INTRODUCTION

International Courts and the Environment: the Quest for Legitimacy

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A International Courts and the Environment: An Introduction

International courts and tribunals (ICs) are fascinating actors. They are supra-national institutions, tasked with upholding the rule of law in international affairs, and, as such, important wheels in the machinery of international law.

They are independent, while at the same time deriving their legitimacy from the establishment by states, as well as states´ consent to exercising jurisdiction.[1] This means that ICs need to tread a thin line between adherence to state sovereignty on one side and protection of a common interests in the environmental asset at stake, on the other – or, more broadly, between being guarantors of stability and agents of change in the global public order.

ICs also exert political influence. They can change in domestic politics, for example, by providing legal, symbolic, and leverage (argumentative) resources that shift the political balance in favor of domestic and international actors who prefer policies more consistent with international law objectives. This (limited) power can translate into political influence and change state behavior.[2]

Because of their independence, ICs can ensure the strength, quality, and longevity of environmental protection against other interests pursued by parties. In that way, they can be defenders of existing norms. But they can also act proactively, at the forefront of norm development. This can happen in different ways. ICs could exercise a "quasi-legislative" function and develop the law by themselves. They may also suggest or request that states factor an appropriate legal response to an environmental challenge. Or they can point to ineffective or insufficient state

[1] K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014).
[2] Ibid.

action, and – indirectly – identify the need for norm development. It is in the latter functions that ICs can act as proponents for a (stronger) environmental rule of law in states' international affairs – a legal framework that extends to the environment the procedural and substantive legal principles enshrined in the "rule of law".[3] However, this function may not be exercised without criticism. "Over-active" ICs could be perceived as providing obstacles to processes that may be better left to diplomatic exchanges and political decision-making.[4]

ICs play multiple roles in the global (judicial) order. Their primary role is to adjudicate disputes between states, or between states and other actors, arising out of the interpretation and application of international law. They legitimize states' claims, clarify legal positions, and announce consequences that arise from breaches of treaties or acts and omissions that do not correspond to legal duties. In doing so, they hold states accountable to their respective international legal obligations and help to ensure compliance by those subject to the rules.[5]

Some ICs, such as the International Court of Justice (ICJ) or the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea (ITLOS), are also competent to give advisory opinions on questions of international law, depending on their jurisdiction. They determine what the law requires by providing authoritative interpretations, and adapt the law to new circumstances through dynamic and evolutionary interpretation.[6] By exercising such functions they play an important role in the contemporary functioning and dynamic development of international law.

Yet, ICs differ significantly in their functions, processes and outputs. Some ICs are open to states only, while others, such as the Permanent Court of Arbitration, also provide services to international organizations or private parties. Only one IC – the ICJ – has broad, general jurisdiction,

[3] C. Voigt (ed.), *Rule of Law for Nature* (Cambridge University Press, 2013); and C. Voigt and Z. Makuch (eds.), *Courts and the Environment* (Edward Elgar Publishing, 2018).

[4] D. Bodansky, *The Art and Craft of International Environmental Law* (Harvard University Press, 2009).

[5] See T. Squatrito et al. (eds.), *The Performance of International Courts and Tribunals* (Cambridge University Press, 2018); and O. Young, *Governing Complex Systems: Social Capital for the Anthropocene* (MIT Press, 2017).

[6] See A. von Bogdandy and I. Venzke, *In Whose Name?: A Public Law Theory of International Adjudication (International Courts and Tribunals Series)* (Cambridge University Press, 2014); and K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014).

while most others are limited to particular subject areas regulated by specific treaties. Some ICs can adjudicate on punitive measures, fines and sanctions, while others are limited to making recommendations or noting inconsistencies with legal obligations. In some cases, treaty-based so-called "non-compliance" mechanisms exist, which provide additional fora for addressing inconsistencies between state behavior and international legal obligations. These mechanisms may exhibit some court-like features, but are primarily aimed at preventing, rather than punishing for, cases of potential non-compliance.

In this dispersed landscape of ICs, environmental claims are an interesting and important area to study. In the absence of a special international environmental court, disputes or claims with environmental relevance come up across a wide spectrum of ICs and in a wide range of circumstances.[7] Moreover, environmental cases hold a number of particular challenges that are not (all) present in other areas of law.

