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Is the Global Pact for the Environment a potential lever for climate justice?

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*Following the first meeting in Nairobi, Kenya, of the ad hoc open-ended working group on the development of a Global Pact for the Environment, from 14th to 18th January, IDDRI organised a seminar on 29th January to discuss the project, with the participation of Michel Prieur (President of the International Centre for Comparative Environmental Law), Lucien Chabason and Elisabeth Hege (IDDRI), and Marta Torre-Schaub (Research Director at CNRS, ISJPS University Paris 1, ClimaLex Network Director). Marta Torre-Schaub summarises her contribution to this seminar in this blog post.**

** The views expressed here are entirely those of the author.*

The draft project of a Global Pact for the Environment is an opportunity to renew and modernise international environmental law, in particular by drawing lessons from movements related to climate justice, while serving as a driver for improving the effectiveness of existing instruments.

One of the key questions posed by the draft Global Pact for the Environment, which is currently under discussion at the UN, is that of its operational utility, beyond its symbolic value. Does it bring something new to the environmental issue? Does it address the needs of the current global ecological crisis? Does it bring anything new to the range of environmental legislation that already exists within international law?

The aim here is to draw attention to the very topical issue of climate justice, with its extensive and global nature, which seems to provide a good example on which to base an analysis of certain principles and rights in the Pact that could be improved, or better adapted to the social and environmental reality. Indeed, climate justice offers a new approach to environmental law, one that is at the juncture of both ecological and socio-economic claims.

A holistic approach to the environment

Firstly, the Pact's development process could include methods adopted by the climate justice movement. For example through the adoption of an "inclusive" process that encompasses diverse actors (civil society in the broad sense, which includes the world of finance, but also indigenous peoples, cities and minority populations). In substance, it would be desirable to include concepts such as "nature as a legal object/subject" or *buen vivir* ("living well" or "well-being"), which are becoming increasingly important in the constitution of some Latin American countries and that facilitate the bringing together of environmental protection and an alternative development model that is more inclusive and mutually supportive.

Secondly, regarding the approach to environmental issues, the Pact could be improved if it adopted the "holistic" concept of the environment advocated by climate justice: the environment is an issue that cannot be addressed from a sectoral basis, but which must encompass all relevant elements (biodiversity, land use, exploitation of natural resources, protection of the seas and oceans, but also the agricultural and food issue), as is the case for climate justice. The Pact could thus provide an opportunity for the adoption into international law of an approach for the total protection of the "Earth system" by including the issue of "boundaries" (see [Planetary Boundaries](#)).

Also, the Pact should be linked to human rights. Even though the UN Special Rapporteur on Human Rights has already started this process in its [latest 2018 report](#), there remains much to be done. Climate justice, in its "legal" aspect, through a number of innovative judicial decisions, such as the [Urgenda decision of 9 October 2018 in the Netherlands](#), now includes human rights to life, to privacy and to family life as inseparable parts of the comprehensive protection of the climate system and the environment.

Procedural rights and obligations

The Pact could reinforce procedural rights by learning lessons from the now well-established practice of climate justice, particularly in Latin America where the rights of participation and access to justice increasingly include minority and indigenous populations that maintain their own cultures and links with nature and Mother Earth (*Pacha Mama*)¹ The draft Pact mentions certain procedural rights in a comprehensive and open manner, but the right to environmental information, for example, currently remains overly dependent on the way in which States will regulate it at the national level. As regards other procedural rights, it is essential for the Pact to include them as an obligation at the international level, for example by following the model of the Paris Climate Agreement, which provides for

transparency and revision mechanisms as well as information, in a precise and detailed manner.²

Regarding the content of the rights developed, the question of equity could also be improved by adopting the two aspects of climate justice: intergenerational justice and intra-generational justice, with emphasis on the issue of the fight against environmental and climatic inequalities. Here again, climate justice can serve as an example based on certain legal decisions, such as that of 5th April 2018 by the Colombian Supreme Court, which provides for “a fair use of resources for all” (including forests and their essential role in the regulation of the global climate system) while respecting “common and shared interests”³.

