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THE TREES SPEAK FOR THEMSELVES: NATURE'S RIGHTS UNDER INTERNATIONAL LAW

*Samantha Franks**

I. INTRODUCTION

When Christopher Stone first published his controversial article, *Should Trees Have Standing?*, his idea that forests should have a voice in court was largely met with ridicule.¹ The concept was simple, albeit radical: Elements of nature, such as forests, rivers, and lakes, should not merely be regarded as property for humans to own.² Instead, they should be considered as independent legal actors with rights in their own name. While this might have been considered unorthodox, the concept was not new. Nature has long received legal standing in foreign court systems.³ Even in the United States, indigenous communities have advocated for and lived by a similar worldview for centuries.⁴ Despite Justice Douglas's wishful opining for a system in which environmental personhood could become a reality, Stone's proposal was handily dismissed by the U.S. Supreme Court's plurality in *Sierra Club v. Morton*.⁵ Indeed, the idea seemed so absurd that the American Bar Association published a poem mocking the notion that nature could possess rights.⁶ The rebuke to standing for nature was not contained to American legal circles; similar notions were summarily dismissal in the

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1. Christopher D. Stone, *Should Trees Have Standing? — Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972).

2. *Id.* at 456.

3. For further explanation, see *infra* note 96.

4. "Rights" are a traditionally Western concept, with its roots in a European conception of humanity. However, indigenous cultures have trended towards the adaptations of such a framework. See, e.g., Hannah White, *Indigenous Peoples, the International Trend Toward Legal Personhood for Nature, and the United States*, 43 AM. INDIAN L. REV. 129 (2018).

5. See *Sierra Club v. Morton*, 405 U.S. 727, 741–42 (1972).

6. See John M. Naff, Jr., *Reflections on the Dissent of Douglas J.*, in *Sierra Club v. Morton*, 58 AM. BAR ASS'N J. 820, 820 (1972) ("If Justice Douglas had his way/O come not that dreadful day/We'll be sued by lakes and hills/seeking a redress of ills.").

international arena, with the call for a Universal Declaration of Nature's Rights from civil society groups going largely unheard. However, in the last two decades, the notion of environmental personhood has seen an explosion in popularity. It is time to reexamine the utility of the concept.

The philosophy of "Earth jurisprudence" underpins the legal notion of "nature's rights." Both concepts ask humans to recognize ecosystems and their elements as imbued with justiciable legal rights. The concept has become increasingly mainstream in the last five decades, driven largely by countries in South America and Africa, and by indigenous actors across the world.⁷ As described by founding scholar Cormac Cullinan, Earth jurisprudence is "based on the idea that humans are only one part of a wider community of beings and that the welfare of each member of the community is dependent on the welfare of Earth as a whole."⁸ Implementing nature's rights requires, "looking at law from the perspective of the whole Earth community and balancing the rights against one another . . . so that fundamental rights take precedent over less important ones."⁹ While this notion has had powerful successes in domestic legislation across the world, the West's resistance to nature's rights remains stubbornly persistent, including at the United Nations. As a result, nature's rights have not featured prominently in discussions of international environmental law.

Meanwhile, the degradation of the natural world is rapidly accelerating. Despite over fifty years of international environmental treaties, the world is warming at an alarming rate. In 2009, the United Nations called on "all relevant organs" to strengthen their efforts in combatting climate change—but in the decade since, climate change has only intensified.¹⁰ Traditional international environmental law ("IEL") has struggled to address the danger in a cohesive way. In January 2021, United Nations Secretary General António Guterres called for a revitalization of climate policies in the wake of the COVID-19's social and economic devastation, arguing that the global recovery to the virus, "offers the chance to change course, and put humanity on a path on which it is not in conflict with nature."¹¹ Practically, endorsing nature's rights could do just that.

7. These countries are sometimes referred to as the "Global South." The phrase "Global South" refers broadly to the regions of Latin America, Asia, Africa, and Oceania. It is one of a family of terms, including "Third World" and "Periphery," that denote regions outside Europe and North America, mostly (though not all) low-income and often politically or culturally marginalized. The use of the phrase Global South marks a shift from a central focus on development or cultural difference toward an emphasis on geopolitical relations of power.

8. Cormac Cullinan, *A History of Wild Law*, in *EXPLORING WILD LAW: THE PHILOSOPHY OF EARTH JURISPRUDENCE* 12, 13 (Peter Burdon ed., 2011).

9. *Id.*

10. G.A. Res. 63/281, *Climate Change and its Possible Security Implications*, ¶ 10 (June 3, 2009).

11. *COVID-19 Recovery Offers 'Chance to Change Course', Guterres Tells One Planet Summit*, UN NEWS (Jan. 11, 2021), <https://news.un.org/en/story/2021/01/1081772>.

In May of 2018, the General Assembly began the onerous effort to knit together the disparate international documents regarding the global climate into a cohesive document, capable of reflecting all existing norms in international environmental law.¹² Over the next year, three working group sessions were held in an effort to create a Global Pact for the Environment (“Global Pact” or “Pact”).¹³ The idea began boldly, with hope for a binding treaty to solidify a variety of soft law norms, but that ambition fizzled at the most recent working group meeting.¹⁴ Instead of a treaty, the group committed only to the creation of a nonbinding declaration to be proposed to the General Assembly in 2022.¹⁵ As such, these efforts have largely been decried as a failure, and some have doubted whether the Pact should remain a priority of the General Assembly.¹⁶ However, insisting upon failure is premature. “Soft law” plays a critical role in the development of international norms, particularly within environmental law.¹⁷ Moreover, the United Nations has seen remarkable success with nonbinding documents before, most notably in the Universal Declaration of Human Rights (“UDHR”).¹⁸ Indeed, the decades-long call for an international document establishing nature’s rights reflects a desire for a process similar to the one in which the UDHR codified human rights in international law.¹⁹

This note argues that the United Nations should center nature’s rights in the upcoming Global Pact on the Environment, solidifying the patchwork of international environmental law and encouraging domestic protection of the environment. Part II explores the current state of international environmental law, outlining the ways in which the doctrine remains incomplete. Part III establishes that Earth jurisprudence is an effective method to fill the gaps existing within traditional international environmental law. Part IV emphasizes the importance of soft law in international law. It draws a parallel between the creation of the Universal Declaration of Human’s Rights and a potential global Declaration of

12. *Towards a Global Pact for the Environment*, U.N. ENV’T PROGRAMME, <https://www.unenvironment.org/events/conference/towards-global-pact-environment> (last visited Feb. 25, 2021).

13. *Id.*

14. Stewart M. Patrick, *It’s Time for a Global Pact for the Environment*, WORLD POL. REV. (Apr. 22, 2019), <https://www.worldpoliticsreview.com/articles/27779/it-s-time-for-a-global-pact-for-the-environment>.

15. *Towards a Global Pact for the Environment*, *supra* note 12.

16. Patrick, *supra* note 14.

17. Soft law is defined as a rule which has no legally binding force, but which is intended to influence international conduct. See Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT’L L. 420 (1991).

18. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

19. See *The World People’s Conference on Climate Change and the Rights of Mother Earth*, PWCCC (Apr. 22, 2010), <https://pwccc.wordpress.com/support/>.

Nature's Rights, thus establishing the possibility for a path forward for the Global Pact. Part V concludes.