First, the main objective of an environmental claim may be to prevent, rather than seek redress for, environmental harm. Avoiding harm to occur, however, might apply only within a small window of time. Accordingly, environmental cases might be more time sensitive than other cases; a situation that sits uneasily with the slow-motion nature of international adjudication.

Secondly, there are difficulties in quantifying environmental harm once it has occurred. In general, courts have recognized material and moral damage, including environmental damage, as long as it is financially assessable.[8] For a long time, however, the question whether ICs would support the idea that environmental damage also encompasses damage to the intrinsic value of the environment, beyond resources of a direct economic value, remained an open one.[9] Only recently has the ICJ started to evaluate environmental harm in *Certain Activities Carried*

[7] T. Stephens, *International Courts and Environmental Protection* (Cambridge University Press, 2009).

[8] J. Crawford, *The International Law Commission's Articles on State Responsibility – Introduction, Text and Commentaries* (Cambridge University Press, 2002), p. 202. For a settlement on, inter alia, environmental damages, see: General Agreement between Iran and the United States on the Settlement of Certain ICJ and Tribunal cases of 9 February 1996, Award on Agreed Terms by order of the Iran–US Claims Tribunal, 20 February 1996, (1996) 32 Iran-U.S.C.T.R. 207, 213.

[9] P. Sands and J. Peel, *Principles of International Environmental Law*, 3rd edn. (Cambridge University Press, 2012), p. 706; and C. Voigt, "Climate Change and Damages" in C. Carlarne, K. Grey and R. Tarasofsky (eds.), *Oxford Handbook of International Climate Change Law* (Oxford University Press, 2016), pp. 464–94.

Out by Nicaragua in the Border Area (2018).[10] However, the final amount of compensation assessed against Nicaragua fell significantly short of what Costa Rica had demanded. The case is nonetheless an important precedent for recognizing conservation interests and ecosystem services; yet the question of how to quantify environmental harm is still far from settled.

Thirdly, environmental cases rely on scientific evidence of causes and effects: for example, which pollutants have which effects on ecosystem, animal or plant life or health. The science can be complex or unsettled. There might be uncertainties and loop-holes. In addition, there could be challenges in securing scientific experts who are willing to speak against vested commercial interests. Once scientific data are presented, the question arises of how to use them in order to decide a case.[11] In most cases judges are trained in law and are not experts in natural sciences. There is a need to translate complex technical data into a language that is accessible to judges. Environmental judicial practice provides some examples of how this can be done and which challenges exist.

These are only some of the circumstances that make the study of international judicial environmental practice relevant. In order to grasp international judicial practice on the environment, however, it is necessary to investigate the many various ways and means by which different international and regional courts and quasi-judicial bodies deal with environmental claims. This necessitates the study of different regional and international courts and tribunals, as well as a large variety of cases and claims. This is the aim of this book. It attempts to shed light on new developments, challenges, and possibilities and issues of legitimacy across a variety of ICs.

For the sake of clarity, it is not the intention of the book to promote the establishment of an environmental court; rather, it seeks to analyse both the procedural and substantive challenges and solutions as they arise in the context of environmental adjudication by various international and regional courts and tribunals.

[10] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua) Compensation Owed by the Republic of Nicaragua to the Republic of Costa Rica* (2018), available at: www.icj-cij.org/en/case/150

[11] C. Foster, *Science and the Precautionary Principle in International Courts and Tribunals: Expert Evidence, Burden of Proof and Finality* (Cambridge University Press, 2013); and J. Vinuales "Legal Technique for dealing with scientific uncertainty in Environmental law", *Vanderbilt Journal of Transnational Law*, 43 (2010), 438.

B The Quest for Legitimacy

Because no special IC exists for international environmental affairs, states and other actors seek to address environmental issues of a transboundary nature in different courts and tribunals on the international and regional stage. This situation gives rise to challenges and possibilities.

The possibilities lie in the fact that states can (and should) pursue various fora and strategies. In the absence of a specialist court, states and other actors may try different avenues in different courts and tribunals with the aim of achieving the desired outcome. While this situation has been criticized by some as "forum shopping",[12] such a fragmented approach can have constructive and healthy (side) effects.[13] Different courts may be asked to deal with similar legal questions pertaining to environmental issues. As a consequence, this situation could give rise to richer and more diverse judicial practice. Moreover, different courts dealing with similar issues might start referring to each others' judgments. This situation could become a counter-tendency to the fragmented structure of international law and could pave the way for a more coherent and consistent body of law. The diversity of ICs potentially available to address environmental claims should thus be seen as an advantage, rather than a constraint.

