

CLIMATE CHANGE, HUMAN RIGHTS, AND THE RULE OF LAW

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ABSTRACT

Climate change challenges the resiliency and integrity of social and legal systems worldwide. Responding to climate change requires us to think systematically—and ambitiously—about how to engage the rule of law as a tool in efforts to limit the causes and consequences of climate change. This Article highlights the important, but underexplored relationship between ongoing pressures on the rule of law and efforts to draw upon the rule of law to limit climate change. It posits that the growth of right-wing populist, nationalist, and authoritarian movements worldwide puts pressure on the rule of law and imperils efforts to advance cooperation on climate change. It then explores the relationship between the rule of law, climate change, and human rights and describes how, despite downward pressures on the rule of law, efforts to embrace and deepen the linkages between climate change and human rights law continue to progress at both the domestic and international level. Ultimately, this Article argues that the rule of law is critical to addressing climate change, but the international rule of law is under pressure and even tentatively held, shared understandings of the rule of law are in question. This uncertainty challenges the ability to leverage law, including human rights law, to achieve effective and equitable change in the climate context.

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INTRODUCTION

We sit at the edge of ecological crisis. Climate change pushes us to the brink of planetary sustainability, even as it poses one of the greatest social, political, and economic challenges of our time. It is a compound challenge, the tendrils of which reach untold areas of our lives and of the law. Any legal or governance project that begins from a point of thinking about how to shape a system of climate law as a distinct area of law is destined to fail because climate change impacts everything from access to food and water, biodiversity, public health, land use, city planning, and mobility, to basic human security and human rights. Climate change challenges the resiliency and integrity of social and legal systems and demands that we think systematically—and ambitiously—about how to engage the rule of law to limit the causes and consequences of climate change. Ultimately, addressing climate change requires us to rethink who we are and how we coexist.

Starting from the premise that addressing climate change means thinking about how it will affect the way we live and govern ourselves, writ large, this Article explores tensions at the intersection between the international rule of law, climate change, and human rights. Part I highlights the important but underexplored relationship between ongoing pressures on the rule of law and efforts to draw upon the rule of law to limit climate change. Here, the Article posits that the growth of right-wing populist, nationalist, and authoritarian movements worldwide puts pressure on the rule of law and imperils attempts to deepen

shared understandings of the rule of law that advance cooperation on climate change. Part II then explores the relationship between the rule of law, climate change, and human rights. It describes how, even as the growth of populism, nationalism, and authoritarianism appears to erode norms of cooperation and human rights, efforts to embrace and deepen the normative and legal linkages between climate change law and human rights law continue to progress at both the domestic and international level. The Article concludes by arguing that we need to more closely examine the extent to which the rule of law and, in particular, a rights-oriented vision of the rule of law provides a foundation for addressing climate change. The rule of law is an essential tool for limiting climate change. However, the international rule of law is under pressure and even tentatively held shared understandings of the rule of law are in question. This uncertainty challenges the ability to leverage law, including human rights law, to achieve effective and equitable change in the climate context.

I. THE RULE OF LAW & CLIMATE CHANGE: DUAL INFLECTION POINTS

A. The Rule of Law in Flux

Global governance is in a state of flux.¹ To put it bluntly, as Professor Mohamed S. Helal suggests, “statespersons, scholars, and commentators of every political persuasion agree that we are currently witnessing a crisis of world order.”² Fluctuations in international politics and patterns of global governance require us to question the

1. See, e.g., Nicola Lacey, *Populism and the Rule of Law* (London Sch. of Econ. and Pol. Sci., Working Paper No. 28, 2019), http://eprints.lse.ac.uk/101867/1/Lacey_populism_and_the_rule_of_law_wp28.pdf [<https://perma.cc/KW89-DE72>] (exploring the implications for the rule of law of the resurgence of populism in Europe and North America); Yascha Mounk & Jordan Kyle, *What Populists Do to Democracies*, THE ATL. (Dec. 26, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/hard-data-populism-bolsonaro-trump/578878/> [<https://perma.cc/FS36-VRCT>]; Jordan Kyle & Limor Gultchin, *Populists in Power Around the World*, TONY BLAIR INST. FOR GLOB. CHANGE (Nov. 17, 2018), <https://institute.global/in-sight/renewing-centre/populists-power-around-world> [<https://perma.cc/E32K-2H5W>].

2. Mohamed S. Helal, *The Crisis of the World Order and the Constitutive Regime of the International System*, 46 FLA. ST. U.L. REV. 569, 569 (2019). Although it is not the focus of this paper, the critique, push back, and decentering of current structures of power (and U.S. hegemony) comes not only from jostling among the great powers but also from more fundamental challenges to the legitimacy of international law, and the international regime, itself. See, e.g., Makau W. Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L., PROC. 94TH ANN. MEETING 31, 31 (2000) (“The regime of international law is illegitimate. . . . [I]nternational law [is] a regime and discourse of domination and subordination, not resistance and liberation.”); James Thuo Gathii, *Rejoinder: Twailing International Law*, 98 MICH. L. REV. 2066, 2066–67 (2000).

strength and solidarity of the international community³ and to examine any assumptions we hold about shared understandings of the content and legitimacy of the rule of law.⁴ This matters in the climate context because stable and transparent systems of law are central to addressing climate change.⁵

The rule of law is, as it has always been, a highly contested principle.⁶ Much of the debate around the rule of law is jurisprudential. These conversations revolve around whether one understands the rule of law in a narrow or thin sense, or as thick and normatively rich. A thin conception of the rule of law focuses on creating consistent and predictable processes, fixed and transparent rules, and constraints on governmental power.⁷ A thick vision of the rule of law expands the concept to include normative considerations of justice, equity, human rights, and respect for international law⁸—what Professor Joseph Raz would characterize skeptically as “the rule of good law.”⁹

3. See Press Release, Security Council, Rising Nationalism Threatens Multilateralism’s 70-Year ‘Proven Track Record’ of Saving Lives, Preventing Wars, Secretary-General Tells Security Council, U.N. Press Release SC/13570 (Nov. 9, 2018).

4. See Press Release, General Assembly, Extremism, Intolerance Overshadowing Moves towards Democracy, Third Committee Delegates Stress as Experts Press Governments to Honour Human Rights Treaties, U.N. Press Release GA/SHC/4326 (Oct. 16, 2018); Amy Oloo, *Global Rule of Law Continues to Decline, but Resistance is Gaining Strength*, DEMOCRACY WITHOUT BORDERS (Mar. 19, 2019), <https://www.democracywithoutborders.org/6976/global-rule-of-law-continues-to-decline-but-resistance-is-gaining-strength> [<https://perma.cc/4S4J-T46M>]; see also Mutua, *supra* note 2.

5. See Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENV’T L. 19, 32 (2016).

6. See Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 67–68 (2007). Lord Bingham offers this description of the debate over the principle:

Raz has commented on the tendency to use the rule of law as a shorthand description of the positive aspects of any given political system. John Finnis has described the rule of law as “[the] name commonly given to the state of affairs in which a legal system is legally in good shape”. Judith Shklar has suggested that the expression may have become meaningless thanks to ideological abuse and general over-use Jeremy Waldron . . . recognised a widespread impression that utterance of those magic words meant little more than “Hooray for our side!” Brian Tamanaha has described the rule of law as “an exceedingly elusive notion” giving rise to a “rampant divergence of understandings” and analogous to the notion of the Good in the sense that “everyone is for it, but have contrasting convictions about what it is.”

Id. (alteration in original) (footnotes omitted).

7. See Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 6 (2008) (“[M]any conceptions of the Rule of Law place great emphasis on legal certainty, predictability, and settlement; on the determinacy of the norms that are upheld in society; and on the reliable character of their administration by the state.”).

8. See Bingham, *supra* note 6, at 69–82.

9. JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, 210–11 (2d ed. 2009) (“If the rule of law is the rule of the good law then to explain its nature is to

The origins of the rule of law are often traced back to the Magna Carta,¹⁰ although debate over the meaning and content of law has been ongoing since the time of Plato.¹¹ These ancient and ongoing debates, however, have taken on greater resonance in recent times. As Professor Jeremy Waldron reminds us, the rule of law is a “fragile but crucial ideal” and is “one of the most important political ideals of our time.”¹²

Despite its centrality to contemporary society, shared understandings of the rule of law remain elusive. At its core, the principle centers around the notion that those in power must be constrained by the law and that the legitimacy of governmental authority is determined in significant part by the degree to which the exercise of power is defined and constrained by a set of public norms that are embodied by and constitute the rule of law. In simple terms, as Professor Paul Craig suggests, “a core idea of the rule of law to which all would subscribe is that the government must be able to point to some basis for its action that is regarded as valid by the relevant legal system.”¹³ Beyond a shared understanding that the rule of law centers on limiting the arbitrary use of governmental power, however, there is considerable disagreement about the scope and content of the rule of law. In particular, there is disagreement about the extent to which the rule of law must, or even can, embody norms of justice and rights.¹⁴

These debates take on particular relevance at the international level, where the legal and normative traditions of hundreds of countries collide and amass in a forum committed to developing modes of governance that simultaneously acknowledge pluralism while also nurturing the development of institutions and ideals that facilitate cooperation and

propound a complete social philosophy. But if so the term lacks any useful function.”)

10. See MAGNA CARTA 1215, arts. 39, 40.

11. See Brian Burge-Hendrix, *Plato and the Rule of Law*, in LAW, LIBERTY, AND THE RULE OF LAW 27 (Imer B. Flores & Kenneth E. Himma eds., 2013).

12. Waldron, *supra* note 7, at 3, 5. According to Waldron, it is “one of a cluster of ideals constitutive of modern political morality, the others being human rights, democracy, and perhaps also the principles of free market economy.” *Id.* at 3.

