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# The process towards a Global Pact for the Environment at the United Nations: From legal ambition to political dilution

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## Abstract

This article examines how instrumental the ongoing process towards a Global Pact for the Environment – launched by the United Nations General Assembly on 10 May 2018 – may be in strengthening the normative and governance system for meeting the challenges represented by environmental degradation in the context of sustainable development. It reviews the origins, evolution and current status of the process towards achieving a Global Pact for the Environment until the setback experienced in Nairobi in May 2019. Arguments stressing the value of a normative approach to the governance of the Earth system are weighed against the manifest preference of States for political action to ensure the better implementation of existing norms. The article ends by making a case for an integrative policy-and-law approach with a view to adopting a robust declaration that expresses the firm commitment of States to protect and restore the integrity of the Earth system.

## 1 | INTRODUCTION

The process 'Towards a global pact for the environment' began with a French initiative on the back of the diplomatic success achieved by the adoption of the Paris Agreement on climate change at the 21st Conference of the Parties (COP 21) to the United Nations (UN) Framework Convention on Climate Change in 2015.<sup>1</sup> The idea to

<sup>1</sup>The idea of a global treaty for the environment is not new. In 1987, the Brundtland report on 'Our Common Future' envisaged a Convention on Environmental Protection and Sustainable Development to be prepared by the United Nations General Assembly ('Report of the World Commission on Environment and Development: Our Common Future' (1987) <<https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>> paras 85–86). In 1989, Professor Alexandre Kiss advocated a general convention that would declare the obligation to protect and preserve the whole biosphere, set out the fundamental principles derived from that obligation and included the provisions required to clarify its implementation, as with the United Nations covenants on human rights (A Kiss, 'Nouvelles tendances en droit international de l'environnement' (1989) 32 *German Yearbook of International Law* 241, 258). In 1995, the International Union for the Conservation of Nature (IUCN), in cooperation with the International Council for Environmental Law (ICEL), presented the text of the Draft Covenant on Environment and Development as a model for a comprehensive conventional instrument on principles and rules related to environment and development (available at <<https://portals.iucn.org/library/efiles/documents/EPLP-031-rev3.pdf>>). In 2017, the Centre International de Droit Comparé de l'Environnement (CIDCE) of the University of Limoges presented a draft of the International Covenant on the Human Right to the Environment as a possible third pact additional to the 1966 International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (available at <[https://cidce.org/wp-content/uploads/2016/08/Draft-of-the-International-Covenant-on-the-Human-Right-to-the-Environment\\_15.II.,2017\\_EN.pdf](https://cidce.org/wp-content/uploads/2016/08/Draft-of-the-International-Covenant-on-the-Human-Right-to-the-Environment_15.II.,2017_EN.pdf)>).

prepare such an instrument originated from the work of the Committee on the Environment of the *Club des Juristes*, a French legal think tank chaired by Laurent Fabius, President of the French Constitutional Court and former COP 21 President. The purpose of the pact would be to respond to the fragmentation of international environmental law by adopting an international treaty which would lay down its fundamental principles and give more coherence to this branch of international law. To that end, the *Club des Juristes* put together an international network of over 100 jurists from all legal traditions and representing over 40 nationalities, called the Group of Experts for the Pact. After September 2016, the Group of Experts prepared the preliminary draft for a global treaty on the environment. The definitive version of this draft was adopted after final refinements were incorporated on 24 June 2017 at an academic event held at the Sorbonne. In September 2017, the promoters of the initiative published a white paper entitled 'Towards a Global Pact for the Environment', which included the articulated text of the proposed draft convention.<sup>2</sup>

<sup>2</sup>Le Club des Juristes, 'White Paper: Towards a Global Pact for the Environment' (2017) <<https://globalpactenvironment.org/uploads/White-paper-Global-pact-for-the-environment.pdf>>.

The project presented by the Group of Experts, which comprised a preamble and 26 articles, was conceived as: an antidote to the fragmentation of the rules of international environmental law, which are dispersed among numerous sectoral agreements; a remedy against the purely declarative nature of many international instruments for environmental protection (soft law); and a reinforcement of the regulatory and institutional congruence of international environmental law. The essential aims of the draft global pact for the environment are to consolidate the fundamental principles of international environmental law to make their content more integrated, robust and mandatory, and to proclaim the right of every person to an ecologically sound environment. The draft global pact has received several analytical and critical reviews with differing assessments of its legal foundations and potential contribution to improving international environmental law.<sup>3</sup> On completion of the preparatory phase, the French project for a global pact for the environment was presented to the UN General Assembly (UNGA) for consideration and possible adoption.

This article reviews the process towards a Global Pact for the Environment at the UN, and critically assesses the outcome of the work that has been completed so far. In Section 2, the article examines the main stages of the process which reveals a progressive decline from its initial aim (a Global Pact for the Environment) to its current outcome (a mere 'political' declaration). In Section 3, arguments stressing the value of a normative approach are weighed against other doctrinal approaches to the possible nature and content of the 'international instrument' to be adopted. In Section 4, the article concludes that, in order to meet the challenge posed by the current global environmental crisis, the political decision to be adopted in 2022 should express legal commitments by States to take concrete actions to preserve the integrity of the Earth system.

## 2 | THE PROCESS TOWARDS A UN GLOBAL PACT FOR THE ENVIRONMENT

At the UN, the process towards a Global Pact for the Environment began in a somewhat unusual manner at a global summit held on the sidelines of the 72nd session of the General Assembly on 19 September 2017. The States present at the summit, chaired by French President Emmanuel Macron and attended by the UN Secretary-General and the UNGA President, decided to set up a

group of Friends of the Pact, whose aim was to prepare a draft resolution on the subject for adoption by the General Assembly.<sup>4</sup>

### 2.1 | The General Assembly resolution 'Towards a Global Pact for the Environment'

The motion for a resolution on a Global Pact for the Environment was formally submitted by France and 90 co-sponsoring countries to the General Assembly on 7 May 2018.<sup>5</sup> The motion led to a short but intense debate in which the most contested points were the role assigned to the UN Environment Programme (UNEP), the unusual process involved in putting together the draft resolution and the real need for a Global Pact for the Environment. As consensus could not be reached, the United States requested a recorded vote and the resolution was adopted with 143 votes in favour, five against and seven abstentions.<sup>6</sup>

Resolution 72/277, titled 'Towards a Global Pact for the Environment',<sup>7</sup> put the French draft pact aside and began the process anew following a new linear methodological approach. In its preamble, the resolution recognizes existing obligations and commitments under international environmental law and reaffirms all the principles of the Rio Declaration. It also stresses 'the need to address, in a comprehensive and coherent manner, the challenges posed by environmental degradation in the context of sustainable development'.<sup>8</sup> The resolution then sets up a step-by-step process with an open-ended approach to its ultimate outcome. First, it requests the Secretary-General to prepare a 'technical and evidence-based' report on 'possible gaps' in international environmental law and environment-related instruments 'with a view to strengthening their implementation'.<sup>9</sup> The first two clarifications ('technical and evidence-based') aim to prevent the report from being non-scientific or too speculative. The meaning of the last clarification ('with a view to strengthening implementation') is more ambiguous.<sup>10</sup> In my understanding, following basic rules of legal interpretation, this sentence only describes the contextual aim of the gap-finding exercise to be conducted by the Secretary-General. Two main consequences

