

International Environmental Law's Lack of Normative Ambition: An Opportunity for the Global Pact and its Gap Report?

Louis J. Kotzé*

Keywords: Anthropocene; international environmental law; Global Pact for the Environment; normative ambition; normative gaps; ecological norms

Abstract

This paper argues that international environmental law (IEL) is not sufficiently ambitious to confront the Anthropocene's socio-ecological crisis. The paper specifically focuses on IEL's lack of ambitious but "unmentionable" ecological norms such as rights of nature, Earth system integrity, and ecological sustainability that are not yet considered to be part of the corpus of IEL, but that arguably should be. Assuming that the recent Global Pact for the Environment initiative and its accompanying United Nations-mandated report that assesses possible gaps in IEL are indicative of the type of reforms we might expect of IEL in future, the paper then determines if and the extent to which these embrace ambitious norms and address IEL's "unmentionable" ecological normative gaps. A secondary, but related, objective of the paper is to briefly respond to the emerging view that any radical critique of the Global Pact initiative is either unfounded, unwarranted or undesirable.

1. Introduction

Aside from an increasingly marginalized group of eco-crisis sceptics,¹ few would disagree that we live in unprecedented times of socio-ecological upheaval. Unnecessary to reproduce here, the daily news, social media, and academic literature are replete with references to, and detailed popular and scientific accounts of, the massive socio-ecological harms and their attendant injustices that are being committed in the name of selective, globally uneven, human "progress" and "development". We see this clearly through the lens of the Anthropocene, which is thought (not uncontroversially),² to be the current geological epoch where some privileged humans have become an Earth system altering geological force.³ After having spent a good part of five years examining the juridical dimensions of the Anthropocene and the

* Research Professor of Law, North-West University, South Africa; Marie Curie Research Fellow, University of Lincoln, United Kingdom. Research for this paper was supported by the author's European Commission Marie Skłodowska Curie project titled: "Global Ecological Custodianship: Innovative International Environmental Law for the Anthropocene" (GLEC-LAW) under grant agreement No. 751782 and it was completed in May 2019. My sincere thanks to Sam Adelman, Duncan French and the anonymous reviewers for their helpful comments on an earlier draft of this paper.

¹ See for a brief discussion, Andrew Hoffman "The Culture and Discourse of Climate Skepticism" 9(1) 2011 *Strategic Organization* 77-84.

² Frank Biermann and Eva Lövbrand "Encountering the 'Anthropocene': Setting the Scene" in Frank Biermann and Eva Lövbrand (eds) *Anthropocene Encounters: New Directions in Green Political Thinking* (Cambridge University Press, 2019) 1-22; A Malm and A Hornborg "The Geology of Mankind? A Critique of the Anthropocene Narrative" 2014(1) *The Anthropocene Review* 62-69.

³ Jan Zalasiewicz *et al* "The Working Group on the Anthropocene: Summary of Evidence and Interim Recommendations" 2017(19) *Anthropocene* 55-60.

normative implications of this trope,⁴ I am confident to suggest that it provides a useful framework to critically interrogate law, and specifically international environmental law (IEL), as a central component of the various “human systems ... that are a past cause, present consequence, and future adaptation of our ecosystem changes”.⁵

Looking through the Anthropocene’s lens, a vast body of critical legal scholarship now reveals the truth about IEL and its entanglement with, and structural complicity in, sustaining multiple drivers of Earth system destruction and socio-ecological injustices.⁶ These include IEL’s support of several foundational paradigms that underlie global economic, political, legal and social human systems such as: anthropocentric sustainable development, (neo)colonialism, property rights, state sovereignty, and perhaps most troubling of them all, neoliberal corporate exploitation. Critical legal scholarship has shown how IEL (mostly implicitly, but often also explicitly) structurally contributes to causing, sustaining and exacerbating these predatory paradigms that, in turn, result in Earth system destruction, exploitation and the oppression of vulnerable humans and the non-human world.⁷

Troubling as these are, I want to pause for a moment and focus on one related issue that I believe demands urgent critical reflection; namely IEL’s lack of normative ambition. My thesis is straightforward: IEL is not sufficiently ambitious to deal with the increasingly assertive and destructive *Anthropos* (understood here to refer to a small and particularized, but powerful and privileged, subset of the past and present global human population),⁸ and with the myriad socio-ecological injustices arising from such human domination of the Earth system and of the vulnerable living order. I do not believe there is, nor that there should be, any question as to whether IEL must provide for ambitious norms. It must, if it wants to retain its legitimacy and *raison d’être* as the primary juridical collection of global environmental protection measures, and if it intends to remain relevant in the face of a changing Earth system. After all, the relevance, purpose and effectiveness of IEL as part of global environmental governance is now increasingly under scrutiny amidst growing public resistance to a business-as-usual approach, evidenced in particular by the “Fridays for Future” climate protests occurring all around the globe, the steady rise of climate litigation, and the surge in support for green political parties during the recent European Commission elections.⁹ I believe the only questions that remain as far as IEL’s normative ambition is concerned, at least for now, are: i) how could its level of normative ambition be raised; and ii) which specific ambitious norms must be developed and embraced by IEL? Assuming that it is an issue that is sufficiently critical to be taken up more

⁴ See, among others, Louis Kotzé “Rethinking Global Environmental Law and Governance in the Anthropocene” 2014(32) *Journal of Energy and Natural Resources Law* 121-156.

⁵ Andrew Hoffman and P. Devereaux Jennings *Re-engaging with Sustainability in the Anthropocene Era* (Cambridge University Press, 2018) 5.

⁶ See, for example, Anna Grear “Deconstructing Anthropos: A Critical Legal Reflection on ‘Anthropocentric’ Law and Anthropocene ‘Humanity’” 2015(26) *Law Critique* 225-249; Louis Kotzé (ed) *Environmental Law and Governance for the Anthropocene* (Hart, 2017).

⁷ Sam Adelman “The Sustainable Development Goals, Anthropocentrism and Neoliberalism” in Duncan French and Louis Kotzé (eds) *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar, 2018) 15-40; Jorge Viñuales “The Organisation of the Anthropocene in our Hands?” 2018 1(1) *International Legal Theory and Practice* 1-81.

⁸ The Anthropocene’s human, or *Anthropos*, is most accurately characterised as being representative of only a small part of the past and present global population that entrenches their dominance and privilege through a neoliberal capitalist and corporatized global political economy and an unjust global social and legal system.

⁹ See, <https://www.dw.com/en/fridays-for-future-students-hold-international-climate-change-protests/a-47927393>; <https://www.euronews.com/2019/05/24/european-elections-2019-latest-updates-and-your-guide-to-understanding-how-they-work>; William Burns and Hari Osofsky (eds) *Adjudicating Climate Change: State, National, and International Approaches* (Cambridge University Press, 2009).

thoroughly in future discussions, in this paper I want to initiate a debate about IEL's normative ambition by broadly reflecting on each of these two questions.

