

GAPS IN INTERNATIONAL ENVIRONMENTAL LAW: TOWARD A GLOBAL PACT FOR THE ENVIRONMENT

by
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About the Author

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Acknowledgements

*To Nick,
May we bring your generation not only hope
But also answers.*

This book was written during the hot summer of 2019 in New York City, as the Open-Ended Working Group met behind closed doors at the United Nations to decide on the future of the Global Pact for the Environment. Following the negotiations that unfolded, the idea of this book advanced based on one goal: to make a record of the steps toward a Global Pact and contribute to the negotiations moving forward. The process so far was far from linear, and supporters of the Global Pact were often discouraged, thinking the proposal would die off along tireless debates on the need for a new framework agreement on environmental principles. However, thanks to the commitment of the co-chairs of the working group, Francisco Duarte Lopes and Amal Mudallali, the initiative took yet another step towards becoming a reality. The recent resolution adopted by the General Assembly in 2019 calls for a political declaration to be adopted by 2022, at the 50th anniversary of the Stockholm Declaration and the 30th anniversary of the Rio Declaration.

Several people were essential in making sure this book was written and published timely as a companion for the next steps in the negotiation of a Global Pact. First and foremost, I am grateful to Prof. Nicholas Robinson, who supported me in every step of this process. As my thesis supervisor, he not only helped me choose the topic of my dissertation but advised me every step of the way, making sure my research was current and useful to other scholars, diplomats, and policymakers. His support was also essential in getting this research published by ELI Press. I am grateful to ELI Press for agreeing to publish this book in such a small timeframe. It was fortunate that the publication was also done in time to commemorate its 50th anniversary, and it is truly an honor to be a small part of the great work ELI has done over the past decades. In particular, I thank Scott Fulton, Jay Pendergrass, and Rachel Jean-Baptiste. I would also like to thank the International Council on Environmental Law (ICEL), represented by Victor Tafur and Prof. Nicholas Robinson, for publishing this book jointly with ELI and for its commitment to this idea.

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As I finish writing this book, my son, Nicholas, turns one year old. The challenges of being an academic triple once one becomes a mother. My support system was essential to continue working while juggling the multiple functions I now have. On a personal level, there are a few people I would like to extend my gratitude. I am eternally grateful to my husband Marcelo, who has always been very supportive of my academic career but was even more so during the last year. Thank you for providing me the structure to keep going, and stepping in when it feels like too much. To Eli, who cared for my son and my house whenever I couldn't and did so like these were her own, I am beyond grateful. To my mother, always, always by my side. To my family, especially Nick, Rodrigo, Ciça, and Maneco. And, finally, to my Peanut friends, for bearing with me, always and forever.

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Foreword

Scott Fulton and Nicholas A. Robinson

Maria Antonia Tigre provides a deep dive into the challenges that characterize international environmental law today. Her study describes contemporary negotiations about how, and even whether, to clarify and strengthen the norms that guide actions affecting the environment. The debates described here are about the future, but they rest on the foundation of the past five decades during which environmental law was created.

Fifty years ago, both the Environmental Law Institute (ELI) and the International Council on Environmental Law (ICEL) were established. That the field of environmental law did not then exist is significant. The founders of ELI and ICEL had both foresight and the courage of their convictions. In 1997, ELI honored ICEL's founders, Wolfgang and Françoise Burhenne-Guilmin, for their leadership in the Environmental Law Programme of the International Union for the Conservation of Nature (IUCN) and in building ICEL, which had been established in New Delhi to support IUCN's endeavors at creating and expanding environmental law internationally. Both ELI and ICEL are members of IUCN. ICEL honored one of ELI's inspirations, Russell Train, with its Elizabeth Haub Award for Environmental Law in 1980. Suffice it to say that since 1969, ELI and ICEL have been instrumental in building the legal principles and methods for, as ELI puts it, "making law work for people, places and the planet."¹

ICEL commissioned this study, especially for the diplomats and jurists who are examining how to strengthen international environmental law. This book offers pathways to gain understanding of the competing trajectories about law and the environment. Questions abound: How extensively should government regulate conduct that affects the environment? Can burdens of applying proposed new laws be added when existing laws remain to be fully implemented? What is the just balance between aspirational policies and norms versus binding rules and regulations? What do the basic juridical principles of care for the Earth mean in each different legal system? Who should decide these questions? These and other issues permeate the dialogue among nations described in this study.

1. See ELI's "Strategic Vision," at <https://www.eli.org/strategic-vision>.

The outcome of the debates is uncertain, but it is certain that the debates will continue and grow in urgency as problems worsen. Land degradation, sea-level rise, intensifying storm events, biodiversity collapse, exhaustion of nature resources, and persistent pollution increasingly erode the economy of nations. For instance, in 2019, the World Health Organization finds that air pollution remains the greatest risk to human health worldwide.² To present this book in 2019 is timely and in the best traditions of both ICEL and ELI as institutions dedicated to advancing what we and the UN now call “the environmental rule of law.”³

We have confidence in the positive outcome of the debates about law and the environment because of what we have experienced since 1969. We are excited to publish this book. The debate over the proposed “Global Pact for the Environment” offers insights into the challenges environmental law faces in the next fifty years. The Global Pact seeks to codify a set of norms. The right to the environment is now commonly found in constitutions around the world, the idea being that “[e]very person has the right to life in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment, and every State or institution, every person, natural or legal, public or private, has the duty to contribute at their own legal to the conservation, protection, restoration and evolution of Earths’ ecosystems.”⁴

While the right to the environment, and other principles, are increasingly recognized in national laws and several international agreements, international lawyers still contest this legal obligation. The contending beliefs about national self-interests inhibit arriving at a quick consensus about any next generation of environmental norms. The same questioning is found in different views on how to address gaps in the legal framework for managing global environmental issues. Such debates about environment rights and duties will mark the next fifty years of deliberations. Arguments about how environmental law should guide sustainable development will generate a new consensus on law reflecting the substantive, agreed aims of the United Nations Sustainable Development Goals.⁵ The basis for this positive prognosis is found in the accomplishments that nations have attained during the past five decades.

