The International Law Association
(Caribbean Branch)

March 2024
Vol. Issue

Special points of interest

- ILA founded 1873
- ILA Caribbean Branch founded April 2014
- 15 Members in the ILA Caribbean Branch
- The ILA Caribbean Branch represents nationals or residents of the Caribbean States and territories regionally and internationally

The International Law Association Background

The International Law Association was founded in Brussels in 1873. Its objectives, under its Constitution, are "the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law". The ILA has consultative status, as an international non-governmental organisation, with a number of the United Nations specialised agencies.

Membership of the Association, at present around 4200, is spread among Branches throughout the world. The ILA welcomes as members all those interested in its objectives, which are pursued primarily through the work of its International Committees, and the focal point of its activities is the series of Biennial Conferences. The Conferences, of which 80 have so far been held in different locations throughout the world, provide a forum for the comprehensive discussion and endorsement of the work of the Committees.

The ILA's membership ranges from lawyers in private practice, academia, government and the judiciary, to non-lawyer experts from commercial, industrial and financial spheres, and representatives of bodies such as shipping and arbitration organisations and chambers of commerce.

ILA Branches Around the World

Albanian	Chilean	Hellenic	Mauritius	Serbian
American	Chinese (Taiwan)	Hong Kong	Mexican	Singaporean
Argentine	Colombian	Hungarian	Nepal	Slovak
Australian	Croatian	Indian	Netherlands	Slovene
Austrian	Cypriot	Irish	New Zealand	South African
Bangladesh	Czech republic	Israel	Nigerian	Spanish
Belarusian	Danish	Italian	Norwegian	Swedish
Belgian	East African	Japan	Pakistan	Swiss
Brazilian	Egyptian	Jordanian	Polish	Turkish
British	Finnish	Korean	Portuguese	Ugandan
Bulgarian	French	former Yugoslav	Qatari	Ukrainian
Canadian	German	Republic of	Romanian	
Caribbean	Headquarters	Macedonia	Russian	

Inside this issue

A message From the Editor

This edition of the Branch Newsletter features some interesting and thought provoking developments on the global horizon.

Anthony Gafoor takes a brief look at the newly issued Saba Declaration, a document which was issued at the conclusion of the Borneo Rainforest Conference at the end of February 2024 and which expresses a major commitment towards a pledge by major stakeholders towards the recognition of the urgency of environmental
protection for rainforests globally.

Nesha Abiraj considers the equally sensitive and pressing issue of whether ecocide, defined to mean mass damage and destruction of ecosystems or severe harm to nature which is widespread or long term should become the fifth international crime against peace.

Ankit Malhotra, another distinguished scholar, explores whether there should be an International Court of Cultural Heritage, an issue which can be seen as an equally compelling matter on par with making progress towards the preservation and protection of the cultural heritage of nations, particularly those exploited by colonialism and the resultant deprivation of national treasures which were looted and over which there has been a raging debate about returning this cultural heritage to their place of origin.

I would particularly like to acknowledge and thank our two main contributors for submitting very thoughtful and thought-provoking articles which have greatly enriched this publication.

The ILA Caribbean Branch seeks to continue to promote thought-provoking debate and raise awareness of issues which were not given a place on the global agenda until more recent times. Your feedback is always welcome and appreciated. We encourage you to consider submitting an article, book review or report on the work of the ILA Committees for future publications.

Justice Dr. Anthony Gafoor
Editor & Hon. Secretary
ILA Caribbean Branch
March 2024

The Saba Declaration and its significance for Climate Justice

Anthony D.J. Gafoor,
PhD, FCIArb

Introduction to the Saba Declaration 2024

The Saba Declaration is a landmark agreement signed by multiple countries to address the pressing issue of climate change. It emphasizes the need for collective action, sustainable practices, and social responsibility to mitigate the impacts of climate change. The declaration sets the stage for a comprehensive approach to climate justice and promotes collaboration among nations to protect the environment and the communities directly impacted by climaterelated challenges.

Key Principles of Climate Justice

* Equity and Fairness: Climate justice is rooted in the principles of equity and fairness, aiming to address the disproportionate impact of climate change on vulnerable populations. It seeks to ensure that every individual and community has equal access to resources and opportunities for resilience and adaptation.
* Responsibility and Accountability: At the core of climate justice lies the concept of responsibility and accountability. It holds both historical emitters and current major contributors responsible for taking action to mitigate climate change and support affected communities.
* Interconnectedness and Solidarity: Climate justice recognizes the interconnectedness of global ecosystems and emphasizes solidarity among nations. It promotes collaboration and mutual support in addressing climate-related challenges, reinforcing the understanding that the impact of climate change transcends national borders.