II. THE EXISTING STATE OF INTERNATIONAL ENVIRONMENTAL LAW

The world is burning and humanity holds the match. 2020 was the hottest year in the hottest decade in humanity's history.²⁰ An increase in global temperatures has led to the melting of ancient glaciers, rapidly rising sea levels, heating of the oceans, and an increase in extreme weather patterns.²¹ In 2018, the United Nations Intergovernmental Panel on Climate Change ("IPCC") estimated that the international community has just one decade left to reduce global greenhouse gas emissions to prevent even more significant damage.²² If countries continue producing greenhouse gases at their current rate, Earth is predicted to warm three to five degrees Celsius by the end of this century.²³ An increase of only two degrees will likely bring deadly droughts, rising seas, and an extreme loss of biodiversity.²⁴ These are not the only threats to the environment; the world is currently facing a mass extinction of epic scale,²⁵ significant land degradation and desertification,²⁶ and an alarming loss of sources of freshwater.²⁷

The impact of these changes is not abstract. Climate change represents the singular greatest threat to humanity's future. It exacerbates global social and political conflicts, stoking armed violence and displacing millions of people.²⁸ It spawns hurricanes, fires, and floods, which ravage the

20. Oliver Milman, *2020 Was Hottest Year on Record by Narrow Margin, Nasa Says*, *GUARDIAN* (Jan. 14, 2021), <https://www.theguardian.com/environment/2021/jan/14/2020-hottest-year-on-record-nasa>.

21. *Id.*

22. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *GLOBAL WARMING OF 1.5 CELSIUS 6* (2018) [hereinafter IPCC Report].

23. Press Release, World Meteorological Society, *WMO Confirms 2019 as Second Hottest on Record* (Jan. 15, 2020), <https://public.wmo.int/en/media/press-release/wmo-confirms-2019-second-hottest-year-record>.

24. Lijing Cheng, John Abraham, Jiang Zhu, Kevin E. Trenberth, John Fasullo, Tim Boyer, Ricardo Locarini, Bin Zhang, Fujiang Yu, Liying Wan, Xingrong Chen, Xiangzhou Song, Yulong Liu & Michael Mann, *Record-Setting Ocean Warmth Continued in 2019*, 37 *ADVANCES ATMOSPHERIC SCIS.* 137, 140 (2020); *see also* IPCC Report, *supra* note 22, at 8.

25. *See* ELIZABETH KOLBERT, *THE SIXTH EXTINCTION* 3 (2014); *see also* D. Jablonski, *The Biology of Mass Extinction: A Palaeontological View*, 325 *PHIL. TRANSACTIONS ROYAL SOC'Y LONDON, SERIES B, BIOLOGICAL SCI.* 357 (Nov. 6, 1989).

26. *Desertification, Degradation, and Drought*, UNITED NATIONS, <https://sustainabledevelopment.un.org/topics/desertificationlanddegradationanddrought> (last visited Feb. 24, 2021).

27. *Freshwater Scarcity*, WORLD WILDLIFE F., <https://www.worldwildlife.org/threats/water-scarcity> (last visited Feb. 24, 2021).

28. For a fuller description of "climate security," *see, e.g.,* Mark P. Nevitt, *Climate Change: Our Greatest National Security Threat?*, *JUST SEC.* (Apr. 28, 2019), <https://www.justsec.org/2019/04/28/climate-change-our-greatest-national-security-threat/>.

homelands of people across the world.²⁹ Other threats are less obvious, but no less severe. For example, as ecosystems collapse and animals are forced to migrate, the promulgation of pandemics becomes more likely, leading Dr. Anthony Fauci to warn that “a deadly barrage of pandemics” is likely approaching.³⁰ Climate change’s threat is one of global proportions – and yet, the international community has struggled for decades to find a cohesive strategy to fight against it.

This Part explores the current lack of international environmental governance. It begins by explaining the basic premises of international environmental law and provides an explanation of the primary environmental treaties. It then turns to trends in international customary law and explains why custom is not enough to combat climate change.

A. *The Current State of International Environmental Treaties*

It has been argued that there is no such thing as international environmental law (“IEL”), only international law applied to environmental harms.³¹ While this is an overstatement, it is true that IEL is a relatively new concept. The foundation underpinning IEL itself contravenes the traditional concept of sovereignty, which has long been the bedrock of international law.³² Under sovereignty theories, states claim the rights and responsibilities over their own land, which includes the right to use that land indiscriminately. More simply, “[s]tates have traditionally asserted the right to pollute at self-determined levels.”³³ And yet, all nations share the planet, and its care requires some semblance of a shared understanding of environmental protection. As a result, the last fifty years have seen an

www.justsecurity.org/63673/climate-change-our-greatest-national-security-threat/ (referring to the twenty-first century as “the climate-security century.”).

29. IPCC Report, *supra* note 22; see also *Unnatural Disasters*, NAT’L WILDLIFE FED’N, <https://www.nwf.org/Our-Work/Environmental-Threats/Climate-Change/Disasters>, (Last visited Mar. 13, 2021).

30. David M. Morens & Anthony S. Fauci, *Emerging Pandemic Diseases: How We Got COVID-19*, 182 CELL 1077 (2020).

31. Ian Brownlie, *Preface*, in B.D. SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION (Ian Brownlie ed., Oxford Univ. Press 1988).

32. Sovereignty is largely considered to be a fundamental cornerstone of international law. The international legal system is structured around the notion that states have the authority to govern themselves, and the international legal order was created largely to protect that governance. See JAMES CRAWFORD, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 12–13 (8th ed. Oxford Univ. Press 2012).

33. VED NANDA & GEORGE (ROCK) PRING, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY FOR THE 21ST CENTURY 7 (Martinus Nijhof, 2d ed. 2012) (citing Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 704 (1993)).

increasing boom of IEL sources, most notably through a proliferation of treaty law.³⁴

As of 2020, IEL is constituted of over 200 separately established multilateral or bilateral environmental treaties, with no singular document recognizing definitive norms, rules, or standards.³⁵ Because IEL relies primarily upon treaties, the doctrine is largely a patchwork of specialized problems instead of one of concrete principles.³⁶ On their face, treaties create one of the most authoritative forms of international law: Once a nation signs a treaty, they are legally bound to obey that treaty's terms.³⁷ However, treaties tend to be issue specific, driven by certain needs in particular moments. For IEL, that movement began in the late 1960s when the world's scientists began to first understand the threats of global warming and climate change and mobilized for a system of legal protection.³⁸

In 1968, the U.N. called for a global conference to address the growing environmental crisis. The U.N. Conference on the Human Environment was held in Stockholm four years later and resulted in the world's first major international environmental treaty, the Stockholm Declaration. The Declaration, created at the Conference, established the first granular commitments to "present and future generations."³⁹ It also created the politically binding Action Plan, which resulted in the development of the U.N. Environment Programme ("UNEP").⁴⁰ Through the Conference and the Declaration, global understanding of environmental threats dramatically increased, which resulted in the promulgation of specific treaties on a variety of environmental issues. Despite some successes, environmental damages continued to escalate across the world.

Two decades later, the U.N. convened another conference to address the growing threat of environmental degradation, this time in Rio de Janeiro, Brazil. The 1992 U.N. Conference on Environment ("UNCED") brought

34. *Id.* at 9–10.

35. Thomas Gehring, *Treaty-Making and Treaty Evolution*, in THE OXFORD HANDBOOK OF INTERNATIONAL LAW 469, 475 (Daniel Bodansky, Jutta Brunnée, & Ellen Hey eds., Oxford Univ. Press 2008).

36. *See* Patrick *supra* note 14.

37. CRAWFORD, *supra* note 32, at 16. The well-known and well-respected principle of *pacta sunt servanda* is a cornerstone of international law, establishing that agreements must be kept. This is further evaluated in the Vienna Convention on the Law of Treaties. Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331.

38. *See* NATHANIEL RICH, *LOSING EARTH: A RECENT HISTORY* (2019).

39. U.N. Conference on the Human Environment, *Stockholm Declaration on the Human Environment*, ¶ 6, U.N. Doc. A/CONF. 48/14 (June 4–16, 1972) [hereinafter *Stockholm Declaration*].

40. UNEP is the primary United Nations branch regulating environmental issues. *See Conferences on the Environment and Sustainable Development*, U.N. ENVIRONMENT PROGRAMME, <https://www.un.org/en/conferences/environment> (last visited at Feb. 27, 2021).

