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## Framing the Global Pact for the Environment: Why It's Needed, What It Does, and How It Does It

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# FRAMING THE GLOBAL PACT FOR THE ENVIRONMENT: WHY IT'S NEEDED, WHAT IT DOES, AND HOW IT DOES IT

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## INTRODUCTION

We face a critical environmental crisis. Humanity consumes unsustainably; we use resources at a rate fifty percent faster than they are reproduced by the planet.<sup>1</sup> The population is growing exponentially<sup>2</sup> and climate change, the most important challenge of this century,<sup>3</sup> is already wreaking havoc around the world.<sup>4</sup> Despite

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1. *Ecological Footprint*, GLOBAL FOOTPRINT NETWORK, <http://www.-footprintnetwork.org/our-work/ecological-footprint/> [https://perma.cc/WPN2-PVAY] (last visited Sept. 9, 2011).

2. *Human Population Lesson Plans*, POPULATION REFERENCE BUREAU (JULY 1, 2009), <http://www.prb.org/Publications/Lesson-Plans/HumanPopulation/PopulationGrowth.aspx>. [https://perma.cc/ZH3A-CYJA]. World population prospects for the year 2100 are of 11,184 million people, an increase of more than 3,500 million during this century. *Id.* For more information, see United Nations Dep't of Economic and Social Affairs, *World Population Prospects*, U.N. Doc. ESA/P/WP/248, [https://esa.un.org/unpd/wpp/Publications/Files/WPP2017\\_KeyFindings.pdf](https://esa.un.org/unpd/wpp/Publications/Files/WPP2017_KeyFindings.pdf).

3. MARY ROBINSON FOUNDATION CLIMATE JUSTICE, POSITION PAPER: HUMAN RIGHTS AND CLIMATE JUSTICE (2014), <https://www.mrfcj.org/wp-content/uploads/2015/09/PositionPaperHumanRightsandClimateChange.pdf>.

4. Emma Howard, *Humans have Already used up 2015's Supply of Earth's Resources—Analysis*, THE GUARDIAN, <https://www.theguardian.com/environment/2015/aug/12/humans-have-already-used-up-2015s-supply-of-earths-resources-analysis> [https://perma.cc/EJD9-PYNS] (last visited Sept. 9, 2017). The Global Footprint Network estimates that human consumption started to exceed the capacity of the Earth in the beginning of the 1970s, and since then, the limits of the planet has

numerous existing international environmental treaties,<sup>5</sup> the Earth, and, therefore, human safety and prosperity, is in peril. According to a recent study by scientists from Stanford University and the National Autonomous University of Mexico, the ongoing “sixth mass extinction”<sup>6</sup> threatens to cause an “assault on the foundations of human civilization.”<sup>7</sup> In November 2017, a report signed by more than 15,000 scientists from 184 countries warned that without a drastic change, we risk catastrophic disruption to Earth systems that enable life on this planet.<sup>8</sup> According to the 2018 Intergovernmental Panel on Climate Change special report, states have already begun to take the kinds of actions needed to avoid some of those catastrophic events, but those efforts need to be rapidly accelerated and scaled.<sup>9</sup>

International environmental law has evolved rapidly over the last four decades. While environmental regulation dates back 2,000 years to Ancient Rome’s protection of municipal water supplies,<sup>10</sup> international environmental law remained undeveloped well into the 20th century. Before 1972, international governance was largely silent on the environment except to recognize states’ total and permanent sovereignty over their natural wealth and resources.<sup>11</sup> But, in 1972, states met in Stockholm, declaring that “adequate conditions of life, in

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begun to overshoot due mainly to the growth in global population as well as to the expansion of consumption around the world. *Id.*

5. For a list of the existing environmental treaties, see Ronald B. Mitchell, *International Environmental Agreements Database Project*, <https://iea.uoregon.edu/> [<https://perma.cc/ABD3-HQAH>] (last visited December 8, 2017).

6. This warning informed by ELIZABETH KOLBERT, *THE SIXTH EXTINCTION: AN UNNATURAL HISTORY* (2014).

7. Ceballos, Gerardo, Paul R. Ehrlich, & Rodolfo Dirzo, *Biological annihilation via the ongoing sixth mass extinction signaled by vertebrate population losses and declines*, 114 *PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES* E6089, E6095 (2017), <http://www.pnas.org/content/pnas/114/30/E6089.full.pdf>.

8. William J. Ripple et al., *World Scientists’ Warning to Humanity: A Second Notice*, 67 *BIOSCIENCE* 1026 (Nov. 2017).

9. Intergovernmental Panel on Climate Change. *Global Warming of 1.5 °C. Summary for Policymakers* (2018) [https://www.ipcc.ch/pdf/special-reports/sr15/sr15\\_spm\\_final.pdf](https://www.ipcc.ch/pdf/special-reports/sr15/sr15_spm_final.pdf).

10. Federico Cheever & Celia I. Campbell-Mohn, *Environmental Law*, *ENCYCLOPEDIA BRITANNICA*, <https://www.britannica.com/topic/environmental-law> [<https://perma.cc/FGQ7-AWK9>] (last visited Sept. 9, 2017).

11. *Id.*; see also G.A. Res. 1803 (XVII) (Dec. 14, 1962).

an environment of quality,” were and are fundamental human rights,<sup>12</sup> thereby formally acknowledging the human right to live in a healthy environment for the first time.<sup>13</sup> Although the Stockholm Declaration does not state or define a “right to a healthy environment” in specific terms, its language responds to the “moral theory of human rights”<sup>14</sup> with universal value,<sup>15</sup> which confers it a natural authority, as the law cannot go against the “common standard of all peoples and nations”<sup>16</sup> in the world.

After Stockholm, the international community sketched out the basic contours of the environmental legal framework over the following twenty years, including the creation of the United Nations Environment Programme (UNEP) in June 1972,<sup>17</sup> and culminating in the 1992 Rio Declaration on Environment and Development. Since then, these contours have been colored in, with the ratification of a number of issue-specific environmental treaties, like those on fishing, biological diversity, pollution, and climate, among others.<sup>18</sup> These

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12. U.N. Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 5–16, 1972). The United Nations organized the first major conference on international environmental issues in Stockholm in June of 1972. The resulting Stockholm Declaration is a foundational document in international environmental governance, along with the Rio Declaration on Environment and Development in 1992. *See* U.N. Doc. A/CONF/151/26, Rio Declaration on Environment and Development (June 13, 1992).

13. *See* David R. Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 17 (J. Knox & R. Pejan eds., 2018).

14. *See* César Rodríguez-Garavito, *A Human Right to A Healthy Environment? Moral, Legal, and Empirical Considerations*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 155, 158–59 (J. Knox & R. Pejan eds., 2018).

15. *See* GREGORIO PECES-BARBA, *CURSO DE DERECHOS FUNDAMENTALES: TEORÍA GENERAL* 22 (1995).

16. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, (Dec. 10, 1994).

17. *About UN Environment*, UNITED NATIONS ENVIRONMENT PROGRAMME (UNEP), <https://www.unenvironment.org/about-un-environment> [<https://perma.cc/5LWR-TNW3>] (last visited Aug. 19, 2018).

18. Examples of those international agreements can be found here: Ocean and Law of the Sea. United Nations. Division for Ocean Affairs and Law of the Sea: [http://www.un.org/depts/los/convention\\_agreements/convention\\_overview\\_fish\\_stocks.htm](http://www.un.org/depts/los/convention_agreements/convention_overview_fish_stocks.htm) [<https://perma.cc/HLN9-XRGQ>] (last visited October 12, 2017); Convention in Biological Diversity: <https://www.cbd.int/convention/> [<https://perma.>

sectoral treaties have been necessary and important additions in a rapidly globalizing world, where many challenges know no borders, and form the scaffolding of today's robust, diverse, and detailed international environmental legal architecture.