At the same time, there are challenges. In the absence of an international environmental court, environmental disputes are being addressed by ICs with either general jurisdiction (e.g. the ICJ) or ICs with other, special – but *non-environmental* – competence, such as the World Trade Organization (WTO) Dispute Settlement Body or regional Human Rights Courts.[14] In this context, environmental legal issues arise before those ICs either as questions of justified exceptions or extensions of legal rights and obligations, but in general not as the basis of claims.

This situation raises a number of legitimacy questions, which are addressed in the six parts of this book.

[12] G. Marceau, "Conflicts of Norms and Conflicts of Jurisdictions, The Relationship between the WTO Agreement and MEAs and other Treaties", *JWT*, 35(6) (2001), 1082.

[13] M. Koskenniemi, *The Gentle Civilizer of Nations – The Rise and Fall of International Law 1870–1960, Series: Hersch Lauterpacht Memorial Lectures (No. 14)* (Cambridge University Press, 2001/2004); M. Koskenniemi and P. Leino, "Fragmentation of International Law? Postmodern Anxieties", *Leiden Journal of International Law*, 15 (2002), 579.

[14] See, for example, E. Grant and C. Voigt, "The Legitimacy of Human Rights Courts in Environmental Disputes – Editorial", *Journal of Human Rights and the Environment* 2, 1 (2015), 131–38; and N. Hayashi and C. Bailliet (eds.), *The Legitimacy of International Criminal Tribunals* (Cambridge University Press, 2017).

1 *Procedural Legitimacy of Judicial Environmental Practice: Access to Justice*

First, there are issues of *procedural legitimacy* of judicial environmental practice, especially with regard to standing, access to courts and admissibility. Environmental law often concerns community interests. It is a field of international law in which public interest norms and environmental issues as common concerns are well recognized. Many of the challenges that ICs face are rife with externalities: Actions or omissions by one state can affect other states, areas beyond national jurisdiction or even the international community *per se*.[15] This situation leads to important and difficult questions of how to protect a general, public interest in the environment, of legal standing and access to courts for those states that are not directly injured, by individual persons or environmental organizations.[16]

2 *Legitimacy and Scientific Certainty: Environmental Adjudication, Use of Experts and the Limits of Science*

Secondly, another procedural aspect arises with respect to scientific evidence, expertise and the use of experts. Environmental cases often involve complex scientific data. Such scientific evidence might not always be easily accessible to judges; neither might it be conclusive. The use of independent experts is therefore often suggested to ICs. In the face of complex environmental challenges, there is often a lack of absolute knowledge about the causes and effects of changes in the environment, creating scientific uncertainties and controversies. These scientific

[15] J. Brunnée, "International Environmental Law and Community Interests: Procedural Aspects" in E. Benvenisti and G. Nolte (eds.), *Community Obligations in International Law* (Oxford University Press, 2017); J. Brunnee, "«Common Interests» – Echoes from an Empty Shell? Some Thoughts on Common Interest and International Environmental Law" *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*, (1989), 793; D. Bodansky, "Global Public Goods, International Law, and Legitimacy" *European Journal of International Law*, 23 (2012), 651–68; and B. Simma, "From Bilateralism to Community Interest in International Law", in *Collected Courses of the Hague Academy of International Law*, The Hague Academy of International Law, 250 (1994).