172 states together to develop another overarching treaty.⁴¹ From the beginning, tension between developed and developing states regarding the balance between environmental protections and sustainable development threatened the enterprise.⁴² The resulting Rio Declaration on Environment and Development attempted to balance environmental protection and economic development, thus beginning the trend towards so-called “sustainable development.”⁴³ UNCED also formed the first politically binding environmental action program for the twenty-first century, termed Agenda 21.⁴⁴ Among other things, Agenda 21 encouraged the development of national legislation to implement international environmental standards on the domestic level.⁴⁵ This agenda led to a widespread passage of domestic laws attempting to regulate the environment, but implementation and enforcement of these laws remains uneven at best.⁴⁶

The principles established in the Stockholm and Rio Declarations have failed to encompass the vast categories of problems enshrined within IEL. As a result, IEL has largely been advanced by smaller, more finite agreements. Instead of creating an umbrella treaty to direct the trajectory of the field, as international human rights,⁴⁷ or international trade law has,⁴⁸ most existing environmental treaties frequently rely upon “an explicit step-by-step approach that does not aim at the comprehensive solution of a larger problem at once, but at the rapid conclusion of a set of initial instruments.”⁴⁹ This has made IEL a dynamic but porous field.

As the twenty-first century enters its third decade, the world faces many of the same environmental dangers that it did in 1968. Very little has changed in legal landscape the last few decades, even as the environment has worsened; in fact, “[n]early everything we understand about global warming was understood in 1979.”⁵⁰ Meanwhile, the international community’s progress has stalled. The Paris Agreement, widely lauded at its inception as integral to the world’s future environmental health, has largely

41. SEAN MURPHY, *PRINCIPLES OF INTERNATIONAL LAW* 418 (2d ed. 2012).

42. *Id.* at 419.

43. See United Nations Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I) (June 3–14, 1992) [hereafter *Rio Declaration*].

44. See MURPHY, *supra* note 41, at 419.

45. *Id.*

46. U.N. ENVIRONMENT PROGRAMME, *ENVIRONMENTAL RULE OF LAW: FIRST GLOBAL REPORT* viii, 98 (2019) [hereinafter *GLOBAL REPORT*].

47. UDHR, *supra* note 18, art. 1; see also *infra* Part IV.A for a further discussion of the role of the UDHR in creating human rights law.

48. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

49. Gehring, *supra* note 35, at 9.

50. NATHANIEL RICH, *LOSING EARTH, A RECENT HISTORY* 3 (Picador, 2019).

stalled.⁵¹ Despite a thirty-eight-fold increase in domestic environmental laws and regulations since the implementation of the Stockholm Declaration, the inability to fully implement and enforce these laws remains a significant problem.⁵²

The United Nation's efforts to create a Global Pact for the Environment were largely driven by these realities. In the first comprehensive review of IEL conducted by the U.N., the Working Group for the Global Pact signaled that the lack of a comprehensive, unifying document setting standards for IEL has been debilitating for the doctrine, and the piecemeal and reactive nature of the current laws has led to senseless ambiguity.⁵³ Nor can customary international law fill in the gaps between IEL's many treaties; it too is incomplete.

B. *The Current State of Customary International Law and the Environment*

While there is a general lack of international consensus regarding the customary international law regulating IEL, the crystallization of several soft law norms provides useful insight for understanding trends within the doctrine. There are no clear *erga omnes* obligations in international environmental law, but there are a variety of norms and soft law which can arguably be considered principles of customary international law.⁵⁴ Among these are the principle of the prevention of transboundary harm, the precautionary principle, and increasingly, the human right to a healthy environment. Understanding the flaws in the application of each of these concepts is integral to understanding the rising prevalence of the rights of nature.

Perhaps the most influential concept in IEL is the one which simply asks that states do not pollute their neighbors. Almost eighty years ago, the

51. See, e.g., Raymond Cléménçon, *The Two Sides of the Paris Climate Agreement: Dismal Failure or Historic Breakthrough?*, 25 J. ENV. & DEV. 3 (2016); Mary Elbon, *Report Finds All European Union Countries Failing Paris Climate Targets*, COMPETITIVE ENTER. INST. BLOG (2018) <https://cei.org/blog/report-finds-all-european-union-countries-failing-paris-climate-targets>; Lisa Friedman, *Trump Serves Notice to Quit Paris Climate Agreement*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/climate/trump-paris-agreement-climate.html>; *Trump's Speech on Paris Climate Agreement Withdrawal, Annotated*, NAT'L PUB. RADIO (June 1, 2017), <https://www.npr.org/2017/06/01/531090243/trumps-speech-on-paris-climate-agreement-withdrawal-annotated>.

52. *Dramatic Growth in Laws to Protect Environment, but Widespread Failure to Enforce, Finds Report*, U.N. ENVIRONMENT PROGRAMME (Jan. 24, 2019), <https://www.unenvironment.org/news-and-stories/press-release/dramatic-growth-laws-protect-environment-widespread-failure-enforce>; see also Tseming Yang, *International Treaty Enforcement as a Public Good: Institutional Deterrent Sanctions in International Environmental Agreements*, 27 MICH. J. INT'L L. 1131, 1132 (2006).

53. GLOBAL REPORT, *supra* note 46, at 98.

54. Customary international law is constituted of two principles: widespread state practice and *opinio juris*. For further discussion, see MURPHY, *supra* note 41, at 12–24.

Permanent Court of International Justice established in the *Trail Smelter* arbitration that states have a duty to protect their neighbors from transboundary environmental harm.⁵⁵ This was codified in the Stockholm Declaration, which states, “States have . . . the sovereign rights to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States.”⁵⁶ The Rio Declaration reiterated the concept, and in the time since, the International Court of Justice has recognized that the principle may now be considered customary international law.⁵⁷ This standard, however, is complicated by harms done to the global commons. Because many of the world’s most severe climate disasters happen outside the jurisdiction of any particular state, the principle is unwieldy. Take, for example, the destruction of coral reefs. The warming of the ocean is instrumental in the mass deaths of oceanic ecosystems across the world; however, no one state is entirely at fault for the increase in temperature, and thus, no one state is responsible for their collapse.

The precautionary principle represents the other most significant example of CIL within IEL. This principle establishes that where there are threats of serious or irreversible environmental damage, a lack of scientific certainty that such threats will materialize should not be used as a reason for postponing cost effective measures to prevent environmental degradation.⁵⁸ This has been articulated in every major environmental agreement adopted since 1990.⁵⁹ The ICJ has recognized the principle as part of the canon of IEL, most notably through the requirement of an appropriately conducted environmental impact study.⁶⁰ However, the precautionary principle does not require ceasing actions which actively harm the environment; instead, it requires only that a basic understanding about the threat of an activity be assessed before it is taken. In reality, this means the principle often ends up without teeth.⁶¹ As a result, the precautionary principle’s efficacy is extremely limited.

55. *Trail Smelter Case* (U.S. v. Canada), 3 R.I.A.A. 1905, 1962 (Perm. Ct. Arb. 1938) (asserting that Canada was liable for the damages caused to the United States by a Canadian smelter).

56. *Rio Declaration*, *supra* note 43, princ. 21.

57. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 241–42, para. 29 (July 8) (“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law.”).

58. *Rio Declaration*, *supra* note 43, princ. 15.

59. *See* MURPHY *supra* note 41, at 426.

60. *Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, 2010 I.C.J. 14, ¶¶ 203–219 (Apr. 20).

61. *See, e.g.,* Nerijus Adomaitis, *Norway Supreme Court Verdict Opens Arctic to More Oil Drilling*, REUTERS (Dec. 22, 2020) <https://www.reuters.com/article/us-norway-oil-environment/norway-supreme-court-verdict-opens-arctic-to-more-oil-drilling-idUSKBN>

The most recent development in CIL within IEL is arguably the trend towards a human right to a healthy environment. As treaties and existing norms have struggled to regulate international environmental degradation, individuals have turned to human rights law to carry the burden of rectifying environmental harm. The relationship between the two fields of law is simple: Without a livable environment, there can be no human rights, and thus, the two are intertwined.⁶² At this moment, a right to a healthy environment does not exist in a binding international treaty. Instead, organizations and states have begun to “green” other, more traditional human rights.⁶³ This movement is encouraging, as it shows a growing understanding of the relationship between humanity and nature.

