

Programme Environment, Energy & Transport

Protecting the Environment – in Court

A case for the reinforcement of environmental rule of law

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Executive Summary

English Over the past decades, global environmental governance has significantly developed and now includes a large number of international agreements, mechanisms and institutions. However, as 2019's climate strikes and demonstrations have highlighted, no significant improvement has been achieved. Most climate and environmental agreements are still insufficient to tackle the most imminent and urgent environmental issues: global environmental governance is in need of reform and fresh approaches.

In order to achieve long-term and profound progress in environmental governance, policy focus needs to be complemented by intensified efforts to strengthen environmental rule of law. To do so, the capacity of international courts to pronounce judgements on environmental matters, the clarity and scope of environmental legal principles, and compliance with and implementation of judgements must be further strengthened. This task falls as much to States as it does to civil society and legal fora (such as courts, tribunals, legal commissions and the like). This policy brief outlines concrete steps which justice and foreign ministries can take, both nationally and internationally, in order to strengthen environmental rule of law. This includes the referral of specific disputes targeted at developing environmental law to international courts. Furthermore, more judicial activism from international civil servants as well as collaboration between civil society organisations should aim at developing specific areas of environmental law. Improving the implementation of international environmental law and the quantitative and qualitative capacities of international legal fora, by joining forces with like-minded States, must also be top priorities of ministries and environmental organisations alike. ●

Deutsch In den letzten Jahrzehnten hat sich die globale Umweltpolitik stark weiterentwickelt und umfasst heute eine Vielzahl von internationalen Vereinbarungen, Mechanismen und Institutionen. Wie die Klimastreiks und -demonstrationen von 2019 jedoch gezeigt haben, konnte keine signifikante Verbesserung erzielt werden. Die meisten Klima- und Umweltabkommen reichen immer noch nicht aus, um die dringendsten Umweltprobleme zu lösen: Die globale Umweltpolitik bedarf Reformen und neuer Ansätze.

Um langfristige und tiefgreifende Fortschritte in der Umweltpolitik zu erzielen, muss der politische Fokus durch intensive Anstrengungen zur Stärkung der Umweltrechtsstaatlichkeit ergänzt werden. Zu diesem Zweck müssen die Fähigkeit der internationalen Gerichte, Urteile zu Umweltangelegenheiten zu fällen, die Klarheit und der Umfang der umweltrechtlichen Grundsätze sowie die Einhaltung und Umsetzung von Urteilen weiter gestärkt werden. Diese Aufgabe obliegt sowohl den Staaten wie auch den Zivilgesellschaften und den Rechtsforen (wie Gerichten, Tribunalen, Rechtsausschüssen und dergleichen). In diesem Diskussionspapier werden konkrete Schritte aufgezeigt, die Justiz- und Außenministerien national und international unternehmen können, um die Umweltrechtsstaatlichkeit zu stärken. Dazu gehört auch die Anrufung internationaler Gerichte bei spezifischen Streitigkeiten, die auf die Entwicklung des Umweltrechts abzielen. Darüber hinaus sollten mehr juristischer Aktivismus von internationalen BeamtInnen sowie die Zusammenarbeit zwischen Organisationen der Zivilgesellschaft darauf abzielen, spezifische Bereiche des Umweltrechts zu entwickeln. Die Verbesserung der Umsetzung des internationalen Umweltrechts und der quantitativen und qualitativen Kapazitäten der internationalen Rechtsforen durch die Zusammenarbeit mit gleichgesinnten Staaten muss auch bei Ministerien und Umweltorganisationen oberste Priorität haben. ●

Français Au cours des dernières décennies, la gouvernance environnementale mondiale s'est considérablement développée et comprend désormais un grand nombre d'accords, d'institutions et de mécanismes internationaux. Cependant, comme l'ont montré les grèves et les manifestations pour le climat en 2019, aucune amélioration significative n'a été réalisée. La plupart des accords sur le climat et sur l'environnement ne suffisent pas encore à lutter contre les problèmes environnementaux les plus imminents et les plus urgents : la gouvernance environnementale mondiale a besoin de réformes et de nouvelles approches.

