The Environment Through the Lens of International Courts and Tribunals

Edgardo Sobenes · Sarah Mead · Benjamin Samson
Editors

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Foreword

'[T]he environment is under daily threat'. This statement was made by the International Court of Justice (ICJ) in its advisory opinion rendered in 1996 in the case concerning the *Legality of the Threat or Use of Nuclear Weapons.*[1]

Such an assessment is still valid today. In light of current environmental challenges—*inter alia*, climate changes and global warming, illegal, unreported and unregulated fishing activities and overexploitation of fishery resources, deforestation, plastic debris, air, water and land pollution—the status of the environment is even more alarming in 2021 than it was 25 years ago. This is so, in spite of the proliferation of international treaties, recommendations and guidelines that aim to preserve and protect the environment.

The dire situation of the fauna and flora of our planet may be a matter of surprise given the abundance of existing international environmental norms. But the adoption of treaties and other rules of international law does not in itself guarantee that the environment is properly protected in practice. An effective regime of protection requires that, in addition to the existence of legal norms, tools and mechanisms be put into place to ensure compliance therewith, to monitor their implementation and to provide legal recourses should they be breached.

It is against this background that the contribution of international courts and tribunals in promoting compliance with environmental rules needs to be assessed. International courts and tribunals may play a useful role when cases involving alleged violations of obligations under environmental law are brought before them. They may settle environmental disputes and avoid their aggravation, clarify the interpretation and scope of the rules concerned, and order reparation.

For the past 30 years, international courts and tribunals have not remained inactive in the environmental field. On the contrary, they have been seized of a growing number of environmental cases, and their decisions (judgments or advisory opinions) have contributed to the development of a broad corpus of environmental rules and

[1] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Reports 1996, p. 241, para 29.

principles. Mention may be made, for example, of the 'concept of sustainable development', to which the ICJ referred to as early as 1997 in its Judgment in the case concerning the *Gabčíkovo- Nagymaros Project (Hungary/Slovakia)*,[2] or the obligation to 'undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context',[3] whose binding character under international customary law was affirmed in 2010 by the ICJ in its *Pulp Mills* judgment, and also by the International Tribunal for the Law of the Sea (ITLOS) in its Advisory Opinion of 2011.[4]

In this context, it is worth noting that the book *The Environment through the Lens of International Courts and Tribunals*, co-edited by Edgardo Sobenes, Sarah Mead and Benjamin Samson comes at the right time. Of course, the fact that this is a timely publication is not the only reason for which the co-editors and the different contributors are to be commended. The added value of the book is to offer in one volume a comprehensive and systematic overview of the different legal issues relating to the handling of environmental cases by international courts and tribunals.

In Part I, readers are given a detailed presentation of the various international courts and tribunals which may have jurisdiction on environmental issues. Besides the ICJ, ITLOS, WTO dispute settlement mechanism and the International Criminal Court, the book also covers more recent developments before regional courts—mainly in the context of human rights—and commercial and investment arbitration tribunals.

A legal battle may be lost or won on procedural grounds. Therefore, it is useful for litigants to be fully aware of procedural and jurisdictional challenges which may be faced during international proceedings. Part II responds to such a need by reviewing in a systematic manner a number of key notions such as jurisdiction, access to courts and tribunals and evidence. Access to international justice is probably the most crucial element to keep in mind in an international legal order without a court possessing general compulsory jurisdiction. This explains why existing compulsory regimes for the settlement of environmental disputes, such as Part XV of the United Nations Convention on the Law of the Sea, are particularly attractive for States willing to engage in international litigation. Part II also includes a chapter on provisional measures before international courts and tribunal. The emphasis put on provisional measures is fully justified. Provisional proceedings may constitute an efficient tool whenever it is necessary to prevent serious harm to the environment pending a decision on the merits.

The co-editors have rightly allocated part of the publication (Part III) to the consideration of issues relating to the future of environmental litigation. The part addresses new trends and ideas, such as the role of international litigation in a context marked

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[2] *Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgement, 25 September 1997, ICJ Reports 1997, p. 78, para 140.

[3] ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, 20 April 2010, ICJ Reports 2010, p. 83, para 205.

