

# **‘Environmental Rule of law’: Reading into the First Global Report**

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## **Abstract**

On 24 January 2019 the UN Environment published its first Global Report of “Environmental Rule of Law”. Despite the steady increase in environmental laws since Stockholm Declaration and the very recent developments in courts tendencies nationally and internationally (i.e Costa Rica vs. Nicaragua and Colombia’s Supreme Court decision STC4360-2018), this report identifies failure to enforce these laws as a global trend and the main challenge in the face of mitigating adverse effect of human activity on the Environment. This very recent report that attempts to provide a roadmap for tracking the effectiveness of efforts to improve and promote an environmental rule of law globally, admits however that developing and advancing the environmental rule of law is a challenge for all countries although it became a growing priority. It is essential to highlight that this report was released as climate experts and political and economic leaders seek to address dire findings released in October 2018 by the United Nations’ Intergovernmental Panel on Climate Change, which urged rapid action to transform the global economy at a speed and scale that has “no documented historic precedent.” Environmental rule of law provides an important entry point for considering how to govern development so that it is sustainable. It is clear that many of the Sustainable Development Goals, even those that do not mention the environment explicitly, will only be met if there is substantial progress on environmental rule of law, and that there is substantial congruity between Sustainable Development Goals and targets and the ingredients of environmental rule of law. This means that as countries and partners pursue the 2030 Agenda for Sustainable Development, they need to mainstream consideration of environmental rule of law into their programming.

This paper will explore first the significance of an implementation gap in legal context. It will move after that to set the theoretical frame of the reading offered from TWAIL (Third World Approaches of International Law) perspective. While standing on the main structure of environmental rule of law as offered by the report it will explore the significance of the rule of law, relevance of sustainable development and a system of civic engagement that serves better

a more efficient global governance and justice. This paper argues and from a TWRIL perspective that we are still far from establishing a clear concept of environmental rule of law. In the absence of empirical data to support the suggested structure of such process of governance the report replicates the implementation gap present in the legal environmental scene.

**Key words:** Sustainable Development, Rule of Law, Environmental Governance, Enforcement, Climate Change, TWRAIL.

## 1- Introduction

Despite the steady increase in environmental laws since Stockholm Declaration and the very recent developments in courts tendencies nationally and internationally to base judgments on environmental principles<sup>(1)</sup>, Studies and reports identify failure to enforce environmental laws as a global trend across different states across with different development records. This failure in implementation of law became the main challenge in the face of mitigating adverse effect of human activity on the Environment<sup>(2)</sup>.

Human activities are estimated to have caused approximately 1.0°C of global warming above pre-industrial levels, with a likely range of 0.8°C to 1.2°C. Global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase at the current rate<sup>(3)</sup>. A recent report in late 2018 of United Nations' Intergovernmental Panel on Climate Change, has urged rapid action to transform the global economy to address the anticipated increase in global warming as this is taking place at a speed and scale that has “no documented historic precedent”<sup>(4)</sup>. In response to this dire finding, climate experts and political and economic leaders sought to address this matter and so was the attempt of the United Nation environmental Program to release its first report on environmental rule of law.

Environmental rule of law offers an important key point to consider how to govern development so that it is sustainable<sup>(5)</sup>. Exploring environmental challenges and climate change goes hand by hand with looking into what has been established as the goals of sustainable development<sup>(6)</sup>. Many of the Sustainable Development Goals set by the agenda of 2030<sup>(7)</sup>, even those that do not mention the environment explicitly, will only be met if there is substantial progress on environmental rule of law, and that there is substantial congruity between Sustainable Development Goals and targets and the ingredients of

(1) For example the case of Costa Rica vs. Nicaragua and Colombia's Supreme Court decision STC4360-2018.

(2) Ludwig Krämer and Emanuela Orlando, Principles of Environmental Law, Elgar Encyclopedia of Environmental Law series, Edward Elgar Publishing, UK, ed. 2018.

(3) United Nations' Intergovernmental Panel on Climate Change, [https://report.ipcc.ch/sr15/pdf/sr15\\_spm\\_final.pdf](https://report.ipcc.ch/sr15/pdf/sr15_spm_final.pdf), last visited on: 18/04/2019.

(4) Ibid.

(5) Irene Khan, How Can the Rule of Law Advance Sustainable Development in a Troubled and Turbulent World?, Gonthier Memorial Lecture. Montreal, June 23, 2017, <http://www.cisd.org/wp-content/uploads/2018/05/How-Can-the-Rule-of-Law-Advance-Sustainable-Development-in-a-Troubled-and-Turbulent-World-I-Khan.pdf>, last visited on: 19/04/2019.

(6) Ibid.

(7) Sustainable Development Goals 2030, <https://www.un.org/sustainabledevelopment/development-agenda/>, last visited on: 19/04/2019.

environmental rule of law. This means that as countries and partners pursue the 2030 Agenda for Sustainable Development, they need to mainstream consideration of environmental rule of law into their programming<sup>(8)</sup>. This paper will explore legal challenges set by the first report on environmental rule of law. The paper highlights that disparity between law in print and implementation is never a new phenomenon, nonetheless the need to bring the two ends together is never as urgent as it is in our today’s environmental context. While the report under study attempts to provide a generalized reading of different trends and challenges to systems of national governance, this paper will set its structural methodology to read it through the eye of Third World Approaches of International law. This study will review the first global report and while highlighting pros and cons into methodology, expectations and the generalization of the structural system offered ultimately by the report. The paper will offer lastly some critique and alternative approach from the third world perspective aiming to add this view to a larger body of recommendation offered by the report and other current and future studies.

After this introduction the paper will be divided into four sections addressing; Implementation Gap, Environment and TWAIL , a third section will read aspects of the first global report and the final section will critically comment on the report form TWAIL background and shed a light on the Arab World reality and end with some concluding remarks

## **2- Implementation Gap**

The legal transformations that have taken place across the globe provide a valuable insight into the complex nature and development of Environmental law as a subfield of international law specifically with regard to the need to uphold rule of law in times identified as an escalating state of natural crisis and as they are ongoing overall the Globe<sup>(9)</sup>. Environmental law could be considered the law we seek to face our environmental crisis and so it comes with it sets of exceptional frame and urgent necessity to tackle a threat that we are yet to know when if it is to end<sup>(10)</sup>.

