

*Climate Change, Human Rights, & The Rule of Law:  
Untangling the Rights-Rule of Law Relationship in the Climate Change Context*

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I. Introduction

Climate change is one of the most pervasive social and legal challenges of our time. It is a 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. Addressing climate change requires us to rethink who we are and how we coexist as national and international citizens. Climate change, therefore, defies categorization as a conventional environmental problem that can be conceptualized and responded to using traditional – or even innovative – tools of environmental law.<sup>1</sup> It challenges the resiliency and integrity of social and legal systems and demands that we think more broadly about how to engage the rule of law as an essential tool in efforts to limit the causes and consequences of climate change.

Starting from the premise that addressing climate change means thinking about how it will affect the way we live and the way that we govern ourselves, writ large, this article explores tensions at the intersection between the international rule of law, climate change, and human rights. Part II highlights the important, but under-explored relationship between ongoing pressures on the rule of law and efforts to draw upon the rule of law to limit climate change. Here, the paper posits that the growth of populist, nationalist, and authoritarian movements worldwide puts pressure on the rule of law and imperils efforts to deepen shared understandings of the rule of law that advance cooperation on climate change. Part III then explores the relationship between the rule of law, climate change, and human rights. Here, the paper 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 apace at both the domestic and international level. Part IV concludes by contending 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 moving forward with

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<sup>1</sup> See, e.g., Cinnamon Carlarne, *Delinking International Environmental Law & Climate Change*, 4 MICH. J. ENVTL. & ADMIN. L. 1, 6 (2014) (arguing that framing climate change in a narrow way as a conventional environmental law problem constrains efforts to experiment and think more creatively about how to address a challenge that defies classification as an environmental issue and demands more innovative, system-wide governance approaches)

efforts to address climate change. One of the primary arguments this article makes is that the rule of law is critical to efforts to address climate change, but that the international rule of law is under pressure and that even tentatively held shared understandings of rule of law are in flux. This flux challenges not only our sense of national and international identity, but also our ability to leverage law, including human rights law, in the climate context.

## II. The Rule of Law & Climate Change: Dual Inflection Points

### a. The Rule of Law in Flux

Patterns of global governance are in a state of flux.<sup>2</sup> To put it bluntly, as Helal suggests, “statespersons, scholars, and commentators of every political persuasion agree that we are currently witnessing a crisis of world order.”<sup>3</sup> Significant unrest and fluctuating modes of governance require us not only to question the strength and solidarity of the international community,<sup>4</sup> but also to examine any assumptions we hold about shared understandings of the rule of law.<sup>5</sup> This matters in the climate context because we increasingly recognize the need for stable and transparent systems of law as the backbone of efforts to address climate change.<sup>6</sup>

The rule of law is, as it has always been, a highly contested principle.<sup>7</sup> Much of the debate around the rule of law is jurisprudential and revolves around whether one understands rule of law in

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<sup>2</sup> See, e.g., Nicola Lacey, *Populism and the Rule of Law*, LSE Working Paper 28 (January 2019), [www.lse.ac.uk/III](http://www.lse.ac.uk/III) (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 ATLANTIC (Dec. 26, 2018), <https://www.theatlantic.com/ideas/archive/2018/12/hard-data-populism-bolsonaro-trump/578878/>; Jordan Kyle & Limor Gultchin, *Populists in Power Around the World*, TONY BLAIR INSTITUTE FOR GLOBAL CHANGE (Nov. 17, 2018), <https://institute.global/insight/renewing-centre/populists-power-around-world>.

<sup>3</sup> Mohamed Helal, *The Crisis of the World Order and the Constitutive Regime of the International System*, 46 FLORIDA STATE UNIV. L.R. (Forthcoming 2019) (suggesting that the international system is in the midst of “a period of constitutive crisis”, critically exploring the “the origins of the current crisis of world order” and reflecting “on the future of world order in an era of increased Great Power competition”).

<sup>4</sup> See UN Security Council, SC/13570, *Rising Nationalism Threatens Multilateralism’s 70-Year ‘Proven Track Record’ of Saving Lives, Preventing Wars, Secretary-General Tells Security Council* (Nov. 9, 2018), <https://www.un.org/press/en/2018/sc13570.doc.htm>.

<sup>5</sup> See UN General Assembly, GA/SHC/4236, *Extremism, Intolerance Overshadowing Moves towards Democracy, Third Committee Delegates Stress as Experts Press Governments to Honour Human Rights Treaties* (Oct. 16, 2018), <https://www.un.org/press/en/2018/gashc4236.doc.htm>; Amy Oloo, *Global Rule of Law Continues to Decline, but Resistance is Gaining Strength*, DEMOCRACY WITHOUT BORDERS (March 19, 2019), <https://www.democracywithoutborders.org/6976/global-rule-of-law-continues-to-decline-but-resistance-is-gaining-strength/>.

<sup>6</sup> See Philippe Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. OF ENVTL. L. 1 (2016).

<sup>7</sup> See Lord Bingham, *The Rule of Law*, 66 THE CAMBRIDGE LAW JOURNAL 67, 67-68 (March 2007). Lord Bingham offers this description of the debate over the principle:

The meaning of this existing constitutional principle may no doubt have been thought to be too clear and well-understood to call for statutory definition, and it is true that the rule of law has been routinely invoked by judges in their

a narrow or “thin” sense, as opposed to a “thick rule of law” that not only focuses on process, fixed and transparent rules, and limiting governmental power,<sup>8</sup> but also on outcomes and includes normative considerations of justice, equity, human rights, and respect for international law<sup>9</sup> – what Raz would characterize skeptically as “the rule of good law”.<sup>10</sup>

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

Despite the centrality of the rule of law 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 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 Craig suggests, “a core idea of the rule of law to which all would subscribe is that the government must be able to

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judgments. But they have not explained what they meant by the expression, and authors have thrown doubt on its meaning and value. Raz has commented on the tendency to use the rule shorthand description of the positive aspects of any system. John Finnis has described the rule of law 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 over-use ... Jeremy Waldron commenting on Bush v. Gore, in which the rule of law was invoked on both sides, recognised a widespread impression that invocation 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.*

<sup>8</sup> Waldron would characterize a formal or structural vision of the rule of law thusly, “many 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”. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1, 7 (2008).

<sup>9</sup> See Lord Bingham, *supra* note 7, pp, 69-82 (rejecting Dicey’s and Raz’s thin notion of the rule of law and setting forth a series of sub-rules that he sees as critical to giving meaning to the principle of the rule of law).

<sup>10</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY*, 210-11 (OUP 2009)(if the “rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function.”)

<sup>11</sup> Magna Carta (1215), arts. 39 & 40 (“No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land” and, “[t]o no one will we sell, to no one deny or delay right or justice.”).

<sup>12</sup> Waldron, *supra* note 8, at 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,” and it is the principle that is “appropriately invoked whenever governments try to get their way by arbitrary and oppressive action or by short-circuiting the norms and procedures laid down in their countries’ laws or constitution”. *Id.*

point to some basis for its action that is regarded as valid by the relevant legal system.”<sup>13</sup> 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.

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 co-existence. Within this pluralistic context, determining how power is distributed, exercised, and constrained is a constant and evolving exercise in diplomacy. As a result, 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”<sup>14</sup>. Others 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.”<sup>15</sup>

Regardless of whether one embraces a thick or thin vision of the rule of law, inherently normative characterizations of the rule of law grounded in a vision of the rule of law as linked to human rights and norms of cooperation and peaceful co-existence have influenced the development of much of what we think of as public international law, including international environmental law, in the post-war era.

#### b. The International Rule of Law, Cooperation, & Rights: A Waning Vision?

A thick, rights-enabling vision of the rule of law informs the United Nations (UN) and has propelled the progressive post-war move towards globalization. In relevant part, while the Charter

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<sup>13</sup> Paul Craig, *Select Committee on Constitution: Sixth Report, Appendix 5: Paper by Professor Paul Craig: The Rule of Law*, UK Parliament, <https://publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15115.htm>. See also Waldron, *supra* note 8, at 6 (suggesting that, while the rule of law “is a multi-faceted ideal”, “[m]ost conceptions of this ideal, however, give central place to a requirement that people in positions of authority should exercise their power within a constraining framework of public norms, rather than on the basis of their own preferences, their own ideology, or their own individual sense of right and wrong.”)

<sup>14</sup> Wayne Sandholtz, *Resurgent Authoritarianism and the International Rule of Law*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3444799](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3444799).

<sup>15</sup> See also Jutta Brunnée, *The Rule of International (Environmental) Law and Complex Problems*, in HEIKE KRIEGER, GEORG NOLTE, & ANDREAS ZIMMERMANN, EDS., *THE INTERNATIONAL RULE OF LAW - RISE OR DECLINE?* (2019).

of the UN does not directly reference it, the principle of the rule of law is embedded in the 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”.<sup>16</sup>

In recent years, the UN has reaffirmed 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 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*.”<sup>17</sup> Similarly, at a 2012 UN High-level Meeting on the Rule of Law,<sup>18</sup> the Member States adopted a new declaration on the rule of law. In this declaration, the Member States reaffirm their “commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development.”<sup>19</sup> The declaration further “reaffirm[s] 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 United Nations”, and declares that it is the “solemn commitment of our States to fulfil their obligations to promote universal respect for, and the observance and protection of, all human rights and fundamental freedoms for all”, based on the understanding that “the universal nature of these rights and freedoms is beyond question.”<sup>20</sup>

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<sup>16</sup> U.N. CHARTER art. 1. (1945). See also Bardo Fassbender, *What’s in a Name? The International Rule of Law and the United Nations Charter*, 17 CHINESE J. OF INT’L L 3 (2018), <https://academic.oup.com/chinesejil/article/17/3/761/5068211>.

