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The Place of the Environment in International Tribunals

David D. Caron

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by
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Addressing the Environmental Consequences of War
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1. Introduction

a. Thank you. I do not speak on behalf of the UNCC.

b. In this century, there have been numerous international adjudication institutions created to address international wrongs. These institutions include ad hoc arbitrations, claims commissions and permanent tribunals. Sometimes these mechanisms were employed to resolve a specific question such as a boundary dispute. Often these mechanisms followed particularly earth-shattering events such as revolution and war. My task is consider the place of the environment in such international tribunals. The consensus both within and outside of this Conference is that war is destructive not only to lives and property, but also to the more fundamental structure of our world, the environment. In attempting to address the consequences of war for the environment, one may attempt to prevent war or to prevent an on-going wars from extending to a particularly sensitive environments. My area however assumes that effort failed at least in part and that one must also consider (1) the mitigation of the consequences of injuries that do occur, (2) the
possible restoration of the environment and (3) responsibility for such mitigation and restoration as a possible deterrent. In these three areas, international adjudication could play a role.

c. In considering this topic, I will address two fundamental questions that when played out have substantial implications for how an international mechanism should be structured to address an environmental claim

i. What is an environmental claim? What is the relationship between the claimant and the environment they claim to represent

ii. Second, where are the monies for mitigation, restoration to come from

d. These two questions provide a basis for assessing the adequacy of international mechanisms. Such an assessment finds them inadequate. I will not perform the assessment today as much as outline some of the directions for reform and the agenda for research.

e. But in saying the mechanisms are not yet there, let me emphasize that the issue is not with the tribunals — they will find ways to perform the tasks entrusted to them if there constitutive documents permit it. The issue is antecedent.

i. Who is the claimant before int’l institutions for env.

   (1) Distinguishing between who files the claim and the capacity in which the claim is filed -- does the state own the claim as principal or does the state represent the interests of its people and in some
sense perhaps the broader international community in presenting the claim

2. **What is an Environmental Claim? What is the relationship between the claimant and the environment they claim to represent**

   a. International environmental law has certain sacred milestones. One is the Stockholm Conference of 1972. Another is the Rio Conference of 1992. A more curious one, but central to the question I pose, is the Trail Smelter arbitration in which awards were made in 1930s and 1940s. The Trail Smelter arbitration is relevant because it is often referred to as the first claim about the environment -- even though the word “ecology,” and certainly the phrase “environmental movement,” did not enter common speech for decades later.

   b. In that case, a smelter in the town of Trail in eastern British Columbia had been releasing atmospheric pollutants that were alleged to have damaged orchards, timber and crops in eastern Washington State. The arbitral tribunal found this to be the case and awarded the U.S. monies for some of the alleged damage.

   c. The significance of the Trail Smelter arbitration is that there has -- for quite some time -- been a practice of international claims regarding property, including real property.

   d. Let me say at this point that in may be that participants in this Conference instead have two very different meanings to the phrase “environmental consequences of war.” On the one hand, there is the question as Prof stone put it of what the
consequences of war are for nature. On the other hand, there is the question of the consequences for a society when war without any complicated path affects that society or when war does so through the disruption of the environment.

e. If one is thinking in terms of the second aspect, there is no question in mind that international tribunals have addressed and can address environmental disruptions claims when what is meant by that is resultant property damage, damage to real property, damage to crops or other parts of the environment with a commercial value, or health effects. In an installment of claims recently concluded at the UNCC, for example, monies were awarded for a claim by a corporation for the costs of repainting a small facility in Saudi Arabia near the border with Kuwait that had been covered with oily smoke from the fires.

f. The question thus is whether there is anything fundamentally different if the claim is referred to as a claim for the disruption of the environment itself. Is it merely that different valuation methods need be devised for resources not already given a value in the market? If that was all that is different, I would not say that the difference is that great.

g. But there is more of a difference and it goes fundamentally to the nature of a claim regarding the environment. And it is this difference that international adjudication mechanisms presently do not take into account and this failure not only leaves the environmental issue perhaps unaddressed but also makes the task of adjudicating the claim more difficult.