This characterisation per se poses challenges of exceptionalism that law is

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(8) Environmental Rule of Law, First Global Report, <https://www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report>, last visited on: 19/04/2019.

(9) Usha Natarajan, Twail and the Environment: The State of Nature, the Nature of the State, and the Arab Spring, Oregon Review of International Law, School of Law, University of Oregon, Vol. 14, (2012).

(10) For a general discussion of the legal theory of exceptional measures in times of crisis see G. Agamben, (2005), The State of Exception, R. V. Munster, (2004), When the Exception Becomes the Rule, International Journal of the Semiotics of Law, M. Neocleous (2006), The Problem with Normality: Taking Exception to “Permanent Emergency”, Alternatives 30.

ought to transcend to make sure our life on the planet is sustainable and this is done within the right time limit<sup>(11)</sup>. Engaging all different realities of states and people around the world to understand a collective sense of responsibility and act for the interest of all as another essential challenge when faced with political will and economic interest in a system of international relations based on power. Akin to the field of human rights, environmental law while seeking to protect individual rights the failure in realising justice affects not only the rule of law but also the sustainability of an environment that we won't even survive if we do not stop its deterioration<sup>(12)</sup>.

Thus realities are different, while developed reality is transfixed with over consumption and less tendency to comply for preserving economic interest, the developing reality is transfixed by recurring themes of conflict and security, which remain embedded within the historical legacy of colonization and independence. The consequential reality of the third world developing countries today offers no change in the existing themes and discourse while the environmental crisis does not promise any decline as tied to a developing reality that is yet to commit to a collective sense of rights.

Environmental law presents a manifestation of the legal interrelation between national and international. Recent developments in terms of constitutional rights of environment and judicial decisions that are more inclined to consider international obligations in national applications and conflicts for the best of environment, all attempt to highlight environmental law as a right issue rather than just a legal procedures aiming to find solutions to an already existing problem<sup>(13)</sup>.

The legal culture of a nation is significant in terms of how citizens recognise not only the judiciary but also the political system at large. The manner in which legal institutions function also has an effect on a country's political, economic, and social development performance. While law is intended to produce a just society, it is ultimately a social structure that has gone through

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(11) Ludwig Krämer and Emanuela Orlando (ed), 2018, 'Principles of Environmental Law', Elgar Encyclopedia of Environmental Law series, Edward Elgar Publishing, UK, ed. 2018.

(12) Denis Salles, Responsibility Based Environmental Governance, 4.1, 2011, VOL.4, N°1, Surveys And Perspectives Integrating Environment & Society (SAPIENS), Steve Vanderheiden, Climate Change and Collective Responsibility, chapter two in N.A Vincent et al. (eds.), 2011, Moral Responsibility, Library of Ethics and Applied Philosophy, Springer.

(13) Tseming Yang, The Relationship Between Domestic and International Environmental Law (2013), School of Law, Santa Clara University, Canada, 2013, Available at: <http://digitalcommons.law.scu.edu/facpubs/768>.

a political process<sup>(14)</sup>. The pedagogical set of questions with regard to whether law changes society or society changes the law remain in fact in the centre of any critical study methodological or contextual Study<sup>(15)</sup>. This is specially so in a developing reality that is heavily loaded politically and characterised with the struggle between power and rule of law. Individual rights are subordinated—sometimes willingly, but more often not—to the ideological goal of the state, namely, national security<sup>(16)</sup>. The concept of climate justice presents a challenge to the classical goal of national security. Climate justice, aims to develop a human centred reading of the national state and further international interest. Linking human rights and developments would be the established ground upon which a rule of law could safeguard the rights of most vulnerable and share equally and fairly burdens and benefits of climate change.

Nonetheless, akin to any ambitious legal development law in practice offers a set of new obstacles. This is specially so in such a complex reality of a global environmental law that seeks international cooperation and fair sharing of resources. Tracing the gap between law making and its implementation goes back to the early establishment of legal theory. Aristotle debated the concepts of equity and the need for judicial interpretation of laws to reflect the different conditions presented by the real conditions that exist when laws are applied as opposed to when they are initially created<sup>(17)</sup>.

In theory, at least, law and policy are facilitators of desired behavior and inhibitors of behavior we want to reduce or eliminate. Law operates on multiple levels, through variety of institutions, and take on many forms including treaties, constitutional provisions, statutory schemes and regulatory provisions that can function globally, multilaterally, bilaterally, or at national, regional or local levels<sup>(18)</sup>.

The discrepancy between law and its enforcement is seen in many if not

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(14) Norman Fairclough, *Discourse and Contemporary Social Change*, Peter Lang, Bern, Switzerland, 2007. See also for CDA Fairclough, Isabela and Fairclough, Norman (2013) *Political Discourse Analysis: A Method for Advanced Students*. London: Routledge, Fairclough, Norman (1992). *Discourse and Social Change*. Cambridge: Polity Press.

(15) M. B. Davies, (2007). *Doing a Successful Research Project: Using Qualitative or Quantitative Methods*, Palgrave Macmillan, P. Mann, (1985). *Methods of Social Investigation*, Blackwell. p. 110, T. May, (1957), *Social Research: Issues, Methods and Process*, Buckingham pp. 111-117.

(16) A. Anghie, (2005), *Imperialism, Sovereignty and the Making of International Law*, Cambridge University Press.

(17) Aristotle, *The Nichomachean Ethics*, Ch. X. “Equity and Justice”.

(18) *Manual on Compliance with and Enforcement of Multilateral Environmental Agreements*, Published in June 2006, UNEP ISBN: 92-807-2703-6.

every field of law. This raises however particular challenges in the field of environmental protection. The development of detailed laws designed to protect the environment over the past three or four decades has been a striking phenomenon of our time<sup>(19)</sup>. Laws in blue print would provide some comfort, but without effective implementation and enforcement they bring very little value. Law makers often pay more attention to the legislative process and passing new laws rather than considering the equally challenging issues of implementation, and what happens after the law has come into force.