But despite these strengths, and the many successes of global environmental governance over the years, environmental protections always stand to be improved. For one, no UN specialized agency is dedicated to protecting the environment.<sup>19</sup> Also, the issue-by-issue approach to governance that has dominated the past quarter century has resulted in treaties well-tailored to address specific challenges, but not necessarily a cohesive and mutually reinforcing environmental code, in part because the treaties have created a “profusion of technical norms” that sometimes lack coherence.<sup>20</sup> Further, while this piecemeal approach has often extracted binding commitments from member states, it has not formally codified the “globally accepted substantive human right to a good or clean and healthy environment”<sup>21</sup> affirmed in Stockholm nearly fifty years ago. As a result, those suffering from environmental harms have had to be resourceful, adapting other rights like the right to health, food, water, and an adequate standard of living to imply a right to the environment.<sup>22</sup> These arguments have had mixed

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cc/VP7Z-J2HK] (last visited October 12, 2017; International Maritime Organization. International Convention for the Prevention of Pollution from Ships (MARPOL): [http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-\(marpol\).aspx](http://www.imo.org/en/about/conventions/listofconventions/pages/international-convention-for-the-prevention-of-pollution-from-ships-(marpol).aspx) [https://perma.cc/WHR4-8U3N] (last visited October 12, 2017); or the UNFCCC and the Paris Climate Change Agreement. United Framework Convention on Climate Change: <http://unfccc.int/2860.php> [https://perma.cc/K287-6JRZ] (last visited October 12, 2017).

19. For a complete list of UN specialized agencies, see *What are UN specialized agencies, and how many are there?*, DAG HAMMARSKOJÖLD LIBRARY, [ask.un.org/faq/140935](http://ask.un.org/faq/140935) [https://perma.cc/3UPQ-8D7G] (last visited Aug. 19, 2018).

20. See Aguila, Yann, *Adopting an International Covenant for the Protection of the Environment: Taking environmental rights seriously?*, SCRIBD, <https://es.scribd.com/document/330275038/Yann-Aguila-International-Covenant-for-Protection-of-Environment> [https://perma.cc/D3MT-HH7R] (last visited Sept. 9, 2017).

21. See Stephen J. Turner, *A SUBSTANTIVE ENVIRONMENTAL RIGHT: AN EXAMINATION OF THE LEGAL OBLIGATIONS OF DECISION-MAKERS TOWARDS THE ENVIRONMENT* (2008).

22. See Dinah Shelton, *Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?*, 35:1 *DENV. J. INT'L L. & POL'Y* 129, 166 (2008); John H. Knox, *Rep. of the Independent Expert on the Issue of Human*

success, and have relied on favorable interpretation by sympathetic courts to prevail.<sup>23</sup> An explicit, universal right to a healthy environment, combined with mechanisms to provide for its enforcement, could build upon and strengthen existing environmental agreements and expand regulation and jurisprudence to better protect against environmental degradation.

But not everyone agrees that there is a need for an elaborated right to a healthy environment. Some have argued that existing international treaties and the dispersed environmental principles included therein are sufficient to solve the problems that the world faces. Instead, these thinkers propose that a more effective use of effort would be to fortify these treaties with more resources and renewed political will, allowing for their full implementation and enforcement.<sup>24</sup> While we recognize that full implementation of existing treaties has been a challenge for environmental governance, we also maintain that this tradeoff need not be zero sum. In fact, it need not even be a tradeoff: efforts to promote a universal right to a healthy environment may well increase political will and improve implementation, if done right.

In this sense, and convinced that the existing body of international environmental law could be usefully strengthened, the French think tank *Le Club des Juristes* (CDJ), has proposed the adoption of a new *Global Pact for the Environment* (GPE) to try to give “greater coherence to international environmental laws, and set out clear obligations for states and individuals to protect the environment.”<sup>25</sup> The codification of a right to environment in international law could be achieved through the adoption of: i) a General Assembly Resolution on the right to a healthy environment<sup>26</sup>; ii) a new Protocol amending

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*Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, at 6, U.N. Doc. A/HRC/25/53 (2014).

23. See DINAH SHELTON, BACKGROUND PAPER NO. 2: HUMAN RIGHTS AND THE ENVIRONMENT: JURISPRUDENCE OF HUMAN RIGHTS BODIES (2002).

24. See, e.g., Susan Biniaz, *10 Questions to Ask About the Proposed ‘Global Pact for the Environment’*, COLUM. L. SCHOOL SABIN CENTER FOR CLIMATE CHANGE LAW, August 2017.

25. Antonio Benjamin, *Global Treaty for the Environment Taking Shape*, ENVIRONMENTAL NEWS SERVICES (July 30, 2017), <http://ens-newswire.com/2017/07/30/global-treaty-for-the-environment-taking-shape/> [https://perma.cc/H8BJ-98TV]

26. See, e.g., G. A. Res. 64/292 1 (Aug. 3, 2010) (formally recognizing “the right to safe and clean drinking water and sanitation as a human right.”).

the existing International Covenant on Economic, Social and Cultural Rights (ICESCR) to recognize the right to environment; or iii) an entirely new instrument that incorporates a right to environment among (presumably) other provisions. The CDJ proposal for the GPE embraces the third option, advocating for the creation of a new treaty to codify the right to live in a healthy environment in addition to other important environmental principles already included in various declarations and soft law documents.<sup>27</sup> According to the CDJ, the GPE presents the opportunity to revitalize existing treaties to maximize their impact and fill gaps that remain between issue-specific treaties by taking a new, holistic approach to international environmental protection. By recognizing the human right to a healthy environment, the CDJ argues that a new GPE can unify existing environmental law and reinforce its efficacy. In doing so, the Global Pact hopes to act as a third international Covenant, codifying the principles enshrined in the Rio Declaration just as the *Covenant on Civil and Political Rights* and the *Covenant on Economic, Social and Cultural rights*, both ratified in 1966, did for the Universal Declaration on Human Rights of 1948.

#### I. TOWARDS A LEGALLY BINDING GLOBAL DOCUMENT FOR THE PROTECTION OF THE ENVIRONMENT

This is not the first time a Global Pact for the Environment has been suggested. The proposal can be traced to Amedeo Postiglione and his advocacy for an International Court for the Environment (ICE).<sup>28</sup> Postiglione, an Italian *Corte Suprema di Cassazione* judge, has argued at least since 1990 that the UN should approve a “Universal Convention for the Environment as a Human Right” establishing “an individual’s inalienable legal rights” and “an adequate level of information, participation, and actions” to protect those rights. This convention would also define “the main obligations of the individual States,” and hold “the people responsible for promoting and protecting

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27. See Boyd, *supra* note 13, at 20.

28. See Tim Stephens, *INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION* 56–57 (2009).

the human right” accountable.<sup>29</sup> His proposal also included the creation of two new international environmental bodies: a) an International Court for the Environment at the UN to have “new legal State liability rules and consequently, compulsory and efficient conflict regulation procedures, supported by a permanent authority”<sup>30</sup>; and concurrently, b) a World Commission on the Environment as a Human Right, to evaluate, investigate, and seek resolution before the International Court for the Environment.<sup>31</sup>

His idea—still the subject of much debate—has now resurfaced thanks to the growing international support to create a specialized judicial system in environmental matters, capable of dealing with the international environmental disputes in an effective way, and which would give non-state actors the right to bring cases directly before it.<sup>32</sup> This development is logical considering that NGOs are commonly recognized as “the most prominent actors” in “the realm of the environmental governance.”<sup>33</sup>

The International Union for Conservation of Nature (IUCN), one of the world’s oldest international conservation and sustainability organizations, has also long advocated for legal recognition of a universal right to a healthy environment.<sup>34</sup> Since 1995, the IUCN has presented five editions of its “International Covenant on the Environment and Development” (ICED), updating the Draft Covenant most recently in 2015.<sup>35</sup> The ICED provides an international “framework for implementing sustainability at all levels of society”

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29. Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an International Court for the Environment within the United Nations*, 20 ENVTL. L. 321, 322 (1990).

30. *Id.* at 323.

31. See Nikos Passas, INTERNATIONAL CRIMES 452 (2016).

32. ICE COALITION, <http://www.icecoalition.org/> [https://perma.cc/52C9-ZEED] (last visited Aug. 19, 2017).

33. Barbara Gemmill & Abimbola Bamidele-Izu, *The Role of NGOs and Civil Society in Global Environmental Governance*, in GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES 3, 77–100, (2002).

