

## Transnational Perspectives on the Paris Climate Agreement Beyond Paris: Redressing American Defaults in Caring for Earth's Biosphere

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# Transnational Perspectives on the Paris Climate Agreement Beyond Paris: Redressing American Defaults in Caring for Earth's Biosphere

NICHOLAS A. ROBINSON<sup>†</sup>

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## I. INTRODUCTION

Anxiety about the fate of human civilization is rising.<sup>1</sup> International Law has an essential role to play in sustaining community of nations. Without enhancing International Environmental Law, the biosphere that sustains all nations is imperiled. Laws in the United States can either impede or advance global environmental stewardship. What is entailed in such a choice?

The biosphere is changing. At a time when extraordinary technological prowess allows governments the capacity to know how deeply they are altering Earth's biosphere, nations experience a perverse inability to cooperate together. The Arctic is melting rapidly, with knock on effects for sea level rise and alterations in the hydrologic cycle world-wide.<sup>2</sup> As both the UN Global Environment Out-

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1. See, e.g., MARTIN REES, *ON THE FUTURE PROSPECTS FOR HUMANITY* (2018); MARTIN REES, *OUR FINAL HOUR* (2003).

2. See John Schwartz & Henry Fountain, *Warming in Arctic Raises Fears of a 'Rapid Unraveling' of the Region*, N.Y. TIMES (Dec. 12, 2018) at A10, <https://www.nytimes.com/2018/12/11/climate/arctic-warming.html> (reporting on the findings of the most recent annual "Arctic Report Card"); *Arctic Report Card*, NAT'L OCEANIC ATMOSPHERIC ADMIN., <https://www.arctic.noaa.gov/report-card> (last visited Mar. 5, 2019).

look (Geo-5)<sup>3</sup> or the Special Report of the Intergovernmental Panel on Climate Change “Global Warming 1.5° C”<sup>4</sup> indicate, global environmental trends are destabilizing and can overwhelm societies on each continent. Governments do not respond effectively. Their tepid response to climate change, as embodied in the Paris Agreement of 2015,<sup>5</sup> is the best evidence that States need to reassess their cooperation. Shallow considerations of *realpolitik* no longer suffice. Nor do otherwise conventional questions, born of once sound practices from the “business as usual” eras, about how governments might methodically shape new treaties or incrementally advance international law while Earth’s biosphere rapidly degrade.<sup>6</sup>

States will need to rediscover the benefits and burdens of international cooperation. The aspirational norms of the United Nations Charter are still in force, albeit too little encouraged. More than needing reaffirmation, they require progressive development. Collaborative principles of law can be framed to provide the shared vision that States will require as the Earth’s human population grows from 7.6 billion today toward 9.8 billion by 2050.<sup>7</sup> This article suggests the contributions that international environmental law can made toward this objective.

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3. U.N. ENV’T. PROGRAM, *Global Environment Outlook 5: Environment for the Future We Want* (2012), [http://wedocs.unep.org/bitstream/handle/20.500.11822/8021/GEO5\\_report\\_full\\_en.pdf?sequence=5&isAllowed=y](http://wedocs.unep.org/bitstream/handle/20.500.11822/8021/GEO5_report_full_en.pdf?sequence=5&isAllowed=y) [hereinafter UNEP Geo-5].

4. IPCC, *Global Warming Of 1.5 Celsius (2018)*, <https://www.ipcc.ch/sr15/> (last visited May 19, 2019).

5. G.A. Res. 1/CP.21, Paris Agreement (Dec. 12, 2015), [https://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf) [hereinafter Paris Agreement].

6. For an instructive example of this rapidly out-moded analysis, see Susan Biniaz, *10 Questions to Ask About the Proposed “Global Pact for the Environment,”* (Colum. L. Sch. Saban Ctr. for Climate Change L. ed., 2017), <http://columbiaclimatelaw.com/files/2017/08/Biniaz-2017-08-Global-Pact-for-the-Environment.pdf>. The exceeding slow pace of the work of the International Law Commission (ILC) on principles of international environmental law, or the excellent ILC work on the sub-field of the law of the atmosphere, is another example of the legal community erring on the side of the past concerns, when scientific reports indicate that a more fundamental legal response is needed. The Inter-American Court of Human Rights has made such a change, in recognizing the autonomous right to the environment. See *The Environment and Human Rights* (Arts. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017), [http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf); see also Christopher Campbell Durufle & Sumudu Anopama Atapattu, *The Inter-American Court’s Environment and Human Rights Advisory Opinion: Implications for International Climate Law*, 8 CLIMATE L. (2018), [https://brill.com/view/journals/clla/8/3-4/article-p321\\_321.xml](https://brill.com/view/journals/clla/8/3-4/article-p321_321.xml).

7. *World Population Projected to Reach 9.8 Billion in 2050, and 11.2 Billion In 2100*, U.N. (June 21, 2017), <https://www.un.org/development/desa/en/news/population/world-population-prospects-2017.html>.

## II. ASSESSING HOW TO STRENGTHEN ENVIRONMENTAL LAW TO SUSTAIN THE PARIS AGREEMENT

In December of 2018, the Secretary General of the United Nations presented the General Assembly with his historic first report on international environmental law, through which governments received an assessment of the legal landscape from which such a shared vision can emerge.<sup>8</sup> The General Assembly established an *ad hoc* open-ended working group under the General Assembly “to consider the report and also discuss possible options to address possible gaps” in international environmental law, and the “scope, parameters and feasibility” of a new international instrument, which could strengthen implementation of international environmental law.<sup>9</sup> While the Report was being prepared, the Working Group convened its organizational session at the UN headquarters on September 5-7, 2018.<sup>10</sup> It decided to hold three consultations in Nairobi, Kenya, in January, March and May of 2019, and to report back its recommendations to the General Assembly thereafter.<sup>11</sup>

The Secretary General’s Report sets the stage for a unique consultation among nations. The process leading to these negotiations began after the Paris Climate Agreement entered into force.<sup>12</sup> In September of 2017, France proposed that the General Assembly consider

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8. *Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment* by the U.N. Secretary-General (Nov. 30, 2018), <https://undocs.org/A/73/419> [hereinafter Report].

9. G.A. Res. 72/277, ¶ 2 (May 14, 2018). The General Assembly selected the UNGA Representatives from Portugal (Ambassador Francisco Duarte Lopes) and Lebanon (Ambassador Amal Mudallali) to co-chair the Open-Ended Working Group.

10. *Towards a Global Pact for the Environment-First Substantive Session*, U.N. ENV’T, <https://www.unenvironment.org/events/conference/towards-global-pact-environment-first-substantive-session> (last visited May 5, 2019).

11. U.N. GAOR, Organizational Sess., U.N. Doc. A/AC.289/1 (Aug. 1, 2018). The Open-Ended Working Group adopted an agenda for the consultations in Nairobi and authorized the co-chairs to finalize a report of the organizational session. See Ana Maria Lebeda, *Governments Commence Organizational Work on Global Pact for Environment*, IISD REP. SERV. (Sept. 6, 2018), <http://sdg.iisd.org/news/governments-commence-organizational-work-on-global-pact-for-environment>; *Towards a Global Pact for the Environment: Organizational Session*, IISD REP. SERV., <http://sdg.iisd.org/events/towards-a-global-pact-for-the-environment> (last visited Mar. 4, 2019). Under the terms of paragraph 2 of G.A. Res. 72/277, the Working Group can recommend that the General Assembly convene “an intergovernmental conference to adopt an international instrument.” G.A. Res. 72/277, *supra* note 9, ¶ 2. The earliest such a conference could convene would be in 2020. The UN maintains a webpage regarding the Consultations under G.A. Res. 72/277 at <https://www.unenvironment.org/events/conference/towards-global-pact-environment>.

12. Ana Maria Lebeda, *Governments Commence Organizational Work on Global Pact For Environment*, IISD REP. SERV. (Sept. 5, 2018), <http://sdg.iisd.org/news/governments-commence-organizational-work-on-global-pact-for-environment/>.

adopting a “Global Pact for the Environment,” based on a draft prepared by international environmental law experts.<sup>13</sup> The successful negotiation and adoption of the Paris Agreement inspired Emmanuel Macron of France, when he became President of France, to propose a further, new “Pact” to the UN.<sup>14</sup> France’s Foreign Minister, Laurent Fabius, who had chaired and was instrumental in securing agreement at the 2015 “COP-21” Paris Conference of the Parties of the UN Framework Convention on Climate Change, was concerned that a more fundamental international consensus would be essential to implementing the Paris Climate Agreement.<sup>15</sup>

The hard-won success in 2015, for even the minimal nationally determined contributions, revealed how much more action would be required from each State, in order to effectively mitigate and adapt to climate change.<sup>16</sup> In 2017, Fabius, who had become President of the French Constitutional Court, was mobilized by the Environment Commission of the *Club des Juristes*, France’s first legal “think tank,”<sup>17</sup> to convene deliberations of an international group of experts to draft a foundational set of legal principles that States could proclaim and rely upon to accelerate their national efforts to address cli-

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13. *Project Global Pact for the Environment*, PERMA (June 24, 2017), <https://perma.cc/L4PM-PTV2>; see also *Global Pact For The Environment*, INT’L UNION FOR CONSERVATION OF NATURE [hereinafter IUCN], <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/global-pact-environment> (last visited May 5, 2019).

14. See *Summit to Launch the Global Pact for the Environment* (UN Web TV broadcast Sept. 19, 2017), <http://webtv.un.org/watch/summit-to-launch-the-global-pact-for-the-environment/5580528902001/?term>; Miroslav Lajčák (*President of the General Assembly*) on the *Launch of Global Pact for the Environment* (UN Web TV broadcast Sept. 19, 2017), <http://webtv.un.org/watch/miroslav-laj%C4%8D%C3%A1k-president-of-the-general-assembly-on-the-launch-of-global-pact-for-the-environment/5582060230001/?term>.

15. The Paris Agreement was adopted in Paris on December 12, 2015 and signed in New York in April 2016, and it entered into force on November 4, 2016. See *The Paris Agreement*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE [hereinafter UNFCCC], <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement> (last visited Mar. 4, 2019).

16. See *generally Reports*, IPCC, <https://www.ipcc.ch/reports/> (last visited Mar. 5, 2019) (Assessment Reports of the Intergovernmental Panel on Climate Change). The IPCC Reports on greenhouse gas emissions have been confirmed since the Paris Agreement was adopted by the U.N. Environment Programme. See UNEP, *U.N. Env’t, Emissions Gap Report 2018* (2018), <https://www.unenvironment.org/resources/emissions-gap-report-2018>.

17. In November of 2015, on the eve of COP-21 in Paris, the *Club des Juristes* issued an expert report on “Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals.” See Env’t Comm., *Club des Juristes, Increasing the Effectiveness of International Environmental Law: Duties of States, Rights of Individuals* (2015), [https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2015/11/CDJ\\_Rapports\\_Increasing-the-effectiveness\\_Nov.2015\\_UK\\_web-VDEF.pdf](https://www.fondation-droitcontinental.org/fr/wp-content/uploads/2015/11/CDJ_Rapports_Increasing-the-effectiveness_Nov.2015_UK_web-VDEF.pdf).

mate change.<sup>18</sup> In June of 2017, Fabius presented their proposed Global Pact for the Environment to France's new president, who in turn proposed to present it to the UN.<sup>19</sup>

Several conferences have been held regarding France's proposal,<sup>20</sup> and experts have urged nations to embrace the proposal for the Pact.<sup>21</sup> Drawing on the *Club des Jurists'* studies, the International Chamber of Commerce in Paris has noted that the proposed Pact has the capacity to harmonize and strengthen national environmental law, while integrating international law, and would affect commerce accordingly.<sup>22</sup> During the World Commission on Environmental Law

18. See, e.g., Cymie R. Payne, *A Global Pact for the Environment*, 22 ASIL Insights, no. 12, (Sept. 5, 2018), <https://www.asil.org/insights/volume/22/issue/12/global-pact-environment>.

19. *Conference 'Toward a Global Pact for the Environment'*, EUROPEAN SOC'Y OF INT'L L., <https://esil-sedi.eu/?p=3068> (last visited Mar. 4, 2019).

20. See, e.g., Nathalie Risse, *Experts, Stakeholders Discuss Added Value of Global Pact of the Environment*, IISD REP. SERV. (Sept. 27, 2018), <http://sdg.iisd.org/news/experts-stakeholders-discuss-added-value-of-global-pact-for-the-environment/> (including a compilation of expert commentary about the Global Pact proposal).

21. See, e.g., Yann Aguila et al., *The Time is Now for A Global Pact for the Environment*, THE GUARDIAN (Oct. 9, 2018), <https://www.theguardian.com/environment/2018/oct/09/the-time-is-now-for-a-new-global-climate-pact>.

