Contribution of the Centre International de Droit Comparé de l'Environnement (CIDCE)[1] to the UN Secretary-General's Technical Report on possible gaps in international environmental law and environment-based instruments with a view to strengthening them, pursuant to Resolution 72/277 of 10 May 2018 "Towards a Global Pact for the Environment"[2]

"The Charter of United Nations governs relations between States. The Universal Declaration of Human Rights pertains to relations between the State and the individual. The time has come to devise a covenant regulating relations between humankind and nature."

UN Secretary-General's 1990 Report[3]

I. Gaps in International Environmental Law

1. International Environmental Law is characterized by numerous sectoral global treaties (about 50[4]) and no general or horizontal global treaty, unlike International Human Rights Law, which comprises two global treaties (the two 1966 Covenants) and 27 sectoral global treaties.

2. Everyone recognizes and regrets the fragmentation of International Environmental Law when the planet is one, and only collectively accepted remedies can overcome the difficulties. Hence the need for synergy between all existing instruments. To this end, a global convention would be the new tool to bring together and codify the general environmental aquis, as well as to fill in their gaps.

3. Although the 1966 Covenant on Economic, Social and Cultural Rights mentions the environment in Article 12 in connection with the right to health, this reference is too general and hence insufficient to cover the entire range of current environmental issues.

4. The environment as a whole must be addressed in a specific global convention in order to strengthen existing regional conventions. Indeed, environmental issues represent worldwide challenges – not only regional –, as they affect the whole of humanity. A global phenomenon requires a global legal response.

5. Moreover, whereas regional environmental agreements significantly contribute to the protection of the environment, they do not provide the same definition and scope for environmental law principles.

6. While the international community has recognized for nearly 50 years the human right to the environment in the Stockholm Declaration (1972) then in the Rio Declaration (1992), and while

[1] https://cidce.org.

[2] This contribution was drafted on 19 August 2018 in Montaigut by: Michel PRIEUR (CIDCE President); Kablan Jean-Michel ATTA (Chargé de mission at CIDCE); Julien BETAILLE (CIDCE National Correspondent in France and Associate Professor); and Professors Marie-Anne COHENDET, Hubert DELZANGLES, Ali MEKOUAR and Pascale STEICHEN.

[3] Javier Perez de Cuellar, quoted by IUCN Environmental Law Programme, "Foreword to the first edition", Draft International Covenant on Environment and Development, 1995.

[4] Covering climate change, biodiversity, desertification, wetlands, international trade in wildlife, seas, natural and cultural heritage, mercury, etc.

the majority of States constitutionally recognize this right, no global agreement explicitly enshrines the human right to a healthy environment.

7. In international law, declarations and/or resolutions of the United Nations General Assembly are commonly transformed into treaties (e.g., the 1948 Universal Declaration of Human Rights was followed by the two Covenants of 1966).

8. Even though a human right to the environment has been recognized by several regional treaties[5] and in scattered regional case law[6], these do not cover the entire planet. Thus, time has come to establish it as a human right on a universal scale.

9. Currently there are about 119 States Parties to the regional agreements recognizing the human right to the environment – still very far from the 193 UN member States, and in any case well below the numbers of States Parties to the Covenant on Civil and Political Rights (171) and to the Covenant on Economic, Social and Economic Rights (168).

10. Regional agreements recognizing the right to a healthy environment generally pertain to human rights law and do not take into account the specificities of environmental issues. Moreover, they do not incorporate the general principles of environmental law, which are key for the effective enforceability of the right to a healthy environment.

11. Several regional agreements acknowledging the right to a healthy environment do not allow individuals and groups to file individual complaints or communications, thus depriving this right of its effectiveness (e.g., under the San Salvador Protocol or the Arab Charter), contrary to what may be done in the field of International Human Rights Law.

12. The Asian States, with a total of 4.5 billion people, still do not have a conventional tool on the right to a healthy environment and its associated principles.

13. Civil and political rights, economic, social and cultural rights, and the right to a healthy environment with its fundamental principles, are all "interconnected and interdependent" (Resolution 421 (V), section E, and Resolution 543 (VI)).

14. In the absence of a global treaty recognizing the human right to a healthy environment, the international community does profit from the valuable "General Comments" devised by the Committee on Economic, Social and Cultural Rights, which allow all States to benefit from experience gained and propose improvements. Thus, International Human Rights Law contributes only partially to the needs of States and populations affected by environmental problems.

[5] Including: (i) the 1981 African Charter on Human and Peoples' Rights (Art. 24); (ii) the 1988 San Salvador Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Art. 11); (iii) the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Art. 1); (iv) the 2003 Maputo African Convention on the Conservation of Nature and Natural Resources (Art. III); (v) the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Art. 18); (vi) the 2004 Arab Charter on Human Rights (Art. 38); (vii) the 2015 Inter-American Convention on Protecting the Human Rights of Older Persons (Art. 25); (viii) the 2018 Escazú Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Art. 4-1).