2. WHO, at <https://www.who.int/emergencies/ten-threats-to-global-health-in-2019>.

3. ELI authored the first Global Report on the Environmental Rule of Law Report (January 2019) released by the United Nations Environment. The Report is available online at: https://www.eli.org/sites/default/files/docs/erol/EnvironmentalRuleofLaw_%20FirstGlobalReport.pdf.

4. Adapted from Principles 1 and 2 of the proposed Global Pact for the Environment, in a Motion submitted by ICEL to the IUCN World Conservation Congress, scheduled for June 2020 in Marseille, France. See www.iucncongress2020.org. The right to the environment is recognized in more than 100 nations. DAVID BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION* (University of British Columbia Press, 2012).

5. See <https://www.un.org/sustainabledevelopment/sustainable-development-goals/>.

In 1987, the United Nations World Commission on Environment and Development published its historic report, *Our Common Future*,⁶ which is also known as the Brundtland Commission Report, after its chairwoman, Norwegian Prime Minister Gro Harlem Brundtland. Still timely today, this report summed up our persistent environmental problems well: “The Earth is one, but the world is not.” The hydrologic cycle, carbon cycle, other planetary geophysical cycles and the world’s oceans link the ecosystems and human settlements on every continent, and yet local and national laws govern only their own country’s territory, and adjacent coastal waters. There are precious few laws to manage human impacts on Earth’s natural systems. Since environmental laws vary greatly from country to country, inconsistent statutes in one nation can, when it comes to planetary problems, often nullify the effectiveness of laws in another. One government can carefully protect the habitat of a migratory species, while another nation sustains rapid loss of its habitat. Pollution is controlled in one region but increases with weak or non-existent controls in another country. Transboundary pollution is indeed growing globally. It is no wonder that the UN’s latest “Global Environmental Outlook” reports a rapid deterioration of the environment in all regions.⁷

The Brundtland Commission embraced a recommendation made earlier by the International Union for the Conservation of Nature (IUCN),⁸ which had called for governments to pursue what IUCN called sustainable development. The World Commission’s definition caught the attention of policymakers everywhere: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Following the United Nations Conference on the Human Environment held in Stockholm in 1972, nations began to enact laws to abate air and water pollution and to better protect flora and fauna. The Stockholm Conference led the United Nations to establish its Environment Programme, UNEP, which assisted nations as they developed their first legal provisions for environmental protection. By 1987, most nations boasted having enacted their first generation of environmental protection laws, but the statutes were uneven in scope and most countries lacked adequate experts to implement them fully. Pollution persisted and often increased. Biodiversity losses esca-

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6. World Commission on Environment and Development (“Brundtland Commission”), *OUR COMMON FUTURE* (Oxford University Press, 1987), available online at <https://www.sustainabledevelopment2015.org/AdvocacyToolkit/index.php/earth-summit-history/historical-documents/92-our-common-future>.
 7. UN Environment, Sixth Environmental Outlook, GEO-6, (2019), at <https://www.unenvironment.org/resources/global-environment-outlook-6>.
 8. IUCN/WWF/UNEP, *Caring for the Earth*, at <https://portals.iucn.org/library/efiles/documents/CFE-003.pdf>.

lated. Governments realized that more effective governance was needed. These concerns led nations in 1992 to convene in Rio de Janeiro, Brazil, the largest summit meeting ever held: the UN Conference on Environment & Development (UNCED), dubbed the “Earth Summit.”

At UNCED, the world’s governments produced two remarkable documents: (a) *Agenda 21*, a blueprint agreed by consensus, consisting of 800 pages of proposals that all countries agreed would promote environmentally sustainable development, and (b) the *Rio Declaration*, a set of agreed principles that each government embraced as the foundational norms for sound environmental stewardship.

Between 1992 and 2019, nearly every country has sought to implement the sensible recommendations of *Agenda 21*, and increasingly observes the norms of the Rio Declaration, as their capabilities permit. For example, virtually all nations have enacted environmental impact assessment laws, as prescribed in Rio Principle 17, and have laws affording public access to environmental information, as provided in Rio Principle 10. Sustainable best practices have been restated by the International Standards Organization (ISO),⁹ and many companies and governments have adapted and adopted the ISO methods. These practices, laws and principles have proven that they can meaningfully contribute to the protection of the environment and sustainable socio-economic development. However, while they are all necessary, they alone are not sufficient.

The first generation of environmental statutes, treaties, and principles demonstrably have not yet been sufficient to stem the global environmental degradation. The Millennium Ecosystem Assessment¹⁰ found that fully one-half of the Earth’s ecosystems are impaired, and the Intergovernmental Panel on Climate Change’s Special Report “Global Warming 1.5° C” (2018)¹¹ warned of devastating consequences from alteration to the carbon cycle and weather patterns in all regions. The Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) in 2018 reports that soil erosion and land degradation is at acute levels that threaten the livelihoods of 3.2 billion people.¹² Some further, more effective, environmental norms evidently are needed.

9. For example, ISO Standards 9,000, 14,000 and 16,000. See https://www.techstreet.com/info/iso?sid=msn&utm_source=bing&utm_medium=cpc&msclkid=e8ff5633cdf718a45d0d0b553a38a874&format=html.

10. https://www.researchgate.net/publication/297563785_Millennium_Ecosystem_Assessment_Ecosystems_and_human_well-being_synthesis.

11. <https://www.ipcc.ch/sr15>.

12. See <https://www.ipbes.net/news/media-release-biodiversity-nature's-contributions-continue-%C2%A0dangerous-decline-scientists-warn>; and *Nature* (28 March 2018), at <https://www.nature>.