Similarly, the obligation of due diligence,⁴ which currently appears in the draft Pact, could draw lessons from certain climate justice decisions which develop the duty of care concept as an obligation for States in climate (and environmental) matters to deploy “all means at their disposal” to “protect” citizens against the risks and damages associated with climate change (and environmental degradation).⁵

A number of new environmental law principles, such as that of non-regression⁶, also arise in the draft Pact. This principle concerns the establishment of a progression obligation for environmental law.⁷ Provided in international environmental law since 4th March 2018 by the Escazu Agreement⁸ and already drafted in the Paris Agreement (Article 4.3), it is the logical continuation of the principle of the protection of future generations, which is already enshrined in the 1972 Stockholm Convention and the 1992 Rio United Nations Framework Convention on Climate Change. In addition, it is the embodiment of the principle of social and environmental equity, which is also present in the 1992 Convention and the 2015 Paris Climate Agreement. The non-regression principle, despite still having a low profile in the international arena⁹, has nonetheless had practical applications in the context of climate litigation through the rights of future generations (see Urgenda and Colombia, 2018). It should be possible to include the principle in the final version of the Global Pact, drawing particularly from the meaning given by the Paris Agreement.¹⁰

Finally, the principle of environmental cooperation was the subject of an advisory opinion of the Inter-American Court of Human Rights of 15th November 2017 on [Colombia's](#) interpretation of the obligations relating to the protection of the environment and potential environmental damage between States. The Court provided a very broad interpretation of the obligations of States in terms of “prevention and cooperation” to avoid cross-border damage (by including greenhouse gas emissions in the concept of pollution). The Court has also included climate change as one of the factors of marine degradation that States must take into account to achieve better cooperation.¹¹ The principle of cooperation drawn from this decision also links with the issue of capabilities (and therefore funding), which is central to climate justice, and which should be supported by the Pact.

The Paris Agreement's contribution to climate

In general terms, the climate regime as proposed by the Paris Agreement—which is largely the basis for the current development of climate justice—includes valuable elements that could lead to the renewal of international environmental law.¹² At the same time, the Pact could provide an opportunity to improve the weaker aspects of the climate regime, such as the need to harmonise the three instruments: the Framework Convention, the Kyoto Protocol and the Paris Agreement. Indeed, the Convention was designed as an open and very general text, even though it conveys the founding principles of the “climate regime”; the Protocol, on the other hand, is binding but has not been particularly effective during its final period (2013-2020) due to the low number of countries involved; while the Paris Agreement, although benefiting from the mass participation of States, is built on a normative model that is currently weakly binding—with the exception of the procedural aspects—and highly flexible, even evolutive, which can convey a certain amount of legal uncertainty. Equally, and in the absence of true sanctions, the name and shame system

could be improved by the clarification of what a penalty regime could be like in case of non-compliance.

Finally, and on a more general level, the Pact could address the institutional fragmentation currently afflicting international environmental law through the inclusion of issues that are presently scattered across texts of various types: international trade, investment law and finance, in a similar way to what has been started by the Paris Agreement.

¹ See decision of 3 August 2018 in Ecuador cancelling the Río Blanco mining project: <https://www.eluniverso.com/noticias/nota/6888863/tribunal-azuay-ratifica-fallo-que-suspende-actividad-minera-rio-blanco>

² In the sense of the obligations set out in Articles 3 and 4, points 2, 4, 12, 13, 14 and 19, and Articles 7.10 and 12, and Article 13 on the transparency framework https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf

³ <https://cdn.dejusticia.org/wp-content/uploads/2018/01/Fallo-Corte-Suprema-de-Justicia-Litigio-Cambio-Clim%C3%A1tico.pdf?x54537>

⁴ International principle of “due diligence” or diligent conduct.

⁵ See decisions Urgenda against the Netherlands of 25 June 2015 and the Netherlands against Urgenda of 9 October 2018

⁶ Stand Still Principle

⁷ Prieur, M. & G. Sozzo (2012). La non régression en droit de l'environnement, Brussels, Bruylant.

⁸ Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean https://repositorio.cepal.org/bitstream/handle/11362/43583/1/S1800428_en.pdf

⁹ European Parliament (29 September 2011). Resolution on developing a common EU position ahead of the United Nations Conference on Sustainable Development (Rio+20). Document no. P7_TA-PROV(2011)0430 and the French law for the restoration of biodiversity of 8 August 2016.

¹⁰ “Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition...” (Article 4.3); See also in this sense L. Kotzé and D. French, A critique of the Global Pact for the Environment: a stillborn initiative or the foundation for Lex Anthropocenae?, Int Environ Agreements: Politics, Law and Economics, Dec (2018), p.p 811–838 <https://doi.org/10.1007/s10784-018-9417-x>

¹¹ Note 123 of the Advisory Opinion.

¹² Particularly the transparency requirements of Article 12 of the Agreement and the references to social and climate justice in the Preamble.

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