[6] Such as, lately, the Advisory Opinion of 15 November 2017 by the Inter-American Court of Human Rights.

15. Indeed, General Comments (GCs) only exist on the right to housing (GC7), the right to health (GC14), the right to water (GC15), and the right to food (GC12). Other environment-related areas are completely ignored (e.g., biodiversity, climate, disasters, etc.), as the Committee's mandate does specifically cover these matters. No General Comment on the environment in general has yet been produced by the Committee on Economic and Social Rights, despite an announcement made to this end by the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.[7]

16. International Environmental Law currently lacks an appropriate legal framework to protect environmental rights defenders.[8]

17. International Environmental Law does not recognize the rights of nature, whereas several States have already adopted legislation to this effect.

18. The general principles to guide environmental policies are scattered in declarations and/or conventions, and are sometimes written, interpreted and applied in different ways.

19. Many non-binding policy statements express a global consensus on the general principles of environmental law and contribute to the development of an international custom. This makes it legitimate to advance towards a global pact clearly stating the standards of behavior accepted by all.

20. To the extent that the general principles of environmental law have now been recognized around the world as essential to sustainable development, they must be understood in a homogeneous way. However, they are currently scattered in several international conventions on the environment, with very different definitions and scope. National environmental laws more or less accurately reflect these differences. A global treaty incorporating these general principles in a homogenous and coherent manner would facilitate the work of national legislators, national courts, and environmental agencies.

21. Given the gravity of the environmental crisis, it is not enough to simply take stock of good practices on a voluntary basis.

22. General International Environmental Law does not contain any instrument that clearly affirms the need for an environmental rule of law, which would legally articulate rights and obligations for all.[9]

23. The 2015 Sustainable Development Goals (SDGs) are powerless, in the current state of environmental law, to overcome the environmental crisis. Although universal in scope, the SDGs are not equipped with appropriate legal tools to implement them. SDG 16[10] must therefore be realized by creating a suitable global legal instrument.

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[7] A/HRC/31/53, 28 December 2015, para. 36.

[8] Unlike human rights defenders under Resolution 53/144 of 9 December 1998 - "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms."

[9] On the "Environmental Rule of Law", see: IUCN World Declaration on the Environmental Rule of Law, IUCN 1st World Congress on Environmental Law, Rio de Janeiro, 2016.

[10] "Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels".

24. Consequently, a global agreement on the general principles of environmental law, as already accepted by States in non-binding declarations and in several international conventions, would make it possible to underpin those principles, while contributing to better achieving the SDGs.

25. International law does not provide an international convention that links the right to a healthy environment with other human rights, although such link is becoming more and more evident. International Environmental Law and International Human Rights Law are and remain separate, both within the UN system and in their respective contents. This substantive and institutional gap now requires greater coherence, facilitated by the formal inclusion of the right to a healthy environment in human rights law, and supported by the numerous resolutions of the Human Rights Council and the annual reports of the Special Rapporteur on the right to the environment since 2012.

26. Unlike International Human Rights Law, there is no global forum for non-state actors in civil society to demand respect for International Environmental Law and/or have access to justice or benefit from a right justiciable by means of complaint, grievance or request brought before compliance committees.[11]

27. States' extraterritorial environmental obligations remain scattered and do not sufficiently take into account the needed measures to prevent, remedy or restore environmental damage.[12]

28. Consideration of the rights of future generations, along with intergenerational and intra-generational equity, with a view to achieving sustainable development for all, is not clearly stated in International Environmental Law as vital for international and national action by States and companies.

29. The Committee on Economic, Social and Cultural Rights has acknowledged the non-regression principle in the context of International Human Rights Law. Yet, this principle is recognized under International Environmental Law only in sectoral treaties, either global or regional. Global sectoral treaties that entail it are the Convention on the Law of the Sea in respect of the common heritage of mankind (Art. 311-6), the Convention on Biological Diversity (Art. 8-k) and the 2015 Paris Climate Agreement (Arts. 3, 4-3, 7, 9-3).[13] Regional sectoral treaties that involve the non-regression principle are the 1975 Statute of the Uruguay River (Art. 41), the 1993 NAFTA Agreement (Art. 10-3) and, since then, all free trade agreements, as well as the Escazú Agreement of 4 March 2018 (Art. 3-c). Taking into account the commitments made by the international community of States in “The Future We Want” at Rio+20 in 2012 (para. 20), the recognition of such general principle for all environmental issues pertaining to international law can strengthen the sustainability of the measures taken to deal with the environmental crisis.

30. Life depends on biosphere integrity and interdependence of ecosystems. The complexity of the environment is not clearly expressed in International Environmental Law. Indeed, the latter is essentially grounded on a series of sectoral obligations. Only the major conferences of 1992,

[11] There are only a small number of compliance committees whose mandate is strictly limited by specialized conventions (Aarhus, Espoo, Barcelona, etc.).