How might nations scale up and enhance their environmental laws more effectively to contain escalating environmental deterioration? France's President Emmanuel Macron proposed "The Global Pact for the Environment" as a new set of "rules of the road" to align all nations behind practices that might safeguard the planet for future generations. Supported by many environmental legal experts, Macron recommended in 2017 to the United Nations General Assembly that nations adopt a new *Global Pact for the Environment*. Debates began. In May of 2018, the General Assembly asked the UN Secretary General to prepare a report on the current state of international environmental law. Entitled, "Gaps in International Environmental Law and Environment-Related Instruments: Towards A Global Pact on the Environment," (A/73/419), the report appeared on November 30th, as the General Assembly had required. This report was widely evaluated because it was the first report on the status of international environmental law ever prepared by the UN Secretary General.¹³ The United Nations General Assembly endorsed intergovernmental consultations in advance of 2022 by consensus, when it accepted the outcome of its Working Group deliberations held in Nairobi in the first half of 2019.¹⁴

Both the proposed Global Pact for the Environment and the Secretary General's Report have become the focus of significant diplomatic debate. Maria Antonia Tigre provides, in this book, the chronology of these debates and access to its sources. It is an essential reference for anyone who cares about the future of the environment and of environmental law.

The current and next phases of deliberations about the gaps in international environmental law will reveal that much remains to be done to attain or restore "sustainability" in socio-economic development. It takes years of negotiation to prepare new multilateral environmental agreements (MEAs), and many of those that we now have are barely implemented. Countries are likely to agree upon a set of "soft law" principles, as they did the 1992 Rio Principles, more quickly than they will negotiate the several new MEAs

com/articles/d41586-018-03891-1.

13. See, e.g., The Environmental Law Institute (ELI), webinar on "The Global Pact and the Future of Environmental Governance," at <https://www.eli.org/vibrant-environment-blog/global-pact-and-future-environmental-governance>; and Stewart M. Patrick, "A Global Pact for the Environment," *World Politics Review* (22 April 2019) available through the Council on Foreign Relations, at <https://www.cfr.org/article/global-pact-environment>; and the Note on the Secretary General's Report (10 December 2018), by the International Council of Environmental Law (ICEL), available at https://www.iucn.org/sites/dev/files/noteforunsgenvllawrptdec2018_final.pdf; The ICEL Note and Secretary General's Report were the subject of a Side Event on the "Global Pact for the Environment: Strengthening the Implementation of International Environmental Law," 10 December 2018, archived at <https://globalpactenvironment.org/en/event/un-side-event-strengthening-the-implementation-of-international-environmental-law-commentaries-on-the-sgs-report/>.
14. See UN Doc. Res. 73/333 (5 September 2019).

needed to fill gaps that threaten Earth's environment, e.g., plastic wastes washed into the oceans, or "acid rain" from air pollution across Asia and the Southern hemisphere, or coping with larger wild fires everywhere. International laws are lacking on these and other "gaps." Rather than waiting years for nations to embrace a comprehensive set of gap-filling treaties, the international community needs to empower governments at all levels to tackle environmental challenges as they appear. Such guidance was the *métier* of the 1992 Rio Declaration, and its success. Might a declaration of principles like those offered in the draft Global Pact for the Environment build on that experience and success?

If all nations know that they have agreed upon the same basic principles, history suggests that the likelihood that they will conduct themselves in accordance with those norms will increase greatly.¹⁵ As has occurred under the guidance of the 1992 Rio Declaration, gradually, in all regions, laws and behaviors should shift in the direction of the stabilizing and conserving ecological and other environmental benefits for society contemplated by those principles. As nations consider how to commemorate the 1972 Stockholm Declaration, and the 1992 Rio Declaration, a launch by the General Assembly of preparation of a new Declaration, with the goal of adoption in the 50th anniversary year of 2022, would be punctuation of a powerful sort. Doing so could serve to stabilize patterns for the human environment's sustainable development, and reassure socio-economic relations in all regions. It could also establish the environmental norms guiding all nations for the next two decades.

The Earth *is* one, but the world remains fragmented. Managing to live in Earth's dynamic and complex environment requires new skills and techniques. Cognitive technologies, such as Artificial Intelligence and Block Chain technologies,¹⁶ offer new methods for managing environmental quality, and breakthroughs in sensing technology promise to dramatically enhance assessment of environmental conditions.¹⁷ The next generation of environmental norms will need to consider how to engage the emerging cognitive and sensing technologies to ramp up environmental conservation in a way that is more fully responsive to escalating threats and at a scale that is capable of containing and reversing their impacts. There is promise here for re-establishing the foundations for sustaining human relationships with

15. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND POLICY* (Columbia University Press, 1979).

16. *See, e.g.*, PRIMAVERA DE FILIPPI AND AARON WRIGHT, *BLOCKCHAIN AND THE LAW* (Harvard University Press, 2018).

17. See the International Telecommunications Union's annual conference, "AIforGood," at <https://aiforgood.itu.int/>.

nature. We do not pretend to know how this will come to be, but pursuit of a new set of environmental norms stands to stimulate the international cooperation needed for this resilient future state to emerge.

The debates explored in this book set the stage for determining whether or not nations can agree on a new set of principles, like those of the proposed Global Pact. Maria Antonia Tigre's book equips each reader with the knowledge to enter confidently into these ongoing debates toward the further evolution of international environmental law.

Scott Fulton

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November 2019

Introduction

I. The Deteriorating State of Our Environment

At the fourth session of the United Nations Environment Assembly (UNEA), held in Nairobi in March 2019, the UN Environment warned policymakers that the world is not on track to achieve the environmental dimension of the Sustainable Development Goals (SDGs), and other internationally agreed environmental goals by 2030, or to deliver long-term sustainability by 2050.¹ The overall condition of the global environment has continued to deteriorate, despite environmental policy efforts across countries and regions.² Unsustainable production and consumption patterns and climate change have degraded the Earth's ecosystems, endangering the ecological foundations of society and hindering policy efforts.³ With the global population reaching 7.5 billion in 2018, and median projections estimating nearly 10 billion by 2050, this scenario is likely to worsen.⁴ Urgent action and strengthened international cooperation are needed to reverse those negative trends and restore the planetary and human health.