22. Int'l Chamber of Commerce [hereinafter ICC], *ICC Primer on the Global Pact for the Environment* (2018), <https://cdn.iccwbo.org/content/uploads/sites/3/2018/10/icc-primer-on-the-global-pact-for-the-environment.pdf>. "The UN Pact aims to become the cornerstone of international environmental law and strengthen the coherence of global environmental governance. If adopted ... the UN Pact could therefore have an impact on the rights and obligations of business..." *Id.* at 1. In particular, having regard to the draft text developed by a group of international environmental lawyers, the Pact would:

Create a legal framework, which would aim to address the challenges posed by environmental degradation in the context of sustainable development and induce some greater degree of uniformity of environmental laws in all countries. Codify and give legal force to certain current environmental principles considered in international law to be 'soft law.'

Create a "third generation" of human rights related to the environment '(building on the UN's two existing international human rights covenants on civil and political rights and on economic, social, and cultural rights).'

Call on governments to take the necessary measures to encourage its implementation by non-State actors and subnational entities, including civil society, economic actors, cities and regions taking into account their vital role in the

protection of the environment (Art. 14) and to 'adopt effective environmental laws, and to ensure their effective and fair implementation and enforcement' (Art. 15).

meeting in Brazil, it was decided to support the proposed global pact, as a component of IUCN's legal projects for strengthening the environmental rule of law.<sup>23</sup>

Rather than defer to the French proposal for the Pact, the Members of the UN General Assembly chose to commission an independent needs assessment.<sup>24</sup> The Secretary General's Report ranges across all of international environmental law, but since it was launched in the wake of Paris Climate Agreement, in order to provide a strong juridical foundation for climate change actions in all States, it is especially relevant to this symposium issue of the *Maryland Journal of International Law*.<sup>25</sup> On December 10, 2018, within a week of the Report's initial release, France, Senegal, the World Commission on Environmental Law of the International Union for the Conservation of Nature, and the International Council of Environmental Law (ICEL) convened a briefing for UN Member States at UN headquarters, at which a substantial study by environmental law authorities evaluating the Report was released.<sup>26</sup>

The Secretary-General's Report notes that under international law, "States are required to contribute to the conservation, protection and restoration of the integrity of the Earth's ecosystem. This entails an obligation to cooperate in good faith and in a spirit of global partnership towards the fulfillment of this objective."<sup>27</sup> The Report assesses the existing law of the atmosphere and specifically notes how

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It is important to note that the preliminary document will not be the basis of the negotiated treaty document, however, it may be used as a reference. ICC, *2018 ICC Primer on the Global Pact for the Environment*, <https://iccwbo.org/publication/2019-icc-primer-global-pact-environment/> (last visited on May 5, 2019).

23. *Environmental Rule of Law*, IUCN, <https://www.iucn.org/commissions/world-com/mission-environmental-law/wcel-resources/environmental-rule-law> (last visited on May 5, 2019).

24. G.A. Res. 72/277, *supra* note 9, ¶ 1.

25. *See* Report, *supra* note 8.

26. *See Strengthening Implementation of International Environmental Law* (UN Web TV broadcast Dec. 10, 2018), <http://webtv.un.org/watch/strengthening-implementation-of-international-environmental-law/5977795659001> (including presentations by Roy S. Lee (Representative of the Asian African Legal Consultative Organization), Claudia de Windt (Senior Legal Advisor, Department of Multidimensional Security, Organization of American States), John C. Cruden (former Assistant Attorney-General for environment and natural resources of the US Department of Justice), and Yann Aguila (former judge of the Conseil d'Etat, France, on behalf of the International Group of Experts for the global pact on the environment). World Comm'n on Env'tl. L. of the Int'l Union for the Conservation of Nature 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* (2018), [https://iucn.org/sites/dev/files/notesfor\\_unsgenblawrptdec2018\\_final.pdr](https://iucn.org/sites/dev/files/notesfor_unsgenblawrptdec2018_final.pdr).

27. Report, *supra* note 8, ¶ 16.

the Paris Agreement obliges all States to communicate every five years “each parties’ highest possible ambition and represent a progression beyond the previous nationally determined contribution.”<sup>28</sup> The Report finds that the pledges State parties have as their “current nationally determined contributions are so far not sufficiently ambitious, and if they are not increased they will not lead to the realization of the global temperature goal.”<sup>29</sup>

The intergovernmental consultations regarding a possible global pact for the environment have potential to foster the codification of the general principles of environmental law, as there is already a wide international consensus about these principles.<sup>30</sup> States may well find consensus in their consultations and working group meetings in Nairobi. By mid-2019, enough UN Members will have agreed to refine and accept a common set of principles. They would be akin to general “rules of the road” that can help nations fill the gaps in international environmental law, and support the implementation of the UN Sustainable Development Goals.<sup>31</sup> Their agreement—or lack thereof—is to be referred to the UN General Assembly for its consideration after the first half of 2019.<sup>32</sup> The UN General Assembly, by majority vote, can then convene an intergovernmental treaty negotiation to agree upon any Global Pact for the Environment.<sup>33</sup>

28. *Id.* at ¶ 15. The Report cites an especially insightful essay on duties of the Paris Agreement under international law by Christina Voigt and Felipe Ferreira. See Christina Voigt & Felipe Ferreira, ‘Dynamic Differentiation’: *The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement*, 5 *TRANSNAT’L ENVTL. L.* 285 (2016), <https://www.cambridge.org/core/journals/transnational-environmental-law/article/dynamic-differentiation-the-principles-of-cbdr-rc-progression-and-highest-possible-ambition-in-the-paris-agreement/59D247C2EFFAD77F980A4CA67B5C4ED3>.

29. Report, *supra* note 8, ¶ 28.

30. See, e.g., PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (2d ed., 2003); LUDWIG KRÄMER & EMANUELA ORLANDO, *ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: PRINCIPLES OF ENVIRONMENTAL LAW* (2018); see also the “ICEL Charts,” which set forth which principles have already been incorporated into international agreements, both regionally and in multilateral environmental agreements, and thus are accepted as international law. ICEL Charts are available at: INT’L COUNCIL OF ENVTL. L., ET AL., *Note on the Secretary-General’s Report, “Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment,”* (Dec. 10, 2018), [https://libraryguides.law.pace.edu/ld.php?content\\_id=45887976](https://libraryguides.law.pace.edu/ld.php?content_id=45887976).

31. U.N. Sustainable Development Goals (SDGs) were adopted in G.A. Res. 70/1 (Oct. 21, 2015); see also *Global Pact For The Environment*, IUCN ¶ 21-24, <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/global-pact-environment> (last visited May 5, 2019).

32. Yann Anguila & Jorge E. Viñuales, *A Global Pact For The Environment: Conceptual Foundations*, WILEY ONLINE LIB. (Feb. 14, 2019), <https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12277>.

33. *Id.*



Although the United States participated in the 2019 Nairobi consultations, the American government has not supported the pact. The United States was not among the 143 governments that initially demanded the Report.<sup>34</sup> On May 10, 2018, the United States voted against General Assembly Resolution 72/277, which launched the global pact consultations and mandated the Secretary General's Report, joined by Iran, the Philippines, Syria, Turkey and Russia.<sup>35</sup> The Trump Administration's antipathy toward the UN may make such opposition seem unexceptional, but the problems that American foreign policy has with international environmental cooperation extend beyond any single administration.

Why is the United States, at best, a reluctant participant in efforts to strengthen environmental law around the world? The United States is often viewed as an inactive leader in environmental conservation. As John C. Cruden noted in his December 10, 2018, presentation about the Secretary General's Report at the UN, the United States was indeed once the world's leader in developing environmental law, with adoption of the National Environmental Policy Act of 1969,<sup>36</sup> and the public consensus expressed in the first Earth Day, as well as each annual Earth Day celebration since 1970.<sup>37</sup> Along with France and Senegal, which embrace the right to a healthy environmental nationally,<sup>38</sup> the United States respects the environmental rule of law at home.<sup>39</sup> Even in governments with markedly different legal

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34. *Summary Of The First Substantive Session Of The Ad Hoc Open Ended Working Group Towards A Global Pact For The Environment*, IISD REP. SERV. (Jan 21, 2019), <http://enb.iisd.org/vol35/enb3501e.html>.

35. Mark Simonoff, *Explanation of Vote on a UN General Assembly Resolution Entitled "Towards A Global Pact For The Environment" A/72/L.51*, United States Mission to the United Nations (May 10, 2018), <https://usun.state.gov/remarks/8427>; see also *Summary of the First Substantive Session*, *supra* note 34.

36. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370m. The duty to prepare environmental impact statements is now a global obligation of governments. See U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 17, U.N. Doc. A/CONF.151/26 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*]; *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010, I.C.J. 135 (Apr. 20) <https://www.icj-cij.org/en/case/135> (declaring that the duty to prepare EIA is now customary international law).

37. *Strengthening Implementation of International Environmental Law* (UN Web TV broadcast Dec. 10, 2018), <http://webtv.un.org/watch/strengthening-implementation-of-international-environmental-law/5977795659001/?lan=english>.

38. See CONSTITUTION OF THE REPUBLIC OF SENEGAL, Title II Article 8; see also Matthew Parsons, *France Jumpstarts Initiative to Protect Environment*, HUM RTS WATCH (Sept. 19, 2007), <https://www.hrw.org/news/2017/09/19/france-jumpstarts-initiative-protect-environment>.

39. See generally David Y Chung et. al., *Environmental Law and Practice in the United States: Overview*, THOMSON REUTERS (Oct. 1, 2017), <https://content.next.westlaw.com/Doc>

systems, such as China, norms for protection for the environment have taken on an urgency in the face of acute pollution.<sup>40</sup> Realizing, like the United States did in 1969,<sup>41</sup> that it takes years to abate pollution and remediate its effects, China has responded positively, developing norms and policies, as well as practices for “ecological civilization.”<sup>42</sup> In China, investment in anti-pollution measures has seen a significant increase.<sup>43</sup> Where gaps exist in environmental protection, grass-roots organizations can help close these gaps in the future, as they do today and have done in the past. Some States will lag while others advance.

While the Secretary-General’s Report illustrates serious gaps in today’s systems of environmental law, it also documents the success that nations have attained in the years during which international environmental law has taken shape.<sup>44</sup> However, the future success of the Paris Agreement, and of the entire field of international environmental law, requires more than just enhanced efforts at international cooperation, inspired by grass-roots activism.

### III. AMERICAN AMBIVALENCE TOWARD INTERNATIONAL ENVIRONMENTAL LAW

Given the United States’ impact globally on the world’s environmental, economic and social sectors, and its leadership in founding the UN in 1945,<sup>45</sup> the United States should be expected to cooper-

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ument/I466099561c9011e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1#kh\_relatedContentOffset.

40. *Four Years After Declaring War on Pollution, China is Winning*, N.Y. TIMES (Mar. 12, 2018), <https://www.nytimes.com/2018/03/12/upshot/china-pollution-environment-longer-lives.html>.

41. RICHARD LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (2004).

42. Zhu Guangyao, *Ecological Civilization: A National Strategy for Innovative, Concerted, Green, Open and Inclusive Development*, OUR PLANET (U.N. ENV’T PROGRAM), <http://web.unep.org/ourplanet/march-2016/articles/ecological-civilization> (last visited May 2, 2019); see also Paul A. Barresi, *The Role of Law and the Rule of Law in China’s Quest to Build an Ecological Civilization*, 1 CHINESE J. OF ENVTL L., 9–36 (2017), <https://doi.org/10.1163/24686042-12340003>; Xiangbai He, *Setting the Legal Enabling Environment for Adaptation Mainstreaming into Environmental Management in China: Applying Key Environmental Law Principles*, 17 ASIA PAC. J. ENVTL. L. 23 (2014); Yuhong Zhao, *Environmental Principles in China*, in ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: PRINCIPLES OF ENVIRONMENTAL LAW, 424–36, (Ludwig Krämer & Emanuela Orlando eds., Vol. 6., 2018).

43. Lijun Wang, *The Changes of China’s Environmental Policies in the Latest 30 Years*, *PROCEDIA ENT’L SCI.*, <https://core.ac.uk/download/pdf/82319880.pdf> (last visited on May 5, 2019).

44. Report, *supra* note 8, at 5.

45. *The United States and the Founding of the United Nations August 1941-October*

ate constructively to ensure world order. In the past, similar to other governments, the United States has cooperated inconsistently, leading or lagging based on the policies of the administration at the time.<sup>46</sup> These policies have been molded by conceptions of realpolitik or ideology and rarely by environmental science.<sup>47</sup> At the national level, ecology has shaped legislation, and in turn also shaped treaties on biological diversity, climate change, and the oceans. Historically, however, such environmental legal developments are tangential to most national foreign policies.

