The War of Survival: Towards a Global Pact for the Environment

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This article is an analysis of the Global Pact for the Environment (GPE), and it examines whether the GPE can be a possible solution for a global environmental instrument to address the current climate crisis. The analysis concludes that the international environmental law consists of many gaps, such as lack of implementation and coherence, fragmentation, as well being ambiguous and lacking fully developed principles. The UN process until June 2019 is analysed by examining the open-ended working group's (OEWG) three substantive sessions, whose outcome did not include recommendations to adopt the GPE. Hereafter, shortcomings of the substantive sessions and the draft of the GPE (Draft) are analysed and discussed. Several shortcomings in the substantive sessions, despite the lack of consensus, can be found, such as the swift timeframe and the fear of losing sovereignty. Some of the Draft's shortcomings are a vague and ambiguous language, risk of regeneralising and over-simplifying already fine-tuned principles, and overall it does not bring anything new to the table. The prospects for adopting the GPE in 2022 by integrating the Earth System and/or the Earth Trusteeship are discussed and are found to be a possible, positive approach towards a GPE.

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1. INTRODUCTION

We all know the expression "survival of the fittest" first used by Herbert Spencer and later and most famously Charles Darwin.[1] However, this might have its limits to the extent that no one and nothing can survive on Earth. The ice sheets in Greenland and the Antarctic are melting with a combined loss of 413 billion tonnes of ice between 1993 and 2016. The sea level has risen approximately 16 inches in the last two decades, and the Earth's average surface temperature has increased by 0.9 degrees Celsius since the late 19th century and currently experiences its warmest years since 2010.[2] It is undeniable that the climate is changing. Scientific experts have concluded with a 95 per cent probability that human activities, such as human-produced greenhouse gases, over the last 50 years are causing the Earth's temperature to rise.[3] Human development affects global biodiversity. Species are rapidly becoming extinct,[4] and the extinction rate could lead to the sixth mass extinction in the Earth's history.[5] Something does, indeed, need to be done and María FE Garcés, the United Nations General Assembly President, describes the climate crisis as "an existential threat to life on the planet".[6] We are in the middle of a war of survival.

However, the seriousness is starting to hit home, and a climate action movement has begun. More than 70 countries are devoted to obtaining net-zero carbon emissions by 2050 just as a group of the largest asset-owners have promised carbon-neutral investment portfolios by 2050. Small countries such as Denmark want to take the lead in climate action.[7] The movement is a coalition between governments, businesses, civil society and youth, and is led by the

1 *Darwin in letters, 1866: Survival of the fittest* (Darwin Correspondence Project, University of Cambridge, nd) <https://www.darwinproject.ac.uk/letters/darwins-life-letters/darwin-letters1866-survival-fittest>.

2 Global Climate Change: Vital Signs of the Planet "Climate Change: How do we know?" (nd) NASA <https://climate.nasa.gov/evidence/>.

3 Global Climate Change: Vital Signs of the Planet "The Causes of Climate Change" (nd) NASA <https://climate.nasa.gov/causes/>.

4 K Raworth "What on Earth is the Doughnut?…" (1 October 2019) Exploring doughnut economics <https://www.kateraworth.com/doughnut/>.

5 F Dantas-Torres "Climate change, biodiversity, ticks and tick-borne diseases: The butterfly effect" (2015) 4(3) International Journal for Parasitology: Parasites and Wildlife 452 <https://www.sciencedirect.com/science/article/pii/S2213224415300067>.

6 P Doran "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" (25 May 2019) 35(3) Earth Negotiations Bulletin <https://enb.iisd.org/download/pdf/enb3503e.pdf> at 2.

7 "Danish PM calls climate change 'greatest challenge of our time' at UN summit" (24 September 2019) The Local DK <https://www.thelocal.dk/20190924/danish-pm-calls-climate-change-greatest-challenge-of-our-time-at-un-summit>.

16-year-old Swedish climate activist Greta Thunberg who so correctly stated that: "We can't solve a crisis without treating it as a crisis. We need to keep the fossil fuels in the ground, and we need to focus on equity. And if solutions within the system are so impossible to find, maybe we should change the system itself."[8]

The climate action movement is, without a doubt, positive, but it is not sufficient. International environmental law (IEL) plays a vital role when addressing climate change and the sustainability of the Earth. The overall structure of IEL is fragmented, and there is no overarching normative framework.[9] A characteristic of IEL is the numerous soft law documents — and thus not legally binding — such as the Stockholm Conference of 1972 on Human Environment, which is viewed as the foundation of IEL.[10] Furthermore, the Rio Declaration of 1992 on Environment and Development aimed to reaffirm and build upon the Stockholm Conference and consists of 27 principles, which still influence global environmental law today.

The idea of a Global Pact for the Environment (GPE) emerged in the lead-up to the Paris Agreement of 2015. Some of the efforts made included a report by the legal think tank Commission Environnement of the Club des jurists. The report had 21 recommendations one of which was the need for a GPE. In 2017 a network of environmental experts was established, and under the aegis of the Commission Environnement, five structured consultations were held in order to address the possible need for a GPE. The final draft was presented in a ceremony to French President Emmanuel Macron on 23 June 2017. Hereafter many expert gatherings were held, and on 10 September 2017 the United Nations General Assembly (UNGA) held the launch summit, which was endorsed and convened by the French President.[11]

This article is going to look at the climate crisis from a legal perspective. It will examine if a GPE could be a possible solution for a global environmental instrument to address the current climate crisis. In order to do so, many aspects of the GPE need to be examined and analysed. The second part of the article will examine the conceptual foundations and thereby the reason why a GPE

8 E Rigitano "COP24, the speech by 15-year-old climate activist Greta Thunberg everyone should listen to" (12 December 2018) LifeGate <https://www.lifegate.com/people/news/greta-thunberg-speech-cop24>.

9 C Voigt "How a 'Global Pact for the Environment' could add value to international environmental law" (2019) 28(1) RICIEL 13 at 14 <https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12288>.

10 Y Aguila and J Viñuales "A Global Pact for the Environment: Conceptual foundations" (2019) 28(1) RICIEL 3 at 4 <https://onlinelibrary.wiley.com/doi/full/10.1111/reel.12277>.

11 G de Lassus Saint-Geniès *Not All that Glitters Is Gold: An Analysis of the Global Pact for the Environment Project* (CIGI Papers No 215, Centre for International Governance Innovation, Waterloo, Ontario, May 2019) at 9.

is needed with the General Assembly's Gap Report (Report) as its fulcrum. The third part will briefly examine the draft of the GPE (Draft) in order to get an idea and understanding of the extent and scope of the GPE. The fourth part will examine the UN process until June 2019, where three substantive sessions were held by an ad hoc open-ended working group (OEWG) with the purpose of presenting recommendations based on the Report. The substantive sessions are selected for examination in order to throw light on the complexity of making a global legally binding treaty and as well to be informed on the final recommendations. The fifth part will examine and analyse the shortcomings of both the substantive sessions and the Draft itself. In other words, it will consider why the adoption of the GPE was not included in the OEWG's recommendations. The sixth part will examine the prospects for the GPE and therefore whether the battle for the Global Pact is lost or how the Global Pact can be improved by integrating the scientific Earth System approach or/and the philosophy of Earth Trusteeship.

2. CONCEPTUAL FOUNDATIONS

In order to examine the GPE, it is first necessary to understand the conceptual foundations that led to the initiative and thus the need for adopting a GPE.

2.1 Towards a Global Pact for the Environment

Twenty-six years after the Rio Declaration, 10 May 2018, the UNGA adopted the resolution "Towards a Global Pact for the Environment". The resolution was adopted by a vote of 143 in favour and six against (including Russia and the United States of America) along with six abstentions. It was as a result of this requested that the General Assembly should generate a technical and evidence-based report (Report) in order to identify the gaps in IEL and international instruments. Furthermore, an ad hoc open-ended working group (OEWG) was established whose task was to review the Report and discuss possible solutions to the gaps in IEL. The President of the General Assembly was requested to appoint two co-chairs of the OEWG, of which one should be from a developing country and one from a developed country, respectively Ambassador Amal Mudallali (Lebanon) and Ambassador Francisco AD Lopes (Portugal).

If the OEWG found it necessary, they had the mandate to recommend an international environmental instrument to be adopted during the substantive sessions in the first half of 2019.[12] The Global Pact will be the first international

12 United Nations General Assembly *Towards a Global Pact for the Environment* (14 May 2018) A/RES/72/277 at 2.

treaty — thus legally binding — to address all matters of the environment. It will thereby function as an "umbrella text" joining the principles in the Rio Declaration, the Earth Charter, the World Charter for Nature, and so on, and thus it is not intended to substitute sectoral treaties but instead fill their gaps thereby making them more effective and efficient.[13]

The working group was required to hold an organisational session in New York, followed by three substantive sessions in Nairobi, Kenya. All four sessions have, at this time, been held and will be examined and analysed in regard to UN process until June 2019 in part 4 of this article.