Since 1880, the global average surface temperature has increased by between approximately 0.8°C and 1.2°C.⁵ Current efforts remain inadequate to halt a rise of 4°C in ambient Earth temperature above the 19th century.⁶ Recent studies indicate that humans may be causing an increase of as much as 5°C.⁷ A major species extinction is unfolding, which scientists have characterized as the sixth mass extinction.⁸ Without complete data that provides a full picture of the challenges we are facing, the current extinction rate could be more than 100 times higher than normal,⁹ which could be considered a “biological annihilation.”¹⁰ Although governance efforts are progressing, greater efforts are required to achieve international objectives,

1. United Nations Environment Assembly of the United Nations Environment Programme, GEO-6 Key Messages, UNEP/EA.4/INF.18, para. 4 (Feb. 12, 2019).
2. UNEP, Global Environment Outlook (GEO-6): Summary for Policymakers 4 (2019).
3. *Id.* at 7.
4. Intergovernmental Panel on Climate Change, Global Warming 1.5° Celsius (Special Report 15, October 2018), accessible at <https://www.ipcc.ch/sr15/>.
5. Paul Voosen, *New Climate Models Forecast a Warming Surge*, 364 SCIENCE 222 (2019).
6. GEO-6, *supra* note 2, at 8.
7. Gerardo Ceballos, et al., *Accelerated Modern Human-Induced Species Losses: Entering the Sixth Mass Extinction*, 1 SCIENCE ADVANCES (2015).
8. Gerardo Ceballos, et al., *Population Losses and the Sixth Mass Extinction*, 114 PROC. NAT'L ACAD. SCI. U.S. AM. E6089 (2017).

such as the Aichi Biodiversity Targets within the United Nations Convention on Biological Diversity's Strategic Plan for Biodiversity 2011–2020, and the SDGS.¹¹

Ocean warming and acidity,¹² rising sea levels,¹³ mass coral bleaching,¹⁴ unsustainable exploitation of living marine resources,¹⁵ and marine plastic litter, including microplastics, threatens the health of our marine and coastal ecosystems. Land degradation, desertification,¹⁶ deforestation,¹⁷ and over-exploitation of natural resources provide an increasing threat for human well-being.¹⁸ Population growth, urbanization, water pollution and unsustainable development induce pressure on water resources across the world, which is further exacerbated by climate change.¹⁹

II. The Anthropocene and Planetary Boundaries

These combined trends provide strong evidence that humankind is now rivaling Nature in its impact on the functioning of the Earth system.²⁰ The growing impact of human activity on earth and the atmosphere emphasize the role of mankind in geology and ecology.²¹ Humans have so irretrievably altered the Earth in the past centuries that the Anthropocene, a new geological epoch, has begun.²² The term Anthropocene suggests that the Earth is now moving out of its current geological epoch, the Holocene. The Holocene represents an epoch in which the environment has been unusually stable.²³ Changes occurred naturally and according to the Earth's regulatory capacity. This shift from a period of stability has occurred largely because

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11. GEO-6, *supra* note 2, at 9.
 12. Lijing Cheng, Kevin E. Trenberth, Peter Jacobs, Yongxin Zhang & John Fasullo, *Hurricane Harvey Links to Ocean Heat Content and Climate Change Adaptation*, EARTH'S FUTURE 1 (2018); UNITED NATIONS, *THE FIRST GLOBAL INTEGRATED MARINE ASSESSMENT: WORLD OCEAN ASSESSMENT I* (Cambridge University Press, 2017).
 13. United Nations, *supra* note 12, at 14.
 14. GEO-6, *supra* note 2, at 10.
 15. United Nations, *supra* note 12, at 11.
 16. GEO-6, *supra* note 2, at 12.
 17. *Id.* at 12.
 18. UNEA, *supra* note 1, at para. 10.
 19. GEO-6, *supra* note 2, at 12.
 20. Will Steffen, et al., *The Anthropocene: Conceptual and Historical Perspectives*, 369 PHILOSOPHICAL TRANSACTIONS OF THE ROYAL SOCIETY 842; 843 (2011). See also Paul J. Crutzen, *Geology of Mankind*, 415 NATURE 23 (2002).
 21. Paul J. Crutzen & Eugene F. Stoermer, *The "Anthropocene,"* 41 GLOBAL CHANGE NEWSLETTER 17 (2000).
 22. Simon L. Lewis & Mark A. Maslin, *Defining the Anthropocene*, 519 NATURE 171 (2015). Jan Zalasiewicz, et al., *The Working Group on the Anthropocene: Summary of Evidence and Interim Recommendations*, 19 ANTHROPOCENE 55 (2017).
 23. Johan Rockström, et al., *A Safe Operating Space for Humanity*, 461 NATURE 472 (2009).

of human activity, since humankind has become a global geological force in its own right.²⁴

To meet the challenge of maintaining the Holocene state, scholars at the Stockholm Resilience Centre have proposed a framework of planetary boundaries which defines borders in which human activities can take place without the risk of transgressing the Earth system's ecological thresholds.²⁵ The team, led by Rockström, identified the following nine Earth system biophysical processes that determine the planet's ability to auto-regulate and therefore maintain its Holocene-like conditions: climate change, stratospheric ozone depletion, land system change, global freshwater use, rate of biodiversity loss,²⁶ ocean acidification, interference with phosphorus and nitrogen cycles,²⁷ atmospheric aerosol loading and chemical pollution.²⁸ These are interdependent, meaning that exceeding the boundaries of one lead to the a change of transgression in another. Four of these boundaries have already entered the uncertainty zone: climate change, land system change, biosphere integrity and biogeochemical flows.²⁹

The scientific data makes it clear that the state of the world is deteriorating. In a few instances, we have reached a tipping point. Governments have responded by enacting environmental laws and policies, always trying to catch up with the new environmental problem faced. The same occurs at the international level, in which the international community negotiates new treaties to address global problems. From a policy perspective, UNEP was created to provide a global framework for environmental protection. Still, the world is in trouble. Clearly, the current response is insufficient. The Anthropocene calls for transformative law to respond to the socio-ecological crisis and promote human stewardship of natural systems.³⁰ Achieving internationally agreed environmental goals on pollution control, clean-up and efficiency improvements is crucial, yet insufficient to achieve the SDGS. A more holistic answer is required. Urgent cross-sectoral policy actions are needed to address the challenges of sustainable development.³¹ Transformative change

24. Steffen, et al., *supra* note 20, at 843.

25. Rockström, et al., *supra* note 23, at 472. The nine "planetary boundaries" represent thresholds in major planetary processes used to help define a "safe operating space for humanity."

