

**Climate Torts and Ecocide in the Context of Proposals for an International
Environmental Court**

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Abstract

This thesis is an exploration of two questions that are neither novel nor lacking in exploration: Is an International Environmental Court (IEC) needed? Is such a court feasible? Proposals for an IEC have a rich history, are well founded and numerous. On the issue of necessity, this thesis attempts to pull together historical and current information on two distinct areas of international environmental law and use these analyses to contextualize the need for an international environmental tribunal. Arguments for and against an IEC are presented within a discussion of environmental diplomacy.

This thesis begins with a legal discussion of potential climate change actions in current international fora. This section is an attempt to add a layer of context on what the international legal landscape looks like for environmental actions while presenting one of two broad areas of environmental redress: a civil action. The analysis then moves on to discuss an international cause of action debated and advocated for over the past half century: ecocide. The need for a singular cause of action to fit the particularities of intentional environmental harm inflicted upon peoples is used to present the second broad area of environmental redress necessitated by international affairs: a criminal action. The analysis then moves from necessity to feasibility, beginning with an overview of proposals for an international agreement to create an environmental tribunal adequate to address the needs presented in the preceding sections.

This analysis draws on international relations theory in its conclusion that such a tribunal is necessary and potential, dependent on legally cognizable factors working in tandem with considerable advocacy. The belief that the potentially catastrophic human ability to affect the global environment has existed at least since the reality of nuclear holocaust threatened during the Cold War, is currently at issue in relation to climate change, and is likely to be an ongoing reality in a quickly developing, technologically hyper-driven, globally interconnected, resource-scarce future underpins this analysis. The need to have international legal mechanisms to protect those at the fringes of these processes who are often the most harmed by environmental degradation lends urgency to the project of investigating the feasibility of creating an IEC tasked with ruling on agreed international environmental norms and rights.

Chapter One: Necessity and Feasibility

This thesis is an exploration of two questions that are neither novel nor lacking in exploration: Is an International Environmental Court (IEC) needed? Is such a court feasible? Proposals for an IEC have a rich history, are well founded and numerous. On the issue of necessity, this thesis attempts to pull together historical and current information on two distinct areas of international environmental law and use these analyses to contextualize the need for an international environmental tribunal. Arguments for and against an IEC are presented within a discussion of environmental diplomacy.

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tandem with considerable advocacy. The belief that the potentially catastrophic human ability to affect the global environment has existed at least since the reality of nuclear holocaust threatened during the Cold War, is currently at issue in relation to climate change, and is likely to be an ongoing reality in a quickly developing, technologically hyper-driven, globally interconnected, resource-scarce future underpins this analysis. The need to have international legal mechanisms to protect those at the fringes of these processes who are often the most harmed by environmental degradation makes the project of investigating the feasibility of creating an IEC tasked with ruling on agreed international environmental norms and rights.

Causes of Action and Theories of Justice

The following analysis simplistically breaks down the legal terrain into two distinct areas of law: civil and criminal. A perspective on justice that incorporates three theoretical concepts reinforces the following analysis. These three types of justice flow throughout the discussion below and guide the analysis of proposals for modulating the international system to serve the needs of those who suffer grave harms:

- Retributive Justice: concerns the ethical appropriateness of punishment for wrongdoing. It encompasses both backward-looking (retaliation) and forward-looking (deterrence) elements. This is the so-called “criminal justice.”
- Corrective Justice: concerns the ethical appropriateness of rectifying imbalances in benefits and burdens caused by a loss or a gain. This is the so-called “civil justice.”
- Distributive Justice: concerns the ethical appropriateness of redistributing goods and benefits (for example, wealth, power, reward, or respect)

between actors who are not in equal situations at the start. This is the so-called “social justice.”¹

It is not the aim here to argue that the international system should embody the perfection of these facets of justice, but only to keep them in mind throughout the discussion and relate current and potential institutional capacity to the goal of justice in its multiple dimensions.

“Civil law” here is meant to cover actions attempting to recover damages for harm done, in an attempt to put the victim in the place they were before the offense.

Transboundary environmental harm is shorthand for civil wrongs committed by one State, its nationals or multinational organizations against the environmental integrity and resources of another State. In contrast to a criminal action, a civil international environmental action does not necessarily carry an ethical or moral judgment with its legal determination. The deterrence value of this type of law is the caution exercised by those who do not want to be materially liable for harm caused to others. It is therefore imperative that the mechanisms for assigning liability and recovering potential damages are founded in principles shared throughout the international community and a long-term view of reciprocal benefit.

“Criminal law” here is meant to cover actions attempting to sanction States, organizations and individuals for reckless or purposeful environmental harm inflicted upon targeted communities in the course of transboundary activities. The deterrence value of criminal law in this context is to warn States and individuals who contemplate inflicting

¹ Can You Hear Me Now? *The Case for Extending the International Judicial Network*. 10 Chi. J. Int'l L.

environmental harm outside of their territorial boundaries that such conduct carries consequences. The moral consequences, commonly considered diplomatic “shaming,” and the economic and political consequences of various forms of sanctioning - limiting movement, trade, etc. for individuals and States - are contemplated.

Diplomatic Theory in the context of Environmental Treaty Making

Environmental diplomacy is considered here as a distinct subset of international negotiations. The mechanisms for answering uniquely ecological legal questions and the need to incorporate innovative strategies to prevent and alleviate environmental harms are unique within the field of international affairs. The negotiations necessary to create a convention that might birth a new international court would be equally challenging. The emergence of the International Criminal Court in 1999 marked an important period in international legal history. To date, 114 States have submitted to the jurisdiction of a court that could prosecute their nationals, independent of domestic judicial and political will. The trajectory of the formation of the ICC is instructive in the quest for a tribunal that might take competency over transboundary environmental crimes. The diplomacy that helped realized the Montreal Protocol process is an example of an environmental treaty regime that limited State governments and generated a treaty regime that was effective and relied on innovative diplomatic approaches. The formative processes that helped to create the ICC and the Montreal Protocol may inform proposals for an IEC. Both types of diplomacy – environmental and what might be termed “judicial” as

necessary to form a new court – would need to be levied by advocates and diplomats from States dedicated to a convention on environmental norms and rights. The following discussion focuses on the role that environmental diplomacy might play in measuring the potential for an IEC. The IEC that is envisioned might exercise broad personal jurisdiction over States and individual actors and hold competency to hear a range of environmental claims – both civil and criminal.

Chapter Two: International Environmental Torts: Climate Change Litigation

Current international judicial institutions are likely insufficient to address the impending impacts of climate change, especially since these impacts are most likely to be felt most acutely by already marginalized communities. These communities either represented by their States or on their own behalf, face jurisdictional and justiciability hurdles that have thus far rendered current international legal fora impotent to address their needs. Legal remedies may afford a measure of protection, even if retrospective, for those who suffer from climate impacts. A legal challenge at an international tribunal would require innovative legal theories. Questions of jurisdictional attachment and causation have particularly challenged international legal scholars who have contemplated such actions. The legal competency of current international tribunals may be insufficient for climate change litigation to move forward. The need for an environmental tribunal, which could hear claims based on damages from climate change, is topical, but not confined to climate change actions. It seems unlikely that increasingly large scale and cumulatively intensive human actions will harmonize with natural systems sufficiently to forestall future detriments to the global environment.

This section looks at four major international judicial bodies that have been proffered as possible forums for claims aimed at redressing the affects of climate change. The following examples do not amount to an exhaustive list of international legal bodies, but rather are representative of the types of institutions potentially available to climate actions. The International Court of Justice (ICJ), often called the World Court, is a forum

for States to address grievances with other States. The Inter-American Court of Human Rights (IACHR) is a regional judicial institution that interprets and applies the human rights treaty under which it was established. The International Criminal Court (ICC) is a tribunal created to prosecute individuals accused of four distinct crimes: crimes against humanity, war crimes, crimes of aggression and genocide. The International Tribunal of the Law of the Seas (ITLOS) is the adjudicatory body established to hear claims under provisions of the Law of the Seas.

These different international fora provide opportunities for potential causes of action that might be brought against parties contributing to climate change. The four chosen represent different arguments for whether international environmental claims could or should be heard. The ICJ might be argued as the best place for such claims to best support the development of public international environmental law. The ICC has been proffered as the best venue because of the potential for describing climate damages as grave international crimes. Hearing a climate claim at a human rights venue could be recognition of environmental rights in international law. Finally, a forum with a specific competency over a specific environmental treaty regime has been thought to provide the most viable legal avenue for a climate claim.

After describing the problem and potential judicial venues, the following section focuses on a potential cause of action akin to a tort action in the United States. The discussion of this potential action focuses on a potential action at the International Tribunal for the Law of the Sea (ITLOS) with a primary analysis of the applicable causation standard under international law. This section applies current international law

with the goal of providing legal protections for those most endangered by global climate change - indigenous peoples. To this end, a brief introduction to a concept of international environmental justice is included here.

It is the aim of this thesis to center those most affected by climate change in the discussion of possible legal avenues for redress and protection. Indigenous populations in areas susceptible to rising tides, desertification and species loss/migration will likely bear the brunt of climate change and in most cases have contributed little to global emissions of climate altering greenhouse gases. These populations often have fewer political rights and less political power, inhabit already fragile ecosystems, rely directly on natural resources, have less resources for increasingly inevitable adaptation and are most likely to suffer cultural destruction from deteriorating environments. Considerations of expediency aside, in order for these populations to be adequately represented in international legal fora and enjoy some measure of legal redress the best option for potential adjudication may be the development of a forum that can adequately hear tortious environmental claims. The current international judicial framework may be insufficient because of the limitations described below. A new international convention specifically dedicated to environmental harms may be necessary to achieve justice and offer protections for indigenous and politically marginalized communities.

Principles of Environmental Justice Applied to Indigenous Communities

It is well established that indigenous communities will likely bear the brunt of negative climate change effects.² In particular, indigenous peoples living in arctic regions, on Small Island States, in areas prone to desertification and in areas already suffering from biodiversity loss are in danger and have in some cases already been forced to migrate to other areas. In the arctic, Inuit peoples have already petitioned the Inter-American Commission on Human Rights, for hearings to be held in order to seek relief from the results of global warming.³ In part, reliance on international forums is necessary because the problems such communities face are global in nature, but also because international law allows for commonality across borders and promises to provide citizens of the world a forum for hearing grievances.⁴

The primary goal of actions to utilize public international law to combat climate change should be rooted in the protection of the rights of indigenous peoples. Many authors have searched for protections through currently recognized human rights regimes, but none have sufficiently provided for the protections from climate change that indigenous populations require. There are many reasons why marginalized groups and the

² See generally, "State of the World's Indigenous Peoples." Department of Economic and Social Affairs, United Nations. UN 2009. Available at http://www.un.org/esa/socdev/unpfii/documents/SOWIP_web.pdf (last visited 05/06/2010). Chapter III: Environment is particularly illustrative of the effects of climate change on indigenous populations.

³ See Petition to the Inter American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States 13-20 (Dec. 7, 2005), available at http://www.earthjustice.org/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf [hereinafter Inuit Petition].

⁴ "The growth of a network of international courts and tribunals increasingly provides individuals across the globe with access to remedies that they could not have domestically, partially redressing inequalities and the moral arbitrariness of citizenship and birth." Cesare P. R. Romano, Can You Hear Me Now? *The Case for Extending the International Judicial Network*. 10 Chi. J. Int'l L. 233, 235 (2009).

individuals within these groups might search out international forums.⁵ In each case the goal is restorative or corrective justice.

One of the goals of this discussion is to explore three strands of current international law: sovereign-State analysis, human rights frameworks and international criminal law. The examination aims to find where environmental harm to humans might fit best within the frameworks of judicial institutions that currently exist and investigate alternative options. One of the problems with trying to fit environmental harm into current frameworks is articulated by Professor Hari Osofsky:

International environmental law primarily focuses on environmental damage, rather than on its impact on human beings. Its ultimate end is certainly to serve human purposes; both treaty and customary international environmental law aim to solve problems that matter to people, and our species' survival may depend on our ability to find more sustainable approaches. But the focus of environmental treaties is primarily on constraining environmentally deleterious behavior, rather than on preventing injuries to people.⁶

A shift in focus may be necessary to accomplish justice for a broad range of populations who are currently effected by harm and for those who will be increasingly affected by climate change.

Osofsky looks to developments in domestic environmental justice movements to provide some answers as to how international environmental law might accommodate the

⁵ “Sometimes domestic courts do not exist (for example, because they have been closed down by war), are unable to dispense justice impartially, or lack jurisdiction over one of the parties (for example, the defendant is shielded by the sovereign immunity doctrine). In these cases, the individual can bypass the domestic level and directly access competent international jurisdictions, should they exist.” *Id.* at 239. Hari Osofsky, Learning from Environmental Justice: A New Model for International Environmental Rights, 24 Stan. Env'tl. L.J. 71, 78 (2005).

⁶ Hari Osofsky, Learning from Environmental Justice: A New Model for International Environmental Rights, 24 Stan. Env'tl. L.J. 71, 78 (2005).

needs of indigenous peoples. Osofsky's method is the case study. She moves across the globe surveying instances of environmental adjudication to uncover factors that connect environmental winners and losers. She focuses on the need for coordinated advocacy, searching for a centralized institution, actor or movement to bind similar cases that have no interconnected support.⁷ Ultimately, Osofsky believes that, “the most helpful development for victims of environmental harms would be a binding environmental rights treaty that creates a corresponding judicial forum with enforcement authority. That forum would have jurisdiction over not only State parties, but also non-State petitioners and defendants.”⁸ The following discussion of international fora that exist under the current treaty regimes applicable to climate change litigation illuminate why this need may be so acute.

The Current International Judicial Framework

The four judicial bodies that are discussed below have different virtues and limitations. Primarily their applicability to climate change actions relates to differences in scope of both personal and subject-matter jurisdiction. The International Court of Justice may only hear cases between States. In the context of the rights of indigenous populations, those States with significantly burdened inhabitants would likely need to bring the suit. Complicating this is the necessity for two States to consent to an ICJ proceeding. The International Criminal Court may hear petitions from individuals so the problem of personal jurisdiction that the ICJ presents is not operative. However, unlike

⁷ *Id.* at 131.

the ICJ, the ICC is limited by the four causes of action included in its organic statute, not by the bounds of applicable international law. The IAHRRC has a broad subject-matter jurisdiction, which encompasses a growing international human rights regime. However, as a regional body its jurisdictional limitations are theoretically territorial in nature. ITLOS may be the best of the available forums in which to bring a climate change action because it has a broad jurisdictional reach and clear structural advantages. However, current standards of international law would pose significant challenges there, as well.

A. International Court of Justice: Getting to Court

The ICJ is the judicial arm of the United Nations and one of the principle organs of the organization, as provided for in Article 7 of the UN Charter.⁹ The Charter also references the Court in Article 36, which States that “as a general rule” the Security Council should refer legal disputes to the ICJ.¹⁰ Chapter XIV, which is comprised of Articles 92 through 96, specifically outlines the institutional structure of the Court. The Statute of the ICJ, an annexed “integral part” of the Charter that organizes the composition and functioning of the Court, supplements the articles of the Charter.¹¹

Chapter XIV makes all UN member States de facto parties to the Statute of the ICJ and provides for compliance to ICJ decisions enforceable by the Security Council. Importantly, Article 96 provides for the Security Council or the General Assembly to request advisory opinions “on any legal question.” The Statute of the ICJ makes clear that

⁸ *Id.* at 129.

⁹ UN Charter art. 7, para. 1.

¹⁰ *Id.* art. 36.

¹¹ Statute of the International Court of Justice, effective Oct. 24, 1954, 59 Stat. 1031, 1060, T.S.

only States may be parties in cases before the Court and that their involvement in cases is dependent on their own referral of a case. In effect, one State may not compel another State to involvement in a case. Both States must agree to accept the jurisdiction of the Court. However, the Statute also provides for the adjudication of all matters provided for in the Charter, which includes advisory opinions on legal questions.

Andrew Strauss has thoroughly outlined possible climate change litigation before the ICJ. He proposes that bringing a suit based on a State's detrimental effect of climate change is possible under the above ICJ framework.¹² As described above, States must consent to ICJ jurisdiction. Since this is extremely unlikely in the case of climate change litigation, Strauss relies on two “back door” routes to State consent to ICJ jurisdiction:

The second way the Court could attain jurisdiction is if under the so-called optional clause of the Article 36(2) of the ICJ Statute, the respondent State has prospectively entered a declaration accepting the compulsory jurisdiction of the court for the kind of dispute being litigated, and the applicant State has allowed in its own declaration that, in accordance with the rule of reciprocity, it would itself be subject to the Court's jurisdiction were it to be sued in a case of similar nature. Finally, the third way that the Court could gain jurisdiction also pursuant to Article 36(1), is if the parties have specifically provided for dispute resolution before the Court in a pertinent treaty which is in effect between the parties.¹³

Strauss's argument for bringing a case to the ICJ is based on the assumption that doing so would be advantageous because, “a favourable ruling by the ICJ could provide an authoritatively sanctioned reference point around which public opinion can crystallize by

¹² Andrew Strauss. *Climate change litigation : opening the door to the International Court of Justice in Adjudicating Climate Change : State, National, and International Approaches* (William C.G. Burns, Hari M. Osofsky, eds.) Cambridge; New York : Cambridge University Press, 2009. 334 – 356.

¹³ *Id.* at 340.

imbuing that claim with the official imprimatur of law.”¹⁴ He recognizes that the ruling would only be applicable to State responsibility for climate change impacts rather than any private actor's responsibility. In a world increasingly threatened by the actions of multinational corporations, this limitation would seem to fatally restrict a broad range of important litigation. However, Strauss believes that an ICJ ruling could still potentially impact domestic litigation against corporations. He posits that domestic tort actions (nuisance or negligence) targeting corporations based on their contribution to global warming would require establishment of some offense to a “community-wide standard of behavior.” Strauss believes that the ICJ ruling could help establish this standard.¹⁵

The tenuous possibility of bringing a case based on climate change to the ICJ and the only possibly constructive and concededly indirect effect such a suit would have on the primary corporate offenders of actions that substantially contribute to climate change likely make this route an unsuccessful one for indigenous peoples. Often, the activities of corporations occur in States where the domestic framework of regulation and tort law are either insufficient or exist within a framework of corruption that does not allow for effective redress of grievances.¹⁶ Even within States where these complications may not be fatal to possible litigation efforts, the relative position of political powerlessness and economic disadvantage of indigenous communities in such States is a frustrating factor for legal activity.