I do so in Part 2 by exploring the notion of normative ambition and then by situating the question of normative ambition specifically in the context of IEL. The several ways in, and extent to which, IEL must be ambitious are widely open to interpretation. Its normative ambition could relate to its legal character (binding or non-binding norms), the parties it applies to (State and non-State), its geographical reach, measures for compliance and enforcement, its domestic impact, environmental governance resources and institutions tasked with its implementation, the political will to implement IEL, and finally, the substance of its norms.¹⁰ I focus for present purposes only on its substance and specifically the extent to which IEL must entrench ambitious ecological norms to address its "unmentionable gaps".¹¹ These "unmentionable gaps" relate to those norms that have not yet been agreed by the international community. In fact, their adoption has been actively resisted by States who continue to claim exceptionalism and the protection of state sovereignty in efforts to avoid ecological commitments. These norms are instead more aspirational and certainly radical in nature, reflecting a genesis that originates instead from other sources: jurisprudence, philosophical and ethical approaches to environmental care, alternatives to the mainstream, religious doctrine, or simply new ideas. These are the "unmentionable gaps" as they are not yet, or not ordinarily, part of the mainstream (international law) discourse – or, if included, invariably in a preambular manner. Some examples are the rights of nature, Earth system integrity, the principle of *in dubio pro natura* and the ecological rule of law; all of which have the potential to push for a radically different and more ambitious normative framework to address the systemic challenges inherent in IEL and in global environmental governance by increasing the normative reach, power and impact of norms that must ultimately seek to counter the socio-economic-political-juridical system's exploitation of the Earth system.

For the sake of context, in Part 3 I pause for a moment to briefly describe two earlier initiatives that could have addressed IEL's lack of normative ambition and that could have responded to its "unmentionable gaps", but ultimately did not. These are the World Charter for Nature of 1982 and the International Union for the Conservation of Nature (IUCN) Draft International Covenant on Environment and Development of 2010 (IUCN Draft Covenant).

Building on two earlier critiques,¹² in Part 4, I then examine the most recent and ongoing attempt to reform IEL, namely, the Global Pact for the Environment (Global Pact) initiative and its recently published United Nations (UN) Secretary-General report that identifies gaps in IEL.¹³ Assuming that the draft text of the Pact and its gap report are at least vaguely indicative

¹⁰ I have identified these based on a list of possible gaps in IEL that Biniac has recently formulated. Susan Biniac "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* 33-39 at 35.

¹¹ Duncan French and Louis 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* 25-32.

¹² Louis Kotzé and Duncan 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; Duncan French and Louis 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* 25-32.

¹³ UNGA, "Towards a Global Pact for the Environment" UN Doc A/RES/72/277 (10 May 2018); UNGA, "Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment", UN Doc A/73/419 (30 November 2018). See for a general discussion, P Thieffrey "The Proposed Global Pact for the Environment and European Law" 2018(27) *European Energy and Environmental Law Review*

of where future reform processes might go, and if the Global Pact initiative is in fact *the* “constitutional moment” that must reform IEL, as it is thought to be,¹⁴ then it is reasonable to expect that the draft Global Pact and its gap report will also have to embrace normative ambition as a core rationale, guiding narrative and objective. Much has been written on the Global Pact,¹⁵ and in this paper I only seek to determine the extent to which the draft Global Pact and its gap report recognise, and are accommodative of the need for, increasing IEL’s normative ambition by embracing “unmentionable” norms. A secondary, but intimately related objective of the paper, is to briefly respond to the recent view that any radical critique of the Global Pact initiative is either unfounded, unwarranted or undesirable.¹⁶

2. IEL’s normative ambition?

In a general sense, meaning the opposite of “modest”, the word “ambitious” or “ambition” does not merely suggest an effort to somehow raise the bar or to progressively strive for improvement. It very specifically also imparts the idea of a deliberate and more immediate pursuit of achievement; a “strong desire and determination to succeed”, which is “intended to satisfy high aspirations and [is] therefore difficult to achieve”.¹⁷ Not something that comes easily then, or even automatically, ambition is instead associated with being “determined, forceful, pushy, enterprising, pioneering, progressive, eager, motivated, driven, enthusiastic, energetic, zealous, committed”,¹⁸ and so forth. An ambitious norm is therefore a norm that is quite extraordinary in terms of its scope, substance, extent of obligations, and the level of achievement it aspires to. It is result-driven and determined to achieve results. It will allow no exceptions and will not apply selectively if this means that it might fail. Moreover, the creation of an ambitious norm, because it is radical and possibly very different from what exists, might very well be resisted because of the possibility that such a norm could upset the status quo.

How is all of this relevant for IEL? There seems to be general agreement that IEL has achieved many victories since its birth in the early 1970s. But there are likewise many valid views suggesting that IEL has not been able to confront head on the ever-deepening socio-ecological crisis that is engulfing the living order. Some of the main concerns revolve on issues related to, among many others: state exceptionalism and voluntarism; IEL’s fragmented, problem-shifting approach; IEL’s inability to counter the dominant neoliberal growth-without-limits development paradigm; IEL’s exclusive human focus; IEL’s lack of normative hierarchy; and IEL’s inability to govern a broader set of actors in addition to the state, such as corporations, that are causing massive socio-ecological destruction.¹⁹ Commentators have suggested ways to address these concerns and to reform IEL including, for example: proposals to “ecologize”

182; J Raith “The ‘Global Pact for the environment’: A new instrument to protect the planet?” 2018 15(1) *Journal for European Environmental and Planning Law* 3–23.

¹⁴ Yann Aguila and Jorge Viñuales “A Global Pact for the Environment: Conceptual Foundations” 2019(28) *Review of European, Comparative and International Environmental Law* 3-12.

¹⁵ See, for example, Yann Aguila and Jorge Viñuales (eds) *A Global Pact for the Environment: Legal Foundations* (Cambridge Centre for Environment, Energy and Natural Resources Governance, Report 2019-1). Available at <https://www.ceenrg.landecon.cam.ac.uk/report-files/AguilaViñualesAGlobalPactfortheEnvironmentCambridgeReportMarch2019.pdf>.

¹⁶ Yann Aguila and Jorge Viñuales “A Global Pact for the Environment: Conceptual Foundations” 2019(28) *Review of European, Comparative and International Environmental Law* 3-12.

¹⁷ <https://en.oxforddictionaries.com/definition/ambitious>.

¹⁸ <https://en.oxforddictionaries.com/definition/ambitious>.

¹⁹ Louis Kotzé “International Environmental Law and the Anthropocene’s Energy Dilemma” (To appear in *Environmental and Planning Law Journal* 2019-copy available on request from author).

IEL with the adoption of rights of nature and of the principle *in dubio pro natura*;²⁰ to develop peremptory global environmental “constitutional” norms or even a global environmental constitution;²¹ to adopt a global right to a healthy environment;²² to replace the principle of sustainable development with that of ecological sustainability;²³ and to develop an all-embracing and elevated framework IEL instrument (or a *Grundnorm*) in the form of the principle of ecological integrity to facilitate coherence in global environmental governance.²⁴ Although they might not have been explicitly framed as such,²⁵ these concerns and reform proposals essentially all express the need for IEL to raise its level of ambition by embracing radical “unmentionable” norms.