Such an inchoate approach is ultimately unsustainable. In its place, a coordinated and inter-sectoral approach is required, similar to the one outlined by the United Nations Sustainable Development Goals.<sup>48</sup> The United States—in both its national legislation and its foreign policy—lacks a holistic approach for sustaining its ecological, economic and social programs. As different parts of the United States suffer from wild fires, droughts, floods, sea level rise, and other harmful impacts of climate change, the public and government will come to recognize the benefits of international cooperation.<sup>49</sup>

By perpetuating “business as usual” in the United States, the federal government invites severe disruptions associated with the effects of climate change. To break free from the thrall of inertia and maintaining business as usual, the U.S. legal framework will need to recognize the fundamental right to a healthy environment. It has done so in the past, whether with the abolition of slavery, in response to the Suffragettes movement, or with recognition of civil rights and environmental justice movements. In the wake of insufficient action under the Paris Agreement, the United States will need to return to foundational values as expressed in the National Environmental Policy Act,<sup>50</sup> and in turn reflect those values in its foreign policy.<sup>51</sup>

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1945, U.S. DEP'T OF STATE, <https://2001-2009.state.gov/r/pa/ho/pubs/fs/55407.htm> (last visited May 5, 2019).

46. See Brett Milano, *The Evolution of American Environmental Law from Nixon to Trump*, HARV. L. TODAY (Nov. 7, 2017), <https://today.law.harvard.edu/evolution-american-environmental-law-nixon-trump/>.

47. *Id.*

48. *About the Sustainable Development Goals*, U.N. SUSTAINABLE DEV. GOALS, <https://www.un.org/sustainabledevelopment/sustainable-development-goals/> (last visited Mar. 6, 2019).

49. *When Nature Strikes: Science of Natural Hazards*, NAT'L SCI. FOUND., [https://www.nsf.gov/news/special\\_reports/naturestrikes/index.jsp](https://www.nsf.gov/news/special_reports/naturestrikes/index.jsp) (last visited Mar. 6, 2019); see also NAT'L ACAD. SCIS., ENG'G, & MED., CLIMATE CHANGE: EVIDENCE AND CAUSES (2014).

50. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 101, 83 Stat.

Since the 1992 Earth Summit in Rio de Janeiro, U.S. foreign policy has retreated from its 1972 support for strengthening an environmental rule of law globally at the Stockholm Summit on the Human Environment. American negativity toward intergovernmental environmental cooperation is blatant in the policies and practices of the Trump Administration, as well as its renunciation of the Paris Agreement, along with many other basic environmental protection legal provisions.<sup>52</sup> However, American antipathy toward environmental norms in international law has persisted for around three decades. To understand the complexity of this long-standing failure of American support for international environmental law and policy, it is instructive to review briefly the gap that exists between domestic environmental law in the United States, and the duties that the United States has under international law for advancing environmental cooperation.

To understand American ambivalence toward international environmental law, it is necessary to venture into an historical thicket. What factors help explain why the United States has not been a strong global environmental partner with other nations, much less a leader, and what might be done to address this deficiency? U.S. law needs to reaffirm fundamental environmental rights, which already exist but need to be recognized and observed.<sup>53</sup> The contours of this exploration can be discerned through: (a) noting that concerns over President Donald Trump's withdrawal from the Paris Agreement, while alarming, are symptomatic of a deeper failing; (b) examining the policies that produced the field of environmental law and have evolved concepts of sustainable development; (c) critiquing the shortfalls in international environmental law, in light of the UN Secretary General's Report; (d) a review of the fundamental principles that should be proclaimed universally, (e) remedying short falls in environmental law, and (f) the essential role of a grounding norm, the right to the environment.

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852, 852 (1970).

51. See Nicholas A. Robinson, *The Most Fundamental Right*, 36 ENVTL. F. 46 (2019).

52. David M Konisky, Neal D Woods, *Environmental Federalism and the Trump Presidency: A Preliminary Assessment*, 48 PUBLIUS: THE J. OF FEDERALISM 3, 345-371 (Apr. 20, 2018), <https://doi.org/10.1093/publius/pjy009>.

53. In *Oposa v. Factoran*, Chief Justice Hilario Davide Jr., expressed this view, in the natural law traditions that guides much international law. G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

## IV. THE PARIS AGREEMENT, PRESIDENT TRUMP, AND AMERICAN DEFICIENCIES

Consternation accompanied the Trump Administration's decision to withdraw from the hard-won 2015 Paris Climate Change Accord. Across America, and internationally, there was dismay that the United States abandoned its global environmental leadership. States like Brazil signaled their willingness to also step outside of the Paris accord.<sup>54</sup> This high-profile retreat from international environmental law commitments was compounded by the federal government's concurrent roll-backs of domestic regulations implementing federal environmental statutes. Public debate over President Trump's neglect of America's international law obligations was also eclipsed by public controversies at the national level surrounding the renunciations by EPA Administrator Scott Pruitt and Interior Secretary Zinke. Domestic debates about Trump Administration policies all foreshadowed the White House's dismissal of a Special Report of the Intergovernmental Panel on Climate Change in October of 2018.<sup>55</sup>

Amidst the final campaigns for national Congressional midterm elections in November 2012, President Donald Trump chose not to respond to the Special Report of the Intergovernmental Panel on Climate Change that attributed the record-breaking floods, droughts, and coastal impacts from rises in sea level to the 1°C. rise in global atmospheric temperature since the pre-industrial era (1850-1900). The IPCC advised that the Paris Agreement's aim to contain any rise in temperature "well below" the 2°C level was insufficient to avert severe disruption globally.<sup>56</sup> The IPCC urged limiting temperature increases to below 1.5°C, but acknowledged that to do so would require

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54. Lisa Viscidi & Nate Graham, *Brazil Was a Global Leader on Climate Change. Now It's a Threat*, FOREIGN POL'Y (Jan. 4, 2019), <https://foreignpolicy.com/2019/01/04/brazil-wa-a-global-leader-on-climate-change-now-its-a-threat/>.

55. Oliver Milman, *Trump Quiet as the UN Warns of Climate Change Catastrophe*, THE GUARDIAN (Oct. 9, 2018), <https://www.theguardian.com/us-news/2018/oct/09/trump-climate-change-report-ipcc-response>.

56. Hoegh-Guldberg et. al., *2018: Impacts of 1.5°C Global Warming on Natural and Human Systems*, IPCC, 3 (Oct. 6, 2018), [https://www.ipcc.ch/site/assets/uploads/sites/2/2019/02/SR15\\_Chapter3\\_Low\\_Res.pdf](https://www.ipcc.ch/site/assets/uploads/sites/2/2019/02/SR15_Chapter3_Low_Res.pdf).

“unprecedented changes” in all aspects of socio-economic life.<sup>57</sup> Rather than heeding this advice, President Trump reaffirmed his decisions to subsidize coal production and ignore global warming.

Despite unprecedented wildfires and severe storms across the United States, its President and its Congress have chosen to retreat from even modest legal measures, contributing to public angst over Trump Administration policies and the inadequacy of all the Paris Agreement’s Nationally Determined Commitments to abate greenhouse gas emissions. Moreover, the debates associated with the Paris Agreement have tended to distract attention from the wider patterns of the federal government’s careless disregard for stewardship of nature. While all nations are deficient in their protection of the climate and wider environment, Trump’s withdrawal from the Paris Accord is a violation of the United States’ duties under international law to cooperate to protect the Earth’s oceans, atmosphere, ice caps, and ecological systems.<sup>58</sup> This breach of international law in turn invites scrutiny of other American deficiencies. Arguably, over the past three decades, the United States has contributed to many of the gaps in international environmental law identified in the UN Secretary General’s Report. Given America’s economic and technological prowess, this should not have occurred.

The U.S. government has sporadically been a leader in environmental protection, as when in the late 19<sup>th</sup> century it pioneered protection of national parks and wildlife, in the 1970s when the first generation of laws to abate acute pollution emerged, when it designed and deployed environmental impact assessments, or currently at the state level with California’s innovations in decarbonization. These celebrated periods of leadership have masked the far wider and longer periods of American “business as usual,” which incrementally have degraded natural systems in the United States and abroad. In order to fully appraise the significance of the President Trump’s withdrawal from the Paris Agreement, it is instructive to take a long look at America’s shortcomings in environmental protection.

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57. *Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C*, IPCC (Oct. 8, 2018), <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ipcc-special-report-on-global-warming-of-1-5c-approved-by-governments/>. To attain acceptable temperature levels, by 2030 global carbon dioxide emissions need to fall to 45% of 2010 levels, and by 2050 it will be necessary to scrub the greenhouse gases from the atmosphere by vastly wider use of photosynthesis by plants (from marine phytoplankton to forests). *Id.*

58. United Nations Conference on the Human Environment (Stockholm Conference), A/CONF.48/14/REV.1 (June 5-16, 1972), <https://sustainabledevelopment.un.org/milestones/humanenvironment>.

Neglect of governmental duties in the United States to protect life and liberty from environment devastation has many antecedents. Unbridled exploitation of forests in the 19<sup>th</sup> century led to establishing the National Forest Service.<sup>59</sup> Desertification during the era of the “Dust Bowl” in the 1930s devastated vast areas in the Midwest region of the nation and required years of diligent work by the Soil Conservation Service to end and rehabilitate damaged areas.<sup>60</sup> Acute air and water pollution following World War II was abated only by the enactment of the Clean Water Act<sup>61</sup> and Clean Air Act,<sup>62</sup> and their implementation through the partnership of federal, state, and tribal environmental agencies. The vast dead zone at the mouth of the Mississippi River basin testifies to the continuing failure to abate a large amount of water pollution, and the nation’s growing numbers of asthma victims are sentinels to persistent and growing air pollution. Efforts to contain chemical contamination continue to be problematic and the warnings of Rachel Carson in *Silent Spring*<sup>63</sup> have largely not been heeded. As the UN reports revealed, similar patterns of environmental degradation are found around the world,<sup>64</sup> where governments are slow to enact and apply their own environmental laws.

From the historical perspective, President Trump’s withdrawal from the Paris Agreement is not exceptional. As evidence of climate-induced destruction mounts, the federal government is likely to flip-flop again as growing political pressure demands protection from a number of environmental perils. Governmental protection of the environment and public health is a policy “football,” which is to be used in the games of economic and political competition. Repeatedly, the “rule of law” about environmental conservation is sacrificed to serve ends that governments find more compelling. Until government is obliged to respect environmental protection duties as fundamental, the environmental home for the economy is at risk.

What is necessary is acknowledgment that humans have a fundamental right to a healthy environment, and the government has duties to ensure that environmental liberties are secured. Political flip

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59. *Theodore Roosevelt and Conservation*, NAT’L PARK SERV. (Nov. 16, 2017), <https://www.nps.gov/thro/learn/historyculture/theodore-roosevelt-and-conservation.htm>.

60. *More Than 80 Years Helping People Help the Land: A Brief History of NRCS*, NAT’L RESOURCES CONSERVATION SERV., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143\\_021392](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392) (last visited May 5, 2019).

61. 33 U.S.C. § 1151 (1948).

62. 42 U.S.C. § 7401 (1970).

63. RACHEL CARSON, *SILENT SPRING* (1962).

64. UNEP Geo-5, *supra* note 3.

flops result from denial of the right to the environment. The history of human abuse of the environment for short term gain will not end until humans acknowledge that this exploitation is not a right, but is a privilege that is constrained by the right to the environment. Humans, and their governments, learned this lesson with their comparable struggle to end human slavery. What are these rights?

#### V. SHAPING A LAW FOR NATURE

The steps that led governments to adopt the Paris Agreement reflect both progress toward stronger environmental protection, and the inadequacy of the steps taken. As the UN Secretary General's Report recounts, The Paris Agreement is the most recent product of deliberations that began during 1990-92, seeking agreement for global policies for protection of the atmosphere. Consensus from the deliberations was expressed both in "soft law" policy in *Agenda 21*<sup>65</sup> and in the "hard law" treaty obligations of the United Nations Framework Convention on Climate Change (UNFCCC).<sup>66</sup> Implementation of both stalled during 1992-2012 in the deliberations of the UN Commission on Sustainable Development for *Agenda 21* and of the Conference of the Parties for the UNFCCC.

The milestones represented by *Agenda 21* and the UNFCCC were only possible because of the prior century of environmental decision-making reflected in legislation and treaties for conservation of nature and protection of the ambient environment. In 2015, the UN General Assembly adopted seventeen Sustainable Development Goals, extending the general approach of *Agenda 21* and replacing the Commission on Sustainable Development (SDGs) with a High-Level Political Forum to convene at UN headquarters annually to agree on steps to attain the SDGs by 2030.<sup>67</sup> That same year, States forged the Paris Agreement.<sup>68</sup> It is in these two parallel settings that governments annually confer to gauge how and when they can implement the IPPC's advice.

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65. See U.N. Conference on Environment and Development [hereinafter UNCED], *Agenda 21*, ¶¶ 9.1–9.35, U.N. Doc. A/CONF.151/26 (Vol. II) (June 13, 1992), as reprinted in Nicholas A. Robinson, *Agenda 21 & The UNCED Proceedings* 137-51 (Vol. 4, 1992) (containing the *travaux préparatoires* of UNCED).

66. See also DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 86 (2010). Hard law has legally binding force, while soft law refers to non-binding international instruments. *Id.* at 99.

67. UN General Assembly Res. 70/1, *supra* note 31.

68. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.