¹⁴ Id at 337. Strauss cites Robert Y. Jennings, *The United Nations at Fifty: The International Court of Justice After Fifty Years*, 89 Am. J. Int'l L. 493 (1995) as a “classic work discussing the role and influence of the International Court of Justice to support this claim.”

¹⁵ *Id.* at 338.

¹⁶ See Ecuadorian example, *infra*.

Still, Strauss is somewhat confident that States could bring suits by way of the two methods described above. In order for States to be able to bring suit under the first method there would need to be the coincidence of both the applicant and responding party having accepted compulsory jurisdiction over a claim of international liability.¹⁷ Strauss believes that a claim might be made within the context of the Kyoto Protocol to the United Nations Framework Convention on Climate Change (UNFCCC). Under the Kyoto Protocol developed States and lesser-developed States are separately categorized and have different responsibilities and obligations. Generally speaking, under the Protocol developed States must reduce their emissions of greenhouse gases and developing States are encouraged to engage in development that, to the extent possible, does not compound the climate change problem. Strauss believes that,

To the extent . . . that such developed countries are themselves victims of global warming, a potential claim could be explored against fellow developed countries that are not bearing their share of the responsibility for the global warming problem, either because they do not appear to be on track to meet their emission reduction obligations, including under the Protocol, or they have not acceded to the Protocol and are not otherwise bearing their share of the responsibility for the global warming problem.¹⁸

Strauss spends the majority of his analysis on this point, searching for countries that might fit this bill.

His assessment is that countries who have acceded to the Kyoto Protocol but who have not complied with its obligations and have accepted compulsory jurisdiction under Article 36(2) of the ICJ are the most likely to be targets of litigation.¹⁹ However, one

¹⁷ *Id.* at 340.

¹⁸ *Id.* at 339.

¹⁹ *Id.* at 341.

problem that he notes is that “[a]ll of the nine countries that have accepted the compulsory jurisdiction of the ICJ under Article 36 – except for Denmark, Liechtenstein, and Norway – have entered reservations to their acceptances excepting disputes which the parties agree to settle by other means of peaceful settlement.”²⁰ This might be problematic because the UNFCCC and Kyoto Protocol provide for States party to it to settle disputes, “through negotiations or any other peaceful means of their choice.”²¹ His “general conclusion is that a persuasive case could be made that the ICJ could assert jurisdiction over disputes under the UNFCCC and Protocol if they involve countries that have opted into the binding jurisdiction of that Court regardless of whether they have done so subject to an *other means of peaceful settlement* provision.”²²

In essence, Strauss believes that just because the specific treaty at issue provides for the parties to a dispute to choose the means of dispute resolution, compulsory ICJ jurisdiction over a dispute arising from that treaty may well still attach. Even by successfully overcoming this jurisdictional hurdle Strauss realizes that the real question at issue is a substantive law one. “[C]ountries attempting to formulate climate change claims so as to achieve maximum impact in an ICJ proceeding would be unlikely to conceptualize them as solely a question of compliance with the UNFCCC and the Kyoto Protocol even if they and their adversaries were party to these agreements.”²³

Strauss also looks at the possibility of a party bringing a claim to the ICJ based on an independent treaty, reflecting the second jurisdictional option listed above. Here, he is

²⁰ *Id.* at 343.

²¹ *Id.* at 342.

²² *Id.* at 344.

forced to rely on the seemingly weak prospect of finding parties who are both members of agreements with extremely broad treaty language, which may cover climate change activities. Here he focuses on a class of treaties described as Friendship, Commerce and Navigation (FCN) treaties.²⁴ He does find some precedent in FCN treaties being used to bring suits not previously contemplated to the ICJ,²⁵ and concludes that a case might be brought if a treaty “negotiated in the context of protecting the mutual commercial interests of countries' citizens can be construed to protect them from harm caused by global warming.”

These jurisdictional hurdles are instructive here primarily in the sense that their complexity and lack of certainty make plain that the UNFCCC treaty regime in conjunction with ICJ jurisdiction presents an uphill battle for successful claims to be heard. This is particularly troubling since, other than the UNFCCC “the international community has not developed specific treaties to deal explicitly with the normative dimensions of the global warming problem.”²⁶ Strauss is more hopeful in his assessment in that he hopes that his analysis will “further a discussion of how the door to that forum might be opened.”²⁷ Still, as the ICJ is constituted now, the State maneuvering necessary get a case to the Court is substantial and would be tied to political considerations such as the adversarial process's effect on future negotiations for a climate change treaty regime to follow the Kyoto Protocol.

²³ *Id.*

²⁴ *Id.* at 345.

²⁵ Strauss' example involves the bombing of vessels during a military conflict, which seems far-flung from the type of action that a State attempting to base a dispute on climate change effects might make. *Id.* at 346.

Strauss's analysis of the law that the ICJ would rely upon illustrates that even to the extent that a claim based on climate change is possible, the ICJ is an ill-suited forum for the redress of grievances suffered by discrete communities within States. In addition, the reality of a State bringing a claim that might serve to protect those most affected is even more circumspect, considering the relative political power impoverishment of such communities. The example of the threatened petition by the small island nation of Tuvalu is illustrative of this point.²⁸

In 2002, the Prime Minister of Tuvalu announced that the people of Tuvalu would bring a suit in the ICJ claiming the inaction of the United States on the problem of climate change threatened their sovereignty.²⁹ Tuvalu is a coral island that some scientists predict will be inundated by rising sea levels within the next 50 years.³⁰ Many scientists attribute this sea level rise to climate change and the position of the Prime Minister in 2002 was that the threat to the island chain from the impacts of climate change were “real, and are already threatening our very survival and existence.”³¹ Tuvalu's legal threat was never carried out, but the novel hypothetical approach to combating climate change sparked discussion about the possibility of bringing such a suit to the ICJ. Beside the procedural

²⁶ *Id.* at 350.

²⁷ *Id.* at 356.

²⁸ Strauss makes note of the Tuvalu example, but in a footnote he puts the onus on the failing of the threat on changing political condition in Tuvalu. *Id.* at 339 note 18.

²⁹ Rebecca Elizabeth Jacobs, Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice, 14 *Pac. Rim L. & Pol'y J.* 103, 103 (2005)

³⁰ *Id.* at 104.

³¹ *Id.* citing Rt. Hon. Bikenibeu Paeniu, Prime Ministerial Special Envoy on Climate Change, Tuvalu statement on the United Nations Framework Convention on Climate Change to the Third Conference of Parties (Dec. 8, 1997), available at <http://www.tuvaluislands.com/kyoto-panieu.htm> (last visited May 14, 2010); Piers Moore Ede, That Sinking Feeling: Their Island Nation on the Verge of Disappearing Due to Sea Level Rise, Citizens of Tuvalu Prepare for Repatriation, 17 *Earth Island J.* 39 (2003) available at http://www.earthisland.org/journal/index.php/eij/article/that_sinking_feeling/ (last visited May 14, 2010).

problems that Strauss observes, substantive issues might preclude Tuvalu from establishing liability under the UNFCCC and Kyoto Protocol. First, the UNFCCC allows parties to refrain from taking preventative measures if they are not cost effective. The U.S. might cite economic hazards from emissions reductions or the U.S. might successfully argue that the convention is not binding.³²

The current international climate change regime may simply be insufficient for presenting the basis of possible litigation in the ICJ. Still, looking at the hypothetical Tuvalu case gives insight into what aspects of international law are at the disposal of all States that may want to bring a climate claim against another State.³³ The first set of concerns deal with harm: what harm has been caused and who is causing the harm. Tuvalu would need to prove that the United States was harming it through its inaction on the issue of climate change. Once established, Tuvalu would need to argue the international law principles of sovereign equality and State liability for harmful activity apply. The principle of sovereign equality ensures that a State has a “sovereign right over its own resources.”³⁴ These principles are uncontested, so incidence and causation would simply need to be shown. The principle of State sovereignty underlies the entire international system of governance that is currently in place. Additionally, State liability for harmful activity occurring on the territory of another sovereign State is a well-founded principle in international law. The decision in the *Trail Smelter Case* is guiding precedent for the

³² Jacobs at 111.

³³ The following is a restatement of the assessment made by Jacobs of the substantive law claims Tuvalu would need to make and the international legal principles that would need to be shown. Jacobs at 119-120.

³⁴ *Id.*

principle of protection from harm from another State.³⁵ With these principles at a State's disposal harm may be easy enough to prove – damages from climate change are already occurring. In this case, Tuvalu is actually sinking. The real problem here would be proving causation. Even if the ICJ would allow for climate change to be the mode of causation, the case would necessarily target a particular State. In the Tuvalu hypothetical the United States was targeted. However, the possibility of ascribing causation to activities of the United States at the ICJ is questionable.³⁶

Tuvalu would also likely want to attempt to obtain prospective relief.³⁷ However, this would be an even greater challenge than making claims based on sovereignty. The necessary principles for prospective relief may be intergenerational equity and the precautionary principle.³⁸ These principles do not enjoy the same status in international law and relations as sovereign equality and the prohibition on transborder harm. Further, “[t]he ICJ has never granted prospective or future damages to parties.”³⁹ The ICJ has heard cases requesting prospective relief, but has “dodged” the issue whenever it has been presented.⁴⁰ Tuvalu could have claimed relief based on intergenerational equity, premising “that humans, as part of a ‘natural system,’ have a responsibility to protect the present

³⁵ “[U]nder the principles of international law, as well as the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury . . . in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.” Jacobs at 120. citing Trail Smelter Arbitral Tribunal, 35 Am. J. Int'l L. 684, 685 (1941). See Appendix A.

³⁶ “Without clear and convincing proof that the United States' emissions are the cause of Tuvalu's injury, the ICJ may reject Tuvalu's claims for direct damage.” *Id.* at 121.

³⁷ “While Tuvalu is already experiencing damage from global warming, the worst is yet to come.” *Id.*

³⁸ *Id.* at 119.

³⁹ *Id.* at 121.

⁴⁰ Jacobs cites the *Nuclear Test Cases* as examples of cases looking for prospective relief. Although Jacobs outlines the ICJ's reluctance to hear prospective claims, she does believe that “[d]espite the ICJ's refusal in

and future of their environment.”⁴¹ In addition to a claim based in intergenerational equity, Tuvalu might also bring a claim based on the United States’ actions contravening the precautionary principle. The precautionary principle “suggests that a country should not refuse to regulate activity simply because it is scientifically uncertain whether the activity will cause harm.”⁴² Tuvalu would need to argue that both these principles are valid customary international law.⁴³ It seems clear that, similar to the procedural maneuvering necessary to gain standing to bring a climate change case before the ICJ, prospective relief would require stretching the bounds of current international law. Of course, this is part and parcel of any groundbreaking litigation. It is still important to point out that without the strengthening of new tools such as the principle of intergenerational equity and the precautionary principle,⁴⁴ any comprehensive claims of climate change litigation may not be feasible. This is why a new international convention recognizing and codifying these principles may be necessary.

The challenges that Tuvalu, or another State would face are perhaps insurmountable in the context of bringing litigation to the ICJ, both on issues of justiciability and substance. While much of this is attributable directly to the unique

the *Nuclear Test Cases* to rule on the issue of prospective damages, future cases involving prospective damages from the effects of global warming may force the ICJ finally to face this issue.” *Id.* at 122.

⁴¹ *Id.*

⁴² *Id.*

⁴³ Article 38 of the Statute of the ICJ provides, “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (b) international custom, as evidence of a general practice accepted as law.” Statute of the International Court of Justice, *supra* note 5.

⁴⁴ Both of these principles do have precedent in international law, e.g. Principle 15 of the Rio Declaration, which notes: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” Rio Declaration on Environment and Development, June 1992. Available at

challenge of climate change it is clear that attempting to find redress in a venue such as the ICJ, which deals exclusively with State actors is highly problematic. Other than the issues brought up above, there is also the fundamental problem of interstate litigation excluding the voices of the individuals who are actually harmed and the potential for finding non-State actors liable for acute harms they perpetrate. In some measure, international human rights law attempts to fill this gap. The IAHRRC is one example of a forum where human rights, and therefore the individuals who are most harmed, are central.

B. Regional Human Rights Court: The Inter-American Court of Human Rights

The advent of regional human rights courts began in 1959 with the constituting of the European Court of Human Rights. Two other regional human rights courts have followed this innovation in international law, the Inter-American Court of Human Rights in 1979 and the African Union Court of Human and Peoples' Rights in 2004. The genesis of these courts show increased judicial capacity to hear human rights claims throughout the world and are just three examples of judicial fora that have or have had competency in the area of human rights.⁴⁵ However, the problems associated with climate change are likely outside the jurisdiction of these courts. “In sum, as long as human rights courts apply treaties that have been drafted between the 1950s and the 1970s, the rights they can

<http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>. However, their usefulness at the ICJ has not been shown.

⁴⁵ See Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 NYU J Intl L & Pol 709, 748-51 (1998-99). (Synoptic Chart). Romano writes that in addition to the three human rights courts listed “[t]here is also a remarkable array of quasi-judicial and implementation-control bodies, such as the various committees established under the UN human rights treaties. There are in total about two dozen, counting both the global and regional levels.” The chart has since been updated. The most recent version (Nov 3, 2004) is available online at <http://www.pict-pcti.org/publications/synoptic_chart/synop_c4.pdf> (visited May 14, 2010), reprinted in Jose E. Alvarez, *International Organizations as Law-Makers* 404-47 (Oxford 2005).

vindicate will remain necessarily confined to the core human rights, leaving many aspects of human life untouched”⁴⁶ One example of the insufficiency of human rights courts to deal with the impacts of climate change comes from the Petition made by North American Inuit peoples to the Inter-American Court of Human Rights.

In December 2005 a petition was filed in the IACHR on behalf of all Inuit of the arctic regions of the United States of America and Canada claiming that the United States violated the human rights of the Inuit through its action and inactions relating to climate change.⁴⁷ In response, the IACHR found that the petition failed to present facts sufficient to characterize a violation under the IACHR treaty.⁴⁸ The significance of the attempt was the creative lawyering that it embodied:

It reframes a problem, typically treated as an environmental one through a human rights lens, and moves beyond the confines of U.S. law to a supranational forum. In so doing, the petition lies at the intersection of two streams of cases occurring at multiple levels of governance: (1) environmental rights litigation and petitions and (2) climate change litigation and petitions.⁴⁹

The currently unsuccessful petition by the Inuit was an attempt to bridge environmental and human rights.⁵⁰ The environmental impacts of climate change on the Inuit are extreme and obvious and the human rights implications are severe.⁵¹

⁴⁶ Romano at 260.

⁴⁷ Inuit Petition, supra note 3.

⁴⁸ Letter from Ariel E. Dulitzky, Assistant Executive Sec'y, Organization of American States, to Paul Crowley, Legal Rep. (Nov. 16, 2006), available at <http://graphics8.nytimes.com/packages/pdf/science/16commissionletter.pdf>.

⁴⁹ Hari Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*. 31 Am. Indian L. Rev. 675, 676 (2007).

⁵⁰ *Id.* at 688.

⁵¹ For example, Osofsky lists “Melting permafrost and worsening storms damage their homes. Changes in animal populations threaten their livelihood as hunting becomes more precarious. Ice thaws make it dangerous to use traditional travel routes. The ground is literally shifting under the Inuit's feet and everything from weather prediction to igloo building is not what it once was.” as some of the

Unfortunately, it seems that the limitations of a regional human rights tribunal would be fatal to a climate change petition or other attempts to have a claim adjudicated on the basis of a human right to a healthy environment. However, the agreements that bore these courts may serve as good examples for a global treaty based on environmental rights enjoyed by all humans.

C. International Criminal Court: Subject Matter Competency

As described above, the International Criminal Court has subject matter jurisdiction over four specific activities criminalized under its organic statute, which does not deal with civil wrongs. Nonetheless, the court is a strong model for the creation of an international adjudicatory body with a particularized competency. The jurisdiction of the court extends to all the members who have acceded to the Rome Statute, which created the court. Currently there are 114 States that are members. Significant absences in the membership of the court include the United States, China, India and Russia. The court has been described as “truly the first court of humanity, a break-through that only twenty years ago would have been unimaginable.”⁵² The court is unique in its scope of personal jurisdiction and for being an international forum that is empowered to impose criminal sanctions. However, “this astonishing development has only affected one facet of justice [criminal] and has left largely untouched the corrective dimension [civil].”⁵³ In this way

environmental impacts.” *Id.* at 685. While the human rights impacts include violations of, “their right to enjoy the benefits of their culture, the right to use and enjoy lands they have traditionally occupied, their right to use and enjoy their personal property, the right to the preservation of health, the right to life, physical integrity, and security, the right to their own means of subsistence, and their rights to residence and movement and inviolability of the home. *Id.* at 686.

⁵² Romano at 267.

⁵³ *Id.*

the court is likely unable to attack the problems of communities who face environmental harm due to climate change or other claims that do not fit within the specific competency of the court.