In our today's societies, where the demands on social goods are intensified by the stresses of globalization<sup>(20)</sup> and the breakdown of traditional relationships there is an even greater role for law. Historically, development realities were one of the most affected by Globalization<sup>(21)</sup>. Globalization era was guided by a particular strategy and justified by a precise political paradigm. Legal implications are paramount in this context specially at the level of international law in some development seeking realities. Because we have no forms of homogenous community and are of diverse political fragments that lack a shared set of consensual norms we cannot depend on common values to shape and guide our social and subsequently legal behavior. Law thus becomes a critically important element of social ordering.

In structural and methodological sense, one may identify multi layered reasons for the failure of law and legal policy<sup>(22)</sup>. A well-recognized reason for the inevitable gap between the creation and implementation of a law is that the data on which law makers rely when they create the policy and law is not specifically accurate for the its purpose. This can be in its content or incompleteness. Nonetheless, even if the original data were accurate and complete at the moment of the law's making, it is only natural for the newly made law to generate a dynamic and transformative pressure in its implementation that aims to alter the nature of the system being addressed.

The making, institutionalization, and application of the law indeed alter the social, economic and cultural realities to which the law is applied and this is

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(19) Ludwig Krämer and Emanuela Orlando (ed), 2018, 'Principles of Environmental Law', Elgar Encyclopedia of Environmental Law series.

(20) Sergio Fabbrini, After Globalization: Western Power in a Post-Western World, Global Policy Journal, 18th September 2010 available at <http://www.globalpolicyjournal.com/articles/global-governance/after-globalization-western-power-post-western-world>, last visited on: 19/04/2019.

(21) BZ Tamanaha, C Sage and M Woolcock (eds), Legal Pluralism and Development: Scholars and Practitioners in Dialogue (Cambridge, Cambridge University Press, 2012).

(22) Manual on Compliance with and Enforcement of Multilateral Environmental Agreements, Published in June 2006, UNEP ISBN: 92-807-2703-6.

specially an ultimate aim in Environmental legal governance<sup>(23)</sup>. The law itself becomes a new changing variable that is ought to generate a mix of foreseen and unforeseen consequences. The situation that law makers seek to regulate is thus a “moving target” in relation to which conditions are changing and adaptations occurring<sup>(24)</sup>.

Taking all of these thematic system of methods and values in account, environmental laws across the globe face a huge difficulty in aims setting and implementations considering different challenges offered by various states realities. Environmental law brings to the fore the relation between national and international governance<sup>(25)</sup>. This is not only at the level of territorial jurisdiction of the state and limited margin offered to international mechanisms in some realities (developed and developing) but also with regard to different legal cultures, resources and relevance to standing for human rights such as the ‘right to a healthy environment’<sup>(26)</sup>.

States have a core obligation to satisfy the minimum essential level of such right but this is usually a national task and can hardly be determined in abstract<sup>(27)</sup>. Once a significant percentage of the population is deprived of their rights to healthy environment, housing, food and health services, the state is under the duty to show that all its available resources are being called upon to fulfill these rights. International community, developed environmental law on the basis that states have no similar resources, access to technology or even contributed to climate change on equal basis. Thus for that reason it considered the whole comprehensive body of environmental rules and agreement to be of collective responsibility within which obligations differ according to the state, infrastructure, economic and resource capacity<sup>(28)</sup>.

Withstanding environmental legal cultures across the globe, international community advanced its legal environmental developments with the set aim of bridging the gap between law and its implementation. The compliance

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(23) Ibid.

(24) Thomas S. Kuhn, *The Structure of Scientific Revolutions* (University of Chicago 1974); David Barnhizer, (2013), *The Implementation Gap: What Causes Laws to Succeed or Fail?*, Cleveland State University

(25) *Climate Change and Collective Responsibility*, chapter two in N.A Vincent et al. (eds.), 2011, *Moral Responsibility*, Library of Ethics and Applied Philosophy, Springer.

(26) Erik Solheim, Head of UN Environment, ‘Stepping up the Fight for the Right to a Healthy Environment. <https://www.unenvironment.org/news-and-stories/blogpost/stepping-fight-right-healthy-environment> last visited on 19/04/2019.

(27) Ibid.

(28) Denis Salles, ‘Responsibility Based Environmental Governance’, 4.1, 2011, VOL.4/N°1, *Surveys And Perspectives Integrating Environment & Society (SAPIENS)*, Steve Vanderheiden, *Climate Change and Collective Responsibility*, chapter two in N.A Vincent et al. (eds.), 2011, *Moral Responsibility*, Library of Ethics and Applied Philosophy, Springer.



system developed by environmental treaties and principles offers a legal accommodation of different development, resources, capacity to implement and so environmental realities. It recognizes that a lack of resources can impede the realization of rights. Accordingly, some legal obligations are of progressive nature in developing states while they are of rather immediate expectations in an industrial developed reality. This was clear in the main environmental principles such as sustainable development and common but differentiated responsibility<sup>(29)</sup>.

The principle of Common but Differentiated Responsibilities (CBDR) was enshrined as Principle 7 of the Rio Declaration at the first Rio Earth Summit in 1992. The declaration states: “In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.” Similar language exists in the Framework Convention on Climate Change; parties should act to protect the climate system “on the basis of equality and in accordance with their common but differentiated responsibilities and respective capabilities.”.

The principle holds that although all countries are responsible for the development of global society, each has a different set of capabilities that they can contribute. The Stockholm declaration, states that policy makers must consider, “the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.”. This is a fundamental principle in the context of environmental law aiming to take differences into account when goals and benchmarks are applied to global development agendas<sup>(30)</sup>. The logic is that if the expectations levied on countries are more appropriate to their national capabilities (social, economic, environmental, etc.), individual country efforts will more effectively complement each other and would increase the likelihood of compliance with international standards<sup>(31)</sup>.

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(29) Common but Differentiated Responsibilities and Respective Capabilities (CBDR–RC) is a principle within the United Nations Framework Convention on Climate Change (UNFCCC) that acknowledges the different capabilities and differing responsibilities of individual countries in addressing climate change.

(30) Current application of CBDR includes but not limited to environment, poverty eradication and financing see Policy Brief and Proposals: Common but Differentiated Responsibilities.