34. See IUCN, *Environment: A Human Right*, IUCN.ORG, <https://www.iucn.org/content/environment-human-right> (last visited Sept. 12, 2017).

35. See IUCN & INT’L COUNCIL OF ENVTL. L., *Draft International Covenant on Environment and Development: Implementing Sustainability*, PORTALS.IUCN.ORG, <https://portals.iucn.org/library/node/46647> [https://perma.cc/64ST-7JRC] (last visited Sept. 11, 2017).



based on the principles of the Rio+20 Conference and the 2030 Agenda for Sustainable Development. It also consolidates and develops existing environmental principles towards the achievement and development of the Sustainable Development Goals (SDGs).<sup>36</sup>

According to the IUCN, the relationship between human rights and the environment is premised on two principles. First, the IUCN believes that states should approach environmental protection like they do other fundamental rights, arguing that environmental safety is a human right, essential to human welfare.<sup>37</sup> The IUCN is not alone in this belief; nearly half of all UN member states recognize the right to a healthy environment in their constitutions.<sup>38</sup> Second, via this rights-based approach to the environment,<sup>39</sup> the IUCN has argued that all public and private institutions should be required to incorporate environmental rights considerations into plans, policies, and processes, based on the rights and obligations set by international law.<sup>40</sup> Hence, this proposal argues that environmental protection must be integrated with human rights, procedural rights, and the other economic, social, cultural, and political rights that contribute to the fulfilment of human welfare; that is, a “full respect of rights.”<sup>41</sup>

Other organizations in the US and in Europe have also supported the incorporation of environmental rights within the human rights framework. In 2003, the German Wuppertal Institute for Climate, Environment and Energy, published a report calling for an international commitment to manage the use of natural resources with respect to consensus norms of sustainability, respect for human rights,

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36. *Id.*

37. See *What is a Human Rights Based Approach?*, HRBA PORTAL, <http://hrbaportal.org/faq/what-is-a-human-rights-based-approach> [<https://perma.cc/UH9N-C246>] (last visited Sept. 11, 2017).

38. Boyd, *supra* note 13, at 171–79. Among the 192 nations that are UN members, the right to a healthy environment is explicitly recognized in the constitutions of ninety. Also, in at least twelve other countries, Supreme or Constitutional Courts have ruled in favor of an implicit constitutional right to environmental health. *Id.*

39. See Jenny Springer, *IUCN’s Rights-Based Approach: A Systematization of the Union’s Policy Instruments, Standards and Guidelines*, IUCN.ORG Oct. 2016, [https://www.iucn.org/sites/dev/files/content/documents/iucn\\_rba\\_systematization\\_compiled.pdf](https://www.iucn.org/sites/dev/files/content/documents/iucn_rba_systematization_compiled.pdf).

40. *Id.* at 19.

41. *Id.* at 17, 20.

and protection of the biosphere.<sup>42</sup> In the US, the environmental law advocacy organization Earthjustice<sup>43</sup> has encouraged the UN High Commissioner for Human Rights to take a holistic approach to human health, recognizing the role that environmental degradation and human rights violations play in endangering wellbeing.<sup>44</sup> Meanwhile, a research team in Ukraine, led by Professor Yuriy Tunytsya, advocated a “World Environment Constitution” in 2006,<sup>45</sup> and French Professor Michel Prieur, Director of the International Center for Comparative Environmental Law,<sup>46</sup> has advocated for adoption of environmental rights into the international human rights framework since 2007.<sup>47</sup>

The United Nations has begun to listen to these overtures. As climate change refocused the broad implications of environmental damage on human rights, the UN Human Rights Council decided to appoint an Independent Expert “[t]o study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.”<sup>48</sup> The Council appointed Professor John Knox of Wake Forest University School of Law in 2012 to be the first Independent Expert, and, in 2015 extended his mandate by naming him the Special Rapporteur on human rights and the environment.<sup>49</sup> Knox has found

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42. See Wolfgang Sachs, *Environment and Human Rights* 137 WUPPERTAL PAPERS 1 (Nov. 2003).

43. See EARTHJUSTICE, <https://earthjustice.org/> [<https://perma.cc/FM66-2CKH>] (last visited Dec. 2017).

44. MARCELLO MOLLO, ET AL., ENVIRONMENTAL RIGHTS REPORT HUMAN RIGHTS AND THE ENVIRONMENT 115 (2004), [http://earthjustice.org/sites/default/files/library/references/2005\\_ENVIRONMENTAL\\_RIGHTS\\_REPORTTrev.pdf](http://earthjustice.org/sites/default/files/library/references/2005_ENVIRONMENTAL_RIGHTS_REPORTTrev.pdf).

45. See Yuriy Y. Tunytsya & Ihor P. Soloviy, *The World Environmental Constitution as an Instrument of International Environmental Governance*, 10 INTERDISC. ENVTL. REV. 85 (2008).

46. See INT’L CTR. OF COMP. ENVTL, L., DRAFT ON THE INTERNATIONAL CONVENTION ON THE HUMAN RIGHT TO THE ENVIRONMENT (2017).

47. See LE CLUB DES JURISTES, TOWARD A GLOBAL PACT FOR THE ENVIRONMENT 25 (2017) [hereinafter DRAFT GLOBAL PACT].

48. G.A. Res. 19/10 2 (Apr. 19, 2010).

49. See *United Nations Mandate on Human Rights and the Environment*, UN SPECIAL RAPPORTEUR ON HUM. RTS. AND THE ENV’T, <http://srenvironment.org/un-mandate/> [<https://perma.cc/S2RD-A95Y>] (last visited Dec. 4, 2017). One August 1, 2018, Professor David R. Boyd replaced Knox as Special Rapporteur. See UN Special Rapporteur to Human Rights and the Environment, *UN Special Rapporteur David R. Boyd*, <http://srenvironment.org/un-special-rapporteur-david-r-boyd> [<https://perma.cc/V8B2-WG78>] (last visited Nov. 30, 2018).

substantial recognition of environmental rights within existing legal systems, explaining the interplay between the right to environmental safety included in other rights, and the responsibility to care for the environment:

Human rights and the environment are inseparable and interdependent.

All human beings depend on the environment in which we live. A healthy environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, housing, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.

At the same time, human rights are needed for the protection of the environment. When people are able to learn about, and participate in, the decisions that affect them, they can help to ensure that those decisions respect their need for a healthy and sustainable environment.<sup>50</sup>

Apparently inspired by this large body of work, the success of COP21 in Paris, and Le Club des Juristes' call to action, former French Minister of Foreign Affairs Laurent Fabius, who presided over the Paris Climate Agreement negotiations, invited a group of environmental legal experts from around the world to draft a blueprint for a Global Pact for the Environment, as the basis for continued discussion and negotiation. By the time of the meeting in June 2017, French President Emmanuel Macron had announced that he would propose a Global Pact for the Environment to the United Nations,

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50. John H. Knox, Statement at the Sixth Meeting of the Parties to the Aarhus Convention (Sept. 14, 2017) (transcript available at [https://www.unece.org/fileadmin/DAM/env/pp/mop6/Statements\\_and\\_Comments/HLS\\_4\\_Thematic\\_OHCHR\\_SR\\_Knox\\_statement.pdf](https://www.unece.org/fileadmin/DAM/env/pp/mop6/Statements_and_Comments/HLS_4_Thematic_OHCHR_SR_Knox_statement.pdf)).

finally laying out a path to codify the human right to a healthy environment in international law.