IEL’s unambitious norms are entangled with, and structurally complicit in promoting, the predatory paradigms that underlie human systems to the extent that States as the explicit architects of IEL, and their corporate stakeholders which increasingly function as “private sector *quasi-states*”,²⁶ would want to avoid (as they currently do) adopting the type of ambitious ecological norms that could disrupt their relentless pursuit of neoliberal economic development. In other words, one major reason behind IEL’s unambitious normative nature is because IEL’s creators deliberately want IEL to be unambitious with a view to promoting their own deeply embedded selective privilege in the short term. To this end, IEL is used to perpetuate some of the deep structural drivers that are causing the Anthropocene.²⁷ I provide only three examples in this respect.

²⁰ Nicholas Bryner “Applying the Principle in Dubio Pro Natura for Enforcement of Environmental Law” in Organization of American States *Inter-American Congress on the Rule of Law: Selected Essays* (2015) 166-173.

²¹ Louis Kotzé *Global Environmental Constitutionalism in the Anthropocene* (Hart, 2016).

²² UN Human Rights Council *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (24 January 2018) (A/HRC/37/59). Par 46; Louis Kotzé “In Search of a Right to a Healthy Environment in International Law” in John Knox and Ramin Pejani (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018) 136-154. Although this is restricted to a specific region, the Inter-American Court of Human Rights recently underscored the significance of developing a global right to a healthy environment in its advisory opinion “Environment and Human Rights” OC-23/17. See, <https://www.escri-net.org/caselaw/2019/advisory-opinion-oc-2317>.

²³ Klaus Bosselmann *The Principle of Sustainability: Transforming Law and Governance* 2nd ed (Routledge, 2016).

²⁴ Rakhyn Kim and Klaus Bosselmann “International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements” 2013 2(2) *Transnational Environmental Law* 285-309.

²⁵ A simple Google Scholar search revealed only 55 publications containing the combined phrases “environmental law” and “normative ambition”; while I was unable to find any publication dealing explicitly and specifically with IEL’s normative ambition in any comprehensive way. I suspect that had the foregoing critique of IEL been grouped under the single, conceptually and thematically coherent banner of “normative ambition” that could have been collectively pursued, (very much in the same way that “compliance and enforcement” acts as another such a banner) it might have had a more decisive impact on the discourse, and perhaps even on practice.

²⁶ Anna Grear “Towards ‘Climate Justice’? A Critical Reflection on Legal Subjectivity and Climate *Injustice*: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy” 2014(5) *Journal of Human Rights and the Environment* 103-133 at 108. Emphasis in the original. Departing from Foucault’s notion of governmentality, Hursh and Henderson argue that the notion of the state must be reconceptualized in the current globalized neoliberal order: “the state is no longer limited to the elected government but includes all those who ‘attempt to shape with some degree of deliberation aspects of our behavior according to particular sets of norms and for a variety of ends’”. This would then include corporations. David Hursh and Joseph Henderson “Contesting Global Neoliberalism and Creating Alternative Futures” 2011 32(2) *Discourse: Studies in the Cultural Politics of Education* 171-185 at 177.

²⁷ See, for a comprehensive account, Jorge Viñuales “The Organisation of the Anthropocene in our Hands?” 2018 1(1) *International Legal Theory and Practice* 1-81.

First, ambitious climate laws are seen to inhibit economic growth. The current global climate law regime is as weak as it is for this very reason, while some of the more ambitious, and certainly innovative, law-making occurs in the areas of global investment law in an effort to stimulate global economic growth. The zeal with which States and their corporations have pursued the creation of the powerful Bretton Woods institutions and the influential World Trade Organization and their accompanying legal regimes on the one hand,²⁸ while they remain reluctant to create an equally powerful global environmental authority on the other hand (the United Nations Environment Programme still does not have more powerful UN “organization” status),²⁹ is a case in point. On balance, global normative ambition seems to remain confined to projects that promote the kind of neoliberal economic development that structurally exacerbates the drivers of the Anthropocene; not the other way around.

Second, States have deliberately ensured that anthropocentric sustainable development is *the* cornerstone principle of IEL. But as deceptively simple and environmentally oriented an idea as sustainable development seems to be, it is *not* a socio-ecologically friendly process.³⁰ Critical legal scholars have shown that it is rather a convenient, fictitious ideological palliative that IEL underwrites and that legitimizes and helps rationalize anthropocentric Earth system altering practices.³¹ Other principles of IEL such as the polluter pays, prevention, and precautionary principles are more explicitly focused on achieving environmental protection results. But while they are usually invoked in the same breath as sustainable development, they have been unable to counter the type of socio-ecological destruction that sustainable development itself perpetuates. Moreover, while they have metamorphosed over the years, these principles have been designed decades ago at a time when the socio-ecological crisis was not appreciated as being all that severe, and when innovative regulatory options were more limited than they are today.³² They have neither kept up with progressive innovations in Earth system science, such as the emergence of resilience thinking, an Earth system law and governance approach, planetary boundaries and the adaptive governance of complex systems; nor can they mirror domestic juridical innovations such as the principle of *in dubio pro natura*.³³ As we will see with the Global Pact process below, many of the discussions around these principles continue to focus not on how to raise their level of ambition, or on creating more effective principles to bolster these, but rather on what their legal status is and how they could be consolidated (itself of course not an unimportant debate, but one that would seem to crowd out other critical deliberations).

²⁸ Anna Grear “Towards ‘Climate Justice’? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy” 2014(5) *Journal of Human Rights and the Environment* 103-133.

²⁹ Frank Biermann and Steffen Bauer (eds) *A World Environment Organization: Solution or Threat for Effective International Environmental Governance?* (Ashgate, 2005).

³⁰ Sam Adelman “The Sustainable Development Goals, Anthropocentrism and Neoliberalism” in Duncan French and Louis Kotzé (eds) *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar, 2018) 15-40 at 21.

³¹ Benjamin Richardson “A Damp Squib: Environmental Law from a Human Evolutionary Perspective” *Osgoode Hall Law School Comparative Research in Law and Political Economy Paper Series* 2011 7(3) 1 at 31; Sam Adelman “Epistemologies of Mastery” in Anna Grear and Louis Kotzé (eds) *Research Handbook on Human Rights and the Environment* (Edward Elgar, 2015) 9-27.

³² Cameron Jefferies, Sara Seck and Tim Stephens “International Law, Innovation, and Environmental Change in the Anthropocene” in Neil Craik, Cameron Jefferies, Sara Seck and Tim Stephens (eds) *Global Environmental Change and Innovation in International Law* (Cambridge University Press, 2018) 1-17.

³³ Louis Kotzé and Rakhyun Kim “Earth System Law: The Juridical Dimensions of Earth System Governance” 2019 1(1) *Earth System Governance* 1-12.

