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Ensuring a 'Tomorrow': The International Environmental Court

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Abstract

The core purpose of the paper is to create a measure of accountability for the man-made factors worsening environmental degradation through the formation of an international court. An independent and specialized court that would criminalize acts against the environment by weighing intricate geographical data and their biological, economic, and social implications in the nearby surroundings. With the likeness of the Rome Statute of the International Criminal Court (ICC), the elements of the crime of the International Environmental Court (IEC) can be quantified with the environmentally damaging factors of different acts by states or individuals. Additionally, the court would ensure that countries pay off and receive their due carbon taxes in exchange for greenhouse gas (GHG) emissions; provide reparations to the affected individuals by the governments; cease environmentally damaging activities, implement international environmental laws, and so on. On the contrary, the court would reserve the right to administer sanctions and order the imprisonment of state officials. Although several environmental treaties have been put into order for decades, their implementation by existing courts has not been noteworthy. Even though the proposition is drafted in a futuristic manner, the author attempts to portray the pragmatism of the insights in the paper. The structure of the Court, with its distinct feature of 'compulsory' jurisdiction, will be further explored. The paper will examine the mandates of the court in bridging the existing gaps of environmental conservation and its possible limitations, and finally, it will conclude with recommendations for its establishment to ensure better conservation of nature for future generations to come.

Keywords: international environmental law, international court, jurisdiction, climate change, environmental conservation

Introduction

It has now become a gospel truth that environmental conservation is necessary in order to survive. It is an essential state interest and an emerging *jus cogens* norm as stipulated in Article 64 of the Vienna Convention on the Law of Treaties, 1969; also evidenced by a wide range of state practices and binding *opinion juris* acts such as the Rio Declaration and the Paris Agreement (Islam & Sayem, 2025). Also, if we look at the Pulp Mills[1] case, the status of the 'no harm principle' of the environment and the 'essential interest' of its protection as a common concern of mankind has been rightfully emphasized

[1] Pulp Mills on the River Uruguay (Argentina v. Uruguay)

by the International Court of Justice (ICJ) (ICJ Reports, 2006, at 113). But who would ensure that states and non-state parties are indeed complying with the aforementioned principles? Which entity would hold them accountable if they do not? With the existence of the ICJ or the World Court, the answer might be straightforward (barring its inability to judge non-state parties). Given its history of adjudicating environmental cases, the capacity, efficacy and legitimacy may not be sufficient. As per the 2023 Synthesis Report of the Intergovernmental Panel on Climate Change (IPCC) Sixth Assessment Report (AR6), "every increment of global warming will intensify multiple and concurrent hazards (high confidence)" (IPCC, 2023). With evident heat waves, ice depletions, and more apparent physical risks, there remain economic risks, too - which eventually gave rise to the net zero emission plan by 2050, where countries have to strategically stop emitting carbon in the atmosphere to limit the global temperature rise to below 1.5 degrees Celsius (Intergovernmental Panel on Climate Change, n.d.). If states were to collectively meet this certain target, they need a feasible and effective form of accountability too. With the voluntary jurisdiction[2] of the ICJ, hesitation of states to label a dispute as 'environmental' and reluctance to appear before the Court[3], there should be stronger alternatives. Since the issues at hand are time-sensitive (they must be mitigated within the foreseeable future, such as achieving net zero emissions by 2050), they need to be addressed promptly and effectively to ensure a sustainable future. The court would handle transboundary environmental disputes, look out for the violation of related binding conventions, preside on submitted cases or provide advisory opinions to help interpret laws, punish states upon failure to contribute to the Nationally Determined Contributions (NDCs), ensure timely payments of carbon tax to the victim nations and so on. International environmental issues are known to be the 'abuse of common resources, transboundary pollution, activities that affect large areas encompassing several states, and local but widely shared issues (because they happen simultaneously in various countries or due to general interest in addressing them) (Speth & Haas, 2006). The possibilities are endless, but the decisions would have to be assertive or legally binding in nature. For ages, the weak and aspirational language, along with the lack of concrete