<sup>3</sup>For a brief presentation, see CR Payne, 'A Global Pact for the Environment' (2018) 22 ASIL Insights 12. For a supportive study of the legal foundations of the pact, see Y Aguila and JE Viñuales (eds), *A Global Pact for the Environment: Legal Foundations* (University of Cambridge 2019). For a more critical review, see G de Lassus Saint-Geniès, 'Not All that Glitters is Gold. An Analysis of the Global Pact for the Environment Project' (Center for International Governance Innovation 2019). Other commentators consider the project as either having gone too far (S Biniaz, '10 Questions to Ask about the Proposed "Global Pact for the Environment"' (2017) <[http://columbiaclimatelaw.com/files/2017/08/Biniaz\\_2017-08-Global-Pact-for-the-Environment.pdf](http://columbiaclimatelaw.com/files/2017/08/Biniaz_2017-08-Global-Pact-for-the-Environment.pdf)>) or not far enough (LJ Kotzé and D French, 'A Critique of the Global Pact for the Environment: A Stillborn Initiative or the Foundation for *Lex Anthropocenae*?' (2018) 18 International Environmental Agreements: Politics, Law and Economics 811, 834–835). See further the contributions in (2019) 28 Review of European, Comparative and International Environmental Law 1.

<sup>4</sup>See the information on the summit posted on UNEP's website: <<https://wedocs.unep.org/bitstream/handle/20.500.11822/22190/Global%20Pact%20for%20the%20Environment%20-%20Concept%20note%20%2813%20November%29.pdf?sequence=3&isAllowed=y>>.

<sup>5</sup>UNGA 'Towards a Global Pact for the Environment' UN Doc A/72/L.51 (7 May 2018).

<sup>6</sup>The United States, the Russian Federation, the Philippines, Syria and Turkey voted against the motion; Saudi Arabia, Belarus, Iran, Malaysia, Nicaragua, Nigeria and Tajikistan abstained. See the arguments expressed in the discussions and explanations for the votes in UN Doc A/72/PV.88 (10 May 2018).

<sup>7</sup>UNGA 'Towards a Global Pact for the Environment' UN Doc A/RES/72/277 (10 May 2018) (UNGA Resolution 72/277).

<sup>8</sup>*ibid* preamble, last sentence.

<sup>9</sup>*ibid* para 1.

<sup>10</sup>According to French and Kotzé, 'connecting the identification of gaps with "their implementation" is conceptually incoherent' since the 'implementation' of gaps is a legal non-sense. D French and LJ Kotzé, 'Towards a Global Pact for the Environment: International Environmental Law's Factual, Technical and (Unmentionable) Normative Gaps' (2019) 28 Review of European, Comparative and International Environmental Law 25, 26.

arose from this: first, the clarification does not prevent the report from addressing possible normative gaps in international environmental law; second, the clarification applies only to the drafting of the report of the Secretary-General but not to subsequent stages of the process towards a Global Pact for the Environment.

Then, the resolution establishes an *ad hoc* open-ended working group (OEWG), open to all UN member States, specialized agencies and accredited nongovernmental organizations, to consider the Secretary-General's report and 'discuss possible options to address possible gaps in international environmental law and environment-related instruments'.<sup>11</sup> The General Assembly resolution also recognizes that the process should not undermine existing relevant legal instruments, frameworks and bodies<sup>12</sup> and that its costs should be supported by voluntary contributions.<sup>13</sup> As for the outcome of the process, the resolution requests that the working group should define, if deemed necessary, 'the scope, parameters and feasibility of an international instrument, with a view to making recommendations to the General Assembly, which may include the convening of an intergovernmental conference to adopt an international instrument'.<sup>14</sup>

Although the title of the resolution and the reference to the possible convening of an international conference could suggest that it implicitly foresees the adoption of a conventional instrument, the prevailing interpretation is that the possible outcomes of the process are not anticipated. Thus, as concluded by Susan Biniaz, the discussions launched by the resolution might lead in several different directions, such as a new legally binding instrument, a political declaration, concrete actions not involving a new instrument or no further action.<sup>15</sup>

## 2.2 | Report of the Secretary-General on gaps in international environmental law

In November 2018, the Secretary-General of the UN presented the requested evidence-based technical report on gaps in international and environment-related instruments.<sup>16</sup> After a thorough analysis, the report's first key finding was that there is no single overarching normative framework in international environmental law that sets out the rules and principles that may be considered of general application.<sup>17</sup> The report also affirms that the existing system of international environmental law is piecemeal, reactive, and characterized

by fragmentation and a general lack of coherence and synergy among a large body of sectoral regulatory frameworks.<sup>18</sup>

The main gaps and deficiencies resulting from the fragmentation and reactive nature of the system of international environmental law are quite categorically summarized in the report as follows: its principles, which are uncertain, are often affected by a lack of international consensus and a lack of clarity (both content-wise and status-wise) that affect their implementation; the fragmentation and general lack of coherence and synergy among a large body of sectoral regulatory frameworks create an important deficit in coordination at the law-making and implementation levels and a need for better policy coherence, mutual supportiveness and synergies in implementation; the articulation between multilateral environmental agreements and environment-related instruments remains problematic; the structure of international environmental governance reveals important challenges for coherence and coordination; and the implementation of international environmental law is challenging at both the national and international levels.<sup>19</sup> The report concludes that:

*The above review and analysis of the state of international environmental law and environment-related instruments reveals gaps and deficiencies at multiple levels. There are significant gaps and deficiencies with respect to the applicable principles of environmental law; the normative and institutional content of the sectoral regulatory regimes, as well as their articulation with environment-related regimes; the governance structure of international environmental law; and the effective implementation of, compliance with and enforcement of international environmental law.*<sup>20</sup>

To revert this negative situation, the Secretary-General report considers a number of concrete legal and policy measures that might help to fill the gaps identified in its six chapters and reaches the general conclusion that '[a] comprehensive and unifying international instrument that gathers all the principles of environmental law could provide for better harmonization, predictability and certainty'.<sup>21</sup>

## 2.3 | Considerations and recommendations of the OEWG

The working group for the Global Pact for the Environment started off by holding several organizational meetings in New York from 5 to 7 September 2018 under the guidance of the two Co-Chairs appointed by the President of the General Assembly: Ms Amal Mudallali

<sup>11</sup>UNGA Resolution 72/277 (n 7) para 2.

<sup>12</sup>*ibid* para 9.

<sup>13</sup>*ibid* para 7.

<sup>14</sup>*ibid* para 2.

<sup>15</sup>S Biniaz, 'The UNGA Resolution on a "Global Pact for the Environment": A Chance to Put the Horse before the Cart' (2019) 28 *Review of European, Comparative and International Environmental Law* 28, 33–34.

<sup>16</sup>UNGA 'Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment, Report of the Secretary-General' UN Doc A/73/419 (30 November 2018) (UNSG Report).

<sup>17</sup>*ibid* para 3.

<sup>18</sup>*ibid* para 103.

<sup>19</sup>*ibid* summary, 1–2.

<sup>20</sup>*ibid* para 100.

<sup>21</sup>*ibid* para 102 *in fine*.