Implications of the Saba Declaration for Climate Justice

* Policy Alignment: The Saba Declaration aligns nations towards a unified policy framework to address climate-related challenges, fostering a cohesive and concerted global effort in pursuit of climate justice.
* Vulnerable Communities: It is imperative to ensure that the Saba Declaration's implications prioritize the needs and resilience of vulnerable communities, especially those disproportionately impacted by climate change.
* Resource Mobilization: The declaration underscores the importance of resource mobilization and allocation, aiming to support climate justice initiatives and projects that promote sustainability and resilience.

* Community Empowerment: The implications of the declaration should focus on empowering communities to take an active role in climate action, ensuring inclusive and participatory approaches to sustainability.

Addressing the Needs of Vulnerable Communities

* Vulnerability Assessment: Conduct comprehensive vulnerability assessments to identify specific challenges faced by vulnerable communities in the wake of climate change.
* Resource Allocation: Allocate resources for the development and implementation of tailored solutions to address the unique needs of vulnerable communities, ensuring equitable access to support.
* Capacity Building: Focus on capacity building initiatives to strengthen the resilience and adaptive capacity of vulnerable communities, empowering them to confront and overcome climate-related challenges.

Promoting Sustainable Development

* Renewable Energy: Encourage the transition to renewable energy sources to reduce greenhouse gas emissions and promote sustainable development.
* Green Infrastructure: Invest in green infrastructure projects to minimize environmental impact and enhance overall sustainability.
* Sustainable Agriculture: Promote sustainable agricultural practices to ensure food security and minimize ecological footprint.

Ensuring Accountability and Transparency

* Monitoring Mechanisms: Establish robust monitoring mechanisms to track climate action initiatives and evaluate their effectiveness, ensuring transparency and accountability.
* Stakeholder Engagement: Emphasize stakeholder engagement to ensure that diverse perspectives are considered in decision-making processes, fostering transparency and inclusive accountability.
* Reporting Standards: Implement standardized reporting criteria to promote transparency and enable comprehensive assessment of climate action and its impact on communities.

Challenges and Obstacles in Implementing the Saba Declaration

* Policy Alignment: Harmonizing diverse national policies and priorities to align with the objectives of the Saba Declaration poses a significant challenge.
* Resource Mobilization: Securing adequate resources and funding for comprehensive climate justice initiatives remains a notable obstacle.
* Global Cooperation: Fostering global cooperation and commitment to collective action among nations with varying interests and priorities proves to be challenging.

Conclusion and Next Steps

* Collaborative Initiatives: Forming collaborative initiatives with international organizations and NGOs to advance climate justice goals.
* Community Engagement: Engaging with over 2,000 communities worldwide to drive grassroots climate action and resilience building.
* Policy Advocacy: Advocating for the integration of climate justice principles into the policies of 5 influential nations.

Rights in Crisis:

Nesha Abiraj,

International Human Rights Lawyer

Should *ecocide* become the 5th *International Crime Against Peace?*

The climate crisis is directly threatening the physical and cultural integrity, and economic functioning, of our world at large. The overwhelming evidence is that Island Nations are the lowest contributors to global warming, yet according to scientific projections, they are likely to be among the first to become uninhabitable and to feel the worst effects of ecological destruction and biodiversity loss caused by climate changed and human caused ecocide[1].

Ecocide, committed repeatedly over decades, is a **root cause** of the climate and ecological emergency that we now face. Ecocide which translates to mean literally the killing of one's own home, is generally understood to mean mass damage and destruction of ecosystems – severe harm to nature which is widespread or long term.

According to the European Law Institute it refers to 'the devastation and destruction of the environment to the detriment of life." While no legal definition by States have been agreed, there is one that is gaining significant traction globally. This is the definition derived by an independent panel of legal experts convened by Jojo Mehta, Chair to the Stop Ecocide Foundation. The panel, defined ecocide as:

"unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."

Belgium was the first country in Europe to announce adding ecocide to its domestic penal code, with the core operative text, though narrower in scope, coming from the Independent Legal Definition ("ILD"). In April of 2023, the European Parliament voted unanimously for the inclusion of ecocide into its new Environmental Crime Directive, and the definition adopted is identical to the "ILD."

On 5th June 2023 as the world observes, World Environmental Day, the Brazilian Political Party, Partido Socialismo e Liberdade, announced it will be submitting a Bill to criminalize ecocide, by criminalizing "…*illegal or wanton acts with the knowledge that they generate a substantial probability of serious and widespread or long-term damage to the environment*."[6] The Bill's wording strongly reflects the language contained in the "ILD."