<sup>17</sup> UNSC, *Report of the Secretary General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* 4, S/2004/616 (Aug. 23, 2004), [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2004/616](https://www.un.org/en/ga/search/view_doc.asp?symbol=S/2004/616) (emphasis added).

<sup>18</sup> The UN described the meeting in this way:

Recognising the central place of the rule of law, the General Assembly at its 67th Session, held a High-level Meeting on the Rule of Law at the National and International Levels on 24 September 2012. This was a unique occasion for all Member States, non-governmental organisations and civil society represented at the highest level, to commit to strengthening the rule of law. The High-level meeting concluded with the adoption by consensus of a Declaration in which Member States reaffirmed their commitment to the rule of law and elaborated on the efforts required to uphold different aspects of the rule of law.

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/>.

<sup>19</sup> UNGA, A/Res/67/1, *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, (Nov. 30, 2012), <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf>.

<sup>20</sup> *Id.* For a recent affirmation of the rights-rule of law relationship at the state level, see the manifesto of the UK conservative party released in the run up to their decisive victory in the December 2019 election, declaring that human rights and the rule of law will be central to the UK’s post-Brexit foreign policy: “We will continue to be an outward-

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 post-war 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.<sup>21</sup> As international law and patterns of globalization evolved however, states began to identify an increasing number of issues – including, human rights, trade and development, 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.<sup>22</sup>

Notably, with these new cooperative efforts, instead of being asked to refrain from certain behaviors, states were often tasked with actively undertaking positive obligations. To advance cooperation around these shared interests, new international institutions were created to establish shared goals and assign roles and responsibilities. Concurrently, these new institutions – using both hard and soft law<sup>23</sup> – facilitated 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”<sup>24</sup> and ongoing normative development to facilitate the degree of cooperation needed. 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 global 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

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looking country that is a champion of collective security, the rule of law, human rights, free trade, anti-corruption efforts and a rules-based international system.” The Conservative and Unionist Manifesto 2019, *Get Brexit Done Unleash Britain’s Potential* 51 (2019), [https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba\\_Conservative%202019%20Manifesto.pdf](https://assets-global.website-files.com/5da42e2cae7ebd3f8bde353c/5dda924905da587992a064ba_Conservative%202019%20Manifesto.pdf).

<sup>21</sup> See Georges Abi-Saab, *Whither the International Community*, 9 EUROPEAN JOURNAL OF INTERNATIONAL LAW 248 (1998).

<sup>22</sup> See WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

<sup>23</sup> See, e.g., Brunnée, *supra* note 16, at pin (“soft law can help fill these conceptual and practical gaps and promote norm development.”)

<sup>24</sup> See Daniel Bodansky, Jutta Brunnée, & Ellen Hey, *International Environmental Law: Mapping the Field*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW*, DANIEL BODANSKY, JUTTA BRUNNÉE, & ELLEN HEY, EDS. (2008), available at <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199552153.001.0001/oxfordhb-9780199552153-e-1#oxfordhb-9780199552153-div1-6>. (noting that “in most international environmental regimes, the treaty text itself represents just the tip of the normative iceberg. The majority of the norms develop through more flexible and dynamic processes, which result in formally non-legally binding decisions.”).

cultivated and deepened, and that regimes must be designed so as to maximize the opportunities for normative interaction”.<sup>25</sup> As a result, international environmental law, including international climate law, have been areas ripe for normative development. In the context of international climate change law, this normative development has centered around evolving principles of equity and, increasingly, human rights.

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 inter-state relationships and 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 action, but also at least a thinly held shared sense of community and purpose – that is, some normative common ground. 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. And, increasingly, the already tenuously held normative common ground and cooperative spirit sustaining these efforts is under pressure.

### c. The Venn Diagram<sup>26</sup> of the Rule of Law, Populism, & the Environment

International climate law has developed around a thick vision of the international rule of law premised on the necessity of cooperation and prioritizing principles<sup>27</sup> of intra- and inter-generational equity<sup>28</sup> and common but differentiated responsibilities<sup>29</sup>. Now, however, the collective commitment to norms of cooperation and shared responsibility appear to be eroding.

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<sup>25</sup> *Id.*

<sup>26</sup> See Sanja Bogojevic, *The Erosion of the Rule of Law: How Populism Threatens Environmental Protection*, 31 JOURNAL OF ENVTL. L. 389 (2019), <https://academic.oup.com/jel/article/31/3/389/5588526> (using ongoing political patterns in Serbia to suggest that “[p]opulism, the rule of law and environmental protection . . . operate within a kind of Venn diagram that shows their interconnectedness.”)

<sup>27</sup> For a thorough discussion of the unique role of principles in environmental law, see ELOISE SCOTFORD, ENVIRONMENTAL PRINCIPLES AND THE EVOLUTION OF ENVIRONMENTAL LAW (2017).

<sup>28</sup> See, e.g., Catherine Redgwell, *Principles and Emerging Norms in International Law: Intra- and Inter-Generational Equity* 186, 193 n.50, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW, CINNAMON P. CARLARNE, KEVIN R. GRAY, & RICHARD TARASOFSKY, EDs., (2016); PETER LAWRENCE, JUSTICE FOR FUTURE GENERATIONS: CLIMATE CHANGE AND INTERNATIONAL LAW 46 (2014); Dinah Shelton, *Equity*, in The Oxford Handbook of International Environmental Law, Daniel Bodansky, Jutta Brunnée, & Ellen Hey eds. (2008).

<sup>29</sup> See, e.g., LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW (2006); Christopher Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT’L L. 276, 278 (2004); Lavanya



In particular, major powers<sup>30</sup> are grappling for influence, and powerful leaders are drawing upon populist and nationalist narratives in ways that test norms of cooperation and shared responsibility. Notably, between 1990 and 2018, the number of populist<sup>31</sup> leaders increased a “remarkable fivefold, from four to 20,”<sup>32</sup> and, by 2019, “the four most populous democracies in the world” were ruled by populists.<sup>33</sup> Similarly, as populism has spread so too has nationalism with nationalist politics increasingly “seen everywhere and in everything” in global politics.<sup>34</sup>

President Trump’s unabashedly populist, anti-globalist speech before the 74<sup>th</sup> 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

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Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime*, 9 REV. EUR. COMMUNITY & INT’L ENVTL. L. 120, 124 (2000).

<sup>30</sup> See, e.g., Thomas Wright, *The Return to Great-Power Rivalry was Inevitable*, THE ATLANTIC (Sept. 12, 2018), <https://www.brookings.edu/opinions/the-return-to-great-power-rivalry-was-inevitable/> (arguing we are in the “early stages of a dramatic change in world politics that necessitates a change in strategy. For several years now, geopolitical competition between the major powers has been intensifying.”); Larry Diamond, *Democracy in Decline*, FOREIGN AFFAIRS, July/Aug. 2016.

<sup>31</sup> Populism is difficult to define. As Pin suggests that “[p]opulism 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, 225–26 (2019). In general terms, however, 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 2. For other discussions of populism, see see Jan Werner Müller, *WHAT IS POPULISM?* (2017); Cristóbal Rovira Kaltwasser et al., *Populism: An Overview of the Concept and the State of the Art*, in THE OXFORD HANDBOOK OF POPULISM, CRISTÓBAL ROVIRA KALTWASSER ET AL., EDS (OUP 2017); Bojan Bugarić & Alenka Kuhelj, *Varieties of Populism in Europe: Is the Rule of Law in Danger?*, 10 HAGUE J. OF THE RULE OF LAW 21 (2018).

<sup>32</sup> Kyle & Gultchin, *supra* note 2 (further explaining that the increase in populist leadership “includes countries not only in Latin America and in Eastern and Central Europe—where populism has traditionally been most prevalent—but also in Asia and in Western Europe. Whereas populism was once found primarily in emerging democracies, populists are increasingly gaining power in systemically important countries.”)

<sup>33</sup> These include: Narendra Modi in India, Donald Trump in the United States, Joko Widodo in Indonesia, and Jair Bolsonaro in Brazil. Mounk & Kyle, *supra* note 2.