[12] See “Extraterritorial dimensions of human rights and the environment”, in Analytical study on the relationship between human rights and the environment, Human Rights Council, Report of the United Nations High Commissioner for Human Rights, 16 December 2011 (A/HRC/19/34).

[13] Under the Paris Agreement, the non-regression principle derives from the notion of “progress” and “progression”. The idea of non-regression was confirmed by the COP-22 final declaration which, in line with the Paris Agreement, noted that the impetus for combating climate change is “irreversible”.

2002 and 2012 endeavored to give a global vision of all the issues at stake. It is therefore imperative that a new legally binding instrument clearly signals the need to take into account all elements of the environment, not separately, but in an integrated way.

31. Like human rights, the legal components of the environment are universal, indivisible and interdependent.

II. The need to strengthen the implementation of International Environmental Law

1. Principle 11 of the 1992 Rio Declaration urged States to "enact effective environmental legislation." Yet, International Environmental Law has never reflected this effectiveness requirement in a general convention on the environment.

2. The Universal Declaration of Human Rights and the Rio Declaration are soft law instruments. As such, their effective implementation cannot be assured. It is therefore necessary to supplement these consensus instruments with a global convention that would secure more efficient mechanisms for the protection of the environment.

3. In both international and domestic law, the effectiveness of the human right to the environment and of environmental law requires a precise and binding legal framework.

4. The magnitude of the ecological crisis calls for more vigorous implementation of International Environmental Law. The current levels of implementation do not allow achieving the objectives of environmental protection, owing in particular to insufficient controls.

5. Inefficiency of the law is emphasized in all relevant reports of the UN, OECD and European Union. In addition, the latest report of J. Knox, Special Rapporteur of the Human Rights Council, recommends ensuring "effective enforcement of environmental standards".[14]

6. Due to the dispersal of treaties, there is no comprehensive view of environmental issues. Implementation of the treaties remains fragmented. Each treaty is applied independently of the others. There is no common method of assisting States in fulfilling their reporting obligations.

7. In particular, reporting mechanisms, public information and participation in international fora, and public access to the various control mechanisms, including compliance committees, should be improved. This would also strengthen the confidence of citizens.

8. Furthermore, the United Nations Environment Assembly (UNEA) could act as a coordinating hub among all international bodies dealing with the environment, including Secretariats of international conventions.

9. Responsibility for implementing International Environmental Law no longer lies solely with States, but also collectively with all stakeholders.

10. While implementation of International Environmental Law requires significant financial and technological resources, harmonizing the general principles of environmental law and enforcing a global pact devoted to these principles common to humanity, would not require any new budget and would not really entail any new obligations.

[14] A/HRC/37/59, 24 January 2018, Framework principle 12, paras. 34 and 35.

Conclusion: Benefits that can result from a global international instrument for the international community, States and non-state actors

1. The idea of a global convention on the environment is old. In particular, the Bruntland Commission already voiced it in its 1987 report.[15] IUCN also prepared in 1995 a draft comprehensive convention on environment and development, whose latest edition is dated 2015.[16] Likewise, the International Centre for Comparative Environmental Law (CIDCE) drafted in January 2017 a proposed Third International Covenant on the Right of Human Beings to the Environment, intentionally linked to the existing international covenants on human rights.[17]

2. It is time for States to respond together to threats of environmental degradation, including climate change and biodiversity loss.

3. The benefits of a global convention on the environment would include the following:
   - ensure complementarity between environmental law, the right to a healthy environment and other human rights, by integrating developments concerning the rights of future generations, the rights of humanity, and the human/nature relations (in light of the United Nations General Assembly resolutions on "Harmony with Nature");
   - establish universally recognized principles to save the planet;
   - guarantee a harmonious and modernized interpretation of the principles laid down since 1972;
   - ensure consistency in making use of the general principles of environmental law through the codification of those principles already recognized by States;
   - enable concrete achievement of the SDGs by 2030 by effectively complementing the SDGs and the legal tools of International Environmental Law;
   - enable States to better integrate into their national law the common and harmonized principles of environmental law, while improving their implementation;
   - enable States to improve the tools and procedures that ensure sustainable development for all;
   - improve practical enforcement of sectoral environmental treaties based on a common-to-all, global instrument;
   - provide civil society with means of intervention or grievance to guarantee the respect of fundamental rights related to the environment;
   - offer as a legacy to future generations an instrument to ensure a more viable and sustainable environment.

[15] "Our Common Future", Chapter 12, para. 86, 10 March 1987.

[16] Draft International Covenant on Environment and Development, Fifth edition, 2015.

[17] See www.cidce.org and Written Statement to the Human Rights Council, A/HRC/34/NGO/X, 11 February 2017.