Pour réaliser d'importants progrès sur le long terme en matière de gouvernance environnementale, l'accent politique doit être appuyé par des efforts intensifiés en faveur du renforcement des règles de droit environnemental. Pour ce faire, il faut davantage renforcer la capacité des tribunaux internationaux à prononcer des décisions en matière d'environnement, la clarté et la portée des principes juridiques environnementaux ainsi que le respect et l'exécution des décisions. Cette tâche incombe tant aux États qu'à la société civile et aux instances judiciaires (telles que les cours, les tribunaux, les commissions juridiques, etc.). Le présent papier présente des mesures concrètes que la justice et les ministères des affaires étrangères peuvent prendre, tant au niveau national qu'international, dans le but de renforcer les règles de droit environnemental. Il s'agit notamment de renvoyer des différends spécifiques visant à développer le droit de l'environnement devant les tribunaux internationaux. De plus, un activisme judiciaire accru ainsi que la collaboration entre organisations de la société civile devraient viser le développement de domaines spécifiques du droit de l'environnement. L'une des principales priorités des ministères et des organisations environnementales doit être l'amélioration de la mise en œuvre du droit international de l'environnement et les capacités quantitatives et qualitatives des instances judiciaires internationales, en conjuguant leurs efforts avec ceux des États partageant la même vision. ●

1. Introduction

The Kyoto Protocol took almost eight years to enter into force. From 2012 to 2016, no global framework on climate change was in force, as the Doha Amendment failed to take effect in the absence of sufficient ratifications.

Urgenda used to be a lesser-known Dutch foundation advocating for sustainable development. Then, they sued the Dutch government for not taking measures effective enough to curb greenhouse gas emissions of the country. In October 2018, they won their case on appeal.¹ Meanwhile, the United States is set to withdraw from the Paris Climate Agreement by 2020.² The Kyoto Protocol took almost eight years to enter into force.³ From 2012 to 2016, no global framework on climate change was in force, as the Doha Amendment failed to take effect in the absence of sufficient ratifications.⁴ The reasons for the inefficiency of current climate and environmental agreements can be boiled down to three key factors: the lack of political will, the time-intensiveness of multilateral diplomacy, and the lack of a clear mandate to create a legal obligation. In fact, the dominance of political approaches towards environmental governance, which rely on

mostly voluntary compliance without a legally binding underpinning, has led to an inefficient system which is insufficient to tackle today's imminent and time-sensitive environmental challenges. Opposed to that, the success of Urgenda illustrates just one way in which a legal approach can efficiently and ambitiously push for progress in environmental matters.

This policy brief argues that in order to achieve sustainable and profound progress in environmental governance, policy focus should be complemented by intensified efforts to strengthen environmental rule of law. According to the UN Environment Programme, environmental rule of law “describes when environmental laws are widely understood, respected, and enforced and the benefits of environmental protection are enjoyed by people and the planet”.⁵ A functioning environmental rule of law includes pushing forward the development and binding character of environmental law itself, strong legal institutions (courts, tribunals, committees, etc.) that are able and willing to develop said law further, as well as strong implementation mechanisms. ●

2. The way forward for environmental rule of law

There are several ways in which environmental policy can and must be strengthened by legal underpinnings, as the latter also have several advantages over the former.

There are several ways in which environmental policy can and must be strengthened by legal underpinnings, as the latter also have several advantages over the former, which will be briefly outlined here.

Firstly, jurisprudence is more long-lived and stable than political approaches, a fact for which the United Nations specialised Tribunals⁶ are a good example. As judicially independent bodies established through a Chapter VII UNSC resolution, the judgements of the Tribunals are legally binding, no matter the changing political will since their establishment. Opposed to international agreements, States cannot simply “opt-out” from binding jurisprudence after it has been rendered. Furthermore, through the law-making effect of legal decisions, many judgements of international fora, be they binding or not, have become an important and widely used source of international

law, independent from the changing attitudes and priorities of policymakers.

What is more, political stakeholders face trade-offs and short-term incentives which often lead away from effective solutions in the interest of the environment. Meanwhile, international judges may have a challenging mandate, but their independence and impartiality are amongst the most highly enshrined principles of international law. Thus, judges can take a much longer-term perspective without being limited by a four-year electoral cycle. Judges at the International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR)⁷ are elected for nine years.⁸ Judges at the former UN Tribunals (now the IRMCT) were elected for four years by the United Nations General Assembly (UNGA).⁹ Recognising the significant long-term and impartiality advantage implied in the mandate of international judges is a key step in strengthening international legal fora.

While some environmental principles and obligations are comparatively new in international law, legal action can base itself on much more well-established legal domains and thus achieve considerable success.