One proposition for rectifying the ICC's lack of application to environmental matters is to create a new cause of action for the court. This cause of action has been discussed in different formulations, but the term ecocide, corresponding with the court's current crime of genocide has a long history in the context of war. In 1973, Robert Falk wrote an article detailing the ecological atrocities committed by the United States government during the Vietnam War.⁵⁴ Essentially, the United States embarked on a campaign of ecological destruction, which included efforts to deforest large areas of Southeast Asia (allegedly to deprive adversaries of natural cover and create staging grounds for hostilities), which had multiple adverse effects on the populations dependent on the vegetation in these areas. Falk also considered other tactics such as indiscriminate bombing and weather manipulation as amounting to ecocide. Falk's article is the seminal piece discussing the use and validity of environmental warfare in Vietnam. Falk's article also concludes with concrete proposals for taking action to create a convention on environmental warfare. Various authors who have undertaken the challenge of fashioning a useful definition of ecocide and a path for its functional implementation in international law have cited Falk's proposals.⁵⁵

⁵⁴ Richard A. Falk, *Environmental Warfare and Ecocide – Facts, Appraisals, and Proposals*, 4 *Bul. Peace Proposals* 80 (1973)

⁵⁵ Avi Brisman, *Crime-Environment Relationships and Environmental Justice*, 6 *Seattle J. for Soc. Just.* 727 (2008); Carl E. Bruch, *All's not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 *Vt. L. Rev.* 695 (2001); Drumbl, 1998. Mark A. Drumbl, *International*

One of these scholars, Professor Mark A. Drumbl, has analyzed the viability of bringing an ecocide claim to the International Criminal Court. Drumbl starts his analysis by looking at the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD). “ENMOD was intended to prohibit the hostile use of large-scale environmental modification such as the deforestation practiced by the United States in Vietnam, as well as possible new forms of environmental modification including weather control and deliberate destruction of the ozone layer.”⁵⁶ A provision of the Rome Statute of the International Criminal Court's follows ENMOD and is found in Article 8, which defines “war crimes” and prohibits:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁵⁷

Drumbl analyzes this section of the Statute as a legal scholar, focusing on the standard two elements necessary for any crime while applying this section as a

Human Rights, International Humanitarian Law, and Environmental Security: Can the International Criminal Court Bridge the Gaps?, 6 ILSA J. Int'l & Comp. L. 305 (2000); Mark A. Drumbl, *The International Responses to the Environmental Impacts of War*, 17 Geo. Int'l Env'tl. L. Rev. 565 (2005); Okorodudu-Fubara, *Oil in the Persian Gulf: Legal Appraisal of an Environmental Warfare*, 23 St. Mary's L.J. 123 (1991); Marcos A. Orellana, *Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad*, 17 Geo. Int'l Env'tl. L. Rev. 673 (2005); Parsons (1998); Peter J. Richards and Michael N. Schmitt, *Mars Meets Mother Nature: Protecting the Environment During Armed Conflict*, 28 Stetson L. Rev. 1047 (1999); Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 Yale J. Int'l L. 1 (1997); Stefanie N. Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 Stan. J. Int'l L. 165 (1992); Ludwik A. Teclaff, *Beyond Restoration – The Case of Ecocide*, 34 Nat. Resources J. 933 (1994); Tara Weinstein, *Prosecuting Attacks that Destroy the Environment: Environmental Crimes or Humanitarian Atrocities?*, 17 Geo. Int'l Env'tl. L. Rev. 697 (2005); Ensign Florencio J. Yuzon, *Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: “Greening” the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 Am. U. J. Int'l L. & Pol'y 793 (1996).

⁵⁶ Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*, 15 Colo. J. Int'l Env'tl. L. & Pol'y 1, 18 (2004).

hypothetical definition of a crime of ecocide. First, he analyzes the hypothetical actus reus, which is the actual physical action needed to be accomplished for the crime to have been committed. Next, he looks at the hypothetical mens rea of the crime, which is the mental component of the crime necessary to be present in an offender for the crime's perpetration.

The actus reus necessary here is the language that was noted from ENMOD above, "widespread, long-term and severe." However, there is a major discrepancy between the wording in the Rome Statute and the version in ENMOD, the conjunction "and" – in ENMOD the word used to join the three terms is "or". To rise to the level of an environmental crime at the International Criminal Court, the action must include all three qualifiers. Drumbl finds fault in the interpretation of the three qualifiers as well. First he notes that the parameters described above in reference to ENMOD are specifically stated in that treaty regime to pertain only to that treaty.⁵⁷ Further, he notes, "the "widespread" and "long-term" principles attempt to ascribe temporal and geographic limitations on environmental harm that, for the most part, does not know such boundaries."⁵⁸ Lastly, he finds that "[t]he anthropocentric limitation of "severe" damage to that which affects human life and human consumption of natural resources underscores a more general shortcoming with the existing framework of environmental protection during wartime, namely that this protection is not geared to protecting the environment

⁵⁷ United Nations Conference on the Establishment of an International Criminal Court, (2 April 1998). Article 8(2)(b)(iv).

⁵⁸ Drumbl (1998) at 128.

⁵⁹ *Id.*

per se, but, rather, humanity's need to make use of it.”⁶⁰ In general, he finds fault in applying ecocide to the strictures of the Rome Statute's actus reus requirements because the paradigm of human victims of harm is inconsistent with the needs of an environmental crime.⁶¹

Drumbl also find the mens rea component problematic since the intent requirement excludes negligence. Those who negligently or carelessly harm the environment are outside the bounds of the Rome Statute's formulation. Drumbl argues for a more objective standard for mental culpability, incorporating a satisfaction of mens rea where “there was a reasonable expectation that environmental damage would occur.”⁶² He cites the negotiations from the development of the standard in the Rome Statute to argue that such a reading is unlikely.⁶³

Drumbl believes that attempting to prosecute ecocide under the Rome Statute would also be severely limited by the language constituting the “clearly excessive” caveat to liability. This caveat is bounded by military necessity. Drumbl notes that such a caveat does not exist in international law for the crimes of genocide and torture. Gauging the seriousness of ecological damage in and of itself and in its effects on current and future generations he writes, “the time may have come to question whether humanity's recourse to physical aggression to settle national or local disputes ought ever to trump environmental integrity.”⁶⁴ In sum, regarding the efficacy of using the Rome Statute as a

⁶⁰ *Id.* at 129.

⁶¹ “A paradigm shift would focus on the environment as the victim of the harm, not humanity.” *Id.*

⁶² *Id.* at 133.

⁶³ *Id.*

⁶⁴ *Id.* at 135.

framework for prosecuting ecocide, Drumbl believes that “[t]he international community's decision to criminalize the willful infliction of “widespread, long-term, and severe damage to the natural environment” is cause for limited celebration, considerable disappointment, and some concern.”⁶⁵ Work by Falk and Drumbl are both discussed further below in the section dedicated to “ecocide” as an international crime. Here it is sufficient to note that Drumbl’s critique is a convincing indictment of the ICC’s inability to hear environmental claims that were contemplated under its organic statute.

Problems with bringing a potential criminal cause of action based on environmental degradation are inclusive of an action premised on climate change. As shown above, the only provision that currently contemplates the environment in the Rome Statute deals with war crimes. Even if a new cause of action would be added to the ICC it is unlikely that it could function as a competent tribunal for plaintiffs seeking civil remedies.

D. International Tribunal of the Law of the Seas

The United Nations Convention of the Law of the Sea (UNLCOS) is an example of a particularized treaty regime that may provide an avenue for redress to States that are particularly affected by destruction to the marine environment occurring from climate change effects. UNCLOS provides “a legal order for the seas and oceans [to] facilitate international communication, and . . . promote the peaceful uses of the seas and oceans, the equitable and efficient utilization of their resources, the conservation of their living

⁶⁵ *Id.*

resources, and the study, protection and preservation of the marine environment.”⁶⁶ This may be a sufficient subject matter jurisdictional hook to allow climate change actions under UNCLOS.

Scholars have proposed using the binding dispute resolution mechanism in UNCLOS to challenge States that are potentially adversely affecting the marine environment through their inaction on climate change mitigation.⁶⁷ Part XV of UNCLOS outlines the dispute resolution mechanism, which provides States with four potential means for settlement of disputes:⁶⁸ the International Tribunal for the Law of the Sea (ITLOS),⁶⁹ the International Court of Justice; an arbitral panel; or a special arbitral panel.⁷⁰ “States may choose to declare their choice of forum, but in cases where they have not, or Parties to a dispute have not accepted the same procedure for dispute settlement, the dispute must be submitted to binding arbitration unless the Parties agree otherwise. To date, the vast majority of Parties to UNCLOS have, de facto, chosen arbitration by their silence on the matter.”⁷¹

UNCLOS has been described as creating “a binding system of obligations and dispute resolutions, which confers on a forum international jurisdiction, authority, and implementing powers that exceed those of other international environmental law forums

⁶⁶ United Nations, Convention of the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 Preamble, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos/unclos_e.pdf, (last visited May 25, 2010) [hereinafter UNCLOS].

⁶⁷ See generally, Will Burns, *Potential Causes of Action for Climate Change Damages in International Fora: The Law of the Sea Convention*, 2 J. Sust. Dev. Law & Policy 27 (2005) and Meinhard Doelle, *Climate Change and the Use of the Dispute Settlement Regime of the Law of the Sea Convention*, 37 J. Ocean Dev. & Intl L. 319 (2006).

⁶⁸ UNCLOS, *supra* note 2, at art. 296(1).

⁶⁹ UNCLOS, *supra* note 2, at Annex VI.

⁷⁰ UNCLOS, *supra* note 2, at art. 287(1).

⁷¹ Burns, *supra* note 1, at 37 citing UNCLOS, *supra* note 2, at art. 287(3)-(5).

and rival those conferred on the World Trade Organization.”⁷² Additionally, UNCLOS defines pollution as “the introduction by man, directly or indirectly, of substances or energy into the marine environment . . . which results or is likely to result in such deleterious effects as harm to living resources and marine life . . . hindrance to marine activities, including fishing.”⁷³ This broad definition of pollution, in addition to the strong adjudicatory structures included in the treaty regime make it an ideal place to investigate potential climate change litigation claims.

The following section explores legal issues that may be pertinent to a potential case at ITLOS.

Potential Case at ITLOS

When investigating whether a potential action at ITLOS might be brought and argued on the behalf of those affected by climate change in relation to the impacts on the marine environment, questions of causation immediately arise. The lack of a clear legal standard of causation for damage to the marine environment under the United Nations Convention on the Law of the Seas is a significant hurdle to bringing a successful claim to ITLOS. Domestic and international case law are investigated below to help illustrate the judicial bounds of such a standard. The standard for proving causation under UNCLOS is not altogether clear since an international tribunal has not adjudicated a claim in the International Tribunal of the Law of the Sea. In addition, other international fora, such as

⁷² Burns, *supra* note 1 at 37, *citing* Jonathan L. Hafetz, *Fostering Protection of the Marine Environmental and Economic Development: Article 131(3) of the Third Law of the Sea Convention*, 15 AM. U. INT’L L. REV. 583, 596 (2000).

the International Court of Justice have also been reluctant to announce a clear causation standard for proving liability for transboundary environmental harm. However, climate change litigation scholars have provided some possible remedies to this dearth of clear causation standards in international jurisprudence by tapping domestic tort law theories of causation.

A. Factual Introduction

Climate change scientists predict continued harm to the world's oceans and marine resources. These effects will likely be broad and far-reaching from ocean acidification⁷⁴ and the depletion of fish stocks in many parts of the world's seas to rising tides, which threaten to inundate complete small island States and areas of extreme dense population. Current international political agreements have so far failed to stem the rising levels of greenhouse gases in the earth's atmosphere, which fuel climate change.⁷⁵ In this vacuum, jurists around the world are increasingly investigating the possibility of bringing judicial

⁷³ UNCLOS, *supra* note 2, at art. 1(4).

⁷⁴ "By the end of this century, projected increases in atmospheric carbon dioxide will result in an almost threefold increase in surface ocean carbon dioxide concentrations relative to pre-industrial levels. This, in turn, could result in the average pH of the oceans falling by 0.5 units by 2100, which would translate into a three-fold increase in the concentration of hydrogen ions, making the oceans more acidic than they have been in 300 million years." Will Burns, *Potential Causes of Action for Climate Change Impacts Under the United Nations Fish Stocks Agreement*, 7 *Sust. Dev. L. & Policy* 34, 35 (2007) citing Ulf Riebesell et al., *Reduced Calcification of Marine Plankton in Response to Increased Atmospheric CO₂*, 407 *NATURE* 364, 364 (2000). 32 Caspar Henderson, *Paradise Lost*, *NEW SCI.* 29-30, Aug. 5, 2006; see also Joan A. Kleypas et al., *Geochemical Consequences of Increased Atmospheric Carbon Dioxide on Coral Reefs*, 284 *SCI.* 118, 118 (1999); see also The Royal Society, *Ocean Acidification Due to Increasing Atmospheric Carbon Dioxide*, Policy Doc. 12/05 (June, 2005), at 6 available at <http://www.royalsoc.ac.uk/displaypagedoc.asp?id=13539> (last visited Feb. 8, 2007).

⁷⁵ The United Nations Framework Convention on Climate Change and its accompanying Kyoto Protocol are the usual suspects here. The Protocol set targets for GHG reductions for developed States and attempted to provide pathways to "clean" development to lesser-developed States. The lack of effectiveness of the Protocol is generally attributed to a lack of involvement by the United States, the world's greatest per capita GHG emitter, the failure of many States to meet their targets and shifting responsibilities for climate change as developing States like China become greater emitters. [cites needed].

actions on behalf of a State based on current multi-lateral international agreements.⁷⁶ One of the significant barriers to bringing such actions is a clear standard for causation in any international tribunal.

Small island States and their indigenous populations are arguably most at risk from the ravages of climate change. As described above in the case of Tuvalu, there has been interest in bringing a climate change action in international law for a small island state. In addition to Tuvalu, potential small island States in the Pacific may be the Republic of the Marshall Islands, the Solomon Islands, Nauru, Palau, Tonga, Vanuatu and Fiji. For example, the Marshall Islands are low elevation coral atolls, which may be harmed by sea level rise and ocean acidification resulting from climate change. Sea level rise threatens to overwhelm such low-lying islands, contributes to the higher salinity of precious arable land, and potential contamination of scant freshwater sources. Most threatening are the increased risks from climate change of greater storm surges in rising seas. More regular and/or stronger surges threaten the physical integrity of these islands. Ocean acidification threatens to limit the growth of the coral reefs that sustain tourism and fishing economies in small island States. In some extremely fragile locations the actual coral reefs may be

⁷⁶ Two prime examples of these efforts are the continuing petitions to the UNESCO World Heritage Committee to preserve World Heritage sites from destruction caused by climate change and the 2005 Petition to the Inter-American Commission on Human Rights on behalf of the Inuit People of North America, which plead for redress for the destruction of Inuit culture and livelihood. See Martin Wagner and Donald M. Goldberg, “An Inuit Petition to the Inter-American Commission on Human Rights for Dangerous Impacts of Climate Change” (2005) Earthjustice/CIEL, online: http://www.ciel.org/Publications/COP10_Handout_EJCIEL.pdf; Paul Brown, “Global Warming is Killing Us Too, Says Inuit” Guardian International (11 December 2003), online: <http://www.guardian.co.uk/international/story/0,3604,1104241,00.html>. For an overview of the attempts to work through the World Heritage Committee and a 2009 Petition regarding the effects of black carbon on world heritage sites see <http://whc.unesco.org/en/climatechange> and specifically <http://whc.unesco.org/uploads/activities/documents/activity-393-4.pdf>.

disappearing. It has been "suggested that such countries could be considered United Nations Environmental Programme protection as 'endangered species'."⁷⁷

B. Legal Principles

First, it is important to look at the issue of causation. The most basic and famous formulation of an environmental legal standard in international law comes from the *Trail Smelter Arbitration* of 1946:

[N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.⁷⁸

However, the generally held proposition that States are required to prevent transboundary harm is primarily a duty of care standard, not a causation standard. If this were taken to be a causation standard it would amount to strict liability, meaning the damage would be compensable regardless of fault. However, the tribunal in *Trail Smelter* did not answer this question definitively.⁷⁹ In *Trail Smelter* the court heard testimony from experts regarding causation, but ultimately crafted its own determination based on scientific recordings.

⁷⁷ National Biodiversity Team of the RMI, 2000. *The Marshall Islands - Living Atolls Amidst the Living Sea/ The National Biodiversity Report of the Republic of the Marshall Islands*. RMI Biodiversity Project. ISBN 982-9045-02-1, St. Hildegard Publishing Company, Santa Clarita, CA, USA.

⁷⁸ *Trail Smelter Arbitration*. See Appendix A.

⁷⁹ "The *Trail Smelter* arbitration set the foundations for discussions of responsibility and liability in environmental law³ but it left open the question of whether a State exercising all due diligence would be liable if transboundary harm results despite the State's best efforts. More generally, the tribunal did not clarify whether a State is liable only for intentional, reckless or negligent behavior (fault based conduct) or whether it is strictly liable for all serious significant transboundary environmental harm." Alexandre Kiss and Dinah Shelton. "Strict Liability in International Environmental Law" in *Law of the Sea, Environmental Law and Settlement of Disputes*. eds. Tafsir Malick Ndiaye and Rüdiger Wolfrum. p. 1132. 2007.

It has been urged that climate change actions may be brought on tort grounds to international law so that a causation standard might be imported there from domestic law.⁸⁰ Such a case would be similar to a toxic tort case where causation is determined through expert testimonies that seek to prove a causal chain linking actions to injury. This was the type of evidence presented in the *Trail Smelter Arbitration*, which the tribunal there rejected before engaging in its own scientific analysis.⁸¹ Ultimately, the *Trail Smelter* tribunal did not lay out a new standard for a showing of factual causation or, as it did regarding the “clear and convincing” standard for proof of injury stated above, use standards from existing domestic law. If the tribunal had used a domestic standard for causation it might have used the “but for” test or the substantial factor test from negligent tort doctrine. However, the arbitrators did not expound on any theory of causation in their decision and subsequent international legal bodies have followed suit.

Failing a general principle of causation in international adjudication, treaty law may need to be relied upon for a standard of causation. Actions between States may need to be brought under a specific treaty regime, such as UNCLOS.⁸² One avenue for bringing a suit under the UNCLOS regime is under the Agreement for the Implementation of the Provisions of the U. N. Convention on the Law of the Sea 10 Dec. 1982 Relating to the Conservation and Management of Straddling Fish Stocks and High Migratory Fish Stocks

⁸⁰ David A. Grossman, *Tort-Based Climate Litigation in Adjudicating Climate Change: State, National and International Approaches*, (Will C. G. Burns & Hari Osofsky, eds. 2009)

⁸¹ See *Trail Smelter Arbitration*.