The United States, in either the UN General Assembly or other multilateral gatherings, has only modestly supported the formation of international environmental laws. In 1973, with the encouragement of the International Union for the Conservation of Nature (IUCN), the State Department led the negotiation of the Washington Convention on the International Trade in Endangered Species.<sup>69</sup> However, in 1995 the United States hosted an international negotiation to agree on an end to the discharge of pollutants from rivers into the oceans, but the United States refused to consider a new treaty, endorsing only a modest declaration of “soft law” policy.<sup>70</sup>

The United States was once a leader in formulating global environmental policy. In 1972, Secretary of State William P. Rogers, received the Report of the State Department’s Advisory Committee on the Human Environment, with detailed recommendations for action on natural resources, pollution, education, governmental organization, and endorsed the draft of the Stockholm Declaration.<sup>71</sup> A decade later, the State Department, together with the President’s Council on Environmental Quality, led an inter-agency study at the direction of President Jimmy Carter that prepared the nation for the environmental challenges of the 21<sup>st</sup> century.<sup>72</sup> This report received wide-

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69. IUCN’s Commission on Environmental Law conferred with Congress on the adoption of the US Endangered Species Act, and with the urging of Congressional leaders, the US State Department agreed to host a diplomatic conference to negotiate CITES, as a way to stifle the illicit market demand for sale of endangered species. See BARBARA LAUSCHE, *WEAVING A WEB OF ENVIRONMENTAL LAW* (2008).

70. Despite the prohibition on discharge of land-based pollutants under the UN Convention on the law of the Sea, and under the US domestic law in the Clean Water Act, and despite recommendations agreed to in Agenda 21 (1992), Chapters 17, 33, and 34, at a conference of European and North American States, held in Washington, D.C., October 23 to 19 November, 1995, the State Department supported adoption of the Washington Declaration on Protection of the Environment from Land-Based Activities. See UNEP, *Washington Declaration on Protection of the Environment from Land-Based Activities* (1995), <https://wedocs.unep.org/bitstream/handle/20.500.11822/13421/WashingtonDeclaration.pdf?sequence=1&isAllowed=y>.

In retrospect the State Department forfeited an opportunity to prevent plastic wastes from polluting the world’s seas, and setting standards for controlling pollution running off from the land. In doing so, the State Department exercised its discretion to disregard existing federal environmental law and to substitute its own foreign policy judgment that States should decide on issues of land-based sources of marine pollution in their domestic law, not via a treaty. This policy ignored the growing scientific evidence of “dead zones” at the mouths of many rivers around the world, and tuned back calls for more robust international cooperation to end this degradation.

71. U.S. DEP’T. OF STATE, *STOCKHOLM AND BEYOND: SECRETARY OF STATE’S ADVISORY COMMITTEE ON THE 1972 UNITED NATIONS CONFERENCE ON THE HUMAN ENVIRONMENT* (U.S. GOV’T PRINTING OFFICE, 1972).

72. GERALD O. BARNEY, *GLOBAL 2000: THE REPORT TO THE PRESIDENT – ENTERING THE TWENTY-FIRST CENTURY* (SEVEN LOCKS PRESS 1991) (1988).

spread attention when published as *The Global 2000: Report to the President: Entering the Twenty-First Century*.<sup>73</sup> *The Global 2000 Report* is a comprehensive assessment of the inter-locking threats to the environment, and called for “vigorous, determined new initiatives” to make addressing them a priority:

If present trends continue, the world in 2000 will be more crowded, more polluted, less stable ecologically, and more prone to disruption than vulnerable to disruption than the world we live in now... Atmospheric concentrations of carbon dioxide and ozone depleting chemicals are expected to increase at rates that could alter the world’s climate and upper atmosphere significantly by 2050... An era of unprecedented cooperation and commitment is essential.<sup>74</sup>

State Department leadership in subsequent administrations chose to set aside this inter-agency assessment, and acted selectively, if at all, on its recommendations.<sup>75</sup>

Ever since the UN’s 1972 Stockholm Conference on the Human Environment, the United States has treated environmental decisions in *ad hoc*, transactional, and inconsistent ways. No coherent approach to the biosphere was evident, which is in contrast to the State Department’s “Global 2000 Report.” At the 1992 Rio Earth Summit, the United States and other nations opposed any attempt to quantify the costs of implementing *Agenda 21* and stripped the cost estimates from the text.<sup>76</sup> The State Department disputed many of the principles in the 1992 Rio Declaration, especially the “Precautionary Principle,” which is ironic since Secretary of State Baker’s support for the

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73. *The Global 2000: Report to the President: Entering the Twenty-First Century* contained three volumes: an executive summary, the report, and extensive technical reports supporting the findings. See *Editions of the Global 2000: Report to the [US] President*, Gerald O. Barney Professional Papers (Apr. 22, 2012), <http://www.geraldbarney.com/G2000Page.html>. An estimated 1.5 million copies in nine different languages were published and sold. *Id.*

74. Gerald O. Barney, Council on Env’tl. Quality & Dep’t. of State, *The Global Report to the President: Entering the Twenty-First Century*, 2–4, [http://www.geraldbarney.com/Global\\_2000\\_Report/G2000-Eng-GPO/G2000\\_Vol1\\_GPO.pdf](http://www.geraldbarney.com/Global_2000_Report/G2000-Eng-GPO/G2000_Vol1_GPO.pdf) (last visited May 5, 2019).

75. *The Global 2000 Report* was subsequently republished as a single volume by the study director, Gerald O. Barney, in 1988, and a forward by Jimmy Carter was added in 1991. Gerald O. Barney, *Global 2000: The Report to the President – Entering the twenty-First Century* (Seven Locks Press 1991) (1988).

76. These cost estimates are shown as annotations in the edition of *Agenda 21* published with the *travaux preparatoires*, in Nicholas A. Robinson, *Agenda 21 & The UNCED Proceedings* (Vol. 4, 1992).

UNFCCC was based on the Bush Administration's "no regrets" policy.<sup>77</sup> Secretary Baker's argument, for President George H.W. Bush, was that where good reasons exist to take an action, those actions should be undertaken as a kind of insurance against the worst case predictions of climate change.<sup>78</sup> This prudent "no regrets" policy was not continued in subsequent State Departments.

Policy flip-flops before and after the year 2000 have rendered American environmental foreign policy both ineffective and inconsistent. This pattern is illustrated by a survey of several issues. Cooperation in the scientific studies and stewardship of Antarctica has been sustained, including agreement on the protocol to preclude mining.<sup>79</sup> However, U.S. engagement through the Arctic Council has not produced a consistent stewardship regime, and environmental cooperation for protected area habitats and species across the Bering Strait has stalled.<sup>80</sup> In 2017, Russia and the United States agreed on designation of new shipping channels through the International Maritime Organization.<sup>81</sup> Air pollution controls for the precursors of acid rain under the Clean Air Act have been reduced significantly,<sup>82</sup> but not ended, while the Clean Air Act's mandate for action to cooperate to end air pollution internationally awaits implementation. The United States now suffers from acid rain from Asia, and does nothing to extend the effect of the Geneva Convention on Long Range Transboundary Air Pollution to other regions. The United States became a State member of the IUCN under President Reagan, and hosted the IUCN World Conservation Congress in Hawaii under President Obama, but while the National Park Service and the U.S. Fish & Wildlife Service have been exemplary in their international cooperation through IUCN, other agencies have not. The State Department

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77. CHRISTOPHER J. BAILEY, *US CLIMATE CHANGE POLICY* 56 (2016); see also Morgan Kelly, *Baker, 61st U.S. Secretary of State, Calls for Conservative Action on Looming Climate Crisis*, PRINCETON UNIV. (May 12, 2017), <https://www.princeton.edu/news/2017/05/12/baker-61st-us-secretary-state-calls-conservative-action-looming-climate-crisis> (discussing and quoting Secretary Baker's 2017 address).

78. Kelly, *supra* note 77.

79. Charlotte Connelly, *How Antarctica Became Home to a New Kind of Science Diplomacy*, THE GUARDIAN (July 1, 2017), <https://www.theguardian.com/science/blog/2017/jul/01/how-antarctica-became-home-to-a-new-kind-of-scientific-diplomacy>.

80. Betsy Baker & Brooks Yeager, *Coordinated Ocean Stewardship in the Arctic: Needs, Challenges and Possible Models for an Arctic Ocean Coordinating Agreement*, *TRANSNAT'L ENVTL L.*, 4(2), 359-394 (Sept. 2, 2015).

81. Int'l Maritime Org., *NCSR 5/3/7* (Nov. 17, 2017), [https://www.navcen.uscg.gov/pdf/IMO/NCSR\\_5\\_3\\_7.pdf](https://www.navcen.uscg.gov/pdf/IMO/NCSR_5_3_7.pdf).

82. NAT'L ACID PRECIPITATION ASSESSMENT PROGRAM, *Report to Congress: An Integrated Assessment*, 1 (2005).

makes funding for IUCN a low priority. Since the late 1970s, the State Department also has been tepid in its support of the United Nations Environment Programme. In 1982, the State Department directed the U.S. Mission to the UN to cast the only negative vote against adoption of the World Charter for Nature in the UN General Assembly.<sup>83</sup> The U.S. State Department, and successive Presidents, have failed to secure Congressional approval of either the UN Convention on the Law of the Sea or the Convention on Biological Diversity, with the result that the United States is left outside of ongoing negotiations that are critical to U.S. environmental and other strategic interests. A variety of examples exist, but this is sufficient to indicate that President Trump's withdrawal from the Paris Agreement, even so soon after the United States accepted the Paris Agreement, is not exceptional.

From a juridical perspective, what makes Trump's retreat from the Paris Agreement remarkable is that it goes beyond policy to affront the norms that States are expected to observe as they cooperate internationally to the development of international law, which violates the principle of non-regression, noted in the UN Secretary General's Report.<sup>84</sup> Additionally, it runs counter to the expectation that once adopted, environmental laws are to be implemented and extended. The Trump Administration's behavior contravenes a century of progressive domestic law-making, nature conservation, and environmental protection. Today, environmental legislation is a staple in most nations, encouraged by the UN's Montevideo Programme of Action, which began in 1981.<sup>85</sup>

Since environmental law contemplates whether reforms will be instituted progressively to abate pollution and safeguard ecosystems,<sup>86</sup> any rejection of cooperation such as through the Paris Agreement or other treaties, is a denial of this basic principle. The foundation of environmental law is the commitment to restore and maintain the biosphere.<sup>87</sup> Thus, regression, or official acts of backsliding, are not permitted. Environmental Law is still an incomplete body of law,

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83. G.A. Res. 37/7, World Charter for Nature (Oct. 28, 1982).

84. Report, *supra* note 8, ¶ 22.

85. See *The Montevideo Programme*, U.N. ENV'T, <https://www.unenvironment.org/pt-br/node/1167> (last visited Mar. 6, 2019).

86. ROBERT F. HOUSMAN, *THE GREENING OF INDUSTRIAL ECOSYSTEMS* 108-22 (1994).

87. J.T. Trevors and M.H. Saier Jr., *Environmental Legislation: A Necessity in Preserving Our Common Biosphere?* WATER, AIR, AND SOIL POLLUTION Vol. 205, Supp. 1, 11-13 (2010).

as the Secretary General's Report makes clear.<sup>88</sup> Its provisions do not yet fully correlate legal stewardship with human impacts on the environment. This area of law lacks the full range of laws needed to avert or manage these impacts, which economists often neglect as "externalities."

Notwithstanding its limitations, environmental law has established a wide array of effective methodologies that do protect the environment.<sup>89</sup> Most governments have yet to deploy these policies, laws, and administrative methods at the scale needed to secure the desired level of environmental protection. For example, after a century of experience observing nature conservation laws, in 2015 the UN General Assembly recognized the urgency of implementing these obligations in SDG 15.<sup>90</sup> The slowness of adhering to or implementing environmental norms is fundamentally different from retreating back into official acts accepting or encouraging environmental degradation.

The principle of enacting legal reforms that progressively protect the environment was born in 19<sup>th</sup> century laws in Europe and the United States to conserve nature. Conservation movements emerged from the "grass roots," as domestic responses to the excesses of the industrial evolution and unsustainable exploitation of nature. There were relatively few advocates for creating international environmental law before World War II. Conservationists, including early Audubon Societies, did campaign to end the pillage of wild birds for their plumage, and the Migratory Bird Treaty Act of 1918 was adopted.<sup>91</sup> However, most conservation law reforms were advocated at the

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88. Report, *supra* note 8, ¶¶ 23–70.

89. Nicholas A. Robinson & Lal Kurukulasuriya, *Training Manual on International Environmental Law*, PACE L. SCHL., <https://digitalcommons.pace.edu/lawfaculty/791/> (last visited May 5, 2019).