The right to a healthy environment is increasingly pervasive, but not entirely effective as a legal tool for environmental protection. It now codified by more than 180 constitutions or state legislatures across the world.⁶⁴ In state and regional courts, it has been tied to the right to life,⁶⁵ the right to privacy,⁶⁶ and the right of future generations.⁶⁷ Most recently, and monumentally, the United Nations Human Rights Committee has recognized that increasing environmental threats may represent a human rights violation so severe that it can impose refugee status upon citizens of particular states.⁶⁸ In spring of 2020, the Inter-American Court similarly recognized the right to a healthy environment as a fundamental human right.⁶⁹ The African Charter on Human and Peoples’ Rights now recognizes the right of peoples to “a general satisfactory environment favorable to their development.”⁷⁰ Arguably, the widespread state practice and decisions of

28W104. It is well known that the Arctic is melting and that the region’s ecosystems are increasingly unstable—and yet an attempt to block drilling in the Arctic failed.

62. See GLOBAL REPORT, *supra* note 46, at 142 (establishing “rights and environmental rule of law are interdependent: neither can exist without the other”).

63. Human Rights Council, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 12, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018), <https://undocs.org/en/A/HRC/37/59>.

64. *Id.* at 7 n.1.

65. See UDHR *supra* note 18, at art. 3.

66. López-Ostra v. Spain, App. No. 1679/90, ¶¶ 5, 13, 17–26 (Dec. 9, 1994), <http://hudoc.echr.coe.int/fre?i=001-57905>.

67. Juliana v. United States, 339 F. Supp. 3d 1062 (D. Or. 2018).

68. Human Rights Comm., *Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016*, ¶ 9.3, U.N. Doc. CCPR/C/127/D/2728/2016 (Jan. 7, 2020).

69. Caso Comunidades Indígenas Miembros De La Asociación Lhaka Honhat (Nuestra Tierra) v. Argentina, Merits, Reparations, and Costs, Judgement, Inter-Am. Ct. H.R. (ser. C) No. 400, ¶ 370 (Feb. 6, 2020), https://www.corteidh.or.cr/docs/casos/articulos/seriec_400_esp.pdf.

70. African Charter on Human and Peoples’ Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 58 (1982).

international bodies suggest a trend towards customary international law. However, the right to a healthy environment has a significant flaw: In order to bring a case under the right to life, a petitioner must show harm. Often, courts are reluctant to hold that the destruction of an ecosystem does not harm any individual person.⁷¹ As a result, nature's rights provide a more palatable path forward.

III. THE UTILITY OF NATURE'S RIGHTS

The international community has seen a recent and rapid trend away from anthropocentric international environmental law to an eco-centric approach, in which judicial protection of nature for the sake of nature itself is made mainstream. This is true both in treaty law and soft law norms, but it is particularly noteworthy in the recent proliferation of domestic laws and regulations recognizing the rights of nature. Endorsing this approach in every international environmental law document to come, including the Global Pact, is both appropriate and powerful.

This Part explores the utility and growing prevalence of nature's rights. It begins by explaining the ways in which nature's rights improve upon traditional Western litigation strategies to protect the environment. It canvasses the nations and groups which already utilize nature's rights, and concludes by explaining how an endorsement of nature's rights by the United Nations could help promote the voice of developing countries under a Third World Approach to International Law ("TWAIL") lens.

A. *Why Nature's Rights?*

In light of the growing environmental crisis and the lack of an overarching system of regulation, lawyers have increasingly turned to litigation to protect the environment. In a global study of climate change activism, UNEP recognized litigation "has arguably never been a more important tool to push policymakers and market participants to develop and implement effective means of climate change mitigation and adaption."⁷² Litigation does what treaties cannot by forcing domestic courts to grapple with the great environmental harms caused by private actors. According to CDP, seventy-one percent of all global greenhouse gas emissions since 1998 can be traced back to just 100 companies.⁷³ Litigation allows another

71. See, e.g., Adomaitis, *supra* note 61. The refusal of the Supreme Court to recognize the right to a healthy environment was not enough to stop Arctic drilling because the connection between the emissions associated with drilling and the lives of Norwegian citizens was too attenuated.

72. UNEP, *THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL REVIEW* 8 (2017) [hereafter *LITIGATION REVIEW*].

73. CDP, *CDP CARBON MAJORS REPORT* 8 (2017).

method for nonprofits and governments to regulate these companies' behavior. A recognition of nature's rights allows a unique and effective venue for lawyers to bring cases on behalf of the environment in a variety of courts. Particularly in countries with strong standing requirements, the shift can be revolutionary.⁷⁴

Embracing nature's rights stands in stark contrast to the traditional understanding of the English inspired common law, which has almost exclusively required cases of environmental harm to be brought under violations of individual property rights, tort law, or the public trust doctrine.⁷⁵ These approaches are injury specific: That is, in order bring a claim, there must already be demonstrated injury and the plaintiff must be able show that injury adversely affected them. This similarly includes cases which are brought under the human right to a healthy environment.⁷⁶ In terms of environmental harm, this approach causes two problems. First: This is a backward-looking approach, addressing harms only after they are committed. Because so much of environmental harm involves the depletion of finite resources, redress centered litigation comes too late. Second: If an ecosystem exists outside of a particular person's legal reach and outside of existing domestic legislation, there are very few remedies. This is particularly threatening towards some of the world's largest ecosystems, such as the Arctic, the Amazon, or coral reefs.⁷⁷

Instead of relying upon a human's relation to the environment, a legal right for nature allows the case to be brought on behalf of the ecosystem itself.⁷⁸ This shift may sound radical, particularly to Western readers. However, modern Western societies have expanded rights before, first to non-landed white men, then white women, then various marginalized peoples, and most recently in some nations, to corporations or trusts.⁷⁹

74. It is noteworthy that strict standing standards themselves are also generally a function of Western governments. For example, in cases in Pakistan, India, Nigeria, and Colombia, standing was not even discussed when cases were brought on behalf of nature. *Id.* at 29.

75. The public trust doctrine establishes that certain natural and cultural resources are preserved for public use, and that the government owns and must protect and maintain these resources for the public's use. See generally Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970).

76. See Rb. Den Haag 24 juni 2015, No. C/09/456689 (Urgenda/Nederland) (Neth.). In the first case brought against a government for their failure to reckon with carbon emissions, the court acknowledged the claim of a corporation but dismissed the class action of 886 individuals for a lack of standing. See also *Comer v. Murphy Oil USA*, 585 F.3d 855 (5th Cir. 2009). There, the Fifth Circuit Court of Appeals found a lack of standing for plaintiffs claiming harm for GHG emissions.

77. See e.g., Adomaitis, *supra* note 61.

78. An ecosystem is "a community of organisms and its environment functioning as an ecological unit." *Definition of Ecosystem*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/ecosystem> (last visited Feb. 26, 2021).

79. See Jennifer Nedelsky, *Reconceiving Rights as Relationship* 1 REV. CONST. STUD. 1, 1, 2-3 (1993). For a poignant example within the United States, one must only look to

Expanding them yet again may seem unattainable at first blush, but societies across the world have begun to embrace exactly this notion already.

B. *A Vast Array of International Actors have Recognized Nature's Rights*

1. Countries

The origin of the phrase “Nature’s Rights” is most commonly associated with Ecuador. In 2008, the country passed by popular referendum a constitutional amendment enshrining “The Rights of Mother Earth” in its national constitution.⁸⁰ The Amendment is both explicit and comprehensive in its defense of the environment. It declares, “We . . . hereby decide to build a new form of public coexistence, in diversity and in harmony with nature, to achieve the good way of living.”⁸¹ The “*Good way of living*,” or “*Buen Vivir*” in the original Spanish, stems from a historically Andean principle, “*Sumac kawsay*.”⁸² The principles enshrined in this traditional concept are “community-centric,” focusing on the desire to protect the health of the many over individual profit.⁸³ This principle exemplifies Earth Jurisprudence in action, focusing on the necessity of protecting the earth broadly instead of prioritizing individual property rights.