(Lebanon) and Mr Francisco Duarte Lopes (Portugal). At the meetings, the group decided to hold three substantive sessions in the first half of 2019 and adopted a provisional agenda for the first.<sup>22</sup>

The first substantive session was held in Nairobi from 14 to 18 January 2019. Work at this session focused on discussing the Secretary-General's report on the gaps in international environmental law and their implications. There was general agreement about the need to engage in open, transparent and inclusive debate and ensure that the process would not weaken existing instruments, bodies or procedures. Some voices also stressed the importance of working on the basis of consensus so that pragmatic, realistic results could be presented as part of the group's recommendations to the General Assembly. To work on the basis of consensus was a very important strategic objective for some influential delegations; the rule of consensus was never formally adopted by the OEWG, but it was implicitly accepted as the applicable decision-making procedure for the negotiations.

On substantive issues, among delegations conflicting views were expressed on matters such as the weight to be attached to the Secretary-General's report; the significance and extent of the gaps in and fragmentation of international environmental law; the opportunity to review the law's guiding principles; and the potential added value of a new instrument (with or without legal force). On institutional issues, the United States delegation upheld the specialized approach of multilateral environmental agreements and the need to respect their autonomy. Other delegations highlighted the need to strengthen the coordinating role of existing international governance structures, such as UNEP and the UN Environment Assembly (UNEA). Some also expressed opinions against including the establishment of an international environmental court in the discussions and the question of liability and reparations for cross-border environmental damage. With regard to shortfalls in the effective implementation of international environmental norms, several delegations stated that these were the responsibility of each State at the national level and that making up for them would require greater effort on their part in financial matters, capacity building and technology transfer.<sup>23</sup>

The second substantive session of the working group was held in Nairobi from 18 to 20 March 2019. The main aim of this session was to discuss item 4 on 'possible options for addressing possible gaps in international environmental law and environment-related instruments'. To structure and guide this discussion, the Co-Chairs circulated a document that focused on possible gaps and options in relation to: (i) the principles of international environmental law; (ii) governance structure; (iii) the implementation of rules and

principles; and (iv) specific regulatory regimes or environment-related instruments with a view to strengthening implementation.<sup>24</sup>

The delegations that were most reluctant to conduct this exercise, such as the United States and Egypt, adopted a delaying strategy, claiming that the group should identify specific gaps in international environmental law before addressing possible responses. Other like-minded delegations noted that the diversification of existing regimes was a 'bonus' and not a problem (Brazil), and that the fundamental task was to implement existing legal instruments and to ensure funding by all States (Russia). However, numerous delegations, including the one from the European Union, were receptive to developing an instrument to improve the implementation of international environmental law and strengthen environmental governance instruments and cooperation between the existing environmental agreements. Many delegations stressed the need to achieve pragmatic results with added value, avoid duplicating existing processes and initiatives without undermining or weakening them, and attempt to reach consensus. With regard to the specific thematic elements contained in the document prepared by the Co-Chairs, the most contentious points were those on the concept and existence of gaps in international environmental law, the need to codify that law's guiding principles and the opportunity to prepare a new international instrument (of a binding or non-binding nature). Greater harmony among the delegations was shown on issues relating to international institutional governance structures, enhanced coordination and cooperation between multilateral environmental agreements and other specific regulatory regimes, and the strengthening of the means of implementation at the national level. At the end of the meeting, the outcome seemed relatively positive, though the road to a Global Pact for the Environment was far from clear.<sup>25</sup>

The third and final substantive session of the working group was held in Nairobi from 20 to 22 May 2019. To facilitate discussion, on 25 April 2019 the Co-Chairs had circulated a non-paper containing draft proposals for recommendations to the 73rd session of the General Assembly.<sup>26</sup> These proposals, accepted as a starting point and guideline for the discussions, combined moderate recommendations for objectives (section I) and substantive elements (section II), with more daring proposals for the continuity of the process (section III).

Discussion on the objectives of the recommendations to the General Assembly listed in section I was relatively peaceful. There was general acceptance that the process should seek to 'reinforce

<sup>22</sup>The OEWG's documents are available at <<https://www.unenvironment.org/events/conference/towards-global-pact-environment>>.

<sup>23</sup>For all the above references to the first meeting of the OEWG, see 'Oral Summary by the Co-Chairs' of the first substantive session of the OEWG, annexed to their letter of 28 February 2019 <[https://globalpact.informea.org/sites/default/files/meetings/29-Jan-3-Oral-summary\\_version-for-circulation\\_25January.pdf](https://globalpact.informea.org/sites/default/files/meetings/29-Jan-3-Oral-summary_version-for-circulation_25January.pdf)>; P Doran, L Bullon-Cassis and N Jones, 'Summary of the First Substantive Session of the Ad Hoc Open-ended Working Group towards a Global Pact for the Environment: 14–18 January 2019' (2019) 35 Earth Negotiations Bulletin 1.

<sup>24</sup>Elements Provided by the Co-Chairs to Structure and Guide the Discussions of the Second Substantive Session' (28 February 2019) <[https://wedocs.unep.org/bitstream/handle/20.500.11822/27614/Pact\\_trasmittal.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/27614/Pact_trasmittal.pdf?sequence=1&isAllowed=y)>.

<sup>25</sup>For all the above references to the second meeting of the OEWG, see 'Co-Chairs' Oral Summary of Discussion' of the second substantive session of OEWG, annexed to the transmittal letter of the President of the General Assembly of 27 March 2019 <[https://globalpact.informea.org/sites/default/files/meetings/PGA\\_Letter-March2019.pdf](https://globalpact.informea.org/sites/default/files/meetings/PGA_Letter-March2019.pdf)>; and P Doran, L Bullon-Cassis and N Jones, 'Summary of the Second Substantive Session of the Ad Hoc Open-ended Working Group towards a Global Pact for the Environment: 18–20 March 2019' (2019) 35 Earth Negotiations Bulletin 2.

<sup>26</sup>Co-Chairs' Non-paper, Draft Elements of Recommendations to the Seventy-third Session of the General Assembly' (25 April 2019) <<https://globalpact.informea.org/sites/default/files/meetings/Nonpaper.pdf>>.

the protection of the environment for present and future generations', uphold 'respective' obligations and commitments of States under international environmental law, help to strengthen the application of that law, and support the full implementation of the 2030 Agenda for sustainable development and the outcome of the UN Rio+20 Conference. It was also agreed that the process should not undermine relevant existing legal instruments, frameworks and bodies. The objectives approved by the working group were limited to maintaining existing commitments and obligations and strengthening their implementation, thus excluding discussions on the development of international environmental law in a spirit of ambition and progress. Numerous proposals for adding new elements to the inventory of objectives, such as recognizing a human right to the environment (Costa Rica), improving international environmental governance (Guyana), responding to the challenges in international environmental law (Micronesia) and encouraging swift global action in areas not yet sufficiently covered (European Union), were rejected.

Among the substantive recommendations outlined in section II, some issues raised controversy. Many delegations stressed the need to increase the means of implementation, mainly through financial contributions, technical assistance and technology transfer. Several delegations, including Argentina, Brazil, Ecuador, Egypt and India, strongly requested that this point be given priority in recognition of the need to increase and accelerate the provision of additional means of implementation. The United States, supported by some delegations, responded that each State is responsible for its own development. The text that was finally agreed recognizes the importance of greater ambition in the provision and mobilization of all means of implementation, which is consistent with the Addis Ababa Agenda of Action and the 2030 Agenda for Sustainable Development.