The third argument in favour of adding stronger legal underpinnings to environmental policy is that the building blocks for strengthened environmental rule of law do already exist. While some environmental principles and obligations are comparatively new in international law, legal action can base itself on much more well-established legal domains and thus achieve considerable success. *Urgenda*, for example, argued and won its case on the basis of articles 2 and 8 of the European Convention on Human Rights¹⁰ (ECHR).¹¹ Other examples of how an environmental link has been established in jurisdictions not traditionally centred on environmental affairs include the recognition of animals as exhaustible (and thus protected) resources before the WTO appellate body in the so-called *Shrimp-Turtles* case,¹² the recognition of commercial wood extraction as a violation of the Human

Right to property¹³ of indigenous people in the Mayagna case¹⁴ before the Inter-American Court of Human Rights (IACHR) and the determination of serious pollution as a violation of the right to respect for the home and private life by the ECtHR.¹⁵ Furthermore, the Office of the Prosecutor of the International Criminal Court (ICC) has announced a new policy for increased prosecution of environmental crimes.¹⁶ Therefore, the benefit of using links between environmental and other areas of law is evident. Nevertheless, this benefit has to date not been used to its fullest potential, especially when it comes to collaboration between NGOs in different subject areas. If the benefit of cross-disciplinary links is to be fully exploited, cooperation between thematic NGOs needs to increase. Notably, less successful cases can also offer helpful guidance on which approaches work and which do not – case in point is the lawsuit of the Swiss “KlimaSeniorinnen”,¹⁷ which has been rejected by the federal administrative court and is now pending before the federal (supreme) court of Switzerland. No matter the case’s final outcome, valuable lessons on the (in)effectiveness of arguments in court proceedings can be drawn from the previous court rulings and, undoubtedly, from the ones still to come.

The most important principles of international environmental law include the principles of precaution, prevention, the public participation principle, the obligation to conduct Environmental Impact Assessments (EIAs) and the polluter pays principle.

2.1 The status quo

Several key principles of international environmental law have emerged over the past decades. The most important ones include the principles of precaution, prevention, the public participation principle, the obligation to conduct Environmental Impact Assessments (EIAs) and the polluter pays principle. However, the extent of legal obligation under these principles is still contested – and legal uncertainty can cause high opportunity costs. For example, the requirements for

an assessment to be recognised as a genuine EIA repeatedly come under discussion; the definition of significant transboundary harm is still a fluid concept, and the status of precaution in international environmental law is yet to be determined with certainty. What is more, new challenges can create significant legal uncertainty as well. How far does the right to a healthy environment go? Who can be held responsible for harm caused by climate change? Which obligations, precisely, fall upon States under the principle of sustainable development? These and numerous other questions remain unresolved in international law, and their clarification would undoubtedly strengthen environmental rule of law.

Another open question addresses the institution which should deal with international environmental law. Some scholars have argued that an efficient way to adjudicate environmental matters would be through the establishment of a specialised court with the sole mandate of arbitrating environmental matters or crimes. However, the potential to establish links between environmental and other areas of law show that such a court would not be necessary. Indeed, this policy brief does not advocate for the establishment of an “environment court” at this time. The reasons are manifold: For one, even in the early 2000s, shoring up enough political will to establish the ICC was a considerable challenge. A similar exercise of political lobbying and negotiation is simply not conceivable in the near future. Furthermore, additional fragmentation of jurisdiction¹⁸ would make the international legal system less effective. The currently existing fora through which environmental issues can be adjudicated have decades worth of experience and accumulated recognition. This recognition and experience are crucial in order to grant judgements traction in their impact and implementation. Thus, especially the ECtHR, the ICJ and the ICC, but also the International Tribunal for the Law of the Sea (ITLOS),¹⁹ are already relevant stakeholders whose judgements are generally accepted as authoritative sources of international law.²⁰ A new court for environmental crimes would not have these advantages and would presumably need years if not decades to achieve any similar success. The environmental chamber at the ICJ illustrates this well: Although it existed for more than a decade (from 1993 to 2006), not a single case had been brought before it. That is why at present, improving the efficiency and impact of the currently existing legal fora and building

recognition of legal principles such as the right to a healthy environment must be prioritised.