The Amendment’s first major success came in 2011, when the Provincial Court of Justice of Loja recognized the right of the Vilcabomba River to flow unimpeded by a construction project.⁸⁴ In its decision, the court recognized that the precautionary principle requires deference when evaluating threats towards nature.⁸⁵ In particular, because harms to nature cause generational damage, a court should exercise that deference aggressively.⁸⁶ In the years since, Ecuador has seen dozens of cases brought under the Amendment, many of which have prevented serious harm to

Citizens United. See *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (standing for the proposition that corporations enjoy free speech protections under the U.S. Constitution).

80. See CONSTITUCIÓN DE LA ECUADOR 2014, arts. 71–73.

81. *Id.* pmbl.

82. Oliver Balch, *Buen Vivir: The Social Philosophy Inspiring Movements in South America*, *GUARDIAN* (Feb. 4, 2013) <https://www.theguardian.com/sustainable-business/blog/buen-vivir-philosophy-south-america-eduardo-gudynas>.

83. *Id.*

84. Natalia Greene, *The First Successful Case of the Rights of Nature Implementation in Ecuador*, *GLOB. ALL. FOR RTS. NATURE*, <https://therightsofnature.org/first-ron-case-ecuador/> (last visited Feb. 25, 2021); see also Craig M. Kauffman & Pamela L. Martin, *Can Rights of Nature Make Development More Sustainable? Why Some Ecuadorian Lawsuits Succeed and Others Fail*, 92 *WORLD DEV.* 130 (2016).

85. See *Rio Declaration*, *supra* note 43.

86. Greene, *supra* note 84.

rivers, forests, and mountains. The consequences have been widespread, not only in Ecuador, but throughout the region, and prove the potential positive effects of Earth Jurisprudence.

Other Latin American countries have followed suit. In 2011, Bolivia passed a constitutional Amendment explicitly equating the rights of nature to the rights of humans.⁸⁷ The Amendment states that nature has the right “to not be affected by mega-infrastructure and development projects that affect the balance of ecosystems and the local inhabitant communities.”⁸⁸ The change came in the face of “serious environmental problems” arising from the mining of raw materials such as silver, gold, and tin, and was explicitly created in part to allow for more stringent regulation of the mining industry.⁸⁹ Similar laws have been passed in Peru,⁹⁰ Colombia,⁹¹ Belize,⁹² Costa Rica,⁹³ and Mexico.⁹⁴

With the proliferation of laws, there has also been a wave of successful environmental rights litigation. In 2019, the Brazilian Superior Court of Justice, adopting an ecological perspective based on the principle of human dignity, issued an historic ruling recognizing non-human animals as subject of rights and thus also dignity. The ruling further addresses the need to change the legal anthropocentric paradigm and replace it with ecocentric thinking, which advances the interconnectedness and close relationship between human beings and Nature.⁹⁵ In the same year, courts in Colombia recognized Katsa Su, the vast territory of the Awá people, as not only a subject of rights but a victim of regional armed conflict. They further recognized three rivers in three separate cases as the holder of rights.⁹⁶

87. See CONSTITUTION DE BOLIVIA 2009, ch. 5 § 1.

88. *Id.* ch. 5 § 1.

89. John Vidal, *Bolivia Enshrines Natural World's Rights with Equal Status for Mother Earth*, GUARDIAN (Apr. 10, 2011) <https://www.theguardian.com/environment/2011/apr/10/bolivia-enshrines-natural-worlds-rights>.

90. See *Rights of Nature*, HARMONY WITH NATURE, <http://harmonywithnatureun.org/rightsOfNature/> (last visited Feb. 25, 2019).

91. See *id.*

92. See *id.*

93. For a particular description of the rights of nature in Costa Rica, see *Costa Rica: Paving the Way for Rights of Nature*, EARTH L. CTR. (2019), <https://www.earthlawcenter.org/blog-entries/2019/1/costa-rica-paving-the-way-for-rights-of-nature>.

94. The rights of nature within Mexico are represented at both the local, state, and federal levels. See *Rights of Nature*, *supra* note 90.

95. See U.N. Secretary-General, *Harmony with Nature*, ¶¶12, ¶¶ 26–28, U.N. Doc. A /74/236 (Jul. 26, 2019) (explaining the Brazilian opinion); see also *Rights of Nature*, *supra* note 90.

96. See *Rights of Nature*, *supra* note 90 (“The Administrative Court of Quindío has recognized the Quindío River as a subject of rights to protection, conservation, maintenance and restoration. . .The First Criminal Court of Neiva’s District recognized the Magdalena River as subject of rights. . .The Superior Court of Medellín recognized the River Cauca, its basin and affluents as subject of Rights. . .The Administrative Court of Tolima ordered to stop

This trend has not been restricted to South America. Nature's rights have been codified in South Africa,⁹⁷ Zimbabwe,⁹⁸ Uganda,⁹⁹ and Nigeria. In 2017, the African Commission on Human and People's Rights "recognized and respect the intrinsic value of sacred natural sites" and called for their protection.¹⁰⁰ In each of these instances, as in Ecuador and Bolivia, Earth Jurisprudence has been explicitly utilized to protect a developing country against the neocolonial efforts of industry. Rights have also been granted to India's Gangotri and Yamunotri glaciers, including their waterfalls, lakes, and meadows.¹⁰¹ The High Court of Uttarakhand in India similarly recognized the Ganga and Yamuna Rivers as rights holders.¹⁰²

A variety of states and ordinances in the United States have also taken up the mantle of nature's rights. In 2006, a town in Pennsylvania declared the dumping of toxic sewage as a violation of the Rights of Nature. That was widely credited as the first American case to invoke the concept.¹⁰³ Since then, several dozen communities across the United States have passed laws and local ordinances recognizing the rights of Nature. Most recently, the city of Toledo, Ohio passed a Bill of Rights recognizing the rights of Lake Erie to "exist, flourish and naturally evolve."¹⁰⁴ Even in the country

the mining exploitation of the rivers Coello, Combeima and Cocora, along with their basins, recognizing them as subject of rights for protection, conservation, maintenance and restoration. . . The Colombian Municipal Civil Court of La Plata - Huila recognized the La Plata River as a subject of rights.")

97. See THE PEOPLE'S CHARTER FOR AFRICA 2013 (declaring "No person has the right to pursue their own wellbeing at the expense of the natural communities, systems and processes that sustain us all.").

98. CONSTITUTION OF ZIMBABWE 2013, § 73.

99. *Rights of Nature Gain Ground in Uganda*, GAIA FOUND., <https://www.gaiafoundation.org/rights-of-nature-gain-ground-in-ugandas-legal-system/> (last visited Feb. 25, 2021).

100. Fiona Wilton, *Respect sacred Natural Sites to Guarantee Human Rights, says New African Commission Resolution*, INT'L UNION FOR CONSERVATION NATURE (Oct. 2017), <https://www.iucn.org/news/commission-environmental-economic-and-social-policy/201710/respect-sacred-natural-sites-guarantee-human-rights-says-new-african-commission-resolution#:~:text=In%20the%20new%20resolution%2C%20the,of%20peoples%20to%20a%20satisfactory.>

101. *Himalayan Glaciers are Granted 'Rights of Human Beings' for Protection*, PUB. RADIO INT'L (Apr. 1, 2017), <https://www.pri.org/stories/2017-04-01/himalayan-glaciers-are-granted-rights-human-beings-protection>.

102. *Mod. Salim v. State of Uttarakhand*, Writ Petition No. 126 of 2014 in the High Court of Uttarakhand at Nainital (2017) (India), <http://lobis.nic.in/ddir/uhc/RS/orders/22-03-2017/RS20032017WPPIL1262014.pdf> [<https://perma.cc/E6L4-J3BG>].