Nearly a year later, on 10 May 2018, the UN Members States adopted Resolution 72/277 “Towards a Global Pact for the Environment,”<sup>51</sup> in which the UN General Assembly requested the Secretary General to submit at its seventy-third session in 2018 “a technical and evidence-based report that identifies and assesses possible gaps in international environmental law and environment-related instruments with a view to strengthening their implementation.”<sup>52</sup> The Resolution also provided for an ad hoc open-ended working group to be formed to oversee this process.<sup>53</sup>

## II. THE 2017 FRENCH PROPOSAL FOR A GLOBAL PACT ON THE ENVIRONMENT

While the fate and future content of a potential GPE remains uncertain, for the purposes of our Paper we assume that the CDJ’s proposed draft text will continue to guide negotiations, especially since the French delegation appears to be using it as a model from which to advocate for a GPE at the UN. This proposal includes rights, principles, and operating rules in a single document, as follows:

1. A right to live in an ecologically sound environment (article 1);<sup>54</sup>
2. Integration of sustainability principles into international and national development plans (article 3);<sup>55</sup>

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51. G.A. Res. 72/277 1 (May 10, 2018). The Resolution was adopted with 143 States in favor, 5 States against and 7 abstentions. See *Record Details – A/72/L.51*, U.N. DIGITAL LIBRARY, [http://digitallibrary.un.org/record/1486477/files/A\\_72\\_L-51-EN.pdf](http://digitallibrary.un.org/record/1486477/files/A_72_L-51-EN.pdf) (last visited Aug. 19, 2018).

<sup>52</sup> The Secretary General’s report is expected to be published on Dec. 3rd, 2018, and the potential negotiations to follow are scheduled take place in Nairobi in January, March, and May of 2019. See UN Environment, *Towards a Global Pact for the Environment*, <https://www.unenvironment.org/events/conference/towards-global-pact-environment> [<https://perma.cc/4F8A-WD7G>] (last visited Nov. 30, 2018).

53. *Id.* at 2.

54. DRAFT GLOBAL PACT, *supra* note 47, at 46.

55. *Id.* at 46.

3. Prevention and precaution principles (articles 5 and 6), and the non-regression principle (article 17);<sup>56</sup>

4. Remediation of damages for environmental harm based on the “polluter pays” principle (articles 7 and 8);<sup>57</sup>

5. Public participation, education, and inclusion of non-state actors (articles 9, 10, 12, 13, 14);<sup>58</sup>

6. Creation of an implementation body, with a seat at the United Nations (articles 21 and 22).<sup>59</sup>

In doing so, the first draft of the Global Pact for the Environment includes both *substantive rights* (articles 1, 3, 4, and 17)<sup>60</sup> and *procedural rights* (articles 9, 10, 11, and 12).<sup>61</sup> It articulates an organized system that provides for “cooperation” between nations to facilitate implementation at the international level (article 18),<sup>62</sup> and “duty of compliance” to adopt and enact effective environmental protections at the national level (article 15).<sup>63</sup> Drawing on the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998),<sup>64</sup> a Committee of independent experts will also monitor

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56. *Id.*

57. *Id.* at 47–48.

58. *Id.* at 49.

59. *Id.* at 51.

60. *Id.* at 46, 50.

61. *Id.* at 48–49.

62. *Id.* at 50.

63. DRAFT GLOBAL PACT, *supra* note 47, at 41–43.

64. The Aarhus Convention and its Protocol “empower people with the rights to access easily information, participate effectively in decision-making in environmental matters and to seek justice if their rights were violated. *See Public Participation*, UNECE, <https://www.unece.org/env/pp/welcome.html> [<https://perma.cc/VM3M-D5DX>] (last visited Dec. 2017). They protect every person’s right to live in an environment adequate to his or her health and well-being.” *Id.*; *see also* EUROPEAN COMMISSION, *What is the Aarhus Convention?*, EC.EUROPA, <http://ec.europa.eu/environment/aarhus/> [<https://perma.cc/H72X-62Z9>] (last visited Dec. 2017); PUBLIC PARTICIPATION CAMPAIGN, *Aarhus Convention Compliance Committee*, PARTICIPATE, <http://www.participate.org/index.php/compliance-campaign/compliance-committee-in-a-nutshell> [<https://perma.cc/2LTS-WJUM>], (last visited Sept. 13, 2017); Viet Koeserm, *The Compliance Committee of the Aarhus Convention - An Overview of Procedures and Jurisprudence*, 37/2-3 ENVTL POL’Y AND L. 83, 96 (2007).

compliance and facilitate implementation (article 21).<sup>65</sup> The design of the Global Pact aims to prevent harm more than to punish it, and to empower non-state actors to strengthen environmental governance at both the national and the international levels.

Recognizing that this blueprint is meant to *guide* drafting and negotiation efforts, but that the actual text of a potential Global Pact for the Environment might change drastically during the negotiation process, we propose that (1) a GPE could usefully strengthen global environmental governance, and (2) the design of said potential GPE should ensure its ability to: unify existing environmental governance in a guiding text; establish a rights-based approach to environmental protection and recognize the right to a healthy environment; provide for environmental adjudication in both international and domestic courts accessible to private citizens and NGOs; and promote greater integration of environmental planning in other areas of international and national governance, especially in international development policy.

*A. A coherent international environmental legal system*

More than 500 distinct international treaties include provisions related to the environment.<sup>66</sup> While these agreements give states flexibility and allow for the narrow tailoring of provisions to address specific issues, they have also created inconsistencies and confusion. As Le Club des Juristes notes:

While multilateral environmental agreements provide States with a high degree of freedom, their proliferation without coordination can result in inconsistencies between parties' obligations. Such inconsistencies can impair both the binding nature of environmental norms as well as parties' responsibilities. The increase of multilateral environmental agreements makes their enforcement more difficult. States can feel

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65. DRAFT GLOBAL PACT, *supra* note 47, at 51.

66. See LE CLUB DES JURISTES, INCREASING THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL LAW 15, [http://www.fondation-droitcontinental.org/fr/wp-content/uploads/2015/11/CDJ\\_Rapports\\_Increasing-the-effectiveness\\_Nov.2015\\_UK\\_web-VDEF.pdf](http://www.fondation-droitcontinental.org/fr/wp-content/uploads/2015/11/CDJ_Rapports_Increasing-the-effectiveness_Nov.2015_UK_web-VDEF.pdf). [hereinafter INCREASING EFFECTIVENESS].

overwhelmed by the heap of obligations they subscribe to, resulting de facto in a lack of implementation. This normative dynamism necessarily leads to unequal environmental protection.<sup>67</sup>

Some have argued that the “right to a healthy environment” has a powerful “ethical” influence in global governance that cannot be avoided,<sup>68</sup> and wondered whether, under a less strict interpretation of the customary law doctrine, the right can also be considered as already existing.<sup>69</sup> If this is true, based on a flexible interpretation of customary law doctrine that considers rights to be legal obligations, then some might reason that the Pact is redundant.<sup>70</sup> However, this argument is specious; its proponents<sup>71</sup> also recognize that this interpretation of common law is not universally accepted and therefore, the Pact is indeed needed to consolidate an enforceable individual right to a healthy environment in similar terms among states (taking into account the diversity of national situations, article 20).<sup>72</sup>

Robust environmental protection requires that we build a coherent and effective environmental legal system, completing the existing International Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights. The Global Pact for the Environment should act as the “cornerstone” of the new environmental law system, and provide a reference point for coordination among the many institutions that touch environmental governance (the UN Environment Program, the UN Conference on Sustainable Development, the World Bank, and the World Trade Organization,

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67. DRAFT GLOBAL PACT, *supra* note 47, at 27.

68. A clear example of this influence is the Earth Charter. Michael L. Jeffrey, *Environmental Ethics and Sustainable Development: Ethical and Human Rights Issues in Implementing Indigenous Rights* 2 MACQUARIE J. INT’L & COMP. ENVTL. L. 105, 107 (2005).

69. Garavito, *supra* note 14, at 157.

70. *Id.* at 158–59.

71. *Id.* at 162–63.

72. DRAFT GLOBAL PACT, *supra* note 47, at 51. Article 20 states:

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special attention. Account shall be taken, where appropriate, of the Parties’ common but differentiated responsibilities and respective capabilities, in light of different national circumstances.

among others).<sup>73</sup> The text of the Pact, as proposed by the Le Club des Juristes, includes the pillars of established environmental principles in a single document, aspiring to serve as a framework to interpret existing environmental treaties.<sup>74</sup> The draft of the Global Pact tries to serve, therefore, as source to guide interpretation of other norms that will be, as such, governed by the Vienna Convention on the Law of the Treaties (in force since 1980).<sup>75</sup> Consequently, if a future Global Pact conflicts with any other norm that might apply to a specific case, the *lex specialis* maxim<sup>76</sup> should be applied under a contextual appreciation,<sup>77</sup> in accordance with the Vienna Convention. The Global Pact should establish principles that inform international environmental law as a whole, strengthening it by providing overall continuity.

