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A New Environmental Charter for the Future

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Abstract. The environmental crisis compels humanity to redefine its relationship with nature. This calls for the principles that would guide the new pathway to be outlined and enshrined into a global treaty. An environmental charter for the future would serve the purpose of a social contract and define the norms which would allow humanity to coexist with its natural environment. In this context, this article argues that faith in the international system could be restored by a global agreement on the basic principles which are to guide the new system for international environmental governance. It will thus first focus on (i) exposing the merits of principles in a legal system, (ii) tackling the purely technical vision that weakens both the creation and implementation of international environmental law and (iii) finally, it will make the case for a global environmental charter that would enshrine fundamental principles and rejuvenate the values that founded the international system.

Keywords: Environmental crisis, environmental charter, global pact for the environment, international environmental governance, environmental justice, international environmental law

The 1945 United Nations Charter laid down the foundations of the current world order. It did so with an optimism unparalleled in the history of international law. As we celebrate its 75th anniversary, we would do well to recall its spirit of hope for the days ahead. Its opening sentence, "*We the peoples of the United Nations*", instilled the belief that peoples, even citizens, would write history hereafter. Yet, 75 years later, international governance seems to be inescapably falling into disorder. An appeal for a reorganizing of world order and a rejuvenation of that hope appears necessary to preserve the integrity of human life on Earth. Amidst international discord on almost every subject of contention, the environment holds that extraordinary quality of being common to all nations and individuals. To translate this shared predicament into a common duty of care is the international task of the twenty-first century. This crisis can be turned into an opportunity to rebuild world order around the keystone of environmental protection.

The environmental subject has already served as cement for a divided world. In the midst of the Cold War, the efforts of multilateral diplomacy gave birth to the 1972 Stockholm Conference, which laid out the principles of environmental governance, as well as the United Nations Environment Program (UNEP). Despite these efforts, the state of the global environment has only worsened. New challenges have arisen. Climate change, desertification, deforestation, air, soil, and water pollution now threaten the very existence of life on Earth. According to the International Panel on Climate Change (IPCC), human activities have so far caused approximately 1.0°C of global warming. If it continues to increase at the current rate, we are likely to reach 1.5°C between 2030 and 2052. Such a scenario would lead to:

> "6% of insects, 8% of plants and 4% of vertebrates to lose over half of their climatically determined geographic range for global warming of 1.5°C,

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compared with 18% of insects, 16% of plants and 8% of vertebrates for global warming of 2°C."[1]

In response to such frightening prospects of a disaster, International Environmental Law has so far proved inadequate to mitigate the decline of the natural world. In a 2018 report issued by the United Nations Secretary-General, it was found that there are consequential gaps and deficiencies at the levels of principles, existing regulatory regimes, governance structure as well as regarding its implementation and effectiveness.[2] The environmental crisis is global in scale and poses a real and foreseeable threat to most, if not all, of the world's nations. An adequate response would inevitably be international in scale. It is, therefore, imperative to upgrade international environmental governance.

Yet, we have arguably moved from an epoch that had hope in international institutions and international law to one that has lost it.[3] Restoring faith in the international idea is thus crucial to elaborating a multilateral response to the global environmental crisis. President Joseph R. Biden, Jr.'s pledge to make the United States lead the world to take on the existential threat of climate change provides an opportune occasion for such a response.[4]

This article argues that faith in the international system could be restored by a global agreement on the principles which are to guide environmental governance. It will thus first focus on exposing the merits of principles in a legal system (I), prior to tackling the purely technical vision that weakens both the creation and implementation of International Environmental Law (II). Ultimately, it will make the case for a global environmental charter that would enshrine fundamental principles and rejuvenate the values that founded the international system (III).