Ecocide is happening globally and it is taking a toll on the planet and humanity yet crimes of this nature continue to be treated with impunity. Organized environmental crimes are highly lucrative. Statistically it is the third largest crime sector in the world and is estimated to generate between $110 and $281 billion per year in criminal proceeds. [7]

Given the highly lucrative nature of environmental crimes, perpetrators are not deterred by existing law and policy nationally or internationally, and in fact have become so emboldened that they now budget for strategic litigation against public participation lawsuits otherwise known by its acronym "SLAPP" lawsuits to inter alia bury litigants and/or intimidate local NGOs and/or local environmentalists and/or reporters in "endless litigation and costs," knowing they will not have the means to fight back. The inadequacy of environmental laws and/or the absence of a strong deterrent in the form of international law and policy, has contributed to *inter alia* to severe harm and wanton destruction of nature, the extinction of many species from the Earth, and it has put the rights of humanity in crisis, with the most vulnerable already feeling the effects. Despite calls by the UN Human Rights Experts for Governments to enact anti-SLAPP laws, the door on a litigant's right to access to justice remains closed.

Assuming countries do adopt anti-SLAPP laws, which some have done already, are anti-SLAPP laws alone sufficient? As more countries also look towards adopting ecocide into their national legislation and call for its international recognition and implementation, could this also be part of the solution? For the purposes of this paper, the latter question will be the focus. In answering that question, it warrants a look at why in addition to the above impediments, the global community needs an international law of ecocide so desperately and urgently?

It is an undisputable global fact that the climate crisis is exacerbating existing international human rights violations. Whether constitutional and/or human rights, all rights are in crisis, because of human caused climate change. The climate crisis is a major threat to every aspect of daily living - health, nutrition, education, development, survival and future potential and it is the blameless and vulnerable that are bearing the consequences.

Hard earned gains and decades' worth of progress in the development of international human rights laws and treaties all stand on the precipice of regression. Much like the Covid-19 pandemic, the climate crisis poses a threat to every single country, individual and to every single sector of society, hence solving the crisis warrants a united and interdisciplinary approach. At COP 27, one of the leading scientists Johann Rockstram, in the context of the 10 scientific insights released in 2022, echoed similar sentiments calling for a deeper need for science to connect with policy. It is clear that an all hands on deck approach is needed

Scientists previously projected more than ½ of humanity is at stake, now according to the latest Intergovernmental Panel on Climate Change, "IPCC" synthesis report "everything is at stake." This begs the question what does all of this mean in the context of a legal and human rights based framework?

Firstly, it means living in a world where already 85% of it has already been affected by human caused climate change. Additionally, it means living in a world, where we may not get to gender equality by 2030, as it is a globally understood reality that the climate crisis is disproportionately affecting the rights of older persons and persons with disabilities, children and in particular women and girls. A world where UNESCO has already projected more than **11 million girls** are now at risk of never returning to school. It also means living in a world where **1 billion children**, nearly half the world's 2.2 billion children, are already vulnerable to multiple climate and environmental shocks. By 2050, it will be **all children**. "There may be no greater growing threat facing the world's children – and their children – than climate change." UNICEF

In the aftermath of natural disasters UNICEF identified 3 main threats to the rights of children, youth and families, and in particular women and girls. The first threat identified was the **right to health** of women and girls in particular. Extreme weather gravely affects pregnant women & neonatal care for infants. Without access to healthcare and no access to clean water, adequate sanitation and menstrual hygiene facilities and in the case of pregnant women no safe place to deliver their babies, women and girls are more prone to disease and even death. According to UN Women, every year **800,000 women and girls** die due to lack of clean water, basic sanitation and hygiene. An estimated **2.4 billion people** still use unimproved sanitation facilities that can pollute water and spread diseases such as diarrhoea, cholera, dysentery, typhoid and polio.[21]

The second threat identified was **extreme poverty**. Currently, **over 380 million** women and girls face extreme poverty living on less than $1.90 USD per day. This means, globally 1 in 5 girls under age 15, are growing up in extreme poverty. 1 in 10 women aged 15+ are living in extreme poverty. The implications of this is placing girls who in many parts of the world are still seen as property or in cases of extreme poverty an extra mouth to feed, at severe risk of early, forced and child marriages often used as a guise for human trafficking for labour and/or sexual exploitation.

An estimated 4.3 million children are now at heightened risk of being subjected to female genital mutilation, "FGM" a practice which can lead to severe health consequences and even death.
According to UNICEF drought in the horns of Africa is exacerbating rates of child marriage and FGM. In countries where both child marriage and FGM co-exist, the risk of girls being subjected to FGM is greater as it seen as a coming of age ritual and/or a sign of purity.

