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The Human Right to Environment in the 21st Century: A Case for its Recognition and Comments on the Systemic Barrier it Encounters

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**THE HUMAN RIGHT TO ENVIRONMENT IN
THE 21ST CENTURY: A CASE FOR ITS
RECOGNITION AND COMMENTS ON THE
SYSTEMIC BARRIERS IT ENCOUNTERS**

LUIS E. RODRÍGUEZ-RIVERA*

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I. INTRODUCTION

The debate regarding the existence of a human right to environment under international law is already reaching the mid-century mark. As early as 1968, United States' Senator Gaylord Nelson proposed a constitutional amendment providing “[e]very person has the inalienable right to a decent environment.”¹ In the ground-breaking National Environmental Policy Act of 1969 the United States' Congress and President Richard Nixon recognized that “each person should enjoy a healthful environment.”² The Works of the Preparatory Committee of the 1972 U.N. Conference on the Human Environment reveal that the draft Stockholm Declaration was “based on the recognition of the rights of individuals to an adequate environment.”³ More specifically, the 1972 Stockholm Declaration announces in its first principle, “[m]an has the fundamental right to freedom, equality and adequate conditions of life, *in an environment of a quality that permits a life of dignity and well-being*, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”⁴ Shortly after the Stockholm Conference, Harvard Law School Professor Louis B. Sohn, one of the founding fathers of international environmental law and a participant in the Stockholm conference, contributed this bit of wisdom regarding the above-quoted Principle 1 of the Stockholm Declaration: “[p]erhaps this phrase is meant to convey the existence of the right to an adequate

1. H.R.J. Res. 1321, 90th Cong., 2d Sess. (1968); see Carole L. Gallagher, *The Movement to Create an Environmental Bill of Rights: From Earth Day, 1970 to the Present*, 9 FORDHAM ENVTL. L. REV. 107, 120 (2017).

2. National Environmental Policy Act, 42 U.S.C.A. §4331(c) (1969).

3. U.N. Conference on the Human Environment, Works of the Preparatory Committee, ¶ 77, U.N. Doc. A/Conf.48/PC/17 (1972) [hereinafter Works of the Preparatory Committee].

4. U.N. Conference on the Human Environment, Rep. of the United Nations Conference on the Human Environment, Principle 1, U.N. Doc A/Conf.48/14/Rev.1 (1972) [hereinafter Stockholm Declaration] (emphasis added).

environment.”⁵ Since then, the human right to environment has been the subject of much study and analysis. Professor Burns H. Weston and David Bollier recently highlighted that numerous environmental and human rights scholars have grappled with this issue during the past several decades “with acuity and at length.”⁶ A considerable

5. Louis B. Sohn, *The Stockholm Declaration on Human Environment*, 14 HARV. INT’L L.J. 423, 455 (1973). Professor Sohn served as Counselor on International Law at the U.S. Department of State during the initial stages of the preparatory works for the Stockholm Conference and was present during the conference as an observer for the Commission to Study the Organization of Peace, a non-governmental organization. *See id.* at 423.

6. BURNS H. WESTON & DAVID BOLLIER, GREEN GOVERNANCE – ECOLOGICAL SURVIVAL, HUMAN RIGHTS, AND THE LAW OF THE COMMONS 30 (2013). Weston and Bollier listed an impressive sample of approximately 60 books, book chapters, articles and draft papers written during the past five decades which are representative of both the amount and quality of the debate regarding the existence of a human right to environment under international law:

Donald K. Anton & Dinah L. Shelton, *Environmental Protection and Human Rights* (2011); David R. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (2012); Alan E. Boyle & Michael R. Anderson, *Human Rights Approaches to Environmental Protection* (1996); W. Paul Gormley, *Human Rights and the Environment: The Need for International Cooperation* (1976); Richard P. Hiskes, *The Human Right to a Green Future: Environmental Rights and Intergenerational Justice* (2009); Phillipe Sands, *Principles of International Environmental Law* 291-307 (2d ed. 2003); Alan E. Boyle, *Human Rights of Environmental Rights? A Reassessment*, 18 Fordham Env’tl. L. Rev. 471 (2008); W. Paul Gormley, *The Legal Obligation of the International Community to Guarantee a Pure and Decent Environment: The Expansion of Human Rights Norms*, 3 Geo. Int’l Env’tl. L. Rev. 85 (1990); W. Paul Gormley, *The Right to a Safe and Decent Environment*, 28 Indian J. Int’l L. 1 (1988); W. Paul Gormley, *The Right of Individuals to be Guaranteed a Pure, Clean and Decent Environment: Future Programs of the Council of Europe*, 1 Legal Issues Eur Integration 23 (1975); Gunther Handl, *Human Rights and Protection of the Environment: A Mildly “Revisionist” View*, in *Human Rights, Sustainable Development and Environment* 117 (Antonio Cançado Trindade ed., 1992); R.S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law*, in *Environmental Change and International Law: New Challenges and Dimensions* 205 (Edith B. Weiss ed., 1992)); Melissa Thorne, *Establishing Environment as a Human Right*, 19 Den. J. Int’l L. & Pol’y 301 (1991).

number of these scholars support the position that an environmental human right is recognized under the international legal order. I count myself among this group having first studied and published on the issue approximately twenty years ago.⁷

On the flip side of this debate, skeptics of the human right to environment have historically argued against the existence of the right relying on several arguments, among them: (1) the inherent indeterminacy of an environmental human right due to its uncertain or ambiguous definition; (2) the redundancy such a right would create for environmental protection, as well as, for environmentalists' efforts as a whole given the existence of other environmental legal regimes, strategies and instruments, both at the national and international levels, including the derivative use of other recognized and applicable human rights; (3) the non-justiciable and non-enforceable nature of an environmental human right; (4) the inherent anthropocentric bias of a human right to environment; (5) the devaluation or debasing of human rights currency if an environmental human right were prematurely recognized; and a catch-all category that I will call, (6) an "environmental human right is conceptually just a bad idea" argument. It should not surprise us that these criticisms mirror those raised against other new or emerging human rights. Fortunately, these criticisms to a human right to environment also have been evaluated thoroughly and rejected in the past with both "acuity and at length."⁸

Id. at 30 n.6. Of course, many more examples exist as the debate regarding the human right to environment continues to inspire the research of new generations of international law and human rights scholars around the globe.

7. See generally Luis E. Rodríguez-Rivera, *Is the Human Right to Environment Recognized Under International Law? It Depends on the Source*, 12 COLO. J. INT'L ENVTL. L & POL'Y 1 (2001).

8. For examples of some of the direct responses made to the skeptics' criticisms discussed in this paragraph, see, e.g., WESTON & BOLLIER, *supra* note 6, at 27-49 (rejecting the criticisms regarding non-justiciability, indeterminacy and anthropocentrism); Rodríguez-Rivera, *supra* note 7, at 29-37 (addressing all of the above criticisms made by traditionalists); ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 24 (1991) (providing that tribunals can solve any uncertainty or ambiguity related to definition of a human right to environment); François Du Bois, *Social Justice and the Judicial Enforcement of Environmental Rights and Duties*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 153 (Alan Boyle & Michael Anderson eds., 1996) (discussing the conflicting views amongst courts regarding environmental rights, and how the branches of government should seek to be impartial in establishing the

Hence, I will merely restate the accurate responses already posed to the same:

(1) the alleged uncertainty or ambiguity related to the content of a right to environment is easily overcome through international, regional and national tribunals who are at this stage more than capable of providing content to said right;⁹

(2) the alleged redundancy criticism is misguided in that, (a) the right to environment serves to fill a very significant gap within international environmental law – that is, the protection of human life and dignity from threats related to environmental degradation caused by the acts or omissions of an individual's own state government,¹⁰ and (b) there is no particular strategy that can address by itself all of the complex problems related to the environment, therefore, additional complementary strategies,

rights); A.A. Cançado Trindade, *The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 302-03 (Edith Brown Weiss ed., 1992) (asserting that existence of human rights institutions for the implementation and supervision of states' compliance with its human rights obligations is sufficient to satisfy the enforceability requirement); Cançado Trindade, *supra* note 8, at 304 (“[f]ormal justiciability or enforceability is by no means a definitive criterion to ascertain the existence of a right under international human rights law”); ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 99-100 (1994) (providing that formal justiciability or enforceability not a definitive criterion to establish or prove existence of a human right); Melissa Thorne, *Establishing Environment as a Human Right*, 19 DEN. J. INT’L L. & POL’Y 331-33 (1991) (stating that the existence of human right to environment would make pertinent forum more willing to hear claims; and proposes that the right to environment, or parts of it, have *jus cogens* status); Dinah Shelton, *What Happened in Rio to Human Rights?*, 3 Y.B. INT’L ENVTL. L. 75, 91 (1992) (categorizing as flawed the argument that it is difficult to conceptualize a human right to environment as an inalienable or non-derogable right when confronted with others, since it establishes the conclusion as a criterion); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 22 (1986) (suggesting it is inaccurate to rely on hierarchical terms when discussing the existence of human rights); PAUL GORMLEY, HUMAN RIGHTS AND THE ENVIRONMENT: THE NEED FOR INTERNATIONAL COOPERATION 43 (1976) (proposing that the right to environment, or parts of it, have *jus cogens* status); R.S. Pathak, *The Human Rights System as a Conceptual Framework for Environmental Law*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 211-14 (Edith B. Weiss ed., 1992) (proposing that the right to environment would qualify as a human right pursuant to the delineation of minimum criteria established for human rights in general).

9. KISS & SHELTON, *supra* note 8, at 24.

10. Cançado Trindade, *supra* note 8, at 302-04.

such as a rights-based approach, should be welcomed;¹¹

(3) the alleged non-justiciability of the right to environment lacks merit given that human rights are as a matter of fact implemented, supervised and enforced by an extensive system of international, regional and national tribunals and commissions, and, more importantly, enforceability is not a definitive criterion in establishing and recognizing the existence of a human right;¹²

(4) the alleged anthropocentric bias of the right to environment is overstated in light that the intrinsic value of the environment has been incorporated into the definition of an expansive right to environment (both substantively and procedurally), and that the implementation of said expansive right would result in benefitting nature;¹³

(5) the alleged devaluation or debasing of the human rights currency is always a persuasive argument, but should not curtail *a priori* the evaluation of new rights as each proposal must measure to human rights standards to gain international recognition,¹⁴ and

(6) the “bad idea” argument is anachronic and outdated as it relates to environmental issues.¹⁵

In this paper, I will revisit in more depth what I consider has been

11. *Id.* (asserting the individual right to be informed of projects and decisions that threaten to harm the environment and the right to participate in making decisions that may affect the environment).

12. HIGGINS, *supra* note 8, at 99-101 (comparing the argument that human rights are found in various international instruments with the argument that these instruments merely serve as a way to express the obligations of providing human rights without actually creating the rights themselves).

13. Erin Daly, *Constitutional Protection for Environmental Rights: The Benefits of Environmental Process*, 17 INT'L J. PEACE STUD. 71, 72 (2012) (describing the difficulties in defining substantive environmental rights compared to procedural rights, and explaining that facilitating public participation could benefit not only the environment, but also civil society).

14. See R.S. PATHAK, THE HUMAN RIGHTS SYSTEM AS A CONCEPTUAL FRAMEWORK FOR ENVIRONMENTAL LAW, IN ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 205 (Edith B. Weiss ed., 1992).

15. *Contra* J.B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RESOURCES & ENV'T 46 (1997) (arguing that including an amendment to the U.S. Constitution to create the right to environmental protection is a bad idea).

the strongest objection raised by classical or traditional international law scholars¹⁶—namely, the alleged dearth of formal hard law sources to support environmental human rights scholars’ claims regarding the existence and recognition of a human right to environment under international law.

Traditionalists argue that since states have not accepted a new human right to environment through a formal treaty, they are not legally bound to this illusory new right.¹⁷ For example, Günther Handl adopted this position some twenty-five years ago while labelling the evidence presented at the time as “indirect, normatively ‘soft’, or exceedingly limited in scope.”¹⁸ Professor Handl reasoned then that the human right to environment could not exist since it “ha[d] not found express affirmation in any binding or effective international legal instrument.”¹⁹ Moreover, Handl concluded:

In sum, international practice does not support the claim of an existing generic human right to a healthy environment. The evidentiary basis that proponents of such a right rely [*sic*] upon is simply too narrow or normatively too weak to lend itself to that major normative extrapolation that a human right to a healthy environment would undoubtedly represent.²⁰

Relying on a more progressive approach to the source’s doctrine, in which so-called soft law instruments may evince as much of a state’s consent as hard law instruments, I previously responded to Handl’s evidentiary argument as follows:

There are many instruments that serve as unmitigated sources for the

16. My use of the term “classical or traditional international law scholars” is intended to refer to those that espouse the view that international law is strictly statist, positivist, and consensual, and that a state’s consent is explicitly or implicitly required as a pre-condition for an international norm’s binding effect over said state.

17. My use of the term illusory is done with a degree of sarcasm. In the past, I have rejected classical or traditional international law scholars’ paternalistic and condescending tone when criticizing the more progressive views of the proponents of new human rights. See Rodríguez-Rivera, *supra* note 7, at 29-31.

18. See Günther Handl, *Human Rights and Protection of the Environment: A Mildly “Revisionist” View*, in HUMAN RIGHTS, SUSTAINABLE DEVELOPMENT AND ENVIRONMENT, 117, 125-26 (Antonio Cançado Trindade ed., 1995) (arguing that evidence of non-binding treaties and individual state law are insufficient to establish a generic environmental right on an international level).

19. *Id.* at 122.

