

COMMENT

A WORLD TRIBUNAL TO PROTECT THE ENVIRONMENT? PREMISES, OPPORTUNITIES, OBSTACLES*

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The development of international environmental law has been accelerated by the emergence of disputes due to numerous physical, economic, social and political factors. These factors include the danger of climate change, the ozone layer's reduction, trans-border air pollution, waste disposal in bodies of water and on land, the transport of hazardous waste, the location of dangerous industries especially in underdeveloped countries, desertification, deforestation and drought, the destruction of plant and animal genetic resources, genetically modified organisms, nuclear accidents, accidents at sea, and the exploitation of the seabed and of the Antarctic.¹

This was especially evident in the last few years of the 20th century. The international community was appalled by a series of environmental disasters. Some of the more notable of these were:²

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¹ INTERNATIONAL COURT OF THE ENVIRONMENT FOUNDATION REPORT, THE GLOBAL ENVIRONMENTAL CRISIS: THE NEED FOR AN INDEPENDENT COURT OF THE ENVIRONMENT (1996) (hereinafter "Foundation Report").

² AMADEO POSTIGLIONE, THE GLOBAL VILLAGE WITHOUT REGULATIONS: ETHICAL, ECONOMICAL, SOCIAL AND LEGAL MOTIVATIONS FOR AN INTERNATIONAL COURT OF THE ENVIRONMENT (1994).

- (a) 1967 Torrey Canyon oil spill off Cornwall³
- (b) 1976 Seveso chemical plant accident in Italy⁴
- (c) 1984 Bhopal chemical plant accident in India⁵
- (d) 1988 Sandoz chemical plant accident in Switzerland⁶
- (e) 1978 Amoco Cadiz oil spill off Brest⁷
- (f) 1986 Chernobyl nuclear plant accident in Russia⁸
- (g) 1989 Bahia Paraiso oil spill in the Antarctic⁹
- (h) 1989 Exxon Valdez oil spill off Alaska¹⁰
- (i) and the 1991 and 2004 burning of oil wells in the Gulf area, among others.¹¹

The common characteristics of these environmental risks are globality, interdependence, indivisibility, the lack of transparency and access to information, a dearth of participation, and access to justice. Moreover, these disasters affect not only the planet's present occupants but future generations as well.

The idea of creating an international environmental court is already sixteen years old. As early as 1988, a committee was formed in Rome, now known as the International Court of the Environment Foundation ("ICEF"), as a private initiative to examine the subject. The committee came out with a proposal on the creation of an International Court of the Environment (ICE) as a new and permanent body separate from the International Court of Justice in the Hague, endowed with an exclusive, specialized and international competence in the field of environment and empowered to implement international law and to guarantee a right of access to individuals

³ In re Barracuda Tanker Corp., 409 F.2d 1013 (2nd Cir. 1969).

⁴ See Council of the European Communities, Council Directive 82/501/EEC, Jun. 24, 1982; Bruna de Marchi et al., *Seveso: A Paradoxical Disaster*, at <http://www.unu.edu/unupress/unupbooks/uu211e/uu211e09.htm>.

⁵ In re Union Carbide Corp. Gas Plant Disaster, 809 F.2d 195, 197 (2nd Cir. 1987); *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2nd Cir. 2004).

⁶ Council of the European Communities, Resolution on the Disaster at the Sandoz Factory, Doc. No. 51986IP1307 (1987). See, e.g., Karyn Keenan, *India, Switzerland and the United States: How Countries Avoid Liability After Disaster*, at <http://www.cowac.org/india.html> (last visited Dec. 20, 2004).

⁷ In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279 (7th Cir. 1992).

⁸ *Burdov v. Russia*, 2002 ECHR 428 (May 7).

⁹ Greenpeace Australia, *Records of the Antarctic Campaign* (Dec. 2000), at <http://www.nla.gov.au/ms/findaids/9432.html>.

¹⁰ In re Exxon Valdez, 270 F.3d 1215 (9th Cir. 2001).

