

# Global Pact for the Environment: Defragging international law?

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A 'defrag' computer program that consolidates fragmented files on a hard drive holds metaphorical attraction for international lawyers. Our encounters with international law often seem to be specific to particular legal regimes, which have a functional orientation and professional sensibility that, in the words of the International Law Commission, may be self-contained. International environmental law and human rights, for example, were developed at different times and are supported by different international and domestic institutions. Now, the United Nations is considering a proposal that promises to integrate various parts of international law, thereby improving its performance: the Global Pact for the Environment.

The draft preliminary text for the Global Pact for the Environment entrenches a right to an ecologically sound environment (Article 1), sets out a duty of states and other actors to take care of the environment (Article 2) and requires parties to integrate the requirements of environmental protection into their planning and implementation, especially to fight against climate change, and to help protect the ocean and maintain biodiversity (Article 3). These and other clauses provide a framework that follows the existing international human rights covenants – on civil and political rights and on economic, social and cultural rights – to promote a 'third generation' of fundamental rights. On 10 May 2018, a resolution adopted by the United Nations General Assembly established an ad hoc open-ended working group to analyse possible gaps in international environmental law and, if deemed necessary, to consider the scope, parameters, and feasibility of an international instrument (which could include, but is not limited to, a legally binding agreement along the lines of the Global Pact). Two co-chairs were appointed the following month. An accompanying White Paper outlines the Pact's antecedents, which include the Rio Declaration on Environment and Development. In this short post, I consider three ways in which the Pact impacts upon the interaction between regimes and 'defragments' international law.

## **Achieving systemic integration in international law**

The Pact is intended to be a binding instrument, thus differing from the earlier 'soft-law' Rio Declaration. This has the potential to clarify, consolidate, and legalize principles of international environmental law that now appear in hundreds of agreements and declarations. Perhaps more importantly, it also promises normative coherence for the international legal system as a whole.

The diversification of international law makes likely a situation where a state enters an agreement (for example, in the field of environmental law) which contradicts another obligation (for example, in the trade regime). The resulting conflicting obligations of states may be resolved through interpretative tools, which are part of a tool-box of professional techniques advocated by the seminal ILC study on fragmentation. For example, Article

31(3)(c) of the Vienna Convention on the Law of Treaties allows us to draw upon ‘relevant rules of international law applicable in the relations between the parties’ when interpreting the scope of an international obligation.

A binding and widely ratified Global Pact for the Environment could provide clearer direction for treaty-interpreters to achieve systemic integration in public international law, due both to its ongoing crystallisation of custom and to its status as a binding treaty. Article 3, for example, provides that parties shall ‘ensure the promotion of ... patterns of consumption both sustainable and respectful of the environment’. A similar provision in the Rio Declaration (Principle 8) has not, to my knowledge, emerged as interpretative context in any decision of an international court or tribunal. Yet a binding obligation to promote such patterns would create a very important interpretative context for trade and investment agreements and, depending on the skill and knowledge of the litigators, for the adjudicators. The latest trade cases relating to renewable energies at the World Trade Organization (including a finding of violation by India in its support for its domestic solar cell industry) may have had a different outcome with a Global Pact, and one that would be more in harmony with other areas of international law including the UNFCCC and the Paris Agreement.

To use another example, Article 6 entrenches a principle of precaution, so that ‘[w]here there is a risk of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing the adoption of effective and proportionate measures to prevent environmental degradation’. The International Court of Justice has so far shown ‘much precaution with the precautionary principle’ (in Judge Cançado Trindade’s droll formulation), but a binding Global Pact on the Environment would provide a more direct force than the existing Rio Declaration Principle 15.

Of course, there are reasons to be circumspect about attempts to create unification and coherence. Susan Biniaz has cautioned that the careful balances struck within existing international environmental agreements could be disrupted by the Global Pact. She considers some principles, such as ‘precaution’, to be better expressed in a non-binding way. Moreover, the quest for unity for international law as a whole may be exposed as an exercise in hegemony (as Martti Koskenniemi has described), with each legal regime attempting to claim universal status, and with compromises taking on a managerial form.

Yet such discussions must also acknowledge the way in which international law evolves: through new treaties, new custom and even through new scientific developments. Even those who have been sceptical of the concept of environmental rights, such as Alan Boyle, now see the merit in investigating how a human right to a decent environment can help to address increasingly pressing environmental problems such as climate change. As he noted in 2012, ‘[a] mutually exclusive relationship between human rights law and general international law on transboundary and global environmental protection is consistent neither with the evolution of international environmental law as a whole nor with contemporary developments in international human rights law’.

### **Enforcement through adjudication**

By establishing a right of every person 'to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfilment' (Article 1), the Global Pact for the Environment offers a new way for environmental protection to be achieved through adjudication by courts and tribunals. This could occur through international litigation (notwithstanding the absence of a World Environment Court), or domestic litigation. Depending on the relevant national constitutional order, the latter is the most likely. As Lord Carnwath, Justice of the Supreme Court of the United Kingdom, has remarked, '[i]t is indeed at national level, and in the national courts, that the Pact, like the Paris Agreement on Climate Change, may well have its main impact'.

Of course, the right to an ecologically sound environment will be subject to the balancing by judges of other rights, with considerable deference given to states to implement the right subject to their own preferences (an idea reinforced in the proposed Pact Article 20's reference to the diversity of national situations). Some, like Boyle, have expressed suspicion that the balancing is better achieved by national or international political institutions, rather than human rights courts. However, in the context of justiciable economic and social rights, domestic courts are institutionally and politically prepared for this type of role. Increasingly, judges themselves are attuned to the way in which issues such as water, ecosystems, and climate are converging in the courtroom.

### **Mobilization of both state and non-state actors**

One of the innovations of the proposed Pact is in its imposition of a duty to take care of the environment on 'every person, natural or legal, public or private' (Article 2). Like the Paris Agreement, it also refers to the vital role of subnational entities (which includes the cities and regions who have so manifestly demonstrated their relevance to addressing climate change), and urges states to encourage their implementation of the Pact (Article 14). While there is much to finesse and finalise in this brave extension of an international treaty into private, transnational governance, it holds welcome prospects for justice in global markets.

### **An idea whose time has come**

The fragmentation of international law has consequences, some good and some bad. While diversity and difference may help promote local solutions and experimentation, the 'environment' is often left behind when the interests of states are shaped by, and pursued through, other regimes, whose functional orientation does not prioritise ecological concerns. Those other regimes have institutional strength and compulsory dispute settlement, while environmental principles are scattered amongst custom and non-binding instruments. A 'defragging' of this system through the proposed Global Pact for the Environment will require much more effort than simply moving bits of data on a hard drive, and the analogy used here is of course limited. But the Pact's premise is promising and a binding instrument could provide much needed integration of environmental issues into international law. This will occur for at least three reasons: because the Pact is binding, because it may be enforced through adjudication, and because it has an innovative reach that includes states and non-state actors. Giving the environment a visible place on the global agenda is welcome in the face of environmental catastrophes, which have ranged from the drastic fires and heatwaves of the European summer months to disasters further afield. The extension of human rights by the Global Pact is supported by the UN Special

Rapporteur on Human Rights and the Environment, who has described the right to a healthy environment as an idea whose time has come and whose incoming successor has published widely on the rights of nature. The Global Pact for the Environment is a crucial development through which issues of environmental protection and sustainability can achieve broader, systemic legal recognition.