* at 35-39.

⁴⁸⁶ *Id.* at 45.

⁴⁸⁷ *Fallo Histórico reconoce a tres ríos del Tolima como sujetos de derechos*, SEMANA (June 6, 2019) <https://sostenibilidad.semana.com/medio-ambiente/articulo/ordenan-el-cese-definitivo-de-actividades-mineras-en-las-cuencas-de-los-rios-combeima-cocora-y-coello/44493> (A regional Tribunal in Colombia recognized rights to the Coello, Combeima and Cocora rivers in the Province of Tolima).

⁴⁸⁸ See Francisca Pou Giménez, *The Rights of Rivers and Forests and Apex Court Dynamics in Colombia: On Natural and Institutional Environments*, INT’L J. CONST. L. BLOG (June 13, 2018), [ahttp://www.iconnectblog.com/2018/06/the-rights-of-rivers-and-forests-and-apex-court-dynamics-in-colombia-on-natural-and-institutional-environments-i-connect-column/](http://www.iconnectblog.com/2018/06/the-rights-of-rivers-and-forests-and-apex-court-dynamics-in-colombia-on-natural-and-institutional-environments-i-connect-column/).

⁴⁸⁹ See e.g. *Narayan Dutt Bhatt v. Union of India & others*, Writ Petition (PIL) No. 43 of 2014, 1, (India.); *T.N. Godavarman Thirumulpad v. Union of India* (2012). I.A. Nos. 1433 and 1477 of 2995 in Writ Petition No. 202 of 1995, Supreme Court of India. *Center for Environment Law and WWF-India v. Union of India* (2013). I.A. No. 100 in Writ Petition No. 337 of 1995, Supreme Court of India.

⁴⁹⁰ *Narayan Dutt Bhatt v. Union of India & others*, *supra* note 489, at 49-50.

⁴⁹¹ *Mohd. Salim v. State of Uttarkhand and Others* (Writ Petition (PIL) No. 126 of 2014 ¶25 (Dec. 5, 2016).

⁴⁹² *Id.* at ¶11.

⁴⁹³ *Id.* at ¶12.

The Court concluded that these precedents affirmed that non-natural persons should be recognized as legal persons.⁴⁹⁴ Through an analogy with family law and acting within its *parens patriae* jurisdiction, the Court declared three state government officials to conserve and preserve Rivers Ganga and Yamuna and their tributaries.⁴⁹⁵ These officers were instructed to uphold the status of the Rivers Ganges and Yamuna and promote the health and well-being of these rivers, as well as represent the interest of the Rivers Ganges and Yamuna in all legal proceedings.⁴⁹⁶ A similar petition seeking protection of the Himalayan ecosystem of glaciers, streams and forests was soon after presented.⁴⁹⁷ With a basis on the environmental and spiritual importance of the Himalayan ecosystem, the Court recognized that trees and wild animals have natural fundamental rights.⁴⁹⁸

In New Zealand, rights of nature are framed as rights of legal personality, which are vested in a particular representative body with strong input from local indigenous Māori communities.⁴⁹⁹ Like South American countries, New Zealand rights of nature law draws heavily on indigenous jurisprudential concepts, particularly the notion of *kaitiakitanga* (guardianship; that humans are stewards, and not owners, of the environment). Specific recognition of the legal personality of forests, rivers and mountains has resulted from legislation passed pursuant to settlements of historic grievances between the government and the Māori. These include the Te Urewera Act 2014⁵⁰⁰ and Te Awa Tupua (Whanganui River Settlement) Act 2017.⁵⁰¹

In 2017, the New Zealand Government conceded that the ancestral river Te Awa Tupua “is a legal person and has all the rights, powers, duties, and liabilities of a legal person.”⁵⁰² Nominated individuals would have a responsibility to speak for the river and promote its rights and interests. A new role, To Pou Tupua, was formally established ‘to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua. Similarly, the government of the Australian state of Victoria has embraced protection measures for the Yarra River through the adoption of the Yarra River Protection (Wilip-gin Birrarung murrn) Act 2017.⁵⁰³ Although the Act does not recognize the river as possessing distinct legal personality, it incorporates many of the features of the rights of nature regimes, including declaring the river to be “one living and integrated natural entity.”⁵⁰⁴ The Act creates the Birrarung Council, a statutory body, to act on its behalf.⁵⁰⁵ It further

⁴⁹⁴ Mohd. Salim v. State of Uttarkhand and Others, *supra* note 491, at ¶16.

⁴⁹⁵ *Id.* at ¶19.

⁴⁹⁶ *Id.*

⁴⁹⁷ Miglani v. State of Uttarakhand, Writ. Petition PIL No. 140 of 2015 (March 30, 2015).

⁴⁹⁸ *Id.* at 41.

⁴⁹⁹ See e.g. Bryant Rousseau, *In New Zealand, Lands and Rivers Can Be People (Legally Speaking)*, NEW YORK TIMES (July 13, 2016) at <https://www.nytimes.com/2016/07/14/world/what-in-the-world/in-new-zealand-lands-and-rivers-can-be-people-legally-speaking.html>; Roy, *supra* note 526; Caroline Taix, *La Nouvelle-Zélande dote un fleuve d'une personnalité juridique*, LE MONDE (Mar. 20, 2017), https://www.lemonde.fr/planete/article/2017/03/20/la-nouvelle-zelande-dote-un-fleuve-d-une-personnalite-juridique_5097268_3244.html.

⁵⁰⁰ Te Awa Tupua (Whanganui River Claims Settlement) Act, §11 (New Zealand, 2017).

⁵⁰¹ Te Awa Tupua, *supra* note 566, at §12.; Nga Tangata Tiaki o Whanganui, *Te Awa Tupua passes in to law*, SCOOP POLITICS (Jul. 9, 2018, 04:29 PM), <http://www.scoop.co.nz/stories/PO1703/S00187/te-awa-tupua-passes-in-to-law.htm>; Liz Charpleix, *The Whanganui River as Te Awa Tupua: Place-based law in a legally pluralistic society*, 184 THE GEOGRAPHICAL J. (2017), <https://onlinelibrary.wiley.com/doi/full/10.1111/geoj.12238>; See Boyd, *supra* note 466, at 139.

⁵⁰² See MARAMA MURU-LANNING, *TUPUNA AWA: PEOPLE AND POLITICS OF THE WAIKATO RIVER* (Auckland University Press, 2016).; Veronica Strang, *The rights of the river: water, culture and ecological justice*, in CONSERVATION (Helen Kopnina & Haydn Washington eds., 2020).

⁵⁰³ Yarra River Protection (Wilip-gin Birrarung murrn) Act No. 49 (Victorian Numbered Acts, 2017); See *Yarra River Protection*, VICTORIA STATE GOVERNMENT (Jul. 9, 2018), <https://www.planning.vic.gov.au/policy-and-strategy/waterways-planning/yarra-river-protection>.

⁵⁰⁴ Yarra River Protection (Wilip-gin Birrarung murrn) Act No. 49, §1(a) (Victorian Numbered Acts, 2017).

⁵⁰⁵ *Id.* at §5(d); 12(2).

recognizes the intrinsic connection between the river and local communities, particularly the local indigenous owners who are recognized as ‘custodians’ of the River.⁵⁰⁶

The rights of nature movement has been slowly growing across the world. While it may be perceived as a bold idea, it brings an ecocentric perspective with practical ways of enforcement that extend a voice to stakeholders that were often left unheard. Strang notes that creating legal opportunities and responsibilities to articulate and promote the interests of non-human beings as co-inhabitants with (rather than subjects of) human societies brings a new environmental ethic into decision making, encouraging more socially and ecologically sustainable ideas and practices.⁵⁰⁷ This ethic fully embarks the religious and philosophical bedrock explained in Chapter II. By legislating that nature has the right to exist, persist and flourish, a critical first step has been taken to shift individual and collective perceptions of nature, as something with integrity and value. It is yet to be attested that this translates into actual protection of nature.⁵⁰⁸

F. Concluding Thoughts

The human right to a healthy environment is a story still being told – we don’t yet know how it turns out. But even at its inception, the paths of human rights and environmental protection grew apart, and each defined its own sphere of protection with barely a nod to the existence of the other. Throughout the past decades, this fragmentation of international law has slowly been demolished, brick by brick. We are now at the last stages of this integration. The last 25 years have seen the development of detailed environmental human rights norms, with the recognition of the right to a healthy environment in constitutions and by courts, as well as an increasing cognizance under international governance regimes. The adoption of the right to a healthy environment by the HRC has decisively brought environmental rights to the realm of human rights law. In the next few months, another chapter to this story will be written as the UNGA considers the matter. And this story will continue to progress, with evolving case law and jurisprudence, and bold ideas that push this discussion forward.

⁵⁰⁶ Id.

⁵⁰⁷ Strang, *supra* note 475, at 206.

⁵⁰⁸ Peter Burdon, *The Jurisprudence of Thomas Berry*, 15 *WORLDVIEWS: GLOBAL RELIGIONS, CULTURE, AND ECOLOGY* 164-164 (2011).

IV. TOWARDS A GLOBAL PACT FOR THE ENVIRONMENT¹

This chapter analyses how the Global Pact for the Environment (GPE or Global Pact), proposed by France as a new legally binding multilateral environmental agreement (MEA) merged into the negotiation of a new political declaration for adoption by the United Nations Environment Assembly (UNEA) in 2022. The chapter follows the progress from 2015 to 2021. The chapter describes the process in which the GPE unfolded, discussing its origins and development within the U.N. General Assembly (UNGA). The chapter largely relies on the updates by the International Institute for Sustainable Development (IISD),² information from websites provided by the United Nations (U.N.) throughout this process, news articles and a few academic articles by leading scholars, which provided insights into the early stages of the discussions. Additionally, several interviews were conducted with participants of the negotiations. This provides a unique perspective into the intricacies of a new declaration, providing the necessary background for its adoption in 2022.

The development of the negotiations of the GPE is explained through the identification of six phases, namely (I) the Pact's genesis as a French-led initiative and draft by an international group of scholars; (II) launch at the United Nations (U.N.) and adoption of a resolution calling for the discussion of gaps in international environmental law by the General Assembly; (III) fulfillment of the Resolution by organizing a working group and publication of a report by the Secretary-General; (IV) discussion of identified gaps by the working group in Nairobi and adoption of recommendations; (V) call for a new political declaration by the UNGA; and (VI) negotiation of a new political declaration throughout 2020-2021.³ This negotiation continues through the beginning of 2022, after this thesis is submitted. In 2022, as a draft political declaration is presented at the U.N. Environmental Assembly (UNEA), Phase VII will begin with the negotiation of a final text.

Phase I: Genesis of the GPE (Nov. 2015 – jun. 2017)

The GPE is the most recent proposed solution to address gaps in international environmental law. It developed in a rather unorthodox way, envisioned by academic scholars, who drafted an entire proposal before its launch at the U.N.. The Pact was conceived by the Club des Juristes (CDJ),⁴ a French legal think tank that provides an independent forum for debates and legal proposals. It responded to a report published by the organization during the 2015 Paris climate conference, which identified inefficiencies in international environmental law, suggesting ways to address them. A “universal charter” was one of the recommended solutions intended to improve the efficiency of the global legal system. The CDJ gained support of the French Minister of Foreign Affairs Laurent Fabius, who began pushing the idea forward. A group of experts from around the globe was then assembled, tasked with drafting the charter. After months of consultations, experts gathered in Paris and launched the GPE in June 2017.

¹ The majority of this chapter was previously published by ELI Press, see MARIA ANTONIA TIGRE, GAPS IN INTERNATIONAL ENVIRONMENTAL LAW: TOWARD A GLOBAL PACT FOR THE ENVIRONMENT (Environmental Law Institute, 2020) (covering the period from 2015-2019) and Maria Antonia Tigre & Victoria Lichet, *Update on Negotiation of a New International Environmental Agreement*, 50(10) ENVTL. L. REP. 10818 (2020) (covering the period from Jan.-Sep. 2020). The developments since Sep. 2020 have not been published yet.

² IISD, <https://www.iisd.org/>.

³ This chapter has been updated until Dec. 2021.

⁴ LE CLUB DES JURISTES, <http://www.leclubdesjuristes.com/>.

As an overarching and legally-binding proposed global agreement, the Global Pact could potentially define fundamental environmental rights for humanity. It intends to harmonize international environmental law by defining consolidated and emerging principles currently fragmented in a variety of MEAs, in particular in soft law declarations. The idea is to lay the groundwork for international environmental law by providing fundamental cornerstones through the codification of principles. The codification would unify treaties and provide essential legal answers for substantive gaps in international environmental law. The right to an ecologically sound environment and the obligation of States and other legal persons to take care of the environment form the pillars of the Global Pact.

This section focuses on Phase I of the development of the Global Pact, entitled “Genesis of the Global Pact for the Environment,” and follows its initial stage traced to the CDJ. Through a chronological order, it is divided as follows. Section 1 provides an overview of the CDJ’s 2015 Report and presents the main arguments offered in support of a “universal environmental charter.” Part 2 focuses on the consultations with a group of international environmental law experts, which gave rise to an earlier draft of the Global Pact. Section 3 addresses a meeting held in June 2017, in which a smaller group of experts gathered in Paris to hash out the final details of the proposed draft, subsequently launching the proposed agreement at the Sorbonne.

1. November 2015: Report by the Club des Juristes

In November 2015, the Environment Committee of the CDJ released the report “Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals” on how to strengthen international environmental law.⁵ The report was presented in the run up of the Conference of the Parties (COP) in Paris in December 2015, as world leaders were working to reach an agreement on climate change. While the Environment Committee welcomed a climate agreement, they warned that more legal action was needed to safeguard the environment from the current crisis. The report cautions against a “double failure” in international environmental law: failure in its development and in its application.

The first “failure” relates to the process of adopting MEAs. According to the CDJ, the drafting of environmental treaties is slow, “even paralyzed.”⁶ As States sometimes object to more stringent commitments, the adoption of non-legally binding agreements is common. Aiming for consensus, rules tend to reflect basic minimum standards, exposing the “common-denominator” problem. For example, the Convention of Biological Diversity (CBD) provides a general and nominal framework for biodiversity conservation,⁷ yet subsequent meetings of the COP have not culminated in more specific and binding agreements in essential issues such as addressing the extinction of species. Negotiations advance too slowly to respond to the fast and irreversible nature of the declining reserve of biodiversity.⁸

The implementation of international environmental law is also flawed. Enforcement of adopted treaties is frequently weak due to the absence of compliance mechanisms and effective sanctions. As a result, international environmental law is often unable to produce the results assigned or the behavior it intends to encourage.⁹ Prioritizing a cooperative rather than a punitive approach, monitoring of MEAs is largely limited to “non-compliance” procedures, overseen by

⁵ *Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals*, Le Club des Juristes (Nov. 2015), https://globalpactenvironment.org/uploads/CDJ_Rapports_Increasing-the-effectiveness_Nov.2015_UK.pdf.

⁶ *Id.* at 26.

⁷ Convention on Biological Diversity Convention on Biological Diversity, Jun. 5, 1992, 1760 U.N.T.S. 79.

⁸ Club des Juristes, *supra* note 5, at 26.

⁹ *Id.* at 28-29.

committees without decision-making authority. Even when sanctions exist, such as those included in the Kyoto Protocol, these have rarely been used.¹⁰ Yann Aguila, chair of the CDJ's Environment Committee, one of the drafters of the report and main proponent of the Global Pact, contends that "due to a lack of control mechanisms and effective sanctions, States may deliberately choose not to respect the treaties they have signed."¹¹

To tackle this "double failure," the report made 21 recommendations¹² based on three pillars: (i) an international environmental court, (ii) a world environment organization and (iii) a universal charter.¹³ The GPE evolved from Proposal 20, which reads "[a]dopt a Universal Environmental Charter in the form of an international convention with binding legal force."¹⁴ The Universal Environmental Charter (later renamed) intends to enshrine the main principles of protecting the planet in a founding text.¹⁵ The report does not go as far as debating the content of the principles. However, the CDJ suggested drafting a text enshrining substantive and procedural rights, as well as the creation of a compliance committee to oversee its applicability. Additionally, the right of recourse would guarantee the enforceability of a charter by national courts, including by civil society.

The CDJ questions the legal value of existing principles in international environmental law, which lack binding force and do not constitute a real guarantee of rights.¹⁶ With binding legal force, a Universal Environmental Charter would improve the accessibility and readability of international environmental law, which is currently made difficult due to its fragmentation across a multitude of MEAs.¹⁷ The charter is intended to clarify founding principles of international law, including the right of each person to a healthy environment, as well as the right of citizens to bring cases to court to force States to respect their international commitments.¹⁸ Additionally, it would provide international environmental law with the necessary cornerstone.¹⁹ Principles could be invoked in court, constituting a real guarantee of rights, supplementing the political and symbolic significance of current principles enshrined in the Stockholm and Rio Declarations, both nonbinding soft law documents.²⁰ The Committee clarifies:

For all these reasons, the Committee believes that a text of universal scope on environmental matters needs to be adopted. This text would be the corner stone of international environmental law. It would lay down the founding principles, from all the sectoral environmental conventions by analysing the variation in, and implementation of, these principles in the specific fields. Furthermore, it could also be envisaged that the Charter would contain a final interpretive clause

¹⁰ Club des Juristes, *supra* note 5, at 29.

¹¹ Yann Aguila, COP 21: 'To Arms, Citizens, to Defend Your Rights!' § 2019 (HuffPost 2015).

¹² See Yann Aguila, *La Adopción de un Pacto Internacional para la Protección del Medio Ambiente* 34 REVISTA ARANZADI DE DERECHO AMBIENTAL (2016); Yann Aguila, *L'Adozione di un Patto Internazionale per la Protezione dell'Ambiente* 3 RIVISTA GIURIDICA DELL'AMBIENTE 563 (2016).

¹³ Club des Juristes, *supra* note 5, at 96.

¹⁴ *Id.* at 104.

¹⁵ *Id.* at 15.

¹⁶ *Id.* at 101.

¹⁷ *Id.* at 100.

¹⁸ Aguila, *supra* note 11.

¹⁹ Club des Juristes, *supra* note 5, at 96.

²⁰ Le Club des Juristes, REPORT SUMMARY: INCREASING THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW – DUTIES OF STATES, RIGHTS OF INDIVIDUAL (2015), available at http://www.leclubdesjuristes.com/wp-content/uploads/2015/11/4.-Report-summary_9-pages.pdf.

so that all the sectoral environmental conventions could be interpreted in the light of the major principles which will have been thus enshrined.²¹

The report largely advanced the idea of establishing the influence of civil society in setting the agenda for environmental issues. It invited a reflection on the state of international environmental law, questioning what could be done by different stakeholders to improve it.²² Through this invitation, it reinforced the essential role of non-state actors for environmental governance, advocating for their right to participate in environmental negotiations.²³ The CDJ therefore presented a “called to arms:” in order to make international law more effective, civil society must take ownership.²⁴ The basis for the report might explain the unorthodox origins of the Global Pact, as civil society took it upon themselves to ignite the process of adopting a legally binding treaty on environmental principles. Consequently, the CDJ did precisely what it called for, igniting the drafting process of a Global Pact.

2. September 2016-June 2017: Consultations with experts

The idea for a Universal Charter received immediate momentum with the support of Former French Minister of Foreign Affairs Laurent Fabius. Mr. Fabius had presided over the Paris Climate Agreement negotiations and had been recently appointed as President of the French Conseil Constitutionnel.²⁵ With the ambition to continue being involved in environmental issues at the international level, Mr. Fabius looked for similar proposals, eventually deciding to support the idea of the Global Pact. Aguila met with Fabius and presented a short 2-page memo about what could be a Global Pact and how to make it come true. Fabius officially showed his support in June 2016.

Following his support, significant legal work was conducted by the CDJ’s Environment Committee.²⁶ Throughout 2016, a documentary basis was assembled to show an example of what a Global Pact could be rather than presenting an abstract idea.²⁷ French experts and students met to gather information and prepare for consultations with experts. In early 2017, the CDJ invited an international network of environmental law experts to draft a blueprint for a Global Pact for the Environment.²⁸ These were chosen based on a geographic diversity and expertise. The Group of Experts for the Pact (GEP) ultimately included over 100 experts, academics, judges, and lawyers, from more than 40 countries.²⁹ These represented diverse legal systems and ecosystems, allowing them to take into account a variety of legal perspectives of what environmental law entailed.³⁰ The group provided opinions on different topics through a series of questionnaires. During the first half

²¹ Club des Juristes, *supra* note 5, at 103.

²² Yann Aguila & Patricia Antunes Laydner, *Reforçar a eficácia do direito ambiental do meio ambiente: uma proposta do Club de Juristes*, 82 REVISTA DE DIREITO AMBIENTAL (2016).

²³ Club des Juristes, *supra* note 5, at 50.

²⁴ *Id.* at 13.

²⁵ Yann Aguila & Jorge E. Viñuales, *A Global Pact for the Environment: Conceptual foundations*, 28 REV. OF EUR., COMP. & INT’L ENV. L. 3 (2019).

²⁶ *White Paper: Toward a Global Pact for the Environment*, LE CLUB DES JURISTES (2017), <https://globalpactenvironment.org/uploads/White-paper-Global-pact-for-the-environment.pdf>.

²⁷ Aguila & Viñuales, *supra* note 25, at XX.

²⁸ Teresa Parejo Navajas & Nathan Lobel, *Framing the Global Pact for the Environment: Why It Is Needed, What It Aims to Do, How it Proposes to Do It*, 30 FORDHAM ENVTL. L. REV. 32, 41 (2018).

²⁹ Aguila & Viñuales, *supra* note 25, at XX.

³⁰ Maria Magdalena Kenig-Witkowska, *The draft Global Pact for the Environment*, CLIENT EARTH, <https://www.documents.clientearth.org/wp-content/uploads/library/2018-10-02-the-draft-global-pact-for-the-environment-ce-en.pdf>.

of 2017, experts responded to five rounds of consultations, starting with broader questions that became more specific as the discussion unfolded.³¹ Consultations addressed matters such as the need for an international treaty, its overall structure, content and, more specifically, the formulation of the principles that would feature in the draft agreement.³²

The exchanges were operationalized by the CDJ's Environment Committee, under the leadership of Aguila.³³ The Environment Committee included 15 experts on environmental law, including academics, judges, and lawyers, who served as the operational committee for the project. The Committee oversaw the organizational aspects, the collection and analysis of the experts' input, and the final drafting of the project.³⁴ A team of 15 student volunteers helped coordinate the questionnaires and analyze the responses.³⁵ The group met every 2 or 3 weeks to discuss the architecture of the Pact and the list of principles included, complementing the material gathered with specific research when needed.³⁶

First Round of Consultation

Since the questionnaire was at the same time the first official approach of experts, it included a general introduction of the project, its background and objective.³⁷ Based on the premise that principles had been "subject to various wording, based on legislators, and diverse interpretations based on the jurisdictions," the goal of the first round was to "have a better understanding of the dynamics involved in the circulation of the principles enshrined in the Rio Declaration since 1992."³⁸ The CDJ intended to identify the principles currently subject to a worldwide consensus and to specify their impact. The first round of consultation asked the experts the following open-ended questions:

According to you, which principles, already enshrined in various international instruments, and particularly in the Rio Declaration, should take priority? According to you, are there principles that are not expressly stated in the international instruments, but that form a sufficiently broad consensus and should be legally recognized? As to the formulation of the Pact, what clarifications need to be integrated to the principles, based on the industry practice since 1992?

Second Round of Consultation

Prior to posing the subsequent round of questions, the committee presented the drafters with initial findings based on the responses from the first questionnaire. The CDJ's Environment

³¹ Aguila & Viñuales, *A Global Pact for the Environment: Conceptual foundations*; Le droit est essentiel pour s'adapter au monde nouveau et pour adapter ce monde nouveau. C'est le but du Pacte mondial pour l'environnement (Entretien exclusif avec Laurent Fabius, président du Conseil constitutionnel), 28 LA SEMAINE JURIDIQUE 1354 (Jul. 10, 2017), http://www.tendancedroit.fr/wp-content/uploads/2017/07/entretien.pdf?utm_source=TendanceDroit&utm_medium=ExtraitRevue&utm_campaign=TendanceDroit.

³² Aguila & Viñuales, *supra* note 25, at XX.

³³ World Commission on Environmental Law, *Global Pact for the environment introduced to the world*, IUCN-WCEL (2017), <https://www.iucn.org/commissions/world-commission-environmental-law/events-wcel/past-events/global-pact-environment-june-2017>.

³⁴ First Questionnaire sent to the Group of Experts, The project for a Global Pact for the Environment, First consultation of the international network of experts, General introduction and open-ended questions (on file with Yann Aguila).

³⁵ Interview with Yann Aguila, in New York, NY (Jul. 16, 2019).

³⁶ *Id.*

³⁷ First Questionnaire, *supra* note 34.

³⁸ *Id.*

Committee found a “double consensus:” drafters agreed on the need of an international agreement enshrining the fundamental principles of environmental law, and on the content of the Pact. The Committee noted “a very broad agreement [that] emerges on most of the principles that should be included in the Global Pact for the Environment.” These principles constituted the “core” of the text. While there were different approaches identified, these remained occasional and incidental, and contributions converged on the most important aspects.

The second round of consultation considered the architecture and the drafting approach of the Pact.³⁹ Based on the findings of the first round, the Committee asked the experts their opinions on a list of principles derived from the Rio Declaration, and subject to broad consensus, as well as on the order these principles should feature in a draft.⁴⁰ Secondly, the Committee requested the experts’ comments on a set of new principles, which included 1) non-regression and/or progression; 2) *in dubio pro natura*; 3) effective environmental legislation (principle of *effet utile*); and 4) recognition of the role of non-state actors. Thirdly, the Committee asked for suggestions regarding reorganization, merging or distinction of certain principles. For example, while Principle 10 of the Rio Declaration mentioned public information, public participation and access to justice, some experts had suggested these should be treated as distinct articles. The principle of prevention and the duty to conduct environmental impact assessment could be merged, similarly to the requirement of sustainable development, integration in public policies, and considering patterns of production and consumption.

The fourth question related to the wording and formulation of the principles. Some previous suggestions included using “short, comprehensive and concise wording” and an “open structure” of the principles to allow for more dynamism. As noted by the Committee, “[t]he Pact should be understood as a living instrument: interpretation and implementation of the principles should be undertaken later on by monitoring bodies.”⁴¹ Additionally, a general formulation of principles would respect “States’ margin of appreciation” and “the necessity of implementing principles in compliance with each national legal context.” The questionnaire also left open to discussion whether to use a direct language style with an explicit obligation (e.g., “Each person shall have the right to access information”) or formulating the obligation through state intermediaries (e.g., “State Party shall endeavor to ensure that each person has the right to access environmental information”).

Third Round of Consultation

The third round of consultation focused on the potential adoption of follow-up and compliance mechanisms to achieve the goal of strengthening the effectiveness of environmental law.⁴² The Committee recognized that a debate on said mechanisms is highly political and would likely be referred to further diplomatic negotiations. To kickstart the debate, the document sent to experts presented some reflections on the nature of a monitoring mechanism, drafting and institutional choices and examples of existing monitoring mechanisms in MEAs. It invited experts

³⁹ Second Questionnaire sent to the Group of Experts, Project on a Global Pact for the Environment, Second consultation of the international network of experts, Architecture and drafting of the Pact (on file with Yann Aguila).

⁴⁰ *Id.* (The list included the following principles 1) Duty of environment protection; 2) Right to live in a healthy environment; 3) Sustainable development and principle of integration; 4) Interest of future generations / Intergenerational equity; 5) Prevention; 6) Precaution; 7) Liability; 8) Polluter pays; 9) Public information; 10) Public participation; 11) Access to justice in environmental matters; 12) Education and formation; 13) Research and innovation; 14) Duty of law-making; 15) Cooperation; 16) Common but differentiated responsibilities).

⁴¹ *Id.*

⁴² Third Questionnaire sent to the Group of Experts, Project on a Global Pact for the Environment, Third consultation of the international network of experts, Follow-up mechanisms (on file with Yann Aguila).

to share their thoughts on options. The first question related to the nature of a compliance mechanism, debating between judicial and non-judicial.⁴³ Secondly, the Committee asked experts how they would divide between treaty provisions and subsequent decisions related to the compliance mechanisms.⁴⁴ This second question related to the wording, concerning what should be included in the treaty and what is left to future decisions.⁴⁵ This issue leads to a follow-up institutional question: In addition to the follow-up committee, should there be specific bodies to support the Global Pact (such as a COP or an executive secretariat), or does it have to be backed by existing institutions?

Fourth Round of Consultation

The fourth round of consultation related to the actual wording and content of the various principles to be included in the Global Pact.⁴⁶ The Committee noted a convergence on around 80 percent of the topics discussed so far and clarified that this consultation integrated the main elements of this consensus. They asked the suggestions and/or observations of experts on a series of principles, concerning their formulation and content. The document also included brief references and commentaries about each principle, noting some questions that arose during the consultations. For example, the Committee noted a consensus on the right to live in a healthy environment, with 178 States having recognized it. However, questions remained on the specific language to be adopted. For example, on whether to adopt the “right to a healthy environment,” or the “right to live” in a healthy environment, on a “healthy” or “ecologically sound” environment and/or an environment that “permits a life of dignity and well-being” (Stockholm Declaration) and / or “adequate to his or her health and well-being” (Aarhus Convention), and/or “healthy” and “respectful of biodiversity,” for the benefit of “everyone,” “any person,” or “any human being.”⁴⁷ The fourth round of consultations invited this type of debate.

Fifth Round of Consultation

The fifth and final consultation related to a White Paper which describes the origins, the context, and the aim of the Global Pact for the Environment. The Committee also sent around a compendium of different iterations of the principles as included in MEAs and other texts drafted by civil society.⁴⁸ Experts took into account the most representative international environmental law agreements, as well as the implementation practice of States and international institutions.⁴⁹

⁴³ Third Questionnaire, *supra* note 42. Question 1: Modalities of the monitoring mechanism. What are your suggestions for how to control and monitor the implementation of the Global Pact? More precisely, what would your recommendations be on: the overall objective of the monitoring mechanism; the nature and composition of the body responsible for monitoring (jurisdictional and / or non-jurisdictional); the methods of filing state reports (periodicity); the possibility of communications, especially individual ones; the powers of the monitoring body (support, sanction, incentive, opportunity to set guidelines, etc).

⁴⁴ *Id.* Question 2: Institutional choice. Is it necessary to formally create autonomous institutions (COP, secretariat, monitoring committee ...) to monitor the implementation of the Global Pact? Is it necessary to refer to an institution external and pre-existing monitoring of the Covenant? And in the latter case, which one? Could we envisage the combined operation of outside?

⁴⁵ *Id.* Question 3: Editor's Choice. Should the provisions of the treaty itself contain all the provisions relating to tracking mechanism? Or should the definition of modalities be referred to subsequent decisions, which could be taken, according to the responses to the question 2, either by a COP or by an external institution and pre-existing?

⁴⁶ *Id.* Fourth Questionnaire sent to the Group of Experts, Project on a Global Pact for the Environment, Fourth consultation of the international network of experts, Wording and content of the principles (on file with Yann Aguila).

⁴⁷ *Id.*

⁴⁸ Compendium, Project on a Global Pact for the Environment (on file with Yann Aguila).

⁴⁹ Kenig-Witkowska, *supra* note 30, at 6-7.

3. June 2017: Paris Meeting and Launch at the Sorbonne

The individual comments from the contributors enabled the GEP to identify fundamental principles, specify the Pact's content and determine the proper wording of each principle.⁵⁰ The GEP intended to prepare a text with clear added value for the development of international environmental law, while also being short, precise and capable of creating consensus among States despite their political, economic, and environmental differences.⁵¹ It was necessary to strike a balance between being realistic but also significantly ambitious to warrant the adoption of a new instrument. The draft takes into account the diversity of needs, principles and challenges characterizing the environment.⁵² An attempt was made to achieve balance between rights and obligations, taking into account the special circumstances of developing countries.⁵³ With respect to the principles and wording chosen, these were based on the most commonly recognized principles and the most often used formulation of such principles.⁵⁴ The draft Global Pact was designed to facilitate implementation of national laws and policies through provisions as general as possible while also having specific legal content.⁵⁵

The CDJ's Environment Committee highlighted that the work to draft a Global Pact was "preparatory," aimed at informing the future reflection of a draft text within the U.N.. The Global Pact was thus originally designed to be a "working document," complemented by "Comments," which could express the experts' interrogations, debates, and hesitations.⁵⁶ As a working document, it was meant to be modified and debated. Once an initial version of the document was drafted, thirty experts met for an in-person discussion at the French *Conseil Constitutionnel* on June 23rd, 2017.⁵⁷ These experts represented the entire network of experts and a diversity of legal systems, and were led by members of the International Union for Conservation of Nature (IUCN) Academy of Environmental Law and the IUCN World Commission on Environmental Law (WCEL)⁵⁸ under the presidency of Fabius.⁵⁹ Meeting into the night, the committee discussed the initial draft, drew conclusions, harmonized the principles from a human rights perspective, and finalized the text.⁶⁰ The draft consists of a preamble and 26 articles, comprising 20 principles.⁶¹ It encompasses substantive and procedural rights and duties, embodying consolidated and emerging principles of international environmental law.

In the Preamble, the Pact acknowledges the threats to the environment and the need for increased ambition, considering the urgency to tackle climate change, the unprecedented loss of biodiversity and the need to ensure ecosystem resilience. The Preamble reaffirms previous nonbinding declarations as well as the SDGs. The nature of the threats requires State cooperation according to their common but differentiated responsibilities and respective capabilities, in light

⁵⁰ Aguila & Viñuales, *supra* note 25, at XX.

⁵¹ CLUB DES JURISTES, *supra* note 26, at 38.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Kenig-Witkowska, *supra* note, at 30, at 6-7.

⁵⁶ First Questionnaire sent to the Group of Experts, *supra* note 34.

⁵⁷ CLUB DES JURISTES, *supra* note 5, at 8.

⁵⁸ Peter Doran, et al., Summary of the Third Substantive Session of the Ad Hoc Open-ended Working Group towards a Global Pact for the Environment: 20-22 May 2019, 35 INT'L INSTITUTE FOR SUSTAINABLE DEVELOPMENT 2 (2019), <http://enb.iisd.org/download/pdf/enb3503e.pdf>

⁵⁹ Aguila & Viñuales, *supra* note 25.

⁶⁰ Club des Juristes, *supra* note 26, at 8.

⁶¹ *Project Global Pact for the Environment*, LE CLUB DES JURISTES, (Jun. 24, 2017), <http://www.leclubdesjuristes.com/wp-content/uploads/2017/05/Project-Global-Pact-for-the-Environment.pdf> For an analysis of each principle included in Draft Zero, see Yann Aguila & Jorge E. Viñuales, A Global Pact for the Environment: Legal Foundations (C-EENRG C-EENRG Report 2019-1 ed. 2019). YANN AGUILA, ET AL. (EDS.), PRINCIPIOS DE DERECHO AMBIENTAL Y AGENDA 2030 (Tirant lo Blanch 2019).

of their different national circumstances. Additionally, States are motivated to promote sustainable development for present and future generations, considering intragenerational and intergenerational equity, while respecting balance and integrity of the Earth's ecosystems. Members are conscious of the need to respect human rights and the rights of people in vulnerable situations, as well as the role of women, and invite non-State actors to participate in environmental protection. They also stress the fundamental importance of science and education for sustainable development. Finally, they affirm the need to adopt a common position and principles that will inspire and guide the efforts of all to protect and preserve the environment.

The Pact is based on two pillars: the right of every person to an ecologically sound environment (Article 1), and the duty of States or international institutions, and every person, to take care of the environment (Article 2). The duty to integrate environmental protection in national policies and pursue sustainable development is contained in Article 3. Article 4 promotes intergenerational equity, placing a duty on present generations to ensure that future generations have the ability to meet their own needs. Articles 5 to 8 refine and consolidate the “older” principles of prevention, precaution, remediation of environmental damages and the polluter-pays. Articles 9, 10 and 11 provide for access to information, public participation and access to environmental justice, while Articles 12 and 13 provide for education and training, as well as research and innovation. Article 14 encourages the role of non-State actors and subnational entities in the implementation of the Pact. Article 15 promotes the duty to adopt and enact effective environmental protections at the national level. Articles 16 and 17 bring the newer principles of resilience and non-regression. Article 18 articulates an organized system that provides for cooperation between nations to facilitate implementation at the international level.⁶² Article 19 provides for measures to protect the environment in relation to armed conflicts. Article 20 acknowledges the diversity of national situations, ensuring the common but differentiated responsibilities and respective capabilities, in light of different national circumstances, when appropriate.

Articles 21 and 22 envision the creation of compliance mechanisms through an implementation body and a Secretariat. Drawing on the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, a Committee of independent experts was envisioned to monitor compliance and facilitate implementation. The design of the Global Pact aims to prevent harm more than to punish it, but also to empower non-state actors to strengthen environmental governance at both the national and international levels.⁶³ Article 23 provides for signature, ratification, acceptance, approval, and accession. Article 24 establishes when the Pact shall enter into force. Article 25 provides for denunciation, and Article 26 for the depositary.

The following day, after the experts met and a final Global Pact draft had been agreed upon, a high-profile symposium was held at the *Grand Amphithéâtre de la Sorbonne*, during which the draft project was officially presented by Fabius to French President Emmanuel Macron and the general public.⁶⁴ The GPE was presented with considerable fanfare and the initiative received ample media coverage.⁶⁵ The ceremony featured former U.N. Secretary-General Ban Ki-moon,

⁶² Maria Antonia Tigre, *Princípio da Cooperação*, in PRINCÍPIOS DE DERECHO AMBIENTAL Y AGENDA 2030 (Yann Aguila, et al. eds., 2019).

⁶³ Navajas & Lobel, *supra* note 28.

⁶⁴ *Vers Un Pacte Mondial Pour l'Environnement: Agir pour la planète, agir par le droit* LE CLUB DES JURISTES, (June 24, 2017), http://www.leclubdesjuristes.com/wp-content/uploads/2017/05/CDJ_Pacte-mondial-pour-l'environnement_Programme.pdf.

⁶⁵ See, e.g., Bid for Environmental Rights Pact to Kick Off in Paris Tomorrow (The Times of India, June 23, 2017), <https://www.india.com/news/agencies/bid-for-environmental-rights-pact-to-kick-off-in-paris-2265306/>; Un Pacte Mondial pour

former Governor of California Arnold Schwarzenegger, the French Minister of the Environment Nicolas Hulot, the Mayor of Paris Anne Hidalgo, several other political figures, and a wider public of experts, diplomats, students, and interested people.⁶⁶ The conference closed with a speech from President Macron, who vowed to personally act to push the Pact forward for adoption at the UNGA.⁶⁷

Phase II: Adoption of the Resolution (Sep. 2017 – May 2018)

The French delegation introduced the Global Pact on the sidelines of the 72nd session of the UNGA in a high-level event titled “Summit on a Global Pact for the Environment.”⁶⁸ Between September 2017 and May 2018, Member States held closed doors negotiations to draft a resolution unfolding the process of debating a potential Global Pact. In May 2018, the UNGA adopted a resolution titled “Towards a Global Pact for the Environment,” by which Member States requested the U.N. Secretary-General to submit a report identifying and assessing possible gaps in international environmental law and environment-related instruments and establish an ad hoc open-ended working group (OEWG) to consider the report and discuss options to address said gaps with a view to making recommendations.⁶⁹

This chapter focuses on the process of adopting Resolution No. 72/277. Phase II, entitled Adoption of the Resolution, relates to the beginning of the discussions of a potential Global Pact at the U.N., starting from the high-level event held by the French delegation in September 2017 to the adoption of the resolution in May 2018. Section I covers the high-level event held at the 72nd UNGA, in which French President Macron presented the Global Pact to U.N. delegates. Part II relates to the subsequent period at the UNGA, in which the diplomatic process for the adoption of a resolution unfolded behind closed doors. Additionally, several academic and diplomatic events were held to support the GPE, gathering support for the proposal. Section III focuses on the draft resolution submitted by the French government and its adoption in May 2018.

Protéger l'Environnement (Le Monde, 25 June 2017); Un Projet de Pacte Mondial pour l'Environnement (Le Figaro, 24 June 2017); Macron Promet de Défendre un “Pacte Mondial pour l'Environnement” (Reuters, 24 June 2017); Emmanuel Macron proposera un pacte pour l'environnement à l'ONU (Le Figaro, 24 June 2017), <http://www.lefigaro.fr/sciences/2017/06/24/01008-20170624ARTFIG00137-emmanuel-macron-proposera-un-pacte-pour-l-environnement-a-l-onu.php>; Macron s'engage à défendre le projet de « pacte mondial pour l'environnement (Le Monde, 24 June 2017), https://www.lemonde.fr/climat/article/2017/06/24/macron-promet-de-porter-le-projet-de-pacte-mondial-pour-l-environnement-devant-l-onu_5150639_1652612.html; Macron, Schwarzenegger back global pact on environment (France 24, 24 June 2017), <https://www.france24.com/en/20170624-macron-launches-global-environment-pact-paris>; France's Macron to back push for global environment rights pact (Reuters, 24 June 2017), <https://www.reuters.com/article/us-world-climatechange-macron-idUSKBN19F0LG>; Emmanuel Macron teams up with Arnold Schwarzenegger to take swipe at Donald Trump on climate change (Independent, 24 June 2017), <https://www.independent.co.uk/news/world/americas/us-politics/trump-macron-arnold-schwarzenegger-climate-change-make-planet-great-again-a7806491.html>.

⁶⁶ See Yann Aguila, *Vers un Pacte Mondial pour l'Environnement: Acte Fondateur à Paris le 24 Juin 2017*, 25 LA SEMAINE JURIDIQUE 718 (2017).

⁶⁷ See *Speech delivered by President Emmanuel Macron during the international launch summit of the 'Global Pact for the Environment', which took place during the 72nd UN General Assembly*, MINISTÈRE DE L'EUROPE ET DES AFFAIRES ÉTRANGÈRES (SEPT. 19, 2017), <https://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/events/united-nations-general-assembly-sessions/unga-s-72nd-session/article/speech-by-m-emmanuel-macron-president-of-the-republic-summit-on-the-global-pact> [hereinafter President Macron speech]

⁶⁸ *Id.*

⁶⁹ UNGA, *Towards a Global Pact for the Environment*, UN Doc A/RES/72/277 (May 10, 2018).

1. *September 2017: 72nd United Nations General Assembly*

The Summit on a Global Pact for the Environment was held at the U.N. headquarters in New York as a side event to the high-level segment of the 72nd session of the UNGA on September 19th, 2017.⁷⁰ The Secretary-General of the UN, 40 Heads of State and Government, Ministers, representatives from U.N. institutions, and figures from civil society attended the Summit. French President Macron gave a speech announcing the Global Pact as the “next phase” in environmental protection.⁷¹ Noting the protection of nature as a daily battle for the U.N. and its agencies, and the rise of statements, conventions, and protocols that promote joint efforts in environmental protection, President Macron said that it was our common responsibility to go further in transforming our societies, taking resolute action for environmental protection.⁷² He added:

A framework that will promote at the highest level peoples’ and governments’ ambitions for protecting the planet. A framework that will establish rights, but also duties for mankind as regards nature and therefore as regards itself. This collective framework is the Global Pact for the Environment.(...) I very strongly believe that the world is ready for this and that it’s our responsibility; and rather than spend too much time wondering whether we should reopen issues we’ve already closed, or decisions we’ve already taken, we’ve instead got to forge ahead and build the next step. This Global Pact for the Environment is the next step.⁷³

The idea was received with great enthusiasm, with immediate encouragement of 17 world countries.⁷⁴ U.N. Secretary-General António Guterres⁷⁵ and President of the European Council Donald Tusk expressed statements in support of the Global Pact.⁷⁶ Speakers included Bangladesh, Bolivia, China, Costa Rica, Croatia, Estonia, Fiji, Gabon, Guinea for the African Union, India,

⁷⁰ President Macron speech, *supra* note 68.

⁷¹ UN / GLOBAL PACT ENVIRONMENT (UN Multimedia, Sep. 19, 2017), <http://www.unmultimedia.org/avlibrary/asset/1972/1972090/>.

⁷² Summit on a Global Pact for the Environment, Concept Note (Sep. 19, 2017), <https://wedocs.unep.org/bitstream/handle/20.500.11822/21712/Global%20Pact%20for%20the%20environnement%20-%20Concept%20note%20%28France%29.pdf?sequence=1&isAllowed=y>.

⁷³ Macron, *supra* note 68.

⁷⁴ Columbia Center on Sustainable Investment, *World Leaders Discuss a Global Pact for the Environment*, STATE OF THE PLANET: EARTH INSTITUTE | COLUMBIA UNIVERSITY (Sep. 26, 2017), <http://blogs.ei.columbia.edu/2017/09/26/world-leaders-discuss-a-global-pact-for-the-environment/>.

⁷⁵ UN News, *French initiative to create global environment pact deserves support, says Secretary-General* (Sep. 19, 2017), <https://news.un.org/en/story/2017/09/565352-french-initiative-create-global-environment-pact-deserves-support-says>.

⁷⁶ European Council, *Council of the European Union, Remarks by President Donald Tusk at the High-Level event on the Global Pact for the Environment* (Sep. 19, 2017), <https://www.consilium.europa.eu/en/press/press-releases/2017/09/19/tusk-speech-un-high-event-environment/>.

Mexico, Norway.⁷⁷ The initiative subsequently received ample coverage in the media,⁷⁸ as well as in academic and policy circles.⁷⁹

Following the high-level summit, the Columbia Center on Sustainable Investment (CCSI) and the U.N. Sustainable Development Solutions Network (SDSN) organized an academic conference to discuss the blueprint for a Global Pact at Columbia University.⁸⁰ The initiative received praise from academics like Prof. Boisson de Chazournes, who welcomed a document to unify the sprawling web of existing environmental law with core principles, and Prof. Burkett, who hoped the Pact could catalyze a green audit of other areas of international governance such as trade, investment, and intellectual property.⁸¹ Significantly, Prof. Susan Biniaz questioned some of the core premises of the Pact, including the idea of codifying principles into hard law, and presented concerns about the effects of the Pact on different iterations of the principles drafted to address specific circumstances. Her concerns echoed a paper published a couple of weeks earlier, which summarized ten questions about the Global Pact, and was harshly critical of it.⁸²

While she acknowledged the need for more action to protect the environment, she argued the Global Pact was not the “right vehicle” for enhancing environmental protection. She raised legal and policy questions, including how the Pact relates to other international agreements, whether it addresses the actual causes of inadequate environmental protection, and whether the provisions would solve any particular environmental problem. Amidst some confusion on the Pact’s intended purpose (create a coherent body of law, provide legally binding effect to soft law principle, create an environment-oriented human-rights treaty or set out law that could be relied upon in courts) and what is its intended scope, she questioned what would be the added value of adopting such an initiative. Her negative approach caused some pause, slowing down the momentum the Pact had built.

⁷⁷ Global Pact for the Environment – Update, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/22190/Global%20Pact%20for%20the%20Environment%20-%20Concept%20note%20%2813%20November%29.pdf?sequence=3&isAllowed=y>.

⁷⁸ ‘Wang Yi Attends Global Pact for the Environment Summit’ (Ministry of Foreign Affairs of the People’s Republic of China, 20 September 2017); H Xiao, ‘China Lauds UN Environment Pact’ (ChinaDaily, 20 September 2017); ‘Macron rilancia all’Onu un Patto globale per il clima’ (La Stampa, 21 September 2017); ‘Secretário-geral da ONU pede apoio a pacto ambiental proposto pela França’ (Nações Unidas no Brasil, 22 September 2017); Laurent Fabius and Yann Aguila, ‘Un Pacto Medioambiental’ (El País, 2 August 2018); ‘Global Pact Will Boost International Environmental Governance’ (The Guardian (Nigeria), 25 September 2018); ‘Appel de 100 Juristes pour l’Adoption d’un Pacte Mondial pour l’Environnement’ (Le Monde, 9 October 2018); Yann Aguila et al, ‘The Time is Now for a Global Pact for the Environment’ (The Guardian, 9 October 2018); ‘Uhuru: Kenya Committed to Fight against Climate Change’ (Daily Nation (Kenya), 11 November 2018).

⁷⁹ See, e.g., Marisol Anglés Hernández, et al., *Global Perspectives on a Global Pact for the Environment*, SABIN CENTER FOR CLIMATE CHANGE LAW (Sep. 20, 2018), <http://blogs.law.columbia.edu/climatechange/2018/09/20/global-perspectives-on-a-global-pact-for-the-environment/>. In addition, many meetings have been held around the world, including in Paris (Conference ‘Towards a Global Pact for the Environment’, La Sorbonne, 24 June 2017), New York (Conference on the Global Pact for the Environment, Columbia University, 20 September 2017), Bogotá (Symposium on the Global Pact for the Environment organized by the Attorney General of the Nation, 1 March 2018), Brasília (Round Table on the Global Pact for the Environment, World Water Forum, 19 March 2018), Dakar (Conference ‘L’Afrique s’engage pour la Planète’, 14 May 2018), Geneva (Conference on the Global Pact for the Environment at the UN International Law Commission, 10 July 2018), Santiago de Chile (Coloquio ‘Pacto mundial del medio ambiente, derechos humanos, y constitución’, 28 August 2018), Québec (Conférence ‘Une opportunité pour un Canada plus vert? Le projet de Pacte mondial pour l’environnement’, 21 September 2018), Ottawa (‘Le projet onusien de Pacte mondial pour l’environnement : quelles implications pour le Canada?’, 24 September 2018), Beijing (Conference on the legal aspects of a healthy environment, 12 October 2018), Naples (‘Une patto globale per l’ambiente’, 19 October 2018).

⁸⁰ Columbia Center on Sustainable Investment, *Conference on the Global Pact for the Environment* (Sep. 20, 2017), <http://ccsi.columbia.edu/2017/09/20/conference-on-the-global-pact-for-the-environment/>.

⁸¹ Nathan Lobel, *World Leaders Discuss a Global Pact for the Environment* § 2019 (CCSI 2017).

⁸² Susan Biniaz, *10 Questions to Ask About the Proposed “Global Pact for the Environment”*, <http://columbiaclimatelaw.com/files/2017/08/Biniaz-2017-08-Global-Pact-for-the-Environment.pdf>.

