

10-2023

To Have and To Be: An International Human Right to Clean, Healthy, and Sustainable Environment

Deepa Badrinarayana

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelpr>



Part of the [Environmental Law Commons](#), [Human Rights Law Commons](#), and the [International Law Commons](#)

Repository Citation

Deepa Badrinarayana, *To Have and To Be: An International Human Right to Clean, Healthy, and Sustainable Environment*, 48 Wm. & Mary Env't L. & Pol'y Rev. 55 (2023), <https://scholarship.law.wm.edu/wmelpr/vol48/iss1/4>

TO HAVE AND TO BE: AN INTERNATIONAL HUMAN RIGHT TO CLEAN, HEALTHY, AND SUSTAINABLE ENVIRONMENT

DEEPA BADRINARAYANA*

INTRODUCTION

In July 2022, the United Nations General Assembly passed Resolution 76/300 (“the Resolution”)—affirming a human right to clean, healthy, and sustainable environment (“environmental human rights”).¹ The Resolution essentially affirms a linkage between environmental human rights and “other rights and existing international law,” and “calls upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices,” to achieve environmental human rights.² On its face, the Resolution is impressive. Not only because of its near unanimous passage but also because the Resolution restores a human rights framework to the international response to environmental problems, thereby collapsing the artificial separation between people and their environment and ecology.³ Nevertheless, the question remains whether the Resolution has any real implications for international environmental law, not only because General Assembly resolutions are per se non-binding, but also given the broader limits of implementing human rights under international law.⁴

* Professor of Law, Chapman University Dale E. Fowler School of Law. The author is grateful for the Chapman School of Law’s summer stipend support for this Article, and to the editors of the *William & Mary Environmental Law and Policy Review* for their excellent editorial support.

¹ G.A. Res. 76/300, at 1–3 (Aug. 1, 2022).

² *Id.* at 3.

³ For a discussion of the integral nature of humans and environment, see Carolyn M. Kurle, Marc W. Cadotte, Minhyuk Seo, Philip Dooner & Holly P. Jones, *Considering Humans as Integral Components of “Nature,”* ECOLOGICAL SOLS. & EVID., Mar. 2023, at 1, 2; Celinne Da Costa, *Bridging Ancient Wisdom into Modern Societies*, FORBES (Dec. 7, 2020), <https://www.forbes.com/sites/celinnedacosta/2020/12/07/bridging-ancient-wisdom-into-modern-society/?sh=59aefca52ee6> [<https://perma.cc/D57Z-BVKL>].

⁴ See generally Model United Nations, *How Decisions Are Made at the U.N.*, <https://www.un.org/en/model-united-nations/how-decisions-are-made-un> [<https://perma.cc/4H7J-9TUX>] (last visited Dec. 4, 2023); Michelle Bachelet, High Comm’r, U.N. Hum. Rts. Off., Speech at the Center for Human Rights and Humanitarian Law, American University

This Article offers a glass half-full perspective on the Resolution, with the caveat that the glass could rapidly become empty unless the right is internalized into domestic legal systems and international agreements that directly or indirectly impact environmental human rights.

Specifically, this Article asserts that the Resolution is a net positive development for two reasons: 1) the historical importance of contemporary human rights, notably the Universal Declaration of Human Rights (“UDHR”),⁵ in framing the normative discourse on international law as a “universal,” rather than “sovereign,” subject matter,⁶ and 2) its potential to return international environmental discourse to a human rights-based approach initially taken in the 1970s,⁷ which is especially important as environmental problems increasingly impose transboundary environmental harms on established human rights. This Article further proposes that the efficacy of the Resolution rests on the ability of nations to not only fully implement multilateral environmental agreements under the principles of international environmental law,⁸ but also to cohesively and systematically review from a lens of human rights the defragmented approach to treaty negotiations that at once promote and negate efforts to meaningfully address environmental problems, as in the case of international trade agreements.⁹

Washington College of Law: ‘Challenges to the Enforcement of Human Rights Today’ (Apr. 11, 2019), <https://www.ohchr.org/en/speeches/2019/04/challenges-protection-human-rights-today> [<https://perma.cc/674V-AS26>]; COUNCIL OF EUR., SUPERVISION OF THE EXECUTION OF JUDGMENTS AND DECISIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS (2021), <https://rm.coe.int/2021-cm-annual-report-en/1680a60140> [<https://perma.cc/DX9F-MNXK>]; see also Marko Divac Öberg, *The Legal Effects of Resolutions of the U.N. Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 EUR. J. INT’L L. 879, 883 (2005).

⁵ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) [hereinafter UDHR].

⁶ See *id.* pmb. (proclaiming the UDHR “a common standard of achievement for all peoples and all nations,” and to strive to secure the “universal and effective recognition and observance” of rights and freedoms articulated).

⁷ The U.N. Conference on the Human Environment articulated this sentiment. See generally Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENV’T L. REV. 471, 473 (2007).

⁸ G.A. Res. 76/300, *supra* note 1.

⁹ For a discussion on this, see generally Anne van Aaken, *Defragmentation of Public International Law Through Interpretation: A Methodological Proposal*, 16 IND. J. GLOBAL LEGAL STUD. 483, 488 (2009); see also Int’l L. Comm’n, Rep. of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682 and Add.1 (Apr. 13, 2006) [hereinafter *ILC Fragmentation Report*], https://legal.un.org/ilc/documentation/english/a_cn4_1682.pdf [<https://perma.cc/6TN3-XMHB>].

Further, the Article asserts that the efficacy of environmental human rights suffers the same limitation as human rights enforcement in international law and the limits of international governance structures. These limitations can be acutely felt in the case of transboundary environmental harms that impact human rights, because unlike traditional human rights cases, the remedies lie outside the purview of domestic law. Thus, in addition to reviewing the normative compatibility of existing international treaties, this Article further suggests that meaningful next steps should include the creation of systematic governance systems—including judicial mechanisms—to address cases of transboundary environmental human rights wrongs. The Article presents the arguments in three additional parts, including a conclusion.

Part I briefly describes the general status of U.N. General Assembly resolutions, and discusses the background to the Resolution on environmental human rights. It reviews the international law implications of the Resolution, specifically as a soft law instrument that does not create hard binding obligations.

Part II sets out arguments for the potential of the Resolution to have meaningful impact, based on the dual reasons of general human rights history and the specific need to revert to a human rights-based approach to international environmental lawmaking. Regarding the first reason, although there are numerous theories on human rights, from natural rights to contemporary iterations,¹⁰ from an international law perspective, the UDHR provides the normative foundation to create accountability systems aimed at strengthening the rule of law that transcend sovereign prerogatives.¹¹ While the operationalization of human rights has been fraught with legitimacy concerns, stemming especially from the perceived hypocrisy of developed nations advocating human rights to developing nations, many of whom the former colonized,¹² the importance of human rights as a normative matter nevertheless remains critical to address systemic problems at all levels of governance and government. Further, the language of human rights has been influential

¹⁰ See, e.g., Kenneth Cmiel, *The Recent History of Human Rights*, 109 AM. HIST. REV. 117, 119–20 (2004).

¹¹ LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 179 (1995); UDHR, *supra* note 5, pmb. (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).

¹² The discussion on the emergence of the right to development illustrates the position of developing nations. See generally Noel G. Villaroman, *The Right to Development: Exploring the Legal Basis of a Supernorm*, 22 FLA. J. INT’L L. 299, 329 (2010).

in articulating legal wrongs in various contexts and in negotiating formal and informal agreements, be it the treatment of prisoners of war or domestic prisoners.¹³ In other words, human rights provide historically important norms and language meant to transcend constructs such as state sovereignty, even state action, particularly when they perpetrate systemic injustice.¹⁴ Contemporary environmental challenges, notably climate change, threaten to unleash large scale and systemic challenges to established human rights like the right to life and property, but the current structure of international environmental law rooted in principles of national sovereignty is falling short on responsiveness.¹⁵ Current environmental problems warrant the more universal norm of human rights that could help formulate a more legitimate and just response to climate change.

The discussion of the second reason focuses on the potential implications of reverting to rights-based environmental norms. The first comprehensive international document on environmental protection, the Stockholm Declaration on the Human Environment (“Stockholm Declaration”),¹⁶ articulated the linkage between human rights and environmental conditions. However, the apparently insurmountable differences between developed and developing nations resulted in the gradual erosion of an environmental human rights norm in exchange for development rights.¹⁷ Beginning with Earth Summit¹⁸ through the Johannesburg Conference,¹⁹ the emphasis shifted from environmental rights to development rights, which replaced the notion of environmental rights with the technical idea of sustainable development. Indeed, in a postcolonial and post–Cold War

¹³ See discussion *infra* Section II.B.

¹⁴ See, e.g., W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 873 (1990).

¹⁵ See generally Deepa Badrinarayana, *Global Warming: A Second Coming for International Law?*, 85 WASH. L. REV. 253, 256, 262 (2010); Cinnamon Carlarne, *Delinking International Environmental Law & Climate Change*, 4 MICH. J. ENV'T & ADMIN. L. 1, 4, 55 (2014).

¹⁶ U.N. Conference on the Human Environment, *Stockholm Declaration and Action Plan for the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1 (June 16, 1972) [hereinafter *Stockholm Declaration*].

¹⁷ *Id.*; HENKIN, *supra* note 11, at 179; see also Villaroman, *supra* note 12, at 300.

¹⁸ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), ¶ 26.1 (Aug. 12, 1992) [hereinafter *Rio Declaration*].

¹⁹ World Summit on Sustainable Development, 26 August–4 September 2002, Johannesburg, <https://www.un.org/en/conferences/environment/johannesburg2002> [https://perma.cc/TL83-WDVH] (last visited Dec. 4, 2023).

period the shift seemed inevitable given the economic challenges of many newly independent nations.²⁰ Economic liberalization took precedence over environmental human rights, with developing nations staking out an equitable right to unregulated and unfettered industrialization.²¹ An ad hoc approach to global environmental problems with a keen eye on developmental and sovereign rights became the norm, and efforts toward a comprehensive international environmental regime fell into the background.²² However, an increase in human rights claims in the domestic context, particularly regarding climate change, which in turn resulted in the Resolution, is a call for reconsidering environmental problems from a human rights perspective.²³

Part III examines meaningful next steps reviewing international treaties from the lens of environmental human rights norms. Like Dr. Jekyll and Mr. Hyde, international law is inherently flawed. While some of the dominant principles of international law such as state sovereignty are critical to protect human rights and to pursue collective and individual interest, the same principles also obfuscate efforts for accountability.²⁴ The case of climate change is emerging as a key illustration of this problem. Indeed, the Resolution is a reflection of the growing consensus among nations of the inextricable link between environmental conditions, such as a relatively stable climate, and fundamental human rights that has resulted in the recognition of environmental human rights as a distinct right. Yet, the recognition of an environmental human right no more guarantees appropriate remedy than the recognition of the existence of

²⁰ See generally Umut Özsu, *Neoliberalism and Human Rights: The Brandt Commission and the Struggle for a New World*, 81 L. & CONTEMP. PROBS. 139, 140–41 (2018). See also John Ntambirweki, *The Developing Countries in the Evolution of an International Environmental Law*, 14 HASTINGS INT'L & COMP. L. REV. 905, 906 (1991).

²¹ For a discussion on this issue, see Scott Vaughan, *Trade and Environment: Some North-South Considerations*, 27 CORNELL INT'L L.J. 591, 593 (1994).