¹¹ See, e.g., U.N. Doc. S/Res/687 (1991).

to protect their human right to the environment.¹² To compliment its judicial function, the ICE could undertake advisory, investigative and conciliatory functions

I. PRINCIPLE OF UNIVERSALITY VIS-A-VIS TERRITORIAL SOVEREIGNTY

The above environmental disasters have proven that the application of international law to the environment is largely inadequate. The enforcement of environmental regulations depends on the sovereignty of States and different national regulations, and these are not subject to a compulsory higher authority.

The current structure of international law is characterized by the principle that States do not recognize authorities as higher than their own. This principle does not seem to be ideally positioned to guarantee balanced management of the environmental problems in the context of international law. These problems are objectively international, and, in some cases, are even outside the control of States. In fact, States by themselves cannot control manmade environmental phenomena such as the greenhouse effect, the ozone hole, and transborder pollution. These phenomena require international cooperation, common decisions, and new rules and procedures for the application of real sanctions. Only new international organizations can confront the environment at the global level, providing new approaches to control the phenomena, to prevent new sources of pollution, to equitably manage common resources, and to apply sanctions, where necessary. The principle of universality should apply since problems of a universal nature should be addressed at the same level.

Some argue that an international tribunal dealing with environmental issues would create a threat to state sovereignty. While it is true that states are unwilling to discuss the principle of territorial sovereignty, it is also true that the environment is an issue that cannot be solved within the well-defined space of an individual State's sovereignty. In fact, in a very broad sense, a State's territory is the issue as the quality of its natural and human resources are concerned. Therefore, the principle of territorial sovereignty is not refuted, but must adapt to new demands. Otherwise, territorial sovereignty will be left without any true meaning as environmental threats respect no State's borders. States would have already lost their sovereignty as a single State is unable to defend its ecology on its own.

¹² Foundation Report, *supra* note 1.

Thus, we should strive towards a new concept of national sovereignty which stresses both a State's Constitutional independence and mutual restrictions on political independence made necessary by the international community's requirements.¹³ The 1972 Stockholm Declaration on the Environment¹⁴ and the 1982 World Charter for Nature¹⁵ provide examples of recognition of an obligation of a sovereign state towards its own people in relation to permanent sovereignty over natural resources.

II. PRIORITY ISSUES

Two points are vital to the creation of an International Court of the Environment

- (a) the individual as subject of international law; and
- (b) the place of the human right to the environment in international law

Currently the question of whether an individual can be a subject of international law has been met with negative response, but it is clear that this position will change under the influence of numerous, interdependent factors. An example of these factors is the enormous increase in world population, which is already not manageable in the current state. Other possible factors include the bureaucratic structure of international society because migratory movements are explosive and spontaneous, the limited resources available in terms of energy, and the phenomenon of planetary pollution. Bearing these and other factors in mind, how can international law remain oblivious to the individual this 21st century?

Society as a whole will have to strike new balances and find common basis for the respect of human rights, including the right to the environment that would place the individual rather than States at the forefront. Right now, supranational tribunals like the European Court of Human Rights ("ECHR") in Strasbourg provide judicial redress to individuals. Through its 1994 landmark decision in the *Lopez-Ostra* case,¹⁶ this Court opened the door for the protection of human rights against nearly

¹³ Nico Schrijver, *The Dynamics of Sovereignty in a Changing World*, in SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE 80-87 (Konrad Ginther ed., 1995).

¹⁴ Stockholm Declaration of the United Nations Conference on the Human Environment, Jun. 16, 1972, in UN Doc. A/CONF.48/14/Rev. 1 (1973).

¹⁵ U.N. Doc. A/RES/35/7 (1982).