13. HOUSE OF LORDS, SELECT COMMITTEE ON CONSTITUTION, SIXTH REPORT, 2006–07, HL 151, app. 5 (UK), <https://publications.parliament.uk/pa/ld200607/ldselect/ld-const/151/15115.htm> [<https://perma.cc/9244-2A4B>].

14. See, e.g., Raz, *supra* note 9, at 210–11 (“[The rule of law] is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.”); cf. Bingham, *supra* note 6, at 76 (“While, therefore, I recognise the logical force of Professor Raz’s contention, I would not myself accept it. A state which savagely repressed or persecuted sections of its people could not in my view be regarded as observing the rule of law, even if the transport of the persecuted minority to the concentration camp or the compulsory exposure of female children on the mountainside were the subject of detailed laws duly enacted and scrupulously observed.”).

coexistence. Within this pluralistic context, determining how power is distributed, exercised, and constrained is a constant and evolving exercise in diplomacy. Some scholars advance thick visions of the international rule of law that are “anchored in rights-based limitations on state authority” and “designed to protect the freedom and dignity of the person.”¹⁵ Others, however, caution that a “substantively thin conception of the rule of law, built around formal requirements of legality and upheld by collective practices of legality” is better “suited to international society’s highly variegated political context.”¹⁶

Irrespective of these varying visions, thick understandings of the rule of law linked to human rights, norms of cooperation, and peaceful coexistence have influenced the development of much of what we think of as public international law, including international environmental law, in the postwar era.

B. The International Rule of Law, Cooperation, & Rights: An Elusive Vision

A thick, rights-enabling vision of the rule of law informs the operations of the United Nations (UN). This same vision has propelled the progressive postwar development of international law.¹⁷ In relevant part, while not directly referenced, the principle of the rule of law is embedded in the UN Charter, which defines one of the aims of the UN as “establish[ing] conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.”¹⁸

In recent years, the UN has affirmed a vision of the rule of law as fundamentally linked to rights. In 2004, then Secretary General Kofi Annan described the rule of law, which he characterized as “a concept at the very heart of the Organization’s mission,” as embodying “a

15. Wayne Sandholtz, *Resurgent Authoritarianism and the International Rule of Law* 3 (KFG Working Paper Series, Working Paper No. 38, 2019).

16. See also Jutta Brunnée, *The Rule of International (Environmental) Law and Complex Problems*, in *THE INTERNATIONAL RULE OF LAW: RISE OR DECLINE?* 211, 211–30 (Heike Krieger et al., eds., 2019).

17. Whether thick or thin, the rule of law is not normatively neutral and, in every iteration, can be used to the advantage of the national and global elite. The ability of the rule of law to function as “the darling of the ruling elite” is well-recognized and deeply problematic. UGO MATTEI & LAURA NADER, *PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL* 13 (2008). This is true both generally, and with respect to environmental law, which can be used to perpetuate social injustice and as a tool of subordination. While this Article cannot explore this issue in depth, it forms the basis of a larger, more in-depth work on the relationship between climate change and the rule of law.

18. U.N. Charter Preamble, June 26, 1945; see also Bardo Fassbender, *What's in a Name? The Int'l Rule of Law and the U.N. Charter*, 17 *CHINESE J. INT'L LAW* 761, 763 (2018).

principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.¹⁹ Similarly, at a 2012 UN High-level Meeting on the Rule of Law,²⁰ the Member States adopted a declaration on the rule of law in which they reaffirmed their commitment to the rule of law and recognized that “human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the UN.”²¹

This rights-oriented understanding of the rule of law has informed the development of international environmental law, including climate change law, which emerged during a period of international law wherein norms of cooperation, community, and rights were at their apex. In the postwar era, international law primarily operated to establish and maintain a minimum of order between potentially antagonistic entities and, thus, to facilitate peaceful coexistence between sovereign states.²² As international law and patterns of globalization evolved, however, states began to identify an increasing number of issues—including human rights, trade, development, and the environment—around which more than coexistence was needed. As a result, new modes of cooperation began to emerge around areas of common interest that could not be addressed unilaterally.²³

Notably, with these new cooperative efforts, instead of being asked to refrain from certain behaviors, states were often tasked with actively undertaking positive obligations.²⁴ To advance cooperation around these shared interests, new international institutions were created to establish shared goals and assign roles and responsibilities.²⁵ Concur-

19. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) (emphasis added).

20. See United Nations and the Rule of Law, *What is the Rule of Law?*, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law-archived> [<https://perma.cc/7T6U-Y8AC>].

21. G.A. Res. 67/1, ¶ 5 (Nov. 30, 2012).

22. See Georges Abi-Saab, *Whither the International Community*, 9 EUR. J. INT'L LAW 248 (1998).

23. See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

24. See, e.g., Dinah Shelton & Ariel Gould, *Positive and Negative Obligations*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 562 (Dinah Shelton ed., 2013).

25. See generally Karen N. Scott, *The Dynamic Evolution of International Environmental Law*, 49 VICT. U. WELLINGTON L. REV. 607 (2018) (discussing the important role that institutions, especially multilateral environmental agreements, have played in the evolution of international environmental law).

rently, these new institutions—using both hard and soft law²⁶—sought to facilitate normative development around areas of shared concern.

The emergence and evolution of international environmental law exemplifies these patterns of cooperation and normative development. The complex and dynamic nature of global environmental challenges requires “more dynamic and flexible standard-setting processes”²⁷ and ongoing normative development to facilitate the requisite degree of cooperation. Consequently, the field of international environmental law has been the site of active and ongoing normative development. Particularly with respect to challenges requiring prolonged and extensive multilateral cooperation—such as biodiversity loss and climate change—international environmental law has developed modes of regime building that reflect the idea that “shared normative understandings must be gradually cultivated and deepened and that regimes must be designed so as to maximize the opportunities for normative interaction.”²⁸ As a result, international environmental law, including international climate law, is ripe for normative development.²⁹ In the context of international climate change law, this process has centered around evolving principles of cooperation,³⁰ equity,³¹ and, increasingly, fundamental rights.³²

26. See, e.g., Brunnée, *supra* note 16, at 230 (“[S]oft law can help fill these conceptual and practical gaps and promote norm development.”).

27. See Daniel Bodansky, Jutta Brunnée & Ellen Hey, *International Environmental Law: Mapping the Field*, in THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1, 21 (Daniel Bodansky, Jutta Brunnée & Ellen Hey, eds. 2008).

28. *Id.* at 12.

29. Arguably, however, this process of normative evolution has not been nearly ambitious enough. See Louis J. Kotzé, *International Environmental Law’s Lack of Normative Ambition: An Opportunity for the Global Pact for the Environment?*, 16 J. EUR. ENV’T & PLAN. L. 213, 213 (2019) (“[I]nternational environmental law (IEL) is not sufficiently ambitious to confront the Anthropocene’s socio-ecological crisis. The critique specifically focuses on IEL’s lack of ambitious and “unmentionable” ecological norms such as rights of nature, Earth system integrity, and ecological sustainability.”).

30. See, e.g., Robert Stavins et al., *International Cooperation: Agreements and Instruments*, in CLIMATE CHANGE 2014: MITIGATION OF CLIMATE CHANGE (Ottmar Edenhofer et al. eds., 2014); David G. Victor, *Effective International Cooperation on Climate Change: Numbers, Interests, and Institutions*, 6 GLOB. ENV’T POL. 90 (2006); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1 (2002).

31. See Cinnamon P. Carlarne & JD Colavecchio, *Balancing Equity and Effectiveness: The Paris Agreement and the Future of International Climate Change Law*, 27 N.Y.U. ENV’T L.J. 107 (2019); Catherine Redgwell, *Principles and Emerging Norms in International Law: Intra- and Inter-Generational Equity*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 185 (Cinnamon P. Carlarne et al. eds., 2016).

32. Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Litigation*, 7 TRANS-NAT’L ENV’T. L. 37, 49 (2018); Marc Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 GA. J. INT’L & COMP. L. 54 (2010).

Developing cooperative governance regimes for international environmental law, and other areas of shared concern, necessitated a fundamental shift in the way that law and international institutions framed interstate relationships. This, in turn, required much more ambitious efforts on the part of states both individually and collectively. Effecting social change of the kind envisioned required developing not only new institutions to facilitate cooperative action³³ but also required at least a modicum of shared sense of community and purpose—that is, some normative common ground.³⁴ This has proven difficult and, in the environmental context, although there are now a multitude of legal and bureaucratic institutions employing tools of hard and soft law to address shared environmental concerns, these institutions have struggled to facilitate the type of cooperation and action that is needed to resolve many of the most pressing global environmental challenges, including climate change.³⁵ And, increasingly, as this Article explores in the following Part, the already tenuously held normative common ground and cooperative spirit sustaining these efforts is under duress.

33. Think, for example, of the operational institutions created to support the emerging multilateral environmental agreements (MEA), including the complex set of institutions created under the umbrella of the UNFCCC, such as the Secretariat, the Conference of the Parties (COP), the financial mechanism, the subsidiary bodies. See, e.g., Christopher Mirasola, *The Role of Secretariats in International Negotiations: The Case of Climate Change*, 24 HARV. NEGOT. L. REV. 213 (2019); David Freestone, *The United Nations Framework Convention on Climate Change: The Basis for the Climate Change Regime*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 31, at 97.

34. In the field of international environmental law, there have been concerted efforts to develop a common normative ground and a set of shared principles that can guide behavior and help resolve disputes. See ELOISE SCOTFORD, ENVIRONMENTAL PRINCIPLES AND THE EVOLUTION OF ENVIRONMENTAL LAW (2017); U.N. Conference on the Human Environment, *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF. 48/14/Rev.1 (1973), reprinted in 11 I.L.M. 1416, princ. 1 (1972); Report of the U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF. 151/26/Rev.1 (Vol. I), annex I, reprinted in 31 I.L.M. 874 (Aug. 12, 1992). Of course, actually achieving normative common ground has proven to be exceptionally difficult in international environmental law, including in the context of climate change, in which fundamental disagreements about roles and responsibilities continue to divide parties after almost thirty years of negotiations. Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT'L & COMP. L.Q. 493 (2016); Lavanya Rajamani, *Differentiation and Equity in the Post-Paris Negotiations*, in THE PARIS AGREEMENT AND BEYOND: INTERNATIONAL CLIMATE CHANGE POLICY POST-2020 19 (Robert N. Stavins & Robert C Stowe eds., 2016).