²² See, e.g., Karen Tyler Farr, *A New Global Environmental Organization*, 28 GA. J. INT'L & COMP. L. 493, 497 (2000); see generally DANIEL C. ESTY & MARIA H. IVANOVA, GLOBAL ENVIRONMENTAL GOVERNANCE: OPTIONS AND OPPORTUNITIES 8 (2002).

²³ See generally JOSHUA C. GELLERS, THE GLOBAL EMERGENCE OF CONSTITUTIONAL HUMAN RIGHTS (2017); Tim Stephens, Book Review, TRANSNAT'L ENV'T L., Oct. 2015, at 444, 444–47 (2015) (reviewing JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2014)); David R. Boyd, *The Right to a Healthy Environment: Revitalizing Canada's Constitution*, 36 HUM. RTS. Q. 258, 261 (2013).

²⁴ See Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSNAT'L L. 97, 98 (2013); Abdullahi Ahmed An-Na'im, *State Accountability to Sovereignty of the Human Person*, 48 INT'L J. LEGAL INFO. 51, 53 (2020) (highlighting the problem of sovereign accountability in Africa, but also arguing for a different conceptual basis for evaluating accountability).

a global environmental problem. The recognition of an environmental human right is implicitly a recognition of the need to reframe and rethink the normative structures undergirding international environmental law. Efforts in this direction have started modestly with the Paris Agreement.²⁵

However, much needs to be done, especially regarding trade agreements that structurally foster resource exploitation even as international environmental and human rights agreements trail behind. For instance, segregating trade and environment for administrative efficiency does not justify a similar fragmented approach for normative purposes. Trading principles and practices that cause direct or indirect transboundary environmental human rights violations should be subject to discipline, preferably of a multilateral nature, but arguably of a unilateral nature as well, where warranted. The Resolution supports such an approach by recognizing a right to safe environmental conditions generally.²⁶ Hence, not just sustainable development, but environmental human rights should be a basis for decision-making and negotiations in the international context. The rights norm is also as compelling as, if not more than, trade theories supported by market access and comparative advantage, given their inviolability to all human beings due to their universality. The trade regime, however, is one example. Others include the bulk of multilateral and bilateral investment treaties that directly or indirectly catalyze activities that engender environmental human rights violations and require careful review and reconsideration.²⁷ Similarly, the precept of state sovereignty requires nuanced restructuring that reflects principles of state responsibility to uphold human rights.

Further, the problem of climate change highlights the need for better accountability and redress mechanisms for transboundary environmental human rights harms. As low-lying island and poor, vulnerable

²⁵ The preamble to the Paris Agreement states: “Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations. . . .” Paris Agreement to the U.N. Framework Convention on Climate Change, at pmb., Dec. 12, 2015, T.I.A.S. No. 16-1104, 3156 U.N.T.S. 79 [hereinafter Paris Agreement].

²⁶ Specifically, the Resolution “[n]otes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law.” G.A. Res. 76/300, *supra* note 1.

²⁷ See generally Rahim Moloo & Justin Jacinto, *Environmental and Health Regulation: Assessing Liability Under Investment Treaties*, 29 BERKELEY J. INT’L L. 1, 8 (2011); Sophia Sepúlveda Harms, *Toward a Green New Treaty Deal: Reforms to ISDS Amid Environmental Crisis*, 58 HOUS. L. REV. 479, 480 (2020).

nations face tremendous threats to human rights from climate change,²⁸ there is no clear redress mechanism in place. Ongoing efforts to establish loss and damage mechanisms are important steps forward.²⁹ However, the governing principles remain ambiguous.³⁰ Further, while important, traditional legal casting of loss and damage in terms of compensation may prove grossly inadequate. For people who stand to lose their entire nation and all property and other rights associated with it, voluntary and arbitrary monetary compensation would be grossly insufficient. What is needed is a redress mechanism that is driven by the norm of human rights protection. Thus, the need of the hour is to either enforce an injunction on activities affecting transboundary environmental human rights or specific performance terms that would restore conditions towards safeguarding human rights in a transboundary context.

There are, no doubt, immense practical limitations and challenges to ambitious advancements from norm to practice. However, unless even incremental efforts are made to translate the normative ambition of the Resolution into effective action, it is merely one more right acquired by the international community, rather than the instrument of normative change that it resolves to become.

I. FIRST, THE CAVEAT: GENERAL ASSEMBLY RESOLUTIONS ARE NOT PER SE A SOURCE OF INTERNATIONAL LAW

The United Nations General Assembly (“UNGA”) is comprised of all U.N. Member States³¹ and is “the main policy-making organ of the

²⁸ For instance, the latest IPCC report reiterates the threat faced by small island and other vulnerable nations. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (“IPCC”), CLIMATE CHANGE 2023: SYNTHESIS REPORT 6 (2023) [hereinafter IPCC AR6], https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf [<https://perma.cc/2E2V-UFBG>]; see also Erin Halstead, *Citizens of Sinking Islands: Early Victims of Climate Change*, 23 IND. J. GLOBAL LEGAL STUD. 819, 820 (2016).

²⁹ Press Release, U.N. Framework Convention on Climate Change (“UNFCCC”), COP27 Reaches Breakthrough Agreement on New “Loss and Damage” Fund for Vulnerable Countries, UNFCCC Press Release (Nov. 20, 2022), <https://unfccc.int/news/cop27-reaches-breakthrough-agreement-on-new-loss-and-damage-fund-for-vulnerable-countries> [<https://perma.cc/DFP7-2KNP>]; UNFCCC, *Sharm el-Sheikh Implementation Plan*, U.N. Doc. FCCC/CP/2022/L.19, Draft Decision -/CP.27, ¶¶ 22–24 (Nov. 20, 2022) [hereinafter *Sharm el-Sheikh Implementation Plan*], https://unfccc.int/sites/default/files/resource/cp2022_L19_adv.pdf [<https://perma.cc/C977-SH9T>].

³⁰ Anastasia Telesetsky, *Climate-Change Related “Non-Economic Loss and Damage” and the Limits of Law*, 11 SAN DIEGO J. CLIMATE & ENERGY L. 97, 100 (2020) (noting “loss” and “damage” has not been clearly defined or identified in negotiations/meetings).

³¹ U.N. Charter art. 9, ¶ 1.

Organization.”³² All Member States have an equal vote³³ and discuss “the full spectrum of international issues covered by the Charter of the [U.N.]”³⁴ Members meet regularly when the UNGA is in session, between September and December every year, to discuss various issues and adopt resolutions as necessary.³⁵ The UNGA also enjoys relative autonomy with the authority “to adopt its own rules of procedure,” and “to elect its President for each session.”³⁶ It also controls the purse, charged with the power to “consider and approve the budget of the [U.N.],” as well as “any financial and budgetary arrangements with special agencies.”³⁷ It also apportions expenses of the U.N. among Members.³⁸ The UNGA is also authorized to:

[D]iscuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter, and, except as provided in Article 12, may make recommendations to the Members of the [U.N.] or to the Security Council or to both on any such questions or matters.³⁹

Broadly, the UNGA enjoys powers to consider various matters pertaining to international peace and security, without overstepping the powers of the Security Council.⁴⁰ Specifically, Article 13 authorizes the General Assembly to make recommendations to “encourag[e] the progressive development of international law and its codification,” and to “realiz[e] . . . human rights and fundamental freedoms.”⁴¹ While the UNGA is not comparable to a domestic legislative body in terms of adopting binding laws, it has leveraged its authority to publish several resolutions on myriad international matters, including on human rights.⁴² These

³² *Workings of the General Assembly*, U.N. GEN. ASSEMB. [hereinafter UNGA], <https://www.un.org/en/ga/> [<https://perma.cc/8AUU-LVPG>] (last visited Dec. 4, 2023).

³³ U.N. Charter art. 18, ¶ 3. Most decisions require a two-thirds majority to pass.

³⁴ UNGA, *supra* note 32.

³⁵ *Id.*; U.N. Charter art. 20. Article 20 requires Members meet in regular annual sessions, unless a special session is requested either by the Security Council or a majority of the General Assembly members.

³⁶ U.N. Charter art. 21.

³⁷ *Id.* art. 17, ¶¶ 1, 3.

³⁸ *Id.* ¶ 2.

³⁹ *Id.* art. 10.

⁴⁰ *See generally id.* arts. 11–16.

⁴¹ *Id.* art. 13.

⁴² U.N. Office of the High Commissioner on Human Rights, *Resolutions and Decisions*, <https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/resolutions-and>

resolutions, however, do not per se constitute a source of international law.

According to Article 38 of the Statute of the International Court of Justice (“ICJ Statute”), the sources of international law are treaties, “international custom, as evidence of general practice accepted by as law,” “general principles of law recognized by civilized nations,” and “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.”⁴³ General Assembly resolutions are not listed as a source of international law that the ICJ can rely on in deciding disputes.⁴⁴ For UNGA resolutions to constitute a source of law, they should either be considered customary international law or reflect rules that are well-accepted in state practice or judicial decisions.⁴⁵ The way in which the General Assembly makes these laws does not automatically elevate it to the status of international law.

However, divergent opinions persist as to whether UNGA resolutions can be considered an established source of international law, such as custom. One viewpoint is that General Assembly resolutions and decisions do not have legal effect, as they are generally recommendatory in nature,⁴⁶ and the General Assembly was never conceived to be a world legislature.⁴⁷ Within this school of thought, UNGA resolutions are not a source of international law that can bind nations, nor are they intended to be such.⁴⁸ Instead, Member States within the General Assembly seek to make a point through their resolution, often driven by concerns about their image rather than to establish state practice, and even though their position may sometimes mirror their actual state practice, the resolutions do not constitute conduct for establishing customary international law.⁴⁹

-decisions [<https://perma.cc/W5JU-FR47>] (last visited Dec. 4, 2023) (listing UNGA resolutions on human rights).

⁴³ Statute of the International Court of Justice, art. 38, ¶ 1(b)–(c). Per Article 59, ICJ decisions do not have precedential value or bind non-parties to the dispute. *Id.*

⁴⁴ *Id.* art. 38, ¶ 1(a)–(d). Article 38 identifies sources of international law the ICJ can rely on: international agreements, custom, general principles of law accepted by civilized nations, and teachings of publicists and judicial decisions as subsidiary sources.

⁴⁵ For a discussion on this point, see Gregory J. Kerwin, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 890 (1983).

⁴⁶ Öberg, *supra* note 4, at 883.

⁴⁷ Stephen M. Schwebel, *The Effects of the Resolutions of the U.N. General Assembly on Customary International Law*, 73 AM. SOC’Y INT’L L. PROC. 301, 301 (1979).

⁴⁸ *Id.* at 302.

⁴⁹ *Id.* at 302–03.

There are also proponents of the view that General Assembly resolutions are a source of international law. Less controversially, in instances involving international governance decisions such as voting or budget issues, the International Court of Justice has found General Assembly resolutions to be binding, and not merely recommendatory.⁵⁰ Proponents of this view argue UNGA resolutions have been considered customary international law even absent state practice or conduct by the ICJ in some cases, which strengthens the argument for treating UNGA resolutions as customary international law.⁵¹

Yet, there remains general resistance to the idea that General Assembly resolutions declare or codify international law. There has also been resistance to declaring international law through a General Assembly resolution passed by most Members that may not include those most impacted by the corresponding resolution.⁵² Indeed, it seems to be a generally accepted position that unless nations unanimously consent to a declaration and their conduct reflects their position, General Assembly resolutions are not customary international law.⁵³ Thus, the Resolution is technically not customary international law, nor can it bind countries as such. Nevertheless, the Resolution is normatively significant and could prove a harbinger for new ways to construe international legal response to issues impacting environmental human rights, notably climate change.