[16] See Chapter 1 in this book: Ludwig Krämer, "The Environment before the European Court of Justice"; Chapter 2: Katja Rath, "The EU Aarhus Regulation and EU Administrative Acts Based on the Aarhus Regulation: The Withdrawal of the CJEU from the Aarhus Convention"; and Chapter 3: Hendrik Schoukens, "Access to Justice before EU Courts in Environmental Cases against the Backdrop of the Aarhus Convention: Balancing Pathological Stubbornness and Cognitive Dissonance?".

uncertainties are placing adjudicators in a difficult position. Kanhanga notes in this context:

> When faced with complex scientific evidence in environmental cases, adjudicators need the capacity to gain an accurate and deep understanding of the science behind the environmental case. If not, the likelihood of making an uninformed decision is more serious and inevitable. However, the insight needed to make sound legal decisions emanates from experts consulted by the courts. While the purpose of expert opinion is to assist the court in giving judgment upon the issues submitted to it for decision, the court must still discharge its judicial functions such as the interpretation of legal rules, the legal categorization of factual issues and the assessment of the burden of proof.[17]

Moreover, the judges and arbitrators on those ICs may not be too well versed in international environmental law and meet challenges in capacity and expertise in this regard, too.

A further procedural aspect applies to the burden of proof, which in general lies with the claimant of an environmental violation by the respondent. Where science is uncertain while there is a risk of harm, this (impossible) burden might challenge the fairness – and thus legitimacy – of judicial proceedings. In this context, the role and potential of the precautionary principle, and whether it could lead to a reversal to the burden of proof, are highly relevant.[18]

3 *Judges as Law-Makers: Legitimate Development of Environmental Law*

Thirdly, a legitimacy concern arises in situations when judges develop the law, rather than just applying it.[19] This can be referred to as a "*substantive legitimacy*". In other words, can courts be law-makers? Where does the judicial function end and a legislative function begin, and to what extent

[17] See Chapter 4: Tracey Kanhanga, "Scientific Uncertainties: A Nightmare for Environmental Adjudicators". See also: *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, Joint Dissenting Opinion of Judges Al-Khasawneh and Simma, para. 6, at: www.icj-cij.org/files/case-related/135/135-20100420-JUD-01-01-EN.pdf,(last accessed on 03/06/2018).

[18] See Chapter 5: Volker Mauerhofer, "Ignorance, Uncertainty and Biodiversity: Decision Making by the Court of Justice of the European Union".

[19] T. Squatrito et al. (eds.), *The Performance of International Courts and Tribunals* (Cambridge University Press, 2018); K. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (Princeton University Press, 2014); and J. Dunoff and M. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press, 2013).

can the latter be exercised justifiably? While this is a long-standing concern regarding any judiciary body, it is more pronounced in environmental cases. Environmental challenges of a collective nature, such as climate change or the decline of biological diversity, require multilateral solutions by international environmental treaties that have a legitimate place in the public global order. This public (or community) interest is recognized by international environmental law, which makes it a particularly interesting area for studying the interaction between the global judiciary and legal advances. At the same time, international environmental treaty law may not be so concise or advanced as to provide a clear legal basis for a claim. It is often based on principles and/or legal obligations that grant significant discretion to the parties. Examples of such principles are good faith,[20] prohibition of transboundary harm[21] or a high level of environmental protection.[22] In a judicial setting, judges might be asked to concretize or specify these principles into legal rules which they apply, walking a tight-rope between application and development of the law. Moreover, in cases in which the treaty does not contain environmental rights, for example most human rights treaties,[23] or where environmental concerns are drawn in in the context of exception clauses,[24] judges might need to apply some legal creativity within their legal boundaries in order to accommodate legitimate environmental concerns.

Human rights law provides a particularly interesting case example. Despite the growing contemporary awareness of the intimacy between environmental quality and fundamental human rights and interests, it remains the case that very few international human rights agreements explicitly recognize the close interconnection between human rights and the environment. Even fewer recognize a human right to a healthy

[20] See Chapter 6: Kazuki Hagiwara, "Sustainable Development before International Courts and Tribunals: Duty to Cooperate and States' Good Faith".

[21] See Chapter 7: Kurt Winter, "The Paris Agreement: New Legal Avenues to Support a Transboundary Harm Claim on the Basis of Climate Change".

[22] See Chapter 8: Delphine Misonne, "The Court of Justice of the European Union and the High Level of Environmental Protection – Transforming a Policy Objective into a Concept Amenable to Judicial Review".

[23] Dinah Shelton, "Legitimate and necessary: adjudicating human rights violations related to activities causing environmental harm or risk", *Journal of Human Rights and the Environment*, 6(2), September 2015, 139–55; and E. Grant and C. Voigt, "The Legitimacy of Human Rights Courts in Environmental Disputes – Editorial", *Journal of Human Rights and the Environment*, 1 (2015), 2, 131–38.