2. *Sep. 2017-May 2018: Informal Meetings*

After the Global Pact was proposed by the French delegation to the UNGA, an internal process unfolded at the U.N.. For the idea to move forward, the General Assembly had to vote on a procedural resolution to provide for the establishment of an open intergovernmental working group responsible for negotiating the Pact and setting out its parameters, such as its scope and legally binding nature.⁸³ Between September 2017 and May 2018, several informal meetings occurred between delegates outlining the scope of a draft resolution in support of the Pact. The internal process unfolded behind closed doors. France and supportive nations planned to bring forward a resolution that would ignite a discussion on the Pact itself. Due to significant pushback from a few delegations, an agreement was reached to take a step back, and instead submit a watered-down resolution to the UNGA. The compromise reached between countries related to a procedural resolution that ignited a discussion on the current state of international environmental law. It set forward the process of considering the codification of environmental principles, asking first whether a Global Pact is needed.⁸⁴

Additionally, several significant steps were taken to support the idea of a Global Pact, including expert gatherings,⁸⁵ a Sino-French Summit between French President Emmanuel Macron and Chinese President Xi Jinping,⁸⁶ and a high-level discussion organized by the U.N. Environment in Geneva.⁸⁷

3. *May 2018: Adoption of the UNGA Resolution A/72/L.51*

Under point 14 of the Agenda of the UNGA's plenary (Integrated and coordinated implementation of and follow-up to the outcomes of the major U.N. conferences and summits in the economic, social and related fields), the UNGA held a meeting on May 10th, 2018 to debate a potential resolution to continue the dialogue on a GPE.⁸⁸ France presented a Draft Resolution

⁸³ Report of the Ad Hoc Committee on the Improvement of the Methods of Work of the General Assembly, U.N.G.A. 18th sess., 1256th Plen. Mtg., U.N. Doc A/RES/1898 (XVIII) (Nov. 11, 1963). See also Rules of Procedure of the General Assembly, U.N. Doc A/520/Rev.18 (Feb. 21, 2017).

⁸⁴ Macron, *supra* note 68.

⁸⁵ See, e.g., Hernández, et al., *supra* note 79. In addition, many meetings have been held around the world, including in Paris (Conference 'Towards a Global Pact for the Environment', La Sorbonne, 24 June 2017), New York (Conference on the Global Pact for the Environment, Columbia University, 20 September 2017), Bogotá (Symposium on the Global Pact for the Environment organized by the Attorney General of the Nation, 1 March 2018), Brasilia (Round Table on the Global Pact for the Environment, World Water Forum, 19 March 2018), Dakar (Conference 'L'Afrique s'engage pour la Planète', 14 May 2018), Geneva (Conference on the Global Pact for the Environment at the UN International Law Commission, 10 July 2018), Santiago de Chile (Coloquio 'Pacto mundial del medio ambiente, derechos humanos, y constitución', 28 August 2018), Québec (Conférence 'Une opportunité pour un Canada plus vert? Le projet de Pacte mondial pour l'environnement', 21 September 2018), Ottawa ('Le projet onusien de Pacte mondial pour l'environnement : quelles implications pour le Canada?', 24 September 2018), Beijing (Conference on the legal aspects of a healthy environment, 12 October 2018), Naples ('Une patto globale per l'ambiente', 19 October 2018).

⁸⁶ 'Joint Declaration between the People's Republic of China and the French Republic' (10 January 2018) para 8 ('China and France intend to continue their constructive dialogue on the formulation of the Global Pact for the Environment'), translation available at <http://www.xinhuanet.com/english/2018-01/11/c_136886038.htm>.

⁸⁷ UN Environment, High-level discussion on the Global Pact for the Environment organized by the UN Environment in Geneva (Mar. 9, 2018, <https://www.unenvironment.org/events/un-environment-event/high-level-discussion-global-pact-environment>). The Geneva Environment Network looked at the contribution of the Global Pact to global environmental governance, informing participants on progress achieved, potential risks and opportunities identified so far in the process.

⁸⁸ United Nations Meetings Coverage and Press Releases, General Assembly Decides to Establish Working Group Aimed at Identifying Gaps in International Environmental Law § 2019 (United Nations UN Meeting coverage, GA 12015, 10 May 2018 ed. 2018).

(A/72/L.51) which was sponsored by 71 States after intense diplomatic negotiations.⁸⁹ The Kenyan delegation proposed minor amendments (A/72/L.53), primarily aimed at ensuring that the process unfolds in Nairobi.⁹⁰

Some delegations took the floor to oppose the project or aspects of it, mainly related to procedural matters.⁹¹ The United States claimed that Member States had not been able to consider how such a proposal would contribute to the existing environmental regime and would be willing to support the establishment of a working group to address gaps, but not the title of the draft resolution, which included specific reference to the Global Pact, or any language that would prejudge discussions before challenges had been identified.⁹² The Philippines also noted the need to follow a transparent and consultative process, with extensive national inter-agency consultations. The Russian Federation noted that the drafting process was not participative and prevented the addition of comments and suggestions. Arguing that France did not consult with the Group of 77 and China to inquire whether they would vote as a group, and instead engaged countries bilaterally, the Philippines decided to vote against it.⁹³

Some of the delegates' comments reflected the need to focus on the implementation of existing agreements rather than negotiating a new document. The Philippines noted that the 2030 Agenda already provided an integrative framework for bringing the global community together on the environment and that we should renegotiate principles.⁹⁴ Also expressing their views on the resolution were representatives from Bulgaria (on behalf of the European Union, voicing disappointment with Kenya's amendment), Bolivia (commending the effort and reinforcing the principle of common but differentiated responsibilities), China (welcoming the initiative), Syria (pointing out that the concept of world environmental law was still legally controversial) and Mali (which had not taken part in the vote, but would have voted in favor of the text).⁹⁵

The United States requested a recorded vote as "no transparent and open discussion had taken place for a new environment-related instrument."⁹⁶ The UNGA adopted Resolution A/72/L.51 by a large majority.⁹⁷ Out of the 193 U.N. Member States, 143 voted in favor of the resolution, five opposed it (Philippines, Russia, Syria, Turkey, the USA), seven abstained (Belarus, Iran,⁹⁸ Malaysia, Nicaragua, Nigeria, Saudi Arabia, Tajikistan) and 38 did not vote.⁹⁹

Resolution No. 72/277, entitled "Towards a Global Pact for the Environment," represents a decisive first step in mobilizing the international community towards environmental protection, while also embodying a commitment from governments to explore existing gaps in international

⁸⁹ Lucien Chabason & Elisabeth Hege *What to expect from a Global Pact for the Environment?* 2 (IDDRI, 2019), <https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/D%C3%A9cryptage/201901-IB0119EN-pacte%20mondial%20env.pdf>.

⁹⁰ Emphasizing Nairobi's standing as the environmental capital of the United Nations, she said all substantive sessions — rather than just the initial one — must be held in the Kenyan capital. That would preserve the integrity of UNEP and the United Nations. The proposal to have Nairobi as the location of the substantive session was in accordance with all resolutions, including the decision adopted in Rio de Janeiro, Brazil, on 20-22 June 2012, contained in the document "The Future We Want".

⁹¹ United Nations Meetings Coverage and Press Releases, *supra* note 88.

⁹² *Id.*

⁹³ Philippines, Explanation of Vote (May 10, 2018), <http://statements.unmeetings.org/media2/18559939/philippines-explanation-of-vote.pdf>.

⁹⁴ *Id.*

⁹⁵ United Nations Meetings Coverage and Press Releases, *supra* note 88.

⁹⁶ *Id.*

⁹⁷ UNGA Resolution 72/277, *supra* note 69.

⁹⁸ Iran's vote was wrongfully recorded, The country wished to abstain rather than vote against it. United Nations Meetings Coverage and Press Releases, *supra* note 88.

⁹⁹ UN, *Voting Record, Item 14 A/72/L.51 as amended (Towards a Global Pact for the Environment)*, General Assembly 88th Plenary Meeting, UN(2018), available at <http://papersmart.unmeetings.org/media2/18559921/vr-1.pdf>.

environmental law and potential ways to approach them.¹⁰⁰ However, the Resolution uses neutral language and provides an intentional distance from the draft proposed by the French government. Before analyzing a potential new agreement, it was necessary to assess whether there was a need for one.¹⁰¹ Notwithstanding the title of the Resolution, “Towards a Global Pact for the Environment,” the text does not actually mention a Global Pact or references the original French draft text. The only reference is by noting the convening of the high-level event held on the sidelines of the 72nd session of the UNGA in 2017, mentioned in its preamble. Politically, it was challenging to begin the process of discussing a new international agreement that was unilaterally proposed by one government. Some countries immediately opposed the idea simply because France proposed it. Instead, to jumpstart the process, it was necessary to start from scratch.

The preamble of the Resolution introduced the context of the need to continue to address, comprehensively and coherently, the challenges posed by environmental degradation in the context of sustainable development. Accordingly, the Resolution sets out a linear and open-ended methodological approach to potential problems and solutions in international environmental law.¹⁰² To gain more clarity on the need for additional action, States agreed to assess whether there are gaps or deficiencies in international environmental law, leaving it open to further deliberations whether to do something about those. The Resolution opened a two-step process: it requested a report from the Secretary-General to assess gaps in international environmental law and established a working group to discuss said report, considering possible gaps in international environmental law.

As a first step, the Resolution requested the UNSG to submit a technical and evidence-based report at the 73rd session of the UNGA in 2018. The UNSG was tasked with identifying and assessing possible gaps in international environmental law and, to encompass non-legally binding documents, environment-related instruments. The investigation shall have the goal of strengthening the implementation of existing instruments at the core of the process. Beginning with the perceived problems followed a logical methodology.¹⁰³ However, the open-ended mandate has caused much debate among delegates. Supporters of a Global Pact expressed frustration with a perceived ambiguity in the Resolution, which set a mandate considered too generic and all-encompassing.¹⁰⁴ During the Nairobi sessions, States disagreed on the meaning of “technical and evidence-based,” “gaps,” and “environment-related instruments.” The question opened the door for a broad discussion on inefficiencies of international environmental law, including gaps in substantive instruments, the governance of international environmental law and its effective implementation.

The second step was to install an ad hoc open-ended working group (OEWG) under the UNGA’s auspices to consider the matter. The group received three specific tasks: (i) consider the report, using it as a guide for discussions; (ii) debate possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate; (iii) if

¹⁰⁰ Niko Urho, et al., *International Environmental Governance: Accomplishments and Way Forward*, NORDIC COUNCIL OF MINISTERS, (2019), <http://norden.diva-portal.org/smash/get/diva2:1289927/FULLTEXT01.pdf>; Elena Loredana Pirvu, *The New Global Pact for the Environment*, 15 ACTA UNIVERSITATIS DANUBIUS JURIDICA 5(2019).

¹⁰¹ Christina Voigt, *How a ‘Global Pact for the Environment’ could add value to international environmental law*, 28 REV. OF EUR., COMP. & INT’L ENV. L. 13 (2019).

¹⁰² Susan Biniaz, *The UNGA Resolution on a ‘Global Pact for the Environment’: A chance to put the horse before the cart*, 28 REV. OF EUR., COMP. & INT’L ENV. L. 33 (2019).

¹⁰³ *Id.* at. 34.

¹⁰⁴ Peter Doran, et al., Summary of the First Substantive Session of the Ad Hoc Open Ended Working Group towards a Global Pact for the Environment: 14-18 January 2019, 35 INT’L INSTITUTE FOR SUSTAINABLE DEVELOPMENT 13 (2019), <http://enb.iisd.org/unep/globalpact/oweg1/>; Aguila & Viñuales, *A Global Pact for the Environment: Conceptual foundations*.

deemed necessary, to deliberate the scope, parameters and feasibility of an international instrument, with a view to making recommendations to the UNGA. These recommendations may include the convening of an intergovernmental conference to adopt an international instrument. The group set a deadline to produce its conclusions to the Assembly during the first half of 2019.

The Resolution does not restrict the consideration of possible gaps identified in the Secretary-General's report.¹⁰⁵ Instead, the OEWG should use the report as a guide to consider whether there are possible "gaps" in existing environmental law and policy and, if so, to articulate ways of approaching them. The OEWG had full discretion in deciding how to move forward.¹⁰⁶ The Resolution does not presume there are gaps in international environmental law. If gaps exist, it leaves open to discussion the type of options that could be discussed to direct them. It also did not task the OEWG with negotiating a legally binding instrument. In fact, the OEWG's mandate does not anticipate the need for a new "international instrument." If it decides a new agreement is necessary, the Resolution does not specify its form, legal character, or name.¹⁰⁷ Not prejudging a specific outcome was essential to provide a distance from the Global Pact. The OEWG's recommendations could include "the convening of an intergovernmental conference" to negotiate a binding or non-legally binding text, but this is just one of the options States could choose. A multi-pronged outcome was a possibility and discussions could lead to several different directions.¹⁰⁸ These included a new legally binding instrument covering a single issue or a wide range of topics, a new instrument of a political character aimed at one or more issues, actions (such as increased funding, a campaign, or a high-level gathering) not involving a new instrument, a combination of the above, or no action.¹⁰⁹

A few specific details established the contours of the mandate. The OEWG was open to participation by all States Members of the U.N. and all members of the specialized agencies.¹¹⁰ Attendance to formal meetings as observers was open to relevant non-governmental organizations in consultative status with the Economic and Social Council, as well as to those that were accredited to relevant conferences and summits.¹¹¹ In addition to setting a deadline for formalizing concluding recommendations, it decided that the working group should hold at least two sessions, one procedural session in New York, focused on deciding the duration, number, and venue of following sessions, as well as one substantive session in Nairobi.¹¹² The Resolution requested the UNGA to appoint two co-chairs of the OEWG, specifying one would come from a developing country and one from a developed country, to oversee its consultations.¹¹³ The OEWG should consult all Member States, regional groups, and relevant stakeholders, and be open, transparent and inclusive.¹¹⁴ Finally, the resolution specified how to fund the working group. The costs

¹⁰⁵ Biniiaz, *supra* note 102, at 34.

¹⁰⁶ Géraud de Lassus Saint-Geniès, *Not All that Glitters is Gold: An Analysis of the Global Pact for the Environment Project*, CENTRE FOR INTERNATIONAL GOVERNANCE INNOVATION (May 17, 2019), https://www.cigionline.org/static/documents/documents/Paper%20no.215web_3.pdf

¹⁰⁷ Biniiaz, *supra* note 102, at 34.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ UNGA Resolution 72/277, *supra* note 69, ¶ 3.

¹¹¹ *Id.*, at ¶ 4 (Reference is made to the non-governmental organizations that were accredited to the following relevant conferences and summits: the United Nations Conference on Environment and Development, the World Summit on Sustainable Development, the United Nations Conference on Sustainable Development and the United Nations summit for the adoption of the post-2015 development agenda)

¹¹² UNGA Resolution 72/277, *supra* note 69, ¶ 5.

¹¹³ *Id.*, at ¶ 6.

¹¹⁴ *Id.*, at ¶ 6.

associated with its work shall be met from voluntary contributions.¹¹⁵ It also requested the Secretary-General to arrange for substantive support from UNEP based on voluntary contributions.¹¹⁶

Significantly, the Resolution recognizes that the process (i.e., the OEWG and its possible continuation by an intergovernmental conference) “should not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.”¹¹⁷ The statement is meaningful, given the concern by several delegates about the potential effect of a new instrument on existing law. This relates to the delicate question of the relationship between a potential GPE and other existing agreements.¹¹⁸ The requirement was reinforced in the UNSG’s report and the final recommendations by the OEWG. In line with this statement, the Resolution reaffirmed the purposes and principles of the Charter of the U.N., existing obligations and commitments under international environmental law, the principles of the Rio Declaration, the 2030 Agenda for Sustainable Development, and the Sustainable Development Goals. It recalled the Declaration of the U.N. Conference on the Human Environment,¹¹⁹ the Rio Declaration on Environment and Development,¹²⁰ Agenda 21,¹²¹ the Programme for the Further Implementation of Agenda 21,¹²² the Johannesburg Declaration on Sustainable Development,¹²³ the Plan of Implementation of the World Summit on Sustainable Development (Johannesburg Plan of Implementation),¹²⁴ the outcome document of the U.N. Conference on Sustainable Development entitled “The future we want,”¹²⁵ as well as the outcomes of all the major U.N. conferences and summits in the economic, social and environmental fields.

Scholars, delegates, and drafters of the Global Pact were harshly critical of the Resolution. One scholar questioned whether the Secretary-General raised the right questions.¹²⁶ Bodansky challenges the possibility of having an objective, evidence-based answer to the question of whether the lack of a general agreement is a gap, arguing it dangles on political and moral judgments.¹²⁷ A few delegates condemned the resolution’s invitation to look at gaps beyond international environmental law, arguing it opened “a can of worms.”¹²⁸ Supporters of the Pact called the Resolution “ambiguous,” deeming the mandate extensively broad. Biniaz, however, praised the Resolution for allowing States to step back and methodically consider the most critical missing pieces in environmental law and policy.¹²⁹ Boer interpreted the Resolution as an indication of the

¹¹⁵ UNGA Resolution 72/277, *supra* note 69, ¶ 7.

¹¹⁶ *Id.*, at ¶ 8.

¹¹⁷ *Id.* at ¶ 9.

¹¹⁸ Saint-Geniès, *supra* note 106, at 6.

¹¹⁹ See Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972 (A/CONF.48/14/Rev.1), part one, chap. I.

¹²⁰ Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992, vol. I, Resolutions Adopted by the Conference (United Nations publication, Sales No. E.93.I.8 and corrigendum), resolution 1, annex I.

¹²¹ *Id.*, annex II; Nicholas A. Robinson, Agenda 21 and the UNCED Proceedings (Oceana 1993, five volumes), being the *travaux préparatoires* of Agenda 21.

¹²² Resolution S-19/2, annex.

¹²³ Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002 (United Nations publication, Sales No. 03.II.A.1 and corrigendum), chap. I, resolution 1, annex.

¹²⁴ *Id.* resolution 2, annex.

¹²⁵ Resolution 66/288, annex.

¹²⁶ Biniaz, *supra* note 102, at 38.

¹²⁷ Hernández, et al., *supra* note 79.

¹²⁸ Peter Doran, et al., Summary of the First Substantive Session of the Ad Hoc Open Ended Working Group towards a Global Pact for the Environment: 14-18 January 2019, 35 INT’L INSTITUTE FOR SUSTAINABLE DEVELOPMENT 13 (2019), <http://enb.iisd.org/unep/globalpact/oewg1/>.

¹²⁹ Biniaz, *supra* note 102, at 38.

international community's readiness to accept that the fundamental importance of environment warrants a new instrument.¹³⁰

The Resolution is particularly noteworthy for inviting an unprecedented discussion on the state of international environmental law. Rather than jumpstarting a negotiation of a new instrument, it takes a step back. It encourages debate on existing gaps and if/how the international community should address them. By providing a broad mandate, the UNGA strikes an essential balance between the different political views of the Member States, which became apparent since the launch of the Global Pact at the Sorbonne. The wide-ranging question presumes there are no preliminary findings on an outcome. The Resolution is precise in the result the UNGA intends to receive, and the deadline to achieve it. Additionally, it sets significant safeguards that protect the current framework of international environmental law, making sure not to undermine the existing MEAs and institutions.

Phase III: Fulfilling the Resolution (Sep. 2018 – Dec. 2018)

After Resolution No. 72/277¹³¹ was adopted, steps were taken to comply with the requests of the UNGA. This section focuses on the first steps of compliance with the mandate of the U.N. Secretary-General (UNSG) and the open-ended working group (OEWG). Phase III, entitled "Fulfilling the Resolution," starts from the appointment of the Co-Chairs of the OEWG in June 2018, and extends to the publication of a commentary on the UNSG's report by the International Council of Environmental Law (ICEL) in December 2018. Section 1 relates to the UNGA choosing the permanent representatives of Portugal and Lebanon to lead the consultation on gaps in international environmental law in Nairobi. Section 2 focuses on the OEWG's September 2018 organizational session, held in New York to decide on a tentative calendar of meetings and programme of work for the Nairobi substantive sessions.

Section 3 relates to the publication of the UNSG's report at the end of November 2018. As the first publication on international environmental law at the Secretary-General's level, the report represented a landmark for the improvement of this field. Through a dialogue between principles, gaps, and institutions, it set a blueprint for the progressive development of international environmental law. Section 4 provides a commentary on the report, highlighting its most significant conclusions. In December 2018, ICEL published a Note on the report, as well as charts on the regional application of each principle included in the Global Pact.

1. June 2018: Appointment of Co-Chairs of the Working Group

Through Resolution No. 72/277, the UNGA requested that its President appoint two Co-Chairs to oversee consultations of the OEWG. It required one to be chosen from a developing country and the other from a developed country.¹³² On June 24th, 2018, UNGA's President Miroslav Lajcak appointed the permanent representatives of Portugal, Mr. Francisco António Duarte Lopes, and Lebanon, Ms. Amal Mudallali, to lead consultations on gaps in international environmental law.¹³³ The Co-Chairs were assisted by the legal representatives Sérgio Carvalho

¹³⁰ Hernández, et al., *supra* note 79.

¹³¹ UNGA Resolution 72/277, *supra* note 69.

¹³² *Id.*, ¶ 6.

¹³³ Miroslav Lajcak, (ALL PERMANENT REPRESENTATIVES AND PERMANENT OBSERVERS TO THE UNITED NATIONS ED., THE PRESIDENT OF THE GENERAL ASSEMBLY (June 4, 2018). <https://www.un.org/pga/72/wp-content/uploads/sites/51/2018/06/Letter-to-MS-4-June.pdf> (last visited Jun. 14, 2019) (appointing Ambassadors Duarte Lopes and Mudallali as co-chairs of the ad hoc working group on the Global Pact for the Environment negotiations).

and Youssef Hitti.¹³⁴ The working group was responsible for negotiating a final text with the 193 member States.¹³⁵ During this process, the work carried out by the legal experts and the UNSG was used as a basis for discussions, which continued between States in collaboration with stakeholders from civil society.¹³⁶ The U.N. Environment Programme (UNEP) was asked to work closely with the UNGA to guide the working group.¹³⁷

The Co-Chairs brilliantly guided the negotiations with specific questions that refocused discussions to the mandate bestowed upon them. After a broad debate on the UNSG's report, the Co-Chairs sent to delegates a specific list of questions intended to move the discussion forward and reach practical suggestions to the gaps envisioned. Additionally, the Co-Chairs provided an oral and written summary after each session, helping summarize the main arguments, and set the stage for the following sessions. Their diplomacy, moved the discussions forward leading to the adoption of an outcome document by consensus.

2. September 2018: Working Group Organizational Session

The OEWG's organizational session convened from 5-7 September 2018 at the U.N. headquarters in New York, US, holding five meetings.¹³⁸ During the session, the countries approved its programme of work (A/AC.289/CRP.1), adopted the provisional agenda and other organizational matters, agreed on the schedule and agenda for the substantive sessions, and discussed activities' financing.¹³⁹ 98 countries, six intergovernmental organizations,¹⁴⁰ one specialized agency,¹⁴¹ U.N. organs and bodies,¹⁴² and 38 non-governmental organizations attended

¹³⁴ Amal Mudallali (@AmbMudallali). "It was a great honor and pleasure to work on the negotiations for a Global Compact for the Environment with my friend & colleague amb. Francisco Duarte Lopes @Portugal_UN and his team especially Sergio. Carvalho who did a great job with Youssef Hitti our legal advisor & expert." Jul. 10, 2019. Tweet.

¹³⁵ Isabelle Hanne, A l'ONU, la France pose les jalons d'un pacte mondial pour l'environnement, LIBERATION (Sep. 20, 2017), http://www.liberation.fr/planete/2017/09/20/a-l-onu-la-france-pose-les-jalons-d-un-pacte-mondial-pour-l-environnement_1597671. Léia Santacroce, Le Pacte mondial pour l'environnement sur de bons rails, GEO (Sep. 20, 2017), <http://www.geo.fr/photos/reportages-geo/le-pacte-mondial-pour-l-environnement-sur-de-bons-rails-179100>.

¹³⁶ Gary Tabor, President Macron announces Global Pact for the Environment, LEONARDO DICAPRIO FOUNDATION (Jul. 24, 2017), <https://www.leonardodicaprio.org/president-macron-announces-global-pact-for-the-environment/>. Speech by M. Emmanuel Macron, President of the Republic: Summit on the Global Pact for the Environment, FRANCE DIPLOMATIE (Sep. 19, 2017), <http://www.diplomatie.gouv.fr/en/french-foreign-policy/united-nations/united-nations-general-assembly-sessions/unga-s-72nd-session/article/speech-by-m-emmanuel-macron-president-of-the-republic-summit-on-the-global-pact>.

¹³⁷ UNGA Resolution, *supra* note 131, para 8. UN ENVIRONMENT, UN Environment New York Office, Gisele Bündchen Joins Heads of State to Launch the Global Pact for the Environment, <http://www.unep.org/newyork/events/gisele-b%C3%BCndchen-joins-heads-state-launch-global-pact-environment> (last accessed Feb. 19, 2019).

¹³⁸ UNGA Resolution, *supra* note 131, ¶ 5.

¹³⁹ Based upon the provisional agenda and annotations (A/AC.289/1), the agenda was adopted as follows: "1. Opening of the session. 2. Adoption of the provisional agenda and other organizational matters. 3. General discussion. 4. Agenda for the substantive sessions. 5. Information on documents to be considered by the substantive sessions. 6. Financing of the activities of the ad hoc open-ended working group. 7. Other matters. 8. Adoption of the report of the proceedings of the session. 9. Closure of the session." UNGA, Ad hoc open-ended working group established pursuant to General Assembly resolution 72/277, Organizational session, New York, 5–7 September 2018, Provisional agenda and annotations, A/AC.289/1 (1 August 2018).

¹⁴⁰ International Chamber of Commerce, International Committee of the Red Cross, International Federation of Red Cross and Red Crescent Societies, International Organization of la Francophonie, International Union for the Conservation of Nature and Natural Resources, and Organization for Economic Cooperation and Development. UNGA, Ad hoc open-ended working group (OEWG) established pursuant to General Assembly resolution 72/277, Organizational session, New York, 5–7 September 2018, Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277 of 10 May 2018 entitled "Towards a Global Pact for the Environment", A/AC.289/2 (22 October 2018).

¹⁴¹ International Fund for Agricultural Development.

¹⁴² United Nations Environment Programme, and United Nations Entity for Gender Equality and the Empowerment of Women.

the meetings.¹⁴³ The main goal was to reach a consensus on the timing, number, and duration of the substantive sessions.¹⁴⁴

The resolution required the OEWG to complete its work by June 2019, starting no sooner than one month after the submission of the report by the Secretary-General.¹⁴⁵ The EU called for allowing two to three months between the meetings to consider the Secretary-General's report, allowing sufficient time for drafting, and consulting among groups.¹⁴⁶ It was necessary to have a number of sessions that would provide the working group with the time and space for a comprehensive discussion on the substance that enabled it to carry out its work and deliver on what was requested by the UNGA. Notably, there should be enough time "in-session" to allow for a fruitful exchange of views and efficiency in the way it carried out discussions, as well as to allow sufficient time for consultations.¹⁴⁷ Delegates expressed their preferences and agreed to the dates of three substantive sessions, as per the suggestion of the EU.¹⁴⁸

The calendar took into consideration the need to avoid overlap with other environmental meetings,¹⁴⁹ and take advantage of trips already scheduled in the delegates' agenda.¹⁵⁰ Explicitly, delegates expressed a desire to hold one session back-to-back with the fourth session of the U.N. Environment Assembly (UNEA-4). This suggestion was especially relevant to ensure full participation of developing countries and countries in special situations, especially least developed countries (LDCs) and small island developing States (SIDS).¹⁵¹ Underscoring that some countries lacked a permanent mission to UNEP, El Salvador called for an alternative that enabled New York-based missions to engage in the working group, such as by circulating documents at the U.N. Headquarters, and webcasting the Nairobi meetings.¹⁵² They ultimately decided to hold three substantive meetings as follows: (i) the first substantive session from January 14-18, 2019, to give countries as much time as possible to consider the report of the Secretary-General; (ii) the second substantive session from March 18, 2019, for 3-5 days, taking place back-to-back with the UNEA-4; (iii) the third substantive session from May 20, 2019, for 3-5 days.¹⁵³

Delegates extensively discussed how to set out the agenda of the substantive sessions on the second day of the organizational meeting.¹⁵⁴ G-77/China was against the idea of setting a

¹⁴³ OEWG, A/AC.289/2, *supra* note 139, para 10-14.

¹⁴⁴ *Id.* item 3 ("The General Assembly also decided that the organizational session would examine matters related to the organization of the work of the ad hoc open-ended working group, including the duration and number of its substantive sessions, with a view to reporting back to the General Assembly during the first half of 2019.")

¹⁴⁵ UNGA Resolution, *supra* note 131, para 2.

¹⁴⁶ Ana Maria Lebeda, *Governments Commence Organizational Work on Global Pact for Environment*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Sept. 6, 2018), <http://sdg.iisd.org/news/governments-commence-organizational-work-on-global-pact-for-environment/>.

¹⁴⁷ OEWG, A/AC.289/2, *supra* note 139, Annex, Decision 2018/1.

¹⁴⁸ Colombia called for a "sufficient" number of sessions to discuss all the gaps in international environmental governance. Faye Leone, *Governments Set Dates for Global Pact Discussions, Begin Debating Agenda*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Sept. 6, 2018), <http://sdg.iisd.org/news/governments-set-dates-for-global-pact-discussions-begin-debating-agenda/>.

¹⁴⁹ Philippines, supported by the G-77/China, EU, Costa Rica, Japan, Monaco and Senegal, raised concerns with the overlaps between the working group's sessions and other environmental meetings.

¹⁵⁰ For example, El Salvador, supported by Thailand, suggested holding one of the substantive sessions back-to-back with the U.N. Environment Assembly (UNEA 4) in March 2019. Some countries expressed concern about a back-to-back meeting with UNEA-4 in March, especially for smaller delegations (Switzerland); and time needed to absorb discussions from one session and prepare for the next (EU and Australia).

¹⁵¹ These concerns were raised by Madagascar, supported by New Zealand (regarding the number of sessions), as well as Egypt for the Group of 77 and China (G-77/China) with China, Costa Rica, India, Madagascar and Philippines (regarding the need for support for representatives' participation in the working group).

¹⁵² Lebeda, *supra* note 146.

¹⁵³ OEWG, A/AC.289/2, *supra* note 139, Annex, Decision 2018/1.

¹⁵⁴ Leone, *supra* note 148.

formal agenda and anticipating the discussed items, and instead called for a “step-by-step approach.” Delegates proposed beginning with examining the Secretary-General’s report, then deciding how to proceed, defining each provisional agenda for the following session.¹⁵⁵ Each substantive session would thus adopt the subsequent session’s provisional agenda and decide on its programme of work.¹⁵⁶ The working group adopted a provisional agenda for the first substantive session on the last day of the organizational session.¹⁵⁷ The organization session concluded its work on September 7th, 2018. A report was made available shortly afterward.¹⁵⁸

3. November 2018: Publication of the UNSG’s Report

On November 30, 2018 Mrs. Mrema, Director of UNEP’s Law Division, announced the release of the UNSG’s report entitled “Gaps in international environmental law and environment-related instruments: towards a global pact for the environment” (A/73/419).¹⁵⁹ The technical and evidence-based report reviewed and analyzed the corpus of international environmental law and environment-related instruments as well as the governance structure and implementation of international environmental law, identifying gaps and deficiencies. The report is divided into five substantive sections: (i) the scope and status of the principles of international environmental law; (ii) gaps relating to the sectoral regulatory regimes; (iii) environment-related instruments; (iv) gaps relating to the governance structure of international environmental law; and (v) gaps concerning the implementation and effectiveness of international environmental law. These will be specifically explored in the next section.

While welcomed by several delegations, the report was harshly criticized for going beyond its mandate. According to Voigt, who helped draft the report, it adopts a wide interpretation of its mandate in three ways.¹⁶⁰ First, the question of what constitutes a “gap” is broadly answered. This issue was central to the discussions in the first session in Nairobi, as will be detailed below. The report identifies a wide range of gaps and assesses deficiencies which impact the effectiveness of international environmental law. These deficiencies include: (i) “blank spots” in the coverage of MEAs; (ii) the status and content of environmental principles; (iii) gaps within and (iv) between MEAs; (v) gaps between MEAs and other international law; and (vi) gaps related to the implementation of MEAs. Second, it not only identifies and assesses regulatory (i.e. procedural and substantive) and governance gaps in international environmental law, but also assesses gaps in environment-related instruments, including international trade, investment, intellectual property, human rights, peace and security, migration, disaster management and armed conflict. Third, a narrow interpretation of paragraph 1 of the UNGA resolution might suggest that the question of how to address any potentially identified gaps would be subject to the OEWG deliberations and would therefore not be part of the mandate for the report. Nonetheless, the report makes several significant suggestions and recommendations, including specifically to clarify and

¹⁵⁵ Leone, *supra* note 148.

¹⁵⁶ Ana Maria Lebeda, *Delegates Set Agenda for First Session on Global Pact for Environment*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Sept. 7, 2018), <http://sdg.iisd.org/news/delegates-set-agenda-for-first-session-on-global-pact-for-environment/>.

¹⁵⁷ OEWG, A/AC.289/2, *supra* note 139, Annex, Decision 2018/2. (“Pursuant to General Assembly resolution 72/277, the ad hoc open-ended working group is to consider the report and discuss possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate, and, if deemed necessary, the scope, parameters and feasibility of an international instrument, with a view to making recommendations, which may include the convening of an intergovernmental conference to adopt an international instrument, to the Assembly during the first half of 2019.”)

¹⁵⁸ OEWG, A/AC.289/2, *supra* note 139.

¹⁵⁹ UN Secretary-General, *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment*, UN Doc. A/73/419 (Nov. 30, 2018).

¹⁶⁰ Voigt, *supra* note 101.

reinforce principles of international law. This led some states to suggest that the UNSG report did not comply with its mandate.¹⁶¹ These issues will be further detailed below.

Shortly after the report was circulated, ICEL, along with the World Commission of Environmental Law (WCEL), and the International Group of Experts for the Pact published a note on the report.¹⁶² The Note commented on aspects of the report, while also explaining how and why the Nairobi consultations could reach consensus on the codification and progressive development of core principles of international environmental law. It included some additional gaps the report failed to examine, such as the implementation of the recommendations of Agenda 21. It called for a recognition of a unity of purpose in international environmental law, shared by States through a set of universally agreed principles.¹⁶³ Through an assessment of the adoption of environmental principles across regions, it showed that the principles which the Global Pact intends to codify are already accepted worldwide.

On December 10, 2018, ICEL organized a conference at the U.N. Headquarters, entitled “Strengthening Implementation of International Environmental Law - Commentaries on the U.N. Secretary General’s report on International Environmental Law for the Global Pact for the Environment.”¹⁶⁴ The conference was organized on the 70th anniversary of the Universal Declaration of Human Rights (UDHR) and provided an opportunity for leading experts to comment the UNSG’s report. The conference was moderated by Professor Nicholas A. Robinson, and hosted by François Delattre, Permanent Representative of France, including the following speakers: Abdoulaye Barro, Deputy Permanent Representative of Senegal, Roy S. Lee, Permanent Observer for the Asian-African Legal Consultative Organization, Claudia De Windt, Senior Legal Advisor for the American-States Organization, John C. Cruden, Former Assistant Attorney General for Environment and Natural Resources to US Department Justice, and Aguila, Secretary General of the International Group of Experts for the Pact and Former Judge at the Conseil d’Etat (the administrative Supreme Court in France).

Delattre opened the event, emphasizing the fact that the Global Pact is solidly rooted in the U.N. Agenda and provides a way to implement the 2030 Agenda. The Pact offers a unique opportunity to look toward the future, continue to promote international law, and recognize new rights such as the right to a healthy environment. Robinson emphasized the need to address codification and progressive development of international environmental law. He pointed out the UNSG’s report is a landmark in international environmental law, as the first report at this level published internationally. Lee said it was essential to understand the causes of deficiencies, especially being the result of divergent position and interest of states, trade-offs, and watered-down formulations necessary to move forward. De Windt explained how principles are the guiding force for the jurists of international environmental law on a daily basis. Aguila highlighted the importance of the U.N. as an international legislator. He noted the report leads to a long “to-do list” for states, but the starting point must be the codification of the principles of law. The discussions resulted in the conclusion that the Global Pact presents an opportunity to return to the spirit of the UDHR, within the environmental context.¹⁶⁵

¹⁶¹ Voigt, *supra* note 101, at 16.

¹⁶² WCEL et. al., Note on the United Nations Secretary-General’s Report, Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment (Dec. 10, 2018).

¹⁶³ *Id.* at 6.

¹⁶⁴ UN Web TV, Strengthening Implementation of International Environmental Law (Dec. 10, 2018), <http://webtv.un.org/watch/strengthening-implementation-of-international-environmental-law/5977795659001/?lan=english>.

¹⁶⁵ Recap of the Event, Strengthening Implementation of International Environmental Law - Commentaries on the UN Secretary General’s Report on International Environmental Law for the “Global Pact for the Environment,” <https://globalpactenvironment.org/uploads/Conference-NY-EN-10122018.pdf> (last visited Aug. 31, 2019).

In February 2019, the Council of Nordic Ministers (CNM) published a report which investigated international environmental governance in the context of the Global Pact and the UNSG's report.¹⁶⁶ The CNM assessed some of the improvements in international environmental law governance, while evaluating what was still lacking. The report concluded that while the reform completed at Rio+20 significantly renewed UNEP's functions and enhanced synergies among MEAs, it had yet to address the normative foundation for keeping environmental challenges under control.¹⁶⁷ It highlighted lack of implementation of existing commitments and obligations as a pervasive feature of international environmental law, while fragmentation of the treaty system leads to a deadlock in its expansion.¹⁶⁸

Despite harsh criticism by delegates and a few scholars, the report is a first step toward the recognition of significant gaps in international environmental law.¹⁶⁹ As the first analysis of international environmental at this level at the UN, the report is welcomed, and should be a first in a series of similar investigations. Through an overview of the developments of the past decades, the UNSG provided a blueprint for how to improve the existing framework. The report confirms a number of gaps in international environmental law in three separate categories: principles, gaps, and institutions. It provided a useful basis to kickstart the debate during the Nairobi consultations, but should be used beyond it, to think creatively about where international environmental law should be heading. Through its piecemeal approach to multilateral treaty-making, international environmental law has often lacked such a broad analysis which looks at the past as much as the future. The report provides a significant step toward the advancement of international environmental law, identifying our current leading challenges, and proposing ways to address them.

4. *The UNSG's Report (Dec. 10, 2018)*

The technical and evidence-based report prepared by the Secretary General reviewed and analyzed the corpus of international environmental law and environment-related instruments as well as its governance structure and implementation. The report indicates that international environmental law developed in a reactive manner, in response to specific sectoral requirements. This incremental and piecemeal nature has resulted in a proliferation of largely sectoral regulatory regimes and a fragmented international legal framework for the protection of the environment.¹⁷⁰ Fragmentation, in turn, leads to a deficit in coordination at the law-making and implementation levels and a need for better policy coherence, mutual supportiveness, and synergies in implementation.¹⁷¹ This temporal aspect is an important factor in understanding what the report describes as “gaps,” “fragmentation” and, consequently, the need for a comprehensive unifying mechanism.¹⁷²

¹⁶⁶ Urho, et al., *supra* note 100.

¹⁶⁷ *Id.* at 14.

¹⁶⁸ *Id.* at 14.

¹⁶⁹ See substantive discussions below.

¹⁷⁰ UN Secretary-General, *supra* note 159, at 4.

¹⁷¹ *Id.* at 2.

¹⁷² Damien Barciche et. al, *What to expect from a Global Pact for the Environment?*, INSTITUTE FOR SUSTAINABLE DEVELOPMENT AND INTERNATIONAL RELATIONS, (2019), <https://www.iddri.org/sites/default/files/PDF/Publications/Catalogue%20Iddri/D%C3%A9cryptage/201901-IB0119EN-pacte%20mondial%20env.pdf>.

The report identified five gaps as well as deficiencies at multiple levels.¹⁷³ First, there is no single overarching normative framework that sets out rules and principles of general application in international environmental law:

First, there is no single overarching normative framework that sets out what might be characterized as the rules and principles of general application in international environmental law even though such principles may help unify the current, sectoral, approach to international environmental law and help fill the gaps in the rules laid out in treaties. While some principles of international environmental law are now well recognized through their incorporation into issue-specific multilateral environmental agreements and have been affirmed by a number of international courts and tribunals, others enjoy neither clarity nor judicial consensus as to their applicability, nor recognition in binding legal instruments. This has an impact on the predictability and implementation of sectoral environment regimes.¹⁷⁴

Second, international environmental law is piecemeal and reactive, characterized by fragmentation and a general lack of coherence and synergy among a large body of sectoral regulatory frameworks. The UNSG noted that “[t]his leads to an important deficit in coordination at the law-making and implementation levels and a need for better policy coherence, mutual supportiveness and synergies in implementation.”¹⁷⁵

Third, the articulation between MEAs and environment-related instruments remains problematic owing to the lack of clarity, content-wise and status-wise, of many environmental principles.¹⁷⁶

Fourth, the structure of international environmental governance is characterized by institutional fragmentation and a heterogeneous set of actors, revealing important coherence and coordination challenges. International courts and tribunals often stress the lack of international consensus concerning environmental principles.¹⁷⁷

Fifth, the implementation of international environmental law is challenging at both the national and international levels. At the national level, implementation is constrained by the lack of appropriate national legislation, financial resources, environmentally sound technologies, and institutional capacities. At the international level, implementation is constrained by the lack of clarity of many environmental principles.

International environmental law lacks a single overarching framework that sets out rules and principles of general application. Customary international environmental law is sparse, since its identification remains a challenging task, with often a gap between what States say and what they actually do. These critical challenges led to the rise of an important body of non-binding instruments, including the Stockholm and Rio Declarations. These have provided important guidance, acting as precursors to the development of subsequent legally binding instruments.¹⁷⁸ To strengthen international environmental law and its implementation, the report suggested actions such as the clarification and reinforcement of principles of international environmental law.¹⁷⁹

¹⁷³ UN Secretary-General, *supra* note 159, at 1.

¹⁷⁴ *Id.* at 1.

¹⁷⁵ *Id.* at 1-2.

¹⁷⁶ *Id.* at 2.

¹⁷⁷ *Id.* at 2.

¹⁷⁸ *Id.* at 5.

¹⁷⁹ *Id.* at 2.

International environmental law and its effective implementation could be strengthened through such actions as the clarification and reinforcement of principles of international environmental law. This could be done through a comprehensive and unifying international instrument that gathers all the principles of environmental law. There should also be more effective reporting, review and verification measures and robust compliance and enforcement procedures and mechanisms, ensuring that those States that require support have adequate resources to enable them to effectively implement their commitments, and the role of non-State actors should be enhanced at multiple levels.¹⁸⁰

In its introduction, the report clarifies the context in which it was drafted, the development of international environmental law and some basic definitions. Noting the transboundary nature of environmental challenges, the UNSG notes the need for international cooperation in the advancement of international environmental law: “Most environmental challenges and problems and their impacts are transboundary, and some are global in nature, which led to the early recognition that international cooperation among States through appropriate legal frameworks was indispensable to the creation of effective responses and solutions.” Anchored in the rules and principles of general public international law, a large body of international legal obligations to protect the environment emerged:

2. International treaties adopted at the regional and global levels, commonly referred to as multilateral environmental agreements, are the dominant sources of international environmental law. A vast body of multilateral environmental agreements, comprising more than 500 instruments, have been adopted so far. Each agreement addresses a specific environmental challenge and is legally and institutionally distinct from the others. The incremental and piecemeal nature of international environmental law-making has resulted in a proliferation of largely sectoral regulatory regimes and a fragmented international legal framework for the protection of the environment.³ Fragmentation has become a frequent phenomenon in international law, and is one of the consequences of multilateral decision-making.¹⁸¹

Still, there is “no single overarching normative framework in the area of international environmental law that sets out what might be characterized as rules and principles of general application.”¹⁸² Although customary international environmental law is sparse, some have already been codified in treaties and confirmed by international courts and tribunals.¹⁸³ Additionally, a significant body of non-binding instruments emerged.¹⁸⁴

6. The normative and institutional fragmentation of international environmental law and the sectoral approach to environmental regulation have led over the years to proposals to enhance the coherence and coordination of global environmental governance, including successful proposals to enhance coordination among specific multilateral environmental agreements, and less

¹⁸⁰ UN Secretary-General, *supra* note 159, at 2.

¹⁸¹ *Id.*, at 4, ¶ 2.

¹⁸² *Id.*, at 4, ¶ 3.

¹⁸³ *Id.*, at 4-5, ¶ 4.

¹⁸⁴ *Id.*, at 5, ¶ 5.

successful proposals to establish a World Environment Organization or to adopt an international covenant on environment and development. More recently, the idea of a global pact for the environment that synthesizes and codifies the principles of international environmental law in one document was proposed. On 10 May 2018, the General Assembly adopted resolution 72/277, entitled “Towards a Global Pact for the Environment”, and requested that the Secretary-General submit, at its seventy-third session in 2018, a technical and evidence-based report that identifies and assesses possible gaps in international environmental law and environment-related instruments with a view to strengthening their implementation. The present report has been prepared pursuant to that request.

The report is then divided into five substantive sections: section II identifies and assesses the scope and status of the principles of international environmental law; section III addresses gaps relating to the sectoral regulatory regimes; section IV identifies and assesses some environment-related instruments; section V deals with gaps relating to the governance structure of international environmental law; and section VI addresses gaps concerning the implementation and effectiveness of international environmental law. The following sections summarize the main points made by the Secretary General in each of those sections.

a) Gaps concerning principles of international environmental law

Part II of the UNSG’s report addresses gaps concerning general principles of international environmental law. The section addresses the (A) scope and (B) status of principles. The section begins by elucidating the scope and role of environmental principles. Principles may help unify the current sectoral approach to international environmental law, guide interpretation of environmental treaties, supplement or complement specific rules, and fill the gaps in the rules laid out in treaties.¹⁸⁵ The UNSG further clarifies:

9. Principles of international environmental law are an important building block and their usage is widespread. (...) [T]hose principles that are not contained in multilateral environmental agreements also play an important role in guiding the interpretation and further development of those agreements. (...) 10. More generally, environmental principles also serve to supplement or complement more specific rules. (...) The general character of the principles permits their application to the continuously evolving interrelationships between human activity and the environment. The principles also play a role with respect to potential gaps arising from the use of different legal sources. (...) [E]nvironmental principles may help to unify international environmental law’s current sectoral approach.¹⁸⁶

Section B relates to the status of principles. It notes that “[w]hile some principles of international environmental law are now well recognized through their incorporation into issue-specific multilateral environmental agreements and have been affirmed by a number of

¹⁸⁵ UN Secretary-General, *supra* note 159, at 1.

¹⁸⁶ *Id.* at 1.

international courts and tribunals, others enjoy neither clarity nor judicial consensus as to their applicability, nor recognition in binding legal instruments.”¹⁸⁷ The degree of legal uncertainty surrounding many of these principles has a direct and indirect impact on the predictability and implementation of sectoral regimes.¹⁸⁸ The section covers the following principles: prevention, precaution, polluter pays, environmental democracy, cooperation, right to a clean and healthy environment, sustainable development, common but differentiated responsibilities and respective capabilities, non-regression and progression. The selection of principles is mainly based on the 1992 Rio Declaration, although the report also takes note of more recent developments.¹⁸⁹

The section reports that some principles are more well-established. Several international courts and tribunals have confirmed the existence of rules of customary international law relating to environmental protection, in particular the obligation to prevent environmental harm beyond national jurisdiction, the performance of due diligence, the duty to conduct an environmental impact assessment and the obligation of reparation for environmental damage.¹⁹⁰ The status of other principles, however, remains debatable. For example, the legal basis of the precautionary principle remains a matter of controversy and debate.¹⁹¹ Environmental democracy, which includes access to information, participation in decision-making and access to environmental justice, is unevenly implemented globally, with remarkably little geographic symmetry.¹⁹² Differing expressions and understandings of principles exist in many issue-specific MEAs. While sustainable development is included in different MEAs and represents the basis of the 2030 Agenda, “questions remain as to the extent to which the sustainable development principles represent binding or non-binding rules or indeed whether they constitute a source of law.”¹⁹³ The principle of common but differentiated responsibilities and respective capabilities responds to similar challenges, with a dynamic and flexible content that deems their general application hardly evident. Others, such as the right to a clean and healthy environment and non-regression, are not fully developed, and have only recently been recognized in a limited number of legal instruments.¹⁹⁴ Chabason & Hege argue the report lacks a comprehensive view of the effective implementation of the principles established in soft law, which could help assessing the added value in translating principles into legal provisions in the form of a new legal instrument.”¹⁹⁵

When enshrined in legally binding MEAs, the scope and content of the relevant principles are confined to that particular MEA. Its dynamic function of gap-filling, an important element in the continuously evolving development of international environmental law, can only be fulfilled when principles are general in character.¹⁹⁶ The report concludes that there is a need to further clarify the environmental principles, without prejudice to the legal developments already achieved in the issue-specific contexts of various MEAs.¹⁹⁷ More clarification of their content and scope would make them more effective and predictable, and would strengthen their implementation. The report goes as far as suggesting a “comprehensive and unifying international instrument,”¹⁹⁸ giving

¹⁸⁷ UN Secretary-General, *supra* note 159, at 1.

¹⁸⁸ *Id.* at 42, ¶ 102.

¹⁸⁹ Voigt, *supra* note 101, at 17.

¹⁹⁰ UN Secretary-General, *supra* note 159, at 42, ¶ 101.

¹⁹¹ *Id.* at 8, ¶ 12.

¹⁹² *Id.* at 8-9, ¶ 14.

¹⁹³ *Id.* at 12, ¶ 20.

¹⁹⁴ *Id.* at 42, ¶ 102.

¹⁹⁵ Chabason & Hege, *supra* note 172, at 2.

¹⁹⁶ UN Secretary-General, *supra* note 159, at 6, ¶ 10.

¹⁹⁷ *Id.*, at 43, ¶ 102. Voigt, *supra* note 101, at 17-18.

¹⁹⁸ UN Secretary-General, *supra* note 159, at 42, ¶ 102.

rise to the criticism of exceeding its mandate as expressed below. The UNSG argues that a comprehensive and unifying international instrument that gathers all the principles of environmental law could provide for better harmonization, predictability, and certainty.¹⁹⁹

b) Gaps relating to existing regulatory regimes

Section B of the report conveys gaps relating to existing regulatory regimes of international environmental law. It analyzed the following sectors: protection of the atmosphere, conservation of biological diversity, protection of soils, protection of freshwater resources, protection of oceans and seas, and regulation of hazardous substances, wastes and activities. It covered existing agreements in each sector, noting, when relevant, existing gaps within those. The notion of gaps in existing agreements was significantly criticized by delegates in Nairobi. Critics argued these should be debated by the governance bodies of the different conventions, and that several perceived gaps were the intended product of negotiations. Chabason and Hege suggested that sectoral legal gaps should be excluded from the outset from future negotiations. Since the institutional topics were dealt with during the Rio +20 Summit in 2012, the only topics of negotiation that should be retained are the horizontal principles, environmental policy integration, for instance in trade agreements, and implementation and effectiveness issues.²⁰⁰ This discussion is further detailed below.