It is true, however, that while key courts including the ECtHR, the ICJ, the ICC, ITLOS and the IACHR are, as substantiated above, already well-positioned, they do need strengthening if they are to take on a key role in driving environmental law forward. International justice is still a comparatively slow wheel: Indeed, every year, the ECtHR has well over 50'000 pending cases; the delivery of judgements at any international court takes years, whereas the ICJ is not fulfilling its potential with only 17 pending cases. International courts are either already overwhelmed, or in no state to handle any larger caseload than they already are.

An additional fragmentation of jurisdiction would make the international legal system less effective.

Lastly, the implementation of judgements is a well-known pressure point in international law in general. In the absence of a global, powerful 'enforcer' of international justice, public pressure, naming and shaming, and soft and hard sanctions have been tried and tested as alternative ways to convince States to implement international law in their domestic systems. When it comes to the implementation of environmental law, the same challenges and opportunities apply.

From these highlighted issues concerning the status quo, three key areas in which to strengthen environmental rule of law can be deduced. These will be discussed in the following sections.

2.2 Strengthening jurisprudence

Increasing dispute resolution at the national and international level

In order to create a more reliable and coherent body of environmental jurisprudence more cases need to be brought before legal fora, be it purely environmental cases or cases with a link to environmental affairs. Concretely, more disputes need to be delegated to international

courts by States with the capacity and will to do so. National justice ministries coordinating with their foreign affairs counterparts could aim at strategically increasing the referral of disputes to international courts. More importantly, the appeal of the ICJ's capacity to pronounce itself in Advisory Opinions (AOs)²¹ must not be underestimated. Only UN organs (not States) can request an AO from the ICJ, and since these AOs are not legally binding, political inhibitions to a referral for an AO may be lower than initiating contentious (inter-State) proceedings before the ICJ, even if a request still depends on a majority vote in the UNGA. The ICJ's recognised authority is such that its repeated interpretation of key principles would contribute significantly to the development of environmental law.

States at the forefront of conducting legal disputes at international fora include those acting as an exemplary, such as the Netherlands (with the seat of several international courts in The Hague) and Switzerland (with Geneva as a symbol for international cooperation). Furthermore, States which have in the past intensively and successfully used international legal fora include several Central American States, especially Nicaragua and Costa Rica at the ICJ.

Justice ministries should strategically select issues or legal questions to submit to international jurisdictions.

A third category of well-placed States to push environmental jurisprudence forward are those most affected by environmental degradation and climate change, such as the Pacific Island States. The Marshall Islands' nuclear weapons case²² may ultimately have been unsuccessful, but nonetheless, it was a landmark litigation demonstrating the empowering effect of international justice for less politically influential countries. It is these countries which hold the necessary will and capacity to drive jurisprudence forward, while the limits to these States' practical possibilities for action necessitates collaboration beyond State borders. Justice ministries should therefore strategically select issues or legal questions to submit to

international jurisdictions, such as issues relating to the extent of obligations under the principle of precaution, sustainable development, and relating to questions of responsibility for harm caused by climate change. Furthermore, zeroing in on the right to a healthy environment and the precise requirements for EIAs has the potential to considerably develop and consolidate environmental jurisprudence.

When it comes to holding governments accountable for harm caused by climate change, an interesting approach would be for States disproportionately affected by the effects of climate change to initiate proceedings against States whose policies contradict their obligations in important climate treaties such as the Paris agreement. Specifically, Pacific Island States or mountainous States (including Switzerland) ought to assess the possibilities for legal action within their justice ministries. At the same time, such legal action can be challenging, considering that the major contributors to global greenhouse gas emissions have not accepted the ICJ's obligatory jurisdiction. Nevertheless, the signalling effect of legal action even against 'smaller' contributors should not be underestimated, as the aforementioned Marshall Islands case has shown. Furthermore, as elaborated above, the possibility to request an ICJ Advisory Opinion on State responsibility for environmental harm remains open, even though such opinions are not legally binding nor directed against one particular State, and such a request would have to be passed by the UNGA.

Interpretation of legal principles and customary international law

International courts and tribunals themselves play a monumental role in strengthening legal environmental governance. In fact, international judges do have some leeway when it comes to customary law and so-called 'general principles' as primary sources of international law.²³ Courts must often assess whether a certain practice or notion can be considered as established customary international law or at least as a crystallising norm. In order to do so, judges conduct the significant work of assembling and comparing State practice in matters before them. This can lead to compelling judgements on previously contested matters, even if the most progressive opinions are often found in dissenting opinions. For example, the ICTY's definitions of international

and non-international armed conflict in the Tadić case, though rather novel at the time, are now referred to as standards in the discipline.²⁴ Daring a similarly exploratory course in international environmental law could conceivably enlarge and consolidate it in areas which are currently marked by insecurity and contestation, such as those elaborated on in the above analysis. The power of international judges also becomes apparent when it comes to the interpretation of treaties.