2.2 Gaps in International Environmental Law — the Need for a Global Pact

In this part of the article, the gaps in IEL will be explained by reference to the Report generated by the General Assembly. It should be noted that not every gap in IEL will be analysed, but specific gaps of importance are selected, systemised, and explained. The structure of this part will, however, follow the structure of the Report. Even though the Report also offers suggestions or recommendations to improve global environmental law, these will not be analysed here. The possible solutions will instead be analysed together with the UN process until June 2019, where the OEWG is looking through the Report.

2.2.1 Application of principles of environmental law

Principles and concepts are essential to IEL. Even though a principle is not incorporated into an issue-specific legally binding multilateral environmental agreement (MEA), the principle still plays a role in terms of interpretation and development of MEAs,[14] and thereby the principles function as a gap filling.

However, the principles from the Rio Declaration also contribute to the gaps in environmental law.[15] The Report reveals that there are cases where the content of a principle completely lacks clarity, or there is no judicial consensus as to its applicability, or no recognition in binding legal instruments, or all of the above.

13 Y Aguila and others *100 Jurists Call for action for the adoption of a Global Pact for the Environment* (Global Pact for the Environment, Paris, 9 October 2018) <https://www.leclubdesjuristes.com/wp-content/uploads/2018/10/Jurists-Call-for-action_Globact-Pact-for-Environment.pdf>.

14 Report of the Secretary-General *Gaps in international environmental law and environment-related instruments: towards a global pact for the environment* (30 November 2018) A/73/419 at 6.

15 Aguila and Viñuales, above n 10, at 3.

(i) Principles are not fully developed

The right to a clean and healthy environment has long been recognised as a human right and is stated in the non-binding Rio Declaration. However, it is only recognised in a few sector-specific legally binding conventions. Currently, the principle is recognised in the constitutions of 155 countries. However, the scope of the right and the limit of environmental harm before a breach of the human right is not yet completely defined. The principle, therefore, lacks an internal legal framework.[16]

Another principle that is not fully developed is the principle of non-regression and progression. Non-regression prohibits backtracking in the environmental field and thus ensures that environmental protection is not weakened. The natural consequence and necessary mean are progression, which entails that scientific knowledge shall be used to improve environmental protection and legislation. This principle is recognised in the Paris Agreement but is relatively new in environmental law, so thus not fully developed.[17]

(ii) Only regional application

Environmental democracy includes the principles of access to information, participation in decision-making, and access to environmental justice. The state requirements are stated in principle 10 of the Rio Declaration, which states that each individual shall have access to appropriate information concerning the environment at the national level, and the states shall make this information widely available. However, many of the legal developments that have taken place in terms of endorsing these principles have only taken place in regional matters and lack geographic symmetry.[18] Thus, it constitutes a gap in international environmental law.

(iii) Ambiguous

The precautionary principle is found in art 15 of the Rio Declaration of 1992, which states that a precautionary approach is necessary in order to protect the environment. Furthermore, it emphasises that scientific uncertainty shall not be used as a reason for postponing measures against environmental degradation.[19] However, this principle is an example of how some of the Rio principles have been interpreted and applied differently. The different international courts interpret the precautionary principle differently to the extent that the precautionary principle is not even a recognised customary international norm.

16 Report of the Secretary-General, above n 14, at 11.
17 At 13.
18 At 8.
19 United Nations Conference on Environment and Development [UNCED] The Rio Declaration on Environment and Development (13 June 1992) UN Doc A/CONF.151/5/Rev.1.

When the courts recognise the principle, it varies if it is interpreted as an emerging norm or if it just may be relevant for interpretation purposes.[20] The latter was the case in the *Pulp Mills* case between Argentina and Uruguay concerning the construction of the pulp mills on the Uruguay River, which is shared between the two countries, and whether the pulp mills should be closed due to possible pollution of the river. The ICJ ruled that the pulp mills should not be closed based on the fact that the mills had not yet polluted the river. The Court only found that the precautionary principle "may be relevant in the interpretation … [it] does not follow that it operates as a reversal of the burden of proof".[21] The divergence of application of principle is possible due to the lack of overarching binding principles.[22] The Rio Declaration simply does not offer strong and clear enough guidance for legislators and courts.

2.2.2 Regulatory regimes

MEAs often serve multiple objectives that are not easily reconciled due to political compromises between the involved states. Even though this creates gaps, an MEA with broad participation is not possible without compromise due to states' different national circumstances. In order to bring all states on board, the concept of equity has become essential. Equity often entails that developed countries' obligations include financial, technological and capacity-building support to developing countries, whereas developing countries' obligations are softer and more flexible.[23]

In general, IEL is fragmented and lacks coherence and coordination between sectoral regulatory frameworks. In addition, there are many gaps in specific regulatory regimes, and many issues have no specific legally binding regulations such as biodiversity, pollution of marine areas by land-based plastic waste, conservation and sustainable use of forests, and climate change.[24] A closer view of the gaps regarding air pollution and hazardous substances, wastes and activities will be given.

(i) Air pollution

Air pollution is a major environmental challenge and is addressed in several sectoral and regional instruments.[25] The fragmentation of the regulation creates gaps in "geographical coverage, regulated activities, regulated substances

20 Aguila and Viñuales, above n 10, at 4.
21 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14.
22 Aguila and Viñuales, above n 10, at 4.
23 Report of the Secretary-General, above n 14, at 14.
24 At 43.
25 Such as the Convention on Long-Range Transboundary Air Pollution of 1979 and protocols, the Stockholm Convention on Persistent Organic Pollutants of 2001,

and, most importantly, applicable principles and rules".[26] Some regional instruments are weakly implemented and do not comply with consisting rules. The Convention on Long-Range Transboundary Air Pollution and the supplementary protocols, regarding acid rain and dispersed pollutions, is an excellent example of the result of the fragmentation. The Convention lacks rules on liability, the geographical range is limited, and even some of the protocols have not yet entered into force. The ASEAN Agreement on Transboundary Haze Pollution, from land and forest fires, also lacks rules of liability. Another gap can be added to the list since the Agreement only addresses pollution from land and forest fires, and thus excludes air pollution from other sources. There is, therefore, a need for a connection between the regional treaties or a global approach to air pollution.[27]

(ii) Hazardous substances, wastes and activities

Hazardous substances include the production of industrial chemicals and pesticides. There are significant gaps in the current instruments. In terms of addressing accident prevention, preparedness and response, the instruments are only regional and only cover North America and Europe. Thus, global rules are absent. Furthermore, a legally binding international set of rules in terms of registration, classification, labelling and packaging are not existing.

Hazardous waste poses a potential risk for human health and the existing international rules. The most comprehensive global treaty is the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal of 1989, which strictly regulates the control of transboundary movements of waste. The waste disposal into specific environmental media is regulated on both the regional and international level. However, in terms of recycling and land-based disposal, the legal regulation is almost non-existent when excluding the European Union. Lastly, a significant gap is the absence of liability and compensation since the relevant protocol of 1999 has not yet entered into force.[28]

In regard to hazardous activities, there are only legally binding regulations on nuclear activities hence an absence of legally binding regulations regarding design, siting, and safety assessment of nuclear power plants.[29]

and the Association of Southeast Asian Nations Agreement on Transboundary Haze Pollution of 2002.