20. *Id.* at 128.

recognition of the human right to environment in the international legal order, including: the thousands of international environmental soft law instruments; the many national constitutions and legislative acts; the dozens of international, regional and national court decisions; the hundreds of non-governmental organizations; the thousands of local or “grass-roots level” community organizations, and, more importantly, the overwhelming and sweeping transformation in the valuation of environmental concerns in all levels of society. To ignore this voluminous evidence of the will of the people would be to ignore the evolution of international law during the last half-century.²¹

The increased use and reliance on soft law agreements by states is an important development in modern international law and, particularly, in international environmental and human rights law. The vital role and effectiveness of soft law instruments in the management and resolution of complex and difficult global problems is positively acknowledged in contemporary legal scholarship.²²

Approximately thirty years ago, Judge Bruno Simma wisely foresaw the vital role that soft law instruments would assume in the development of new human rights, as well as, in the resolution of global standard-setting issues:

Even a hard look at the role that soft law plays in the development of international human rights will reveal a decidedly positive picture. Soft law is used regularly for international human rights standard setting, designed either as a final or as an intermediate reflection of international consensus. In the process of development of human rights law at the universal level, a soft-law stage is certainly the rule now. In other instances, soft-law instruments or processes do not play merely a preliminary role, but are here to stay and assume functions that go well beyond that of preparing and

21. Rodríguez-Rivera, *supra* note 7, at 44-45.

22. See, e.g., Edith Brown Weiss, *Introduction, in* INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 1-3 (1997) (recognizing the increase in “soft law” and their increasing importance as a source of international law); Geoffrey Palmer, *New Ways to Make International Environmental Law*, 86 AM. J. INT'L L. 259, 269-71 (1992) (discussing how soft law makes important contributions to international law and establishing norms); Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 MICH. J. INT'L L. 420 (1991); KISS & SHELTON, *supra* note 8, at 108-10 (1991); C.M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L. Q. 850, 866 (1989). See generally Joseph Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443 (1983).

maybe testing the text of later human right treaties. I would go as far as saying that it is probably the more important part of international human rights that is manifesting itself within the soft-law processes and mechanisms of standard setting, or maybe I should say that part where the political action is.²³

Many scholars have accepted the premise that soft law instruments are important sources of modern international law and agree that most international actors comply with the duties and obligations agreed upon in said instruments. Professor Edith Brown Weiss explains:

The common assumption is that countries comply much better and more fully with binding international agreements than with nonbinding legal instruments. Experience suggests an alternative hypothesis: that countries under some circumstances may comply with legally nonbinding instruments as well as they do with binding ones.²⁴

The reality is that most states comply with a considerable number of soft law instruments in modern international law subject areas.²⁵

23. Bruno Simma, *Remarks: A Hard Look at Soft Law*, 82 AM. SOC'Y INT'L L. PROC. 371, 379 (1988).

24. Weiss, *supra* note 22, at 1.

25. See, e.g., Peter M. Hass, *Why Comply, or Some Hypotheses in Search of an Analyst*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 21 (Edith Brown Weiss ed., 1997); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 49 (Edith Brown Weiss ed., 1997); Atsuko Kanehara, *Some Considerations Regarding Methods of Regulation in Global Issues: "Sovereignty" and "Common Interests,"* in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 81 (Edith Brown Weiss ed., 1997); Dinah Shelton, *Compliance with International Human Rights Soft Law*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 119 (Edith Brown Weiss ed., 1997); Richard W. Parker, *Choosing Norms to Promote Compliance and Effectiveness: The Case for International Environmental Benchmark Standards*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 145 (Edith Brown Weiss ed., 1997); Naomi Roht-Arriaza, *Compliance with Private Voluntary Agreements: The Example of the International Organization for Standardization's ISO 14000 Environmental Management and Related Standards*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 205 (Edith Brown Weiss ed., 1997); David A. Wirth, *Economic Assistance, the World Bank and Nonbinding Instruments*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 219 (Edith Brown Weiss ed., 1997); Virginia A. Leary, *Nonbinding Accords in the Field of Labor*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 247 (Edith Brown Weiss ed., 1997).

Why would it be otherwise? As Professor David Kennedy has expressed, “there is no *a priori* reason to divide either the ‘sources’ of law or persuasive reasons for compliance into these two categories.”²⁶

II. INITIAL CODIFICATION OF “BINDING HUMAN RIGHTS” AND THE ADVENT OF MODERN INTERNATIONAL LAW

The recognition of human rights as a subject of international law is of relatively recent vintage. Consensus exists among international law scholars that the 1945 United Nations Charter²⁷ “effectively brought human rights into the sphere of international law – in the process achieving the simultaneous internationalization of human rights and the birth of the ‘human individual’ as a subject, rather than an object, of international law.”²⁸ The 1948 Universal Declaration of Human Rights contains the first codification of binding human rights.²⁹ Other sources with binding human rights include the 1948 Genocide Convention,³⁰ the 1965 Convention on the Elimination of All Forms of Racial Discrimination,³¹ the 1966 United Nations Covenant on Civil and Political Rights,³² and the 1966 United Nations Covenant on Economic, Social and Cultural Rights.³³ Together, these international

26. See DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 29 (1987) (explaining that the sources doctrine’s “hard” and “soft” law categories are arbitrary). *Id.* at 99 (“[t]he authority of various sources, their limitations, and the hierarchical relationship among sources do not depend upon the content of the norms they originate . . . argument about the authority of various norms, when conducted in the rhetoric of sources doctrine, proceeds independent of the norm’s particular content or application.”).

27. See generally U.N. Charter.

28. Anna Grear, “*Framing the Project*” of *International Human Rights Law: Reflections on the Dysfunctional “Family” of the Universal Declaration*, in BURNS H. WESTON & ANNA GREAR, *HUMAN RIGHTS IN THE WORLD COMMUNITY – ISSUES AND ACTION* 18, 19 (2016).

29. G.A. Res. 217A (III), Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration of Human Rights].

30. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 276.

31. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, 660 U.N.T.S. 195.

32. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

33. G.A. Res. 2200A, annex, International Covenant on Economic, Social and

treaties are considered the “International Bill of Rights.”³⁴

Convincing states to accept the inherent limitations imposed upon their sovereignty by the nascent human rights system was no small feat, and its contribution towards the planet’s future survival is immeasurable. But, are the human rights contained in the International Bill of Rights a finite list of rights? May the list be expanded? If so, how may the list be expanded? What effect does the inclusion of individuals as subjects of international law have on the future development of human rights? How will international norm creation change with modern developments in science, technology and communications? How do we account for social developments affecting religious, cultural, moral, and ethical values? Was a human rights Pandora’s box opened by the states’ formal adherence to the International Bill of Rights? As we can surmise, these and many more questions become relevant today as “new” or “emerging” human rights continue to blossom well into the twenty-first century.

Scientific and technological breakthroughs that took place after the development of the International Bill of Rights have altered dramatically the notion and concept of time within the international legal order.³⁵ We must remember that just a few years after the signing of the covenants on civil, political, economic, social, and cultural rights, a human walked on the Moon! International travel that once took weeks and months has been reduced to hours and minutes. The evolution of computers and the internet has made access to information both universal and instantaneous, thus, giving new meaning to freedom of information. In turn, this new reality has affected how scholars currently evaluate the existence and recognition of international norms.³⁶ Traditionally, state practice required decades, if not centuries, before crystallizing into customary law, as the

Cultural Rights (Dec. 19, 1996) [hereinafter International Covenant on Economic, Social and Cultural Rights].

34. See Grear, *supra* note 28.

35. See generally Christine A. Khalili-Borna, *Technological Advancement and International Human Rights: Is Science Improving Human Life or Perpetuating Human Rights Violations?*, 29 MICH. J. INT’L L. 95 (discussing how rapid technological advancements outpace human ability to make ethical decisions regarding its use).

36. See generally *World Youth Report 2003*, U.N., <http://www.un.org/esa/socdev/nyin/documents/worldyouthreport.pdf>.

compilation and analysis of evidence conducive to establishing uniformity and *opinio juris* was an extremely slow process. This fact was generally understood and tolerated under the premise that the very information needed for a proper evaluation of the elements of customary law travelled very slowly around the world, so to speak. Today, evidence of state practice can be recollected and studied quickly and accurately, making the process of the crystallization of customary law potentially much faster than in the past.

The very essence of sovereignty as a concept also transformed in the modern age of globalization.³⁷ For example, participation and access to the global economy significantly restricts a state from taking protectionist economic actions, while also opening its fiscal and monetary policies to scrutiny by the global financial market.³⁸ As Robert McCorquodale and Richard Fairbrother explained:

Globalization has thus been transformative in terms of a reconceptualizing of state sovereignty within both international relations and international law.

Of course, states have never had exclusive control over their economic, legal, political, and security affairs. However, the current trend of globalization differs from past transnational influences on state sovereignty in the scale and speed of its operation.

....

... [T]he fact that the economic decision-making process is being taken away from governments and put in the hands of financial “experts” in globalized economic institutions also means that the people and the governments of developing states are not effectively involved in decisions affecting their lives. This has an impact on both state sovereignty and human rights.³⁹

37. See generally John H. Jackson, *Sovereignty – Modern: A New Approach to an Outdated Concept*, 97 AM. J. INT'L L. 782, 786-88 (2003) (discussing how globalization enabled a shift from traditional conceptions of sovereignty as state actions increasingly transcend state borders).

38. See WORLD BANK, *WORLD DEVELOPMENT REPORT 1997: THE STATE IN A CHANGING WORLD* 12 (1997), <http://hdl.handle.net/10986/5980>.

39. Robert McCorquodale & Richard Fairbrother, *Globalization and Human Rights*, 21 HUM. RTS. Q. 735, 737-38, 746-47 (1999).

Moreover, states currently acknowledge “the Internet is incubating a different type of economics and governance, one that recognizes the human propensity to cooperate and the right of everyone to participate in managing shared resources.”⁴⁰ Hence, we cannot ignore that modern global developments continue to impact and transform the very core of international law, including how international norms are developed and recognized in the modern era. Modern international law requires a novel and innovative approach to the source’s doctrine; one that incorporates technological developments, as well as, the new values that modern societies are adopting.

The International Bill of Rights has been supplemented since 1966 by a handful of “binding” treaties focused on specific rights (such as, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁴¹) or on specific rights-holders (such as the Convention on the Elimination of All Forms of Discrimination against Women⁴²).⁴³ However, the development of new human rights in modern international law has relied mainly on soft law instruments.⁴⁴ This should not surprise us. As I explained some two decades ago:

[M]odern international law has evolved into a more political and diplomatic order, and less of a legal order. Thus, the role of international organizations and of non-governmental organizations has gained greater importance in the formulation of international norms. Further, it is undeniable that soft law instruments have become the preferred legislative approach in the international community, particularly in the field of human rights. The factors that explain the exponential growth of soft law instruments in

40. WESTON & BOLLIER, *supra* note 6, at 16.

41. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

42. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

43. See Grear, *supra* note 28, at 20.

44. See generally Mariana R. Villegas Ergueta, *The Multifaceted and Dynamic Interplay Between Hard Law and Soft Law in the Field of International Human Rights*, UNIVERSIDAD CATOLICA BOLIVIANA (Dec. 2015), http://www.scielo.org.bo/pdf/rcc/v19n35/v19n35_a10.pdf (asserting the international community relies on soft law instruments to create international norms, using the Universal Declaration of Human Rights as an example of a soft law instrument becoming authoritative in international human rights).

modern international law must be considered.

The attractiveness of soft law instruments stems from the flexibility they provide. The form of these instruments is not the important element; what is important is "the manner in which the obligations, if any, created by them are expressed." Soft law instruments are generally produced by lengthy, and often controversial, negotiations. The fact that states are careful in the drafting of soft law documents is evidence that these 'are perceived to have political consequences of a serious sort.' States may continue to defend their actions under the doctrine of sovereignty, but it is clear by the proliferation of soft law documents that states understand that mutual interdependence in the world necessitates cooperation. Global cooperation, in turn, requires the narrowing of the sovereignty doctrine.⁴⁵

Experience has also proven that states comply with soft law documents to the same degree as they do other binding international agreements, making soft law documents even more attractive as an effective instrument for the management and resolution of complex international problems.⁴⁶

III. HUMAN RIGHTS AND THE ENVIRONMENT

Global awareness of environmental problems began during the 1970s. Depletion of the ozone layer, acid rain, deforestation, desertification, reduction in the world's biodiversity, and the disposal of hazardous materials were among the difficult issues tackled by the international community during the last three decades of the twentieth century. However, during the period when human rights were discussed and identified in the International Bill of Rights (1945-1966), environmental knowledge and sensibilities had not yet developed. Therefore, the argument that the human right to environment does not exist because it is absent from those initial documents misses the point. Current U.N. Human Rights Council's Special Rapporteur on Human Rights and the Environment (formerly the Council's Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and

45. Rodriguez-Rivera, *supra* note 7, at 41-42.

46. See Weiss, *supra* note 22, at 1 ("Experience suggests . . . that countries under some circumstances may comply with legally nonbinding instruments as well as they do with binding ones.").

sustainable environment), John H. Knox, expounded on this very issue:

The drafters of the seminal human rights instrument, the 1948 Universal Declaration of Human Rights, did not include environmental rights. Nor, at the time, did the national constitutions to which the drafters looked for inspiration. The silence was understandable. Although humans have always known of our dependence on the environment, we were only beginning to realize how much damage our activities could cause to the environment and, as a result, to ourselves. Efforts to mitigate environmental degradation were then still in their infancy.⁴⁷

The fact that as early as 1972, the international community met during the United Nations' Conference on the Human Environment held in Stockholm, Sweden, and agreed that humans had the inalienable right to live "in an environment of a quality that permits a life of dignity and well-being"⁴⁸ should not be trivialized or dismissed merely because the states involved chose to recognize this new right using a soft law document. On the contrary, this strategy—that is, the use of a non-binding or soft international legal instrument—set the standard for future dealings in the global community concerning the environmental *problématique*, as well as other complex modern international problems.⁴⁹ The lesson that remains clear from the Stockholm Conference is that ever since the very first international meeting concerning the human environment, it was obvious to all present that the human right to environment existed and was recognized by the international community.⁵⁰ The human right to

47. Rep. of the Indep. Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Env't, (Preliminary Report), Human Rights Council, 22nd Sess., U.N. Doc. A/HRC/22/43 (2012) [hereinafter Report of the Independent Expert, Preliminary Report]; see also, WESTON & BOLLIER, *supra* note 6, at 285 ("Most human rights treaties, declarations, and other international instruments do not reference the natural environment explicitly. This is so mainly because the majority of those instruments came into being before the environment – especially the global environment – became widely understood to require universally concerted attention and protection.").

48. Stockholm Declaration, *supra* note 4, art. 1.

49. See Weiss, *supra* note 22, at 1.

50. Paolo Galizzi, *From Stockholm to New York, via Rio and Johannesburg: Has the Environment Lost its Way on the Global Agenda?*, 29 *FORDHAM INT'L L.J.* 952, 960 (2005) (claiming the Stockholm agenda included the topic of the human right to environment at the forefront, reflecting a common outlook on the need for the

environment was initially expressed in terms of a linkage between human rights and the environment and subsequently articulated in terms of a linkage between human development and the environment.⁵¹

Today, the existence and recognition of the human right to environment is more obvious and necessary than ever before. First, the catastrophic risks and threats to the environment and to human rights presented by the climate change phenomena, as well as other environmental conditions, are widely understood and recognized.⁵² Second, the exponential growth of international environmental instruments, documents, and actions adopted by states, international, and regional organizations, non-governmental organizations, academic and research institutions, experts of all related disciplines, grass-roots and community movements, and environmental activists confirms the international recognition of the human right to environment.