Most delegations also agreed on the need to ensure coherence on cross-cutting issues among the various multilateral environmental agreements and scientific institutions as well as the need to enhance cooperation and coordination between the governing bodies and secretariats of the various conventions and the scientific community, though there were slight differences in the methods proposed for doing so. There was also broad consensus on the need to simplify information and monitoring procedures by, for example, favouring joint reporting systems in related multilateral environmental agreements. The debate on strengthening implementation measures at the national level through appropriate legislative, administrative and judicial actions and the required international cooperation was also relatively peaceful. Repeated reference was made to the role that could be played by the Programme for the Development and Periodic Review of Environmental Law (Montevideo V). At the request of the European Union, the incorporation of environmental protection into sectoral policies and programmes and the effective participation of all stakeholders in the implementation of environmental and regulatory instruments of international law were sustained.

The main substantive elements that aroused major controversy were the principles of international environmental law, the need to fill the gaps and correct the deficiencies in international environmental law identified in the Secretary-General's report, and several

matters related to international institutional governance. Although the European Union, supported by other delegations, stressed the importance of principles and called for continuing dialogue, the United States and other delegations opposed further discussion on these issues and no further progress was made. In agreement with the mandate given to the working group by the UNGA resolution, several delegations called for concrete action to fill the gaps in international environmental law and requested regulatory action in fields such as environmental protection in armed conflicts (Ukraine), the control of marine pollution caused by detritus and plastics (Turkey), and other global environmental problems previously identified by UNEA (European Union).<sup>27</sup> However, after several rounds of discussions all these proposals were rejected. On institutional matters, intense debate ensued between delegations (led by Kenya and the Russian Federation) that assigned the primary role in environmental issues to UNEP and those (led by the United States) that considered that UNEP's authority was shared with other UN institutions and multilateral environmental agreements. At the end of the debate, the Co-Chairs endorsed the majority view that UNEP is the leading global environmental authority.

The elements in section III on the continuity of the process and the nature of the international instrument to be adopted were the most contentious topics discussed by the working group. As it was impossible to reach consensus, the Co-Chairs created an informal working group led by two co-facilitators, Ms Solveig Crofton (Norway) and Ms Elizabeth Taylor (Colombia). This informal working group considered proposals submitted by Colombia, Ecuador, the European Union, Morocco, Russia, Switzerland and the United States. After difficult discussions, an understanding was reached *in extremis* in the late hours based on three aspects: continuity of the process; maintenance of discussions on principles; and preparation by UNEA of a 'political' declaration (the word 'political' was added at the last minute) to be adopted at a UN high-level meeting on the 50th anniversary of the Stockholm declaration.<sup>28</sup>

In conclusion, despite containing some constructive elements, the outcome of the OEWG's consultations dramatically cuts down any ambitious expectations of a substantial development of international environmental law that may have been generated by the UNGA resolution launching the process towards a Global Pact for the Environment. In fact, the evolution of the process at the OEWG reveals the systematic demolition of the initiative towards a Global Pact for the Environment resulting from the successful diplomatic action of various leading States that were able to recruit a majority of delegations in favour of a mere political declaration. Although the

<sup>27</sup>Chile, Mexico, Morocco, Norway and Turkey supported the European Union in the face of opposition from the United States and Saudi Arabia.

<sup>28</sup>For all the above references to the third meeting of the working group, see 'Draft Recommendations (Zero Draft)' (20 May 2019) <<https://globalpact.informea.org/meetings/meeting/third-substantive-session-ad-hoc-open-ended-working-group>>; and P Doran, D Davenport and P Wood, 'Summary of the Third Substantive Session of the Ad Hoc Open-ended Working Group towards a Global Pact for the Environment: 20-22 May 2019' (2019) 35 Earth Negotiations Bulletin 3; UNGA 'Report of the Ad Hoc Open-ended Working Group Established Pursuant to General Assembly Resolution 72/277' UN Doc A/AC.289/6/Rev.2 (13 June 2019).

mandate of the group was to address possible gaps 'in international environmental law and environmental related instruments', there was almost no significant legal debate among the delegations. Most legal issues arising at the OEWG negotiations were systematically suffocated by political discourse, under the pressure of the need for consensus.

## 2.4 | UNGA resolution on the follow-up to the report of the OEWG

On 30 August 2019, the General Assembly adopted without a recorded vote Resolution 73/333 on the follow-up to the report of the *ad hoc* OEWG.<sup>29</sup> It could have been reasonably expected that the General Assembly, when considering the OEWG recommendations, take some time to assess the work done, to complete its recommendations, if needed, and to set up the procedures for the process ahead. However, the General Assembly, following the invitation of the President, chose to simply endorse all the recommendations of the working group and call on member States 'to take action on those recommendations and to use them as a stepladder to our collective drive for greater ambition'.<sup>30</sup>

In its operative paragraphs, the UNGA resolution endorses all the recommendations of the working group, as set out in its annex, and decides that all cost of its implementation shall be met from voluntary contributions. The section stating the 'objectives guiding the recommendations' opens with a commendable pledge to reinforce the protection of the environment for present and future generations.<sup>31</sup> Other objectives with some legal relevance are those recommending to uphold respective obligations and commitments of States under international law (preservation of the international legal *acquis*),<sup>32</sup> not undermine existing relevant legal instruments, frameworks and bodies (mandate for non-regression)<sup>33</sup> and contribute to the strengthening of the implementation of international environmental law and environment-related instruments.<sup>34</sup> The objectives of the recommendations include also the support of full implementation of the 2030 agenda for sustainable development as well as of the outcome document of the Rio+20 conference, with special reference to the institutional provisions contained in its paragraphs 88 and 89.<sup>35</sup> The objectives of the recommendations are certainly well intentioned, but ultimately they add almost nothing to what is already established in current international environmental law and in the practice of the UN. In addition, as a result of odd structural drafting, it is not clear at all to whom these

recommendations and its guiding objectives are addressed. As one commentator of the outcome of the negotiations on the Global Pact for the Environment has written, this 'raises the question of whether the five objectives that guide the recommendations of the open-ended working group are also intended to guide the content of the "political declaration"'.<sup>36</sup>

The section on substantive recommendations combines some assertive proclamations with other statements that use a merely encouraging wording. In the first group, mention can be made of the recommendation reaffirming UNEP's role as the leading global environmental authority and the role of UNEA.<sup>37</sup> Also quite assertive is the recommendation stressing the importance of enhanced ambition regarding means of implementation, including the provision and mobilization of all types and sources consistent with the Addis Ababa Action Agenda on Financing for Development and the 2030 Agenda for Sustainable Development.<sup>38</sup> By contrast, the recommendation recognizing the role of discussions on principles of international environmental law is more ambiguous: the compromise language recognizes the importance of the topic, which implies further discussion, also noting the ongoing work in the International Law Commission (ILC) on general principles of law,<sup>39</sup> but without specificity or a clear path forward. In fact, the recognition of 'the role of discussions on principles of international environmental law in enhancing the implementation of international environmental law' is virtually meaningless and does not shed any light on the possible follow-up of this core controversial issue.