26 Aguila and Viñuales, above n 10, at 18.

27 Report of the Secretary-General, above n 14, at 14.

28 At 29.

29 At 29.

2.2.3 Environment-related instruments

Regarding trade instruments, the World Trade Organization has a reluctance to apply environmental principles in order to justify measures that are inconsistent with trade obligations, and the implementation of mutual supportiveness of trade and environment are lacking.[30]

From a global perspective, environmental references to treaty preambles and environmental regulation in investment instruments have recently declined. Moreover, investment instruments do not include matters such as climate change and biodiversity.[31]

Intellectual property instruments interfere with farmers' rights, access, and benefit-sharing from local communities in terms of biodiversity and genetic resources, which do not harmonise with the global agricultural concerns.[32]

States must prevent harm to international human rights, and this obligation includes harm caused by environmental degradation. Many human rights instruments do have a reference to environmental concerns; however, the regional courts are filling the gaps between human rights law and environmental law on a case-by-case basis.[33]

2.2.4 Governance structure of international environmental law

Overall, the governance of IEL is fragmented, and the governance is lacking participation from non-state actors such as major groups, trade unions and NGOs, and scientific and technological communities, whose importance are vital for global governance. The enormous amount of MEAs and treaties generates a potential for overlaps and conflicts, and the lack of coordination between the institutions created by the MEAs and the UN are key challenges. Enhanced coordination is necessary in the international environmental field itself but likewise in other instruments that affect the environment directly or indirectly, such as the instruments mentioned in part 2.2.3 above.[34]

2.2.5 Implementation of effectiveness of international environmental law

Many MEAs have not been implemented in several countries, which creates a gap in terms of addressing environmental challenges.[35]

30 At 30.
31 At 30.
32 At 31.
33 At 31.
34 At 33–35.
35 At 36.

Financial resources, technical and institutional capacities, and environmentally sound technologies are essential for an effective implementation but are lacking. Financial resources for implementation are insufficient, unpredictable, and vary among different regimes. The environmentally sound technologies face challenges such as lack of cooperation among governments and insufficient information.[36]

The reporting and review from developed countries are essential in order to determine whether a country meets its requirements and thus evaluate the effectiveness of implementation. However, such reporting has been lagging behind.[37]

An international environmental court is non-existent; hence the disputes have been settled in different non-specialised international courts and tribunals. However, these courts and tribunals are struggling, especially where environmental damage has not yet occurred. The use of scientific, environmental data experts in order to solve the disputes are limited and thus creates a gap. Furthermore, obstacles are found in the application of environmental norms to environmental harm.[38]

3. THE DRAFT OF THE EXPERTS

In 2017 a legal network of over a hundred legal experts created a draft of a GPE (Draft).[39] The Draft will briefly be explained in order to get an overview of the initial proposal.

It has never been the experts' intention that the GPE should substitute for sectoral treaties. On the contrary, it should harmonise the fragmentation in the more than 500 legal instruments.[40] The idea is a legally binding treaty that shall function as an "umbrella text" by entrenching all the major international environmental principles — and thus making the already existing treaties more effective and efficient by filling out the gaps.[41] The Pact will, therefore, be the first global environmental human rights instrument and contribute to developing a globally recognised right to live in an ecologically sound environment.[42]

36 At 36.
37 At 37.
38 At 38.
39 Aguila and Viñuales, above n 10, at 7.
40 P Magalhães and others *Why do we need an Earth System approach to guide the Global Pact for Environment?* (Common Home of Humanity, 2019) at 3.
41 Aguila and others, above n 13.
42 LJ Kotzé "A critique of the Global Pact for the environment: a stillborn initiative or the foundation for *Lex Anthropocenae*?" (2018) 18 Int Environ Agreements 811 at 812.

The Draft consists of 26 articles where principles of environmental law are codified in arts 1 to 21. In general, the Draft lists several rights and obligations with a horizontal dimension hereunder of general obligations, leading principles of public policies and procedural rights.[43] The Draft entrenches the global environmental principles such as the human right to an ecologically sound environment (art 1), precaution principle (art 6), polluter-pays principle (art 8), public participation (art 10), access to environmental justice (art 11) and common but differentiated responsibilities (art 20). What attracts special attention is the emphasis of the non-state actors such as seen in art 14: "*The Parties* shall take the necessary measures to encourage the implementation of this Pact *by non-State actors* and subnational entities, including civil society, economic actors, cities and regions taking into account *their vital role in the protection of the environment*" (emphasis added).[44] The Draft thus seeks to increase the relevance of the non-state actors.[45] More elements of the Draft will be examined under part 5.2 of this article, where the shortcomings are discussed.

4. UN PROCESS UNTIL JUNE 2019

The ad hoc open-ended working group's task was to review and discuss possible solutions to the gaps in global environmental law. The substantive sessions took place between 14–18 January 2019, 18–20 March 2019 and 20–22 May 2019, respectively. The organisational session will not be elaborated upon in this article.

The first two substantive sessions will briefly be explained and analysed. Hereafter, the third substantive session — the recommendations — will be explained further. In order to fully get a picture of the UN process, a few comments on the recommendations will be included. Due to the scope of this article the main focus will be on the European Union's (EU) comments. However, further observations regarding the process will be drawn into the discussion of shortcomings in part 5.1 of this article.

4.1 The First Substantive Session (14–18 January 2019)

The main focus of the first substantive session was on the contents of the Report by the UNGA. It was concluded that the Report itself had some gaps, and the

43 MM Kenig-Witkowska *The draft Global Pact for the Environment* (ClientEarth Poland, Warsaw, October 2018) at 15.

44 At 24.

45 Kotzé, above n 42, at 6.

US even critically stated that they did not believe that the OEWG could rely on the gaps identified in the Report.[46] However, the OEWG did find the Report to provide a comprehensive overview of the gaps in IEL and related instruments, and thus the Report could serve as a springboard for discussions.[47]

In general, it was stressed by numerous delegations that the Report did not give adequate importance to the customary international law, regional/national agreements, and non-binding instruments. Zooming in on the application of principles, a variety of views amongst the delegations were present. The Report suggested that "a comprehensive and unifying international instrument clarifying all the principles of environmental law would contribute to making them more effective and strengthen their implementation".[48] However, several delegations disagreed; others were open to discussing the possibility of either a binding or non-binding new instrument; some delegations underlined a possible risk associated with reopening and redefining existing principles where others saw the opportunity to update these principles.[49] In terms of regulatory regimes, the importance of not undermining specific regulatory regimes and avoiding duplication was reaffirmed by several delegations.[50]

The environmental-related instruments were understood differently amongst the delegations, where some delegations only interpreted it as non-binding environmental principles. In terms of the gaps concerning intellectual property rights mentioned in part 2.2.3 above, the delegations were divided and either embraced the ongoing process or emphasised the need for progress. Human rights instruments were — as well — either viewed as to include the right to a clean and healthy environment or seen as a distinct system.[51]

A general understanding was, however, present regarding strengthening the governance structure of IEL while maintaining the independence of each MEA. Many delegations agreed with the Report that better coordination and cooperation between MEAs, bodies, and processes are needed and supported the possibilities of synergies between conventions and implementation guidelines for MEAs as proposed in the Report. As well, the importance of non-state actors was shared amongst the delegations.[52]

Several delegations recognised gaps concerning implementation and effectiveness, and there was a broad understanding that the capacities of actors

46 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) at 1.
47 FA Lopes and A Mudallali *Co-Chairs' Summary of the First Substantive Session of the Ad Hoc Open Ended Working Group* (14–18 January 2019) at 1.
48 Report of the Secretary-General, above n 14, at 7.
49 Lopes and Mudallali, above n 47, at 3.
50 At 4.
51 At 5.
52 At 6.

in charge of implementing need to be strengthened. Furthermore, several delegations agreed that developed countries should increase their support to developing countries through the means of financial resources, technology transfer, and capacity building. The lack of an international environmental court was also stressed, and several delegations found it appropriate to make recommendations regarding the lack of liability.

4.2 The Second Substantive Session (18–20 March 2019)

In the second substantive session, the focus changed to the possible options needed to address the gaps and thus prepare for the recommendations in the third substantive session.

The options relating to the gaps in the *principles* without duplicating or undermining existing law were first discussed. The EU had multiple suggestions, and one was a legally binding instrument or treaty containing environmental principles with the possibility of combining it with a non-legally binding instrument.[53] The EU stressed that the importance of the principles should be acknowledged and thus should be taken into account in both the UN process and by states when implementing domestic policies.[54] The International Consortium for the Protection of the Environment supported the idea of a GPE and pointed out that there will be no risk of regression because the GPE will only include a set of minimum standards, and the doctrine of *lex specialis* will apply to the already existing MEAs.

Regarding the options relating to the gaps in the *governance structure*, the EU focused on ratification and implementation of MEAs and encouraged non-yet parties to do so. The EU further suggested that the UN Environment Assembly (UNEA) should give additional support to efforts on synergies as well as the need for improvement in the coordination and cooperation between the MEAs.[55] In terms of a better coherence, the EU called for better information sharing between the MEAs' scientific bodies and suggested a streamlining of the reporting on implementation.[56]

When discussing the possible options regarding the gaps relating to the *implementation* of existing rules and principles, the EU proposed that the United Nations Environment Programme (UNEP) should develop a strategy in order to support the states' challenges in terms of implementation. Furthermore,

53 P Doran "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" (22 March 2019) 35(2) Earth Negotiations Bulletin <https://enb.iisd.org/download/pdf/enb3502e.pdf> at 8.