*B. A rights-based approach to environmental protection*

Unlike international governance on human rights, for example, the environmental governance framework has developed through narrowly tailored sectoral treaties on specific issues. As discussed before, this approach has left the establishment of environmental rights to nations, leading to varied levels of protection, and has left governance gaps as scientific understanding of new problems has developed. While this approach capably establishes clear, specific actions that parties must take, a rights-based approach to environmental protection can fill gaps left by issue-specific treaties and allow international environmental law to adapt (assisted by the precautionary principle and the best available technology—at the

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73. DRAFT GLOBAL PACT, *supra* note 47, at 28.

74. *See generally* Aguila, *supra* note 20.

75. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

76. The maxim “*Lex specialis derogat legi generali*” means that a special law regulating an issue repeals a general one on the same matter. *See* AARON X. FELLMETH AND MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (2009), <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380-e-1303> [<https://perma.cc/28QT-ESGL>]. For a deeper analysis, see Anja Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 NORDIC J. OF INT’L L. 27 (2005).

77. *See* Int’l Law Comm’n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, 56–122, U.N. Doc. A/CN.4/L.682 (August 2006) [hereinafter Fragmentation Report].



lowest possible cost—(BAT) principle)<sup>78</sup> and evolve as our understandings of problems do. The rights-based approach promotes the “non-retrogression and progressive realization of all human rights,”<sup>79</sup> defining development priorities more clearly to improve environmental and social resiliency, and establishing a shared foundation for a more robust, holistic, and integrated environmental system that anticipates its own evolution.<sup>80</sup>

In re-centering rights-based discourse in international environmental law, the Global Pact could have a substantial impact on domestic legislation adopted by state parties. Critically, ratifying a Global Pact that articulates rights in this way would be just the first step in an ongoing process of improving environmental protections. After ratification, much of the work of implementation would fall to state governments to bolster environmental legislation and regulation at the national and sub-national levels in order to ensure environmental safety for their citizens. Many of the states that would sign a new GPE—or similar instrument—would presumably support its aims and provisions and would therefore also be inclined to update environmental codes to ensure the protection of all rights guaranteed in the GPE. The potential profusion of domestic regulations to protect environmental rights could be one of the most impactful consequences of a successful GPE.

In addition to catalyzing a proliferation of domestic regulations to strengthen environmental protections, a rights-based approach to environmental governance is critical because it would allow for the use of existing human rights instruments to challenge environmental damage. Because the concept of “environmental right[s] is generally underdeveloped,”<sup>81</sup> defenders of environmental rights have traditionally had to advocate using international human rights

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78. The Best Available Technology (BAT) principle entails that when using a technology, it should be the most advanced version of it, in accordance with the precautionary principle, which implies, in turn, that if a specific decision or action might cause a harm, that action should be avoided. See *BAT - Best Available Technology explained*, ENVI-BAT, <http://www.envibat.se/bat-best-available-technology-explained/?lang=en> (last visited Dec. 2017).

79. ALED DILWYN FISHER, *A HUMAN RIGHTS-BASED APPROACH TO THE ENVIRONMENT AND CLIMATE CHANGE* 5 (2014) (emphasis removed).

80. *Id.*

81. Stephens, *supra* note 28, at 53.

frameworks and in institutions not designed to apply to the particularities of environmental harms, such as the World Trade Organization.<sup>82</sup> Despite the natural connection between the environment and human rights, most international human rights instruments do not include explicit reference to the environment, in part because they were drafted before environmental protection became a universally recognized state duty.<sup>83</sup> Where these instruments do reference the environment, those references are generally vague, and have not been widely invoked to protect the environment.<sup>84</sup>

As a result, environmental defenders have sought to argue that a right to environment is implicit in many other formally recognized rights. While there is no explicit consideration of the environment in most international human rights treaties, the UN General Assembly has highlighted the importance of environmental health on human rights on many occasions.<sup>85</sup> Similarly, the former Special Rapporteur on human rights and the environment John Knox has also argued that

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82. See *The Environment: A Specific Concern*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/bey2\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm) [<https://perma.cc/E8S2-BFFU>] (last visited Dec. 2017).

83. See Shelton, *supra* note 22, at 166.

84. See DINAH SHELTON, HUMAN RIGHTS, HEALTH AND ENVIRONMENTAL PROTECTION: LINKAGES IN LAW AND PRACTICE. A BACKGROUND PAPER FOR THE WHO 29 (2002), [http://www.who.int/hhr/information/Human\\_Rights\\_Health\\_and\\_Environmental\\_Protection.pdf](http://www.who.int/hhr/information/Human_Rights_Health_and_Environmental_Protection.pdf). That said, four human rights treaties do explicitly enumerate a “right to a healthy environment”: the African Charter on Human and People’s Rights, 1981 (article 24), the San Salvador Protocol, 1988 (article 11), the Aarhus Convention, 2001 (Preamble), and the Arab Charter on Human Rights, 2004 (article 35). See Garavito, *supra* note 14, at 161–62. Curiously, the European Union, which considers itself a leader in environmental policy, lags behind in this respect. Neither the European Convention for the Protection of Human Rights and Fundamental Freedoms nor the European Social Charter includes a specific reference to the protection of the environment, and the Charter of Fundamental Rights of the European Union (signed in 2000 and with legal force since 2009, with the Lisbon Treaty) only recognizes the duty of public authorities to integrate a “high level of environmental protection” as well as an “improvement of the quality of the environment” in public policies. Charter of Fundamental Rights of the European Union art. 37, 2010 O.J. C 83/02.

85. Examples of which include: G.A. Res. 43/196 (Dec. 20, 1998); G.A. Res. 45/94 (Dec. 14, 1990); see also John H. Knox (Special Rapporteur), *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment*, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016).

the UN Human Rights Commission consider the effects of environmental harm in human rights cases.<sup>86</sup> Consequently, the Commission advocates for “cooperation between human rights bodies and those concerned with the environmental protection.”<sup>87</sup>

Still, existing jurisprudence on human rights has not developed in such a way that allows for comprehensive consideration of the particularities of environmental violations.<sup>88</sup> The implicit right to live in a healthy environment has been recognized by some courts recently, including by the High Court of Ireland<sup>89</sup> and the Inter-American Court of Human Rights,<sup>90</sup> for example, but such recognitions are far from common and rely upon case-by-case favorable interpretation by specific judges.<sup>91</sup>

Therefore, the explicit ratification of a human right to a healthy environment “as a stand-alone justiciable right,”<sup>92</sup> as proposed by the draft of the Global Pact for the Environment, would build upon existing trends in human rights jurisprudence to provide for greater predictability and protection for those suffering from harm.

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86. See generally Knox, *supra* note 85.

87. Shelton, *supra* note 84, at 9.

88. See Evadne Grandt, *International human rights courts and environmental human rights: re-imagining adjudicative paradigms*, 6 J. HUM. RTS. AND THE ENV'T 156 (2015).

89. See *Friends of the Irish Env't CLG v. Fingal County Council* [2017] No. 201 JR 266 (Ir.); see also Dena Adler, *Irish High Court Recognizes a Right to an Environment, But Finds that Environmental Group Lacks Standing to Make Climate Change Claims in Airport Runway Case*, CLIMATE LAW BLOG, <http://blogs.law.columbia.edu/climatechange/2017/12/12/irish-high-court-recognizes-a-right-to-an-environment-but-finds-that-environmental-group-lacks-standing-to-make-climate-change-claims-in-airport-runway-case/> [https://perma.cc/N38W-594Y] (last visited Dec. 2017).

90. See *Medio Ambiente y Derechos Humanos*, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017) (Spanish only). For the English summary of that advisory opinion, see Official Summary Issued by the Inter-American Court, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017), [http://www.corteidh.or.cr/docs/opiniones/resumen\\_seriea\\_23\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_23_eng.pdf).

91. Shelton, *supra* note 23, at 1.

92. Atapattu Sumudu, *The Right to a Healthy Environment and Climate Change: Mismatch or Harmony?*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* (J. Knox & R. Pejan eds., 2018).