With regard to the catastrophic risks and threats to the environment and human rights brought upon by climate change, the Fifth Assessment Report of the Intergovernmental Panel on Climate Change indicates:

SPM 2. Future Climate Changes, Risks and Impacts

Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing

preservation and enhancement of the human environment).

51. For examples of articulations of the human right to environment as a linkage between human rights and the environment, *see, e.g.*, G.A. Res. 2398, U.N. GAOR, 23rd Sess., Supp. No. 18, at 2, U.N. Doc. A/7291 (1968); Works of the Preparatory Committee, *supra* note 3, at art. 1; G.A. Res. 45/94, U.N. GAOR, 45th Sess., Supp. No. 49A, at 178, U.N. Doc. A/45/49 (1990). For examples of expressions of the human right to environment as a linkage between human development and the environment, *see, e.g.*, Rep. of the World Comm'n on Env't and Dev., Our Common Future, U.N. Doc A/42/427, at 339 (1987), <http://www.un-documents.net/our-common-future.pdf>; United Nations' Conference on Environment and Development, *Rio Declaration on Environment and Development (Rio Declaration)*, UN Doc. A/CONF.151/26 (vol. I), annex I (1992) [hereinafter *Rio Declaration*].

52. *See generally Climate Change 2014: Synthesis Report, Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPPC), https://www.ipcc.ch/pdf/assessmentreport/ar5/syr/AR5_SYR_FINAL_SPM.pdf.

the likelihood of *severe, pervasive and irreversible impacts for people and ecosystems* . . .

SPM 2.3 Future Risks and Impacts Caused by a Changing Climate

Climate change will amplify existing risks and create new risks for *natural and human systems*. Risks are unevenly distributed and are generally greater for *disadvantaged people and communities* in countries at all levels of development.⁵³

Climate change threatens water availability, food security and infrastructure, as well as, the deterioration of people's health and the increased displacement among the poor.⁵⁴ John H. Knox recently described the dreadful effects from climate change already evidenced around the globe:

In what has become a tragic annual event, a deadly typhoon struck the Philippines. Record floods inundated Chennai in India, as well as towns across the United Kingdom of Great Britain and Northern Ireland and along the Mississippi River in the United States of America, parts of Argentina, Brazil, Paraguay and Uruguay experienced their worst flooding in 50 years, forcing the evacuation of tens of thousands of people. Other areas suffered from too little water. UNICEF warned that 11 million children in eastern and southern Africa were at risk of hunger, disease and lack of water because of drought conditions. Lake Poopó, the second-largest lake in the Plurinational State of Bolivia, was reported to have dried up as a result of changing weather patterns. As 2016 began, scientists reported that 2015 was the hottest year in modern history, about 1° C warmer than the pre-industrial average.⁵⁵

I must confess that as I draft this section of the paper, I cannot help but recall the natural disasters recently experienced in the Caribbean Region. On September 20, 2017, Puerto Rico and the U.S. Virgin Islands were ravaged by Hurricane Maria, a Category 5 hurricane that hit the islands with sustained winds between 150 and 170 miles per

53. *Id.* at 8, 13 (emphasis added).

54. *See id.* at 15-16.

55. Rep. of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, Human Rights Council, U.N. Doc. A/HRC/31/52, at 9, ¶ 32 (2016) [hereinafter Special Rapporteur's Report 2016] (emphasis added).

hour.⁵⁶ Not since 1928 had a storm landed on these U.S. territories with such ferocity.⁵⁷ The loss of life, property, and infrastructure caused by Hurricane Maria is historic and cataclysmic. After a brief visit to Puerto Rico, Speaker of the U.S. House of Representatives, Paul Ryan, described the devastation caused by this storm as a “game changer.”⁵⁸ Yet, unfortunately, this was not an isolated event.

Two weeks prior to Hurricane Maria, Hurricane Irma carved its own deadly path of destruction through the Caribbean Region.⁵⁹ Hurricane Irma became the most powerful hurricane ever recorded to date in the area (Category 5 with maximum sustained winds registered at 185 miles per hour).⁶⁰ This devastating and life-transforming hurricane left behind intense human suffering and desolation as it forced its way through Antigua and Barbuda; St. Martin and St. Marteen; St. Kitts and Nevis; Anguilla, Peter Island and Tortola; St. Croix, St. John and St. Thomas; Puerto Rico and Cuba; Turks and Caicos; and the Florida Keys and Florida, U.S.A.⁶¹ Hurricane Irma was itself preceded two weeks prior by Hurricane Harvey, which caused massive flooding and destruction in Texas, U.S.A.⁶²

In between Hurricane María and Hurricane Irma, the previously Irma-stricken Leeward Islands were impacted again by Hurricane

56. Benjamin Haas & Nicolas Figueroa, *Puerto Rico Forecast to Take ‘Potentially Catastrophic’ Direct Hit from Hurricane Maria*, THE GUARDIAN, (Sept. 20, 2017, 2:47 AM), <https://www.theguardian.com/world/2017/sep/20/puerto-rico-potentially-catastrophic-direct-hit-hurricane-maria>.

57. Id.

58. Joanisabel González & Cynthia López Cabán, *Ryan Se Compromete con la Isla – Anticipa la Necesidad de Hacer Análisis, Discusión e Inversión entre el Gobierno Local y el Federal para Lograr la Recuperación de Puerto Rico a Largo Plazo*, EL NUEVO DÍA (Oct. 14, 2017), <http://www.elnuevodia.com/noticias/politica/nota/paulryansecomprometeconlaisla-2365991/>.

59. Haas, *supra* note 56.

60. *Detailed Meteorological Summary on Hurricane Irma*, NAT’L WEATHER SERV. https://www.weather.gov/tae/Irma_technical_summary (last visited Sept. 15, 2018).

61. Stephanie Rosenbloom, *After Maria and Irma: Caribbean Tourism, Island by Island*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/travel/maria-irma-caribbean-tourism-island-by-island.html>.

62. Elaina Plott, *Hurricane Harvey is Houston’s Unending Nightmare*, THE ATLANTIC (Aug. 26, 2018), <https://www.theatlantic.com/politics/archive/2018/08/hurricane-harvey-is-houstons-unending-nightmare/568579/>.

José, which became the longest-lived Atlantic hurricane since 2012,⁶³ and the Mexican coast was struck by Hurricane Katia, also leaving substantial loss of lives and property.⁶⁴ Shortly after Hurricane Maria left the Caribbean waters, Hurricane Nate caused widespread destruction and death through Central America, Cuba, Cayman Islands, Mississippi and other southern states of the U.S.A.⁶⁵ Together, these tropical storms left millions of people throughout the Caribbean Region in an anarchic state of deprivation, with widespread looting and piracy.⁶⁶ No water, no food, no electricity, no communications, and no hope for millions of people.⁶⁷ Hundreds of lives lost; millions of souls battered and irreversibly impoverished for generations.⁶⁸ Extensive migration in the region is making any meaningful recovery extremely difficult, at best.⁶⁹

Dramatic changes in the climatological patterns, brought upon by global warming, have been experienced during the past decades by the approximately forty million people who reside in the Caribbean Region.⁷⁰ Tropical storm systems, such as hurricanes, have increased

63. Maggie Astor, *Harvey, Irma, Jose, Maria: No, the 2017 Hurricane Season is Not Normal*, THE TAMPA BAY TIMES (Sept. 20, 2017), <https://www.tbo.com/news/harvey-irma-jose-maria-no-the-2017-hurricane-season-is-not-normal/2338196>.

64. Kate Linthicum, *Hurricane Katia Strikes Mexico, Killing At Least Two, As the Nation Still Reels from a Massive Earthquake*, L.A. TIMES (Sept. 9, 2017), <http://www.latimes.com/world/mexico-americas/la-fg-mexico-earthquake-201709-09-story.html>.

65. AJ Willingham, *A Look At Four Storms from One Brutal Hurricane Season*, CNN (Nov. 21, 2017), <https://www.cnn.com/2017/10/10/weather/hurricane-nate-maria-irma-harvey-impact-look-back-trnd/index.html>.

66. Alvin Baez, *Caribbean Residents Fend Off Looters After Irma; Branson Urges 'Marshall Plan'*, REUTERS (Sept. 11, 2017) <https://www.reuters.com/article/us-storm-irma-caribbean-branson/caribbean-residents-fend-off-looters-after-irma-branson-urges-marshall-plan-idUSKCN1BM2AJ?il=0>.

67. Willingham, *supra* note 65 (detailing the impacts of each storm including lives lost and property damage).

68. *Id.*

69. Arelis R. Hernández, *Exodus from Puerto Rico Grows as Island Struggles to Rebound from Hurricane Maria*, THE WASHINGTON POST (Mar. 6, 2018), https://www.washingtonpost.com/national/exodus-from-puerto-rico-grows-as-island-struggles-to-rebound-from-hurricane-maria/2018/03/06/b2fcb996-16c3-11e8-92c9-376b4fe57ff7_story.html?utm_term=.7670728442ac (estimating 200,000 migrants from Puerto Rico to mainland U.S. by the end of 2018).

70. D.J. Wuebbels et al., *Highlights of the Findings of the U.S. Global Change Research Program Climate Science Special Report*, U.S. GLOB. CHANGE RESEARCH

in occurrence and intensity; rain patterns have altered dramatically resulting in unseasonal floods and droughts. In the Caribbean, we not only understand climate change, we live it!

Simply explained, climate change is caused by the increase in carbon dioxide (CO₂) and other greenhouse gas emissions around the world.⁷¹ In turn, the increase in CO₂ and other greenhouse gas emissions is the direct result of governments around the world promoting and implementing policies that increase or allow the increase of these emissions, therefore, exposing vulnerable communities, even their own, to the risks associated with climate change.⁷² To make matters worse, climate change is only one in an extensive list of environmental degradation and human rights violations that states' actions are responsible for.⁷³

Although international environmental law developed an impressive corpus intended to ameliorate global environmental degradation during the last five decades, one obvious gap not included in this body of law involves the protection of human life and dignity from threats related to said environmental degradation, specifically when a government's actions or inactions directly cause such threats. This is the fundamental reason why a human right to environment is needed and why during the last fifty years the international community has moved towards the recognition and implementation of the human right to environment. More importantly, it is time to accept that "[w]ere the Universal Declaration to be drafted today, it is easy to imagine that it would include a right recognized in so many national constitutions and regional agreements."⁷⁴

PROGRAM (2017), <https://science2017.globalchange.gov/chapter/executive-summary/> ("The magnitude of climate change beyond the next few decades will depend primarily on the amount of greenhouse gasses (especially carbon dioxide) emitted globally.").

71. *Id.*

72. *Id.* (stating country announcements regarding emissions of greenhouse gasses are currently above levels necessary to combat climate change).

73. *Id.*

74. Report of the Independent Expert, Preliminary Report, *supra* note 47, at 6, ¶ 14.

IV. DEVELOPMENT OF THE HUMAN RIGHT TO ENVIRONMENT: FIFTY YEARS OF RECOGNITION

Reflecting on the approximately twenty years that have passed since I started researching the subject of the human right to environment, provides a clear example of the effect that time has had over the study of international law. The access to primary and secondary legal sources provided by current research tools is now much easier, faster, and thorough than twenty years ago. The proceedings and documents of international and regional organizations are readily available on any laptop. International, regional, and national case law are literally fingertips away. Book chapters and law review articles are quickly retrieved through the internet. More importantly, I have witnessed how the volume and quality of the scholarship on the right to environment has grown exponentially during the last twenty years. For example, recent work published by Burns H. Weston and David Bollier (2013)⁷⁵ and Alan Boyle (2011)⁷⁶ represent important contributions in the study of the human right to environment and inspire new voices researching and writing on the subject.

The human right to environment is best understood as a compendium or bundle of rights developed to protect human life and dignity, as well as, the environment.⁷⁷ This compendium or bundle of rights can be subdivided into three distinct categories:

- 1) a substantive and autonomous right to environment, which I define as a human right to live in an environment of such a baseline quality as to allow for the realization of a life of dignity and well-being (also includes elements of the right of environment that flow from the environment's own intrinsic value and independent from human use of the environment, of sustainable

75. See generally WESTON & BOLLIER, *supra* note 6.

76. Alan Boyle, *Human Rights and the Environment: A Reassessment*, U.N.E.P., First Preparatory Meeting of the World Congress on Justice, Governance and Law for Environmental Sustainability (October 12-13, 2011), https://www.google.com.pr/url?sa=t&rc=t=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwjoeZ-UpfrVAhWB3SYKHUnMBKkQFggnMAA&url=http%3A%2F%2Fweb-local.rudn.ru%2Fweb-local%2Fprep%2Ffrj%2Ffiles.php%3Ff%3Dprep_5e2a8d6bb6e83fb989b6e15d5d5113d4&usg=AFQjCNHMkkKxzY6vWlat-Eos2ssD_O9n9A (updated and expanded version of a paper published in, 18 *FORDHAM ENVTL. L. REV.* 471 (2008)).

77. Rodriguez-Rivera, *supra* note 7, at 9.

development and of intergenerational equity);⁷⁸

2) a substantive and derivative right to environment generated by the reformulation or expansion of existing civil and political rights (such, as the right to life and respect for private and family life),⁷⁹ and economic, social and cultural human rights (such as, rights to a standard of living adequate for health and well-being, to the highest attainable standard of mental and physical health, to safe and healthy working conditions, among others)⁸⁰ -- or as Professor Boyle suggests the "greening of human rights",⁸¹ and,

3) procedural human rights (also called *environmental rights*) derived from the reformulation or expansion of existing civil and political human rights, which are indispensable for the effective implementation of the substantive right to environment in both its autonomous and derivative forms ("[e]nvironmental rights include: access to environmental information, participation in the decision-making process of environmental policies, availability of legal remedies to redress environmental harm, and due process rights in general").⁸²

78. For an in-depth discussion on the contents of the autonomous right to environment, including its right of environment component, see Rodríguez-Rivera, *supra* note 7, at 9-15.

79. See WESTON & BOLLIER, *supra* note 6, at 285.

80. See generally R.R. Churchill, *Environmental Rights in Existing Human Rights Treaties*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 89 (Alan E. Boyle & Michael R. Anderson eds., 1996). I previously identified the following economic, social and cultural rights as having potential to be reformulated or expanded to incorporate environmental protection:

[T]he right to safe and healthy working conditions; the right to an adequate standard of living and the continued improvement of living conditions; the right to food; the right to the highest attainable standard of physical and mental health; the right to improvement of all aspects of environmental and industrial hygiene; the right to education; the right to enjoy benefits of scientific progress; and the right to participate in cultural life.

Rodríguez-Rivera, *supra* note 7, at 19; see also International Covenant on Economic, Social and Cultural Rights, *supra* note 33, at 7.