h. So at its root, the question that must be addressed is how a claims process may be said to be about the environment, or in
a more conventional sense, about the representation of the international community’s interest in the environment. And once we have a handle on this we also will go a long ways in addressing the relationship between the claimant and the environment.

i. The way I would like to analyze this question is as a problem of agency. An agent acts on behalf of a principal. What does this mean in terms of claims regarding the environment? What does it mean to act as an agent for the environment, for the community’s interest in that environment? How may institutions be structured to monitor such crucial agency roles.

j. An assessment of current institutions in terms of these questions reveals a quite weak position accorded to the environment. A position that reflects the deeply embedded notion in such institutions that it is the consequences of the war for the claimant, rather than the environment, that are addressed by such mechanisms. In other words, is the claimant a principal in possession of an asset called the environment which has been damaged, or is the claimant instead an agent executing the directions and will of its people, perhaps in some broader sense humanity, the principal, regarding the environment.

k. The significance of thinking in terms of agency becomes evident if one contrasts an area of international life where the role of the state has shifted from one as principal to one as agent. A striking example is the place of the individual in international tribunals.

l. *The Shift to Agency in the Case of Individual before*
International Tribunals.

i. At the beginning of this century, if one state injured the national of another’s state, then the state of the injured national was said to be also wronged and could espouse the claim against the state that had wronged its national. This process, termed “diplomatic protection,” is, in the words of the Permanent Court of International Justice, a situation in public international law whereby “... in taking up the case of one of its nationals, by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own right, the right to ensure in the person of its nationals respect for the rules of international law.”

ii. My paper reviews several examples of practice concerning the relationship of state to the claims of its nationals, but the important point is that under the classical doctrine of diplomatic espousal the claim is a claim of the state as principal, not a claim of the state as agent or representative of the national.

iii. Thus in the Trail Smelter arbitration previously mentioned, the individual farmers in eastern Washington State themselves were at least in theory not the claimants. If the U.S. government had chosen to do so, it could simply refuse to espouse the claim of the nationals, because it was its claim. It likewise could have settled the claim without the agreement of the nationals. Indeed, in theory, it need not even have turned the monies awarded over to the nationals since the injury was to it.
iv. In more recent times, the individual’s place before the institution has been stronger, and correspondingly the state’s involvement increasingly is as an agent. This tendency is a fundamental aspect of human rights law. But its import can be seen particularly in the Iran-United States Claims Tribunal and is quite explicit in the case of the United Nations Compensation Commission (“UNCC”)

v. I do not have time to review what occurred in the case of the Iran-United States Claims Tribunal, but rather will concentrate my comments on the UNCC.

vi. In the case of the UNCC, the claims of some 2 million individuals are brought together and filed with the Commission primarily by governments. But the government does so not as principal.

vii. Two examples.

viii. What if a government refused to file the claim of a person resident in its territory. The UNCC would appoint an agent to collect those claims and present to the Commission. Indeed, numerous claims have been filed with the Commission by UNDP or UNHCR. This is why in the corporate claims eg the caption on procedural orders reads the claim of such and such corporation presented by such and such state

ix. Secondly, the agent is the monitored in the performance of its role. Decision 18 of the Governing Council of the UNCC offers important insights in this regard. Again, under diplomatic protection, it was the state that
received the award. The state in such cases had no duty to inform the tribunal of what it ultimately did with the funds received. The UNCC process is quite different. Decision 18 requires that all governments receiving awards (1) prior to or immediately following receipt of payment, inform in writing the UNCC on the arrangements made for distribution of the funds to claimants; (2) within six months of receipt, distribute the specified funds to named claimants; (3) not later than three months after the deadline for distribution, inform the UNCC on the amounts distributed and the reasons for any non-payment; and (4) after distribution of all payments received, provide a final summary account of all distributions made. If a government fails to distribute the funds received, fails to submit adequate reports, or does not in the view of the Governing Council provide satisfactory reasons for non-payment, the Governing Council "may decide not to distribute further funds to that particular government." Funds received which have not been distributed to claimants owing to inability to locate such claimants "shall be reimbursed to the Compensation Fund." Governments in establishing their arrangements for distribution may deduct processing costs from payments made to claimants, but such fees (1) shall not be imposed until the government involved provides "explanations satisfactory to the Governing Council;" (2) shall be commensurate with the actual expenditure of governments; and (3) should not exceed 1.5% of amounts payable in categories A, B and C, or 3% of amounts payable in categories D, E and F. If the governments involved intend to convert the United States dollar payments into other currencies for
distribution, they shall notify the Council on the method of conversion and exchange rate to be used.