*C. Improved implementation through new institutions*

While the international community has already created an impressive body of environmental law, full implementation remains a challenge, particularly at the international level. To overcome this challenge, the next generation of international environmental agreements, starting with the Global Pact for the Environment, could critically improve implementation by providing for the design and operation of institutions that can promote the full and faithful observance of environmental commitments by states.<sup>93</sup> The draft blueprint of the Global Pact nods to this present deficit by including creation of a generic monitoring mechanism to facilitate compliance and implementation (article 20).<sup>94</sup>

International adjudication of environmental claims would likely improve compliance,<sup>95</sup> but enforcing compliance with existing treaties has “traditionally been a sensitive matter,” mostly because it involves the sovereignty of the states concerned.<sup>96</sup> New (or improved) administrative and judicial institutions with compulsory jurisdiction over environmental disputes could usefully be created to facilitate enforcement of the right to a healthy environment at the international level.<sup>97</sup> The draft Global Pact elaborated in Paris is notably silent on the creation of specific new institutions, but the CDJ considers them necessary for the effectiveness of international environmental governance<sup>98</sup> because existing international oversight institutions lack the requisite power to penalize non-compliant states.

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93. *See* Stephens, *supra* note 28, at 1–2.

94. DRAFT GLOBAL PACT, *supra* note 47, at 51.

95. Richard Bilder, *Adjudication: International Arbitral Tribunals and Courts*, in PEACEMAKING IN INTERNATIONAL CONFLICT: METHODS AND TECHNIQUES 195, 195 (William Zartman and J. Lewis Rasmussen rev. ed. 1997) (“International adjudication is a method of international dispute settlement that involves the referral of the dispute to an impartial third-party tribunal—normally either an arbitral tribunal or an international court—for binding decision, usually on the basis of international law.”).

96. *See* Stephen J. Turner, A GLOBAL ENVIRONMENTAL RIGHT 99 (2014).

97. *Id.* at 61–62.

98. The CDJ argues that the Global Pact should eventually include “the creation of an international judicial system for environmental matters and articulate its jurisdiction with that of existing systems” to aid implementation and impact. *See* INCREASING EFFECTIVENESS, *supra* note 66, at 84.

In the absence of new institutions created to support the implementation and enforcement of the GPE, its implementation would likely be overseen by UNEP, which serves as the main coordinating body on environment within the UN system. An administrative body will be important to promote compliance with the GPE because, while many states may *want* to comply with the provisions of the Pact, some may lack the resources or institutional capacity to do so. Therefore, the future Pact will need to provide for complementary measures beyond legal confrontation to ensure fair implementation and not to penalize states for good faith attempts to comply. Such a generic “compliance mechanism to facilitate implementation” is included in article 21 of the blueprint GPE.<sup>99</sup> However, many countries have criticized UNEP’s relative weakness and supported efforts to strengthen and provide it with more funding.<sup>100</sup> Some support the idea of simply reinforcing the existing organization by increasing its financial resources and creating a new (or bolstered) executive environmental body<sup>101</sup> to fully address our serious environmental challenges,<sup>102</sup> while others argue that UNEP must be upgraded into a specialized Agency to fulfil its mandate.<sup>103</sup> At any rate, it is clear that UNEP needs some reform or reorganization to support states to comply where domestic capacities alone are insufficient.

In addition to strengthening the administration of international environmental governance, many scholars also more controversially argue for the creation of an International Court for the Environment (ICE), with a similar mandate to the existing European Court of

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99. See DRAFT GLOBAL PACT, *supra* note 47.

100. See Maria Ivanova, *Designing the United Nations Environment Programme: A Story of Compromise and Confrontation.* 7 INT’L ENVTL. AGREEMENTS: POL., L. AND ECON. 337, 339-40 (2007).

101. See *id.* at 355.

102. Maria Ivanova, *UNEP as Anchor Organization*, in INTERNATIONAL ORGANIZATIONS IN GLOBAL ENVIRONMENTAL GOVERNANCE 151-174 (Frank Biermann et al. eds., 2009).

103. Nils Meyer-Ohlendorf and Markus Knigge, *A United Nations Environment Organization*, in GLOBAL ENVIRONMENTAL GOVERNANCE: PERSPECTIVES ON THE CURRENT DEBATE 133, 137-38 (Lydia Stewart and Estelle Perry eds., 2007).

Human Rights (ECHR).<sup>104</sup> This idea, however, is not new: as early as 1989, the International Court of the Environment Foundation elaborated a model statute to create an International Environmental Agency and an International Court of the Environment that was later presented at the 1992 Rio Earth Conference. In 1994, the NGO International Court on Environmental Arbitration and Conciliation (ICEAC) was established in Mexico to assist in the resolution of environmental disputes, although it has never played an active role in actual legal cases. And in 1999, a group of environmental experts and organizations discussed proposals for an ICE modeled after the International Court of Justice during the Third Annual Environmental Law Conference at George Washington University.<sup>105</sup> Others have also advocated for the creation of an environmental court, including Amedeo Postiglione,<sup>106</sup> as well as Tim Stephens,<sup>107</sup> the International Bar Association,<sup>108</sup> and the ICE Coalition.<sup>109</sup>

While at present it appears unlikely that an International Court of the Environment will be included in the Global Pact negotiations, we agree with those who believe that such an institution would importantly improve the effectiveness of the environmental legal enforcement and raise public awareness on the importance of the environmental matters to international governance. It would make intuitive sense to include the creation of both an environmental court and a strengthened environmental administrative body in a future GPE to both facilitate implementation and enforcement of the provisions

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104. *See generally* *How the Court Works*, EUROPEAN COURT OF HUMAN RIGHTS, <http://www.echr.coe.int/Pages/home.aspx?p=court/howitworks&c=> [https://perma.cc/65DA-9VK7] (last visited Dec. 2017).

105. *See* INT'L BAR ASS'N CLIMATE CHANGE JUST. AND HUM. RTS. TASK FORCE, *ACHIEVING JUSTICE AND HUMAN RIGHTS IN AN ERA OF CLIMATE DISRUPTION* 85–86 (2014), <https://www.ibanet.org/PresidentialTaskForceClimateChangeJustice2014Report.aspx> [https://perma.cc/E4KZ-KC6Q] (last visited 19 August 2018) [hereinafter INT'L BAR REPORT].

106. *See generally* Postiglione, *supra* note 29. Or, more recently, see Amedeo Postiglione, *An International Court of the Environment*, in *GOVERNING FOR THE ENVIRONMENT: GLOBAL PROBLEMS, ETHICS AND DEMOCRACY* 221 (Brendan Gleeson & Nicholas Low eds., 2001).

107. *See* Stephens, *supra* note 28, at 56–61.

108. *See generally* INT'L BAR REPORT, *supra* note 105.

109. *See* ICE COALITION, *supra* note 32.

therein and also to contribute to the GPE's broader project of unifying the larger body of international environmental law.

It is important to note that efforts to promote these institutions should not come at the expense of proposals to strongly encourage or even require parties to codify the GPE's principles within domestic law, thereby leveraging domestic legal systems to enforce a right to a healthy environment, along with other principles commonly included in soft law instruments. Allowing for domestic enforcement of the Pact's provisions would also emphasize the notion that the Global Pact aims to act not only as a treaty among states, but also between states and their citizens.

*D. Broadened standing for effective implementation and improved protection at both the national and the international levels*

Traditional binding international agreements assign responsibilities to states and provide for findings of liability for failure to comply. A hypothetical binding environmental agreement would provide for state parties to be responsible for regulating conduct within their borders. But, as previously noted, international environmental treaties and institutions are poorly suited to hold states accountable when they fail to comply with commitments.

In addition to codifying soft law principles and aiding adjudication, the future Global Pact should go beyond this traditional model of bilateral or centralized accountability. Although the CDJ's draft GPE blueprint does not establish bodies for international adjudication between states, it does provide for the inclusion of non-state actors in promoting compliance with the Global Pact (article 14).<sup>110</sup> We go a step further, advocating that non-state actors be granted explicit standing to challenge their own states or neighboring states for infringing upon their rights. In doing so, the draft of the Global Pact should work to democratize its own enforcement and multiply pressure points to incent implementation, thereby overcoming the "Westphalian model"<sup>111</sup> of state sovereignty that has limited international

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110. DRAFT GLOBAL PACT, *supra* note 47, at 49.