II. TO HAVE AN ENVIRONMENTAL HUMAN RIGHT: THE RESOLUTION AND WHY IT MATTERS

Arguendo the Resolution is not a source of customary international law, but this part examines its normative relevance to international environmental law. It considers the general impact of other UNGA resolutions relevant to the current discussion, as well as the potential for using the Resolution as a platform for reverting to environmental human rights norms as a foundational principle of international environmental law.

⁵⁰ Öberg, *supra* note 4, at 883–84.

⁵¹ Schwebel, *supra* note 47, at 303 (citing decisions of the ICJ finding at least two UNGA resolutions to be binding international law: the Declaration on the Granting of Independence to Colonial Countries and Peoples and the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations).

⁵² *Id.* at 303–04.

⁵³ See Laurence R. Helfer & Ingrid B. Wuerth, *Customary International Law: An Instrument Choice Perspective*, 37 MICH. J. INT'L L. 563, 577 (2016) (discussing this issue and collecting authorities on different positions).

A. *Resolution A/76/300: History and Substance*

As a preliminary matter, the history and substance of the Resolution is briefly examined here. The immediate origins of the Resolution can be traced to the creation of a mandate by the U.N. Human Rights Council (“HRC”) to appoint an “Independent Expert” on human rights and the environment in 2012, which has since been periodically renewed.⁵⁴ The appointed Special Rapporteur on the Environment within the HRC was mandated to “study human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment,” “identify, promote and exchange views on good practices relating to human rights obligations and commitments that inform, support and strengthen environmental policy making,” “promote and report on the realization of human rights obligations [relating to environmental protection] . . . [giving] particular emphasis to practical solutions [regarding] implementation,” identify “challenges and obstacles to full realization of” environmental human rights, participate and contribute to international meetings and conferences, “develop a dialogue . . . with all relevant stakeholders to enhance public awareness” on environmental human rights, and undertake country visits.⁵⁵ Pursuant to the mandate, the Special Rapporteur submits an annual report to both the HRC and the UNGA.⁵⁶ Since its inception, the Special Rapporteur has submitted several reports on different dimensions of environmental human rights.

The first Preliminary Report noted that human rights and environmental protection were inextricably linked, but required further clarification regarding the “nature, scope and content of the obligations.”⁵⁷ The following Mapping Report focused on human rights obligations of states, focusing on procedural obligations “to assess environmental impacts on human rights and to make environmental information public, to facilitate participation in decision-making, and to provide access to

⁵⁴ Human Rights Council Res. 19/10, U.N. Doc. A/HRC/RES/19/10, ¶¶ 2(a), 3–4 (Apr. 19, 2012); Human Rights Council Res. 28/11, U.N. Doc. A/HRC/RES/28/11, ¶¶ 1, 3, 10 (Apr. 7, 2015); Human Rights Council Res. 37/8, U.N. Doc. A/HRC/RES/37/8, ¶ 8(c) (Mar. 22, 2018); Human Rights Council Res. 46/7, U.N. Doc. A/HRC/RES/46/7, ¶ 9(C) (Mar. 23, 2021).

⁵⁵ See U.N. Office of the High Commissioner on Human Rights, *Special Rapporteur on Human Rights and the Environment*, <https://www.ohchr.org/en/special-procedures/sr-environment> [<https://perma.cc/3STX-P47C>] (last visited Dec. 4, 2023) (discussing the context of the mandate).

⁵⁶ *Id.*

⁵⁷ Human Rights Council Res. 22/43, U.N. Doc. A/HRC/22/43, ¶ 54 (Dec. 24, 2012).

remedies for harm”; substantive obligations, “to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors”; and specific obligations in relation to vulnerable groups, “including women, children and indigenous peoples.”⁵⁸ Following reports have focused on myriad topics and aspects, notably, good practices,⁵⁹ implementation,⁶⁰ climate change,⁶¹ biodiversity,⁶² children’s rights,⁶³ clean air,⁶⁴ safe climate,⁶⁵ global water crises,⁶⁶ food impacts,⁶⁷ non-toxic work and play environment,⁶⁸ sustainable development goals,⁶⁹ prevention of future pandemics,⁷⁰ and women and girls.⁷¹

In addition to the diverse thematic reports, the Special Rapporteur’s reports have also consistently focused on persuading States to recognize a general human right to healthy environment. In 2018, the Special Rapporteur, released two reports, one, setting out the Framework Principles on Human Rights and the Environment⁷² and another, calling for a global recognition of environmental human rights, based on existing environmental human rights in many countries around the world.⁷³ Thus, over a decade now, the creation of a special environmental mandate within the HRC has catalyzed efforts that culminated in the Resolution.

The passage of the Resolution has also been catalyzed by growing human rights claims in the context of climate change. Climate change litigants have staked out the position that climate change affects established

⁵⁸ Human Rights Council Res. 25/53, U.N. Doc. A/HRC/25/53, summary (Dec. 30, 2013).

⁵⁹ Human Rights Council Res. 28/61, U.N. Doc. A/HRC/28/61 (Feb. 3, 2015).

⁶⁰ Human Rights Council Res. 31/53, U.N. Doc. A/HRC/31/53 (Dec. 28, 2015).

⁶¹ Human Rights Council Res. 31/52, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016).

⁶² Human Rights Council Res. 34/49, U.N. Doc. A/HRC/34/49 (Jan. 19, 2017).

⁶³ Human Rights Council Res. 37/58, U.N. Doc. A/HRC/37/58 (Jan. 24, 2018).

⁶⁴ Human Rights Council Res. 40/55, U.N. Doc. A/HRC/40/55 (Jan. 8, 2019).

⁶⁵ U.N. Rep. of the Comm. for Programme & Coordination, U.N. Doc. A/74/16, ¶¶ 481–83 (June 28, 2019).

⁶⁶ Human Rights Council Res. 46/28, U.N. Doc. A/HRC/46/28 (Jan. 19, 2021).

⁶⁷ UNGA, Summary, Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/76/179 (July 19, 2021).

⁶⁸ Human Rights Council Res. 49/53, U.N. Doc. A/HRC/49/53 (Jan. 12, 2022).

⁶⁹ G.A. Res. A/77/284, Summary (Aug. 10, 2022).

⁷⁰ Human Rights Council Res. 52/44, U.N. Doc. A/HRC/52/44 (Dec. 21, 2022).

⁷¹ Human Rights Council Res. 52/33, U.N. Doc. A/HRC/52/33 (Jan. 5, 2023).

⁷² Human Rights Council Res. 37/59, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018).

⁷³ John Knox, *First Rep. on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 57, U.N. Doc. A/73/188 (July 18, 2018) (Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment).

human rights, including rights to property, life, and health.⁷⁴ The threats to these human rights in turn have spurred concerns about forced migrations, and the absence of human rights protections for “climate refugees,” within the existing international legal framework.⁷⁵ While few have been successful in establishing a human rights violation claim,⁷⁶ they have infused a sense of urgency by closely examining the human rights implications of climate change. In 2009, and since 2016, the HRC has prepared numerous reports on the various dimensions of human rights and climate change, including migration.⁷⁷ The mandate, combined with increasing focus on the linkage between climate change and human rights at the national, regional, and international level through the HRC, culminated in the HRC adopting Resolution 48/13, recognizing that the “right to a clean, healthy and sustainable environment as a human right that is important to the enjoyment of human rights.”⁷⁸ Resolution 48/13 reaffirmed States’ “obligation to respect, protect and promote human rights, including in all actions undertaken to address environmental challenges, and to take measures to protect the rights of all . . .” and to take “additional measures . . . for those who are particularly vulnerable to environmental

⁷⁴ See, e.g., Rosa Celorio, *The Kaleidoscope of Climate Change and Human Rights: The Promise of International Litigation for Women, Indigenous Peoples, and Children*, 13 ARIZ. J. ENV'T L. & POL'Y 155, 178 (2023) (explaining petitions brought by climate refugees to international legal forums about the impact of climate change on human rights).

⁷⁵ See, e.g., Benoit Mayer, *The International Legal Challenges of Climate-Induced Migration: Proposal for an International Legal Framework*, 22 COLO. J. INT'L ENV'T L. & POL'Y 357, 357 (2011) (proposing an international legal framework on climate change-induced migrations); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENV'T L. REV. 349, 367 (2009) (proposing a three-pronged instrument to address climate change refugees).

⁷⁶ See, e.g., Hum. Rts. Comm., Views Adopted by the Committee Under Article 5(4) of the Operation Protocol, Concerning Communication No. 2728/2016, ¶¶ 2.2, 2.4, 4.5, 10, U.N. Doc. CCPR/C/127/D/2728/2016 (Oct. 24, 2019) (expressing Views adopted by the Committee regarding Ioane Teitiota's refugee status application rejection by the New Zealand government); Lucia Rose, *The World After Teitiota: What the HRC Decision Means for the Future of Climate Migration*, 12 SAN DIEGO J. CLIMATE & ENERGY L. 41, 49 (2021) (explaining the impact of the Committee's decision about Teitiota's application on climate migration).

⁷⁷ Hum. Rts. Comm., Rep. on the Relationship Between Climate Change and Human Rights: H.R.C. 10/61 (2009), H.R.C. 32/23 (2016), H.R.C. 32/24 (2016), H.R.C. 35/13 (2017), H.R.C. 35/14 (2017), H.R.C. 37/CRP.4 (2018), H.R.C. 38/21 (2018), H.R.C. 41/26 (2019), H.R.C. 42/26 (2019), H.R.C. 44/30 (2020), H.R.C. 46/46 (2020), H.R.C. 47/46 (2021), H.R.C. 49/61 (2021), H.R.C. 50/57 (2022), H.R.C. 52/48 (2023), H.R.C. 53/47 (2023), <https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change> [<https://perma.cc/229H-FTXM>] (last visited Dec. 4, 2023).

⁷⁸ Human Rights Council Res. 48/13, U.N. Doc. A/HRC/RES/48/13, at 1, 3 (Oct. 8, 2021).

harm.”⁷⁹ Resolution 48/13 also called upon States and business enterprises to scale up their efforts to achieve sustainable development.⁸⁰ Further, it “invite[d] the General Assembly to consider the matter” of environmental human rights as a subject of international law.⁸¹ Although Resolution 48/13 was supported by the limited number of States serving on the HRC, four of whom abstained,⁸² it marked an important step in bringing the matter of environmental human rights before the universal collective of States, the U.N. General Assembly.

The UNGA adopted Resolution 76/300, recognizing the right to a clean, healthy, and sustainable environment, reflecting the language in Resolution 48/13, on July 28, 2022.⁸³ The Resolution was supported by all nations except eight abstaining Member States—Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, the Russian Federation, and Syria.⁸⁴ Much of the Resolution’s goals are articulated in the Preamble.⁸⁵ In passing the Resolution, the UNGA relied on the purposes and principles of the U.N. Charter for guidance.⁸⁶ It reaffirms the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and recalls the Declaration on the Right to Development, the Declaration of the U.N. Conference on the Human Environment (Stockholm Declaration), the Rio Declaration on Environment and Development, and relevant international and regional human rights treaties and instruments.⁸⁷ It reaffirms prior State obligations and commitments, including commitment to sustainable development, to multilateral environmental agreements, as well as commitments made by business enterprises through the Guiding Principles on Business and Human Rights.⁸⁸ Much of the preamble focuses on specific ways in which human rights are implicated in the environmental context, including special impacts on vulnerable

⁷⁹ *Id.* at 2.

⁸⁰ *Id.*

⁸¹ *Id.* at 3.