<sup>34</sup> Florian Bieber, *Is Nationalism on the Rise? Assessing Global Trends*, 17 ETHNOPOLITICS 519 (2018) (suggesting that “while there is no universal trend towards nationalism, it has become more prevalent in global politics in recent years.”). See also Jack Snyder, *The Broken Promise: How Nationalism Came Back*, FOREIGN AFFAIRS (March/April 2019), <https://www.foreignaffairs.com/articles/world/2019-02-12/broken-bargain>; Parnesjit 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/>.

to patriots”.<sup>35</sup> President Trump’s style of populism is closely aligned with nationalism and anti-globalism, and – in the case of environmental issues – anti-expertise.<sup>36</sup>

Reflecting a similar skepticism about globalism and a contempt for international interference in what he understands to be a purely national matter, in 2019, Brazil’s populist President Bolsonaro suggested that it is a “fallacy” to describe the Amazon as the heritage of humanity. He then rejected international funds for the Amazon and accused the G7 of undermining Brazil’s sovereignty and treating it “as if we were a colony or a no-mans land” and calling “into question that which we hold as a most sacred value, our sovereignty.”<sup>37</sup> While hesitancy to have other states, or international organizations, interfere in domestic decision-making is far from uncommon, what is notable about this instance is that Brazil has historically been a key facilitator for the development of international environmental governance – the host state for the Rio Conference and the Rio +20 Conference – and an active state in cooperative dialogue. Protective of sovereignty, yes, and a proponent of the development rights of developing countries, yes, but hostile to international cooperation and globalism, no.

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.<sup>38</sup> In Europe, for example, where populism is at its highest levels since the 1930s,<sup>39</sup> the Council of Europe has cautioned that the rise of populism poses fundamental challenges to Europe’s well-being and

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<sup>35</sup> WhiteHouse.Gov, *Remarks of President Trump to the 74<sup>th</sup> Session of the United Nations General Assembly* (Sept. 24, 2019), <https://www.whitehouse.gov/briefings-statements/remarks-president-trump-74th-session-united-nations-general-assembly/>.

<sup>36</sup> 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>].

<sup>37</sup> *Amazon Rainforest Belongs to Brazil, Says Jair Bolsonaro*, BBC NEWS (Sept. 24, 2019), <https://www.bbc.co.uk/news/world-latin-america-49815731>; Jane Dalton, *Amazon Fires: Bolsonaro Rages at ‘Colonial’ G7 Leaders Over £16 Million Aid Deal to Fight Brazil Blazes*, THE INDEPENDENT (Aug. 26, 2019), <https://www.independent.co.uk/news/world/americas/amazon-fires-bolsonaro-brazil-g7-summit-aid-deal-a9079586.html> (translating Bolsonaro’s Twitter comments).

<sup>38</sup> See Nicola Lacey, *Populism and the Rule of Law*, LSE Working Paper 28 (January 2019), [www.lse.ac.uk/III](http://www.lse.ac.uk/III); 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> (“The new WJP Rule of Law Index scores show that more countries declined than improved in overall rule of law performance for the second year in a row, continuing a negative slide toward weaker rule of law around the world.”). 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>.

<sup>39</sup> See European Economic and Social Committee, *Studies on Societies Outside Metropolises: The Role of Civil Society Organisations in Facing Populism* 1 (2019), <https://www.eesc.europa.eu/sites/default/files/files/qa-04-19-236-en-n.pdf>.

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.”<sup>40</sup> Globally, growing populist and nationalist movements place increasing pressure on already fragile cooperative institutions and shared sense of purpose and understanding of the rule of law and its operation, particularly with respect to matters of environmental law.<sup>41</sup>

With respect to environmental law, there is widespread concern that the rise of populism undermines environmental law<sup>42</sup> and hinders the development of the environmental rule of law.<sup>43</sup> As Fisher suggests, “[e]nvironmental problems and environmental law are a flashpoint for . . . right-wing populist politics.”<sup>44</sup>

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. According to the 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 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 laws grounded in procedure and pluralism. That is, whether thinly or thickly conceived, most conceptions of the ideal of the rule of law include, at their core, the

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<sup>40</sup> Report of the Secretary General of the Council of Europe, *State of Democracy, Human Rights and the Rule of Law: Role of Institutions, Threats to Institutions* 5 (2018), <https://rm.coe.int/state-of-democracy-human-rights-and-the-rule-of-law-role-of-institutio/168086c0c5> (noting, e.g., “findings show the growing influence of xenophobic and populist rhetoric in public opinion” and suggesting that “creeping populism and 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”). For further discussion of the populist resurgence in Europe, see Francesca Bignami, *Introduction: EU Law, Sovereignty, and Populism*, in *EU LAW IN POPULIST TIMES*, FRANCESCA BIGNAMI ED. (2019) (“Populist leaders take aim at the elements of the EU agenda that go to the heart of national sovereignty: economic policy, human migration, internal security, and fundamental constitutional precepts connected with the rule of law, rights, and democracy.”).

<sup>41</sup> See Elizabeth Fisher, *Unearthing the Relationship Between Environmental Law and Populism*, 31 *JOURNAL OF ENVTL. L.* 383 (2019), <https://academic.oup.com/jel/article/31/3/383/5585945>; Bogojevic, *supra* note 26.

<sup>42</sup> Brian J. Preston, *The End of Enlightened Environmental Law?*, 31 *JOURNAL OF ENVTL. L.* 399 (Oct. 19, 2019), <https://academic.oup.com/jel/advance-article/doi/10.1093/jel/eqz029/5601117>.

<sup>43</sup> For a discussion of the emerging idea of an “environmental rule of law”, 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://www.iucn.org/sites/dev/files/content/documents/world_declaration_on_the_environmental_rule_of_law_final_2017-3-17.pdf) (“[t]he 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. Strengthening the environmental rule of law is the key to the protection, conservation, and restoration of environmental integrity. Without it, environmental governance and the enforcement of rights and obligations may be arbitrary, subjective, and unpredictable”). See also UN Environmental Programme Res. 27/9, U.N. Doc. UNEP/GC.27/17 (Feb. 2013), <https://wedocs.unep.org/bitstream/handle/20.500.11822/12221/Governing%20Council%20Decision%2027-2.pdf?sequence=1&isAllowed=y> (calling on the UN system and national governments to develop and implement the environmental rule of law).

<sup>44</sup>Fisher, *supra* note 41.

prerequisite that people in power are bound by publicly promulgated and administered laws that create a “constraining framework of public norms”<sup>45</sup> 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 as a product of the elite and a roadblock to the unmediated relationship between ‘the people’ and the leader, this impatience with procedure<sup>46</sup> 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 common populist narrative, bureaucracy and expertise are often depicted as sites of corruption that interrupt and dilute the voices and preferences of ‘the people’. Because environmental law is “overwhelmingly procedural in nature”, intimately linked with bureaucracy and expertise, and inherently pluralistic, it is particularly vulnerable to populist critique.<sup>47</sup> 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 places across the globe.”<sup>48</sup> Consequently, responding to environmental problems requires drawing upon the rule of law to construct “complex architecture to mediate between different interests”.<sup>49</sup> The resulting governance architecture legitimizes the same bureaucratic institutions that populist leaders frequently are attacking and seeking to dismantle. As a result, populist leaders often 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”<sup>50</sup> 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 miners and the “people of Pittsburgh”<sup>51</sup> – with the main exclusions from ‘the people’ being corrupt elites who favor certain minority groups, the

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<sup>45</sup> Waldron, *supra* note 8, at 6.

<sup>46</sup> Müller, *supra* note 31, at 40.

<sup>47</sup> Bogojevic, *supra* note 26.

<sup>48</sup> Fisher, *supra* note 41 (As Fisher suggests, “recognising environmental problems is recognising that ‘the people’ are not as free, as sovereign, and as in control as populist politics asserts them to be. ‘Take back control but do think about your waste problem’ is not very evocative.”).

<sup>49</sup> *Id.*

<sup>50</sup> See White House, *President Donald J. Trump’s Six Months of America First*, (July 20, 2017),

<https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-six-months-america-first/> (“Together, we are working every day for the citizens of this country: protecting their safety, bringing back their jobs and, in all things, putting AMERICA FIRST.” – President Donald J. Trump.)

<sup>51</sup> President Donald J. Trump, Statement by President Trump on the Paris Climate Accord (June 1, 2017),

<https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord> [<https://perma.cc/U9YF-9792>].

interests of the global community and, importantly, experts, including academic experts and scientists. 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.

Exemplifying this approach, when denouncing the Paris Agreement, President Trump declared that: “I am elected to represent the citizens of Pittsburgh, not Paris”.<sup>52</sup> He then characterized the Paris Agreement as “punish[ing] the United States”, “put[ting] the workers— and the people — of [this] country at this debilitating and tremendous disadvantage”, and as the:

latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers — who I love — and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production.<sup>53</sup>

President Trump’s characterizations of the Paris Agreement epitomize his distinct brand of nationalist-aligned 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 law<sup>54</sup> 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 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.<sup>55</sup> The erosion of the rule of law, in turn, implicates the reliability of the rule of law – whether thickly or thinly conceived – to facilitate long-term, 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 system[s] of regulations and enforcement – systems predicated on the rule of law – threats to the environment will remain unresolved and present ever-greater challenges to society.”<sup>56</sup>

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<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See Cinnamon P. Carlarne, *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, 69 AM. U. L. REV. (add pin cites when paginated) (forthcoming 2019).

<sup>55</sup> TOM BINGHAM, *THE RULE OF LAW* 174 (2010) (“in 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.”)