90. Owen Gaffney, *Sustainable Development Goals: Improving Human and Planetary Wellbeing*, GLOBAL CHANGE, Issue 82 (May 2014), <http://www.igbp.net/download/18.62dc35801456272b46d51/1399290813740/NL82-SDGs.pdf>. Sustainable Development Goal 15, for example, sets the goal to "[p]rotect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss." See *15: Life on Land*, U.N. SUSTAINABLE DEV. GOALS, <https://unstats.un.org/sdgs/report/2016/goal-15/> (last visited Mar. 6, 2019).

91. The Migratory Bird Treaty Act of 1918 (MBTA), codified at 16 U.S.C. §§ 703–712 (although § 709 is omitted), is a United States federal law, first enacted in 1916 to implement the convention for the protection of migratory birds between the United States and Great Britain (acting on behalf of Canada). See *Migratory Bird Treaty Act of 1918*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/laws/lawsdigest/migtrea.html> (last visited Mar. 6, 2019). Federal enforcement was upheld in *Missouri v. Holland*, 252 U.S. 416 (1920). One of the policies of President Trump's Interior Department, announced in 2018, was to no longer enforce the MBTA against companies that were responsible for bird deaths, as occurred in the Deep Water Horizon case. See David Yarnold, *If You Care About Birds, Protect the*

domestic level, whether in the United States or abroad. Natural scientists and conservationists were aware of nature degradation around the world, but international law provided no way to address trends that recurred globally. Meanwhile, the scientific discipline of ecology was born at the outset of the 20<sup>th</sup> century, but its findings did not command a wide audience until after WWII.

## VI. EMERGENT INTERNATIONAL LEADERSHIP

The movement to build international law for the environment had developed roots in the first half of the 20<sup>th</sup> century, interrupted by World Wars I and II. These roots had successfully advocated in the United States. On March 25, 1948, Fairfield Osborn, president of the New York Zoological Society, published *Our Plundered Planet*.<sup>92</sup> Osborn explained that the threat to Earth's natural systems was greater than that of nuclear weapons.<sup>93</sup> Osborn called for long-range planning and nature conservation stewardship.<sup>94</sup> Later that year, on October 5, 1948, Osborn, along with Harold Coolidge and other American conservationists, gathered in France at Fontainebleau.<sup>95</sup> They joined 18 States, 107 national organizations for silviculture, hunting fishing, and nature conservation organizations, and 7 international organizations, such as the recently constituted UN Educational, Scientific and Cultural Organization (UNESCO), to establish a new and unique international organization: the "International Union for the Protection of Nature."<sup>96</sup> In 1956, the Union's governing assembly changed its name to the International Union for the Conservation of Nature & Natural Resources (IUCN).<sup>97</sup> In 1961, IUCN launched the World Wildlife Fund (WWF), which now has many national WWF organizations.<sup>98</sup> IUCN's Members from the United States, include major non-governmental organization like WWF and the Wildlife Conser-

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*MBTA*, AUDUBON, Spring 2018, at 8, <https://www.audubon.org/magazine/spring-2018/if-you-care-about-birds-protect-mbta>.

92. HENRY FAIRFIELD OSBORN, *OUR PLUNDERED PLANET* (1948).

93. *Id.*

94. *Id.*

95. Frits Hesselink and Jan Čerovský, *Learning to Change the Future: A Bird's-Eye view of the history of the IUCN Commission on Education and Communication*, IUCN, 1 (Sept. 30, 2008), <https://portals.iucn.org/library/sites/library/files/documents/2008-098.pdf>.

96. See Harold J. Collidge, Jr., *Notes for the Conference for the Establishment of the International Union for the Protection of Nature: Relationship of the Proposed UNESCO Conference to UNSCCUR*, UNESCO (Oct. 1, 1948), <https://unesdoc.unesco.org/ark:/48223/pf0000154737>.

97. Hesselink and Čerovský, *supra* note 95.

98. *Id.*

vation Society, and federal agencies such as the National Park Service and the US Fish and Wildlife Service.<sup>99</sup> In 1963, with the leadership of Elisabeth Haub, Wolfgang E. Burhenne, Cyrille de Klemm and others, IUCN established its Environmental Law Programme.<sup>100</sup>

At its inception, IUCN's governing statutes explicitly recognized that "conservation of nature and natural resources involves the preservation and management of the living world, the natural environment of humanity, and the earth's renewable natural resources on which rests the foundation of human civilization."<sup>101</sup> The statutes also foresaw that:

[T]he increasing impoverishment of natural resources will inevitably result in a lowering of human standards of living but the trend need not be irreversible provided that people fully come to recognize their close dependence upon these resources and to the recognition of the need to preserve and manage them in a way that is conducive to the peace, progress and prosperity of humanity.<sup>102</sup>

Toward these ends, IUCN's statutes provide, *inter alia*, for building the capacity to address legal aspects of conservation at local, regional, national, and global levels of governance, to influence national and international legal and administrative regimes and policies, and to contribute to the preparation and implementation of international agreements for conservation of nature and natural resources.<sup>103</sup>

IUCN is a unique, hybrid international organization, composed of sovereign States, ministries within States, about 1,000 international and national environmental non-government organizations, and institutions representing indigenous peoples and their nations.<sup>104</sup> The UN General Assembly invited IUCN to establish a permanent Observer Mission to the UN and participate in its work as an inter-

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99. MARTIN HOLDGATE, *THE GREEN WEB: A UNION FOR WORLD CONSERVATION* (EARTHSCAN 2013) (1999) (setting forth the history of IUCN).

100. See Lausche, *supra* note 69 (setting forth the history of the IUCN Environmental Law Programme).

101. IUCN, Statutes, Including Rules of Procedure of the World Conservation Congress, and Regulations 1 (Statutes last amended Sept. 10, 2016, Regulations last amended Feb. 9, 2017), [https://www.iucn.org/sites/dev/files/iucn\\_statutes\\_and\\_regulations\\_september\\_2016\\_final-master\\_file.pdf](https://www.iucn.org/sites/dev/files/iucn_statutes_and_regulations_september_2016_final-master_file.pdf).

102. *Id.* pmb1.

103. *Id.* at 2.

104. *About the IUCN*, IUCN, <https://www.iucn.org/about> (last visited May 5, 2019).

governmental organization.<sup>105</sup> IUCN is the only specialized environmental voice in the UN General Assembly. IUCN has six expert commissions, one of which is the World Commission on Environmental Law.<sup>106</sup> UNESCO helped to finance the IUCN from its inception to 1954.

As early as 1949, when Members of the new United Nations deliberated at Lake Success in Long Island, New York, about the rights and duties of States, there was an early discussion, in which the IUCN took part, of the need to provide state obligations for nature conservation.<sup>107</sup> In September 1946, President Harry Truman called upon the new UN to convene a scientific conference on conservation of nature and natural resources. In 1948, the UN convened its first world scientific conference, with the assistance of the recently formed UN Educational, Scientific and Cultural Organization (UNESCO), entitled: the “Scientific Conference in the Conservation and Utilization of Resources.”<sup>108</sup> One speaker to the Conference summed up its debates: “Nature’s plentifulness is a heritage not to be squandered with impunity; it must be conserved for future generations or its bankruptcy will extinguish us all.”<sup>109</sup> Inspired by the Universal Declaration on Human Rights, which had been adopted on December 10, 1948, the Conference heard calls for proclaiming a legal duty to protect the environment, but doing so was a lower priority compared to the UN’s challenges for establishing the legal framework for world order after World War II.<sup>110</sup> Another missed early opportunity for action was the 1961 UN Conference on New Sources

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105. *Permanent Observer Mission to the UN*, IUCN, <https://www.iucn.org/regions/washington-dc-office/our-work/permanent-observer-mission-un>.

106. See Nicholas A. Robinson, *IUCN as Catalyst for a Law of the Biosphere: Acting Globally and Locally*, 35 ENVTL. L. 249 (2005), <https://digitalcommons.pace.edu/lawfaculty/368/>. IUCN helped to establish the Convention on the International Trade in Endangered Species (CITES), the Bonn Convention on Migratory Species (CMS), and the Convention on Biological Diversity (CBD), and contributed to many other conventions and international agreements. *Id.* at 266–67.

107. *United Nations Conference on the Conservation and Utilization of Resources*, INT’L J. OF SCI., 617 (April 17, 1948), <https://www.nature.com/articles/161617a0.pdf>.

108. UNESCO provided the conference secretariat. See UNESCO DEP’T OF EXACT AND NAT. SCIS., *The Scientific Conference on Resource Conservation and Utilization* (Nov. 10, 1948), <http://unesdoc.unesco.org/images/0015/001547/154751eb.pdf>.

109. See IUCN, *Proceedings of the United Nations Scientific Conference on the Conservation and Utilization of Resources* (1950); see also M.G. CHITKARA, AIR POLLUTION (2012), [http://www.vedamsbooks.com/product\\_detail\\_print.htm?pid=79309](http://www.vedamsbooks.com/product_detail_print.htm?pid=79309) (citing the delegate’s statement).

110. *Summary Records and Documents of the First Session including the Report of the Commission to the General Assembly*, [1949] 1 Y.B. INT’L L. COMM’N, U.N. Doc. A/CN.4/Ser.A/1949, [http://legal.un.org/ilc/publications/yearbooks/english/ilc\\_1949\\_v1.pdf](http://legal.un.org/ilc/publications/yearbooks/english/ilc_1949_v1.pdf).



of Energy, which was held in Rome and urged the use of solar, wind geothermal, and tidal energy sources, as means to prevent air pollution.<sup>111</sup>

International recognition of a right to the environment first appeared in 1972 when the IUCN's Law Commission members participated in the 1972 UN Stockholm Conference on the Human Environment, which adopted the Stockholm Declaration.<sup>112</sup> The Declaration's preamble stated that:

Man is both creature and molder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth. In the long and tortuous evolution of the human race on this planet a stage has been reached when, through the rapid acceleration of science and technology, man has acquired the power to transform his environment in countless ways and on an unprecedented scale. Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself.<sup>113</sup>

In light of these and other considerations, the Stockholm Conference proclaimed an environmental right and duty in its first principle, which was based on the assumption that the Earth's environment was stable and capable of being sustained: "Man 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."<sup>114</sup> Principle 2 provided that: "The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future gener-

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111. *New Sources of Energy and Energy Development; Report On The United Nations Conference On New Sources Of Energy: Solar Energy, Wind Power, Geothermal Energy*, U.N. (1962).

112. U.N. Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, 3, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972), <http://www.un-documents.net/aconf48-14r1.pdf>.

113. *Id.*

114. *Id.* at 4.

ations through careful planning or management, as appropriate.”<sup>115</sup> These principles set the stage for debates about how to more clearly recognize a right to the environment.

The most cited provision of the 1972 Stockholm Declaration is Principle 21, governing state obligations and rights. Principle 21, restated in 1992 as Principle 2 of the Rio Declaration on Environment and Development, has been more commonly cited than the human rights about life within the environment in Principles 1 and 2. Principle 21 provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental 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.<sup>116</sup>

States have struggled to find the balance between their right to develop natural resources, and their duty to ensure that they do not harm the environment at the same time. This tension led to debates about “environment and development” at the 1992 Rio Earth Summit,<sup>117</sup> and was resolved in principle by accepting the doctrine of “sustainable development,”<sup>118</sup> which came to be expressed in the 2015 UN Sustainable Development Goals.<sup>119</sup> The gathering associated climate change now raise the prospect that policies and laws for sustainable development are insufficient. Both the environment and development are at risk.

As the five IPCC Assessment Reports have documented, and the 2018 Report “Global Warming 1.5°C” summarizes, it is evident that the assumptions that States could avert harming each other and destabilizing the biosphere have been proven wrong.<sup>120</sup> The scientific evidence confirms that States are today in breach of their duty to ensure that the activities within their jurisdiction and control do not harm the

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115. *Id.*

116. *Id.* at 5.

117. Benjamin Goldman, *Equity and the 1992 Rio Earth Summit*, 4 *FORDHAM ENVR. L. Rev.* 1, 1-2 (2011).

118. *Id.* at 4.

119. UN General Assembly Res. 70/1, *supra* note 31.

120. See *Global Warming 1.5 Degrees Celsius*, IPCC, <https://www.ipcc.ch/sr15/chapter/summary-for-policy-makers/> (last visited on May 5, 2019).

climate and shared atmosphere, and in turn the environments of other States.<sup>121</sup> States also routinely pollute one another with acid rain and disrupt the migration of species across one another's territories.

#### VII. THE RIGHT TO THE ENVIRONMENT AS AN EMERGENT REMEDY

Would universal recognition of the right to the environment lead governments to take their duties seriously under either Principle 21, or the Paris Agreement? Must the right to the environment be stated more categorically than it was in the 1972 Stockholm Declaration?<sup>122</sup> Could taking the right to the environment seriously induce States to adopt, for climate change, the same tool they established under the Convention for the International Trade in Endangered Species (CITES), which is the ability to ban trade with States who do not observe their CITES duties?<sup>123</sup> At the national level, would injured parties have a claim against governments that violate their duty to secure the right to a healthy environment?