54 At 4.

55 At 5.

56 At 9.

the private sector was pointed out as a good source for funding environmental initiatives. Quite contrary to several delegations, the US did not see a lack of implementation as a gap in environmental law.[57]

In terms of the options to address the gaps and strengthen the implementation in *specific regulatory regimes* or environmental-related instruments, the EU underlined the importance of reporting and compliance mechanisms to achieve effective implementation of existing MEAs. The EU also saw the need for rapid political action, including action on marine and plastic litter. Several other delegations came up with suggestions on how to approach the gaps, such as better coordination between existing instruments and to strengthen the role of the United Nations Environment Programme. Once again, the US did not view the design elements in the current MEAs as gaps.[58]

4.3 The Third Substantive Session (20–22 May 2019)

On the first day, the pros and cons of a new instrument were debated among the delegations. There was no overall consensus of adopting a new environmental instrument, and after just 24 hours, the idea of an instrument was off the table. Delegations such as the US, Russia, Japan, Mexico and Brazil lacked consensus.[59] The US stressed that any support for a possible legally binding document would be crossing a red line.[60] Switzerland did not believe that the process should go through the UNGA, Norway emphasised its sympathy for the worries of lack of clarity, and Canada recognised the lack of consensus suggested of considering multiple options.[61]

In the rest of the third session, the draft recommendations created by the co-chairs based on the OEWG's discussions became the focal point,[62] and many small adjustments were made during the debate. The adjustments will nevertheless not be the focal point of this part of the article, whereas the final recommendations to the UNGA will be the main focus. It must be noted that the below-mentioned recommendations are a broad overview, and for the precise recommendations, please refer to the OEWG's final recommendations. However, comments made by the EU and the US will be included.

The recommendations are divided into three sections: (i) the objectives guiding the recommendation; (ii) the substantive recommendations; and (iii) consideration of further work.

57 At 7.
58 At 8.
59 Doran, above n 6, at 8.
60 U.S. Submission, above n 46, at 2.
61 Doran, above n 6, at 5.
62 At 2.

In terms of the objectives guiding the recommendation, the OEWG recommended reinforcing the protection of the environment, to uphold respective obligations and commitments, strengthening the implementation, supporting the full implementation of the 2030 Agenda for Sustainable Development Goals (SDGs) and the outcome of the UN Conference on Environment and Development (Rio+20).[63] The EU also wanted to include a rapid change of actions in the areas that are not sufficiently addressed on a global level, but this was not included.[64]

In terms of the substantive recommendations, the OEWG overall recommended that the UNEP, as the leading global environmental authority, should promote a coherent implementation and function as an authoritative advocate for the global environment. There is a need for a renewed effort in order to enhance the implementation of IEL.[65] The EU, once again, stressed the importance of enhancing political awareness.[66] The OEWG further recommended that the ongoing work of the International Law Commission on general principles of law should be recognised. It is recommended that the scientific community strengthens cooperation among themselves. Likewise, that they share information and experiences with the bodies that inform the work of MEAs, and streamlining of the reporting for better coherence should be considered. The governing bodies of the MEA shall as well increase the effort to create policy coherence across environmental instruments as well as addressing the implementation challenges within the regimes. The bodies of MEAs are also invited to enhance cooperation among themselves and UNEP and UNEA. The OEWG recommends that all MEAs must be ratified, and international environmental laws, regulatory frameworks, and policies must be strengthened at the national level where needed. It is encouraged to include the environment into all levels of sectoral policies and programmes and have active and meaningful engagement from all stakeholders.[67] The EU, in their comments to draft recommendations, stressed that this should include investments in environmental matters and from the private and financial sectors. The EU also stressed that human rights defenders in environmental matters should be protected.[68] Lastly, it is recommended to explore further ways of supporting the

63 Ad hoc open-ended working group established by General Assembly Resolution 72/277 *Recommendations, as agreed by the working group (22 May 2019)* <https://wedocs.unep.org/handle/20.500.11822/28367> at 1.

64 The European Union *EU & MS Opening Statement for the Third substantive session of the AHOEWG on Global Pact for the Environment (20–22 May 2019, Nairobi)* <https://globalpact.informea.org/sites/default/files/documents/EU_Opening.pdf > at 1.

65 Ad hoc open-ended working group, above n 63, at 1.

66 The European Union, above n 64, at 1.

67 Ad hoc open-ended working group, above n 63, at 2.

68 The European Union, above n 64, at 2.

Montevideo Programme and continuing to strengthen system-wide inter-agency environmental coordination.[69]

Overall, the connection thread of the recommendation from the OEWG is the lack of sufficient implementation. Thus, the OEWG focused on ratifying, enhancing, strengthening, and promoting coherent implementation. As well, the recommendations focused on better cooperation, collaboration, information sharing, and engagement. Having studied the second substantive session, these recommendations are of no surprise, and the roots clearly stem from the debates in the session. As mentioned in part 2.1 above, the OEWG had the mandate to recommend a legally or non-legally binding instrument, but such a recommendation was not proposed. A GPE would thus not see the light of day in 2019. However, the EU successfully managed to include a UN high-level meeting, which would keep the door open for the possibility of a GPE.[70]

5. SHORTCOMINGS — WHY DID THE GPE FAIL?

In this part of the article, the shortcomings of the GPE will be discussed. This part will focus both on (i) the shortcomings of the OEWG's substantive sessions as well as (ii) the shortcomings of the Draft.

5.1 The Substantive Sessions

In order to examine the shortcomings of the GPE, it is essential first to examine why there was no consensus to adopt the Pact on the third substantive session. This will give a broader understanding of the shortcomings concerning the GPE and will illustrate an interlinkage between the quality of the Draft and the outcome of the negotiations.

For many experts and climate enthusiasts, the outcome of the OEWG's negotiations was disappointing, and Co-Chair Duarte Lopes viewed the result as weak comparing it to the high ambitions for the GPE project.[71] The reasons for this outcome can be many, but the general feeling of fear amongst some delegations played a fundamental role. The concerns were expressed by one delegate as "fear of losing sovereignty, fear of complicating existing MEA regimes, fear of opening up established principles and their varied/contested application, and, significantly for developing countries, a fear of committing to steps that they lack the capacity to implement".[72]

69 Ad hoc open-ended working group, above n 63, at 2.
70 Doran, above n 6, at 11.
71 At 11.
72 At 11.

The mutual feeling among many can perhaps be explained by looking at the process as a whole. Chabason and Hege view the rapid process, since the summit launch in 2017, as a disadvantage, and emphasise that it requires time to take ownership of negotiations.[73] A process of one and a half years to make the first global legally binding environmental instrument combined with only three substantive sessions of a period of four months is a short time for all delegations to negotiate and, at the same time, consider all the above fears. In fact, even Mexico and Costa Rica, some of the countries that generally were positive towards the GPE, stressed that there was a lack of time to discuss and share ideas for the recommendations of a GPE.[74] Moreover, the EU stressed that "further work is necessary" due to the short time of the third substantive session.[75] As mentioned in part 4.3 above, countries such as Switzerland, Canada and Norway did not give the GPE their full support even though these countries generally are viewed as being very environmentally friendly. The EU — at the forefront of the environment — was divided: one side supporting France and the GPE, and those less convinced of the GPE as a binding instrument supporting Germany.[76] It is generally positive that the EU speaks for all and thereby represents every member of its union because it makes the EU appear stronger. However, in this case, the one voice made the debate less nuanced since the member states that supported the GPE were not heard. There was simply a general lack of consensus of making the soft law principles legally binding.

Overall, it seems like a rushed and confusing process. The delegations have had struggles with the meaning of the UNGA's use of gaps in the Report, and even on the last day of the negotiation, some were still struggling. Furthermore, after the possibility of adopting an instrument was off the table, it is argued that just keeping the process going became the ambition of the third session.[77] Finally, looking at the positive side of the negotiations, Co-Chair Mudallali does view this as the first step in a continuing process with 2022 as its milestone.[78]

73 L Chabason and E Hege "Failure of the Global Pact for the Environment: a missed opportunity or a bullet dodged?" (28 May 2019) IDDRI <https://www.iddri.org/en/publications-and-events/blog-post/failure-global-pact-environment-missed-opportunity-or-bullet> at 4.

74 At 4.

75 The European Union, above n 64, at 2.

76 Chabason and Hege, above n 73, at 3.

77 Doran, above n 6, at 10.

78 At 9.

5.2 The Draft

Next, some shortcomings of the Draft are picked out and discussed further. The shortcomings of the Draft will as well throw light upon why adoption of the GPE was not recommended in the third substantive session.