<sup>56</sup> See World Justice Project: Environment, <https://worldjusticeproject.org/resource-hub/environment>; G.A. Res. 66/228, ¶ 10 (Oct. 27, 2012), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/66/288&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/66/288&Lang=E) (The Rio+20 outcome document, “The Future We Want,” reiterates the importance of the rule of law, stating that “[d]emocracy,

#### 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 as to be helpful. Suffice to note that these debates are intensifying as a result of the ongoing crisis of world order and 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, particularly at the international level. Moreover, regardless of whether one embraces a vision of 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 crises. 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.<sup>57</sup> Consequently, we now find ourselves at important inflection points both with respect to the rule of law and with respect to limiting climate change. And, 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.”<sup>58</sup> What law is and how we understand it is contingent and evolving and this impacts 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

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good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development.”)

<sup>57</sup> UNGA, GA/12131, *Only 11 Years Left to Prevent Irreversible Damage from Climate Change, Speakers Warn during General Assembly High-Level Meeting* (March 28, 2019), <https://www.un.org/press/en/2019/ga12131.doc.htm> (“We are the last generation that can prevent irreparable damage to our planet,” General Assembly President María Fernanda Espinosa Garcés (Ecuador)).

<sup>58</sup> Waldron, *supra* note 8, at 24.



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. That is, 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 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 better understand 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 the threats that climate change poses to the stability of the rule of law and the opportunities that rule of law offers in responding to climate change.<sup>59</sup>

### III. The Rule of Law, Climate Change, & Human Rights: Fiddling as the World Burns?

#### a. The Rights Revolution in Environmental & Climate Change Law

Even as states have struggled to develop a functional, cooperative international community capable of working collectively to address issues of shared concerns, the UN and key international institutions have propelled the development of international law along a pathway imagining the realization of this vision. 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 as a system of law focusing on ways to allow states to co-exist peacefully, to a system that also seeks to facilitate cooperation around issues of common interest. Moreover, international climate change law represents the paradigmatic example of the assumption that we are a collective human community and we are prepared to cooperate as such.<sup>60</sup> Although this vision has never come to full fruition and now faces increasing pressure, it has propelled international climate law along a development 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 global

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<sup>59</sup> As Zimmerman has recently suggested “in ‘turbulent times’, such as the ones the international legal order is currently undergoing”, “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.” For some, this endeavor may be largely jurisprudential in nature, but for purposes of engaging the international rule of law as a tool in efforts to address climate change, it is a matter of practicality. Andreas Zimmerman, *Times are Changing – And What about the International Rule of Law*, EJIL: TALK! (March 5, 2018), <https://www.ejiltalk.org/times-are-changing-and-what-about-the-international-rule-of-law-then/>.

<sup>60</sup> See generally Cinnamon P. Carlarne & Mohamed S. Helal, *A Conversation about Climate Change Law and the ‘International Community’*, 9 CLIMATE LAW 1 (2018).

cooperation necessary to achieve meaningful progress on behalf of humankind, despite competing individual state interests.<sup>61</sup>

As patterns of climate change have progressed and efforts to curb climate change have failed to make meaningful progress, however, the layers of inequity intrinsic to climate change and the vast challenges climate change poses to human rights have been laid bare.<sup>62</sup> This has driven a rights-based turn in climate change.<sup>63</sup> Climate law and climate discourse, thus, 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.<sup>64</sup>

These linkages build off ongoing work within the UN that seeks to highlight 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<sup>65</sup>, little was done during the first two decades of legal development to explore and cultivate these linkages.<sup>66</sup> In the early days of international climate law, however, the topic began to garner renewed attention. In 1994, the same year the United Nations Framework Convention on Climate Change (UNFCCC) came into force,<sup>67</sup> 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

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<sup>61</sup> *Id.*

<sup>62</sup> See e.g., Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Litigation*, 7 *TRANSNATIONAL ENVTL. L.* 37 (2018); John Knox, *Human Rights Principles and Climate Change*, in *THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW*, CINNAMON P. CARLARNE, KEVIN R. GRAY, RICHARD TARASOFSKY, EDs. (2016).

<sup>63</sup> Marc Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 *GA. J. INT'L & COMP. L.* 54 (2010).

<sup>64</sup> See, e.g., *Human Rights and Climate Change*, U.N. OFF. HIGH COMMISSIONER FOR HUM. RTS., <https://www.ohchr.org/en/issues/hrandclimatechange/pages/hrclimatechangeindex.aspx> [<https://perma.cc/PX7B-3JY6>].

<sup>65</sup> The Stockholm Declaration included one of the earliest references to the links 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.” Declaration on the Human Environment, Principle 1. In *Report of the UN Conference on the Human Environment*, UN General Assembly Resolution 2997 (XXVIII), UN Doc. A/CONF.48/14/Rev.1, New York, 1972; [www.un-documents.net/unchedec.htm](http://www.un-documents.net/unchedec.htm).

<sup>66</sup> For example, 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 had taken 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. The Rio Declaration “avoided the terminology of rights altogether” and, instead, declared that “human 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* 44, 49, 63, in *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION*, ALAN E. BOYLE & MICHAEL R. ANDERSON, EDs. (1998).

<sup>67</sup> U.N. Framework Convention on Climate Change (“UNFCCC”), May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.



Economic and Social Council.<sup>68</sup> The declaration proposed the creation of 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. In the ensuing years, 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 “the number and scope of international and domestic laws, judicial decisions, and academic studies on the relationship between human rights and the environment have grown rapidly.”<sup>69</sup>

Almost two decades after the initial report, in 2012, growing concern about these links prompted the UN Human Rights Council to establish a mandate on human rights and the environment to “study the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promote best practices relating to the use of human rights in environmental policymaking.”<sup>70</sup> To this end, Professor 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.<sup>71</sup> 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.<sup>72</sup> The framework principles declared:

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. At the same time, the exercise of other freedoms, including the rights to information, participation and remedy, is vital to the protection of the environment. The relationship between human rights and the environment has countless facets, and our understanding of it will continue to grow for many years to come.<sup>73</sup>

These same connections are present, visible, and urgent in the specific context of climate change. Recognizing this connectivity, and on the basis that “there is now global agreement that

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<sup>68</sup> Fatma Zohra Ksentini, *Draft Declaration of Principles on Human Rights and the Environment*, Final Report 90, UN Doc. E/CN.4.Sub.2/1994/9 (1994) <https://undocs.org/pdf?symbol=en/E/CN.4/SUB.2/1994/9>.

<sup>69</sup> United Nations Human Rights Office of the High Commissioner, *Special Rapporteur on Human Rights and the Environment*, <https://www.ohchr.org/en/Issues/environment/SREnvironment/Pages/SREnvironmentIndex.aspx>

<sup>70</sup> *Id.*

<sup>71</sup> See United Nations Human Rights Office of the High Commissioner, Call for Inputs: Climate Change and Human Rights - a Safe Climate, <https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SafeClimate.aspx>.

<sup>72</sup> United Nations Human Rights Office of the High Commissioner, *Framework Principles on Human Rights and the Environment*, A/HRC/37/59 (2018),

<https://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/FrameworkPrinciplesReport.aspx>.

<sup>73</sup> *Id.*

human rights norms apply to the full spectrum of environmental issues, including climate change”, the new special rapporteur on human rights and the environment, Mr. David Boyd, has been tasked with “preparing a thematic report focusing on human rights obligations related to global climate change.”<sup>74</sup>

While the Office of the High Commissioner spearheads UN efforts to recognize the relationship between human rights and the environment, complementary efforts have been taking place all over the world.

As has been exhaustively examined elsewhere, an environmental rights revolution<sup>75</sup> has been sweeping the globe. Although estimates vary,<sup>76</sup> more than 100 States have recognized the right to a healthy environment at the national level through constitutional or legislative provisions.<sup>77</sup> Additionally, the right to a healthy environment has been incorporated into numerous regional human rights agreements and environmental treaties.<sup>78</sup> As Knox reported to the UN General Assembly, “no other “new” human right has gained such widespread constitutional recognition so rapidly.”<sup>79</sup>

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.<sup>80</sup> However, in his final submission as Special Rapporteur in 2018, Knox reported:

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<sup>74</sup> *Id.*

<sup>75</sup> This phenomenon has been explored in great depth elsewhere. *See, e.g.*, 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 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); David R. Boyd, The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (2012).

<sup>76</sup> *See* Chris Jeffords & Joshua C. Gellars, 9 J. of Human Rights Practice 136, *Constitutionalizing Environmental Rights: A Practical Guide*, (2017).

<sup>77</sup> John Knox, *Framework Principles on Human Rights and the Environment: The Main Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy, and Sustainable Environment* 6 n.1, UN Human Rights Special Procedures: Special Rapporteurs, Independent Experts, & Working Groups (2018), <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/FrameworkPrinciplesUserFriendlyVersion.pdf>.

<sup>78</sup> *Id.* (“See Convention on Access to Information, Public Participation in Decision- Making and Access to Justice in Environmental Matters, art. 1; African Charter on Human and Peoples’ Rights, art. 24; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11; Arab Charter on Human Rights, art. 38; and ASEAN Human Rights Declaration, art. 28.”)

