

EDITORIAL

LAWS OF NATURE AND NATIONS

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2022 is a year emblematic for International Environmental Law. Before the United Nations Stockholm Conference on the Human Environment in 1972, this field of law did not exist. There were statutes, and even international agreements by which States established norms and rules governing how humans affected the natural world. Laws governing hunting and fishing, or managing the harvest of timber, were common by the 18th century. As hunting depleted species, laws for sustaining their reproductive capacity emerged, such as the Fur Seal Convention of 1911, which controlled commercial harvests of fur-bearing mammals (such as Northern fur seals and sea otters) in the Pribilof Islands of the Bering Sea. However, laws for conservation of nature were regarded as largely being peripheral to government or commerce.

To be sure, in human history there have been seminal events that established fundamental rules governing nature. Justinian's Institutes (534) had codified the public trust doctrine, later ensuring public rights of access to waterways in legal systems that embraced the *Corpus Juris*. Centuries later, the promulgation of *Magna Carta's* principles for the rule of law in 1215, *Carta de Foresta* in England in 1217 preserved public access to harvest nature's bounty: all persons, «*omnes*», held «*libertates des forestis*» and that all also had a correlative duty to observe those liberties. By the late 19th century, it was increasingly common for governments to designate public parks and protected natural areas. Left out of this progression of law-making were the indigenous peoples, whose cultures had sustained nature for generations.

These themes —establishing the rules for public access and regulating the use and exploitation of natural resources— took on new characteristics with the world-wide growth in human populations (from 1 billion in 1800 to 7.9 billion today), and the expanding capacity of the industrial revolution. Pol-

lution grew exponentially and indiscriminately. Resource depletion became a recurring phenomenon. When the United Nations Charter was adopted in 1945, States considered their environmental problems to be matters of domestic and local concern, not international. Similarly, the Universal Declaration of Human Rights made no explicit acknowledgment of environmental rights. Troubled that most States neglected what ecology reported were escalating threats to wildlife globally, a small number of States and scientific bodies founded the International Union for Conservation of Nature (IUCN) in 1948.

Preoccupied with the end of the colonial era through self-determination and the UN Trusteeship Council, States and International Law paid scant attention to scientific reports about degradation of nature. The newly enlarged UN General Assembly decided to re-establish international laws, with the participation of newly independent States. A series of diplomatic conferences began to formulate laws for the oceans. In 1963, IUCN established its Commission on Legislation, later known as the World Commission for Environmental Law, and worked with all States to strengthen national legislation for nature conservation, and to launch proposals for international laws, such as the Convention on the International Trade in Endangered Species (CITES).

In the 1960s, when extreme water pollution caused rivers to catch fire in North America and Eurasia, and IUCN's Red Data Books chronicled a growing rate of extinction of species, and citizens in cities demonstrated in the streets against air pollution and growing volumes of waste. States began to act. The first environment ministries were established and laws to curb pollution enacted. Beginning in 1969, Environmental Impact Assessment laws (EIA) were designed for the first time, and began to become standard practices. Amidst the widespread public revulsion against environmental degradation, the UN General Assembly convened the Stockholm Conference on the Human Environment.

The Stockholm Conference re-set global norms for care of the Earth. The Stockholm Declaration celebrated each person's right to the environment. In Principle 21, the Declaration also restated the customary international law obligation of States to protect the commons and not to harm the environment of any other States. The Conference called for a ban on dumping waste from ships into the oceans. Most important, is requested that the UN General Assembly to establish the United Nations Environment Programme (UNEP). Stockholm delegates inspired the further negotiations that integrated environmental norms into the UN Conference on the Law of Sea. By 1982, States had codified rules governing 70 % of Earth's surface, including agreeing in Part XII that «States have the obligation to protect and preserve the marine environment» (art. 192). Beginning in 1976 with the Mediterranean Sea's Barcelona Agreement, the UN Regional Seas treaties provide a growing framework for legal actions to protect the marine environment.