The Inter-American Court of Human Rights has answered these questions affirmatively. In its Advisory Opinion OC-23/17, requested by Colombia, the Court found that there is an autonomous right to the environment.<sup>124</sup> The Court further ruled that individuals could seek redress for violations of this right through the Court's human rights procedures.<sup>125</sup> Similar issues are presented by the litigation of *Juliana v. United States*,<sup>126</sup> in the federal district court in Oregon, asserting that rights secured under due process of law are being violated by the federal government's failure to address climate change.<sup>127</sup> There are historical foundations to support the presence of the right to the environment as a component of the rule of law, and due process

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121. *Id.*

122. Declaration of the United Nations Conference on the Human Environment, June 16, 1972, A/CONF.48/14/REV.1.

123. Convention on International Trade in Endangered Species of Wild Fauna and Flora, 993 U.N.T.S. 243 (Mar. 3, 1973).

124. The Environment and Human Rights (Arts. 4(1) and 5(1) American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017), [http://www.corteidh.or.cr/docs/opiniones/seriea\\_23\\_esp.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf).

125. *Id.*

126. *Juliana v. United States*, No. 6:15-cv-01517-TC (D. Or. June 8, 2019).

127. See Barry E. Hill, *No Ordinary Lawsuit*, 35 ENVTL. F. 27 (2018), <https://www.eli.org/the-environmental-forum/no-ordinary-lawsuit>.

of law, ever since Magna Carta.<sup>128</sup> Quite independently, 174 nations have recognized an explicit right to a healthy environment in their national constitutions.<sup>129</sup>

While there is abundant evidence in state practice to support a finding that the right to a healthy environment is widely recognized, the scope and application of that right is still uncertain. When the UN World Commission on Environment and Development (“Brundtland Commission”) published its seminal report in 1987, it observed “The Earth is one but the world is not. We depend on one biosphere for sustaining our lives. Yet each community, each country, strives for survival and prosperity with little regard for its impact on others.”<sup>130</sup> This Commission envisioned the need for more effective legal norms to coordinate national behavior, and included an Annex on “Legal Principles.”<sup>131</sup> The Commission described the Earth’s interlocking environmental crisis: “Our human world of five billion must make room on a finite environment for another human world. The population could stabilize at between eight billion and fourteen billion” between 2000 and 2100.<sup>132</sup> In 2018, the world’s population is seven and a half billion people, and the need for a coherent regime to guide international cooperation toward sustainable development is widely acknowledged.<sup>133</sup>

By the time nations convened in Rio de Janeiro for the 1992 “Earth Summit,” there was wide agreement on what States needed to do to stop the trends of environmental degradation. The UN Conference on Environment and Development was the largest summit meet-

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128. See Nicholas A. Robinson, *The Most Fundamental Right*, 36 ENVTL. F. 46 (2019), <https://www.eli.org/the-environmental-forum/most-fundamental-right>; Nicholas A. Robinson, *The Charter of the Forest: Evolving Human Rights*, in NATURE, MAGNA CARTA AND THE RULE OF LAW 311 (Daniel Magraw et al. eds., 2014).

129. See DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT* (2012).

130. WORLD COMM’N ON ENV’T & DEV., *REPORT OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT: OUR COMMON FUTURE 1* (1987), <http://www.un-documents.net/our-common-future.pdf> (last visited May 5, 2019).

131. *Id.*

132. *Id.* at 13.

133. The scope of Earth’s growing environmental crises has been highlighted often. See, e.g., Time Mag., Jan. 2, 1989 (featuring neither a man nor a woman of the year, but instead “Planet of the Year: Endangered Earth”). Across all parts of the Earth, the summer of 1988 produced scorching temperatures, droughts, floods, forest fires, polluted beaches, and other environmental problems. The editors concluded that “it was no longer enough just to describe familiar problems one more time.” They convened thirty-three world experts at the National Center for Atmospheric Research in Boulder, Colorado, and produced a 33-page issue of TIME which asked “What on Earth are we doing?” and scoping out “What nations should do.”

ing ever convened, with all nations represented.<sup>134</sup> The States expressed their consensus in *Agenda 21*, an 800 page action plan with specific reforms.<sup>135</sup> States also agreed on legal principles in the Rio Declaration on Environment and Development, and endorsed and signed three new multilateral environmental agreements: The UN Framework Convention on Climate Change, which President George H.W. Bush and Secretary of State James Baker supported, the UN Convention on Biodiversity, which President Bush declined to sign, and in 1994, and the UN Convention to Combat Desertification, which despite its domestic history of the Dust Bowl, the United States treated as a low priority.<sup>136</sup>

Since the 1992 Earth Summit, the *Rio Declaration* has played a singularly important role. Most nations, having accepted its principles, implemented them in their state practice. For example, consistent with Rio Principle 10, many States have enacted laws for providing the public with access to information about environmental issues, establishing rights for public participation in environmental decision-making, and access to justice.<sup>137</sup> These principles have been

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134. Jean-Paul Lanly, *Forestry Issues at the United Nations Conference on Environment and Development*, FOOD AND AGRIC. ORG., <http://www.fao.org/3/u7760e/u7760e0b.htm> (last visited on May 5, 2019).

135. *United Nations Conference on Environment & Development*, Agenda 21, U.N. SUSTAINABLE DEV. (1992), <https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf> (last visited May 5, 2019).

136. See generally *United Nations Documentation: Environment: Major Conferences and Reports*, U.N., <https://research.un.org/en/docs/environment/conferences> (last visited May 8, 2019).

137. Principle 10 of the *Rio Declaration* provides,

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

*Rio Declaration*, *supra* note 36, Principle 10. This principle's three components have been established as basic procedural rights in laws in the United States, which were key to the successful implementation of environmental law norms. The Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237 (1946), established requirements governing rule-making to implement status, with notice and opportunity for public comment. The Freedom of Information Act provided for access to all government documents and reports, including environmental reports required under statutes, and the public disclosure of the toxic release inventories under the Pollution Prevention Act. The APA Section 509, and environmental citizen suit provisions such as Section 505 of the Clean Water Act, provided for judicial review. European States provide similar remedies in their domestic legislation. Rio Principle

incorporated into treaties such as the Århus Convention in Europe<sup>138</sup> and the Escazu Agreement for Latin America and the Caribbean.<sup>139</sup> Similarly, Principle 17 of the Rio Declaration establishes that States shall employ environmental impact assessment (EIA) in their national decision-making, and most nations have enacted national laws for EIA, such as the U.S. National Environmental Policy Act.<sup>140</sup> In 2010, the International Court of Justice determined that EIA is a duty of customary international law.<sup>141</sup> EIA is a methodology that enables States to observe Principle 21, and is an effective way to implement the precautionary principle. It is applied specifically for this purpose in the Espoo Convention.<sup>142</sup> Notwithstanding the widespread acceptance of the principles, and despite the fact that under U.S. domestic law, including the Administrative Procedure Act, the Freedom of Information Act, and the National Environmental Policy Act mandate observance of Rio Principles 10 and 17, the State Department routinely resists expanding the use of these principles in international law.

Widespread global adherence to the Rio Principles, and to the other multilateral agreements, like the UNFCCC and Paris Agreement, characterize global trends in international law since the 1992 Rio Earth Summit.<sup>143</sup> The IUCN World Commission on Environmental Law and UN Environment track these legal developments, and have been advancing their recognition under the rubric the “environmental rule of Law.”<sup>144</sup>

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10 confirmed these procedural rights to the environment, setting the stage for nations to recognize and provide them in their own legislation world-wide. This is a good example of US domestic legal leadership setting an example for global action.

138. *Regional Forum on Sustainable Development for the UNECE Region, Empowering the People to Protect the Planet*, UNECE, [http://www.unece.org/fileadmin/DAM/RCM\\_Website/SDG\\_16\\_2.pdf](http://www.unece.org/fileadmin/DAM/RCM_Website/SDG_16_2.pdf) (last visited on May 5, 2019).

139. *Id.*

140. Luis E. Sanchez & Peter Croal, *Environmental Impact Assessment, From Rio-92 to Rio +20 and Beyond*, 15 AMBIENT SOC. 41 (2012).

141. *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010, I.C. J. 135 (Apr. 20) <https://www.icj-cij.org/en/case/135>.

142. Alan Boyle, *Developments in International Law of EIA and their Relation to the Espoo Convention*, 20 REV. OF EUR. COMMUNITY & INT’L ENVTL L. 227 (2012).

143. See Edith Brown Weiss, *The Evolution of International Environmental Law*, 54 JAPANESE Y.B. INT’L L. 1 (2011).

144. *Environmental Rule of Law*, IUCN, <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/environmental-rule-law> (last visited May 5, 2019).

In order for a right to the environment to be observed and duly implemented, it is essential for each nation to sustain an effective national environmental law regime. The rudiments of such national regimes exist now in all regions of the world. In North America, the United States and Canada have well developed domestic environmental law regimes, even if much remains to address all environmental problems. The European Union has a strong and effective regime for environmental law.<sup>145</sup> EU concepts of subsidiarity tailor the environmental norms to the appropriate level of government that is most effective and efficient in implementing given norms.<sup>146</sup> The European Court of Human Rights has been a leader in identifying the environmental components of human rights. However, as the UN Secretary-General's Report highlights, there is a strong need for capacity-building to enable each country to protect the environment.<sup>147</sup> A survey of several different regional legal frameworks illustrates this in the Caribbean, Africa, the Pacific, and Southeast Asia.<sup>148</sup>

The State Members of the Caribbean Community (CARICOM) have been leaders in establishing and implementing international environmental principles that further sustainable development.<sup>149</sup> The revised Treaty of Chaguaramas, which entered into force in 2006, ranks in the forefront of all regional common market and trade compacts.<sup>150</sup> It provides common norms for environmental protection across all States, including applying the general principles of environmental law (Article 65.2.e) proposed for codification in the Global Pact for the Environment.<sup>151</sup> The treaty's provisions on Environmental Protection, Fisheries, Forests, Agricultural Policy and for Sustainable Tourism are exemplars for harmonious integration of trade and

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145. See, e.g., JAN H. JANS & HANS H. B. VEDDER, *EUROPEAN ENVIRONMENTAL LAW* (3d ed. 2008).

146. EUR. PARLIAMENT, *Human Rights and Climate Change: EU Policy Options*, 79 (2012), [http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457066/EXPO-JOIN\\_ET\(2012\)457066\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/457066/EXPO-JOIN_ET(2012)457066_EN.pdf).

147. U.N. ENV., *Annual Report 2018*, <https://www.unenvironment.org/annualreport/2018/index.php> (last visited May 5, 2019).

148. *Id.*

149. See U.N. Caribbean Sustainable Dev. Goals, UN Multi-Country Sustainable Development Framework (2016), <https://www.unicef.org/about/execboard/files/UNDAF-MSDF-Caribbean.pdf>.

150. Revised Treaty of Chaguaramas Establishing the Caribbean Community Including CARICOM Single Market and Economy, Jan. 1, 2006, 2259 UNTS 293, [https://caricom.org/documents/4906-revised\\_treaty-text.pdf](https://caricom.org/documents/4906-revised_treaty-text.pdf).

151. *Id.*

the environment.<sup>152</sup> CARICOM States have adhered to international environmental agreements, expressly preferring their obligations under the Treaty of Chaguaramas.<sup>153</sup>

CARICOM Members States are also Members of the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region, which came in force in 1988, its Protocols on Oil Spills, which came in force in 1986, Specially Protected Areas and Wildlife, which came in force in 2000, and Pollution from Land Based Sources of Pollution, which came in force in 2010.<sup>154</sup> This regional seas programme is among the most advanced internationally. CARICOM Member States also adhere to the United Nations Convention on the Law of the Sea, and the several multilateral environmental agreements.<sup>155</sup> This tradition of cooperation has furthered the region's international cooperation, for example under the UN Multi-Country Sustainable Development Framework nations build mutually supportive programs among States and UN agencies to further the 2030 Agenda for implementing the Sustainable Development Goals.<sup>156</sup>

World-wide, small island States in the Pacific and other regions, including the Caribbean, have forged a mutual agenda for building their capacity to sustain the environment. The Barbados Programme of Action for Small Island Developing States (1994) led to significant international cooperation for sustainable development across the fourteen thematic areas it prioritized.<sup>157</sup> The Caribbean States joined the Pacific Island States, and other Small Island Developing States (SIDS), to recently agree on the SAMOA Pathway at the 3<sup>rd</sup> Conference on Small Island Developing States in 2014.<sup>158</sup>

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152. *Id.*

153. *Id.* art. 62.

154. Caribbean Community Environmental and Natural Resources, Policy Framework, CARICOM, [https://caricom.org/documents/15676/att\\_i\\_draft\\_final\\_caricom\\_env\\_nat\\_resource\\_policy.pdf](https://caricom.org/documents/15676/att_i_draft_final_caricom_env_nat_resource_policy.pdf).

155. *Id.*

156. *U.N. Multi-Country Sustainable Development Framework in the Caribbean (2016)*, UNICEF, <https://www.unicef.org/about/execboard/files/UNDAF-MSDF-Caribbean.pdf> (last visited on May 5, 2019).