<sup>79</sup> UNGA A/73/188, *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, <http://srenvironment.org/sites/default/files/Reports/2018/Boyd%20Knox%20UNGA%20report%202018.pdf>.

<sup>80</sup> Jeffords & Gellars, *supra* note 69 (suggesting that their adoption has been associated with stronger environmental laws and more environmental litigation).

Governments have made genuine efforts, with varying degrees of success, to respect, protect, fulfil and promote this right. Over the past forty years, national courts, regional tribunals, treaty bodies, special procedures and many international institutions have contributed to defining the content, scope and parameters of the right to a healthy environment, as well as its relationship with other human rights.<sup>81</sup>

Complementing these national efforts, at the international level there are ongoing efforts to develop a new Global Pact for the Environment.<sup>82</sup> This Pact would seek to remedy existing gaps in international environmental law and “solidify the environmental rule of law around the world”.<sup>83</sup> Negotiations for the Pact include calls for the new 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.”<sup>84</sup>

The rapid diffusion and imbedding 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 efforts 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.<sup>85</sup>

Nonetheless, 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.

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<sup>81</sup> UNGA A/73/188, *Human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment* 11, <http://srenvironment.org/sites/default/files/Reports/2018/Boyd%20Knox%20UNGA%20report%202018.pdf>.

<sup>82</sup> UNGA, A/RES/72/277, *Towards A Global Pact for the Environment* (May 14, 2018), [https://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/72/277](https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/72/277).

<sup>83</sup> IUCN: World Commission on Environmental Law, *Global Pact for the Environment*, <https://www.iucn.org/commissions/world-commission-environmental-law/wcel-resources/global-pact-environment>.

<sup>84</sup> *Id.*

<sup>85</sup> See Jessica Scott, *From Environmental Rights to Environmental Rule of Law: A Proposal for Better Environmental Outcomes*, 6 MICH. J. ENVTL. & ADMIN. L. 203 (2016). See also *Framework Principles on Human Rights and the Environment*, *supra* note X, at 18 (“Once adopted, the standards must be implemented and enforced to be effective. Governmental authorities must comply with the relevant environmental standards in their own operations. They must also monitor and effectively enforce compliance with the standards by preventing, investigating, punishing and redressing violations of the standards by private actors as well as governmental authorities.”).

As has been explored in depth,<sup>86</sup> over the past decade, efforts 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.<sup>87</sup> 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. The testimony provided during these hearings helped establish the connections between climate change and human rights and kickstarted 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 United Nations human rights system to address the issue as a matter of urgency."<sup>88</sup>

Picking up on these trends, in 2009, the UN Human Rights Council (UNHRC) issued a resolution on human rights and climate change, in which it noted that:<sup>89</sup>

that climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and

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<sup>86</sup> See Margaretha Wewerinkle-Singh, *STATE RESPONSIBILITY, CLIMATE CHANGE AND HUMAN RIGHTS UNDER INTERNATIONAL LAW* (2019); Peel & Osofsky, *supra* note 58; *HUMAN RIGHTS & 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. ENVTL. L. REV. 477 (2009); Siobh n McInerney-Lankford, *Climate Change and Human Rights: An Introduction to Legal Issues*, 33 HARV. ENVTL. L. REV. 431 (2009); Sumudu Atapattu, *Global Climate Change: Can Human Rights (and Human Beings) Survive This Onslaught?*, 20 COLO. J. INT'L ENVTL. L. & POL'Y 35, 66 (2008).

<sup>87</sup> Ctr. for Int'l Envtl. Law, *Inuit File Petition with Inter-American Commission on Human Rights, Claiming Global Warming Caused by United States Is Destroying Their Culture and Livelihoods*, (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/>; petition available here: [https://www.ciel.org/Publications/ICC\\_Petition\\_7Dec05.pdf](https://www.ciel.org/Publications/ICC_Petition_7Dec05.pdf).

<sup>88</sup> Marc Limon, *Human Rights Obligations and Accountability in the Face of Climate Change*, 38 GA. J. INT'L & COMP. L. 54 (2010) (citing Male' Declaration on the Human Dimension of Climate Change (Nov. 13-14, 2007), available at [http://www.ciel.org/Publications/Male\\_Declaration\\_Nov07.pdf](http://www.ciel.org/Publications/Male_Declaration_Nov07.pdf)).

<sup>89</sup> UNHRC res. 10/4 (2009) on Human Rights and Climate Change, [https://ap.ohchr.org/documents/E/HRC/resolutions/A\\_HRC\\_RES\\_10\\_4.pdf](https://ap.ohchr.org/documents/E/HRC/resolutions/A_HRC_RES_10_4.pdf).

sanitation, and recalling that in no case may a people be deprived of its own means of subsistence.<sup>90</sup>

With this resolution, the UNHRC also “affirmed 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.<sup>91</sup>

In the years that have followed, efforts to recognize and respond to the critical linkages between climate change and human rights have proliferated.<sup>92</sup> Many of these efforts have focused on the courts. Increasingly, as Peel and Osofsky suggest, there is a “rights turn in climate litigation”<sup>93</sup>, wherein litigants are seeking to situate state obligations to address climate change as a matter of fundamental constitutional and human rights.<sup>94</sup> In courts around the world, litigants are drawing upon constitutional and human rights law to assert that the state has a fundamental legal obligation to address climate change.<sup>95</sup> As 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”.<sup>96</sup>

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<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 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 certain member states under the Convention cause an perpetuate the climate crisis resulting in the violation of the petitioner’s rights. Chiara Sacchi et al., *Communication to the Committee on the Rights of the Child*, <https://childrensvclimatecrisis.org/wp-content/uploads/2019/09/2019.09.23-CRC-communication-Sacchi-et-al-v.-Argentina-et-al-Redacted.pdf>. The petitioner children allege that “[c]limate change is exposing them to life-threatening dangers and harming their health and development. For the indigenous petitioners, their thousand-years-old cultures are threatened by climate change” and argue that

In the context of the climate crisis, obligations under international human rights law are informed by the rules and principles of international environmental law. The CRC must be interpreted taking into account the respondents’ obligations under international environmental law. Each respondent has failed to uphold its obligations under the Convention to (i) prevent foreseeable domestic and extraterritorial human rights violations resulting from climate change; (ii) cooperate internationally in the face of the global climate emergency; (iii) apply the precautionary principle to protect life in the face of uncertainty, and (iv) ensure intergenerational justice for children and posterity.

<sup>93</sup> Peel & Osofsky, *supra* note 58.

<sup>94</sup> 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](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/W9BU-7CVG]; DENA P. ADLER, COLUMBIA LAW SCH., SABIN CTR. FOR CLIMATE CHANGE LAW, 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].

<sup>95</sup> See, e.g., Rb.’s-Gravenhage 24 juni 2015, AB 2015, 336 m.nt. Ch.W. Backes (Stichting Urgenda/Staat der Nederlanden),.

<sup>96</sup> 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/7NQD-WQ8H].

This rights-turn in litigation complements larger trend in the development of international climate law, whereby questions of rights and justice increasing pervade and influence climate negotiations and, even, climate treaties. Notably, the Paris Agreement is the first international climate agreement to explicitly integrate human rights language into the text of the treaty. In relevant part, the Paris Agreement states:

[a]cknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.<sup>97</sup>

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 imbedded within the burgeoning body of climate law.<sup>98</sup>

#### b. The Reliability of Rights

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 becomes of central concern. The rights-turn 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.<sup>99</sup> 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.<sup>100</sup> This is the vision of the rule of

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<sup>97</sup> U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on its Twenty-First Session*, U.N. Doc. FCCC/CP/2015/10/Add.1, pmbl (Jan. 29, 2016).

<sup>98</sup> 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 HUMAN RIGHTS L.R. 409 (2016).

<sup>99</sup> 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).

<sup>100</sup> See HENRY SHUE, BASIC RIGHTS 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* 239, 249, in DEMOCRATIC GOVERNANCE IN INTERNATIONAL LAW, GREGORY FOX & BRAD ROTH EDS. (2000). For a detailed discussion of the

law embraced and advanced by the UN<sup>101</sup> and that propelled the development of international law, and the shape of the international system in the latter half of the twentieth century.<sup>102</sup> This vision of the rule of law – both the integrity and accuracy<sup>103</sup> of the vision – is under pressure. 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.<sup>104</sup>

As Loeffler & Versteeg describe, even though, [o]ver the past 20 years the human rights agenda has advanced at a pace few could have imagined”, in recent years:

the human rights project has been marred by a sense of impending crisis. Wide-scale human rights violations remain abound, and human rights have come under pressure in regard to thorny issues such as immigration, the fight against terror and surveillance. In addition, the human rights project has been accused of politicisation and several governments have criticised international human rights institutions for advancing rights too far.<sup>105</sup>

The human rights project, thus, has come under increased scrutiny both for its failures to achieve its objectives<sup>106</sup> as well as for “its putative blindness to the political ideologies and power dynamics at work in its own formation.”<sup>107</sup> Moreover, as populist and nationalist politics roil<sup>108</sup> and

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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).