⁸² *Id.*

⁸³ G.A. Res. 76/300, *supra* note 1, at 3; Deepa Badrinarayana, *The Hard Expectations of Soft Law*, 39 ENV'T F., 34–39 (2022).

⁸⁴ Press Release, UNGA, With 161 Votes in Favor, 8 Abstentions, General Assembly Adopts Landmark Resolution Recognizing Clean, Healthy, Sustainable Environment as Human Right, U.N. Press Release GA/12437 (July 28, 2022) [hereinafter *Abstentions Discussion*], <https://press.un.org/en/2022/ga12437.doc.htm> [<https://perma.cc/6GPF-UUQR>] (reporting the position of abstaining nations).

⁸⁵ G.A. Res. 76/300, *supra* note 1, at 2.

⁸⁶ *Id.* at 1.

⁸⁷ *Id.*

⁸⁸ *Id.* at 2–3.

members of society, geographically, economically and technologically vulnerable countries, as well as special impacts in the context of climate change.⁸⁹ It also recognizes some of the most pressing environmental threats to human rights—general environmental degradation, climate change, biodiversity loss, desertification and unsustainable development.⁹⁰ It also recognizes human rights that are critical to avert these threats, including the “rights to seek, receive, and impart information, to participate effectively in the conduct of government and public affairs and to an effective remedy.”⁹¹ Above all, it reaffirms “that all human rights are universal, indivisible, interdependent and interrelated.”⁹²

The substance of the Resolution is pithy: 1) it “[r]ecognizes the right to a clean, healthy and sustainable environment as a human right”; 2) it “[n]otes that the right to a clean, healthy and sustainable environment is related to other rights and existing international law”; 3) it “[a]ffirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law”; and 4) it “[c]alls upon States, international organizations, business enterprises and other relevant stakeholders to adopt policies, to enhance international cooperation, strengthen capacity-building and continue to share good practices in order to scale up efforts to ensure a clean, healthy and sustainable environment for all.”⁹³

While the Resolution recognizes a right to environmental human rights, flags the key role of various stakeholders in operationalizing the right, and reiterates the close linkage between other human rights, international law, and multilateral environmental agreements (“MEAS”),⁹⁴ its actual reach and impact as a norm of international law require further examination.

B. The Normative Importance of the Resolution: Lessons from the UDHR

While the passage of the UNGA Resolution on environmental human rights comes at a critical juncture, it begs an important question

⁸⁹ *Id.*

⁹⁰ *Id.* at 3.

⁹¹ G.A. Res. 76/300, *supra* note 1, at 3.

⁹² *Id.* at 2.

⁹³ *Id.* at 3.

⁹⁴ *Id.*

that this Article begins to explore: Is it relevant from an international law perspective? Not only is it relevant because of the number of States—167—that voted for the Resolution,⁹⁵ but because such a resounding favorable vote is an indication of the normative value that States are willing to endorse. Even though normative values are not automatically binding or enforceable, they could serve as important guideposts for the evolution of international law, as well as national laws. The case of international human rights, particularly the Universal Declaration on Human Rights (“UDHR”), is illustrative.

The history of human rights is complex, and many theories abound on what human rights mean, from natural rights theories to contemporary iterations.⁹⁶ The human rights that emerged in the 1940s largely involved two categories of rights: civil and political rights, and social, economic and cultural rights.⁹⁷ Civil and political rights embodied rights to life, personal dignity, freedom from slavery and torture, as well as religious freedom.⁹⁸ Social and economic rights focused on human well-being by recognizing the right to food, housing, medical care, and education.⁹⁹ In contemporary international law, however, the most prominent formal international document on human rights is the UDHR.¹⁰⁰

The General Assembly by Resolution 217 (III) A adopted the UDHR in 1948.¹⁰¹ At the outset, it recognized “the inherent dignity and . . . the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.”¹⁰² It proclaimed, “as the highest aspiration of the common people,” “the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want,” to replace one in which “disregard and contempt for human rights [had] resulted in barbarous acts which [had] outraged the conscience of mankind . . .”¹⁰³ It identified the importance of the rule

⁹⁵ Abstentions Discussion, *supra* note 84.

⁹⁶ See, e.g., Cmiel, *supra* note 10.

⁹⁷ *Id.* at 122–23, 130; HENKIN, *supra* note 11, at 179.

⁹⁸ Cmiel, *supra* note 10, at 122; HENKIN, *supra* note 11, at 186–87; see also International Covenant on Civil and Political Rights, arts. 1–27, Dec. 16, 1966, 999 U.N.T.S. 171.

⁹⁹ International Covenant on Civil and Political Rights, *supra* note 98; see also International Covenant on Social, Economic, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁰⁰ UDHR, *supra* note 5.

¹⁰¹ *Universal Declaration of Human Rights: History of the Declaration*, UNITED NATIONS, <https://www.un.org/en/about-us/udhr/history-of-the-declaration> [<https://perma.cc/37ZY-DHX2>] (last visited Dec. 4, 2023).

¹⁰² UDHR, *supra* note 5, pmbl.

¹⁰³ *Id.*

of law in protecting human rights to avoid “rebellion against tyranny and oppression.”¹⁰⁴ It reiterated the importance of promoting the development of friendly relations between States.¹⁰⁵ It pointed to Member States’ commitment to “fundamental human rights . . . the dignity and worth of the human person and . . . the equal rights of men and women . . . and to promote social progress and better standards of life in larger freedom” under the U.N. Charter; to Member States’ pledge to ensure through the U.N., “the promotion of universal respect for and observance of human rights and fundamental freedoms,” and noted that a full realization of the commitments and pledge could only be achieved by a “*common understanding of [the] rights and freedoms.*”¹⁰⁶

With that background, the UDHR proclaimed:

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the people of Members States themselves and among the peoples of territories under their jurisdiction.¹⁰⁷

In addition to setting out numerous rights, the UDHR also proclaims the equality of all human beings, with everyone being entitled to all the rights and freedoms set out regardless of “race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,” or “political, jurisdictional or international status of the country or territory to which a person belongs, whether . . . independent, trust, non-self-governing or under any other limitation of sovereignty.”¹⁰⁸ In short, the rights and freedoms were inherent to every individual and not vested due to any external status. The UDHR sets out myriad rights, including rights to life, liberty, and security of person;¹⁰⁹ right against slavery or servitude, and slave trade;¹¹⁰ right against torture or cruel and

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.*

¹⁰⁸ UDHR, *supra* note 5, arts. 1–2.

¹⁰⁹ *Id.* art. 3.

¹¹⁰ *Id.* art. 4.

inhuman or degrading treatment or punishment,¹¹¹ right to personhood in law,¹¹² right to equal protection and non-discrimination,¹¹³ right to effective remedy by national tribunal for violation of legally recognized fundamental rights,¹¹⁴ right to freedom of movement,¹¹⁵ and right to property.¹¹⁶ The UDHR further states that “[e]veryone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”¹¹⁷ In addition to a comprehensive set of rights, Article 29 of the UDHR also states that everyone has duties to the communities and binds rights and freedoms to the U.N. Charter.¹¹⁸

While the UDHR is now accepted as a “general articulation of recognized rights,”¹¹⁹ this was not initially true. When the principles of contemporary human rights were introduced in the 1940s, several European nations that had colonies across the world protested the idea; in the United States, where support for the idea was found, slavery was prevalent.¹²⁰ The UDHR, too, therefore, passed at a critical juncture, when there was a high awareness of the global scale of injustice and oppression of peoples, as was the need for adequate international response. Since its passage, the UDHR became the basis for the negotiation of binding human rights treaties, and it was also instrumental in shaping the constitutions of many countries.¹²¹ Both developments are important in evaluating the impact of the UDHR as a UNGA resolution.

As international relations scholars have long observed, international law is mainly “soft law,” but is prevalent when it offers “superior institutional solutions.”¹²² From the perspective of these scholars, soft law is not only necessary to navigate complex and diverse political and

¹¹¹ *Id.* art. 5.

¹¹² *Id.* art. 6.

¹¹³ *Id.* art. 7.

¹¹⁴ UDHR, *supra* note 5, art. 8.

¹¹⁵ *Id.* art. 13.

¹¹⁶ *Id.* art. 17.

¹¹⁷ *Id.* art. 20.

¹¹⁸ *Id.*

¹¹⁹ See RESTATEMENT (THIRD) FOREIGN RELS. L. OF THE U.S. § 701 n.6 (AM. L. INST. 1987).

¹²⁰ Cmiel, *supra* note 10, at 123.

¹²¹ See, e.g., Vijayashri Sripati, *Constitutionalism in India and South Africa: A Comparative Study from a Human Rights Perspective*, 16 TUL. J. INT'L & COMP. L. 49, 49 (2007) (noting the South African Constitution is a post-UDHR product); Nsongurua J. Udombana, *Mission Accomplished? An Impact Assessment of the UDHR in Africa*, 30 HAMLINE J. PUB. L. & POL'Y 335, 350 (2008).

¹²² Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 421 (2000).

socio-economic interests of States, but also because in their view international law is “both an interest-based and a normative enterprise.”¹²³ Yet, States pursue hard law for several reasons, including increasing the “credibility of their commitment,”¹²⁴ reduction of transaction costs,¹²⁵ and optimization of political strategies.¹²⁶ As such, a rational view of law demands international law bind nations and have institutional enforcement mechanisms. Often, the process of international lawmaking straddles soft law and hard law strategies, and soft law instruments can become the basis for the emergence of hard law. The case of UDHR has not been different. Nearly twenty years following the UDHR proclamation, States negotiated two binding agreements fleshing out in greater detail the rights enshrined in the UDHR: the International Covenant on Civil and Political Rights (“ICCPR”),¹²⁷ and the International Covenant on Social, Economic, and Cultural Rights (“ICESCR”).¹²⁸

Both the UDHR and covenants have greatly influenced the articulation of these rights in national constitutions, as well as their enforcement. Such influence, however, is not limited to postcolonial constitutions. Studies have revealed that the UDHR has impacted the U.S. Constitution by silent incorporation, notably through judicial interpretation of both constitutional provisions and congressional legislation applying the rights set out in the UDHR.¹²⁹ Further, there is evidence that the nations incorporating rights in their national constitutions since 1948, when the UDHR was adopted, has increased.¹³⁰ The authors also demonstrate that national constitutions incorporating human rights have increased dramatically after 1948, with the average number of rights listed in the UDHR incorporated in national constitutions peaking in 2005 at 30.5.¹³¹ Most incorporation, however, has been found to occur in emergent countries.¹³²

¹²³ *Id.* at 425.

¹²⁴ *Id.* at 427.

¹²⁵ *Id.* at 430.

¹²⁶ *Id.* at 431.

¹²⁷ G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).

¹²⁸ G.A. Res. 2200A (XXI), International Covenant on Economic, Social and Cultural Rights (Dec. 16, 1966). *See also* HENKIN, *supra* note 11, at 186–94 (discussing the differences between the two agreements).

¹²⁹ David Sloss & Wayne Sandholtz, *Universal Human Rights and Constitutional Change*, 27 WM. & MARY BILL RTS. J. 1183, 1186 (2019).

¹³⁰ *Id.* at 1187, 1190–1203.

¹³¹ *Id.* at 1192.

¹³² Colin J. Beck, Gili S. Drori & John W. Meyer, *World Influences on Human Rights Language in Constitutions: A Cross-Nations Study*, 27 INT’L SOCIO. 483, 493–95 (2012).