157. Barbados Programme of Action, G.A. Res. 47/189 (1994).

158. U.N. Conference on Small Island Developing States, *SIDS Accelerated Modalities of Action Pathway*, <http://www.sids2014.org/index.php?menu=1537> (last visited May 5, 2019).



The African Union also has a long tradition of building regional regimes for environmental stewardship. African States have the world's leading regional convention for protected area stewardship, called the African Convention on the Conservation of Nature and Natural Resources.<sup>159</sup> Shortly after the 1989 negotiation of the Basel Convention on Transboundary Movement and Management of Hazardous Waste and Their Disposal, African States agreed on the Bamako Convention on the Ban of Imports into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa in 1991, and established its secretariat in the African Union.<sup>160</sup> African States actively participate in the work of the Convention on Trade in Endangered Species of 1973 and African States adopted the 1994 Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora.<sup>161</sup> Africa also has several regional seas agreements.<sup>162</sup> African governments were key to the acceptance of the UN Sustainable Development Goals (SDGs).<sup>163</sup>

The Association of South West Asian States (ASEAN) also has a well elaborated framework for regional environmental law formulation and integration.<sup>164</sup> While under the ASEAN Charter of 2007, cooperation on an inter-ministerial level ensured a useful flow of information and experience across Member States. The ASEAN Heritage Parks program has established a positive set of best practices for protected area management.<sup>165</sup> On the other hand, the failure to implement the Regional Haze Agreement and protect peatland forests from fires means that transboundary air pollution is a regional problem and

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159. See African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, 1001 U.N.T.S. 14689. A revised version was adopted on March 7, 2017; see also *Revised African Convention on the Conservation of Nature and Natural Resources*, AFR. UNION, <https://au.int/en/treaties/african-convention-conservation-nature-and-natural-resources-revised-version> (last visited Mar. 8, 2019).

160. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, UiO, <https://www.jus.uio.no/lm/hazardous.waste.ban.afrian.import.bamako.convention.1991/portrait.pdf> (last visited May 5, 2019).

161. Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora, 35 U.N.T.S. 1950 (Sept. 8, 1994).

162. U.N. ENV'T., *Regional Seas Programme*, [https://www.un.org/Depts/los/biodiversity\\_workinggroup/Regional\\_seas\\_programmes\\_ABNJ.pdf](https://www.un.org/Depts/los/biodiversity_workinggroup/Regional_seas_programmes_ABNJ.pdf) (last visited May 5, 2019).

163. See SUSTAINABLE DEVELOPMENT GOALS CENTER FOR AFRICA, *Africa SDG Index and Dashboard Report 2018*, <http://unsdsn.org/wp-content/uploads/2018/07/AFRICA-SDGS-2018-Complete-Report-WEB.pdf> (last visited on May 5, 2019).

164. See KOH KHENG-LIAN ET AL., *ASEAN ENVIRONMENTAL LEGAL INTEGRATION: SUSTAINABLE GOALS?* (2016).

165. *Id.* at 91–98.

major contributor to greenhouse gas emissions.<sup>166</sup> Unlike the European Union, which has advanced national environmental management systems, ASEAN's national systems require further capacity building toward effective implementation of both regional and international environmental law.

#### VIII. REMEDYING SHORT FALLS IN ENVIRONMENTAL LAW

As remarkable as these regional cooperation systems are at progressively advancing the international law of the environment, the impacts of a warming atmosphere and climate change threaten to overwhelm the success to date. Governments, businesses, and all of human society still sees the world through the "rear-view mirror."<sup>167</sup> Two forces preclude action: one is entrenched in "business as usual" practices and inertia because it is easier to keep established systems operating than to change, and the second is population growth, which produces demands for goods and services that need to be met. Societies react to the needs of their people by continuing to do what they learned worked in the past. This is the thinking of the Holocene Epoch, but Earth has entered the Anthropocene Epoch.<sup>168</sup>

The pace of developing and applying international environmental law is simply too slow to keep up with the trends in environmental degradation. President Trump's withdrawal from the Paris Agreement delays progress, but is just one of many environmentally retrogressive acts across socio-economic sectors internationally. For example, although migratory species in the Western Hemisphere are in decline from Argentina and Chile to the Arctic, not a single nation in the Americas has adhered to the Bonn Convention on Migratory Species, which IUCN helped negotiate.<sup>169</sup> Under this framework agreement, States agree on species specific programs to protect migration across each species' range.<sup>170</sup> In Africa and Europe, such interconti-

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166. Laode M. Syarif, *Evaluating the (In)effectiveness of ASEAN Cooperation Against Transboundary Air Pollution*, TRANSBOUNDARY POLLUTION: EVOLVING ISSUES OF INT'L L. AND POL. 295, 295–326 (S. Jayakumar et al., eds., 2015).

167. BREAKING SMART, *The Future in the Rear-View Mirror*, <https://breakingsmart.com/e/season-1/the-future-in-the-rear-view-mirror/> (last visited May 5, 2019).

168. See RULE OF LAW FOR NATURE: NEW DIMENSIONS AND IDEAS IN ENVIRONMENTAL LAW (Christina Voigt ed., 2013), <https://doi.org/10.1017/CBO9781107337961>.

169. Convention on the Conservation of Migratory Species of Wild Animals, Nov. 1, 1983, 1651 U.N.T.S. 333.

170. *Id.*

mental range agreements exist, facilitated by national and regional environmental laws.<sup>171</sup> Without such regimes, the attempts under CITES to protect a species is too little, too late.

The 2018 Report of the UN Secretary-General offers a useful analysis of contemporary fault lines in international environmental law.<sup>172</sup> The UN General Assembly mandated preparation of this Report in adopting a Resolution on May 10, 2018, entitled “Toward a Global Pact for the Environment.”<sup>173</sup> The Report was prepared as a briefing for UN Member States participating in deliberations on international environmental law in Nairobi, Kenya, during the first half of 2019.<sup>174</sup> The Secretary General evaluates four different kind of gaps in international environmental law, and related instruments: (a) gaps in the scope and legal status of the environmental principles; (b) gaps within existing MEAs; (c) gaps between MEAs and other international regimes; and (d) gaps in specific international environmental areas/issues that are not addressed in any treaty or legal instrument.<sup>175</sup>

Because this Report is the first such report delivered at the level of the Secretary General, it is of exceptional importance. It emerged from France’s presentation of a draft “Global Pact for the Environment” to the UN General Assembly in 2017.<sup>176</sup> Anticipating its release, the remarks of the UN Secretary General at the Paris Peace Forum on November 11, 2018, had commended States for their positive contributions to international environmental cooperation, including negotiations for an agreement for the protection of biodiversity beyond areas of national jurisdiction on the High Seas. The UN Secretary General also observed that “codifying the fundamental principles of environmental law would provide predictability and clarity.”

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171. G.C. Boore & B. Lenten, *The African-Eurasian Waterbird Agreement: A Technical Agreement Under the Bonn Convention*, 10 INT’L WATER STUDIES 45 (1998).

172. Report, *supra* note 8.

173. G.A. Res. 72/277, *supra* note 9, ¶ 1.

174. Report, *supra* note 8.

175. *Id.*

176. The draft Global Pact was prepared through the Club des Jurists’ commission on Environmental Law, Paris, and finally agreed at a meeting at the Constitutional Court of France in June 2017. *See generally* LE CLUB JURISTES, <http://www.leclubdesjuristes.com> (last visited May 5, 2019); *see also* IUCN, [www.iucn.org/commissions](http://www.iucn.org/commissions) (last visited May 5, 2019).

IX. THE FUNDAMENTAL RIGHT TO THE ENVIRONMENT – THE  
KEYSTONE FOR GENERAL PRINCIPLES OF INTERNATIONAL  
ENVIRONMENTAL LAW

Reflecting the success of the 1992 Rio Principles on Environment and Development, codification of a more holistic set of environmental principles has been proposed. Prior to Rio, the UN General Assembly had adopted the World Charter for Nature.<sup>177</sup> The Rio Earth Summit had considered proposals for an “Earth Charter,” but lacked the time and capacity to do so.<sup>178</sup> Thereafter, a number of former senior government officials, including Ruud Lubbers of The Netherlands, Mohamed Sahnoun of Algeria, and Mikhail Gorbachev of Russia, worked with Steven Rockefeller and others to prepare an holistic Earth Charter, which UNESCO and IUCN have endorsed.<sup>179</sup> During this period, the IUCN World Commission on Environmental Law in partnership with the International Council of Environmental Law, prepared a “draft covenant and environment and development,”<sup>180</sup> which demonstrated how codification of environmental law principles could be formulated. There are a number of scholarly restatements of international environmental law principles.<sup>181</sup> Others would endeavor to replicate or elaborate on these efforts with new endeavors, such as the Oslo Manifesto for Ecological Law and Governance,<sup>182</sup> or the Hague Declaration on Planetary Security in 2018.<sup>183</sup> The quest for agreement on a set of guiding norms for the care of the Earth is a recurring effort.

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177. World Charter for Nature, U.N. G.A. Res. 37/7 (1982).

178. Stephanie Meakin, *The Rio Earth Summit: Summary of the U.N. Conference on Environment and Development*, GOV. OF CAN., <http://publications.gc.ca/Collection-R/LoPBdP/BP/bp317-e.htm> (last visited May 8, 2019).

179. See EARTH CHARTER INITIATIVE, <http://earthcharter.org/> (last visited Mar. 6, 2019) (containing the Earth Charter and the history of its preparation, and studies by scholars at Simon Bolivar University which show how the Charter’s principles already reflect international environmental law).

180. See *Draft International Covenant on Environment and Development: Implementing Sustainability*, IUCN, <https://portals.iucn.org/library/node/46647> (last visited Mar. 6, 2019) (containing the 2015 ICEL/IUCN Draft Covenant on Environment and Development, with commentaries, in its fifth and latest edition from ICEL and IUCN’s World Commission on Environmental Law).

181. See, e.g., PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* (2D ED., 2003); LUDWIG KRÄMER & EMANUELA ORLANDO, 6 *ELGAR ENCYCLOPEDIA OF ENVIRONMENTAL LAW: PRINCIPLES OF ENVIRONMENTAL LAW* (2018).

182. *Text of the Oslo Manifesto – ELGA’s Founding Document*, ECOLOGICAL L. & GOVERNANCE ASS’N, <https://www.elga.world/oslo-manifesto/> (last visited Mar. 6, 2019).

183. Planetary Security Initiative, *The Hague Declaration on Planetary Security* (2018), [https://www.planetarysecurityinitiative.org/sites/default/files/201711/PSI\\_Declaration\\_Planetary\\_Security\\_1.pdf](https://www.planetarysecurityinitiative.org/sites/default/files/201711/PSI_Declaration_Planetary_Security_1.pdf) (last visited May 5, 2019).

On an intergovernmental level, the challenge has been to identify the general principles of international law that must guide State conduct toward the biosphere. In 1987, the report “Our Common Future” from the UN World Commission on Environment and Development set forth “general principles, right and responsibilities” as an Annex.<sup>184</sup> The first right reads: “All human beings have the fundamental right to an environment adequate for their health and well-being.”<sup>185</sup> This right was earlier stated in the Stockholm Declaration of 1972.<sup>186</sup>

Since the 1972 Stockholm Conference on the Human Environment, there has been wide acceptance of general principles of international environmental law.<sup>187</sup> The various principles, however, are stated with slight variations in language.<sup>188</sup> Moreover, because the principles appear in diverse agreements, their holistic nature is overlooked and they appear fragmented. Their codification in a single agreed text would substantially further their observance and implementation. Even if the 2019 Nairobi consultations do not produce an agreed text in the six months allotted,<sup>189</sup> a consensus could probably be reached over a longer time period.

Agreement on general principles in a consolidated text will encourage States to find the synergies among the various international environmental agreements, and foster both their integration globally and facilitate their observance through national implementation. Due to States enacting environmental laws in segmented and serial ways, at different times and places, the laws are not congruent with the holistic approach to the problems. For example, laws address specific types of environmental problems, such as water pollution, separately

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184. World Comm’n on Env’t & Dev. *supra* note 130.

185. *Id.* Annex 1, Section I(1).

186. U.N. Conference on the Human Environment, *supra* note 112.

187. Gunther Handle, Declaration of the United Nations Conference on the Human Environment, 1972 and the Rio Declaration on Environment and Development, 1992, U.N. Audiovisual Libr. of Int’t L. 1 (2012).

188. See, e.g., *Rio Declaration*, *supra* note 36; U.N. Conference on the Human Environment, *supra* note 112; World Comm’n on Env’t & Dev., *supra* note 130; *Oslo Manifesto*, *supra* note 182; Handle, *supra* note 187.