[4] ITLOS, *Responsibilities and obligations of States with respect to activities in the Area*, Advisory Opinion, 1 February 2011, ITLOS Reports 2011, p. 50, para 145.

by an increased recourse to municipal courts in environmental litigation, and the potential role of the United Nations Security Council in dealing with environmental emergencies.

At a time when confidence in the multilateral legal order and the peaceful settlement of international disputes remains fragile, it is a source of comfort to see that more than twenty international practitioners and academics (with a composition which reflects gender balance and includes representatives of the new generation) have united their efforts to provide to the public what may be characterized as a guide to international environmental litigation. Legal norms to protect the environment do exist. It remains to be hoped that this new publication will contribute to a greater use of international courts and tribunals in order to protect our common environment.

Louvain-la-Neuve, France
September 2021

H. E. Mr. Philippe Gautier
Registrar, International Court of Justice

Preface

As litigators and scholars specialised in international law with a deep concern for the environmental crises upon us, this book aims to put the spotlight on how international courts and tribunals are addressing issues relating to the environment. It is our view that, only with a clear sense of the state of play, can we determine whether the system of international dispute resolution is up to the task of protecting our most precious asset: the natural world.

The book covers the full range of international, regional and transnational courts and tribunals, with a focus on their treatment of the environment. Presented in three parts, the book addresses how individual courts and tribunals engage with environmental matters (Part I); compares the manners in which these courts and tribunals are resolving key issues common to environmental litigation (Part II); and delves into future opportunities and developments in the field (Part III). The book therefore serves as both an essential aid to scholars and students engaged in research in this ever-developing field, and practitioners involved in environmental litigation.

The breadth of international courts and tribunals covered in this book can only be achieved through an edited volume: each contributor has brought their specialist knowledge and experience to the task of preparing their respective chapters. We, the editors, are deeply grateful for their commitment to the project—despite the delays and difficulties caused by the COVID-19 pandemic. We also extend our sincere gratitude to our assistant editor, Joseph Reeves, who has been instrumental in bringing the final manuscript together.

For better or worse, the sovereign state remains at the heart of the international legal system. Yet it is evident that the system has failed to pay adequate attention to the interconnected nature of the natural world. Our flourishing as a global community therefore depends on the ability for our systems to change—and the system of international dispute resolution is no different. It is our hope that, by showing how

international courts and tribunals have fared to date, this book lays the foundation for further research aimed at identifying ways to strengthen the system of international disputes resolution towards the better protection of our global environment for future generations.

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About the Editors

Edgardo Sobenes is an international lawyer with extensive experience in international litigation before the International Court of Justice and a unique practice in coordinating and managing international legal teams. His consultancy practice focuses on issues concerning public international law, international disputes, and procedural support. Currently he is the President of the Nicaraguan Branch of the International Law Association, and the creator and host of the first Podcast about international law in Spanish (Hablemos de Derecho Internacional—HDI). He guest lectures globally on topics related to international law and international litigation, and has written extensively in the field of public international law. He holds an Advanced LL.M. in Public International Law and International Dispute Settlement from Leiden University and an International Master's in Law from the University of Barcelona and ISDE.

Sarah Mead is a New Zealand-trained lawyer specialising in international environmental law and international human rights law. She presently works as a Senior Legal Associate at the Climate Litigation Network, an international project of the Urgenda Foundation which brought the ground-breaking climate change litigation against the Dutch State. Sarah also co-leads the IUCN World Commission on Environmental Law project: *Judicial Handbook on Climate Litigation.* She has published widely on topics relating to international environmental law, international climate change law and policy, and small island-states. She holds an Advanced LL.M. in Public International Law from Leiden University.

Benjamin Samson holds a Ph.D. in law from Université Paris Nanterre. He specialises in public international law, international investment law and law of the sea. He has extensive experience acting as counsel for governments in proceedings before the International Court of Justice, the International Tribunal for the Law of the Sea and the Permanent Court of Arbitration. He was a Visiting Scholar at the George Washington University School of Law (Washington D.C.) (2017), and has taught international law and international dispute settlement at various universities

in France. He has published a book and several articles on various international law issues.

Joseph Reeves is a Ph.D. candidate at the University of Angers, from which he holds a degree in international law. His doctoral research focuses on animal law. As a research assistant, he has taught international and European law at different French universities and has written in the fields of environmental law, European law, investment law, and human rights law. He has also advised various non-profit organisations on questions relating to animal law, European law and French administrative law.