5.2.1 Lack of evidence

The Draft is meant to be an "umbrella" document that will make the already existing IEL more effective and efficient by addressing the fragmentation in IEL and thus filling out the gaps. However, the question of whether the Draft will do such a job can be asked.

It is argued by Kotzé that there is no such evidence that defragmentation of IEL will constitute a more efficient and effective global environmental governance.[79] In fact, Kotzé makes several points about why the opposite might be the case. First of all, he argues that due to Earth's diverse challenges, a fragmentation of the law might be a better fit as it can and is tailor-made in order to address specific challenges in specific environmental sectors.[80] A fragmentation thereby allows more flexibility and innovation.[81] Biniaz mentions the example from the negotiations (ICAO) regarding the issue of international aviation's usage of greenhouse gases. The negotiations were conducted by using innovative and problem-specific solutions and would thus not have benefited from the general principles in the GPE.[82] Secondly, global environmental governance is sectorised (water, climate, air pollution, etc), and it is not possible to consolidate all environmental principles, and hence, only the key principles will be included in the GPE.[83] Chabason and Hege even make the argument that an adoption of the GPE could have led to more fragmentation and even weaken IEL if a small majority would have adopted the GPE. Some countries would have signed the treaty without ratifying its content. Likewise, as mentioned in part 4.3 above, many countries (including significant countries) were not in favour of the GPE and would not have signed the treaty. These countries' contributions to the negotiations would, therefore, have weakened the outcome of the GPE. Furthermore, some countries would not have allowed the GPE,

79 Kotzé, above n 42, at 6.
80 Saint-Geniès, above n 11, at 15.
81 Kotzé, above n 42, at 7.
82 S Biniaz "10 Questions to Ask About the Proposed 'Global Pact for the Environment'" (August 2017) Sabin Center for Climate Change Law, Columbia Law School <http://columbiaclimatelaw.com/files/2017/08/Biniaz-2017-08-Global-Pact-for-the-Environment.pdf> at 10.
83 Kotzé, above n 42, at 7.

as international law, to be invoked before the national courts by their citizens or NGOs.[84]

Finally, the point should be made that just because the soft law principles become legally binding does not itself improve the quality or effectiveness of IEL.[85]

5.2.2 Language

Reading the articles of the Draft, a particular pattern of vagueness emerges. The GPE was meant to be a legally binding treaty; however, the language of the Draft is typical of soft law documents. Already in the preamble, the Draft affirms the "need to adopt a common position and principles that will *inspire* and *guide* the *efforts of all* to protect and preserve the environment" (emphasis added). First of all, it can be discussed how to determine the legal status of "inspire and guide". Secondly, the "efforts of all" is vague in the sense that it questions to whom the GPE is addressed and the legal status of the GPE itself.[86] The preamble further "welcomes the vital role of non-State actors, including civil society, economic actors, cities, regions and other subnational authorities in the protection of the environment"[87] — does the "effort of all" then include all of the beforementioned? That would indeed contradict the legal status of the GPE as a treaty because only states can be parties since individuals and NGOs are not subjects of international law.[88]

The vague or weak language continues within the articles. An example is art 5 which states that "[t]he *necessary measures* shall be taken to prevent *environmental harm*" (emphasis added).[89] What does "necessary measures" actually entail? It is not very precise and can be interpreted differently by different states. The prevention principle was also a subject for interpretation in the *Pulp Mills* case. Here the Court stated that "[a] State is thus obliged *to use all means at its disposal* in order to avoid activities … causing significant damage to the environment of another State", which Kotzé finds to strengthen the obligation of the principle why art 5 should have borrowed the phrase.[90] Furthermore, the broad term "environmental harm" is unclear, and it will create significant interpretive problems of a legally binding treaty.[91]

84 Chabason and Hege, above n 73, at 6.
85 Kotzé, above n 42, at 7.
86 At 13.
87 Kenig-Witkowska, above n 43, at 3.
88 Biniaz, above n 82, at 4.
89 Kotzé, above n 42, at 4.
90 At 18.
91 Biniaz, above n 82, at 5.

Another example can be found in art 15, which states that parties "have the duty to adopt *effective* environmental laws, and to ensure their effective and fair implementation and enforcement" (emphasis added).[92] Once again, the question can be asked what "effective" entails. Nevertheless, it *could* relate to the adherence to specified minimum standards based on proper science in order to improve environmental quality or avoid deterioration.[93]

The last example is art 17, which states that "[t]he Parties and their sub-national entities refrain from allowing activities or adopting norms that have the effect of reducing the global level of environmental protection *guaranteed by current law*" (emphasis added).[94] By "current law" is the GPE then referring to the current law in the different states or a specific MEA in international environmental law? This remains unclear.[95]

5.2.3 The codification of principles

The British Supreme Court Judge Robert Carnwath said in a speech in 2018 that a codification of the IEL principles would pose a great symbolism and "could provide a strong and principled framework for the interpretation and development of those national laws within a shared global vision of the environmental rule of law".[96] A codification and consolidation of environmental principles can perhaps increase the relevance, visibility and usage of the principles and thereby ease interpretation, and in the absence of applicable rules, it can fill out the normative gaps.[97]

However, it is not just a bed of roses. There is a risk to consider when codifying principles. The IEL is sectorised, and the principles in the different MEAs have been adjusted and modified to fit the specific challenges within its regimes, and there is, therefore, a risk of undermining these fine-tuned principles. The principle of "common but differentiated responsibilities" (Rio Declaration) is one of the principles that has been developed and adjusted multiple times. It stems from the general concept of equity, and regarding climate change, the principle has changed to "common but differentiated responsibilities *and respective capabilities*" (emphasis added) in the United Nations Framework Convention on Climate Change, and more recently the

92 Kenig-Witkowska, above n 43, at 6.
93 Kotzé, above n 42, at 20.
94 Kenig-Witkowska, above n 43, at 7.
95 Biniaz, above n 82, at 5.
96 Lord Carnwath, Justice of the Supreme Court "Climate justice and the Global Pact" (Judicial Colloquium on Climate Change and the Law in Lahore, Pakistan, 26 February 2018) <https://www.supremecourt.uk/docs/speech-180226.pdf> at 11.
97 Voigt, above n 9, at 20.

phrase "in light of different national circumstances" was added in the Paris Agreement. In the latter, the addition was made in order to break a negotiation deadlock and to include a broader application of circumstances of responsibility. There is, therefore, a risk of regeneralising or over-simplifying a principle in the GPE's codification and thus losing the progress and development of the principle already achieved in the climate regime.[98] Biniaz likewise points out that the precautionary principle in art 16 of the Draft is different from other expressions of the principle, for example in the London Protocol. It differs in various aspects, such as how serious the harm must be, the measurements to be taken, and the scientific level of inconclusiveness. Again, this is because the MEAs are designed to address a particular environmental challenge.[99]

Additionally, there is no clear articulation of the intent of the GPE. The principles such as prevention, precaution, and polluter-pays can already be found in several MEAs and other soft law documents, hence one can ask the question — what is the relationship between the principles in the GPE and where they are found elsewhere? In case of a conflict, which instrument's principle would prevail?[100] Voigt, overall, states that there is no hierarchy of normative order in terms of interpretation of IEL. Nonetheless, Voigt does refer to the classic doctrine or guidelines of *lex specialis*, *lex posterior*[101] in case of a conflict of laws.[102] However, this does not constitute a clear answer. On the one hand, some states could argue that a specific MEA is *lex specialis*, thus it prevails over the general principles in the GPE. On the other hand, some states could argue that the GPE is *lex posterior*, and thus the principles prevail over the prior MEAs. As Voigt argues, this could lead to confusion of the application of principles, and in the worst case, it can undermine earlier but more specific expressions of a principle.[103] In fact, the US under the substantive sessions did likewise share this concern and said that even a new non-binding instrument would be insufficient, and there would be a risk of losing the ground gained through previous MEAs.[104]

Furthermore, it can be argued that if the fundamental principles were codified into the GPE it could, ultimately, become a problem for environmental protection. Judges might be less likely to clarify the content of the principles and not recognise new environmental principles. This could thereby restrain the role of international judicial bodies in the development of IEL.[105]

98 Voigt, above n 9, at 21.
99 Biniaz, above n 82, at 6.
100 Kotzé, above n 42, at 19.
101 Voigt, above n 9, at 20.
102 *Lex superior* is not important in this context since there is no hierarchy in international environmental law.
103 Voigt, above n 9, at 21.
104 Doran, above n 6, at 4.
105 Saint-Geniès, above n 11, 19.