35. See generally Cinnamon Carlarne, *Delinking International Environmental Law & Climate Change*, 4 MICH. J. ENV'T & ADMIN. L. 1 (2014); DANIEL BODANSKY, THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW 16 (2010).

C. The Venn Diagram³⁶ of the Rule of Law, Populism, & the Environment

International climate law is in flux. It developed around a thick vision of the international rule of law premised on the necessity of cooperation and prioritizing principles³⁷ of intra- and intergenerational equity³⁸ and common but differentiated responsibilities.³⁹ Now, however, even the semblance of a thinly held collective commitment to norms of cooperation and shared responsibility appear to be eroding.

In particular, major powers are grappling for influence,⁴⁰ and powerful leaders are drawing upon rightwing populist and nationalist narratives in ways that test norms of cooperation and shared responsibility. Notably, between 1990 and 2018, the number of populist⁴¹ leaders increased a “remarkable fivefold, from four to 20,”⁴² and, by 2019, “the four most populous democracies in the world” were ruled by populists.⁴³ Similarly, as populism has spread, so too has nationalism

36. See Sanja Bogojevic, *The Erosion of the Rule of Law: How Populism Threatens Environmental Protection*, 31 J. ENV'T L. 389, 390 (2019) (“Populism, the rule of law and environmental protection . . . operate within a kind of Venn diagram that shows their interconnectedness.”).

37. For a thorough discussion of the unique role of principles in environmental law, see SCOTFORD, *supra* note 34.

38. See, e.g., Catherine Redgwell, *Principles and Emerging Norms in International Law: Intra- and Inter-Generational Equity*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 31, at 186, 193 n.50; PETER LAWRENCE, JUSTICE FOR FUTURE GENERATIONS: CLIMATE CHANGE AND INTERNATIONAL LAW 46 (2014).

39. See, e.g., LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW (2006); Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 278 (2004).

40. See, e.g., Thomas Wright, *The Return to Great-Power Rivalry was Inevitable*, BROOKINGS (Sept. 12, 2018), <https://www.brookings.edu/opinions/the-return-to-great-power-rivalry-was-inevitable> [<https://perma.cc/7SCD-JCE8>]; Larry Diamond, *Democracy in Decline: How Washington Can Reverse the Tide*, 95 FOREIGN AFFS. 151 (2016).

41. Populism is difficult to define, but “is normally perceived as a phenomenon of constitutional retrogression, degeneration, or backsliding; liberal democracies consider it a pathology. It is, however, a largely amorphous phenomenon, and its contours are hard to grasp.” Andrea Pin, *The Transnational Drivers of Populist Backlash in Europe: The Role of Courts*, 20 GERMAN L.J. 225, 225 (2019) (footnotes omitted). In general terms, populism makes two claims: “(1) A country’s ‘true people’ are locked into conflict with outsiders, including establishment elites; (2) Nothing should constrain the will of the true people. Although populism always shares these two essential claims, it can take on widely varying forms across contexts.” Kyle & Gultchin, *supra* note 1. For other discussions of populism, see JAN WERNER MÜLLER, WHAT IS POPULISM? (2016); Cristóbal Rovira Kaltwasser et al., *Populism: An Overview of the Concept and the State of the Art*, in THE OXFORD HANDBOOK OF POPULISM 1 (Cristóbal Rovira Kaltwasser et al. eds., 2017); Bojan Bugarcic & Alenka Kuhelj, *Varieties of Populism in Europe: Is the Rule of Law in Danger?*, 10 HAGUE J. RULE L. 21 (2018).

42. Kyle & Gultchin, *supra* note 1.

43. These include: Narendra Modi in India, Donald Trump in the United States, Joko

with nationalist politics increasingly “seen everywhere and in everything” in global politics.⁴⁴

US President Donald Trump’s unabashedly populist, antiglobalist speech before the 74th Session of the UN General Assembly exemplifies this trend. Addressing the General Assembly, he declared, “[t]he free world must embrace its national foundations. . . . Wise leaders always put the good of their own people and their own country first. The future does not belong to globalists. The future belongs to patriots.”⁴⁵ President Trump’s style of rightwing populism is closely aligned with nationalism and antiglobalism, and—in the case of environmental issues—anti-expertise.⁴⁶

Reflecting a similar skepticism about globalism and a contempt for international interference in what he views as a purely national matter, in 2019, Brazil’s rightwing populist President Jair Bolsonaro suggested that it is a “fallacy” to describe the Amazon as the heritage of humanity. He then rejected international funds to combat fires in the Amazon and accused the G7 of undermining Brazil’s sovereignty and treating it “like a colony or a no-man’s land” and calling “into question that which we hold as a most sacred value, our sovereignty.”⁴⁷ While hesitancy to have other states (especially former colonial powers) or international organizations interfere in domestic decisionmaking is far from uncommon, what is notable about this instance is that Brazil has historically been a key facilitator in the development of international

Widodo in Indonesia, and Jair Bolsonaro in Brazil. Mounk & Kyle, *supra* note 1.

44. Florian Bieber, *Is Nationalism on the Rise? Assessing Global Trends*, 17 ETHNOPOLITICS 519, 519–20 (2018) (“[W]hile there is no universal trend towards nationalism, it has become more prevalent in global politics in recent years.”); *see also* Jack Snyder, *The Broken Bargain: How Nationalism Came Back*, FOREIGN AFFS. (Mar./Apr. 2019), <https://www.foreignaffairs.com/articles/world/2019-02-12/broken-bargain> [<https://perma.cc/J4BV-NVVW>]; Prasenjit Duara, *Development and the Crisis of Global Nationalism*, BROOKINGS (Oct. 4, 2018), <https://www.brookings.edu/blog/future-development/2018/10/04/development-and-the-crisis-of-global-nationalism> [<https://perma.cc/N5MN-GMTK>].

45. Remarks of President Trump to the 74th Session of the United Nations General Assembly, 2019 DAILY COMP. PRES. DOC. 657 (Sept. 24, 2019), <https://www.govinfo.gov/content/pkg/DCPD-201900657/pdf/DCPD-201900657.pdf> [<https://perma.cc/3768-VW5S>].

46. *See, e.g.*, Dan Farber, *Updates on the War on Science: The Trump Administration Continues Its Campaign to Suppress Science*, LEGAL PLANET (June 10, 2019), <https://legal-planet.org/2019/06/10/updates-on-the-war-om-science> [<https://perma.cc/Q6EP-QU4S>].

47. *Amazon Rainforest Belongs to Brazil, Says Jair Bolsonaro*, BBC NEWS (Sept. 24, 2019), <https://www.bbc.co.uk/news/world-latin-america-49815731> [<https://perma.cc/WU84-Y9GD>]; Jane Dalton, *Amazon Fires: Bolsonaro Rages at ‘Colonial’ G7 Leaders Over £16m Aid Deal to Fight Brazil Blazes*, INDEPENDENT (Aug. 26, 2019, 5:40 PM), <https://www.independent.co.uk/news/world/americas/amazon-fires-bolsonaro-brazil-g7-summit-aid-deal-a9079586.html> [<https://perma.cc/H7A8-QF93>] (translating Bolsonaro’s Twitter comments) (internal quotation marks omitted).

environmental governance—it was the host state for the Rio Conference and the Rio +20 Conference⁴⁸—and an active state in cooperative dialogue.⁴⁹ Thus, while Brazil has consistently prioritized the needs of developing countries—particularly the rapidly developing economies—in international environmental negotiations,⁵⁰ until now,⁵¹ it has never been vehemently hostile to international cooperation on matters of the environment.

These are just two examples of a global upswelling of what constitutes a complex mix of populist and nationalist sentiment. The surge of populism and nationalism worldwide has sparked concern that democracy is in decline and that the rule of law is under pressure.⁵² In Europe, for example, where populism is at its highest levels since the 1930s,⁵³ the Council of Europe has cautioned that the rise of populism poses fundamental challenges to Europe's wellbeing and warned that while “human rights, democracy and the rule of law depend on the institutions that give them form,” populists who invoke the “‘will of the people’ in order to stifle opposition” often seek to subvert these fundamental institutions.⁵⁴ Globally, growing populist and nationalist movements place

48. See, e.g., U.N. Conference on Sustainable Development, *The Future We Want: Outcome of the UNCSD 2012 (Rio +20)*, U.N. Doc. A/CONF.216/L.1 (June 19, 2012); Senator Al Gore, *Address at Rio Earth Summit*, 59 TENN. L. REV. 645 (1992); Edith Brown Weiss, *International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L.J. 675, 707 (1993).

49. For an overview of some of the early steps Brazil took to address climate change see Karen Alvarenga Oliveira, *Brazilian Climate Change Law*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 31, at 724.

50. See, e.g., Edith Brown Weiss, *The Evolution of International Environmental Law*, 54 JAPANESE Y.B. INT'L. L. 1, 10 (2011) (noting that “[t]he location of the conference in Brazil sent an important message that environment and development were the concerns of all countries, regardless of their stage of economic development.”).