The UNSG notes that the adoption of MEAs faces a significant challenge “to encourage the participation of all relevant actors while at the same time ensuring that the commitments are ambitious enough to provide for an effective response to the problem, and ensure that parties comply with their obligations.”²⁰¹ Political compromises and the notions of fairness feature prominently in negotiation of sectoral agreements and ensure broad participation. The report predicts that “because the national circumstances and capabilities of States differ significantly, the future development of international environmental law is likely to require more, rather than less, differentiation and flexibility.”²⁰²

Substantive gaps identified in this section include: gaps related to liability and compensation in the regime of the Paris Agreement;²⁰³ need for harmonization of multiple climate change treaties;²⁰⁴ lack of control of short-lived chemical pollutants and nitrous oxide (N₂O), some specific uses of controlled substances, such as uses in feedstock and for quarantine and pre-shipment; disposal of controlled substances that are in banks, such as insulation foams or equipment;²⁰⁵ gaps in monitoring and verification in the regulation of the stratospheric ozone layer;²⁰⁶ gaps in monitoring and verification of data related to the regulation of mercury;²⁰⁷ linkages and coordination between the Minamata Convention and other MEAs that relate to the regulation of mercury;²⁰⁸ gaps in geographical coverage, regulated activities, regulated substances and applicable principles and rules related to the regulation of air pollution;²⁰⁹ with respect to the

¹⁹⁹ UN Secretary-General, *supra* note 159, at 42, ¶ 102.

²⁰⁰ Barciche et. al, *supra* note 172, at 3.

²⁰¹ UN Secretary-General, *supra* note 159, at 13, ¶ 23.

²⁰² *Id.* at 14, ¶ 25.

²⁰³ *Id.* at 15, ¶ 29.

²⁰⁴ *Id.* at 15, ¶ 29.

²⁰⁵ *Id.* at 15-16, ¶ 30.

²⁰⁶ *Id.*, at 16, ¶ 31-32.

²⁰⁷ *Id.* at 16-17, ¶ 33.

²⁰⁸ *Id.* at 17, ¶ 34.

²⁰⁹ *Id.* at 18, ¶ 35.

problem of acid rain and other dispersed pollutants, there are no rules on liability, some of the protocols have not entered into force and the geographical scope is limited;²¹⁰ lack of an overall strategy and coherent structure for conservation of biodiversity, with many issues lacking a specific, legally binding regulation, including on the conservation and sustainable use of forests, the pollution of marine areas by land-based plastic waste, the protection of soil, the use of pesticides, noise pollution, human rights and biodiversity, the Arctic area, nanomaterials and some geo-engineering processes;²¹¹ limitation of the jurisdictional scope of the Aichi Targets to areas within national jurisdiction;²¹² lack of cooperation with international agreements in other fields such as trade, intellectual property rights and plant genetic resources for food and agriculture, regulation of invasive alien species and of issues of synthetic biology and digital sequence information;²¹³ limited international legal responses related to land and soil degradation;²¹⁴ gaps related to the lack of general framework of freshwater governance and legal integration;²¹⁵ uncertainty in the applicability of principles in the field of water resources protection;²¹⁶ lack of coordination and cooperation among the regional seas frameworks and relevant global multilateral environmental agreements;²¹⁷ gaps related to the material or geographical scope of instruments related to ocean management;²¹⁸ underdeveloped rules governing the transport of hazardous substances by different modes of transport, and limited geographical application;²¹⁹ significant gaps remain with respect to regional coverage as well as the regulation of the disposal of marine plastic litter and microplastics, mine tailings and associated wastes from mining operations, and wastes from deep seabed mining, land-based disposal, recovery, recycling and reuse;²²⁰ and significant gaps in the regulatory regimes of hazardous substances, wastes and activities.²²¹

c) Environment-related instruments

With respect to environment-related instruments, the UNSG analyzed gaps in trade, investment, intellectual property, and human rights, as those related to international environmental law.²²² The mandate was significantly questioned by Member States during the Nairobi session, as will be detailed below. Delegates argued these should be discussed within their own frameworks and were beyond the mandate of the OEWG.

The UNSG noted that normative gaps in disputes concerning environment-related trade measures have been evident, despite mutual supportiveness in environmental treaties featuring trade components. Specifically, the WTO Appellate Body has been reluctant to apply environmental principles to justify measures that are inconsistent with trade obligations.²²³ The UNSG concluded that “significant challenge of reaching consensus on the implementation of

²¹⁰ UN Secretary-General, *supra* note 159, at 18, ¶ 36.

²¹¹ *Id.* at 19, ¶ 41.

²¹² *Id.*, at 19, ¶ 42.

²¹³ *Id.* at 20, ¶ 42.

²¹⁴ *Id.* at 21, ¶ 48.

²¹⁵ *Id.* at 23, ¶ 54.

²¹⁶ *Id.* at 23, ¶ 55.

²¹⁷ *Id.* at 25, ¶ 58.

²¹⁸ *Id.* at 25-26, ¶ 61.

²¹⁹ *Id.* at 27-28, ¶ 64.

²²⁰ *Id.* at 28-29, ¶ 67.

²²¹ *Id.* at 29, ¶ 69.

²²² *Id.* at 30.

²²³ *Id.* at 30, ¶ 71.

mutual supportiveness of trade and environment suggests a widening gap between these two normative regimes.”²²⁴

State practices on environmental clauses in investment treaties vary widely, with a few developed States systematically including them and a trend toward its inclusion and newly concluded investment treaties, particularly in Africa.²²⁵ Observing a global decline in the frequency of approaches that include references to environmental concerns in investment agreements, the UNSG notes that “normative gaps arise because the specific environmental concerns explicitly addressed in these agreements are limited, and have generally not evolved to include more recent concerns such as climate change and biodiversity.”²²⁶

With respect to intellectual property instruments, the UNSG observed a normative gap between patent law and the plant-breeders’ rights regimes which promote these rights, a gap between the World Intellectual Property Organization (WIPO) institutional norms that promote innovation and the provisions of the Convention on Biological Diversity (CBD) regarding access and benefit-sharing, the rights of traditional knowledge holders and biodiversity conservation, and between the regimes of the TRIPS Agreement and the CBD.²²⁷

On human rights, the report notes the obligation of States under international human rights law to prevent foreseeable human rights harms, including those caused by environmental degradation.²²⁸ Several principles from human rights instruments are applied in the context of environmental law, and explicitly reference the environment or environmental concerns. The report specifically notes the framework of principles on human rights and the environment by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment articulates the application of existing human rights norms in the environmental context.²²⁹ Human rights instruments further reflect a wide array of principles applied by regional human rights and environmental democracy treaties. While U.N. resolutions include a right to a healthy environment, it is not explicitly present in the International Covenant on Economic, Social and Cultural Rights. Resolutions from the Human Rights Council (HRC) have addressed the issues of human rights and the environment generally, and regional courts have filled gaps between sources of human rights law and environmental law.²³⁰ This gap has been partially filled with the adoption of the right to a healthy environment by the HRC.

d) Gaps relating to the governance structure of international environmental law

According to the report “[t]he structure of international environmental governance is characterized by institutional fragmentation and a heterogeneous set of actors. Although States remain the primary actors, international environmental governance is a multi-actor governance system that includes international institutions, treaty bodies, non-governmental organizations, the scientific community, and the private sector.”²³¹ In addition to UNEP and UNEA, several U.N. programmes, funds, and specialized agencies have acquired considerable environmental

²²⁴ UN Secretary-General, *supra* note 159, at 30, ¶ 71.

²²⁵ *Id.*, at 30, ¶ 72.

²²⁶ *Id.* at 30-31, ¶ 72.

²²⁷ *Id.* at 31, ¶ 73.

²²⁸ *Id.* at 32, ¶ 74.

²²⁹ See John H. Knox, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018).

²³⁰ UN Secretary-General, *supra* note 159 at 31-32, ¶ 74-76.

²³¹ *Id.* at 33, ¶ 77.

responsibilities since UNEP was established. This problem is exacerbated by a proliferation of environmental agreements with separate mandates that “ignore the unity, interconnectedness and interdependence of the Earth’s ecosystem”, and “create potential for overlap and conflict, institutional and policy incoherence and increased financial and administrative burdens on states parties.”²³² These create potential for overlap and conflict, institutional and policy incoherence and increased financial and administrative burdens on State parties.²³³ Institutional fragmentation and a lack of coordination are key challenges with regard to the current international environmental governance²³⁴ and enhanced coordination might be necessary within the field of international environmental law and between MEAs and other instruments that directly or indirectly affect the environment.²³⁵

The report suggested a few options to improve efficiency and address institutional fragmentation, such as: “(a) creating clusters and synergies between conventions; (b) mapping existing global and regional action plans and agreements to create an overview of coverage and identify interlinkages; (c) avoiding duplication of reporting and/or monitoring processes by using the same reporting channels and not creating additional burdens (“integrated reporting”); (d) sharing lessons learned and best practices; (e) developing implementation guidelines for multilateral environmental agreements; and (f) sharing information among the different scientific bodies that support the work of related multilateral environmental agreements. Potential conflicts between treaty regimes can be managed by using legal means, including conflict clauses, mutual supportiveness or the application of the general rule of treaty interpretation contained in article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties.”²³⁶

Finally, despite a trend in broadening the range of actors recognized as having a legitimate role in environmental governance, “compared to the international human rights mechanisms there exists a significant gap in international environmental law regarding effective participation by non-State actors in international law-making and implementation.”²³⁷

e) Gaps relating to the implementation and effectiveness of international environmental law

The report identified the lack of effective national implementation of MEAs as a major gap in addressing environmental challenges. Implementation deficits arise for many reasons, including “knowledge gaps; a lack of adequate means of implementation, such as finance, capacity-building or technology; the need for facilitation for compliance; a lack of coordination between relevant government departments as well as with other sectors; insufficient monitoring and law enforcement; a lack of political will; and the inadequate engagement of different stakeholders, such as civil society and women’s organizations.” The challenges at the international level are similar to those at the national level, where different ministries may be responsible for the implementation of different MEAs. Coherence, synergy and coordination at the international level could ease implementation at the national level.²³⁸ To address gaps in effectiveness and enable

²³² UN Secretary-General, *supra* note 159, at 34, ¶ 80.

²³³ *Id.*

²³⁴ *Id.* at 34, ¶ 81.

²³⁵ *Id.* at 34-35, ¶ 82.

²³⁶ *Id.* at 35, ¶ 83.

²³⁷ *Id.* at 35, ¶ 84.

²³⁸ *Id.* at 36, ¶ 86.

compliance, the report suggested improving access to means of implementation, such as financial resources, environmentally sound technologies and technical and institutional capacities.²³⁹

Gaps in the implementation of international environmental law also appear in inter-State dispute settlement.²⁴⁰ Since there is no international environmental court, disputes are addressed by a variety of international courts and tribunals, revealing a variety of gaps. Additionally, compliance mechanisms and procedures within MEAs vary greatly between them and generally do not enforce their findings.²⁴¹ Gaps are also observed in the enforcement of rights and obligations regarding the global commons and shared natural resources and in disputes concerning natural resources which do not originate from environmental treaties.²⁴² There has been limited development in the area of liability and redress for transboundary environmental harm.²⁴³ Finally, the rules of State responsibility may need to be further developed if they are to play any significant role as a tool for redressing transboundary environmental harm.²⁴⁴ For example, very few treaties provide for international liability for transboundary environmental damage.²⁴⁵ The regimes of civil liability lack an agreed international standard for a *de minimis* threshold of environmental damage,²⁴⁶ environmental damage in areas beyond the limits of national jurisdiction is not covered in many cases, and liability is limited in terms of the amount of compensation payable.²⁴⁷

f) Conclusions

The UNSG concluded that “[t]here are significant gaps and deficiencies with respect to the applicable principles of environmental law; the normative and institutional content of the sectoral regulatory regimes, as well as their articulation with environment-related regimes; the governance structure of international environmental law; and the effective implementation of, compliance with and enforcement of international environmental law.”²⁴⁸

The UNSG noted “important deficiencies with respect to principles of international environmental law” with “instances where there is no clarity as to the nature and content of a principle, or no judicial consensus as to its applicability, or no recognition in binding legal instruments, or all of the above.”²⁴⁹ The degree of legal uncertainty surrounding many of these principles has a direct and indirect impact on the predictability and implementation of sectoral environmental regimes. “There is a need to further clarify the principles of environmental law, without prejudice to the legal developments already achieved in the issue-specific contexts of various MEAs. A comprehensive and unifying international instrument that gathers all the principles of environmental law could provide for better harmonization, predictability and certainty.”²⁵⁰

The UNSG noted fragmentation in MEAs and in the governance structure of international environmental law and suggested “better coordination at both the law-making and implementation

²³⁹ UN Secretary-General, *supra* note 159, at 36, ¶ 87.

²⁴⁰ *Id.*, at 8, ¶¶ 90-91.

²⁴¹ *Id.* at 38, ¶ 92.

²⁴² *Id.*, at 39, ¶ 93.

²⁴³ *Id.*, at 39, ¶ 94.

²⁴⁴ *Id.*, at 40, ¶ 96.

²⁴⁵ *Id.*, at 41, ¶ 97.

²⁴⁶ *Id.*, at 41, ¶ 99.

²⁴⁷ *Id.*, at 42, ¶ 99.

²⁴⁸ *Id.*, at 42, ¶ 100.

²⁴⁹ *Id.*, at 42, ¶ 102.

²⁵⁰ *Id.*, at 43, ¶ 102.

levels [is needed] in order to ensure policy coherence, mutual supportiveness and synergies in implementation.”²⁵¹ Gaps and deficiencies were also found in specific sectoral regulatory regimes, with issues remaining without a “specific, legally binding regulation.”²⁵² These include “regulations on the conservation and sustainable use of forests, the pollution of marine areas by land-based plastic waste, the protection of soil, human rights and climate change, biodiversity, nanomaterials and some geo-engineering activities.”²⁵³ Some gaps are also found within existing MEAs, with an identified need for harmonization of treaties, a global approach to issues dealt with at the regional level, principles to harmonize the application of a patchwork of agreements, improved compliance mechanisms, and better articulation between MEAs and environment-related instruments.²⁵⁴ Compliance mechanisms and means of implementation need to be strengthened to promote the effective implementation of MEAs.²⁵⁵ At the international level, implementation is constrained by the lack of clarity of environmental principles.²⁵⁶ Implementation at the international level could be strengthened through more effective reporting, review and verification processes, robust compliance and enforcement procedures and mechanisms, and increased role of non-State actors in law-making, implementation monitoring and compliance procedures.²⁵⁷

The UNSG finalized: “Building upon the creative approaches that States have thus far adopted to protect the environment, it is essential that States and the U.N. work together to address gaps in international environmental law. We must collectively seize the opportunity to use international environmental law in new and dynamic ways to provide a strong and effective governance regime with a view to better safeguarding the environment for future generations.”²⁵⁸

Phase IV: Nairobi Sessions and Adoption of Recommendations (Jan. 2019 – Jun. 2019)

After the adoption of the UNGA Resolution no. 72/277 and the OEWG’s organizational session held at the U.N. Headquarters, three substantive sessions followed at the headquarters of the UNEP in Nairobi, Kenya. This section focuses on the content of these discussions. Phase IV, entitled “Nairobi Sessions and Adoption of the Recommendations,” relates to the work done by the working group between January and May 2019. Sections 1 to 4 follow the Nairobi sessions chronologically, identifying the factual information related to the meetings. Section 1 covers the first substantive session in January 2019, which was characterized as a “stocktaking” opportunity, as delegates considered the UNSG’s report while examining the current state of international environmental law. Section 2 covers the second substantive session in March 2019. The second session included a more focused discussion about potential recommendations from the working group on options to respond to possible gaps in international environmental law and environment-related instruments. To guide the discussion, Co-Chairs posed specific questions designed to facilitate initial reflections on main themes of the working group: principles, governance, implementation, and specific regulatory regimes of environment-related instruments. Section 3 relates to the draft recommendations circulated by the Co-Chairs in between sessions. Section 4

²⁵¹ UN Secretary-General, *supra* note 159, at 43, 43, ¶ 103.

²⁵² *Id.* at 43, ¶ 104.

²⁵³ *Id.* at 43, ¶ 104.

²⁵⁴ *Id.* at 43-45, ¶ 104-109.

²⁵⁵ *Id.* at 45, ¶ 110-111.

²⁵⁶ *Id.* at 45, ¶ 112.

²⁵⁷ *Id.* at 45, ¶ 112.

²⁵⁸ *Id.* at 45, ¶ 113.

covers the third and final substantive session in May 2019 and the subsequent adoption of recommendations by the working group.

Section 5 then specifically analyzes the main challenges in international environmental law and policy raised by delegates during the Nairobi sessions. Given that many topics raised in Nairobi were discussed on more than one session, these are analyzed jointly by topic, referring, when relevant, to how the UNSG's report also portrayed them. The section addresses the following points: what is a gap; fragmentation of international environmental law; matters of process; governance of international environmental law; implementation; environment-related issues; and environmental principles. These show how delegates view these issues and their most significant concerns, showing how they were ultimately addressed in the final recommendations. Section 6 offers a geopolitical analysis of the position of States on whether they were favorable to the adoption of a new instrument related to the codification of principles. This section provides an overview of where we currently stand politically, showing how such a proposal is supported.

1. *January 2019: First Substantive Session*

The first substantive session of the OEWG convened from 14-18 January 2019.²⁵⁹ Based on the agenda and programme of work, the week-long gathering consisted of ten meetings.²⁶⁰ These were mostly dedicated to discussing each section of the UNSG's report.²⁶¹ The all-encompassing report provided delegates with an opportunity to engage in a "stocktaking" exercise, examining the current state of international environmental law²⁶² based on the UNSG's findings.²⁶³ Approximately 288 participants attended the meeting, including government delegates from 109 countries, representatives of U.N. bodies, secretariat units and convention secretariats,²⁶⁴ representatives of international organizations,²⁶⁵ and members from 67 non-governmental organizations.

²⁵⁹ See Amal Mudallali and Francisco Duarte Lopes, *Letter to UN Members from the co-chairs of the ad hoc open-ended working group established by the General Assembly resolution 72/277 inviting Member States to participate in the first substantive session* (Dec. 6, 2018), <https://wedocs.unep.org/bitstream/handle/20.500.11822/27168/Invitation.pdf?sequence=1&isAllowed=y>.

²⁶⁰ Based on the provisional agenda agreed at the organizational session, the agenda was adopted as follows: "1. Opening of the session. 2. Adoption of the agenda and programme of work. 3. Financing of the activities of the ad hoc open-ended working group. 4. General statements. 5. Consideration of the report of the Secretary-General. 6. Provisional agenda and dates for the second substantive session. 7. Other matters. 8. Closure of the first substantive session." UNGA, *Ad hoc open-ended working group established pursuant to General Assembly resolution 72/277, First substantive session, Nairobi, 14–18 January 2019, Provisional agenda and annotations thereto for the first substantive session of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277, A/AC.289/3* (6 December 2018).

²⁶¹ UNGA, *A/AC.289/6/Rev. 1* (Jun. 13, 2019), *Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277* (¶ 6).

²⁶² The provisional agenda was adopted as follows: (1) Opening of the session; (2) Adoption of the agenda and programme of work; (3) Financing of the activities of the ad hoc open-ended working group; (4) General statements; (5) Consideration of the report of the Secretary-General; (6) Provisional agenda and dates for the second substantive session; (7) Other matters; (8) Closure of the first substantive session. OEWG, *A/AC.289/3, Provisional agenda and annotations thereto for the first substantive session of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277* (Dec. 6, 2018).

²⁶³ UN Environment, *Member States debate the need for a global pact for the environment* (January 28, 2019), available at <https://www.unenvironment.org/news-and-stories/story/member-states-debate-need-global-pact-environment>.

²⁶⁴ Department for General Assembly and Conference Management; Office of the United Nations High Commissioner for Human Rights (OHCHR); secretariat of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants; secretariat of the Convention on Wetlands of International Importance especially as Waterfowl Habitat; secretariat of the Minamata Convention on Mercury; secretariat of the Montreal Protocol on Substances that Deplete the Ozone Layer; United Nations Development Programme; United Nations Office at Nairobi.

²⁶⁵ International Chamber of Commerce, International Committee of the Red Cross, International Federation of the Red Cross and Red Crescent Societies, League of Arab States.

Delegates received the UNSG's report with mixed reviews. Many delegations welcomed its findings, considering it provided a comprehensive overview of the existing gaps and was a sound basis for further discussion.²⁶⁶ Others were wary of its limited effect and invited a more extensive dialogue on challenges, using the report only as an initial guide.²⁶⁷ Some Member States expressed concern about its contents, requesting more up-to-date information and the use of empirical evidence to confirm its outcomes.²⁶⁸ A few delegations considered that the report could have provided a more in-depth and objective analysis of specific areas and a more considerable justification for some of its findings. One of the most significant criticisms concerned its inclusion of recommendations to address the gaps identified. Since the UNGA specifically called upon the OEWG – not the UNSG – to suggest recommendations, these delegations argued the UNSG went beyond its mandate.²⁶⁹

The meaning of gaps was an essential point of debate.²⁷⁰ There was a significant concern about the methods followed by the OEWG and its potential effect on existing instruments, bodies, and processes. Delegations called for a commitment to MEAs, without duplicating or undermining them.²⁷¹ The Co-Chairs highlighted the need for a constructive, open, transparent, and inclusive discussion. It was essential to reach a consensus-based outcome that was both pragmatic and realistic, without prejudging the result.²⁷² Section 5 extensively debates these issues.

Co-Chairs invited delegates to submit additional inputs during the inter-sessional period. Taking all views expressed into consideration, Co-Chairs would provide elements to structure and guide the discussions for the following session.²⁷³ Co-Chairs agreed to synthesize the feedback supplied by delegates into a non-paper to serve as a basis for deliberations at the second substantive session. Finally, they provided an oral summary, with a written version circulated on Jan. 25, 2019.²⁷⁴

2. March 2019: Second Substantive Session

The second substantive session of the OEWG convened from 18-20 March 2019, totaling six meetings. Nearly 300 participants, including delegates from 102 countries, representatives of U.N. bodies, secretariat units and convention secretariats,²⁷⁵ intergovernmental organizations,²⁷⁶ and 38 non-governmental organizations attended. Participants were invited to engage in a “results-oriented” discussion on options to respond to possible gaps in international environmental law and

²⁶⁶ UN Environment, Member States debate the need for a global pact for the environment § 2019 (UN ENVIRONMENT 2019).263.

²⁶⁷ Mudallali and Duarte Lopes, *supra* note 260; *Oral summary by the Co-chairs*, United Nations Environment Programme, <http://wedocs.unep.org/bitstream/handle/20.500.11822/27261/Oral%20summary.FINAL.pdf?sequence=124&isAllowed=y>.

²⁶⁸ UN Environment, Member States debate the need for a global pact for the environment. 2019.263.

²⁶⁹ Mudallali and Duarte Lopes, *supra* note 268.

²⁷⁰ UN Environment, Member States debate the need for a global pact for the environment (January 28, 2019), <https://www.unenvironment.org/news-and-stories/story/member-states-debate-need-global-pact-environment>.

²⁷¹ *Id.*

²⁷² Mudallali and Duarte Lopes, *supra* note 268.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ Food and Agriculture Organization of the United Nations; Office of the United Nations High Commissioner for Human Rights; secretariat of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants; secretariat of the Minamata Convention on Mercury; secretariat of the Montreal Protocol on Substances that Deplete the Ozone Layer; UNEP; United Nations Office at Nairobi.

²⁷⁶ International Chamber of Commerce, League of Arab States.

environment-related instruments.²⁷⁷ The meetings focused mainly on item 4 of the agenda,²⁷⁸ entitled “Discussion of possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate.”²⁷⁹

Co-Chairs guided the discussions through four specific questions. These were designed to form a bridge from the preliminary “stocktaking” exercise in January to a process of formulating precise responses and possibly designing alternatives to recommend to the UNGA.²⁸⁰ Based on the exchanges thus far, the questions focused on (i) principles of international environmental law; (ii) the governance structure of international environmental law; (iii) the implementation of international environmental law; and (iv) specific regulatory regimes or environment-related instruments.²⁸¹ These included suggestions on the form and content of options, ranging from legally to non-legally binding instruments, a high-level declaration or other UNGA outcome that might capture and collate the international community’s current ambition to renovate the international environmental law system and environment-related instruments.²⁸² The Co-Chairs asked invites thoughts from delegates on the following issues:

What options can be considered to address the possible gaps or challenges related to principles of international environmental law mentioned by delegations without duplicating nor undermining existing law and ongoing efforts/processes? What would be the objective of such options? What methodology should be used to develop them?

What options can be considered to address gaps related to the governance structure of international environmental law, including challenges in coordination and mutual supportiveness as well as risks of incoherence highlighted by delegations?

What options can be considered to addressing gaps or challenges relating to the implementation of existing rules and principles of international environmental law?

What options can be considered to address possible gaps related to specific regulatory regimes or environment-related instruments with a

²⁷⁷ Peter Doran, et al., *Summary of the Second Substantive Session of the Ad Hoc Open Ended Working Group towards a Global Pact for the Environment*, 35(2) INT’L INSTITUTE FOR SUSTAINABLE DEVELOPMENT (2019), <http://enb.iisd.org/unep/globalpact/oewg2/>.

²⁷⁸ Based on the provisional agenda agreed at the first substantive session, the agenda was adopted as follows: “1. Opening of the session. 2. Adoption of the agenda and programme of work. 3. Financing of the activities of the ad hoc open-ended working group. 4. Discussion of possible options to address possible gaps in international environmental law and environment-related instruments, as appropriate. 5. Provisional agenda and dates for the third substantive session. 6. Other matters. 7. Closure of the session.” UNGA, Ad hoc open-ended working group established pursuant to General Assembly resolution 72/277, Second substantive session, Nairobi, 18–20 March 2019, Provisional agenda and annotations thereto for the first substantive session of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277, A/AC.289/4 (5 February 2019).

²⁷⁹ Amal Mudallali and Francisco Duarte Lopes, Letter to UN Members from the Co-Chairs of the ad hoc open-ended working group established by the General Assembly resolution 72/277 circulating the oral summary of the second substantive session and the provisional agenda for the third substantive session (Mar. 26, 2019),

https://wedocs.unep.org/bitstream/handle/20.500.11822/27870/PGA_Letter-March2019.pdf?sequence=1&isAllowed=y.

²⁸⁰ Doran et al., *supra* note 277.

²⁸¹ *Id.*

²⁸² *Id.*

view to strengthening the implementation of international environmental law?²⁸³

At the end of the session, Co-Chairs invited delegations to submit concrete proposals for consideration of draft recommendations at the third session. On March 26, 2019, Co-Chairs circulated a summary of the second substantive session to provide a synthesis of the views expressed, to be read in conjunction with the interventions made by delegations throughout the session.²⁸⁴ These included views on principles in international environmental law and the negotiation of a new instrument, with different views on its nature and format. Delegates also expressed views that the nature of the instrument can be determined later, namely in the context of a negotiation process launched to develop such an instrument.

3. April 2019: Draft Recommendations Ad-Hoc Working Group

On April 25, 2019, Co-Chairs of the OEWG circulated draft elements of recommendations to be submitted to the UNGA at the end of its mandate. These were based on views expressed by governments during the first two substantive sessions.²⁸⁵ Hoping to attract broad support, Co-Chairs recommended considering the elements “as a package” and welcomed active participation. Considering the main concerns of delegates, recommendations included three categories: (i) elements related to the objectives informing the recommendations; (ii) elements related to the substantive recommendations; (iii) elements related to the process.²⁸⁶

Elements of these “draft recommendations” addressed, inter alia: (i) a broad understanding of gaps in international environmental law, and whether these are lacunae, deficiencies, or challenges; (ii) principles, their interpretation, and the consistency of their application; (iii) options for a new instrument and its legally or non-legally binding nature, including a high-level declaration and/or a UNGA compendium document on international environmental law principles; (iv) governance and enhancing cooperation, synergies, and coordination of existing MEAs, scientific regimes, and system-wide mainstreaming of the environment; (v) strengthening and revisiting the role of the UNEP, the UNEA, and other bodies charged with enhancing the impact and coordination of elements within the existing regime of international environmental law; and (vi) options to address the implementation gap caused by a lack of capacity building, finance, technology, and political will.²⁸⁷ Negotiations were set to begin on the basis of this draft at the third substantive session in May 2019.

4. May 2019: Third Substantive Session and Final Recommendations

The third and final substantive session of the OEWG convened from 20-22 May 2019, preceded by pre-session consultations. Around 300 participants attended, including delegates

²⁸³ Amal Mudallali and Francisco Duarte Lopes, Letter to UN Members from the Co-Chairs of the ad hoc open-ended working group established by the General Assembly resolution 72/277 circulating the oral summary of the first substantive session and guiding questions for the second substantive sessions (Feb. 28, 2019), https://wedocs.unep.org/bitstream/handle/20.500.11822/27614/Pact_trasmittal.pdf?sequence=1&isAllowed=y.

²⁸⁴ *Id.*

²⁸⁵ Ana Maria Lebeda, Draft Elements Proposed for Resolution on Global Pact for Environment, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (2019), <https://sdg.iisd.org/news/draft-elements-proposed-for-resolution-on-global-pact-for-environment/>.

²⁸⁶ Amal Mudallali and Francisco Duarte Lopes, Letter to UN Members from the Co-Chairs of the ad hoc open-ended working group established by the General Assembly resolution 72/277 (Apr. 25, 2019), available at <https://www.un.org/pga/73/wp-content/uploads/sites/53/2019/04/25-April-ad-hoc-open-ended-working-group-002.pdf>.

²⁸⁷ Doran, et al., *supra* note 277.

from 107 countries, representatives of U.N. bodies, secretariat units and convention secretariats,²⁸⁸ intergovernmental organizations,²⁸⁹ and 24 non-governmental organizations. Following the provisional agenda,²⁹⁰ the OEWG completed its mandate, and adopted recommendations to the UNGA.²⁹¹ Delegates arrived at agreement after a series of formal and informal negotiations. The UNGA Resolution had provided for the OEWG to consider, if necessary, the scope, parameters and feasibility of an international instrument, with a view to making recommendations to the UNGA during the first half of 2019.²⁹² Final recommendations encompassed the views presented by delegations and set out: (i) objectives, including the reinforcement of environmental protection for present and future generations and strengthening international environmental law and environment-related instruments; (ii) substantive recommendations; and (iii) consideration of further work.²⁹³

At the beginning of the session, Duarte Lopes presented the Co-Chairs' non-paper noting it was developed based on divergent views and sought delegates' support in reaching consensus with text-based negotiations to then achieve a concrete outcome.²⁹⁴ Many delegations indicated that they would consider working on the consolidation of principles of international environmental law, noting the possibility of developing a new instrument with that purpose. Different views were shared with respect to the nature of such instrument, including whether it should be legal in nature. However, some delegations pointed out that the report failed to offer a solid justification for such

²⁸⁸ Secretariat of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade and the Stockholm Convention on Persistent Organic Pollutants; secretariat of the Convention on Wetlands of International Importance especially as Waterfowl Habitat; secretariat of the Montreal Protocol on Substances that Deplete the Ozone Layer; UNEP.

²⁸⁹ International Chamber of Commerce, International Organization of la Francophonie, Arab Organization for Agricultural Development, League of Arab States.

²⁹⁰ Based on the provisional agenda agreed at the first substantive session, the agenda was adopted as follows: "1. Opening of the session. 2. Adoption of the agenda and programme of work. 3. Statement on the financing of the activities of the ad hoc open-ended working group. 4. Consideration of the draft recommendations of the ad hoc open-ended working group. 5. Consideration of the draft report of the ad hoc open-ended working group. 6. Other matters. 7. Closure of the session." UNGA, Ad hoc open-ended working group established pursuant to General Assembly resolution 72/277, Third substantive session, Nairobi, 20–22 May 2019, Provisional agenda for the third substantive session of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277, A/AC.289/5 (25 March 2019).

²⁹¹ UN Ga President (@UNGA). "Sincere thanks @LebanonUN and @Portugal_UN for your work as co-chairs of the working group created by resolution 72/277 towards a global pact for the environment. I commend you and all delegations on the agreement of recommendations by consensus #Environment4All #UN4ALL" May 29, 2019. Tweet. Amal Mudallali (@AmbMudallali). "The role of the PGA @UN_PGA was instrumental in bringing this process to a successful end. Her efforts and support was invaluable especially her reaching out to thr conference in Nairobi and urging a positive outcome. Thank you @UN_PGA PGA. N" May 29, 2019. Tweet. Portugal na ONU (@Portugal_UN). "The #Nairobi #OEWG3 on the #GlobalPactEnvironment concluded its work and agreed, by consensus, to recommend, inter alia, a political declaration at a @UN high level meeting in 2022 @UN_PGA @LebanonUN" May 23, 2019. Tweet. Amal Mudallali (@AmbMudallali). "The #OEWG3 concluded it's work on #GlobalPactEnvironment in Nairobi by consensus on recommendations to #UNGA PGA on way forward in process. Thanks to my co-facilitator PR Francisco Duarte Lopes, to Sérgio Carvalho, Portugal, , UNEP & our legal expert Youssef Hitti for good work." May 25, 2019. Tweet. Amal Mudallali (@AmbMudallali). "The WG toward a Global Pact of Environment successfully concluded its final session @ UNEP, Nairobi, with consensus on recommendations 4 #UNGA & @UN_PGA. My Co- Facilitator PR Lopes and I are grateful to all who helped make it success esp. ambs of Columbia & Norway in Kenya." May 24, 2019. Tweet. Amal Mudallali (@AmbMudallali). "We gaveled! The WG toward a Global Pact for the Environment succeeded in reaching consensus on a outcome document of recommendations to the GA. It was a difficult process but result is testimony that we all want to work together 4 environment no matter what our differences are." May 24, 2019. Tweet.

²⁹² Lebeda, *supra* note 285. .

²⁹³ Lynn Wagner, *Global Pact Talks Forward Recommendations to UNEA-5*, 28 May 2019, IISD(2019), <https://sdg.iisd.org/news/global-pact-talks-forward-recommendations-to-unea-5/>.

²⁹⁴ Doran et al., *supra* note 277; Mudallali and Duarte Lopes, *supra* note 267.

a proposal.²⁹⁵ Several delegations pointed out the need for further discussions on the concrete added-value of such an instrument, whether binding or non-binding, and how its development could contribute to strengthening environment protection.²⁹⁶ Iran cautioned against the creation of a comprehensive new instrument without recognizing root causes of gaps in international environmental law and called for creativity in reviving existing environmental instruments. Cuba and the Republic of Korea were suspicious of an overarching framework as a response to a wide range of environmental problems. The US specifically criticized the report arguing it was biased towards the option of a global pact. Likewise, the Russian Federation emphasized that the OEWG should not set up a new framework.²⁹⁷ Additionally, delegations indicated that there is no agreement at this stage on the conclusion of the report that “a comprehensive and unifying international instrument clarifying all the principles of environmental law would contribute to making them more effective and strengthen their implementation”. Given this push-back, any mention of an agreement on the codification of principles was ultimately not included in the final recommendations. This evaluation is further developed in the geopolitical analysis below.

Recommendations to the UNGA

The consensus-based final recommendations include a section identifying its objectives, substantive recommendations, and consideration of further work. Section 1 pertains to five objectives guiding the recommendations and reinforces some of the concerns presented by delegates during the Nairobi sessions. The first objective reinforces the protection of the environment for present and future generations. The second refers to upholding existing obligations and commitments under international environmental law, thus making sure not to undermine prior agreements. The third objective is a commitment to contribute to strengthening the implementation of international environmental law and environment-related instruments. The fourth refers to supporting the full implementation of the 2030 Agenda for Sustainable Development. Finally, the fifth objective concerns the governance structure of international environmental law, with a commitment not to undermine existing relevant legal instruments and frameworks, and relevant global, regional, and sectoral bodies.²⁹⁸

The second section includes thirteen substantive recommendations, as follows: (a) reaffirm the role of UNEP and UNEA; (b) catalyze efforts to further the implementation of international environmental law and environment-related instruments, including through accelerating the mobilization of the necessary means of implementation consistent with the AAAA and the 2030 Agenda; (c) promote further discussion of principles of international environmental law, recognizing the ongoing work by the ILC; (d) an invitation to the scientific community and scientific, technical and technological bodies of MEAs to work on crosscutting issues and information sharing; (e) an invitation to the governing bodies of MEAs to promote policy coherence and consider challenges in implementation; (f) foster increased cooperation and coordination among the governing bodies of MEAs; (g) promote increased efforts to streamline the reporting and/or monitoring processes of MEAs and scientific bodies, as well as an invitation to increased sharing of information between them, and for joint reporting, as an when appropriate; (h) encouraging Member States to ratify MEAs and implement them; (i) encourage Member States to ratify MEAs if they haven't already done so, and effectively implement them; (j) encourage

²⁹⁵ Mudallali and Duarte Lopes, *supra* note 267.

²⁹⁶ *Id.*

²⁹⁷ Doran, et al. *supra* note 129.

²⁹⁸ Mudallali and Duarte Lopes, *supra* note 286, Item I.

Member States to strengthen regulatory frameworks at the national level, as well as the capacity of the judiciary to apply international environmental law; (k) promote active and meaningful stakeholder engagement in the different fora related to the implementation of international environmental law and environment-related instruments; (l) explore further ways for Member States to support and make full use of the Montevideo Programme V to foster the environmental rule of law and advance the implementation of environmental law; (m) encourage UNEP to develop U.N. system-wide strategies on how they could best support Member States in the integration and implementation of international environmental law.²⁹⁹

The proposed draft elements recommend the UNGA to (i) consider adopting an international instrument at a high-level U.N. conference, with a view to strengthening the implementation of international environmental law; (ii) establish a preparatory committee prior to that conference, to make substantive recommendations to the UNGA during the first half of 2020 on elements of an international instrument, including its nature, scope, and parameters; (iii) determine a specific timeline by which the negotiations would take place and reach a conclusion; and (iv) establish that the negotiations are to be open to all U.N. Member States, members of specialized agencies and parties to the multilateral environment agreements, with others invited as observers in accordance with the past practice of the U.N..³⁰⁰

However, agreed substantive recommendations were more limited. The OEWG recommended (a) circulating the recommendations to U.N. Member States, specialized agencies, and governing bodies of MEAs; and (b) forwarding the recommendations to UNEA for its consideration. UNEA, in turn, shall prepare, at its fifth session in February 2021, a political declaration for a U.N. high-level meeting. The declaration shall be subject to voluntary funding and be adopted in the context of commemoration of the creation of UNEP by the 1972 Stockholm Conference. It shall be drafted with a view to strengthening the implementation of international environmental law, and international environmental governance in line with paragraph 88 of the “Future we Want.” This recommendation is at the core of the negotiations happening in 2022.

President Macron had set an ambitious goal to have the text adopted by 2020, which could not be achieved.³⁰¹ On the first substantive session, the delegations observed that there was relatively little time to prepare recommendations for the UNGA by the end of the first half of 2019. They acknowledged that whatever package of recommendations emerged would probably, of necessity, fall short of what is objectively needed to completely overhaul the international environmental law regime, given the current climate for multilateralism and the risks that would accompany any attempt to force a new normative consensus.³⁰² The *Earth Negotiations Bulletin* analysis of the meeting highlights that “fear played a role and ultimately shaped the outcome: fear of losing sovereignty, fear of complicating existing MEA regimes, fear of opening up established principles and their varied/contested application, and, significantly for developing countries, a fear of committing to steps that they lack the capacity to implement.”³⁰³

The OEWG ultimately agreed on a “weaker” recommendation for the UNGA with a longer deadline than originally envisioned and no mention of a binding agreement. However, it “keeps the doors open for the conversation initiated by the global pact proposal to survive and inform a wider global conversation and set of aspirations that may be unleashed by the landmark 50th

²⁹⁹ Mudallali and Duarte Lopes, *supra* note 286, at Item II.

³⁰⁰ *Id.*

³⁰¹ Léia Santacroce, *supra* note 135.

³⁰² Doran et al., *supra* note 277.

³⁰³ Wagner, *supra* note 293.

anniversary of the U.N. Conference on the Human Environment” in 2022.³⁰⁴ The new deadline was more reasonable – obviously not considering the pandemic scenario, which was unprecedented and eventually delayed this process – and allowed for an in-depth negotiation of potential solutions to the challenges observed. The discussion of principles was also not set aside. Recommendation 2(c) recognizes the role of the discussion on environmental principles for enhancing implementation of international environmental law, thus still leaving the door open for the potential adoption of a new instrument. However, the Nairobi sessions broadened the set of questions, possibly opening a door for a multi-pronged solution that may also include an agreement on principles. The next section analyzes the main legal issues raised by delegations and how these were ultimately addressed in the draft recommendations.

5. *Analysis of Substantive Issues Discussed and how the recommendations came about*

Delegates substantially disagreed on a series of question related to gaps in international environmental law during the Nairobi sessions. Questions arose as to what constituted a gap, whether there were any, the reason behind gaps, whether gaps were intentional, and what could ultimately be done to address them. There was, however, a general understanding that the state of international environmental law was lacking. If nothing else, the Global Pact initiated a conversation on what was missing in the field, and what steps we could take within the UN system to achieve some progress. Based on the UNSG’s report and the IISD summaries of the discussions held during the Nairobi sessions, this section examines the main legal issues raised by delegations and if and how the final recommendations ultimately tackled them. This review provides a background for how the recommendations come in play. These are complemented, when appropriate, by academic arguments raised by scholars on the Global Pact itself, the UNSG report, and, in some cases, by the written comments submitted by delegates, available at UNEP’s website.

What is a Gap?

The UNGA bestowed upon the UNSG a mandate to identify and assess “possible gaps in international environmental law and environment-related instruments,”³⁰⁵ without defining what “gaps” denoted in that context. The meaning of “gaps” was clarified in the UNSG Report as a preliminary matter. Drawing from a legal dictionary, “gap” is defined in the report as a lacuna, void, defect or deficiency.³⁰⁶ The wording of the Resolution allows for a comprehensive interpretation of the gap analysis.³⁰⁷ The goal of the first substantive session of the OEWG was to assess the UNSG’s report and discuss the gaps identified. However, as abridged by the IISD, this session turned out to be a game of deconstruction of the meaning of gaps.³⁰⁸ The conclusions of the UNSG’s report raised more questions than answers. Before the substantive issues could be discussed, there were several preliminary questions to be addressed. What is a gap? How is it defined? Can the supposed gaps identified by the UNSG be defined as gaps, or are those a result of intended policy decisions by the international community?

³⁰⁴ Wagner, *supra* note 293.

³⁰⁵ UNGA resolution, at para. 1.

³⁰⁶ UN Secretary-General, *supra* note 159, at 6.; See BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE, 2nd ed. 496 (Oxford University Press, 2001).

³⁰⁷ Duncan French & Louis J. Kotzé, ‘Towards a Global Pact for the Environment’: *International environmental law’s factual, technical and (unmentionable) normative gaps*, 28 REV. OF EUR., COM. & INT’L ENV’L L. (2019).

³⁰⁸ Doran et al., *supra* note 297, at 12-13.

According to French & Kotzé, the language of the Resolution is both “progressive and conceptually incoherent,” as it connects the identification of gaps with “their implementation.”³⁰⁹ Indeed, the very notion of a “gap” raises fundamental linguistic and conceptual complexities.³¹⁰ This was proven right at the Nairobi sessions. Questioning the mandate incumbent upon the UNSG, Bodansky asks whether “gaps” can even be identified and assessed in a “technical and evidence-based” manner as requested by the UNGA.³¹¹ The Nordic Council of Ministers differentiated between factual and normative gaps. The first category included substantive (lack of coverage of the issue in question), legal (guidelines exist but are not legally binding), membership-related (some parties are excluded from all or certain commitments), or geographic (an instrument does not apply to all regions), institutional (no institution/organization/instrument exists or is tasked to carry out particular functions) or compliance/enforcement-related (there is an agreement, but the compliance mechanism is very soft) gaps.³¹² On the other hand, a normative gap exists when there is no agreement that an issue should be addressed. For example, there may be agreement that no instrument exists for a particular issue (a substantive gap) but disagreement on whether an instrument is necessary. It is also important to consider whether a gap results from a deliberate design choice when negotiating a legal instrument.³¹³ Biniáz further listed gaps related to means of implementation, including inadequate domestic action, resources (insufficient funding, capacity, etc.), and political will.³¹⁴

The report addressed five substantive types of gaps: (i) the scope and status of the principles of international environmental law; (ii) gaps relating to the sectoral regulatory regimes; (iii) environment-related instruments; (iv) gaps relating to the governance structure of international environmental law; and (v) gaps concerning the implementation and effectiveness of international environmental law.³¹⁵ It embodied regulatory gaps (substantive/normative gaps, including procedural and institutional) and governance gaps (implementation gaps). It analyzed gaps (i) within an MEA with respect to its content or ability to fulfil its object and purpose; (ii) between legal frameworks (e.g., substantive or procedural overlaps, discrepancies or conflicts); or (iii) where there is no regulation at all (e.g., limitations in substantive, institutional or geographical coverage).³¹⁶

A discussion on “gaps” was quickly initiated in Nairobi. For some delegations, “gaps” should be interpreted in a narrow sense and be limited to normative ones. This interpretation would disregard some of the gaps identified in the report as “challenges.” These delegates argued that deficiencies in implementation and other challenges would complicate the work of the OEWG and should thus not be discussed at this point.³¹⁷ However, since means of implementation was consistently highlighted by delegates as a major concern, this interpretation did not receive much traction. For other delegations, gaps should be considered in their broader meaning, including normative, institutional or implementation gaps.³¹⁸ By assessing both regulatory and governance gaps, the report adopted a broader interpretation of what constitutes a “gap.” Voigt clarifies that

³⁰⁹ French & Kotzé, *supra* note 307.

³¹⁰ *Id.*

³¹¹ See Hernández, et al., *supra* note 79 (contribution by Daniel Bodansky).

³¹² Urho, et al., *supra* note 100, at 80.

³¹³ *Id.*

³¹⁴ Biniáz, *supra* note 102, at 35.

³¹⁵ UN Secretary-General, *supra* 306, at 6.

³¹⁶ *Id.* at 6.

³¹⁷ Doran, et al., *supra* note 297, at 9.

³¹⁸ Mudallali and Duarte Lopes, *supra* note 267, at 2.

by focusing on the effectiveness of international environmental law, the report allows for exploring a wider set of parameters than merely the absence of rules and law.³¹⁹

According to Biniaz, the strongest case for a “gap” may be when an entire environmental topic has been unaddressed (or sorely under-addressed).³²⁰ This would constitute, in the language used by French & Kotzé, a factual gap. An example would be the debate on marine plastic.³²¹ However, even that conclusion may be controversial. As argued by Guyana, the mere absence of a rule or agreement on a particular issue does not necessarily constitute a gap.³²² Egypt distinguished between a “gap,” a void or lacuna in the international legislation, and a “deficiency,” an outcome of an existing process that reflects a country’s priorities and compromises.³²³ These are policy decisions.

In some cases, particularly where there is already an international agreement on a particular subject, a putative “gap” may reflect a design choice on the part of negotiators.³²⁴ These are “intentional” (US), “conscious and deliberate” (Australia, Canada and Argentina) decisions, which result from “political compromises” (Japan) and constitute “necessary gaps” (Guyana). When conceivable gaps occur within MEAs, these are described as “design elements” (US) and should be addressed in discussions under MEAs (Colombia) instead of by the OEWG.³²⁵ These might have been motivated by considerations of substance, politics and/or participation. The choices might have involved, for example, one or more non-legally binding provisions, exceptions to a general rule, provisions that allow a party to opt out of a particular commitment, grace periods or the absence of compliance/enforcement procedures.³²⁶ Some gaps reflect a necessary compromise among States (Brazil, the Russian Federation, Egypt, Mexico, Norway).³²⁷ Many States are likely to consider any particular absence or omission part of the delicate balance that led to an acceptable agreement, whether these refer to the exclusion of a few countries from a commitment, accommodating special circumstances in an agreement, a light compliance regime or a non-legally binding approach to a particular instrument or provision.³²⁸ As a matter of policy, this “gap” may lack a legal solution.³²⁹

Since it may be based on policy decisions, ascertaining factual gaps is a subjective exercise. Bodansky clarifies that legal gaps (or *non liquets*) exist, if at all, only in very rare cases where the law does not decide an issue one way or the other – where an action is neither permitted nor prohibited. Whether any such gaps exist in international environmental law is doubtful, since ordinarily the absence of a legal rule regulating an issue (say, plastics pollution or protection of a species) does not create a gap in the law; it simply means that, legally, states are free to act as they choose.³³⁰ There is a discontinuity rather than a flaw to be filled. Through a subjective assessment, states make political and moral judgments about whether an agreement would serve a useful purpose.³³¹ If we accept that current MEAs are concrete evidence and manifestations of States’

³¹⁹ Voigt, *supra* note 101, at 16.

³²⁰ Biniaz, *supra* note 102, at 34.

³²¹ French & Kotzé, *supra* note 307.

³²² Doran et al., *supra* note 297, at 4.

³²³ *Id.* 4.

³²⁴ Biniaz, *supra* note 102, at 34.

³²⁵ Doran, et al., *supra* note 297 at 3; 4.

³²⁶ Biniaz, *supra* note 102, at 34.

³²⁷ Mudallali and Duarte Lopes, *supra* note 267, at 2.

³²⁸ Biniaz, *supra* note 102, at 34-35.

³²⁹ French & Kotzé, *supra* note 307.

³³⁰ See Hernández, et al., *supra* note 79 (contribution by Daniel Bodansky).

³³¹ *Id.*

normative ambitions, it is clear that States have been decidedly unambitious in what they believe *should* exist as global environmental protection norms.³³²

The UNGA resolution seems to use the term “gap” as a flaw in the international environmental law field.³³³ This understanding received a lot of resistance from states. Some delegates argued that there are no gaps in international environmental law. Others agreed with the gaps identified in the UNSG’s report but didn’t agree with how they are formulated. Finally, there were those who said there are gaps, but not the ones in the UNSG’s report.³³⁴ To level the playing field at discussions, several delegations pointed out that before delving into the task of assessing and addressing gaps, a common understanding of the definition of a gap was necessary.³³⁵ Those who held the “no gaps” view tended to support their positions with one of two broad, connected rationales: (i) fragmentation in international environmental law is the result of the very nature of the field, and indeed is desirable since different MEAs are required to address different needs; and (ii) gaps in existing MEAs are the result of deliberate design by their respective parties.³³⁶

The lack of consensus on what is a possible gap was constantly recalled by delegates who opposed the process.³³⁷ Several delegates argued that the report had exceeded its mandate.³³⁸ This discussion was also used in an attempt to postpone a discussion on possible options to address said gaps until the OEWG decided whether gaps exist and what they are.³³⁹ Summarizing the first session, Co-Chair Duarte Lopes called for a clear definition of a gap, with some preference for a focus on normative gaps, and a clearer identification of challenges and the need to distinguish between normative, institutional, and implementation gaps.³⁴⁰ Additionally, several delegations reinforced that the identification of gaps should be made through a science-based process, with the notion that gaps should be understood broadly.

At the second session, delegates agreed on some of the elements of the “draft recommendations” to be suggested to the UNGA, which included a broad understanding of gaps in international environmental law, and whether these are lacunae, deficiencies, or challenges.³⁴¹ Co-Chair Mudallali recalled the discussions of the first session and noted that there would be no attempt to pre-empt discussions on an understanding of gaps.³⁴² They then moved forward to the discussion of potential options to address gaps through guiding questions circulated to delegates. Co-Chair Duarte Lopes emphasized, however, that by asking these questions the Co-Chairs do not mean to suggest that there is an agreement on the existence of gaps, the nature of those gaps, and on the need or opportunity to address them.³⁴³ This reminder was essential, since several countries continued to try to lead the discussion back to the meaning of gaps.³⁴⁴

³³² French & Kotzé, *supra* note 307.