[24] C. Voigt, *Sustainable Development as a Principle of International Law – Resolving Conflicts between Climate Measures and WTO Law* (Martinus Nijhoff Publishers, 2009).

environment. In fact, environmental rights have been proclaimed in only two regional human rights treaties: the African Charter of Human and Peoples' Rights[25] and the Additional Protocol to the American Convention on Human Rights.[26] Other human rights treaties contain no such explicit guarantees. The European Convention on Human Rights (ECHR), for example, does not provide for a right to a healthy environment and is thus dependent on the interpretation of other, explicitly enumerated, human rights to include or to extend to environmental matters. This is an interpretive strategy now widely recognizable in the practice of regional human rights courts, which have been increasingly active in applying existing general human rights norms to environmental issues – and environmentally sensitive interpretive strategies to existing human rights and jurisprudence. As a result, these human rights courts and bodies have begun to develop an important body of environment-related human rights jurisprudence in relation to procedural rights as well as to substantive rights. Taken together, such developments provide strong evidence of converging trends towards greater uniformity and certainty concerning human rights obligations relating to the environment.

4 *Legitimacy of Outcomes: Performance, Effects (and Side-Effects)*

Fourthly, adjudication can have legal or political effects beyond a particular case and/or outside the parties involved. These effects may not be intended or within the control of the judicial organ. The question is whether courts would be legitimately expected to consider such wider consequences or whether they are simply outside the realm of the deciding court. Courts, and ICs in particular, are organs that are sensitive to political and legal tensions and criticism. In particular, questions of conflict of norms,[27] normative development beyond the court[28] and

[25] Article 24, Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at: www.refworld.org/docid/3ae6b3630.html (accessed 13 May 2018).

[26] Article 11, Organization of American States, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights ("Protocol of San Salvador"), 17 November 1988, OAS Doc. OAS/Ser.L/V/I.4 rev. 13.

[27] See Chapter 9: Marie-Catherine Petersmann, "When Environmental Protection and Human Rights Collide: Four Heuristics of Conflict Resolution".

[28] See Chapter 10: Cristiane Derani and Arthur Rodrigues Dalmarco, "Silent Implications of *US-Tuna II*: Greening Market Behaviour through the WTO".

shifts in legal strategies by parties in response to previous judgments point to the issue of extended "judicial influence".

For example, states are increasingly invoking the jurisdiction of ICs and tribunals to adjudicate legal matters relating to the obligation to carry out an Environmental Impact Assessment (EIA). The increase in such disputes comes as a response to previous difficulties of ICs in granting compensation for environmental harm. Loewenstein notes that:

> Framing a dispute as one concerning EIA instead of – or in addition to – a claim for environmental harm may be advantageous. An EIA claim does not require a state, for example, to establish that harm occurred; nor must it prove a causal link between the respondent state's alleged delinquency and the harm it allegedly caused. Moreover, by putting its claim in terms of EIA, a claimant may challenge the respondent state's allegedly delinquent actions before any harm has materialized or, indeed, even prior to the implementation of the project. The claimant can thus seek to influence the project through the adjudicative process.[29]

But where does the sphere of normative influence for which the court may assert responsibility end, and which implications of decisions simply lie outside the court's concern? The question is whether ICs can "ignite" change and transformation, where effective treaty law is missing or where parties do not comply with their obligations, or whether litigation before an IC is a limited tool to answer specific questions of international law. This is particularly opportune with regard to environmental goods of global common nature. Here, pressing questions arise as to whether ICs, typically addressing issues between two parties, are well suited to dealing with problems of common concern. If they are, what is the effect of their findings on the collective ability to address the environmental problem at stake through the development of effective international norms?

Also, the repercussions of judgments of ICs on domestic law and domestic courts raise interesting questions. To what extent, if any, should ICs be familiar with and sensitive to domestic circumstances? Because (most) ICs are limited in their jurisdictional scope, national courts might provide an important avenue to pursue international environmental obligations. But what is the interplay, if any, between domestic and international environmental judicial practice? Could we foresee a stronger judicial interaction between national and international courts

[29] See Chapter 11: Andrew B. Loewenstein, "Adjudication of Environmental Impact Assessment Claims before International Courts and Tribunals".