81. Boyle, *supra* note 76, at 1.

82. Rodríguez-Rivera, *supra* note 7, at 15. Professor Philippe Sands summarized the civil and political rights contained within the concept of environmental rights as follows:

[T]he right to life; prohibition against cruel, inhuman or degrading

The human right to environment, in the above three formulations, “is today officially recognized juridically” under modern international law.⁸³ As I explained in the previous section, the international community has produced an overwhelming number of international environmental instruments and actions that evince the recognition and implementation of the human right to environment. States have expressed their consent to an environmental human right in a myriad of ways. International and regional treaties, as well as state constitutions, laws, and court opinions, have explicitly and implicitly adopted and implemented the human right to environment in all three of its formulations (autonomous, derivative, and procedural). International, regional, and national declarations, expressions, and statements in general have been issued by states, international, and regional organizations, non-governmental organizations, academic and research institutions, experts of all related disciplines, grass-roots and community movements, and by environmental activists confirming the international recognition of the human right to environment. The United Nations’ General Assembly, as well as many of the United Nations’ organs, programs, funds, and specialized agencies, have aggressively promoted and recognized the human right to environment in all or some of its manifestations; as have also, regional organizations around the world, including those in Africa, the Americas, Asia, the Middle East, the South-Pacific, and Europe.

treatment; the right to equal protection against discrimination; the right to an effective remedy by competent national tribunals for acts violating fundamental rights; the right to receive information; the right to a fair and public hearing by an independent and impartial tribunal in the determination of rights and obligations; the right to protection against arbitrary interference with privacy and home; prohibition against arbitrary deprivation of property; and the right to take part in the conduct of public affairs.

PHILLIPE SANDS, 1 PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 229 (1995). Inter-American Human Rights’ Commissioner Dinah Shelton would also include freedom of association in the context of environmental rights. See Dinah Shelton, *supra* note 8, at n.2. See generally International Covenant on Civil and Political Rights, *supra* note 34, art. 1 (declaring that every person should have the right to political freedom).

83. WESTON & BOLLIER, *supra* note 6, at 285.

I will proceed to list some examples of the sources of law that promote or recognize the human right to environment under each of the above categories. I include both explicit and implicit sources as well as “hard law” and “soft law” sources, as I understand they all are acceptable and persuasive sources of modern international law. Moreover, pursuant to a more progressive approach to international law, I highlight the value behind the diversity of cultural, philosophical, legal, and political ideologies associated with the following sources of law as well as the importance of including the voices of institutions that are accessible to underrepresented individuals and communities. Substance should always be more important than form.

A. AUTONOMOUS RIGHT TO ENVIRONMENT

1. *International Level*

- In 1968, the United Nations’ General Assembly recognized the link between the degradation of the human environment and the enjoyment of basic human rights.⁸⁴
- In 1969, the United Nations’ General Assembly called for the implementation of international and national legal and administrative measures for the protection and improvement of the environment.⁸⁵
- In 1972, the Stockholm Declaration recognized in its first principle: “Man has the fundamental right to freedom, equality and adequate conditions of life, *in an environment of a quality that permits a life of dignity and well-being*, and he bears the solemn responsibility to protect and improve the environment for present and future generations.”⁸⁶
 - The works of the Preparatory Committee of the 1972 U.N. Conference on the Human Environment reveal

84. G.A. Res. 2398, *supra* note 51, at 2 (noting how scientific advancement impacts the relationship between man and his environment, while expressing concern about the accelerating degradation of the environment and its impact on basic human rights).

85. G.A. Res. 2542, U.N. GAOR, 24th Sess., Supp. No. 30, at 49, U.N. Doc. A/7630 (1969).

86. Stockholm Declaration, *supra* note 4, art. 1 (emphasis added).

that the draft Stockholm Declaration “was based on the recognition of the rights of individuals to an adequate environment.”⁸⁷

- After participating in the 1972 U.N. Conference on Human Environment held in Stockholm, Professor Louis Sohn commented about the above-quoted Principle 1 of the Stockholm Declaration: “[p]erhaps this phrase is meant to convey the existence of the right to an adequate environment.”⁸⁸
- In 1974, the United Nations’ General Assembly approved the Charter for the Economic Rights and Duties of States which raised the protection, preservation, and enhancement of the environment for the present and future generation as an international duty of states.⁸⁹
- In 1979, the United Nations’ General Assembly called for multi-sectoral international environmental cooperation.⁹⁰
- In 1979, the Convention on the Elimination of All Forms of Discrimination against Women implicitly recognized the autonomous right to environment.⁹¹
- In 1980, the United Nations’ General Assembly issued a resolution titled Historical responsibility of States for the preservation of nature for present and future generations, which concluded that preservation of nature “is a prerequisite for the normal life of man.”⁹²
- In 1982, the United Nations’ General Assembly adopted the World Charter for Nature, which proclaimed among its conservation principles the protection of nature, ecosystems,

87. Works of the Preparatory Committee, *supra* note 3.

88. Sohn, *supra* note 5, at 455.

89. G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, at 50, U.N. Doc. A/9631 (Dec. 12, 1974).

90. G.A. Res. 34/188, U.N. GAOR, 34th Sess., Supp. No. 46, at 129, U.N. Doc. A/34/46 (Dec. 18 1979).

91. Convention on the Elimination of All Forms of Discrimination against Women, *supra* note 42, art. 14(2)(h).

92. G.A. Res. 35/8, U.N. GAOR, 35th Sess., Supp. No. 48, U.N. Doc. A/35/48, at 15 (Oct. 30, 1980).

species, and organisms.⁹³

- In 1982, the United Nations' General Assembly promoted an international effort to list banned products harmful to health and the environment.⁹⁴
- In 1986, the Legal Principles on Environmental Protection and Sustainable Development, adopted by the Experts Group on Environmental Law of World Conference on Environment and Development and later made part of the Brundtland Commission Report, declared: "[a]ll human beings have the fundamental right to an environment adequate for their health and well-being."⁹⁵
- In 1987, the United Nations' General Assembly endorsed The Environmental Perspective to the Year 2000.⁹⁶
- In 1987, the World Commission on Environment and Development issued a report (commonly referred to as the "Brundtland Commission Report") that gave birth to the concept of sustainable development and adopted the above-discussed 1986 Legal Principles containing express reference to the human right to environment.⁹⁷
- In 1989, the Convention on the Rights of the Child implicitly recognized the autonomous right to environment.⁹⁸
- In 1989, the United Nations' General Assembly called for the implantation of warning systems and assistance mechanisms for environmental emergencies.⁹⁹

93. G.A. Res. 37/7, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51, at 17 (Oct. 28, 1982).

94. G.A. Res. 37/137, U.N. GAOR, 37th Sess., Supp. No. 51, U.N. Doc. A/37/51, at 112 (Dec. 17, 1982).

95. Our Common Future, *supra* note 51, at 339.

96. G.A. Res. 42/186, U.N. GAOR, 42nd Sess., Supp. No. 49, U.N. Doc A/42/49, at 141 (Dec. 11, 1987) (welcoming the desire of the Governing Council of the U.N. Environment Program to develop the Environmental Perspective and transmit it to the General Assembly for adoption).

97. Our Common Future, *supra* note 51, at 339.

98. Convention on the Rights of the Child art. 27, Nov. 20, 1989, 1577 U.N.T.S. 3 ("[T]he right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.")

99. G.A. Res. 44/236, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc A/44/49, at 161 (Dec. 22, 1989).

- In 1989, the twenty-four heads of state governments or their representatives adopted the Declaration of the Hague declaring that environmental degradation, including, among others, ozone depletion and climate change, “involve not only the fundamental duty of the community of nations vis-à-vis present and future generations to do all that can be done to preserve the quality of the atmosphere.”¹⁰⁰
- In 1990, the United Nations’ General Assembly recognized: “all individuals are entitled to live in an environment adequate for their health and well-being.”¹⁰¹
- In 1990, the United Nations’ Commission on Human Rights reiterated the link between the preservation of the environment and the promotion of human rights and applauded the Sub-Commission on Prevention of Discrimination and Protection of Minorities’ decision to study the problems of the environment and their relation to the realization of human rights.¹⁰²
- In 1992, in Principle 1 of the Rio Declaration the United Nations’ Conference on Environment and Development recognized: “[h]uman beings are at the centre [sic] of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”¹⁰³ “In the aftermath of the Rio Summit, virtually every major international convention

100. U.N. ESCOR, Declaration of The Hague Adopted at The Hague on 11 March 1989, at 2, U.N. Doc A/44/340 (1989) (including the twenty-four signatories of Australia, Brazil, Canada, Côte d’Ivoire, Egypt, France, West Germany, Hungary, India, Indonesia, Italy, Japan, Jordan, Kenya, Malta, Norway, New Zealand, Netherlands, Senegal, Spain, Sweden, Tunisia, Venezuela, and Zimbabwe).

101. G.A. Res. 45/94, U.N. GAOR, 45th Sess., Supp. No. 49A, at 178, U.N. Doc. A/45/49 (Dec. 14, 1990).

102. U.N. ESCOR Comm’n on Human Rights, Rep. on the Forty-Sixth Session, at 102, U.N. Doc E/CN.4/1990/94 (1990).

103. Rio Declaration, *supra* note 51; John Lee, *The Underlying Legal Theory to Support a Well-Defined Human Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 283, 308 (2000) (language of Principle 1 of the Rio Declaration was copied verbatim and approved without reservations by “179 nations at the 1994 U.N. Conference on Population and Development; by 186 nations at the 1995 World Summit for Social Development; by 175 nations at the 1996 Second Conference on Human Settlements (Habitat II); and by seventeen nations at the OAS-sponsored 1997 Hemispheric Summit on Sustainable Development.”).

concerning multilateral cooperation added environmental protection as one of the goals of the state parties. Areas of international action that developed during earlier periods, including human rights, began evolving in new directions to take into account environmental considerations. The result was an infusion of environmental norms into most branches of international law, including free trade agreements that mention environmental cooperation as an aim.”¹⁰⁴

- In 1994, the United Nations’ Commission on Human Rights’ Sub-Commission on Prevention and Protection of Minorities’ Final Report concluded that there presently exists “universal acceptance of the environmental rights recognized at the national, regional, and international levels.”¹⁰⁵ The Ksentini Final Report also indicated: “*it is impossible to separate the claim to the right to a healthy and balanced environment from the claim to the right to ‘sustainable’ development.*”¹⁰⁶
- In 1994, the International Group of Experts prepared Draft Principles on Human Rights and the Environment expressing: “[a]ll persons have a right to a secure, healthy and ecologically sound environment.”¹⁰⁷ This Draft Declaration was incorporated into the Ksentini Final Report and recommended for subsequent adoption by the United Nations.
- In 1996, the International Court of Justice issued an advisory opinion requested by the United Nations’ General Assembly on

104. U.N. Conference on Sustainable Development, Human Rights and the Environment - Rio+20: Joint Report OHCHR and UNEP, at 12, http://wedocs.unep.org/bitstream/handle/20.500.11822/9970/JointReport_OHCHR_HRE.pdf?sequence=1&isAllowed=y [hereinafter Human Rights and the Environment].

105. U.N. ESCOR Comm’n on Human Rights, Final Rep. Prepared by Mrs. Fatma Zohra Ksentini, Special Rapporteur, at 58, U.N. Doc. E/CN.4/Sub.2/2994/9 (July 6, 1994) [hereinafter Ksentini Final Report]; see Adriana Fabra Aguilar & Neil A.F. Popovic, *Lawmaking in the United Nations: The UN Study on Human Rights and the Environment*, 3 REV. EUR. COM. & INT’L L. 197 (1994) (providing an in-depth analysis of the Ksentini Final Report).

106. Ksentini Final Report, *supra* note 105, at 15-16 (emphasis added).

107. Ksentini Final Report, *supra* note 105, at 75; see Neil A.F. Popovic, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487 (1996) (providing an in-depth analysis of the Draft Declaration).

the Legality of the Threat or Use of Nuclear Weapons. In this opinion, the Court recognized:

[T]he environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. 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 relating to the environment.¹⁰⁸

- In 1997, the International Court of Justice delivered several opinions in the Gabčíkovo-Nagymaros Project (Hungary/Slovakia) Case. The majority opinion recalled the above quoted language from its advisory opinion in Legality of the Threat or Use of Nuclear Weapons, and explained that with this language it had “occasion to stress . . . the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind.”¹⁰⁹ The majority opinion also acknowledged that Hungary’s natural environment concerns raised to the level of “essential interest of that State.”¹¹⁰ Although the majority opinion understood it could resolve the questions posed by the parties without the need of expounding on environmental human rights, the Court’s vice-president, the late Judge C.G. Weeramantry, drafted a separate opinion focusing precisely on the environmental issues raised in this case. Weeramantry’s separate opinion remains an important contribution to the recognition of the human right to environment:

When a major scheme, such as that under consideration in the present case, is planned and implemented, there is always the need to weigh considerations of development against environmental considerations, as their underlying juristic bases - the right to development and the right to environmental protection - are important principles of current

108. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. Rep. 226, 241-42, ¶ 29 (July 8).

109. The Gabčíkovo-Nagymaros Project (Hung. v. Slov.), Judgment, 1997 I.C.J. Rep. 7, 41, ¶ 53 (Sept. 25).

110. *Id.*

international law.¹¹¹

....

The people of both Hungary and Slovakia are entitled to development for the furtherance of their happiness and welfare. They are likewise entitled to the preservation of their human right to the protection of their environment.¹¹²

....

The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.

While, therefore, all peoples have the right to initiate development projects and enjoy their benefits, there is likewise a duty to ensure that those projects do not significantly damage the environment.¹¹³

....

The principle of sustainable development is thus a part of modern international law by reason not only of its inescapable logical necessity, but also by reason of its wide and general acceptance by the global community. The concept has a significant role to play in the resolution of environmentally related disputes. The components of the principle come from well-established areas of international law - human rights, State responsibility, environmental law, economic and industrial law, equity, territorial sovereignty, abuse of rights, good neighborliness - to mention a few. It has also been expressly incorporated into a number of binding and far-reaching international agreements, thus giving it binding force in the context of those agreements. It offers an important principle for the resolution of tensions between two established rights. It reaffirms in the arena of international law that there must be both development and environmental protection, and that neither of these rights can be

111. *Id.* at 89 (separate opinion by Weeramantry, J.).

112. *Id.* at 90.

113. *Id.* at 91-92.

neglected.¹¹⁴

In sum, Judge Weeramantry's separate opinion, while determining the existence of sustainable development in modern international law, clearly recognizes that the right to development and the right to environment are also part of modern international law.