Additionally, UNICEF projected as more people are pushed into extreme poverty resulting from the climate crisis and/or conflict, **9 million more children may suffer from wasting** which is the **most life-threatening form of malnutrition** by the end of 2022. With the worsening of the climate crisis driving up rates of extreme poverty and food insecurity, the number of children impacted will continue to rise.

The third threat UNICEF identified, is an increased risk of **gender based violence**. Living under such stressful conditions places women and girls at increased risk of violence. Globally 1 in 3 women and girls alive today are victim to Gender Based Violence. In 80% of water deprived households, women and girls carry the burden of water collection, which puts them at an added risk of violence. They often face impossible dangerous circumstances and perilous journeys.

In addition to these threats to fundamental human rights, it also means countries are now at severe risk of disappearing in their entirety and parts of the earth becoming uninhabitable. Consequentially, this would result in 100s of millions of people forcibly migrating because of actions they had nothing to do with and then facing the risk of being dehumanized in receiving countries in part as a result of growing authoritarian populism.

It is an open secret that almost ¾ of the world's refugee population are housed in the developing world. It is also an open secret that there is no legal pathway internationally that provides a means for climate refugees to gain refugee status and asylum in other countries. Additionally, it is also no secret that those seeking asylum are likely to be individuals coming from countries that had the least to do with the crisis!

In the matter of Ioane Teitiota v. The Chief Executive of the Ministry of Business, Innovation and

Employment [2015] NZSC 107 the Supreme Court of New Zealand denied refugee status to a Kirabiti citizen seeking refugee status, under the 1951 Refugee Convention. The appellant's case was premised on the threat

Climate change posed to his rights as a result of rising sea levels and environmental degradation. Noteworthy, in 2014 Kirabiti became the first Pacific island to purchase land to relocate its people, due to the threat of the island being besieged.

The Appellant took his case to the UN Human rights Committee where a landmark decision was given stating "that countries may not deport individuals who face climate change-induced conditions that violate the right to life." The Committee also clarified that asylum seekers are not required to prove imminent harm if returned to their countries. While the Committee's decision was hailed to be historic in opening the door to climate refugees seeking protection, neither the 1951 Refugee Convention nor the 1967 Refugee Protocol has been amended to reflect the Committee's decision. In the circumstances, it is unclear whether the Committee's decision on its own will be sufficient to be authoritative and binding on all countries that are parties to Refugee Convention and/or 1967 Protocol.

How did Humanity get to this point?

It comes from the way human beings view the Earth, and there are two pre-dominant views. The first is human beings generally see the Earth as an inert thing, a commodity, something a value is imposed on with a price tag, something to sell, use, abuse and exploit. Property law dictates human beings are the only species on the planet which puts a value on the earth which they *inter alia* own, sell, purchase, destroy and exploit. This way of viewing the earth, also triggers the laws of corporation to put profit first. Companies in fact have a legal duty to maximize its profits to its shareholders. While this may have served them well, no one looked at the consequences.

The second way of perceiving the Earth which is becoming increasingly more prevalent is that of the Earth as a living being, spiritual something of intrinsic value for which we all have a responsibility. This view triggers trusteeship law- which imposes a primary duty of care on all human beings to put the health and well-being of people and planet first. This view of the earth is supported by Article 73 and 75 of the United Nations Charter which is considered a living document and it is this view of the earth that underscores the philosophy behind ecocide law.

Stemming from the second world view, there is also a very real failure by many in the global community to understand our interconnectedness as a world. Put simply, what happens in one country, can mean life or death, or reduced quality of life in another. Put another way, as long as the world's largest or top polluters continue to operate as is, even if those countries with the lowest emissions meet all their global climate goals, it will not change the consequences that the countries and the people which had the least to do with the crisis, shall be forced to bear. As members of the legal community of the Commonwealth we can help lead the charge for climate justice and accountability nationally and internationally, through law and policy.

International Climate Justice & the Role of Lawyers

The late Polly Higgins, Female Scottish Barrister hailed as the pioneer and catalyst for defining ecocide and the movement to make ecocide international law, famously remarked "The Earth is in need of a good lawyer." The context of her quote was grounded in the reality that the global community is facing the threat of mass extinction stemming from melting ice caps, deforestation, drought, rising sea temperatures, food insecurity, resource depletion, forced migration, which could lead to geopolitical tension which can manifest into conflict and even war, taking us full circle back to mass extinction. A vicious cycle which has the same end result because there is no one defending the rights of nature or the Earth from destruction. Existing environmental laws have not evolved to meet the challenges our world faces today.

The late Barrister Higgins paved the way for those in the legal community and beyond to take up the mantle of responsibility in demanding accountability and climate justice through international law and policy. Specifically, the criminalization of ecocide at an international level which would in effect provide a pathway to access to justice for those most affected by the climate crisis.