Understandably, the recommendations addressed to other bodies, such as the scientific community, the governing bodies and secretariats of multilateral environmental agreements, and other relevant stakeholders are only hortatory. The scientific community is invited to further its work on interconnected and cross-cutting issues by sharing information among the leading scientific, technical and technological bodies that inform the work of multilateral environmental agreements and environmental processes, and encourage these bodies to strengthen cooperation among themselves.<sup>40</sup> The governing bodies of multilateral environmental agreements are invited, while preserving their independence and respective mandates, to promote policy coherence<sup>41</sup> and enhance cooperation and collaboration among themselves and UNEA;<sup>42</sup> they are also encouraged to exchange information and experiences including with a view to considering the streamlining of reporting and/or monitoring processes.<sup>43</sup> The constructive consensus gained on these recommendations is based on the assumption that any deficiencies identified

<sup>29</sup>UNGA 'Follow-up to the Report of the Ad Hoc Open-ended Working Group Established Pursuant to General Assembly Resolution 72/277' UN Doc A/RES/73/333 (30 August 2019).

<sup>30</sup>UNGA '103rd Plenary Meeting, Friday, 30 August 2019' UN Doc A/73/PV.103 2.

<sup>31</sup>UNGA (n 29) Annex, para 1.

<sup>32</sup>*ibid* Annex, para 2.

<sup>33</sup>*ibid* Annex, para 5.

<sup>34</sup>*ibid* Annex, para 3.

<sup>35</sup>*ibid* Annex, para 4.

<sup>36</sup>G de Lassus St-Geniès, 'The Outcome of the Negotiations on the Global Pact for the Environment: A Commentary' (2020) 12 Sustainability 877.

<sup>37</sup>UNGA (n 29) Annex, para 6.

<sup>38</sup>*ibid* Annex, para 7.

<sup>39</sup>*ibid* Annex, para 8.

<sup>40</sup>*ibid* Annex, para 9.

<sup>41</sup>*ibid* Annex, para 10.

<sup>42</sup>*ibid* Annex, para 11.

<sup>43</sup>*ibid* Annex, para 12.

under specific regimes are addressed in the context of each specific agreement (*lex specialis*).

With respect to possible developments at the international level, States are only encouraged to consider ratifying multilateral environmental agreements and to effectively implement them.<sup>44</sup> By contrast, the recommendations encouraging further engagement of States in the implementation of international environmental law at the national level are stronger. States are encouraged to strengthen environmental laws, policies and regulatory frameworks and mainstream the environment into sectoral policies, including in the administrative and judicial sectors, in accordance with national legal systems.<sup>45</sup> The recommendations also encourage the active and meaningful participation of all relevant stakeholders in the different forums related to the implementation of international environmental norms<sup>46</sup> as well as the exploration of further ways for States to support and make full use of the Fifth Programme for the Development and Periodic Review of Environmental Law (Montevideo Programme V), adopted at UNEA IV.<sup>47</sup> The last substantive recommendation encourages UNEP, as the chair of the Environmental Management Group, in collaboration with the other members of the Group, to continue to strengthen system-wide inter-agency coordination, and call for active coordination and support in the implementation of system-wide strategies on the environment.<sup>48</sup>

In my opinion, the above substantive recommendations have two main inherent limitations: first, following a reductionist interpretation of the UNGA mandate, they only aim at improving the implementation of international environmental law (but not improving international environmental law itself); and second, the recommendations are drafted in very weak and merely hortatory terms. States and other international actors are 'invited', 'encouraged', 'called upon' or simply addressed to consider enhancing implementation of existing norms. In so doing, the substantive recommendations mostly reiterate well-established orientations of current international environmental law, but they do not incorporate any new normative elements which may grant significant added value to them.

The final section on further work conveys the somehow ambiguous consensus reached at OEWG consultations, recommending to:

- a. *Circulate the above-mentioned recommendations and make them available to States Members of the United Nations, the members of specialized agencies and the governing bodies of multilateral environmental agreements for their consideration and action, as appropriate.*
- b. *Forward these recommendations to the United Nations Environmental Assembly for its consideration, and to prepare, at its fifth session, in February 2021, a political declaration for a United Nations high-level meeting, subject to voluntary funding, in the context of the commemoration of the creation of the United Nations Environmental*

<sup>44</sup>ibid Annex, para 13.

<sup>45</sup>ibid Annex, paras 14–15.

<sup>46</sup>ibid Annex, para 16.

<sup>47</sup>ibid Annex, para 17.

<sup>48</sup>ibid Annex, para 18.

*Program by the United Nations Conference on the human environment, held in Stockholm from 5 to 16 June 1972, with a view to strengthening the implementation of international environmental law and international environmental governance in line with paragraph 88 of the outcome document of the United Nations conference of sustainable development entitled 'The future we want'.<sup>49</sup>*

The text merges the proposal from the United States to solely circulate the recommendations to States and the secretariats of multilateral environmental agreements with the Co-Chairs proposals on follow-up work, as reframed by the OEWG final plenary. It clearly reflects that the outcome of the process will not be a legally binding instrument but a political declaration to be adopted at a UN high-level meeting. However, the text raises important questions as to how to advance on the recommendations and on the process towards the UN high-level meeting.<sup>50</sup> Actually, it is not at all clear how the adoption of the political declaration prepared by UNEA V at a UN high-level meeting in 2022 will be coordinated with other possible UN initiatives and processes for the commemoration of the creation of UNEP in 1972. Some doctrinal suggestions have been made on the possible paths towards the preparation of the political declaration to be adopted in 2022.<sup>51</sup> However, since no official initiatives have been announced so far, the possibilities contemplated are only speculative and, as one commentator of the outcome of the negotiations has written, 'the preparation of the declaration could very well become a highly contentious process'.<sup>52</sup>

In conclusion, considering the weak content of the recommendations adopted by the OEWG, it is doubtful that they could be useful to enhance the problem-solving capacity of international environmental law.

### 3 | THE TRANSITION FROM A GLOBAL PACT FOR THE ENVIRONMENT TO A POLITICAL DECLARATION

The global pact for the environment was originally presented by the Group of Experts for the Pact as an attempt to provide international environmental law with an overarching treaty that could act as an umbrella for all existing multilateral conventions and environment-related instruments. The proponents of the project have extensively elaborated on its conceptual foundations, but the diplomatic discussions held so far clearly indicate that States are more inclined to accord the global pact for the environment the status of a political declaration.

<sup>49</sup>ibid Annex, 4.

<sup>50</sup>See International Council of Environmental Law (ICEL), 'Analysis of the Consensus Recommendations to Strengthen Implementation of International Environmental Law Under UNGA Resolution 72/277 "Towards a Global Pact for the Environment"' (June 2019) 23 <[https://www.iucn.org/sites/dev/files/content/documents/2019/icelnoteglobalpactanalysisjune2019\\_062510final.pdf](https://www.iucn.org/sites/dev/files/content/documents/2019/icelnoteglobalpactanalysisjune2019_062510final.pdf)>.

<sup>51</sup>ibid 23–24; de Lassus St-Geniès (n 36) 8–10.