¹⁶ *Lopez-Ostra v. Spain*, 1994 IIHRL106 (Dec. 9).

all sources of environmental pollution. Briefly, some members of the Gregoria Lopez-Ostra family suffered from nausea, vomiting, allergic reactions, bronchitis and anorexia due to emissions from a waste treatment plant built by the government in Lorea, in Murcia, Spain, just twelve meters from the Lopez-Ostra house. She filed complaints with the Administrative Division of the Murcia Audiencia Territorial, the Supreme Court and the Constitutional Court, to no avail.

Afterwards, she submitted a complaint to the ECHR, alleging inaction by the local authorities violated her rights under the European Convention on Human Rights, namely protection of private life and family life¹⁷ and claimed compensation. The Court unanimously held that the pollution from the plant and Spain's inaction violated the Convention's article 8. It explained that States have the positive duty to secure rights under this article and a negative duty to stop official interference. The progressive decision provides a most comprehensive individual right to environmental protection and stimulates the discussion on the existence of a human right to a decent environment.

Structurally, international law will recognize a more articulate group of legal subjects: individuals, state communities, regional communities such as the European Union, and new international organizations. From the point of view of norms, it can readily be anticipated that the number of international conventions will grow to meet new problems such as those posed by the environment. Above all, the contents of these conventions will impose on States an increasing duty of service towards the international community and will allow States less recourse to claims of sovereignty.

The question asked is whether international law recognizes the right to the environment as a fundamental right of every person. To answer this question, a careful examination is required of customary law, treaty norms and constitutional norms. The constitutional norms in many States already recognize the individual's right to the environment, and provide indirect evidence of *communis opinio*. What is even more significant is that in these States, it has captured attention at the grassroots level of even the smallest communities.

¹⁷ European Convention on Human Rights, Nov. 4, 1950, art. 8, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>.

The first identification of the human right to a healthy environment appeared in the United Nations Declaration on the Human Environment, or the Stockholm Declaration. Its Principle 1 states:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment of present and future generations.

Some legal experts are in a quandary regarding the content, effect and enforcement of such a human right. There are those who regard the right to a healthy environment as an independent right which imposes obligations upon individual states and the world at large. Others view the same as part of universally recognized rules which dictate that States are not allowed to contract out of, or *jus cogens* norms, per the Vienna Convention on the Law of Treaties¹⁸ and international customary law on the assumption that the right has been accepted by the world community. Still others regard environmental rights as belonging to the grey area between a political guideline and a rule of law, simply stated: a law in the making.¹⁹

From the human perspective, the human right to a healthy environment could be viewed as a portion of the rights to life and to dignity. For indigenous people, it means the right to a living. It could also be regarded as the means to combat environmental deterioration as far as it threatens human life.

Noticeably, the right to a healthy environment is not mentioned in the Universal Declaration of Human Rights.²⁰ However, it should be borne in mind that the Stockholm Declaration is considered an authentic interpretation of the notion of human rights embodied in the UN Charter. Thus, it provides the minimum standard for the moral duty of states. Furthermore, the UN Commission on Human Rights has put it on record that:

States parties to the International Covenant on Economic, Social and Cultural Rights, recognized the right of everyone to the enjoyment of

¹⁸ May 23, 1969, art. 53, 1115 UNTS 311.

¹⁹ PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW AND THE ENVIRONMENT* 25 (2nd ed., 2002); Amado Tolentino, *Good Governance Through Popular Participation in Sustainable Development*, in *SUSTAINABLE DEVELOPMENT AND GOOD GOVERNANCE* 137-48 (Konrad Ginther ed., 1995).

²⁰ U.N. Doc A/RES/217 (1948).

the highest attainable standard of physical and mental health and agreed, for that purpose, to take steps necessary for the improvement of all aspects of environmental and industrial health.²¹

A very interesting interpretation is the one drawn from the preamble of the 1982 World Charter for Nature:

"Every form of life is unique, warranting respect regardless of its worth to man...."

This statement has led to the issue of awarding rights to subjects other than man, and has granted legal standing to natural entities such as rivers and mountains, and the right of species to survive.