1. Why Principles Matter: Inspiring Fundamentality

1.1. Law embodies values

The history of nations is punctuated by foundational constitutional moments. The spirit of these defining moments often comes to be encapsulated in fundamental scriptures. The principles of the French Revolution were enshrined in the 1789 Declaration of the Rights of the Man and of the Citizen. Similarly, the values of the American Revolution were embodied in the 1776 Declaration of Independence. These texts lay down the basis and narrate the story which ultimately help in defining a society. As such, their function is not solely legal. They tell a story which inspires people to live up to the ideals they proclaim. This 'story-telling' function of principles is aptly resumed by former United States President Barack Obama in a 2016 speech:

> "[s]ometimes we think people are motivated only by money, or they're only motived by power, or these very concrete incentives. But people are also inspired by stories. [...] You think about the United States of America. We have a really good story called the Declaration of Independence. "We hold these truths to be self-evident, that all men are created equal; that we're endowed with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." That's a wonderful story. [...] when the Declaration was made, there really was no United States. It was just a good story that they were telling about what could be. And then people were attracted to that story. And it led to independence. [...] It inspired movements around the world. So, yes, the stories we tell each other are very, very important."[5]

From a legal perspective, Hans Kelsen, one of the most prominent jurists of the 20th century, posited that legal systems function in a hierarchy, which is often understood as resembling a pyramid of norms. The top of the pyramid is composed of fundamental principles that irrigate the entire system. Inferior norms, *i.e.*, norms that occupy the lower echelons of the hierarchy, are valid only insofar as they comply with the values enshrined on top of the pyramid. These principles, therefore, constitute the keystone of the legal edifice: the whole structure would crumble in their absence.

While this conception of law aims to decipher how norms become legitimate in a legal system, it is also prescriptive in that it advocates for judicial review of legislation and executive orders. The pyramid of norms imposes limits to the action of the executive and legislative power. Legislation and executive acts have to comply with a fundamental norm. This ambition lies at the core of the 1789 French Declaration of the Rights of Man and of the

Citizen, which outlined that its very purpose is to ensure that:

> "the acts of the legislative power, as well as those of the executive power, may be compared at any moment with the objects and purposes of all political institutions and may thus be more respected [...]".[6]

While the People and their elected representatives are sovereign in a democratic system, the agreed-upon fundamental principles of society impose limits on the prerogatives of rulers. "*Whoever has power*", according to Montesquieu, "*is tempted to abuse it*." To counteract this insight, the judicial branch is competent to ensure that the other branches do not overstep the boundaries imposed by these fundamental principles. Laws, according to Portalis, are "*are not acts of pure power*." They are instead "*acts of wisdom, justice, and reason. The legislator exercises less of an authority than a vocation*".[7] The legislator exercises his functions within the frame of the limits imposed by the fundamental norm. As such, the law embodies the fundamental values of a society, those which make up the social contract which binds every citizen to the whole.

On this account, legal principles fill four functions in a legal system. First, they have an 'architectural function' in that they provide the foundation of all sectorial regimes. Laws can be interpreted as translating fundamental principles into technical rules. The validity of these secondary norms can be reviewed on the basis of the standards offered by fundamental principles. Secondly, principles fulfill an 'interpretative function' insofar as they can inspire courts in interpreting certain provisions. For example, a judge could refer to a treaty's founding principles when required to interpret an unclear provision. Principles could also inspire the legislative branch in its attempts to regulate a specific domain or sector. Thirdly, principles have a 'conciliatory function': when norms contradict each other, principles offer a conceptual matrix that helps articulate inconsistent requirements. Ultimately, principles serve a 'gap-filling function'. This role is particularly emphasized by Ronald Dworkin in his study on the linkages between legal and non-legal rules.[8] From his point of view, there are no 'gaps' in Law: if a judge finds no answer to a litigious question, he has the duty to refer to the philosophical and political principles that underpin the polity. Dworkin thus seeks to limit the risk of arbitrary rulings by suggesting, whenever the texts are silent, that judges refer to a society's fundamental values.

1.2. Generality and normativity

Nevertheless, these fundamental values and principles are sometimes decried as being too vaguely formulated to be endowed with legal effect. This conception is mistaken in that it operates a confusion between two concepts: the generality of a principle and its normativity. In fact, a general principle of law can very well carry a normative effect. Judges are indeed accustomed to applying provisions from constitutions or bills of rights to particular cases, despite their broad wording.