³³³ See Hernández, et al., *supra* note 79 (contribution by Daniel Bodansky).

³³⁴ Doran, et al., *supra* note 297, at 13.

³³⁵ Alessandra Lehmen, Towards a Global Pact for the Environment – Civil society inputs with regard to legal considerations raised at the First Substantive Session, International Center for Comparative Environmental Law (2019), available at https://cidce.org/towards-a-global-pact-for-the-environment-civil-society-inputs-with-regard-to-legal-considerations-raised-at-the-first-substantive-session/?utm_source=E2%80%A6. Doran, et al., Summary of the First Substantive Session of the Ad Hoc Open Ended Working Group towards a Global Pact for the Environment: 14-18 January 2019. 2019. P. 10 (Japan).

³³⁶ Doran, et al., *supra* note 297, at 13.

³³⁷ *Id.* at 10. (Russia, the US and Saudi Arabia at the first session).

³³⁸ *Id.* at. 4; 8; 10 (US, Saudi Arabia, Belize, Canada).

³³⁹ *Id.* at. 10 (US, Argentina, Australia, and Canada).

³⁴⁰ *Id.* at. 11.

³⁴¹ Doran, et al., *supra* note 277, at 1.

³⁴² *Id.* at. 2.

³⁴³ *Id.* at 3.

³⁴⁴ *Id.* at 3 (US, arguing that options to address said gaps would depend on the precise identification of gaps, in an attempt to lead the discussion back to the focus of the first session. The US called on delegations to “slow down,” focus on gaps, and consider

The broader question on the definition of gaps was addressed when discussing Question 1 of the second substantive session.³⁴⁵ Argentina stressed that there are no gaps in international environmental law, since all situations relating to environmental issues can be resolved by implementing existing law.³⁴⁶ Saudi Arabia, with the US, Egypt, Japan, and Brazil, underlined the absence of consensus on gaps.³⁴⁷ Recalling the argument of “intentional gaps,” Colombia noted that apparent gaps can appear in international environmental law under a number of circumstances, including where states have decided not to address certain issues.³⁴⁸ The US called for the OEWG to conclude that it does not view design elements in existing MEAs as gaps.³⁴⁹ The Federal States of Micronesia said that gaps should not be interpreted narrowly, but should include challenges, inconsistencies, and shortcomings in international environmental law.³⁵⁰ Brazil, with Ecuador, noted consensus that gaps exist in the broad sense of the translation of existing legal norms into reality, and supported talking about “challenges” rather than “gaps,” stressing that these exist regarding implementation and means of implementation.³⁵¹ Turkey noted that a *de jure* gap on paper may not be a *de facto* gap, and vice versa, and noted the importance of sovereign state decisions. He urged a focus on challenges.³⁵² Alternatively, other delegations underlined that previous decisions made by States should not prevent ambitious and innovative solutions today. Calling for a broader understanding of “gaps” as defined by the UNSG, ICEL noted:

Thus, the process should continue to encompass a review of deficiencies of normative nature, institutional or as pertaining to implementation, in international environmental law and environment-related instruments, as appropriate, to address, in a comprehensive and coherent manner, the challenges posed by environmental degradation in the context of sustainable development. Furthermore, this process is “open to participation by all States Members of the United Nations and all members of the specialized agencies,” as well as “to relevant nongovernmental organizations in consultative status with the Economic and Social Council and those accredited to relevant conferences and summits” related to sustainable development. In sum, the mandate of Resolution 72/277 is a focused, but comprehensive and inclusive, review of the relevant “gaps” in the field. ICEL notes that the global consensus in favor of advancing the UN Sustainable Development Goals (SDGs) offers the appropriate context

options at the third substantive session once views had coalesced.) Australia, Ecuador, India, the Philippines, and Kenya said Member States should first arrive at a shared view of what constitutes a gap. New Zealand stated that while it is essential to settle on what is or is not a gap before discussing possible options, both may have to be examined together considering that there is no agreement on this question).

³⁴⁵ *Id.* at 4. Question 1: What options can be considered to address the possible gaps or challenges related to principles of international environmental law mentioned by delegations without duplicating nor undermining existing law and ongoing efforts/processes? What would be the objective of such options? What methodology should be used to develop them?

³⁴⁶ *Id.* at 3.

³⁴⁷ *Id.* at 4.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 6.

³⁵⁰ *Id.* at 4.

³⁵¹ *Id.*

³⁵² *Id.* at 6.

for analysis of “gaps.” Issues concerning “gaps” should be resolved in favor of the SDGs.³⁵³

At the end of the second session, Co-Chair Duarte Lopes proceeded to offer reflections from the Co-Chairs on the process, the current session, and the way forward, noting the discussion on definition of gaps in international environmental law and related instruments, which gaps should be considered, and options to address them.³⁵⁴ When summarizing the session, the Secretariat included some conclusions on gaps: namely, a broad understanding of gaps as lacunae, deficiencies, or challenges, confirming the definition of the UNSG’s report; the importance of identifying gaps through a science-based approach; a view that some gaps in environmental instruments are voluntarily designed and are often the result of delicately balanced compromises in difficult negotiations; and support for innovative solutions.³⁵⁵ Also, an understanding of gaps in implementation ranging from a lack of capacity building and financial and technological resources to an absence of the prioritization of political decision-making and political will, with weak monitoring; the importance of strengthening means of implementation, with a main focus on international cooperation, including provision for necessary funding, capacity building, and the transfer of technology; and the link between political will and implementation.³⁵⁶

The IISD assertedly analyzed:

In contrast to the broad focus on options, some early interventions sought to limit talks within the scope of the discussion held during the January session on “gaps” in the context of the UNSG’s report, which some described as an “interminable” debate. The risk of the OEWG process disappearing amidst endless gaps and definitions was highlighted at a pre-session briefing organized by the French Government. Suggestions in plenary that the OEWG could not move forward in its discussion of options until it had reached agreement on the question of gaps were respectfully taken on board and simultaneously circumvented. This “throwback” to the first substantive session led some delegates to express frustration that the process was “going in circles.” Others considered that while there may not be consensus on gaps, there was general agreement in the room that “challenges” existed. Most urged that a lack of consensus on gaps should not preclude the OEWG from moving forward. Considering the range of options that were in fact proposed, it could be said that this sentiment carried the day to some extent.³⁵⁷

Even on the final day of the OEWG at the third session, at least one delegate repeated the claim that negotiators were struggling with the meaning of “gaps.”³⁵⁸ The lack of consensus on gaps was still briefly mentioned at the last session, but much less so. Ecuador, Nicaragua, Saudi Arabia and Egypt used the lack of consensus on gaps as an argument to avoid developing recommendations.³⁵⁹ Providing another response to this challenge, Japan and Canada proposed

³⁵³ International Council of Environmental Law (ICEL), Note on Options to Address Gaps Under Resolution 72/277 (10 May 2018) “Towards a Global Pact For The Environment,” submitted for consideration in the 2019 Nairobi Consultations (Feb. 19, 2019), available at https://wedocs.unep.org/bitstream/handle/20.500.11822/27609/ICEL_Report.pdf?sequence=1&isAllowed=y.

³⁵⁴ Doran, et al., *supra* note 277, at 7.

³⁵⁵ *Id.* at 8.

³⁵⁶ *Id.* at 9.

³⁵⁷ *Id.* at 10.

³⁵⁸ Doran, et al., *supra* note 297, at 10.

³⁵⁹ *Id.* at 4-5.

putting forward a menu of workable solutions.³⁶⁰ The word “gap” was ultimately not included in the final recommendations agreed by the working group.³⁶¹

Fragmentation of International Environmental Law

The UNSG’s report traced several inefficiencies in international environmental law to a general lack of coherence and synergy among a large body of sectoral regulatory frameworks.³⁶² Fragmentation is inevitable given the “piecemeal, incremental and reactive nature of international environmental law-making.”³⁶³ The nature of environmental law-making resulted in sectoral regimes and a fragmented legal framework for environmental protection.³⁶⁴ Different environmental problems require tailored-made solutions, drafted specifically for a set of issues, contexts, or geographical region. The issue-by-issue governance approach has resulted in treaties well-tailored to address individual challenges, forming the scaffolding of today’s international environmental legal architecture.³⁶⁵

Some scholars have welcomed the system for its ability to enable creative and innovative case-appropriate solutions.³⁶⁶ ICEL rejects the notion of a dysfunctional fragmentation and recognizes the sectoral approach as a strength of the environmental legal system.³⁶⁷ ICEL summarized the debate:

On the one hand, there is a recognition that fragmentation reflects the scope and inherent nature of international environmental law. On the other hand, it is also recognized that fragmentation becomes problematic when it creates a duplication of processes, lack of legal clarity and predictability, and that addressing fragmentation would facilitate the effective implementation of environmental law as well as the 2030 Agenda.³⁶⁸

The first round of discussions in Nairobi significantly addressed this issue, with some delegations welcoming fragmentation. Russia emphasized that fragmentation is necessary to achieve consensus on environmental matters.³⁶⁹ Smaller and issue-specific agreements are usually faster to negotiate and enter into force, especially if those involve fewer countries.³⁷⁰ Mexico and Brazil noted that it reflects a diversity of environmental problems and associated solutions.³⁷¹ For some delegations, fragmentation should be considered an asset, as it manifests the non-hierarchical character of international environmental law and its need to adapt to provide specific answers to specific situations.³⁷² Because of regionalization, and the pressure from neighboring countries to

³⁶⁰ Doran et al., *supra* note 297, at 4-5.

³⁶¹ See Recommendations, as agreed by the working group (22 May 2019).

³⁶² UN Secretary-General, *supra* 306, at 42.

³⁶³ *Id.* at 43.

³⁶⁴ *Id.* at 4, 42.

³⁶⁵ Navajas & Lobel, *supra* note 28, at 35.

³⁶⁶ *Id.*

³⁶⁷ WCEL et al., *supra* note 162, at 7. See i.e., A Fischer-Lescano and G Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25(4) MICHIGAN J. OF INT’L L. 999 (2004); M Koskenniemi, *Fragmentation of International Law? Postmodern Anxieties*, 15(03) LEIDEN J. OF INT’L L. 553 (2002).

³⁶⁸ ICEL, *supra* note 353.

³⁶⁹ Doran, et al., *supra* note 297, at 3.

³⁷⁰ F Biermann et al, *The Fragmentation of Global Governance Architectures: A Framework for Analysis*, 9(4) GLOBAL ENVIRONMENTAL POLITICS 25 (2009).

³⁷¹ Doran, et al., *supra* note 277, at 7.

³⁷² Mudallali and Duarte Lopes, *supra* note 267, at 2.

fulfill commitments, States are more likely to comply with international law.³⁷³ Tailored-made solutions to environmental problems can ultimately lead to a higher level of performance.³⁷⁴ Overall, the current MEA system has produced several positive results, including less polluted regional seas, the depletion of the ozone layer and reduction of acid rain, and a better scientific understanding of climate change.³⁷⁵

Nonetheless, it leads to a significant gap in international environmental law. Burkett argues that this compartmentalization has real-world impact, rendering environmental law and policy irrelevant to areas such as commercial law, corporate law and intellectual property.³⁷⁶ Serbia stressed the need to take seriously the UNSG's conclusion that international environmental law is fragmented, incoherent, and piecemeal.³⁷⁷ Some delegations underlined that fragmentation becomes problematic when it creates a lack of legal clarity and predictability, and that addressing fragmentation would facilitate implementation.³⁷⁸ The many advantages brought by fragmentation do not necessarily mean that the perceived weaknesses should be left unaddressed. Given the role of environmental principles as building blocks, serving to supplement or complement more specific rules, aiding interpretation, filling gaps, and ultimately unifying the sectoral approach of international environmental law, the UNGA has recommended the adoption of an overarching legal framework of environmental principles.³⁷⁹ It noted that a comprehensive and unifying international instrument clarifying all the principles of environmental law would contribute to making them more effective and strengthen their implementation.³⁸⁰

Several delegations stressed that international environmental law is a part of international law and that rules of international law can be used to fill the gaps. The role of customary international law, non-binding instruments and regional/national agreements were not sufficiently stressed in the Report and should be given more importance.³⁸¹ Some delegations highlighted that the existence of gaps prevented the implementation of international environmental law obligations, while other disagreed with this approach.³⁸² Taking an intermediate position, China pondered that fragmentation can be, depending on the issue area, a positive or a negative aspect of international environmental law; soft law may sometimes be a better tool to respond to the urgent nature of environmental issues; and more studies on the codification of principles are needed.³⁸³ Similarly, Co-Chair Duarte Lopes, during an oral summary in the first session, noted how some view this as an asset and a reflection of the diversity of international environmental law, its non-hierarchical character, and ability to adapt and provide specialized answers to certain issues. He acknowledged the view that some gaps can be intentional and a reflection of compromise among states parties,

³⁷³ Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law* 25 MICHIGAN J. OF INT'L L. 849, 851 (2004).

³⁷⁴ Norichika Kanie, *Governance with Multilateral Environmental Agreements: A Healthy or Ill-equipped Fragmentation?*, in GLOBAL ENVIRONMENTAL GOVERNANCE: PERSPECTIVES ON THE CURRENT DEBATE 73-74 (Walter Hoffmann & Lydia Swart eds., 2007).

³⁷⁵ *Id.* at 71, 73.

³⁷⁶ Hernández, et al., *supra* note 79 (contribution by Maxine Burkett).

³⁷⁷ Doran, et al., *supra* note 297, at 5.

³⁷⁸ Mudallali and Duarte Lopes, *supra* note 267, at 2.

³⁷⁹ UN Secretary-General, *supra* 306, at 4.

³⁸⁰ *Id.* at 6-5, 43.

³⁸¹ Mudallali and Duarte Lopes, *supra* note 267, at 2.

³⁸² *Id.*

³⁸³ Doran et al., *supra* note 297, at 4.

while for others fragmentation is regarded as problematic when it reflects a lack of legal clarity.³⁸⁴ The issue was only briefly mentioned during the second³⁸⁵ and third sessions.³⁸⁶

Matters of Process

The Nairobi sessions showed a lot of apprehension from countries regarding the effect of the consultative process on existing MEAs. States called for an open, inclusive, transparent, constructive, and meaningful Member State-led process. At the end of the second session, the Co-Chairs acknowledged a general agreement on a transparent discussion and the importance of consensus, the need to reach pragmatic outcomes that add value while avoiding duplication, and wide support for the view that the OEWG's work should not undermine or weaken existing instruments.³⁸⁷ The need to reach an agreement based on consensus was one of the highest priorities of the Co-Chairs. Indeed, acknowledging that the agreement reached at the end of the third session was weak, Co-Chair Duarte Lopes said that it was nevertheless based on consensus, and thus represented a first step in a continuing process.³⁸⁸ The conventional approach of having to build a working consensus for environmental agreements, sometimes in the context of strong or even hostile opposition, has shaped international environmental law.³⁸⁹

There was a general unanimity on guaranteeing that the process and the ongoing debate should not undermine existing instruments, bodies and processes.³⁹⁰ Several countries reinforced the need to consider existing MEAs, so as to respect current processes, strengthen existing obligations, avoid weakening prevailing environmental law, principles and standards³⁹¹ or overlapping or duplicating with existing international instruments.³⁹² Monaco advised against renegotiating existing MEAs, while Brazil noted that a hasty overhaul of the system could erase important concepts and principles. Delegations also highlighted the importance of basing the process on existing relevant political declarations, including the Stockholm Declaration, the Rio Declaration on environment and development, the Rio+20 Declaration, the 2030 Agenda, and the Addis Ababa Action Agenda.³⁹³ ICEL noted the consensus on two substantive issues related to process:

Notably, two paramount consensus issues have emerged, and two other central issues identified, as a result of the first substantive session. First, consensus 2 that the ongoing consultations should not undermine existing instruments, bodies and processes. Second, agreement on basing the process on existing relevant political declarations — including the Stockholm Declaration, the Rio Declaration, the Rio+20 Declaration, and the Sendai Framework on Disaster

³⁸⁴ Doran et al., *supra* note 297, at 11.

³⁸⁵ Doran, et al., *supra* note 277, at 3. (Venezuela, arguing that fragmentation does not justify a legally binding instrument).

³⁸⁶ *Id.* at 4; 5. (Argentina, clarifying that international environmental law is inherently fragmented, a product of decentralization, spontaneity, and non-hierarchical pluralism; Chile, arguing that gaps and fragmentation in some areas of international law should not be a concern).

³⁸⁷ *Id.* at 8.

³⁸⁸ Doran et al., *supra* note 297, at 1; 3; 8; 9; 10.

³⁸⁹ *Id.* at 11.

³⁹⁰ Mudallali and Duarte Lopes, *supra* note 267.

³⁹¹ Doran, et al., *supra* note 297, at 2; 3; 4. Doran, et al., *supra* note 277, at 3; 6 (Australia, Bangladesh, Bolivia, Canada, Cuba, India, Romania, for the European Union (EU), and South Africa).

³⁹² Doran, et al., *supra* note 297, at 3; 4; 9 (Australia, Bahrain, China, Colombia, Iraq). Doran, et al., *supra* note 277, at 3; 6. (Australia). Doran, et al., Summary of the Third Substantive Session of the Ad Hoc Open-ended Working Group towards a Global Pact for the Environment: 20-22 May 2019. *Global Pact for the Environment*. Vol. 35 No. 3, available at <http://enb.iisd.org/download/pdf/enb3503e.pdf>. 5 (Chile)

³⁹³ Mudallali and Duarte Lopes, *supra* note 267.

Risk Reduction 2015-2030 — and on existing relevant UNGA resolutions — such as the 2030 Sustainable Development Agenda and the Addis Ababa Action Agenda.³⁹⁴

Still, countries acknowledged the existing system needs a reboot, either through the clarification of ambiguities and strengthening of existing principles (El Salvador) or by improving cohesiveness at the global level (Colombia). China called for the progressive development of principles. Guyana also underscored that the OEWG process should bring added value in terms of cohesion, coherence, synergies, and effectiveness. Colombia explicitly stressed the need to bolster cooperation and coordination among MEAs. ICEL further notes:

A possible way to avoid duplication and backsliding is an explicit recognition that existing sector-specific agreements present *lex specialis* and therefore have priority and should not be undermined. Any codification is without prejudice to the specific expression of principles already established in international treaty law. A multifaceted response is called for and ICEL encourages the several conferences of the parties under international agreements, as well as the UNGA, to address the gaps identified where they have authority to do so.³⁹⁵

In the final recommendations submitted to the UNGA, the OEWG included as objectives for guiding the recommendations to (b) uphold respective obligations and commitments under international environmental law of States members of the United Nations and members of specialized agencies; (c) contribute to the strengthening of implementation of international environmental law and environment-related instruments; (d) support the full implementation of the 2030 Agenda for Sustainable Development, as well as the outcome of the UN Conference on Environment and Development (Rio+20), including its paragraphs 88 and 89; (e) not undermine existing relevant legal instruments and frameworks and relevant global, regional and sectoral bodies.³⁹⁶

International Environmental Governance

The report called attention to the institutional fragmentation which characterizes international environmental law, with a heterogenous set of actors in a system of multi-actor governance with international institutions, treaty bodies, non-governmental organizations, the scientific community and the private sector.³⁹⁷ The UN system, comprised of UNEP and several UN programmes and funds, and treaty bodies established by MEAs have yet to properly coordinate for coherent implementation. Institutional fragmentation and a lack of coordination are key challenges in international environmental governance.³⁹⁸ The UNSG called for enhanced coordination in international environmental law, between MEAs, and with environment-related areas.³⁹⁹

Several Member States raised concerns about the institutional aspects of international environmental law, with Japan noting this was a good opportunity to reflect on how the

³⁹⁴ ICEL, *supra* note 353, at 2.

³⁹⁵ *Id.* at 4.

³⁹⁶ See Recommendations, as agreed by the working group (22 May 2019).

³⁹⁷ UN Secretary-General, *supra* 306, at 33.

³⁹⁸ *Id.* at 34.

³⁹⁹ *Id.* at 34-35.

international community has addressed pressing environmental issues through MEAs.⁴⁰⁰ Lack of coherence and cooperation between different instruments contribute to creating challenges in implementation and fail to address the natural dependence of ecosystems. There was a general understanding that the OEWG could support the strengthening of the governance structure of international environmental law, while preserving the independence of each MEAs and respecting ongoing processes. The strengthening of synergies and promotion of better coordination and cooperation between MEAs, bodies and processes, building on ongoing initiatives, was stressed by many delegations. In this regard, many supported the idea that the OEWG considers the possibility of developing further work on the proposals made in the paragraph 83 of the Report.⁴⁰¹ Others noted that so far initiatives aimed at improving cooperation and coordination had not provided all the results expected. Some delegates further argued that this discussion should occur within respective MEAs, not by the OEWG.

Several nations underscored the role of UNEP as the global authority on environment in the UN system,⁴⁰² noticing the need to strengthen it as part of improving coordination in international environmental law.⁴⁰³ Many delegations have called for supporting UNEP and strengthening the capacities of national systems under the Montevideo Programme (Programme of Development and the Periodic review of Environmental Law). Likewise, the role of UNEA as the main environmental body in the UN system was noted, especially in addressing governance gaps.⁴⁰⁴ Brazil highlighted the need to address insufficient coordination in the UN system.⁴⁰⁵ Other delegations underlined the need for the full implementation of paragraph 88 of the Rio+20 Declaration. There was a broad understanding regarding the importance of non-State actors' participation in governance, including major groups, indigenous people and local communities, youth, women, NGOs, and the business sector. Several delegations supported a more coherent and pro-active approach to the participation of stakeholders in the different MEAs. Other delegations highlighted that this participation should be carried out in accordance with international and national laws, reflecting the differences of each specific context.⁴⁰⁶

Institutional fragmentation and weak coordination between treaties can be addressed through various means, such as: (a) creating clusters and synergies between conventions; (b) mapping existing global and regional action plans and agreements to create an overview of coverage and identify interlinkages; (c) avoiding duplication of reporting and/or monitoring processes by using the same reporting channels and not creating additional burdens (“integrated reporting”); (d) sharing lessons learned and best practices; (e) developing implementation guidelines for multilateral environmental agreements; and (f) sharing information among the different scientific bodies that support the work of related multilateral environmental agreements.⁴⁰⁷

A few options in relation to these issues included strengthening UNEP and UNEA; a call by the UNGA for increased cooperation and coordination among MEAs; a call by the UNGA to all Member States that have not done so to ratify the MEAs and effectively implement them; the creation of working groups tasked with identifying possible synergies to be explored by different

⁴⁰⁰ Doran et al., *supra* note 277.

⁴⁰¹ Mudallali and Duarte Lopes, *supra* note 267.

⁴⁰² *Id.*

⁴⁰³ Doran et al., *supra* note 277.

⁴⁰⁴ Mudallali and Duarte Lopes, *supra* note 267.

⁴⁰⁵ Doran et al., *supra* note 277.

⁴⁰⁶ Mudallali and Duarte Lopes, *supra* note 267.

⁴⁰⁷ UN Secretary-General, *supra* 306, at 35.

instruments and bodies; the creation of a specific forum where representatives of relevant instruments and bodies could meet and coordinate, while indicating that this could be done under UNEA; a call by the UNGA for some mainstreaming of the environment within the U.N. system including through coordination mechanism such as the environment management group.

Means of Implementation

The UNSG's broad mandate included the assessment of implementation gaps,⁴⁰⁸ which the report broadly called institutional gaps.⁴⁰⁹ Although some countries objected to calling it a "gap," preferring the word "challenge,"⁴¹⁰ there is undoubtedly a missing link between the obligations States assume and their full implementation.⁴¹¹ The fact that the Resolution expressly mentions implementation firmly place these conversations within the ambit of the OEWG's inquiry. Lack of implementation was one of the main topics of discussion during the Nairobi sessions, and also significantly encompassed the core of the recommendations of the OEWG to the UNGA.

Implementation gaps include ineffectiveness in monitoring, reporting and verification, compliance and enforcement, the absence of liability rules, or the need for better harmonization, synergies and coordination with other MEAs. These arise for different reasons, ranging, for example, from capacity challenges, the need for facilitation and compliance, insufficient monitoring and law enforcement, to lack of political will.⁴¹² Many delegations reaffirmed that means of implementations need to be strengthened, some noting that it should be the main focus of the working group, which should result in reinforcing international cooperation and effective means of implementation, including provision on the necessary funding, capacity building and transfer of technology.⁴¹³

The national implementation of international law represents one of the most significant challenges.⁴¹⁴ There is a broad understanding that national implementation is first and foremost the responsibility of States and that many countries face challenges to implement their obligations under different MEAs, taking into account national circumstances and priorities. The implementation deficit can be traced to knowledge gaps; a lack of adequate means of implementation, such as finance, capacity-building, knowledge sharing or technology transfer; lack of access to funding and environmentally-friendly technologies; the need for facilitation for compliance; a lack of coordination between relevant government departments as well as with other sectors; insufficient monitoring and law enforcement; weak compliance mechanism and weak monitoring; a lack of political will; and the inadequate engagement of different stakeholders, such as civil society and women's organizations.⁴¹⁵ Funding for implementation still remains insufficient, unpredictable and incoherent, and varies considerably among the different regimes. The lack of cooperation among governments, corporations and the financial community; and the inadequacy of systems for collecting, synthesizing and reporting back information and knowledge

⁴⁰⁸ UNGA Resolution, *supra* note 131.

⁴⁰⁹ UN Secretary-General, *supra* note 159, at 6.

⁴¹⁰ Oral summary second working group, p. 4.

⁴¹¹ Biniiaz specifically questioned the notion of a gap related to implementation, asking whether there is a gap when an agreement covers a subject, but the environment remains unsatisfactory addressed. Biniiaz, *supra* note 102, at 34-35.

⁴¹² Voigt, *supra* note 101, at 23.

⁴¹³ Oral summary second working group, p. 4.

⁴¹⁴ UN Secretary-General, *supra* note 159, at 36. See also UNEP, "Future shape of international law to address pollution of global significance affecting the Earth's ecosystems: consolidated report of initial consideration by experts", 6 April 2018.

⁴¹⁵ UN Secretary-General, *supra* note 159, at 36. See DAVID VICTOR, KAL RAUSTIALA AND EUGENE B. SKOLNIKOFF, EDs., *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* (MIT Press, 1998). Doran, et al., *supra* note 277, at 3; 4.

on such technologies are also highlighted as significant challenges in implementation.⁴¹⁶ Limited reporting for assessment of resources mobilized and compliance constraints the effective implementation of treaty provisions.⁴¹⁷

The report assessed specific implementation challenges of different MEAs,⁴¹⁸ suggesting that the proliferation of instruments and the fragmentation in the regulatory regimes create the need for institutional coordination and cooperation, as well as the implementation of the various legal instruments in a mutually supportive manner.⁴¹⁹ It called for strengthening mechanisms to harness interlinkages and promote synergies for effective implementation of MEAs.⁴²⁰ This could be done, for example, by clustering related MEAs.⁴²¹ It also suggested developing implementation guidelines for MEAs.⁴²² It was suggested that the Secretariats need to be provided with sufficient means to support developing countries to implement obligations. The importance of compliance was underlined, including through the development of compliance mechanisms. Some delegations were against having a global compliance mechanism, suggesting this should rather be addressed within the sphere of each specific MEA.⁴²³

Many delegations stressed the need to strengthen the means of implementation to implement international environmental law in line with Agenda 2030 and the Addis Ababa Action Agenda. There was a call for developed countries to increase their support to developing countries through increased financial resources, capacity building and technology transfer, as well as for developing a tracking mechanism in this regard.⁴²⁴ One of the objectives guiding the recommendations is to contribute to the strengthening of implementation of international environmental law and environment-related instruments;⁴²⁵ and to d) support the full implementation of the 2030 Agenda for Sustainable Development, as well as the outcome of the UN Conference on Environment and Development (Rio+20), including its paragraphs 88 and 89.⁴²⁶ A few delegations recommended to Member States to fully use the Montevideo Programme Programme of Development and the Periodic review of Environmental Law to foster the environmental rule of law and support the implementation of environmental law at all levels.⁴²⁷

Finally, gaps were identified in the dispute settlement, compliance and enforcement mechanisms, as well as in the assessment of liability and redress for transboundary environmental damage.⁴²⁸ Regarding dispute settlements, several delegations emphasized the absence of an international environmental court. Some explained that the time was not ripe for such a court to be established.⁴²⁹ Delegations also underlined the importance of strengthening the capacities of national judicial systems. On liability and redress for transboundary environmental damage, some delegations stressed that States have an obligation of conduct, not an obligation of results. Some delegations highlighted that there was not a predictable obligation for any transboundary environmental damages. While it was highlighted that the few regimes with rules on civil liability

⁴¹⁶ UN Secretary-General, *supra* note 159, at 36.

⁴¹⁷ *Id.* at 37.

⁴¹⁸ *Id.* (See section III: Gaps relating to existing regulatory regimes).

⁴¹⁹ *Id.* at 30.

⁴²⁰ *Id.* at 34.

⁴²¹ Synergies process launched by the Basel, Rotterdam and Stockholm Conventions.

⁴²² UN Secretary-General, *supra* note 159, 35.

⁴²³ Oral summary second working group, at 4.

⁴²⁴ Mudallali and Duarte Lopes, *supra* note 267, at 6.

⁴²⁵ Recommendations, item c.

⁴²⁶ Recommendations, item d.

⁴²⁷ Oral summary second working group, p. 4.

⁴²⁸ UN Secretary-General, *supra* note 159, at 37-42.

⁴²⁹ Mudallali and Duarte Lopes, *supra* note 267, at 6.

are very specific and not always coherent, many delegations underlined that it would not be appropriate for the ad-hoc open-ended working Group to make recommendations on liability.⁴³⁰

The OEWG's final recommendations to the UNGA include, among its substantive recommendations: an encouragement to all that have not done so to consider ratifying MEAs and to effectively implement them;⁴³¹ States members of the U. N. and all members of the specialized agencies to strengthen, where needed, environmental laws, policies and regulatory frameworks at the national level, as well as the capacities across all sectors for the effective implementation of international environmental law, including the administrative and justice sectors in accordance with national legal systems, while acknowledging the importance of international cooperation in supporting and complementing national actions;⁴³² encourages active and meaningful engagement of all relevant stakeholders at all levels in the different *fora* related to the implementation of international environment law and environment-related instruments;⁴³³ explores further ways for States members of the U.N. and all members of the specialized agencies to support and make full use of the Fifth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme V) adopted by the fourth session of the UNEA, in order to foster the environmental rule of law and advance the implementation of environmental law at all levels;⁴³⁴ encourages the United Nations Environment Program, as Chair of the Environment Management Group (EMG) and in collaboration with the members of the Group, to continue to strengthen system-wide inter-agency coordination on environment and to call for active involvement and support of all EMG members for the implementation of system-wide strategies on the environment.⁴³⁵ In line with this, the OEWG recommended that the General Assembly forwards these recommendations to the UNEA for its consideration, and to prepare, at its fifth session in February 2021, a political declaration for a UN high level meeting, in the context of the commemoration of the creation of UNEP, with a view to strengthening the implementation of international environmental law and international environmental governance in line with para. 88 of the "Future We Want."⁴³⁶

⁴³⁰ Mudallali and Duarte Lopes, *supra* note 267.

⁴³¹ Recommendations, item h.

⁴³² Recommendations, item j.

⁴³³ Recommendations, item k.

⁴³⁴ Recommendations, item l.

⁴³⁵ Recommendations, item m.

⁴³⁶ "88. We are committed to strengthening the role of the United Nations Environment Programme as the leading global environmental authority that sets the global environmental agenda, promotes the coherent implementation of the environmental dimension of sustainable development within the United Nations system and serves as an authoritative advocate for the global environment. We reaffirm General Assembly resolution 2997 (XXVII) of 15 December 1972 establishing the United Nations Environment Programme and other relevant resolutions that reinforce its mandate, as well as the Nairobi Declaration on the Role and Mandate of the United Nations Environment Programme of 7 February 1997 and the Malmö Ministerial Declaration of 31 May 2000. In this regard, we invite the Assembly, at its sixty-seventh session, to adopt a resolution strengthening and upgrading the United Nations Environment Programme in the following manner: (a) Establish universal membership in the Governing Council of the United Nations Environment Programme, as well as other measures to strengthen its governance as well as its responsiveness and accountability to Member States; (b) Have secure, stable, adequate and increased financial resources from the regular budget of the United Nations and voluntary contributions to fulfil its mandate; (c) Enhance the voice of the United Nations Environment Programme and its ability to fulfil its coordination mandate within the United Nations system by strengthening its engagement in key United Nations coordination bodies and empowering it to lead efforts to formulate United Nations system-wide strategies on the environment; (d) Promote a strong science-policy interface, building on existing international instruments, assessments, panels and information networks, including the Global Environment Outlook, as one of the processes aimed at bringing together information and assessment to support informed decision-making; (e) Disseminate and share evidence-based environmental information, and raise public awareness on critical, as well as emerging, environmental issues; (f) Provide capacity-building to countries, as well as support, and facilitate access to technology; (g) Progressively consolidate headquarters functions in Nairobi, as well as strengthen its regional presence, in order to assist countries, upon request, in the implementation of their national environmental policies, collaborating closely with other relevant entities of the

In line with the suggestions by delegates and the recommendations to the UNGA, Voigt suggests that one of the ways the Global Pact (or a global pact) could add value is by addressing implementation deficiencies. She argues:

Coherence and coordination at the international level have been identified as easing implementation challenges but are seldom seen as the only ways to achieve effective implementation. A Pact could aim at bringing together state and non-state actors in a global compact to raise the necessary means for the effective implementation of environmental agreements. This could lead to cooperation on increased capacity-building across State borders and across the public/private divide. It could bring private companies and corporations onto the scene and provide a space for interaction on addressing financial, capacity and technology gaps.”⁴³⁷ “In this sense, a Pact could address implementation challenges, coordination deficits between MEAs (and between MEAs and other international treaties) or bring together actors from the public and private sector in the global concern for environmental protection.”⁴³⁸

During the closing plenary, NGOs described political will as the most important gap and accused those countries most responsible for the planet’s ecological breakdown of attempting to “kill the process.” Co-Chair Duarte Lopes captured the muted tone of the session when he responded by thanking the NGOs for helping to steer the ambition of the process and acknowledged that the outcome was weak. Nevertheless, he said, it was based on consensus, and provides a first step in a continuing process.⁴³⁹

Environment Related-Areas

Although the UNGA called for the report on gaps to also cover environment-related instruments, several delegations raised concerns as to how the environmental aspects relate to processes in other areas. The term “environment-related instruments” is taken to include those international legal instruments that do not fall exclusively within the field of the environment or have as their primary objective the protection of the environment, such as those dealing with international trade, investment, intellectual property rights, human rights, peace and security, migration and disaster management.⁴⁴⁰ Some delegations understood “environment-related instruments” as covering non-binding environmental instruments, and not as covering those international legal instruments that have an environmental dimension. However, some delegations called for the integrity of existing regimes, especially when related work is ongoing, and encouraged the relevant processes to consider the environment-related aspects of their work.⁴⁴¹

There was a lot of criticism on this specific section of the report, which some deemed outdated, inaccurate or containing generalizations. For example, efforts from the WIPO relating to the CBD were not mentioned. Likewise, the assessments on rights of indigenous peoples and the

United Nations system; (h) Ensure the active participation of all relevant stakeholders, drawing on best practices and models from relevant multilateral institutions and exploring new mechanisms to promote transparency and the effective engagement of civil society.

⁴³⁷ Voigt, *supra* note 101.

⁴³⁸ *Id.* at 24.

⁴³⁹ Doran, et al. 2019.

⁴⁴⁰ UN Secretary-General, *supra* note 159, at 6.

⁴⁴¹ Doran, et al., *supra* note 277, at 9.

jurisprudence on trade and investment were incomplete.⁴⁴² On trade instruments, some delegations underscored the need to find a balance between safeguarding trade interests and protecting the environment. On investment instruments, some delegations noted the growing tendency of taking into account environmental considerations in this sector, while others indicated that environmental clauses were still insufficiently included. On intellectual property rights, several delegations mentioned the ongoing work in this sector, while others stressed that more progress needed to be made. On human rights instruments, some delegations noted that many human rights cannot be fully enjoyed without the right to a clean and healthy environment. Some stressed that the human right sector was a distinct system that was not relevant in this context. In this regard, some delegations cautioned against the risk of politicization.⁴⁴³ The IISD analyzed that the report's chapter on environment-related instruments sparked its own debate, leading one delegate to question whether it had "opened a can of worms."⁴⁴⁴

Environmental Principles

The report identified important inefficiencies in the role of environmental principles, in particular with respect to their content and legal status.⁴⁴⁵ These result from general lack of coherence and synergy among a large body of sectoral regulatory frameworks. Fragmentation is inevitable given the "piecemeal, incremental and reactive nature of international environmental law-making."⁴⁴⁶ While it is a frequent phenomenon in international law and multilateral decision-making, other fields rely on a binding framework instrument(s) with rules that provide coordination and coherence.⁴⁴⁷ International environmental law still lacks such a framework.⁴⁴⁸ To enhance the coherence and coordination of global environmental governance, the UNGA concluded that there is a need to further clarify the content and legal status of principles of environmental law in a "comprehensive and unifying law" that could provide for better harmonization, predictability and certainty.⁴⁴⁹

To a certain extent, the conclusion of the report might have given the impression to some states that it was already prejudging what the outcome of the OEWG had to be and, unsurprisingly, the report faced a critical reception.⁴⁵⁰ In particular, several delegations (including Argentina, Iran and Morocco) expressed reservations about the need to adopt a new comprehensive legal instrument. As mentioned above, for some (and notably the European Union), a GPE is deemed necessary to "fill a gap" in IEL. However, not all states are of the view that the absence of an overarching treaty on the environment constitutes a gap. For instance, for Argentina, "any gaps and shortcomings in IEL are in implementation, and relate to financing, capacity building, and technology transfer, hinge on political will, and can be addressed through existing institutions."⁴⁵¹ From this perspective, the adoption of a GPE can of course not appear as a priority.⁴⁵²

Discussions on principles started at the organizational session. Several countries remarked on the need to reinforce existing principles and agreements. Brazil, China, Ecuador, India and

⁴⁴² Doran et al., *supra* note 277, at 7.

⁴⁴³ Mudallali and Duarte Lopes, *supra* note 267.

⁴⁴⁴ Doran, et al., *supra* note 277, at 13.

⁴⁴⁵ UN Secretary-General, *supra* note 159, at 42.

⁴⁴⁶ *Id.* at 43.

⁴⁴⁷ *Id.* at 4 (Examples include international human rights law, international trade law, and international law of the seas).

⁴⁴⁸ *Id.* at 5.

⁴⁴⁹ *Id.* at 43.

⁴⁵⁰ Doran et al., *supra* note 277.

⁴⁵¹ *Id.*

⁴⁵² Saint-Geniès, *supra* note 106.

Egypt highlighted the principles of the Rio Declaration as the basis for the engagement of developing countries, especially the principle of common but differentiated responsibilities (CBDR). Within this context, Brazil called for an agenda item on the Rio principles and their implementation.⁴⁵³

With regards to the methodology for developing such an exercise, several delegations highlighted the need to take into consideration principles of international environmental law already contemplated in existing instruments and political declarations as well as customary international law. In this regard, it was pointed out that there is a risk associated with reopening or redefining existing principles as this could possibly lead to a regression rather than a progression. There was a general warning about re-opening, re-negotiating, or weakening principles, noting that one principle can sometimes have different formulations across various instruments.⁴⁵⁴ Several delegations stressed that this work should focus on the principles that gather international consensus. Other delegations indicated that such an exercise would be an opportunity to update existing principles and include emerging principles as international environmental law has considerably developed in the last decades.⁴⁵⁵

Some delegations identified gaps on principles, related to their interpretation, unequal implementation and lack of consistency. Other delegations did not identify such gaps. Some delegations noted that a few principles have matured to become customary international law while others constitute soft law. Further clarifications with regard to the scope of principles was needed. The value of codifying or compiling principles to support implementation, improve consistency and facilitate interpretation, including by developing a common understanding. Different views were expressed as to whether it should only encompass widely applicable and agreed upon principles or also emerging ones. Some delegations noted that an instrument could also clarify emerging principles.

Many delegations underlined the importance of general principles as building blocks of international environmental law. Several delegations stressed the role of principles in promoting legal certainty, enhancing visibility of international environmental law, ensuring consistency of implementation, facilitating interpretation, as well as filling normative gaps.⁴⁵⁶ A few underlying principles were particularly highlighted by countries as warranting special attention. Indonesia called for the inclusion of the leading principles of international environmental law in any new global pact. The Philippines cautioned that the UN already has an integrative framework for sustainable development, and that agreed principles and agreements should not be renegotiated. Nigeria proposed that new and omitted principles be consolidated in a pact and emphasized the importance of climate justice and expanding the rights of those suffering from environmental harm.

Many delegations commented on the importance and content of several principles, including the principle of prevention, precaution, polluter-pays, common but differentiated responsibilities and respective capabilities, national sovereignty over natural resources, non-regression and progression, equity, access to environmental justice, and the right to a clean and healthy environment.⁴⁵⁷ Several countries specifically emphasized the principles of sovereignty over national resources (Ethiopia, for the G-77/China, China, the Russian Federation, Saudi Arabia) and common but differentiated responsibilities (Ethiopia, for the G-77/China, Bolivia,

⁴⁵³ Lebeda, *supra* note 146.

⁴⁵⁴ Doran et al., *supra* note 297, at 8.

⁴⁵⁵ Doran et al., *supra* note 277.

⁴⁵⁶ Mudallali and Duarte Lopes, *supra* note 267.

⁴⁵⁷ Doran et al., *supra* note 277.

Chile, Cuba, Egypt, Iraq). Bolivia called for recognition of the interdependence of ecological and social systems, and the legacy of colonialism, global debt, and questions of ecological injustice. Ecuador added that nature has a right to be respected and maintained. South Africa said the principles of equity and fair and equitable benefit sharing were not adequately addressed in the UNSG's report.⁴⁵⁸

Some delegations pointed out that the identification of principles of international environmental law is a delicate and controversial exercise, and that any action in that regard should wait for the outcome of the study launched by the International Law Commission (ILC) on the criteria to define general principles of law.⁴⁵⁹ Some delegations suggested waiting for the ILC to conclude its work, while others indicated that this was not necessary as the ILC is not specifically addressing principles of international environmental law.

A few delegations added that a new instrument on principles would also apply whenever there is a vacuum of MEAs or regulations. Several delegations said that any further work on principles should be based on the Rio Declaration. The relevance of the principle of common but differentiated responsibilities and respective capabilities was noted a few times. Others reiterated the primacy of the principle of national sovereignty over natural resources.

A few options were mentioned in relation to this issue. One alternative would be to negotiate a new instrument. Different views were expressed on its nature and format. Possibilities include a legally-binding instrument, a high-level political declaration, or a document agreed by the UNGA. The nature could also be determined at a later stage, during the negotiation process launched for the purpose of negotiating a new instrument. Some delegations noted that negotiations don't need to be limited to principles but could also include other issues, such as means of implementation. Several delegations were against negotiating a new instrument, which was to some premature at this stage. Another option would be to hold further intergovernmental negotiations, either through the creation of a group of experts mandated by the UNGA, through the UNEA, or refer to the ILC. A third option was to establish an International Court for the Environment, which several delegations objected.

The Nordic Council of Ministers noted that codifying principles of international environmental law requires a systemic analysis or the regional recognition of these principles.⁴⁶⁰ Through a series of regional charts that group in one place most of the environmental law principles that governments have already accepted in their international agreements, ICCEL demonstrated the consensus on principles and objectives in international environmental law.⁴⁶¹ The "ICCEL charts" set forth the correspondence between the Draft Global Pact and the UN Sustainable Development Goals, general principles of international soft law, multilateral environmental agreements, and various regional environmental agreements. They cover the African Union (AU), the Association of South East Asian States (ASEAN), the Caribbean Community (CARICOM), China, the Commonwealth Independent States (CIS), the League of Arab States (Arab League), the OAS, the Pacific Island Forum, South Asian Association for Regional Cooperation (SAARC) and South Asia Cooperative Environment Program (SACEP). Additionally, it includes charts focused on Multilateral Environmental Agreements, Soft Law Instruments and Sustainable Development Goals.

⁴⁵⁸ Doran et al., *supra* note 277.

⁴⁵⁹ *Id.*

⁴⁶⁰ Urho, et al., *supra* note 100, at 82.

⁴⁶¹ The charts can be accessed at *Global Pact for the Environment*, PACE UNIVERSITY (Feb. 27, 2020), <https://libraryguides.law.pace.edu/icel>.

6. *Geopolitical Analysis of the Nairobi negotiations*

To help think about the pathway forward, this section provides an initial geopolitical analysis of the positions taken by delegates in Nairobi. It investigated each countries' positions as to a possible new framework agreement that codified principles, or, when applicable, to the Global Pact specifically. This section largely relies on the ENB summaries provided by the IISD⁴⁶² and the analysis of some official statements submitted by countries.⁴⁶³ It does not particularly take into account the format such an agreement would take. In some cases, countries favored an agreement but had suggestions as to what it should include. Since the Global Pact was intended to be working document, this is precisely the discussion it invited. These statements also set the stage to where they compromised.

This section groups countries in three categories: countries directly against a new framework agreement, a Global Pact, or the codification of principles; countries directly favoring it; and countries within a gray area, in an undefined position. The third category also includes the countries which have not participated in the process at that point (i.e., did not vote on the resolution, did not attend the organizational session in New York, nor any of the sessions in Nairobi). As the discussions develop, it is likely that some of these positions might change. However, it provides a blueprint of the positions in that time.

Overall, the Nairobi negotiations revealed a major lack of consensus on the adoption of an agreement on principles. However, some remarks are warranted here. Since the sessions were not held at the UN headquarters, several countries interested in the process were not able to attend even though the OEWG received special funds to assist broad participation. In total, 35 countries did not participate in any stage of the negotiations. Several countries voted in favor of the resolution but did not attend the Nairobi sessions. The Global Pact was proposed just after the Paris Agreement was adopted, based on the argument that the political momentum favored such a new development. However, the Nairobi sessions showed that a few countries, including the United States, Japan, Brazil and Russia, showed a hard position against such an idea. The political context with respect to the global environment has hardened. However, with a renewed support from the European Union, new coalitions can be built to attract broader support for ongoing negotiations.

Countries Against a New Instrument

Overall, 19 Member Countries directly opposed a new framework agreement, the codification of principles or a Global Pact specifically. These mainly related to a concern over the effects on existing agreements and an argument that existing instruments such as the Montevideo Program V, the Adis Ababba Action Agenda and the 2030 Agenda already fulfilled similar purposes. A few countries also referred to the ongoing work on principles by the International Law Commission. Argentina, Brazil, Japan, Philippines, Russia, Saudi Arabia, Syria, Turkey, United States, and Venezuela presented a strong opposition to the proposal. Bolivia, Cuba, Djibouti, Ecuador, Egypt, India, Iran, Korea, and Malaysia were slightly against it.

The United States opposed the process from its onset, calling for a vote on the resolution and opposing any reference to the Global Pact.⁴⁶⁴ At the organizational session, the US argued that the resolution did not necessarily mandate the OEWG to make recommendations to the UNGA, in

⁴⁶² Dora, et al., 2019; Doran, et al., *supra* note 277.; Doran, et al., *supra* note 297.

⁴⁶³ See *Towards a Global Pact for the Environment*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://globalpact.informea.org/homepage>.

⁴⁶⁴ United Nations Meetings Coverage and Press Releases, *supra* note 88.

an effort to avoid any substantial document to result from the discussions.⁴⁶⁵ In the first session, the US consistently questioned the UNSG's report, deeming it not objective and biased towards a Global Pact. It challenged the meaning of gaps and its analysis by the UNSG, repeatedly arguing that several gaps were intentional, and consisted of "design elements" in existing MEAs. During the three sessions, the country generally opposed any reference to principles of international environmental law. Additionally, the country resisted the idea of an overarching compliance mechanism and argued there is no universally recognized human right explicitly relating to the environment. The US claimed that national, rather than international, actions should improve implementation. The country relied on an extensive discussion on the problems and a potential solution to argue that there was no consensus, and an outcome would thus be hard to achieve. It opposed a legally binding instrument and argued that a non-binding instrument could undermine previous agreements. The US favored, however, a debate on improving coordination and enhanced cooperation among MEAs. However, with the Biden administration, it is possible that the US's position might change.

Japan did not vote on the resolution and opposed a new instrument. While the country expressed interest in considering the governance of international environmental law, it questioned the notion of gaps as included in the UNSG's report. Japan questioned the existence of a gap on principles and referred to the work of the ILC. It noted that it may be premature to codify certain principles that are neither already well established nor widely used in MEAs, and said it remains unclear how an overarching instrument compiling principles could address gaps and challenges in implementation of IEL. Japan suggested a menu of workable solutions given the lack of consensus on gaps and on a potential binding instrument.

Russia was against the resolution, censuring its drafting process. The country criticized the UNSG's report, especially as it lacked reference to sovereignty over natural resources. Russia reinforced the relevance of developing international environmental law based on consensus and welcomed fragmentation as a necessary feature to achieve it. It ultimately rejected a new framework for environmental law and questioned the significance of well-grounded non-binding agreements such as the 1992 Rio Declaration as a source of international law. Russia reinforced implementation as one of the main challenges in the implementation of international environmental law and called for support of the Montevideo Programme V, but was wary of the impact of the development of sanctions. While Russia rejected any reference to further discussion on principles in the final recommendations, it suggested that UNEP should be requested to continue this debate.

While Brazil voted in favor of the resolution, it was quick to repudiate any proposal related to principles during the substantive sessions. It reinforced the role of the Rio Principles and challenged the methodology used by the UNSG to select the principles identified in the report. In particular, Brazil reinforced the principle of CBDR and the sovereignty of States. Significantly, it referred to the current investigation of the ILC on general principles of law as a prerequisite to any further examination of principles of international environmental law. It saw the diversification of international environmental law as a benefit and cautioned against "a hasty overhaul of the system." Paradoxically, Brazil noted the lack of consensus on a legally binding instrument while also expressing concern that a political declaration could have limited value. Brazil did not indicate an area which it believed warranted attention. It directed the discussions towards the lack of means of implementation, especially to strengthen finance, technology transfer, and capacity building for developing countries. These are particularly important in support of the SDGs and MEAs. Brazil

⁴⁶⁵ Leone, *supra* note 148.

suggested the 2030 Agenda and UNEA could potentially act as platforms to bridge coordination gaps. Additionally, the Addis Ababa Action Agenda (AAAA) could form the basis for means of implementation to underline the insufficiency of existing resources.