Finally, states have different understandings of the same principle, and this is unlikely to change just by codifying the principles.[106] To support this argument, the Draft's arts 5 to 8 are in broad terms, just a "copy and paste" of key environmental principles without any attempt to revise or update them and, thus, they do not offer anything noticeably different from the current IEL.[107]

5.2.4 Pure omissions

It is also worth mentioning that the Draft also has pure omissions. One example is the omission of art 23 of the Rio Declaration, which states that "[t]he environment and natural resources of people under oppression, domination, and occupation shall be protected".[108] This is not included in the Draft even though it is a principle of importance since it reaffirms the fundamental rights of IEL.[109] Another example is the Draft's art 19 regarding environmental damage associated with armed conflicts. First of all, the article is not clear whether "their obligations under international law" is referring to existing law or if this article is changing the law of armed conflicts.[110] Secondly, the article does not reflect current law, and it does not address the armed conflicts that stem from, for example, climate change, shared resource use, and environmental-related migration, which all are vital concerns that are unsolved.[111] Lastly, the Draft does not include an international environmental court, even though it could create a judicial body for the peaceful settlement of global environmental disputes.[112]

5.2.5 Anthropocentric — an outdated worldview

The Draft's language overall has traces of the anthropocentric approach to sustainable development, and this can be argued to be a general shortcoming of the Pact. Anthropocentrism is the acknowledgement of human beings as being the most important consideration, thus the centre of the world. The anthropocentric worldview views the evolution of nature, the evolution of cultures, and the evolution of humanity as separate processes.[113] In other words, it is the protection of rights and interests of humans to a clean environment,

106 Voigt, above n 9, at 20.
107 Kotzé, above n 42, at 17.
108 UNCED, above n 19, at 4.
109 Kotzé, above n 42, at 17.
110 Biniaz, above n 82, at 9.
111 Kotzé, above n 42, at 22.
112 At 23.
113 K Bosselmann *When Two Worlds Collide: Society and Ecology* (RSVP Publishing, Auckland, 1995) at 60.

while the environment itself is only viewed as an object of property.[114] In the preamble, the Draft recalls the commitment to the Sustainable Development Goals, which are anthropocentric oriented; hence the Draft already here emphasises its anthropocentric worldview. The preamble, furthermore, states that the ecosystem shall "contribute to human well-being". The Draft thereby prioritises economic and social development at the expense of global Earth system integrity.[115]

The anthropocentric approach does not end at the preamble, and art 1 — the *grundnorm* of the Draft — states that "*[e]very person* has the right to live in an *ecologically sound environment* adequate for *their* health, well-being, dignity, culture and fulfilment" (emphasis added). The Pact's *grundnorm* does not promote an ecologically sound environment for the sake of mother nature itself but only for human development.[116] The anthropocentric approach is argued to be what caused the global environmental crisis in the first place.[117] Additional examples will not be touched upon in this part of the article. However, Earth-centred and nature-centred worldviews will be discussed further in the prospects for the GPE.

6. PROSPECTS FOR 2022 — IS THE BATTLE LOST?

The outcome of the OEWG's substantive sessions did not include a consensus for the GPE, and as mentioned above, there are many shortcomings and thus reasons for the disappointing result. The OEWG will, however, meet again mid-2022 for the celebration of the 50th anniversary of the Stockholm Conference, and Switzerland pointed out in the third substantive session that this could create the necessary political momentum for the GPE.[118] However, the question remains: is the battle lost, or is there still a ray of hope for a Global Pact for the Environment?

Many environmental law experts have criticised the anthropocentric approach to IEL, just as Kotzé objected above. There is a need for a paradigm shift.[119] Some law experts have been calling for an eco-centric turnaround.[120]

114 LJ Kotzé and RE Kim "Earth system law: The juridical dimensions of earth system governance" (2019) 1 Earth System Governance 1 at 6.
115 Kotzé, above n 42, at 12.
116 At 13.
117 K Bosselmann "Ecological Human Rights and Constitutions" in K Bosselman *The Principle of Sustainability: Transforming Law and Governance* (Routledge, New York, 2017) 148.
118 Doran, above n 6, at 5.
119 Kotzé, above n 42, at 24.
120 Bosselmann "Ecological Human Rights and Constitutions" , above n 117, at 148.

An eco-centric approach to IEL is *nature* centred.[121] However, a more modern perspective is the Earth System approach. This is neither human- nor nature-centred. The Earth-centred approach has the entire community of life as its central fulcrum in a state-centric system.[122] Human-social and ecological elements are intertwined: "The stability of the ecological element is required for the human-social element to flourish, while the human-social element is determinative of the overall stability and integrity of the Earth system … ."[123] The Earth System thus embodies a transformed global democracy, the rights of nature, and a global ecological citizenship.[124] Could such an Earth System approach be an asset in the battle?

6.1 Earth System

It is argued that the GPE's goal of creating coherence, effectiveness, and harmonising the MEAs will be meaningless unless the importance of the interconnection between the different elements of the environment is adopted in the GPE. The different environmental elements are so intertwined that they function as a single Earth System.[125]

Magalhães and others point out that Alexandre Kiss framed the problem of the international environmental structure back in 1982: "'How can we admit that a good, which belongs to no one, can be governed by a specific law'? We clearly need to *define* what 'global environment' is, what is the *good/object* that should be put under the protection of the law, and to whom it belongs."[126]

It was not possible to define this in the 1980s, but by using contemporary science and the concept of the Earth System, this is now possible. The planetary boundaries (PB) framework based on scientific findings contains useful elements in order to understand the function of the Earth System.[127] The PB framework consists of nine key processes[128] that determine the Earth System's functions. The existing conventions only address some of the PB and only in a limited manner.[129] It is important *not* to continue to address the PB in isolation

121 At 149.
122 A state-centric system meaning that the state is the central source of legitimacy and authority.
123 Kotzé and Kim, above n 114, at 5.
124 Kotzé, above n 42, at 8.
125 Magalhães and others, above n 40, at 3.
126 At 4 (emphasis added).
127 At 4.
128 (i) climate change; (ii) stratospheric ozone depletion; (iii) land system change; (iv) freshwater use; (v) change in biosphere integrity; (vi) ocean acidification; (vii) biogeochemical flows; (viii) atmospheric aerosol loading; and (ix) introduction of novel entities.
129 Magalhães and others, above n 40, at 5.

and thus ignore the interaction with other PB processes, the feedbacks, and domino effects caused by the interaction. It is these feedback loops that create the Earth System's self-regulation.[130] The goal is to keep the Earth System within the science of the dynamic and functional Safe Operating Space for Humanity. The science makes it possible to measure the necessary conditions to support life and thus determine the limits of the PB in order to stay within the Safe Operating Space for Humanity.[131] In fact, it is possible to go a step further and view the PB alongside the social boundaries such as the economist Kate Raworth has done in her "doughnut" model, which she states can act as a compass for human progress.[132]

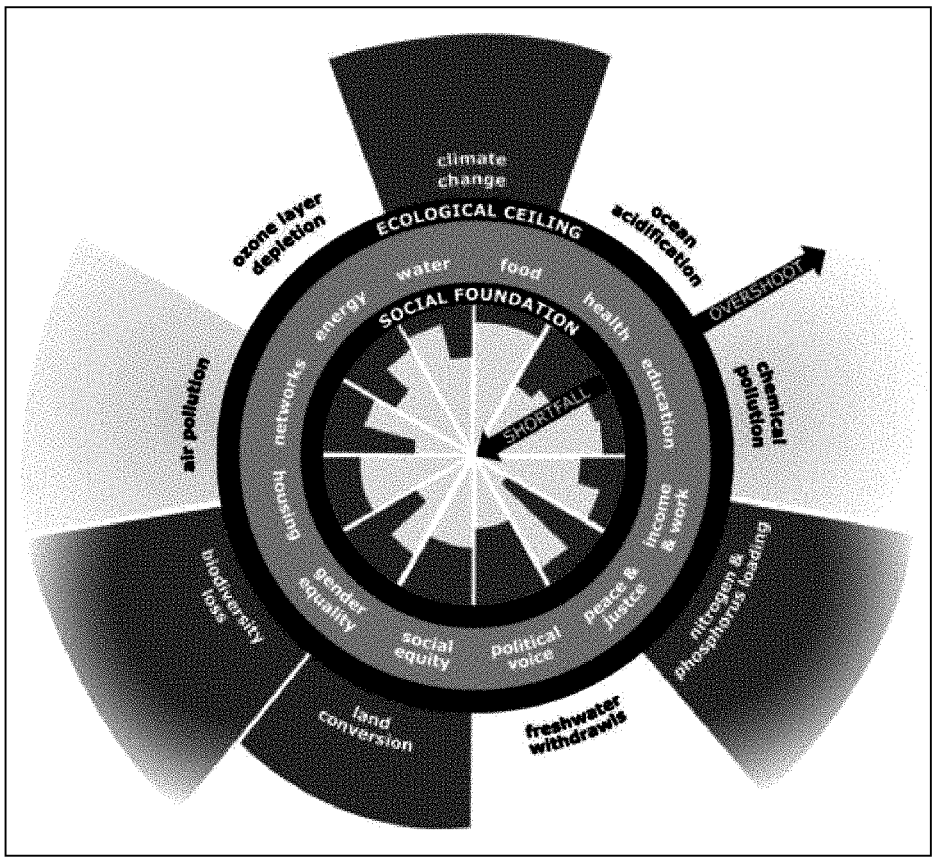

Figure 1: The Doughnut of social and planetary boundaries (2017).