[2] Article 36(1), Statute of the International Court of Justice; although the Court does comprise of a compulsory jurisdiction as per Article 36, paragraphs 2-5 of the Statute where states may declare that they recognize the jurisdiction *ipso facto*, however, the cases are mostly limited to *(a)* the interpretation of a treaty;
(b) any question of international law;
(c) the existence of any fact which, if established, would constitute a breach of an international obligation;
(d) the nature or extent of the reparation to be made for the breach of an international obligation. Such cases are brought before the Court by means of written applications. This would not suffice for environmental disputes that require very specific approaches and a stricter jurisdiction that states would be compelled to oblige to. The compulsory jurisdiction (through declarations) is not what is intended for the IEC.

[3] It can be well presumed from the inactivity of the Chamber for Environmental Matters by the International Court of Justice (ICJ) that was created in 1993 to work on particular interests of environmental matters. It had zero by states in the course of its lifetime, before eventually disbanding in 2006. Although the ICJ has on its own dealt with several environmental matters, for example, rendering its first ever decision on environmental damage and compensation in the case of *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* in 2018, ordering Nicaragua to compensate Costa Rica for reparation. However, the developments are not prompt enough. The Court deals with almost every kind of issue which takes away its specialization in environmental matters hence the futuristic Court requires specialized proceedings (further explored ahead).

commitment, remained deeply problematic given the climate emergency and the urgent need for climate justice in environmental dispute decisions. The Court could impose sanctions, order compensations, and take other remedial measures to address the profound degradation of the environment and restore the ecosystem.

Specialties of the proposed Court

Most scholars to date have discussed the necessity of the futuristic court but not the possible frameworks the Court would comprise of, some also worried about its vast jurisdiction and how it would be difficult to tackle this concern (Pedersen, 2012; Hinde, 2003). There remains another group of scholars who in a way believe that the ICJ is equipped enough to litigate such disputes (Viñuales, 2008).

Formerly, a blueprint of this possible court was provided by ICE Coalition, it too explored the compulsory jurisdiction of the court and its possible sources of funding (Riches & Bruce, 2013). But what sets this paper apart is the exploration of additional specialties of the Court that could be added to the blueprint of the probable court, alongside the possible implications of doing so. Over time, the author believes that more characteristics will be added to legal scholarship, as people gradually, if not immediately, come to understand the importance of forming an IEC. With varying opinions and suggestions, the court's framework will be strengthened, paving the way for a potential formulation in the near future.

Through a centralized platform, the court would ensure accountability by allowing both state and non-state parties (e.g. organizations and individuals) to present their matters before this court. Apart from the ICJ, the International Tribunal for the Law of the Sea (ITLOS)[4], or the Permanent Court of Arbitration (PCA), the former also does not allow non-state actors to file complaints (as parties), and the latter does so only with consent. The proposed court should also try individuals (perhaps state leaders and heads of business conglomerates guilty of environmental damage) like the ICC.

There is no doubt that the ICJ is the World's court that has been established to maintain relations between states in accordance with international law. While discussing its jurisdictional complexities, Hoque (1999) writes:

> In comparison to international courts, municipal courts play a much more important role in a state. If the ICJ has not been a success story, the reasons for this should be attributed to the fluidity of international relations, strict adherence by states to the principle of sovereignty, and diverging socio-economic and cultural patterns of the world society.

Other courts like the European Court of Human Rights, the African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights' (through the Inter-American Commission on Human Rights) endeavours are also commendable in the advancement and spread of international environmental law and adjudication. Although they are not, by definition, universal in reach or in terms

[4] Although it is only limited to subject matter of issues arising out of the United Nations Convention on the Law of the Sea.