111. The Treaties following the Peace of Westphalia, signed in 1648 after the Thirty Years War and the Eighty Years War, altered the existing political structure in Europe, establishing the state sovereignty system which is the modern

enforcement in the past. Of course, this would not limit states' ability to bring cases against other states as well.

Litigation can therefore powerfully complement a global executive institution's police powers to provide remediation for harm as well as the monitoring mechanism proposed in article 21.<sup>112</sup> By conceiving of standing broadly in this way, a future GPE could supplement dependence on domestic political will or centralized UN resources to hold negligent, or malevolent, polluters directly accountable to those that their negligence or malevolence most affects. Most importantly, extending standing in this way not only strengthens appropriate remediation for environmental harms under the *polluter pays* principle (articles 7 and 8),<sup>113</sup> but also encourages states to comply with the provisions of the Global Pact for the Environment. There is ample evidence that the threat of liability influences government policy-making in other realms of international law.<sup>114</sup> This adjudication would then serve the *ex post* purpose of compensating affected parties for previous harm, but also the *ex ante* purpose of preventing future harm from occurring, through incentivizing stronger domestic regulation and practices (article 5).<sup>115</sup>

*E. Greater integration of environmental principles into other international legal regimes*

In addition to bringing coherence to the international environmental legal system, the Global Pact for the Environment should aim to spur the integration of good faith environmental considerations within all the "component parts of the global legal architecture that affects the environment."<sup>116</sup> Agreements on trade, on investment, on human rights, on security, and on climate, for example, all have broad implications for environmental quality. The UN and other international governance bodies, as well as many countries, already recognize this, expressed through the language of sustainable

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international system of states. See Derek Croxton, *The Peace of Westphalia of 1648 and the Origins of Sovereignty*, 21 INT'L HIST. REV. 569 (1999).

112. DRAFT GLOBAL PACT, *supra* note 47, at 51.

113. *Id.* at 47–48.

114. Julia Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, 3 WESTERN J. OF LEGAL STUDIES 1, 1–25 (2013).

115. DRAFT GLOBAL PACT, *supra* note 47, at 47.

116. Turner, *supra* note 96, at 4–5.



development adopted in the 2030 Agenda<sup>117</sup>. Sustainable development reconciles care for the environment with social and economic concerns. But too often environmental and human rights commitments are separated out from economic policymaking. The Global Pact should provide legal certainty through clarity and transparency to the international legal system as a whole. Moreover, the creation of an overarching environmental text is consistent with article 31.3(c) of the Vienna Convention on the Law of Treaties<sup>118</sup> and with the opinions of the UN International Law Commission, which has encouraged consolidation, in the face of an increasingly fragmented international legal system.<sup>119</sup>

By providing for the participation of non-state actors and assigning the duty to care for the environment to them as well as states, the draft of the Global Pact also acknowledges the fundamental role that the private sector will play, not only to work towards solutions to environmental degradation, but also to integrate environmental best practices into economic decision-making. The Global Pact should also globalize standards of environmental regulation and curb corporate ability to seek out pollution havens. By giving a clear framework of consolidated environmental principles, the Global Pact should guarantee a minimum level (but sufficiently ambitious, given the current environmental crisis we are facing) of environmental observance among states, thus patching some of the gaps left by domestic regulation.

### III. CLIMATE CHANGE AND THE GLOBAL PACT FOR THE ENVIRONMENT

The Inuit people of the United States and Canada brought the first human rights case based on climate change against the United States in 2005, before the Inter-American Commission on Human Rights.<sup>120</sup>

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<sup>117</sup> G.A. Res. 70/1 (Oct. 21, 2015). See A/RES/70/1, U.N. DIGITAL LIBRARY, <https://digitallibrary.un.org/record/803352/> (last visited Nov. 30, 2018).

<sup>118</sup> Vienna Convention, *supra* note 75, at art. 31. “General rule of Interpretation” (3. “There shall be taken into account, together with the context: . . . (c) Any relevant rules of international law applicable in the relations between the parties.”)

<sup>119</sup> See *generally* Fragmentation Report, *supra* note 77.

<sup>120</sup> For more information in a simplified version, see *Climate Change Responsibilities in Polar Peoples: The Inuit Case*, EJOLT (August 05, 2014),

Though the petition was dismissed, the placed climate change definitively on the human rights agenda. In 2007 the Malé Declaration on the Human Dimension of Global Climate Change<sup>121</sup> established the first instrument of international policy to explicitly recognize the link between human rights and climate change.<sup>122</sup> In 2009, the Office of the UN High Commissioner for Human Rights (OHCHR) officially acknowledged the danger that climate change poses to human rights in Resolution 10/4 further strengthening the case for international and national climate change action.<sup>123</sup> After that, the Cancun Agreement 2010, recognized the need to respect human rights in climate change related actions as an obligation for the Parties, and in 2015, the Paris Agreement called on countries, in the Preamble, to “respect, promote and consider their respective obligations on human rights” in their fight against climate change,<sup>124</sup> alluding to the declaration of a right to a healthy environment.<sup>125</sup>

The link between climate change and the human rights dimension of the environment is evident and already stated by experts in the matter<sup>126</sup>: the right to a healthy environment is an essential part of the fight against climate change, as the normal development of life will not be possible (or will change dramatically) if we do not act urgently and effectively. The *need* to protect the human rights of climate change

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<http://www.ejolt.org/wordpress/wp-content/uploads/2015/08/FS-44.pdf> (last visited Dec. 2017).

121. *See* MALÉ DECLARATION ON THE HUMAN DIMENSION OF GLOBAL CLIMATE CHANGE (Nov. 14, 2007), [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf).

122. *Id.* Human Rights Council Resolution 7/23 was the first one to note, in an explicit way, the “immediate and far-reaching threat to people and communities around the world” the effects of climate change represent, and also, its “implications for the full enjoyment of human rights.” Human Rights Council Res. 7/23, U.N. Doc. A/HRC/RES/7/23, at 1 (Mar. 28, 2008).

123. Human Rights Council Res. 10/4, Human Rights and Climate Change, U.N. Doc. A/HRC/RES/10/4, at 1 (Mar. 25, 2009).

124. UNFCCC, HUMAN RIGHTS & CLIMATE CHANGE WORKING GROUP, <http://climaterights.org/our-work/unfccc/> [<https://perma.cc/KUW4-FNBN>] (last visited Dec. 2017); PARIS AGREEMENT (adopted 12 December 2015, opened for signature on 22 April 2016, entered into force on 4 November 2016).

125. Lavanya Rajamani, *Human Rights in the Climate Change Regime: From Rio to Paris and Beyond*, in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 17 (J. Knox & R. Pejan eds., 2018).

126. *See, e.g.*, Knox, *supra* note 85.

victims and refugees is clear, but the path forward on action, and who will shoulder the burden of protection, remains murky. While the Global Pact for the Environment, and the duty to act in order to protect all people's right to a healthy environment would not completely solve these problems, it would provide new avenues of accountability to those suffering from climate harms and create an added culture of urgency to the climate fight. Needless to say, the creation of an International Court of the Environment would certainly help to this respect.

#### IV. QUESTIONS FOR THE DAYS AHEAD

While the preliminary draft of the Global Pact for the Environment points to a number of clear objectives for the Global Pact to deliver, a number of questions still must be addressed before the Pact is ready to be made into law. We do not answer these questions here, but instead raise them as crucial to the success of the Pact in the future.

##### *A. Is it necessary that the Global Pact be codified in Hard Law?*

The first and most central question for the Global Pact is of its legal character. Some have questioned the virtue of codifying soft-law principles into hard law. Pointing out that "it would not necessarily be advantageous to turn non-legally binding principles into legally binding ones," Columbia Law Professor Susan Biniiaz argues that while principles like the precautionary one are useful as considerations, they would create confusion if converted into hard law.<sup>127</sup> Others might approach hard environmental law more favorably, but worry that incorporating strict commitments in the Global Pact might hurt its ability to attract broad participation.