⁸² Standing challenges may prove insurmountable to bringing a claim to the ICJ directly. For a thorough discussion of standing issues see Andrew Strauss, *Climate Change Litigation: Opening the Door to the International Court of Justice in Adjudicating Climate Change: State, National and International Approaches*, (Will C. G. Burns & Hari Osofsky, eds. 2009).

(UNFSA).⁸³ A possible pathway to litigation through the UNFSA has been explored by Professor Will Burns in a series of articles, culminating in a chapter of a book he co-edited.⁸⁴ In Burns' chapter of this book, "Potential Causes of Action for Climate Change Impacts under the United Nations Fish Stocks Agreement," he discusses the challenges to proving general and specific causation in a potential climate change case between two States party to the treaty.⁸⁵ Burns relates the conclusions of other climate change litigation scholars: "establishing legal causation in climate change actions – that is, proving that a defendant's actions caused the harm suffered by a plaintiff – will pose the greatest obstacle for a majority of plaintiffs."⁸⁶ Burns cites causation problems in unsuccessful petitions brought to the Inter-American Commission on Human Rights and World Heritage Committee. Burns presents an action under UNFSA as a more viable alternative to problems with proving general and specific causation that dogged those attempts.⁸⁷ Primarily, the reason the UNFSA is so attractive is that large emitter States are party to the treaty and actions under the UNFSA have binding force under the UNCLOS regime described above.

⁸³ Aug. 4, 1994, U.N. Doc. A/CONF.164/37.

⁸⁴ Will C. G. Burns, *Potential Causes of Action for Climate Change Impacts under the United Nations Fish Stocks Agreement in Adjudicating Climate Change: State, National and International Approaches*, (Will C. G. Burns & Hari Osofsky, eds. 2009). For articles developing the concepts in this chapter see Burns, *supra* note 3 and Will C. G. Burns, *Potential Causes of Action for Climate Change Impacts under the United Nations Fish Stocks Agreement*, *Sustainable Dev. L. & Pol'y*, Winter 2007, at 34.

⁸⁵ One of the important positive aspects of bringing a challenge under UNFSA is that both the United States and China are party to the agreement. Another is that this treaty has dispute resolution "teeth" to enforce its provisions related to protection of the marine environment. It is therefore a particularly attractive international agreement for potential enforcement tied to climate change. *Id.* at 314-315 *citing* Note, *Fisheries: United State Ratifies Agreement on Highly Migratory and Straddling Stocks*, 1996 *Colo. J. Int'l Env't'l L. & Pol'y* 78, 80 (1996) and contrasting UNFSA with potential actions under the American Convention on the Rights of Man and the World Heritage Convention.

⁸⁶ *Id.* at 326 *citing* Joseph Smith & David Sherman, *Climate Change Litigation* 107 (2006).

⁸⁷ *Id.* at 327.

Burns defines general causation as, “the causal link ‘between activity and the general outcome.’”⁸⁸ Any action under UNFSA would be based on declines on fish stocks or shifts in the distribution of stocks.⁸⁹ These changes could be attributable to a variety of factors. A defendant State in a climate change action under the UNFSA would likely claim a lack of a causal link between climate change and the degradation of fish stocks sufficient to establish liability. Burns believes that a tribunal assessing liability to find a “material increase of risk” could use statistical probability analysis. This line of reasoning would allow for liability based on climate change being a substantial factor to damaged fish stocks. Burns cites to a UK asbestos liability case from 2002 to support the notion that a court might use this type of causation analysis.⁹⁰ Here, Burns projects only a possible judicial analysis.

Burns also questions a defense based on a lack of general causation on the grounds that the treaty regime’s precautionary principle provides that, “States shall apply the precautionary approach widely to conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks in order to protect the living marine resources and preserve the marine environment.”⁹¹ Even where there is uncertainty the UNFSA provides, “[t]he absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures.” Based on this treaty language, Burns concludes that, “it can be argued that the Parties [to UNFSA] have

⁸⁸ *Id.*

⁸⁹ *Id.* For example, Burns cites “overfishing, habitat destruction, or diminution of prey species” as possible factors contributing to climate change affected species degradation.

an obligation to take action even in the absence of definitive proof of causation.”⁹² Here he skirts the causation issue, arguing that a court applying the strictures of the treaty regime in toto would find that the precautionary principle creates a relaxed causation standard. Of course, a tribunal may not find this altogether compelling. The precedent of a potential recognition of the precautionary principle in other adjudicated contexts would be most instructive, but Burns does not provide such precedent.

Burns considers specific causation to mean, “the causal link between a specific activity and a specific damage.”⁹³ The defense that a State may raise in relation to specific causation would be that “climate change is caused by a multitude of anthropogenic sources, and thus, any specific harm cannot be attributable to a specific Party, even a large greenhouse [gas] emitting State such as the United States or China.”⁹⁴ Burns believes that this argument is untenable because 1). it is primarily applicable to parties seeking damages and States are unlikely to seek damages in a climate change case and 2). even if the State is seeking damages the substantial factor test does not preclude establishment of specific causation. Burns’ first proposition is based on a hypothetical wherein a State would be asking for the recognition of the principle of *pacta sunt servanda*, or good faith in international law. Burns argues that a State could charge that another State has failed to

⁹⁰ The *Fairchild v. Glenhaven* ([2002] UKHL 22) case cited by Burns includes case law from Australia (*March v. E & MH Stramare Pty Ltd* [1991] 171 CLR 506) and Canada (*Snell v Farrell* [1990] 2 SCR 311) which discuss the use of causation standards alternate to the “but for” test.

⁹¹ UNFSA, *supra* note 10, at art. 6(1).

⁹² Burns, *supra* note 11 at 329.

⁹³ *Id.* at 327 citing Richard S.J. Tol & Roda Verheyen, *Liability and Compensation for Climate Change Damages – A Legal and Economic Assessment*, Research Unit Sustainability and Global Change, Hamburg University, FNU-9 (2001), <http://www.fnu.zmw.de/fileadmin/fnu-files/publication/working-papers/adapcap.pdf> (last visited May 27, 2010).

⁹⁴ *Id.* At 329.

fulfill a UNFSA treaty obligation in good faith and this would preclude a showing of specific causation. The substantial factor test argument made by Burns is possibly the most interesting of his hypothetical maneuvers.

Burns makes compelling and innovative arguments for possible ‘work-arounds’ for the problem of causation in a climate change case. However, the general standard that U.S. and U.K. domestic courts use is the “but for” test, under which a balance of probabilities may find that a causal link does not exist. In essence, the question would be, “But for a State’s actions or inaction would climate change occur and adversely affect fish stocks?” While there is a possibility of the “material increase of risk” analysis prevailing for a moving party on the issue of causation, a court using the “but for” test would not find a causal link to State action or inaction. The “material increase of risk” standard Burns cites is similar to the substantial factor test in U.S. tort law. This test is primarily used when two forces each could have caused the total harm and it is not possible to determine which force ultimately caused the harm. In such cases the “but for” test cannot be used because it would allow all parties to escape liability. This test might not be wholly applicable to questions regarding climate change causation because of the scope of forces creating harm and the novelty of using the test in an international court. The question here is really about which test a tribunal might use and there is little case law in international tribunals which give clues as to which standard might be used.

C. Applicable International Law

Burns' analysis of the viability of a successful showing of causation in a climate change claim under UNFSA is largely hypothetical and devoid of precedent in international law. And for good reason: of the 17 cases adjudicated by ITLOS 10 have concerned the release of ships and only one was particularly about pollution of the marine environment.⁹⁵ The ITLOS *MOX Plant* case that dealt particularly with pollution of the marine environment was forestalled and eventually dropped without a full investigation by the court of the pollution issue.⁹⁶ Additionally, the case would likely not have produced much of a challenge to causation since it dealt with pollution from a particular industrial source, like the pollution source in *Trail Smelter*. What may be instructive about this case for the purposes of a hypothetical climate change action under UNFSA is that the tribunal found the case to lack the urgency required for them to intervene. Instead, “the Tribunal considered that the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law” and deferred to “prudence and caution” in requiring only that the two parties cooperate and exchange information.⁹⁷ This language is illustrative of the marine resource jurisprudence of the Tribunal, which have produced weak provisional measures at best.⁹⁸

⁹⁵ See attached, “ITLOS Cases”

⁹⁶ *The MOX Plant Case* (Ireland v. United Kingdom), (Int’l Trib. L. of the Sea 2001), available at <http://www.itlos.org>. The MOX plant case involved proceedings before four different fora, an arbitral tribunal under the OSPAR Convention, the ITLOS, an arbitral tribunal under Annex VII to UNCLOS, and the European Court of Justice.

⁹⁷ Press Release, *Order in the Mox Plant Case*. Dec. 3, 2001. Available at http://www.itlos.org/news/press_release/2001/press_release_62_en.pdf.

⁹⁸ The best of these are the *Southern Bluefin Tuna Cases*. Here the Tribunal acknowledged significant “scientific uncertainty” regarding the evidence presented, but nonetheless found provisional measures

The enunciation of a clear theory of causation in international law is not unexpected. Climate change science correlates the causes of climate change with the effects and damages that global warming creates. The challenge of bridging the gap between this scientific correlation and legal causation is an ongoing mystery to international jurists.⁹⁹ As Burns points out, alternative theories of causation such as the “material increase of risk” theory, or substantial factor analysis or a type of market share liability analysis may provide relief but these theories have gone untested in international fora.¹⁰⁰ The International Court of Justice has also not enunciated a clear causation standard for environmental damage due to climate change. That tribunal’s last environmental law decision, the *Pulp Mills* dispute between Uruguay and Argentina, revolved around the issue of adequate environmental impact statements (similar to the action in the *MOX Plant Case* before ITLOS).¹⁰¹ There the ICJ concluded that provisional measures were not justified because there was “no imminent threat of irreparable damage.”¹⁰² The Court did recall its general respect for the environment and “[t]he existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus

justified. *Southern Bluefin Tuna Cases* (N.Z. v. Japan, Aus. v. Japan), paras. 79-90 (Int'l Trib. L. of the Sea 1999) (Aug. 27 Order on the Provisional Measures Req.), available at <http://www.itlos.org>.

⁹⁹ “[T]he causation theories used in international law are admittedly not adapted to substitute correlation for causation.” Jorge E. Vinuales, *Legal Techniques for dealing with Scientific Uncertainty in Environmental Law*, 43 Vand. J. Transnat'l L. 437, 498 (2010).

¹⁰⁰ *Id.* at 499. Vinuales analogizes a drug manufacturer tort case to illustrate market share liability analysis’s applicability to potential climate change litigation.

¹⁰¹ *Pulp Mills on the River Uruguay* (Arg. v. Uru.) (Order of July 13, 2006), para. 73 available at <http://www.icj-cij.org/docket/files/135/11235.pdf>.

¹⁰² *Id.* at para. 87.

of international law relating to the environment.”¹⁰³ As discussed above, the ICJ is not particularly applicable beyond general statements of international obligation when searching for a solid causation standard for international environmental law in general and in the climate change context specifically.

Conclusions on International Environmental Torts

The international judicial framework is a rich combination of institutions that provide coverage for an array of human activity. However, the lack of a court dedicated to environmental matters is increasingly problematic. In keeping with the framework of a tripartite conception of justice, an environmental court would need to focus on corrective justice and retributive justice to be successful. Environmental harm may be both intentional, as in the case of environmental warfare, and the serious consequence of negligent conduct, as in the case of climate change. Both of these types of harm are challenges for an international community that values peace and equity. Often those living already fragile lives are most effected by environmental harm, be they refugees in a war torn area or indigenous people struggling to maintain their direct connection to the land. Providing justice for these people will require international institutions tailored to the necessary job of attacking climate change and creating the mechanisms that will protect the earth and all of its inhabitants from future environmental harm.

Potential actors moving to bring climate change actions in international fora will likely need to present multiple avenues for proving causation. The scientific uncertainty

¹⁰³ Id. at para. 72 citing *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J.

that plagues the establishment of both general and specific causation of damages attributable to climate change under UNCLOS or another current treaty regime will need to be addressed thoroughly. Domestic tort law theories of causation may be helpful when developing a case aimed at an existing international forum. However, a new court would undoubtedly be shaped around issues of causation in international environmental law. This would provide potential defendants and plaintiffs with a clear standard for causation in the case of environmental harm, which is currently lacking under international law.

Reports 1996 (I), pp. 241-242, para. 29; and *Gabčíkovo-Nagymaros Project* (Hungary/Slovakia), I.C.J. Reports 1997, p. 78, para. 140.

Chapter Three: International Environmental Crime: Ecocide

ecocide n. destruction or damage of the environment, esp. when reckless or intentional; an instance of this.¹⁰⁴

Ecological damage may be of sufficient scale and scope that it creates conditions that threaten the continued existence of a people. When this environmental destruction is anthropogenic it clearly constitutes an injustice perpetrated against the suffering population. This environmental harm most often stems from the use of environmentally destructive weaponry, the destruction of natural resources, and the loss of land use from contamination or destruction. Such environmental harm plagues communities around the world. For example, campesinos in Colombia have argued that U.S. government-sponsored crop dusting engaged in with the aim of eradicating coca and opium crops as part of the “war on drugs” has created detrimental human health effects and environmental damage that threaten not only their health, but their food crops, livestock, and ability to remain in their homes.¹⁰⁵ Another ongoing example of environmental harm comes in the form of

¹⁰⁴ "ecocide, n." OED Online. Dec. 2009. Oxford University Press. 6 May 2010 <<http://dictionary.oed.com/cgi/entry/50071979>>. The etymological notes from the OED cite historic uses of the term, “1969 Encycl. Sci. Suppl. (Grolier) 159 Discarded automobiles, old newspapers and telephone books, tin cans, nonreturnable bottles all add to the growing problems of solid-waste disposal... *Ecocide the murder of the environment is everybody's business. 1982 New Scientist 3 June 663/1 Olof Palme denounced the Americans for ecocide in Vietnam. 2003 P. HERVIK Mayan People iii. 74 The national and international media presented the wildfire as an ecocide, since many species became extinct because of the milpa making that includes burning patches for cultivation.” By contrast, the term, “geocide” has not made it into standard English dictionaries.

¹⁰⁵ Several news reports have published the concerns of the inhabitants of areas regularly sprayed since the program began in earnest in the late 1990s. The ongoing program, Plan Colombia, has been criticized by NGOs, the government of Ecuador and a domestic Colombian court. See Chris Kraul, “*Drug War*” in *Colombia: Echoes of Vietnam*, Rachel Massey, 22 J. Pub. Health Pol’y 280 (2001) and “Getting high on the war on drugs,” Los Angeles Times, Dec. 16, 2009 A1. The Colombian and U.S. government maintain that the glyphosate used to dust crops are not substantially toxic to humans or livestock. A report commissioned by the two governments concluded that current practices for growing illicit coca and opium crops in Colombia are more environmentally destructive than the crop dusting itself. See Keith R. Solomon, et al., *Environmental and Human Health Assessment of the Aerial Spray Program for Coca and*

large oil spills arising from military, paramilitary and negligent action or omissions. Four million gallons of oil entered the Mediterranean Sea after Israel bombed Lebanese fuel tanks during a 2006 blockade of that country which has resulted in continuing ecological and economic damage.¹⁰⁶ Oil spills originating in Nigeria, which are likely the result of militant activity, have exacerbated the negligence, if not outright intentional devastation, perpetrated by a host of multinational oil companies in the Niger River Delta - one of the most severely oil polluted areas in the world.¹⁰⁷ Each of these examples involves actors and victims from different States and burdens carried across State borders. Each of these examples involves environmental degradation that potentially destroys ecosystems that human populations depend on for survival. These examples of international environmental destruction illustrate the urgent need to protect ecosystems from severe environmental harm.

Intentional acts that seek to harm populations through ecological destruction and unintentional acts that have the effect of harming populations through ecological destruction must both be subject to legal processes to help ensure that these activities are halted if ongoing, deterred from commencing and remedied through compensatory and injunctive relief. When the cause of such damage originates within the borders of one State and harms the population in another State the legal process is necessarily international. As

Poppy Control in Colombia, Washington, DC, USA: Inter-American Drug Abuse Control Commission (CICAD) section of the Organization of American States (OAS). 121.

¹⁰⁶ See, Matthew L. Tucker, *Mitigating Collateral Damage to the Natural Environment in Naval Warfare: An Examination of the Israeli Naval Blockade of 2006*, 57 *Naval L. Rev.* 161 (2009).

¹⁰⁷ See, James Donnelly-Saalfield, *Irreparable Harms: How the Devastating Effects of Oil Extraction in Nigeria have not been Remedied by Nigerian Courts, the African Commission, or U.S. Courts*, 15 *Hastings W.-N.W. J. Envtl. L. & Pol'y* 371 (2009). See, also [article on latest oil spill claimed by militant group].

noted before, since the conclusion of the *Trail Smelter Arbitration* in 1941 the principle of State liability for transboundary harm has been firmly set in international law.¹⁰⁸ Many commentators and advocates have called for the creation of an international tribunal to hear claims based on transboundary environmental harm.¹⁰⁹ This chapter aims to add to that discussion by focusing on a potential cause of action in such a tribunal: ecocide.

International law provides norms and institutions that aim to address threats such as these. However, legal mechanisms for application of norms have fallen short at providing necessary protections. Current international criminal law, codified in the Rome Statute of the International Criminal Court, recognizes that domestic protections are insufficient to deal with the challenges posed by environmental aggression, which is of such severity and scope that it constitutes a war crime.¹¹⁰ Still, there are discrete problems with the possibility of prosecutions for war crimes that involve environmental destruction, leaving the question open whether the current formulation of environmental

¹⁰⁸ The arbitral tribunal in the *Trail Smelter Case* found that, “under the principles of international law ... no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.” *Trail Smelter (U.S. v. Can.)*, 3 R.I.A.A. 1905, 1907 (Arb. Trib. 1941). This principle has been ratified in the International Court of Justice.