Nevertheless, the best interpretation is the one which regards the environmental right as a traditional human right to be guaranteed by the State. This is the interpretation used by the Philippine Supreme Court in *Oposa v. Factoran*²² where due recognition was given to the standing of minor citizens for the environmental right as an inter-generational right. The Supreme Court said that while the right to a balanced and healthful ecology is guaranteed by the Philippine Constitution, it need not be actually written in the fundamental law of the land as it is assumed from the inception of humankind. If it is so written, it is because of the:

well-founded fear of the framers that unless the right to a balanced and healthful ecology and to health are mandated as state policies by the Constitution itself ... the day would not be too far when all else would be lost not only for the present generation but also for those to come - generations which stand to inherit nothing but parched earth incapable of sustaining life.²³

It must further be recognized that the environment now receives a complex legal treatment throughout the world at various levels. Environmental law attracts great attention because it can be found in all organs that have the responsibility for environmental protection, as can be shown by one established fact: the rights-duties of environmental protection are exercised by existing institutions, in particular, by lawmaking bodies, executives and the judiciary in individual states, although with varying zeal and effectiveness.

²¹ IUCN Background Documents: Draft Convention on Environmental Conservation and Sustainable Use of Natural Resources, IUCN Commission on Environment Law and International Council of Environmental Law (1992).

²² G.R. 101083, 224 SCRA 792, Jul. 30, 1993, *reprinted in* 33 ILM 173 (1994).

²³ *Id.* at 805.

Individuals are not considered the mere beneficiaries but rather active proponents of environmental protection. This explains the existence of procedural rules which confer upon individuals the right-duty to information, participation and standing in legal proceedings. Environmental law and the right to the environment are intimately connected because, as world-renowned French environmental law Professor Alexander Kiss observed, "The first is the guarantee for the exercise of the latter."

The environment as a human right also finds an indirect legal basis in conventions, instruments, written accords, and in the written record of meetings on the environment between states and other international subjects. This written normative framework embraces well over 199 international instruments on the environment.

Lastly, the classic customary rule announced in the *Trail Smelter* case²⁴ and *Corfu Channel*²⁵ found its place in international environmental law at the 1972 UN Stockholm Conference on the Environment.²⁶ In particular, Principle 21 says:

states have... the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond their national jurisdiction.

III. ACCESS TO ENVIRONMENTAL JUSTICE

As proposed, the following parties may appear before the International Court of the environment:

- (a) Individuals;
- (b) Non-governmental organizations and environmental associations;
- (c) States;
- (d) Supranational organizations such as the European Union; and
- (e) International organizations under the UN and the individual organs of the UN.

²⁴ *Trail Smelter Arbitration* (U.S. v. Can.), III UN. R.I.A.A. 1911 (1938) and III UN.R.I.A.A. 1938 (1941).

²⁵ (U.K. v. Alb.), Merits, 1949 I.C.J. 4 (Apr. 9).

²⁶ IUCN Background Document to the International Environmental Law Conference, The Hague (1991).

Of relevance is the fact that, to date, the International Court of Justice has declined to submit decisions by UN organs to judicial review.²⁷ International organizations are not accountable in law and do not exercise powers independently of their member states. How can the World Bank, for example, be held legally accountable for its participation in an oil and pipeline project if that project were to result in environmental harm? In connection, take note that in recent times, international financing institutions such as the International Monetary Fund and regional development banks have become the object of ire of nongovernmental organizations (NGOs), and even some government arms, due to development projects perceived as destructive of the environment.

At present, international organizations, environmental associations, NGOs and potentially affected individuals are not granted direct access to the ICJ. Only States have direct access and not the individuals who are the direct victims of environmental destruction. While it is commonly known that States themselves may commit or tolerate environmental crimes, it is advisable and realistic to work towards strengthening international judicial guarantees for effectively protecting the rights of the individual to a healthy and undisturbed environment.