103. *Tamaqua Borough, Pennsylvania*, CMTY. ENV'T LEGAL DEF. F., <https://celdf.org/2015/08/tamaqua-borough/> (last visited Mar. 13, 2021).

104. LAKE ERIE BILL OF RIGHTS §1(a).

where the possibility of standing for nature was once ridiculed, the rights of Nature are on the rise.¹⁰⁵

2. Indigenous Communities

A system of “rights” is an inherently Western concept. However, the desire to respect and live alongside nature as equals is fundamentally linked to indigenous communities, who have proffered such notions for centuries.¹⁰⁶ It is fitting, then, that many of the most significant developments on behalf of the rights of nature in developed countries have been advanced by indigenous tribes. As explained by indigenous legal scholar Kelsey Leonard, “Our indigenous legal systems have a foundational principle of understanding our nonhuman relations as being living and protected under our laws.”¹⁰⁷ It is not a coincidence that the first cases explicitly linking human rights to the environment were brought by indigenous peoples.¹⁰⁸ It is similarly powerful that indigenous voices in developed nations now serve as an impetus for legislation endorsing nature’s rights.

New Zealand and Australia offer poignant examples. In New Zealand, legislation recognized the Whanganui River as an “indivisible and living whole” in 2017,¹⁰⁹ granting legal rights to what is sometimes referred to as “the Rhine of New Zealand.”¹¹⁰ The Whanganui is considered by the Maori people to be an ancestral figure to their tribe; its abuse by colonial settlers has long been a source of pain for the indigenous peoples of New Zealand.¹¹¹ The legislation granting rights for the river also established the Maori as its legal guardian. It was followed by a recognition of Mount Taranaki’s legal rights, and then several national parks.¹¹² Simultaneously in Australia, the Victorian Parliament legally recognized the Yarra River as an indivisible

105. However, rights of nature in the United States are often quickly struck down. *See e.g.*, Nicole Pallotta, *Federal Judge Strikes Down ‘Lake Erie Bill of Rights’*, ANIMAL LEGAL DEF. F. (May 2020), <https://aldf.org/article/federal-judge-strikes-down-lake-erie-bill-of-rights/> (explaining that Judge Zouhary argues that the Bill of Rights preempted state law and was “impermissibly vague” under the 14th Amendment.).

106. White, *supra* note 4.

107. Kelsey Leonard, *Why Lakes and Rivers Should Have The Same Rights As Humans*, Address Before the TEDWomen 2019 Conference (Dec. 5, 2019), https://www.ted.com/talks/kelsey_leonard_why_lakes_and_rivers_should_have_the_same_rights_as_humans/transcript?language=en.

108. *See* Rb. Den Haag 24 juni 2015, No. C/09/456689 (Urgenda/Nederland) (Neth.); *see also* Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights*, 31 AM. INDIAN L. REV. 675 (2007).

109. Te Awa Tupua Act No. 7/2017 (N.Z.).

110. Kennedy Warne, *A Voice for Nature*, NAT’L GEOGRAPHIC (Apr. 1, 2018) <https://www.nationalgeographic.com/culture/2019/04/maori-river-in-new-zealand-is-a-legal-person/>.

111. *See* Dan Cheater, *I Am the River, and the River is Me: Legal Personhood and Emerging Rights of Nature*, W. COAST ENV’T L. BLOG (Mar. 2018), <https://www.wcel.org/blog/i-am-river-and-river-me-legal-personhood-and-emerging-rights-nature>.

112. *Id.*

living entity with judicial rights.¹¹³ The Yarra, which is an urban river just outside of Melbourne, was also granted a River Council to advocate on its behalf. In the time since, the Council has been able to bring claims to stop the disposal of harmful plastics into the river's waters.¹¹⁴

Similarly, the indigenous tribes of the United States have made great strides towards the recognition of the rights of nature. Under the American legal doctrine, tribes are in a uniquely powerful position to demand the rights of nature be respected on their land.¹¹⁵ This has been used to remarkable success. In 2018, the Ponca Nation of Oklahoma adopted a customary law recognizing the rights of nature. In the same year, the White Earth band of the Chippewa Nation adopted the "Rights of the Manoomin" law securing legal rights of manoomin, or wild rice, in order to prevent the development of an oil pipeline which would destroy the crop's viability.¹¹⁶ In 2019, the Yurok tribe in the U.S. recognized legal rights of the Klamath River in order to protect the river from pollution; the General Council for the Yurok Tribe in Northern California explained that legal personhood was a new and necessary tool to protect the river. These protections have historically proven much more successful in litigation than other ordinances in the United States.¹¹⁷

3. International Community

In 2015, Pope Francis made waves by using his considerable platform to release a detailed and explicit condemnation of humanity's impact on the world. In the statement, he recognized that "a true right of the environment" existed.¹¹⁸ The statement took many by surprise, but the point was simple: Across the world, the way people, organizations and states think about the planet has become increasingly eco-centric.

113. *Rights of Nature*, *supra* note 90, ¶ 2.

114. *Id.*; see also *Time to Transform the Yarra*, ENV. JUST. AUSTL., <https://www.envirojustice.org.au/projects/time-to-transform-the-yarra/> (last visited Feb. 27, 2021).

115. See, e.g., *United States v. Winters*, 207 U.S. 564, 565 (1908) (stating Indian reservations are meant "to provide the Indians with a 'permanent home and abiding place'"). This has led to the Indian Trust Doctrine, which requires the U.S. federal government to protect indigenous property.

116. Ruby Russel, *Rights of Nature: Can Indigenous Traditions Shape Environmental Law?* DEUTSCHE WELLE (May 2, 2020) <https://p.dw.com/p/3WyBe>.

117. Because of the unique combination of a federal system and a strict standing requirement, nature's rights in local ordinances have fared very poorly in appellate litigation in the United States. See Pallotta, *supra* note 105.

118. Pope Francis, *Laudato Si' [Encyclical Letter On Care For Our Common Home]* (May 25, 2015), http://www.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html.

Years earlier, in 2009, the United Nations formally designated April 22 as International Mother Earth Day.¹¹⁹ At the time, the General Assembly recognized for the first time the necessity of “promot[ing] harmony with nature and the Earth.”¹²⁰ Bolivian President Evo Morales, who spearheaded the movement on behalf of fifty nations for the day’s dedication, used his time on the global stage to outline the ways unfettered urban development has destroyed precious environmental resources in Latin America.¹²¹ He closed by expressing the fervent hope that the twenty-first century would be known as the century of the rights of Mother Earth and calling for a Universal Declaration of Nature’s Rights.¹²² The call went unheeded by the General Assembly. Undeterred, Bolivia hosted its own conference to establish a declaration.¹²³ The event drew upwards of 50,000 people, including representation of a wide variety of non-governmental NGOs, and produced an informal Declaration on Nature’s Rights.¹²⁴

Around the same time, the Global Alliance for the Rights of Nature was formed by interested NGOs. The Global Alliance sought to create multilateral Tribunals to debate and litigate laws supporting the rights of nature. Much as the International War Crimes Tribunal and the Permanent Peoples’ Tribunal once provided social pressure to create and strengthen international human rights law, the International Tribunal for the Rights of Nature was meant to foster international Rights of Nature law.¹²⁵ In 2014, the Alliance sponsored the first Tribunal in Ecuador. Three subsequent tribunals have now been held in Paris, Germany, and Australia. While they do not create legally binding law, the Tribunals serve as a place for members of the international community to come together and strategize for the creation and integration of legal rights of nature. They were instrumental in a recent and monumental decision by the Inter-American Court of Human Rights, which introduced a path forward for the legal rights of nature under the Inter-American Charter, and have served as a foundation for several European Commissions.¹²⁶

119. G.A. Res. 63/278 (Apr. 22, 2009).

120. *Id.*

121. *Bolivia’s Leadership*, GARN GLOBAL ALL. FOR RTS. NATURE, <https://therightsofnature.org/bolivia-experience> (last visited Mar. 15, 2021).