At the same time though, the judiciability of the right to an ecologically sound environment lies at the core of the CDJ's draft of the Global Pact. And, while it might seem that states would be hesitant to legally bind themselves to stricter environmental standards, it is important to remember that as of 2012, ninety countries had already recognized some form of right to a clean environment in their

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127. Biniiaz, *supra* note 24, at 2–3.

constitutions,<sup>128</sup> and fully 177 of the 193 UN member countries had recognized the right to environmental quality through constitutions, legislation, judicial precedent, or international agreement.<sup>129</sup>

Both supporters of hard and soft law wield valid arguments. The future character of the Pact requires further debate. One might consider though whether some of the Pact's provisions could remain legally binding in a clear way, while others remained vaguer, as mere instructive principles. If possible, would such a construction be preferable to the way that the preliminary draft is crafted?

*B. How should the Global Pact define "environment"?*

If the right to live in an ecologically sound environment is going to remain in the Pact, "environment" will need to be better understood. Does a right to environment refer only to a right to safe air to breathe, water to drink, and land to live on? Or a right to access the natural world? Or the right to have all spaces where people live their lives be clean and healthy, even if those "environments" are man-made? Could it also include more intangible elements that draw a link between environment and cultural heritage? Or could it affirm the inherent ethical value of Nature, as noted in the Earth Charter and the World Charter of Nature?<sup>130</sup> Are there social inputs to environment, or only physical ones? Does the right to a stable climate fall under the right to live in an ecologically sound environment? On the other hand, some might argue that it would be best to leave "environment" undefined, allowing common understanding of the word to allow for the Pact's flexible use. Regardless, how environment is defined—or left undefined—will have important implications for the types of cases that will be able to be brought under the Pact.

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128. David R. Boyd, *The Implicit Constitutional Right to Live in a Healthy Environment*, 20 REV. EUROPEAN COMMUNITY & INT'L ENVTL. L., 171, 171 (2011).

129. David R. Boyd, *The Constitutional Right to a Healthy Environment*, 54 ENV'T: SCI. & POL'Y SUS. DEV. 3, 3–4 (2012).

130. See Kotzé, Louis J., and Duncan French. A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for Lex Anthropocenae?" INT'L ENVTL. AGREEMENTS: POL., L. AND ECON (2018).

*C. Should the Global Pact be implemented primarily in international or domestic courts?*

This Paper has put forward a vision of the Global Pact at least in part enforced through a new international judicial body, the International Court for the Environment. But, as (or if) the Global Pact's provisions evolve during the negotiations at the UN, some have asked what level of judicial system would be best able to maximize the Pact's effective implementation. At present, domestic legal systems have much greater capacity than an international court would, and often have greater coercive authority to enforce judgements. Moreover, since "international justice is optional,"<sup>131</sup> and not all domestic legal systems would recognize the compulsory jurisdiction of a potential International Court of the Environment,<sup>132</sup> its efficacy would be reduced. In addition, the creation of an International Court of the Environment seems politically unlikely at present.

That said, if one of the aims of the future Global Pact is to provide for adjudication of international disputes, domestic adjudication advocates need to provide a mechanism for the adjudication of potential cases between states or between non-state actors of different nationality. Whether it aims to promote adjudication through domestic courts, an international court, or both, the Global Pact needs clearer language to provide jurisdiction over cases.

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131. INCREASING EFFECTIVENESS, *supra* note 66, at 14.

132. Countries have, for example, withdrawn from the jurisdiction of the International Court of Justice rather than submit to unfavorable rulings. France terminated its declaration in 1974 after the Nuclear Test Cases, (Austl. V. Fr.), 1973 I.C.J. 99 (Interim Protection Order of June 22), (N.Z. v. Fr.), 1973 I.C.J. 135 (Interim Protection Order of 1973). Letter received Jan. 10, 1974, 907 U.N.T.S. 129 (Terminating France's declaration). The US terminated its declaration in 1985 after the Nicaragua case, (Nicar v. U.S.), 1984 I.C.J. 392 (Judgment on Jurisdiction of the Court and Admissibility of the Application of Nov. 26). Letter Received Oct. 7, 1986, 1408 U.N.T.S. 270 (Terminating United States' declaration). For the current status of all ICJ declarations, see *Declarations recognizing as compulsory the jurisdiction of the International Court of Justice under Article 36, paragraph 2, of the Statute of the Court*, UNITED NATIONS, [https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg\\_no=1-4&chapter=1&clang=\\_en#4France](https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=1-4&chapter=1&clang=_en#4France) [<https://perma.cc/7JYH-7KJR>] (last visited Nov. 6, 2018).

The European Union's "direct effect" doctrine, also used in international law by many states around the world,<sup>133</sup> may be instructive in designing enforcement mechanisms for the Pact. In the EU, direct effect, when certain conditions are met,<sup>134</sup> "enables individuals to immediately invoke a European provision before a national or European court," even sometimes if that specific provision has not yet been incorporated into the legal system of a specific country.<sup>135</sup> A citizen can exercise vertical direct effect when rights conferred by a directive are violated by the State, or can exercise horizontal direct effect to make claims against other private individuals before national courts.

*D. Which "non-state actors" should the Global Pact hope to include, and how?*

Providing the mechanism for citizens and civil society to hold states accountable in the courts is a central premise of the draft of the Pact. But, the preliminary draft requires stronger guidelines for the participation of non-state actors. Does this mean just citizens and NGOs? Or does it include corporations? In that case, could a corporation bring a case against a competitor, or against citizens it hopes to coerce? What about city authorities? Any others? As the negotiations evolve, drafters and negotiators should take care to address these points.

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133. André Nollkaemper, *The Duality of Direct Effect of International Law*, 25 *EUR. J. INT'L L.*, 105, 109 (2014).

134. Those conditions were established by the EU Court of Justice in *N.V. Algemene Transport v. Neth. Inland Revenue Admin.*, 1963 *EUR-Lex* 2, 7–8 (Feb. 5, 1963).

135. EurWork, *Direct Effect*, EUROFOUND, <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/direct-effect> [<https://perma.cc/M4AE-TQGM>] (last visited Nov. 2017). *See also* Nollkaemper, *supra* note 133; TIM HILLIER, *SOURCEBOOK ON PUBLIC INTERNATIONAL LAW* 58 (1998). Application under direct effect is governed by conditions first established by the European Court of Justice in 1963, in the *Van Gend & Loos* Judgment. *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin.*, Judgment of the Court of Justice, Case 26-62, *ECLI:EU:C:1963:1* (Feb. 5, 1963) <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61962CJ0026:EN:PDF>. *See also* J.H.H. Weiler, *Van Gend en Loos: The Individual as subject and object and the dilemma of European legitimacy*, 12 *INT'L J. CONST. L.* 94 (2014).

## CONCLUSION

The planet requires bold new thinking to protect its future. Today's leaders must break from the past to forge a new path for environmental protection. By codifying the human right to a healthy environment, consolidating environmental principles, and democratizing enforcement, the Global Pact can empower people in their own protection, thereby representing the type of innovative, big thinking necessary to reverse course on environmental degradation.

Diplomats, advocates, and academics still have plenty to sort out before the Global Pact is ready to become international law. If the Pact succeeds, it could provide recourse to environmental problems in international courts, shift judicial norms in domestic courts, and promote better domestic policy-making to protect the environment. But, even if the Pact never reaches ratification, or is ratified with vastly different content, the campaign for the Pact may well push policymakers of all stripes to consider the relationship between environmental protection and other international law, with benefits potentially spilling over into other realms of environmental protection that would be difficult now to predict.

The problems we face are severe. The Global Pact, and the enforceable right to a healthy environment that it intends to codify, would be a milestone achievement in the fight for environmental protection. The Global Pact can capitalize on the hopeful and aspirational momentum of the Paris Agreement to save lives. It is the logical conceptual extension of the Paris Agreement, providing for democratic enforcement of commitments to fight climate and protect the environment alike, advocated by the Paris Agreement's architect, Laurent Fabius. Many around the world have claimed that 2015 would be a turning point in international environmental governance; the Global Pact for the Environment could help to make that prediction a reality.