- In 1997, the Institute of International Law asserted: “[e]very human being has the right to live in a healthy environment.”¹¹⁵
- In 1999, the United Nations’ Educational, Scientific, and Cultural Organization (UNESCO) and the United Nations’ High Commissioner for Human Rights organized the International Seminar of Experts on the Right to the Environment which issued the Bizkaia Declaration on the Right to the Environment. Article 1 of the Bizkaia Declaration stated: “[e]veryone has the right, individually or in association with others, to enjoy a healthy and ecologically balanced environment . . . [which] may be exercised before public bodies and private entities, whatever their legal status under national and international law.”¹¹⁶
- In 2002, the Seminar of Experts on the Right to Environment, organized by the United Nations’ Office of the High Commissioner for Human Rights and the United Nations’ Environment Programme at the urging of the United Nations’ Commission on Human Rights, acknowledged:

[A] growing body of case law from many national jurisdictions is clarifying the linkages between human rights and the environment, in particular by: (a) recognizing the right to a healthy environment as a fundamental human right; (b) allowing litigation based on this right, and facilitating its enforceability in domestic law by liberalizing provisions on standing; (c) acknowledging that other human rights recognized in domestic legal systems can be violated as a result of

114. *Id.* at 95.

115. Inst. of Int’l L., *Resolution on the Environment*, art. 2 (1997), http://www.idi-iil.org/app/uploads/2017/06/1997_str_02_en.pdf.

116. U.N. Educ., Sci., and Cultural Org. (UNESCO), *Declaration of Bizkaia on the Right to the Environment*, at 4, U.N. Doc. 30 C/INF.11 (Sept. 24, 1999).

environmental degradation.¹¹⁷

The Seminar of Experts also recommended that additional support be provided to “[t]he growing recognition of a right to a secure, healthy and ecologically sound environment, either as a constitutionally guaranteed entitlement/right or as a guiding principle of national and international law.”¹¹⁸

- In 2002, the United Nations’ Commission on Human Rights’ Sub-Commission on Prevention and Protection of Minorities’ Preliminary Report, prepared by Special Rapporteur El Hadji Guissé, asserted that the right to a drinking water supply and sanitation is already an existing human right, and necessarily impacts the right to a healthy environment, also recognized under international law.¹¹⁹
- In 2002, the United Nations’ World Summit on Sustainable Development held in Johannesburg, South Africa adopted the Johannesburg Declaration on Sustainable Development, which reiterated the commitment to sustainable development made in the 1992 Rio Declaration.¹²⁰
- In 2002, the Global Judges Symposium adopted the Johannesburg Principles on the Role of Law and Sustainable Development that provided:

We recognise that the people most affected by environmental degradation are the poor, and that, therefore, there is an urgent need to strengthen the capacity of the poor and their representatives to defend environmental rights, so as to ensure that the weaker sections of society are not prejudiced by environmental degradation and are enabled to enjoy *their right to live in a social and physical environment that*

117. U.N. ESCOR, Comm’n on Human Rights, Rep. of the Joint OHCHR-UNEP Seminar on Human Rights and the Environment, at 14, U.N. Doc. E/CN.4/2002/WP.7 (Jan. 16, 2002).

118. *Id.* at 16.

119. U.N. ESCOR, Comm’n on Human Rights, Preliminary Rep. Submitted by Mr. El Hadji Guisse in Pursuance of Decision 2002/105 of the Comm’n on Human Rights and Res. 2001/2 of the Sub Comm’n on the Promotion and Protection of Human Rights, at 12-13, U.N. Doc E/CN.4/Sub.2/2002/10 (June 25, 2002).

120. World Summit on Sustainable Development, Report of the World Summit on Sustainable Development, at 1, U.N. Doc. A/Conf.199/20 (Sept. 4, 2002) [hereinafter Johannesburg Declaration].

*respects and promotes dignity.*¹²¹

- In 2007, the United Nations' General Assembly adopted the Declaration on the Rights of Indigenous Peoples, which proclaimed: "[i]ndigenous people have the right to the conservation and protection of the environment."¹²²
- In 2007, the Alliance of Small Island States (AOSIS) approved the Male' Declaration on the Human Dimension of Global Climate Change, which recognized "the fundamental right to an environment capable of supporting human society and the full enjoyment of human rights."¹²³
- In 2008, the United Nations' Human Rights Council adopted a resolution on Human Rights and Climate Change, which acknowledged that the "international community has a role in addressing the serious threat that climate change currently poses in undermining existing human rights or likely to undermine in the future."¹²⁴ More importantly, this resolution urged states to act appropriately by pledging to target "the poorest and most vulnerable in their own countries, ensuring transparency and accountability of the finance, ensuring wide participation and integration of civil society and affected groups into development strategies."¹²⁵ This is very much akin to implementing the existing right to environment (or the

121. International Relations & Cooperation, *Johannesburg Principles on the Role of Law and Sustainable Development Adopted at the Global Judges Symposium Held in Johannesburg, South Africa, on 18-20 August 2002*, REPUBLIC S. AFR., https://www.soas.ac.uk/cedep-demos/000_P514_IEL_K3736-Demo/treaties/media/2002%20WSSD%20Joburg%20Principles%20on%20the%20Role%20of%20Law%20and%20Sustainable%20Development.pdf (last visited July 1, 2018) [hereinafter *Johannesburg Principles*] (emphasis added).

122. G.A. Res. 61/295, U.N. Declaration of the Rights of Indigenous Peoples, U.N. GAOR, 61st Sess., Supp. No. 49, at 16, U.N. Doc. No. A/61/49 (Vol.III) (Sept. 13, 2007).

123. All. of Small Island States, *Male' Declaration on the Human Dimension of Global Climate Change*, at 1, (Nov. 14, 2007), http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf.

124. Human Rights Council Res. 7/23, *Human Rights and Climate Change*, at 3 (2008), <http://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/UK.pdf>.

125. *Id.*

sustainable development component of an expansive substantive right to environment).

- In 2010, the United Nations' Human Rights Council published a Report, prepared by Special Rapporteur Okechukwu Ibeanu, that commented on an Indian Supreme Court opinion and noted "with satisfaction that the Supreme Court has on a number of occasions recognized the right to a safe and healthy environment as being implicit in the fundamental right to life."¹²⁶
- In 2011, the United Nations' Human Rights Council endorsed the Guiding Principles on Business and Human Rights which adopted a three-prong approach for the implementation of States' human rights and environmental obligations: 1) protection against human rights abuses by third parties, including corporations; 2) the taking of appropriate measures to prevent, investigate, punish, and redress against said abuse; and 3) the provision of remedies for human rights abuses caused by third parties, including corporations. This framework for business and human rights also applies to all environmental human rights abuses.¹²⁷
- In 2012, the United Nations' Human Rights Council issued a preliminary report, prepared by then Independent Expert John H. Knox, which concluded: "[s]ome fundamental aspects of that relationship [of human rights and the environment] are now firmly established, but many issues are still not well understood." The preliminary report also "urges States and other stakeholders to remember that the lack of a complete understanding as to the content of all environmentally related

126. Okechukwu Ibeanu (Special Rapporteur on the Adverse Effects of the Movement and Dumping of Toxic and Dangerous Products and Wastes on the Enjoyment of Human Rights), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, at 17, U.N. Doc. A/HRC.15.22.Add.3 (Sept. 2, 2010).

127. See John Ruggie (Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises), *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, and Remedy" Framework*, at 6-7, U.N. Doc. A/HRC.17/31 (Mar. 21, 2011).

human rights obligations should not be taken as meaning that no such obligations exist. Indeed, some aspects of the duties are already clear.”¹²⁸

- In 2013, at the United Nations’ Human Rights Council, a mapping report prepared by Independent Expert John H. Knox explained: “States have obligations to protect against environmental harm that interferes with the enjoyment of human rights.”¹²⁹ This includes: “obligations (a) to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights; and (b) to regulate private actors to protect against such environmental harm.”¹³⁰
- In 2015, the United Nations’ Human Rights Council reiterated in a report compiling good practices prepared by then Independent Expert John H. Knox that “States have substantive obligations to adopt and implement legal frameworks to protect against environmental harm that may interfere with the enjoyment of human rights.”¹³¹
- In 2016, the United Nations’ Human Rights Council distributed a report prepared by its Special Rapporteur John H. Knox on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment. In the context of providing a framework for the implementation of the right of environment, the report explained:

In applying their duty to protect against environmental harm that interferes with the enjoyment of human rights, States have discretion to strike a balance between environmental protection and other societal

128. Report of the Independent Expert, Preliminary Report, *supra* note 47, at 18.

129. Hum. Rts. Council, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, Mapping Report, ¶ 44, U.N. Doc. A/HRC/25/53 (Dec. 30, 2013).

130. *Id.* at 13, ¶ 46.

131. Hum. Rts. Council, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, Compilation of Good Practices, 1, ¶ 72 U.N. Doc. A/HRC/28/61 (Feb. 3, 2015) [hereinafter Report of the Independent Expert, Compilation of Good Practice].

goals, such as economic development and the promotion of other human rights. But the balance struck cannot be unreasonable or result in unjustified, foreseeable infringements of human rights.¹³²

- In 2018, the Framework Principles on Human Rights and the Environment as presented by John H. Knox, the Special Rapporteur on Human Right and Environment in his a report to the United Nations Human Rights Council in March 2018, “set out the basic obligations of States under human rights laws as they relate to the enjoyment of a safe, clean, healthy, and sustainable environment.”¹³³
- In 2018, Special Rapporteur John Knox submitted his Final Report to the United Nations General Assembly stating: “There can be no doubt that the right to a healthy environment is a moral right, essential to health, well-being, and dignity of all human beings.”¹³⁴

2. Regional Level

- In 1981, the African Union (formerly Organization of African States) adopted the Charter on Human and Peoples’ Rights (Banjul Charter), which recognizes in Article 24: “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.”¹³⁵
- In 1988, the Organization of American States adopted a protocol to the 1969 American Convention on Human Rights (San Salvador Protocol), which recognized in Article 11: “[e]veryone shall have the right to live in a healthy environment. . . . The States’ Parties shall promote the protection, preservation and improvement of the

132. Special Rapporteur’s Report 2016, *supra* note 55, ¶ 65.

133. John H. Knox (Special Rapporteur on Human Rights and the Environment), Framework Principles on Human Rights and the Environment, U.N. Doc. A/HRC/37/59 (Mar. 2018).

134. John H. Knox (Special Rapporteur on Human Rights and the Environment), Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/73/188, at 18, ¶ 54 (2018).

135. African Charter on Human and Peoples’ Rights art. 24, June 27, 1981, 1520 U.N.T.S. 217.

environment.”¹³⁶

- In 1998, the United Nations’ Economic Commission for Europe sponsored the drafting of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention), which referred in Article 1 to “the right of every person of present and future generations to live in an environment adequate to his or her health and well-being.”¹³⁷
- In 2000, the Council of Europe adopted the Charter of Fundamental Rights for the European Union which provided in Article 37: “[a] high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”¹³⁸ This language subsequently became binding on the European Union in 2009, with the entry into force of the Lisbon Treaty.¹³⁹
- In 2001, the African Commission on Human and Peoples’ Rights issued an important opinion in the Ogoniland Case enforcing the human right to environment as provided for in the 1981 African Charter on Human and Peoples’ Rights. The Commission determined:

The right to a general satisfactory environment, as guaranteed under Article 24 of the African Charter or the right to a healthy environment, as it is widely known, therefore imposes clear obligations upon a government. It requires the state to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.

136. Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 11, Nov. 14, 1988, O.A.S.T.S. No. 69, 28 I.L.M. 156 [hereinafter Protocol of San Salvador].

137. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 1, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

138. Charter of Fundamental Rights of the European Union, 2007 O.J. (C 303) 1.

139. Treaty of Lisbon, Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1.

Government compliance with the spirit of Article 16 and Article 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising [sic] environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.¹⁴⁰

- In 2003, the Council of Europe's Parliamentary Assembly called on the Council's member states to "recognize a human right to a healthy, viable and decent environment which includes the objective obligation for states to protect the environment, in national laws, preferably at constitutional level."¹⁴¹ The Council further recommended that the Committee of Ministers to prepare additional protocols to the European Convention on Human Rights guaranteeing environmental rights.¹⁴²
- In 2003, the African Union adopted the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, which stated in Articles 18 and 19 that women "shall have the right to live in a healthy and sustainable environment . . . [and] shall have the right to fully enjoy their right to sustainable development."¹⁴³
- In 2004, the League of Arab States adopted a new Arab Charter on Human Rights which declared in Article 38: "[e]very person has the right to an adequate standard of living for himself and his family, which ensures their well-being and a decent life, including food, clothing, housing, services and the right to a

140. Social and Economic Rights Action Center (SERAC) v. Nigeria, Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 52-53 (Oct. 27, 2001) [hereinafter Ogoni Decision].

141. Eur. Parl. Ass., *Environment and Human Rights*, Recommendation 1614 (2003).

142. *Id.*

143. African Comm'n on Human and Peoples' Rights, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa arts. 18-19 (2003).

healthy environment.”¹⁴⁴

- In 2004, the European Court of Human Rights issued its opinion in *Taskin v. Turkey* which primarily legitimized the right to respect for family, life, and privacy as a derivative form of protecting the environment; however, by relying on Turkish cases affirming the constitutionally protected right to a healthy and balanced environment and international documents recognizing the right to environment, the court in *Taskin* effectively accepted the existence of the same.¹⁴⁵
- In 2005, the European Court of Justice emphasized: “it is common ground that protection of the environment constitutes one of the essential objectives of the Community.”¹⁴⁶
- In 2007, the Asia Pacific Forum of National Human Rights Institutions issued a Final Report and Recommendation prepared by its Advisory Council of Jurists which advocated for the “adoption and implementation of a specific right to an environment conducive to the realization [sic] of fundamental human rights.”¹⁴⁷
- In 2012, the Association of Southeast Asian Nations adopted the Human Rights Declaration which incorporated in paragraph 28(f) a “right to a safe, clean and sustainable environment” as an element of the right to an adequate standard of living.”¹⁴⁸

144. League of Arab States, Arab Charter on Human Rights art. 24 (May 22, 2004).

145. See *Taskin v. Turkey*, 2004-X Eur. Ct. H.R. 22-23 (2005) (following Turkish Supreme Court opinions and international law instruments, the European Court of Human Rights concluded that the government violated applicants’ human rights by failing to enforce existing local environmental laws); see also *Okyay v. Turkey*, 2005-VII Eur. Ct. H.R.