122. *Id.*

123. *Id.*

124. UNIVERSAL DECLARATION OF THE RIGHTS OF MOTHER EARTH 2010, <https://therightsofnature.org/universal-declaration/>.

125. Kauffman & Martin, *supra* note 84, at 131.

126. For example, the Inter-American Court found,

The right to a healthy environment protects components of the environment, such as forests, seas, rivers, and other natural features, as interests in themselves, even in the absence of certainty or evidence about how it affects individual people. As in the advisory opinion, the Court indicated an openness to recognizing the “rights of nature.” It explicitly acknowledged the protection of nature because of its

C. A Critical Approach to International Environmental Law

The history of international law is largely a history of colonialism and empire, of a hierarchy created by the West in order to reinforce hegemonic control. Within IEL, this reality is particularly contentious and has led to a principle of “common but differentiated responsibilities.” The principle recognizes that because developed states have traditionally contributed more to global environmental degradation, they must shoulder the heavier burden in combatting climate change.¹²⁷ While the notion has been instrumental in the creation of the 2030 Sustainable Development Goals, it has presents several serious pitfalls.¹²⁸ Among them is the notion that the concept applies only to state action. It does not apply to the corporations of developed nations who are most noticeably responsible for the continued degradation of valuable ecosystems.

Understanding the case for a global evaluation of nature’s rights requires understanding that the greatest push for such a principle has come from traditionally disempowered communities. Historically, international law has “order[ed] the world into the European and the non-European, and gives primacy to the former.”¹²⁹ To create a more equal system of international law, efforts must be made to “transform that nature of globalization.”¹³⁰ Nature’s rights are not revolutionary merely because they require a deviation from long-held norms. A global recognition of such rights is transformative because it recognizes a movement which has been largely spurred by developing countries and indigenous actors.¹³¹ As such, implementing nature’s rights into the Global Pact offers the chance for an

importance for other living organisms, rather than for its “usefulness” to or “effects” on human beings.

Maria Antonia Tigre, *Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment*, AM. SOC’Y INT’L L.: INSIGHTS (June 2, 2020), <https://www.asil.org/insights/volume/24/issue/14/inter-american-court-human-rights-recognizes-right-healthy-environment>.

127. See *Rio Declaration*, *supra* note 43, princ. 7.

128. See, e.g., Christopher Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT’L L. 2 (2004).

129. Makau Mutua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841, 841 (2000).

130. *Id.* at 851.

131. See UDHR, *supra* note 18, art. 27; see also Emma Henderson & Nicole Shackleton, *Minority Rights Advocacy for Incarcerated*

Indigenous Australians: The Impact of Article 27 of the ICCPR, 41 ALT. L.J.

244 (2016) (explaining how article 27 has been interpreted to protect specific cultural groups.)

amplification of traditionally disempowered voices and an opportunity to diversify IEL.¹³²

The movement may buck traditional notions of property and sovereignty. However, this is not as radical as it may seem, and recognizing nature's rights in the Global Pact would not be out of step with the current trajectory of IEL. The United Nations has recognized the need to exist in "harmony with nature" no less than ten times.¹³³ The difficulty now is understanding how to crystallize principles which emphasize harmony with nature when so many member states have varying understandings of what "nature" even means. However, international law has made such a shift before. In the wake of World War II, the international community drew together to solidify a universal understanding of human rights despite varying norms, values, and beliefs. That process could be mirrored now in an effort to expand the rights of nature.

IV. THE UTILITY OF SOFT LAW: USING HUMAN RIGHTS AS A ROADMAP

The Universal Declaration of Human Rights ("UDHR") represents the international community's most cohesive effort to codify the obligations human beings owe to one another. It is undeniably a foundational document of international law – yet it is not a binding instrument. The process for creating the UDHR provides valuable insight into how the Global Pact could be utilized to create a foundation for nature's rights. Further, the impending environmental crisis puts all of the rights enshrined in the UDHR into peril, particularly for vulnerable people, and thus exacerbates the need for a complimentary document for the rights of nature.

A. *The UDHR Clarified Existing International Conversation, Helping Ensure its Success*

The atrocities of World War II resulted in an international legal movement to establish global human rights law. Before the 1940s, the language of individual "human rights" hardly existed,¹³⁴ and certainly could not be considered universal.¹³⁵ Notably, the Covenant for the League of

132. For a more robust understanding of the role of Third World Approaches to International Law in the environmental context, see Tracy-Lynn Humby, *Evaluating the Value of TWAAIL, Environmental Justice, and Decolonization Discourses as Framing Lenses for International Environmental Law*, 26 *TRANSNAT'L L. & CONTEMP. PROBS.* 317 (2017).

133. *Rights of Nature*, *supra* note 90; see also G.A. Res. A/RES/74/224, at 2 (Dec. 19, 2019).

134. See Kenneth Cmiel, *The Recent History of Human Rights*, 109 *AM. HIST. L. REV.* 117, 117 (2004).

135. See Jan Burgers, *The Road to San Francisco: The Revival of the Human Rights Idea in the Twentieth Century*, 14 *HUM. RTS. Q.* 447–77 (1992).

Nations of 1919 codified only “fair and humane conditions of labour”¹³⁶ and “just treatment,”¹³⁷ possessing no mention of the now familiar rhetoric of “human dignity.”¹³⁸ The war changed the language of international commitment. By 1942, the Allied forces issued a proclamation stating that they were, “convinced complete victory over their enemies [wa]s essential to defend life, liberty, independence and religious freedom, and to *preserve human rights and justice in their own lands, as well as other lands.*”¹³⁹ This shift in rhetoric demonstrated a shift in how countries understood their obligations: “Human rights” were now a shared international burden.

At the war’s end, the delegates to the United Nations dedicated themselves to preventing another global outbreak of violence. The UDHR formed a pillar of the newly minted United Nations, clarifying the goals of the already-ratified U.N. Charter. Prior to its existence, human rights existed in a patchwork of individual bilateral and regional treaties. The doctrine of human rights then looks much as IEL does now, created from a collage of subject specific treaties rather than a systemic effort of international relations.¹⁴⁰ However, these particular treaties created a “cumulative effect” which amounted to an “established tradition” of human rights.¹⁴¹ That tradition created the groundwork for the creation of the UDHR in the wake of World War II. Upon its ratification, international law formally recognized that all nations of the world owe human beings certain rights and obligations not based upon citizenship or status, but on a shared value of humanity itself.¹⁴²

Creating the UDHR was a laborious process. The Committee tasked with the decision met eighty-six times to debate the final text, which does not include various subcommittee meetings, nor preliminary drafting meetings.¹⁴³ The Committee spent more time on the Declaration than on any other founding document of the United Nations, including the United Nation’s Charter.¹⁴⁴ It was, by no accounts, an easy process, nor one which every country came to the table with identical perspectives or shared values. Because of the incongruity in expectations, the UDHR’s existence as a

136. League of Nations Covenant art. 23.

137. *Id.* art. 23.

138. UDHR *supra* note 18, art. 23.

139. Declaration by United Nations, Jan. 1, 1942, 55 Stat. 1600 (emphasis added).

140. MOSES MOSKOWITZ, HUMAN RIGHTS AND WORLD ORDER: THE STRUGGLE FOR HUMAN RIGHTS IN THE UNITED NATIONS 15 (1958).

141. *Id.* at 15.

142. UNITED NATIONS, OUR RIGHTS AS HUMAN BEINGS: A DISCUSSION GUIDE ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 18–19 (1951).

143. NEHEMIAH ROBINSON, UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGIN, SIGNIFICANCE, APPLICATION, AND INTERPRETATION 27 (1958).