m. This is a simply astounding shift in this century, and the important point to note is that we seem however to still be at the beginning of the century in terms of the environmental claims

n. *The Shift to Agency Needed in the Case of Environmental Claims*

o. How would this sense of agency be extended to claims regarding the environment.

p. Again this leads us to examine the fundamental nature of this claim regarding the environment. To do so, assume, that an armed conflict has caused substantial harm to a marsh area. The marsh is owned in part by an individual who harvested oysters, in part by a corporation which ran a duck shooting establishment and in part by the government which had hoped to create a resort there. All three of these entities have claims as principals -- the injury to their property and the surrounding property has diminished the value of their assets. Simultaneously, it does not necessarily appear to be the case that paying the claims of these three entities addresses the environmental consequences of the war. More subtle foundational aspects of the environment seem possibly unrelated. The health of the marsh, for example, is likely essential to fisheries in the region. It may have been an important waystation for a migratory and endangered species of birds. Who owns these aspects? We tend to think that the individual and the corporation does not. Moreover, the state in owning them owns them as parent of the people, holds
them in trust as an agent of its nation and increasingly as the logical agent of the international community.

q. The state is the natural candidate to be the agent because the land, the territory, is so fundamentally a part of the state. But international organizations, scientific research institutions and other non governmental organizations conceivably might play a role in such efforts.

r. In contrast, let’s consider the implications of the state as principal rather than agent. If the state is the principal, then it is its choice as to whether it wishes to bring a claim at all. It could decline to bring a claim preferring to spend its investigatory resources on assisting individuals, corporations and ministries in the preparation of their claims. Recall how the UNCC as far as claims of individuals is different in this regard. If the state is the principal, it could also simply not spend the money to restore the environment.

s. The Terms of the Agency

t. If the state should be viewed as agent presenting a broader community’s claim regarding the environment, then how are we to view that agency, what are its terms? This is a question for further research, but let me provide some outline of the answer.

u. First, a test will be necessary to divide when a state as claimant acts as principal or as agent. I would assert that it will be quite clear. (1) when the state has the interest comparable to what a participant in the market would have it is a principal but (2) that interest in the market can not be one requiring a use of the environment contrary to international
environmental law. For example, assume there was a war in central Africa that destroyed many of the last rhinoceros — the state as principal could have a claim for loss of ecotourism at a government resort in the park but it is quite different to say that it could claim the export value of the rhino horns when either the harvesting or export of the horns is prohibited. Thus state often claim as both principal and agent — principal for its loss of legitimate use, agent for what it holds in trust for a broader community

v. Second, who is the principal. The agent acts to protect the interests of the principal. In the case of the environment, the principal may be said to be the environment itself but close examination of that leaves one without guidance about what is to be valued more or less in an environment altered by war. In terms of sovereignty, the principal must be the people of that nation. In terms of international governance, it is the people of the nation with minimum respect for the environment required by int’l customary and treaty law. In this sense, the principal is the interest of humanity in the environment. And I would assert that it really does not matter whether one regards that as the people of the nation or the globe.

w. Looking to intl env law, there is a duty to mitigate damage. A duty to prepare contingency planning. A duty to protect specially sensitive habitats and species.