Scholars have also collected empirical data demonstrating many countries have incorporated human rights found in international rights documents such as the UDHR in their national constitutions.¹³³ Correlation has been established as well between international covenants and incorporation and state ratification of covenants and domestic performance on human rights.¹³⁴ Based on the vast empirical evidence, some scholars have suggested that given the strong influence of international human rights on many constitutions, the latter should be considered “supra-national documents” and human rights “a coherent transnational legal order by itself.”¹³⁵

The concept of transnational legal order (“TLO”) has been defined as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions.”¹³⁶ To also encompass “what is conventionally considered to be *international public and international private law*,”¹³⁷ TLOs are not limited to national or global legal ordering, but “span legal orders that vary in their geographic scope, from bilateral and plurilateral agreements to private transnational codes to regional governance bodies to global regulatory ordering.”¹³⁸ As a result, TLOs engender transnational coordination that “constrain[s] the sovereign choices” of nations, and the legal norms are legitimated by nations by implementing and enforcing such norms in the national context through regulatory mechanisms.¹³⁹

The narrative on the transnational legal impact of UDHR and the two covenants, especially the impact on national constitutions, begs the question whether a similar trend will be seen in the case of environmental human rights. That is, the Resolution could incrementally result in the negotiation of binding treaties on environmental human rights that flesh out different aspects of the right, followed by the adaptation of explicit rights in national constitutions, which in turn could transform

¹³³ Zachary Elkins, Tom Ginsburg & Beth Simmons, *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT'L L.J. 61, 63 (2013); Beck et al., *supra* note 132, at 494.

¹³⁴ Elkins et al., *supra* note 133, at 63.

¹³⁵ Colin J. Beck, John W. Meyer, Ralph I. Hosoki & Gili S. Drori, *Constitutions in World Society: A New Measure of Human Rights*, SOC. SCI. RSCH. NETWORK (Feb. 2, 2017).

¹³⁶ Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS 3, 11 (Terrence C. Halliday & Gregory Shaffer eds., 2015).

¹³⁷ *Id.* at 19.

¹³⁸ *Id.* at 18–19.

¹³⁹ *Id.* at 19.

the regulatory landscape. Indeed, such a scenario is not inconceivable given that over one hundred countries have directly or through judicial interpretation recognized environmental human rights in their national constitutions.¹⁴⁰ Further, as illustrated in the case of the UDHR, national constitutions that have already recognized these rights could further strengthen the scope of the rights. Notably, studies show that the U.S. Supreme Court's interpretation of the Fourteenth and Fifth Amendments was likely strengthened by the recognition of human rights norms in the U.N. Charter and UDHR.¹⁴¹ Thus, the Resolution as a reflection of the broader political morality on the issue of environmental human rights could be influential in shaping domestic judicial decisions, and thus domestic laws and regulations, even in countries that already recognize environmental human rights. This is especially important as climate change litigation based on human rights and related claims continues to grow.¹⁴²

On the other hand, since many nations already have enshrined environmental human rights in their constitutions, those provisions beg the question whether the Resolution brings any more value. In examining this question, the lessons from the transformative role of the UDHR should not be transferred verbatim, but rather in spirit. The story of the UDHR is a story of normative transitions between different legal orderings and institutions. The passage of the Resolution reflects a similar transition. Whereas the UDHR represents an era where fewer nations articulated human rights in their national constitutions, and hence the translation of human rights norms into national documents is significant, in the case of environmental human rights, the reverse is true. Much of the impetus for internationalization of the norm of environmental human rights has emerged from a gradual recognition of environmental rights

¹⁴⁰ See generally GELLERS, *supra* note 23; Stephens, *supra* note 23.

¹⁴¹ Sloss & Sandholtz, *supra* note 129, at 1247–48. In making their case, the authors point especially to the Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Bolling v. Sharpe*, 347 U.S. 497 (1954), arguing the two unanimous decisions should be understood through the lens of the Truman administration's foreign policy, given "the dearth of legal authority to support those decisions." They also assert that given the psychological and political undesirability of relying on the U.N. Charter under the Supremacy Clause to overturn *Plessy v. Ferguson*, 163 U.S. 537 (1896), the Court "incorporated the political morality of human rights into its interpretation of the Equal Protection Clause through a process of silent incorporation." The authors also note the reference to the U.N. Charter and human rights in several briefs in various cases on the issue of equal protection.

¹⁴² For an overview of ongoing climate change litigation, see *Climate Change Litigation Databases*, CLIMATE CASE CHART, <https://climatecasechart.com> [<https://perma.cc/HPM3-PRPW>] (last visited Dec. 4, 2023).

by domestic courts.¹⁴³ Hence, the question in the case of environmental human rights is not just the influence that the Resolution may have on national constitutions, but in transforming other international norms and laws that directly or indirectly affect environmental human rights. As TLO scholars have admitted, the theory could “create a false sense of coherence,”¹⁴⁴ but the process of transnational ordering of norms is much more dynamic. It is this dynamism that will perhaps unfold as a result of the Resolution, as discussed below.

C. *The Resolution as an Opportunity to Rethink International Environmental Law Norms on Development*

The origins of modern international environmental law can be traced to the 1970s. The Club of Rome’s report, *The Limits of Growth*, warned against exponential growth in “population, food production, industrialization, pollution, and consumption of nonrenewable natural resources,” as early as 1972.¹⁴⁵ The same year, the U.N. organized the Stockholm Conference on the Human Environment (“UNCHE”) to create an international framework for environmental protection.¹⁴⁶ The Stockholm Declaration on the Human Environment adopted at UNCHE proclaimed an early version of environmental human rights, that “[b]oth aspects of man’s environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights—even the right to life itself.”¹⁴⁷ Although UNCHE did not proclaim a distinct environmental human right, it recognized the linkage between humans in a manner that had become ingrained in the judicial interpretation in some jurisdictions that have interpreted the right to environment as part of the constitutional right to life.¹⁴⁸

Principle 1 further stated the “common conviction” that “[m]an has the fundamental right to freedom, equality and adequate conditions

¹⁴³ See Boyle, *supra* note 7, at 483. Although there is no detailed empirical study on the issue, a chronological analysis of the emergence of the right to environment would likely reveal this to be the case.

¹⁴⁴ Halliday & Shaffer, *supra* note 136, at 21.

¹⁴⁵ DONELLA H. MEADOWS, DENNIS L. MEADOWS, JØRGEN RANDERS & WILLIAM W. BEHRENS III, *THE LIMITS TO GROWTH* 25 (1972), <http://www.donellameadows.org/wp-content/userfiles/Limits-to-Growth-digital-scan-version.pdf> [<https://perma.cc/NSU9-292J>].

¹⁴⁶ See *supra* Introduction.

¹⁴⁷ Rep. of the U.N. Conference on the Human Environment, at 3, U.N. Doc. A/CONF.48/14/Rev.1 (1972).

¹⁴⁸ See generally Stephens, *supra* note 23, at 445–46.

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.”¹⁴⁹ It also condemned and called for the elimination of “policies promoting or perpetuating *apartheid*, racial segregation, discrimination, colonial and other forms of oppression and foreign domination.”¹⁵⁰ Principle 16 enunciated support for demographic policies to manage population growth, “without prejudice to basic human rights.”¹⁵¹ Interestingly, the development occurred a few years following the adoption of UDHR, as well as the ICCPR and ICESCR, indicating a continuum in the evolution of the human rights norm in the context of environmental protection. Other principles called for the protection and better management of the environment for the present and future generations.¹⁵²

However, UNCHE and the Stockholm Declaration were fraught with controversy from the beginning. Many developing nations resisted the idea of limiting development as they faced the specter of postcolonial and other internal problems. Their sentiment was pithily articulated by the prime minister of India, Indira Gandhi, who declared that poverty, not wealth creation, was the greatest polluter.¹⁵³ UNCHE reflects these competing interests as well. For one, Principle 21 reiterated the sovereign right of States to “exploit their own resources pursuant to their own environmental policies,” so long as such exploiting did not cause transboundary harm.¹⁵⁴ Principle 23 also articulated the need to take a nuanced approach, keeping in mind differences in value in countries, as well as feasibility of standards that could be appropriate for advanced economies but not developing ones.¹⁵⁵ Principle 26 reiterated the importance of cooperatively negotiating multilateral and bilateral agreements to address environmental problems without impinging on national sovereignty; as reiterated, international organizations had an important role to play in addressing the issue.¹⁵⁶ Nevertheless, support in the UNGA for

¹⁴⁹ *Stockholm Declaration*, *supra* note 16, at 71.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ DTE Staff, *Looking Back at Stockholm 1972: What Indira Gandhi Said Half a Century Ago on Man and Environment*, DOWN TO EARTH (May 31, 2022), <https://www.downtoearth.org.in/news/environment/looking-back-at-stockholm-1972-what-indira-gandhi-said-half-a-century-ago-on-man-environment-83060> [<https://perma.cc/QTL4-ECE4>].

¹⁵⁴ *Stockholm Declaration*, *supra* note 16, at 72.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

the Declaration was strong, with 114 favorable votes, abstentions mainly from the Soviet bloc of countries, and none opposed.¹⁵⁷

Although UNCHE married the language of rights with environmental protection, it did not appeal to universalism in the same way the UDHR strove to do. At its very inception, UNCHE reflected an awareness of the challenges in reconciling the positions of developed and developing nations vis-à-vis environmental protection. The extent of the wedge became evident with the UNGA's adoption of the Declaration on the Right to Development ("DRD").¹⁵⁸ Unlike UNCHE, the DRD set out to establish the right to develop as a universal right within the framework of the UDHR and the ICCPR and ICESCR.¹⁵⁹ Article 1 of the DRD states that the "right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social cultural, and political development, in which all human rights and fundamental freedoms can be fully realized."¹⁶⁰ It further states, "the human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their national wealth and resources."¹⁶¹ The "active participant and beneficiary" of the DRD is the "human person," and human beings are vested with the responsibility to develop and to promote and protect "appropriate political, social and economic order for development," as a result of their human rights and fundamental freedoms.¹⁶² The DRD also sets out the responsibilities of States in achieving the right to development.¹⁶³

Support for the DRD resolution was also robust, with 146 countries voting in favor, with 8 abstentions,¹⁶⁴ and 1 unfavorable vote cast by the United States.¹⁶⁵ Some Nordic nations resisted the DRD because of the inherent conflict with human rights, which were instruments to

¹⁵⁷ See generally Louis B. Sohn, *The Stockholm Declaration on the Human Environment*, 14 HARV. L.J. 423, 502 (1973).

¹⁵⁸ G.A. Res. 41/128, at 2 (Dec. 4, 1986).

¹⁵⁹ *Id.* at 3.

¹⁶⁰ *Id.* at 2.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ Surya P. Subedi, *Declaration on the Right to Development*, U.N. AUDIOVISUAL LIBR. INT'L L. (2021), <https://legal.un.org/avl/ha/drd/drd.html> [<https://perma.cc/PHF6-YX2G>].

¹⁶⁵ *Id.*

fight oppression and hold States accountable to individuals, and collective rights, which included government developmental policies to achieve collective goals.¹⁶⁶ Third World countries' concern for ensuring economic growth after years of colonization was unpersuasive from this perspective, since to opposing nations it would be tantamount to allowing a fox in the henhouse of human rights, i.e., allowing States to pursue a right that could run contrary to human rights, including adequate conditions of life.¹⁶⁷

The indubitable contemporary relevance of the right to development is evident from the ongoing efforts to negotiate a convention on the right to development, with the objective of promoting “the full, equal and meaningful enjoyment of the right to development by every human person and all peoples everywhere, and to guarantee its effective operationalization and full implantation at the national and international levels.”¹⁶⁸ The problem, however, is that the focus on right to development has skewed the focus on environmental human rights. This outcome is inevitable because of the inextricable link between resource use and environmental damage. But as discussed below, it gained such momentum as to recast the international environmental agenda, away from a human rights perspective.