146. Case C-176/03, *Comm’n v. Council*, 2005 E.R.C. I-7907.

147. ASIA PACIFIC FORUM, HUMAN RIGHTS AND THE ENVIRONMENT FINAL REPORT AND RECOMMENDATIONS, 33 (2007), https://www.ohchr.org/Documents/Issues/ClimateChange/Submissions/Asia_Pacific_Forum_of_NHRIs_1_HR_and_Environment_ACJ_Report_Recommendations.pdf.

148. Ass’n of Southeast Asian Nations [ASEAN], *ASEAN Human Rights Declaration and the Phnom Penh Statement on the Adoption of the ASEAN Human Rights Declaration (AHRD)*, ¶ 28(f) (Nov. 18, 2012).

- Regarding the European Convention of Human Rights, Alan Boyle suggests:

So extensive is [the European Court of Human Rights'] growing environmental jurisprudence that proposals for the adoption of an environmental protocol have not been pursued. Instead, a Manual on Human Rights and the Environment adopted by the Council of Europe in 2005 recapitulates the Court's decisions on this subject and sets out general principles.¹⁴⁹

3. National Level

The dramatic development of environmental rights can best be witnessed at the national or local level. Since the 1970s, when knowledge of and sensibility to environmental issues became manifest, the protection and conservation of the environment has become truly universal at the national level.

- Of the 192 states recognized by the United Nations, 130 national constitutions contain language raising the protection of the environment or natural resources to the constitutional level as either a human entitlement or a state duty, including the overwhelming majority of those written or amended after 1970.¹⁵⁰
- In 1976, Portugal was the first state to adopt a constitutional "right to a healthy and ecologically balanced human environment." More than ninety states have subsequently adopted similar rights in their national constitutions.¹⁵¹
- Of the 117 state constitutions identified by Earthjustice in 2005 as making a reference to the protection of the environment, "[109] of them recognize the right to a clean and healthy environment and/or the state's obligation to prevent

149. Boyle, *supra* note 76, at 13.

150. See Human Rights and the Environment, *supra* note 104, at 19; see also EARTHJUSTICE, ENVIRONMENTAL RIGHTS REPORT 2007 (2007), <http://earthjustice.org/sites/default/files/library/references/2007-environmental-rights-report.pdf>.

151. See Report of the Independent Expert, Preliminary Report, *supra* note 47, at 5; see also Report of the Independent Expert, Compilation of Good Practice, *supra* note 131, at 15.

environmental harm.”¹⁵² “[I]t is clear that the trend is toward greater and more widespread constitutional recognition of the human right to a clean and healthy environment as an autonomous right.”¹⁵³ More importantly, national courts around the globe are recognizing constitutionally-mandated rights to environment in all its variations: autonomous, derivative, and procedural.¹⁵⁴

Most states without a constitutionally-protected right to environment nonetheless have national laws that protect the environment, government agencies charged with implementing and enforcing said laws, and citizen access to courts and legal remedies designed to protect the environment from illegal government or private actions.

- As clearly detailed in a joint report issued in 2012 by the United Nations’ Environment Programme and the United Nations’ Office of High Commissioner for Human Rights:

Environmental protection laws in many, if not most states, provide for citizen lawsuits as a means of enforcing legislative and regulatory standards. Such suits have played a significant role in enforcing clean air and water acts, as well as endangered species laws. As with human rights litigation, citizens sue the government to secure its performance of mandatory duties under the law; in addition, however, suits may be brought against the regulated industries and other polluters in order to halt environmental harm. Courts have upheld citizen suit provisions and enforced substantive limits on permissible activities. In general, government officials are held to a due diligence standard.¹⁵⁵

B. DERIVATIVE RIGHT TO ENVIRONMENT

1. *International Level*

- In 1966, the United Nations’ Covenant of Civil and Political Rights allows the following civil and political rights may be reformulated in order to derive environmental protection: the right to life; the right against cruel, inhuman, or degrading

152. WESTON & BOLLIER, *supra* note 6, at 321.

153. *Id.* at 323.

154. *Id.* at 336.

155. Human Rights and the Environment, *supra* note 104, at 19-20.

treatment; the right to liberty and security of person; the right to privacy; the right to freedom of thought, conscience, and religion; the right to freedom of expression; the right to peaceful assembly; the right of the child; the right against discrimination and to the equal protection of the law; cultural and indigenous rights; the right to political participation; the right to information; and the right to legal redress.¹⁵⁶

- In 1966, the United Nations' Covenant of Economic, Social and Cultural Rights allows the following economic, social, and cultural rights may be reformulated in order to derive environmental protection: the right to safe and healthy working conditions; the right to an adequate standard of living and the continued improvement of living conditions; the right to food; the right to the highest attainable standard of physical and mental health; the right to improvement of all aspects of environmental and industrial hygiene; the right to education; the right to enjoy benefits of scientific progress; and the right to participate in cultural life.¹⁵⁷
- In 1972, the Stockholm Declaration derived environmental rights by re-interpreting and expanding existing and recognized human rights stemming from a narrow reading of the Stockholm Declaration: "The reasoning behind this strategy is that an adequate measure of environmental protection can be obtained by the reformulation of existing human rights, thus taking advantage of existing international and regional monitoring and enforcement mechanisms."¹⁵⁸

2. Regional Level

The European Court of Human Rights has in many instances derived environmental obligations from the European Convention of Human Rights Article 2 (right to life) and Article 8 (right to private and family life). A sample of these cases include:

156. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

157. International Covenant on Economic, Social and Cultural Rights, *supra* note 33.

158. Rodriguez-Rivera, *supra* note 7, at 18.

- In 1994, the court in *López Ostra v. Spain* found “severe environmental pollution affects individuals’ well-being and prevents them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.”¹⁵⁹
- In 1998, the court in *Guerra v. Italy* found a violation of the right to private and family life (Article 8).¹⁶⁰
- In 2004, the court in *Öneryildiz v. Turkey* found a violation of the right to life (Article 2). The Court stated: “[t]he positive obligation to take all appropriate steps to safeguard life for the purposes of Article 2 entails above all a primary duty on the State to put in place a legislative and administrative system framework designed to provide effective deterrence against threats to the right to life.”¹⁶¹
- In 2004, the court in *Moreno Gómez v. Spain* found a violation of the right to private and family life (Article 8).¹⁶²
- In 2004, the court in *Taskin v. Turkey* found a violation of right to a fair hearing (Article 6.1) and the right to private and family life (Article 8).¹⁶³
- In 2005, the court in *Fadeyeva v. Russia* found a violation of the right to private and family life (Article 8).¹⁶⁴
- In 2005, in the case, *Marangopoulos Foundation for Human Rights v. Greece*, the European Committee of Social Rights found a violation of the right to health.¹⁶⁵
- In 2008, the court in *Budayeva v. Russia* found a violation of the right to life (Article 2), in both substance and procedure, as

159. *López Ostra v. Spain*, App. No. 16798/90, Judgment, Eur. Ct. H.R. 15 (1994).

160. *Guerra v. Italy*, 1998-I Eur. Ct. H.R. 16.

161. *Öneryildiz v. Turkey*, 2004-XII Eur. Ct. H.R. 29.

162. *Moreno Gómez v. Spain*, 2004-X Eur. Ct. H.R. 5.

163. *Taskin v. Turkey*, 2004-X Eur. Ct. H.R. 50.

164. *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 296.

165. *Marangopoulos Foundation for Human Rights (MFHR) v. Greece*, Complaint No. 30/2005, Eur. Comm. of Soc. Rts., ¶ 221 (Dec. 6, 2006), [http://hudoc.esc.coe.int/eng/#{%22ESCDcIdentifier%22:\[%22cc-30-2005-dmerits-en%22\]}](http://hudoc.esc.coe.int/eng/#{%22ESCDcIdentifier%22:[%22cc-30-2005-dmerits-en%22]}).

the state government failed to implement land-planning and emergency relief policies despite the area's vulnerability to mudslides and failed to investigate the accident.¹⁶⁶

- In 2009, the court in *Tatar v. Romania* found a violation of the right to private and family life (Article 8).¹⁶⁷

After reviewing the above cases and others issued by the European Court of Human Rights, Burns H. Weston and David Bollier concluded: “[o]n the basis of these cases alone, the right to a clean and healthy environment may be understood to be accepted as law, however implicitly, in the European human rights system.”¹⁶⁸ Even if some traditionalists would challenge this conclusion, I believe it is irrefutable that these cases prove that a derivative right to environment exists in the European Human Rights System as part of a reformulated right to life and right to private and family life.

The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have also issued important opinions that reformulate existing rights contained in the American Declaration of Rights and Duties of Man, the American Convention on Human Rights, and the San Salvador Protocol to include environmental rights as part of existing human rights. A sample of these opinions include:

- In 1985, in *Yanomami v. Brazil*, Commission determined that highway construction on lands occupied by the Yanomami that resulted in the loss of diversity and other environmental degradation violated the “following rights recognized in the American Declaration of the Rights and Duties of Man: the right to life, liberty, and personal security (Article I); the right to residence and movement (Article VIII); and the right to the preservation of health and to well-being (Article XI).”¹⁶⁹
- In 1997, the Report on the Situation of Human Rights in Ecuador explained:

166. *Budayeva v. Russia*, 2008-II Eur. Ct. H.R. 267.

167. *Tatar v. Romania*, App. No. 67021/01, Eur. Ct. H.R. (2009), <http://hudoc.echr.coe.int/eng?i=002-1736>.

168. WESTON & BOLLIER, *supra* note 6, at 294.

169. *Yanomami v. Brazil*, Case No. 7615, Inter-Am. Comm'n H.R., Resolution No. 12/85, ¶ 1 (1985), <http://www.cidh.org/annualrep/84.85eng/brazil7615.htm>.

The American Convention on Human Rights is premised on the principle that rights inhere in the individual simply by virtue of being human. Respect for the inherent dignity of the person is the principle which underlies the fundamental protections of the right to life and to preservation of physical well-being. Conditions of severe environmental pollution, which may cause serious physical illness, impairment and suffering on the part of the local populace, are inconsistent with the right to be respected as a human being.¹⁷⁰

- In 2001, in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the Inter-American Commission on Human Rights noted the Nicaraguan Government had violated Article 4 (right to life), Article 11 (right to privacy), and Article 17 (right to family) of the American Convention on Human Rights.¹⁷¹
- In 2004, in *Maya Indigenous Community of the Toledo District v. Belize*, the Inter-American Commission on Human Rights concluded that logging and oil concessions granted by Belize violated the communities' right to property, right to equality before the law, to equal protection of the law and to nondiscrimination, as well as the right to judicial protection under the Inter-American Declaration of Human Rights.¹⁷²
- In 2005, in *Indigenous Community of Yakye Axa v. Paraguay*, the Inter-American Court of Human Rights found violations to the right to property.¹⁷³
- In 2007, in *Saramaka People v. Suriname*, the Inter-American Court of Human Rights found violations to the right to property.¹⁷⁴

The African Commission on Human and Peoples' Rights, while

170. Inter-Am. Comm'n on Human Rights, *Report on the Situation of Human Rights in Ecuador*, chp. VIII, ¶ 1, OEA/Ser.L/V/II.96 Doc. 10 rev. 1 (Apr. 24, 1997), <http://www.cidh.org/countryrep/ecuador-eng/index%20-%20ecuador.htm>.

171. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

172. *Maya Indigenous Communities v. Belize*, Case 12.053, Inter-Am. Comm'n H.R., Report No. 78/00, OEA/Ser.L/V/II.111, doc. 20, rev. (2000).

173. *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 143, 156 (June 17, 2005).

174. *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 95, 158 (Nov. 28, 2007).

analyzing the previously mentioned *Ogoniland* case, also took the opportunity to set a bridge between the right to environment and the right to life (Article 4), and the right to health (Article 16), in addition to the right to environment (Article 24) of the African Charter on Human and Peoples' Rights.¹⁷⁵

3. National Level

National courts around the world have actively validated the right to environment contained in national constitutions, and have reformulated other constitutional rights, such as the right to life, the right to health, and the right to privacy, while protecting and enforcing environmental rights and duties.¹⁷⁶

Weston and Bollier illustrated that several other rights have also been reformulated to protect against environmental degradation affecting individuals and communities:

Also invoked for this purpose in national fora, and generally with the same or similar logic, are the rights to habitat, livelihood, culture, dignity, equality and nondiscrimination, and sleep. Clearly, the spectrum of substantive human rights claimed as surrogates for protection of environmental harm or as a substitute for the autonomous right to a clean

175. See Ogoni Decision, *supra* note 140.

176. See, e.g., U.N. Hum. Rts, Human Rights and the Environment: Regional Consultation on the Relationship between Human Rights Obligations and Environmental Protection, with a Focus on Constitutional Environmental Rights, (January 23-24, 2014), www.ohchr.org/Documents/Issues/Environment/JohannesburgConsultation.doc; WESTON & BOLLIER, *supra* note 6, at 300-07 (discussing and citing national cases from Latin America, Sub-Saharan Africa, and South Asia); Dinah L. Shelton, *Developing Substantive Environmental Rights*, 1 J. HUM. RTS. & ENV'T. 89 (2010); Ole W. Pedersen, *European Environmental Human Rights and Environmental Rights: A Long Time Coming?*, 21 GEO. INT'L ENVTL. L.R. 73, 111 (2008); Michael R. Anderson, *Individual Rights to Environmental Protection in India*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 199 (1996) (analyzing national cases from India); Martin Landau, *Islam and Judicial Activism: Public Interest Litigation and Environmental Protection in the Islamic Republic of Pakistan*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 285 (1996) (reviewing national cases from Pakistan); Adriana F. Aguilar, *Enforcing the Right to a Healthy Environment in Latin America*, 3 REV. EUR. COMMUNITY & INT'L ENVTL. L. 215 (1994) (identifying national cases from Latin America).

and healthy environment is a broad one.¹⁷⁷

C. PROCEDURAL ENVIRONMENTAL RIGHTS

Among the bundle of rights contained within an expansively defined right to environment are the procedural human rights whose implementation are vital to substantive environmental policymaking. “In general, these are rights whose free exercise makes policies more transparent, better informed and more responsive. They include rights to freedom of expression and association, rights to receive information and participate in decision-making processes, and rights to legal remedies.”¹⁷⁸

Weston and Bollier described the procedural environmental rights as “[a]rguably the most widely recognized and entrenched of environmental rights.”¹⁷⁹ Boyle added that “their role is one of empowerment, facilitating participation in environmental decision-making and compelling governments to meet minimum standards of protection for life, private life and property from environmental harm.”¹⁸⁰ I would add that environmental rights are necessary for the implementation of the substantive right to environment, in both its autonomous and derivative forms. The international legal community, including most traditionalists, has been more receptive in recognizing the existence of procedural environmental rights.¹⁸¹ This can be

177. WESTON & BOLLIER, *supra* note 6, at 307.

178. See Report of the Independent Expert, Preliminary Report, *supra* note 47, at 10, ¶ 25; see also Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103, 117 (1991) (identifying many international agreements and state constitutions that include the right to environment).