<sup>52</sup>de Lassus St-Geniès (n 36) 10.

### 3.1 | Conceptual foundations for a framework normative instrument

The conceptual foundations for a framework normative instrument on the environment are based on numerous considerations of an empirical, political, ethical and legal nature.

The first background element deserving consideration is the empirical confirmation that humanity is facing a growing environmental crisis of tremendous magnitude that prevents States and social forces from achieving sustainable development and puts their future at risk. Through the industrial and technological revolutions, we have entered the Anthropocene, a new geological era in which humans have become the main driver of global environmental change.<sup>53</sup> Scientific evidence shows that the rate of anthropogenic global impact on the environment is accelerating and may be exceeding the biophysical thresholds of 'planetary boundaries'.<sup>54</sup> In current conditions, the relationship between humans and nature paints a frightening picture of continual and increasing degradation of the Earth's resources and ecological processes. The most vital elements of the biosphere – such as the air, oceans, freshwater, land, forests, biodiversity and habitats – are suffering a sharp deterioration and some are reaching their critical limits. Some islands and coastal territories may totally or partially disappear as a result of sea-level rise due to the effects of climate change. Enough scientific evidence exists of a multidimensional ecological crisis that is endangering the prospects of social sustainability and threatening the survival of humankind on Earth. As the former director of UNEP, Klaus Töpfer, asserted in 2006:

*today's world is facing an unprecedented environmental crisis.... The degradation of the Earth's environment increasingly threatens the natural resource base and processes upon which all life on Earth depends ... The urgency of balancing development with the Earth's life support systems is being finally recognized and understood. Now it is time to act upon this understanding.*<sup>55</sup>

The 2012 UNEP report Global Environmental Outlook 5 confirmed that the Earth's environment is degrading faster and further than it was

in 2006.<sup>56</sup> Today, authoritative international scientific bodies such as the International Panel on Climate Change (IPCC) and the Intergovernmental Science-policy Platform on Biodiversity and Ecosystem Services, as well as the latest UNEP report Global Environment Outlook 6, are reaching the same empirical conclusions.<sup>57</sup> On 28 November 2019 the European Parliament has adopted a resolution declaring the current situation as a 'climatic and environmental emergency'.<sup>58</sup>

Faced with such an unprecedented global ecological crisis, the foremost collective responsibility of all States should be to improve both the governance of the Earth system transformation and the protection of the Earth's ecological integrity for present and future generations. States also have an ethical responsibility to recognize the human right to a healthy environment, as well as the rights of nature, contribute to environmental justice and respond to peoples' environmental demands across the world. Particularly vulnerable States demand more committed international action to preserve the world's ecological conditions and prevent environmental catastrophes that put their survival at risk. A growing number of communities, especially the younger generations, are asking the world's governments to raise the political importance of the environmental agenda and take immediate action to restore the Earth. These objectives are fully in line with the Sustainable Development Goals and targets proclaimed in Agenda 2030 by the UNGA in 2015.<sup>59</sup>

To curb the current environmental crisis, States must not only implement urgent policy actions but also work together to strengthen international environmental law and provide better institutional and operational governance instruments. In this context, at least in legal theory, the absence of an overarching normative instrument that would establish the constitutional legal parameters of the international regime to protect the environment could be considered a dysfunctional feature of the system. As the Secretary-General's report clearly states, the lack of an overarching normative framework that sets out what might be characterized as the rules and principles of general application in international environmental law and the fragmentation of the system of international environmental law creates gaps and deficiencies at the law-making and implementation levels and reveals important coherence and coordination challenges that make implementation difficult at both the international and national levels.<sup>60</sup> In the same vein, Kim and Bosselmann point out that international practice shows that the amalgamation of sectoral multilateral

<sup>53</sup>The Anthropocene describes the current situation in which almost every biogeochemical system on the planet is influenced in one way or another by human activities. The concept of the Anthropocene was put forward by Paul Crutzen (Nobel Prize winner in Chemistry for his work on atmospheric ozone), who linked it to the global environmental effects of economic development and increased human population. See PJ Crutzen and FF Storer, 'The "Anthropocene"' (2000) 41 Global Change Newsletter 17; PJ Crutzen, 'Geology of Mankind' (2002) 415 Nature 23.

<sup>54</sup>J Rockström et al, 'Planetary Boundaries: Exploring the Safe Operating Space for Humanity' (2009) 14 Ecology and Society 32; W Steffen et al, 'Planetary Boundaries: Guiding Human Development on a Changing Planet' (2015) 347 Science 736; EF Fernández and C Malwé, 'The Emergence of the "Planetary Boundaries" Concept in International Environmental Law: A Proposal for a Framework Convention' (2019) 28 Review of European, Comparative and International Environmental Law 48.

<sup>55</sup>UNEP, *Training Manual on International Environmental Law* (UNEP 2006).

<sup>56</sup>UNEP, *Global Environment Outlook 5: Environment for the Future We Want* (UNEP 2012).

<sup>57</sup>As the Norwegian delegate at the General Assembly meeting of 30 August 2019, which adopted the OEWG report, recalled: 'in spite of everything we are doing, our efforts are not yet sufficient to curb the overall trajectory in terms of climate change, biodiversity loss and plastic pollution in our oceans, among other things'. UNGA '103rd Plenary Meeting' UN Doc A/73/PV.103 (30 August 2019).

<sup>58</sup>European Parliament Resolution of 28 November 2019 on the Climate and Environment Emergency' (2019/2930(RSP)) <[https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078\\_EN.pdf](https://www.europarl.europa.eu/doceo/document/TA-9-2019-0078_EN.pdf)>.

<sup>59</sup>UNGA 'Transforming Our World: The 2030 Agenda for Sustainable Development' UN Doc A/RES/70/1 (25 September 2015) para 33.

<sup>60</sup>UNSG Report (n 16) 1-2.

environmental agreements and other environment-related instruments generates dramatic examples of problem-shifting rather than problem-solving, with potentially severe consequences for the global environment.<sup>61</sup> As they rightly conclude, multiple parallel and overlapping multilateral environmental agreements may not lead to a greater global protection standard, and the Earth's environmental conditions have therefore continued to deteriorate despite the accumulating body of environmental law.<sup>62</sup>

Against this doctrinal backdrop, different paths to enhance the effective contribution of international environmental law to the preservation of the Earth system have been proposed. According to a first line of thought, inspired in global constitutionalist theories, an overarching normative instrument has the potential to contribute to improving structural coherence in the international response regime for the preservation of the Earth system while promoting social-ecological goals that respect planetary boundaries in the Anthropocene. Kotzé and Muzangaza affirm that the Anthropocene arguably demands a level of normative ambition, or a global environmental constitutional moment, similar to the one last seen with the creation of the UN in 1945 and the adoption of the Universal Declaration of Human Rights in 1945.<sup>63</sup> With the same approach, Kim and Bosselmann have called for a clearly agreed unifying goal, the exact form and nature of which is yet to be decided, that would set the fundamental *Grundnorm* for the international environmental legal system, for instance 'protecting and restoring the integrity of the Earth system'.<sup>64</sup> In their opinion, such a superior norm (or set of norms and principles) will be embodied in the agreed global pact for the environment in order to provide all international regimes and organizations with a shared purpose to which their specific objectives must contribute.<sup>65</sup> In contrast with these opinions, other writers note that 'for the moment, international environmental law remains a set of commitments by states, rather than a constitutional order'<sup>66</sup>

and wonder about the concrete benefits of a constitutional instrument to increase the problem-solving capacity of international environmental law.<sup>67</sup>