51. *Id.*

52. See Lacey, *supra* note 1; World Justice Project, *WJP Rule of Law Index 2019: Global Press Release, Rule of Law Continues Negative Slide Worldwide* (Feb. 27, 2019), <https://worldjusticeproject.org/news/wjp-rule-law-index-2019-global-press-release> [<https://perma.cc/22AT-7593>]. As one commentator suggests: “Now, not even the American President will stand up for liberal democracy, nor a founding mission of the United Nations: to promote peace through interconnectedness.” Jill Filipovic, *First Trump Insults Greta. Then the World*, CNN (Sept. 24, 2019), <https://edition.cnn.com/2019/09/24/opinions/trump-insulted-greta-and-then-then-world-filipovic/index.html> [<https://perma.cc/4ZR4-QJXX>].

53. See Eur. Econ. & Soc. Comm. [EESC], *Studies on Societies Outside Metropolises: The Role of Civil Society Organisations in Facing Populism*, at 1 (Feb. 2019), <https://www.eesc.europa.eu/sites/default/files/files/qe-04-19-236-en-n.pdf> [<https://perma.cc/E6LE-BK3V>].

54. Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law: Role of Institutions, Threats to Institutions*, COUNCIL EUR. 4–5, 11 (2018), <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-role-of-institutio/168086c0c5> [<https://perma.cc/FEG8-35W8>] (“[F]indings show the growing influence of xenophobic and populist rhetoric in public opinion. . . . [C]reeping populism and

increasing pressure on already fragile cooperative institutions and on shared understanding of the rule of law and its operation, particularly with respect to matters of environmental law.⁵⁵

There is widespread concern that the rise of populism in its current, largely rightwing iteration undermines environmental law⁵⁶ and hinders the development of the environmental rule of law.⁵⁷ As Eliza-

attempts to limit political freedoms among some member states have resulted in challenges to the judiciary's independence at home—and at the international level too.”); see also Francesca Bignami, *Introduction: EU Law, Sovereignty, and Populism*, in *EU LAW IN POPULIST TIMES: CRISES AND PROSPECTS 3* (Francesca Bignami ed., 2019).

55. See Elizabeth Fisher, Comment, *Unearthing the Relationship Between Environmental Law and Populism*, 31 *J. ENV'T L.* 383 (2019), <https://academic.oup.com/jel/article/31/3/383/5585945> [<https://perma.cc/36YQ-Z3WV>]; Bogojevic, *supra* note 36.

56. See Brian J. Preston, Comment, *The End of Enlightened Environmental Law?*, 31 *J. ENV'T L.* 399 (Oct. 19, 2019), <https://academic.oup.com/jel/advance-article/doi/10.1093/jel/eqz029/5601117> [<https://perma.cc/4K84-MUU4>]. Populism, of course, can also take other forms. In fact, the evolving climate social movement and current forms of climate litigation represent a form of left-wing populism that offers a very different narrative of who ‘the people’ are that the political branches are failing to represent. In the United States, for example, President Trump’s attempts to deploy his particular brand of nationalist-aligned populism to deconstruct domestic climate law and denounce the Paris Agreement have sparked widespread backlash and a counteroffensive with its own populist undertones. This pushback includes employing innovative litigation strategies as well as a multitude of efforts undertaken by sub-federal and nonstate actors to oppose and counteract President Trump’s demolition efforts. Taken together, these varied efforts suggest that President Trump’s populist flavored obstructionist approach to climate change has triggered defiant efforts to concentrate and mobilize subnational and civil society actions and to create a populist-influenced counternarrative about the need for climate action for the health and wellbeing of present and future generations of the American people. For a full discussion of these litigation, subnational, and nonstate efforts see Cinnamon P. Carlame, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 *AM. U.L. REV.* 387, 439–77 (2019) [hereinafter *U.S. Climate Change Law*]. Equally, the parallel growth of the global climate movement, which in recent years has been fed by new and powerful voices, offers a decidedly different view of who ‘the people’ are that need to be represented and accounted for in the populist narrative and an increasingly strong and mobilized resistance to mounting pressures on the rule of law. In particular, globally and in the United States, the youth climate movement has swelled in numbers and influence. Mobilized by the raw, powerful messages of the likes of the plaintiffs in the previously mentioned *Juliana* litigation and Greta Thunberg—whose climate strike outside the Swedish Parliament has inspired activists and politicians worldwide—the youth message has changed the tone of the climate movement. The message is simple and powerful: our future is at stake and inaction is intolerable. See, e.g., *Greta Thunberg Named Time Person of the Year*, *BBC NEWS* (Dec. 10, 2019), <https://www.bbc.co.uk/news/world-europe-50740324> [<https://perma.cc/9TCR-RTB3>]; *Climate Change: What Did Greta Thunberg Say at COP25?*, *BBC NEWS* (Dec. 11, 2019), <https://www.bbc.co.uk/newsround/50743328> [<https://perma.cc/KMP2-DJ2L>].

57. See IUCN & World Commission on Environmental Law, *IUCN World Declaration on the Environmental Rule of Law* (2016), https://www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf [<https://perma.cc/GS8L-M89Z>] (“The *environmental rule of law* is understood as the legal framework of procedural and substantive rights and obligations that incorporates the principles of ecologically sustainable development in the rule of law.” (emphasis added));

both Fisher suggests, “[e]nvironmental problems and environmental law are a flashpoint for . . . right-wing populist politics.”^{58 59}

Populism revolves around a narrative of the relationship between the people and the elite, that depicts the elite as failing to represent the people, as variously constructed.⁶⁰ According to prevailing populist narrative, the new leader’s role is to decenter the elite and create a direct, uninterrupted relationship and line of communication between the people and the sources of power. Populism’s insistence on disrupting the established elite and removing constraints on the voice of the people often collides with ideals of the rule of law grounded in procedure and pluralism.⁶¹ That is, whether thinly or thickly conceived, most conceptions of the ideal of the rule of law include, at their core, the prerequisite that people in power are bound by publicly promulgated and administered laws that create a “constraining framework of public norms”⁶² that emerge from and reflect the collective will of the people. To the extent that populism rejects the validity of the existing rule of law by characterizing it as a product of the elite and a roadblock to the unmediated relationship between the people and the leader, this impatience with procedure⁶³ threatens the integrity of the rule of law and minimizes the role of the rule of law in reflecting and protecting the plurality of voices that exist in society.

Moreover, in this dominant populist narrative, bureaucracy and expertise are often depicted as sites of corruption that interrupt and dilute the voices and preferences of the people.⁶⁴ Because environmental law is procedural in nature, intimately linked with bureaucracy and expertise, and inherently pluralistic, it is particularly vulnerable to contemporary populist critique.⁶⁵ Environmental problems are multifaceted and dynamic and involve recognizing that “there may be many different people causing problems and being affected by them in different

see also U.N. Environment Programme Res. 27/9, U.N. Doc. UNEP/GC.27/17, annex I (Mar. 12, 2013) (calling on the UN system and national governments to develop and implement the environmental rule of law).

58. Fisher, *supra* note 55.

59. For a discussion of this contemporary form of authoritarian populism, see Bojan Bugarić, *The Populist Backlash Against Europe: Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe*, in *EU LAW IN POPULIST TIMES*, *supra* note 54, at 477.

60. *See, e.g.*, Fisher, *supra* note 55.

61. *See id.*

62. Waldron, *supra* note 7, at 6.

63. Müller, *supra* note 41, at 40.

64. *See, e.g.*, Greg Sasso & Massimo Morelli, *Bureaucrats Under Populism*, *SocARX-IV* (Feb. 11, 2020), <https://doi.org/10.31235/osf.io/uznxd>.

65. Bogojevic, *supra* note 36.

places across the globe.”⁶⁶ Consequently, responding to environmental problems requires drawing upon the rule of law to construct “complex architecture to mediate between different interests.”⁶⁷ The resulting governance architecture legitimizes the same bureaucratic institutions that populist leaders frequently are attacking and attempting to dismantle. As a result, populist leaders may eschew environmental law and seek to dismantle it as evidence of their commitment to removing constraints to the leaders’ ability to effectuate the will of the people.

President Trump, for example, has situated his vociferous attacks on environmental and climate law as part of his “America First”⁶⁸ campaign, which epitomizes his particular brand of nationalist-aligned populism. In President Trump’s dominant populist narrative, the people he presumes to represent include working class Americans—coal miners⁶⁹ and the “citizens of Pittsburgh”⁷⁰—with the main exclusions from the people being corrupt elites who favor certain minority groups, the interests of the global community, and academic experts and scientists.⁷¹ He has drawn upon this narrative to undermine environmental law and to advance an aggressive agenda of rolling back federal environmental law, including climate change laws and to actively impede sub-federal efforts to advance climate law.⁷²

Exemplifying this approach, when denouncing the Paris Agreement, President Trump declared that the agreement “punishes the

66. Fisher, *supra* note 55, at 385.

67. *Id.* at 384.

68. See *President Donald J. Trump’s Six Months of America First*, WHITE HOUSE (July 20, 2017), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-six-months-america-first> [<https://perma.cc/42S3-RPT9>].

69. Separating rhetoric from reality, during President Trump’s first three years in office, the coal industry has continued to decline and the retirement of coal plants—and the loss of coal jobs—has continued at an even faster pace than during the Obama Administration. See Zeke Hausfather & Lauren Anderson, *Trump’s War on Coal*, THE BREAKTHROUGH INST. (Dec. 5, 2019), <https://thebreakthrough.org/issues/energy/trumps-war-on-coal> [<https://perma.cc/DN3J-P74G>]; see also Chuck Jones, *The Coal Industry Has Lost Almost One Thousand Jobs Since Trump Became President*, FORBES (Mar. 7, 2020, 2:55 PM), <https://www.forbes.com/sites/chuckjones/2020/03/07/the-coal-industry-has-lost-almost-one-thousand-jobs-since-trump-became-president/#397f8a462e29> [<https://perma.cc/4PYG-ZWRH>].

70. Remarks Announcing United States Withdrawal From the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 373 (June 1, 2017), <https://www.govinfo.gov/content/pkg/DCPD-201700373/pdf/DCPD-201700373.pdf> [<https://perma.cc/HC7F-8JQJ>].