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

27. Later renamed biogeochemical flows.

28. Rockström, et al., *supra* note 23, at 473.

29. Will Steffen, et al., *Planetary Boundaries: Guiding Human Development on a Changing Planet*, 347 SCIENCE 1259855-1 (2015).

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

31. United Nations Environment Programme, Meeting of the Bureau of the UN Environment Assembly, Finding the Right Theme for the 2020 UN Environment Assembly, para. 14 (17 June 2019), <http://>

is needed to enable and combine long-term strategic and integrated policy-making while building bottom-up social, cultural, institutional and technological innovation.³² Robust international cooperation is one of the key features of effective environmental policies for sustainable development.³³

III. The Necessity of New Law

Changes in the Earth system mark a distinct new geological period in the Earth's history. The Earth is moving into an unstable state as a result of the global human imprint on the biosphere. Humanity has become a geological agent in much the same way as a volcano or meteor, able to change the Earth and its systems.³⁴ As Robinson explains, determining the existence of the Anthropocene "is a scientific one, not a socio-economic or cultural determination, yet its greatest implications may lie in the realm of the social sciences."³⁵ Anthropocene has become a popular lens through which to consider the pure scientific, and increasingly the social aspects of past, present and future global environmental change.³⁶ We need to prepare politically, legally, socially and economically for the adaptation to those global environmental changes that can no longer be avoided.³⁷

The Anthropocene calls for re-imaginings of the role of environmental law, its components and aspects. As Kotzé puts it, the law "cannot continue to comfortably rest on foundations that evolved under the harmonious Holocene, because under the type of biospheric conditions in the Anthropocene, 'Holocene law' will arguably be unable to establish and maintain the type of societal ordering it typically would have sought to achieve under 'normal' Holocene conditions."³⁸ The Anthropocene pushes for a new cognitive framework, providing an opportunity to question and re-imagine the legal interventions that are best able to respond to the current global socio-ecological crisis. This space was previously preserved for fragmented, issue-specific and narrow legal enquiries that were adequate for a less alarmist expressions

wedocs.unep.org/bitstream/handle/20.500.11822/28387/Note%20on%20theme%20for%20discussion%20by%20the%20Environment%20Assembly%20Bureau.pdf;sequence=15&isAllowed=y.

32. *Id.* para. 15.

33. *Id.* para. 16.

34. Mike Hodson & Simon Marvin, *Urbanism in the Anthropocene: Ecological Urbanism or Premium Ecological Enclaves?*, 14 CITY 298 (2010).

35. Nicholas A. Robinson, *Fundamental Principles of Law for the Anthropocene?*, 44 ENVTL. POL'Y & LAW 13 (2014). 13.

36. LOUIS J. KOTZÉ, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM IN THE ANTHROPOCENE* 5 (Hart Publishing Paperback Edition ed. 2016).

37. *Id.* at 6.

38. *Id.* at 6.

of urgency.³⁹ The Anthropocene calls for transformative law to respond to the socio-ecological crisis and promote human stewardship of natural systems.⁴⁰ A globally binding instrument that sets a framework for international environmental law might be just what is needed to navigate through the challenges faced in this new epoch.⁴¹

IV. Foundation of the Global Pact

When the 1948 Universal Declaration of Human Rights (UDHR)⁴² was adopted, the world was a much different place. After the horrors of World War II, nations throughout the globe craved a universal charter that specified individual human rights and freedoms. Environmental concerns were then not a widespread global problem. As environmental consciousness emerged in the 1970s, human rights were already firmly established. As a result, environmental rights were not included among fundamental rights and freedoms in major international human rights agreements,⁴³ and environmental problems created by humankind exacerbated.

Without a framework that laid the basic ground rules for the development of international environmental law, the field advanced inorganically. It addressed each environmental problem separately, through the careful negotiation of individual agreement. As a result, an abundant web of environmental treaties slowly emerged. Today, over 1,300 multilateral environmental agreements (MEAs) and 2,200 bilateral environmental agreements exist.⁴⁴ These encompass a wide range of topics, from biodiversity loss to climate change and desertification, as well as regions, from the Amazon rainforest to Antarctica. However, this framework still lacks a binding treaty harmonizing them, linking the portions that make up international environmental law. Given the obvious correlation between environmental problems, their regulating laws must also be interconnected. Sectoral agreements were essential for multilateralism, and the web of treaties could only be achieved piece

39. *Id.* at 6-7.

40. Robinson, *supra* note 30, at 488.

41. Luisa Leme & Carin Zisis (Producer), *LatAM in Focus: Can International Law Save the Amazon? (Interview with Maria Antonia Tigre)* (AS/COA, 2019), available at <https://www.as-coa.org/watchlisten/latam-focus-can-international-law-save-amazon>.

42. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71, art. 3 (1948) (UDHR).

43. See UDHR; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) and International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR).

44. See IEA Database Home, INT'L ENVTL. AGREEMENTS (IEA) DATABASE PROJECT, <https://iea.uoregon.edu> (last visited Mar. 27, 2019).

by piece. Nonetheless, this approach has often been criticized for being too fragmented. As highlighted by the UN Secretary-General (UNSG) in the 2018 report on the state of international environmental law, fragmentation leads to many gaps in the field, with challenges left unattended. In an ever-worsening state of the environment, it is time to address fragmentation. The Anthropocene calls for innovative legal solutions that can confront the new environmental challenges emerging each day.