(31) Maksim Lavrik, Alicia Jimenez and Mirian Vilela, Earth charter International Secretariat, 2018, ‘The Earth Charter and the Regional Treaties Implementing Access Rights – Principle 10 of the Rio Declaration’ [http://earthcharter.org/wp-content/uploads/2018/06/Principle-10\\_Aarhus-and-Escazu-Treaty-Article-1.pdf](http://earthcharter.org/wp-content/uploads/2018/06/Principle-10_Aarhus-and-Escazu-Treaty-Article-1.pdf).

It is specifically this logic behind CBDR that was advocated by critical readings of international law and standards from the third world that is the most affected by climate change although it is not the one mostly contributing to this environmental harm. The following section will frame the reading of environmental rule of law within Third World Approaches of International law and it will specifically reflect on the reality of the Arab world in the wake of the waves of revolutions since 2011 and the aspiration to alter dynamic of governance. This theoretical and methodological perspective is most pertinent to this paper to help establishing the relevance of the first global report to the region<sup>(32)</sup>.

### **3- Third World Approaches to International law and The Environment**

Development of environmental law in modern time is traced back to 1972 Stockholm Conference through the 1992 Rio Earth Summit and the 2002 Johannesburg Conference to more recent summits in Copenhagen and Durban. Alongside this development the world witnessed also deepening of already existing divide between the South and the West on environmental issues. Legal concepts such as sustainable development and common but differentiated responsibilities for the global environment was advanced to adeptly articulated what was needed to bridge the divide. However, the concepts were unsuccessful in actually bridging it, as they fell short of assigning a hierarchy of norms and actions for states to observe<sup>(33)</sup>.

In 2010 and just before the spark of the ‘Arab Spring’, Human Development Report of The United Nations Development Program provided that Arab states led the world in terms of improvements in human development over the past forty years<sup>(34)</sup>. Development in leading states was essentially in terms of improving access to health and education in addition to increased gross domestic product<sup>(35)</sup>. All of these development fail short in saving the area of uprisings that keep challenging existing state systems<sup>(36)</sup>. This paradox of development achievement and yet absence of populace satisfaction neither stability calls the role of environment and natural resources in shaping legal systems and governance<sup>(37)</sup>. Understanding the relevance of this paradox helps

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(32) Okafor, Obiora Chinedu. «Critical Third World Approaches to International Law (TWAİL): Theory, Methodology, or Both?» *International Community Law Review*, 10, (2008), pp. 371-378.

(33) *Ibid.*

(34) U.N. Development Programme, *Human Development Report*, at 29, (2010).

(35) *Ibid.*

(36) As of the recent Algerian and Sudanese movements.

(37) Obiora Chinedu Okafor, *Critical Third World Approaches to International Law (TWAİL): Theory, Methodology, or Both?*, *International Community Law Review*, 10, (2008), pp. 371-378.

explaining why development gains have not been able to prevent popular uprising in the Arab World<sup>(38)</sup>. All of these movements (revolutions and counter revolutions) challenged state legitimacy. Many scholars and commentators indeed have pointed to the region's lack of civil and political rights, giving the populace neither protection from the state nor means to harvest development progressions<sup>(39)</sup>.

The wave of revolutions and counter revolutions since 2011 recreated an already existing complexity of conflict and hostility to International law in the Arab World. Historically, development realities were one of the most affected by Globalization<sup>(40)</sup>. Globalization era was guided by a particular strategy and justified by a precise political paradigm. Legal implications are paramount in this context specially at the level of international law or international norms adopted to pursue development agenda in some development seeking realities. It was assumed that economic deregulation might be governable by an international state system hierarchically controlled by the Cold War<sup>(41)</sup>. Post Globalization on the other hand offered a multi layered dynamics corresponding with the multiplicity. This series of uprising however raises a number of interesting questions for scholars of Third World Readings of International Law (TWAIL).

TWAIL is a part of New Approaches movement of international law that emerged in 1990s<sup>(42)</sup>. Scholars of post-colonial theory contend that the representation of the 'Orient' was depicted in a very distorted and negative way by some individuals in the late eighteenth and nineteenth centuries<sup>(43)</sup>. Scholars of TWAIL, similar to post-colonial theorists, viewed international law as playing a pivotal and instrumental role in turning the Orient into a colonial space<sup>(44)</sup>. Therefore, the historical expansion of the discourse on development suddenly took root as the governing logic of an international system<sup>(45)</sup>. It has

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(38) Ibid.

(39) U.N. Development Programme, Human Development Report, at 29, (2010).

(40) BZ Tamanaha, C Sage and M Woolcock (eds), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*, Cambridge University Press, Cambridge, 2012.

(41) Sergio Fabbrini, *After Globalization: Western Power in a Post-Western World*, *Global Policy Journal*, 18th September 2010 available at: <http://www.globalpolicyjournal.com/articles/global-governance/after-globalization-western-power-post-western-world>, last visited on 30/03/2019.

(42) F. R. Snyder et al. (1987), *Third World Attitudes Toward International Law*, Kluwer Academic Publishers.

(43) E. W. Said, (1979), *Orientalism*, Vintage Books; P. Williams and L. Chrisman (1994), *Colonial Discourse and Post-Colonial Theory: A Reader*, Columbia University Press.

(44) A. Boyle, and C. Chinkin, (2007), *The Making of International Law*, Oxford University Press, F. R. Snyder et al. (1987), *Third World Attitudes Toward International Law*, Kluwer Academic Publishers.

(45) A. Anghie, (2005), *Imperialism, Sovereignty and the Making of International Law*, Cambridge

been argued further that the mandate system of the League of Nations was the first instrumental link between colonialism and development followed by international institutions established later to maintain economic development through the World Bank and other global entities<sup>(46)</sup>. The implementation of international law and standards in the area was always perceived as tainted by a double standard<sup>(47)</sup>. TWAIL scholars hoped Third World legal traditions could be gradually integrated into the existing system through participation in the evolution of the traditional sources of law and thus will be able to pave the way for a better engagement with international standards in an inclusive community<sup>(48)</sup>.