Civil society will need to recognise their power as *amici curiae* before international jurisdictions.

Such interpretations are not simply confined to the text of a legal instrument, but may also rely on preparatory works and the circumstances of the treaty's conclusion.²⁵ When taking such conditions into account, the time pressure of climate change and long-term effects of environmental degradation are circumstances courts in the future may find worth taking into account.

Still, achieving just the right balance between the crystallisation and development of international law while remaining a credible and neutral instance of international justice, requires skillful and confident judges – even more so a reason to conduct strategic elections for international justice, as elaborated under paragraph 2).

Amici curiae²⁶

Lastly, civil society will need to recognise their power as *amici curiae* before international jurisdictions. In fact, once an *amicus curiae* is allowed by a court, its submissions can be relied upon in other cases and even jurisdictions. Therefore, appearing as *amici curiae* is a unique opportunity for civil society organisations to contribute to the development of international environmental law and establish ties between different jurisdictions. Conversely, courts themselves would also benefit from allowing more *amicus curiae* submissions and increasingly considering expert civil society input. Likewise, it would be beneficial for courts to increasingly consider decisions from other

jurisdictions, in order to allow for a thriving cross-fertilisation between jurisdictions on cases with an environmental link. In the same vein, State policy should aim at facilitating access to courts for private actors and especially environmental civil society. In jurisdictions and procedures where *amici curiae* are not permitted, a procedural inclusion of environmental organisations could come in the form of States allowing members of civil society to serve as their official representatives, thus giving weight to their input and expertise.

Foreign ministries and their delegations to international organisations can exercise influence through support of their nationals' international careers and reputation

The role of civil society in strengthening environmental governance is pivotal, even in the political field. In the legal realm, civil society ought to focus more of its attention not on policymakers, but on bringing environmental cases, including cases with an environmental link, before international jurisdictions in the first place.

2.3 Strengthening legal fora

States with similar interests, such as the ones identified under paragraph 1), ought to strengthen cooperation between themselves when it comes to the proposition and election of international experts and judges. Foreign ministries and their delegations to international organisations can exercise influence through support of their nationals' international careers and reputation, as well as through the way candidates up for election are assessed.

For example, ICJ judges are elected by the UNGA. This is a forum where it should be crucial to assess candidates regarding their track record in handling environmental affairs, knowledge in the environmental field, and potential previous experience in cases with environmental links. If delegations with similar interests coordinate and work together in this assessment without resorting to the usual tit for tat, they may succeed in rendering the field of international civil servants more conscious, knowledgeable and experienced with environmental

affairs, and thus, more likely to push environmental law forward.

At the same time, delegations of aforementioned States to international organisations should also advocate in favour of shoring up human resources in international courts. This would not only enable them to handle their current caseload more efficiently, but also ensure that an increasing caseload of environmental disputes can be taken on. It may even be time to consider reactivating the environmental chamber at the ICJ. The chamber was never used from 1993 to 2006, but with a renewed push from the international community to have environmental cases heard and have AOs on environmental matters pronounced, it may well give the needed impetus to specifically designate judges to the chamber again. The success of this approach might even encourage other courts, such as the ECtHR or the IACHR, to establish dedicated sections for environmental matters as well.

2.3 Strengthening implementation

In order to strengthen the implementation of judgements rendered by newly reinforced international courts, it again falls to civil society organisations to enable concerted international action against non-compliance by publicising environmental cases, especially those within national jurisdictions. This would serve the wider purpose of allowing organisations to cross-fertilise from submissions made and decisions rendered elsewhere. In part, this implies more publicity work, but also, the simple provision of translations from the national language to English, French and other widely used languages.