of wide jurisdiction, they currently offer a potential alternative for 'access to justice' for individuals in terms of environmental adjudication.
Principles like that of Maastricht on The Human Rights of Future Generations also devote themselves to ensuring an environmentally secure future for the upcoming generations.
If states were to take environmental disputes seriously from the very beginning of the court's initiation and bring forth the charges before the Court, perhaps its constraints would be lowered to what is apparent today.
In its Advisory Opinion on the *Legality of the Threat of Nuclear Weapons*, the ICJ unanimously stated that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn" (*Threat or Use of Nuclear Weapons* Advisory Opinion, 1996, para. 29). Judge Weeramantry in his dissenting opinion, highlighted that, regarding the environment, the Court (ICJ) must "pay due recognition to the rights of future generations" and noted that "the rights of future generations ... have woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognized by civilized nations" (Advisory Opinion, pp. 233-234). While adding onto his reasoning on ensuring intergenerational justice, he also stated that "[w]hen incontrovertible scientific evidence speaks of pollution of the environment on a scale that spans hundreds of generations, this Court would fail in its trust if it did not take serious notes of the ways in which the distant future is protected by present law."

One may argue that improving the scope of the ICJ (or any other court per say[5]), it itself can be used to deal with environmental claims, why would this world need another court? However, given the specialization the IEC needs, it would be too tedious and expensive to bring about changes to the existing courts than simply creating a new one. Plus, bringing such drastic and extensive changes to the existing courts may further affect their legitimacy of the previous rulings on related matters or perhaps even impact their image and credibility overall.

Combining the two aforementioned analogies of municipal courts and upholding intergenerational justice, several countries have been wonderful in their endeavours. Researchers from India have discovered the need for specialized environmental court for their domestic disputes (Gupta, 2011). Municipal courts like the Federal Court of Australia issued a landmark judgement when eight teenagers had filed a case (*Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment*)[6] against the Environmental Minister of Australia, Sussan Ley for agreeing upon a coal mining extension project, being the world's first case to rely on common-law principles to establish the duty of care, and so was relevant to other common-law countries including England, the United States and New Zealand (Slezak & Timms, 2022). They argued on the concept of 'duty of care' and

[5] It could be contended that if environmental crimes are dealt with by the Rome Statute (upon possible amendments), the ICC could be used as an environmental court to persecute individuals.

[6] (No 2) [2021] FCA 774

whether the law will be violated if it fails to prevent carbon emissions that would harm children. Although the appeal was in favour of the minister failing to establish her duty of care to the teenagers, it opens new frontiers for the possibilities of arguing in a similar manner and perhaps seeing light at the end of the tunnel.

Another (almost) successful attempt is by the Court of Hague when it ordered a leading oil company, Shell to cut its carbon emissions by 45 per cent by 2030 (compared to 2019), aiming to make the company align its business plans with Paris Agreement goals (*Milieudefensie et al. v. Royal Dutch Shell plc., 2021)*. Although an appeal is extended by the end of 2024, the order remains and it stands as a testament to the length of measures that municipal courts are taking (Frost, 2024). It is time for an international court to take stricter approaches to ensure that states, businesses, and individuals comply with the obligations. Any action that exasperates climate change needs to be circumvented; it is the duty of the judiciary. Courts are more effective in their respective states for crimes within their jurisdiction, and the obligation of the judiciary now comes down to environmental crimes on international frontiers. While countries have already started to understand the importance of a specialized environmental court in their domestic jurisdictions, it is high time that it is implemented internationally for global issues and matters involving two or more countries.

It is expected that a court dealing with scientific concepts and terminologies related to the environment would need to comprise of a body of experts in environmental science/management like geologists, ecologists, hydrologists, environmental scientists, wildlife biologists, conservation scientists, sustainability consultants, scientific analysts, and so on. If not available at the panel of judges, or further expert supervision/consultation is required, they can be requested to be a part of the panel. Together with legal experts, they can propose solutions or schemes that would either enforce the incarceration of state leaders or individuals guilty of environmental misconduct and/or ensure compensation to the victim(s). However, another reason an IEC is required as opposed to the ICJ handling environmental disputes is because of the lack of its scientific technical data. It is only fair that every field is different, and not everyone is aware of concepts that are limited to other fields of career. In the very first 'environmental' case of the ICJ, *Gabčíkovo-Nagymaros Project* (1997), the disinterest of the Court to use scientific information was seen (page 7):

> Perhaps the most disappointing aspect of the *Gabčíkovo-Nagymaros* judgment lies in the visible efforts made by the ICJ to circumvent the apparent scientific dimensions of the parties' conflict regarding the damming of the Danube. The first contentious environmental case decided by the ICJ showcases several judicial maneuvers with which the bench sought to escape evaluating the highly technical party-submitted expert evidence, both at the stage of framing the legal dispute and during its scientific fact-finding procedure.