What applies in national jurisdictions is equally valid on an international scale. General Principles of Law are recognized by Article 38 of the Statute of the International Court of Justice as a source of law.[9] Those principles are fundamental in the international system and often serve a gap-filling function. In addition, while the provisions of the European Convention for the Protection of Human Rights (ECHR) may be broad in outlook, they nevertheless bind parties and confer court-enforceable rights to individuals. The European Court of Human Rights was thus conceived with the competence to review governmental decisions and legislative or administrative measures that clearly contradict the agreed principles and rights.[10] Furthermore, the broadness of its principles allowed European judges to interpret the ECHR progressively, in line with its objective to further the realization of human rights and fundamental freedoms.[11]

While the ECHR does not enshrine environmental rights as such, the Court's case law made it clear that the other rights of the Convention could be threatened by violations of environmental norms.[12] Indeed, the Presidency of the Council of Europe has recently observed that:

> "[d]espite the absence of a specific reference to the environment in the Convention of Human Rights, the Court has clearly established that environmental degradation, ineffective assessment of environmental risks (...), can result in violations of substantive human rights, such as the right to life, to private and family life, the prohibition of inhuman and degrading

treatment, and the peaceful enjoyment of the home".[13]

2. The Technical Conception of Law and its Effects on International Environmental Law

2.1. *The need for principles at the level of law-making and implementation*

In contrast to value-laden legal systems, International Environmental Law has been elaborated in a piecemeal fashion to provide punctual and technical responses to clearly delimitated issues. The United Nations Framework Convention on Climate Change (UNFCCC) and its derived agreements, such as the Kyoto Protocol and the Paris Agreement, are exclusively focused on climate change. The Montreal Protocol is designed solely to protect the ozone layer. The Ramsar Convention, on the other hand, aims at the conservation and sustainable use of wetlands. The United Nations Convention to Combat Desertification seeks, as its name suggests, to tackle the issue of desertification. Overall, more than 500 such Multilateral Environmental Agreements (MEAs) co-exist in international law.[14] Principles typically occupy a secondary role in these agreements. They are scarce in number and are laid out in a dispersed and punctual fashion. Per example, the UNFCCC only refers to principles in Article 3, which notably enshrines the precautionary principle.[15]

The multiplication of such technical agreements in the absence of a common normative framework leads one to believe that International Environmental Law really forms a haphazard set of rules. This purely technical conception of law makes one forget that Law carries and vehiculates values. The idiosyncratic difficulties met by International Environmental Law are caused by this absence of consensus around key values and principles.

In this light, there are two reasons why principles are needed in International Environmental Law. First and foremost, at the level of treaty-making, lack of consensus around the fundamental principles of International Environmental Law hinders the creation of new norms. With no common purpose or shared values, it is harder for negotiators to reach an agreement on the technicalities that are to solve a specific problem. Moreover, the purely technical conception of law requires negotiators to start anew with a new norm for each problem that arises. A fundamental norm would ease this task by limiting the scope of law-making to sectorial adaptations of foundational principles. In addition, the value of a technical regulation could then be evaluated on the basis of its capacity to further the fundamental principles from which it would derive. For example, one could argue that the Paris Agreement could be evaluated on the basis of its ability to ensure the right to a healthy environment and intergenerational equity. This would allow to put the technical MEAs in their context: not an end in themselves but rather a means to furthering the fundamental principles of environmental law.

Secondly, at the level of implementation, the strength of a State's commitment to a technical regulation is more likely to falter in the absence of agreement on a common foundation. It is between States as it is in marital life. When the relation is tested by stormy weather, one must recall the reasons for which one committed in the first place. In both cases, the strength of a commitment lies in the solidity of the values which underlie it. When the time comes for a State to pay its dues under an international agreement, some may think it more expedient to abandon ship rather than incur the cost. This is precisely the kind of reasoning that backed Canada's 2011 withdrawal from the Kyoto Protocol and led the United States to denounce the Paris Agreement. Agreeing on the fundamentals can thus strengthen a State's commitment by providing solid ground on which to bear the cost of implementation.