<sup>101</sup> See *infra* Part II(b).

<sup>102</sup> See Helal, *supra* note 3, at pin (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.”).

<sup>103</sup> 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).

<sup>104</sup> For a rich discussion of the ongoing challenges to the existing legal and political order, see Helal, *supra* note 3: populist parties and politicians reject the ideas and institutions that underpin the Code of Civilization, especially free trade, environmental protection and combatting climate change, pro-immigration policies and multiculturalism, and multilateralism. The importance of this ongoing populist revolt is that it has afflicted the very heart of the western world. The societies that articulated the Code of Civilization and led the post-Cold War order are now rejecting the normative foundation of that order they built.

<sup>105</sup> James Loeffler & Mila Versteeg, *Foreword: The Future of Human Rights Scholarship*, 81 LAW AND CONTEMPORARY PROBLEMS 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 LAW & POLICY (Dec. 14, 2018), <https://blogs.icrc.org/law-and-policy/2018/12/14/strengthening-compliance-with-ihl-disappointment-and-hope/>.

<sup>106</sup> 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' Mobilizing For Human Rights*, 44 N.Y.U. J. INT'L L. & POL. 819 (2012); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2008).

<sup>107</sup> Loeffler & Versteeg, *supra* note 100, at i.

<sup>108</sup> See, e.g., *State of Democracy, Human Rights and the Rule of Law*, *supra* note 11 (describing how “human rights non-governmental organisations (NGOs) and defenders have experienced a clampdown 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”).

the great powers continue to grapple for control, the late twentieth century vision of “a world composed of liberal democracies that protect human rights”<sup>109</sup> 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.”<sup>110</sup>

While human rights, undoubtedly, continue to constitute a central tenet of the international system,<sup>111</sup> ongoing challenges to that system erode the illusion<sup>112</sup> 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 that “the relationship between human rights and the environment has countless facets” and “that a healthy environment is of fundamental importance to the full enjoyment of a vast range of human rights”,<sup>113</sup> rights-based climate narratives and strategies must proceed with caution.

Beyond grappling with long-standing questions over the compatibility of using a rights-based narrative in the climate context<sup>114</sup> – these including concerns about the highly anthropocentric and

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<sup>109</sup> Helal, *supra* note 3, at pin (“the post-Cold War order was also challenged from within. Despite initial successes in the 1980s and 1990s, by the early 21<sup>st</sup> century it appeared that the Code of Civilization was failing to achieve its objectives of constructing a world composed of liberal democracies that protect human rights and that adopt a neoliberal model of economic governance.”).

<sup>110</sup> Report by the 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? 4 (2017)

<sup>111</sup> 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 7, at 75.

<sup>112</sup> *Id.* at 75. 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” and acknowledges that the rule of law does not, for example, address the full range of freedoms protected by bills of rights in other countries or in international instruments of human rights, or those now protected by our recently enacted Human Rights Act 1998, as set out in the European Convention on Human Rights (such as the right not to suffer torture, or the right to freedom of expression or rights of privacy or sexual freedom). There is not, after all, a standard of human rights universally agreed even among civilised nations.

*Id.* at 76-77. *But see Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, *supra* note 21. (providing a vision of the rule of law and human rights as mutually reinforcing: We are convinced that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, *all of which in turn reinforce the rule of law*, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.)

<sup>113</sup> *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, *supra* note 73.

<sup>114</sup> *See, e.g.*, Bridget Lewis, *Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection*, 8 MACQUARIE J. OF INTL. & COMPARATIVE ENVIRONMENTAL LAW 36 (2012); Kerri Woods, *What Does the Language of Human Rights Bring to Campaigns for Environmental Justice?*, 15 ENVTL. POLITICS 572 (2006); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT’L L. 103 (1991-1992).



deeply individualistic nature of human rights,<sup>115</sup> the limited ability of human rights to account for the interests of future generations,<sup>116</sup> and difficulties inherent in articulating a ‘right to the environment’<sup>117</sup> – 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 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.<sup>118</sup> As former UN High Commissioner for Human Rights, Mary Robinson, declared, climate change:

has already begun to affect the fulfillment of human rights, and to the extent that polluting greenhouse gases continue to be released by large industrial countries, the basic human rights of millions of the world’s poor to life, security, food, health and shelter will continue to be violated<sup>119</sup> Climate change poses pervasive threats to the realization of numerous enumerated rights. Addressing climate change is not just important, but necessary to ensure basic human health and well-being<sup>120</sup> and, in some cases, to protect entire ways of life and, even, existence.<sup>121</sup> But climate change is also much

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<sup>115</sup> See, e.g., Catherine Redgwell, *Life, the Universe & Everything: A Critique of Anthropocentric Rights*, in HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION, ALAN E. BOYLE & MICHAEL R. ANDERSON, EDs. (1996).

<sup>116</sup> See, e.g., Marcus Düwell & Gerhard Bos, *Human Rights & Future People – Possibilities of Argumentation*, 15 J. OF HUMAN RIGHTS 231(2016); RICHARD P. HISKES, THE HUMAN RIGHT TO A GREEN FUTURE: ENVIRONMENTAL RIGHTS AND INTERGENERATIONAL JUSTICE (2009).

<sup>117</sup> See Alan Boyle, *The Role of International Human Rights Law in the Protection of the Environment*, in BOYLE & ANDERSON, *supra* note 115, at 51.

<sup>118</sup> See *Communication to the Committee on the Rights of the Child*, *supra* note 87, 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”).

<sup>119</sup> *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>.

<sup>120</sup> See MYLES ALLEN ET AL., INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, GLOBAL WARMING OF 1.5°C: SUMMARY FOR POLICYMAKERS 9 (Valérie Masson Delmotte et al. eds., 2018), <https://www.ipcc.ch/sr15/chapter/summary-for-policy-makers> [<https://perma.cc/YFF8-SH6E>]:

Any increase in global warming is projected to affect human health, with primarily negative consequences (*high confidence*). Lower risks are projected at 1.5°C than at 2°C for heat-related morbidity and mortality (*very high confidence*) and for ozone-related mortality if emissions needed for ozone formation remain high (*high confidence*). Urban heat islands often amplify the impacts of heatwaves in cities (*high confidence*). Risks from some vector-borne diseases, such as malaria and dengue fever, are projected to increase with warming from 1.5°C to 2°C, including potential shifts in their geographic range (*high confidence*).

See also Cinnamon Carlarne & Michael H. Depledge, *Climate Change, Environmental Health, and Human Rights* in ENCYCLOPEDIA OF HUMAN HEALTH, volume 1, pp. 699–707, JO NRIAGU, ed. (Burlington: Elsevier 2011); Michael Depledge & Cinnamon Carlarne, *Environmental Rights and Wrongs*, 42 ENVIRONMENTAL SCIENCE & TECHNOLOGY 990 (2008); Michael Depledge & Cinnamon Carlarne, *Sick of the Weather: Climate Change, Human Health and International Law*, Opinion Piece, 9 ENVIRONMENTAL LAW REVIEW 231 (2007).

<sup>121</sup> See *id.* at 2, 42-43, 87-88. For 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*

more than a human rights crisis. It is a planetary crisis<sup>122</sup>. It is by now indisputable that “without rapid action to curb greenhouse gas emissions and efforts to safeguard the environment we risk causing irreversible damage to the planet”.<sup>123</sup> Climate change, therefore, imperils not only intra- and inter-generational human rights and health and well-being, but also planetary health.<sup>124</sup>

Climate change threatens to disrupt entire planetary systems,<sup>125</sup> including both ‘natural’<sup>126</sup> and human systems. In order to prepare systems to be responsive to climate change for the purpose of ensuring human and planetary health and well-being, therefore, it is necessary to think beyond climate law and, even, beyond human rights law, to how to integrate climate considerations into law and governance structures more systemically. This requires us to think broadly about the relationship between climate change and the rule of law and contextualizes why it is critical that, before we rush forward to decipher our collective will in the climate law context, or to orchestrate the future of climate law drawing heavily upon a rights-based narrative, we first must explore the contours of the larger context within which we are operating and the ways in which ongoing debates about the meaning and

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States, 217 F. Supp. 3d 1224 (D. Or. 2015) (Case No.: 6:15-cv-01517-TC) (Sept. 10, 2015) (in which the petitioner children describe the various ways in which climate change will affect their lives and undermine their constitutional rights)[hereinafter *Youth Complaint*]; *Juliana v. United States*, 217 F. Supp. 3d 1224, 1233, 1250 (D. Or. 2016) (Case No.: 6:15-cv-01517-TC) (Sept. 10, 2015) (finding that under U.S. constitutional law, the right to a climate system capable of sustaining human life is a fundamental right.).

<sup>122</sup> House of Commons: Environmental Audit Committee, *Our Planet, Our Health* 58 (Sept. 17, 2019), <https://publications.parliament.uk/pa/cm201719/cmsselect/cmenvaud/1803/1803.pdf> [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. Report of The Rockefeller Foundation-Lancet Commission on Planetary Health*, 386 THE LANCET 1973, 1973 (Nov. 14, 2015), <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2815%2960901-1>.

<sup>123</sup> *Our Planet, Our Health*, *supra* note 117, at 58.