Argentina did not vote on the resolution but flagged its disapproval of the proposal since the beginning of the working group's discussions. It repeatedly asserted that there were no gaps in the substance of international environmental law, only in its implementation. These relate to financing, capacity building, and technology transfer, hinge on political will, and can be addressed through existing processes and institutions such as the AAAA and the Montevideo Programme V. Specifically, the process should consider how to resolve the lack of means of implementation, how to improve coordination and synergy between international environmental organizations, and how not to undermine existing agreements and bodies. It recalled the absence of reference to sovereignty over natural resources in the UNSG's report and questioned the inclusion of the precautionary principle, arguing it remains controversial and could therefore not be considered customary law. The country was concerned about the duplication of efforts and stressed that a new instrument was not needed. Argentina argued that this process would only be credible if there were consensus on a decision. It rejected any reference to principles, directing the debate to the ongoing work conducted by the ILC.

Egypt did not vote on the resolution but was against any discussion on environmental principles. The country did not support a new mechanism, citing the lack of consensus on gaps and the risk of complicating existing international environmental law, arguing a one-size-fits-all approach was unrealistic. The country disagreed that a comprehensive and unifying instrument would strengthen implementation and underlined the risk of re-opening or redesigning existing principles. Egypt underscored that environmental principles evolved within sectoral regimes and may apply differently depending on the circumstances. An instrument unifying international environmental law may be useful for areas currently lacking regulation, but not for existing regimes. Egypt urged postponing the discussion on principles until the ILC has finished its work on general principles of law.

Turkey voted against the resolution, opposing a general top-down multilateral approach to address deficiencies in international environmental law. The country called for strengthening institutions, especially UNEP and UNEA, and using existing processes such as the Montevideo Programme V. Turkey also called for a focus on new issues such as marine litter. It rejected any reference to principles or environmental defenders. The Philippines voted against the resolution and positioned itself against a new framework, arguing that the 2030 Agenda already fulfilled a similar purpose, and that States should not renegotiate consolidated agreements such as the Rio Declaration, and other principles included in the preamble of MEAs. Syria voted against the resolution, reinforcing the sovereignty of countries over natural resources and arguing one document would not achieve the international goal of protecting the environment. It also questioned the "concept of world environmental law," claiming it was still legally controversial. The country did not attend any of the sessions in Nairobi.

Saudi Arabia abstained from voting on the resolution. The country criticized the report for not being "technical and evidence-based," using the 1992 Rio Declaration as a source of international law, and for a "weak" analysis of gaps relating to existing regulatory regimes. It specifically noted the importance of the principle of national sovereignty over natural resources and CBDR and argued that international environmental law principles are non-binding. It reinforced the need to strengthen implementation and explicitly called for additional financial resources and increased coordination between MEAs. It rejected any further discussion of

principles of international environmental law or a new instrument altogether and identified the Montevideo Programme V as an avenue to increase implementation. Saudi Arabia said there was no consensus that “swift action is needed” to address environmental challenges. Iran abstained from voting on the resolution and cautioned against the creation of a comprehensive new instrument without recognizing root causes of gaps in international environmental law and called for creativity in reviving existing environmental instruments.

Djibouti did not vote on the resolution but was against the idea of a new instrument as it would create confusion. It saw fragmentation of international environmental law as the reason for its lack of efficiency and called for the harmonization of instruments and increasing capacity building for national implementation.⁴⁶⁶ Ecuador did not vote on the resolution and was against “opening principles to discussion,” questioning whether a new instrument would help improve the state of international environmental law. Rather, the country consistently referred to the need to improve means of implementation and capacity building. Additionally, the country criticized the lack of reference to corporate responsibility for environmental damage, the right to development, the reduction of patterns of unsustainable consumption and production, climate justice and the principle of national sovereignty over natural resources in the UNSG’s report.

India voted in favor of the resolution. The country noted that technical and financial gaps also needed to be reflected in the OEWG’s agenda. The country also reinforced the need to include the principle of CBDR and national sovereignty over natural resources in any discussion. India cautioned against undermining existing instruments and argued that many of the principles are subject-specific. The country cautioned that the non-paper from the Co-Chairs pushed institutionalization via a new instrument with no clarity on how this would address global challenges. It opposed further discussion on principles and rather focused on improving means of implementation.

Venezuela did not vote on the resolution but consistently positioned itself against the negotiation of a new instrument. The country cautioned about the risk of interfering with existing MEAs, leading to regression in terms of the validity and implications of international environmental law principles. Instead, the process should affirm existing principles and avoid re-interpretation. Bolivia did not vote on the resolution. The country was against further discussing principles and noted that the work of the ILC is distinct from the work on environmental principles. The country was cautious about undermining existing agreements. Bolivia called for increased commitment to means of implementation and strengthening the AAAA and the 2030 Agenda. It proposed that the process be taken to the UNGA or UNEA, with future consideration of a political declaration. Noting the rights of nature, Bolivia called for an interdisciplinary analysis of the normative evolution of the concept of the environment. The country also reinforced the role of indigenous group, which was not adequately noted in the report.

Cuba did not vote on the resolution but voiced concerns about a potential new instrument. The country cautioned against undermining existing instruments and indicated that a single instrument dealing with all issues would not be the most consistent way to address a wide range of problems. Instead, Cuba underscored the need to strengthen existing agreements and called for more coordination across MEAs. The country reinforced the need to enhance means of implementation and opposed any reference to principles in the final recommendations. Malaysia abstained from voting on the resolution and reinforced the need to strengthen means of

⁴⁶⁶ Commentaires de la République de Djibouti (OEWG’s First Session), <http://wedocs.unep.org/bitstream/handle/20.500.11822/27261/Commentaires%20de%20la%20R%c3%a9publique%20de%20Djibouti.pdf?sequence=100&isAllowed=y>.

implementation, which the country called the most important gap in international environmental law. Malaysia opposed a global mechanism or instrument to cover existing MEAs. The Republic of Korea did not vote on the resolution and expressed concern about how the codification of principles could address gaps in international environmental.

Countries Favoring a New Instrument

The proposal of a Global Pact or, generally, the codification of principles received broad support of countries. In total, 59 countries wanted to continue a discussion on the codification of principles, including the EU's individual members. While the majority of EU countries have not positioned either way on the Global Pact, these are included within the list of supporters.

The EU voted in favor of the resolution and supported the process. The following five EU countries did not vote on the resolution and attended at least one session in Nairobi but made no statement for or against the codification of principles or a Global Pact: Austria, Hungary, the Netherlands, Poland, and Sweden. The following six EU countries voted in favor of the resolution but did not attend any of the sessions in Nairobi: Croatia, Cyprus, Latvia, Lithuania, Luxembourg, and Portugal. The following twelve EU countries voted in favor of the resolution and attended at least one session in Nairobi but made no statement for or against the codification of principles or a Global Pact: Belgium, Czechia, Denmark, Estonia, Finland, Germany, Ireland, Italy, Malta, Romania, Slovakia, and the United Kingdom of Great Britain and Northern Ireland. France presented the proposed Global Pact and the resolution but made no statement during the Nairobi sessions.

The EU noted that the report's list of principles is not exhaustive, these exist in different variations, and thus more work is needed. She saw potential for the OEWG to work on principles to strengthen environmental protection and suggested considering to what extent and how to address issues. Furthermore, she offered continuing support for a global pact initiative and strengthening IEL and environment-related instruments. The EU also disagreed with postponing any discussion of principles until the ILC had finished its work on general principles of law, describing the work of the ILC as responsive and reactive, while it is the role of states to take a lead in developing state practice. The EU said the OEWG's recommendations should include the adoption of an instrument within a certain timeline, where it could be either an instrument approved by the UNGA, a high-level declaration, a legally binding instrument, or some other option. The EU said any work on principles has to take into account their history and context and suggested that the OEWG process could acknowledge the relevance and importance of principles, but also express a commitment by states to be guided by or apply principles when they implement domestic policies. The EU proposed a legally binding instrument or a treaty containing: provisions safeguarding or enhancing environmental protection; and a list of, and other references to, IEL principles, together with other matters, to be possibly combined with a non-legally binding object and agreed by 2020 or 2021. The EU stressed the importance of principles, calling for continuing dialogue.

Costa Rica voted in favor of the resolution as it favors the Global Pact. The country called for the international community to take advantage of this opportunity to reaffirm commitments to the environment and be ambitious. Arguing the Global Pact provided an opportunity to bolster multilateralism and the leading role of the UN system, the country called for an instrument in the form of a compilation of the main guiding principles of international environmental law, including a categorization of "lesser principles." It highlighted the right to a healthy and ecologically balanced environment. Costa Rica also noted deficiencies in implementation resulting from the

proliferation of instruments and called for a centralizing process, hosted and managed by UNEP. The country suggested that there may be a need for the OEWG to have a multiplicity of outcomes.

Colombia voted in favor of the resolution and supported a new binding agreement on principles. The country highlighted the value of codifying existing principles and noted the need to recognize the evolution of principles as well as contributions from regions, such as the jurisprudence of the Inter-American Court of Human Rights. Colombia supported a new instrument to guide general principles that could serve a role in contributing to legal clarity, avoiding potential disputes, awareness raising, and dispute settlement and called for the inclusion of soft law in any compilation. However, Colombia warned that issues and challenges in international environmental law might not be resolved by a new treaty. The country called for further clarification of environmental principles through customary law, governance, and a possible declaration; negotiations that help identify options and consolidate and update principles agreed since the Rio Declaration and for deferring a decision on an international instrument, which would not necessarily need to be legally binding.

China voted in favor of the resolution and supported the development of a Global Pact. The country highlighted the potential of the Global Pact to strengthen global environmental governance and noted the OEWG should pursue progressive development of international environmental law. However, China highlighted the principles of CBDR and sovereignty over their natural resources as the basis for the engagement of developing countries. China underlined that different countries and scholars have different views on the “content and scope of application” of international environmental law principles and called for more research on the codification process. China also proposed an enhanced role for UNEP in the codification of principles.

Armenia did not vote on the resolution, but was open to a global pact, which it argued need to be a dynamic document. Additionally, the country called for political will to support reforms in international environmental law. Benin voted in favor of the resolution and wanted to continue further discussion on principles of international environmental law. It called for a careful treatment of issues such as the precautionary principle and suggested focusing on coordination, synergies, and capacity building. El Salvador did not vote on the resolution but called for strengthening existing principles in international environmental law and clarification of ambiguities. The country favored the Global Pact to strengthen existing principles and empower national implementation. El Salvador reinforced the principles of equity and sovereignty over national resources.⁴⁶⁷ The country also underlined the importance of modes of implementation and proposed building on the AAAA. The Gambia did not vote on the resolution but was in favor of continuing the discussion on principles, supporting swift action on a global level for environmental protection. Guinea voted in favor of the resolution and supported bringing all principles into a single instrument.

Indonesia did not vote on the resolution but called for the inclusion of the leading principles of IEL in any new global pact, supporting continued discussion on the subject. The country also proposed to give special attention to the protection of environmental defenders. Uganda did not vote on the resolution but supported continued discussions on principles. The country noted that gaps had not been addressed by the OEWG, despite the opportunity to increase coherence and enhance implementation. Additionally, Uganda called for an implementation programme under UNEP with a longer-term horizon than that of the Montevideo Programme.

Belize did not vote on the resolution and expressed concern that the UNSG’s report had gone beyond the mandate of the UNGA resolution, which required a factual, evidence-based

⁴⁶⁷ Documento de posición de El Salvador sobre viabilidad de un pacto global sobre medio ambiente. El Salvador (Feb. 20, 2019-02-20 (OEWG’s First Session), available at <https://wedocs.unep.org/handle/20.500.11822/27606>.

report. Speaking for the Alliance of Small Island States (AOSIS), stressed the need to stay true to the UNGA mandate, said it remained open to convening an intergovernmental conference to adopt an instrument and called for the special circumstances of small island developing states to be recognized across all MEAs. Cambodia did not vote on the resolution but was committed to a potential Global Pact. Cameroon did not vote on the resolution. The country recognized the need to harmonize international environmental law but did not believe there was a need to unify it and questioned whether a global pact would resolve problems in implementation. Cameroon called for strengthening means of implementation and enforcement in international environmental law. It called on the OEWG to consider innovative and emerging principles. Cameroon suggested the recommendations of the OEWG should be a single integrated package addressing gaps and challenges, fragmentation of IEL, principles, and implementation. Noting a linkage between means of implementation and principles of international environmental law, the country requested retention of the paragraph on promoting further discussion on principles, calling the principles the “heart” of the global pact process. It additionally supported referring to the parameters for a final outcome of the global pact for the environment process.

Tunisia voted in favor of the resolution and supported further discussions on principles, called for the autonomy of MEAs, and noted the opportunity to improve implementation and overcome environmental challenges. Burkina Faso voted in favor of the resolution and noted that a global pact could help address gaps at the state, regional, and international levels and help bolster the binding nature of general principles of IEL, as well as the implementation role of judges. The country called for delegates to be “candid” when stating whether a pact is possible and underscored the fundamental challenge of implementation of existing agreements. Uruguay is in favor of the codification of principles. The country stressed that unifying the various principles does not contradict diverse MEAs that provide different solutions to specific issues. Uruguay called for the consolidation of existing principles, while tracking their development. Principles should be compiled without being codified, separately from the ILC, so that this compilation can also include new principles. Noting the Montevideo V Programme, the country clarified that it is complementary to the OEWG’s work, which shows that new frameworks do not necessarily modify existing MEAs.

The Democratic Republic of Congo (DRC) voted in favor of the resolution and showed support of an overarching instrument, saying it could unify IEL, provide for visibility of its principles, and strengthen cooperation. The country asked for continuing a discussion on principles. However, the DRC also questioned whether a global pact could solve issues in implementation. The country noted the need to strengthen means of implementation available to developing countries. The DRC called for building on progress made in IEL, including the Montevideo Programme and UNEP’s role in assisting implementation. Senegal voted in favor of the resolution and supported the idea for a Global Pact. The country called for a Global Pact that should also be a democratic institution for more equity between North and South and incorporate a human rights and gender-based approach. Senegal highlighted the importance of capacity building, technology transfer, and coordination of IEL. The country was disappointed with the final recommendations because no action was proposed on a Global Pact.

The Federal States of Micronesia voted in favor of the resolution and supported the idea of a Global Pact. The country highlighted the vulnerability of small island developing states and the need for a comprehensive approach to facilitate implementation. FSM noted a global pact could both call for greater IEL governance synergies between institutions and consolidate a number of principles. The country called for a consolidation approach to existing principles, while tracking

their development and particularly objected referring the discussion on principles to the work of the ILC. FMS highlighted that a formal instrument can be powerful, whether it is binding or not and called for an expert-led approach to the development of a global pact, including the use of surveys, and for an intergovernmental conference preceded by a one-year preparatory process. The country underlined two case studies demonstrating the need for clarity in, and compilation of, international environmental law principles, citing: a resolution on geoengineering withdrawn at UNEA-4, where the difficulties in garnering consensus demonstrated inconsistent interpretations of the precautionary principle, and the international community's delay in recognizing the right to a healthy environment as an important environmental principle. The country noted that MEAs must be viewed as evolving responses to new challenges and said that the process offered a solution to international environmental law's main challenges, including lack of common principles, fragmentation, and the need for attention to MOI.

Guyana voted in favor of the resolution and said a Global Pact can add value in the area of governance. Guyana suggested two pathways for additional research to gain better insight into the need for a Global Pact. The country called for a summary of the gaps discussed with options for how each might be addressed, to help determine the necessity and shape of a Global Pact, as well as a report with a synthesis of how environmental law principles have been treated in domestic jurisprudence and legislation. Guyana urged country to strengthen means of implementation. The country cautioned against referring the work on principles to the ILC and suggested that UNEP be requested to promote it instead. Mali did not vote on the resolution but mentioned its support for the proposal. The country said it was "high time" for a universal legal instrument for environmental law. Monaco voted in favor of the resolution but cautioned against undermining existing agreements. The country stressed the essential role of international legally binding instruments in environmental protection and highlighted the need for unity of international environmental law. Morocco voted in favor of the resolution and reinforced the need to strengthen means of implementation, noting a link to principles. The country supported further discussion on principles and a political declaration.

Mexico supported further discussion on principles and was favorable to a political declaration. The country said a pact should be flexible in its form and legal nature, harmonizing all principles of international environmental law, linking with the 2030 Agenda, and incorporating means of implementation and strengthening relevant UN bodies. Mexico called for clarity in international environmental law and a consolidation approach to existing principles, while tracking their development. UNEP could be responsible for further promoting a discussion on principles. The country called for further negotiations, noting the upcoming anniversary of the Earth Summit in 2022, and possible the adoption of a political declaration linked to the 2030 Agenda and the SDGs, taking account principles and implementation. Nigeria abstained from voting on the resolution. The country supported the codification of environmental principles but noted uncertainty on how it will close gaps.

St. Lucia did not vote on the resolution and attended the Nairobi sessions, making limited statements referring to the need to provide concrete recommendations and an analyses of international environmental law principles and related environmental instruments. While St. Lucia did not explicitly favor the Global Pact or the codification of principles, the country showed support to strengthening environmental principles in their submissions to the OEWG. Samoa did not vote on the resolution but was open to discussing the need for a Global Pact. The country called for greater synergy between regional and international agreements. Serbia did not vote on the resolution but was supportive of the initiative. However, the country noted it would be difficult to

seek a global pact, and said the choice was to let the moment pass or risk “tampering” with the system to improve it. Serbia invited delegations go beyond the UNSG’s report to see if a pact could be achieved by examining what is needed for national implementation. Togo did not vote on the resolution and attended the Nairobi sessions, supporting a legally binding instrument and considering socio-economic issues in implementation.

Canada voted in favor of the resolution but was not entirely convinced that a single overarching framework would bring about overall effectiveness in international environmental law, cautioned that a new instrument could reduce resources for existing ones. The country said any discussion on principles is premature and cautioned against unwinding political compromises. Specifically, the country questioned the precise scope and content of environmental obligations, and whether codifying the principle of non-regression would create a risk that states would take on weaker obligations to preserve flexibility in future negotiations. Canada noted that the main gap in international environmental law is in domestic implementation and invited delegations to go beyond the UNSG’s report to see if a pact can be achieved by examining what is needed for national implementation. The country recommended considering multiple options for the process, and supported “further discussion” of principles, noting that many of these are already incorporated in MEAs. Finally, Canada expressed concerns about committing to a discussion where an outcome could be pre-judged but indicated support for clarificatory text on the event.

Switzerland did not vote on the resolution but was supportive of negotiating a new agreement. The country said, however, that a pact must not be restricted to codifying principles, nor should it be the sole solution for the gaps, which primarily require better governance structures. Cautioning that reformulating principles could result in regression in established principles of IEL, the country called for any codification to focus on new principles. Switzerland said ambiguity contributed to achieving consensus in MEAs and that, instead of overarching legal principles, bottom-up approaches should be privileged. The country outlined several options to address the possible gaps or challenges related to principles: an instrument; transferring and applying existing principles from one geographic region or level to other regions or levels; and targeting the specific deficit of each principle within its current setting, for instance in the MEA in which the principle is embedded.

Bangladesh voted in favor of the resolution and offered support for any instrument that will reduce gaps between MEAs. However, the country stressed that the principles of existing IEL are the result of prolonged negotiations and represent a delicate balance and suggested that it may be appropriate to consider special and differential treatment of principles in certain circumstances. Bangladesh also noted the consideration of a new instrument should await broad consensus that it will add value. Peru voted in favor of the resolution and underscored that principles such as environmental justice could be included, and that international environmental law is an evolving field responding to new circumstances, creating a regular need to review what has previously been agreed. Peru further said that a future instrument should incorporate a human rights and gender-based approach and called for further discussion on principles.

Gray Area

The majority of countries fall within a gray zone of an undefined position, either because its participation in Nairobi was limited, attending none or few sessions, or having made limited statements. In total, 82 countries are characterized as “undefined.” Additionally, 35 countries did not participate in any part of the discussion (Afghanistan, Bahamas, Cabo Verde, Dominica, Dominican Republic, Fiji, Grenada, Guinea-Bissau, Haiti, Jamaica, Kazakhstan, Kiribati,

Kyrgyzstan, Lao People's Democratic Republic, Lesotho, Lichtenstein, Marshall Islands, Mauritius, Mozambique, Namibia, Nauru, Oman, Palau, Papua New Guinea, Republic of Moldova, Saint Vincent and the Grenadines, San Marino, San Tomé and Príncipe, Solomon Islands, South Sudan, Trinidad and Tobago, Uzbekistan, Vanuatu, Yemen, Zimbabwe). As such, 117 could still be persuaded one way or another. However, it should be noted that several of these might vote as a group.

The following 22 countries did not vote on the resolution and attended at least one session in Nairobi, but made no statement for or against the codification of principles or a Global Pact: Antigua and Barbuda, Azerbaijan, Botswana, Comoros, Congo, Fiji, the Holy See, Iceland, Israel, Kuwait, Liberia, Mongolia, Myanmar, Nepal, Panama, Rwanda, Saint Kitts and Nevis, Sierra Leone, the State of Palestine, Sudan, Ukraine, Vietnam. Albania, Andorra, Angola, Bosnia and Herzegovina, Bulgaria, Central African Republic, Equatorial Guinea, Ghana, Libya, Montenegro, Seychelles, the former Yugoslav Republic of Macedonia, Turkmenistan voted in favor of the resolution but did not attend any of the sessions in Nairobi. Some attended only the organizational session in New York, including Barbados, Brunei Darussalam, Tonga, Slovenia, United Arab Emirates. The following 9 countries voted in favor of the resolution and attended at least one session in Nairobi but made no statement for or against the codification of principles or a Global Pact: Bhutan, Jordan, Lebanon, Madagascar, Niger, Qatar, Sri Lanka, Suriname, and Tuvalu. Two countries, Belarus and Tajikistan, abstained from voting on the resolution and did not attend any sessions. Nicaragua abstained from voting on the resolution and reinforced the need to strengthen means of implementation.

A few countries mildly favored further discussion on principles or the idea of a Global Pact. Côte d'Ivoire did not vote on the resolution and made limited remarks during the third session, asking for further discussion on principles and more regional discussion. Gabon voted in favor of the resolution and requested furthering the discussion on principles. Malawi did not vote on the resolution and called for strengthening means of implementation available to developing countries. The country supported a continued discussion on principles. Eswatini did not vote on the resolution and remained open to discussing a new instrument providing it was agreed by consensus by Member States.⁴⁶⁸ Tanzania did not vote on the resolution and made limited statements during the sessions. The country reinforced modes of implementation but opposed adding reference to international environmental governance on strengthening implementation. Tanzania objected the specific mention of environmental defenders or indigenous peoples and local communities. Maldives did not vote on the resolution and made limited statements underlining the role of Montevideo Programme V and challenges in national implementation. Burundi did not vote on the resolution and attended the Nairobi sessions but made limited statements. The country said consideration of a new instrument should await broad consensus that it will add value, linked the process to the SDGs, and called for more specificity on MEAs and cooperation.

Iraq did not vote on the resolution and was conscious about avoiding duplicating existing MEAs. The country stressed that a global pact should support the most vulnerable countries, include the principle of CBDR, achieve climate justice and respect national sovereignty. Algeria did not vote on the resolution but expressed full support of the OEWG's work. The country cautioned against re-negotiating international agreements and noted that some principles identified in the report do not enjoy universal support due to national policies. It reinforced the need for

⁴⁶⁸ Statement of the Kingdom of Eswatini to the Co-Chairs Non-Paper Draft Recommendations (OEWG Third Session), available at https://wedocs.unep.org/bitstream/handle/20.500.11822/28338/Eswatini_Statement.pdf?sequence=1&isAllowed=y.

strengthened implementation. Pakistan did not vote on the resolution and attended one session in Nairobi but made a limited statement on the need to simplify international environmental law and increase environmental protection without detrimentally affecting developing countries.

New Zealand did not vote on the resolution and questioned how an overarching one-size-fits-all framework could improve the situation in areas such as marine pollution. The country endorsed the benefits of coordination and synergies and welcomed the positive results international environmental law had already achieved. Honduras did not vote on the resolution and made limited statements during the sessions, stressing the principle of CBDR should be included in any potential instrument. Bahrain did not vote on the resolution. The country suggesting clarifying principles and objectives such as sustainable development but was concerned about the risk of new instruments on the duplicating and repeating existing MEAs. Bahrain proposed language on modes of implementation as a prerequisite to upholding states' respective obligations and commitments. Australia did not vote on the resolution and was cautious about the process of issuing recommendations to the UNGA. The country was concerned about the effect of a potential new agreement on existing international environmental law and how it would relate to national laws. Australia also questioned how the Global Pact would address the gaps identified in the UNSG's Report. South Africa did not vote on the resolution and attended the Nairobi sessions, highlighting the need for means of implementation and strengthened multilateral approaches. South Africa supported the development of a non-legally binding instrument.

Eritrea did not vote on the resolution. Speaking for the African Group, the country cautioned against undermining existing agreements, called for strengthening UNEP's role, and underlined the role of the AAAA and the 2030 Agenda. Zambia did not vote on the resolution and made limited statements on the sessions. Speaking for the African Group, the country questioned several dimensions of the UNSG's report, including that it does not sufficiently account for the role of the Rio and Stockholm Declarations, and suggested that strengthening the role of UNEP could play a central role in improving coordination in international environmental law. Ethiopia did not vote on the resolution and did not express strong views for or against a new instrument. However, speaking for G-77/China, the country reinforced the need for increasing means of implementation and capacity building and made sure to reinforce that the principles of sovereignty over national resources and common but differentiated responsibilities should be included in any potential agreement.

Singapore did not vote on the resolution and expressed concern about the risk of undermining existing international environmental law. The country questioned whether international environmental law principles should apply wholesale in areas such as trade, investment, intellectual property, and human rights. Singapore noted limited support among states for the adoption of a legally binding instrument, calling for a pragmatic approach to other possible options and the consideration of the principles in the specific context of MEAs, as well as different national circumstances in the principles' application. Singapore ultimately agreed that the OEWG should not recommend that UNGA adopt an instrument.

Chile voted in favor of the resolution and mildly favored a global pact during the first session. The country suggested analyzing which principles of international environmental law were generally agreed upon and going beyond the UNSG's report to see if a pact could be achieved by examining the needs for national implementation. However, Chile was concerned about undermining existing MEAs and invited an examination of the effects of a treaty on international environmental law. Additionally, it called for focusing the discussions during the second session on how to improve coordination and synergies between MEAs. It also presented a comprehensive

view of the discussions, involving norms, institutions, and implementation. Chile did not object to language referring to the promotion of further discussion on principles during the third session but said a new instrument could be counterproductive and lead to duplication of efforts since there was no consensus on a new global platform to address gaps. Kenya voted in favor of the resolution and underlined the 1992 Rio Declaration as a source of core principles of IEL, together with the principles of non-regression and progression as set out in the Paris Agreement.

Chad voted in favor of the resolution. The country attended the Nairobi sessions but made limited comments stressing the importance of access to justice and capacity building for national implementation, as well as “strengthening” UNEP’s role. Georgia voted in favor of the resolution and reinforced the need to support developing countries in implementing international environmental law. Guatemala voted in favor of the resolution and attended two sessions, making limited statements calling for language on preventing environmental damage. Paraguay voted in favor of the resolution and attended one session, making a limited statement on the need to bolster already existing coordination mechanisms between the UN and MEAs.

Norway voted in favor of the resolution and expressed doubt as to the merits of a legally binding pact, suggesting that recommendations to UNGA could address the need to strengthen IEL. Norway further noted that many principles are already established in customary international law, based on the Stockholm and Rio Declarations, and questioned how overarching codification could change and risk adversely affecting the application and interpretation of principles in individual MEAs.

Phase V: Back to New York (Jul. 2019 – 2020)

After the adoption of the consensus-based recommendations by the OEWG, the Co-Chairs returned to New York, bringing the process back to the UNGA. Section V, entitled “Back to New York,” focuses on the most recent developments of the fulfillment of the Resolution “Towards a Global Pact for the Environment.” It notes the events from July 2019 to May 2020. Section 1 covers the adoption of Resolution No. A/RES/73/333 by the UNGA, fully adopting the recommendations from the OEWG. Section 2 covers two UNEA-5 Meetings of the Bureau which briefly discussed these negotiations. Section 3 addresses a questionnaire sent out to stakeholders to guide negotiations forward. Section 4 covers the roadmap for consultations and appointment of co-facilitators.

1. August 2019: Adoption of Resolution No. A/RES/73/333⁴⁶⁹

The Co-Chairs presented the recommendations of the OEWG to the President of the UNGA María Fernanda Espinosa during an informal meeting on July 9th, 2019.⁴⁷⁰ Both the UNGA President and the Co-Chairs stressed the significance of having satisfied the mandate by consensus. During the briefing, the EU made the following key points: (i) the OEWG adhered to its mandate; welcomes the outcome and underscores that it was reached by consensus, calling it a “significant

⁴⁶⁹ The adoption of the resolution was the last development included in the *Gaps* book. See TIGRE, *supra* note 11.

⁴⁷⁰ Report from ICCEL representative Victor Tafur, e-mail from Jul. 10, 2019; See also Amal Mudallali (@AmbMudallali). “The PGA @UN_PGA has been a great supporter of the environment and of the Global Pact and today under her leadership we briefed member states about the results of our work and fulfilling our mandate. Thank you PGA & the best of luck in seeing this process reach its conclusions.” Jul. 9, 2019. Tweet. UNGA President (@UNGA). “Thank you, @LebanonUN & @Portugal_UN, Co-Chairs of the Working Group, created by RES72/277, “Towards a Global Pact for the Environment” for the timely & important briefing. Find the actionable recommendations here (link: <https://bit.ly/2YSjObG>) bit.ly/2YSjObG #Environment4All #UN4ALL” Jul. 9, 2019. Tweet.

achievement” that “should not be underestimated,” thus demonstrating that countries can work together for strengthening international cooperation aiming at environmental protection for common global interests; (ii) believes that it is very important to bring the Nairobi discussions to New York and share what was achieved; (iii) along with a group of countries, intends to table a short resolution for the UNGA to endorse what was achieved in Nairobi. It was estimated that a limited number of informal meetings would be sufficient to reach agreement before the end of July to adopt the resolution within the 73rd session of the UNGA. After the EU, other delegations took the floor: Morocco (in support), France (in support), Russia (on how their comments were reflected in the report), and China (generally in support).⁴⁷¹

On August 30, 2019, the UNGA adopted resolution No. A/RES/73/333.⁴⁷² The UNGA welcomed the work of the OEWG established pursuant to UNGA resolution 72/277, as well as its report, and endorsed all its recommendations.⁴⁷³ The resolution was facilitated by Finland, and cosponsored by the 28 EU member countries, plus EU candidate countries Albania, Montenegro, and North Macedonia, as well as potential candidate Bosnia and Herzegovina. Other sponsoring countries for tabling the resolution included Costa Rica, Lebanon, Micronesia, Palau, and Uruguay. From the floor, Andorra, Colombia, Fiji, Georgia, Kenya, Lesotho, Monaco, Morocco, San Marina, Senegal, and Ukraine also sponsored, totaling 48 countries. The resolution was adopted without a recorded vote.

Only two countries took the floor for explanation of the vote. The United States, to maintain prior statements made on the key U.N. documents mentioned in the considerations, such as, the 2030 Agenda for Sustainable Development and the outcome document of the U.N. Conference on Sustainable Development, entitled “The future we want,” and to note that the language on means on implementation should not be understood as any further financial commitment and that the governing bodies of the MEAs set the relevant specific policies. The other explanation was delivered by Norway, to support the recommendations, in particular as it pertains to the next U.N. Environment Assembly (UNEA-5), which it presided in February 2021. Ola Elvestuen, Norway’s minister of climate and environment, was appointed president of UNEA-5.

The resolution calls for the adoption of a political declaration for a U.N. high-level meeting to be prepared in February 2021 during the fifth session of the U.N. Environmental Assembly (UNEA-5).⁴⁷⁴ The political declaration will likely be adopted by 2022, on the occasion of UNEP@50. The fifth session of the U.N. Environment Assembly (UNEA-5) was expected to take place during the last week of February 2021, in Nairobi, Kenya.⁴⁷⁵ Due to the Covid-19 pandemic, the first session (UNEA-5.1) was held online on February 22-23, 2021 with a revised agenda focusing on urgent and procedural decisions, while the substantive matters requiring in-depth negotiations were deferred to an in-person session that will be held in Nairobi between February 28 and March 2nd, 2022 (UNEA-5.2).⁴⁷⁶

Indeed, the UNGA resolution kicks off a new phase by forwarding these recommendations to the UNEA for its consideration, and prepare, at its fifth session, in February 2021, a political

⁴⁷¹ Report from ICEL representative Victor Tafur, e-mail from Jul. 10, 2019.

⁴⁷² UNGA, Resolution No. A/RES/73/333 (adopted Aug. 30, 2019).

⁴⁷³ *Id.* ¶ 1.

⁴⁷⁴ As the world’s highest-level decisionmaking global environmental body and with universal membership, UNEA addresses critical environmental challenges from a global policy perspective. It functions as the world’s “de facto Parliament for the Environment” by convening environment ministers to set the global environmental agenda. TIGRE, *supra* note 11, at 190-91.

⁴⁷⁵ *Fifth Session of the UN Environment Assembly (UNEA-5)*, INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT (Feb. 22-23, 2021), <http://sdg.iisd.org/events/fifth-session-of-the-un-environment-assembly-unea-5/>.

⁴⁷⁶ *Fifth Session of the United Nations Environment Assembly – UNEA 5.2*, UNITED NATIONS ENVIRONMENT PROGRAMME (2022) <https://www.unep.org/news-and-stories/editorial/fifth-session-united-nations-environment-assembly-unea-52-2022>.

declaration for a U.N. high-level meeting, subject to voluntary funding, in the context of the commemoration of the creation of UNEP by the U.N. Conference on the Human Environment held in Stockholm in 1972. While this objective is far less ambitious than the initial intention of the Global Pact as a legally binding treaty, it nevertheless represents an opportunity to achieve progress in the development of international environmental law.⁴⁷⁷ It could be a first step toward the adoption of a binding treaty. The initiative continues to offer an opportunity for reform, as well as a valuable case study to determine the extent to which the ongoing processes that shape international environmental law are committed to embracing ambitious norms.⁴⁷⁸

2. July 2019 / October 2019: UNEA-5 Meeting of the Bureau

A Meeting of the Bureau of the 5th session of UNEA was held on July 3rd, 2019.⁴⁷⁹ A Note to the Bureau entitled “Towards a Global Pact for the Environment” was forwarded prior to the meeting as a background document for Agenda Item 2: “A joint vision for the fifth Session of the U.N. Environment Assembly.”⁴⁸⁰ The note provided a one-page background on the process so far, noting the recommendations of the working group to UNEA. In a background document related to finding a theme for UNEA-5, the challenges of implementation of MEAs and the UNGA resolution “Towards a Global Pact for the Environment” were highlighted.⁴⁸¹

On October 1, 2019, the Bureau of the Environment Assembly had another meeting at the UN’s Nairobi office. Agenda Item 3 related to the follow-up of UNGA resolution 73/333, specifically as it related to preparations for UNEA-5.⁴⁸² Through a background paper prepared for the Bureau and the Committee of Permanent Representatives (CPR), the note recommended time-bound consultations amongst member States in Nairobi on the implementation of the Provisional agenda UNEA-5 (Decision 4/2)⁴⁸³ and resolution 73/333. The note clarified that both Decision 4/2 and Resolution 73/333 address the commemoration of the creation of UNEP by the 1972 Stockholm Conference, albeit adopted under different processes.⁴⁸⁴

On October 7-11, 2019, UNEA held the annual subcommittee meeting of the Committee of the Permanent Representatives to the U.N. Environment Program. UNEP further prepared a background note with information and recommendations related to Decision 4/2 and the follow-up on UNGA’s resolution.⁴⁸⁵ UNEP clarified that:

⁴⁷⁷ Maria Antonia Tigre & Victoria Lichet, *Update on Negotiation of a New International Environmental Agreement*, 50 ENVTL. L. REP. 10818 (2020).

⁴⁷⁸ Louis J. Kotzé, *International Environmental Law’s Lack of Normative Ambition: An Opportunity for the Global Pact for the Environment?*, 16 J. FOR EUR. ENVTL. & PLAN. L. 213 (2019).

⁴⁷⁹ UNEA Bureau Meetings, Meeting of the Bureau of the fifth session of the UN Environment Assembly (Jul. 3, 2019), available at <https://www.unenvironment.org/events/unea-bureau-meetings/meeting-bureau-fifth-session-un-environment-assembly>.

⁴⁸⁰ United Nations Environment Programme, Meeting of the Bureau of the UN Environment Assembly, Note to Bureau of the UN Environment Assembly, “Towards a Global Pact for the Environment” (10 June 2019), <https://wedocs.unep.org/bitstream/handle/20.500.11822/28461/GPE.Note%20to%20UN%20Environment%20Assembly%20Bureau%20%281%29.pdf?sequence=1&isAllowed=y>.

⁴⁸¹ United Nations Environment Programme, Meeting of the Bureau of the UN Environment Assembly, Finding the right theme for the 2020 UN Environment Assembly (17 June 2019), <http://wedocs.unep.org/bitstream/handle/20.500.11822/28387/Note%20on%20theme%20for%20discussion%20by%20the%20Environment%20Assembly%20Bureau.pdf?sequence=15&isAllowed=y>.

⁴⁸² Meeting of the Bureau of the Environment Assembly, Note on possible follow-up action on the relevant recommendations endorsed through General Assembly resolution 73/333, in particular as they relate to the preparations for UNEA-5 (Sep. 23, 2019).

⁴⁸³ Decision 4/2. Provisional agenda, date and venue of the fifth session of the United Nations Environment Assembly, U.N. Doc. UNEP/EA.4/2, <https://wedocs.unep.org/bitstream/handle/20.500.11822/28512/Decision%204-2.pdf?sequence=1&isAllowed=y>.

⁴⁸⁴ *Id.*, ¶ 4.

⁴⁸⁵ UNEP, Note on the implementation of UNEA Decision 4/2, “Provisional agenda, date and venue of the fifth session of the United Nations Environment Assembly,” UNEP/CPR/SC2019/6 (Sep. 13, 2019).

7. The commemoration of the creation of UNEP in 2022 provides a unique opportunity to take stock of progress made to protect the global environment and the human wellbeing, including under the auspices of UNEP, and to consider a forward-looking vision on how to strengthen efforts to effectively integrate environmental sustainability in the context of the implementation of the UN 2030 Agenda, and reflect on possible future multilateral action to address areas and approaches where additional efforts are needed to fully achieve the environmental dimension of sustainable development.

8. It will be necessary for Member States to consider further guidance, in a timely manner, on the modalities of the commemoration – such as the level of ambition and participation, format, scope, expected outcomes, venue, budget, timing, etc.⁴⁸⁶

Decision 4/2 requested the Executive Director to make preparations for the commemoration of UNEP, thus setting a consultative process with Member States and stakeholders.⁴⁸⁷ Resolution 73/333, although endorsing the recommendation of the working group to prepare a political declaration at UNEA-5 for a U.N. high-level meeting, failed to provide further guidance on how to implement it.⁴⁸⁸ In the absence of a follow-up provision, the way in which the UNGA would consider the implementation of the recommendation at its 74th session remained unclear. The implementation of both decisions falls under the purview of UNEA and its inter-sessional subsidiary organ, the CPR, to deliberate on how it will implement and carry forward these decisions. It is foreseen that the UNEP Secretariat will take the lead in the preparatory process for its 50th anniversary commemoration, in close cooperation with Member States, the Secretariats of Multilateral Environmental Agreements and other relevant U.N. organizations.⁴⁸⁹ UNEP thus issued the following recommendation:

“The UNEP Secretariat thus recommends that the Environment Assembly Bureau and the Committee of Permanent Representatives and its Bureau organizes time-bound consultations amongst member States in Nairobi on the implementation of Decision 4.2 and General Assembly resolution 73/333 and to do so in consultation with the Executive Director.”⁴⁹⁰

UNEP recommended consultations to take place between October 2019 and February 2020 in Nairobi, focusing on organizational and process-oriented questions. The consultations would take a holistic view, considering the commemoration of the establishment of UNEP and the implementation of paragraph 88 of the outcome document of the U.N. Conference on Sustainable Development.⁴⁹¹ After the consultations, the President of UNEA could, in consultation with the Executive Director, communicate to the President of the UNGA the achieved outcome, including recommendations on the implementation of both decisions and possible inter-linkages between them and possibly proposed recommended action to be taken by UNEA and/or the UNGA.

The commemorations in 2022 could take one of the following formats: (i) a ceremonial commemoration event to celebrate the 50th anniversary of the creation of the U.N. Environment

⁴⁸⁶ UNEP, *supra* note 324, at ¶ 7-8.

⁴⁸⁷ UN Environment Assembly, *supra* note 482, at ¶ 5.

⁴⁸⁸ *Id.*, ¶ 6.

⁴⁸⁹ UNEP, *supra* note 485, at ¶ 13.

⁴⁹⁰ UN Environment Assembly, *supra* note 482, at ¶ 8.

⁴⁹¹ *Id.*, ¶ 9.

Programme (UNEP+50 Summit) to be held in Nairobi; (ii) a UNEA Special Session in Nairobi; (iii) a U.N. event or conference at the highest political level in a dedicated host country, with a strong and visionary political impact and outcome prepared and negotiated in Nairobi, comparable with the outcomes from the Stockholm Conference in 1972; (iii) a UNGA commemoration event in New York, with or without a political outcome; (iv) dedicated forums or summits for parliamentarians, youth or other specifically targeted stakeholders' contribution to the commemoration; (v) a "virtual" U.N. meeting, using the latest information and communication technology and artificial intelligence solutions to maximize impact while minimizing the environmental footprint; (vi) a series of multistakeholder-led events, activities or meetings, possibly also including voluntary pledges and commitments, to leverage support for the commemoration.⁴⁹² UNEP suggested the commemoration to take place with the celebration of the World Environment Day on June 5, 2022.⁴⁹³

With respect to the preparation of a political declaration, UNEA suggested a couple of different interpretations of the mandate: preparing *and* possibly finalizing a political declaration to be submitted for the consideration of a U.N. high-level meeting; rather than finalizing, UNEA could agree on an outline, or elements of a declaration, or a draft declaration with bracketed text, or a combination of these alternatives. In either circumstance, the CPR is well positioned to recommend to UNEA an appropriate course of action on the negotiation of the declaration, such as the appointment of facilitators, as well as its content and scope.⁴⁹⁴ On the political outcome, options included (i) a visionary political declaration taking stock of progress made and outlining a long-term vision on how to best address remaining gaps and challenges in the next 50 years (2072), also taking into account the recommendations in UNGA resolution A/73/333; (ii) agreements, including through targeted resolutions and decisions, to take action on specific emerging issues; (iii) concrete actions and pledges to strengthen implementation of the existing commitments and instruments; (iv) possible launch of new initiatives in areas where progress has been insufficient; (v) agreements on institutional follow-up and/or financial resources in support of implementation of the political outcome; (vi) a global plan of action to protect the environment and human health in the context of the 2030 Agenda and beyond; (vii) voluntary pledges/commitments by key stakeholders, including Member States, private sector, civil society and individuals; (viii) partnership agreements in support of implementation of the political outcomes.⁴⁹⁵ Some of these options may be combined. In any case, the event should build on science-policy input, the Global Environment Outlook series and other relevant global environmental assessments, including the review of nationally determined contributions of the Paris Agreement, the adoption of the post-2020 framework on biodiversity, and the future global framework on chemical and waste.⁴⁹⁶

The Executive Director of UNEP intended to put in motion the following initiatives: (i) establish an advisory panel of eminent persons that will contribute to a successful commemoration of UNEP; (ii) put in place an internal Secretariat Task Force for the commemoration; (ii) reach out to leading representatives from Member States, U.N. organizations and civil society and private sector entities to solicit views on how to best undertake the 50 year commemoration; (iii) mobilize all interested stakeholders to influence and engage actively in the commemoration, through disseminating information, creating online platforms, organizing events and offering training

⁴⁹⁴ UN Environment Assembly, *supra* note 482, at ¶ 13.

⁴⁹⁵ UNEP, *supra* note 485, at ¶ 11.

⁴⁹⁶ *Id.* at ¶ 12.

opportunities; (iv) prepare for a substantial Executive Director's report on the commemoration of UNEP, including a set of recommendations, for consideration by UNEA-5.⁴⁹⁷

3. *December 2019: Questionnaire to Guide the Way Forward on Resolution No. 73/333*⁴⁹⁸

The first step for the implementation of resolution 73/333 constituted informal consultations with regional and political groups.⁴⁹⁹ In December 2019, questionnaires were sent to stakeholders with four guiding questions on the interpretation of the OEWG's recommendations:⁵⁰⁰ (1) under which agenda item UNEA-5 would consider the recommendations; (2) what level of detail a text would be required to meet to be considered "prepared" by UNEA-5 when the preparations for a political declaration would begin, and how States could be involved; (3) when and how a "U.N. high-level meeting" would be convened; and (4) which elements should be included in the political declaration.⁵⁰¹ Twenty-six inputs were received from States and regional/political groups, as well as nine inputs from stakeholders and significant groups.⁵⁰²

Several States questioned the meaning of the mandate to "prepare" a political declaration, arguing it does not mean its "adoption," "conclusion," or "finalization," but rather the adoption of suggestions to be forwarded to the CPR to UNEP. Additionally, States suggested that a draft should be general, inspirational, outcome-oriented, providing policy guidance, and including elements that could serve as "building blocks" toward a political declaration. Countries also suggested the development of a timeline, outline, and modalities for the negotiation of the political declaration.⁵⁰³

Some States also called for an "inclusive, transparent, and CPR-based process," with two leading co-facilitators, in a similar format as the OEWG negotiations. Several countries suggested ways to ensure broad participation, including States without representation in Nairobi, for example by allowing written contributions, video conferences, informal consultations, or moving the negotiations to the U.N. headquarters in New York.

Regarding the meaning of a "U.N. high-level meeting," several States construed "high-level meeting" as requiring ministerial attendance. Many countries welcomed Sweden's offer to host the meeting in Stockholm for the commemoration of the 1972 Stockholm Conference. Other States alternatively suggested that UNEA or the UNGA should convene the meeting. Overall, views differed regarding its format as States proposed round table discussions and exhibit halls, a general debate with a list of speakers, an opening ceremony, a plenary session, and parallel round tables with interactive discussions.

Regarding the scope of elements to be included in the political declaration, several States recommended that the declaration only focus on the elements defined in the annex to Resolution

⁴⁹⁷ UNEP, *supra* note 485, at ¶ 14.

⁴⁹⁸ This section outlines the document of the UNEA of UNEP, *Agenda Item 6: Implementation of General Assembly Resolution 73/333*, 149th mtg., U.N. Doc. UNEP/CPR/149/5 (2020)

[https://wedocs.unep.org/bitstream/handle/20.500.11822/31581/CPR%20149-](https://wedocs.unep.org/bitstream/handle/20.500.11822/31581/CPR%20149-5%20summary%20of%20inputs%20to%20questionnaire.pdf?sequence=1&isAllowed=y)

[5%20summary%20of%20inputs%20to%20questionnaire.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/31581/CPR%20149-5%20summary%20of%20inputs%20to%20questionnaire.pdf?sequence=1&isAllowed=y) [hereinafter *Agenda Item 6*],

⁴⁹⁹ These included the Group of African States, Group of Asia-Pacific States, Group of Eastern European States, GRULAC, Group of Western European and Other States, European Union, and League of Arab States. UNEP, SUMMARY OF CONSULTATIONS ON UNGA RESOLUTION 73/333 (2019),

[https://wedocs.unep.org/bitstream/handle/20.500.11822/30952/Summary%20consultations%20UNGA%20res%2073-](https://wedocs.unep.org/bitstream/handle/20.500.11822/30952/Summary%20consultations%20UNGA%20res%2073-333.pdf?sequence=6&isAllowed=y)

[333.pdf?sequence=6&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/30952/Summary%20consultations%20UNGA%20res%2073-333.pdf?sequence=6&isAllowed=y).
⁵⁰⁰ *Note and Questionnaire to Guide the Way Forward on UN General Assembly Resolution 73/333*, UNEP, 149th mtg., U.N. Doc. UNEP/CPR/149/2 (2019),

[http://wedocs.unep.org/bitstream/handle/20.500.11822/31316/Letter%20on%20the%20Implementation%20of%20GA%20Resolu](http://wedocs.unep.org/bitstream/handle/20.500.11822/31316/Letter%20on%20the%20Implementation%20of%20GA%20Resolution%2073_333.pdf?sequence=28&isAllowed=y)

[tion%2073_333.pdf?sequence=28&isAllowed=y](http://wedocs.unep.org/bitstream/handle/20.500.11822/31316/Letter%20on%20the%20Implementation%20of%20GA%20Resolu).

⁵⁰¹ UNEP/CPR/149/2, *supra* note 502.

⁵⁰² *Agenda Item 6*, *supra* note 33.

⁵⁰³ *Id.* at 3.

No. 73/333 (the OEWG's recommendations). Some States identified specific objectives and recommendations that should be prioritized, such as sustainable development and adherence to the rule of law. Additionally, many States stated that the declaration should refer to the objectives and recommendations of the OEWG through a clear statement or by reaffirming Resolution No. 73/333 and the outcome of the 1992 U.N. Conference on Environment and Development. Other suggestions included (1) using the objectives and recommendations as guiding principles, (2) summarizing them in the declaration and, if not feasible, incorporating them as an annex to the declaration, and (3) including the objectives in the preamble and the recommendations in the operative part of the declaration.

4. *February-May 2020: Road Map for Consultations and Appointment of Co-Facilitators*

As a result of the consultations, Members of UNEA's Bureau and UNEP's CPR jointly agreed on a road map for implementation of the resolution's provisions.⁵⁰⁴ The consultations were planned to be held in Nairobi – which did not happen due to the Covid-19 pandemic – under the leadership of two co-facilitators, one from a developed and one from a developing country. Three substantive meetings were scheduled: (1) the first one, held in July, to discuss the scope of the political declaration, taking into account an outline/elements/building blocks paper developed by the co-facilitators, and drawing from inputs from member States and specialized agencies; (2) a second substantive meeting in October 2020 to follow up on the outcomes of the first consultation and consider possible draft elements for a procedural resolution for UNEA-5; and (3) a third substantive consultation to take place in January/February 2021, before the fifth open-ended meeting of the CPR, to consider the draft procedural resolution implementing the mandate given to UNEA-5.

In May 2020, the president of UNEA and the chair of the CPR appointed Saqlain Syedah, vice chair of the CPR, high commissioner and permanent representative of Pakistan, and Ado Lohmus, vice president of the UNEA and permanent representative of Estonia, as co-facilitators for the informal consultations under the auspices of the CPR on the implementation of Resolution No. 73/333, following consultations with the Bureaux of the CPR and UNEA and the chairs of the regional groups.⁵⁰⁵

Phase VI: New Working Group (Jul. 2020 – Dec. 2021)

The sixth phase of the development of a political declaration on international environmental law was kick-started in 2020 with informal consultations on the scope of the political declaration. Unfortunately, the negotiations were significantly delayed due to the Covid-19 pandemic. This section, entitled “New Working Group,” covers the work of the working group created to draft the 2022 political declaration. Section 1 covers the first informal substantive consultation. Section 2 addresses the draft building blocks of a political declaration shared by co-facilitators, which received substantial comments from a group of participants by January 2021. Section 3 analyses the second informal substantive consultation, in which States substantially

⁵⁰⁴ *Roadmap for Consultations on Follow-Up of UN General Assembly Resolution 73/333*, UNEP, 149th mtg., U.N. Doc. UNEP/CPR/149/5/ADD.2 (2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/31664/Adopted%20Add5-2-Rev.1%20CPR%20149%20-%20roadmap%20on%20consultations%20on%20GA%20res%2073%20333.pdf?sequence=1&isAllowed=y>.