The Stockholm Conference launched four extraordinary decades of negotiations that would establish new substantive international agreements and

agree on the norms of «sustainable development». IUCN proposed the norm of sustainable development, with UNEP and the WWF-International, through a program «Caring for the Earth»¹. With IUCN's urging, and new reports on environmental problems from UNEP, in 1985 the General Assembly convened a World Commission on Environment and Development. Through the horrific accounts of environmental degradation in all regions of the Earth, this Commission's report, *Our Common Future* (1987), set the stage for the UN General Assembly to convene the 1992 «Earth Summit», in Rio de Janeiro, on the 20th anniversary of the 1972 Stockholm Conference.

The Rio World Conference on Environment and Development (WCED) was extraordinary. It was the largest summit meeting ever held, and was preceded by a parallel world summit of Indigenous Peoples also held in Brazil. The WCED adopted *Agenda 21*, a blueprint for sustainable development, and the Rio Declaration on Environment and Development, which set out clear principles for all States to follow. Quite remarkably, these principles have been implemented universally, if still imperfectly. Principle 17, the duty to conduct EIA, has been acknowledged by the International Court of Justice in 2010 as a customary international law norm². The public's right of participation, in Principle 10, is a corner stone of environmental decision-making in most nations. Rio provided the occasion for signing the UN Framework Convention on Climate Change and the UN Convention on Biological Diversity, and in 1994 the Convention to Combat Desertification. The General Assembly decided to convene annually a Permanent Forum on Indigenous Issues at the UN headquarters.

These gains would be confirmed at the Johannesburg Summit on Sustainable Development (WSSD) in 2002, on the 30th anniversary of the 1972 Stockholm Conference. States agreed that environmental protection is an equal pillar for sustainable development, together with the social and economic pillars. By then, States increasingly acknowledged the right to water as a human right. UNEP regularly convened the Montevideo Programme on the Development and Periodic Review of Environmental Law (also known as the Montevideo Environmental Law Programme), now in its fifth iteration (2020-30) for governments to build their environmental Law capacity nationally. IUCN established the IUCN Academy of Environmental Law, linking university law schools around the world in teaching and researching environmental law. The UN's *Training Manual on International Environmental Law* restated this new field in 2006³.

Despite these gains, or perhaps because they are so vast that it was hard for diplomats to absorb them, at the 40th anniversary of Stockholm, the States that had assembled again in Rio de Janeiro were unsure how to progress.

¹ <https://portals.iucn.org/library/node/6439>.

² *Argentina v. Uruguay, Pulp Mills on the River Uruguay*, http://www.worldcourts.com/iccj/eng/decisions/2010.04.20_pulp_mills.htm.

³ <http://digitalcommons.pace.edu/lawfaculty/791/>.

The next, historic round of negotiations then resumed in New York. States negotiated for two years and thereafter the UN General Assembly adopted the 17 Sustainable Development Goals (SDGs) in 2015. The priorities were a holistic and integrated set of attainable goals, together with indicators to measure progress in doing so. States also launched consultations toward concluding a new oceans treaty, on the protection of biodiversity in areas beyond national jurisdiction (BBNJ). IUCN's World Commission on Environmental Law helped launch a Global Judicial Institute on the Environment, the first global network for courts.

In light of this history, one might be forgiven in believing that International Environmental Law would, by 2022, have provided a firm foundation for protecting the Earth's great commons. It has been my honour and privilege to have participated personally in much of this saga just recounted, from attending Stockholm and Rio to the deliberations at the UN General Assembly in New York. I am proud of my own work as a jurist, and that of ICEL and IUCN, and all those who established international environmental law. Our collective accomplishments have been necessary, but not sufficient. Earth's human environment remains at risk, more acutely than in 1972.

Instead of celebrating on the 50th anniversary of the Stockholm Conference, it is unavoidable to honestly acknowledge that the civilizations of nations and peoples, evolved since time immemorial, are at great and immediate risk. This reality was documented in February of 2021, when the United Nations released a scientific synthesis report entitled: «Making Peace With Nature: A scientific blueprint to tackle the climate, biodiversity and pollution emergencies», which presents the evidence⁴.