<sup>124</sup> Planetary health has been defined as:

The achievement of the highest attainable standard of health, wellbeing, and equity worldwide through judicious attention to the human systems— political, economic, and social—that shape the future of humanity *and* the Earth’s natural systems that define the safe environmental limits within which humanity can flourish. 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 117, at 5 (citing Richard Horton & Selina Lo, *Planetary Health: A New Science for Exceptional Action*, 386 THE LANCET 1921 (2015))

<sup>125</sup> See Johan Rockström et al., *Planetary Boundaries: Exploring the Safe Operating Space for Humanity*, 14(2) ECOLOGY AND SOCIETY 32, 33 (2009) (In key part, Rockström et al propose the “novel concept, planetary boundaries, for estimating a safe operating space for humanity with respect to the functioning of the Earth System”, and identify “key Earth System processes and attempt to quantify for each process the boundary level that should not be transgressed if we are to avoid unacceptable global environmental change.” They define unacceptable change “in relation to the risks humanity faces in the transition of the planet from the Holocene to the Anthropocene”).

<sup>126</sup> Arguably, the idea of nature is a human construct and, given the human footprint on Earth, there are no true ‘natural’ systems left, but I use the term here to refer to ecosystem as conceptually – if not absolutely – distinct from human social, legal, cultural, and economic systems. For an excellent discussion of the challenges we face in the Anthropocene in understanding the human-nature relationship, see JEDEDIAH PURDY, *AFTER NATURE: A POLITICS FOR THE ANTHROPOCENE* (2015).

substantive content of the rule of law shape the governance space within which we are developing climate-related responses.

Therefore, while it is important to recognize that 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, it is also imperative that these strategies operate in full view of both the inherent limitations of human rights law, and the contemporary pressures that strain the strength of rights narratives in the international rule of law.<sup>127</sup> 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 climate change poses, however, reach far beyond human rights.

The focus of this article is on examining the relationship between the rule of law, climate change, and human rights with a view towards understanding how fluxes in international politics shape understandings of the rule of law, which in turn impact efforts to draw upon the rule of law – including human rights law – to address climate change. To focus myopically on how shifts in the international system have a downward effect on the development of climate law, however, is to miss how ongoing efforts to develop climate law simultaneously operate upward to interact with and influence governance trends and the rule of law. The next section briefly sketches out how ongoing efforts to develop climate change governance systems constitute important counterpoints to current pressures on the rule of law.

### c. The Climate Law Resistance

Concerns about a crisis of world order abound<sup>128</sup> and pressure is mounting to examine the stability of the institutions and normative foundations of the international system amidst the resurgence of populism, nationalism, and authoritarianism. The resulting erosion of respect for a rights-enabling vision of the international rule of law threatens to undermine efforts to advance international cooperation on climate change. Against this backdrop of decline, however, there is a

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<sup>127</sup> See generally Peerenboom, *supra* note 95 (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.

<sup>128</sup> See Helal, *supra* note 3; PATRICK J. DENEEN, *WHY LIBERALISM FAILED* (2018); HENRY KISSINGER, *WORLD ORDER* 375 (2014); G. JOHN IKENBERRY, *LIBERAL LEVIATHAN: THE ORIGINS, CRISIS, AND THE TRANSFORMATION OF THE AMERICAN WORLD ORDER* 159 (2012).

surge of energy and efforts pushing back against the erosion of democracy, cooperative will, and a rights-infused vision of the rule of law. There are counter trends, particularly visible at the national level, to expand the rule of law with respect to rights and climate change and to advance a more climate-friendly vision of populism.<sup>129</sup> These trends push back against the intensifying downward pressures on the rule of law and the human rights project.

First, as discussed *infra*, at the national level, there has been a sweeping change with respect to the recognition of environmental and climate-related rights, with complementary proposals also being put forward at the international level. The degree to which environmental rights have spread across the globe and become entrenched in national law and regional agreements reflects widespread continuing support for rights-based theories of law. Moreover, in recent years, these efforts have expanded even further to advocate legal rights for nature.<sup>130</sup> In locations ranging from New Zealand,<sup>131</sup> Ecuador, Bolivia,<sup>132</sup> and Australia<sup>133</sup> to Toledo, Ohio<sup>134</sup> advocates have advanced initiatives to grant legal personality and, therefore, legal rights to rivers, lakes, coral reefs, mountains and, even, Mother Earth. Many of these new and proposed rights-based regimes are young and untested and the degree to which the rights will prove meaningful in advancing environmental objectives hinges on the stability of the rule of law in the relevant context. Nonetheless, the trend towards expanding rights and bringing these rights to bear to advance climate-related objectives embeds rights in legal systems even as pressure mounts on the international human rights system in ways that erode the integrity of rights and undermine the alignment of rights with the international rule of law.

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<sup>129</sup> Note, also, as Fisher reminds us that environmental law was “borne itself out of a strand of left-wing populist politics in the 1960s and 1970s.” Fisher, *supra* note 41, at 384.

<sup>130</sup> The contemporary origin for these arguments can be traced to Professor Christ Stone’s influential article proposing rights for nature. Christopher D. Stone, *Should Trees Have Standing? - Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972). See also CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT* (2010).

<sup>131</sup> See Katherine Sanders, *‘Beyond Human Ownership’? Property, Power and Legal Personality for Nature in Aotearoa New Zealand*, 30 J. OF ENTL. L. 207 (2018); Paolo Villavicencio Calzadilla & Louis J. Kotzé, *Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia*, 7 TRANSNATIONAL ENVTL. L. 397 (2018).

<sup>132</sup> See Paolo Villavicencio Calzadilla & Louis J. Kotzé, *Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia*, 7 TRANSNATIONAL ENVTL. L. 397 (2018); Susan Borràs, *New Transitions from Human Rights to the Environment to the Rights of Nature*, 5 TRANSNATIONAL ENVTL. L. 133 (2016).

<sup>133</sup> See Randall S. Abate, *Rights of Nature: US and Foreign Domestic Perspectives*, in CLIMATE CHANGE AND THE VOICELESS: PROTECTING FUTURE GENERATIONS, WILDLIFE, AND NATURAL RESOURCES (2019).

<sup>134</sup> See Robert Macfarlane, *Should this Tree Have the Same Rights as You?*, THE GUARDIAN (Nov. 2, 2019), <https://www.theguardian.com/books/2019/nov/02/trees-have-rights-too-robert-macfarlane-on-the-new-laws-of-nature>; Community Environmental Legal Defense Fund (CELDF), *Rights of Lake Erie Recognized in Historic Vote* (Feb. 27, 2019), <https://celdf.org/2019/02/rights-of-lake-erie/>; Sigal Samuel, *Lake Erie Now has Legal Rights, Just Like You*, VOX (Feb. 26, 2019), <https://www.vox.com/future-perfect/2019/2/26/18241904/lake-erie-legal-rights-personhood-nature-environment-toledo-ohio>.

Second, autocratic and populist leaders are “spawning a resistance that keeps winning its share of battles.”<sup>135</sup> A climate-focused contingent comprises an active part of this resistance. 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 counter-offensive with its own populist undertones. This pushback includes employing innovative litigation strategies as well as a multitude of efforts undertaken by sub-federal and non-state actors to oppose and counteract President Trump’s demolition efforts.<sup>136</sup>

Briefly, with respect to the ongoing wave of litigation, some of the more innovative strategies focus on prompting recognition of fundamental rights<sup>137</sup> for the people of the United States – namely children in the case of the most prominent *Juliana* case<sup>138</sup> – that are overlooked, underrepresented, and otherwise harmed by the government’s failure to take their interests into account. In *Juliana*, the petitioners – 21 young people – allege that the US federal government has deprived them of their right to a safe climate without due process of law and thereby violated their constitutional rights of due process,<sup>139</sup> equal protection,<sup>140</sup> and unenumerated rights protected under the Ninth Amendment,<sup>141</sup> as well as violating the public trust doctrine.<sup>142</sup> As the presiding district court judge summed up, the core of the plaintiffs’ claim is that the federal government’s actions and inactions—“whether or not they violate any specific statutory duty—have so profoundly damaged

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<sup>135</sup> Human Rights Watch, *World Report 2019: Events of 2018* 1 (2019), [https://www.hrw.org/sites/default/files/world\\_report\\_download/hrw\\_world\\_report\\_2019.pdf#page=10](https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2019.pdf#page=10) (exploring mounting resistance to autocracy and challenges to the rule of law worldwide) (“Yet while the autocrats and rights abusers may capture the headlines, the defenders of human rights, democracy, and the rule of law are also gaining strength. The same populists who are spreading hatred and intolerance are spawning a resistance that keeps winning its share of battles.”). See also *Studies on Societies Outside Metropolises: The Role of Civil Society Organisations in Facing Populism*, *supra* note 39 (exploring the role civil society organisations play in responding to the populism resurgence across Europe).

<sup>136</sup> For a full discussion of these litigation, sub-national, and non-state efforts see *U.S. Climate Change Law: A Decade of Flux and an Uncertain Future*, *supra* note 52.