189. *Summary of the First Substantive Session*, *supra* note 34.

from air pollution,<sup>190</sup> or protected area habitat management apart from trade in endangered species.<sup>191</sup> The general principles apply across various sectoral bodies of law.<sup>192</sup>

Moreover, expansion of sectoral agreements by further protocols or decisions of the conferences of the parties, exacerbates a sense of fragmentation in environmental law as a field.<sup>193</sup> This in turn makes coordination among the various environmental agreements difficult. The fact that there is no central, inter-governmental authority to direct the undertakings of the treaty organizations for each environmental sector, makes it all the more urgent that a holistic set of principles exist to provide guidance. A common set of legal principles would contribute to a more uniform pattern of implementation of international environmental law obligations. Framing agreed principles in a single text would produce a more coherent, robust, and effective environmental legal system and governance. Situating the principles in a “Global Pact” would produce a foundation and center piece grounding the environmental law system,<sup>194</sup> providing a common reference point for interpretation and coordination among the various environmental norms and institutions.<sup>195</sup>

Agreeing to a common set of codified principles in a Global Pact for the Environment would significantly help achieve the 2030 Agenda. In the Charter of the UN, the Member States agreed to

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190. See, e.g., Pollution Prevention Law and Policies, ENV. PROTECTION AG. (last visited May 7, 2019), <https://www.epa.gov/p2/pollution-prevention-law-and-policies> for the varying United States laws pertaining to pollution.

191. See, e.g., *U.S. Conservation Laws*, U.S. FISH AND WILDLIFE SERV., <https://www.fws.gov/international/laws-treaties-agreements/us-conservation-laws/> (last visited May 7, 2019).

192. MICHEL COLOMBIER AND EMMANUEL GUERIN, *SECTORAL AGREEMENTS*, INSTITUT DU DEVELOPEMENT DURABLE ET DES RELATIONS INTERNATIONALES (IDDR) (2008).

193. As indicated by Professor Nilufer Oral, Istanbul Bilgi University (Turkey) discussing the steady progression of international environmental law into a “a maze of hard and soft law instruments including broad global framework agreements, declarations, codes, guidelines, regional instruments and national laws.” Tiffany Challe, *Global Perspectives on a Global Pact for the Environment*, CLIMATE L. BLOG (Sept. 20, 2018), <http://blogs.law.columbia.edu/climatechange/2018/09/20/global-perspectives-on-a-global-pact-for-the-environment/>.

194. Professor Bharat H. Desai, Jawaharlal Nehru University (India) points out the landmark that the Global Pact could represent in international environmental governance: “In view of this, the crystallization of the proposed Global Pact will serve as landmark event since the 1992 Rio Earth Summit.” *Id.*

195. As indicated by Professor Nilufer Oral, Istanbul Bilgi University (Turkey), “The Pact would offer a modality of integration of these principles that have evolved over different periods of time and under differing circumstances into a single coherent instrument which would contribute significantly to guiding States and other bodies.” *Id.*

“...promote higher standards of living ... and conditions of economic and social progress and development, as well as solutions of international economic, social, health, and related problems.”<sup>196</sup> All UN Member States unanimously support the 2030 Agenda and SDGs.<sup>197</sup> They are “a universal call to action to end poverty, protect the planet, and ensure that all people enjoy peace and prosperity.”<sup>198</sup>

Through a codified text of principles, States and international and regional inter-governmental organizations would find common purpose in agreeing on measures necessary to attain the Sustainable Development Goals. A single codified, overarching text would complete the sustainability system by providing a common legal foundation to the SDGs. The inter-linkages between and among the SDGs could be identified, giving more consistency to the sustainable development goals agreed to in the 2030 Agenda.<sup>199</sup> This would provide an easily understood legal framework that could guide the action of the States towards its aim of realizing a fairer and more sustainable world.<sup>200</sup> Without a world-wide coordination of efforts to radically reduce greenhouse gas emissions, as emphasized by the Special Report of IPCC (2018),<sup>201</sup> all international environmental law is rendered nugatory, not just the Paris Agreement.

A codified set of principles would facilitate international cooperation for stewardship of the Earth.<sup>202</sup> As the Earth Charter acknowledged, “[w]e urgently need a shared vision of basic values to provide an ethical foundation for the emerging world community.”<sup>203</sup> The

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196. U.N. Charter ch. IX, art. 55, para. a (1945).

197. *Historic New Sustainable Development Agenda Unanimously Adopted by 193 UN Members*, U.N. SUSTAINABLE DEV. (Sept. 25, 2015), <https://www.un.org/sustainabledevelopment/blog/2015/09/historic-new-sustainable-development-agenda-unanimously-adopted-by-193-un-members/>.

198. *Sustainable Development Goals*, U.N. DEV. PROGRAMME, <http://www.undp.org/content/undp/en/home/sustainable-development-goals.html> (last visited Mar. 6, 2019).

199. UN General Assembly Res. 70/1, *supra* note 31.

200. The draft of the Pact contributes to the environmental justice; as stated by Professor Damilola S. Olawuyi, Hamid Bin Khalifa University (United Arab Emirates), “The Global Pact for the Environment ... is a bold and imaginative document that seeks to address North-South contentions, by reinforcing the need for technology transfer, common but differentiated responsibilities and environmental education amongst others. Coming at a time of real need, the Pact provides a timely framework for building an inclusive global rule of law for the environment.” Challe, *supra* note 95.

201. *Global Warming of 1.5°C*, IPCC, <http://www.ipcc.ch/report/sr15/> (last visited May 5, 2019).

202. Maria Ivanova, *Global Governance in the 21st Century: Rethinking the Environmental Pillar*, U.MASS. BOS. 8 (2011), [https://scholarworks.umb.edu/crhsgg\\_faculty\\_pubs/1](https://scholarworks.umb.edu/crhsgg_faculty_pubs/1).

203. *The Earth Charter*, UNESCO 1 (2000), [http://www.unesco.org/education/tlsf/mods/theme\\_a/img/02\\_earthcharter.pdf](http://www.unesco.org/education/tlsf/mods/theme_a/img/02_earthcharter.pdf).

SDGs, in particular SDG 1, makes clear the gravity of today's environmental and social problems.<sup>204</sup> In the coming decade, as the UN Environment's GEO-5 report documents, States will need to deal with the lack of effective response because Earth's natural systems are at a categorical turning point.<sup>205</sup> The agreement on the principles of right to a healthy environment, and codification of the other principles, would generate support for attaining the SDGs.

The agreed general principles serve to guide State conduct broadly, thus they are not linked exclusively to SDGs. They advance the duty in UNCLOS to protect the marine environment, which SDG 14 covers,<sup>206</sup> or the principles in the Convention on biodiversity, which are the focus of SDG 15, and relate to the SDG on water.<sup>207</sup> Codification of principles will promote the progressive development of international and comparative environmental laws for sustainable development, and contribute to a transformative realization of sustainability goals. ICEL notes that rather little attention is currently paid to advancing implementation of principles of law and practices.<sup>208</sup> There is a need for more expert advice, compilation and dissemination of information, education, capacity-building, institutional development, and practical engagement that advances proposals with a realistic prospect of being adopted. Agreement on a codified ICEL Global Pact for the environment would also provide support for the capacity-building to strengthen national implementation of international environmental law.

Those who have expressed doubts about the need for a global pact for the environment tend to discount or ignore the need to provide a legal foundation for the UN SDGs.<sup>209</sup> The proposal for codification is not the same as envisioning the enactment of one "unified" law.<sup>210</sup> General principles, indeed due process of law itself, are already capable of being applied in diverse environmental and socio-economic contexts.<sup>211</sup> Experts have shown the evolving recognition

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204. *Sustainable Development Goals*, *supra* note 198, at <https://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-1-no-poverty.html>.

205. UNEP Geo-5, *supra* note 3, xix.

206. *Sustainable Development Goals*, *supra* note 198, at <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-14-life-below-water.html>.

207. *Id.* at <http://www.undp.org/content/undp/en/home/sustainable-development-goals/goal-15-life-on-land.html>.

208. Summit to Launch the Global Pact for the Environment, *supra* note 14.

209. See, e.g., Biniiaz, *supra* note 6.

210. See *id.* at 2, discussing the cons of a "unified" body of international environmental law.

211. See, e.g., Draft International Covenant on Environment and Development: Imple-



of these principles,<sup>212</sup> as does the UN Secretary-General's Report.<sup>213</sup> As the 1992 Rio Declaration illustrates, once clearly stated, principles can be incorporated into national statutes and treaties.<sup>214</sup> Principles could be stated in an agreement as international law, as the French have proposed for the Global Pact,<sup>215</sup> however, it would still be up to each nation to decide (a) to accept the agreement as a treaty, and (b) to implement it in accordance with its national constitution and laws. It will always be the province of national authorities to interpret the rights and duties in the global pact, just as they do for all other areas of law.<sup>216</sup> Those who argue that adopting the principles as "hard" law would lead to confusion do not give credit to the national law-making systems. Environmental principles will become enmeshed in disputes as they are applied, similarly to what happens with commercial law or family law principles, and the normal dispute-resolution systems of courts, arbitral tribunals, or mediation systems will decide those disputes.<sup>217</sup> It is a false argument to say that because disputes may arise, a principle should not be regarded as legally binding. Most telling, however, is the claim that international law cannot set forth duties or rights of individuals, but only of States.<sup>218</sup> This is a 19<sup>th</sup> century conception, which state practice has left behind.<sup>219</sup> The international law regimes governing both Human Rights and Humanitarian law already do so, as does the right to a healthy environment, which is now recognized in 193 constitutions.<sup>220</sup> The Global Pact would clarify for States that the autonomous right to a healthy environment exists as a general principle of international law. This right, and others, would guide state conduct in the instances where the law confronts a gap, or where application might be unclear.<sup>221</sup> The principles would give substance to the interpretive rule, *in dubio pro natura*, allowing application of the law to err on the side of pro-

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menting Sustainability, *supra* note 90 (commentaries).

212. *Id.*

213. Report, *supra* note 8.

214. Global 2000 Report, *supra* note 73.

215. G.A. Res. 72/277, *supra* note 9, ¶ 1.

216. Professor Bharat H. Desai, in Challe, *supra* note 193.

217. See e.g., Sai Ramani Garimella, *Environmental Dispute Resolution, ADR Methods and the PCA Arbitration Rules*, ILI L. REV. 199 (2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2836347](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836347).

218. Alexander Orakhelashvili, *The Position of the Individual in International Law*, CAL. W. L. REV. 241 (2000), <https://scholarlycommons.law.cwsl.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1217&context=cwilj>.

219. *Id.* at 242-43.

220. Historic New Sustainable Development Agenda, *supra* note 193.

221. See *supra* notes 189, 190.

tecting the environment whenever possible. Those who live with the blinders of “business as usual” find this objectionable.<sup>222</sup> Given the Earth’s gathering environmental crises, those who invest the time and effort to consult about the global pact principles in Nairobi think otherwise.<sup>223</sup>

Most States recognize the right to the environment.<sup>224</sup> The United States should do so as well, it as already present in its constitutional foundation. Recognizing a regime of environmental rights will not save the environment, but it can build rigor into implementing the Paris Agreement, end regression in observance of existing environmental laws, and provide legal grounds for reversing the myriad trends in environmental degradation.

#### X. CONCLUSION – NAIROBI AND BEYOND

It will be difficult for the consultations in Nairobi to agree on the role or content of a possible global pact for the environment. Legal principles that support attaining the UN Sustainable Development Goals will be identified, especially where they are already embodied in existing international agreements, as illustrated by the ICEL charts.<sup>225</sup> Regardless of the outcome of the 2019 Nairobi consultations, the process of elaborating international environmental law will continue.

Nairobi in 2019, like Stockholm in 1972, or Rio de Janeiro in 1992, is a weigh station on the path to building an integrated and effective regime for human stewardship of the Earth.<sup>226</sup> It will take several generations to do so, and even then the result will be incomplete and complicated by the dynamic nature of the planet. Earth has always been changing and humans will always need to learn how to live sympathetically with the changes. Environmental law will never be complete, since human societies will forever be adapting to life in new ambient environments. So, the process, the norms for the environmental rule of law, will become especially critical as governments and civil society pioneer the next steps in environmental decision-making.

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222. *See supra* note 190.

223. *See generally* Challe, *supra* note 193.

224. Historic New Sustainable Development Agenda, *supra* note 197.

225. *Note on the Secretary-General’s Report*, *supra* note 30.

226. *See generally* Summary of the First Substantive Session, *supra* note 34.

The Secretary General's Report offers an agenda for further law-making. Further developments will be halting, incremental, and sectoral, but as the disruptions of sea level rise or other climate-induced events impact each nation's domestic wellbeing, the willingness to work together will emerge. Those States that acknowledge the right to the environment are likely to see progress in establishing effective and resilient national or regional environmental laws. Conversely, those States, including the United States, that persist in a denial of environmental rights, will struggle.

The Secretary General's Report sums up this long-term challenge well:

Building upon the creative approaches that States have thus far adopted to protect the environment, it is essential that States and the United Nations 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.<sup>227</sup>

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227. Report, *supra* note 8, ¶ 113.