Often transnational corporations are the ones committing grave environmental destruction, and more often than not, the consequences of those actions may not show up right away and when it becomes blatant, the CEOs of these companies are nowhere the be found. If current law and policy geared towards environmental protection were adequate, would we find ourselves facing crisis level risks? Simply put internationally and nationally, environmental laws as outlined above are woefully inadequate.

The realities of the IPCC report is daunting, the environmental movement continues to be criticized, for more talk than actual action. That said, coastal regions and Island States may be the most vulnerable to the impacts of the crisis however they are by no means powerless. They have a very real collective power which can curb the destructive practices exacerbating ecological destruction and biodiversity loss and driving up human rights violations. This power is at the level of international law.

An international crime of ecocide would provide accountability for the worst offenders, justice for the blameless and most vulnerable, act as a legal deterrent or in other words a "think before you act" provision – in many countries, it is unclear whether any work is to be done which con potentially be hazardous to the environment and those living there, whether environmental assessments are required. If such assessments are required, who ultimately makes the decision that the contractor can go ahead? Is it the politician, or the state agency or is it an environmentalist with the requisite expertise? With a "think before you act" provision, intended litigants, can identify where the source of the problem originated, and it would force possible perpetrators, to act with due diligence, because the stakes are higher. Finally and most importantly this can help slow the pace of human caused ecocide.

How can Ecocide become International Law?

Making ecocide international law, would be through harnessing the power of international criminal law at the International Criminal Court (ICC) to protect our global environment. This can be done by way of amending the Rome Statute which underpins the ICC. A two thirds majority is required to amend the Rome Statute and unlike the UN Security Council, there is no question of a veto power. The ICC since its creation has been premised on safeguarding the wellbeing of the world.
Its remit is to deal with the largest threats to the world's peace and security. If you are looking for evidence that the climate crisis is one of the largest threats facing the world, one need not look any further, than the latest IPCC synthesis report.
In a post-World War II era, the world was at a precipice, and came together to establish binding precedent that would protect future generations through law, justice and accountability at the highest level. This gave birth to the three major crimes against peace, Genocide, Crime against Humanity and War Crimes. The Crime of Aggression was later added. Today humanity stands at the edge of another precipice which threatens the fate of all living beings and our natural environment
Ecocide can fill in the gap that currently exists in national and international climate justice laws and policies. United the Commonwealth, by making ecocide the 5th International Crime against
Peace, could provide a much needed legal guardrail to steer us back from the precipice by setting an outer boundary to deter, prevent and sanction the worst threats to ecosystems which are a root cause of climate change. This will act as a powerful brake on harmful extractive practices and a much-needed incentive for strategic change and innovation.

Ecocide is not by any means a new concept. The term "ecocide" was first coined by Professor Richard Falk back in 1973 when he proposed an international crime of ecocide in response to the use of a chemical known as "agent orange" used by the United States to destroy crop fields to gain better visibility on their targets during the Vietnam War. The consequence was mass environmental destruction and the poisoning of the health millions of Vietnamese children and families. An estimated three million Vietnamese have been affected, including an estimated 150,000 children born after the war with serious birth defects.

It should therefore come as no surprise that there was a similar provision aimed at preventing this type of environmental destruction in the original draft of the Rome Statute, which ultimately did not make it in. Today the Global Community has the chance to make what ought to have been made international law years ago, a reality within infrastructures that already exist.

In the face of *inter alia* record breaking rates of displaced children, child labour, rising food insecurity, extreme poverty, rise of climate related diseases, human trafficking, forced migration, and a growing number of countries in conflict– where is the justice for those affected? The answer lies with what we choose to do next as a legal profession. Today, here and now we can advocate to defend the earth and humanity by calling for the criminalization of ecocide nationally and internationally, within structures that already exist. The IPCC report has made clear, the window for action is "rapidly closing" and "brief." The decisions we make today will affect the next millennia and as United Nations Secretary General, Antonio Gutierrez remarked "delay means death[35]."

[1]https://www.stopecocide.earth/legal-definition
[2] https://www.europeanlawinstitute.eu/projects-publications/completed-projects/ecocide/
[3] https://www.theguardian.com/environment/2021/jun/22/legal-experts-worldwide-draw-up-historic-definitionof-ecocide; https://www.stopecocide.earth/legal-definition

[4] https://www.stopecocide.earth/breaking-news-22/belgium-government-proposes-adding-ecocide-to-domesticpenal-code
[5] http://opiniojuris.org/2023/04/10/european-parliament-votes-unanimously-for-ecocide/ [6] https://www.stopecocide.earth/breaking-news-2023/ecocide-bill-submitted-to-congress-in-brazil?ss_source=sscampaigns&ss_campaign_id=647da15198dc430242e945db&ss_email_id=647e33888ffbef74084cf410&ss_campaign_name=Breaking%3A+ecocide+law+proposed+in+Brazil&ss_campaign_sent_date=2023-0605T19%3A12%3A14Z