A second group of environmental law experts advocate the adoption of a legally binding instrument in the form of a global convention that would provide an umbrella for a larger number of multilateral environmental agreements. As Aguila and Viñuales, two advocates of a Global Pact for the Environment, have outlined, the arguments in favour of a legally binding instrument are as follows: first, the general principles of international environmental law are usually embodied in non-binding texts, which has prevented certain principles from deploying their full effects; second, numerous gaps and deficiencies leave important questions open or unsettled; third, little attention is paid to non-linear effects of those gaps and deficiencies; fourth, conflicts between legal instruments eventually lead to problem-shifting rather than problem-solving; fifth, strong discrepancies remain in the interpretation and application of basic systemic principles; sixth, guidance provided to national legislators and courts by international environmental law is neither clear enough nor strong enough; and finally, at the international level there is a lack of strong institutional bodies with normative, administrative or judicial powers to protect the global environment.<sup>68</sup> However, it has been argued that the demonstration as to how the proposed global pact would help to improve the alleged lack of coherence of international environmental law is not convincingly made.<sup>69</sup>

There is a third line of thought represented by some international legal experts who believe that it is time to do more to enable improvements in international environmental law, but not necessarily by concluding a global pact for the environment in the form of a framework treaty. Voigt, one of the legal experts who helped to draft the Secretary-General's report on gaps in international environmental law, asserts that 'this could be the right thing at the right time' to enable improvements in international environmental law to be made.<sup>70</sup> However, she believes that the future global environmental pact should not necessarily be limited to just one aspect, strategy or instrument but that it 'could provide a "toolbox" for the general improvement of international environmental law and the enhanced effectiveness of environmental protection'.<sup>71</sup> According to Voigt, the Global Pact could then promote and facilitate at least five non-mutually exclusive developments: first, to support better coordination and synergies between multilateral environmental

<sup>61</sup>Kim and Bosselmann have identified several cases of problem-shifting. For example, replacing gasoline with corn ethanol may shift net environmental impacts towards increased eutrophication and greater water scarcity; afforestation and reforestation projects are often partially driven by perverse incentives that promote the conversion of natural forest into monoculture tree plantations; and ocean fertilization and other forms of marine geo-engineering can produce greater acidification of sea waters and unexpected impacts on marine ecosystems and biodiversity. RE Kim and K Bosselmann, 'International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements' (2013) 2 *Transnational Environmental Law* 285, 298–302. See also J Juste Ruiz, 'Ocean Options for Climate Change Mitigation: Disposal of Greenhouse Gases at Sea under the 1996 London Protocol' in R Giles Carnero (ed), *Los Nuevos Desafíos de la Acción Jurídica Internacional y Europea frente al Cambio Climático* (Atelier 2018) 43.

<sup>62</sup>Kim and Bosselmann (n 61) 302.

<sup>63</sup>See LJ Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart 2019); LJ Kotzé and W Muzangaza, 'Constitutional International Environmental Law for the Anthropocene?' (2018) 27 *Review of European, Comparative and International Environmental Law* 278; K Bosselmann, 'Global Environmental Constitutionalism: Mapping the Terrain' (2015) 21 *Widener Law Review* 171, 173. For a more general approach on global constitutionalist theories of international law, see J Klabbers, A Peters and G Ulfstein, *The Constitutionalization of International Law* (Oxford University Press 2009).

<sup>64</sup>Kim and Bosselmann (n 61) 303, 309.

<sup>65</sup>*ibid* 285.

<sup>66</sup>D Bodansky, 'Is There an International Environmental Constitution?' (2009) 16 *Indiana Journal of Global Legal Studies* 565, 584.

<sup>67</sup>de Lassus Saint-Geniès (n 3) 12.

<sup>68</sup>Y Aguila and JE Viñuales, 'A Global Pact for the Environment: Conceptual Foundations' (2019) 28 *Review of European, Comparative and International Environmental Law* 3, 5–7.

<sup>69</sup>de Lassus Saint-Geniès (n 3) 6–8. Susan Biniiaz, one of the major detractors of the French draft pact has concluded that the project is 'misguided in its one-size-fits-all-environmental-issues approach, unclear as to its effects on existing international environmental law and potentially undermining of current agreed environmental principles'; see Biniiaz (n 15) 33.

<sup>70</sup>C Voigt, 'How a "Global Pact for the Environment" Could Add Value to International Environmental Law' (2019) 28 *Review of European, Comparative and International Environmental Law* 13, 23.

<sup>71</sup>*ibid* 22.

agreements; second, to take the shape of a framework or umbrella document aiming at fitting together the different sectoral and geographical agreements; third, address implementation deficits; fourth, act as a 'mediator' between international environmental law and other areas; and fifth, aim at charting of and increasing awareness of future environmental challenges or technologies which are not covered by international treaty law.<sup>72</sup>

Finally, other writers affirm that international environmental law is not incoherent or fragmented (in any pejorative sense) and praise the ability of the existing international legal system to allow for case-specific negotiated regimes that may be conveniently adapted to the particular conditions of the different environmental situations being subject to regulation.<sup>73</sup> Under such premises, they invite States 'to step back and methodologically consider the most important missing pieces in the environmental law and policy arena and the best manner or forum to address them'.<sup>74</sup>

### 3.2 | States' preferences for the adoption of a political declaration

The process for developing a global pact for the environment suggest that most States prefer to introduce political actions to improve the implementation of existing legal instruments rather than begin preparing a new framework treaty.

Some of the world's great powers as well as a significant number of other States believe that the global pact for the environment should be limited to implementing existing obligations and commitments under international environmental law. In their view, this includes enhancing cooperation and coordination between the governing bodies and secretariats of the various conventions and the scientific community and strengthening international institutional bodies such as UNEP and UNEA. Beyond that, most States do not see the need to develop international environmental law, either because they challenge the existence of the gaps identified in the report of the Secretary-General, or simply because they do not have the political will to accept new international environmental obligations. The United States and Russia have even proposed ending the process towards a global pact for the environment forthwith, recommending to the General Assembly that 'no further action be taken'.<sup>75</sup>

In rejecting any further action at the law-making level, some delegations (e.g. Argentina) maintain that there are no real gaps in the international system of environmental protection law. Others deny that there was any 'fragmentation', stressing that it has been the will of all States to construct this body of law in such a way (United

States) and that the 'piecemeal approach' should be regarded as an asset rather than a deficiency of the international legal system (Brazil). In line with these positions, those delegations have rejected the convenience of discussing the drafting of new rules on international environmental law in general and the need to draw up a new global and overarching treaty in particular. In their view, the paramount objective of the process towards a global pact for the environment should be to preserve the regulatory and institutional autonomy of existing multilateral environmental agreements rather than to add any new super-structural normative instrument. This objective is especially important for the world's great powers, which feel at ease with the existing sectoral amalgamations of autonomous legal regimes and so refuse to accept any further international environmental obligations and commitments set forth in a global pact for the environment.