130 At 11.
131 At 11.
132 Raworth, above n 4.

The green "doughnut" defines the Safe Operating Space for Humanity. As seen in the illustration, many planetary boundaries are already overshooting, and the social boundaries are short. The climate change boundary is maximum 350[133] but the current value is 400 and is continually increasing. The biodiversity loss cannot extend more than 10[134] but this value is currently between 100 and 1,000 and still increasing.[135]

It is, therefore, possible with the science of the Earth System to establish targets and thus be assured that we can bring the climate to a specific stabilisation.

The Report (section 1.2) reveals many gaps such as fragmentation and lack of coherence and coordination between sectoral regulatory frameworks; however, the absence of an Earth System approach can be viewed as an additional gap.[136] The Earth System is still an unidentified legal object, and the law does not reflect the complexity and wholeness of the Earth.[137] The Earth System will need to be addressed as a legal object, and thus has legal implications. It needs to be mentioned that this will not conflict with the sovereign rights of the state since there can be no sovereignty over the biogeochemical quality of the territorial waters or airspace. It is the common heritage of humankind.[138]

Kotzé believes that the Earth System approach would strengthen the symbolism of the GPE. It would need to be incorporated in its name and provisions.[139] Kotzé states that even the reference to the word "environment" in the title is a reprint of the Rio Declaration and the Stockholm Convention's wordings that both unsuccessfully addressed a greater care to the non-humans. He suggests that just by substituting "environment" with "nature" or "Earth" will create a more significant symbolism of how *we*, human beings, are a part of the Earth System.[140]

Furthermore, other experts have argued that the GPE's goal of creating coherence and effectiveness among the MEAs only can be done by harmonising them based on a scientific foundation due to the interconnection of the Earth.[141] This can be done by incorporating a new art 1 in the GPE based on the integrity and unity of the Earth System, which in short entails that: "The parties recognize that the Earth System is a single and complex system … [and] the Earth System

133 Atmospheric carbon dioxide concentration parts per million.
134 Rate of species extinction per million species per year.
135 Raworth, above n 4.
136 Magalhães and others, above n 40, at 7.
137 Kotzé and Kim, above n 114, at 5.
138 Magalhães and others, above n 40, at 13.
139 Kotzé, above n 42, at 8.
140 At 9.
141 Magalhães and others *Integrity and Unity of the Earth System: A New Principle of International Environmental Law* (Common Home of Humanity, 2019) at 5.

should be addressed as a single interconnected whole, and Humanity should develop deliberate and sustained action to become an integral, thus, humanity should develop and sustain action to adapt to Earth System dynamics."[142]

6.2 Earth Trusteeship

Not only the Earth System has been suggested as the way forward in the battle towards a sustainable Earth and the GPE. In fact, an "appeal" was made to include the Earth Trusteeship and the Hague Principles in the OEWG's process towards the recommendations.[143]

The Hague Principles were adopted 10 December 2018 on the celebration of the 70th anniversary of the Universal Declaration of Human Rights. The Hague Principles entails the principles of Earth Trusteeship in the context of human rights and responsibilities. Even though the Earth Trusteeship principles were only recently adopted, the philosophy has been a life mission to former and late Vice President for the International Court of Justice CG Weeramantry who stated that "[h]umanity is in a position of trusteeship of the environment and not in a position of dominance".[144]

The maxim of Earth Trusteeship is that "[a]ll global citizens are equal trustees of the Earth for the benefit of future generations".[145] This means that humanity must not act as the legal owner of the Earth but must act as a trustee for the Earth, which includes the responsibilities to care for the future generations for the common good.[146] Earth Trusteeship can therefore be viewed both (i) as an ethical commitment and (ii) as a new type of governance, which speaks and acts on behalf of all the Earth trustees but also on behalf of those without a voice such as Earth, non-humans, and our future generations.[147]

The Hague Principles only consist of three fundamental principles, namely (i) the responsibilities for Earth, (ii) the responsibilities within the community of life, and (iii) the responsibilities for human rights.[148] At the launch of the Hague Principles, Bosselmann stressed that the core message to be taken from the Hague Principles is that all humans are members of the community of life,

142 At 5.

143 *Earth Trusteeship Initiative — proposal for GPE* (School for Wellbeing Studies and Research, 2019) <https://wedocs.unep.org/bitstream/handle/20.500.11822/27976/ETI_proposal.pdf?sequence=1&isAllowed=y?> at 2.

144 At 1.

145 At 8.

146 At 7.

147 K Bosselmann "Earth Trusteeship Forum, 10 December 2018, Peace Palace, The Hague" Alliance for Responsible and Sustainable Societies (October 2018) <http://base.alliance-respons.net/docs/concept_for_10_december.pdf > at 2.

148 The Hague Principles for a Universal Declaration on Responsibilities for Human Rights and Earth Trusteeship, 10 December 2018.

the Earth System, thus referring to the second principle. Further stressing that human rights must be viewed on a larger scale and indicating that the duties and responsibilities of humans, individually and collectively, are more fundamental than human rights itself. Bosselmann states that "without it, we would be saying that Earth doesn't matter, and that human survival doesn't matter either".[149]

Countries such as Germany and Norway have already been amending their constitutions by adding environmental rights and duties. Likewise, in 2014 the Supreme Court of New Zealand rejected the courts' economic-friendly approach as not in accordance with the purpose of the Resource Management Act 1991 — making a constitutional change where "economic development [is] conditional to preserving the integrity of ecological systems".[150] Around the world, there are traces of the idea of Earth Trusteeship in the form of the legal trusteeship over natural objects by giving nature a legal status such as the Whanganui River in New Zealand and the Himalayan mountains, rivers, forests and so on in India.[151] Bosselmann stresses the need for a clear voice of the Earth Trusteeship[152] and perhaps this voice is to be found in the Global Pact for the Environment?

As discussed in part 5.2.1 above, regarding shortcomings of the Draft, innovation and flexibility are essential, and the Draft's art 13 itself refers to the importance of research and innovation. Making the Earth Trusteeship function as an overarching principle will thereby embrace such an innovative approach to IEL.[153] Furthermore, it adds the positive dimension of addressing inequality, it strengthens global citizenship,[154] and adds education and awareness of sustainability.[155]

However, not everyone views the Earth Trusteeship with the same enthusiasm, especially when it comes to sovereignty and natural boundaries. However, it is argued that the Earth Trusteeship does not challenge the states' sovereignty over natural resources, but on the contrary, the increased responsibility will strengthen sovereignty.[156] This reassertion of the national

149 K Bosselmann "The Launch of the Hague Principles" (speech, 10 December 2018, time: 14.05) <https://www.earthtrusteeship.world/the-launch-of-the-the-hague-principles/>.

150 K Bosselmann "The Next Step: Earth trusteeship" (Seventh Interactive Dialogue of the United Nations General Assembly on Harmony with Nature, UN Headquarters, New York, 21 April 2017) <http://files.harmonywithnatureun.org/uploads/upload96.pdf> at 3–4 referencing *Environmental Defence Society Inc v New Zealand King Salmon Co Ltd* [2014] NZSC 38, [2014] 1 NZLR 593.

151 At 4.

152 At 4.

153 *Earth Trusteeship Initiative*, above n 143, at 11.

154 At 11.

155 At 12.

156 At 8.

sovereignty is problematised and viewed as a utopian by Barr and other authors.[157]

Nevertheless, Bosselmann is of the belief that the ideal of the Earth Trusteeship "is closer to reality than we may think". He emphasises that states must act as a trustee for the environment in order to strengthen the legitimacy of a 21st-century state.[158]

6.3 Is One Asset Enough to Win the Battle?

The Earth System and the Earth Trusteeship are different approaches to a sustainable Earth, and have, in theory, nothing to do with one another. In other words, one does not need to be an Earth System scientist in order to appreciate the philosophy of the Earth Trusteeship. However, is it really this black and white? Is one asset enough to win the battle, and if so, which one?