[6] https://globalinitiative.net/wp-content/uploads/2018/09/Atlas-Illicit-Flows-FINAL-WEB-VERSION.pdf
[7] https://www.sipri.org/commentary/topical-backgrounder/2022/organized-environmental-crime-why-it-matterspeace-operations

[8] https://www.ohchr.org/en/press-releases/2022/12/un-experts-concerned-systematic-use-slapp-cases-againsthuman-rights
[9] https://www.ohchr.org/en/press-releases/2022/12/un-experts-concerned-systematic-use-slapp-cases-againsthuman-rights
[10]https://www.unep.org/resources/report/climate-change-and-human-rights

[11] https://www.unep.org/resources/report/climate-change-and-human-rights

[12] https://www.youtube.com/watch?v=dpEHODe3nGk; https://public.wmo.int/en/media/news/ten-essentialclimate-science-insights-2022-presented-cop27

[13] https://www.ipcc.ch/report/ar6/wg2/; https://www.theguardian.com/environment/2022/feb/28/what-atstake-climate-crisis-report-everything
[14] http://www.publichealthnewswire.org/?p=climate-update-2021

[15] https://www.un.org/sustainabledevelopment/gender-equality/
[16] https://sahiyo.org/sahiyo-blog/the-climate-crisis-human-rights.html
[17] https://www.unesco.org/en/articles/girls-education-and-covid-19-new-factsheet-shows-increased-inequalitieseducation-adolescent-girls
[18] https://www.unicef.org/reports/coldest-year-rest-of-their-lives-children-heatwaves

[19] https://www.unicef.org/reports/coldest-year-rest-of-their-lives-children-heatwaves

[20] https://www.unwomen.org/en/digital-library/publications/2022/09/progress-on-the-sustainable-developmentgoals-the-gender-snapshot-2022
[21] https://www.who.int/news/item/30-06-2015-lack-of-sanitation-for-2-4-billion-people-is-undermining-healthimprovements; https://www.who.int/news-room/fact-sheets/detail/drinking-water
[22] https://www.unicef.org/press-releases/world-will-miss-target-ending-fgm-2030-without-urgent-actionincluding-men-and-boys
[23] https://www.unicef.org/press-releases/child-marriage-rise-horn-africa-drought-crisis-intensifies

[24] https://www.girlsnotbrides.org/learning-resources/child-marriage-and-health/fgmc-and-child-marriage/
[25] https://www.who.int/news-room/fact-sheets/detail/violence-against-women

[26] https://www.unhcr.org/us/about-unhcr/who-we-are/figures-glance

[27] http://climatecasechart.com/non-us-case/ioane-teitiota-v-the-chief-executive-of-the-ministry-of-businessinnovation-and-employment/
[28] https://www.theguardian.com/environment/2014/jul/01/kiribati-climate-change-fiji-vanua-levu

[29] https://www.ohchr.org/en/press-releases/2020/01/historic-un-human-rights-case-opens-door-climate-changeasylum-claims

[30] https://edition.cnn.com/2022/02/28/world/un-ipcc-climate-report-adaptation-impacts/index.html; https://edition.cnn.com/2021/12/06/africa/south-sudan-floods-climate-cmd-intl/index.html

[31] https://www.jstor.org/stable/44480206 ; https://sas-space.sas.ac.uk/4686/

[32] https://www.usip.org/publications/2022/01/addressing-harmful-legacy-agent-orange-vietnam;
[33] https://www.aljazeera.com/news/2022/2/28/climate-change-could-make-world-sicker-poorer-un-report [35] https://news.un.org/en/story/2022/02/1112852

EXPLORING AN INTERNATIONAL COURT OF CULTURAL HERITAGE

ANKIT MALHOTRA
Judicial Law Clerk, Supreme Court of India
LL.M., Felix Scholar (2022-2023), School of Oriental and African Studies, University of London
B.A. (Hons.) LL.B. (2016-2022) (Gold Medalist) O.P. Jindal Global University, Sonipat
President and Co-Founder, Jindal Society of International Law, Center for Study of United Nations

Introduction

One remembers the words of Sir Robert Jennings, former Whewell Professor of International Law at Cambridge University and judge and president of the International Court of Justice (ICJ), who wrote:

> "It is undeniably important that scholars with imagination and vision should publish ideas for better international law. Good ideas, if they are timely and blessed by good fortune, possibly accomplish as much as, or more than, the diplomatic conferences, with their promising drafts of articles, so beloved by those who seek to further the 'progressive development' of international law. Yet it is important not to carry the campaign for a 'new' international law so far as possibly to weaken the authority and respect which our present international law enjoys"

These words remain as accurate today as they were in 1990. Lawyers, especially those engaged in academic pursuits, may propose innovative ideas, including changes to the law or legal system, which is a recognized role for legal scholars. However, unless they are purely speculative and deviating significantly from their professional boundaries, lawyers should base their work on existing law instead of envisioning an entirely new discipline. The current system of public international law has taken centuries to develop and serves us well. Attempting to start over is unlikely to be productive or meaningful. Wood expresses scepticism to the idea of a global environmental court, and to a potential court of human rights, described by Philip Alston also as 'a truly bad idea' The complexities surrounding the dual nature of cultural property have given rise to legal disputes and necessitated the establishment of an International Court of Cultural Heritage (ICCH). This essay will explore the potential benefits and challenges associated with the creation of an ICCH, the importance of considering the Third World Approach to International Law (TWAIL) perspective, and the need to strike a balance between international standards and local cultural perspectives in order to promote cultural diversity and intercultural dialogue. By examining these key aspects, we aim to understand the significance of an ICCH in protecting our shared cultural heritage and fostering a more inclusive and equitable legal framework for future generations.

Robert Y. Jennings, 'An International Lawyer Takes Stock' [1990] 39 ICLQ 513, 527-528.
More on disillusionment; John Dugard, 'Overcoming Disillusionment with International Law' in Vesselin Popovski and Ankit Malhotra (eds), Reimagining the International Legal Order (Routledge 2023) https://www.routledge.com/Reimagining-the-International-Legal-Order/Popovski-Malhotra/p/book/9781032469331 accessed 7 May 2023.
Philip Alston, 'A Truly Bad Idea: A World Court For Human Rights' (open Democracy, 2014) <https://www.opendemocracy.net/en/openglobalrights-openpage-blog/truly-bad-idea-world-court-for-human-rights/.>.

The Foundations

What is cultural property? The intangible works of art, often considered as repositories of historical, symbolic, religious, as well as scientific significance can be enshrined in cultural object. Accompanied by the archetypal 'property', tangible, aspect, which emphasizes physical integrity, signifies the possibility of possessing them, and suggests that marketable assets portray a boutique of financial value. Cultural property, it can be argued, refers to physical and intangible objects or artefacts that are deemed to have significant cultural, historical, or aesthetic value. It can include tangible items such as artwork, artefacts, and archaeological finds, as well as intangible items such as music, dance, language, and folklore. Cultural property therefore can be considered to be the collective heritage of a particular community or nation, and as such, it is regarded as an asset that should be preserved and protected. However, defining what constitutes cultural property can be complex and contentious, particularly when it comes to objects and artefacts that have been acquired or taken from their places of origin. The dual nature of cultural property, encompassing both intangible aspects like historical, symbolic, and religious significance, and tangible aspects like physical integrity and marketable value, sets it apart from everyday goods. Cultural heritage legislation has increasingly focused on safeguarding the material aspects of art and culture due to their embodiment of a group or nation's achievements, beliefs, and convictions. As a legal notion, 'cultural property' is difficult to define. Even the question of whether a particular case's disagreement relates to a matter of 'cultural property' is open to debate.

As a possible solution to these and other issues elaborated later, the proposed ICCH provides a possible solution.

Issues, such as the increased threat to cultural heritage sites and artefacts, caused by various factors such as defining cultural heritage, protecting it in armed conflict, natural disasters, and illegal activities such as looting and trafficking provide enough fodder for this fire to result in a burning question. The ICCH would function as an international tribunal focused on resolving disputes related to cultural heritage and enforcing relevant treaties and conventions such as but not limited to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit

See generally, International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) 53 Yearbook of the International Law Commission (Part II) 3, 82, art 36(2).
International Law Commission, 'Protection of Cultural Property' (2021) UN Doc A/CN.4/L.942, at 5.
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property', UNESCO, 14 November 1970, 823 UNTS 231.
Ibid.
Attila Tanzi, The Means for the Settlement of International Cultural Property Disputes: An Introduction, «TRANSNATIONAL DISPUTE MANAGEMENT», 2020, 17, pp. 5].
Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 8(2)(b)(ix).
International Law Commission, 'Draft Articles on the Protection of Persons in the Event of Disasters' (2016) UN Doc A/71/10, art 11.
United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 6.
Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215.

Import, Export, and Transfer of Ownership of Cultural Property, and the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage.