71. See generally Ronald Inglehart & Pippa Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash* (HKS Fac. Rsch. Working Paper Series, Working Paper No. RWP16-026, 2016), <https://www.hks.harvard.edu/publications/trump-brexit-and-rise-populism-economic-have-nots-and-cultural-backlash#citation> [<https://perma.cc/4Q3V-TUSA>].

72. See, e.g., U.S. Climate Change Law, *supra* note 56.

United States . . . put[s] the workers—and the people—of [this] country at this debilitating and tremendous disadvantage” and is merely the “latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries.”⁷³

President Trump’s characterizations of the Paris Agreement epitomize his distinct brand of nationalist-aligned rightwing populism as directed at climate law, which he depicts as a product of an elite bureaucracy that prioritizes the interests of the global community over the interests of the national people. He has drawn upon this narrative to rescind the core pillars of domestic climate law⁷⁴ and to withdraw from the Paris Agreement—that is, to reject the core of the emerging rule of law around climate change at both the domestic and international levels.

Within and beyond the United States, the tides of rightwing populism and nationalism are wearing away at the rule of law and undermining the ability of the rule of law to serve as a unifying force in national and international politics.⁷⁵ The erosion of the rule of law, in turn, implicates the reliability of the rule of law—whether thickly or thinly conceived—to facilitate longterm, cooperative efforts to limit environmental degradation, including climate change. These pressures intersect with the deepening sense of urgency around climate change and growing recognition that, in the absence of effective and equitable systems of law, “threats to the environment will remain unresolved and present ever-greater challenges to society.”⁷⁶

D. The Rule of Law & Climate Change at the Crossroads

Debates over the meaning and content of the rule of law are persistent, complex, and intractable. Yet, these conversations are essential to decisions about how we govern ourselves. Engaging deeply in these jurisprudential conversations here would be too discursive to be helpful. Suffice it to note, these debates are intensifying as a result of the ongoing crisis of the world order as well as the rise of populism and nationalism in global politics and the resulting need to assess our continuing ability to rely on existing modes of governance.⁷⁷ Moreover,

73. *Id.* at 422; Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, *supra* note 70.

74. *See U.S. Climate Change Law, supra* note 56, at 420–36.

75. *See* TOM BINGHAM, *THE RULE OF LAW* 174 (2010) (“[I]n a world divided by differences of nationality, race, colour, religion, and wealth [the rule of law] is one of the greatest unifying factors, perhaps the greatest It remains an ideal, but an ideal worth striving for”).

76. *Environment*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/resource-hub/environment> [<https://perma.cc/4LZH-DBSV>]; *see* G.A. Res. 66/228, ¶ 10 (Oct. 27, 2012).

77. *See, e.g.*, Secretary General of the Council of Europe, *supra* note 54; *see also*

regardless of whether one embraces a vision of the international rule of law as thick, rights-inclusive, and focused on advancing liberal norms or as thin, formalistic, and focused on limiting arbitrary exercises of power, the international rule of law is under pressure. This instability requires us to reexamine the role of the rule of law in advancing efforts to develop cooperative governance strategies for matters of common concern, such as climate change.

Hence, while the discourse over the rule of law is not new, it now intersects with and determines in part how we respond to an incontrovertibly global and inevitably determinative crisis. The UN has declared that we have just over a decade within which to act to limit greenhouse gas emissions so as to avert the worst effects of climate change—effects that would touch us all and pose insidious threats to the stability and efficacy of the rule of law, whether thinly or thickly conceived.⁷⁸ Consequently, we now find ourselves at important inflection points both with respect to the rule of law and climate change. As Waldron suggests, “a system of political rule is not a system of law unless social order is organized around the existence of identifiable norms issued for the guidance of conduct.”⁷⁹ What law is and how we understand it is contingent and evolving, and impacting our ability to identify and rely upon a set of shared norms that can guide conduct moving forward. We are, at once, debating who we are and how we relate to one another, and we are doing so at the precipice of global change.

The heightened nature of the ongoing debates about the meaning and content of the rule of law shape the governance space within which efforts to limit climate change emerge and evolve. Consequently, the intersection of these two inflection points demands that we interrogate the relationship between climate change and the rule of law in order to assess the role that law, especially international law, can play in orchestrating the future of collective efforts to respond to climate change. To understand what is possible and to maximize the rule of law as a tool in addressing climate change, we need to better understand where

Larissa Ramina, *TWAIL—“Third World Approaches to International Law” and Human Rights: Some Considerations*, 5 REV. INVESTIGAÇÕES CONST. 261 (2018) (Braz.), https://www.scielo.br/scielo.php?pid=S2359-56392018000100261&script=sci_arttext#fn51 [<https://perma.cc/7Q8T-SLZC>].

78. Meetings Coverage, General Assembly, Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn During General Assembly High-Level Meeting, U.N. Doc. GA/12131 (Mar. 28, 2019), <https://www.un.org/press/en/2019/ga12131.doc.htm> [<https://perma.cc/9PEC-L67S>] (“‘We are the last generation that can prevent irreparable damage to our planet,’ General Assembly President María Fernanda Espinosa Garcés (Ecuador)”).

79. Waldron, *supra* note 7, at 24.

we are as an international community in our shared understandings—or lack thereof—with respect to the rule of law and its application in the climate context. We need to more deeply engage with the ways in which climate change and the rule of law are intimately interlinked at every level of governance so that we can appreciate and respond to both the threats that climate change poses to the stability of the rule of law and the opportunities that the rule of law offers in responding to climate change.⁸⁰ This is particularly true at the intersection of the rule of law, human rights, and climate change, given that there are increasing attempts to draw upon rights-based tools to respond to the climate crisis.

II. THE RULE OF LAW, CLIMATE CHANGE, & HUMAN RIGHTS: FIDDLING AS THE WORLD BURNS?

A. The Rights Revolution in Environmental & Climate Change Law

The ideal of a cooperative international community remains elusive. However, the UN continues to propel the development of international law along a pathway imagining the realization of this ideal. The notion that we are a global community that can and, at times, should function collectively guided by a set of shared norms is intertwined with the evolution of international law from a system of law focusing on ways to allow states to coexist peacefully to a system that seeks to facilitate cooperation around issues of common interest. International climate change law represents the paradigmatic example of the assumption that we are a collective human community and that we are prepared to cooperate as such.⁸¹ Although this vision has never come to fruition, it has propelled international climate law along a pathway premised on the possibility of developing an institutional framework that enables the construction of an “international community” that recognizes enough shared common interests, collective initiative, and normative common ground to enable the degree of cooperation necessary to achieve meaningful progress on behalf of humankind, despite competing individual state interests.⁸²

80. As Zimmermann suggests “in ‘turbulent times’, . . . it is the vocation of scholars of international law to carefully analyze to what extent, and for what reasons, the international rule of law may thus have become an endangered species, and how to protect it.” Andreas Zimmermann, *Times Are Changing—and What About the International Rule of Law Then?*, EJIL:TALK! (Mar. 5, 2018), <https://www.ejiltalk.org/times-are-changing-and-what-about-the-international-rule-of-law-then> [<https://perma.cc/P49Q-SRBO>].

81. See generally Cinnamon P. Carlarne & Mohamed S. Helal, *A Conversation About Climate Change Law and the ‘International Community’*, 8 CLIMATE L. 229 (2018).

82. *Id.* at 239.

However, as patterns of climate change have intensified and efforts to curb climate change have faltered, the layers of inequity intrinsic to climate change and the vast challenges climate change poses to human rights have been laid bare.⁸³ This has driven a rights-based turn in climate change law.⁸⁴ Climate law and climate discourse increasingly focus on mapping out and responding to the risks climate change poses to human rights, using a full suite of rights-based frames and tools.⁸⁵

These linkages build off work within the UN that responds to the relationship between human rights and the environment. Although the relationship between human rights and environmental quality has been recognized since the emergence of modern international environmental law at the 1972 UN Conference on the Human Environment,⁸⁶ little was done during the first two decades of legal development to explore and cultivate these linkages.⁸⁷ In the early days of international climate law, however, the topic began to garner renewed attention. In 1994,⁸⁸ Fatma Zohra Ksentini, the UN designated Special Rapporteur on Human Rights and the Environment, presented the Draft Declaration on Principles of Human Rights and the Environment to the UN Economic and Social Council.⁸⁹ The declaration proposed the creation of

83. See e.g., John H. Knox, *Human Rights Principles and Climate Change*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW, *supra* note 31, at 214.

84. See Peel & Osofsky, *supra* note 32; Limon, *supra* note 32.

85. See, e.g., *Human Rights and Climate Change*, OHCHR, <https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx> [<https://perma.cc/PX7B-3JY6>].

86. The Stockholm Declaration included one of the earliest references to the relationship between human rights and the environment, stating that “man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being” U.N. Conference on the Human Environment, *Stockholm Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/Rev.1, princ. 1 (June 16, 1972).

87. Between the 1972 Stockholm Conference and the 1992 UN Conference on Environment and Development in Rio de Janeiro, the debate over human rights and environmental protection took a back seat to efforts to address a growing suite of global environmental challenges that required careful considerations of the balance between environmental protection and economic development. As a result, the “initial emphasis on a human rights perspective [was not] maintained” in the 1992 Rio Declaration, which “[a] void[ed] the terminology of rights altogether” and, instead, declared that “[h]uman beings are at the centre of concerns for sustainable development.” Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 44, 49, 63 (Alan E. Boyle & Michael R. Anderson eds., 1998).