And third, IEL still consciously pursues voluntarism when it comes to corporate responsibility. It is failing as a result to reign in corporate exploitation and in creating stringent standards to regulate the many eco-destructive activities of corporations. IEL has failed in this latter respect because States deliberately want it to fail: the corporation after all remains the State's most agile, lucrative, profitable and influential agent of sustainable development, as it were. These "guardians of the neoliberal global order", as Grear says, "which many ... see as being the guardians of a *global economic elite*- are committed, it seems, to an ideology with demonstrably destructive social and environmental impacts, and a profoundly intensifying effect on the unevenness of the legal order."³⁴ Proposals for IEL to hold corporations directly accountable for causing global climate change would certainly be frowned upon and swept under the rug together with other "unmentionable" norms.

The foregoing are only some examples of IEL's normative "modesty", or its lack of normative ambition. At best, the current set of climate laws, principles of IEL, and corporate environmental norms can be described as being the opposite of ambitious, i.e., "moderate, fair, tolerable, passable, adequate, satisfactory, acceptable, unexceptional",³⁵ and at worst as being non-existent and unacceptable. Ambitious IEL norms then would be those norms that are exactly the opposite of what we currently have. These are the "unmentionable" norms that recognise and set as juridical threshold the finiteness and fragility of the Earth's entire life support system and that embrace Earth system integrity as a *Grundnorm*,³⁶ norms that recognise the "symbiotic generativity of life"³⁷ or inter-speciesism aimed at ensuring inter- and intra-species justice in an inter- and intra-generational sense; norms that address profound patterns of global unevenness and differentially distributed human and non-human vulnerabilities; and norms that restrict the principal actors, such as corporations, that drive neoliberal economic development at the cost of Earth system integrity.³⁸

3. (A brief interlude)

I have noted above one major concern that keeps complicating efforts to raise the level of IEL's normative ambition: ambitious environmental protection norms are seen (quite rightly so because this is after all their *raison d'être*), to restrict the short term-focused, neoliberal, capitalist, growth-without-limits agenda. Any effort to raise the level of IEL's normative ambition could thus be expected to be met with significant resistance from those actors that have vested interests in perpetuating this agenda. Moreover, it would probably take a carefully coordinated effort to muster global State support for instigating any radical change of the IEL order.

³⁴ Anna Grear "Towards 'Climate Justice'? A Critical Reflection on Legal Subjectivity and Climate Injustice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy" 2014(5) *Journal of Human Rights and the Environment* 103-133 at 107. Emphasis in the original.

³⁵ <https://en.oxforddictionaries.com/thesaurus/modest>.

³⁶ Rakhyn Kim and Klaus Bosselmann "International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements" 2013 2(2) *Transnational Environmental Law* 285-309.

³⁷ Anna Grear "'Anthropocene, Capitalocene, Chthulucene': Re-encountering Environmental Law and its 'Subject' with Haraway and New Materialism" in Louis Kotzé (ed) *Environmental Law and Governance for the Anthropocene* (Hart, 2017) 91.

³⁸ Louis Kotzé "The Anthropocene, Earth System Vulnerability and Socio-ecological Injustice in an Age of Human Rights" 2019 10(1) *Journal of Human Rights and the Environment* 62-85.

The Global Pact initiative is not the first global effort with such ambitions. In 1982 a large majority of UNGA Member States did seem willing to take the road less travelled with their almost universal endorsement of the World Charter for Nature.³⁹ The World Charter for Nature is a blend between a juridical and ethical instrument, but in both contexts an “avowedly ecological instrument, which emphasises the protection of nature as an end in itself”.⁴⁰ As I have argued elsewhere,⁴¹ this is an agreement that could have raised the level of IEL’s normative ambition through its “principles of conservation by which all human conduct affecting nature is to be guided and judged.”⁴² The World Charter for Nature raises the bar to the extent that it hints at “unmentionable” norms, including for example: “life depends on the uninterrupted functioning of natural systems”; “living in harmony with nature” is critical; and “Every form of life is unique, warranting respect regardless of its worth to man”.⁴³ Moreover, “Ecosystems and organisms ... shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist.”⁴⁴

The World Charter has, however, all but disappeared from collective consciousness and it has not featured prominently in or exerted any obvious norm-shaping influence on the development of IEL. Instead, all subsequent global environmental conferences pointedly retreated from the deep ecological and ambitious principles of the Charter,⁴⁵ and States continue down the unambitious “sustainable development” path, which they fully endorsed at subsequent global conferences (such as the UN Conference on Environment and Development of 1992 and the World Summit on Sustainable Development in 2002), and through grand development visions such as Our Common Future of 1987, the Millennium Development Goals, and more recently, the Sustainable Development Goals.⁴⁶

Another reform initiative was the IUCN Draft Covenant, which was meant to be, “an authoritative reference and checklist for legislators, civil servants and other stakeholders worldwide in their endeavours to ensure that principles and rules of international environmental law and development are thoroughly addressed when they are drafting new, or updating existing, policies and laws”.⁴⁷ Useful as this is, the Covenant instead more clearly serves the role of an unenforceable generic checklist that could guide the consolidation of existing IEL norms (also a principal objective of the Global Pact initiative as we shall see below). Not endorsed by the UNGA, while the Covenant does contain some ecological provisions that might be considered more ambitious,⁴⁸ it mostly restates trite principles such as prevention and

³⁹ UNGA Resolution A/RES/37/7, of 28 October 1982, on World Charter for Nature. Available at: <http://www.un.org/documents/ga/res/37/a37r007.htm>.

⁴⁰ Philippe Sands and Jacqueline Peel *Principles of International Environmental Law* 3rd ed (Cambridge University Press, 2012) 37.

⁴¹ Louis Kotzé “A Global Environmental Constitution for the Anthropocene?” 2019 8(1) *Transnational Environmental Law* 11-33.

⁴² Preamble.

⁴³ Preamble.

⁴⁴ Article 4.

⁴⁵ Bill Devall “The Deep, Long-Range Ecology Movement: 1960-2000 - A Review” 2001 6(1) *Ethics and the Environment* 18-41 at 30.

⁴⁶ Sam Adelman “Sustainable Development Goals, Anthropocentrism and Neoliberalism” in Duncan French and Louis Kotzé (eds) *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar, 2018) 15-40; Louis Kotzé “The Sustainable Development Goals: An Existential Critique Alongside Three New-millennial Analytical Paradigms” in Duncan French and Louis Kotzé (eds) *Sustainable Development Goals: Law, Theory and Implementation* (Edward Elgar, 2018) 41-65.

⁴⁷ IUCN *Draft International Covenant on Environment and Development* 4th ed (IUCN, Gland, 2010) xi.