The judgment marks a shaky start in the ICJ's history of deciding scientifically-loaded environmental disputes. Unsurprisingly, the decision was met with harsh criticism in contemporaneous scholarship for the many shortcomings in the ICJ's fact-finding technique and its lack of appreciation of the technical aspects of the case.

The Pulp Mills case was also marred by criticisms for the same reason (Riddell, 2009). The air, noise and visual pollution was considered beyond the scope of the Court. The *Certain Activities/Construction of a Road* (2015) and the *Whaling in the Antarctic* (2014) cases both featured cross-examination allowing the Court to 'test the credibility and consistency of party-submitted scientific data' (Sulyok, 2022). In the *Whaling* case, the judges did not give "*carte blanche* acceptance of expert opinions" (Sulyok, 2022; Mangel, 2016). The ICJ unfortunately avoided consideration of overarching environmental principles.

The proposed court needs to follow a holistic approach and understand the nature and temporality of environmental impacts, scientifically. Even an organization like the International Union for Conservation of Nature that is devoted to working on climate change, biodiversity loss and pollution, comprises of approximately 16,000+ volunteer scientists and other experts working for the international union across 160+ countries (IUCN - IUCN expert Commissions, n.d.). The experts make up 7 specialized commissions for performing different tasks of undertaking research and other technical work for their greater enforceability; they assist decision-makers with information, legal analysis, advisory services, legislative drafting, mentoring, and capacity building at national, regional, and global levels (Laur, 2016; Islam & Sayem, 2025). The World's (Environmental) Court would need to have such a detailed panel of experts if they truly want to make a difference. Hence, the proposition is such that experts from all over the world will be welcomed to work equivalently with the judges of the Bench to ensure it is scientifically sound.

The IEC would serve as a specialized body to ensure compliance with the environmental conventions, agreements and treaties. It could also be formulated with the amalgamation of the existing environmental frameworks to in turn create a new statute for the inception of the Court.

Policy decisions are always a state practice where states themselves stand hesitant to bring environmental disputes to the international front, failing to recognize their gravity. To counteract such blatant issues, the Court may be encompassed with *suo moto* power to have jurisdiction over a dispute. Moreover, individuals and non-state actors can seek justice before this Court, ensuring access to justice and the international environmental rule of law. Here, for the IEC, the jurisdiction is compulsory to fully commit to the "Save the Planet" drive and the Court to uphold the *erga omnes* principles. No country can disregard its jurisdiction.

Possible limitations & subsequent recommendations

One of the main reasons why the ICJ failed to successfully litigate environmental disputes all over the world is because of its state-consented (controlled) jurisdiction.[7] Countries would be reluctant to cede

[7] Lawson (1952) states that "[c]ommitments for reference to the Court of certain classes of future disputes might theoretically have been included in the Statutes themselves, and judicial settlement of these disputes thereby made obligatory… This was favored by the Advisory Committee of Jurists in 1920 but rejected by the Council of the League of Nations...there was majority support for the broadening of the compulsory jurisdiction of the Court by making its

their sovereignty to international bodies that, in a way, limit their interests. They would not be able to do so independently (sans repercussions), moreover considering that different countries have varying priorities regarding environmental protection, with reference to their own development plans. This could also pose a problem of non-compliance by states with the formation of the environmental court. However, this could be counteracted if members of the United Nations are *ipso facto* bound to accept the jurisdiction of the Court concerning its matters – this could be decided through treaty law or perhaps a resolution. States need to understand that the risks associated with environmental degradation are not limited to physical changes but also economic ones.