First of all, I do not believe that the idea of Earth Trusteeship can function with an anthropocentric worldview. In order for the Earth to survive, humans cannot continue to be the centre of the world. There is, indeed, a need for a paradigm shift. One could argue that the Earth Trusteeship will function just fine in an eco-centric worldview. However, even though nature is vital, I do not believe that this is ambitious enough. Why not take advantage of the science and recognise that we have the knowledge of the planetary boundaries to set targets in order to be within the Safe Operating System? This will make the Earth itself the centre of the world. The planetary boundaries give us the right to use portions of the Earth. One could ask if the Earth System science, thereby, is enough? No, I do not believe so. As mentioned before, duties and responsibilities are more fundamental than rights; thus, we will need to add the responsibilities of Earth Trusteeship. A UN Trusteeship Council for the Earth System and the common heritage will be essential and will supplement a GPE by defining priorities, compensation, budget and so on.[159]

Secondly, one thing is certain. The Earth needs a legal status. Earth has been treated as an unlimited resource, and humans have been acting like owners. The lack of a legal status causes, for example, pollution, to go unsanctioned because there is no one to claim a violation of its rights.[160] Bosselmann suggests that civil society should be common legal owners of the atmosphere and thereby be

157 M Barr, Newcastle University "*Earth Governance: Trusteeship of the Global Commons* by Klaus Bosselmann" (review, nd) <https://eprints.ncl.ac.uk/file_store/production/251061/F334175D-A44B-4C54-AE0B-AE20684890CA.pdf > at 2.

158 Bosselmann, above n 150, at 2.

159 Magalhães and others, above n 40, at 14.

160 Bosselmann, above n 113, at 35.

able to sanction the damage to common property and reward the trustees who protect it. This can thereby help eliminate greenhouse gases.[161]

Thirdly, it will not be enough to integrate the Earth System and the Earth Trusteeship. If the GPE is to become a success, the shortcomings from part 5.2 above will need to be taken into consideration. The Draft will need to be more precise and less vague in its wording in order to function as a legally binding document. Furthermore, it needs to keep the risk in mind of regeneralising or over-simplifying a principle. The intent of the GPE also needs to be clearer in terms of whom it is addressed to and its status in relation to other MEAs in terms of a conflict of laws.

Finally, the lack of the recognition of the Earth System as a new legal subject and non-existing GPE are gaps in order to protect the Earth. However, the lack of political will is just as crucial. In this context, it should be mentioned that New Zealand's Prime Minister Jacinda Ardern in her speech at the United Nations General Assembly in 2019, referred to the Māori concept of kaitiakitanga and explained this as: "The idea that each of us here today are guardians. Guardians of the land, of our environment and of our people. There is a simplicity to the notion of sovereign guardianship."[162] This illustrates the idea of Earth Trusteeship just using a different word. Perhaps this speech will help spread the philosophy among Earth's nations.

So, no, I do not believe that one asset is enough to win the battle in this enormous fight. This is why I think the disappointing outcome of the substantive sessions should be turned into possibilities. There is now more time to get the language in the Draft right, to integrate an Earth System approach along with the integration of ecological integrity and the idea of Earth Trusteeship. Because then — we just might — be able to win the battle.

7. CONCLUSION

At the beginning of this article, I asked the question whether the GPE could be a possible solution for our climate crisis.

There is no simple answer. There is no mathematical equation that can solve this problem. As Koskenniemi has stated: "international law does not contain a ready-made blueprint for a better world that could only be 'applied' so as to bring about peace and justice".[163]

161 At 36.

162 "Watch: Jacinda Ardern's full speech at United Nations General Assembly" (25 September 2019) Newshub <https://www.newshub.co.nz/home/politics/2019/09/watch-jacinda-ardern-s-full-speech-at-united-nations-general-assembly.html>.

163 Kotzé, above n 42, at 25.

It can, however, be concluded that the global environmental law is filled with gaps. The Report shows that there are environment principles that are not fully developed, or only have regional application, or are ambiguous and applied differently by the legislators and courts, or have no recognition in binding legal instruments. In general, IEL lacks coherence, and coordination between sectoral regulatory regimes and issues such as climate change and biodiversity and so on have no specific legally binding instrument. Some regional instruments (for example, in terms of air pollution) are weakly implemented and lack liability. Likewise, governance of IEL is fragmented, and lacks coordination as well as participation from non-state actors. Not to mention that other instruments that are environmental-related lack references to environmental regulations and treaty preambles. Another essential gap appears in terms of the implementation and effectiveness of IEL. Many MEAs are not implemented, the financial resources thereof are insufficient, the reporting of the effectiveness of implementation from developed countries is lagging behind, and there is no international environmental court of justice.

There are, indeed, many gaps in IEL, and therefore it can be argued that there is a need for a GPE. However, the OEWG's three substantive sessions that were held between January and May 2019 did not include such recommendations. The OEWG did, however, with some exceptions, agree with the gaps shown in the Report. The OEWG's recommendations did in broad terms only focus on ratifying, enhancing, strengthening, and promoting a better implementation. Likewise, they focused on better cooperation and collations in terms of information sharing and engagement but without specific measures in order to obtain the beforementioned.

No GPE has yet been adopted, and there are many shortcomings in both the substantive sessions and in the Draft itself. A factor that played a vital role in the substantive sessions was the timeframe provided. The process has since the launch summit in 2017 been confusing and rapid, with only a few months and a few substantive sessions of negotiation. Furthermore, states are afraid of losing sovereignty, of opening up established environmental principles, and committing to steps that they cannot implement. Additionally, the Draft that was provided had many shortcomings, which furthermore added to reasons for the disappointing outcome of the substantive sessions. The Draft's language is typical of a soft law document in the sense that it is vague, ambiguous and unclear. The Draft codifies fundamental environmental principles; however, this poses a risk of regeneralising and over-simplifying already fine-tuned principles. Additionally, the GPE is unclear of its status in terms of a conflict of laws, which can lead to confusion and involve a risk of undermining earlier but more specific expressions of the principles. Lastly, it has been discussed whether defragmentation of IEL and a legally binding instrument itself will constitute a more efficient and effective global governance. Moreover, the Draft

does not bring anything new to the table, many principles are just a copy-paste, and some fundamental principles are even left out. Finally, the Draft has many elements of an anthropocentric approach, which is an outdated worldview.

Even though the outcome of the substantive sessions and the shortcomings can be viewed as a setback, it does not mean that the battle is lost. There is, unquestionably, a need for a paradigm shift. The anthropocentric worldview is outdated, and I believe that integrating the Earth-centred scientific Earth System approach in the GPE will lead the way to this paradigm shift. It is important to take advantage of the science that is available in order to create a better and more efficient global environmental instrument. Likewise, making Earth a legal subject is necessary in order to obtain the paradigm shift. Furthermore, the idea of the Earth Trusteeship is honourable. Human rights cannot exist without human responsibilities for Earth, and it will smoothly function alongside the Earth System and together — at least in theory — will strengthen the GPE.

I write "in theory" because integrating the Earth System and Earth Trusteeship in the GPE is still just words, and words do not themselves create better behaviour. Political willingness must not be neglected. Looking from an operational sociological approach to law, it can be questioned whether the GPE will create the wanted effect. As mentioned before, individuals are not subject to international law. Thus, the states need to incorporate the GPE into national legislation and incorporate the Earth Trusteeship. Many factors are of importance, including the states' annual economic budget. However, one of the most important actors is the citizens themselves as they will be affected indirectly and directly by the GPE and the incorporation, respectively. The effect of the law will often depend on whether citizens are positive or negative towards the law; unfortunately, the economic aspects and benefits of law play a role.[164] The philosophy of Earth Trusteeship can be traced in many indigenous peoples' cultures; however, this mindset is not, in general, a part of states' norms. It is thus of vital importance that the mindset and the norms of the citizens are changing towards the philosophy of being a trustee of Earth in order to create the wanted effect of the GPE. Communication and information are thus also fundamental necessities.[165]

It is, therefore, difficult to say if the GPE could be a possible solution for our climate crisis: our war of survival. But I do believe that creating an improved GPE that surmounts the shortcomings and incorporates the Earth System and the Earth Trusteeship will be a victory of one of the many battles in the war of Earth's survival.

164 J Dalbjerg-Larsen *Lovene og livet — en retssociologisk grundbog* (Djøf Forlag, Copenhagen, 2014) at 263.

165 At 265.