88. The same year the United Nations Framework Convention on Climate Change (UNFCCC) came into force. U.N. Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

89. Fatma Zohra Ksentini (Special Rapporteur on Human Rights and the Environment), *Review of Further Developments in Fields With Which the Sub-Commission Has Been Concerned*, U.N. Doc. E/CN.4.Sub.2/1994/9, annex I (July 6, 1994).

a new category of human rights that would recognize a right to a safe and healthy environment. The report garnered considerable interest but did little to prompt legal change within the UN system.⁹⁰ Subsequently, however, as patterns of climate change and global environmental degradation progressed, “recognition of the links between human rights and the environment has greatly increased” and “[t]he number and scope of international and domestic laws, judicial decisions, and academic studies on the relationship between human rights and the environment are growing rapidly.”⁹¹

In 2012, almost two decades after the initial report, growing concern about these links prompted the UN Human Rights Council to establish a mandate on human rights and the environment to “examine the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment,” and “promote best practices of the use of human rights in environmental policymaking.”⁹² To this end, John Knox was appointed to serve as the Independent Expert and Special Rapporteur on Human Rights and the Environment.

Over the course of his appointment, Knox brought renewed focus to the human rights-environment interface, including the relationship between climate change and human rights.⁹³ At the conclusion of his term, Knox presented a report setting out framework principles for states to ensure the enjoyment of a safe, clean, healthy, and sustainable environment within the context of human rights.⁹⁴ As Knox declared when presenting the report:

There can no longer be any doubt that human rights and the environment are interdependent . . . A healthy environment is necessary for the full enjoyment of many human rights, including the rights to life, health, food, water and development. . . . The relationship between

90. See, e.g., Caroline Dommen, *Claiming Environmental Rights: Some Possibilities Offered by the United Nations' Human Rights Mechanisms*, 11 GEO. INT'L ENV'T L. REV. 1, 33–34 (1998); Neil A.F. Popović, *In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment*, 27 COLUM. HUM. RTS. L. REV. 487, 490–93 (1996).

91. *About Human Rights and the Environment*, OHCHR, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/AboutHRandEnvironment.aspx> [https://perma.cc/VW4L-7HYX].

92. *Special Rapporteur on Human Rights and the Environment*, OHCHR, <https://www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx> [https://perma.cc/P3R4-7X58].

93. See *Safe Climate Report*, OHCHR, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SafeClimate.aspx> [https://perma.cc/8PLD-VWL8].

94. *Framework Principles on Human Rights and the Environment (2018)*, OHCHR, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx> [https://perma.cc/K49P-DKM3].

human rights and the environment has countless facets, and our understanding of it will continue to grow for many years to come.⁹⁵

These same connections are present, visible, and urgent in the context of climate change. Recognizing this connectivity, the current Special Rapporteur on Human Rights and the Environment, David Boyd, issued a report illustrating “the devastating effects of the current global climate emergency on the enjoyment of human rights, and the crucial role for human rights in catalysing action to address climate change”, and concluding “that a safe climate is a vital element of the right to a healthy environment and is absolutely essential to human life and well-being.”⁹⁶

While the Office of the High Commissioner spearheads UN efforts to recognize the relationship between human rights and the environment, complementary steps have been taking place all over the world. As has been examined exhaustively, an environmental rights revolution⁹⁷ is sweeping the globe. Although estimates vary,⁹⁸ more than 100 states have recognized the right to a healthy environment at the national level through constitutional or legislative provisions.⁹⁹ Additionally, the right to a healthy environment has been incorporated into numerous regional human rights agreements and environmental treaties.¹⁰⁰ As Knox reported to the UN General Assembly in 2018, “No other ‘new’ human right has gained such widespread constitutional recognition so rapidly.”¹⁰¹

95. *UN Expert Calls for Global Recognition of the Right to Safe and Healthy Environment*, OHCHR (Mar. 5, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22755&LangID=E> [<https://perma.cc/FRY3-HJ4R>].

96. David R. Boyd (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Rep. on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/74/161, at 2 (July 15, 2019).

97. See, e.g., 7 HUMAN RIGHTS AND THE ENVIRONMENT: LEGALITY, INDIVISIBILITY, DIGNITY AND GEOGRAPHY (James R. May & Erin Daly eds., 2019); THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT (John H. Knox & Ramin Pejan eds., 2018); BRIDGET LEWIS, ENVIRONMENTAL HUMAN RIGHTS & CLIMATE CHANGE: CURRENT STATUS & FUTURE PROSPECTS (2018); JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2015).

98. See Chris Jeffords & Joshua C. Gellars, *Constitutionalizing Environmental Rights: A Practical Guide*, 9 J. HUM. RTS. PRAC. 136, 136–37 (2017).

99. John H. Knox, *Framework Principles on Human Rights and the Environment*, U.N. HUM. RTS. SPECIAL PROCS. 6 n.1 (2018), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf> [<https://perma.cc/3GAF-DYE3>].

100. *Id.*

101. John H. Knox (Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment), *Rep. on Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 30, U.N. Doc. A/73/188 (July 19, 2018) [hereinafter *Knox Report*].

While environmental rights are an increasingly common feature of national constitutions, these rights are young. There is still much to be learned about how incorporating environmental rights into national systems shapes substantive outcomes and the rule of law.¹⁰²

Complementing these national measures, at the international level there are ongoing efforts to develop a new Global Pact for the Environment.¹⁰³ The emerging Pact seeks to remedy existing gaps in international environmental law, and to “solidify the environmental rule of law around the world.”¹⁰⁴ Negotiations for the Pact include calls for the agreement to center around a rights-based frame. The IUCN World Commission on Environmental Law, for example, advocates a vision of the Pact that would “[e]stablish the universal right to an ecologically sound environment as a human right at the international level, able to be invoked in international, regional, and national courts of law.”¹⁰⁵

The rapid diffusion and embedding of environmental rights in national and regional law is unique and suggests widespread recognition of the linkages between a safe and healthy environment and the realization of basic human rights. It also reflects ongoing attempts to embed rights—including environmental rights—in national conceptions and realizations of the rule of law. Despite this trend towards thickening the rights-focused nature of national law, the degree to which rights provide meaningful vehicles for addressing environment-related harms, of course, depends on the strength and stability of the rule of law. Therefore, even in contexts where environmental rights have been recognized, weak systems of law limit the ability to realize and make these rights meaningful.¹⁰⁶

All of these developments demonstrate how deepening recognition of the intrinsic links between the environment and human rights is driving efforts to embed rights in the evolving body of environmental law. These linkages increasingly influence the development of climate law, as well.

102. Jeffords & Gellars, *supra* note 98, at 139–40 (suggesting that their adoption has been associated with stronger environmental laws and more environmental litigation).

103. G.A. Res. 72/277, *Towards A Global Pact for the Environment* (May 14, 2018).

104. *Global Pact for the Environment*, IUCN, <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/global-pact-environment> [https://perma.cc/QKJ6-JGEM].

105. *Id.*

106. See Jessica Scott, *From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes*, 6 MICH. J. ENV'T & ADMIN. L. 203 (2016); see also Knox, *Framework Principles on Human Rights and the Environment*, *supra* note 99, at 18.

As has been explored in depth,¹⁰⁷ over the past decade, attempts to establish and respond to the relationship between climate change and human rights have expanded exponentially. These efforts began in earnest as early as 2005, when the Inuit Circumpolar Conference filed a petition with the Inter-American Commission on Human Rights (IACHR) claiming that the United States' failure to curb its greenhouse gas emissions was leading to climate change that, in turn, violated the Inuit's human rights, including their rights to property, culture, and subsistence.¹⁰⁸ Although the IACHR declined to rule on the complaint, the IACHR invited the petitioners to return to the Commission to provide testimony on the links between climate change and human rights.¹⁰⁹ The testimony provided during these hearings helped establish the connections between climate change and human rights and kickstarted a multitude of efforts to respond to these connections.

Subsequently, in 2007, leaders from some of the world's most vulnerable Small Island Developing States met in the Maldives to explore the human rights–climate change relationship. The result of this meeting, the Male' Declaration on the Human Dimension of Climate Change, "stated explicitly, and for the first time in an international agreement, that 'climate change has clear and immediate implications for the full enjoyment of human rights' and called on the UN human rights system to address the issue as a matter of urgency."¹¹⁰

107. See MARGARETHA WEWERINKLE-SINGH, *STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW* (2019); Peel & Osofsky, *supra* note 32; HUMAN RIGHTS AND CLIMATE CHANGE (Stephen Humphreys ed., 2010); John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 165 (2009); John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENV'T L. REV. 477 (2009); Siobhán McNerney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues*, 33 HARV. ENV'T L. REV. 431 (2009); Sumudu Atapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive This Onslaught?*, 20 COLO. J. INT'L ENV'T L. & POL'Y 35, 66 (2008).

108. *Inuit File Petition with Inter-American Commission on Human Rights, Claiming Global Warming Caused by United States Is Destroying Their Culture and Livelihoods*, CTR. FOR INT'L ENV'T L. (Dec. 7, 2005), <https://www.ciel.org/news/inuit-file-petition-with-inter-american-commission-on-human-rights-claiming-global-warming-caused-by-united-states-is-destroying-their-culture-and-livelihoods> [<https://perma.cc/B8PB-G5BR>]. 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 States, *Watt-Cloutier v. United States*, Inter-Am. Comm'n H.R., Petition N P-1413-05 (Dec. 7, 2005), https://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf [<https://perma.cc/5ES9-EQ8P>].

109. See Timo Koivurova, *International Legal Avenues to Address the Plight of Victims of Climate Change: Problems and Prospects*, 22 J. ENV'T L. & LITIG. 267, 285–95 (2007).

110. Marc Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 GA. J. INT'L & COMP. L. 547 (2010) (citing *Male' Declaration on the Human Dimension of Climate Change*, CTR. FOR INT'L ENV'T L. (Nov. 14, 2007), http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf [<https://perma.cc/8MKU-MJZY>]).