The idea of a comprehensive and legally binding document enshrining fundamental environmental rights and obligations has been exhaustively discussed. A similar universal agreement has been suggested before.⁴⁵ These relate to the codification of environmental principles, environmental rights, or the improvement of the governance structure of international environmental law. Several frameworks fell short of a binding treaty, but nevertheless provided a basis for the development of international environmental law. These include the Stockholm Declaration,⁴⁶ the World Charter for Nature,⁴⁷ and the Rio Declaration.⁴⁸ In 1995, the IUCN's World Commission on Environmental Law designed a treaty to serve as an umbrella agreement to "govern the interactions of nations with the Earth's natural systems," based on the absence of a "unifying umbrella agreement to facilitate integrating environment and development."⁴⁹ The Draft International Covenant on the Environment and Development (ICED), now in its fifth edition, consolidated environmental principles, much like the Global Pact has done.⁵⁰ Through the consolidation of environmental principles, the ICED provides an international "framework for implementing sustainability at all levels of society." In 2016, the IUCN adopted the World Declaration on the Environmental Rule of Law, which similarly promotes the adoption of core principles

45. See, *i.e.*, Amedeo Postiglione, an Italian Corte Suprema di Cassazione judge, has argued for a "Universal Convention for the Environment as a Human Right." See 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). A research team in Ukraine, led by Prof. Yuriy Tunytsya, advocated for a World Environment Constitution in 2006. 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. Report of the United Nations Conference on the Human Environment, Stockholm 5–16 June 1972, UN Doc. A/CONF.48/14/Rev.1 (1973).

47. UNGA, World Charter for Nature, UN Doc. A/RES/37/17 (28 October 1982).

48. Rio Declaration on Environment and Development in Report of the United Nations Conference on Environment and Development, UN Doc. A/CONF.151/26 (vol I) (12 August 1992) Annex.

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

50. IUCN & ICED, *Draft International Covenant on Environment and Development* (Fifth Edition, 2015), available at https://sustainabledevelopment.un.org/content/documents/2443Covenant_5th_edition.pdf.

and norms as the legal foundation for environmental justice.⁵¹ These documents provide the foundation for the Global Pact. But while they helped promote environmental principles, they also illustrate the limitations of a statement of principles in soft law instruments, highlighting the need for a binding agreement.⁵²

In parallel, legal scholars have advocated for the recognition of a human right to a healthy environment. This approach focuses on the adoption of new human rights rather than more broadly supporting the integrity of life's support system and the environment. Spearheaded by French Professor Michel Prieur, the International Center for Comparative Environmental Law (CIDCE) drafted a Covenant on the Right to Environment in 2017.⁵³ Prof. John Knox's last thematic report as Special Rapporteur on Human Rights and the Environment presented sixteen framework principles, which set out essential obligations of States under human rights law as they relate to the enjoyment of a safe, clean, healthy and sustainable environment.⁵⁴ This same trend has been picked up by national and regional courts. In 2018, the Inter-American Court of Human Rights recognized an autonomous right to the environment in a landmark decision, reinforcing this approach and establishing the role of courts in pushing environmental law forward when international and national law is still lacking.⁵⁵ While this approach has received broad academic support, several delegates firmly opposed the idea of a third covenant during the Nairobi sessions, arguing that this discussion was beyond the existing mandate and should instead continue within the human rights regime.⁵⁶ While the argument is debatable, it shows the lack of diplomatic appetite for such a discussion.

A third approach called for reshaping the institutional framework of international environmental law. Similarly, this has been broadly discussed in

51. IUCN, World Commission on Environmental Law, *World Declaration on the Environmental Rule of Law* (2016), available at https://www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf.

52. Yann Aguila & Jorge E. Viñuales, *A Global Pact for the Environment: Conceptual foundations*, 28 REV. EUR., COMP. & INT'L ENVTL. L. 3 (2019).

53. Centre International de Droit Comparé de L'Environnement, *Draft on the International Convention on the Human Right to the Environment*, available at <https://cidce.org/> (2017).

54. UN Doc. A/HRC/37/59 (24 January 2018).

55. Inter-American Court of Human Rights, Opinión Consultiva OC-23/17 (Nov. 17, 2017), Solicitada por la República de Colombia, Medio Ambiente y Derechos Humanos, available at http://www.aida-americas.org/sites/default/files/oc23_corte_idh.pdf. See Maria Antonia Tigre & Natalia Urzola, *The 2017 Inter-American Court's Advisory Opinion: Changing the Paradigm for International Environmental Law in the Anthropocene* (upcoming).

56. Peter Doran, et al., *Summary of the First Substantive Session of the Ad Hoc Open-Ended Working Group Towards a Global Pact for the Environment: 14-18 January 2019*, Vol. 35 No. 1, International Institute for Sustainable Development (2019), available at <http://enb.iisd.org/uncp/globalpact/oweg1/>.

academia, often with a proposal for a new institution such as the World Environment Organization.⁵⁷ The recognition that there is still much needed work to be done to reshape the institutional framework was constantly repeated in Nairobi. Explicitly, delegates agreed on the need to address institutional fragmentation and the weak coordination between treaties. However, one of the main outputs of the discussions was the need to reinforce existing institutions such as UNEP and UNEA rather than create new ones, showing the lack of support for this alternative.⁵⁸

The UNSG's Report identified gaps in the scope and content of environmental principles, environmental rights, and environmental governance. The approaches mentioned address these gaps in different ways. While the codification of environmental principles received some pushback by Member States, it received broad support from others. Ultimately, the Global Pact is a response to one of the gaps identified, but it can be part of a multi-pronged solution negotiated at the UN to address gaps in international environmental law.