The Arab World for example has always struggled with international law and standards. Scholars of TWAIL argue that Third world participation in international law was always limited and international justice in terms of international courts and tribunals rarely reflected on this scholar. After the successful quest for self-determination, Arab governments became fixed on maintaining security and order<sup>(49)</sup>. However, states of the third world also contributed to outlawing apartheid and racism in modern international law, turning away from the law’s colonial past<sup>(50)</sup>. The states of this scholar also played a significant part in formulating a number of legal concepts that are directly related to environmental law including, the principle of common heritage of humankind; the doctrine of permanent sovereignty over natural resources; the concept of peaceful and friendly relations among states; social, economic, and cultural rights; the right to development for all states and peoples; the principle of common but differentiated responsibilities for the global environment; and the principle of sustainable development. Effective implementation of these principles is yet to be realized.

The first global report on environmental rule of law as some aspects of it discussed below attempts to highlight different elements at play when

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University Press; F. R. Snyder et al. (1987), *Third World Attitudes Toward International Law*, Kluwer Academic Publishers; L. Gandhi, (1998), *Postcolonial Theory: A Critical Introduction*, Columbia University Press.

(46) A. Seidman, and B. Seidman, (1994) *State and Law in the Development Process: Problem-solving and Institutional Change in the Third World*, St. Martin’s Press.

(47) J. Allain, (2004), *Middle East and International law: Closer to Power than Justice*, Ashgate Publishers.

(48) Usha Natarajan, ‘TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring’, *Oregon Review of International Law*, (2012), Vol. 14.

(49) Zeine N. Zeine, 1960 (2ed edition 1977), *The Struggle for Arab Independence: Western Diplomacy and the Rise and Fall of Faisal’s Kingdom in Syria*, Caravan Books; G. Fawaz, (1994), *The Superpowers and the Middle East: Regional and International Politics, 1955-1967*, Westview Press.

(50) Advisory opinion of the International court of justice on the wall 2004, <https://www.icj-cij.org/en/case/131>

environmental law is in practice. The report will be read from the angle of TWAIL and so this lack of hierarchy and realization will be followed by the chapters within the report on the quest to find answers from TWAIL perspective.

#### 4- The Report

The release of the first global report received with some high ambitions from experts, researchers and throughout social and traditional media. Being the first report raised the expectation for a comprehensive structure that could be directly implemented by states to address the gap between law and implementation and help realizing the rule of law. The report however stated its limitation early in its methodology by highlighting that it reflects only a ‘desk study’<sup>(51)</sup>. The methodology relied on extensive examples, studies and discussions within the Environmental Institution. It provided also that the framework derives from the United Nations Environment Programme’s issue brief “Environmental Rule of Law: Critical to Sustainable Development” as well as the United Nations Environment Programme Governing Council Decision 27/9 on advancing justice, governance, and law for environmental sustainability.

The literature and methodological structure of the study is robust in its outreach and depth considering the novelty of the term ‘Environmental Rule of Law’. Examples of best practice and guidance throughout the report were of a good use in terms of focus and illustrations. It is however essential to keep in mind that the report did not rely on empirical study/ studies to produce its finding and thus it seems to have presented some general reading of potential structure and applicability of an environmental rule of law as a concept rather than practically examining existence or absence of such a concept and offer practical solution of dynamics to help realizing the rule of law. Using the words of the report it seeks to provide the ‘empirical founding’<sup>(52)</sup> for further empirical studies. This however leaves the research under methodological questions of applicability, effectiveness and validity of the piloting of its study into other less studied countries.

This report is set with five objectives; First to explore the significance of environmental rule of law as a novel term and a structure yet to be agreed upon. Second, it highlights trends in environmental rule of law as to what

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(51) Environmental Rule of Law, First Global Report, <https://www.unenvironment.org/resources/assessment/environmental-rule-law-first-global-report>, p. 15.

(52) Op. Cit., pp. 15-28.

prevents upholding this process or its different facets in different states. Third, it illustrates specific approaches that countries, domestic stakeholders, and international partners have been adopting to improve environmental rule of law in particular ways. Fourth, it provides a benchmark against which to assess future developments. Finally, it sets forth priority recommendations for measures that countries and others can pursue to continue progress on environmental rule of law. The Report has also identified opportunities for countries and the international community to strengthen the environmental rule of law. Each chapter identifies priority actions and opportunities for that particular set of issues<sup>(53)</sup>.

The introduction of the report bestowed the following chapters together as it introduced the work starting with the positive proliferation of environmental laws, the term of Environmental Rule of Law and how the reality called for such a key platform to address other essential elements for a comprehensive system of governance. Thus the report was divided into an introduction and another five chapters as it follows; Institutions, Civic Engagement, Rights, Justice and Future Directions.

The introduction explored the expansion in environmental laws and institutions since the Stockholm declaration which have had slowed and in occasions reversed environmental degradation. Yet this legal development did not disguise an apparent gap that has opened between these new laws and their implementation in both developed and developing countries. Within this context Environmental Rule of Law is proposed as a ‘key’ to address this implementation gap. For that purpose, environmental rule of law is described as “when laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet”<sup>(54)</sup>.

This process is directly linked with sustainable development and its four pillars in 2030 Agenda for sustainable development “Without environmental rule of law, development cannot be sustainable. With environmental rule of law, well-designed laws are implemented by capable government institutions that are held accountable by an informed and engaged public lead to a culture of compliance that embraces environmental and social values”<sup>(55)</sup>. The reports continues to identify trends in different forms of laws and legal frames by states in response to international obligations; separate laws, embedded rules within different laws, and independent mechanisms for following environmental laws.

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(53) Op. Cit., pp. 225-27.

(54) P. 10 and further discussion and evaluations of ERL pp 8-34.

(55) Sustainable development goals 2030, <https://www.un.org/sustainabledevelopment/development-agenda/>

In order to define the environmental rule of law it was compared with the general concept of rule of law as defined by the United Nations through three main components; law should be inclusively developed and fairly effectuated; and law should bring forth accountability not just on paper, but in practice — such that the law becomes operative through observance of, or compliance with, the law. These three components are interdependent: when law is consistent with fundamental rights, inclusively promulgated, and even-handedly and effectively implemented, then the law will be respected and observed by the affected community.