144. HERBERT VERE EVATT, THE TASK OF THE NATIONS 113 (1949).

nonbinding document was integral to its success. In the end, it was voted into existence with only eight abstentions and no votes against.¹⁴⁵

Importantly, the finalized UDHR meant different things to different nations. Some considered it a general call to action, but little more.¹⁴⁶ Others saw it as a quasi-binding document, capable of reshaping the international world order.¹⁴⁷ Interestingly, the UDHR was always meant to coexist alongside a binding treaty on human rights.¹⁴⁸ That treaty never materialized because the member states of the United Nations could never formally agree upon how it should look—but the UDHR is still considered a foundational success in the realm of international law. Ultimately, its existence is what matters rather than the fact that countries interpret the document in different ways.

The UDHR's nonbinding status allowed it to inspire individuals, nations and even entire regions to create carefully tailored, uniquely appropriate actions to promote human rights. In fact, the ability to adapt the UDHR's goals to fit regional sensibilities and understandings of rights-based norms has been critically important. Just two years after the UDHR was ratified, the binding European Convention on Human Rights ("ECHR") was created in its image.¹⁴⁹ In 1969, the Organization of American States adopted the American Convention on Human Rights;¹⁵⁰ in 1981, the African Union adopted the African Charter, which created justiciable rights and duties based upon the UDHR.¹⁵¹ These three documents have been monumentally influential in the development of justiciable human rights law.

In the decades since the UDHR's creation, a great many global human rights treaties also have been steadily created and ratified in an effort to fulfil its initial mission, including the landmark International Covenant of Civil and Political Rights ("ICCPR")¹⁵² and the International Covenant for Economic and Cultural Rights ("ICESR").¹⁵³ The ICCPR went on to spawn the Human Rights Committee, which is now one of the United Nations' most active bodies, and is widely considered the most authoritative voice on

145. ROBINSON, *supra* note 143, at 28.

146. MOSKOWITZ, *supra* note 140, at 15.

147. *Id.* at 15.

148. ROBINSON *supra* note 143 at 29.

149. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention on Human Rights].

150. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

151. African Charter on Human and Peoples' Rights, June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, 21 I.L.M. 59 (1982).

152. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

153. International Covenant on Economic, Social and Cultural Rights, 1978, 993 U.N.T.S. 3 [hereinafter ICESR].

human rights norms. Similarly, the UDHR inspired a variety of subject matter treaties, such as the Convention for the Elimination of Discrimination Against Women and the Convention on the Rights of the Child, which have gone on to create very active treaty body reporting groups.¹⁵⁴ Throughout all of this, the subject matter of human rights has remained controversial worldwide. However, by allowing adaptable structures for debate based upon foundational norms, the UDHR has encouraged the doctrine to grow. While it bound no one country to a specific action, it has inspired decades of complex growth within the doctrine.

In the context of a Global Pact codifying Earth Jurisprudence, this pathway is illuminating. A Global Pact focused on nature's rights need not be binding to be influential; instead, it can offer a roadmap for how countries can move forward in their own development of environmental laws. Like the UDHR, the Global Pact could draw upon the existing trend of nature's rights to fill in the gaps in existing law. Doing so could provide an important baseline for other environmental documents and provide a roadmap for guiding regional treaties under the umbrella of IEL.

B. The Protection of the Environment is Vital to the Mission of the UDHR

It is worth noting that as environmental degradation rapidly increases, the project of the Universal Declaration of Human Rights itself is in dire danger. Ellen Hey argues that every right within the Declaration is threatened now that humans have reached the Anthropocene.¹⁵⁵ She suggests that the current environmental crisis requires human beings to reimagine their relationship to the world before the world's conditions become even more severe; as conditions deteriorate, human rights themselves will become unsustainable.

Many nations have attempted to circumvent this problem by establishing the right to a healthy environment as a foundational human right.¹⁵⁶ The data is clear that this approach has some merit; seventy-eight percent of these countries saw a reported strengthening of domestic laws once constitutional provisions were implemented.¹⁵⁷ The impact is similarly stark in the extraconstitutional level where sixty percent of the states within the United States have implemented some kind of environmental protection regime in their state constitution.¹⁵⁸

154. United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

155. Ellen Hey, *The Universal Declaration of Human Rights in the Anthropocene*, 112 AM. J. INT'L L. 350, 352 (2018).

156. GLOBAL REPORT, *supra* note 46.

157. *Id.* at 157.

158. *Id.* at 161.

However, this approach has limits. The first United Nations study on the environmental rule of law found in 2019 that, “[w]hile environmental laws have become commonplace across the globe, too often they exist mostly on paper because government implementation and enforcement is irregular, incomplete, and ineffective.”¹⁵⁹ Most notably, confusion surrounding what it requires of a state to implement a human right to healthy environments has led to both poor implementation and even poorer enforcement. In short, the laws exist on paper, but they have had little real impact. Conversely, applying rights of nature allows for immediate shifts in legal cultures. In a 2016 study of thirteen Ecuadorian cases brought under the adapted constitution, it was found that nature’s rights cases “build precedent and raise awareness” for environmental litigation much more effectively than other legal strategies.¹⁶⁰ Because legal suits can be brought on behalf of nature itself, cases are more straightforward than an approach in which humans must be able to prove harm to themselves. Such cases brought more significant wins for the environment, and protected rivers, mountains, forests, and seas in much more comprehensive ways. As such, an argument for an international document supporting Earth Jurisprudence can also persuasively be made in the name of human rights themselves.

V. CONCLUSION

When establishing the first Tribunal for the Rights of Nature in 2014, Cormac Cullinan declared the international legal structure of the twenty-first Century to be “an arid wasteland devoid of leadership and of any discernible tracks towards a viable future for most of humanity.”¹⁶¹ In the same year, the first People’s Climate March rocked New York City, drawing tens of thousands.¹⁶² In the years since, environmental activism has only increased; as youth activist Greta Thunberg reminded us all, “[o]ur house is on fire.”¹⁶³ In 2019, more than six million individuals joined the People’s Climate March.¹⁶⁴ The world is desperate for a change. An increasing flood of

159. *Id.* at 3.

160. Kauffman & Martin, *supra* note 84, at 131.

161. Cormac Cullinan, *A Tribunal for Earth: Why It Matters*, INT’L RTS. NATURE TRIB. (June 1, 2012), <https://www.rightsofnaturetribunal.org/a-tribunal-for-earth-why-it-matters/>.

162. See Lisa Foderaro, *Taking a Call for Climate Change to the Streets*, N.Y. TIMES (Sept. 21, 2014), <https://www.nytimes.com/2014/09/22/nyregion/new-york-city-climate-change-march.html>.

163. Greta Thunberg, ‘Our house is on Fire’: Greta Thunberg, 16, *Urges Leaders to Act on Climate*, GUARDIAN (Jan. 2019), <https://www.theguardian.com/environment/2019/jan/25/our-house-is-on-fire-greta-thunberg-16-urges-leaders-to-act-on-climate#:~:text=Our%20house%20is%20on%20fire,able%20to%20undo%20our%20mistakes.&text=And%20on%20climate%20change%2C%20we%20have%20to%20acknowledge%20we%20have%20failed..>

164. Matthew Taylor, Jonathan Watts & John Bartlett, *Climate Crisis: 6 Million People Join the Latest Wave of Global Protests*, GUARDIAN (Sept. 2019), <https://www.theguardian.com/environment/2019/sep/20/climate-crisis-6-million-people-join-the-latest-wave-of-global-protests>.

national legislation and litigation supporting the rights of nature has shown to be creative and successful paths forward.

Meanwhile, the United Nations General Assembly has come tantalizingly close to bringing Earth Jurisprudence into a meaningful international document. By recognizing the principle in its Harmony for Nature initiatives, it has already acknowledged its power. As the conversations for the Global Pact on the Environment continue, the opportunity to crystallize and amplify nature's rights should not be taken for granted. Doing so can unify the incomplete doctrine of international environmental law and inject creativity into the way lawyers and legislators view global environmental protection. It can rightfully give nature its place in courts across the world. In short, recognizing nature's rights could change everything.