¹⁰⁹ See, e.g., Suriya E.P. Jayanti, *Recognizing Global Environmental Interests: A Universal Standing Treaty for Environmental Degradation*, 22 *Geo. Int'l Env'tl. L. Rev.* 1, 22 (2009) citing Sean D. Murphy, *Conference on International Environmental Dispute Resolutions: Does the World Need a New International Environmental Court?*, 32 *Geo. Wash. J. Int'l L. & Econ.* 333 (2000); Kenneth F. McCallion & H. Rajan Sharma, *Conference on International Environmental Dispute Resolutions: Environmental Justice Without Borders: The Need For an International Court of the Environment to Protect Fundamental Environmental Rights*, 32 *Geo. Wash. Int'l L. & Econ.* 351 (2000); Audra E. Dehan, *An International Environmental Court: Should There Be One?*, 3 *Touro J. Transnat'l L.* 31 (1992); Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an International Court for the Environment Within the United Nations*, 20 *Env'tl. L.* 321 (1990).

¹¹⁰ Section 8(2)(b)iv of the Rome Statute of the International Criminal Court provides the standard “For the purpose of this Statute, ‘war crimes’ means: Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;”.

war crimes is impotent to protect those affected by ecocidal acts.¹¹¹ Moreover, environmental destruction stemming from human actors is perpetrated both during times of war and times of peace. At different moments over the last half-century the term ecocide has been used to describe different facets of a central problem: human destruction of ecosystems that support human life. This chapter attempts to provide the parameters for a functional legal definition for ecocide based on the concept's history, the ongoing need for a recognized international crime, and the feasibility of such a cause of action's acceptance in the discipline of international law.

Although the term ecocide has found its way into major dictionaries and exists in a corner of the literature on international environmental law, the definition from the OED above illustrates that the word now enjoys such a broad formulation that the term has been rhetorically neutralized. An example of the breadth of definition that the term now suffers from is found in the writings of British lawyer and environmental activist, Polly Higgins. Higgins advocates for "ecocide" becoming the "5th crime against peace." While the goal of her media campaign, comprising a book, website and many speaking engagements, is laudable, the definition that she uses is over broad and the reliance on slotting it into the framework of current humanitarian law misses the mark.¹¹² When

¹¹¹ Jessica C. Lawrence & Kevin J. Heller, *The First Ecocentric Environmental War Crime: The Limits of Article 8(2)(b)(iv) of the Rome Statute*, 20 *Geo. Int'l Env'tl. L. Rev.* 61, 61 (2007).

¹¹² The definition Polly Higgins has proffered is, "ecocide: the extensive destruction, damage to or loss of ecosystem(s) of a given territory, whether by human agency or by other causes, to such an extent that peaceful enjoyment by the inhabitants of that territory have been severely diminished." <http://www.thisiseccide.com>, *Eradicating Ecocide*, Chapter 5. While many of the goals of this article coincide with Higgins's, namely an argument for the use of international legal mechanisms to stem ecological destruction, this author finds her arguments problematic and solutions inappropriate. Many of the ideas are conflation of concepts (e.g. environmental damage and climate change), misunderstandings or unfounded premises of international law (e.g. a definition of "inhabitants) and suspect analysis (e.g. an analysis of strict liability in the environmental context only when called for). The focus of Higgins's work

Shakespeare wrote, “. . . many wearing rapiers are afraid of goosequills,” he could have been referring to his own vocabulary, which has been sufficient to inspire awe for over four hundred years.¹¹³ Without questioning the power of words to inspire, it is fair to say that a legal term of art devoid of meaning, or one with a meaning attempted to be imbued with panacea-like qualities, becomes ineffective - prostrate under its own weight.

The term “genocide,” coined in 1944 by Raphael Lemkin, gained prominence when it was considered during the Nuremburg trials.¹¹⁴ The concept and term were subsequently taken up by multiple governments at the United Nations and given legal substance through international processes.¹¹⁵ If a charge of ecocide is to have meaning and utility it should be enacted through an international institutional process that includes stakeholders most affected by ecological harm. It should be tailored to fit its rhetorical power in relation to genocide and its historical development stemming from military atrocities. It should deal with environmental harm so detrimental to human populations that it threatens their continued existence.

This chapter discusses the development of the term ecocide and its application to detrimental harm suffered by communities in Vietnam, Iraq, and Ecuador. These three examples of ecocide illuminate three different ways in which the destruction of ecosystems has threatened the survival of targeted groups. The first example, perpetrated

on punishment is also problematic, which has been criticized by commentators on the International Criminal Court, into which Higgins would like to slot her concept of “ecocide.” See, e.g.,

¹¹³ The quotation comes from Hamlet, Act 2, scene II.

¹¹⁴ Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* 90 (1944).

¹¹⁵ For a discussion of the genesis of the legal term “genocide” and its use in international fora see, William A. Schabas, *National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes,’* 1 J. of Int’l Crim. Just. 39, 41-42 (2003).

against Vietnamese populations during the international war of aggression waged by the U.S. Government, is a case of intentional ecocide waged by one State against the population of another. The second example, inflicted upon the Marsh Arabs in Iraq by the Saddam Hussein regime, is a case of intentional ecocide waged against a discrete domestic population by their own government. The third example is offered as a case of reckless or negligent ecocide committed against indigenous populations in Ecuador by private international actors.

This chapter advocates for a definition for ecocide based on the history of the term, the need it serves and the bounds of international law. The conclusions and analysis throughout these sections aim to support the multiple proposals for international environmental tribunals while keeping the potential for retributive justice for those directly harmed central to the analysis. This discussion of a legal definition of ecocide follows first the proposals of Richard Falk in relation to the Vietnam War. Following this, the writings on ecocide by legal scholars, in particular Mark Drumbl, are considered.

The Roots of Ecocide

The origins of the term ecocide can be traced to the peace movement of the 1960s when ecological destruction was recognized as an overt tool of war.¹¹⁶ In reference to the war in Vietnam, the New Left socialist Herbert Marcuse wrote,

¹¹⁶ The first use of the term is surely older than in the usage of the authors cited here. For example, the term was used by an international relations scholar as a title to an article in a popular journal that does not bring up the term within the body of its text one year before the Marcuse article referenced below. L. Craig Johnston. *Ecocide and the Geneva Protocol*. 49 *Foreign Aff.* 4, 711 1971. This would seem to illustrate that the term was widely known at the time, although a search of the publications archives did not show any other use of the term in the publication's history. (searched 05/11/10).

The violation of the earth is a vital aspect of the counterrevolution. The genocidal war against people is also “ecocide” insofar as it attacks the sources and resources of life itself. It is no longer enough to do away with people living now; life must also be denied to those who aren't even born yet by burning and poisoning the earth, defoliating the trees, blowing up the dikes.¹¹⁷

Although, ecological damage has been a form of warfare since the beginning of recorded history, the scope and severity of the United States Government's ecological warfare during the war in Vietnam laid the basis for the term's use to describe various modern instances of environmental destruction.¹¹⁸

Surveying the literature on ecocide brings multiple conceptions of the term. Some have tied the term directly to the attacks on indigenous peoples.¹¹⁹ The term has also been used to describe the environmental impact on decline of the Soviet Union.¹²⁰ The

¹¹⁷ Herbert Marcuse, “Ecology and Revolution,” in *16 Liberation* 10 (Sept. 1972), reprinted in *Introduction to Ecology: Key Concepts in Critical Theory* 1, 52 (Carolyn Merchant ed., Prometheus Books 1999).

¹¹⁸ See for example, Drumbl (1998). Drumbl cites Roman soldiers salting the soil of Carthage and the World War II German scorched earth policy along with more recent environmental warfare techniques. Also, “Since time immemorial, war has visited its excesses on nature, excesses that many fear the Earth can no longer tolerate. From ancient times to modern, the environment has been used as a weapon and as a target of war. For instance, the Spartans salted Athenian fields during the Peloponnesian War. The Dutch opened dikes to create a water barrier (the “Dutch Water Line” of 1672) to halt the French in the Third Anglo-Dutch War. Both sides burned huge expanses of the veldt during the Boer War. Verdun was emaciated by artillery and poisoned with gas during World War I. A horrific loss of life and widespread devastation occurred when the Chinese dynamited the Huayuankow dike on the Yellow River during the Second Sino-Japanese War (1938). The United States extensively seeded clouds over the Ho Chi Minh Trail and defoliated large jungle tracts during the Vietnam War. Another chilling example is the contamination of Scotland's Gruinard Island during Britain's Anthrax testing in 1942; the island remains uninhabitable today. If environmental damage during armed conflict is not restrained, the armed forces that are intended to protect us from harm may become the agents of our ultimate destruction.” Rymn James Parsons, *The Fight to Save the Planet: U.S. Armed Forces, “Greenkeeping,” and Enforcement of the Law Pertaining to Environmental Protection During Armed Conflict*, 10 *Geo. Int'l Env'tl. L. Rev.* 441, 441 (1998).

¹¹⁹ Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization* (2d ed. 1999).

¹²⁰ Murray Feshbach & Alfred Friendly, Jr., *Facing Facts, in Ecocide of the USSR: Health and Nature Under Siege* 1 (1992). “When historians finally conduct an autopsy of the Soviet Union and Soviet Communism, they may reach the verdict of death by ecocide. . . . No other great industrial civilization so systematically and so long poisoned its land, air, water and people. None so loudly proclaiming its efforts to improve public health and protect nature so degraded both. And no advanced society faced such a bleak political and economic reckoning with so few resources to invest toward recovery. The Soviet Union was

idea has been proffered by some as a necessary step in addressing the ecological effects of war.¹²¹ Ecocide also has a more ecocentric formulation, wherein the term focuses on the destruction of ecosystems, independent of effects on humans.¹²² Most recently the term has been used to connect resource exploitation with the global climate change movement.¹²³ The term has variant meanings, and it is important to recognize the different strains of thought that flow from the way that ecocide is defined. Here the focus is on “ecocide” as a crime and the prospect of codifying it clearly in international law.

Two of the periods of military action that have included environmental destruction at such a scale and ferocity that the word ecocide is often used to describe them are the Vietnam War and the Gulf War in Iraq. These two periods of military aggression captured the world's attention and from the use of Agent Orange in Vietnam to the burning of oil fields in Iraq, images of ecological disaster are familiar to many. However, the international community has much to learn from the experiences of those affected by ecological destruction from both of these affronts to peace. Much of the focus on Agent Orange is placed on the effects on American veterans. Similarly, much of the focus on the Gulf War atrocities failed to take into account attendant effects on populations in that country. Particularly, the ecological effects on marginalized populations went without notice outside of academia. It may be that “such activity remains permissible because there is no definitive or readily enforceable code of conduct governing what warring

mired in shocking environmental catastrophe at every level of society. The effects of the Chernobyl debacle and the Aral Sea tragedy are still unfolding, and serve as powerful iconography for the cornucopia of pollution, disease and environmental degradation that is a hallmark of autocratic regimes.”

¹²¹ Nada Al-Duaij. *Environmental Law of Armed Conflict*. p. 412

¹²² Franz J. Broschimmer, *Ecocide: A Short History of the Mass Extinction of Species 1* (2002)

parties can and cannot do to the environment.”¹²⁴ By showcasing ecological harm on the stage of international law and relations and establishing definitive codes of conduct vis-à-vis the environment, this destruction may be partly averted.

A. Vietnam: International Environmental Warfare

In 1973, one year after Marcuse wrote on ecocide, Richard Falk wrote the article discussed above detailing the ecological atrocities committed by the U.S. government during the Vietnam War.¹²⁵ As described above, the U.S. campaign of environmental destruction deforested large areas and adversely affected the South Asian population dependent on the ecosystems in these areas. However, such actions were not contained to forestland. Particularly disastrous for civilian populations were chemical herbicide attacks that targeted cropland.¹²⁶

The U.S. military strategies in Vietnam were based on “the basic rationale of separating the people from their land and its life supporting characteristics.”¹²⁷ Other tactics, such as indiscriminate bombing and weather manipulation were also part of this campaign. One of the ways that the U.S. government decided to accomplish this goal was through the use of the chemical herbicide Agent Orange. The horrors of the after-effects of the use of Agent Orange are the most glaringly inhumane of the biological effects that civilians suffered from this campaign. The birth defects and continuing health effects

¹²³ See This is Ecocide <http://www.thisisecocide.com/>.

¹²⁴ Drumbl, 1998 at 123.

¹²⁵ Falk, (1973) supra.

¹²⁶ For example, “The use of chemical herbicides to destroy crops destined for civilian consumption is one of the points where the allegations of ecocide merge with allegations of genocide. *Id.* at 87.

¹²⁷ Falk at 80.

associated with exposure to dioxin, found in Agent Orange, are well documented.¹²⁸ At the time of the writing of Falk's piece, the United States had modulated some of its environmental warfare techniques from chemical weaponry to industrial machinery to clear vast tracts of forestland. However, it had not abandoned its project of ecological destruction. This campaign raged on for many years and consumed vast amounts of forest and cropland. This policy laid the foundation for international concern for the use of ecological destruction in modern warfare to accomplish military goals.

B. Iraq: Civil Environmental Warfare

The documented brutality inflicted upon the land and people of Vietnam were instances of the aggression of an outside military force during armed conflict. There are other instances of severe environmental harm that occur during the stresses and strains of war. Actions by the Hussein regime in Iraq in the 1990s provide multiple examples of actions considered to amount to ecocide by legal scholars. These actions included the setting fire to 600 of Kuwait's oil wells in the first Gulf War and deliberately discharging at least six million barrels of oil into the Persian Gulf.¹²⁹ The following is a short discussion of a third ecological atrocity perpetrated by the Hussein regime. After the unsuccessful Shiite rebellion of 1991, the Hussein government drained the marshlands of

¹²⁸ The birth defects and continuing health effects associated with exposure to dioxin, found in the herbicide Agent Orange, are well documented, but outside of the scope of this article. The United States government does recognize that U.S. veterans of the Vietnam War have continuing health problems associated with exposure. See Agent Orange - Herbicide Exposure, <http://www.vba.va.gov/bln/21/benefits/Herbicide/> (last visited 05/12/10).

¹²⁹ Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*, 15 *Colo. J. Int'l Env'tl. L. & Pol'y* 1, 1 (2004).

Southern Iraq, successfully destroying the lifestyle and culture of the Shiite Ma'Dan, or Marsh Arab.¹³⁰

Perhaps unsurprisingly, the use or citing of the term ecocide in legal scholarship spiked after the actions of the Hussein regime.¹³¹ Most authors cited the first two examples of ecological destruction and connected the term to the line of reasoning regarding international norms of humanitarian law. Few authors have dealt explicitly and fully with the attacks on the Shiite Ma'Dan. While recognizing the significance of the burning of the oil wells and discharging of oil into the Persian Gulf, these authors have expanded the use of ecocide outside of the State-on-State hostility paradigm. In contrast to the paradigm of the ecological atrocities of the Vietnam War, “while the American campaign was intended to facilitate military maneuvers, the draining of the Iraqi wetlands was a deliberate effort to eradicate the Marsh Arabs and their culture by altering the environment upon which they and their culture depended.”¹³² In reviewing the scholarship focused on the plight of the Marsh Arabs, a picture of ecocide as a possible cause of action embracing the character of human rights law more fully begins to emerge.

The marshes of Southern Mesopotamia were once the region's largest wetlands. The people who lived in this region of Iraq developed a culture in which they existed “in

¹³⁰ Id.

¹³¹ For examples of articles referencing both 'ecocide' and the environmental damage perpetrated during the Gulf War see, Okorodudu-Fubara (1991); William Beardslee, *International Law & the Environment: The Need for an Aggregate Organization*, 5 J. Int'l L. & Prac. 379 (1996); James S. Robbins, *War Crimes: The Case of Iraq*, 18-FALL Fletcher F. World Aff. 45 (1994); Schmitt (1997); Timothy Schofield, *The Environment as an Ideological Weapon: A Proposal to Criminalize Environmental Terrorism*, 26 B.C. Env'tl. Aff. L. Rev. 619 (1999); Peter Sharp, *Prospects for Environmental Liability in the International Criminal Court*, 18 Va. Env'tl. L.J. 217 (1999); Eva M. Kornicker Uhlmann, *State Community Interests, Jus Cogens and Protections of the Global Environment: Developing Criteria for Peremptory Norms*, 11 Geo. Int'l Env'tl. L. Rev. 101 (1998); Yuzon (1996).

¹³² Schwabach at 7.

harmony with the marsh environment.”¹³³ For hundreds of years, the Marsh Arabs were “completely dependent on marsh resources: the plants, animals and water of the marshes . . . [t]he reeds that grew in the marshes were the primary building material for houses and boats; the fish and waterfowl of the marshes were a primary source of food.”¹³⁴ However, claims charging the Hussein regime envisioned under the Genocide Convention, Hague and Geneva Regimes, Human Rights Covenants, and specific environmental treaties were not considered possible and were met with considerable cynicism.¹³⁵ Protections espoused in Human Rights Covenants¹³⁶ are problematic in that they afford protections only when those who are harmed may be collectively defined as a “people.”¹³⁷ While, environmental treaties are generally too focused on harms to the environment instead of or without enough attention paid to the humans who may rely directly on attacked ecosystems.¹³⁸

The programs of the Iraqi government moved from disruptions of the marsh ecosystem to targeted military attacks on Marsh Arab populations in a process of ecocide.¹³⁹ “From an ecocide perspective, draining the Marshlands deprived indigenous people of their homes and livelihood, damaged the ecosystem, and destroyed the Marsh Arab culture. Saddam deliberately destroyed the ecosystem with the intent to kill people

¹³³ *Id.* at 3.

¹³⁴ *Id.*

¹³⁵ *Id.* at 8.

¹³⁶ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3. & International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 386.

¹³⁷ Schwabach at 12.

¹³⁸ *Id.* at 15.