⁴⁸ See, for example some statements in the preamble, article 2 (respect for all life forms) and article 9 (resilience).

precaution,⁴⁹ bolsters anthropocentric juridical claims such as the right to development,⁵⁰ and reinforces claims to “sustainable development”.⁵¹

4. The Global Pact initiative

The most recent (and still ongoing) initiative to reform IEL, is the Global Pact that was initially presented to the world in June 2017 by French think tank, *Le Club de Juristes*, which also coordinated its drafting process.⁵² The Pact was drafted by a Group of Experts; a network of over 100 lawyers representing almost 40 nationalities and chaired by Laurent Fabius, the president of Climate Change COP21, the current President of the French Constitutional Council, and recently appointed UN Environment Patron on Environmental Governance. The Pact’s objectives seem to be three-pronged and to be something of a blend between the World Charter for Nature and the IUCN Draft Covenant, namely: to be a globally binding environmental law instrument; to thus entrench all major principles of IEL in one document (elsewhere described as a “broader common core of legally binding principles on which significant gaps in the regulation could rely upon”⁵³); whilst also developing progressively the law to provide a globally recognised right to live in an ecologically sound environment, with associated procedural environmental rights.⁵⁴ In terms of these objectives, the ambition of the Global Pact presumably lies in its pursuit to be the first binding framework instrument of IEL; in its vision to codify environmental principles; and in its pursuit to be the first global instrument that entrenches higher order global environmental constitutional norms in the form of rights. It therefore clearly wants to be ambitious. If it actually succeeds is an altogether different matter which I reflect on below.

On 19 September 2017 France convened a “launch summit” as a side event to the high-level segment of the 72nd session of the UNGA which led nations to bring forward a draft resolution on the Global Pact to the UNGA. On 10 May 2018, the resolution was adopted by a majority of UNGA Member States.⁵⁵ In particular, the resolution established an *ad hoc* open-ended working group to consider the matter of the Global Pact, and in particular to be guided by a “technical and evidence-based” report from the UN Secretary-General on “possible gaps in international environmental law and environment-related instruments”.⁵⁶ Published in late 2018,⁵⁷ this report is currently being considered by the *ad hoc* working group established under the resolution, to “discuss possible options to address possible gaps ... and, if deemed

⁴⁹ Articles 6 and 7.

⁵⁰ Article 10.

⁵¹ Article 1.

⁵² As a draft text adopted by a broad consultative process, its present status and an authoritative source for its existence is difficult to formalise into traditional citation. I used the text available at: <http://pactenvironment.emediaweb.fr/wp-content/uploads/2017/07/Global-Pact-for-the-Environment-project-24-June-2017.pdf>.

⁵³ Yann Aguila and Jorge Viñuales “A Global Pact for the Environment: Conceptual Foundations” 2019(28) *Review of European, Comparative and International Environmental Law* 3-12 at 5.

⁵⁴ <https://globalpactenvironment.org/en/the-pact/objectives/>.

⁵⁵ 143 votes in favour, 6 against and 6 abstentions. The States voting against were Iran, Philippines, Russia Federation, Syria, Turkey, and the United States; whilst the States abstaining were Belarus, Malaysia, Nicaragua, Nigeria, Saudi Arabia, and Tajikistan. UNGA, ‘Towards a Global Pact for the Environment’ UN Doc A/RES/72/277 (10 May 2018).

⁵⁶ UNGA, ‘Towards a Global Pact for the Environment’ UN Doc A/RES/72/277 (10 May 2018) paras 1 and 2.

⁵⁷ UNGA, “Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment”, UN Doc A/73/419 (30 November 2018).

necessary, the scope, parameters and feasibility of an international instrument”.⁵⁸ The gap report is appropriate and it could possibly be very useful, even though it should arguably have preceded and informed the content of the draft Global Pact; not the other way round. Biniiaz suggests in this regard that: “[A]s a matter of process, it was disturbing that the proposal [of the Global Pact] set out a solution – that is, a new, overarching agreement with broad, legally binding principles – without a persuasive case that such an instrument bore any relationship to real-world environmental problems. The proposed Global Pact seemed to be a solution in search of a problem, rather than in response to one.”⁵⁹

It is impossible to know, or even to predict at this stage, what the outcome of the foregoing deliberative process might be. There are several possible scenarios, ranging from the *ad hoc* working group suggesting to do nothing at all and to maintain the *status quo*; to a “middle way” option that continues the process of identifying gaps and to further investigate ways to address these gaps in incremental stages; through to what could be the most “drastic” option, namely to adopt, as soon as possible, a globally binding instrument to address the gaps in IEL. Focusing for present purposes only on the latter, such a binding global instrument might or might not contain the type of ambitious norms that are required, depending on what the working group advises, and ultimately of course, on what the architects of IEL believe must be included in such a document. But again, this remains mere speculation which leaves us neither here nor there. It is therefore more useful at this stage in the process to determine whether the draft Global Pact and its gap report consider the need to pursue normative ambition as being important, and if they do, the extent to which they embrace the type of extraordinary and unconventional norms that must respond to IEL’s “unmentionable” gaps.

As a prelude to such a determination, I am well aware of the view maintaining that a critique of the Global Pact in its *draft* form is premature, and therefore unfounded. Aguila and Viñuales say “the draft project is, in many ways, a ‘proof of concept’ developed to lend credibility to the larger enterprise of launching negotiations to conclude a [Global Pact]”.⁶⁰ Without referring to anyone specifically, they believe that “much of the criticism that the initiative has faced, including from overtly hostile quarters ... rely on ... details of formulation in the draft project which will very likely change in the course of the negotiations, without undermining the overall idea.”⁶¹ Such a perception of “hostility” might perhaps be understandable at some level, although it is unfortunate that well-meaning and ultimately radical scholarly critique is mistaken for something that it is not. The severity of critique in this context has always only been determined by the need to convey a sense of urgency to encourage using the Global Pact initiative as effectively as possible, and as a potentially radically different and powerful response to the Anthropocene’s socio-ecological challenges. If there is any perceived “hostility” towards the Global Pact project, it is solely aimed at cautioning against the pitfalls of a business-as-usual approach. Biniiaz has equally made it patently clear that critiquing and challenging the draft Global Pact and its process does not imply that one is “against the

⁵⁸ UNGA, ‘Towards a Global Pact for the Environment’ UN Doc A/RES/72/277 (10 May 2018) para 2.

⁵⁹ Susan Biniiaz “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* 33-39 at 34.

⁶⁰ Yann Aguila and Jorge Viñuales “A Global Pact for the Environment: Conceptual Foundations” 2019(28) *Review of European, Comparative and International Environmental Law* 3-12 at 9.

⁶¹ Yann Aguila and Jorge Viñuales “A Global Pact for the Environment: Conceptual Foundations” 2019(28) *Review of European, Comparative and International Environmental Law* 3-12 at 9.

environment”,⁶² or that one seeks to actively undermine the laudable agenda for change that the Global Pact initiative pursues. On the contrary.

I maintain the view that a critical, possibly even *radical*, approach to critiquing the process, content and objectives of the Global Pact in all stages of its development (from its draft, through to its gaps analysis, negotiation and possible adoption) remains valuable, even though such critique might be frowned upon. Complacency and timidity, after all, have rarely led to deep structural changes of society and of its social systems, including of the law. If we agree about everything, nothing changes. It is when people become “hostile” that human rights are adopted as key components of the post-world War legal order, that oppressive apartheid regimes fall, that women are allowed to vote, and that same sex couples are allowed to marry. Equally, the Anthropocene’s socio-ecological crisis asks everything but being timid or complacent, especially from scholars:

An important role of legal scholarship is to question the prevailing conventions of legal thought and practice, including the traditional legal forms of accepted institutions. The legal forms of environmental protection should not be immune from the scrutiny of radical legal scholarship, a scholarship which reexamines prevailing principles, laws, and legal regimes.⁶³

In pursuit of such radical critique then, in the same way that there is considerable value in critiquing a draft bill serving before parliament that often looks very different from the final statute, notably to the extent that such critique could make a constructive contribution to *improving* the final statute, there is undeniably value in continuing a critique of the Global Pact, *especially* in its draft form.