2.2. *Finding common values in an uncertain world*

The Covid-19 pandemic gave rise to predictions that the world may be entering a phase of 'deglobalization'.[16] Others instead argue that the pandemic is more likely to entrench and intensify already-existing trends.[17] Just as with climate change, Covid-19 reminds us that uncoordinated responses to transnational issues can spell disaster for all. Transnational problems require multilateral responses. Such solutions will however, have to engage in international law-making if their effects are to last in time. Whether we like it or not, the fundamental challenges of our time require a multilateral response and will often require developing common norms.

Yet, it is no secret that elaborating common norms on an international scale is a sizeable

challenge. More than two millennia ago in the 5th century B.C., Herodotus had already warned that all men are tempted to see the mores of their country as objectively better.[18] This challenge has not evaporated in the modern era and is even exacerbated by the diverging approaches of each nation's legal culture. Pierre-Henri Teitgen, one of the architects of the ECHR, advised in its *travaux préparatoires* that "we should need years of mutual understanding, study, and collective experiments, even to attempt after many years, with any hope of success, to formulate a complete and general definition of all the freedoms and all the rights which Europe should confer on the Europeans."[19]

Beyond the regional scale, finding consensus on a global level can prove to be even more difficult. When the Universal Declaration of Human Rights was voted in 1948, the United Nations only had 58 members in total, among which 48 voted in favor of the Declaration.[20] This seminal text is now regarded as the closest approximation to what could constitute universal values. While this view is not without criticism, the preparatory works of the Declaration reveal that its drafters actively engaged in a tough cultural and ideological balancing act.[21] It would doubtlessly prove harder to find such common ground today with 193 United Nations member states.

Nevertheless, the relative effectiveness of International Trade Law and International Investment Law reveal that it is possible to develop an efficient international legal system. Trade, the international domain *par excellence*, has indeed been governed by its own set of international rules and principles, the *lex mercatoria*, since the 11th century in Europe. The practice of investment arbitration equally shows that general principles of international law can find application before tribunals to resolve disputes between sovereign and/or non-sovereign parties.

3. Revivifying Values: A New Environmental Charter for the Future

3.1. The environmental crisis: An opportunity to rejuvenate the post-war order?

Unfortunately, values were historically forged in the cradle of catastrophes. After the horrors of the Second World War, the post-war generation took it upon itself to revivify the values of humanism and to build positive values out of ruins. This meant defining the common values that are shared by all humankind and building the institutions that would allow for international governance. For this generation, only by reviving the values of humanism could the tide of nationalism be stopped and the international spirit rekindled.[22]

No domain was to bear the fruits of this rejuvenation as quintessentially as the Law. The preparatory work of the ECHR showed that the Second World War provided a wake-up call for jurists to rejuvenate the value of humanism.[23] This realization provided the impetus for a constitutional moment in international law. The post-war years indeed witnessed the creation of the great institutions and treaties which characterize the current world order. The United Nations was created at the 1945 San Francisco Conference. The Universal Declaration of Human Rights was adopted in 1948 and the European Convention of Human Rights in 1950. The Geneva Conventions of 1949 laid out the principles of International Humanitarian Law, whilst the 1951 Geneva Convention reforged the international regime of protection granted to refugees and asylum seekers.

This corpus of post-war international law, which constitutes the frame of contemporary international relations, is the closest thing humanity has to a Constitution. In the anarchic order of international law, however, one could certainly make the point that States are the alpha and omega of the current world order. Nevertheless, and by analogy to a national context, a Constitution is what binds a polity together. It is a social contract between citizens who decide to make society. In a similar, albeit non-identical fashion, States consent to self-limit their sovereignty in order to protect a higher interest.

Given the scale, gravity, and transnational character of the global environmental crisis, there is little doubt that protecting the global environment could take precedent over parochial national interests. The ecological crisis offers an opportunity to reforge the international order. In fact, the word 'crisis' contains both a negative aspect and a positive aspect – the occasion to write a new chapter in world history. Narratives matter in shaping the way to a sustainable future. Recent research has indeed found sufficient evidence to confirm that narratives of vision influence social dynamics of movements toward sustainable futures.[24]