Global politics and the greater influence of the West (which is also the largest emitter of carbon) may influence the reduction of disputes that may make it to the Court. The financial burden of NDCs on developing countries is already enormous since industrialized nations in the Global North account for the majority of the world's carbon emissions[8], the countries might hesitate to bring forth additional burdens in terms of costs (discussed in detail in the following section) or by the fear of diplomatic protests and sanctions. They would have to pay a price that they do not deserve. The *suo moto* power of the court may help counteract that, without states having to voluntarily bring in the cases officially.

As a paymaster, the parties have to pay for the litigations and it may not seem much for developed nations, it could develop reluctance on the minds of the developing or underdeveloped nations to even be a part of the court or its foundational treaty at all. With allegations in the past about international courts being too expensive[9], if the history repeats here too, it could cause more duress than aid

acceptance automatic on adherence to the Statute. Opposition of the United States and the Soviet Union was determining, however".

[8] As per Hickel (2020), in 2015, 92% of excess global carbon emissions, United States alone accounted for 40%. A developing country like Bangladesh on the other hand amounted to 0.4% of the contribution, but devastating impacts are posing existential challenges for the country. See also, Sarwar, M. G. (2023, December 21). COP28 outcome: The road (not taken) towards a fossil-free future. *The Daily Star*. https://www.thedailystar.net/opinion/views/news/cop28-outcome-the-road-not-taken-towards-fossil-free-future-3499161), accessed May 21, 2024.

[9] See also Silverman, J. (2012, March 14). Ten years, $900m, one verdict: Does the ICC cost too much? *BBC News*. Retrieved October 11, 2024, from https://www.bbc.com/news/magazine-17351946, which stipulates how cost is indeed a great issue for litigations where courts like ICC since its inception, spent around $900m. The annual budget for the International Criminal Tribunal for the former Yugoslavia has gone up 500-fold since it began life in 1993. The International Criminal Tribunal for Rwanda budget for 2010-2011 was $257m. As opposed to the humongous costs and expenditure, it has completed about 50 trials since 1994. More recently, South Africa spent about 1.96 million South African Rand in the proceedings instituted by the government against Israel before ICJ. (See, Neethling, 2024).

(Romano, 2005). Particularly, being resource-heavy with specialists, with a decent infrastructure, and dealing with complex issues, the court would be expensive to maintain. If members are not helpful enough with funding, the plan could be jeopardized. Hence, compulsion becomes necessary (even if it sounds unpleasant with context to state sovereignty) to fund the court if it means to ensure the rule of law. The NDC budget could also be administered in the litigation proceedings since it is, after all, meant to help reduce emissions and tackle its existing effects. Another possibility could be the use of alternative dispute resolution or outside court settlements as well to reduce the cost of formalities of a traditional court proceeding.

Considering there is a plethora of environmental conventions and laws, disputes could arise on what will be followed by the Court. This could be tackled with the formation of a new treaty that forms the Court (similar to the Rome Statute) and discusses the elements of the possible crimes on land, water and air. Since environmental laws all vary in nature, the treaty would need to reach a common consensus. It could be an amalgamation of the existing principles, laws and directives (whatever seems appropriate) to the panel of expert drafters, who would be hand-picked based on their interests and expertise similar to the bench of judges. The authoritative alliance body would need to be formed first, which would then constitute the drafters of the instrument to finally select judges (including environment experts), lawyers and court officers.

Speaking of ICC, with the presence of numerous international bodies and courts, there is a risk of overlapping of procedural functions and jurisdictions, particularly with that of the ICJ, or even ITLOS and PCA. And the variety of existing courts try resolve matters through various areas that are simultaneously political, diplomatic, quasi-judicial, and judicial. There remains not one international court with universal jurisdiction that focuses exclusively on environmental concerns. However, these methods have been continuously challenged for their shortcomings, since they are not sufficiently prepared to handle the unique requirements of global environmental protection, at least in their current configuration (Stephens, 2009).[10] From prior arguments, this has been demonstrated how imperative IEC is today. With the formation of a specialized court dealing solely with transboundary environmental conflicts, I think this problem can be avoided. If parties file similar cases here, other courts will not accept them but rather redirect cases to the IEC, the court would gradually receive its recognition and credibility.