<sup>137</sup> Rights based cases are being heard by courts worldwide. See *Rb.’s-Gravenhage* 24 juni 2015, AB 2015, 336 m.nt. Ch.W. Backes (Stichting Urgenda/Staat der Nederlanden); *Ashgar Leghari v. Federation of Pakistan* (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015, available at: [https://elaw.org/pk\\_Leghari](https://elaw.org/pk_Leghari) (Leghari); *Third Runway at Vienna International Airport* case, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, 2 Feb. 2017; *Earthlife Africa Johannesburg v. Minister for Environmental Affairs & Others*, Case No. 65662/16, Judgment of High Court of South Africa, Gauteng Division, Pretoria (South Africa), 8 Mar. 2017, available at: <http://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf>.

<sup>138</sup> *Juliana*, *supra* note 115.

<sup>139</sup> *Youth Complaint*, *supra* note 155, at 84–88.

<sup>140</sup> *Id.* at 88–91.

<sup>141</sup> *Id.* at 91–92.

<sup>142</sup> *Id.* at 92–93. For one of the most important legal analyses on the public trust doctrine as it applies to natural resources, see Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 477 (1970).

our home planet that they threaten plaintiffs’ fundamental constitutional rights to life and liberty.”<sup>143</sup> In allowing the claims to proceed, the court held that “the right to a climate system capable of sustaining human life is fundamental to a free and ordered society.”<sup>144</sup> That is, the court determined that under U.S. constitutional law, the right to a climate system capable of sustaining human life is a fundamental right.<sup>145</sup> In essence, the petitioners’ claims in *Juliana* rest on the argument that the government has failed ‘the people’ when it has failed to secure this right.

Another strand of this litigation attempts to force private actors – namely the carbon majors<sup>146</sup> – to publicly disclose how their actions and inactions impact the planet and its people, and to directly address what they see as their legal and moral obligations to the people in the face of these revelations.<sup>147</sup> This forced transparency and public grappling with legal roles and moral responsibilities highlights the increasingly inexplicable gap between the threats climate change poses and the legal responses offered, focusing on how these actions and inactions leave the health and well-being of ‘the people’ at the whim of the seemingly unaccountable profit-oriented

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<sup>143</sup> *Juliana*, *supra* note 155, at 126.

<sup>144</sup> *Id.* at 1250. Judge Aiken qualifies the recognition of a new fundamental right, explaining:

In framing the fundamental right at issue as the right to a climate system capable of sustaining human life, I intend to strike a balance and to provide some protection against the constitutionalization of all environmental claims. On the one hand, the phrase “capable of sustaining human life” should not be read to require a plaintiff to allege that governmental action will result in the extinction of humans as a species. On the other hand, acknowledgment of this fundamental right does not transform any minor or even moderate act that contributes to the warming of the planet into a constitutional violation.

*Id.* at 1250.

<sup>145</sup> *Id.* (“To hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink.”).

<sup>146</sup> See Richard Heede, *Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers, 1854–2010*, 122 CLIMATIC CHANGE 229 (2014). In his influential 2013 study, Richard Heede provided a quantitative analysis of historic fossil fuel and cement production records of 90 leading investor-owned, state-owned and nation-state producers of oil, natural gas, coal and cement. This study revealed 90 entities—i.e., carbon majors—were responsible for 63% of cumulative worldwide industrial emissions of CO<sub>2</sub> and methane from 1854–2010. Of these 90 entities, the 20 largest investor- and state-owned energy corporations were responsible for 29.5% of all global industrial emissions through 2010. This study has proved pivotal to the recent round of lawsuits being brought against these heavy emitting entities, which have come to be known as the “carbon majors.” *Id.* at 229, 234. See also *National Inquiry on Climate Change*, PHIL. COMMISSION ON HUM. RTS., <https://chr.gov.ph/nicc-2> [https://perma.cc/E35P-9WQJ]. The inquiry is a response to a petition that was filed with the Commission “seeking to establish how climate change is related to the increasing frequency and severity of natural disasters and how human rights of the Filipinos are affected by them.” *Id.* The inquiry includes an investigation of the responsibility of the “Carbon Majors” for human rights violations resulting from climate impacts, drawing upon the abovementioned study by Richard Heede and advancements in attribution science.

<sup>147</sup> For discussions of this litigation see Geetanjali Ganguly et al., *If at First You Don’t Succeed: Suing Corporations for Climate Change*, 83 OXFORD J. LEGAL STUD. 841, 846–47 (2018); Lisa Benjamin, *The Road to Paris Runs Through Delaware: Climate Litigation and Directors’ Duties*, UTAH L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3379848](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3379848) [https://perma.cc/6GVL-737S?type=image]; Myanna Dellinger, *See You in Court: Around the World in Eight Climate Change Lawsuits*, 42 WM. & MARY ENVTL. L. & POL’Y REV. 525 (2018).

corporations<sup>148</sup> and neglectful governmental actors – a decidedly different populist narrative to the one that the Trump Administration offers. The public reckoning this litigation seeks may not lead to decisive legal victories in every case, but it reflects the growth of climate consciousness among a wide swath of US citizens and poses an alternative view of who falls into the category of the underrepresented ‘people’ in the context of governmental and private sector action and inaction on climate change.

Arguably, however, the most compelling evidence that President Trump’s actions have instigated organized resistance comes from the actions of state and local governments and non-state actors. President Trump’s climate law reversals have prompted a deluge of legal and extra-legal responses.<sup>149</sup> Through initiatives such as *We Are Still In* and the *Climate Alliance*, “more than 2,500 non-federal actors representing more than half the U.S. economy . . . have pledged their support for the Paris Agreement goals.”<sup>150</sup> The scale of these commitments is significant: “the combined Gross Domestic Product (GDP) of U.S. states and cities that have stated they remain committed to action in line with the . . . Paris Agreement would be larger than 195 out of 197 Parties to the [UNFCCC].”<sup>151</sup> These commitments are further bolstered by the “more than 1,300 businesses with U.S. operations, representing \$25 trillion in market capitalization and accounting for 0.9 gigatons (Gt) carbon dioxide equivalent (CO<sub>2</sub>e) of GHG [greenhouse gas] emissions per year” that have voluntarily adopted GHG targets.<sup>152</sup>

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 counter-narrative about the need for climate action for the health and well-being of present and future generations of the American people.

Finally, 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

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<sup>148</sup> See, e.g., Laurel Wamsley, *Exxon Wins New York Climate Change Fraud Case*, NPR (Dec. 10, 2019), <https://www.npr.org/2019/12/10/780317799/exxon-wins-new-york-climate-change-case?t=1576133240358>.

<sup>149</sup> See U.S. *Climate Change Law: A Decade of Flux and an Uncertain Future*, *supra* note 52, add pins when available.

<sup>150</sup> Kristin Ugusky & Kevin Kennedy, *By the Numbers: America’s Pledge Shows How US Is Taking Climate Action Without Trump*, WORLD RESOURCES INST. (Nov. 11, 2017), <https://www.wri.org/blog/2017/11/numbers-americas-pledge-shows-us-moving-forward-climate-action> [<https://perma.cc/J345-UZH8>].

<sup>151</sup> BLOMBERG PHILANTHROPIES, AMERICA’S PLEDGE: PHASE 1 REPORT-STATES, CITIES, AND BUSINESSES IN THE UNITED STATES ARE STEPPING UP ON CLIMATE ACTION 14 (2017).

<sup>152</sup> See *id.* at 14–15.



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<sup>153</sup>—whose climate strike outside the Swedish Parliament has inspired activists and politicians worldwide—the youth message has changed the tone of the climate movement.<sup>154</sup> The message is simple and powerful: our future is at stake and inaction is intolerable.

Thus, even as pressure mounts on the international rule of law and the human rights project, climate-related actions form a source of resistance to these erosive pressures. Nevertheless, states – and powerful state leaders – continue to wield emphatic power to enable or to cripple large-scale change and to undermine the rule of law. As a result, the populist trends sweeping the globe pose a real threat to the ability to leverage the rule of law to respond to climate change within the timeframe that is necessary to avert the worst effects of climate change for people and the planet.

#### IV. Climate Change, Human Rights, & The Rule of Law: Unravelling a Tangled Web

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.<sup>155</sup> 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.

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<sup>153</sup> See *Greta Thunberg Named Time Person of the Year*, BBC NEWS (Dec. 10, 2019), <https://www.bbc.co.uk/news/world-europe-50740324>; *Climate Change: What Did Greta Thunberg Say at COP25?*, BBC NEWS (Dec. 11, 2019), <https://www.bbc.co.uk/newsround/50743328> (“Well I am telling you there is hope. I have seen it. But it does not come from governments or corporations. It comes from the people.”)

<sup>154</sup> Leslie Hook et al., *Greta Thunberg’s Influence Grows as Young Activist Heads for US*, FIN. TIMES (Aug. 4, 2019), <https://www.ft.com/content/c1fc37b4-bce4-11e9-89e2-41e555e96722>.

<sup>155</sup> Kenneth W. Abbot & Duncan Snidal, *International Regulation without International Government: Improving IO Performance through Orchestration Deficit*, 42 VAND. J. TRANSNAT’L L. 501 (2009).