⁵⁰⁵ Letter from Jorge Laguna-Celis, Director of Governance Affairs, to Ministers Responsible for the Environment et al., UNEP (May 8, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/32266/Letter%20on%20co-facilitators%20REV%20JLC.pdf?sequence=1&isAllowed=y> (appointing co-facilitators for the informal consultations).

discussed the language of the draft declaration. States will convene in February 2022 at UNEA-5 to agree on the final content of the political declaration.

*1. July 2020: First Informal Substantive Consultation*⁵⁰⁶

UNEP opened an informal consultation process with regional and political groups following the road map for consultations, holding the first meeting virtually between July 21-23, 2020. The meeting allowed States to share their stance on the scope of the political declaration and the proceedings of international environmental governance. Yet the discussions mostly mimicked the debates held in Nairobi, failing to add much new to the table. Few countries participated. Like the first Nairobi session, there was a lot of discussion on diverse aspects of IEL, with very few action-oriented solutions proposed.⁵⁰⁷ With a few exceptions, ambition of countries remained low, with the majority opposing new and future-oriented proposals that would better prevent and prepare for environmental crises.⁵⁰⁸

Surprisingly, very few countries noted the global context of the pandemic in which the negotiations were developing and ignored how Covid-19 influences the need for a new environmental agreement. The Group of Latin America and the Caribbean (GRULAC), representing a region that has been profoundly devastated by Covid-19, noted the need to recommit to the SDGs.⁵⁰⁹ The E.U.⁵¹⁰ called for a green recovery,⁵¹¹ while New Zealand and Turkey called on global environmental challenges “to build back better” from the pandemic.⁵¹² Brazil acknowledged the need to recover from Covid-19 while also fighting climate change,⁵¹³ albeit contending that sustainable development cannot be achieved unless poverty, aggravated by the

⁵⁰⁶ This section draws on the documents available at UNEP, *CPR Meetings: First Informal Substantive Consultation Meeting on UNGA Resolution 73/333*, https://www.unenvironment.org/events/cpr-meetings/first-informal-substantive-consultation-meeting-unga-resolution-73333?_ga=2.93341341.1021647480.1596565913-1017108954.1595267309 (last visited Aug. 20, 2020). A prior version of this section appeared on Maria Antonia Tigre & Victoria Lichet, *Update on Negotiation of a New International Environmental Agreement*, 50 ENVTL. L. REP. 10818 (2020).

⁵⁰⁷ TIGRE, *supra* note 11, at 102-04, 112-36.

⁵⁰⁸ See DOMAINE, *supra* note 25, at 13 (on the lack of political will as a barrier to the OEWG’s negotiations).

⁵⁰⁹ GRULAC Representative, Item 3: General Statements by Regional and Political Groups and Interested Member States and Members of Specialized Agencies, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 1 (July 21-23, 2020) [hereinafter GRULAC Statement on Item 3], <https://wedocs.unep.org/bitstream/handle/20.500.11822/33188/GRULAC%20Intervention%20Final%2021JUL20.pdf?sequence=1&isAllowed=y>.

⁵¹⁰ Serbia and Ukraine align themselves with all four EU statements.

⁵¹¹ EU and Member States Representative, EU & MS Statement on “Means of Implementation” (Recommendations 7, 13, 15, 16), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 2 (July 21-23, 2020) [hereinafter EU & MS Statement on “Means of Implementation”], https://wedocs.unep.org/bitstream/handle/20.500.11822/33266/73-333-EUMS_Statement_Cluster%20_MoI.pdf?sequence=1&isAllowed=y.

⁵¹² See, within this context, the work currently developed by the Global Pandemic Network, <https://www.globalpandemicnetwork.org/> (last visited Aug. 20, 2020).

⁵¹³ Nicola Speranza, Ministry of Foreign Affairs of Brazil, Remarks by Brazil on Cluster 2 (Means of Implementation), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 3 (July 21-23, 2020) [hereinafter Brazil’s Statement on Cluster 2], <https://wedocs.unep.org/bitstream/handle/20.500.11822/33239/BRAZIL%20Cluster%20%20Means%20of%20Implementation.pdf?sequence=1&isAllowed=y>.

pandemic, is eradicated.⁵¹⁴ New Zealand specifically addressed a potential political spotlight on environmental law and principles.⁵¹⁵

Most States⁵¹⁶ demanded the adoption of a declaration that furthers the 2030 Agenda and the SDGs. However, once again, this should not be used as an excuse to avoid further commitments, which could be advanced while also addressing poverty issues (in a “green recovery” type of solution or alternatives for “building back better”). For example, the Democratic Republic of Congo suggested that some developing countries require external funding to better cooperate at the international level.⁵¹⁷ Yet many countries still reinforced the importance of the principle of CBDR,⁵¹⁸ calling attention to poverty as an additional impact factor given how Covid-19 has influenced economies. China also demanded that the principle of State sovereignty over environmental resources be included in a declaration.⁵¹⁹

While the Covid-19 health crisis provides several challenges of a socio-economic nature, it also reinforces the connection between humanity and nature. Additionally, it raises foundational questions for the international legal order, including the effect of the pandemic on fundamental human rights and international environmental law. Therefore, rather than using the pandemic as an excuse to avoid further international obligations—following the national example of countries such as Brazil and the United States under the Trump administration, which have sought an opportunity to promote environmental rollbacks during the pandemic—this should be seen as an additional incentive to agree on more stringent commitments.

Most States⁵²⁰ acknowledged that the meetings should only focus on the recommendations of Resolution 73/333 and converged on the understanding that the political declaration should be nonbinding and action oriented. However, the recommendations provide a vast field for developing ambitious norms. Indeed, it addresses a wide range of issues including, generally, the protection of the environment for present and future generations, strengthening implementation of international environmental law and environment-related instruments, the implementation of the 2030 Agenda, the Addis Ababa Action Agenda, the role of UNEP, cross-cutting issues and coherence between MEAs, cooperation between bodies and secretariats of MEAs, and, more

⁵¹⁴ Ambassador Fernando Estellita Lins de Salvo Coimbra, Opening Remarks by Brazil, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 1 (July 21-23, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/33200/BRAZIL%20Opening%20remarks.pdf?sequence=1&isAllowed=y>

⁵¹⁵ New Zealand’s opening statement, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/33196/New%20Zealdn%20statement.pdf?sequence=1&isAllowed=y>. New Zealand Representative, New Zealand Statement, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333 (July 21-23, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/33196/New%20Zealdn%20statement.pdf?sequence=1&isAllowed=y>.

⁵¹⁶ African Group, EU, GRULAC, Costa Rica, Brazil, India.

⁵¹⁷ Democratic Republic of the Congo Representative, Intervention by the Democratic Republic of the Congo on Cluster 2 Agenda Item: “Means of Implementation,” Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333 (July 21-23, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/33258/DEMOCRATIC%20REPUBLIC%20OF%20THE%20CONGO%20Cluster%202.pdf?sequence=1&isAllowed=y>.

⁵¹⁸ African Group, Algeria, GRULAC, Costa Rica, Brazil, Egypt, India, the Group of 77 (a coalition of 134 developing countries), and China.

⁵¹⁹ Sun Jin, Ministry of Foreign Affairs of the People’s Republic of China, General Statement by China, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/33, UNITED NATIONS ENVIRONMENT PROGRAMME, at 1 (July 21, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/33235/China%20opening%20remarks.pdf?sequence=1&isAllowed=y>.

⁵²⁰ The Group of 77, African Group, China, GRULAC, Chile, Colombia, Brazil, Egypt, Ethiopia, New Zealand, Turkey, and the United Kingdom (U.K.).

specifically, the role of discussions on principles of international environmental law in enhancing implementation.

The majority of these States also insisted on recognizing and supporting the implementation of existing frameworks and conventions rather than creating new obligations. Some countries, such as Brazil, mistakenly pointed out that the OEWG concluded that there was not a lack of international environmental norms but a lack of proper implementation of existing rules. While the OEWG's recommendations primarily focused on means of implementation, they did not eliminate the debate on adopting new norms. The UNSG specifically addressed gaps in existing norms, while the OEWG recommended the adoption of a new soft law agreement, a political declaration. While declarations traditionally recall prior commitments from the international community, these also push forward new commitments, an example that should be followed in this case.⁵²¹

Most States⁵²² concluded that the political declaration should encourage coordination and cooperation between MEAs with UNEP and UNEA. This would enhance synergies among MEAs and promote more robust and coordinated global environmental governance, avoiding duplicated efforts and overlaps.⁵²³ The E.U. gave the example of the “synergies process” established by the Basel, Rotterdam, and Stockholm Conventions as a valuable method for advancing policy coherence, improving implementation, and reducing administrative burdens.⁵²⁴ Similarly, Brazil recommended identifying the best strategies for enhancing coordination among MEA secretariats.⁵²⁵ However, Brazil specified that States' efforts to promote synergies should not lead to obligations that might undermine the original compromises required to achieve each MEA.⁵²⁶ This concern was explicitly addressed in the OEWG's recommendations, which noted the objective not to undermine existing legal instruments and frameworks.⁵²⁷ The E.U. also proposed that UNEA act as a “central platform for cross-cutting issues of specific global environmental workstreams.”⁵²⁸

The civil society group urged that scientific research, innovation, and cooperation should be encouraged across relevant bodies to adequately inform the work of MEAs and national and sub-national sustainable development commissions. Within this context, more ambition was called for on means of implementation (finance, technology, technical assistance, and capacity building in the environmental field) for developing countries. The African Group and Egypt specified that each country's national circumstances and development imperatives should be considered, while GRULAC recommended more precise assessments and monitoring of national capabilities.

⁵²¹ See, e.g., Stockholm Declaration (*Report of the U.N. Conference on the Human Environment, Stockholm 5-16 June 1972*, U.N. Doc. A/CONF.48/14/Rev.1 (1973)) and the Rio Declaration (*Rio Declaration on Environment and Development*, U.N. Conference on Environment and Development, Annex, U.N. Doc. A/CONF.151/26 (Vol. I) (1992)), which, while having several principles in common, are not identical, as the Rio Declaration progressively adopted additional principles.

⁵²² EU, African Group, China, Chile, Kenya, Malawi, the U.K., and the civil society group.

⁵²³ See Urho, et al., *supra* note 100.

⁵²⁴ EU and Member States Representative, EU & MS Statement on “Governance” (Recommendations 6, 9, 10, 11, 12, 18), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 2 (July 21-23, 2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/33228/73-333-EUMS_Statement_Statement_Governance.pdf?sequence=1&isAllowed=y [hereinafter EU & MS Statement on “Governance”].

⁵²⁵ Brazil's Statement on Cluster 2, *supra* note 48, at 3.

⁵²⁶ Patrick Luna, *Deputy Permanent Representative of Brazil to UNEP, Remarks by Brazil on Cluster 1 (Governance), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333*, at 2 (July 21-23, 2020),

<https://wedocs.unep.org/bitstream/handle/20.500.11822/33229/BRAZIL%20Cluster%201%20Governance.pdf?sequence=1&isAllowed=y>.

⁵²⁷ G.A. Res. 73/333, *supra* note 9, at annex (5).

⁵²⁸ EU & MS Statement on “Governance,” *supra* note 65, at 1.

Brazil acknowledged that States must work at the national level to ensure the respect of their legal commitments, which requires enhanced coordination among different governmental agencies.⁵²⁹ The E.U. and Malawi expressed the importance of mainstreaming environmental considerations at all levels. They proposed that all States be encouraged to mainstream the environment into relevant sectoral policies, programs, and action plans. The E.U. and Brazil also suggested that the private sector and other stakeholders should be involved at all levels in implementing environmental commitments, which would require an increased level of access to information.

Further, almost all States⁵³⁰ called for reaffirming and strengthening the role of UNEP as the leading global environmental authority. The E.U. and the civil society group specifically noted the role of UNEP within the U.N. Sustainable Cooperation Framework. Additionally, the E.U. suggested that UNEP should intensify its dialogue with other U.N. entities to bring “its environmental expertise into ongoing negotiations of specific sectors, thereby contributing to more coherent policy-making.”⁵³¹ The civil society group recommended that UNEP’s policy influence be further strengthened regarding all “relevant international organizations whose mandates may impact environmental matters.”⁵³² States such as Brazil and Kenya and the civil society group recommended increasing UNEP’s authority by providing sufficient funding through UNEP’s Environment Fund. The E.U. considers that financial resources should also come from private sources and innovative finance mechanisms.⁵³³

Some States, including the E.U. and Algeria, maintained that the process cannot remain a “perpetual[ly] postponed aspiration”⁵³⁴ and a primary objective to reach through adequate means of implementation. The E.U. specifically recommended that States discuss the extent to which international law principles can help implement environmental law, implicitly referencing the Global Pact, which started this process.⁵³⁵ While this proposal remains unpopular among some States, the support of a powerful actor could help maintain it on the negotiating table. Indeed, the discussion of principles was explicitly noted in the OEWG’s recommendations, which gave the debate further breath. Japan believes that the political declaration should be an opportunity for all

⁵²⁹ Patrick Luna, Deputy Permanent Representative of Brazil to UNEP, Remarks by Brazil on Cluster 3 (Environmental Rule of Law), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 1 (July 21-23, 2020) [hereinafter Brazil’s Statement on Cluster 3].

<https://wedocs.unep.org/bitstream/handle/20.500.11822/33245/BRAZIL%20Cluster%203%20Environmental%20RoL.PDF?sequence=1&isAllowed=y>.

⁵³⁰ EU, Group of 77, China, African Group, Brazil, Chile, Ethiopia, Kenya, Turkey.

⁵³¹ EU & MS Statement on “Governance,” *supra* note 65, at 1.

⁵³² Christina Catalano, Institute for Planetary Synthesis, *Intervention From the NGOs on Governance (Recommendations 6, 9, 10, 11, 12, 18), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333*, at 1 (July 21-23, 2020),

<https://wedocs.unep.org/bitstream/handle/20.500.11822/33231/Intervention%20from%20the%20NGOs%20on%20agenda%20point.pdf?sequence=1&isAllowed=y>.

⁵³³ EU & MS Statement on “Means of Implementation,” *supra* note 46, at 1.

⁵³⁴ Algeria Representative, *Algeria Opening Remarks, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333*, UNITED NATIONS ENVIRONMENT PROGRAMME (July 21-23, 2020),

<https://wedocs.unep.org/bitstream/handle/20.500.11822/33218/Algeria%20Statement%2021-23%20July.pdf?sequence=1&isAllowed=y>.

⁵³⁵ EU and Member States Representative, *EU & MS Opening Statement, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333*, UNITED NATIONS ENVIRONMENT PROGRAMME at 2 (July 21-23, 2020),

https://wedocs.unep.org/bitstream/handle/20.500.11822/33236/EUMS_Statement_Opening_Statement.pdf?sequence=1&isAllowed=y.

States to demonstrate their strong political will to strengthen international environmental law and governance “to address formidable and emerging environmental challenges.”⁵³⁶

However, once again, several States referred to the ILC’s work “to contribute to the progressive development and the codification of international law.”⁵³⁷ Brazil noted its support of the ILC’s process and urged that the preparation of the political declaration not prejudice the studies undertaken by the Commission regarding principles of law.⁵³⁸ Kenya favored the nomination of experts by each State to actively engage in the ILC’s work to diversify perspectives and approaches enhancing environmental governance.⁵³⁹

Yet it should be noted that the ILC’s work, which is cumbersome and lengthy, refers to general principles of law and is not environment-specific. Therefore, both processes could develop independently. Although the work of the ILC is significant for the development of international law, a reference to this process was mainly used as a tactic to delay negotiations in Nairobi, and it seems to have been brought up once again with similar intentions. With a specific deadline to adopt a new agreement by 2022, it is unlikely that States could wait for the ILC to finish its study.

Within this context, the E.U. stated that existing and agreed principles of IEL contribute to the objective of environmental protection but stressed the importance of identifying approaches for developing an understanding of each principle and its implementation.⁵⁴⁰ Indeed, the clarification of environmental principles was suggested by the UNSG as a way to address current gaps in international environmental law.⁵⁴¹ The IUCN-WCEL and ICEL further noted that clarification and reinforcement of principles of international environmental law could provide a more balanced reconciliation of economic, social, and environmental rights and equip States to build resilience and capacity amidst present and future environmental diversity—something even more significant during and after the pandemic.⁵⁴²

The civil society group indicated the need to agree on environmental rights and recognize universal responsibilities.⁵⁴³ This call follows a statement from the outgoing and incoming U.N. special rapporteurs on human rights and the environment, who jointly urged the UNGA to

⁵³⁶ Japan Representative, Statement of Japan, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, UNITED NATIONS ENVIRONMENT PROGRAMME, at 1 (July 21-23, 2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/33238/Japan%20statement%20First%20informal%20consultation%20on%2073_333.pdf?sequence=1&isAllowed=y.

⁵³⁷ See generally ILC, *Analytical Guide to the Work of the International Law Commission*, https://legal.un.org/ilc/guide/1_15.shtml (last visited Aug. 20, 2020); *Second Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur*, ILC, 72d Sess., U.N. Doc. A/CN.4/741 (2020) [hereinafter *ILC Second Report*], <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N20/093/44/PDF/N2009344.pdf?OpenElement>; TIGRE, *supra* note 11, at 135.

⁵³⁸ Brazil’s Statement on Cluster 3, *supra* note 70, at 2.

⁵³⁹ Kenya Representative, Group 3: Environmental Rule of Law (Recommendations 8, 14, 17), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333 (July 21-23, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/33244/KENYA%20INTERVENTIONS%20UNDER%20%20GROUP%203.pdf?sequence=1&isAllowed=y>.

⁵⁴⁰ EU and Member States Representative, EU & MS Statement on “Environmental Rule of Law” (Recommendations 8, 14, 17), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 1 (July 21-23, 2020), https://wedocs.unep.org/bitstream/handle/20.500.11822/33255/73-333-EUMS_Statement_Agenda_EnvRuleLaw.pdf?sequence=1&isAllowed=y.

⁵⁴¹ *Report of the Secretary-General*, *supra* note 7, at 2, 42.

⁵⁴² WCEL et al., *supra* note 162.

⁵⁴³ Leida Rijnhout, Stakeholder Forum, NGOs’ Opening Statement, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 2 (July 21-23, 2020) [hereinafter NGOs’ Opening Statement], <https://wedocs.unep.org/bitstream/handle/20.500.11822/33198/NGOs%20statement%20agenda%20point%203.pdf?sequence=1&isAllowed=y>.

recognize the right to a healthy environment.⁵⁴⁴ Additionally, the group highlighted that an effective environmental rule of law depends on access to quality environmental information to participate in decision-making.⁵⁴⁵ GRULAC also insisted on the importance of specifying that human beings and nature should live in harmony to overcome the challenges of biodiversity loss, climate change, and pollution.⁵⁴⁶ Turkey explicitly expressed the need to consider prevention, including protecting ecosystems, conservation of biodiversity, sustainable and climate-friendly agricultural practices, and carbon emissions.⁵⁴⁷

2. *October 2020: Draft building blocks*

In October 2020, despite canceling the second substantive consultation due to the pandemic,⁵⁴⁸ the co-facilitators (H.E. Ms. Saqlain Syedah and Mr. Ado Lohmus) published the draft building blocks of a political declaration.⁵⁴⁹ The building blocks drew on resolutions 72/277 and 73/333, as well as inputs from the first informal consultation meeting. The building blocks considered existing UNGA, UNEP Governing Council, and UNEA resolutions on environmental law and governance, as well as the Rio Declaration, Agenda 21, Implementation of Agenda 21, the Johannesburg Declaration, the Addis Ababa Action. Agenda, and the 2030 Agenda for Sustainable Development (items 2, 3, 4). While this was the first draft in an ongoing negotiation process, inviting comments from States and NGOs, there was no innovation or increased commitment, especially on environmental rights and duties.

Right to a healthy environment and procedural environmental rights

Despite the growing call for recognition of a right to a healthy environment in the international arena at the time— and an express mention in the draft Global Pact – the draft building blocks were shy of acknowledging it. Item 1 uses a soft language by noting that we (drafters, including governments and civil society) “believe that everyone should be able to live in a safe, clean, healthy and sustainable environment and thus recognize the urgent need to reinforce the protection of the environment for present and future generations.”⁵⁵⁰ The soft language recognizes an intergenerational aspect of a healthy environment but does not establish a duty to protect it. Additionally, the draft acknowledges the same three pillars of procedural environmental rights (access to information, access to public participation, and access to environmental justice) and encourages participation.⁵⁵¹

⁵⁴⁴ *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment: Note by the Secretary-General*, U.N. GAOR, 73d Sess., U.N. Doc. A/73/188 (2018).

⁵⁴⁵ Omoyemen Lucia Odigie-Emmanuel, Centre for Human Rights and Climate Change Research, NGO Intervention Block 3: Environmental Rule of Law (Recommendations 8, 14, 17), Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333, at 1 (July 22, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/33256/NGO%20intervention%20Block%203%20%20Wednesday%202020of%20July%202020.pdf?sequence=1&isAllowed=y>.

⁵⁴⁶ GRULAC Statement on Item 3, *supra* note 44, at 1.

⁵⁴⁷ Turkey Representative, Turkey’s Input/Statement, Remarks at the First Informal Substantive Consultation Meeting on UNGA Resolution 73/333 (July 21, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/33246/Turkey%20STATEMENT%2073%20333.pdf?sequence=1&isAllowed=y>.

⁵⁴⁸ H.E. Ms. Saqlain Syedah & Mr. Ado Lohmus, Letter to Member States and Accredited Stakeholders from the Co-Facilitators on the second informal substantive consultation meeting on United Nations General Assembly resolution 73/333 (Oct. 7, 2020).

⁵⁴⁹ *Draft building blocks of a political declaration*, UNITED NATIONS ENVIRONMENT PROGRAMME (Oct. 7, 2020), <https://wedocs.unep.org/bitstream/handle/20.500.11822/34020/Draft%20Building%20Blocks%20of%20a%20Political%20Declaration%20under%20UNGA%20resolution%2073....pdf?sequence=1&isAllowed=y>.

⁵⁵⁰ *Id.* at Preamble, item 1.

⁵⁵¹ *Id.* at item 32; 33.

Environmental Governance

The text also fell short of expectations on environmental governance. The drafters reaffirmed existing principles and “recognized” the role of existing obligations and commitments. They specifically noted the “backdrop of the Covid-19 crisis to reduce pollution and to ensure green recovery and building back better.”⁵⁵² The need to strengthen international environmental governance was also highlighted, with a dedicated section. In that, there was a call to enhance the role of UNEP through funding and political recognition, calling on UNEP to increase visibility and engagement in international processes and intensify dialogue with other U.N. entities. UNEA’s role was also endorsed, especially as an enabler of synergies between MEAs and by addressing “major, acute and emerging environmental issues universally in a coherent manner.”⁵⁵³

Implementation of environmental law

The draft called for the development and adoption of efficient environmental law and invited governments to recognize and incorporate the role of principles.⁵⁵⁴ It specifically recognized the role of courts to give full effect to environmental principles and encouraged governments to strengthen environmental laws, policies, and regulatory frameworks at all levels.⁵⁵⁵ In addition, there was an invitation to governments to ratify MEAs, and improve their implementation, repeating once again what has been said in many previous similar documents.⁵⁵⁶ The draft also recognizes the role of finance and commits to exploring different alternatives to enhance financial resources at multiple levels.⁵⁵⁷ IUCN also submitted comments on the draft building blocks.⁵⁵⁸

3. January 2021: Proposed Roadmap for consultations and meetings + Comments on the draft building blocks

On January 19, 2021, the co-facilitators shared a proposed roadmap with the Member States and Specialized Agencies for the consultations and meetings later in 2021. They sought comments on the draft building blocks of the political declaration. Only 17 countries⁵⁵⁹ and five NGOs (including a group of NGOs)⁵⁶⁰ provided written feedback on the draft building blocks. ICCEL shared two contributions for the consultations: the first referred to strengthening

⁵⁵² Syedah & Lohmus, *supra* note 387, at preamble, item 6.

⁵⁵³ *Id.* (Strengthening international environmental governance in the context of sustainable development, items 1-8).

⁵⁵⁴ *Id.* at item 14-15.

⁵⁵⁵ Draft building blocks of a political declaration, *supra* 549, at 16; 18.

⁵⁵⁶ *Id.* at 21; 22.

⁵⁵⁷ *Id.* at 24; 27-31.

⁵⁵⁸ IUCN, Comments on the Draft Building Blocks of a Political Declaration and the process toward the adoption of a political declaration in 2022, UNITED NATIONS ENVIRONMENT PROGRAMME (Mar. 15, 2022), https://wedocs.unep.org/bitstream/handle/20.500.11822/35800/IUCN%20Comments%20on%20Draft%20Building%20Blocks%20of%20a%20Political%20Declaration_20210315.pdf?sequence=1&isAllowed=y.

⁵⁵⁹ Argentina, Australia, Canada, Chile, China, Colombia, Egypt, the European Union, Japan, Myanmar, New Zealand, Norway, Singapore, Switzerland, Thailand, the United Kingdom, the United States. See all submitted inputs/comments at UNEP, Inputs to the draft building blocks of the political declaration under UNGA Resolution 73/333,

<https://www.unep.org/environmentassembly/inputs-draft-building-blocks-political-declaration-under-unga-resolution-73333?%2Finputs-resolution-73333=>.

⁵⁶⁰ Emirates Environmental Group, Institute for Planetary Synthesis, IUCN, ICCEL, and a general submission from the NGOs involved in the Res. 73/333 process.

environmental cooperation toward attaining the SDGs,⁵⁶¹ while the second contribution focused on recognizing harmony with nature.⁵⁶² The limited submitted comments on the building blocks make any assessment of States' position challenging. Yet some preliminary conclusions can be drawn. The contributions still showed disagreement about the goals of a new political declaration and its content. The majority emphasized the difficulty of determining a common set of principles in international environmental law and the importance of sticking to the mandate provided by Resolution 73/333. The commitment of States is still lacking. This section analyzes the contributions of States and NGOs according to a few categories, namely: (i) general comments, (ii) principles of international environmental law, (iii) right to a healthy environment and duty to protect the environment, (iv) environmental governance, (v) implementation of international environmental law, (vi) capacity building, and (vii) harmony with nature.

General Comments

The United States⁵⁶³ noted no mandate to actionize the working group's recommendations and expressed its skepticism that there was political space to make further progress on the recommendations, given how difficult it was to achieve consensus then. The U.S. shared its perception that there was disagreement on nearly all issues debated at the July 2020 consultation and questioned whether the co-facilitators' draft regarded the member States' input. The U.S. thus shared its belief that the building blocks do not set the stage for success for any future negotiations. Several countries recalled the need to stay within the scope of the recommendations of UNGA Resolution 73/333 and Paragraph 88 of "The Future We Want." Canada⁵⁶⁴ noted that the country would not comment on the draft as a political declaration, given that the question of when, where, and by whom the political declaration would be adopted remained unresolved. These questions are essential for the operative provisions, terminology, and format.

The E.U.⁵⁶⁵ called for a shorter, more focused, concise, and action-oriented text. Colombia⁵⁶⁶ called on countries to take advantage of the opportunity to reaffirm commitments with sustainable development, a healthy environment, and the fight against environmental crises. A new political declaration must enhance environmental governance and gain further clarity on the principles of international environmental law necessary to provide for effective implementation of environmental law for the benefit of people and the planet. Several countries called for increased

⁵⁶¹ ICEL, *Strengthening environmental cooperation in 2022 toward attaining the Sustainable Development Goals* (Mar. 15, 2021), <https://wedocs.unep.org/bitstream/handle/20.500.11822/35462/ICELnoteUNConsultations73-333March15202Final.pdf?sequence=1&isAllowed=y>.

⁵⁶² ICEL, *Recognition of Harmony with Nature*, UNITED NATIONS ENVIRONMENT PROGRAMME (Mar. 15, 2021), https://wedocs.unep.org/bitstream/handle/20.500.11822/35463/ICEL_NOTE_HarmonyWithNature_March152021.pdf?sequence=1&isAllowed=y.

⁵⁶³ *USA Draft Response to co-facilitators' UNGA 73/333 building blocks*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/35431/USA%20Response%20to%2073-333%20building%20blocks.pdf?sequence=1&isAllowed=y>.

⁵⁶⁴ *Canada's Commens: Draft Building VLocks of a Political Declaration*, UNITED NATIONS ENVIRONMENT PROGRAMME, https://wedocs.unep.org/bitstream/handle/20.500.11822/35423/CANADA_draft%20Building%20Blocks.pdf?sequence=1&isAllowed=y.

⁵⁶⁵ *Second informal substantive consultation meeting on United Nations General Assembly resolution 73/333, entitled "Follow-up to the report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277"*, UNITED NATIONS ENVIRONMENT PROGRAMME (June 15-17, 2021), https://wedocs.unep.org/bitstream/handle/20.500.11822/35443/73_333%20EUMS%20General%20Comments%20on%20Draft%20Building%20Blocks%20of%20Political%20Declaration.pdf?sequence=1&isAllowed=y.

⁵⁶⁶ *Annex I*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/35444/Colombia%20-%20Draft%20Building%20Blocks%20of%20a%20Political%20Declaration%20under%20UNGA%20resolution%207.pdf?sequence=1&isAllowed=y>.

recognition of the science-policy interface. For example, Chile⁵⁶⁷ called for express recognition of the triple planetary crisis (biodiversity loss, climate change, and pollution). Several States acknowledged the role of many stakeholders – these include the role of indigenous peoples and traditional knowledge.

IUCN called on a declaration to be ambitious and forward-looking to meet the needs of the present moment and the next 50 years.⁵⁶⁸ IUCN suggested recognizing the need for transformative change in this crucial decade until 2030.⁵⁶⁹

Principles of International Environmental Law

Following a contentious aspect of all the negotiations that followed this process so far, there was a lot of disagreement about the role of environmental principles in a new political declaration. Some countries still believe international environmental principles represent a core aspect of any future agreement, while others are ultimately against it. A few countries still maintain the importance of traditional principles, limiting the possibility of progressing in the commitment to environmental protection, such as the principle of sovereignty over national resources and CBDR (for example, China⁵⁷⁰ and Argentina⁵⁷¹).

The United Kingdom⁵⁷² objected to including “agreed principles of international environmental law” in the document as “an established body of principles does not exist.” Canada also questioned the references to principles of international environmental law throughout the document. For example, Canada noted that the “discussions of the ad hoc open-ended working group in 2018-19 and those at the 1st informal substantive consultation in 2020, showed there are widely diverging views regarding what an environmental principle is and whether or not specific principles are principles of international law. We should be mindful not to reopen those discussions, which would not be productive in the context of developing the political declaration.” The U.S. and Norway also share this view.⁵⁷³ Canada further noted the importance of clarifying that not every environmental principle is legally binding and that not every principle is easily applicable in a domestic law context. Therefore, it recalled that such language would need to be nuanced. This aspect, however, reinforces the need for universal principles that are malleable and easily adapted to a regional context.

The E.U. specifically recognized the role of principles of international environmental law as building blocks for environmental governance and their effective application, enhancing clarity,

⁵⁶⁷ *Implementation of UN General Assembly resolution 73/333 Draft Building Blocks of a Political Declaration Comments from Chile*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/35427/Implementation%20of%20UN%20General%20Assembly%20resolution%2073%20333%20-%20Comments%20from%20Chile.pdf?sequence=1&isAllowed=y>.

⁵⁶⁸ IUCN, *supra* note 558, at 4.

⁵⁶⁹ *Id.* at 5.

⁵⁷⁰ *Chinese Inputs on Draft Building Blocks of a Political Declaration*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/35424/Chinese%20input%20on%20Draft%20Building%20Blocks%20of%20a%20Political%20Declaration%20under%20UNGA%20resolution%207.pdf?sequence=1&isAllowed=y>.

⁵⁷¹ *Implementation of General Assembly Resolution 73/333, entitled “Follow up Report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/777”*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/36273/Res.73.333.ArgentinaComments.DraftPoliticalDeclaration.pdf?sequence=1&isAllowed=y>.

⁵⁷² UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/35430/UK%20Input%20on%20draft%20building%20blocks%20of%20the%20Political%20Declaration.pdf?sequence=1&isAllowed=y>.

⁵⁷³ *Norwegian comments on the Draft Building Blocks of a Political Declaration*, UNITED NATIONS ENVIRONMENT PROGRAMME, https://wedocs.unep.org/bitstream/handle/20.500.11822/35425/Draft%20Building%20Blocks%20for%20a%20Political%20Declaration_Inputs%20from%20Norway.pdf?sequence=1&isAllowed=y.

interpretation, improved coherence, and consistency, and called attention to the interlinkages between environmental law and governance. China suggested adding the need to recognize the value of harmony between man and nature, which forms a community of life as a goal of the text.

Several countries referenced the ongoing work of the ILC on general principles of law. However, Colombia warned that countries do not need to wait until a final report from the ILC to begin a conversation on identifying agreed principles of international environmental law. In its 2020 report, the ILC recognized the existence of general principles of law in the field of the environment, using the polluter pays principles as an example.⁵⁷⁴ Additionally, Colombia noted great doubts regarding the mandatory nature and scope of international environmental law principles within courts (national, regional, and international). This aspect reinforces the need to clarify principles to enhance the implementation of international environmental law. Colombia recalled that one of the main hindrances for effective and coherent implementation of international environmental law is the lack of clarity on which principles are binding, their content, and scope.

Therefore, to truly contribute to the effective implementation of international environmental law, a new declaration should give a mandate, within the framework of the UNEP, to identify those principles that could be considered as customary rules and to define their meaning, scope, and content, considering State practice, decisions of international courts and tribunals, and the work of the ILC, where appropriate. Colombia thus suggested adding the following paragraph: “We invite all States to engage in a process under the coordination of UNEP to identify which of the principles contained in the U.N. Conference on the Human Environment and the Rio Declaration on Environment and Development are part of customary international law, and particularly to define their meaning, scope and content, taking into account State practice, decisions of international courts and tribunals, as well as the work of the International Law Commission where appropriate.”

ICEL suggested that a political declaration includes general principles that, while filling the gaps in international environmental law, will unify international law currently fragmented between technical and sectorial treaties (climate, biodiversity, land degradation, etc.). Furthermore, since the biosphere embraces natural systems that link and connect ecosystems, any political declaration will need to envision protecting all the life-support systems on Earth. Moreover, it can reflect and confirm the rights and duties of citizens and governments towards the planet.⁵⁷⁵ By way of illustration, ICEL suggested the adoption of six principles that would advance environmental governance, namely: (i) non-regression, (ii) resilience, (iii) duty of care, (iv) rights of future generations, (v) ecological health, and (vi) observing environmental laws, which includes calling for establishing the crime of ecocide when environmental laws are disregarded.⁵⁷⁶ IUCN similarly suggested the adoption of the new and emerging principles of IEL such as (i) non-regression, (ii) progression, (iii) *in dubio pro natura*, (iv) the ecological functions of property.⁵⁷⁷

Right to a Healthy Environment and Duty to Protect the Environment

The express recognition of a right to a healthy environment found direct support by a few countries. Switzerland called for the recognition of a right to a healthy environment, explicitly noting the work of the U.N. special rapporteur on human rights and the environment. In particular, the E.U. called for spelling out that “everyone should be able to live in a safe, clean, and sustainable

⁵⁷⁴ UNGA, International Law Commission, Seventy-second Session, Second report on general principles of law (Special Rapporteur Marcelo Vázquez-Bermúdez), A/CN.4/741 (Apr. 9, 2020), <https://daccess-ods.un.org/tmp/5562068.22395325.html>.

⁵⁷⁵ ICEL, *supra* note 561, at 20.

⁵⁷⁶ *Id.* at 22.

⁵⁷⁷ IUCN, *supra* note 558, at 3; 5.

world and have the right to a healthy environment” and adding a reference to “our shared duty to reinforce the protection, restoration, and sustainable use of the environment for present and future generations and to intergenerational equity.” Colombia suggested adding the following paragraph: “We recognize that advancing obligations related to the enjoyment of a safe, clean, healthy and sustainable environment while making continued progress towards the universal recognition of the right to a healthy environment, will provide effective legal environmental frameworks to address the interconnections between the three mutually reinforcing crises of climate change, biodiversity loss and pollution and their nexus with human health, helping to reduce the risk of future pandemics derived from zoonotic diseases.”

In a joint submission, several NGOs called for a firm commitment to establishing an Intergovernmental Negotiation Committee (INC)⁵⁷⁸ to start an inclusive negotiation process towards a framework that meaningfully improves and coordinates as well as strengthens international environmental law and governance. The NGOs specifically suggested a “package” which included principles for the protection of the environment, respecting the human right for a safe and healthy environment based on the concept of One Health⁵⁷⁹ and One Welfare, the principles of Agenda 21 and the GPE, strengthening human rights courts and introducing environmental courts, concrete proposals for means of implementation, monitoring schemes and implementation of mechanisms for conflict resolution. ICEL further supported a political declaration that recognizes internationally the rights that the vast majority of States already recognize in national law, the right to an ecologically sound environment.⁵⁸⁰ IUCN also called for recognizing the right to a clean and healthy environment and rights-based approaches as an effective and equitable way to ensure a high quality of the environment.⁵⁸¹ Finally, IUCN called for the recognition of the importance of environmental defenders.⁵⁸²

Environmental Governance

The draft building blocks brought a lot of confusion about the role of each organization within the framework of environmental governance and their specific mandates. Several countries questioned the provisions that specifically addressed the roles of UNEP, UNEA, and the CPR. Norway noted the need to respect the mandates and roles of UNEP, UNEA, MEAs, and other relevant multilateral organs to be consistent with that one would expect with a political declaration from a high-level U.N. meeting. Japan, for example, remarked that UNEA’s role as an enabler to enhance synergies in environmental governance of MEAs should not conflict with the recommendations of Resolution 73/333, which ensures the independence and their respective mandate of MEAs. The U.S. specifically highlighted some paragraphs that increased the role of UNEP or its governing bodies mandates, which is beyond the scope of the recommendations from Resolution 73/333.

ICEL acknowledged the need for States to cooperate to resolve existing challenges and define building blocks for governance. In that vein, ICEL addressed four issues for consideration under the building block of governance: (a) UNEA policies on Covid-19 and averting the next

⁵⁷⁸ *Submission from the NGOs involved in the Res. 73/33 process*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/35442/Submission%20from%20the%20NGOs%2073%20333.pdf?sequence=1&isAllowed=y>.

⁵⁷⁹ See *Taking a Multisectoral, One Health Approach: A Tripartite Guide to Addressing Zoonotic Diseases in Countries*, UN WHO, UN FAO, and OIE (2019), <http://www.fao.org/3/ca2942en/ca2942en.pdf>.

⁵⁸⁰ ICEL, *supra* note 561, at 20.

⁵⁸¹ IUCN, *supra* note 558, at 5.

⁵⁸² *Id.* at 6.

pandemic; (b) global policies on financing sustainable development and converting sovereign debt to finance coping with environmental emergencies; (c) building capacity for effective governance through employing the environmental rule of law; and (d) strengthening all governance systems through the use of Ecological Management Systems (EMS).⁵⁸³ A holistic framework that relies on the existing national, regional, and international agreements is essential to reverse the contemporary trends in environmental degradation. ICEL recommends that the consultations apply the SDGs as the framework for recommendations on international inter-governmental governance. Specifically, ICEL took note of SDG 17 and the need to prescribe a holistic approach for a One Health approach.⁵⁸⁴ ICEL further suggested converting sovereign debt to finance stewardship, especially in the context of the economic hardship brought by the pandemic. A potential political declaration to guide those reforms is grounded in SDGs.⁵⁸⁵ Concerning item c, building capacity for effective governance, ICEL recommends employing the environmental rule of law.⁵⁸⁶ Finally, ICEL notes the need to strengthen governance through ecological management systems to strengthen existing MEAs.⁵⁸⁷ IUCN made an urgent call for effective implementation, compliance, and enforcement of existing international treaties, agreements, and other instruments, as well as national and local environmental laws, regulations, and policies.⁵⁸⁸

Implementation of International Environmental Law

The E.U. specifically emphasized the need for green recovery from Covid-19. Yet Colombia noted that the term would likely face opposition and suggested referencing “building back better through a green, sustainable and inclusive recovery.” Egypt,⁵⁸⁹ for example, suggested adding a reference to the disproportionate impacts of the pandemic and towards countries’ efforts towards sustainable development and poverty eradication.

Australia⁵⁹⁰ sought clarifications on several terms of the draft building blocks, including what “efficient” means concerning implementing environmental laws (Japan⁵⁹¹ also specifically asked for this clarification). Regarding financial mechanisms, the language to set a target percentage from GDP of financial resources to reflect the global environmental ambition was strongly opposed. The U.S. specifically questioned any financial aspects, given the limits of multilateralism on this issue. On the other hand, the E.U. supported the discussion of the possible inclusion of follow-up mechanisms focused on implementation to continue strengthening international environmental law.

The Institute for Planetary Synthesis (IPS) suggested three specific actions to provide actors with tools to foster coherence between MEAs. First, IPS suggested strengthening UNEP’s

⁵⁸³ ICEL, *supra* note 561, at 5.

⁵⁸⁴ *Id.* at 5 (See UNEP/EA 3/Res 4 (2017) and UNEP/EA.5/L.5 (18 Feb. 2021).

⁵⁸⁵ *Id.* at 9.

⁵⁸⁶ *Id.* at 11.

⁵⁸⁷ ICEL, *supra* note 561, at 13.

⁵⁸⁸ IUCN, *supra* note 558, at 5.

⁵⁸⁹ *Draft Building Blocks of a Political Declaration*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/35426/Egypt%27s%20initial%20inputs%20to%20the%20Draft%20Building%20Blocks%20of%20a%20Political%20Declaration%20under%20UNGA%20resolution%207.pdf?sequence=1&isAllowed=y>.

⁵⁹⁰ *Draft Building Blocks of a Political Declaration*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/35422/Australia%20submission%20-%202073-333%20draft%20declaration%20-%20March%202021.pdf?sequence=1&isAllowed=y>

⁵⁹¹ *Japan’s comment on draft building blocks of a political declaration*, *Draft Building Blocks of a Political Declaration*, UNITED NATIONS ENVIRONMENT PROGRAMME, (Mar. 15, 2021), https://wedocs.unep.org/bitstream/handle/20.500.11822/35429/Japan%e2%80%99s%20comment%20on%20draft%20building%20blocks%20of%20a%20political%20declaration_final.pdf?sequence=1&isAllowed=y

computer portal, InforMEA, to facilitate communication and consistencies between legal instruments and bridge the gaps between them. Specific recommendations included adding the principles of international environmental law and the relevant work of the ILC, which provide a connective element between MEAs and could enable non-professionals to play an active role in the implementation of environmental law at all levels. Second, IPS called on broad involvement in implementing environmental law through a high-level U.N. day. Third, encourage Voluntary National Reviews (VNRs) directed at a nation's activities favoring the environment.

IUCN called for the recognition of the environmental rule of law, specifically for institutions to support the development of clear, strict, enforceable, and effective environmental laws at all levels and strengthen the effective implementation of existing IEL within regional systems, national and local levels.⁵⁹²

Capacity Building

ICEL further suggests improving environmental stewardship through “environmental management systems” that provide best practices by which governments can benefit from their environmental laws and the environmental rule of law.⁵⁹³ Education is at the core of capacity building, and a political declaration should prioritize enhancing capacity-building for sustainable development (i.e., through the Montevideo Programme for the Development and Periodic Review of Environmental Law).

Harmony with Nature

In its second contribution, ICEL noted the development of the harmony with nature framework, highlighting there is sufficient consensus about the rights of nature that articulation of appropriate reference to these rights should be included in a new political declaration. This proposal would provide an international moral compass to protect nature.⁵⁹⁴ In addition, this proposal aligns with UNEP's 2021 report “Making Peace With Nature.”⁵⁹⁵

4. June/July 2021: Informal Workshops⁵⁹⁶

On February 22-23, 2021, the first part of the 5th session of the UNEA occurred. However, the negotiations on a political declaration were postponed until February 21, 2022.⁵⁹⁷ The second substantive consultation was initially set to occur in November of 2020.⁵⁹⁸ Nevertheless, the Bureau of the CPR decided to postpone it on multiple occasions to allow for in-person consultations or at least in a hybrid format (in October 2020, it delayed the consultation to June 2021; the meeting was then postponed to early November 2021). In May 2021, co-facilitators provided an update on the implementation of the resolution and decided to convene a series of

⁵⁹² IUCN, *supra* note 558, at 5.

⁵⁹³ ICEL, *supra* note 561, at 14.

⁵⁹⁴ ICEL, *supra* note 562, at 5.

⁵⁹⁵ UNEP, *Making Peace With Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity and Pollution Emergencies*, (2021), www.unep.org/resources/making-peace-nature.

⁵⁹⁶ See *Informal online workshops on the implementation of UNGA resolution 73/333*, UNITED NATIONS ENVIRONMENT PROGRAMME (2021), <https://www.unep.org/events/cpr-meetings/informal-online-workshops-implementation-unga-resolution-73333>.

⁵⁹⁷ UNEA, Decision 5/3 (UNEP/EA.5/L.3),

<https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/35940/Decision%205-3%20-%20Adjournment%20and%20resumption%20of%20the%20fifth%20session%20of%20the%20United%20Nations%20Environment%20Assembly.pdf?sequence=1&isAllowed=y>.

⁵⁹⁸ H.E. Ms. Saqlain Syedah & Mr. Ado Lohmus, Letter to Member States and Accredited Stakeholders from the Co-Facilitators on the second informal substantive consultation meeting on United Nations General Assembly resolution 73/333 (Oct. 7, 2020).

informal online workshops with member States, members of specialized agencies, and accredited stakeholders to address (i) the inputs received to the first draft of the building blocks, (ii) questions on governance, (iii) questions on environmental law, and (iv) means of implementation. The informal workshops convened on three different dates (June 9, June 22, and July 7, 2021).⁵⁹⁹

Co-facilitators designed the workshop to facilitate informed and in-depth discussions on the inputs received to the first draft of the building blocks of a political declaration.⁶⁰⁰ Co-facilitators posed specific questions to spark an informed forum for that purpose. In the first workshop, participants addressed the inputs received to the first draft of the Building Blocks. The co-facilitators posed the following questions:

- a. What could be the role and added value of the political declaration as one of the outcomes of UNEP@50?
- b. What elements of the current draft building blocks for the declaration you cannot support?
- c. Which elements are outside the mandate of UNGA resolution 73/333? Which important elements are missing from the draft building blocks?
- d. Should the Political Declaration include any follow-up action for Member States, Members of Specialized Agencies, the United Nations Environment Programme, the United Nations System and the Multilateral Environment Agreements?

In response to Question 1, Member States indicated the renewed efforts to (i) enhance implementation of existing obligations and commitments under international environmental law, (ii) promote ambition, (iii) enhance environmental governance, (iv) provide clarity on the principles of international environmental law, (v) consider national capacities and the principle of common but differentiated responsibilities, (vi) clarify the supporting role of UNEP, and (vii) strengthen environmental governance.⁶⁰¹ In response to Question 3, some Member States reflected the need to reference the right to a healthy environment to provide an adequate legal framework to address the triple planetary crisis (biodiversity, pollution, and climate change) and their nexus with human health. However, discussions still showed the lack of consensus on addressing environmental principles in a declaration. Member countries also addressed finance, transfer of technology, and capacity building questions. A follow-up mechanism was also briefly suggested.

In the second workshop, participants had the opportunity to discuss strengthening international environmental governance in sustainable development. Co-facilitators posed the following questions:

⁵⁹⁹ H.E. Ms. Saqlain Syedah & Mr. Ado Lohmus, *Letter to Member States and Members of Specialized Agencies and Accredited Stakeholders from the Co-Facilitators on the roadmap for implementation of UN General Assembly resolution 73/333* (May 21, 2021), <https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/36086/Co.Facilitators.Note.21%20May%202021%20final.pdf?sequence=1&isAllowed=y>.

⁶⁰⁰ H.E. Ms. Saqlain Syedah & Mr. Ado Lohmus, Concept note 1 and provisional agenda for the first workshop on United Nations General Assembly resolution 73/333, entitled “Follow-up to the report of the ad hoc open-ended working group established pursuant to General Assembly resolution 72/277” (June 2, 2021), <https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/36234/Workshop1%20Concept%20Note%2026%20May%202021%20-%20final.pdf?sequence=1&isAllowed=y>.

⁶⁰¹ Co-Facilitator’s summary, First workshop on implementation of General Assembly resolution 73/333 (Jun. 9, 2021), https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/36420/summary_first%20workshop_final.pdf?sequence=1&isAllowed=y.

- (i) Which building blocks under title “Strengthening international environmental governance in the context of sustainable development” might expand current mandates or fall outside the scope of resolution 73/333?
- (ii) What are the benefits of having United Nations Environment Assembly (UNEA) as a central collaboration platform that provides overarching policy guidance and sets the global environmental agenda?
- (iii) What action can the U.N. Environment Assembly (“UNEA”), as a universal body, take that would reaffirm and strengthen the role of the United Nations Environment Programme (UNEP) as an authoritative advocate for the global environment?
- (iv) How can UNEP increase its visibility and engagement in international processes?
- (v) What are the benefits of achieving greater collaboration at the policy level between multilateral environment agreements (MEAs) including the Rio Conventions as well as between MEAs and UNEA and how could such collaboration be strengthened?

Member States discussed several issues of environmental governance, including (i) broadening the engagement of stakeholders beyond political arrangements, (ii) promoting strategic partnerships with civil society organizations, (iii) how to integrate science into decision-making, (iv) how to improve the interdependence and (v) interconnectedness of ecosystems and improve coherence in implementation.⁶⁰² Member States further discussed the role of UNEP and its relationship with UNEA and MEAs.

In the third workshop, participants focused on international environmental law and means of implementation. Co-facilitators posed the following questions:

- (i) Which building blocks under titles “Environmental law is essential for the protection of our planet” and “Accelerating and facilitating action and implementation at all levels” expand current mandates or fall outside the scope of resolution 73/333?
- (ii) What are the benefits of international environmental law when it comes to protecting the environment?
- (iii) What are the opportunities that exist for making full use of the Montevideo Environmental Law Programme in order to increase Member States' capacity building for implementing environmental law?
- (iv) What assessment tools, including environmental performance reviews, would help Member States in advancing the environmental agenda?
- (v) How can Member States make optimal use of existing financial mechanisms and funds for implementing the international environmental law and improving the status of the global environment?