Such an early determination of the extent to which the Pact pursues normative ambition is further important because the draft text of the Global Pact (either in its present or amended form) could possibly be the blueprint from which States launch their ensuing deliberations; informed as such deliberations will likely also be by the accompanying gap report and the recommendations of the *ad hoc* working group. This remains at least a possibility despite the valid alternative view that the Global Pact initiative “never expected for the draft project to be adopted as such, or even in a mildly revised form. The text proposed is above all representative of an approach, which may change significantly, even fundamentally during the negotiations.”⁶⁴ A real possibility indeed, but states might also very well adopt the draft text on the back of recommendations of the *ad hoc* working group as its point of departure, regardless of the initial intentions of its drafters. It will therefore be critical for the Global Pact initiative to already embrace normative ambition and to lay the foundations for the creation of ambitious IEL norms because the reality is that intergovernmental negotiations usually water down the starting document rather than increasing its normative strength, or viscosity. An undesirable scenario that must be avoided as far as possible, such negotiations often “mainly involve political compromises and decision making by consensus, and more often than not result in low or lowest common denominator outcomes. This could lead to a regression towards

⁶² Susan Biniarz “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* 33-39 at 34.

⁶³ Richard Brooks “A New Agenda for Modern Environmental Law” 1991(6) *Journal of Environmental Law and Litigation* 1-38 at 1.

⁶⁴ Yann Aguila and Jorge Viñuales “A Global Pact for the Environment: Conceptual Foundations” 2019(28) *Review of European, Comparative and International Environmental Law* 3-12 at 9.

minimum standards, which – once codified – could present an obstacle to further specification and increased ambition.”⁶⁵

4.1. The Draft Global Pact

The original text of the Global Pact was drafted by civil society actors and it must also be read and critiqued within this context.⁶⁶ The Group of Experts was notably not constrained by the usual potentially inhibitive inter-State politics, exceptionalism and posturing; it could be as creative and *ambitious* as its wished to be and they could mention the “unmentionable gaps”. How ambitious has this Group of Experts managed to be in the draft text? To start with, the Pact’s preamble reads very much like any standard multilateral environmental agreement (MEA), although it does attempt to introduce the type of language that could be more explicitly associated with “unmentionable” ambitious norms. For example, the preamble mentions the World Charter for Nature, the need for ecosystem resilience, respect for the balance and integrity of the Earth’s ecosystem, and the need to respect human rights obligations.

More importantly, article 1 says: “Every person has the right to live in an *ecologically sound environment* adequate for their health, well-being, dignity, culture and fulfilment.”⁶⁷ Despite the almost universal domestic emergence of environmental human rights the world over, (and in some countries the rights of nature),⁶⁸ and apart from the Stockholm Declaration’s implicit hint at the existence of such a right,⁶⁹ no IEL instrument, hard or soft, currently provides for an environmental right. This, despite high-level calls for its adoption in a global instrument.⁷⁰ The inclusion of such a “constitutional” right in a binding global instrument will therefore not only fill a normative gap in IEL, it could also potentially raise that instrument’s level of normative force and status to that equalling a global “constitution”.⁷¹ This is further important because, although not nearly as normatively ambitious as a rights of nature clause, the Pact’s formulation deviates slightly, but in an important way, from standard versions of this right in that it also ambitiously recognises *ecological soundness* as a threshold for transgression, and not only human health and well-being.⁷²

Immediately following the environmental right clause, article 2 provides for a duty of care: “Every State or international institution, every person, natural or legal, public or private, has the duty to take care of the environment. To this end, everyone contributes at their own levels

⁶⁵ Christina 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* 13-24 at 21.

⁶⁶ See, for the full text <https://globalpactenvironment.org/uploads/EN.pdf>.

⁶⁷ Own emphasis.

⁶⁸ Louis Kotzé and Paola Villavicencio Calzadilla “Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador” 2017 6(3) *Transnational Environmental Law* 401-433; Paola Villavicencio Calzadilla and Louis Kotzé “Living in Harmony with Nature? A Critical Appraisal of the Rights of Mother Earth in Bolivia” 2018 7(3) *Transnational Environmental Law* 397-424.

⁶⁹ Principle 1.

⁷⁰ UN Human Rights Council *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* (24 January 2018) (A/HRC/37/59). Par 46.

⁷¹ Louis Kotzé *Global Environmental Constitutionalism in the Anthropocene* (Hart, 2016).

⁷² See, generally James May and Erin Daly *Global Environmental Constitutionalism* (Cambridge University Press, 2014). The environmental right provision is laudably bolstered by the trite procedural rights of access to information, public participation and access to environmental justice, which are regionally focused as a result of their inclusion in the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 1998. Articles 9-11.

to the conservation, protection and restoration of the *integrity* of the Earth’s ecosystem.”⁷³ This is a provision one is more likely to encounter in domestic regimes and its inclusion here,⁷⁴ alongside the broadening of the scope of this duty to non-state actors and its reference to Earth system integrity, is both innovative, and I would suggest, ambitious. In fact, such a provision could also usefully form the basis of a norm holding corporations to account for socio-ecological destruction.

Articles 3-7 simply restate the well-known general principles of IEL including: integration and sustainable development, intergenerational equity (and strangely not also intra-generational or interspecies equity), prevention, precaution, remediation of environmental damages and polluter pays. A similar regurgitation occurs with respect to provisions on education and training, research and innovation, the role of non-state actors and subnational entities, cooperation, armed conflicts (from which provisions on ecocide are notably absent) and diversity of national situations.⁷⁵ A plain reading of these principles and provisions suggests that they do not provide anything that could be considered more ambitious than what already exists.

It is only towards the end of the draft text that there is again an attempt to be more ambitious. Article 15 states: “The Parties have the duty to adopt effective environmental laws, and to ensure their effective and fair implementation and enforcement.” Both in terms of the level and scope of obligation it requires and in terms of its purpose and possible practical implications, this is arguably one of the most ambitious norms of the draft text. Then follows a provision on resilience which provides “The Parties shall take necessary measures to maintain and restore the diversity and capacity of ecosystems and human communities to withstand environmental disruptions and degradation and to recover and adapt.” This is an equally ambitious principle that more fully responds to the emerging field of resilience-thinking, and that innovatively seeks to incorporate the duty to ensure resilience into the broader corpus of IEL.⁷⁶ While a strong case could be made out in support of an argument that IEL must not only halt socio-ecological decay, but also more ambitiously *improve* Earth system stability and integrity and promote restoration, article 17 at least provides for the principle of non-regression: “The Parties and their sub-national entities [must] refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law.”