In sum, there are three key areas in which legal environmental governance can and must be strengthened. Implementation of environmental law – especially through wider publication and translation of judgements – must be reinforced. The capacity of legal fora must be built up, both quantitatively in human resources, as well as qualitatively in the support for expert judges and civil servants. And, most importantly, jurisprudence must be strengthened: through increased dispute resolution at the international level both quantitatively and qualitatively through targeted and selective submission of legal questions; through more courageous judicial activism; and through input from environmental civil society organisations, which can appear as *amici curiae* and experts before international courts. ●

3. Recommendations for action

In order to increase legal clarity on key environmental principles, the Swiss justice and foreign ministries should approach their counterparts in Central America, the Benelux as well as the Pacific Island States.

3.1 Strengthening jurisprudence

In order to increase legal clarity on key environmental principles, the Swiss justice and foreign ministries should approach their counterparts in Central America, the Benelux as well as the Pacific Island States to **introduce a draft resolution to the UNGA requesting an Advisory Opinion of the ICJ** to further specify EIA requirements, a clarification of legal obligations for States under the sustainable development principle, as well as an updated assessment of the right to a healthy environment.

Furthermore, in preparation for the next Assembly of State Parties (ASP) of the ICC, due to take place in December 2019 in The Hague, the multilateral section of the Swiss embassy in The Hague ought to spearhead diplomatic démarches with their international colleagues by **pushing for concrete implementation of the focus on**

environmental destruction as set out by the 2016 OTP policy paper on case selection and prioritisation. It would also fall to the Swiss delegation to the ASP to add a specific discussion point on this onto the agenda of the next ASP, or at least to bring it up during the scheduled general debate.

Recommendation 1

Clarifying the law

- By requesting ICJ Advisory Opinions to
- Specify EIA requirements
 - Specify the legal obligations for States under the sustainable development principle
 - Re-assess the status of the right to a healthy environment in international law

Civil society organisations which would be particularly well-placed for renewed and stronger legal leadership are UNEP-accredited NGOs: WWF, for example, would focus its efforts on cases in biodiversity, whereas Greenpeace would be investing itself more thoroughly in climate change litigation. At the same time, the burden does not exclusively fall to environmental civil society; for example, considering the right to a healthy environment, even Human Rights organisations, the most established ones being Human Rights Watch and Amnesty International, could make a significant impact. These organisations ought to recognise the scope and potential for cooperation beyond national borders and beyond specialised mandates. If they do, they can achieve a comprehensive coverage of environmental cases and advocate for environmental matters more strategically. Thus, organisations like 350.org, Greenpeace, the Environmental Law Alliance Worldwide or Global Witness, but also Amnesty International and Human Rights Watch, having access to a broad and qualified member base, ought to **create - both on an international level and nationally through their local branches - working groups which monitor and strategically select cases in international environmental law** which show promise for developing the field further. Thus, resources can be pooled and NGOs as valuable and credible contributors - *amici curiae* - will gain more acclaim.

Recommendation 2

Compliance and implementation

- Establishment of a new section to the Central Language Services at the Federal Chancellery

In addition, the Swiss justice ministry is encouraged to **appoint civil society agents as their representatives** in international court cases.

A further strengthening of environmental cases and the place of *amici curiae* in international proceedings could occur through the **establishment of an international group of environmental prosecutors** within the network of the International Association of Prosecutors,²⁷ which would share and collaborate on resources not only within the group, but also make those resources available to the public.

Recommendation 3

Environmental civil society participation

1. Large (UN-accredited) NGOs create a working group to monitor and select promising cases in international environmental law
2. The International Association of Prosecutors establishes a subgroup of environmental prosecutors
3. States appoint more civil society agents as their representatives in international environmental litigations

3.2 Strengthening legal fora

In February 2021, the terms of office of five ICJ judges will expire, meaning that as of the beginning of 2020 (judging by the timing of previous ICJ elections), the process for nominations from the national groups²⁸ will begin yet again. This is an opportunity for the Swiss embassies and missions in New York and The Hague to take up a leading role in **ensuring that judges with environmental experience will be nominated by their national group**. The same goes for the election of a new ICC Prosecutor, for which **nominees with strong backgrounds in environmental law ought to be supported**. Considering that this election will take place during the 2020 ICC ASP, coordination and

lobbying efforts by the Swiss Embassy in The Hague ought to be kicked off beforehand **during this year's ASP**.

The run-up to the 2020 UNGA session is also an opportunity for the Mission of Switzerland to the UN to start **approaching like-minded States' delegations about a possible reinstatement of the environmental chamber at the ICJ** by forming a working group which may produce a draft resolution to be voted on during the 75th UNGA session.