¹³⁹ Briefly, the history that Al Moumin outlines is, “Saddam's regime forces put down [an] uprising, killing between 30,000 and 60,000 people in the process. . . . Next, Saddam's regime began large-scale hydro-engineering projects in the marshes. . . . [followed by the] arrest, detention, torture, summary execution, as well as military operations such as poisoning and napalming the local population and the Marshlands.” *Id.* at 507-508.

because of their belonging to a certain religious division.”¹⁴⁰ The Hussein regime had an explicit policy against the Marsh Arabs.¹⁴¹ This shows an intentionality to kill the members of the group through ecological destruction.¹⁴² In order for actions such as these to be potentially deterred by the force of international law, it seems that universal environmental rights would need to be recognized in a multilateral convention

C. Ecuador: Private Environmental Warfare

There may also be factual arguments for extending a potential definition of ecocide outside of the context of armed aggression. Where ecological resources of a community have been destroyed through the actions of an international commercial actor, the willful or grossly negligent destruction of the environment may cause grave harm to populations. An international criminal cause of action may be one way to allow for guilty parties to be recognized. In one such case the U.S. corporation Texaco presided over a massive environmental detriment after it contracted with the Ecuadorian government to extract oil from the land of its indigenous population.

The first U.S. legal academic to expose the harm done in Ecuador was Professor Judith Kimerling. She has chronicled the transgressions of the multinational oil company and presented a startling picture of the harm done to the indigenous peoples who have

¹⁴⁰ *Id.* at 509.

¹⁴¹ For example, when discussing the ongoing efforts to re-inundate the illegally drained marshlands, Al Moumin recognizes the importance of international assistance, but States, “More troubling is the lack of Marsh Arab involvement in the rehabilitation process. The Marsh Arabs are the real stakeholders and, thus, are very eager to commit their time and expertise, including valuable geographical knowledge, to restoration projects that will help them to return to their original way of life.” Mishkat Al Moumin, *Mesopotamian Marshlands: An Ecocide Case*, 20 *Geo. Int'l Envtl. L. Rev.* 499, 502 (2008).

¹⁴² “Environmental injustice involves taking an indirect action that puts people of a certain race, religion, or culture at higher risk by polluting their environment. Ecocide is about taking a direct action to kill a group of a certain race, religion, or culture by destroying their ecosystem completely. Ecocide involves the

subsisted on the rain forest ecosystem that Texaco contaminated. For example, “[i]n addition to routine, willful discharges and emissions, Texaco spilled nearly twice as much oil as the Exxon Valdez from the main pipeline alone, mostly in the Amazon basin.”¹⁴³

The actions that Texaco perpetrated against the indigenous people of Ecuador have had lasting implications for the health of individuals and the cultures of this population.

American and Ecuadorian lawyers, alerted by Kimerling’s scholarship and their own personal connections to the ongoing environmental degradation, brought a U.S. suit against Texaco in 1993. Chevron inherited the case in 2001 when it merged with Texaco and was successful in an action to remove the case from U.S. courts to Ecuador. This case has garnered much media attention, but has failed to provide the indigenous Ecuadorian peoples with redress.¹⁴⁴ The case has highlighted the inability of indigenous peoples to receive compensation in domestic courts for the serious detriments they have endured through what many believe amounts to criminal activity of international corporations. The factual lesson one might take from the Ecuadorian example is that resource extraction may be carried out in places where those most affected have little economic or political power without the threat of any economic resolution for suffering populations. If this model of

intent to kill the people of certain race, religion, or culture, whereas the concept of environmental injustice does not involve an intent to kill.” *Id.* at 506.

¹⁴³ Judith Kimerling, *Transnational Operations, Bi-National Injustice: Chevron, Texaco and Indigenous Huaorani and Kichwa in the Amazon Rainforest in Ecuador*, 31 *Am. Indian L. Rev.* 445, 458. (2007). In one disconcerting passage Kimerling relates an interaction she had with a Ecuadorian oil worker who told her, “Three years ago, I went to a training course . . . and a gringo from Texaco told us that oil nourishes the brain and retards aging. He said that in the United States they do this on all of the roads, and people there are very intelligent.” It is not difficult to imagine such evidence as part of a claim of ecocide. Kimerling has been working on the ground with indigenous populations in Ecuador since 1989. Her 1991 book *Amazon Crude* was the first in depth study of the damage done to the Ecuadorian Amazon.

¹⁴⁴ See e.g. Berlinger, J. Director. (2009). *Crude: The Real Price of Oil* [Film] New York: Entendre Films. The Ecuadorian case was ultimately decided in favor of the indigenous plaintiffs, but Chevron has no assets in Ecuador and has not, to date, voluntarily paid any of the 9 billion dollar ruling.

international environmental governance is the de facto rule of law, the international community will have failed to protect its most vulnerable members and provided the stage for intensive economic waste that threatens us all. The aforementioned problems with oil extraction in Nigeria provide another example of this type of resource waste and destructive business practices that are ongoing and severe.

Toward a New Formulation of Ecocide

There is growing support for formulating a cause of action in international law that would cover the polluting practices of any actor, national or private in character. The following discussion aims to present some of the scholarship on “ecocide” to frame a potential cause of action that might be incorporated into a potential IEC. These scholars

A. Richard Falk: Genesis of an Idea

Falk's article is the seminal piece of scholarship on ecocide, discussing the use and validity of environmental warfare in Vietnam. Falk concludes his article with concrete proposals for taking action to create a convention on environmental warfare. Various authors who have undertaken the challenge of fashioning a useful definition of ecocide and a path for its functional implementation in international law have cited his proposals.¹⁴⁵

¹⁴⁵ Avi Brisman, *Crime-Environment Relationships and Environmental Justice*, 6 *Seattle J. for Soc. Just.* 727 (2008); Carl E. Bruch, *All's not Fair in (Civil) War: Criminal Liability for Environmental Damage in Internal Armed Conflict*, 25 *Vt. L. Rev.* 695 (2001); Drumbl, (1998); Drumbl, (2000); Drumbl, (2005); Okorodudu-Fubara, *Oil in the Persian Gulf: Legal Appraisal of an Environmental Warfare*, 23 *St. Mary's L.J.* 123 (1991); Marcos A. Orellana, *Criminal Punishment for Environmental Damage: Individual and State Responsibility at a Crossroad*, 17 *Geo. Int'l Env'tl. L. Rev.* 673 (2005); Parsons (1998); Peter J. Richards and Michael N. Schmitt, *Mars Meets Mother Nature: Protecting the Environment During Armed Conflict*, 28 *Stetson L. Rev.* 1047 (1999); Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 *Yale J. Int'l L.* 1 (1997); Stefanie N. Simonds, *Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform*, 29 *Stan. J. Int'l L.* 165 (1992); Ludwik A. Teclaff, *Beyond Restoration – The Case of Ecocide*, 34 *Nat. Resources J.* 933 (1994); Tara Weinstein, *Prosecuting Attacks that Destroy the Environment:*

Falk's article anchors his discussion of environmental warfare in tenets of customary international law that cover “any belligerent conduct not specifically covered by valid treaty rule.”¹⁴⁶ These are the well-recognized principles of necessity, humanity, proportionality, and discrimination:

- Principle of necessity. No tactic or weapon may be employed in war that inflicts superfluous suffering on its victims, even if used in the pursuit of an otherwise military objective;
- Principle of humanity. No tactic or weapon may be employed in war that is inherently cruel and offends minimum and widely shared moral sensibilities;
- Principle of proportionality. No weapon or tactic may be employed in war that inflicts death, injury, and destruction disproportionate to its contribution to the pursuit of lawful military objectives;
- Principle of discrimination. No weapon or tactic may be employed in war that fails to discriminate between military and non-military targets and that is either inherently or in practice incapable of discriminating between combatants and noncombatants.¹⁴⁷

Falk framed the ongoing atrocities in Vietnam under the above tenets of international law. Although without the treaty framework Falk proposed, the tactics of environmental warfare were not violative of agreements to which the United States was bound. Only cold comfort may have been had in the notion that customary international law of war applied to the U.S. government's actions. This customary law was at least a moral indictment of the continuing environmental destruction that ultimately targeted human life, but little more.

Environmental Crimes or Humanitarian Atrocities?, 17 *Geo. Int'l Env'tl. L. Rev.* 697 (2005); Ensign Florencio J. Yuzon, *Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: “Greening” the International Laws of Armed Conflict to Establish an Environmentally Protective Regime*, 11 *Am. U. J. Int'l L. & Pol'y* 793 (1996).

¹⁴⁶ *Id.* at 82.

¹⁴⁷ *Id.*

Falk makes a legal distinction between “weapons and tactics that are designed to damage the environment and those that, like bombs, are designed to strike human or societal targets but which may also, as a side effect, damage the environment.”¹⁴⁸ This distinction is important in a couple of different ways for the development of a definition of ecocide that is useful under international law. First, when considering what constitutes ecocide (and beyond a working definition, one that becomes politically palatable) the issue of the intent of potentially responsible parties becomes important. Intent underlies the principles of customary international law governing proper conduct during war listed above. Moreover, the distinction Falk raises are central to defining ecocide beyond wartime actions. Falk distinguishes between what might be termed ecocide (acts culminating in intended ecological destruction) and those to be considered ecocidal (acts that incidentally destroy the natural environment). Such a distinction is important when framing the scope of those potentially liable. Without those actions that are in effect ecocidal being codified as amounting to ecocide the idea of an ecocide convention remains firmly within the realm of the laws of war. Primarily, these distinctions create a class of actions that might be covered by customary international law (those intended) and a class that are not. Subsequent scholars, discussed herein, explore this distinction and have expanded the notion of ecocide that Falk eloquently presented.

To flesh out these humanitarian challenges, Falk catalogues the specific actions of the U.S. Government in Vietnam that he recognizes as amounting to ecocide and looks at their legal rationale and then makes his own legal appraisals. On the basis of humanitarian

¹⁴⁸ Id. at 84.

principles, Falk finds that the environmental warfare then occurring in Vietnam amounted to war crimes under international law. However, Falk recognized that under the prevailing international system, wherein the United States was one of two Cold War superpowers, it could effectively block any inquiry into its conduct in Vietnam.

Falk's analysis is thoroughly rooted in his own “historical moment,” which he describes as when the world was “in the process of discovering the extent to which man’s normal activities are destroying the ecological basis of life on the planet.”¹⁴⁹ He wonders as to why at that moment humans “should also be confronted by this extraordinary enterprise of deliberate environmental destruction in Indo-china.”¹⁵⁰ Falk also centered those most affected by ecological warfare in his analysis. Falk foreshadowed the language of others who describe the ecological attack of the developed States on least developed countries, declaring, “The target of environmental warfare is the Third World.”¹⁵¹ His analysis and basic proposal for an ecocide convention is the basis for the other work that I review below.

B. A Scholarly Mini-Movement: The scholarship on Ecocide in the 1990’s

Multiple international law scholars undertook the topic of severe environmental degradation during the last decade of the 20th century. During this period the International Law Commission (ILC) finalized a decades-long project to codify international crimes completing substantial work on a Draft Code of Crimes Against the Peace and Security of Mankind. The UN General Assembly had tasked the ILC with creating such a code as far

¹⁴⁹ *Id.* at 80.

¹⁵⁰ *Id.*

back as 1954, in conjunction with the ILC's work creating the Nuremberg Charter used to guide the prosecution of individuals at the Nuremberg Trials. In 1991 the provisional draft Code consisted of 12 international crimes, including "willful and severe damage to the environment." This provision, along with 5 other of the original 12 crimes, of the Draft Code proved to be contentious among UN member States. In 1996, the ILC established a Working Group to "examine the possibility of covering in the draft code the issue of willful and severe damage to the environment."¹⁵² That Working Group "proposed to the Commission that this crime be considered as a war crime, a crime against humanity or a separate crime against the peace and security of mankind. The Commission voted to refer to the Drafting Committee only the text prepared by the Working Group for inclusion of willful and severe damage to the environment as a war crime."¹⁵³ In the same 1996 ILC session the Commission adopted the final text of the Draft Code of Crimes Against Peace and Security of Mankind with 20 articles. Article 20 - War Crimes, reads:

Any of the following war crimes constitutes a crime against the peace and security of mankind when committed in a systematic manner or on a large scale: (g) In the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.¹⁵⁴

The 1996 Draft Code laid the basis for the 1999 Rome Statute of the International Criminal Court discussed above, which includes the Article 8 prohibition of "intentionally

¹⁵¹ *Id.*

¹⁵² The Work of the International Law Commission, 7th Ed. New York: United Nations, 2007.

¹⁵³ *Id.*

¹⁵⁴ "Draft Code of Crimes against the Peace and Security of Mankind." Yearbook of the International Law Commission, 1996, vol. II (Part Two).

launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”¹⁵⁵ It may have seemed that as the world moved into the 21st century the crime of ecocide was recognized and established in international law. However, as discussed here, the environmental provision has not proven to be actionable, even though potentially intentional severe damage to the natural environment in the context of war has taken place. Further, it seems clear that the international law here referencing environmental degradation is firmly set only within the context of wartime activities.

International legal scholars writing at the same time that the ILC and UN was undertaking their work pushed for the codification of ecocide such that it would encompass activities outside of the context of war. Each considered transboundary harm itself as an international delict, relying on the development of international environmental law. One scholar argued for categorizing all transboundary environmental harm, as an international crime when the harm is “massive.”¹⁵⁶ For example, the threat of large oil spills and nuclear incidents arising out of peacetime activities may constitute “ecocide.”¹⁵⁷ This view of ecocide would allow for it to be recognized as an international delict not requiring the assigning of fault, becoming a strict liability “supertort.”¹⁵⁸ Such a formulation of what constitutes “ecocide” brings it out of the context of wartime activity, but in so doing the concept arguably loses the focus on direct human impact that Falk

¹⁵⁵ Supra. note 55.

¹⁵⁶ Ludwik A. Teclaff, *Beyond Restoration - The Case of Ecocide*, 34 Nat. Resources J. 933, 934 (1994).

¹⁵⁷ *Id.*

advocated.¹⁵⁹ This formulation of the term might be seen as less anthropocentric both in the impacts of the action and the intentionality of perpetrators. It is unclear whether this might make ecocide more politically palatable. Still, such a view of what constitutes ecocide is a significant step toward an argument for a new international cause of action. Reliance on the scale of ecological impact, rather than on notions of intentionality, loss of life, or other factors that subsequent authors have used to shape the concept of ecocide provides part of the picture of a potential future international crime.

Another scholar, agreeing with the view that ecocide occurs when “States, and arguably individuals and organizations, causing or permitting harm to the natural environment on a massive scale breach a duty of care owed to humanity in general and therefore commit an international delict,” also investigated the potential of ecocide to rise to the level of an international crime.¹⁶⁰ While not convinced that ecocide at that time rose to the level of an international crime under international law, it was clear that “ecocide in its entirety resembles accepted international crimes in important ways and therefore could, and perhaps eventually will, be accorded that status.”¹⁶¹ Following these important steps in the development of ecocide, international legal scholar Mark Drumbl extensively investigated the dimensions of severe international environmental harm that bring it into the realm of an international crime.

¹⁵⁸ *Id.* at 950.

¹⁵⁹ At least one author has taken on equalizing massive environmental damage with human-centric concerns by arguing that “geocide” is a violation of a right to healthy environment through intentional species destruction. See Lynn Berat, *Defending the Right to a Healthy Environment: Toward a Crime of Geocide in International Law*, 11 B.U. Int'l L.J. 327 (1993).

¹⁶⁰ Mark Allan Gray, *The International Crime of Ecocide*, 26 Cal. W. Int'l L.J. 215, 216 (1996).

¹⁶¹ *Id.* at 266.

C. Mark Drumbl: Elaboration in a New International Order

Professor Mark A. Drumbl thoroughly addresses the use of the term ecocide to describe an international crime that the international legal community might utilize to deal with severe environmental harms. Drumbl's discussion of ecocide transforms it from a term of art used to describe a phenomenon to a cause of action that could provide the backbone for a new international convention. Falk called for this in reference to environmental warfare twenty-five years earlier, but Drumbl is writing with a broader scope of environmental degradation in mind and in an era that has seen much development of international law.

Although there was development in international environmental law between the 1970s and 1990s, as shown above, Drumbl declares that “[a]ll that the international community has been able to negotiate is scattered collateral references in a variety of treaties and conventions.” As discussed in the previous chapter, Drumbl disposes of the Rome Statute as a weak alternative for prosecution. Thereafter in his analysis, he moves on to developing the case for an ecocide convention that could address the needs of severe environmental harms.

This crime, named geocide or ecocide, literally a killing of the earth, is the environmental counterpart of genocide, and would be enshrined in a single international convention. The logic of ecocide is as follows: significantly harming the natural environment constitutes a breach of a duty of care, and this breach consists, in the least, in tortious or delictual conduct and, when undertaken with willfulness, recklessness, or negligence, ought to constitute a crime. The ability of the crime to encompass negligent or willfully blind conduct is particularly important. Proof of intentionality, as we have seen, can be difficult to establish.¹⁶²

¹⁶² *Id.* at 143.

While Drumbl recognizes that there are significant challenges to accomplishing such a goal, he also believes that they may be overcome and result in a stronger international agreement than is presently available.¹⁶³

Drumbl considers the policy considerations of utilizing the International Criminal Court or beginning again with a new convention. First, he notes that “[o]ne overarching problem is that the International Criminal Court is principally designed to punish and to deter genocide and crimes against humanity *per se*.”¹⁶⁴ The problem here may lead to environmental crimes being neglected in such a context. Next he points out that “[m]agistrates and judges on an International Criminal Court will likely not have expertise in the area of environmental law, policy, or science.”¹⁶⁵ A new convention could alleviate this problem by having a full body of judicial experts dedicated to environmental crime. Perhaps the largest problem with relying on the International Criminal Court is that major international players have not acceded to the Court’s jurisdiction.¹⁶⁶ Drumbl acknowledges that the same may be true of a separate ecocide convention, but he presents compelling arguments for why the membership of such a regime may in fact be more universal. Essentially, he argues that the war crimes that the Rome Statute primarily covers are “hot

¹⁶³ “Although the concept of ecocide may sound utopian within the context of the present framework of reference, this framework needs to be challenged. After all, the notion of what is politically realistic is, as it has always been, essentially elastic.” *Id.* at 145.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 146.