‘Rule of law’ has been also studied and reflected upon by extensive number of civil society projects and initiatives. One standing definition is the work of the world justice project; that links the rule of law as a process a framework of laws and institutions that embodies four universal principles: accountability, just laws, open government and accessible and impartial dispute resolution. It further and delicately developed these principles into nine factors basis utilized to produce the annual index associated with this initiative. This regular carefully depicted process to follow up; constrains on government powers, absence of corruption, opened government, fundamental rights, order and security, regulatory enforcement, civil justice, criminal justice and finally informal justice. While comparing the two terms is very beneficial one needs to keep in mind the very will structured and established process of general rule of law compared with the embryonic state of an environmental rule of law that is yet to find its factors of assessment while the body of laws are still more or less in a phase of experimentation.

The Report emphasizes that Environmental rule of law incorporates these components and applies them in the environmental context. As such, environmental rule of law holds all entities equally accountable to publicly issues, independently adjudicated laws that are consistent with international standards for sustaining the planet. Environmental rule of law integrates critical environmental needs with the elements of rule of law, thus creating a foundation for environmental governance that protects rights and enforces fundamental obligations. This incorporation in turns bring to the fore the multidimensional nature of environmental rule of law and how these components cuts actually across many forms of law and many forms of governance. From social and customary norms of villages to statutory laws of nations to voluntary standards adopted by companies and from customary governance among indigenous peoples and rural populations to subnational, national, regional, and international government regulation. It often resides

in more than one agency or ministry across several levels of government, meaning that regulation of a mine, for example, may involve the environmental, water, mining, labor, finance, social development, and justice ministries at the national and often subnational levels.

Understanding and addressing the diversity of environmental compliance and noncompliance was addressed by looking into deterrent patterns and how some norms do not provide enough incentive to comply with the law when the sanction does not seem to deter the social behavior. This section reflected on some psychological and social studies that are consulted to achieve a better understanding to how a specific society would alter its behavior when it is aware of better options of life and it relates to its climate responsibility. In principle, this subsection is very important in terms of offering an insight into some main studies and initiatives that are already exploring alternative for social, businesses and individual behavior to improve compliance. This focus however lacks the ability to look into different realities and seems to be limited when third world reality is involved. For example, the UK Nudge Unite was an essential illustrated example. While this is a valuable initiative of a team of analysts within the cabinet office, it lacks any structural elements to generalize it on other states of the third world that may face much harder challenges in basic aspects such as the reach of media and/or scarcity in basic resources.

### **Institutions**

The report in its second chapter addressed institutions. This was through emphasizing the need for clear and appropriate mandates development on which institution could relay to establish its legitimacy. Information collection, management, and use investigation and enforcement to manage institutions was also. environmental auditing and institutional review mechanisms. Leadership

Environmental laws and institutions are in place in many countries as per the report. Modeling laws and institutions on those in other countries where they do not reflect local culture, practices, and resources, or fully fleshed out to provide sufficient direction, authority, and mechanisms for implementation would be a major challenge to realize the potential of these institutions. States need to capitalize on existing opportunities to strengthen institutions to make them more effective and legitimate, thereby strengthening not only environmental rule of law, but social inclusivity, cohesion, and stability.

The report suggests evaluating the current mandates and administrative structure of environmental institutions to identify regulatory overlap or



underlap would be a first step. Supreme audit institutions or other independent oversight bodies can be tasked with examining the overall effectiveness of existing efforts and with recommending ways to better tailor the country's environmental institutions to existing environmental, economic, and social priorities. Convening stakeholders from government, communities, regulated parties, and academia can yield further insights into whether the risks are being identified and prioritized appropriately

Leadership and awareness are essential in such a context. Awareness of environmental challenges ideally should reflect on wider understanding of human rights and equality culture bases. Integral leadership would manage environmental institutions by engendering a culture of compliance that can spread beyond the institution. Corruption within an institution undermines goodwill and compliance efforts. Common sense management techniques, such as adequate pay, performance reviews, and meaningful performance measures, can boost staff morale and deter corruption, which in turn can result in better environmental outcomes

International institutions, nongovernmental organizations, and bilateral agencies build capacity, share information, and finance many domestic efforts to implement and enforce domestic environmental laws. They are often crucial partners in investigating transnational environmental crime. The international community's effort to coordinate train and provide resources are essential to fostering improved implementation of environmental rule of law.

Civic engagement as discussed under the third chapter is defined as "...a dynamic process in which information is shared between government and the public as part of inclusive, consultative, and accountable decision making". While strengthening governmental institutions is essential for an environmental rule of law, seeking a transformation in social choices and behavior requires a whole- of-society approach.

Informed decision making by government is often a result of an effective engagement of civil society. Such an engagement paves the way also for more responsible environmental actions by companies, more assistance in environmental management by the public, and more effective environmental law. Access to environmental information is paramount for meaningful opportunities to participate. This equips the civil society better to hold violators to account and ensure compliance with environmental protections and thus to support development of environmental rule of law. Such informed society will be better equipped to involve vulnerable and marginalized populations

that are often excluded from decision making and yet are most affected by environmental and natural resource decisions is a challenging but integral aspect of civic engagement. Effective civic engagement will also play a pivotal role in monitoring environmental management and ensure that ministries and other governmental authorities undertake actions required by law and that are in the public interest. For example, including the public in decisions about the environment and natural resources is a cornerstone of good governance that has the benefit of building trust of local communities in government, which increases both social cohesion and environmental rule of law.

### **Rights**

A right centered legal approach has been growing since the early development of modern international law. It is an approach mainly adopted by other subfields of international law such as human rights law. This specific chapter is per se responsive to the frame offered by critical approach to international law including TWAIL. TWAIL advocates a legal system of a collective sense of rights. It links as it did since its early contributions to international law the realization of rule of law with establishment of a system of rights to protect other or the same rights<sup>(56)</sup>.

In environmental context the inclusion of the right to healthy environment in constitutions became an indicator of a stronger environmental laws and offers a critical net for redress of environmental harm otherwise not governed by the law<sup>(57)</sup>. To realize such a right a set of other rights are essential to be guaranteed. This includes right to nondiscrimination and rights of marginalized populations, rights of free association, free expression, and freedom of assembly. TWAIL however is acquainted with a set of challenges a right based approach. The report meets, in theory, with the TWAIL in terms of identifying challenges that include but not limited to resource allocation and political will and capacity.