V. The Global Pact for the Environment

International environmental law developed by steadily responding to environmental problems. Environmental policy-making emerged in a global context at the 1972 Stockholm Conference. Concerns were then limited to conservation and management of natural resources, and it was impossible to predict the severity or variety of problems that would arise. Rather than centralized around a general rule, environmental norms advanced in response to emerging problems, negotiated by way of "specific" regimes considered in relative isolation.⁵⁹ When an environmental problem arises, it is identi-

57. Frank Biermann, *The Case for a World Environment Organization*, 42 ENVIRONMENT 22 (2000). FRANK BIERMANN, *A WORLD ENVIRONMENT ORGANIZATION: SOLUTION OR THREAT FOR EFFECTIVE INTERNATIONAL ENVIRONMENTAL GOVERNANCE?* (Routledge Ebook Edition ed. 2005). Adil Najam, *The Case Against a New International Environmental Organization*, 9 GLOBAL GOVERNANCE 367 (2003). John Whalley & Ben Zissimos, *What Could a World Environmental Organization Do?*, 1 GLOBAL ENVTL. POL. 29 (2001).

58. Doran, *supra* note 55; Peter Doran, et al., *Summary of the Second Substantive Session of the Ad Hoc Open-Ended Working Group Towards a Global Pact for the Environment*, Vol. 35 No. 2, International Institute for Sustainable Development (2019), available at <http://enb.iisd.org/unep/globalpact/oweg2/>; Peter Doran, et al., *Summary of the Third Substantive Session of the Ad Hoc Open-Ended Working Group Towards a Global Pact for the Environment: 20-22 May 2019*, Vol. 35 No. 3, International Institute for Sustainable Development (2019), available at <http://enb.iisd.org/download/pdf/enb3503e.pdf>.

59. Norichika Kanie, *Governance With Multilateral Environmental Agreements: A Healthy or Ill-Equipped Fragmentation?*, in GLOBAL ENVIRONMENTAL GOVERNANCE: PERSPECTIVES ON THE CURRENT DEBATE 70 (Walter Hoffmann & Lydia Swart eds., 2007); Harro van Asselt, *Managing the Fragmentation of International Environmental Law: Forests at the Intersection of the Climate and Biodiversity Regimes*, 44 J. INT'L L. & POL. 1205; 1208; 1209 (2012).

fied individually as a matter of international legal concern.⁶⁰ The approach in international environmental law is inherently reactive. Each agreement addresses a specific challenge and is legally and institutionally distinct from the others. However, the causes and consequences of environmental problems are transboundary and sometimes global in nature. It demands international cooperation, and renders a coordinated approach challenging.⁶¹ The incremental, piecemeal and reactive nature of international environmental law has resulted in a legal framework composed of hundreds of MEAs segregated by topic, sector, and territory.⁶²

Fragmentation is inevitable given the “piecemeal, incremental and reactive nature of international environmental law-making.”⁶³ While it is a frequent phenomenon in international law and multilateral decision-making, other fields rely on a binding framework instrument(s) with rules that provide coordination and coherence.⁶⁴ International environmental law still lacks such a framework.⁶⁵ There is no single overarching normative framework that sets out what might be characterized as rules and principles of general application.⁶⁶ The many advantages brought by fragmentation do not necessarily mean that the perceived weaknesses should be left unaddressed. Given the role of environmental principles as building blocks, serving to supplement or complement more specific rules, aiding interpretation, filling gaps, and ultimately unifying the sectoral approach of international environmental law, the UNSG has recommended the adoption of an overarching legal framework of environmental principles. It noted that a comprehensive and unifying international instrument clarifying all the principles of environmental law would contribute to making them more effective and strengthen their implementation.⁶⁷

Since 1972, legal scholars and environmental advocates have encouraged the adoption of a legally binding framework for international environmental law. The idea returns in waves, whenever the political momentum seems favorable to such an agreement. But while several soft law instruments have

60. Bethany L. Hicks, *Treaty Congestion in International Environmental Law: The Need for Greater International Coordination*, 32 U. RICH. L. REV. 1643; 1646-47 (1999).

61. UN Secretary-General, Gaps in International Environmental Law and Environment-Related Instruments: Towards a Global Pact for the Environment, UN Doc. A/73/419, 43 (30 November 2018).

62. Gerhard Loibl, *International Environmental Regulations—Is a Comprehensive Body of Law Emerging or Is Fragmentation Going to Stay?*, in INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION: Festschrift in Honour of Gerhard Hafner (Isabelle Buffard, et al. eds., 2008).

63. UN Secretary-General, *supra* note 60, at 43.

64. *Id.* at 4. Examples include international human rights law, international trade law, and international law of the seas.

65. *Id.* at 5.

66. *Id.* at 4.

67. *Id.* at 6-5; 43.

been adopted at the United Nations, States have yet to embrace a binding treaty providing guidelines for international environmental law. The most recent initiative to adopt a legally binding agreement on environmental principles is the Global Pact. This initiative had an unorthodox origin. Rather than emerging within the UN, it was brought forward by environmental legal scholars. Dissatisfied with the current state of international environmental law, they envisioned the Global Pact as a solution to improve effectiveness and better prepare the field for the never-ending emerging challenges of the Anthropocene.

After careful drafting by a group of scholars from a wide range of countries, the Global Pact was embraced by the government of France and presented at the United Nations General Assembly (UNGA) in 2017. It was the first time a legally binding instrument codifying environmental principles was proposed by a head of state at the United Nations. In a high-level diplomatic dialogue, States began discussing whether to codify environmental principles as hard law. The response to the proposal was immediately divided, with some Member States favoring the idea, and others pointedly opposing it. Conscious of its unorthodox genesis and of the immediate pushback, the UNGA took a step back and requested a study of the current state of international environmental law prior to proposing any potential solution.