The international community must be aware that a proper international court exists where they can make their claims apart from a higher authority responsible for its management, supervision and control. That proposed higher authority can exist in the form of the proposed International Environment Agency. Further, the evolution of the concept of environmental crime, the widening of liability law for environmental damages, and the application of the Polluter Pays Principle²⁸ could make a new court necessary. Supplementary arguments are the jurisdictional deficiencies in different state systems, the social and ethical need for environmental justice and the educational role of such an institution. Last but not least, an international court for the environment would be able to focus special attention on areas outside the jurisdiction of individual states. For example, such a body could concentrate on the urgent problems of protecting the global commons.

Critics may point out that the ICJ established a Chamber for environmental matters in 1993. Nevertheless, it is unrealistic to expect that

²⁷ Certain Expenses of the United Nations, 1962 ICJ 151 (Jul. 20).

²⁸ Rio Declaration on Environment and Development, Aug. 12, 1992, Principle 16, A/Conf.151/26 (Vol. I) (Annex I).

tribunal to extend legal access to private parties or political action groups because "States are inherently reluctant to relinquish sovereignty and expose themselves to legal proceedings."²⁹

Another institution, the Permanent Court of Arbitration (PCA), is also mentioned as a possibility in resolving environmental disputes. But as the jurisdiction of the PCA is not compulsory, its competence can be derived only from an agreement to arbitrate, or an agreement submitting an existing dispute to arbitration.

III. ARGUMENTS AGAINST THE CREATION OF AN INTERNATIONAL COURT OF THE ENVIRONMENT

The proliferation of international adjudicatory bodies leads to the enumeration of arguments against the creation of a world court on the environment. At the global level, the ICJ, the Appellate Body of the World Trade Organization, and the Tribunal of the Law of the Sea have handed down decisions in disputes related to protection of the environment. Other forums include the ICJ Environment Chamber and the Permanent Court of Arbitration's Environment Facility. Arbitral procedures are also available to settle disputes like the arbitral tribunal which may be set up under article 27(3)(a) of the Convention on Biological Diversity³⁰ and special bodies such as the United Nations Compensation Commission³¹ which may rule on cases involving international environmental law. Likewise, regional forums such as the RCHR, the Inter-American Court of Human Rights, and the Court of Justice of the European Community have decided on cases relating to international environmental law.

It can thus be said that existing courts and tribunals are, or may be made well-equipped, to consider cases on environmental issues. Moreover, disputes concerning international environmental law also involve other aspects of international law. For instance, multilateral environmental agreements often provide for trade-related instruments to be implemented with special consideration for the interests or rights of particular groups

²⁹ POSTIGLIONE, *supra* note 2.

³⁰ 31 ILM 818 (1992).

³¹ UN Security Council Resolution Affirming Earlier Resolutions and Setting Forth Terms of Cease-Fire, 30 ILM 846 (1991), provides that "Iraq... is liable for any direct loss, damage, including environmental damage and the depletion of natural resources... as a result of Iraq's unlawful invasion of Kuwait. The UNCC has classified claims related to environmental damage as category F4 claims."

such as indigenous people. A dispute that may arise under an environmental treaty may also be defined in terms of a dispute under other treaties, such as the UN Convention on the Law of the Sea.³² So, what kind of international environmental dispute would be handled by an international court for the environment when several other areas of international law such as international water law, human rights law, fisheries law, trade law, and international law related to the use of force are involved?

Such a situation is illustrated by the *Fisheries Jurisdiction* case (Spain v. Canada)³³, a suit brought by Spain against Canada before the ICJ. Canada arrested a Spanish fishing vessel on the high seas based on the argument that the vessel was fishing illegally in that area contrary to Canadian law and international fisheries conservation obligations applicable to the European Community. Canada further alleged that marine biological diversity was being threatened by Spain's fishing activities. The European Community and Spain, on the other hand, argued that the international conservation obligations did not apply to the fishing activities complained of and that Canada had acted illegally in arresting the vessel.