Similarly, the United States, Russia and several other States<sup>76</sup> have opposed any further discussions on the principles of international environmental law, declaring that the issue should be left to the ILC. However, the topic of 'general principles of law', introduced into the ILC's work programme at the end of 2018, addresses a quite different problem from that of the principles of international environmental law.<sup>77</sup> By contrast, Bolivia, the European Union, Mexico and Micronesia have supported the need for further discussions on principles as the main element in the process towards a global pact for the environment. The consensus text finally agreed employs a nuanced wording that recognizes the importance of discussing the principles of international environmental law to improve the law's implementation and notes the work ongoing in the ILC. Although not entirely explicit, the text seems to accept the possible continuation of work on principles in the next stages of the process towards a global pact for the environment.

However, an analysis of the diplomatic discussions held thus far at the UN reflects that the majority's objection to including legislative developments in the process towards a global pact for the environment responds more to political positions than to legal considerations. The arguments expressed in the discussions at OEWG paid little attention to genuine legal matters while emphasizing issues concerning opportunity, alternative priorities, the more beneficial use of financial resources, presumed difficulties in the process and scepticism about its added value. Numerous important legal elements have therefore been omitted in relation to, for example, international responsibility and liability for environmental damage (especially in relation to global commons), the proclamation of a human right to a sound environment and the recognition of emerging principles such as 'non-regression'. The process has also avoided from the outset discussion of several important institutional issues, such as

<sup>72</sup>ibid 22–23.

<sup>73</sup>Biniiaz (n 15) 33.

<sup>74</sup>ibid 38.

<sup>75</sup>U.S. Submission to the Co-Chairs of the Ad-hoc Open-ended Working Group Established by General Assembly Resolution 72/277' (12 April 2019) <[https://wedocs.unep.org/bitstream/handle/20.500.11822/27980/US\\_proposal.pdf?sequence=1&isAllowed=y](https://wedocs.unep.org/bitstream/handle/20.500.11822/27980/US_proposal.pdf?sequence=1&isAllowed=y)> 2. Very close positions were also espoused by other countries, such as Argentina, Brazil, Egypt, Japan, Nicaragua, Turkey and others.

<sup>76</sup>Such as Argentina, Brazil, Egypt and Saudi Arabia.

<sup>77</sup>At its 70th session, in 2018, the ILC decided to include the topic 'General principles of law' in its programme of work. The first report on the matter submitted by the ILC's special rapporteur Marcelo Vázquez-Bermúdez in April 2019 makes clear that the scope of the project concerns 'general principles of law as a source of international law', a much broader topic than the principles of international environmental law. ILC 'First Report on General Principles of Law, by Marcelo Vázquez-Bermúdez, Special Rapporteur' UN Doc A/CN.4/732 (5 April 2019) 75.

the need for a possible new UN Organization for the Environment, the viability of a possible international environmental court and the establishment of a compliance mechanism for controlling the overall application of existing sectoral multilateral environmental agreements.

As for the nature of the international instrument to be adopted, some States reject any kind of legal instrument, binding or otherwise (United States and Russia), while others prefer a non-binding instrument (Kenya, Mexico, South Africa) and some advocate leaving the issue open until a later stage in the process (European Union). The final arrangement, expressed in the working group's report on a global pact for the environment and subsequently endorsed by the General Assembly in Resolution 73/33, may be viewed as a setback for a Global Pact on the Environment in the form of a treaty, since it clearly supports a political declaration being adopted at a UN high-level meeting in 2022.

## 4 | CONCLUSION

The evolution of the UN process towards a global pact for the environment shows that, for the time being, a majority of States oppose the conclusion of a framework environmental convention. They prefer a political decision to be adopted at a UN high-level meeting, as stated in the recommendations agreed by OEWG and endorsed by the General Assembly in its Resolution 73/333.

Some of the reasons for the set-back of the global pact for the environment are procedural, while others are of a substantive nature. As regards the diplomatic negotiations in Nairobi, several elements hindering the proposal for a global pact for the environment can be identified – such as not including the French draft global convention among the working documents for the OEWG; limiting discussions to implementation issues, thus excluding any ambition to make legislative progress; and tacitly accepting the rule of consensus for adopting decisions. This latter element might need some explanation, given that the consensus procedure is widely recognized as a constructive instrument for multilateral negotiations and a way to ensure that what is adopted is considered as legitimate by the States. However, in contexts such as the one at hand, consensus may act as a *de facto* power of veto since it enables States with enough diplomatic strength to block any initiative that goes beyond the legal *status quo*.

From a more substantive viewpoint, it should be conceded that the preference of most States to limit multilateral efforts to improving the implementation of existing norms through political cooperation rather than to conclude a new global framework treaty builds on some valid arguments. The fragmented structure of international environmental law is the result of the historical conditions under which this body of norms was established. Since the initial stages of the development of international environmental law, innovative ways to overcome its structural deficiencies were found. In addition, possible gaps in international environmental law might eventually be filled through the evolution of customary law, with the contribution of

international jurisprudence. Against this backdrop, most States are sceptical about how the proposed Global Pact for the Environment could critically contribute to remedy the possible structural deficiencies of the system of international environmental law and governance. However, while accepting the above, it should be also recognized that limiting the efforts to be made solely to improving the implementation of existing international environmental law forecloses the immediate possibilities of further progress towards filling the structural constitutional gap of international environmental law, and advancing on the regulation of important outstanding issues – such as pollution caused by marine debris and plastics, environmental protection during armed conflicts and the proclamation of a human right to a sound environment.

The adoption of the OEWG consensus recommendations and its endorsement by UNGA Resolution 73/333 has been welcomed by some as a significant milestone towards achieving an enhanced framework of cooperation among States – and of coordination within the UN system – to strengthen the implementation of environmental law and support the full implementation of the 2030 Agenda for Sustainable Development.<sup>78</sup> However, it can be argued that, in addition to choosing the weakest possible type of international instrument to be adopted (a mere 'political' declaration), the substantive recommendations for the preparation of such a political declaration on the environment are not sufficiently strong. For the most part, the recommendations, which aim only to strengthen the implementation of existing law, are repetitious, unmoving and not sufficiently ambitious; they propose only vague policy objectives expressed in purely exhortative language. The original call for legal ambition implied in the General Assembly resolution launching the process towards a Global Pact for the Environment has been progressively diluted into weak policy recommendations. Arriving at this point, the relevant question might be: how could a political declaration based on such a set of weak recommendations add value to international environmental law?

In fact, if the process towards a political declaration by a UN high-level meeting in 2022 is to adequately respond to the challenges posed by the ongoing environmental crisis, the integration between policy and law should be revitalized so as to outline a normative framework for ecological sustainability in the Anthropocene. As hoped by the International Council of Environmental Law, the constructive outcome reached so far 'can grow in ambition and commitment as all Member States, the entire UN system and civil society contribute to their implementation'.<sup>79</sup>

To meet the alert sent by scientists and the rising demands of civil society across the world, the political declaration to be adopted at a high-level UN meeting in 2022 must express clear commitments by States to more ambitious actions to protect and preserve the common environment and the unity and integrity of the Earth system for present and future generations.

<sup>78</sup>ICEL (n 50) 4.

<sup>79</sup>*ibid*.

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