3.2. *The limits of current instruments on principles*

Unfortunately, the environmental catastrophe of our times has yet to give rise to a similar process of value-making. Yet, some of the foundations of international environmental governance have already been laid. The first consequential attempt to elaborate a global environmental framework is without doubt the United Nations Conference on the Human Environment, which was held in June 1972.[25] This conference is hailed as a constitutional moment for International Environmental Law.[26] It catalyzed the development of international as well as domestic environmental law.[27] While the framework it provided fell short of a global treaty, it did lay the foundations of the recognition of the right to a healthy environment and of the duty to take care of the environment.[28]

Twenty years later, the 1992 Rio Declaration on Environment and Development showcased that it is possible for the international community to adopt a universal declaration by consensus. This method as well as the prominent place the declaration gives to development, led to many to decry its content as weak.[29] Nonetheless, and with the benefit of hindsight, it would seem that the Rio Declaration is the closest we have come to formulating consensual and universal principles of environmental governance.[30] The principles it enshrined have subsequently spread to other treaties and domestic constitutions. Three major illustrations of this influence are provided by the precautionary principle (stated in Principle 15 as an approach),[31] the principle of common but differentiated responsibilities (stated in Principle 7)[32], and the principle of public participation in environmental matters (stated in Principle 10).[33] Other principles, particularly the three norms that constitute the heart of customary International Environmental Law,[34] namely prevention (stated in Principle 2),[35] the requirement to conduct an environmental impact assessment (stated in Principle 17)[36] and the duty of cooperation (stated in Principles 18 and 19),[37] also received their authoritative formulation in the Rio Declaration. But these examples also illustrate the limitations of a statement of principles in a 'soft law' instrument such as the Rio Declaration. Such limitations highlight the need for a new environmental charter for the future.

4. Looking Ahead: A New Environmental Charter For The Future

The environmental crisis compels humanity to redefine its relationship with nature. The principles which guide this approach should be outlined and enshrined in a global treaty. An environmental charter for the future would serve the purpose of a social contract and define the norms which would allow humanity to coexist with its natural environment.

Forging this new instrument could rekindle the flame of multilateral cooperation. The environment, despite divergences of method, binds the human race together in its quest for the protection of its common heritage. We all, to cite Saint-Exupery, "*live in the same cause, are borne through life on the same planet, form the crew of the same ship.*"[38] This duty lends itself, and in fact requires, to find common values on the basis of which specific rule-making can prosper. Some have even gone to the length of calling for the recognition of collective ownership of the Planet by its inhabitants, an 'Earth Condominium' which would give rise to a collective duty of care.[39]

It is clear that International Environmental Law is inadequately armed to tackle the ecological challenges of our time. These inadequacies were strikingly revealed throughout the process initiated by Resolution 72/777 of 10 May 2018, which sought to bring forward a Global Pact for the Environment. In November 2015, the *Club des Juristes*, a legal think-tank, published a report recommending the adoption of a Universal Environmental Charter.[40] The report's initial vision was to break the gridlock over the insufficient enforcement of international environmental by granting court-enforceable environmental rights to individuals. By making individuals subjects of international law, it sought to give citizens of the world the tools to assert their environmental rights and implement environmental justice.

In June 2017, a network of more than a hundred international experts from 40 countries presided by former COP 21 President Laurent Fabius redacted a preliminary draft of such a Global Pact.[41] This draft enshrined two source principles: the right to a healthy environment and the duty to take care of the environment. From these source principles spring well recognized substantial principles, such as the precaution and prevention principles, the

polluter-pays principle, as well as some innovations such as the principle of non-regression. The draft Global Pact also enshrined three procedural principles: the right to access environmental information, the right to public participation as well as the right to access environmental justice.[42] While this initiative may seem new, it is important to highlight that it is rather a reflection of deeper trends in environmental law and of previous attempts to elaborate such a framework treaty.[43] Less than a year later, the United Nations General Assembly adopted the above-mentioned resolution, which paved the way for the negotiation of such a Global Pact. It also called upon the United Nations Secretary-General to prepare a report on the gaps in environmental law which would be filled by a Global Pact.