On balance then, the extent to which the draft Global Pact’s pursues normative ambition is a mixed bag. In some instances it innovatively offers ambitious norms that have not yet been taken up in the current body of IEL, and this is encouraging. But in other instances it simply restates several existing norms which cannot by any measure be said to be ambitious. It has shied away, for example, from being overtly “ecological” by shunning provisions such as the rights of nature, the principles of *in dubio pro natura* and inter-species justice.

4.2. The gap report

⁷³ Own emphasis.

⁷⁴ See, for example, section 28 of South Africa’s *National Environmental Management Act* 107 of 1998.

⁷⁵ Articles 12, 13, 14, 18, 19 and 20.

⁷⁶ Jonas Ebbesson and Ellen Hey “Where in Law is Social-Ecological Resilience?” 2013 18(3) *Ecology and Society* 25-28.

For its part, the gap report confirms much that we already know, namely that 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.⁷⁷

More specifically, restating also those featuring in the draft Global Pact, the report first evaluates all the existing principles of IEL.⁷⁸ More promisingly, it recognises that the “right to a clean and healthy environment” is not part of IEL law yet, and that “international treaties have not defined the threshold below which the level of environmental quality must fall before a breach of a person’s human rights has occurred.”⁷⁹ While the draft Global Pact uses the much more ambitiously formulated “ecological soundness” as a threshold, the gap report’s threshold is considerably less ambitious as evidenced by its use of “clean and healthy environment”. The report also steers well clear of identifying rights of nature as a possible gap. What will certainly qualify as an “unmentionable” gap, and going considerably further than the draft Global Pact, is the principle of non-regression *and progression*: “Non-regression aims at ensuring that environmental protection is not weakened, while progression aims at the improvement of environmental legislation, including by increasing the level of protection, on the basis of the most recent scientific knowledge.”⁸⁰

Moving from the principles of IEL to the gaps relating to existing regulatory regimes,⁸¹ the gap report recognises that: “The challenge is to encourage the participation of all relevant actors while at the same time ensuring that the *commitments are ambitious enough* to provide for an effective response to the problem, and to ensure that parties comply with their obligations.”⁸² It says, with specific reference to the existing climate regime, that “the current nationally determined contributions are so far not sufficiently ambitious, and if they are not increased they will not lead to the realization of the global temperature goal.”⁸³ This is an important recognition of the need to create ambitious norms that could essentially restrict carbon-intensive economic activities for the benefit of addressing climate change. Having said that, unlike the draft Global Pact’s ambitious provision on the duty of care, the report then says nothing about the “unmentionable” and deeply troubling gap in IEL to hold liable and accountable non-state actors, such as corporations, that contribute to climate change. Moreover, nothing in the remainder of this part of the report that includes protection of the atmosphere, conservation of biodiversity and protection of soils, protection of freshwater resources, protection of oceans and seas and the regulation of hazardous substances and activities, identifies any “unmentionable” gaps.

Part IV of the report deals with gaps in environment-related instruments, including those related to trade, investment, intellectual property and human rights. Again, no mention is made of “unmentionable” gaps. Although admittedly less relevant for the type of “unmentionable” gaps and norms that are addressed in this paper, the same is also true for Part V that deals with

⁷⁷ UNGA “Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment” UN Doc A/73/419 (30 November 2018).

⁷⁸ Part II.

⁷⁹ At par 18.

⁸⁰ At par 22.

⁸¹ Part III.

⁸² At par 23. Own emphasis.

⁸³ At par 28.

gaps relating to the governance structure of IEL and for Part IV that surveys gaps in the implementation and effectiveness of IEL. There is no reference, for example, to concerns surrounding the lack of a more centralised and powerful UN environmental governance body. And while the fragmentation of IEL is a recurring theme in this part, it is not discussed in the context of a lack of an Earth system approach, or being the result of the absence of a unifying ecological *Grundnorm* such as Earth system integrity, as some believe it is.⁸⁴

In sum, the report does not expressly or comprehensively address the issue of lack of normative ambition, suggesting perhaps that it does not consider the lack of ambitious norms to be a gap in the strict sense of the word. And with one or two exceptions, nor does it attempt to identify alternative and potentially more ambitious “unmentionable” norms that IEL should ideally provide for. On balance, the report ultimately seems to be less focused on the content of norms and their level of ambition than it is on the processes and structures of IEL and its implementation. In the words of one of the co-drafters of the report, “‘Gaps’ in their most obvious meaning, for instance lacunae or unregulated environmental issues, are covered to a disappointingly limited extent.”⁸⁵

Without having had the benefit of scrutinizing the gap report which was published several weeks after we explored IEL’s “factual, technical and (unmentionable) normative gaps”, French and I asked at that stage:

Will the gap report, as an important potential initiator of such a reform process [of IEL], mention the ‘unmentionable gaps’? ... We remain sceptical and are concerned that the gap report will indeed be suitable reading to be left around the home for all (States) to read – precisely because it says very little that is radical and shocking, new or groundbreaking.⁸⁶

Regrettably, our suspicions have been confirmed; the report mentions many gaps, all of them relevant and worthy of consideration by the *ad hoc* working group, but it mentions very few “unmentionable” gaps or ways to respond to these.

Some might argue that a consideration of such unmentionable gaps as part of the gap analysis was never part of the Secretary-General’s mandate. But one could counter that the wording of the mandate (“*possible gaps* in international environmental law and environment-related instruments”)⁸⁷ is sufficiently broad to also include lack of normative ambition and IEL’s “unmentionable” gaps. Moreover, the report itself confirms that its scope of inquiry was broad enough to focus on both “regulatory gaps” and “governance gaps” which mean respectively “substantive/normative (including procedural and institutional) gaps and implementation gaps in the international legal framework.”⁸⁸ Fortunately, the *ad hoc* working group’s consideration of the “possible gaps in international law” is not restricted to possible gaps in the Secretary-

⁸⁴ Rakhyun Kim and Klaus Bosselmann “International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements” 2013 2(2) *Transnational Environmental Law* 285-309.

⁸⁵ Christina 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* 13-24 at 16-17.

⁸⁶ Duncan French and Louis 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* 25-32 at 32.

⁸⁷ UNGA, ‘Towards a Global Pact for the Environment’ UN Doc A/RES/72/277 (10 May 2018) at par 1. Own emphasis.

⁸⁸ UNGA “Gaps in International Environmental Law and Environment-related Instruments: Towards a Global Pact for the Environment” UN Doc A/73/419 (30 November 2018) at par 7.

General's report.⁸⁹ This means that “unmentionable” gaps could still be explored by the working group in the coming months and be included as part of its recommendations to the UNGA; a possibility that must certainly be encouraged.

5. Conclusion

The Global Pact initiative offers a timely and critically important opportunity to improve the ways in which we respond juridically to an increasingly erratic Earth system and how we address the underlying drivers that cause, exacerbate and perpetuate the Anthropocene. I believe the Pact's value lies specifically in how it admirably manages to raise awareness of global socio-ecological decline; how it attempts to seek broader consensus among the public, the scientific community, and (hopefully also) among States that something needs to be done soon; and for the momentum it is creating that could possibly culminate in the type of “global environmental constitutional moment”⁹⁰ that the Anthropocene ultimately demands. The numerous benefits of the Global Pact initiative are obvious, and even if it only gets us talking again about the deficiencies of IEL and finding ways to address these deficiencies, it would already have been worth the many laborious efforts pursued by its proponents.