The question here is whether the dispute involves international natural resources law, international fisheries law, international environmental law or international law related to the conservation of biological diversity. Spain presented the case to the ICJ for infringement of its rights as a flag state, an aspect that was also part of the overall dispute. ICJ ruled it had no jurisdiction to consider the merits of the case. Nevertheless, it can not be denied that the above areas of law would have influenced a decision had the ICJ assumed jurisdiction. Assuming that such a case is submitted before an international environmental court, what is the assurance that it has sufficient expertise to cover all these other aspects of international law? Would it thus not be better if existing tribunals instead be provided with sufficient expertise in international environmental law?

There is the argument that the proliferation of international courts and tribunals risks fragmentation in the international legal system. For instance, the ICJ, in *Reservations to the Convention on Genocide*,³⁴ held that a State that makes a declaration containing a reservation to which another State party to the Genocide Convention objects can be considered a non party to

³² Dec. 10, 1982, U.N. Doc. A/CONF.62/122 and Corr.1 to 11.

³³ (Spain v. Canada), 1998 ICJ 96 (Dec. 4).

³⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 ICJ 15 (May 28).

that Convention vis-à-vis the objecting state, thereby preventing the declaration from having a legal effect. The ECHR, however, ruled in the celebrated case *Loizidou v. Turkey*³⁵ that the declaration by Turkey on the Court's jurisdiction, which contained a reservation regarding the non-application of the Convention to the northern part of Cyprus, was valid with respect to the jurisdiction of the court but void with regard to the reservation. The ECHR awarded Greek-Cypriot refugee Titana Loizidou USD1.3 million, which the Turks agreed to pay, for obstructing Loizidou's access to her home by its occupation of the north. Turkey may have to pay millions more in similar cases.

Some practitioners and academicians propose frequent consultations among the members of the different tribunals to allay fears about fragmentation of international law. The ICJ should likewise develop an active judicial policy that would enable it, in practice, to become not only the principal judicial body not only of the UN, but of the entire international legal system as well. Moreover, multiplicity of international forums permits a degree of experimentation and exploration which can lead to improvements through integration of positive results in the body of international law.

Examples of experimentation and exploration that could introduce changes in the international legal system include, first, the non-compliance or compliance procedure established or in the process of being established within multilateral environmental agreements.³⁶ The Kyoto Protocol on Climate Change³⁷ goes a step further by proposing to establish an enforcement branch that could take decisions with legally binding consequences as part of the non-compliance procedure for the Protocol.³⁸

Second, the Permanent Court of Arbitration's Environment Facility could result in increased confidence in the PCA as a venue for settling disputes involving international environmental issues. One notes the PCA's rules on international arbitration where only one party is a State, and similar rules for disputes involving intergovernmental organizations and States and international organizations and private parties.³⁹

³⁵ 1998 ECHR 60 (Jul. 28).

³⁶ Mass Goote, *Non-Compliance Procedures*, 9 Y.B. INT'L ENV'TL L. 146-54 (1998).

³⁷ Dec. 10, 1997, 37 I.L.M. 22 (1997).

³⁸ Annex to Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, Jun. 5, 2000, Doc FCC/SB/2999/CRP.3/Rev.1.

³⁹ PHILIPPINE SANDS & RUTH MACKENZIE, SETTLEMENT OF DISPUTES UNDER INTERNATIONAL ENVIRONMENTAL AGREEMENTS: AA POTENTIAL ROLE FOR THE

Finally, the establishment of the Inspection Panel by the World Bank and similar units by other development banks such as the Asian Development Bank and the Inter-American Development Bank could translate factual relationships that exist between individuals and groups and an international body into a legal relationship and enable them to hold the organization accountable. The International Monetary Fund will likewise be establishing an Independent Evaluation Office.⁴⁰

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PERMANENT COURT OF ARBITRATION, BACKGROUND PAPER FOR THE BUREAU OF THE PCA, Jul. 1997 (on file with the author).

⁴⁰ ELLEN HEY, REFLECTIONS ON AN INTERNATIONAL ENVIRONMENTAL COURT 24-27 (2000).