This 2018 Report on *Gaps in International Environmental Law* revealed gaps and deficiencies at five different levels: at the level of the principles, of existing regulatory regimes, of environment-related instruments, of the governance structure, and relating to the implementation and effectiveness of International Environmental Law.[44] It recommended that International Environmental Law and its effective implementation be "strengthened through such actions as the clarification and reinforcement of principles", and suggested that this "could be done through a comprehensive and unifying international instrument that gathers all the principles of environmental law."[45]

Unfortunately, the ongoing negotiations on the Global Pact project have so far not led to the emergence of such an instrument. Despite the diplomatic gridlock, an international treaty that enshrines fundamental environmental rights and duties remains desirable and possible. Regardless of the denomination that would be given to such an instrument, the growing consensus around environmental rights and the shifting diplomatic board could very well give rise to such an environmental charter in the future.

Such a charter would have to fill the gaps revealed by the Secretary-General's report and harmonize a fragmented International Environmental Law. It could go further than that by recognizing enforceable environmental rights for citizens in the same vein as the 1998 Aarhus Convention or the 2018 Escazù Agreement. A universal environmental charter will further serve as a unifying symbol to demand ambitious action from states and private sector. Its universal nature would also raise the threshold for environmental protection worldwide, thus contributing to level playing field for private actors in a globalized economy.

A new environmental charter would further need to heal the excesses of anthropocentrism. The very word 'environment' gives the impression that Man is at the core and is only surrounded by an environment. We must rather come to understand that the environment is, in fact, the core and that we are but fragile peripheral elements. Environmental Law has hitherto focused on defining the rights and duties of humankind towards its natural surroundings. The time has perhaps come to recognize that the natural world has value in itself, regardless of its utility for humankind.

5. Conclusion

The state of the world environment requires recalibrating international law around the ecological question. A constitutional moment is required to forge the rules of this new world order, which will guarantee the sustainable coexistence of all living beings. While this may seem like a distant dream at the present moment, the history of international relations shows us that there is always hope. In 2009, the Copenhagen summit was decried as a catastrophic failure as States missed the opportunity to agree on a climate agreement. In spite of this defeat, the Paris Agreement was signed 6 years later as the perseverance and optimism of people of goodwill led States to come back to the negotiating table.

In a similar fashion, one could be tempted to believe that an international treaty akin to a Global Pact will never come to fruition simply because the 2018 initiative did not meet its objectives. Yet all hope is not lost. In 2022, States could adopt a political declaration that would revive the idea of a Global Pact in the context of the commemoration of the 50th anniversary of the Stockholm Conference. The environmental crisis requires us to lay down the foundational principles that are to guide humankind's interaction with its environment. Principles, in the end, are like stars. They may seem out of reach, but they light the path ahead.

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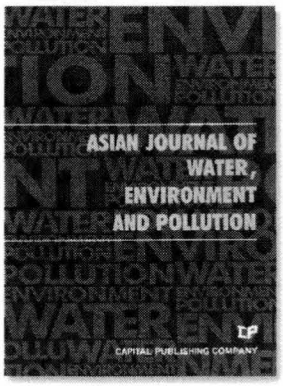

Asian Journal of Water, Environment and Pollution

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Aims and Scope

Asia, as a whole region, faces severe stress on water availability, primarily due to high population density. Many regions of the continent face severe problems of water pollution on local as well as regional scale and these have to be tackled with a pan-Asian approach. However, the available literature on the subject is generally based on research done in Europe and North America. Therefore, there is an urgent and strong need for an Asian journal with its focus on the region and wherein the region specific problems are addressed in an intelligent manner.

In Asia, besides water, there are several other issues related to environment, such as; global warming and its impact; intense land/use and shifting pattern of agriculture; issues related to fertilizer applications and pesticide residues in soil and water; and solid and liquid waste management particularly in industrial and urban areas. Asia is also a region with intense mining activities whereby serious environmental problems related to land/use, loss of top soil, water pollution and acid mine drainage are faced by various communities.

Essentially, Asians are confronted with environmental problems on many fronts. Many pressing issues in the region interlink various aspects of environmental problems faced by population in this densely habited region in the world. Pollution is one such serious issue for many countries since there are many transnational water bodies that spread the pollutants across the entire region. Water, environment and pollution together constitute a three axial problem that all concerned people in the region would like to focus on.

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