In May 2018, the UNGA adopted a resolution requesting the UN Secretary-General to submit a report identifying possible gaps in international environmental law and environment-related instruments and establish a working group to consider said report and discuss possible options to address gaps. In November 2018, the UNSG published the report, identifying several inefficiencies in international environmental law. These addressed principles, gaps and institutions. It ultimately recommended the adoption of a global pact as one of the solutions to address them. The recommendation was frowned upon by some states, which criticized the UNSG for going beyond its mandate and being biased towards the adoption of a Pact.

Between January and May 2019, the ad-hoc open-ended working group (OEWG) met in Nairobi. Under the guidance of the Co-Chairs, the working group did a global stocktaking of the state of international environmental law, discussing whether there are any gaps, whether these are intentional, and what could be done to address them. Delegates disagreed on some fundamental issues, both in terms of the types of challenges we currently face and how to solve them. It was generally acknowledged, however, that the current framework of international environmental law is insufficient. With a set of guiding questions crafted by the Co-Chairs, discussions were even-

tually steered towards different solutions to address some of the problems observed by delegates. Ultimately reaching a consensus, the OEWG agreed on a set of 13 recommendations to be submitted to the General Assembly for consideration.

Since there was no mention of a global pact, the recommendations were primarily seen by part of the international community as a failure. Others, however, could acknowledge that these provided a blueprint for the future of environmental law. It included a more flexible timeline to reach an agreement on a new document by 2022, at the 50th anniversary of the Stockholm Convention and the 30th anniversary of the Rio Convention, while keeping the discussion on environmental principles open. It is now up to the UNGA and the Member States to push for the progressive development of international environmental law. On August 2019, the UNGA decided to adopt the recommendations, moving the process forward.

VI. About This Book

This book was written in an effort to inform the upcoming diplomatic discussions on “gaps in international environmental law and environment-related instruments,” providing delegates with the necessary background to prepare for the adoption of an agreement in 2022 that effectively promotes environmental protection. The goal of this book is twofold. The first is to leave a record of the development of the discussions on a Global Pact for the Environment, tracking the arguments and positions that came into play. The second is to contribute to the discussion following the adoption of the Recommendations of the ad hoc open-ended working group established by UN General Assembly Resolution A/72/L.51.

The book describes the process in which the Global Pact for the Environment unfolded, discussing its origins and development within the UNGA. It investigates arguments presented in the Nairobi sessions, considering the main issues and discussions brought by delegates. It brings forward the leading causes of inefficiency in international environmental law as presented by States, as well as the menu of options proposed to address them. It concludes with some thoughts towards the future and possible outcomes, including whether a restatement of principles is still on the table. The book largely relies on the updates by the International Institute for Sustainable Development (IISD),⁶⁸ which closely followed the substantive sessions of the Ad Hoc Open-Ended Working Group Towards a Global Pact for the Environment,

68. IISD, <https://www.iisd.org/>.

publishing substantial summaries and analyses of each meeting. This source is complemented by news articles and a few academic articles by leading scholars, which provided insights into the early stages of the discussions. A few other websites by UNEP, the drafters of the GPE and the Elisabeth Haub School of Law at Pace University provided constant updates and resources on the Global Pact. These resources are listed at the end of this book in Annex 1 and 2. Each chapter is accompanied by documents that inform the process, when relevant. These include some of the submissions made by the International Council of Environmental Law (ICEL).

This book is organized as follows. Chapter 1 focuses on the first phase of the development of the Global Pact for the Environment. Phase I, entitled “Genesis of the Global Pact,” relates to its beginning, which arose from the efforts of the Club des Juristes (CDJ). Although based on earlier attempts at codifying environmental principles, the idea for this Global Pact was initially proposed in a 2015 report published by the CDJ. As the idea gained traction, a group of experts was convened. Through rounds of discussions, the experts were asked about which principles embodied the foundations of international environmental law, ultimately debating what to include in a Global Pact and how to include them. After the drafting process, a few experts gathered in Paris for a final round of discussion, launching the Global Pact in June 2017. At the end of the chapter, the text of the Global Pact is reproduced, along with a brief commentary by Yann Aguila, who spearheaded this process.

Chapter 2 relates to the second phase of this development, from the proposal of the Global Pact at the 72nd UNGA by President Macron in 2017 to the adoption of a resolution by the UNGA in 2018. The May 2018 resolution called for the elaboration by the UNSG of a report on gaps in international environmental law and gave rise to the open-ended working group discussions on said gaps. Phase II, entitled “Adoption of the Resolution,” provides an overview of the initial discussion on the topic, and the reasons why the resolution adopted did not refer to a global pact except in its title. The chapter includes the text of the resolution, along with a brief commentary on its content.

Chapter 3 relates to Phase III, entitled “Fulfilling the Resolution.” It covers the first steps set out by the UNGA to fulfill the investigation of gaps in international environmental law. The chapter covers the appointment of the co-chairs of the working group, the financing of its activities, and the organizational session held in September 2018. Additionally, it discusses the report published by the Secretary-General. Finally, the chapter includes the response to the UNSG’s report published by ICEL shortly after.

Chapter 4 covers the substantive sessions held by the OEWG in Nairobi. It begins by briefly summarizing each session, without going into much detail about the substantive issues discussed. These issues are then analyzed in Section V, which presents the in-depth discussions of the main topics covered in Nairobi, including, when relevant, references to the arguments raised in the UNSG's report and by academic scholars. It specifically examines (i) what is a gap; (ii) fragmentation of international environmental law; (iii) matters of process; (iv) environmental governance; (v) implementation of international environmental law; (vi) environment-related areas; and (vii) environmental principles. In addition to pointing out the arguments presented by delegates, the chapter provides a brief geopolitical analysis, mapping out in which direction the Member States were leaning towards in terms of the possibility of adopting a new instrument. The chapter then reproduces the Nairobi recommendations as well as ICEL's analysis of the outcome.

Chapter 5 relates to the current stage of the negotiations and provides a potential timeline for 2022. These updates cover developments up to September 2019, when this book went to print. Chapter 6 presents the conclusions, which assess some pathways to fulfill the recommendations, adopting a new instrument by 2022.