Recommendation 4

Environmental justice institutions

1. Strategic support to ICJ judge candidates with environmental backgrounds and/or expertise
2. Strategic support to ICC Prosecutor candidates with environmental backgrounds and/or expertise
3. Lobby for the re-establishment of the ICJ environmental chamber

3.3 Strengthening implementation

In Switzerland, court rulings are not systematically, nor officially translated. However, in order to enable other jurisdictions to draw from outcomes and lessons learnt in Swiss cases, such translations are crucial. Therefore, striving towards progress in implementation implies the addition of a **new section to the Central Language Services at the Federal Chancellery**. This section would firstly be responsible for providing official translations of federal judgements from German into French and vice versa, and secondly, to start providing translations into English and making those translations easily accessible to the public.²⁹ ●

Recommendation 5

Criminal law

1. Push for implementation of the focus on environmental destruction at the ICC
2. Strategic support to ICC Prosecutor candidates with environmental backgrounds and/or expertise

4. Conclusion

Strengthening environmental rule of law is a key step in the quest towards a more efficient and coherent environmental governance.

Strengthening environmental rule of law is a key step in the quest towards a more efficient and coherent environmental governance. To do so, the capacity of international courts to pronounce judgements on environmental matters, the clarity and scope of environmental legal principles, and compliance with and implementation of judgements must be further strengthened. This task falls as much to States as it does to civil society and legal fora themselves.

Already in 2018, “protecting the environment through the courts” took the first spot of the “Top ten developments in international law”.³⁰ But the strengthening of environmental governance and environmental rule of law does not rely solely on international courts. Indeed, States need to start including legal considerations in all aspects of environmental foreign policy, especially in the multilateral field. Still, any system is only as efficient as the coherence and stringency of its rules. Thus, the way forward for global environmental governance really does lie along a legal path. ●

Environmental Rule of Law

Laws

that...

- Are clear, effective & well-designed
- Respect human rights law
- Strive for high standards of environmental protection and environmental quality

Compliance

- Laws are implemented by capable institutions
- All persons and entities, public and private, can be held accountable
- Laws are equally enforced and independently adjudicated
- Environmental auditing and reporting

Participation

- Laws are publicly promulgated
- Information is accessible to the public
- Environmental civil society takes part in decision-making
- Access to environmental justice for all

Sources:

UN Environment, Environmental Rule of Law, First Global Report, January 2019, available at: https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y

World Commission on Environmental Law, IUCN World Declaration on the Environmental Rule of Law, April 2016, available at: https://www.iucn.org/sites/dev/files/content/documents/english_world_declaration_on_the_environmental_rule_of_law_final.pdf