### **Justice**

Environmental issues pose several challenges in established justice system including lack of access, lack of skilled judges and advocates and lack of effective remedies. While justice remain an essential factor in the establishment of process of rule of law, environmental rule of law comes with the extra

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(56) Jose Manuel Barreto, 2013, ‘Human Rights from a Third World Perspective: Critique, History and International Law’, Cambridge Scholars Publishing.

(57) Erik Solheim, Head of UN Environment, ‘Stepping up the Fight for the Right to a Healthy Environment. <https://www.unenvironment.org/news-and-stories/blogpost/stepping-fight-right-healthy-environment>.

task of creating a specialized route of courts that would have the knowledge , experience and so sufficient remedies<sup>(58)</sup>.

Creating specialized courts and tribunals allow broader access to courts and more efficient and meaningful environmental adjudication. These specialized routes can be cost efficient, offer specialized legal expertise and offer a quicker solution. Administrative enforcement process could also be more efficient in handling minor offences Use of administrative enforcement orders, administrative consent orders, administrative tribunals, and modest fines can speed the resolution of less serious infractions. This can reduce burdens on courts and other tribunals, freeing them to focus on more serious violation. Taking a swift action against environment infractions.

Increase public environmental awareness and provide a specialized education for the judiciary and advocates. Successful implementation of environmental law depends on the ability to quickly and efficiently resolve environmental disputes and punish environmental violations. Providing environmental adjudicators and enforcers with the tools that allow them to respond to environmental matters flexibly, transparently, and meaningfully is a critical building block of environmental rule of law.

The report in its last chapter the report offers some future directions and general recommendations. It rightly connects between the realization of rule of law in environmental context and achieving the 17 goals of The UN 2030 Agenda of sustainable development. 2030 Agenda envisages “a world of universal respect for human rights and human dignity, the rule of law, justice, equality and non-discrimination”. It contains 17 targets that are. the United Nations Rio+20 summit in Brazil in 2012 committed governments to create a set of sustainable development goals (SDGs) that would be integrated into the follow-up to the Millennium Development Goals (MDGs) after their 2015 deadline.

Since 2000, the MDGs have focused on reducing extreme poverty in developing countries. But pursuing a post-2015 agenda focused only on poverty alleviation. A growing body of evidence and constant changes in our world convincingly show that humanity is driving global environmental change and has pushed us into a new geological epoch The definition of sustainable development, as laid out in the 1987 report from the UN World Commission on Environment and Development (the Brundtland Commission), should therefore be redefined to “development that meets the needs of the present while safeguarding Earth’s

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(58) P.183 and P. 204 of the report.

life-support system, on which the welfare of current and future generations depends”. The targets for the SDGs must be measurable, based on the latest research and should apply to developed and developing countries.

First, however, we need to reframe the UN paradigm of three pillars of sustainable development — economic, social and environmental — and instead view it as a nested concept. Building on decades of research, a 2009 analysis defined planetary boundaries which would be unsafe to transgress for nine earth system processes; climate change, rate of biodiversity loss (terrestrial and marine); interference with the nitrogen and phosphorus cycles; stratospheric ozone depletion; ocean acidification; global fresh-water use; change in land use; chemical pollution; and atmospheric aerosol loading. Adapting these planetary boundaries work, and using recent credible scientific studies and existing international processes — such as the United Nations Framework Convention on Climate Change.

The report highlights the need to engage and coordinate diverse actors such as environment, water, fisheries minerals agricultures forests energy and land this coordination will require regular assessment of environmental rule of law. The reports ends by highlighting the need for pilot testing of approaches in the absence of empirical studies on each and every country best practice will be the only available yardstick to assess and encourage progress.

## **5- Critique and Concluding Remarks**

The report offers a comprehensive structural foundation for interested governments, researchers, experts and civil society to build upon further studies that could establish for what could be called environmental rule of law. It highlights the gap in terms of implementation and scarcity of data to measure affectivity rather than mere cooperation. Accumulating experiences and best practices is highly valuable in terms of offering insights into best practice. Examples however are too focused on successful experiences without trying to capitalize on some failed experiences that could add some valuable indicators. Noncompliance of some important industrial states have recently caused some serious adverse effects on environmental. Apart from civic engagement and more rights based elements very little if any discussion is offered to help bring these states for better compliance<sup>(59)</sup>.

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(59) By withdrawing from the Paris accord, the United States—the second-largest global emitter—could undercut collective efforts to reduce emissions, transition to renewable energy sources, and lock in future climate measures; The Consequences of Leaving the Paris Agreement <https://www.cfr.org/backgrounder/consequences-leaving-paris-agreement> last visited on 19/04/2019.

Lack of regional focus is a clear shortcoming in the report. While area studies raise some epistemologically concern with regard to the need of producing general knowledge over such a general concept such as rule of law. Environmental rule of law requires different set of epistemological tools. Environmental concerns while they are shared by the whole planet, they are specific in their regional relevance and so third world vulnerable populations are the most suffering. Striking a balance between obligation and responsibility towards the environmental is important to makes sure that.

For example, the Arab region contains 14 of the world's 20 most water-stressed countries<sup>(60)</sup>. To conquer such challenges, the United Nations Development Programme (UNDP) is supporting countries in the four sub-regions of the Arab region (Mashreq, Maghreb, Arab Gulf and Horn of Africa) to adapt to climate change impacts and to prepare for disaster risks. These countries include some of the least developed countries (LDCs), namely: Djibouti, Somalia, Sudan, and the Republic of Yemen; Tunisia in the Maghreb; and the Arab Republic of Egypt, Iraq, Jordan, Lebanon and the occupied Palestinian territories in the Mashreq<sup>(61)</sup>.

The waves of revolutions and counter revolutions and their consequences in terms of constant attempts to restructure the dynamics of governance, law and civil society engagement, would certainly have its implication on the relation of the states in the area with international law including implementation of environmental norms and obligations. It might also raise the question over the possibility of a more active participation in developing international norms in accordance with the reality of the area and its limitations in development and security<sup>(62)</sup>.

The struggle for sovereignty over natural resources shaped the nature of Arab states and remains at the root of contemporary tensions and the paradox of internal conflict and security. Energy and water resources are the top two challenges of development in the region<sup>(63)</sup>. In Iraq and more recently Syria,

(60) UNDP-RBAS and Sida, *Water Governance in the Arab Region: Managing Scarcity and Securing the Future*, 2013.