179. WESTON & BOLLIER, *supra* note 6, at 328 (delineating the elements of procedural environmental rights as “(1) a right to prior knowledge of [potential environmental harm], with a corresponding state duty to inform; (2) a right to participate in decision-making; and (3) a right to recourse before competent administrative judicial organs”).

180. Alan Boyle, *Human Rights and the Environment? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471, 471 (2007).

181. See, e.g., WESTON & BOLLIER, *supra* note 6, at 328-36 (“procedural environmental rights appear to enjoy authoritative recognition and support applicable of law everywhere”); Alan E. Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 43, 50 (Alan Boyle & Michael Anderson eds., 1996); James Cameron & Ruth Mackenzie, *Access to Environmental Justice and*

explained by the fact that procedural environmental rights are descendants of Western-centric civil and political human rights.

1. *International Level*

- The 1948 Universal Declaration of Human Rights recognizes procedural environmental rights in Articles 7, 8, 19, 20, and 21.¹⁸²
- The 1966 United Nations Covenant on Civil and Political Rights recognizes procedural environmental rights in Articles 2, 19, 21, 22, and 25.¹⁸³
- The 1982 World Charter for Nature provides in Principle 23: “All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.”¹⁸⁴
- The 1992 Rio Declaration provides in Principle 10:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.¹⁸⁵

Procedural Rights in International Institutions, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 129 (Alan Boyle & Michael Anderson eds., 1996); PATRICIA W. BIRNIE & ALAN E. BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 194-95 (1992); Kiss & Shelton, *supra* note 8, at 25-26; Shelton, *supra* note 178, at 117-21.

182. Universal Declaration of Human Rights arts. 7, 8, 19, 20, 21, *supra* note 29 (establishing that certain political and civil rights are inalienable).

183. International Covenant on Civil and Political Rights arts. 2, 19, 21, 22, 25, *supra* note 32 (declaring that the rights listed are inherent in human dignity).

184. G.A. Res. 37/7, *supra* note 93, ¶ 23.

185. Rio Declaration, *supra* note 51, Principle 10.

- The 1992 United Nations' Framework Convention on Climate Change (UNFCCC), Article 6, provides similar information and participatory rights.¹⁸⁶
- The 1992 United Nations' Convention on Biological Diversity provides similar information and participatory rights in various articles.¹⁸⁷
- The 1994 United Nations' Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly, in Africa, Article 5(d), provides specific procedure for the provision of information and participatory rights.¹⁸⁸
- The 1994 International Atomic Energy Agency's Convention on Nuclear Safety provides specific procedure for the provision of information and participatory rights.¹⁸⁹
- The 1997 International Atomic Energy Agency's Convention on Safety of Radioactive Waste Management provides specific procedure for the provision of information and participatory rights.¹⁹⁰
- The 1997 Kyoto Protocol to the UNFCCC, Article 10(e), provides similar information and participatory rights.¹⁹¹
- The 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in

186. Framework Convention on Climate Change art. 6, May 9, 1992, S. Treaty Doc. No. 102-38, 1771 U.N.T.S. 107.

187. Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818 (recognizing the importance of biodiversity in the protection of human life).

188. G.A. Res. 241/27, Convention to Combat Desertification (Sept. 12, 1994) (noting the importance of participation by local populations with non-governmental organizations to mitigate the effects of drought).

189. Convention on Nuclear Safety, Sept. 20, 1994, 1963 U.N.T.S. 293 (mandating that each party to the convention shall submit a report detailing its efforts to ensure compliance with the measures in the convention).

190. Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, Sept. 29, 1997, 2153 U.N.T.S. 357 (emphasizing the importance of measures to ensure states safely use nuclear technologies).

191. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22 (suggesting parties implement educational and training programs to increase understanding of climate change).

International Trade provides specific procedure for the provision of information and participatory rights.¹⁹²

- The 2000 Cartagena Protocol on Biosafety to the Convention on Biological Diversity provides specific procedure for the provision of information and participatory rights.¹⁹³
- The 2001 United Nations' International Law Commission adopted the Draft Preamble and Articles on Prevention of Transboundary Harm from Hazardous Activities, which in Article 13 provides: "States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views."¹⁹⁴
- The 2001 Stockholm Convention on Persistent Organic Pollutants, Article 10, provides similar information and participatory rights.¹⁹⁵
- The 2002 United Nations' World Summit on Sustainable Development adopted the Johannesburg Implementation Plan, which reaffirmed Principle 10 of the 1992 Rio Declaration.¹⁹⁶
- The 2002 Global Judges Symposium adopted the Johannesburg Principles on the Role of Law and Sustainable Development, which called for a work program that includes: "The improvement in the level of public participation in

192. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 2226 U.N.T.S. 293 (entered into force Feb. 24, 2004), <https://UNEP-FAO-RC-CONVTEXT-2015.English.pdf> (promoting collaboration among parties to protect human life from hazardous chemicals).

193. Cartagena Protocol on Biosafety to the Convention on Biological Diversity, Jan. 29, 2000, 2226 U.N.T.S. 208, <http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> (recognizing states' shared responsibility in protecting and promoting biodiversity).

194. G.A. Res. 62/68, annex, at 512 (2008); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 370 (2001) [hereinafter Rep. on the Work of Its Fifty-Third Session].

195. Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 2256 U.N.T.S. 119, http://www.wipo.int/edocs/trtdocs/en/unep-pop/trt_unep_pop_2.pdf (developing measures to protect human life and the environment from pollutants).

196. Johannesburg Declaration, *supra* note 120.

environmental decision-making, access to justice for the settlement of environmental disputes and the defense and enforcement of environmental rights, and public access to relevant information.”¹⁹⁷

2. Regional Level

Numerous regional environmental treaties contain information and participatory rights similar to Article 10 of the Rio Declaration.¹⁹⁸

The most influential regional treaty that articulates procedural environmental rights is the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.¹⁹⁹ The Aarhus Convention presents a comprehensive system of procedural environmental rights that includes:

[I]nformation concerning the physical elements of the environment, such as water and biological diversity, as well as information about activities, administrative measures, agreements, policies, legislation, plans, and programmes likely to affect the environment, human health, safety or conditions of life. Cost benefit and other economic analyses and assumptions used in environmental decision-making are also included. Rights of access are extended to NGOs ‘promoting environmental protection’ in accordance with national law. There are detailed provisions, consistent for the most part with [European Community] law, on access to and collection of environmental information.²⁰⁰

The Aarhus Convention has influenced judges at the international, regional, and national levels, and served as a template for numerous environmental treaties and national laws.²⁰¹

197. Johannesburg Principles, *supra* note 121.

198. See WESTON & BOLLIER, *supra* note 6, at 331 n.205.

199. Aarhus Convention, *supra* note 137.

200. Boyle, *supra* note 76, at 17-18; see also Jonas Ebbesson, *Background Paper No. 5: Information, Participation and Access to Justice: the Model of the Aarhus Convention*, JOINT UNEP-OHCHR EXPERT SEMINAR ON HUMAN RIGHTS AND THE ENV'T (Jan. 14-16, 2002), http://www.ohchr.org/Documents/Issues/Environment/BP_Information_Participation_Access_Justice_Model_AarhusConvention.pdf.

201. *The EU & the Aarhus Convention: In the EU Member States, in the Community Institutions and Bodies*, EUR. COMM'N (Aug. 6, 2016), <http://ec.europa.eu/environment/aarhus/studies.htm> (highlighting the Aarhus Convention's training and support afforded to the judiciary).

V. CONTINUED SKEPTICISM DESPITE OVERWHELMING EVIDENCE OF THE CRYSTALLIZATION OF THE HUMAN RIGHT TO ENVIRONMENT

After approximately fifty years of development, we can safely conclude that the human right to environment (in its three forms: autonomous right, derivative right, and procedural rights) has effectively crystallized into a recognized modern international norm. States simply cannot, by act or omission, degrade the environment to the point where individuals and communities can no longer live a life of dignity or pursue other recognized human rights.²⁰² Pursuant to the human right to environment, states have the duty to implement and enforce environmental protection and sustainable development policies, as well as to promote and facilitate information and participatory rights.²⁰³ In turn, these substantive and procedural environmental policies must guarantee all people the ecosystem conditions necessary for the fulfillment and enjoyment of other recognized civil, political, economic, social, and cultural human rights. Such policies are desired by humanity, as evidenced by the countless international, national, and regional instruments which are all intended to be binding expressions of the international community's recognition of a human right to environment. As I stated before, there is no doubt that if the Universal Declaration of Human Rights were drafted today, it would include the human right to environment.

More evidence and support of the existence and recognition of the human right to environment is constantly added to that outlined above. Scholars around the world continue uncovering additional proof evincing the universal recognition, adoption, and implementation of the right to environment, in its three forms. This voluminous evidence

202. *Human Rights Norms*, PERMANENT PEOPLE'S TRIBUNAL ON HUMAN RIGHTS, FRACKING AND CLIMATE CHANGE, <https://www.tribunalonfracking.org/human-rights-norms/> (last visited June 30, 2018).

203. John H. Knox, Independent Expert on Human Rights and the Environment, *Human Rights Obligations to Protect the Environment*, SIDA Workshop on Human Rights and the Environment (May 20, 2014), <http://srenvironment.org/wp-content/uploads/2013/05/Knox-presentation-final.docx>.

includes: resolutions, declarations, reports, and studies from United Nations organs, programs, funds, and specialized agencies; judicial decisions from international, regional, and state tribunals; writings and conference proceedings from academic experts; constitutional provisions, laws, practices, declarations, and other forms of expression from an overwhelming number of states; and demands and claims raised by civic groups, non-governmental organizations, communities, and individuals. As discussed above, these sources of international law are representative of all geographical regions of the world and of a wide diversity of cultural, philosophical, legal, and political traditions.

Notwithstanding the above reality, skeptics of the human right to environment continue rejecting the existence of a binding right to environment.²⁰⁴ However, these arguments generally are unimaginative as they merely restate those previously dismissed in Part I of this article. Examples of some skepticism recently shared with me by traditionalist colleagues on the right to environment include:

(1) Lack of uniformity in the language used and contained in the thousands of documents, expressions, and actions previously identified as evincing the international community's recognition of the right to environment. For example, I have been confronted by skeptics who point to the fact that although some states recognize an environmental right or entitlement exists under international law, others recognize instead that only an environmental duty is owed by states as a matter of law. Other colleagues propose that a lack of uniformity exists between the substantive right to environment adopted and implemented by some states and the procedural environmental rights universally recognized and put into practice. Yet others reject that the universally recognized concept of sustainable development is related or derived from the right to environment. In my view, these criticisms are easily rebutted. For every right, there is also a duty. If states prefer to highlight one over the other, so be it. Under either system the end result should be the protection of individuals and communities from state-caused environmental degradation. The possessors of the right include all individuals and protected communities whose right to live or exist in a healthy, clean, safe, sustainable, adequate, etc., environment or habitat is violated by an act or omission of its own state government. The assignees of the duty are the state governments. That states use different languages while adopting and implementing the right to

204. See, e.g., *id.* ("Many human rights instruments are based on the 1948 Universal Declaration of Human Rights, which does not mention the environment.").

environment does not limit their recognition of said right; it merely reflects the existence of diverse cultural and legal traditions within the international community.²⁰⁵ Therefore, different states may incorporate their own moral, social, and legal accents into the language and concepts chosen in adopting and implementing the right to environment. Tribunals at the state, regional, and international levels have the ultimate task of interpreting the content of the right to environment within the particular context in which it was adopted. What is most important is that states recognize and implement, as a matter of fact, both substantive and procedural environmental protections.

(2) Lack of state practice or uniformity based on the varied legal implementation strategies adopted to guarantee the right to environment.²⁰⁶ This argument also is unpersuasive. Some states have adopted a constitutionally-based environmental protection approach, while others have opted for legislative or administrative approaches.²⁰⁷ What matters is that states indeed have adopted and implemented environmental safeguards in recognition that a right to environment exists under international law, and that national and regional courts have validated said approaches.²⁰⁸

(3) The human right to environment is a creation of the United Nations and has gathered support only in the developing regions of Africa, Asia, and Latin America. Hence, skeptics reason that the developed nations in North America and Europe are not bound by said right until a formal treaty is signed by them on this subject. This argument ignores that both North American and European states have solid and long traditions of protecting the environment through legislation, regulations and court opinions.²⁰⁹ The

205. *Id.* (noting that states have implemented different measures in various economic sectors but they are still nonetheless environmental standards).

206. Org. of Am. States [OAS], ENVIRONMENTAL RULE OF LAW: TRENDS FROM THE AMERICAS, INTER-AMERICAN CONGRESS ON THE ENVIRONMENTAL RULE OF LAW 5 (2015) (recognizing the varying perceptions of the term rule of law).

207. *Id.* at 38-40 (identifying three approaches, varying among jurisdictions, to environmental protection including the human rights approach, the watershed approach, and the ecosystems approach).

208. *Id.* at 167 (“[A]s part of the rule of law, we generally recognize that one of the central duties of governments is to protect and safeguard the rights and interests of vulnerable parties and minorities . . . this duty ought to extend to the environment as well; ecosystems hold valuable, yet vulnerable interests that are inadequately represented in the legislative process or in administrative decision-making”).

209. Robinson Meyer, *How the U.S. Protects the Environment, from Nixon to Trump*, ATLANTIC (Mar. 29, 2017), <https://www.theatlantic.com/science/archive/2017/03/how-the-epa-and-us-environmental-law-works-a-civics-guide-pruitt-trump/521001/> (detailing the environmental legislation enacted in the United States over the past fifty years, including the Clean Air Act of 1970, which sets standards for toxic air pollutants; the Clean Water Act of 1972, which sets standards for

fact that their approach to environmental protection favors procedural, legislative, and administrative approaches merely reflects their cultural and legal affinity to civil and political human rights. Moreover, as presented in Part IV above, tribunals in Europe have routinely enforced claims brought against states for violating substantive environmental rights—albeit, derivatively by reformulating other substantive rights.²¹⁰ In my appreciation, states in North America and Europe have adopted and implemented the expansive right to environment and are bound by the environmental duties emanating from said right. Moreover, the fact that the United Nations' organs and developing states in Africa, Asia, and Latin America expressly recognize the right to environment serves as further proof of its existence.²¹¹

(4) Human rights, by definition, cannot be used to protect non-human entities like the environment because they exclusively reflect anthropocentric values.²¹² Thus, a right of environment or nature (or animals, etc.), including its integration as part of an expanded right to environment, is rejected outright. Some traditionalists find a proposed right of environment more questionable than the right to environment. I also find this argument unpersuasive. First, the protection of the environment based on its own intrinsic value has long been recognized as an essential element necessary for the enjoyment of all human rights. The link between nature and humans was first recognized in the 1972 Stockholm Declaration and further articulated in the 1982 World Charter for Nature, both discussed in Part IV.²¹³ The emphasis of incorporating elements of the right of nature based on its intrinsic value serves as an objective standard within the conceptualization of an expanded right to environment. Second, incorporating the value of nature within a rights-based approach ultimately

pollutants being released into bodies of water; the National Environmental Policy Act of 1970, which requires the government to conduct an environmental study before its builds or renovates; and the Endangered Species Act of 1973, which allows certain wildlife protective services to protect species that are at risk for extinction).