¹⁶⁶ “Another critical limitation on the effectiveness of the Rome Statute is, of course, the fact that China, India, Russia, and the United States are not parties.” *Id.*

button” issues and major militarized States have thus far balked at the notion of conceding any sovereignty around such issues.¹⁶⁷

Drumbl ends his argument by reiterating concisely that “[t]he concept of ecocide ought not to be restricted to actual war. . . . Ecocide could also apply in times of peace.”¹⁶⁸

In conclusion, Drumbl cites examples of intense ecological damage that is ongoing and likely to continue in the future and States in no uncertain terms that “The effects on the environment are clear: immediate destruction, an inability of ecosystem regeneration, and a contribution to global warming. Such conduct ought to fall within an ecocide convention and be sanctioned by an IEC.”¹⁶⁹ His recommendations inspire action in much the same way Falk's framework for change did in the 1970s.

Conclusions on the Genesis of Ecocide

Reviewing some of the important scholarship on “ecocide” shows that the concept of an international convention focused on environmental crimes is not a new one. In fact, the idea has already gone through significant changes, most notably a shift from a focus on military activities to all ecologically detrimental acts.¹⁷⁰ So, why has no progress been made in creating an independent convention for the crime of ecocide? Scholars recognized that the problem is political and will take popular and governmental support to gain momentum. In addition, legal scholars, political scientists, civil society leaders, and those

¹⁶⁷ “[W]ar crimes writ large is such a thorny area in which to obtain meaningful international consensus that segregating environmental war crimes from other types of war crimes may in fact facilitate consensus-building in the environmental arena.” *Id.* at 147.

¹⁶⁸ *Id.* at 152.

¹⁶⁹ *Id.* at 153.

¹⁷⁰ For a continuation of scholarship drawing on the aforementioned scholars and in this vein see Rajendra Ramlogan, *Creating International Crimes to Ensure Effective Protection of the Environment*, 22 *Temp. Int'l*

most affected by the serious threats – particularly those within indigenous communities– will need to advocate for themselves and generations to come. The challenges faced in this particular historical moment have also evolved since many of these articles have been written. For example, a new convention may need to take into account the growing number and intensity of detrimental harms attributable to climate change. Still, the core value of an independent, specified convention remains. What seems clear is that a functional legal definition of ecocide should include standards for the necessary severity and scope of environmental destruction. A functional definition would allow States, communities and individuals to be protected against wartime and peacetime activities. Activities carried out by international and domestic actors who contravened clearly defined and internationally recognized standards for basic environmental rights would be a part of such a definition. The following section looks at whether a proposal for an international environmental court might fulfill the needs presented above.

Chapter Four: Prospects for an IEC

A New Diplomacy for a New Convention for a New Court

The following is a discussion of whether an international tribunal with competency to hear a broad range of environmental claims – those both criminal and civil in subject matter and with jurisdiction over parties both public and private – might become a reality. Some scholars believe that such an effort is ill advised for political and legal reasons. Politically, the difficulty of attaining a multilateral agreement that would create such a court may be a futile effort. Legally, current proposals may be lacking in sufficient clarity and could be counterproductive for potential plaintiffs. The following discussion does not attempt to fully answer these criticisms. Instead, it presents one avenue for tackling a portion of the political question by applying “environmental diplomacy” to a potential convention for an international environmental court. Thereafter, particular proposals for an IEC are discussed, along with arguments against such an endeavor.

Environmental Diplomacy

Environmental diplomacy is a relatively new area of diplomatic relations amongst States. An IEC would likely stem from a multilateral treaty dealing with environmental rights and norms, which would demand strong environmental diplomacy. Richard Benedick, the U.S. ambassador who was the delegate to the 1987 Montreal Protocol negotiations has written that, "At least five major factors distinguish the new environmental diplomacy: (1) the nature of the subject matter; (2) the role of science and

scientists; (3) the complexity of the negotiations; (4) the unique equity issues involved; and (5) innovative features and approaches."¹⁷¹ These factors would be indispensable to the negotiation of an IEC convention.

The first two of Benedick's factors are inextricably connected to the international environmental law concept of the precautionary principle. The precautionary principle can broadly be understood as a State "duty to take precautionary action and to avoid risk,"¹⁷² when dealing with possible environmental harm. This principle has begun to solidify into customary international law; for example, the precautionary standards embodied within the Montreal and Kyoto Protocols support this development. Negotiations for an IEC convention would be founded on recognition of the importance of the precautionary principle because stakeholders would need to be convinced of the importance of environmental governance and the science that supports it to participate in good faith.

The third and fourth factors Benedick lists can be placed in the context of the multilateral diplomacy that characterizes environmental negotiations. Diplomacy theorists note that multilateral diplomacy has become an increasingly important venue for State interaction and cooperation and was once itself called "the 'new' diplomacy."¹⁷³ Broad agreement across States with disparate threats and goals would be one of the strongest challenges of establishing a treaty regime codifying international environmental legal norms. The 1992 Earth Summit provides an example of the need to bring the global

¹⁷¹ Benedick, Richard. "Diplomacy for the Environment". Environmental Diplomacy Conference Report. American Institute for Contemporary German Studies. 1999.

¹⁷² Tinker, Catherine. "Responsibility for Biological Diversity Conservation Under International Law." Vanderbilt Journal of Transnational Law. No. 28. 1995. p. 792

¹⁷³ Berridge, G.R. *Diplomacy: Theory and Practice*. Third Ed. Palgrave: New York. 2005 p. 151.

community together to effectively address international environmental issues. The resulting documents from that effort would inform a convention on legal norms pertaining to the environment, which dealt with a portion of the equity issues I have discussed above.¹⁷⁴

Benedick's fifth factor relies on both the strength of recognizing the precautionary principle and the advantages of multilateral diplomacy. Innovation in increasingly complex environmental diplomatic negotiations will be essential because states will likely demand flexible mechanisms to achieve their goals. Innovative legal approaches may likely be the cornerstone of an IEC convention because of the breadth of parties involved and the fundamental nature of the problems a comprehensive subject matter and personal jurisdiction treaty presents. Looking at the success of the Montreal Protocol and the heretofore lack of success of the Kyoto Protocol vis-à-vis the strength of each of their precautionary provisions and the extent of the multilateral support they were able to achieve is helpful in understanding what innovations may be necessary to negotiate a treaty that would result in an IEC.

A. History of the Protocols

The Vienna Convention for the Protection of the Ozone Layer (1985) provided the framework for the Montreal Protocol (1987). The subject of the convention was the regulation of CFC's, which were thought to be causing depletion of the protective ozone

¹⁷⁴ See United Nations, "Agenda 21" 1992, available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> and the Rio Declaration on Environment and Development, June 1992, available at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

layer in the Earth's atmosphere. While the original convention facilitated "intergovernmental cooperation on scientific research, systematic observation of the ozone layer, monitoring of CFC production and the exchange of information, . . . it contained no commitment to take any action to reduce CFC production or consumption."¹⁷⁵ Therefore, diplomacy became essential even after the guiding treaty was created in order to arrange an implementation agreement to which States could comply. Although not originating this particular style of diplomatic State cooperation, the Vienna-Montreal model has since become the "gold standard" of environmental diplomacy because of the success it has achieved.

Richard Benedick has chronicled the diplomatic success of the Montreal Protocol in his book *Ozone Diplomacy*. He attributes the successful negotiations to seven factors: "the indispensable role of science," "the power of knowledge and of public opinion," "the activities of a multilateral institution (UNEP)," the U.S.'s "policies and leadership," "private sector leadership," the "flexible and dynamic instrument" that was created and the "process [of] subdividing this complex problem into more manageable components."¹⁷⁶ The role of science, public opinion and UN involvement has permeated environmental diplomacy because of the complexity and comprehensive nature of the subject matter. In regard to the leadership, which Benedick splits between the U.S. and the private sector. For example, "U.S. support for regulating CFCs was first constrained, and later facilitated, by the development of CFC substitutes by Dupont Chemical Corporation, the major CFC

¹⁷⁵ "The Vienna Convention for the Protection of the Ozone Layer." Ozone Secretariat - UN Environment Programme. Kenya. 2001. p. 26

producer in the United States."¹⁷⁷ This gave the U.S. incentive to enter into the agreement, especially since the European Community, the other large producer and consumer of CFCs, was competing well with the U.S.¹⁷⁸ Benedick's final assessments of success are central to the innovative features and approaches that are characteristic of the new environmental diplomacy. Chief among these approaches is the idea of the protocol, or protocols,¹⁷⁹ as a set of linkages to the convention, to which States may pick and choose adherence. One of the strengths of the protocols that are found in the Montreal agreement and the subsequent agreements following the Montreal round of negotiations is the almost universal compliance States have shown.

A corollary to the protocol innovation in a treaty regime producing an international environmental court might include different "parts" within the structure of the court, which like the protocols, States might choose to be bound to or not. One part might be a criminal part and another might be a civil part – to follow the approach taken in this discussion, or parts could be divided along thematic environmental lines (e.g. land, water, air, multimedia) or other designations. The ultimate project might be to have universal membership for each part, which could be an ongoing political process akin to the process advocates for the International Criminal Court have been engaged. One might imagine that national politics might be able to support such adherence to different parts over the course of time as populations and economies in States deal with particular environmental threats.

¹⁷⁶ Benedick, Richard. *Ozone Diplomacy: New Directions in Safeguarding the Planet*. Harvard University Press. 1991. p. 5-7.

¹⁷⁷ Susskind, L.E. *Environmental Diplomacy*. Oxford University Press. 1994. p. 33.

¹⁷⁸ Benedick. 1991. p. 26.

However, the convention-protocol model has not been without its critics. This convention-protocol model has been criticized for prolonging the process of negotiations as well as being particularly ill fitting in its application to environmental problems. The convention-protocol model may rely too heavily on political consensus producing "lowest common denominator agreements"¹⁸⁰ that can be common in multilateral diplomacy. This limitation of multilateral diplomacy may be necessary to get States to the negotiating table and stay there, but, "satisfying the political demands of the countries involved is not enough,"¹⁸¹ simply because of the nature of the subject matter. Another criticism of the process lies in the "bloating" of subsequent environmental diplomacy processes after the success of the Montreal process. In the decade following the Vienna-Montreal combination the international diplomatic process to deal with climate change attempted to mirror Montreal's success. However, the multilateral diplomacy conducted at Vienna was between 28 States while the 1992 UNFCCC was undertaken during the largest summit of world leaders of its time at the UN Conference on Environmental and Development (UNCED).¹⁸² Such "multilateral spectacles" have been criticized for their girth and the problems this causes related to questions of who is to participate, how decisions will be made, who will set the agenda and how public the debate will become.¹⁸³ Unfortunately, an IEC convention may need to mirror the UNFCCC in this regard.

¹⁷⁹ Barrett discusses the multiple linkages within separate protocols in regards to the Convention on Long-Range Transboundary Air Pollution. 146

¹⁸⁰ Susskind. 32.

¹⁸¹ Ibid.

¹⁸² The 1992 Earth Summit was attended by "117 heads of State and representatives of 178 nations in all attending". "United Nations Conference on Environment and Development." Encyclopædia Britannica. 2007. Encyclopædia Britannica Online. 11 Dec. 2007 <<http://search.eb.com/eb/article-9074305>>.

¹⁸³ Berridge. 160-170. Particularly problematic

Notwithstanding its scope, the UNFCCC was relatively similar to the Vienna Convention. However, the level of fulfillment of its final criteria is perhaps oxymoronic in that in some ways it attempted to be an innovative copy. Having a similarly broad environmental topic and dealing specifically with an atmospheric problem, the convention was created to mirror Vienna in providing a framework for a subsequent protocol. The Kyoto Protocol, modeled on Montreal, was created in order to fulfill the UNFCCC. There were innovations within Kyoto, but the basic model remained in tact. This reliance on formula can hardly be described as innovative. An IEC convention would surely need to learn from the successes and failures of both the Montreal and Kyoto processes.

B. The Precautionary Principle

First and foremost, the characteristic that distinguishes environmental diplomacy from other areas of diplomacy is the subject matter. The natural environment places constraints and responsibilities on States that are not present in economic negotiations, conflict diplomacy or human rights conferences. One of the primary differences in environmental diplomacy deals with a reliance on scientific data. However, when dealing with ecologies this data is not only often hard to record, it is often speculative. For this reason the precautionary principle has began to form in international law. Simply stated, it is necessary for States to avoid risk before scientific data can fully quantify that risk because after the harm has been done it may be irreparable. This principle's necessity is most acute in the forum of biodiversity wherein a lack of precautions has resulted in the extinction of species. This principle can also be applied to fish stock management wherein

species extinction carries a direct economic consequence. Even a State reluctant to engage in multilateral agreements such as the U.S. has led in the creation and ratification of a treaty providing for "a precautionary approach to fisheries management with strong provisions on enforcement and incentives for cooperation among countries."¹⁸⁴

The Vienna Convention was partly significant in that it was "probably the first example of the acceptance of the "precautionary principle" in a major international negotiation."¹⁸⁵ The UNFCCC followed suit by including in its third article that parties, "should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects."¹⁸⁶ Benedick is extremely proud of the achievements of the Montreal Protocol in regard to the precautionary principle, writing that it "contained unprecedented provisions that significantly influenced future environmental negotiations and that, taken together, represented a sea-change in international diplomacy."¹⁸⁷ However, even though the principle did make it into the subsequent Kyoto Protocol there has not been the level of compliance with Kyoto as there was with Montreal. The Precautionary Principle is still not considered to be customary international law and even if this designation does become evident there are those that believe it does little to sway State behavior.¹⁸⁸

¹⁸⁴ "Environment and Diplomacy: Environment and US Foreign Policy." US Department of State Online. Archived Material as of January 20, 2001. Available: <http://www.State.gov/www/global/oes/earth.html>

¹⁸⁵ "The Vienna Convention for the Protection of the Ozone Layer." p.26.

¹⁸⁶ "United Nations Framework Convention on Climate Change." United Nations. FCCC/INFORMAL/84. 1992. p. 4.

¹⁸⁷ Benedick. 1989. p. 5.

¹⁸⁸ A standard rebuke of State complicity with customary international law in preference to a reliance on State activity determined by self-interest can be found in Jack Goldsmith and Eric Posner's *The Limits of International Law*. 2005

The progression of the precautionary principle in international law can be seen in the various treaties and international agreements that invoke it. However, the general level of compliance with these invocations is low in most countries, showing that the principle has not entered the realm of customary international law. This can be attributed most bluntly to a reliance on a wait-and-see strategy or 'no regrets' policy akin to the position of the U.S. government in reference to climate change negotiations.¹⁸⁹

Arguments against the precautionary principle range from "meaninglessness" to bad policy. The meaningless charge stems from the contention that the principle actually has no application to policy decisions because it is impossible to "identify safe options . . . when we are profoundly ignorant of the probable outcomes."¹⁹⁰ This argument fails to take into account a conception of risk assessment that underlies the precautionary principle. A more middling argument is exemplified in the decision of the WTO regarding the propriety of European Union regulations on genetically modified foods, which followed a precautionary principle.¹⁹¹ In that case, the WTO found the EU precautionary principle policies to be overreaching and in conflict with WTO regulations. The WTO approach required a risk assessment only when there was scientific uncertainty as to cause and effect, magnitude or severity instead of merely insufficient scientific data. In a

¹⁸⁹ A full discussion of this is found in James Cameron and Juli Abouchar's "The Precautionary Principle: A Fundamental Principle of Law and Policy for the Protection of the Global Environment." *Boston College International and Comparative Law Review*. Vol. 14. No. 1. 1991.

¹⁹⁰ Whyte, Jamie. "Only a reckless mind could believe in safety first." *The Times* (London). 27 July, 2007. p. 17.

¹⁹¹ A full discussion of the case is found in Lawrence Kogan's "WTO Ruling on Biotech Foods Addresses 'Precautionary Principle'". Washington Legal Foundation: Legal Backgrounder. Vol. 21. No. 38. 8 December 2006. Available at <http://www.itssd.org/Publications/wto-biotech-foods-dec0806.pdf>. Citing to *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Report of the Panel, WT/DS291/R, WT/DS292/R and WT/DS293/R, final report issued Sept. 29, 2006, at http://www.wto.org/english/news_e/news06_e/291r_e.htm.

case of the latter, EU law would have been triggered by the precautionary principle. The WTO decision can be read as a rebuke of the solidification of the EU-recognized formulation of the precautionary principle as a standard of international customary law. The WTO ruling specifies that there has been no authoritative decision regarding the principle and no definitive legal definition of the principle.¹⁹²

While the formulation of a legal definition for the “precautionary principle” could stem from international adjudication, a convention that establishes an IEC would likely include this foreseeable and potentially contentious interpretation. The climate change issue is currently a divisive one in national and international policies, based in some measure on the level to which risks must be averted through precaution by mitigation efforts, as opposed to adapting to conditions as they arise. The codification of a precautionary principle in international law in an IEC convention could alleviate some of this controversy.

A precautionary principle would span the environmental considerations of biodiversity, management of fish stocks, natural resource management, and environmental commons protection. One of the fundamental necessities in environmental diplomacy is the codification of a precautionary principle that is sufficient to protect ecologies humans depend upon both for health and economic activity. As the Rome Statute codified war crimes based on human rights norms, an IEC convention may be able to fashion an accepted definition of transboundary breach that is based on international environmental norms, like the precautionary principle. However, adherence to those norms will require

¹⁹² *Id.* at 4.

universal jurisdiction (or its functional equivalent) so multilateral diplomacy regarding environmental governance will need to extend to all States. The involvement of States such as the U.S. and China that disproportionately affect and are affected by international environmental issues would be indispensable to such efforts.