Picking up on these trends, in 2009, the UN Human Rights Council issued a resolution on human rights and climate change, in which it recognized the threats that climate change poses to the realization of a suite of human rights, including the rights to life, adequate food, health, housing, self-determination, safe drinking water and sanitation, among others.¹¹¹ With this resolution, the Council also “affirm[ed] that human rights obligations and commitments have the potential to inform and strengthen international and national policymaking in the area of climate change” and called for further work to improve understanding of the relationship between the two areas of law.¹¹²

In the years that have followed, efforts to recognize and respond to the critical linkages between climate change and human rights have proliferated.¹¹³ Much of this work has focused on the courts. Increasingly, as Professors Jacqueline Peel and Hari M. Osofsky suggest, there is a “rights turn in climate change litigation,”¹¹⁴ wherein litigants in courts around the world are seeking to situate state obligations to address climate change as a matter of fundamental constitutional and human rights.¹¹⁵ As Professor Ann Carlson suggests, these claims are driven by “the compelling nature of climate change as an existential risk and the failure of our institutions to address it, in the face of a mountain of evidence.”¹¹⁶

The rights turn in litigation complements a larger trend in the development of international climate law, whereby questions of rights

111. Human Rights Council Res. 10/4, Human Rights and Climate Change (Mar. 25, 2009).

112. *Id.* at 2.

113. For a recent example, see the recent children’s petition pursuant to the UN Convention on the Rights of the Child, alleging that the acts of certain member states under the Convention cause and perpetuate the climate crisis resulting in the violation of the petitioner’s rights. Petition Submitted Under Article 5 of the Third Optional Protocol to the United Nations Convention on the Rights of the Child, *Sacchi v. Argentina, Committee on the Rights of the Child* (Sept. 23, 2019), <https://childrenvsclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-Redacted.pdf> [<https://perma.cc/8EYV-VCCE>] [hereinafter *Petition Submitted to the CRC*].

114. Peel & Osofsky, *supra* note 32, at 49.

115. See JOANA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2019 SNAPSHOT 8 (2019), http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2019/07/GRI_Global-trends-in-climate-change-litigation-2019-snapshot-2.pdf [<https://perma.cc/D57C-FR3Z>]; DENA P. ADLER, COLUMBIA LAW SCH., SABIN CTR. FOR CLIMATE CHANGE L., U.S. CLIMATE LITIGATION IN THE AGE OF TRUMP: YEAR TWO 19 (2019), <http://columbiaclimatelaw.com/files/2019/06/Adler-2019-06-US-Climate-Change-Litigation-in-Age-of-Trump-Year-2-Report.pdf> [<https://perma.cc/JUH9-KUAY>].

116. Sean Hecht, *UCLA Law’s Ann Carlson Interviewed on CBS’s 60 Minutes Discussing Juliana v. U.S., Landmark Climate Change Lawsuit*, LEGAL PLANET (Mar. 6, 2019), <https://legal-planet.org/2019/03/06/ucla-laws-ann-carlson-interviewed-on-cbss-60-minutes-discussing-juliana-v-u-s-landmark-climate-change-lawsuit> [<https://perma.cc/J8SY-7YPV>].

and justice increasingly pervade and influence climate negotiations and even climate treaties. Notably, the Paris Agreement is the first international climate law agreement to explicitly integrate human rights language into the text of the treaty, calling upon parties to “respect, promote and consider their respective obligations on human rights.”¹¹⁷ The inclusion of human rights language in the Paris Agreement and the growing rights turn in climate litigation reflects the degree to which human rights has become embedded within the burgeoning body of climate law.¹¹⁸

B. The Reliability of Rights

The rights turn in climate law raises questions about the health and integrity of the human rights project. To the extent that climate law is increasingly intertwined with and employing the norms and mechanisms of human rights to advance climate-related objectives, the stability of human rights norms within the larger international system is of central concern. The focus on human rights in climate law is attributable, at least in part, to the idea that the principles and institutions of human rights form a solid and supportive foundation upon which to develop authoritative arguments, implementable responses, and remedies for violations with respect to climate change.¹¹⁹ This vision of human rights as a normatively heavy and a reliable anchor for climate law builds upon a vision of the international rule of law that is embedded with or, at least, enabling of human rights.¹²⁰ This

117. U.N. Framework Convention on Climate Change, *Paris Agreement*, U.N. Doc. FCCC/CP/2015/10/Add.1, pmb1. (Jan. 29, 2016) (including: “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 equity”).

118. For critical appraisals of the complexities involved in intertwining human rights, the environment, and climate change see Alan Boyle, *Human Rights and the Environment: Where Next?*, 23 EJIL 613 (2012); Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925 (2007). See also Hurst Hannum, *Reinvigorating Human Rights for the Twenty-First Century*, 16 HUM. RTS. L.R. 409 (2016).

119. Equally, while international environmental law and international climate law focus primarily on preventing environmental degradation and mobilizing cooperation around precautionary measures, they provide few opportunities for seeking remedies for violations. In contrast, international human rights law offers forums and mechanisms for seeking remedies for violations. See SUMUDU ATAPATTU, *HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE: CHALLENGES AND OPPORTUNITIES* 49 (2015).

120. See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 174 (1996) (discussing a “global consensus that state sovereignty is conditional upon the protection of at least basic rights”); see also JURE VIDMAR, *DEMOCRATIC STATEHOOD IN INTERNATIONAL LAW* (2013); Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in *DEMOCRATIC GOVERNANCE IN INTERNATIONAL LAW* 239, 249 (Gregory

is the vision of the rule of law embraced and advanced by the UN¹²¹ and that has propelled the development of international law and the shape of the international system in the latter half of the twentieth century.¹²² However, this vision of the rule of law—both its integrity and its accuracy¹²³—is in doubt. Shifts in world order and modes of global governance challenge the degree to which there is, or ever was, a shared understanding of the international rule of law that embodies and advances a move towards a rights-oriented international system.¹²⁴

As Professors James Loeffler & Mila Versteeg describe, even though, “[o]ver the past 20 years the human rights agenda has advanced at a pace few could have imagined,”¹²⁵ this:

golden age of human rights scholarship has been accompanied by a growing unease, if not crisis, in some academic circles about the utility and legitimacy of the human rights movement, and, relatedly, of human rights studies. Some recent high profile contributions in the literature have suggested that human rights law has failed to do what it was supposed to do: improve respect for human rights and minimize harm on the ground. Against the popular image of human rights as a self-evidently positive endeavor, a growing counter-narrative challenges the movement for its putative blindness to the political ideologies and power dynamics at work in its own formation.¹²⁶

Fox & Brad Roth eds., 2000). For a detailed discussion of the relationship between human rights and the rule of law see Randall Peerenboom, *Human Rights and Rule of Law: What's the Relationship?*, 36 GEO. J. INT'L L. 809 (2005).

121. See *infra* Subpart II.B.

122. See Helal, *supra* note 2, at 623–24 (describing a vision of the modern international system that “introduced a requirement that states adopt a democratic and economically liberal form of government that protects basic human rights and promotes private enterprise to be eligible to join the international system,” suggesting that human rights were “the *cause célèbre* of the 1990s,” and arguing that “[t]he legitimacy of states and their right to retain their sovereignty and enjoy the privileges of statehood was becoming contingent on their human rights record.”).

123. See Arthur Chaskalson, *How Far Are We from Achieving the Goals of the United Nations' Declaration of Human Rights?*, 24 MD. J. INT'L L. 75 (2009).

124. For different perspectives on this discussion see James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS, (Jeffrey Dunoff & Mark Pollack, eds., forthcoming); Helal, *supra* note 2; STEVEN L.B. JENSEN, *THE MAKING OF INTERNATIONAL HUMAN RIGHTS: THE 1960S, DECOLONIZATION, AND THE RECONSTRUCTION OF GLOBAL VALUES* (2016).

125. Cecilia Marcela Bailliet, *Call for Papers: “Human Rights Under Pressure: Exploring Norms, Institutions and Policies”*, INTLAWGRRLS (Feb. 21, 2014), <https://ilg2.org/2014/02/21/call-for-papers-human-rights-under-pressure-exploring-norms-institutions-and-policies> [<https://perma.cc/PN7T-WPQP>].

126. James Loeffler & Mila Versteeg, *Foreword: The Future of Human Rights Scholarship*, 81 L. & CONTEMP. PROBS. i, i (2018). For a brief discussion of similar challenges facing international humanitarian law, see Helen Durham, *Strengthening Compliance with IHR: Disappointment and Hope*, HUMANITARIAN L. & POL'Y (Dec. 14, 2018), <https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope>

The human rights project has come under increased scrutiny both for its failures to achieve its objectives¹²⁷ as well as for “its putative blindness to the political ideologies and power dynamics at work in its own formation.”¹²⁸ Moreover, as populist and nationalist politics roil¹²⁹ and the great powers continue to grapple for control, the late twentieth century vision of a world composed of “liberal democracies that protect human rights”¹³⁰ becomes increasingly tenuous. The Council of Europe, for example, has warned of growing instances of populist influenced “governments openly challenging constitutional constraints and disregarding their international obligations to uphold human rights.”¹³¹

While human rights, undoubtedly, continue to constitute a central tenet of the international system,¹³² ongoing challenges to that system erode the illusion¹³³ that there is a shared understanding of the international rule of law that is inherently thick or rights-inclusive and raises questions as to the integrity of advancing a vision of climate law that is overly-entwined with, and dependent upon, a rights-based frame. Thus, while fully acknowledging substantive linkages between climate change and the realization of human rights,¹³⁴ rights-based climate narratives and strategies must proceed with caution.

Beyond grappling with longstanding questions over the compatibility of using a rights-based narrative in the climate context¹³⁵—these

[<https://perma.cc/Z9RD-TCKU>].

127. See SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2018); STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013); ERIC A. POSNER, *Some Skeptical Comments on Beth Simmons's Mobilizing for Human Rights*, 44 N.Y.U. J. INT'L L. & POLS. 819 (2012); UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* (2008).