Two additional major global environmental conferences followed the Stockholm Conference, the 1992 U.N. Conference on Environment and Development (“UNCED,” or “Earth Summit”) in Rio de Janeiro and the 2002 World Summit on Sustainable Development in Johannesburg (“WSSD,” or “Johannesburg Conference”).¹⁶⁹ These conferences reframed environmental concerns as a development issue, casting aside language on human rights. The UNCED recast global environmental concerns as one of sustainable development. The Rio Declaration on Environment and Development (“Rio Declaration”) that was adopted at UNCED recognized only two rights: 1) the sovereign right of nations to exploit their own natural resources,¹⁷⁰ and 2) the right to sustainable development.¹⁷¹ The Rio Declaration contains no human rights language, unlike

¹⁶⁶ See generally Ragnar Hallgren, *The U.N. and the Right to Development*, 22 PEACE RSCH. 31, 32 (1990).

¹⁶⁷ *Id.*

¹⁶⁸ Rep. of the Draft Convention on the Right to Development, art. I, U.N. H.R.C. WG.2/21/2/Add.1 (2020).

¹⁶⁹ See *supra* Introduction.

¹⁷⁰ *Rio Declaration*, *supra* note 18, annex 1.

¹⁷¹ See *id.* at 2. Although Principle 3 does not use the term “sustainable development,” its

the UNCED. However, Agenda 21, labeled the Action Plan for Earth,¹⁷² or a blueprint for nations to follow, included some rights language, although it remains a non-binding document and too detailed and diffuse to provide concrete normative direction. The thrust of the Rio Declaration was sustainable development, which enunciated principles focused on balancing environmental protection and economic/development interests of States through a combination of international and national legislation and measures.¹⁷³ Importantly, it introduced environmental management principles, notably precautionary approach, environmental impact, and polluter pays principles.¹⁷⁴ It also called on nations to develop national and international laws on liability and compensation for pollution and environmental harm.¹⁷⁵ However, the link between human rights and environmental harm was severed. Arguably, the Rio Declaration emphasized various mechanisms to strengthen environmental protection: the creation of domestic legislation¹⁷⁶ and institutions to address environmental problems, recognizing nations have a duty not to cause transboundary harm.¹⁷⁷

Parallel geopolitical developments during the same time period provide insights into the reasons for this shift, primarily the end of the Cold War.¹⁷⁸ The fall of the Berlin Wall also heralded the emergence of a new world order amid a wave of economic liberalization and globalization that promised to ride a tide that lifts all boats.¹⁷⁹ Nations renegotiated the General Agreement on Tariffs and Trade in 1994 ("GATT") along with a range of agreements, including an agreement establishing a dispute settlement mechanism with compulsory jurisdiction, managed under the aegis of an organization whose establishment had eluded nations

reference to the right to develop to meet the environmental and development needs of future generations is the generally accepted definition of the term.

¹⁷² U.N. Conference on Environment and Development, *Agenda 21*, U.N. Doc. A/CONF.151/PC/100/Add.1 (1992).

¹⁷³ See generally *Rio Declaration*, *supra* note 18.

¹⁷⁴ *Id.* at 3.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* (acknowledging such regulation would not always be cost-effective in developing countries).

¹⁷⁷ *Id.* at 1 (reinforcing the right of permanent sovereignty over natural resources and the right of states to pursue their own environmental and development policies).

¹⁷⁸ For an overview of the sentiment regarding economic policies at the time, see generally Nicholas Bayne, *International Relations After the End of the Cold War*, 29 GOV'T & OPPOSITION 3, 5–6 (1994).

¹⁷⁹ See generally THOMAS FRIEDMAN, *THE WORLD IS FLAT* 47 (2005).

since the end of World War II—the World Trade Organization.¹⁸⁰ The significance of the moment on environmental human rights cannot be overstated. Whereas nations were willing to negotiate terms to bring developing countries to the table,¹⁸¹ including the creation of a binding treaty with compulsory dispute settlement and enforcement mandate to facilitate free movement of goods and services unobscured by tariffs or non-tariffs barriers,¹⁸² no such attention was given to environmental human rights. Indeed, environmental protection measures were permitted under GATT only under certain exceptional circumstances, and then only in the least trade-restrictive manner.¹⁸³ Disputes that have arisen since 1994 bear testimony to the limited utility of Article XX exceptions.¹⁸⁴

Moreover, the Rio Declaration itself reflected this shift; it proclaimed that sustainable development was a core human concern, meaning that human beings were “entitled to a healthy and productive life in harmony with nature.”¹⁸⁵ It further urged States to cooperate in promoting:

a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.¹⁸⁶

¹⁸⁰ John H. Jackson, *The Case of the World Trade Organization*, 84 INT’L AFFS. 437 (2008).

¹⁸¹ For a discussion on the negotiating strategies to involve developing countries, see Trish Kelly, *Why Are Developing Countries Still Negotiating?: The WTO’s Success at the Doha Round*, 48 CHALLENGE 109, 111, 113 (2005).

¹⁸² General Agreement on Tariffs and Trade, art. I, *opened for signature* Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

¹⁸³ *Id.* art. XX.

¹⁸⁴ For a discussion on the interpretation of Article XX environmental exceptions, see generally Dominic A. Gentile, *International Trade and the Environment: What Is the Role of the WTO?*, 20 FORDHAM ENV’T L. REV. 197, 230 (2009); Lisa Benjamin, *Renewable Energy and Trade: Meeting the Paris Agreement’s Goals Through a Two-Step Jurisprudential Advance*, 22 MINN. J.L. SCI. & TECH. 1, 14 (2021); Carrie Wofford, *A Greener Future at the WTO: The Refinement of WTO Jurisprudence on Environmental Exceptions to GATT*, 24 HARV. ENV’T L. REV. 563, 566 (2000); see also Padideh Ala’i, *Free Trade or Sustainable Development? An Analysis of the WTO Appellate Body’s Shift to a More Balanced Approach to Trade Liberalization*, 14 AM. U. INT’L L. REV. 1129, 1137 (1999) (discussing Article XX jurisprudence, but arguing harmonious evolution of WTO and environmental goals is possible).

¹⁸⁵ *Rio Declaration*, *supra* note 18, annex I, princ. 12.

¹⁸⁶ *Id.* at 3.

It also discouraged the use of unilateral measures to deal with environmental challenges beyond the national jurisdiction that were not based on international consensus.¹⁸⁷ This shift away from developing an environmental human rights norm was evident in the Johannesburg Declaration adopted in 2002 at the WSSD, the follow-up meeting to UNCHE and UNCED.¹⁸⁸ While the Johannesburg Declaration cursorily acknowledged problems such as biodiversity loss and fish stock depletion, it focused primarily on the economic aspects of sustainable development and poverty eradication.¹⁸⁹

Environmental human rights, on the other hand, witnessed a steady decline, with focus shifting to sustainable development to encourage environmental problem solving through technological and trade-based solutions. The most notable contemporary example of this shift is the U.N. Framework Convention on Climate Change (“UNFCCC”), which was opened for signature at UNCED and specifically states:

The Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.¹⁹⁰

The Kyoto Protocol, which nations negotiated to set out concrete mitigation and adaptation obligations, echoed the same language. Article II mandated Annex I Parties implement their obligations in a manner that would not only minimize “adverse effects of climate change” but also “effects on international trade, and social, environmental and economic impacts on other Parties.”¹⁹¹ While many Annex I Parties had been aware of the problem of climate change since UNCED, the General Assembly

¹⁸⁷ *Id.*

¹⁸⁸ WSSD, *Johannesburg Declaration on Sustainable Development*, U.N. Doc. A/CONF .199/20 (Sept. 4, 2002).

¹⁸⁹ *See generally id.*

¹⁹⁰ U.N. Framework Convention on Climate Change, art. 3, ¶ 3, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

¹⁹¹ Kyoto Protocol to the U.N. Framework Convention on Climate Change, art. 2, ¶ 3 Dec. 10, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

convened a special session in which it tasked the World Meteorological Organization (“WMO”) to conduct a study on climate change.¹⁹² And although the study affirmed the causal link between greenhouse gas (“GHG”) emissions and climate change, resulting in the formation of the Intergovernmental Panel on Climate Change (“IPCC”) in 1989,¹⁹³ and although the IPCC confirmed the link between climate change and GHG emissions, which became the basis for UNFCCC negotiations, after the Cold War, nations focused on expanding trade policies without a balancing climate change policy.¹⁹⁴ Indeed, the past few decades have witnessed an expansion in trade and an increase in GHG emissions, with newly liberalized economies such as China and India rapidly emerging as major GHG emitters.¹⁹⁵ Simultaneously, trade and competition, in conjunction with the principle of common but differentiated responsibility that was developed at UNCED, set the stage for failed collective bargaining on climate change, resulting in the failure to legally bind nations to reduce GHG emissions and the shift to a system of voluntary commitments, beginning with the Copenhagen Accord negotiated in 2007.¹⁹⁶

The result of the shifts that have occurred since UNCED, particularly in the climate change context, is a sense of government failure among many people across the world, and an increased sense of vulnerability to the erosion of rights.¹⁹⁷ The first notable human rights claim to articulate and respond to this sentiment was the 2005 Inuit Circumpolar Council’s petition to the Inter-American Commission on Human Rights (“the Petition”), seeking relief from violations resulting from global warming caused by acts and omissions of the United States.¹⁹⁸ Although dismissed

¹⁹² John Zillman, *A History of Climate Activities*, 58 WMO BULL. 141 (2009), <https://public.wmo.int/en/bulletin/history-climate-activities> [<https://perma.cc/BGQ5-6C4E>] (last visited Dec. 4, 2023).

¹⁹³ See *About IPCC*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, <https://www.ipcc.ch/about/> [<https://perma.cc/WS53-9TDN>] (last visited Dec. 4, 2023).

¹⁹⁴ Zillman, *supra* note 192.

¹⁹⁵ See *Global Emissions*, CTR. FOR CLIMATE & ENERGY SOLS., <https://www.c2es.org/content/international-emissions/> [<https://perma.cc/832Z-D9DK>] (last visited Dec. 4, 2023).

¹⁹⁶ See Melissa J. Durkee, *The Pledging World Order*, 48 YALE J. INT’L L. 1, 16–24 (2023); David Hunter, *Implications of the Copenhagen Accord for Global Climate Governance*, 10 SUSTAINABLE DEV. L. & POL’Y 4, 5 (2010).

¹⁹⁷ Christiana Figueres, Yvo de Boer & Michael Zammit Cutajar, *For 50 Years, Governments Have Failed to Act on Climate Change. No More Excuses*, GUARDIAN (June 2, 2022), <https://www.theguardian.com/commentisfree/2022/jun/02/for-50-years-governments-have-failed-to-act-on-climate-change-no-more-excuses> [<https://perma.cc/S7LE-DKSL>].

¹⁹⁸ Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United

on the ground that “the information provided [did] not enable [the Commission] to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration,”¹⁹⁹ the Petition set the stage for reviewing climate change from the lens of human rights. It galvanized the Office of the United Nations High Commissioner for Human Rights (“OHCHR”) to begin a systematic study of the implications of climate change on human rights.²⁰⁰ In 2009, OHCHR released its first report on the relationship between climate change and human rights,²⁰¹ followed by biannual reports since 2016.²⁰² OHCHR also established the human rights and the environment mandate in 2012, appointing a special rapporteur to study the relationship between the two areas.²⁰³ The Resolution is a product of the OHCHR’s work over the past few years, and it is emblematic of an important reversion to environmental human rights. Further proof of the normative shift can be found in the incorporation of human rights language in the 2015 Paris Agreement, albeit cursorily, and in the 2021 Glasgow Climate Pact. The Paris Agreement urges nations to “respect, promote and consider their respective obligations on human rights,”²⁰⁴ and the Glasgow Climate Pact reiterates the human rights language in the Paris Agreement.²⁰⁵ The Sharm el-Sheikh Implementation Plan adopted at

States, Sheila Watt-Cloutier et al. (Dec. 7, 2005), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2005/20051208_na_petition.pdf [<https://perma.cc/8JNB-7CHZ>].