Environmental concerns are everywhere around us and from the smallest of the area, complaints of environmental degradation can be found. This might raise concerns of overflowing complaints and litigations. To avoid the obstacle of overflowing case works and backlog of cases which would again impact the speed of proceedings like other courts of similar manner, the jurisdiction could start by focusing on the most crucial problems of the time being, that are at the risk of escalating even further or have no possibility of stopping so until the root cause is dealt with. For dealing with matters of emergency e.g. air quality worsening than 200 Air Quality Index (AQI) would need to be mitigated quicker than perhaps that of a city with perhaps a 100 AQI because the unhealthy air quality at that

instance would have a great chance of worsening and becoming very unhealthy and potentially, cause several diseases.[11] However, a moderate air quality region would have a reasonable span of time before endangering humans, unless something disastrous occurs instantaneously. An international court with particular jurisdiction over environmental issues may provide an effective conflict resolution system that takes into account the nature of the same rights it seeks to safeguard (Stephens, 2009).[12] The strength of the court is its specialized approach that would help suppress the possible escalations of environmental degradations.

Another obstacle that the IEC may face is when states use the veil of the administrative power or mandate of the government, labelling it as a policy issue in a case[13]. The instrument of the court would need to clarify as much as possible the scopes of the court and when *erga omnes* obligations with context to the conservation of the environment would supersede all forms of domestic administrative powers. Considering the necessity in this time and age, it should be done.

The court has several challenges to overcome, such as not ruling judgements that feel inclined and supportive towards monetary and political interests but solely towards avoiding environmental degradation. However, that cannot also overlook economic interests completely. The decisions have to be conscious and pragmatic, otherwise this scare would also deter states even more and cause protests.

The environmental and legal specialist judges may face difficulties in cooperating in an alien structure as opposed to traditional concepts of an international court structure, particularly when both the ends do not have much idea about the other ends' field of expertise. Various technical scientific terms may be difficult to interpret legally and adjudge accordingly, more so if the concept is undergoing experiments and developing. However, everything starts with unfamiliarity and could instead mark the beginning of an incredible creation.

Conclusion

Although it is a vast concept and can have several different opinions as to what would be required in the formation of the court, this paper remarks the views of the author and with time modifications to the proposals are possible with time, given that the changes to the environment are ever-evolving and would require varying attentions. Although domestic courts are effective, victims of transboundary

[11] 151 to 200 AQI being in the range of 'Unhealthy'; 201 to 300 being 'Very unhealthy air quality that may cause widespread effects for the general population and more serious effects for sensitive groups' and 301 to 500 being 'Hazardous air quality'. Whereas, 51-100 denote as Moderate.

For a more vivid comparison, it can be presumed at that the condition of Dhaka (over 200 AQI as of December, 2024) would be of greater importance or require quicker response than New York air (AQI below 100 as of December, 2024) where people are getting sicker in the former (World Bank Group, 2022). Holding the regulatory bodies accountable through the court and suggestions from the expert panel would help minimize the risks.

[12] Lehmen (2015) also discusses how important IEC is in resolving disputes between both states and non-state parties as plaintiff and defendant.

[13] The Minister of Environment argued and the Chief Justice of Australia reaffirmed that the only reason the "duty of care" ruling would stand is when there would need to be changes made to the government policy and that the matter should be left to the government itself, not the courts.

environmental contamination have little chance of success and a short window of time to file a suit against a foreign polluter, a foreign polluter-state or its branches. The appropriate organization for monitoring the implementation of international rules established by environmental treaties would be an international instrument, such as an international environmental court. Having a court or a permanent body to look over the changes and the developments of international environmental law and interpret it would ameliorate the redress faced by distraught countries facing climate calamities. Notably, an international court would offer standing to state as well as non-state actors, keeping intact the principles of "access to justice" and *erga omnes* obligations in enforcing international environmental law.

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