C. Multilateral Diplomacy

The process of garnering cooperation between multiple States, as is needed in the case of climate change negotiations, are invariably complex. However, "complexity is indeed a problem but it is not normally fatal."¹⁹³ Multilateral diplomacy has greatly increased in size and, "as an important mode of diplomacy multilateralism is here to stay."¹⁹⁴ Part of the reason for the important role of multilateral diplomacy is the complexity of the world in which it exists. "By the middle of the twentieth century, the international arena had become too big and too complex for traditional bilateral diplomacy to manage."¹⁹⁵ It is the scope of State power of the natural environment and the potentially global effects of environmental issues that resonate in Benedick's call for recognition of unique equity issues during environmental negotiations.

As noted above, the Montreal process originally included only the 28 mostly industrialized States party to the Vienna Convention. However, once the Montreal Protocol was formulated, "the developing world moved to center stage in 1989 and claimed a major role in revising the protocol."¹⁹⁶ There were stark inequities in the

¹⁹³ Berridge. 166.

¹⁹⁴ Berridge. 170.

¹⁹⁵ Muldoon, James ed. *Multilateral Diplomacy and the United Nations Today*. Westview Press. 1999. p. 2.

¹⁹⁶ Benedick (1991). 148.

consumption of CFC's per capita. Consumption rates of high populations countries, primarily China and India, were dwarfed by the consumption rates by individuals in the West. The economies of these countries, having developed 'late' were still in the process of gaining certain technologies. Curbing of the allowable production of CFC's was worrisome to countries that had not benefited from CFC production in the past, but might have in the future. To ensure that the ban on CFC's would not harm these developing nations' economies they wanted to have assurances that the new benign technologies that the West had developed would be available to them in order to compete in the global market place.¹⁹⁷ In the end, developing nations, including the Chinese and Indian holdouts, ratified the convention protocol and subsequent amendments. Without the continued multilateral diplomacy that Benedick chronicles in *Ozone Diplomacy*, the agreements would surely have fallen apart.

The application of the Montreal process is a seductive model for subsequent international environmental agreements. It has been an overall success in dealing with scientific data and furthering the precautionary principle and it is an example of effective utilization of multilateral diplomacy to deal with a complex and broad-impact issue. However, the primacy of Benedick's final component for environmental negotiations, while evident in the substance of Montreal's provisioning, has not translated to all environmental diplomacy efforts, i.e. the UNFCCC and the Kyoto Protocol. The centrality of innovation in Montreal, both in terms of its contribution to the

¹⁹⁷ Ibid at 149.

precautionary principle and its variations on multilateral diplomacy, cannot be wholly transposed to Kyoto and is unlikely a direct blueprint for an IEC convention.

D. Innovative Approaches

The framers of the Vienna Convention did not invent the convention-protocol relationship. However, it was the flexibility of linkages that are inherent in this form of diplomacy that was improved upon by the Vienna-Montreal diplomatic process. While the judicial subject matter of the Rome Statute process might afford a more direct analogy on one level to a proposed IEC convention, the underlying environmental issues are likely important considerations around which diplomacy would need to be structured for an IEC convention. The inter-reliant connections between environmental science and policy were made clear in the Vienna-Montreal diplomatic process and the protocol strengthened these connections by providing for periodic assessments, "undertaken by an elaborate structure of international expert groups that interacted with the government negotiators."¹⁹⁸ States have been able to opt out of the subsequent amendments to Montreal that have made regulation tighter and include far more compounds in its list of ozone depleting chemicals. An IEC convention might need to be premised on the reality that scientific consensus can change and that decisions of the court would necessarily be informed by current scientific information, which might afford review of cases as science and technology progress.

Innovations of Montreal that dealt with the inherent complexities within global multilateralism was the development of a fund to assist developing countries and two separate voting systems, one for industrialized and one for developing countries. This

separate voting scheme accepted that broad consensus would not be particularly efficient and has facilitated cooperation. Such consideration of the strength of parties by legal burden shifting or composition of an arbitral panel in a judicial context might be considered in an IEC convention. Finally, the compliance issue in Montreal was given over to a threat of sanctions, however the mechanisms to avert this last resort compliance were both smart and strong, relying "on consultation and assistance rather than confrontation and penalties."¹⁹⁹

However, not all innovations in the environmental diplomacy context have born fruit and should be analyzed scrupulously to avoid similar mistakes in a new contention. The Kyoto Protocol had an innovation of its own beyond the model that Montreal presented, namely the emissions trade mechanisms built into the protocol. These mechanisms allowed for industrialized nations to offset their (primarily carbon) emissions by purchasing credits from lower or non-emitting organizations in a marketplace created for this purpose. The model for this system was the U.S. Clean Air Act.²⁰⁰ U.S. pressure to include this sort of market-based answer to the inequality and compliance issues is ironic since the U.S. did not ratify Kyoto. In addition, the refusal of the Kyoto *process* by President George W. Bush in 2001 "reinforced the view that Kyoto had to be the only way forward."²⁰¹ Unfortunately, these market mechanisms have not produced either

¹⁹⁸ Benedick (1999). 10.

¹⁹⁹ Ibid.

²⁰⁰ Barrett. 398.

²⁰¹ Ibid at 371.

compliance by States (most notably in the Canadian case)²⁰² that have entered into Kyoto or effectively addressed developing nations increasing consumption of fossil fuels and consequent emissions. The lesson here would seem to be that domestic solutions to problems do not always translate well to international agreements. For example, legal solutions for structuring an international environmental court may likely learn much from the case of national specialized environmental courts, but an IEC would need to be carefully crafted to fill a unique position in the international legal landscape.

Benedick's criteria for environmental diplomacy are a good set of indicators for successful environmental negotiations. However, as Benedick notes, "the signing of a treaty is not necessarily the decisive event in a negotiation; the process before and after signing is critical."²⁰³ An effort to create an IEC convention would require the further development of the 'new' diplomacy in that innovative, science based arguments underpinning the need for such a convention would need to be presented to multiple stakeholders within the context of judicial resolution as the prime mode for multiparty rewards and overall, beneficial international stability. However, much of the negotiations will deal with the structure and function of the court. Most of the proposals for the court have focused on these aspects, as discussed below.

Proposals for an IEC

In the analysis above, Mark Drumbl proposed that a new convention structured around ecocide might yield a new court that could adjudicate such a claim. Drumbl's

²⁰² "Canada Alters Course on Kyoto." Washington Post Online. 3 May 2006. Available:

discussion of the deficiency of the International Criminal Court touches on political considerations and international relations theory.

Recent scholarship in the area of international relations shows that conventions with strict liability and rigorous enforcement measures are difficult to negotiate and even more difficult to enforce, especially when no uniform consensus exists. The trick lies in utilizing more effective and often gradual methods to stimulate agreement. As a result, discussions related to ecocide might be more effective if undertaken within the nexus of a framework negotiation, as had been the case in climate change, another urgent area of environmental concern. Instead of focusing on immediately creating unambiguous rules and strict liability, an attempt ought to be made to negotiate consensus around mutually acceptable standards that, through ongoing negotiations, can eventually be distilled into rules. Such negotiations should involve not only States, but also non-governmental organizations, transnational public interest advocates, trading organizations, and other similar groups. [T]he ecocide convention would be more than simply a criminal statute, but an organization designed to enhance awareness and to develop methods to maximize incentives not to engage in environmentally pernicious military initiatives in the first place.²⁰⁴

Drumbl's comments acknowledge that the type of environmental diplomacy that Benedick describes may be necessary to move the international community toward a convention establishing an adjudicatory body dedicated to protecting the global environmental.

Multiple international organizations have either dedicated resources or have been developed specifically to press for an IEC. These include the Italian organization International Court for the Environmental Foundation (ICEF).²⁰⁵ The ICEF produced the first potential statute for an IEC in 1992. The British organization International Court for

<http://www.washingtonpost.com/wp-dyn/content/article/2006/05/02/AR2006050201774.html>

²⁰³ Benedick (1991). 206.

²⁰⁴ Drumbl (1998) at 149.

²⁰⁵ See Amedeo Postiglione, *A More Efficient International Law on the Environment and Setting Up an*

the Environment Coalition (ICE) is also an active advocacy organization. ICE envisions a court that progresses from an optional forum to a mandatory one. The ICE proposes a court that is first an arbitral forum that would be available for submission by parties to its jurisdiction and once this is established the court might attain mandatory jurisdiction in the future.²⁰⁶ The thinking on this type of incremental project involves the belief that such a court could become a trusted, de facto forum for international environmental arbitration, which would lend it to the authority to gain trust of hard-to-convince international actors (i.e. the United States and multi-national corporations).

Seemingly, the problem with this approach is that the political hurdle of having key States and their powerful economic interests submit to the authority of such a court may not be affected by it becoming a regular “port of call” for corporations or States who submit to the arbitral jurisdiction of the court. It seems unlikely that any of the pressing concerns that are outlined in this discussion would entail potential defendants’ submission to any court’s jurisdiction after a potential wrong is committed. Ultimately, it is an issue of the difference in international relations between voluntary or mandatory commitments. Environmental diplomacy is the effort to potentially gain State agreement to mandatory commitments. In the case of a convention that forms an IEC, the mandatory commitment would likely be a submission to the court’s jurisdiction.

The issue of whether voluntary action or commitments will best serve environmental problems (e.g. climate change or ecocide) is an uncomplicated one for most

International Court for the Environment within the United Nations, 20 *Envtl. Law* 321 (1990).

²⁰⁶ Stephen Hockman, “The Case for an International Court for the Environment.” Draft retrieved 04/08/11 from <http://www.ice.org/>.

analysts of international relations. A State commitment is preferable to voluntary action in the concrete resolution of an international issue because of the reliance on cooperation, dialogue and assistance that follows respected international commitments. It is important to note that a State enters into a commitment voluntarily and is not obligated to do so, but once committed it is difficult for a State to release itself from the commitment because of the effect this has on subsequent international agreements. In effect, States do not want to develop "a reputation for breaking one's promises."²⁰⁷ Commitments within the framework of international agreements signal to all the States in the agreement that compliance will be interdependent and self-enforcing within the compact between States. States are prompted to act by the expectation that other States will comply and their compliance is expected.²⁰⁸ There are consequences for non-compliance that can be built into international binding agreements, but it is the agreement itself that is the primary compliance mechanism. Voluntary State action, absent a multilateral agreement, has no such guarantees. It is important to note however, that it is the diplomatic process that must engage important actors in order for such an international agreement to be effective.

Further, the ICE model of voluntary submission to jurisdiction can already be found at the ICJ for disputes involving States. As discussed above, the ICJ has not become a place where environmental disputes are regularly heard. As noted, the most recent environmental law case at the ICJ, the *Pulp Mills Case*, provides little hope for that forum becoming such a tribunal. It may be that the competency of the ICJ was lacking,

²⁰⁷ Bodansky. 39.

²⁰⁸ Ibid.

since the court there decided the issue on a procedural matter instead of delving into the science necessary to make an informed judgment on the merits. However, it may be that the inherently political structure of the ICJ, which is primarily dependent on State submission to its jurisdiction did not allow for a merit-based decision. Another international tribunal with voluntary submission to jurisdiction, even one with the technical competency to deal with complex environmental issues, might not provide the type of resolutions necessary – those which may seriously affect the economies of the States party to the case. A political analysis of the *Pulp Mills Case* finds that the pollution issue was subverted to allow the ICJ to dodge a potential political bullet. Time may well tell if an ICE-type incremental proposal might garner a new court. The efforts of that organization are surely inspiring on this front. However, this discussion envisions a court with jurisdiction similar to the ICC growing from a multi-stakeholder international convention. A convention that is based on compulsory jurisdiction and undertaken by States that are in agreement with the underlying principles of justice on which an IEC bases its decisions. In this way, the court is merely the manifestation of the most important portion of this process: the binding agreement of international norms on environmental law.

An international convention for a new environmental court would likely need to be formed on the basis of multiple arguments addressing concerns and providing inducements for disparate stakeholders of environmental issues. Arguments would need to be made on moral (the weakest States and individuals are most threatened), economic (resource waste and legal irregularity are bad for business), political (resource conflicts threaten

sovereignty), population (for whom public health is required), and ecological (future biological generations must be protected) bases. As the discussion of environmental diplomacy shows, the need for inducements for States, business, NGO's and individuals need to be clear. Threats are not enough. Positive outcomes for each of these constituencies are necessary.

Multiple gatherings of international scholars have debated the need for an international forum with particularized environmental competencies, but none of these has, of yet, yielded the types of momentum necessary for an international convention. One such convention occurred in Rome in 1989 through the efforts of the newly formed ICEF. The recommendations of the group of international legal scholars in attendance there was clear: a new international court is needed to deal with pressing environmental concerns, there considered to amount to a "world ecological crisis." Another conference on the subject was held in Washington, D.C. in 1999. A group of scholars also gathered in Johannesburg before the 2002 World Conference on Sustainable Development to discuss international environmental adjudication. At each of these gatherings the problems of the current system of international environmental governance were recognized, but little momentum within the United Nations or community of world leaders has been made toward creating a World Environmental Organization or IEC. The twentieth anniversary of the Rio Declaration will be honored in 2012 with a new Earth Summit. It remains to be seen whether organizations dedicated to an IEC will be able to levy their resources and gain international and key domestic momentum to bring the dream of an IEC to reality.

Not all international scholars are convinced that an IEC would be a positive or

potential development. A dissenting voice in a speech from the president of the ICJ, Robert Jennings, in 1992 has been said to have effectively removed the idea from the agenda of UNCED in Rio de Janeiro.²⁰⁹ However, Jennings's remarks were an argument for the use of the ICJ to develop international environmental law, rather than an argument against the idea of a separate permanent court. In fact, the remarks criticized the use of *ad hoc* tribunals for resolving international environmental disputes. Jennings's arguments included potential fragmentation of the current international system, the lack of a necessity since existing court can or should be able to deal with environmental issues and a specialized environmental court would be ineffectual because international environmental disputes often include other areas of law. Since Jennings's speech, subsequent commentators on an international environmental court have cited these concerns.²¹⁰ In this vein, Tim Stephens laid out structural concerns for a new IEC in his thorough text on international environmental judicial governance.²¹¹

Stephens posits that existing proposals are intrinsically problematic because proposals which include criminal and appellate jurisdiction diverge from standard domestic judicial frameworks and in cases where domestic frameworks are relied upon for IEC proposals, they do not take into account the realities of international relations.

Additionally, Stephens believes that a specialized forum may not be the best option for many environmental disputes since environmental disputes are often part of more complex

²⁰⁹ Robert Jennings, "Need for an Environmental Court?" 20 *Environ. Policy & Law* 312 (1992).

²¹⁰ See Ellen Hey, *Reflections on an International Environmental Court*. The Hague: Kluwer Law International (2000).

²¹¹ Tim Stephens. *International Courts and Environmental Protection*. Cambridge: Cambridge University Press, pp 56-61. 2009.

matters that involve other areas of international law. He also wonders, as others have, whether the international system would become more fragmented with a separate environmental court.²¹² Stephens does not refute the need for serious environmental harm to be addressed judicially and does agree that the current “patchwork” of international environmental judicial governance is insufficient.

The critiques of Stephens and his predecessors would be important in shaping the expectations for an international agreement. Both legal considerations and diplomatic considerations would necessarily be confronted when structuring an agreement and engaging in the multilateral diplomacy necessary to make an agreement effective. However, Stephens relied primarily on one proposal for the court and did not undertake the project of evaluating what might be necessary to make an agreement diplomatically palatable or a proposed court functional.²¹³ For example, a treaty regime for an environmental court may have to interact explicitly with other international courts, such as the ITLOS Tribunal and World Trade Organization arbitral mechanisms to ensure coverage of complex issues in the so-called fragmented world of international courts.

What each of the negative evaluations of an international court has in common is their focus on a court that would undertake current jurisdictional competencies of other courts – those that deal with specific treaty regimes and classic transboundary disputes between States that are currently heard at the ICJ. Such critiques of an IEC are not

²¹² *Id.* citing Hey, (2000).

²¹³ See Alfred Rest, *The Indispensability of an International Environmental Court*, 7 *Rev. of European Comm. & Int'l Envmt'l Law* 63 (1998). Also see M. Vespa, *An Alternative to an International Environmental Court? The PCA's Optional Arbitration Rules for Natural Resources and/or the Environment*, 2 *Law & Prac. Int'l Cts. & Tribunals* 295 (2003).

altogether applicable to a court envisioned to potentially handle the aforementioned disputes, but more importantly handle challenges arising from States and individuals that seek redress as described above for claims ranging from international environmental torts and criminal actions. For the latter, a new convention is necessary and from this convention a new court would need to take its place alongside the current framework of international adjudicatory bodies, working with them to craft a new generation of international environmental laws.

The process for crafting an environmental court would be complex and would rely on innovation, but successful precedent for this type of effort exists in the lessons from the Montreal Protocol and ICC processes. Even without such precedent, if the will for a groundbreaking international environmental organizational plan exists then individuals, organizations and States will work to shape this into an agreement. Again, complexity is not dispositive of impossibility or desirability. Benedick's seven factors for success might be a good framework for starting to envision how an IEC might fulfill the promise of a venue to hear their claims that so many have desired.

Conclusions

The prospects for a new treaty regime that would encompass the needs presented in the first two sections of this discussion are not altogether apparent in current discussions on the needs of the international legal community. The impacts of climate change on marginalized communities and States may push international legal practitioners and decision makers to advocate for innovative strategies to provide legal redress to affected. Similarly, those who are subject to ecological warfare, during times of war and “peace,” may be increasingly represented in international media and at international decision-making bodies. Their potential calls for international legal mechanisms to assign guilt to perpetrators of willful, destructive acts may move this debate forward.

Political pressure from those affected most by environmental degradation and their allies will surely be needed to stem the tide of harms to the ecosystems that all of us depend upon. However, a strong international diplomatic effort will ultimately prove dispositive to the question of whether an international convention sufficient to deal with climate tort actions and ecocide might be formed. Ongoing efforts to create an IEC are laudable, but seem to have a long way to go to present a cohesive, viable plan to rally the international community around a need for such a court. However, the development of international environmental law heretofore and the problems currently impacting the international community may make this the correct “historical moment” to attempt such a process in earnest. The need for an IEC seems clear. The feasibility of its genesis is still in question.

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