¹⁹⁹ Letter from Ariel E. Dulitzky, Assistant Exec. Sec’y, Inter-Am. Comm’n on Hum. Rts., to Sheila Watt-Cloutier et al., Int’l Chair, Inuit Circumpolar Council (Nov. 16, 2006), https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2006/20061116_na_decision.pdf [<https://perma.cc/Q2SZ-ADZZ>].

²⁰⁰ John H. Knox, *Bringing Human Rights to Bear on Climate Change*, 9 CLIMATE L. 165 (2019); David R. Boyd, *Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment*, at 27, 44 U.N. Doc. A/74/161 (2019), <https://www.ohchr.org/sites/default/files/Documents/Issues/Environment/SREnvironment/Report.pdf> [<https://perma.cc/8VNM-J24W>].

²⁰¹ Rep. of the Off. of the U.N. High Comm’r for Human Rights on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009), <https://www.ohchr.org/sites/default/files/Documents/Press/AnalyticalStudy.pdf> [<https://perma.cc/76GE-WW7Y>].

²⁰² *Reports on Human Rights and Climate Change*, OFF. HIGH COMM’R FOR HUM. RTS., <https://www.ohchr.org/en/climate-change/reports-human-rights-and-climate-change> [<https://perma.cc/229H-FTXM>] (last visited Dec. 4, 2023).

²⁰³ Human Rights Council Res. 19/10, U.N. Doc. A/HRC/RES/19/10 (Apr. 19, 2012).

²⁰⁴ Paris Agreement, *supra* note 25, pmbl.

²⁰⁵ U.N. Framework Convention on Climate Change, *Glasgow Climate Pact*, U.N. Doc. FCCC/PA/CMA/2021/10/Add.1, Decision 1/CP.26 (Mar. 8, 2022) [hereinafter *Glasgow*]

COP27 in Egypt articulates the shift to environmental human rights norms more fully.

The Preamble acknowledges not only that climate change is a common concern, but also that when taking action Parties should:

[P]romote and consider their respective obligations on human rights, the right to a clean, healthy and sustainable environment, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity²⁰⁶

This latest acknowledgment of the norm of environmental human rights coincides with increased human rights litigation globally.²⁰⁷ This indicates a firm shift back to the centrality of human rights in addressing environmental concerns, which is important to craft reasonable and thoughtful policies not divorced from the ultimate beneficiaries of international law, or law generally—people.

The normative shift is evidenced beyond climate change treaties as well. In the recent COP15 meeting under the Convention on Biological Diversity (“CBD”), Parties adopted the Kunming-Montreal Global Biodiversity Framework (“GBF”), which not only includes recognition of specific rights of indigenous and local communities, but also of general environmental human rights. Specifically, GBF references the Resolution and states that “the implementation of the Framework should follow a human-rights based approach respecting, protecting, promoting and fulfilling human rights. The Framework acknowledges the human right to a clean, healthy and sustainable environment.”²⁰⁸

Of course, the outcome of introducing the language in varying contexts, including the domestic context, remains to be seen. It also does not imply the language will gain foothold in all international environmental

Climate Pact], https://unfccc.int/sites/default/files/resource/cop26_auv_2f_cover_decision.pdf [<https://perma.cc/99NF-Z43F>].

²⁰⁶ *Sharm el-Sheikh Implementation Plan*, *supra* note 29, at 1–2.

²⁰⁷ See *supra* Section II.B for discussions on UDHR.

²⁰⁸ U.N. Convention on Biological Diversity, *Kunming-Montreal Global Biodiversity Framework*, U.N. Doc. CBD/COP/15/L.25, Draft Decision Submitted by the President, annex ¶ 14 (Dec. 18, 2022), <https://www.cbd.int/doc/c/e6d3/cd1d/daf663719a03902a9b116c34/cop-15-l-25-en.pdf> [<https://perma.cc/959Q-NEJ5>].

treaties. The recently concluded negotiations under the U.N. Convention on the Law of the Seas is an example. The draft agreement concluded therein does not replicate the Resolution or include any environmental human rights language, but it is limited to the rights of indigenous people and sovereign rights.²⁰⁹ Perhaps some agreements, such as those involving natural resource use and management, do not implicate environmental human rights in the same manner. However, this example demonstrates the Resolution's effect on environmental human rights broadly is still evolving. Nevertheless, given the impact it has had in the context of climate change and biological diversity, the Resolution's potential to move the debate back to environmental human rights is significant.

III. THE RESOLUTION SHOULD BE TREATED AS *ERGA OMNES* AND INFLUENCE THE REFORM OF GLOBAL ENVIRONMENTAL GOVERNANCE

In early 2000 when the world was in the thrall of the new era of globalization, a study group of the International Law Commission ("ILC") released a report, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law."²¹⁰ According to the ILC, fragmentation of "social action and structure" as a consequence of globalization had caused "the emergence of specialized and (relatively) autonomous rules or rule-complexes, legal institutions and spheres of legal practice."²¹¹ This emergence of specialized legal fields such as "human rights," "trade law," "environmental law" resulted in issues that had been governed by "general international law" being replaced by issue-specific principles and institutions.²¹² The ILC asserted this development created both institutional and substantive challenges, but focused on the latter, i.e., managing potential conflicts between special regimes and/or special regimes with international law.²¹³ Essentially, the ILC expressed concern that the emergence of "self-contained

²⁰⁹ See generally U.N. General Assembly, *Draft Agreement Under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction* (Mar. 4, 2023), https://www.un.org/bbnj/sites/www.un.org/bbnj/files/draft_agreement_advanced_unedited_for_posting_v1.pdf [<https://perma.cc/B8XE-QNGD>].

²¹⁰ See *ILC Fragmentation Report*, *supra* note 9.

²¹¹ *Id.* at 10.

²¹² *Id.*

²¹³ *Id.* at 10–11.

regimes' and geographically or functionally limited treaty-systems, [created] problems of coherence in international law."²¹⁴

The ILC then explicated four general principles and practices through for the continuing coherence of international law. First, that international law was a legal system, which meant that international law was not a random assemblage of rules but a coherent collection of hierarchical norms differentiated by their general or specific character as well as their time of creation.²¹⁵ It further noted that norms could interact with each other, in some instances lending to synergetic interpretation, but in others normative conflicts could arise. In the latter situation, the ILC reiterated that the norms had to be interpreted per the Vienna Convention on the Law of Treaties ("VCLT"), particularly articles 31–33.²¹⁶ Finally, the ILC articulated the principle of harmonization, that is, where multiple norms had bearing on an issue, their interpretation should create compatible obligations.²¹⁷

As part of an extensive discussion on each of the above stated principles and practices, the ILC Fragmentation Report explained various rules, notably VCLT, bearing on the relationship between special regimes and rules—*lex specialis*—and successive norms—*lex posterior*—as well as the hierarchical relationship between certain international norms, noting that some rules were superior to others, specifically those that were "fundamental" or that expressed "elementary considerations of humanity" or were "intransgressible."²¹⁸ In such cases, the ILC concluded those fundamental norms, or *jus cogens* generally, would have precedence.²¹⁹ Even *jus cogens*, however, would not override the rules that created obligations to the "international community as a whole," i.e., obligations *erga omnes*, which because of their universal applicability vested in every State the right to "invoke the responsibility of the State violating such obligations."²²⁰ The ILC cited as examples "certain obligations under the 'the principles and rules concerning the basic rights of the human person,' as well as of some obligations relating to the global commons."²²¹

²¹⁴ *Id.* at 11.

²¹⁵ *Id.* at 15.

²¹⁶ *ILC Fragmentation Report*, *supra* note 9, at 20–21, 23, 25, 39–42, 44, 68.

²¹⁷ *Id.* at 15–16.

²¹⁸ *Id.* at 83.

²¹⁹ *Id.*

²²⁰ *Id.* at 22.

²²¹ *Id.* at 22–23.

While the Resolution is not binding international law, it nevertheless articulates an important norm at an important time, especially in regard to global environmental problems. Further, the development of multiple specific or special environmental treaties and regimes to address myriad environmental problems is very much symbolic of the fragmentation problem. Whereas early general principles of international law response to international environmental disputes revolved around the questions of rules regulating transboundary harm,²²² since UNCHE, specific treaties with specific legal architecture and institutions have emerged to deal with environmental problems. Further, some of the principles articulated in the Rio Declaration, such as the precautionary principle, as well as the general concept of sustainable development, have become special norms of international environmental law that have been further built upon in dealing with specific environmental problems such as climate change.

However, as discussed previously, the insufficiency of the special regimes in reconciling the conflicting norms, notably in relation to trade and investment or general economic policies and environmental protection, has, specifically against the backdrop of colonialism, resulted in the resurgence of a human rights–focused approach to international environmental law. The Resolution in that sense could be construed not only as an example of harmonization of two special norms—human rights and environmental protection—but also as the creation of a new universal norm. In effect, the Resolution could constitute an obligation *erga omnes*.²²³ The implication of such a construction is that States have an international obligation vis-à-vis environmental human rights. This means States have a right to invoke the responsibility of other States for violating this particular right.

Further, for greater efficacy, environmental human rights as obligations *erga omnes* should serve as the basis for reviewing current responses to international environmental problems, notably climate change, because it involves a space that is loosely treated as a global commons, the atmosphere, and because it impinges on the territorial integrity of nations. Consequently, not only would nations be generally responsible for violating environmental human rights in a transboundary

²²² For a thorough discussion of the emergence of the principle of transboundary harm, see Maria L. Banda, *Regime Congruence: Rethinking the Scope of State Responsibility for Transboundary Environmental Harm*, 103 MINN. L. REV. 1879, 1924 (2019).

²²³ The author will explore this idea further in a separate article. For an explanation on obligations *erga omnes* generally, see *ILC Fragmentation Report*, *supra* note 9, at 22.

context, but also, nations should be called to reexamine existing international treaties that could potentially conflict with a right to a clean, safe, and sustainable environment, as well as reexamine existing environmental treaties from a human rights perspective.

For example, as mentioned earlier,²²⁴ climate change treaties did not contain human rights language until its recent, perfunctory introduction in the Paris Agreement, and its following incorporation in the Glasgow Climate Pact and Sharm el-Sheikh Implementation Plan.²²⁵ With the introduction of this language, Parties also removed the trade-related language included in UNFCCC and the Kyoto Protocol, both of which called on Parties to minimize adverse international trade impacts as well.²²⁶ This is an example of harmonization or removal of conflicting language that also signals a departure from the erstwhile notion that trade and other interests like climate mitigation and human rights could be part of the same set of legal goals. Of course, the removal of the trade language does not by itself indicate the change was motivated by the elevation of environmental human rights to the status of *erga omnes* obligation. Rather, it is an indication of how the adoption of environmental human rights could influence the evolution of global environmental governance.