In theory at least, the Global Pact initiative could do many things, including to increase IEL's normative ambition. And if it does, “[S]tates should take advantage of this opportunity to consider the issues systematically and non-politically, in the hopes of focusing global effort on key areas in need of strengthened international attention.”⁹¹ Looking to the future, and remaining consistent with past State practice, States might very well deliberately shy away from including ambitious norms in a globally binding instrument. But I suspect that this time round it might be slightly more complicated for States to do so and to justify their (in)actions in any plausible way considering that the socio-ecological crisis of the Anthropocene has now become a prominent aspect of peoples' lived realities and of the public discourse (especially in terms of climate change). This, in turn, could raise the pressure on States to act more deliberately. The Global Pact initiative has also already garnered considerable support in the public, scientific and even State domains, which places additional pressure on States to be more readily receptive to instigating reforms of IEL. Collectively this challenges the status quo, namely, that reforming international (environmental) law has historically been, and will continue to be, a protracted process where incremental, politically acceptable, and therefore reforms with *unambitious* results, are the order of the day.

More importantly, however, and looking to the present, what happens now will inevitably shape the future trajectory of the Global Pact initiative, including the design, objectives, scope and normative ambition of a globally binding instrument (if this option remains on the table). Considering the contentious nature of the issue of normative ambition in international (environmental) law, if the Global Pact initiative does not already now endorse the type of norms to address IEL's “unmentionable” gaps, it is highly unlikely that it will do so in future. While we have praised the collective initiative behind the Global Pact, the momentum it creates for change and the hope it offers for much needed structural reform of IEL, French and I have

⁸⁹ Susan 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* 33-39 at 34.

⁹⁰ Louis Kotzé “The Anthropocene's Global Environmental Constitutional Moment” 2015 25(1) *Yearbook of International Environmental Law* 24-60.

⁹¹ Susan 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* 33-39 at 33.

cautioned that it would be “retrogressive to entrench an inadequate document which fails to reflect the imperative of new law, or *Lex Anthropocenae*”.⁹² We have similarly raised concerns about the type of gaps its gap report might concern itself with, including possible ways to “fill” these gaps.⁹³ Our concerns have been shared by others.⁹⁴ Regrettably, these concerns remain. The foregoing analysis suggests that while there are some innovative and normatively ambitious provisions in the draft text of the Pact, it cannot be labelled an ambitious ecological instrument in any overt sense. Neither is the gaps analysis predominantly geared towards raising the level of IEL’s normative ambition by addressing ways in which to fill “unmentionable” gaps.

The Global Pact initiative is currently riding an unprecedented wave of optimism, which is obviously encouraging and well worth of further encouragement. But going forward, it would be important not to be placated by any false sense of security that such optimism and a business-as-usual approach to shaping this initiative might create. If the intention is for the Global Pact to “only” serve as a binding “overarching statement of principles”,⁹⁵ and thus to be less concerned about IEL’s substance while it unambitiously maintains the normative *status quo*, then we need not take the debate on normative ambition any further in the context of the Pact. But then we would also need to be comfortable with the fact (and accept the responsibilities that will come with such a decision) that we are merely preserving, what Brooks calls, the “relative stability of the traditional legal regime”; a regime that in turn provides a “legitimate agenda for conventional legal scholarship ... [which] will treat the traditional environmental law regime as a machine designed to achieve laudable purposes, but needing a squirt of oil here or a new ball bearing there.”⁹⁶ The Anthropocene tells us that IEL requires a complete overhaul, not merely tinkering at the margins.

In a comprehensive assessment of law’s involvement with the processes that cause the Anthropocene, Viñuales recently argued:

...there is a tendency to assume that the role of law is to tackle the negative externalities of transactions (e.g. their environmental or social implications) rather than the core of the underlying transactions (i.e. the organisation of production and consumption processes). Such focus on externalities fails, in my view, to unveil the role of law in prompting, sustaining and potentially managing the processes that have led to the Anthropocene.⁹⁷

I entirely agree that IEL cannot convincingly ignore or deny its entanglement with the rise of *Anthropos*, its mastery of the Earth system, and the unjust socio-ecological order that results therefrom. IEL has been and continues to be complicit in causing, sustaining and exacerbating the Anthropocene’s socio-ecological crisis, if not always explicitly, then certainly in subtle,

⁹² Louis Kotzé and Duncan 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* 811-838 at 834-835.

⁹³ Duncan French and Louis 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* 25-32.

⁹⁴ Susan Biniáz “10 questions to ask about the proposed “Global Pact for the Environment”. Sabin Centre for Climate Change Law (2017). <http://columbiaclimatelaw.com/files/2017/08/Biniáz-2017-08-Global-Pact-for-the-Environment.pdf>. Accessed 24 April 2019.

⁹⁵ Yann Aguila and Jorge Viñuales “A Global Pact for the Environment: Conceptual Foundations” 2019(28) *Review of European, Comparative and International Environmental Law* 3-12 at 12.

⁹⁶ Richard Brooks “A New Agenda for Modern Environmental Law” 1991(6) *Journal of Environmental Law and Litigation* 1-38 at 6.

⁹⁷ Jorge Viñuales “The Organisation of the Anthropocene in our Hands?” 2018 1(1) *International Legal Theory and Practice* 1-81 at 2.

but no less effective and disturbing ways.⁹⁸ And while it is arguably far easier for IEL to address negative externalities such as pollution, it is manifestly more challenging for it to drive the type of structural changes necessary to avoid these externalities in the first place. The three examples I have offered in Part 2 above are cases in point. To this end, the more pertinent question that arises when reflecting on the “task of law in the Anthropocene”, as Viñuales says, “is not merely whether existing legal concepts can be extended and adjusted to reflect the new human condition but, more generally, whether new legal ontologies must be developed that are specifically (not just tangentially) concerned with the geological implications of human powers.”⁹⁹ Ambitious “unmentionable” norms arguably could go a long way to foster such new legal ontologies that more accurately and fully reflect augmented human responsibility. In so doing, ambitious norms could at once contribute to confront head on IEL’s structural complicity in enabling the Anthropocene’s drivers, with the ultimate view to eventually inaugurating a new legal paradigm more fit for purpose in the Anthropocene.

If the Global Pact initiative also endeavors to be part of such a confrontation by raising the level of IEL’s normative ambition (and I believe it should be), then it will have to be much more attentive to embracing the type of ambitious “unmentionable” norms that IEL has hitherto shied away from. The Global Pact and everyone involved with promoting it will have to become much more “hostile” to the *status quo*, despite, or hopefully even consequent on, sustained radical critique that is aimed at bolstering this important initiative.

⁹⁸ Louis Kotzé “International Environmental Law and the Anthropocene’s Energy Dilemma” (Accepted for publication and to appear in *Environmental and Planning Law Journal*).

⁹⁹ Jorge Viñuales “The Organisation of the Anthropocene in our Hands?” 2018 1(1) *International Legal Theory and Practice* 1-81 at 24.