Member States discussed the creation of a coherent framework for financing sustainable development, the role of interagency working groups in monitoring and implementing commitments, as well as expanding commitments on developing issues, such as action in the face of Covid-19 and climate change.

⁶⁰² *Co-Facilitator's summary, Second workshop on implementation of General Assembly resolution 73/333* (Jun. 22, 2021), https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/36421/summary_workshop%202_final.pdf?sequence=1&isAllowed=y.

5. *November 2021: Second informal substantive consultation*⁶⁰³

After being postponed several times, the second substantive consultation meeting was held in a hybrid format between November 17-19, 2021.⁶⁰⁴ The second meeting allowed States to follow up on the outcomes of the first consultation and lend further consideration to possible draft components for a procedural resolution for the UNEA-5. In preparation for the consultation meeting, the co-facilitators circulated a revised draft of the political declaration on October 12, 2021.⁶⁰⁵

During this session, States negotiated, line by line, the content of the draft political declaration.⁶⁰⁶ Co-facilitators published a first draft on October 11, 2021. This draft, despite some interesting provisions, lacked truly ambitious proposals. The declaration aims to strengthen the implementation of international environmental law and governance. The consultation revealed that references to rights and principles remain divisive, and the overall level of debate remains relatively unambitious.⁶⁰⁷

Right to a healthy environment

The number of States supporting recognizing the right to a healthy environment (included in the preamble of the draft declaration) has increased. The E.U. has a unified position in favor of the right to a healthy environment and its variations in procedural environmental rights (rights to access to information, access to public participation, and access to justice in environmental matters). Also in favor are the Latin American and Caribbean group of States (in particular Colombia and Costa Rica), Morocco, Norway, and Switzerland. The United Kingdom, while not opposed, remains rather lukewarm on the subject. This strengthening of positions in favor of environmental rights is a positive consequence of the adoption by an overwhelming majority on

⁶⁰³ *Second informal substantive consultation meeting on United Nations General Assembly resolution 73/333*, UNITED NATIONS ENVIRONMENT PROGRAMME (2021), <http://stg.unenvironment.org/events/cpr-meetings/second-informal-substantive-consultation-meeting-united-nations-general>.

⁶⁰⁴ *See the Provisional Agenda of the Second substantive consultation meeting on the UNGA Resolution 73/333*, UNITED NATIONS ENVIRONMENT PROGRAMME (2021), <https://wedocs.unep.org/bitstream/handle/20.500.11822/37302/Provisional%20Agenda-2nd%20consultation%2028%20Oct%202021.pdf?sequence=1&isAllowed=y>; H.E. Ms. Saqlain Syedah & Mr. Ado Lohmus, Invitation Letter to Member States and Members of Specialized Agencies and Accredited Stakeholders from the Co-Facilitators to the second consultation on implementation of UN General Assembly resolution 73/333, <https://wedocs.unep.org/bitstream/handle/20.500.11822/37301/Invitation%20letter%2073333%20November.pdf?sequence=1&isAllowed=y>.

⁶⁰⁵ *Draft political declaration for a United Nations high-level meeting, in the context of the commemoration of the creation of the United Nations Environment Programme*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://wedocs.unep.org/bitstream/handle/20.500.11822/36930/Draft%20political%20declaration%2011%20Oct%202021%20final.pdf?sequence=1&isAllowed=y>.

⁶⁰⁶ *Draft political declaration for a United Nations high-level meeting, in the context of the commemoration of the creation of the United Nations Environment Programme*, UNITED NATIONS ENVIRONMENT PROGRAMME, https://wedocs.unep.org/bitstream/handle/20.500.11822/37449/Draft%20political%20declaration%2011%20Oct%202021%20final%20%28002%29_17%2011%202021_PM1906H.pdf?sequence=1&isAllowed=y (Political declaration as at Day One (Nov. 17, 2021)); *Draft political declaration for a United Nations high-level meeting, in the context of the commemoration of the creation of the United Nations Environment Programme*, UNITED NATIONS ENVIRONMENT PROGRAMME, https://wedocs.unep.org/bitstream/handle/20.500.11822/37463/Draft%20political%20declaration%2011%20Oct%202021%20final%20%28002%29_18%2011%202021_18H56.pdf?sequence=1&isAllowed=y (Political declaration as at Day Two (Nov. 18, 2021)); *Draft political declaration for a United Nations high-level meeting, in the context of the commemoration of the creation of the United Nations Environment Programme*, UNITED NATIONS ENVIRONMENT PROGRAMME, https://wedocs.unep.org/bitstream/handle/20.500.11822/37466/Draft%20political%20declaration%2011%20Oct%202021%20final%20%28002%29_19%2011%202021_18H00%20-%20Copy.pdf?sequence=1&isAllowed=y (Political declaration as at Day Three (Nov. 19, 2021)).

⁶⁰⁷ *Second Consultation on 2022 Declaration: Debrief*, PATHWAY TO 2022 DECLARATION (Nov. 23, 2021), <https://www.pathway2022declaration.org/news/second-consultation-on-2022-declaration-debrief/>.

October 8, 2021, of U.N. Human Rights Council resolution 48/13 enshrining the right to a healthy environment.

As of January 10, 2022, the draft declaration includes some interesting and ambitious proposals, albeit with several questions remaining about the language and level of ambition adopted. For example, paragraph 2 consists of a provision related to the right to a healthy environment. However, some countries are still proposing a language similar to that of the 1992 Rio Declaration (“everyone is entitled to live in a healthy environment”), while others are pushing for an express adoption of the right (“everyone should have the right to a healthy and sustainable environment;” “everyone has the right to a healthy and sustainable environment”).⁶⁰⁸ In addition, some ambitious language related to the duty to protect the environment was proposed.⁶⁰⁹

On the other hand, opposition of certain States is not weakening. The U.S. and Russia have been particularly vocal against recognizing the right to a healthy environment. Japan and Algeria are also reluctant. In the face of such opposition, consensus will likely be achieved by downgrading the level of the declaration. This dynamic is likely to manifest itself in the deletion of the content on the rights and principles of environmental law. In conclusion, this opposition is a bad omen for adopting an ambitious declaration in 2022. Nevertheless, the increase in the number of States in favor of the right to a healthy environment is a favorable indicator for the adoption of a 2022 UNGA resolution recognizing the right to a healthy environment, extending the reach of the resolution of the HRC.

Dividing lines

Some delegations, including the United States and Russia, continue to systematically refuse to negotiate any new proposal. On the other hand, a large group of delegations such as the European Union, Colombia, Costa Rica, Morocco, and Switzerland are trying to raise the ambition of the declaration. The negotiations also show the continuing developed/developing country divide. The debate is mainly centered on the principle of CBDR and sovereignty over natural resources. Brazil invariably tries to include the latter, much to the displeasure of developed countries. Other developing countries, such as Costa Rica and Chile, try to soften the blow by insisting on the respective responsibilities and capacities of all States.

6. Next steps: February 2022: UNEA-5 Part 2

2022 is the watershed year. Decisions made about governance, and capacity-building, and clarifying the norms that can guide future state conduct will seal

⁶⁰⁸ Other alternative language includes: “Recognizing the right to a clean, healthy, and sustainable environment;” “Believing that everyone should enjoy a healthy and sustainable environment;” “Recalling the recognition by the UN HRC of the HR.. Res 48/13.”

⁶⁰⁹ “Recognizing the urgent need and our [shared] duty / responsibility to reinforce and advance the protection, preservation, restoration and sustainable use of the environment for present and future generations [in the spirit of inter-generational equity] and intra-generational equity, as it is crucial to urgently break the current trends of environmental decline, which are impeding progress towards sustainable development, [reaffirming that eradicating poverty in all its forms and dimensions, including extreme poverty, is the greatest global challenge and an indispensable requirement for sustainable development, and recognizing the need to promote the environmental, social, and economic dimensions in an integrated and balanced manner, as well as the importance of fostering innovation and cooperation based on the sustainable use of natural resources to strengthen sustainable employment and income, generating programmes and opportunities],” or, alternatively, “Recognizing the urgent need to protect, restore, and sustainable use of the environment for present and future generations and to progress towards sustainable development]” (¶ 7).

the fate for the Sustainable Development Goals, one way or the other. It is time to make peace with the planet.⁶¹⁰

The resumed 5th Session of UNEA (UNEA-5) will take place online and in Nairobi on February 28-March 2, 2022.⁶¹¹ The third and last substantive consultation will occur on February 16-18, 2022, before UNEP's CPR's fifth open-ended meeting. It will allow States to give their final thoughts on the draft of the procedural resolution, which will implement the mandate given to UNEA-5 by UNGA Resolution 73/333. UNEA-5 will be followed by a Special Session of the UNEA (UNEP@50), commemorating the 50th anniversary of the creation of UNEP in 1972. UNEP@50 will be held online and in-person in Nairobi on March 3-4, 2022.⁶¹²

States have the unique opportunity to agree on the policies that can guide the international community through today's environmental emergencies. With the agreement of States, the co-Facilitators might appoint an informal, temporary drafting group. Alternatively, the designation of a group could be done as part of the consensus of the UNGA in its next session, when the UNGA considers the appropriate event for the adoption of a political declaration, including the option of adopting the declaration as one of the outcomes of the special session of the Environment Assembly to be held to commemorate the 50th anniversary of the creation of UNEP.

The work of such a drafting group is non-binding. It would be supplemental to the UNEA's invitation that States submit proposed resolutions for consideration by the Environment Assembly at the resumed meeting of the fifth session, which has urged that drafts be ready preferably at least eight weeks in advance of the resumed meeting of the fifth session of the Open-ended CPR, to allow for a productive period of consultation between the online and resumed meetings of the fifth session of the UNEA. On February 3, 2022, the co-facilitators circulated a revised draft of the political declaration of the special session of the UNEA.⁶¹³ Given the short period remaining before February of 2022, the work product of a temporary drafting group, agreed by States, could ensure that all States have ample time to consider elements appropriate for a possible political declaration. This approach, which has been effective often in the past, accounts for the limited time and resources available for the negotiation of any declaration and other proposed draft resolutions to be decided by UNEA.⁶¹⁴

With renewed support from the E.U., the Global Pact received improved political encouragement. There is ample agreement among States to frame and adopt further political declarations on the 50th anniversary of the historic 1972 Stockholm Conference on the Human Environment and the establishment of the UNEP. This consensus is found in the recent adoption of the medium-term strategy for 2022–2025 and the programme of work and budget for the biennium 2022–2023.⁶¹⁵ While there is yet no clarity on how to follow up on the recommendations and several pieces to be filled, there is an opportunity to achieve progress in developing international environmental law. Any political declaration in 2022 will need to meet the high

⁶¹⁰ ICEL, *supra* note 561, at 23.

⁶¹¹ See *About UNEA-5*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://www.unep.org/environmentassembly/about-unea-5>;

⁶¹² UNEP, UNEP@50, <https://www.unep.org/events/unep-event/unep-50>.

⁶¹³ See *Draft Political Declaration of the Special Session of the United Nations Environment Assembly to commemorate the fiftieth anniversary of the establishment of the United Nations Environment Programme* (clean version, circulated on Feb. 2, 2022, available at

<https://wedocs.unep.org/bitstream/handle/20.500.11822/38033/UNEP50%20political%20declaration%20draft%202%20Feb%202022%20clean.pdf?sequence=1&isAllowed=y>).

⁶¹⁴ ICEL, *supra* note 561, at 4.

⁶¹⁵ UNEP/EA.5/L.3/Rev.1 (17 February 2021).

standards for such declarations as established previously in 1972, 1992, and 2002.⁶¹⁶ To enhance and further the decisions flowing from this multilateral diplomacy and deliberations in 2022, ICEL recommends that attention be devoted to extending the deliberations throughout the U.N. system. A declaration and conference in 2022 are not an end but the beginning of an all-of-government effort in each State and an all-of-the U.N. system approach globally, designed to cope with Earth's escalating environmental emergencies.⁶¹⁷

Regional meetings could be convened through the five regional economic commissions of the U.N.: ECE, ECA, ECLAC, ESCAP, and ESCWA. These follow-up U.N. regional meetings would generate regional cooperation to attain the SDGs, protect the environment, and manage emerging infectious diseases. Precedent in this approach is found in the U.N. World Commission on Environment and Development (WCED) deliberations, which held regional meetings to secure guidance and support for the WCED report, *Our Common Future* (1987). Tackling the climate, biodiversity, and pollution emergencies require an all-of-U.N. approach, in the same way that all stakeholders are called upon to attain the U.N. SDGs. The political declaration of 2022, and related decisions, can substantially accelerate international cooperation and capacity building to achieve the U.N. SDGs by 2030 and beyond.

As all States recover from the Covid-19 pandemic, solidarity on these fundamental areas of agreement needs to be renewed, affirmed, and acted upon. There are also ongoing deliberations about possible conferences in Stockholm and elsewhere, reflected in a draft resolution entitled "United Nations high-level meeting Stockholm+50: A healthy planet for the prosperity of all – our responsibility, our opportunity," submitted under UNGA Agenda item 19, convened by the Permanent Missions of Kenya and Sweden.

The UNGA could further ask the UNSG to prepare additional reports on more specific issues discussed during the Nairobi sessions and reconvene the OEWG to discuss it. For example, during the first Nairobi session, Guyana suggested a summary of the gaps discussed with options for how each might be addressed to help determine the necessity and shape of a Global Pact, as well as a report with a synthesis of how environmental law principles have been treated in domestic jurisprudence and legislation. In addition, ICEL suggested the recommendation of further intergovernmental negotiations on the progression of principles of international environmental law:

Such an exercise would be an opportunity to advance or update existing principles and include emerging principles in response to developments in the last decades, such as nonregression, progression, equity, resilience, and access to environmental justice. The work must include the possibility of developing an additional declaration or instrument on the right to a clean and healthy environment. ICEL reiterates that the principle of sustainable development implies that "the right to development is to be balanced with and constrained by the right to a clean, safe, healthy and sustainable environment," xi embraced by at least 155 States. This would ensure that all U.N. Member States working

⁶¹⁶ ICEL, *supra* note 561, at 20.

⁶¹⁷ *Id.* at 4.

towards the realization of the 2030 Sustainable Development Agenda apply this principle.⁶¹⁸

As UNEA adopts a political declaration for further consideration within the U.N., it continues to move the process forward.

7. *Final thoughts*

UNEA creates and coordinates U.N. environmental activities and policies and develops international environmental law. With universal membership, UNEA is also the primary international body to discuss environmental issues, particularly those that require collective global action. UNEA was established in 2012 as part of the “strengthening and upgrading” of the U.N. Environment Programme after the U.N. Conference on Sustainable Development. While the U.N. Member States are the only voting members, the UNEA meetings, which occur every other year, include the voices of thousands of representatives of governments, international organizations, and civil society groups. As the world’s highest-level decision-making body on the environment, UNEA addresses the critical environmental challenges facing the world today and reviews essential and emerging environmental policy issues.⁶¹⁹ It functions as the world’s “de facto Parliament for the Environment” by convening environment ministers on a biennial basis to set the global environmental agenda, contribute effectively to global solutions through the development of international environmental law and provide overarching policy guidance on emerging environmental challenges.⁶²⁰

UNEA’s sessions usually adopt many resolutions proposed and negotiated by the Member States. The draft resolutions and decisions adopted at each session are prepared during the Open-Ended Committee of Permanent Representatives (OECPR) meeting,⁶²¹ which are held back-to-back with UNEA-5, and finalized by the Committee of the Whole. Though not legally binding, the resolutions identify critical issues for the global environment and provide the impetus for coordinated action. UNEA sessions also serve as forums for promoting the environmental dimension of the 2030 Agenda and giving input to annual sessions of the High-Level Political Forum on Sustainable Development (HLPF).

Despite the urgency of the state of the environment, the political declaration that should be adopted during UNEA-5.2 will not be as ambitious as initially thought by the drafters of the draft Global Pact. More importantly, the political declaration will not be binding document. The adoption of the Global Pact as a political declaration could thus serve as a first step, leading to a more ambitious convention. The idea is emerging that the UNGA might adopt a resolution recognizing the right to a healthy environment in September 2022 to follow the steps of the U.N. Human Rights Council which recognized the right to a healthy environment in a non-binding resolution in October 2021. The February 2022 draft of the political declaration includes a provision on the right to a healthy environment. If approved, it would take another step in the global movement towards international recognition. Under those circumstances, the Global Pact

⁶¹⁸ *Note on Options to Address Gaps Under Resolution 72/277 (10 May 2018) “Towards a Global Pact For The Environment,” submitted for consideration in the 2019 Nairobi Consultations*, INTERNATIONAL COUNCIL OF ENVIRONMENTAL LAW, (Feb. 19, 2019), https://wedocs.unep.org/bitstream/handle/20.500.11822/27609/ICEL_Report.pdf?sequence=1&isAllowed=y.

⁶¹⁹ *Fifth Session of the United Nations Environment Assembly UNEA-5*, UNITED NATIONS ENVIRONMENT PROGRAMME, <http://web.unep.org/environmentassembly/un-environment-assembly-and-governing-council>.

⁶²⁰ *Our Planet: The magazine of the United Nations Environment Programme*. UNITED NATIONS ENVIRONMENT PROGRAMME, ISSN: 1013-7394 (2014). UNEA-1, Decision 27/2.

⁶²¹ *The Committee of Permanent Representatives*, UNITED NATIONS ENVIRONMENT PROGRAMME, <https://www.unenvironment.org/cpr/committee-permanent-representatives>.

could eventually become a convention on the right to a healthy environment, thus providing the international framework necessary for the implementation of the right to a healthy environment recognized by the UNGA.

V. CONCLUSION

What is required is a shift in our understanding of law and governance of Copernican magnitude. Just as Copernicus and Galileo pointed out to their societies that, despite long-held beliefs, the reality was that the Earth moved around the Sun rather than vice versa, so we must convince our societies to invert the fundamental purpose of our governance systems. Instead of perpetuating legal systems designed to facilitate the domination and exploitation of Earth, we urgently require systems of governance that encourage us to sustain mutually enhancing relationships with the other members of the Earth community. This will require moving away from the principles of property law, with its emphasis on the control and use of objects, as the basis for our relationship with Nature, and towards principles aimed at fostering and maintaining good relationships.¹

Achieving the Sustainable Development Goals (SDGs) is one of the biggest challenges we face today.² The 50th anniversary of the Stockholm Declaration and the creation of UNEP provide an opportunity to assess the adequacy of our current legal system to respond to the environmental challenges we face. International environmental law has developed through a systematic and coordinated effort to protect the environment throughout the past five decades. As a result, MEAs have increased widely, providing innovative environmental governance solutions addressing complex policy problems of international concern, often without precise scientific knowledge. However, the state of the global environment continues to deteriorate. The science is precise: we are annihilating our environment, and the existing legal responses are insufficient to curb the current rate of devastation. In light of this scenario, we are faced with two options: we can feel paralyzed by the bleak future predicted by scientists or take action. One way to pursue the latter is by reframing international environmental law.

Appropriate legal frameworks provide an essential component to achieve sustainability goals.³ The most powerful tool to advance such protection is international environmental agreements, including treaties and other binding instruments.⁴ Nevertheless, a paradox lingers in light of the Earth Emergency Crisis: while the State of environmental degradation accelerates, governments remain slow to acknowledge and embrace environmental principles and environmental rights.⁵ While we currently face ‘strong’ questions, these appear to have no realistic solution. As a result, responses are ‘weak,’ as they do not adequately address the problem, grounding the lack of a proper response on the issue’s complexity.⁶

Some proposed solutions attempt to critically challenge the questions by redefining the basic features of international law. This type of response is exemplified by greening human rights law, which slowly brought human rights and the environment together as solutions addressing the same problem. These potential solutions, qualified as ‘weak-strong,’ are progressive in that they

¹ Cormac Cullinan, *Do Humans Have Standing to Deny Trees Rights*, 11 BARRY L. REV. 11, 19 (2008).

² UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, 21 October 2015, A/RES/70/1.

³ Emmanuella Doussis, *Does International Environmental Law Matter in Sustainable Development?*, 28 YEARBOOK OF INT’L ENV’T. L. 3, 7 (2019).

⁴ Ulrich Beyerlin, *Different Types of Norms in International Environmental Law: Policies, Principles, and Rules*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 425 (Daniel Bodansky et. al., 2007).

⁵ Nicholas A. Robinson, *Earth Law into the Anthropocene*, in *The crisis in global ethics and the future of global governance: fulfilling the promise of the Earth Charter 111* (Peter Burdon, et al. eds., 2019).

⁶ Cristiano Gianolla, *Human Rights and Nature: Intercultural Perspectives and International Aspirations*, 4 J. HUM. RTS. & ENV’T. 58, 59 (2013).

try to identify alternative solutions among options that are usually rejected as unrealistic.⁷ Despite having a significant role in advancing international environmental law, these solutions are not enough. We need an ecological transformation: one that is grounded on rights-based approaches and the intrinsic value of nature and truly propels us towards a new body of law: the Anthropocene law. This thesis shows lawyers, diplomats, legislators, policymakers and legal scholars how to reframe international environmental law. It provides the answers to how to move away from the current Earth Emergency Crisis through rights-based approaches that properly respond to the environmental crisis of the Anthropocene. At the moment of this writing, negotiators at the U.N. are debating a new political declaration – the current draft also embraces the right to a healthy environment like the Human Rights Council did mere months ago. It is time that the world fully embraces the right to a healthy environment: through a HRC resolution, a political declaration, a UNGA resolution, and, eventually, through a binding global agreement.

The science exposes the threats we currently face and the dire future ahead of us in case of inaction

Many reports published in the past few years warn us that our environment is rapidly deteriorating. We are on the brink of an environmental disaster. Chapter I highlighted some of these reports, showing the scientific consensus on the Earth Emergency Crisis. The destruction of our environment is so widespread that it calls for new legal answers to address the environmental crisis. UNEP's 2021 Report on Making Peace with Nature⁸ highlighted five critical messages on the planetary emergency, lighting a path to a sustainable future: (i) environmental changes are undermining hard-won development gains and impeding progress on ending poverty and hunger by causing economic costs and millions of premature deaths annually; (ii) the well-being of today's youth and future generations depends on an urgent and clear break with current trends of environmental decline; (iii) Earth's environmental emergencies and human well-being need to be addressed together to achieve sustainability; (iv) the economic, financial and productive systems can and should be transformed to lead and power the shift to sustainability; and (v) everyone has a role to play in ensuring that human knowledge, ingenuity, technology, and cooperation are redeployed from transforming nature to transforming humankind's relationship with nature.

UNEP warns that the coming decade is crucial: "Society needs to reduce carbon dioxide emissions by 45 percent by 2030 compared to 2010 levels and reach net-zero emissions by 2050 to limit warming to 1.5 °C as aspired to in the Paris Agreement, while at the same time conserving and restoring biodiversity and minimizing pollution and waste."⁹ This requires more synergy in developing the goals, targets, commitments, and mechanisms under the fundamental environmental conventions and their implementation. Society needs to include natural capital in decision-making, eliminate environmentally harmful subsidies and invest in the transition to a sustainable future. Polycentric governance is key to empowering people to express themselves and act environmentally responsibly without undue difficulty or self-sacrifice.¹⁰

The changes in the Earth system mark a distinct new geological period in the Earth's history. The Earth is moving into an unstable state due to the global human imprint on the

⁷ Gianolla, *supra* note 7, at. 59.

⁸ *Making Peace with Nature: A Scientific Blueprint to Tackle the Climate, Biodiversity, and pollution emergencies*, UNITED NATIONS ENVIRONMENT PROGRAMME (2021), <https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/34948/MPN.pdf> [hereinafter *Making Peace with Nature*].

⁹ *Making Peace with Nature*, *supra* note 18, at 13.

¹⁰ *Id.*

biosphere. Humanity has become a geological agent in much the same way as a volcano or meteor, changing the Earth and its systems.¹¹ Anthropocene has become a popular lens to consider the purely scientific and increasingly the social aspects of past, present, and future global environmental change.¹² The Anthropocene calls for re-imaginings of the role of environmental law, its components, and elements. Considering this new geological epoch, this thesis has developed the foundation of Anthropocene law through an evolutionary process that gives rise to a new phase in the development of international environmental law.

As Kotzé puts it, the law “cannot continue to comfortably rest on foundations that evolved under the harmonious Holocene, because under the type of biospheric conditions in the Anthropocene, ‘Holocene law’ will arguably be unable to establish and maintain the type of societal ordering it typically would have sought to achieve under ‘normal’ Holocene conditions.”¹³ These new challenges brought by human interference in the natural environment require new and progressive legal solutions to care for nature. Robinson clarifies: determining the existence of the Anthropocene “is a scientific one, not a socio-economic or cultural determination, yet its greatest implications may lie in the realm of the social sciences.”¹⁴ We need to prepare politically, legally, socially, and economically to adapt to those global environmental changes that can no longer be avoided.¹⁵ The escalating environmental crises call for the progressive development of international law and the codification of principles, inducing their realization as state practice.¹⁶

Dupuy observes that “at that breakneck pace, mankind, seeing itself quite clearly as the impetuous “master and possessor of nature” is jeopardizing a planet which has become unbreathable and headed for the sterility of silent springs.”¹⁷ Noting the need for increased “responsibility on the part of national governments,” the Pope called for “a legal framework” with “clear boundaries.”¹⁸ The Anthropocene pushes for a new cognitive framework, providing an opportunity to question and re-imagine the legal interventions that can best respond to the current global socio-ecological crisis. This space was previously preserved for fragmented, issue-specific, and narrow legal inquiries adequate for less alarmist expressions of urgency.¹⁹ The Anthropocene calls for transformative law to respond to the socio-ecological crisis and promote human stewardship of natural systems.²⁰ A progressive new political declaration that sets a framework for international environmental law might be just what is needed to navigate the challenges faced in this new epoch.

We have a moral and legal duty to care for nature

Can we use our common notion of care for the Earth to find ethical guidance to environmental protection? Can we finally move away from the inertia of States and harmonize our vision for the future? Chapter II shows that our common religious ecology already provides the

¹¹ M. Hodson and S. Marvin, *Urbanism in the Anthropocene: Ecological urbanism or premium ecological enclaves?*, 14 TAYLOR & FRANCIS J. 298 (2010).

¹² Louis J. Kotzé, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM IN THE ANTHROPOCENE 5* (Hart Publishing Paperback Edition ed. 2016).

¹³ *Id.* at. 6.

¹⁴ Nicholas A. Robinson, *Fundamental Principles of Law for the Anthropocene?*, 44 ENVTL. POL'Y & LAW 13 (2014).

¹⁵ Kotzé, *supra* note 9, at 6.

¹⁶ Robinson, *supra* note 5, at 111.

¹⁷ Pierre Marie Dupuy, *Intergenerational Reflections on International Law: An Essay from Pierre Marie Dupuy* (Jan. 31, 2020), EJIL: TALK!, <https://www.ejiltalk.org/intergenerational-reflections-on-international-law-an-essay-from-pierre-marie-dupuy/>.

¹⁸ Pope Francis, Post-Synodal Apostolic Exhortation of the Holy Father Francis, “Querida Amazonia”, ¶52 (Feb. 12, 2020).

¹⁹ Kotzé, *supra* note 9, at 6-7.

²⁰ Nicholas A. Robinson, *Keynote: Sustaining Society in the Anthropocene Epoch*, 41 DENV. J. INT'L L. & POL'Y 467, 488 (2013).

framework for a unified vision. Perhaps the core idea of the Global Pact was ‘lost in translation’ in how the proposal was presented at the U.N.: the idea that we do not need more instruments in international environmental law, but somewhat different approaches to managing human relationships with the Earth. The burgeoning Earth jurisprudence movement offers a deep philosophical anchor and a range of practical and multi-disciplinary approaches necessary to create law reform and societal change that will better support the natural world and human societies than our current system. This is where the Anthropocene Law fits in.

Environmental problems do not respect political boundaries and cross the limits of religion and culture. For this reason, we need to achieve coherence and coordination among the conservation policies inspired and guided by multicultural environmental ethics.²¹ As the moral agents on this planet, humankind is responsible for recreating human institutions to meet this challenge.²² The thesis shows enough jurisprudence to support developing a new agreement on international environmental law. Our religious and jurisprudential bedrock illustrates that environmental ethics, a right to a healthy environment, and a duty to care for the environment already exist across multiple religions and cultures. If the environmental crisis mandates the development of environmental ethics, then environmental ethics must be correspondingly multicultural. The time is right for humanity to envision new systems of jurisprudence for the well-being of the entire Earth community.²³ At the core of this ethical responsibility lies the duty of care.

The obligations of States towards the environment have traditionally been recognized in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration. The Stockholm Declaration embraced the right to the environment as a fundamental principle and the principles associated with the duties of States to care for the environment and enact effective laws to safeguard the environment. The ‘duty of care’ is closely related to the concept of ‘due diligence’ in international law, implying the “positive obligation to make every reasonable effort in view of ensuring respect and protection of the rights of others and of general interests of the international community.”²⁴ Deemed the “cornerstone of international environmental law,” the duty of care is considered a general principle of law.²⁵ It includes a negative obligation: the responsibility *not* to cause damage to the environment of other States or of areas beyond national jurisdiction.

The principle includes two aspects. First, it recognizes State’s “sovereign right to exploit their own resources pursuant to their own environmental [and developmental] policies” and “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.” State practice since 1972 has assiduously avoided the decoupling of both aspects of the principle. Second, it guarantees limitations to the exercise of States’ rights, restricting the sovereignty of States over natural resources.²⁶ Beyond that, the principle provides a legal basis for bringing claims under customary law asserting liability for environmental damage.²⁷ The duty of care is not confined nor incidental to the law governing good neighborhood relations but becomes an element of the general

²¹ J. Baird Callicott, *Multicultural Environmental Ethics*, 130 DAEDALUS 77 (2001).

²² Koons, *supra* note 217, at 69.

²³ *Id.* at 69.

²⁴ Francesco Francioni, *A General Duty of Care toward the Environment*, in A GLOBAL PACT FOR THE ENVIRONMENT - LEGAL FOUNDATIONS 37 (Yann Aguila & Jorge E. Viñuales eds., 2019).

²⁵ PHILIPPE SANDS AND JAQUELINE PEEL, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 191 (Cambridge, 4th ed. 2018); see also Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. INT’L L.J. 423, 485-93 (1973) (for an account of the negotiating history of Principle 21).

²⁶ *Id.* at 195.

²⁷ *Id.* at 200.

principle of prevention of environmental harm and extends to areas beyond national jurisdiction.²⁸ Additionally, the legal basis for the attribution to States of wrongful conduct causing environmental damage is expanded beyond the territorial sovereignty to include States' activities within their jurisdiction or control, recognizing an 'extraterritorial' reach of the duty of care.²⁹

The development of the duty of care also encompassed the protection of 'global environmental goods,' which cannot be reduced to a specific territory or physical space but needs to be preserved for its tangible character and the vital function it performs in the preservation of the planet's ecosystem, such as the ozone layer, endangered species, biological diversity, and the climate.³⁰ The protection of this aspect of the environment is one of the current most significant challenges of environmental protection. Therefore, it is crucial to reinforce the duty of care of States to protect the environment and state that duty more progressively. For example, the draft Global Pact purposefully avoided repeating the sovereignty aspect of the principle, finally decoupling from the traditional approach of establishing an exception to the general rule of unrestricted exploitation of natural resources. Such decoupling is essential to constrain the unlimited exploitation of natural resources, especially oil and gas, and achieve net zero emissions through decarbonization. The text is also phrased with a positive obligation to protect the environment. In this sense, rather than just avoiding environmental harms, States have an active role in ensuring environmental protection. Another crucial aspect is expanding the role of other stakeholders in environmental protection, ensuring that individuals, companies, civil society organizations, and international organizations have an active duty of care.

The content of the duty of care in environmental protection has already been delineated. For example, the former Special Rapporteur John Knox mapped a series of obligations related to human rights and the environment, including *procedural* and *substantive* obligations.³¹ Substantive obligations include the obligation to adopt a legal framework that protects against environmental harm and the duty to protect against environmental harm caused by corporations, other non-state actors, and State agencies.³² In addition, Knox clarifies that States have the discretion to strike a balance between environmental protection and other issues of societal importance, such as economic development and the rights of others. Nonetheless, the balance shall be reasonable. In determining whether an environmental law has struck a reasonable balance, relevant factors include whether it meets national and international health standards and whether it is retrogressive. Moreover, once a State has adopted environmental standards, it must implement and comply with them.³³

The Inter-American human rights system has also recently clarified the content of the duty of care in environmental law. The Inter-American Court on Human Rights (IACtHR) specifically established the obligation of States to respect the rights to life and personal integrity concerning

²⁸ Francioni, *supra* note 8, at 39.

²⁹ *Id.*

³⁰ *Id.*

³¹ John H. Knox, Independent Expert on Human Rights and the Environment, Statement, Human Rights Council, 25th Session, 10 March 2014.

³² John H. Knox, U.N. Human Rights Council on its Twenty-Fifth Session, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoying of a Safe, Clean, Healthy and Sustainable Environment, Mapping Report, U.N. Doc. A/HRC/25/53, (Dec. 30, 2013) [hereinafter Independent Expert Mapping Report]; see also David R. Boyd, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 83 (2012).

³³ John Knox, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, *Framework Principles on Human Rights and the Environment*, U.N. Doc. A/HRC/37/59, ¶ 6 (Jan. 24, 2018) [hereinafter Framework Principles].

environmental protection.³⁴ The obligation implies that they must: (i) avoid causing ‘significant’ environmental damage in and outside their territory, for which they must regulate, supervise and monitor activities that could cause harm; (ii) assure, among other things, the realization of practical and independent environmental impact studies, as well as mitigation and contingency plans for potential damages; (iii) cooperate with other States and provide them with information regarding risks to their natural environment; (iv) apply the precautionary principle to protect the rights to life and personal integrity due to severe and irrevocable environmental degradation, even when scientific uncertainty exists; (v) guarantee the rights to public participation, access to information related to potential environmental harms, and access to justice in decision-making that could affect the environment.³⁵ A new political declaration could build on these elucidations to further expand the content of the duty of care in international environmental law.

The UNSG Report shows the current gaps in international environmental law

The U.N. Secretary-General 2018’s Report provided a platform to discuss the current state of international environmental law and consider options to address the existing legal gaps. The report showed that the law remains vague regarding principles and gaps in international environmental law.³⁶ Two of the gaps identified by the report relate to the underlying causes of the current unstable conditions of the Earth: (i) international environmental law is piecemeal and reactive, and (ii) the structure of international environmental governance is characterized by institutional fragmentation. While these causes reflect the available scientific knowledge when international environmental law and international institutions were established, we now better understand our Earth and its systemic functioning. Nevertheless, this is not reflected in our legal systems, which must maintain the Earth System in a favorable state. The report recognizes that the proliferation of MEAs and the resultant distinct and separate mandates ignore the Earth’s ecosystem’s unity, interconnectedness, and interdependence.³⁷ Therefore, it is vital to provide such unity and ensure that our legal system flows coherently and that the laws can be better implemented. The report further concluded that environmental principles affect how environmental treaties can be interpreted, and may be used, if necessary, to fill gaps between the rules laid out in the instruments. Additionally, it recommended the adoption of the right to a healthy environment at the international level. These suggestions can be welcomed in the new political declaration.

A new declaration follows the development of international environmental law

Scholars and diplomats have developed significant research throughout the last five years to create a new text. The work that was done reflects five decades of development of international environmental law. Kaniaru notes the considerable investment from States, international

³⁴ Advisory Opinion OC-23/17 (15 November 2017). Series A No. 23. Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, ¶56-68.

³⁵ See Maria Antonia Tigre & Natalia Urzola, *The 2017 Inter-American Court’s Avisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene*, 12 J. HUM. RTS. & ENV’T. 24 (2021).

³⁶ UN Secretary-General, Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment UN Doc A/73/419, 42 (30 November 2018).

³⁷ *Id.*, at ¶ 80.

organizations, and professionals from the Stockholm Declaration to the present.³⁸ As a result, principles adopted in the Stockholm Declaration have been refined, considered, and affirmed in different forms by jurists and publicists, reinforced by States, the International Court of Justice (ICJ), and regional and national tribunals, and selectively incorporated in agreements, global and regional conventions, and a vast body of MEAs.

The idea for a global charter on environmental rights and principles is not new. Resulting from international environmental conferences, the 1972 Stockholm Declaration,³⁹ the 1982 World Charter for Nature,⁴⁰ the 1992 Rio Declaration,⁴¹ and the 2012 Rio+20 Declaration⁴² were adopted at the U.N. The 1987 Brundtland Report by the World Commission on Environment and Development (WCED) included a list of “Legal Principles for Environmental Protection and Sustainable Development,” and advised the U.N. to prepare a new universal convention on environmental protection and sustainable development.⁴³

In 1995, the IUCN’s World Commission on Environmental Law (WCEL) designed a treaty to serve as an umbrella agreement to “govern the interactions of nations with the Earth’s natural systems,” based on the absence of a “unifying umbrella agreement to facilitate integrating environment and development.”⁴⁴ Despite being void of official legal status, this Draft International Covenant on Environment and Development (ICED) has been used as a global guide for environmental principles.⁴⁵ The ICED provides an international “framework for implementing sustainability at all levels of society” based on the principles of the Rio+20 Conference and the 2030 Agenda for Sustainable Development (2030 Agenda). It also consolidates and develops existing environmental principles towards achieving and developing the SDGs.⁴⁶ The draft Covenant served several roles, justified by the drafter, including “lawyers and diplomats from around the world, and for legal specialists in civil law, common law, Islamic law, and socialist law traditions, working together to prepare this text.”⁴⁷

The 2000 Earth Charter, based on the notion of ecological integrity, was also proposed by civil society as an ethical framework for the Earth.⁴⁸ In 2016, the IUCN adopted the World Declaration on the Environmental Rule of Law, promoting the adoption of core principles and

³⁸ David W. Kaniaru, *Considerations as Contribution to, and Beyond the Political Declaration*, PATHWAY TO THE 2022 DECLARATION, (<https://www.pathway2022declaration.org/article/considerations-as-contribution-to-and-beyond-the-political-declaration/>)

³⁹ Declaration of the United Nations Conference on the Human Environment in ‘Report of the United Nations Conference on the Human Environment’ UN Doc A/CONF.48/14/Rev.1 (1973) [hereinafter Stockholm Declaration].

⁴⁰ World Charter for Nature, G.A. Res. 7, 36 U.N. GAOR Supp. (No. 51) at 17, U.N. Doc. A/51 (1982), reprinted in 22 I.L.M. 455 (1982).

⁴¹ Rio Declaration on Environment and Development, in Report of the United Nations Conference on Environment and Development, UN Doc A/CONF.151/26 (vol I) (12 August 1992) Annex [hereinafter Rio Declaration].

⁴² UNGA, *The Future We Want*, UN Doc A/RES/66/288 (27 July 2012) (Rio+20 Declaration).

⁴³ The Environmental Law Experts are referenced in the Report of the U.N. World Commission on Environment and Development, UNGA UN Doc A/42/427 (4 August 1987), reprinted in Special Working Session, *World commission on environment and development*, OUR COMMON FUTURE; WCED, ED.; OXFORD UNIVERSITY PRESS: OXFORD, UK (1987). [hereinafter Brundtland Report]. Full recommendations were published in RD Munro and J Lamers (eds), *Environmental Protection and Sustainable Development: Legal Principles and Recommendations* (Martinus Nijhoff 1987).

⁴⁴ Nicholas A. Robinson, *IUCN’s Proposed Covenant on Environment & Development*, 13 PACE ENVTL. L. REV. 133,143; 148 (1995).

⁴⁵ International Union for Conservation of Nature, Environmental Law Programme, Draft International Covenant on Environment and Development: Implementing Sustainability (5th ed. 2015) [hereinafter IUCN Draft Covenant].

⁴⁶ *Id.*

⁴⁷ Robinson, *supra* note 44, at 141.

⁴⁸ See Earth Charter Commission, The Earth Charter (2000), https://earthcharter.org/wp-content/uploads/2020/03/echarter_english.pdf?x90724.

norms as the legal foundation for environmental justice.⁴⁹ Previous initiatives, such as those presented by the IUCN, often lacked political backing. We are once again awaiting the debate of an agreement on environmental principles and rights at the U.N. As Robinson put it on the occasion of the draft Covenant, “States must resolve whether or not they wish to translate the soft law of Agenda 21 on sustainable development into a hard law treaty, and if so, how.”⁵⁰

A new political declaration results from converging factors. Given the rate and degree of environmental degradation, there is an obvious need to develop favorable legal provisions corresponding to the third generation of rights. The success of the Paris Agreement showed that progress in environmental governance is possible. Nonetheless, the engagement of States is essential. When States convene to discuss multilateral conventions, normative values shape the backdrop of the discussion.⁵¹ The analysis done in this thesis on the arguments raised by States is essential in giving context to the new political declaration. Foreseeing the likelihood of the idea not moving forward, Robinson noted that “If it does nothing else, at least the terms of the draft Covenant provide an inventory for this future agenda, which is essential to the well being of Earth and the life it sustains.”⁵² The same rationale applies now.

We have a duty to cooperate

We have exhausted our natural resources and caused species to become extinct. We have spread pollution and disrupted a once stable climate. Robinson notes that humans have also exhausted time itself on the occasion of the 50th anniversary of the 1972 UNCHE.⁵³ How could we have reached a state of such despair despite five decades of environmental governance, with a multitude of norms, laws, practices, and programs to care for the Earth?⁵⁴ While the pace and scope of environmental lawmaking in the past five decades is “remarkable and historic,”⁵⁵ it is not yet sufficient to safeguard the Earth’s natural systems and sustain human socio-economic development.⁵⁶ What will the next five decades bring? Which challenges will we face? How can we provide a more coherent legal framework of international environmental law to better cope with the current state of environmental degradation and the expanding negative impacts of climate change? We need dramatic shift in the legal system of international environmental law through the Anthropocene Law. After 30 years, the 1992 Rio Conference still represents the high point of international cooperation in the five decades since the 1972 Stockholm Conference.⁵⁷

The interdependence of our globalized world has become painfully evident in recent years. Governments alone cannot grasp the magnitude of global issues.⁵⁸ Cooperation is vital in preventing the degradation of the environment and human health caused by certain hazardous activities and substances, particularly concerning developing States.⁵⁹ Nevertheless, nation-state

⁴⁹ IUCN-WCEL, World Declaration on the Environmental Rule of Law (2016).

⁵⁰ Robinson, *supra* note 44, at 159.

⁵¹ S. James Anaya, *Customary International Law*, 92 AM. SOC’Y & INT’L L. PROC. 41, 42 (1998).

⁵² Robinson, *supra* note 44, at 159.

⁵³ Nicholas A. Robinson, *Depleting Time Itself: The Plight of Today’s “Human” Environment*, 51 ENVTL. POL’Y. AND L. 361, 362 (2021).

⁵⁴ L. KURUKULASURYA L. AND NICHOLAS A. ROBINSON, TRAINING MANUAL ON INTERNATIONAL ENVIRONMENTAL LAW, UNEP (2006).

⁵⁵ BARBARA J. LAUSCHE, WEAVING A WEB OF ENVIRONMENTAL LAW (IUCN Environmental Law Centre, 2008).

⁵⁶ Robinson, *supra* note 53 at 362.

⁵⁷ *Id.* at 363.

⁵⁸ Daniel C. Esty, Good Governance at the Supranational Scale: Globalizing Administrative Law, YALE L.J. 1490, 1493 (2005).

⁵⁹ UN Secretary-General, *supra* note 36, at 11. See Makane M. Mbengue, *Principle 14: dangerous activities and substances*, in THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 383 (JORGE E. VIÑUALES, ED., Oxford, 2015).

remains the dominant structure in international relations, with a growing distrust of international institutions. Multilateralism remains elusive, and several States continue to invoke their national sovereignty to resist new agreements or commitments.⁶⁰ Given the current aversiveness to multilateralism, exemplified in several countries worldwide, it is ever more pressing that States reengage in environmental cooperation. Under the Trump administration, the United States constantly invoked a return to nationalism. Brazil followed a similar path under President Bolsonaro. Dupuy notes that we currently contemplate an effort of trivial populist leaders around the world, including within the European Union, for dismantling or, at least, radically criticizing the very implications of a multilateralism which was and, in principle, still is the most convincing constituent of the international legal system established after the second world war.⁶¹

Esty asks, “How does one square the demonstrable need for structured international cooperation in a world of interdependence with the political strain that arises whenever policymaking authority is lodged in global institutions?” The doubts often fall on these arguments: the perceived lack of democratic legitimacy, concerns about lost national sovereignty, unhappiness about the delegation of important policy choices to distant and unaccountable officials, and dissatisfaction with decision-making processes.⁶² However, States can shape international policy by setting the parameters they wish to engage, such as by establishing broad-reaching environmental principles at the transnational level and fully embracing the right to a healthy environment.

The elusiveness of multilateralism shows precisely the need for strengthened cooperation. International environmental law is premised on cooperation and shared responsibility.⁶³ There is tacit adherence to the idea of international cooperation on environmental issues.⁶⁴ Both the 1972 Stockholm Declaration (Principle 24) and the 1992 Rio Declaration (Principle 27) have stressed this duty. More recently, the Paris Agreement (Article 6, among several others)⁶⁵ and the 2030 Agenda for Sustainable Development (¶31) bolster the global call for cooperation. Cooperation is recognized in a number of crucial environmental treaties,⁶⁶ texts drafted by civil society,⁶⁷ U.N. instruments,⁶⁸ the jurisprudence of international courts and tribunals and the World Trade Organization (WTO),⁶⁹ and in codification work of the International Law Commission (ILC).⁷⁰

⁶⁰ Robinson, *supra* note 53 at 364.

⁶¹ Dupuy, *supra* note 21.

⁶² Esty, *supra* note 66.

⁶³ Leonardo da Rocha de Souza & Margareth Anne Leister, *A influência da soft law na formação do direito ambiental*, 12 REVISTA DE DIREITO INTERNACIONAL 767 (2015).

⁶⁴ Raneé Khooshie Lal Panjabi, *From Stockholm to Rio: A Comparison of the Declaratory Principles of International Environmental Law*, 21 DENV. J. INT’L L. & POL’Y 215, 231 (1993).

⁶⁵ Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, arts. 6, 7 (6)–(7) (a) and 8 (4) (a)–(f) [hereinafter Paris Agreement].

⁶⁶ See Stockholm Declaration, *supra* note 44. At princ. 24; UNCLOS, art. 197; WCN, arts. 21 (a) and 22; Vienna Ozone Convention, art. 2 (2) (a); Agenda 21, chap. 2.1; Rio Declaration, principles 5, 7, 9, 12–14, 24 and 27; UNFCCC, preamble and art. 3 (5); CBD, art. 5; United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD), arts. 3(b) and (c); Paris Agreement, arts. 7 (6)–(7) (a) and 8 (4) (a)–(f).

⁶⁷ See Oslo Principles, preamble; CIDCE Draft Covenant, art. 20; Earth Charter (generally).

⁶⁸ See draft articles on prevention of transboundary harm from hazardous activities, art. 4.

⁶⁹ World Trade Organization, United States—Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, AB-1998-4, Report of the Appellate Body, 12 October 1998, ¶ 168.

⁷⁰ Peter H. Sand, *Principle 27: Cooperation in a Spirit of Global Partnership*, in THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 617 (JORGE E. VIÑUALES, ED., Oxford, 2015).

Since it is affirmed in virtually all international environmental agreements,⁷¹ cooperation forms the basis of specific obligations and rights that shape state behavior.⁷²

The SDGs provide a universal platform for integrating cooperation between States, intergovernmental agencies, and civil society to eliminate destructive practices and establish behaviors to sustain human society within the earth's natural systems. The duty to cooperate is closely linked to the implementation of the SDGs and is essential for the 2030 Agenda to be realized. For example, SDG 6 (Indicator 6.5.2., Goal 6.5) deals specifically with the role of cooperation in cross-border resource management. In addition, formal cooperation schemes between riparian countries provide a framework for cooperation.⁷³ Objective 17 addresses cooperation as it warns of the need for partnerships to achieve the objectives to strengthen the means of implementation and revitalize the global partnership for sustainable development. The recently published rule of law report calls for broader cooperation, which also deals with other cooperative spheres to ensure democratic deficits. For example, when local communities are significantly informed and participate in natural resource management decisions, they are more likely to have a sense of ownership and respect decisions. Such decisions can be made at the strictly local level, such as those related to village management, at the regional level, with transnational water agreements.⁷⁴ This type of environmental cooperation builds trust and limits the power of non-state and non-citizen actors to co-opt government actions.⁷⁵

The development of cooperation reflects its acceptance not only as a political necessity but also as a fundamental principle and norm of international environmental law.⁷⁶ This obligation makes cooperation a binding principle of international law,⁷⁷ a legal and moral norm, and a good neighborly duty⁷⁸ that is universally accepted.⁷⁹ The UNGA has clarified that the framing of cooperation as a principle of international environmental law, through the adoption of auxiliary instruments and standards by the Parties' conferences, serves the progressive development and dynamic evolution of conventional treaty law.⁸⁰

The challenges of the 21st century bring the need for new alternatives for cooperation.⁸¹ Indeed, globalization has brought about increased interdependence between countries, broadly transforming societies.⁸² New environmental challenges require cooperative efforts and procedures to promote action and collective trust.⁸³ Faced with these ever-increasing challenges, the sum of efforts by States to avoid them becomes urgent. Faced with the environmental challenges of the Anthropocene, the principle of cooperation should once again be emphasized and encouraged to bring about new ways of promoting environmental management.⁸⁴ Boisson de Chazournes rationalizes that cooperation is a cornerstone principle of international environmental

⁷¹ Sands and Peel, *supra* note 29, at 204.

⁷² CHRISTINA LEB, *COOPERATION IN THE LAW OF TRANSBOUNDARY WATER RESOURCES* 76 (James Crawford & John S. Bell eds., Cambridge University Press, 2013).

⁷³ Leb, *supra* note 82, at 95.

⁷⁴ UN Environment, *Environmental Rule of Law*, First Global Report 19 (2019).

⁷⁵ Tigre, *supra* note 88.

⁷⁶ *Id.* at 76.

⁷⁷ DAVID HUNTER ET. AL., *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 489 (2015).

⁷⁸ Nicholas Robinson, *Beyond sustainability: environmental management for the Anthropocene Epoch*, 12 J. OF PUBLIC AFFAIRS 184 (2012).

⁷⁹ UN Secretary-General, *supra* note 36, at 10.

⁸⁰ *Id.* at 10. See Sand, *supra* note 70, at 617.

⁸¹ Souza & Leister, *supra* note 63, at 770.

⁸² Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43(1) VA. J. INT'L L. 2 (2002).

⁸³ Robinson, *supra* note 14, at 18.