210. See *supra* text accompanying notes 159-167.

211. Paris Agreement, U.N. Framework Convention on Climate Change, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9, <https://unfccc.int/resource/docs/2015/cop21/eng/109.pdf> [hereinafter Paris Agreement] (listing the parties that have ratified the Paris Agreement).

212. See Quinn Hungeski, *Human Rights for Non-Human Entities: Nature and the Corporation*, PARAGRAPH (June 21, 2011), <https://theparagraph.com/2011/06/human-rights-for-non-human-entities-nature-and-the-corporation/> (arguing that giving non-humans human rights weakens democracy).

213. See *supra* text accompanying notes 86 and 93.

benefits both humans and nature. Thus, the purported human/nature theoretical dichotomy rejected by traditionalists is no more than a game of semantics.

VI. OVERCOMING THE SYSTEMIC BARRIERS ENCOUNTERED BY THE HUMAN RIGHT TO ENVIRONMENT

The recognition of the human right to environment certainly is a positive step in global efforts to address the environmental *problématique*. However, now we need to face a stark reality: violations of the human right to environment are prevalent around the world.²¹⁴ As explained above, states have recognized the right to environment and have structured constitutional, statutory, and regulatory frameworks to implement this right. Nonetheless, many of these same states violate, by act and omission, the very legal framework set up to guarantee the right to environment. “Evidence of this government failure can be seen in the rapid decline of so many different ecosystem elements: atmosphere, biodiversity, desertification, glaciers, inland waterways and wetlands, oceans, coral reefs, and more.”²¹⁵ As a result of violations to their right to environment, people around the globe are also denied the full enjoyment of their rights to life, health, privacy, food, and water, among many others.²¹⁶ This brings us to the next stage of a rights-based approach to environmental protection: overcoming the systemic barriers inherently encountered by the right to environment in the context of a globalized economy.

214. See, e.g., Anne Van Schaik & Lucia Ortiz, *Violations of Human and Environment Rights Continue*, FRIENDS OF THE EARTH INT'L (June 16, 2016), <https://www.foei.org/news/5-years-failure-un-voluntary-measures-arent-stopping-bad-business-behavior> (arguing that international agreements have not been able to keep multinational corporations accountable for acts that damage the environment).

215. See WESTON & BOLLIER, *supra* note 6, at 20 (identifying the environment as a platform to undermine the governments' credibility as evidenced by the surge in environmental protests in recent years demanding not only for environmental reform but also questioning the authority of the government).

216. See Schaik & Ortiz, *supra* note 214 (detailing government failure to hold corporations accountable for environmental damage and the damage such failure has caused to other human rights).

First, I pose an example concerning a pressing global environmental issue: climate change. This is an issue that has received much attention in recent decades, culminating with the 2015 Paris Agreement.²¹⁷ Nonetheless, many jurisdictions have failed to implement measures directed at ameliorating this global phenomenon. One such case is Puerto Rico, a densely populated (approximately 3.5 million inhabitants) small island (one hundred miles long by thirty-five miles wide) territory of the United States, which does not have specific legislation that establishes an official climate change policy. The United States under Donald Trump's presidency has announced that it will cease all participation in the Paris Agreement.²¹⁸ Moreover, President Trump has revoked executive orders previously issued by President Barack Obama that had established and implemented policies meant to address climate change.²¹⁹ Making matters worse, both the United States and Puerto Rico governments have promoted the island's dependency on fossil fuels during the past century and neither has engaged in any significant measures to decrease Puerto Rico's vulnerability to climate change.²²⁰ The net result is that at present the entire population of Puerto Rico is extremely vulnerable to the effects associated with climate change, such as sea-rise, increases in temperature, changes in climatological patterns, floods, droughts, and hurricanes, among others. These effects expose Puerto Ricans and the island's ecosystems to a deteriorated environment, thus violating many human rights including: the right to life, the right to health, and the right to environment. These human rights violations have become more pervasive in the wake of Hurricane Maria, as explained above in Part III.

217. Paris Agreement, *supra* note 211.

218. See, e.g., Off. of the Press Sec'y, The White House, Statement by President Trump on the Paris Climate Accord, (June 1, 2017), <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord>; Michael D. Shear, *Trump Will Withdraw U.S. from Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://mobile.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.amp.html>.

219. See, e.g., Exec. Order No. 13783, 82 Fed. Reg. 16,093 (Mar. 28, 2017).

220. Catalina M. de Onis, *For Many in Puerto Rico, 'Energy Dominance' is Just a New Name for US Colonialism*, CONSERVATION (Aug. 21, 2017), <http://theconversation.com/for-many-in-puerto-rico-energy-dominance-is-just-a-new-name-for-us-colonialism-80243>.

Second, I present two examples regarding local environmental issues. Puerto Rico has an environmental protection clause in its 1952 Constitution,²²¹ thousands of substantive and procedural environmental laws and regulations (at both the United States federal and local levels), and several federal and local government agencies charged with implementing, supervising, and enforcing this voluminous body of environmental protection policies.²²² However, communities in Puerto Rico are frequently forced to challenge environmentally harmful actions that are illegally approved or undertaken by the federal and state governments. Currently, a community in Arecibo is battling against the illegal permitting and construction of a solid-waste incinerator,²²³ while a community in Peñuelas is fighting against the illegal and harmful use of coal ash as cover in a nearby landfill.²²⁴ The environmental and health risks in both examples have been scientifically proven and reported to government officials.²²⁵ Yet, the United States and the Puerto Rico governments continue promoting both projects to the detriment of

221. P.R. CONST. art. VI, § 19 (“It shall be the public policy of the Commonwealth to conserve, develop and use its natural resources in the most effective manner possible for the general welfare of the community.”).

222. Guillermo Silva-Wiscovich, *Environmental Protection in Puerto Rico: Island at a Crossroads*, AM. B. ASS’N SEC. OF ENV’T, ENERGY, AND RESOURCES NEWSL. (2017), <https://www.americanbar.org/publications/trends/2016-2017/may-june-2017/environmental-protection-in-puerto-rico.html>.

223. See Luis E. Rodríguez Rivera, *La Incineración de Basura en Puerto Rico: La Máquina Sigue Patinando*, 85 REV. JUR. U.P.R. 1 (2016), <http://revistajuridica.uprrp.edu/wp-content/uploads/2016/05/85-Rev.-Jur.-UPR-1-2016.pdf>; Ingrid Vila, *A Fight Worth Fighting: Waste Incinerator in Puerto Rico – Guest Blog Post*, EARTHJUSTICE (Oct. 6, 2015), <https://earthjustice.org/blog/2015-october/a-fight-worth-fighting-waste-incineration-in-puerto-rico>.

224. See Ingrid M. Vila Biaggi & Luis E. Rodríguez Rivera, *Comentarios de Cambio Sobre Proyectos de Cenizas de Carbón Dirigidas al Sen. Carlos Rodríguez Mateo, Presidente de la Comisión*, Comisión de Salud Ambiental y Recursos Naturales del Senado de Puerto Rico, Vista Pública del 7 de marzo de 2017, <http://nebula.wsimg.com/d8b88897bf6c4258f17cb468840245c2?AccessKeyId=cA8929B36EA4B8693354&disposition=0&alloworigin=1>; Ruth Santiago, *Coal Ash Contamination in Puerto Rico*, OPENDEMOCRACY (Nov. 25, 2016), <https://www.opendemocracy.net/democraciaabierta/ruth-santiago/coal-ash-contamination-in-puerto-rico>.

225. Clare Condon, *D.C. Circuit Rules Against Groups’ Challenge of 1980 PSD Reg*, EHS DAILY ADVISOR (Mar. 28, 2016), <https://ehsdailyadvisor.blr.com/2016/03/d-c-circuit-rules-against-groups-challenge-of-1980-psd-reg/>.

vulnerable communities and to the benefit of special interests.²²⁶

Compliance with human rights, particularly economic, social, and cultural rights, has been difficult to achieve due to state governance flaws and global economic interests. Scott Leckie expressed:

Current political, social, and especially economic trends are not at all conducive to the prevention of violations of economic, social and cultural rights, or even the preservation of rights already in place. . . . Even when human rights bodies take action or other criticism of violators is forthcoming, this action is frequently no match for what are increasingly perceived as larger state interests, in particular those linked to trade, market share, and misplaced notions of national security.²²⁷

Similar barriers exist in the implementation of a rights-based approach to environmental protection. As highlighted in a 2012 joint report issued by the United Nations' Office of the High Commissioner on Human Rights and the United Nations' Environment Programme:

Governance: The inappropriate institutional and governance arrangements mentioned above, as well as the presence of corruption and weak systems of regulation and accountability limit the effective integration of environment and human rights into economic planning and activities. Weak human and institutional capacity related to the assessment and management of ecosystems and their services, underinvestment in regulation and management, lack of public awareness, and lack of awareness among decision-makers of both the threats and opportunities that more sustainable management of ecosystems and public participation could provide hinder the green economy.

Economic: Economic and financial interventions provide powerful regulatory instruments; however, market mechanisms and most economic instruments can only work effectively if supporting institutions are in place, and thus there is a need to build institutional capacity to enable more widespread use of these mechanisms. A related program could support investment in the development and diffusion of clean technologies that could reduce the harmful impacts of various drivers of ecosystem change,

226. *Id.* (challenging the proposal in the United States Court of Appeals for the D.C. Circuit).

227. Scott Leckie, *Another Step Toward Indivisibility: Key Features of Violations of Economic, Social and Cultural Rights*, in HUMAN RIGHTS IN THE WORLD COMMUNITY – ISSUES AND ACTION 171 (2016).

while also producing new industries and employment opportunities.²²⁸

Weston and Bollier have concluded that the governance system for environmental issues is profoundly broken.²²⁹ They further elaborated on the above barriers facing the right to environment (i.e., governance and global economic interests):

It is an open secret that various industry lobbies have corrupted if not captured the legislative process. The regulatory apparatus, for all its necessary functions, has shown itself to be essentially incapable of fulfilling its statutory mandates, let alone pioneering new standards of environmental stewardship. Furthermore, regulation has become ever more insulated from citizen influence and accountability as scientific expertise and technical proceduralism have come to be more and more the exclusive determinants of who credibly participate in the process. Given the parameters of the administrative State and the neoliberal policy consensus, we have reached the limits of leadership and innovation.

The State will not of its own provide the necessary leadership to save the planet. Nationally, where most environmental problems first arise, regulatory systems are captive to powerful special interests much if not most of the time. Internationally, where authority and control rests heavily on the will of coequal sovereign states, governments jealously guard their claimed territorial prerogatives . . . It has become abundantly clear that the State is too indentured to Market interests and too institutionally incompetent to deal with the magnitude of so many distributed ecological problems.²³⁰

Some scholars, such as Professor Mary Christina Wood, understand that the legal frameworks used to implement the right to environment are systemically flawed for the same reasons:

The Modern environmental administrative state is geared almost entirely to the legalization of natural resource damage. In nearly every statutory scheme, the implementing agency has the authority – or discretion – to permit the very pollution or land destruction that the statutes were designed to prevent. Rather than using their delegated authority to protect crucial resources, nearly all agencies use their statutes as tools to affirmatively sanction destruction of resources by private interests. For example, two-thirds of the greenhouse gas pollution emitted in [the United States] is

228. Human Rights and the Environment, *supra* note 104, at 35-36.

229. WESTON & BOLLIER, *supra* note 6, at 4.

230. *Id.* at 4, 20.

pursuant to government-issued permits.²³¹

Once we understand and recognize these and other barriers that prevent people and communities from enjoying their human right to environment to the fullest, we can begin the path towards eliminating said barriers. Professor Wood has called for a change in governance and economic paradigm based on the Public Trust Doctrine,²³² while Professors Weston and Bollier have proposed the implementation of a new paradigm based on the cooperative management principle of the Commons.²³³

The next step for the rights-based approach to environmental protection is the development of more scholarship evaluating all barriers faced by the right to environment (i.e., social and behavioral factors and accountability have been suggested),²³⁴ and presenting alternative governance and economic paradigms. Only with such a paradigm shift will states structure international, regional, and national strategies that will honor the moral and legal commitments they have made by recognizing the existence of an expansively defined right to environment under modern international law.

VII. CONCLUSION

After approximately fifty years of development, the case for the recognition of the human right to environment under modern international law is robust, to say the least. The evidence of the human right to environment's crystallization into a binding international norm is overwhelming. Numerous treaties, resolutions, declarations, reports, studies, judicial decisions, scholarly writings and conferences, constitutional provisions, laws, regulations, and statements and claims from international actors have been made at the international, regional, national, community, and individual levels. These sources of modern

231. Mary C. Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for a Paradigm Shift*, 39 ENVTL. L. 43, 55 (2009), <https://law.uoregon.edu/images/uploads/entries/39-1woodpt1.pdf>.

232. *See id.*

233. *See* WESTON & BOLLIER, *supra* note 6, at 30 (explaining this concept, which was inspired by Garrett Hardin's *The Tragedy of the Commons*).

234. *See* Human Rights and the Environment, *supra* note 104, at 35.

international law emanate from all geographical regions of the world and incorporate a wide diversity of cultural, philosophical, legal, and political traditions.

During the last half century, states have adopted and incorporated substantive and procedural environmental policies, as well as sustainable development, information, and participatory policies, into their legal systems in response to their recognition of the human right to environment. These policies serve to guarantee to their constituents the minimum ecosystem conditions necessary for their fulfillment and enjoyment of other recognized civil, political, economic, social, and cultural human rights. However, states also are blatantly violating the right to environment by ignoring the very guarantees and protections they have adopted. This is the result of state governance flaws and global economic interests, which have provoked the development of systemic barriers that have allowed special interests to capture the governmental decision-making process. We must study this phenomenon and propose new governance and economic paradigms in which a rights-based approach to environmental protection can be successfully implemented and enforced.