x. Third, an implication of thinking in terms of agency is that the issues of valuation I believe become clearer. The claims as principal tend to remain ascertainable by accepted methods. It is the claims as agent that are more problematic.
... But it is the terms of the agency that gives us more guidance than merely the removal of oil from rocks on a shore. It will cost the same amount to clean oil from sand hard scrapple as it will from a marsh -- yet one is far more important in terms of environment. The terms of agency also provides priorities informing the agent, for example, to focus on critical habitats and the range of biodiversity.

y. There are agents other than state. International agencies such as UNEP have a more ecosystemic view {add false boundaries of the state). Agents would have a duty to cooperate with other agents of a shared environment

z. Eniwetak people, restoration value, does one have a duty to restore having gotten so much? But it is not economic to do so. Imagine what it would be worth to the environment generally. Note also that we start looking only to the range of control of the agent, when the ecosystem may be regional.

3. Funds: The Problem of Conflicting Demands on Limited Funds

a. We heard yesterday about the ethical difficulty and likely result of a military commander choosing increased causalities and the environment damage. There is likewise a conflict for relief workers between humanitarian relief and environmental relief. The story I recall is the relief worker who saw animals running through Kuwait city ...

b. There is the same issue later with compensation. There often are no funds. When there are funds, there will almost always be fewer funds than those cause by the damage of the war. And again there will be a tension between how much funds should be allocated to research, planning and restoration of
the environment vs. The immediate tangible claims of individuals, corporations and states.

c. The UNCC is an instance in which uncertainty actually helps all concerned avoid thinking about this choice. No one knows how much will ultimately go to the Compensation Fund to pay awards. Let’s assume however that instead of 30% of Iraq’s oil revenues for an indefinite period, the Fund had been set at 80 billion dollars -- The claims before the UNCC total appropriately 200 billion, how would the discussion gone about the priority to be given to the substantial amounts necessary to restore the environment.

d. To me the solution of the ethical tension for the relief worker, is for there to be two different workers. One is the agent of humanity seeking to ameliorate human suffering. The other is an agent seeking to ameliorate animal suffering and damage to the environment.

e. Similarly there must be two sources of funds

4. Directions for Reform and Agenda for Research

a. Improving the Claimants Role as Agent of the humanity in representing the environment

i. Who should be the agent — States and IOs

ii. What are the terms of the agent’s charge, this could be tied in quite neatly with literature concerning trusteeship and stewardship
iii. What are the mechanisms by which we may monitor the performance of agents

(1) transparency in terms of reporting requirements as in case of the UNCC with individuals
(2) Conditions on the award of funds, terms of the trust, reporting
(3) Improve accountability of the agent through transparency — what did they do with the monies received?
(4) designation of advocates for the principal — e.g. Defender of the Fund
   (a) Informally this is how NGOs would circle the process
(5) Finally I would note that some monitoring can be directly into the substantive standard — reasonable costs of restoration, justifiable restoration efforts

iv. In the case of the UNCC, I would suggest that the UNCC considers mechanisms along the line of those in Decision 18 for certain of the claims regarding the environment

v. Using the idea of agency with scientific assessment of the environmental impact to look to mitigation and restoration objectives that then feed back on suggesting the method used for valuation

vi. In the beginning of my remarks, I suggested that adjudication is important not only to restoration but also mitigation of harm. Mitigation of harm must be
addressed in a timely manner however. In this regard, as I have written elsewhere, I believe the UNCC simply because the issue was new, was not sufficiently proactive. For example, in the very beginning of the UNCC’s work, the Governing Council could have made a block grant of funds to UNEP, world health Organization and to the various Gulf State national research institutions for the funding of proposals aimed at various research or direct mitigation actions. A Decision 18 like process could have been established to monitor the granting process and mechanisms could have been to coordinate research between the various the Gulf States.

b. Dedicated Sources of Funds

i. Funds — different sources

ii. Insurance schemes — natural heritage sites, see Stone

(1) Encourage listing as a site

(2) subrogation

(3) Perhaps the initial contributors should be those who most harmed the environment during war.