128. Loeffler & Versteeg, *supra* note 126.

129. See, e.g., Secretary General of the Council of Europe, *supra* note 54 (“[H]uman rights non-governmental organisations (NGOs) and defenders have experienced a clamp-down as a number of countries have drafted or passed oppressive legislation or undermined them by a range of other means. In an increasing number of states, the space for civil society is shrinking, and peaceful public events are viewed and treated as dangerous”).

130. Helal, *supra* note 2, at 580.

131. Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law: Populism—How Strong are Europe's Checks and Balances?*, COUNCIL EUR. 4 (2017), <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-populism-how-strong/168070568f> [<https://perma.cc/SB2W-HJNX>].

132. Equally, important regional actors, such as the European Commission continue to advance a vision of the rule of law as thickly intertwined with respect for human rights. See, e.g., Lord Bingham, *supra* note 6, at 75.

133. *Id.* Lord Bingham suggests that, while “the law must afford adequate protection of fundamental human rights. This would not be universally accepted as embraced within the rule of law.” *Id.* at 76–77. *But see* G.A. Res. 67/1, *supra* note 21 (providing a vision of the rule of law and human rights as mutually reinforcing).

134. Knox Report, *supra* note 101.

135. See, e.g., Bridget Lewis, *Environmental Rights or a Right to the Environment?*

including concerns about the anthropocentric and individualistic nature of human rights,¹³⁶ the limited ability of human rights to account for the interests of future generations,¹³⁷ and difficulties inherent in articulating a ‘right to the environment’¹³⁸—efforts to tie the climate change narrative to human rights and to adopt a human rights–centered approach to climate change must also acknowledge and contend with the pressures that confront the human rights project and challenge the centrality of human rights in rule of law narratives worldwide. The failure to do so could jeopardize the already fragile social and legal foundations of the emerging climate law “project.”

This is not to question the basic relationship between climate change and human rights. There is little doubt that the climate crisis is a human rights crisis.¹³⁹ As the former UN High Commissioner for Human Rights, Mary Robinson, declared, climate change is already interfering with the fulfillment of “the basic human rights of millions of the world’s poor.”¹⁴⁰ Addressing climate change is not just important, but necessary to ensuring basic human health and wellbeing¹⁴¹ and, in some cases, to protecting entire ways of life and, even, existence.¹⁴² It

Exploring the Nexus Between Human Rights and Environmental Protection, 8 MACQUARIE J. INT'L & COMPAR. ENV'T L. 36 (2012); Kerri Woods, *What Does the Language of Human Rights Bring to Campaigns for Environmental Justice?*, 15 ENV'T POLS. 572 (2006); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991).

136. See, e.g., Catherine Redgwell, *Life, the Universe and Everything: A Critique of Anthropocentric Rights*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION 71, 71–87 (Alan E. Boyle & Michael R. Anderson eds., 1996).

137. See, e.g., Marcus Düwell & Gerhard Bos, *Human Rights and Future People—Possibilities of Argumentation*, 15 J. HUM. RTS. 231 (2016); RICHARD P. HISKES, *THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE* (2009).

138. See Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, *supra* note 87, at 43, 51.

139. See, e.g., *Petition Submitted to the CRC*, *supra* note 113, at 3 (“The climate crisis is a children’s rights crisis. Children have an inalienable right to life under the Convention on the Rights of the Child . . . Mitigating climate change is a human-rights imperative.”).

140. *Mary Robinson: Climate Change Is an Issue of Human Rights*, INDEPENDENT (Dec. 10, 2008), <https://www.independent.co.uk/voices/commentators/mary-robinson-climate-change-is-an-issue-of-human-rights-1059360.html> [<https://perma.cc/NLA5-WVY3>].

141. See Myles Allen et al., *Global Warming of 1.5°C: Summary for Policymakers*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 11–12, 20–26 (Valérie Masson-Delmotte et al. eds., 2018), <https://www.ipcc.ch/sr15/chapter/summary-for-policy-makers> [<https://perma.cc/YFF8-SH6E>]; see also C Carlarne & MH Depledge, *Climate Change, Environmental Health, and Human Rights*, in 1 ENCYCLOPEDIA OF HUMAN HEALTH 699 (J.O. Nriagu ed., 2011); Michael H. Depledge & Cinnamon P. Carlarne, *Environmental Rights and Wrongs*, 42 ENV'T SCI. & TECH. 990 (2008); Michael Depledge & Cinnamon Carlarne, *Sick of the Weather: Climate Change, Human Health and International Law*, 9 ENV'T L. REV. 231 (2007).

142. See *Petition Submitted to the CRC*, *supra* note 113, at 2, 42–43, 87–88. For a

is, arguably, the greatest threat to intergenerational human rights. But climate change is also much more than an intra- and intergenerational human rights crisis. It is a planetary crisis.¹⁴³ It is by now indisputable that “[w]ithout rapid action to curb greenhouse gas emissions and efforts to safeguard the environment we risk causing irreversible damage to the planet.”¹⁴⁴ Climate change, thus, imperils not only intra- and intergenerational human rights¹⁴⁵ and human health and wellbeing, but also planetary health on an almost inconceivable scale.¹⁴⁶

In order to prepare systems to be responsive to climate change to ensure human and planetary health and wellbeing, it is necessary to think beyond climate law, and even beyond human rights law, to focus on how to integrate climate considerations into law and governance structures more systemically.¹⁴⁷ This requires us to think broadly about the relationship between climate change and the rule of law. Before we rush forward to decipher collective will in the climate law context or to orchestrate the future of climate law drawing heavily upon a

complementary discussion of the relationship between climate change and US constitutional rights, see First Amended Complaint for Declaratory & Injunctive Relief at 92–93, *Juliana v. United States*, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 15-1517) [hereinafter *Youth Complaint*]; *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233, 1250 (D. Or. 2016).

143. HOUSE OF COMMONS ENV’T AUDIT COMM., *OUR PLANET, OUR HEALTH*, 2017–19, HC 1803, at 14 (UK), <https://publications.parliament.uk/pa/cm/201719/cmselect/cmenvaud/1803/1803.pdf> [<https://perma.cc/4J89-Z4CY>] [hereinafter *OUR PLANET, OUR HEALTH*] (“Without rapid action to curb greenhouse gas emissions and efforts to safeguard the environment we risk causing irreversible damage to the planet. This is already having a significant and growing impact on human health, with impacts set to become more severe.”); Sarah Witmee et al., *Safeguarding Human Health in the Anthropocene Epoch: Report of The Rockefeller Foundation-Lancet Commission on Planetary Health*, 386 *LANCET* 1973, 1973–76 (Nov. 14, 2015), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2815%2960901-1> [<https://perma.cc/R5TU-35ZP>].

144. *OUR PLANET, OUR HEALTH*, *supra* note 144, at 14; see also Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14(2) *ECOLOGY Soc’y* 32, 33 (2009).

145. Arguably, in fact, climate change is the greatest threat to intergenerational human rights. See, e.g., *Climate Change*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/climate-change> [<https://perma.cc/8HYC-QX8K>].

146. “Put simply, planetary health is the health of human civilisation and the state of the natural systems on which it depends.” *OUR PLANET, OUR HEALTH*, *supra* note 144, at 5 (citing Richard Horton & Selina Lo, *Planetary Health: A New Science for Exceptional Action*, 386 *THE LANCET* 1921 (2015)).

147. See, e.g., Louis J. Kotzé & Rakhyun E. Kim, *Earth System Law: The Juridical Dimensions of Earth System Governance*, 1 *EARTH SYS. GOVERNANCE* 1 (2019); *U.S. Climate Change Law*, *supra* note 56 (providing an overview of how climate considerations increasingly shape local, state, and international law and the evolving role of different legal and extralegal actors and institutions, in this regard); Hari M. Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 *EMORY L.J.* 695 (2016); Victor B. Flatt, *Adapting Laws for a Changing World: A Systemic Approach to Climate Change Adaptation*, 64 *FLA. L. REV.* 269 (2012).

rights-based narrative, we first must explore the contours of the larger governance space within which we are operating.

Establishing the relationship between climate change and human rights offers opportunities to elevate the status of climate claims, to provide remedies for violations, and to respond to the very real linkages that exists between climate change and human rights. However, it is also imperative that these strategies operate in full view of both the inherent limitations of human rights, and the contemporary pressures that strain the strength of rights narratives.¹⁴⁸ Undoubtedly, existing systems of governance are inadequate to address the threats climate change poses. And, almost certainly, human rights offer opportunities to extend and strengthen governance systems. The governance challenges posed by climate change, however, reach far beyond what the existing, highly individualized, reactive, state-focused system of human rights can cure alone.

CONCLUSION

The rule of law and the human rights project are under duress. The climate crisis is reaching its apex. The intersection of these challenges requires us to revisit any assumptions we hold about the strength and normative foundations of the international rule of law and the benefits of adopting a thickly rights-based frame for climate change.

We are beyond debating whether climate change is real. Equally, we are beyond debating whether climate change impacts human rights. The question is not whether we need to draw upon the rule of law to address climate change or whether we must acknowledge and respond to the relationship between climate change and human rights. We must, on both counts. But, as we do so, there is a pressing need to more closely examine how fluxes in the international system do and should shape how we orchestrate climate governance strategies moving forward.¹⁴⁹ Only in this way can we appreciate and maximize the role of the rule of law and human rights, respectively, in responding to climate change.

148. See generally Peerenboom, *supra* note 120 (examining in depth the human rights–rule of law relationship and exploring how the “human rights movement has increasingly encountered conceptual, normative and political challenges. In particular, the movement’s claim to universality has been shattered by critiques that take issue with the secular, individualistic, liberal commitments of the movement.”). *Id.* at 811.

149. See Kenneth W. Abbot & Duncan Snidal, *International Regulation without International Government: Improving IO Performance through Orchestration Deficit*, 5 REV. INT’L ORGS. 315 (2010).