(61) Classification used by the UN and the League of Arab States: The Cooperation Council for the Arab States of the Gulf (GCC): Bahrain, Kuwait, Oman, Qatar, Saudi Arabia and the United Arab Emirates; The Least Developed Countries (LDCs): the Comoros, Djibouti, Mauritania, Somalia, the Sudan and Yemen; Maghreb: Algeria, Libya, Morocco and Tunisia; and Mashreq: Egypt, Iraq, Jordan, Lebanon, Palestine and the Syrian Arab Republic.

(62) Usha Natarajan, 'TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring, Oregon Review of International Law, (2012), Vol. 14.

(63) Ibid.

benefit-sharing from energy is the backdrop for unresolved disputes over constitutionalism, federalism, and regional autonomy<sup>(64)</sup>. Prior to the spark of the unrest in Syria draughts in the northern area pushed rural population to move to central urban cities or seek immigration from the country. Egypt struggles with rural and urban poor lack access to decision-making regarding natural resources on which their livelihoods depend, whether in fishing, farming, cotton, or the oil and gas industries<sup>(65)</sup>.

Oil economies are also a standing case of particular relevance with intensity off energy, scarcity of water and questionable civic engagement. The discovery of oil fields and access to this strategic resource has influenced states’ policies in the Arab region with regard to colonization, decolonization, military intervention, military and financial aid, foreign direct investment, sanctions, embargoes, and a myriad of other foreign policy issues<sup>(66)</sup>. State responses to the Arab Spring are no different. The oil-driven dynamic is evidenced by selective international interventions in support of one or the other side. As a result, experts as well as the general public have clearly different expectations from the Arab Spring in oil-importing states as opposed to oil-exporting states<sup>(67)</sup>.

Accordingly, national engagement, a right based legal framework and accessibility to justice at each level specified by the report will always fluctuate from state to a state and from political reality to another. Engagement with the international community is directly relevant to political and economic will.

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(64) Nathan J. Brown, *The Final Draft of the Iraqi Constitution: Analysis and Commentary*, Carnegie Endowment For International Peace (Sept. 16, 2005), <http://www.carnegieendowment.org/files/FinalDraftSept16.pdf>; Christopher M. Blanchard, *Iraq: Oil and Gas Legislation, Revenue Sharing, and U.S. Policy*, Congressional Research Service, (Nov. 3, 2009).

(65) *A Vision for Agriculture 2017*, Egypt National Human Development Report, 6 (2005), <http://www.undp.org/LinkClick.aspx?fileticket=hX%2BQrUZc%2B9g%3D&tabid=187&mid=675>.

(66) () Usha Natarajan, ‘TWAIL and the Environment: The State of Nature, the Nature of the State, and the Arab Spring’, *Oregon Review of International Law*, (2012), Vol. 14.

(67) Ariana Keyman, *The Resilience of Arab Spring Monarchies*, E-International Relations (Apr. 2, 2012), <http://www.e-ir.info/2012/04/02/the-resilience-of-arab-monarchies-in-the-arab-spring/>; Khalifah Rashid al-Shaali, *The Gulf Exception*, *Al Monitor* (Kamal Fayad trans., Jan. 23, 2012), <http://www.al-monitor.com/pulse/politics/2012/01/the-arab-stage-and-gulf-scene.html>; Shadi Hamid, *In the Middle East: Two Models for Democratic Change*, *Brookings* (Feb. 2, 2011), <http://www.brookings.edu/research/opinions/2011/02/02-egypt-democracy-hamid.com>; Alan Greenblatt, *In Arab States, it’s Good to be the King*, *National Public Radio* (Nov. 12, 2011), <http://www.npr.org/2011/11/10/142218146/in-arab-states-its-good-to-be-the-king>; Ahmed Souaiaia, *The Gulf Cooperative Council and the Arab Spring*, *Foreign Policy In Focus* (Dec. 26, 2011), [http://www.fpif.org/articles/the\\_gulf\\_cooperative\\_council\\_and\\_the\\_arab\\_spring](http://www.fpif.org/articles/the_gulf_cooperative_council_and_the_arab_spring); James M. Dorsey, *Thinking the Unthinkable: Is the Gulf Next?*, *World Politics Review* (Feb. 2, 2011), <http://www.worldpoliticsreview.com/articles/7751/thinking-the-unthinkable-is-the-gulf-next>.

This is a reflection of one region such as the Arab world. Other regions employ different set of political dynamics and will inevitably have different elements at play that will prevent or facilitate implementation of environmental laws part of the general structure available by the report.

This study suggested an approach of area focused structures of environmental rule of law. While considering the particulate significance of sovereignty over natural resources, this will be by looking into each of existing national system of governance and international political context and stepping out. This study is vigilant to the fact the report does not suggest any neglect of national and international reality and rather attempts to establishing a legal governance system regardless of these two elements. It argues however that while the effort is excellent in terms of collecting examples and practices it is methodologically naive to expect a viable structure for environmental rule of law in the absence of these consideration at the time of conducting the study.

This is specially so when the study has also offered very little in absence of empirical data and thus it is indeed no more than ‘desk study’. of Sustainable development goals emphasis, the need to eradicate poverty and work on realities that most need peace and security. Thus it is ecological change presents an existential threat. Environmental crises such as climate change and biodiversity loss evidence the limits of Western understandings of the global economy and the unsustainability of economic models that do not take into consideration natural limits to growth. States and peoples in First and Third Worlds look over their shoulders at progress made and question evolutionary certainties and one-way determinism. As Amartya Sen observed, the solutions to problems of global public goods such as the natural environment “will almost certainly call for institutions that take us beyond the capitalist market economy.”

The term of environmental rule of law is still in its early phases of formation. This report offers a positive step in a rather long and problematic path. Dominant development patterns entwined with population growth will lead to increased resource consumption and pollution and waste, causing a continuation of both resource scarcity and ecological crises. As the last remaining pockets of many natural resources exist in the Third World, and as poorer regions are more vulnerable to ecological crises, international environmental law will become an ever more strategic site from which Third World peoples, scholars, movements, scholars, and states can contest, negotiate, and resist international economic and development paradigms.

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