Since the 1990s, efforts to establish WTO were paralleled by efforts to establish a global environmental organization, with the objective of establishing systematic rules and institutional structures to manage the global environment.²²⁷ The idea was to abandon the ad hoc treaty approach and refocus on efforts since UNCHE by creating hierarchical rules and institutions that could not only coordinate global efforts to manage environmental issues, but also create a somewhat balanced international legal structure to minimize the impacts of fragmentation, both substantive and institutional. However, those efforts failed, perhaps primarily due to the direct conflict between trade and economic interests and environmental protection. Still, the Resolution signals environmental human rights have a universal appeal, which is especially important in the context of climate change, as it presents existential threats to humanity, and more imminently to vulnerable nations.²²⁸ Given this situation, this

²²⁴ See Paris Agreement, *supra* note 25.

²²⁵ See *id.*; Sharm el-Sheikh Implementation Plan, *supra* note 29; Glasgow Climate Pact, *supra* note 205.

²²⁶ Kyoto Protocol, *supra* note 191, art. 2, ¶ 3; UNFCCC, *supra* note 190, art. 3, ¶ 5.

²²⁷ See, e.g., ESTY & IVANOVA, *supra* note 22.

²²⁸ See generally G.A. Res 76/300, *supra* note 1.

Article proposes nations reconsider the appropriate legal response to environmental protection and management.

To date, nations have dabbled with principles that purportedly unite fractured interests of developed and developing countries, including principles of common but differentiated responsibilities.²²⁹ While these principles are important for equitable allocation of responsibility among nations based on their contribution to specific issues, such as ozone layer depletion or even climate change, they are ineffective for addressing fundamental drivers of these problems, notably a history of inadequately regulated global economic policies and growth. The history of colonization, for instance, is a history of failed international legal governance, to the extent principles of sovereignty that undergrid international law were Eurocentric, excluded non-European nations, and resulted in state-sanctioned exploitation of other territories.²³⁰ The resulting impoverishment of nations across the world is at the center of discord over international legal responses to environmental problems such as climate change and biodiversity loss, which are driven by trade and economic policies similar to those that historically drove unequal and unjust exploitation of resources and territories, as well as human rights violations.²³¹ Yet, as climate change demonstrates, bringing more countries into the fold of similarly exploitative economic and trade policies, unfettered by balancing principles of human rights or environmental protection, has escalated the threat to human rights in developing countries, even as some powerful developing nations, such as China and India, have used their history and economic status as a double-edged sword to pursue the very economic policies they claim to be victims of. These policies threaten fundamental human rights, both of their own citizens and of other nations; indeed, continuing increases in GHG emissions continue to threaten low-lying island nations and other similarly vulnerable ones.²³²

²²⁹ For a critical analysis of the principle, see Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 298 (2004).

²³⁰ See, e.g., ANTHONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (James Crawford et al. eds. 2005); Daniel Butt, *Colonialism and Post-colonialism*, in INTERNATIONAL ENCYCLOPEDIA OF ETHICS 892, 896 (2013); Anthony Anghie, *Francisco de Vitoria and the Colonial Origins of International Law*, 5 SOC. & LEGAL STUD. 321, 420 (1996); Anthony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L. REV. 325, 371 (1999) (collecting other authorities).

²³¹ Deepa Badrinarayana, *A Colonial Perspective of Human Rights: Perspectives from British India*, 58 TEX. INT'L L.J. 45, 47, 49 (2022); NICK ROBINS, THE CORPORATION THAT CHANGED THE WORLD: HOW THE EAST INDIA COMPANY SHAPED THE MODERN MULTINATIONAL 7 (2d ed. 2012).

²³² IPCC AR6, *supra* note 28.

The Resolution provides an opportunity to rethink the fundamental structures of international law that have denied to people basic natural infrastructure such as clean air or clean water. While scientific innovation and economic growth has been instrumental in providing social services like better health care, reduced mortality rates, and improved access to drinking water, these gains made are threatened by imbalanced economic and trade policies. This Article proposes that nations could optimize the good while eliminating the bad by reviewing trade, economic, and environmental policies from the lens of environmental human rights. While this may resemble the concept of sustainable development, it is distinct. Sustainable development primarily uses the lens of economic growth. Environmental human rights, on the other hand, focuses on the individual or collective rights of people, and the impact of policies on people. Treaties or policies that fail to preserve and/or promote environmental human rights would essentially require renegotiation.

For example, the Resolution could lead to an incremental shift in the negotiation of future treaties as well as in the interpretation of existing multilateral environmental agreements or agreements such as the General Agreement on Tariffs and Trade (“GATT”). Most international environmental treaties are not specifically designed to address human rights, but instead create ad hoc legal and administrative structures to manage environmental problems by a combination of legal obligations and technological solutions. Even treaties addressing problems that directly impact human health, such as the ozone-depleting treaties or the transboundary movement of hazardous waste, acknowledge correlative human health impacts are not framed around the protection of individual rights, but rather around a technical or technological solution to the problem.²³³ Similarly, the interpretation of environmental clauses outside multilateral environmental agreements (“MEAs”) do not take a human rights perspective. For example, in interpreting the Article XX environmental exceptions to GATT, judges on the panel and/or Appellate Body set up under the dispute settlement mechanisms under the World Trade Organization (“WTO”) have focused on principles such as the precautionary principle and sustainable development.²³⁴

²³³ For a brief discussion on the approach to hazardous waste management under the Basel Convention, see Miles L. Buckingham, *The Basel Convention*, 1998 COLO. J. INT'L ENV'T L. & POL'Y 291, 298 (1998). For a discussion on the management of ozone layer depletion, see Katya Jestin, *International Efforts to Abate the Depletion of the Ozone Layer*, 7 GEO. INT'L ENV'T L. REV. 829, 832 (1995).

²³⁴ See, e.g., Appellate Body Report, *United States Import Prohibition of Certain Shrimp*

However, the Resolution has opened the door for the introduction of an individual rights dimension. Alternatively, the Resolution can have a signaling function when international environmental principles are considered in domestic courts, especially in the context of evergrowing climate litigation. The signaling function of the Resolution is robust, especially since it passed with zero negative votes and only eight abstentions, most of those for reasons other than opposition to a human rights approach to environmental protection *per se*.²³⁵ Such a shift can in turn warrant a reconceptualization of environmental protection.

The implementation of such an approach presents at least two challenges. The first is the willingness of nations to participate in such a scheme and the limits on sovereign incursion, and the second, overcoming the legitimacy problems in light of the international history of colonization notably. The two challenges are also interdependent and thus have to be addressed in tandem. Regarding the second challenge, reparation has been presented as an option in various contexts and has indeed been considered even in certain domestic contexts.²³⁶ While that could be one way to move forward, it would be wistful to think the clock can be entirely reset. Rather, the question that will need to be addressed is how historic and contemporary economic benefits can be distributed in an equitable manner, rather than focusing only on increasing the size of the pie. Of course, given the deepening inequalities even in wealthy nations, this may merely be wishful thinking. Yet, it remains critical to nations fulfilling their obligations vis-à-vis environmental human rights. Also, ongoing negotiations on loss and damage mechanisms in the climate context are an example of micro levels at which such mechanisms could be established.²³⁷ Additional policies, including on immigration, could provide another lens from which these issues could be managed.

and Shrimp Products, ¶¶ 131, 152–53, WTO Doc. WT/DS58/AB/R (adopted Oct. 12, 1998) (noting the term “sustainable development” in the chapeau to GATT 1994 informed the interpretation of Article XX(g), an exception from GATT rules to protect exhaustible natural resources).

²³⁵ See Abstentions Discussion, *supra* note 84.

²³⁶ See, e.g., Fabiola Cineas, *New Zealand’s Māori Fought for Reparations—and Won*, VOX (Jan. 17, 2023), <https://www.vox.com/the-highlight/23518642/new-zealand-reparations-maori-settlements> [<https://perma.cc/NHN5-ZCKA>]. The State of California has set up a special task force to consider reparations for slavery, and the task force released a report on reparations in June. CAL. OFF. OF THE ATT’Y GEN., THE CALIFORNIA REPARATIONS REPORT (June 29, 2023), <https://oag.ca.gov/ab3121/report> [<https://perma.cc/7ZLM-R6HR>].

²³⁷ See, e.g., *The United States Agrees to Loss and Damage Fund at COP27*, 117 AM. J. INT’L L. 331 (2023); see also UNFCCC, *supra* note 29.

Regarding the first issue, one could only hope that efforts that have culminated in the adoption of the Resolution promise continuing engagement with States in expanding the scope of universal environmental human rights. It is remarkable that the small number of countries that abstained—Belarus, Cambodia, China, Ethiopia, Iran, Kyrgyzstan, the Russian Federation, and Syria—have a poor international human rights record.²³⁸ Their abstention, however, is itself a signal of a broader shift in the international sentiment on human rights insofar as they chose to abstain rather than reject the Resolution. In fact, during the discussions, although the Iranian delegate opposed the Resolution for lack of proper scope and potential downside for developing countries, she also noted the absence of “unilateral coercive measures” to enforce the environmental rights made it ineffective.²³⁹ Belarus similarly opposed the resolution unless it would be part of a universally binding instrument.²⁴⁰ These discussions should lend credence to the idea that the Resolution perhaps comes at a defining moment to review and rethink not only the structure of environmental governance, but also the architecture of international law in a historic context as well.

CONCLUSION

To have rights is important. To be a society that genuinely respects the complex and diffuse set of rights, however, remains elusive. The Resolution presents an important opportunity to shape international environmental law to motivate societies to protect and promote environmental human rights. At least one reason for this situation is the pressing inequality among nations, indeed even within nations, that has prevailed globally for centuries. In the international arena, the history of colonization has left an indelible mark on the legitimacy of international law, indeed the rule of law itself. Like the proverbial tossing of the baby with the bath-water, state engagement with international law remains tenuous with developed and developing countries approaching it from different experiences, ambitions, and viewpoints. Straddling these positions is the U.N. Charter’s lofty dream of a world in which “we

²³⁸ For a detailed report on the human rights of the listed countries (and others), see *A–Z of Countries and Regions*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/> [<https://perma.cc/ZKH7-GW2N>] (last visited Dec. 4, 2023).

²³⁹ Abstentions Discussion, *supra* note 84.

²⁴⁰ *Id.*

the peoples of the world, will cooperatively establish peace and security.”²⁴¹ Much progress, of course, has been made. However, even as urgent environmental problems such as climate change raise existential problems, we must reckon with the problem of economic inequality among nations that the international legal order has failed to meaningfully engage with. It is equally clear that as the tussle continues among nations, people across the board stand to lose the very rights they have fought hard for over centuries.

With the shift towards unregulated development, the urge to have more material goods has increased dramatically. However, the current sweep of environmental challenges raises the important question of whether such a shift has benefited people at large. While many people globally have witnessed better living circumstances as a result of economic development, the flip side is also equally true. Disparity recognized as a problem in the Rio Declaration, for instance, has impacted people and their ability to enjoy well-established human rights, both in developed and developing nations.²⁴² The diminution of human rights is not always redressable because of various challenges, including jurisdictional challenges. The Resolution has thrown the gauntlet, challenging us to become a society where the right to clean, healthy, and sustainable environmental conditions will be pursued. That cannot be achieved under the current policy focus. The Resolution holds the promise to shape and change these policies by creating obligations *erga omnes* that could infuse international law with the normative core of environmental human rights.

²⁴¹ U.N. Charter pmb1.

²⁴² *Rio Declaration*, *supra* note 18, annex I, princ. 5. For a discussion on the impact of various disparities on the enjoyment of human rights, see, for example, Richard D. Glick, *Environmental Justice in the United States: Implications of the International Covenant on Civil and Political Rights*, 19 HARV. ENV'T L. REV. 69 (1995).