«Making Peace with Nature» summarizes the scientific assessments about the impacts of climate change, biodiversity loss and today's massive pollution of air, water, land and life. Despite the UNFCCC and CBD, States have virtually no legal framework agreements on chemical pollution and contamination. The air is unhealthy in every large city in the world. As humans destroy wild habitats, they unleash zoonotic diseases, like Covid-19, from previously healthy animals. The rate of infectious disease afflictions from zoonotic spill-overs is growing, predictably. Forests, which provide photosynthesis to produce the oxygen we breathe globally, for our climate, lack any protection under international law. Marine phytoplankton, providing 30 % of Earth's oxygen, is being degraded progressively, and adopting the BBNJ treaty will not immediately halt this decline. Chemical contamination, as evidenced by plastic wastes, is pervasive and systemic in all regions, even where no chemicals products are made or used.

Earth's Land, Air and Water (LAW) is being sacrificed to «business as usual». International LAW norms are being neutered by the failure to implement and rapidly progress the law's development. As UN Secretary-General An-

⁴ <https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/34948/MPN.pdf>.

tónio Guterres puts it: «Humanity is waging war on nature. This is suicidal. Nature always strikes back - and it is already doing so with growing force and fury». The findings of the Intergovernmental Panel on Climate Change are that it is «almost inevitable» that temperatures will rise above 1.5 °C, devastating human living conditions. As António Guterres puts it: «Some government and business leaders are saying one thing - but doing another. Simply put, they are lying. And the results will be catastrophic».

Is it any wonder that there are calls to establish the international crime of «Ecocide»? Ecocide, like crimes against humanity, is universal. As jurists debate and refine the definitions for Ecocide, it seems to embrace conduct alike by States, corporations, or individual humans. It addresses harms existing today, beyond the limits of the Geneva Conventions' war crimes, and beyond the scope of the Environmental Modification Convention (1976), which focuses upon those acts of States having «widespread, long-lasting or severe effects». It arguably can be seen to embrace all acts that impair nature to the point of nullifying a person's human right to the environment. The environment is holistic, and cumulative small harms are having immediate and chronically harmful impacts. It is no defense, nor any excuse, to say one does not see the harm or know the measurements, as «Making Peace with Nature» explains.

So, the challenges in this emblematic year for International Environmental Law are profound. States are united in support of the UN Sustainable Development Goals, in particular, 15: «Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation and halt biodiversity loss». Based on that consensus, much can be accomplished. To save human well-being, the ecologist Dr. Edward O. Wilson urged us to sustain the remaining one half of the Earth's natural areas as they are today, as places in which people and nature live compatibly. This means ending exploitation of remaining forests and wetlands and other natural areas, so humans and nature can adapt to changing climactic conditions across the Earth. The International Military Council on Climate and Security has issued a report which thoughtfully calls for the further elaboration of international environmental law⁵. ICEL and IUCN have called for adopting a «One Health» approach to prevent future pandemics, and the World Health Organization seeks negotiation of a new treaty to do so. The Intergovernmental Panel on Climate Change has documented the many ways at hand to cease quickly the further combustion of fossil fuels. There are so many other opportunities for States to cooperate regionally and globally, that it is safe to observe that 2022 inaugurates a transformative era of ecological jurisprudence.

The tools to make peace with nature are already invented and ready to deploy. The coming roles for International Environmental Law will be to establish the legal norms and duties to do so. Either States anticipate and establish new international environmental laws, and rigorously implement their

⁵ <https://imccs.org/the-world-climate-and-security-report-2021/>.

existing and new duties in municipal law, or the disruptions that UN Secretary-General Guterres has identified will overwhelm all States and oblige them to revise their laws in the wake of tragedy. States have barely enough time left to act, to avert experiencing what scientific models reveal as «worst case» scenarios in real time.

When the UN General Assembly this year recognizes the «Human Right to the Environment», will it be too late for people to enjoy this right? Can this right motivate action to at once implement environmental laws, and fashion the new laws needed? With this right, is there not a correlative duty to protect the environment? Given the exemplary record by which States have established International Environmental law in the past five decades, they have shown that States do know how to cooperate to protect the Earth. All people today share in the benefits of environmental law. But measured by the needs of present and future generations, as well by what is required to heal and restore the health of ecosystems and other species, our human accomplishments fall short. We are on the cusp of regressing to failure.

Like the Phoenix, we can rise from these ashes. Is not care for our common home our common responsibility? Can people and their States rediscover the popular spirit that once moved States to convene the 1972 Stockholm Conference? As we all endeavor to advance and implement International Environmental law, together we shall learn the answers.