⁸⁴ Robinson, *supra* note 78, at 184.

law, and its content needs to be refined to reinforce the protection of the environment for present and future generations.⁸⁵ The new political declaration provides an opportunity for that. More precise obligations in cooperation in international environmental law would ensure better environmental protection since, without cooperation, there is neither proper protection of global public goods nor effective management of shared resources.⁸⁶

Boisson de Chazournes contends that while the obligation to cooperate and its many facets can be found in various international instruments, the obligation's status and the legal contours are not precisely defined.⁸⁷ The ambiguity about its content impacts its implementation, particularly in terms of States' requirements in discharging their obligation to cooperate. First, the status of cooperation in international environmental law needs to be defined, specifying whether it is a generic principle or a specific obligation.⁸⁸ In this context, the question is whether the simple act of cooperating is sufficient or necessary to achieve specific results. Secondly, what kind of cooperation is needed? What are its requirements? Is simply cooperating in good faith enough? Third, how can the principle be implemented? These questions are essential for adequately elaborating the language of the principle of cooperation into a potentially binding and comprehensive new treaty. Without doing so, it will be reduced to a repetition of previous attempts at a binding treaty and will most likely fail to bring about any real change.⁸⁹

While calling for increased cooperation and a renewed multilateral commitment towards environmental protection, a new political declaration could further define its content. Furthermore, there is a need to better articulate how the duty of cooperation is shaped by the principle of common but differentiated responsibilities (CBDR). This is particularly important as the current state of the environmental crisis does not allow weakening individual obligations and instead calls for a global and inclusive approach. Especially helpful in reshaping CBDR is the growing notion of "fair share," which ensures that every nation has *some* responsibility in the state of our environment.⁹⁰ Cooperation is a cornerstone principle of international environmental law. Its importance needs to be confirmed and its content refined to "reinforce the protection of the environment for present and future generations" and contribute to "effectively implement" MEAs.⁹¹

One of the criticisms of the traditional ideal of state cooperation concerns the limitation in the age of globalization and the failures of environmental governance. The question is whether the State remains the preeminent institution with the necessary political authority and directing capacity to deal with ecological issues.⁹² In the face of this criticism, it is essential to expand the list of actors who can implement cooperation and require cooperation beyond State-actors. For example, one way to improve and extend global governance is to broaden environmental NGOs by ensuring civil society dialogue.⁹³ The civil society movements are also crucial in this regard. But essential is the understanding of the right to a healthy environment as the centerpiece of any new agreement.

⁸⁵ Laurence Boisson de Chazournes, *A Call for Strengthening Cooperation*, PATHWAY TO THE 2022 DECLARATION, <https://www.pathway2022declaration.org/article/a-call-for-strengthening-cooperation/>.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Maria Antonia Tigre, *Princípio da Cooperação*, in PRINCÍPIOS DE DERECHO AMBIENTAL Y AGENDA 2030 (Yann Aguila, et al. eds., 2019).

⁸⁹ *Id.*

⁹⁰ Lavanya Rajamani et. al, *National 'fair shares' in reducing greenhouse gas emissions within the principled framework of international environmental law*, 21(8) CLIMATE POLICY 983 (2021).

⁹¹ Boisson de Chazournes, *supra* note 92.

⁹² John Vogler, *In Defense of International Environmental Cooperation*, in THE STATE AND THE GLOBAL ECOLOGICAL CRISIS (John Barry & Robyn Eckersley eds., 2005).

⁹³ *Id.* at 231.

The right to a healthy environment is at the core of any new legal solution

Evolved norms about nature prompt the identification of new legal principles in many nations.⁹⁴ At the core of the emerging environmental norms lies the right to a healthy environment. The right to a healthy environment updates the human rights approach to the conditions of the Anthropocene, just as emerging forms of “new Earth politics”⁹⁵ are revising political thought and action in light of the conditions of our epoch.⁹⁶ Shelton believes that “although human rights and environmental protection represent distinct social values, the overlapping relationship between them can be resolved in a manner which will further both sets of objectives. A clearly and narrowly defined international human right to a safe and healthy environment, currently emerging in international law, can contribute to this goal.”⁹⁷ Moreover, a specific environmental right might optimize the environmental protection benefits of human rights approaches.⁹⁸

Some have argued that the “right to a healthy environment” has a powerful “ethical” influence on global governance.⁹⁹ Rodríguez-Garavito notes that the added value of enshrining a human right is a legally enforceable rule. It provides greater precision, certainty, and enforceability and sends an authoritative institutional message about the importance of the entitlement in question.¹⁰⁰ Indeed, it endows a moral claim with additional material and symbolic power. These additional powers “explain why human rights actors spend a considerable part of their efforts trying to enshrine rights in legal texts, whether national constitutions, domestic legislations, regional treaties, or international hard-law or soft-law instruments.”¹⁰¹ Despite the expansion of the adoption of a right to a healthy environment, as delineated in Chapter IV, there is still a wide implementation gap between the requirements of environmental laws and their implementation and enforcement.

Following a rights-based approach, a new political declaration could identify the right to a healthy environment and potentially new environmental rights, further emphasizing the link between human rights and the environment. The consensus from the international community needs to rely on the SDGs with an explicit acknowledgment of the right to a healthy environment and its correlative duty to care for the environment.¹⁰² New rights such as granting rights to nature, for example, could be adopted in the declaration, solidifying a trend followed recently by several countries.

Recent developments in procedural rights should also be noted. As some delegates from Latin America suggested in the Nairobi negotiations, the discussions should consider the recently adopted Escazú Agreement.¹⁰³ A human rights approach would help support more robust

⁹⁴ Nicholas A. Robinson, *Evolved norms: A canon for the Anthropocene*, in *RULE OF LAW FOR NATURE* 55 (Christina Voigt ed. 2013).

⁹⁵ S. NICHOLSON AND S. JINNAH (EDS.), *NEW EARTH POLITICS: ESSAYS FROM THE ANTHROPOCENE* (MIT Press, 2016).

⁹⁶ Cesar Rodriguez-Garavito, *A Human Right to a Healthy Environment? Moral, Legal and Empirical Considerations*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 155 (John H. Knox & Ramin Pejan eds., 2018).

⁹⁷ Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 *STAN. J INT'L L.* 103, 106 (1991).

⁹⁸ Michael Anderson, *Human Rights Approaches to Environmental Protection: An Overview*, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* (Alan Boyle & Michael Anderson eds., 1996).

⁹⁹ A clear example of this influence is the *See EARTH CHARTER*, *supra* note 55.

¹⁰⁰ Rodríguez-Garavito, *supra* note 96, at 155.

¹⁰¹ *Id.* at 157.

¹⁰² Nicholas A Robinson, *Ecological Civilization and Legal Norms for Resilient Environmental Governance*, 4 *CHINESE J. OF ENV'L L.* 131, 150 (2020).

¹⁰³ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean Escazú, 4 March 2018, LC/CNP10.9/5

compliance mechanisms open to the public and calls for new agreements on procedural access rights, such as the Aarhus Convention and the Escazú Agreement, and even for a global Principle 10 agreement.¹⁰⁴ Finally, the rights of environmental defenders could also be protected, further addressing a global crisis. The Escazú Agreement provides a solid example of how a “general” political declaration recognizing the right to a healthy environment could be further implemented at the regional level, considering the peculiarities of each region.¹⁰⁵

A discussion on what it means to have a recognized human right to a healthy environment will undoubtedly follow. Essential in a rights-based approach is understanding what the remedies are. What is the role of humans as representatives of environmental protection? What does it mean to give rights to nature? Robinson notes that the 1972 Stockholm Conference and the 1992 Rio Conference required extensive prior preparation to achieve success.¹⁰⁶ However, the advent of the Covid-19 pandemic has disrupted the positive movement towards increased ambition on environmental protection, as evidenced by the delay in the negotiations of a new political declaration. Nevertheless, the adoption of the right to a healthy environment by the HRC provides a renewed commitment towards nature.¹⁰⁷ Moreover, as most nations have already adopted the right to a healthy environment in their constitutions, courts have started implementing it at the national level, with several bold and progressive decisions that have advanced environmental stewardship.¹⁰⁸ Invoking the right to the environment before courts worldwide can provide the action locally that sovereign States have failed to produce globally.¹⁰⁹

The significance of a political declaration

While there was a broad disappointment among the Global Pact’s drafters when the binding agreement sought was ‘diluted’ into a political declaration, it is already significant that we will have a new environmental agreement in 2022. Higgins observes that “the passing of binding decisions is not the only way in which law development occurs.” Legal consequences can also flow from acts that are not, in the formal sense, ‘binding.’¹¹⁰ Dufour argues we should not overlook the potential of a ‘simple’ political declaration, which might, like a Trojan horse, potentially succeed where a full-fledged treaty might fail.¹¹¹ She argues that if a consensus emerges from the process leading to its adoption, the political declaration could already generate more legal effects

¹⁰⁴ John H. Knox, *The Global Pact for the Environment: At the crossroads of human rights and the environment*, 28 REVIEW OF EUROPEAN, COMPAR. & INT’L ENV’T L. 40,46 (2019).

¹⁰⁵ Maria Antonia Tigre, *Principle 10: What Can We Learn From its Regional Implementation Through the Escazú Agreement?*, PATHWAY TO THE 2022 DECLARATION, <https://www.pathway2022declaration.org/article/principle-10-what-can-we-learn-from-its-regional-implementation-through-the-escazu-agreement/>.

¹⁰⁶ Robinson, *supra* note 53, at 367.

¹⁰⁷ Victoria Lichet & Maria Antonia Tigre, *Historic Breakthrough for Environmental Justice: The UNHRC Recognizes the Right to a Healthy Environment as a Human Right*, OpinioJuris (Oct. 13, 2020), <http://opiniojuris.org/2021/10/20/historic-breakthrough-for-environmental-justice-the-unhrc-recognizes-the-right-to-a-healthy-environment-as-a-human-right/>.

¹⁰⁸ See i.e., Maria Antonia Tigre, *Major Developments for Global Climate Litigation: The Human Rights Council Recognizes the Right to a Healthy Environment and the Committee on the Rights of the Child Publishes its Decision in an International Youth Climate Case*, SABIN CENTER FOR CLIMATE CHANGE LAW: CLIMATE LAW BLOG (Oct. 12, 2021), <http://blogs.law.columbia.edu/climatechange/2021/10/12/major-developments-for-global-climate-litigation-the-human-rights-council-recognizes-the-right-to-a-healthy-environment-and-the-committee-on-the-rights-of-the-child-publishes-its-decision-in-an-inter/>.

¹⁰⁹ Robinson, *supra* note 53, at 367.

¹¹⁰ ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 24 (Oxford University Press 1995)

¹¹¹ Geneviève Dufour, *Et si le pacte mondial pour l’environnement prenait la forme d’une simple déclaration: un cheval de troie pour une meilleure mise en œuvre des normes environnementales?*, in L’APRÈS COVID-19 : QUEL MULTILATÉRALISME FACE AUX ENJEUX GLOBAUX? 252 (Olivier Bichsel, et al. eds., 2021).

than a treaty. Boyle states that it is a fallacy to dismiss soft law as of no importance since it can and does contribute to the corpus of international law.¹¹²

Whether the process leads to the adoption of a formal treaty or a simple declaration, implementation is ultimately determined by the level of adherence of States to the norm.¹¹³ The UNSG's report shows that despite a broad normative framework, international environmental law remains fragmented, sectoral, piecemeal, and imprecise, while also suffering from a lack of international consensus, affecting effectiveness and application. A unifying, comprehensive approach achieved by consensus could yield better results than a binding treaty, especially in a divided global society. Furthermore, a declaration can potentially produce significant legal effects as it is not subject to acceptance by States to enter into force or threatened by reservations and withdrawals. Once adopted, a declaration has full effects. In addition, soft law produces legal effects as States are bound by good faith in international relations.¹¹⁴ Finally, adopting fundamental principles entails a moral commitment and a joint promise for those who vote in favor of it and, consequently, a mutual right of control over how other countries apply it.

While it is not a treaty, the label attached to the instrument is not decisive.¹¹⁵ Once soft law interacts with binding instruments, its non-binding character may be lost or altered.¹¹⁶ Due to state practice, soft law norms may harden, being frequently incorporated into subsequent treaties or becoming customary international law. Within States, the norms contained in non-binding instruments may provide a model for domestic legislation and thus become legally binding internally while remaining non-binding internationally.¹¹⁷ Many authors have exhibited a pronounced inflationary tendency: nonlaw becomes soft law, soft law becomes hard law, and various customary and treaty norms become *jus cogens*.¹¹⁸ It is even possible, according to some, that nonbinding instruments, such as UNGA resolutions, can identify the supreme norms of *jus cogens*. As a result, there has been a "blurring of the normativity threshold," and soft law instruments are treated variably, depending more on their content than on their form and process of adoption.¹¹⁹

The negotiations of a new political declaration allow an opportunity to multilaterally determine the fundamental principles of international environmental law. A precisely drafted text declaring a common set of universal principles could be a turning point in global environmental governance. It would show the collective will to act towards environmental protection. Additionally, it could provide the first step towards adopting a binding instrument in the future. International or national decision-makers may use soft law to interpret present rules of international law, even if the soft law is non-legal. As norms already articulated, soft law can be attractive to a decision-maker. It might be said that the soft law expresses a prior law, even though the articulation is non-legal in form. On the other hand, the soft law articulation may reflect a nascent law that has since crystallized as described by the soft law.

¹¹² Alan Boyle, *Soft Law in International Law-Making*, in INTERNATIONAL LAW 119 (Malcolm David Evans ed. 2014)

¹¹³ *Id.* at 258.

¹¹⁴ Vienna Convention on the Law of Treaties art. 26, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

¹¹⁵ Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, ICJ Reports 1994, at 112.

¹¹⁶ Boyle, *supra* note 112, at 120.

¹¹⁷ Dinah Shelton, *Soft Law*, in HANDBOOK OF INTERNATIONAL LAW (David Armstrong, et al. eds., 2008).

¹¹⁸ Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. OF INT'L L. 291, 322 (2006).

¹¹⁹ *Id.*

Indeed, an international agreement does not need to have a specific format to be binding.¹²⁰ The context within which they are negotiated and accompanying statements of delegations are also relevant, along with the degree of support, the time at which the resolution was passed, the fundamental issues that ground the resolution, how the vote was taken, or the language adopted.¹²¹ Widespread acceptance of soft law instruments will legitimize conduct and make the legality of opposing positions harder to sustain. When delegates representing almost all the world's national governments cast votes on a resolution or a political declaration, they are in effect providing a joint confirmation (or rejection) of the presence and acceptance of that issue in international law.¹²² A resolution adopted by consensus or by unanimous vote will necessarily carry more weight than one supported by a two-thirds majority. Other resolutions are adopted without any vote or passed by an overwhelming margin but not endorsed by certain blocs of countries.¹²³ Still, some scholars argue that attaining a unanimous vote on a resolution or even having the same recommendation redundantly recited in subsequent resolutions cannot preclude the fact that such recourses fail to alter its legal station.¹²⁴

Spier notes that an over-arching approach that addresses the urgent demands of our time is complementary to the issue-specific rules related to climate change, environmental degradation, loss of biodiversity, and the eradication of poverty. Such general rules enable courts to tailor the law to a case in point.¹²⁵ However, the approach also provides some disadvantages, as it unavoidably creates significant differences in implementation between countries. A combination of general and more specific rules would be most effective, as these could determine the obligations of key stakeholders while assisting them in complying with their obligations, assessing whether they fully comply, and serve as guidance for courts on how to interpret the law. Spiers uses the Oslo Principles and the Principles on Climate Obligations of Enterprises¹²⁶ as examples of specific 'rules.'¹²⁷ Additionally, Spiers suggests adding an accompanying commentary on how to use the rules in specific situations, similar to what the Special Rapporteurs on Human Rights and the Environment have done in the Framework Principles on Human Rights and the Environment¹²⁸ and the Good Practices on the right to a healthy environment.¹²⁹

¹²⁰ Maria Gavouneli, *Legislating by Compacts? – The Legal Nature of the Global Compacts*, EJIL: TALK (Feb. 28, 2019), <https://www.ejiltalk.org/legislating-by-compacts-the-legal-nature-of-the-global-compacts/>.

¹²¹ Gabriella Rosner Lande, *The Changing Effectiveness of General Assembly Resolutions*, 58 PROCE. OF THE AM. SOC. OF INT'L L. AT ITS ANN. MEETING 162, 165 – 66 (1964).

¹²² A caveat is necessary here, as certain factors such as realpolitik, the membership composition of the General Assembly and its coalition politics can and obscure the real reasons motivating votes for or against resolutions. General Assembly resolutions do not always accurately reflect the genuine opinion of individual states voting on an issue. Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445, 460-61 (1981).

¹²³ Gregory J. Kerwin, *Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 895 (1983).

¹²⁴ Joyner, *supra* note 122.

¹²⁵ Jaap Spier, *Towards a High-Level Political Declaration – A Search for Building Blocks*, PATHWAY TO THE 2022 DECLARATION, <https://www.pathway2022declaration.org/article/towards-a-high-level-political-declaration-a-search-for-building-blocks/>

¹²⁶ *Discerning Legal Obligations to Tackle Climate Change*, CLIMATE PRINCIPLES FOR ENTERPRISES, (<https://climateprinciplesforenterprises.org/>; *Oslo Principles on Global Climate Change Obligations* (Eleven International Publishing ed., 2015), <https://climateprinciplesforenterprises.files.wordpress.com/2017/12/osloprincipleswebpdf.pdf>).

¹²⁷ Spier, *supra* note 133.

¹²⁸ John Knox, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, *Framework Principles on Human Rights and the Environment*, U.N. Doc. A/HRC/37/59, ¶ 6 (Jan. 24, 2018) [hereinafter Framework Principles].

¹²⁹ David Boyd, Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, *Right to a Healthy Environment: Good Practices*, U.N. Doc A/HRC/43/53 (Dec. 30, 2019).

Robinson warns that if the 50th anniversary of the U.N. Stockholm Conference passes without a political declaration that is at least as important as the 1992 Rio Declaration, the consensus for the SDGs will likely erode. Conversely, if agreed principles emerge in or shortly after 2022, humankind can unite behind a shared vision, despite geopolitical differences among nations.¹³⁰ Robinson further notes that debates around environmental principles have preoccupied jurists but done little to protect nature. It was thought that consensus about existing principles of international environmental law had progressively become more widely accepted.¹³¹ Many principles are ‘accepted’ (e.g., EIA and public participation in environmental decision-making) but are not necessarily widely observed or enforced. Others remain ‘emerging’ principles (e.g., intergenerational equity and duties to future generations).¹³² Some environmental principles have emerged in particular legal systems, reflecting the needs, aspirations, and objectives of that particular culture or legal traditions’ (e.g., ‘public trust doctrine’ in the U.S., ‘protection first’ in China or ‘in dubio pro natura’ in Brazil).¹³³ The recognition of the right to a healthy environment, despite not yet achieving global adoption, has been widely adopted worldwide. Nonetheless, environmental harm cannot be averted until States embrace a clearer mandate that ends harmful conduct.¹³⁴ This is where the Anthropocene Law comes into place. We need to build a jurisprudence of ecological law and its transition from environmental law. Ongoing capacity-building like the Montevideo Environmental Law Programme is helpful to provide said transition, but without the guiding star of a robust ecological law principle, Earth’s natural systems and human societies will continue their decline.¹³⁵

New legal concepts

The aim of adopting new law by consensus has long been criticized by scholars.¹³⁶ Robinson and Fulton note that the contending beliefs about national self-interests inhibit arriving at a quick consensus about any next generation of environmental norms.¹³⁷ Arguments about how environmental law should guide sustainable development will generate a new consensus on law reflecting the substantive, agreed aims of the United Nations Sustainable Development Goals.¹³⁸ Some States oppose considering new environmental agreements, while others argue that these should only address ‘gaps’ in international environmental law instead of integrating existing agreements.¹³⁹ However, it is essential to adopt new laws that address the ecosystem, considering the intrinsic value of all life forms.

¹³⁰ Robinson, *supra* note 114, at 139.

¹³¹ Sands and Peel, *supra* note 29; see in particular ‘General Rules and Principles’, 197–251.

¹³² Robinson, *supra* note 114, at 139.

¹³³ LUDWIG KRÄMER & EMANUELA ORLANDO, *PRINCIPLES OF ENVIRONMENTAL LAW* 83 (Edward Edgar Publishing, ed. 6ed., 2018).

¹³⁴ Robinson, *supra* note 114, at 140.

¹³⁵ *Id.*

¹³⁶ It was one of the biggest criticisms by the Club des Juristes, leading to the suggestion of a Global Pact. See Maria Antonia Tigre, *GAPS IN INTERNATIONAL ENVIRONMENTAL LAW: TOWARD A GLOBAL PACT FOR THE ENVIRONMENT 3* (Environmental Law Institute, ed, 2020). See also *Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals*, Le Club des Juristes at 26 (Nov. 2015), https://globalpactenvironment.org/uploads/CDJ_Rapports_Increasing-the-effectiveness_Nov.2015_UK.pdf.

¹³⁷ Nicholas Robinson and Scott Fulton, *Foreword*, in *GAPS IN INTERNATIONAL ENVIRONMENTAL LAW: TOWARD A GLOBAL PACT FOR THE ENVIRONMENT* (Environmental Law Institute, ed, 2020).

¹³⁸ *Id.*, at 145.

¹³⁹ Robinson, *supra* note 5, at 113.

Adopting a new political declaration also provides an opportunity to recognize new and emerging legal concepts. These include the notion of planetary boundaries,¹⁴⁰ the concept of harmony with nature,¹⁴¹ a revised notion of territorial sovereignty,¹⁴² ecological integrity,¹⁴³ and ecocide.¹⁴⁴ Planetary boundaries include nine thresholds, which, if crossed, would cause irreparable environmental damage.¹⁴⁵ Harmony with nature includes implementing Indigenous' perspectives into the environmental discourse.¹⁴⁶ There is also a need to reconceptualize territorial sovereignty in order to allow for more cooperation of States with each other concerning environmental matters.¹⁴⁷ This revised notion relies on the notion of common concern of mankind¹⁴⁸ and common heritage of mankind.¹⁴⁹ State cooperation will help guide States in protecting ecological integrity, to uphold systems of governance within environmental matters.¹⁵⁰ This will help prevent ecocide, a potential new crime being defined under the ICC.¹⁵¹ Using criminal law to enforce environmental obligations could be a gamechanger at the international level.¹⁵²

Additionally, the link between habitat destruction and disease calls for better protection and management of the environment.¹⁵³ The One Health approach recognizes that the health of people is closely connected to the health of animals and our shared environment. It aims to achieve the best health outcomes for people, animals, and plants alike by promoting collaboration between professionals in human health, animal health, the environment, and other areas of expertise. Scholars have argued that the "One Health" approach could bring about changes in two respects: (i) emphasizing the interdependence between human and environmental health and that both are threatened by environmental degradation; and (ii) foster cross-sectoral and holistic new laws which counter the currently fragmented international environmental law.¹⁵⁴ The "One Health" approach brings disparate areas together and promotes a holistic approach that provides new comprehensive solutions to the environmental threats we face today. The zoonotic origins of the Covid-19

¹⁴⁰ *Planetary Boundaries*, STOCKHOLM RESILIENCE CENTRE, <https://www.stockholmresilience.org/research/planetary-boundaries.html>.

¹⁴¹ Maria Antonia Tigre, *Living in Harmony with Nature in a Post-Pandemic Scenario*, THE LAW AND NATURE DIALOGUE (Sept. 6, 2021), <https://lawandnaturedialogue.wixsite.com/macquariecel/post/living-in-harmony-with-nature-in-a-post-pandemic-scenario>.

¹⁴² Klaus Bosselmann, *Environmental Trusteeship and State Sovereignty: Can They be Reconciled*, 11 TRANSNAT'L L. THEORY 41, <https://www.tandfonline.com/doi/abs/10.1080/20414005.2020.1757862>.

¹⁴³ Klaus Bosselmann, *The Imperative of Ecological Integrity: Conceptualizing a Fundamental Legal Norm for a New "World System" in the Anthropocene*,

<https://researchspace.auckland.ac.nz/bitstream/handle/2292/44155/Chapter13Bosselmann+final.pdf?sequence=19>.

¹⁴⁴ Phillipe Sands et. al, *Defining Ecocide*, VÖLKERRECHTSBLOG (Apr. 24, 2011), <https://voelkerrechtsblog.org/defining-ecocide>.

¹⁴⁵ *Planetary Boundaries*, STOCKHOLM RESILIENCE CENTRE, <https://www.stockholmresilience.org/research/planetary-boundaries.html>.

¹⁴⁶ Tigre, *supra* note 141.

¹⁴⁷ Bosselmann, *supra* note 142

¹⁴⁸ Frank Biermann, *Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law*, 34(4) ARCHIV DES VÖLKERRECHTS 426 (1996).

¹⁴⁹ Paulo Magalhães, *Can the 2022 Declaration be a game changer?*, PATHWAY TO THE 2022 DECLARATION, <https://www.pathway2022declaration.org/article/can-the-2022-declaration-be-a-game-changer/>.

¹⁵⁰ Klaus Bosselmann, *The Imperative of Ecological Integrity: Conceptualizing a Fundamental Legal Norm for a New "World System" in the Anthropocene*,

<https://researchspace.auckland.ac.nz/bitstream/handle/2292/44155/Chapter13Bosselmann+final.pdf?sequence=19>.

¹⁵¹ Phillipe Sands et. al, *Defining Ecocide*, VÖLKERRECHTSBLOG (Apr. 24, 2011), <https://voelkerrechtsblog.org/defining-ecocide>.

¹⁵² Jojo Mehta, *Ecocide as a fifth crime at the International Criminal Court*, PATHWAY TO THE 2022 DECLARATION, <https://www.pathway2022declaration.org/article/ecocide-as-a-fifth-crime-at-the-international-criminal-court/>.

¹⁵³ Maria Antonia Tigre, Natalia Urzola & Victoria Lichet, *Reframing Global Biodiversity Protection after COVID-19: Is International Environmental Law up to the task?*, 23 VERMONT ENVT. L. J. 123 (2022).

¹⁵⁴ Rahel Zimmerman, *The 2020 Declaration to Advance the "One Health" Approach*, PATHWAY TO THE 2022 DECLARATION <https://www.pathway2022declaration.org/article/the-2022-declaration-to-advance-the-one-health-approach/>.

pandemic reinforce the need for this approach.¹⁵⁵ Political commitment is crucial in promoting a One Health Approach for responding to and managing zoonotic diseases and thus should be supported by policy decisions and legal frameworks.¹⁵⁶

The Covid-19 has illustrated how the international community can rapidly respond to a global emergency. Natural disasters, like hurricanes or earthquakes, have triggered normative changes on a smaller scale. The same sense of urgency must trigger meaningful and enduring responses to the earth emergency crisis. We are at a breakthrough point with the Covid-19, climate, pollution, and biodiversity crises. The horrors of the 1800s have developed humanitarian law. The horrors of the World War II have developed human rights law and crimes against humanity. The horrors of the Earth Emergency Crisis warrant a similarly strong response that reshapes our legal system. I am hopeful that this will lead to positive legal developments that give rise to the Anthropocene Law.

Role of Civil Society Organizations

The traditional model of international environmental lawmaking was one of state-to-state contracting or the multilateralization of this contracting process.¹⁵⁷ However, as mentioned previously, transboundary environmental problems often bring novel and challenging questions, with little prior experience guiding policymaking. As a result, new problems appear that had never been anticipated or contemplated. This distinguishes environmental cooperation from other traditional areas, such as trade and security, both of which have long histories of international policymaking that provide some guidance and benchmarks.¹⁵⁸ Environmental problems, and environmental law, as a consequence, have evolved enormously over the past decades. The growth in the complexity, scope and regulatory nature of international environmental law has fostered the inclusion of non-traditional stakeholders in environmental governance, particularly the expansion of private sector and NGO participation in the formulation and maintenance of international environmental law.¹⁵⁹

The development of international environmental law has afforded NGOs an unparalleled opportunity for participation in environmental governance, which has been legitimized in a series of environmental treaties.¹⁶⁰ Agenda 21 both encourages NGO participation directly, through creating a high-level advisory board to the U.N. Secretary-General, and indirectly, through the general focus on transparency, reporting, and access.¹⁶¹ In the opening paragraphs of the Stockholm Declaration, it was recognized that “[i]ndividuals in all walks of life as well as organizations in many fields ... will shape the world environment of the future” and that local and

¹⁵⁵ WHO-convened *Global Study of Origins of SARS-CoV-2: China Part*, WORLD HEALTH ORGANIZATION (March 30, 2021), <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/origins-of-the-virus>.

¹⁵⁶ Maria Antonia Tigre et. al., *Environmental protection and human rights in the pandemic*, 1(1-2-3) LEGAL POL’Y & PANDEMICS: THE J. OF THE GLOBAL PANDEMIC NETWORK 123 (2021).

¹⁵⁷ John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution* 46 INT. ORG. 561 (1992).

¹⁵⁸ Kal Raustiala, *States, NGOs, and International Environmental Institutions*, 41 INT’L STUDIES QUARTERLY 719, 727 (1997).

¹⁵⁹ Kal Raustiala, *The Participatory Revolution in International Environmental Law*, 21 HARV. ENV. L. REV. 537, 557.

¹⁶⁰ See e.g. Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY Doc. No. 100-10 (1987), 26 I.L.M. 1550 (entered into force Jan. 1, 1989) [hereinafter Montreal Protocol], art. 11; United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (entered into force Mar. 21, 1994) [hereinafter Climate Convention], art 7; Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 28 I.L.M. 657 (entered into force May 5, 1992). at 671.

¹⁶¹ Agenda 21, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/4 (Part IV), at 52 (1992) [hereinafter Agenda 21].

national governments bear the most significant burden of environmental policy.¹⁶² Paragraph 21 of the World Charter for Nature also identifies non-state actors – public authorities, international organizations, individuals, groups, and corporations – as having a responsibility to protect nature.¹⁶³ NGO participation was recommended by the 1987 Brundtland Commission¹⁶⁴ and favored in the Rio Declaration.¹⁶⁵ Principle 10 of the Rio Declaration stipulates that “[e]nvironmental issues are best handled with the participation of all concerned citizens, at the relevant level.”¹⁶⁶ UNCED, apart from establishing important principles in environmental governance and law, identified local communities as stakeholders to make the implementation of multilateral environmental agreements possible and, ultimately, more effective.¹⁶⁷

These statements are “more than mere rhetoric”¹⁶⁸ and reflect a view that States “can no longer claim to be the sole holders of the right to participate in the international legal order and its processes, having been joined by a new range of actors.”¹⁶⁹ These provisions show a broader trend towards including non-nation-States in environmental governance. Mainly where the interests of the global commons are concerned, NGOs are increasingly perceived as the only actors capable of providing a crucial guardianship role.¹⁷⁰ The U.N. Commission on Sustainable Development (CSD) pioneered engaging non-governmental actors in multi-stakeholder dialogues, where representatives from diverse sectors convene, share their experience, and forge common grounds.¹⁷¹ Today, NGOs regularly participate as observers at meetings of international environmental institutions and processes and effectively use their right to intervene and submit their views and proposals.¹⁷²

The general statements which set the framework for broader participation have been supplemented by regional agreements further regulating the topic.¹⁷³ The Aarhus Convention, recalling, *inter alia*, Principle 10 of the Rio Declaration, thus aims to “further the accountability of and transparency in decision-making and to strengthen public support for decisions on the environment.”¹⁷⁴ The Escazú Agreement involved significant public participation and significantly expanded the scope of public participation in environmental matters.¹⁷⁵ Furthermore, the 2018 UNDROP aimed to strengthen peasants and other people working in rural areas, stipulates

¹⁶² Stockholm Declaration, *supra* note 44, para 7.

¹⁶³ World Charter for Nature, Doc A/RES/37/7 (28 October 1982), para 8, para 21, para 23.

¹⁶⁴ WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 328 (1987).

¹⁶⁵ Rio Declaration on Environment and Development, U.N. Conference on Environment and Development, U.N. Doc. A/CONF.151/15 (1992) [hereinafter Rio Declaration], princ 3.

¹⁶⁶ Rio Declaration on Environment and Development, 1992, 31 ILM 874 (1992) (Rio Declaration), Princ 10.

¹⁶⁷ Nikolas Sellheim, *The Evolution of Local Involvement in International Conservation Law*, YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 9 (2020).

¹⁶⁸ Raustiala, *supra* note 159 at 566.

¹⁶⁹ PHILIPPE SANDS, GREENING INTERNATIONAL LAW xxv (Earthspan, 1993).

¹⁷⁰ See Christopher D. Stone, *Defending the Global Commons*, in GREENING INTERNATIONAL LAW (Philippe Sands ed. 1993).

¹⁷¹ Hilary French, *Reshaping Global Governance*, in STATE OF THE WORLD 195 (Worldwatch Institute ed. 2002).

¹⁷² Franz Xaver Perrez, How to Get Beyond the Zero-Sum Game Mentality between State and Non-State Actors in International Environmental Governance, CONSILIENCE 211, 215 (2019).

¹⁷³ See Emily Barritt, *Global Values, Transnational Expression: From Aarhus to Escazú*, in RESEARCH HANDBOOK ON TRANSNATIONAL ENVIRONMENTAL LAW (Veerle Heyveart & Leslie-Anne Duvic-Paoli eds., 2020).

¹⁷⁴ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998, 2161 UNTS 447.

¹⁷⁵ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean Escazú, 4 March 2018, LC/CNP10.9/5 [hereinafter Escazú Agreement]. See Maria Antonia Tigre, *The Six Pillars of the Escazú Agreement (Part 1)*, THE GLOBAL NETWORK FOR HUMAN RIGHTS AND THE ENVIRONMENT (Aug. 3, 2021), <https://gnhre.org/community/the-six-pillars-of-the-escazu-agreement-part-1/>; and L. Lizarazo and J. Teixeira de Feritas, *Aarhus and Escazú: The two sides of the Atlantic in the field*, THE GLOBAL NETWORK FOR HUMAN RIGHTS AND THE ENVIRONMENT (Aug. 11, 2021), <https://gnhre.org/community/aarhus-and-escazu-the-two-sides-of-the-atlantic-in-the-field-of-public-participation-in-environmental-matters/>.

fundamental human and environmental rights stemming from other legally binding agreements.¹⁷⁶ Against this backdrop, environmental democracy has become an ever-increasing feature of environmental governance.¹⁷⁷

At the 1972 UNCED, representatives from over 250 NGOs were in attendance. This was a turning point in the negotiating process of environmental treaties,¹⁷⁸ having “changed the face of international environmental law.”¹⁷⁹ Since then, the activities of NGOs at the international level have increased steadily.¹⁸⁰ According to the Union of International Associations, there are over 37,000 active international NGOs, a majority of which are placed significantly in the fields of human rights and environmental protection.¹⁸¹ NGOs are now a regular part of the cooperative process, addressing delegations as a state would. They have been increasingly incorporated into what was previously “States only” governance activities, and their activities’ scope, type, and scale are more significant than ever before. As has long been the case in domestic environmental law, NGOs are now prominent actors in formulating, implementing, and enforcing international environmental law.¹⁸²

Increased procedural changes in international law have allowed for greater transparency, access, and interaction between stakeholders and rule-makers.¹⁸³ There is still room for a lot of improvement in participation and transparency.¹⁸⁴ However, this shift in formal and informal participation represents a notable evolution and has transformed the process of international environmental cooperation.¹⁸⁵ Nevertheless, while international decision-making processes seek legitimacy through the involvement of civil society, formal mechanisms for NGO participation within the U.N. system remain limited.¹⁸⁶ Moreover, even when NGO involvement is formally permitted, participation may be limited to specific stages of negotiations, and they can still be excluded from informal meetings between state actors.¹⁸⁷ Nevertheless, the involvement of NGOs in international environmental lawmaking offers multiple benefits.

NGOs help set agendas by notifying the public and governments of emerging issues. Under democratic systems, it is common to observe NGOs functioning as information providers, lobby groups, agenda setters, and norm generators.¹⁸⁸ They identify new policy areas, debate the

¹⁷⁶ United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas, Doc A/RES/73/165 (Dec. 17, 2018) (UNROP).

¹⁷⁷ Michael Mason, *Information Disclosure and Environmental Rights: The Aarhus Convention*, 10 GLOBAL ENV'TL POLITICS 10(2010).

¹⁷⁸ Elin Enge & Runar Malkenes, *Non-Governmental Organizations at UNCED: Another Successful Failure?*, in GREEN GLOBE YEARBOOK OF INTERNATIONAL CO-OPERATION ON ENVIRONMENT AND DEVELOPMENT 25(Helge Ole Bergesen & Georg Parmann eds., 1993).

¹⁷⁹ David Tolbert, *Global Climate Change and the Role of International Non-Governmental Organizations (NGOs)*, in INTERNATIONAL LAW AND GLOBAL CLIMATE CHANGE 95, 108 (Robin Churchill & David Freestone eds., 1991).

¹⁸⁰ Philippe J. Sands, *Environment, Community and International Law*, 30 HARV. INT'L. L. J. 393 (1989).

¹⁸¹ See Union of International Associations, available at <https://uia.org/projects/unesco>.

¹⁸² Raustiala, *supra* note 159, at 538.

¹⁸³ *Id.* at 581.

¹⁸⁴ Nicola Sharman, *Observer participation in the wake of COP26: the role of human rights law*, GLOBAL NETWORK FOR HUMAN RIGHTS AND THE ENVIRONMENT, <https://gnhre.org/climate-change-2/observer-participation-in-the-wake-of-cop26-the-role-of-human-rights-law/>.

¹⁸⁵ Raustiala, *supra* note 159, at 538.

¹⁸⁶ Barbara Gemmill & Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, in GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS & OPPORTUNITIES 77 (Daniel C. Etsy & Maria H. Ivanova eds., 2002).

¹⁸⁷ Raustiala, *supra* note 157, at 726-733.

¹⁸⁸ Gayle Allard & Candace Agrella Martinez, *The influence of Government Policy and NGOs on Capturing Private Investment* § 7 ORGANIZATION FOR ECONOMIC COOPERATION DEVELOPMENT (Apr. 8, 2008), <https://pdf4pro.com/view/the-influence-of-government-policy-and-ngos-on-56c5b5.html>.

consequences of policies, and identify aspects that require review and refinement.¹⁸⁹ NGOs often offer information to which governments do not have access, addressing governance gaps.¹⁹⁰ By involving NGOs in the process, governments gain reasonably accurate, efficacious, and creative policy advice from independent sources.¹⁹¹ NGOs prepare studies for wide dissemination, engage the media to influence public opinion, and contribute expertise to governmental delegations.¹⁹² Additionally, they promote further discussion and debate about environmental issues.¹⁹³ Indeed, NGOs have an evolving influence in the production, communication, and uptake of information¹⁹⁴ and can influence the agenda-setting of international environmental governance.¹⁹⁵

The development of the Global Pact is a case in point. Non-state actors ignited the Global Pact initiative and provided valuable participation as the negotiations moved forward within the U.N., including publishing studies on environmental principles and gaps in international environmental law and providing valuable inputs during the negotiations in Nairobi.¹⁹⁶ This is particularly important for developing countries, lacking the resources and expertise to allow adequate policy evaluation and creation.¹⁹⁷ NGOs confer legitimacy to environmental lawmaking.¹⁹⁸ Environmental NGOs can play a crucial role in helping to plug gaps by conducting research to facilitate policy development, building institutional capacity, and facilitating independent dialogue with civil society.¹⁹⁹

NGO participation strengthens States' regulatory powers, allowing them to regulate ecologically harmful activities with greater efficiency, effectiveness, and legitimacy.²⁰⁰ NGOs negotiate outcomes by offering alternative options for policy outcomes and engaging in extensive networking.²⁰¹ They may act as a voice for the voiceless and thereby propel the substance of environmental law in a more just, inclusive, and equitable direction. These include the representation of natural objects such as rivers and nature itself.²⁰² Finally, NGOs may articulate interests, such as those of future generations, which are otherwise unlikely to be raised in a diplomatic setting.²⁰³

¹⁸⁹ Gemmill & Bamidele-Izu, *supra* note 184.

¹⁹⁰ Maria Antonia Tigre, *From Ideas to Implementation: 3 Ways to Ensure that Citizens Have Access to Information*, THE CITY FIX (July 28, 2015), <https://thecityfix.com/blog/ideas-implementation-3-ways-citizens-access-information-brazil-maria-tigre/>.

¹⁹¹ Raustiala, *supra* note 158 at 559.

¹⁹² JEFFREY L. DUNOFF & STEVEN R. RATTNER, *INTERNATIONAL LAW, NORMS, ACTORS, PROCESS: A PROBLEM-ORIENTED APPROACH* (Wolters Kluwer 4th ed. 2015).

¹⁹³ Anjali Agarwal, *Role of NGOs in the Protection of Environment*, 2 J. OF ENV. RESEARCH AND DEVELOPMENT 933 (2008).

¹⁹⁴ Lindsey Jones, et al., *The changing role of NGOs in supporting climate services*, Issue no. 4, BRACED(2016), available at https://www.researchgate.net/profile/Rachel_Godfrey_Wood/publication/308710391_The_changing_role_of_NGOs_in_supporting_climate_services/links/5831b22008ae102f07338001/The-changing-role-of-NGOs-in-supporting-climate-services.pdf.

¹⁹⁵ Perez, *supra* note 171 at 219.

¹⁹⁶ See *i.e.*, Tigre, *supra* note 136 (generally); *i.e.*, PATHWAY TO 2022, <https://www.pathway2022declaration.org/>.

¹⁹⁷ Raustiala, *supra* note 158 at 560.

¹⁹⁸ Peter J. Simmons, *Learning to Live with NGOs*, 112 FOREIGN POLICY 82 (1998).

¹⁹⁹ Razan Al Mubarak & Tanzeed Alam, *The Role of NGOs in Tackling Environmental Issues*, MIDDLE EAST INSTITUTE (2011), available at <https://www.mei.edu/publications/role-ngos-tackling-environmental-issues>. Examples include the WORLD RESOURCES INSTITUTE, <https://www.wri.org/>, the CLIMATE ACTION TRACKER, <https://climateactiontracker.org/>, C40 CITIES, <https://www.c40.org/>, the CLIMATE ACTION NETWORK INTERNATIONAL, <https://climatenetwork.org/>.

²⁰⁰ Raustiala, *supra* note 158 at 539.

²⁰¹ Michele Merrill Betsill & Elisabeth Corell, *NGO Diplomacy: the influence of nongovernmental organizations*, in INTERNATIONAL ENVIRONMENTAL NEGOTIATIONS (The MIT Press, ed., 2007).

²⁰² Christopher Stone, *Defending the Global Commons*, in GREENING INTERNATIONAL LAW (New York New Press, ed., 1994) 1993; Christopher D. Stone, *Should Trees Have Standing? Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

²⁰³ See *e.g.*, Edith Brown Weiss, *The Planetary Trust: Conservation and Intergenerational Equity*, 11 ECOLOGY L.Q. 495 (1984); Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198 (1990);

Environmental NGOs are also crucial for accountability. Domestically, NGOs play a critical role in enforcing and promoting international legal norms.²⁰⁴ NGOs can push for further action through public interest litigation when all else fails. NGOs have been increasingly engaged in environmental litigation and in particular in climate litigation.²⁰⁵ It represents a response by civil society to the lack or inadequate response of States towards the environmental crisis.²⁰⁶ For example, NGOs have stepped up to launch campaigns driving inter-governmental negotiations, such as regulating hazardous wastes.²⁰⁷ By interrelating global and local concerns, NGOs find themselves able to emphasize critical ecological issues and raise consciousness about the environment.²⁰⁸

NGOs further contribute to closing a significant gap in international environmental law, the lack of adequate and timely reporting, as they provide an alternative route for information about state behavior.²⁰⁹ Additionally, NGOs have provided a valuable service at environmental diplomacy by issuing daily bulletins on the state of negotiations.²¹⁰ These bulletins provide detailed accounts of each day's formal statements, points of contention, proposals, and decisions. Finally, NGO oversight can also assist in international activities facilitated through participatory structures. For example, NGOs can alert governments to delegation action by identifying delegates who diverge from the preferences of government principals.²¹¹

NGOs can also address political concerns in ratifying treaties and potentially reduce the likelihood of ratification failure through their early inclusion in international negotiations. In ensuring that agreements are ratified domestically, NGO networks help bridge the gap between international and domestic arenas. Directly involving societal actors in the negotiations process enhances the flow of information and may win the support of skeptics and opponents.²¹² NGOs are particularly helpful in negotiating treaties in complex regimes, such as ozone depletion, transboundary air pollution, hazardous wastes, biodiversity, and climate change, which demand more resources and require greater levels of implementation and adjustment.²¹³

Despite the growing advantages and increased participation of non-state actors in environmental governance, and the trend in international environmental governance “increasingly towards broadening the range of actors recognized as having a legitimate role in governance,” there is still a “significant gap in international environmental law regarding effective participation by non-State actors in international lawmaking and implementation.”²¹⁴ Therefore, it is imperative that more foundations and NGOs are involved in environmental governance to help push governments towards more significant action. Through increased action by a multitude of stakeholders, we will enter the Anthropocene Law epoch.

Edith Brown Weiss, *Intergenerational Equity: Toward an International Legal Framework*, in GLOBAL ACCORD: ENVIRONMENTAL CHALLENGES AND INTERNATIONAL RESPONSES (Nazli Choucri ed. 1993).

²⁰⁴ See e.g., the role of Greenpeace, World Wildlife Fund (WWF), and Union of Concerned Scientists (UCS) in launching public awareness to the destruction of the Amazon in the 2000s.

²⁰⁵ Sethi Garvita, *Climate Litigation Movement by Non-Government Organizations: Contributions & Challenges*, 29(5) EUR. ENERGY AND ENV. L. REV. 177 (2020).

²⁰⁶ Agarwal, *supra* note 193, at 934.

²⁰⁷ *Responsible Business*, <https://www.iisd.org/business/ngo/roles.aspx>.

²⁰⁸ Agarwal, *supra* note 193, at 938.

²⁰⁹ Raustiala, *supra* note 157.

²¹⁰ Examples include the Earth Negotiations Bulletin and Eco.

²¹¹ Raustiala, *supra* note 158, at 562-563. The reporting by IISD provides a good example of this type of oversight.

²¹² *Id.* at 563.

²¹³ *Id.* at 568-569.

²¹⁴ United Nations Secretary-General, *supra* note 36, at 35.

Final thoughts

Global environmental justice is regulated by international law. International law is defined and agreed by States and reflects their respective – often individual – interests. These usually do not coincide with the interests of the global community. Still, international law represents the outcome of bargaining among states. While international law has to respond to complex and important questions relating to society and the environment, its response is weakened by the dominance of the national interests of the most powerful states.²¹⁵ Environmental groups have long articulated the need for greater legal protections for nature.²¹⁶ However, a recent shift of consciousness has swept across the globe, recognizing the need for systemic changes in law, governance, and human behavior for the planet's sake.²¹⁷

As demonstrated by the adoption of the Paris Agreement, the ongoing U.N. debate on a new political declaration, citizen movements (e.g., Fridays for Future, Extinction Rebellion), and the current global pandemic, momentum is rapidly developing. A global wave of mobilization has injected new energy into global climate (and environmental) politics.²¹⁸ This new breath should be leveraged to trigger socio-economic and cultural changes advanced through law towards sustainable development. As the world's environment gets worse, stakeholders need to continue being motivated in the same direction, adopting environmental rights, recognizing new principles, consistently implementing environmental laws, and prioritizing enforcement at the national level. States are more likely to implement environmental norms if there are basic principles to observe, including, at its core, the right to a healthy environment.

Mobilizing actors – adults and children protecting the current and future generations – are pushing for increased action at all levels. These address long-term health and well-being and require approaches that are sensitive to gender, age, and culture and incorporate policy mixes across the full range of available instruments.²¹⁹ Climate change litigation has been increasingly used to fast-track change, especially by children and youth.²²⁰ However, litigation is slow and piecemeal, and brings results one stakeholder at a time. To fully embrace the new Anthropocene Law, it is crucial to adopt a new political declaration that adequately responds to the Earth Emergency Crisis. The new political declaration should be grounded in environment rights.

Through different theoretical thoughts, this thesis has shown how to achieve that progressive development and kickstart the beginning of Anthropocene Law. This concluding chapter brings together all the pieces, looking at the whole forest rather than each individual tree. It ultimately shows the underlying rationale for progressive legal responses. The science is precise: we are at the brink of collapse and need immediate and meaningful responses to adjust the course. We also have a moral and legal duty to care for nature, grounded in centuries of philosophical, religious, and cosmological moral reasoning observed across cultures. More recently, the UNSG Report has displayed the existing legal gaps in international environmental law, providing a legal path forward grounded in international law and under the auspices of the U.N.

²¹⁵ Gianolla, *supra* note 6, at 59.

²¹⁶ See, e.g., PAUL HAWKEN, BLESSED UNREST: HOW THE LARGEST SOCIAL MOVEMENT IN HISTORY IS RESTORING GRACE, JUSTICE, AND BEAUTY TO THE WORLD 29-47 (Penguin Books ed. 2007) (summarizing conservation efforts in the 19th and early 20th centuries).

²¹⁷ Judith E. Koons, *What Is Earth Jurisprudence: Key Principles to Transform Law for the Health of the Planet*, 18 PENN ST. ENVTL. L. REV. 47, 50 (2009).

²¹⁸ Joost de Moor et al., *New kids on the block: taking stock of the recent cycle of climate activism*, 20(5) SOCIAL MOVEMENT STUDIES 619 (2021).

²¹⁹ Paul Ekins & Joyceta Gupta, *Perspective: a healthy planet for healthy people*, 2 GLOBAL SUSTAINABILITY 1, 6 (2019).

²²⁰ Elizabeth Donger, *Children and Youth in Strategic Climate Litigation: Advancing Rights through Legal Argument and Legal Mobilization*, TRANS. ENVTL. L. (forthcoming 2022).

The UNGA has therefore called for the adoption of a new political declaration. The *travaux préparatoires* included in this thesis, following the negotiations so far, shows that international cooperation still works. International cooperation has successfully achieved global goals of environmental protection, despite the current aversion to multilateralism.²²¹ The declaration advances from the five decades of development on international environmental law, including multiple soft law instruments that have significantly improved our legal system. We have a legal duty to cooperate, despite the current adverse state of multilateralism.

While critics have felt disappointment towards the lack of a binding nature of a new instrument, a political declaration is significant. It can include new and progressive legal concepts that advance international environmental law despite being soft law. The importance of a new political declaration also lies in its implementation: civil society organizations have a crucial role in that respect. If we are to change the course of the Earth Emergency Crisis, we need fast and steady action that truly leads us towards an ecological transformation. This transformation can only be successful if grounded in a new body of transformative law, the Anthropocene Law. Anthropocene Law can guide the next decade of change so that we can transform the way in which we interact with nature and truly reverse course.

Let's not waste this opportunity. It is essential that we keep hope and environmental multilateralism alive. Change is a part of life and development of the Earth, and while resilience is at the core of any path forward, it is also essential to progressively move forward. Depression and anxiety over the current state of our climate has already taken over younger generations.²²² If we do not act now, we will definitively jeopardize their future. Working on the process, one change after the other, provides a way to get back to the good and promote change. The new era of Anthropocene Law can provide that change, starting with a progressive new political declaration in 2022.

²²¹ See i.e., Agenda 21, SGS, Rio and Stockholm Declarations.

²²² Caroline Hickman et al., *Climate Anxiety in Children and Young People and Their Beliefs About Government Responses to Climate Change: A Global Survey*, 5(12) THE LANCET PLANETARY HEALTH e863 (2021).