Endnotes

- 1 The Hague Court of Appeal, *The State of the Netherlands v Urgenda Foundation*, 9 October 2018, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=EC-LI:NL:GHDHA:2018:2610&showbut-ton=true&keyword=Urgenda>.
- 2 Reuters, U.S. submits formal notice of withdrawal from Paris climate pact, 4 August 2017, available at <https://www.reuters.com/article/us-un-climate-usa-paris/u-s-submits-formal-notice-of-withdrawal-from-paris-climate-pact-idUSKBN1AK2FM>.
- 3 United Nations Climate Change, *The Kyoto Protocol – Status of Ratification*, available at <https://unfccc.int/process/the-kyoto-protocol/status-of-ratification>.
- 4 United Nations Climate Change, *Doha Amendment*, available at <https://unfccc.int/process/the-kyoto-protocol/the-doha-amendment>.
- 5 UN Environment Programme, *environmental rule of law, first global report*, January 2019, available at https://www.eli.org/sites/default/files/docs/ero/EnvironmentalRuleof-Law_%20FirstGlobalReport.pdf.
- 6 In the early 1990s, the UN Security Council used its unique period of unanimity to establish the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) through Security Council Resolution S/RES/827 (1993) and Resolution S/RES/955 (1994). Subsequently, these Tribunals turned out to be an unprecedented and since then unparalleled success story of serving justice in politically sensitive contexts.
- 7 International Court of Justice, *Members of the Court*, available at <https://www.icj-cij.org/en/members> and European Court of Human Rights, *Composition of the Court*, available at <https://www.echr.coe.int/Pages/home.aspx?p=court/judges&c>.
- 8 However, the re-election process for ICJ judges does pose a non-negligible threat to judicial independence. At the ECtHR, re-election is not possible.
- 9 United Nations International Criminal Tribunal for the former Yugoslavia, *Election process*, available at <http://www.icty.org/en/about/chambers/election-process>.
- 10 *The Right to Life and the Right to respect for private and family life*.
- 11 The Hague Court of Appeal, *The State of the Netherlands v Urgenda Foundation*, 9 October 2018, available at <https://uitspraken.rechtspraak.nl/inziendocument?id=EC-LI:NL:GHDHA:2018:2610&showbut-ton=true&keyword=Urgenda>.
- 12 World Trade Organisation, *United States – Import prohibition of certain shrimp and shrimp products*, AB-1998-4, 12 October 1998, available at https://www.wto.org/english/tra-top_e/dispu_e/58abr.pdf, para 131.
- 13 American Convention on Human Rights, art. 21.
- 14 Inter-American Court of Human Rights, *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 31 August 2001, available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf.
- 15 European Court of Human Rights, *López Ostra v. Spain*, 9 December 1994, available at <https://hudoc.echr.coe.int/eng/?i=001-57905>.
- 16 International Criminal Court, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, available at https://www.icc-cpi.int/itemsDocuments/20160915_OTP-Policy_Case-Selection_Eng.pdf.
- 17 In this case, elderly female Swiss citizens claim that climate change affects them disproportionately, e.g. through extreme heat waves to which the elderly are particularly vulnerable. They want the Swiss government to set more ambitious climate goals and more efficient measures to achieve them.
- 18 A plurality of international jurisdictions (represented amongst others by the ICC, ICJ, the Law of the Sea Tribunal, the WTO dispute settlement mechanisms and the multitude of ad-hoc and specialised Tribunals such as the IRMCT, Kosovo Chambers and the Special Tribunal for Lebanon) already co-exist, which some scholars view as problematic, as it fragments international jurisprudence and hence the credibility of the international legal system.
- 19 The UN Convention on the Law of the Sea contains several explicit references to the marine environment and the protection thereof, for example in art. 145. See https://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf.
- 20 Even arbitration mechanisms installed in bilateral investment treaties may consider the environmental impact of private sector investment.
- 21 More information on Advisory Opinions and their procedures: <https://www.icj-cij.org/en/advisory-jurisdiction>.
- 22 See: <https://www.icj-cij.org/en/case/158> and judgement of 5 October 2016, <https://>

www.icj-cij.org/files/case-related/158/158-20161005-JUD-01-00-EN.pdf

23 See for example: Statute of the International Court of Justice, art. 38(b) and 38 (c).

24 See also: Mia Swart, *Judicial Lawmaking at the ad hoc Tribunals: The Creative Use of the Sources of International Law and “Adventurous Interpretation”*, available at http://www.zaoerv.de/70_2010/70_2010_3_a_459_486.pdf, pp. 476-477.

25 Vienna Convention on the Law of Treaties, 23 May 1969, art. 32.

26 *Amicus curiae* is a Latin expression meaning “friend of the court”. The term refers to “one (such as a professional person or organisation) that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question”, or “A non-party with an interest in the outcome of a pending lawsuit who argues or presents information in support of or against one of the parties to the lawsuit. In many instances, the *amicus curiae* attempts to draw the court’s attention to arguments or information that the parties may not have presented, such as the effects of a particular court ruling on the interests of certain third parties.” See: Merriam-Webster Legal Dictionary, definition available at <https://www.merriam-webster.com/dictionary/amicus%20curiae> and Thomson Reuters, *Practical Law*, available at [https://uk.practicallaw.thomsonreuters.com/4-502-7653?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhpc=1](https://uk.practicallaw.thomsonreuters.com/4-502-7653?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhpc=1).

27 The IAP already federates numerous thematic groups, such as a group on prosecuting conflict-related sexual violence. A similar network for prosecutors working with environmental crimes could easily be established by current members of the IAP.

28 See: <https://pca-cpa.org/en/about/structure/members-of-the-court/>, para. 2.

29 The German Federal Constitutional Court already regularly publishes English translations of its most important judgements, orders, proceedings and even press releases. Current examples can be found at https://www.bundesverfassungsgericht.de/SiteGlobals/Forms/Suche/EN/Entscheidungensuche_Formular.html?language_=en.

30 Oxford University Press Blog, *Top ten developments in international law in 2018*, 31 December 2018, available at <https://blog.oup.com/2018/12/top-ten-developments-international-law-2018/>.

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