In addition, the court could promote education and awareness about the importance of cultural heritage protection through collaboration with national governments and international organizations, such as UNESCO and the International Council on Monuments and Sites. The establishment of the ICCH would require the cooperation and support of various stakeholders, including governments, legal experts, and organizations, as well as a clear legal framework and adequate funding. But using a Third World Approach to International Court of Cultural Heritage (TWAIL-CH) is critical.

Introducing Materiality of ICCH

What is materiality? Materiality helps determine whether certain facts or evidence can impact or have a direct bearing on the matter at hand and can influence the decision-making process. For instance, the design of our homes; the materials of which our monuments are constructed; animals and vehicles which carry us about; the fabric of our clothes; the sandiness or otherwise of our soil. In continuation, Eslava also notes that the materiality of international law is often overlooked but is essential to understand the full scope of the law. Materiality of international law through legal texts and codifications serve as tangible embodiments of international law, representing the rules and principles that govern the interactions between states and other actors. These documents, ranging from treaties and conventions to resolutions and declarations, provide the foundation for international legal norms and are crucial for understanding the materiality of international law. The physicality of these texts, as well as the process of their drafting and negotiation, can significantly influence the interpretation and application of legal principles. Physical spaces, such as international courts, tribunals, and conference venues, also contribute to the materiality of international law. These locations serve as the backdrop for the negotiation, interpretation, and enforcement of legal norms. The architecture, design, and layout of these spaces can shape the dynamics of legal proceedings and negotiations, influencing the outcomes and decisions reached within their walls. By examining the materiality of these spaces, scholars can better understand the complex interplay between physical environment and international

Id 3.
Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.
Id 3.
International Council on Monuments and Sites, 'ICOMOS Statutes' (adopted 22 June 1978, as amended 6 December 2014) art 1.
James A R Nafziger, 'The Emerging Role of the International Court of Cultural Heritage' (2022) 27 Int'l J Cultural Prop 1.
L. Eslava Local Space, Global Life: The Everyday Operation of International Law and Development (2015); L. Eslava, 'The Materiality of International Law: Violence, History and Joe Sacco's The Great War', London Review of International Law (2017), 49.
Id.
Crawford, J. (2012). Brownlie's Principles of Public International Law. Oxford: Oxford University Press.
Koskenniemi, M. (2005). From Apology to Utopia: The Structure of International Legal Argument. Cambridge: Cambridge University Press. Pg. 9.
Philippopoulos-Mihalopoulos, A. (2015). Spatial Justice: Body, Lawscape, Atmosphere. London: Routledge. Pg. 60.

legal processes. Material artefacts, such as maps, charts, and monuments, also play a significant role in the materiality of international law. These objects can serve as evidence or representations of legal principles, helping to define and shape the understanding of international legal norms. For example, maps and charts can influence the interpretation of territorial boundaries and maritime claims, while monuments can serve as physical reminders of historical events or legal decisions. By examining the materiality of these artefacts, scholars can gain new insights into the ways in which legal norms are constructed, contested, and reinforced. Therefore, materiality of international law can be understood as the tangible and practical aspects of international law and how it interacts with and influences the real world. And to study this interaction of materials by humans in a concrete edifice, in the form of ICCH House.

Generally speaking, TWAIL focuses on the historical and contemporary marginalization of the Third World in international legal institutions and highlights the power imbalances that persist in these forums. The theory, in the context of cultural heritage, therefore, guides the notion that cultural heritage is a resource that all people around the world share, and it emphasizes the value of preserving cultural heritage for generations to come, especially in third-world nations where the consequences of colonialism and the forced displacement of cultural heritage are most keenly felt. The TWAIL approach reveals that the ICCH is not exempt from the same critiques that apply to other international legal institutions, particularly with regard to the unequal representation and participation of Third World countries. For example, the composition of the ICCH's judiciary and staff, as well as the sources of its funding, can be seen as perpetuating the dominance of the Global North in international law. Additionally, the legal framework governing cultural heritage, such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, and the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, have been criticized for reflecting the interests of the Global North over those of the Global South.

TWAIL might argue that the ICCH should adopt measures that better reflect the diversity of the world's cultural heritage and consider the unique challenges faced by the Third World. This could include ensuring greater representation of the Global South in the ICCH's decision-making processes, as well as acknowledging and addressing the colonial legacy that has contributed to the current state of cultural heritage preservation and management. In sum, the TWAIL approach highlights the need for a more equitable and inclusive international legal framework for the protection of cultural heritage, with the ICCH as a key institution in this process.

Branch, D. (2011). Mapping the Sovereign State: Technology, Authority, and Systemic Change. International Organization, 65(1), 1-36. Pg. 5.
Akande, D., & Shah, S. (2013). Immunities of State Officials, International Crimes, and Foreign Domestic Courts. In The British Yearbook of International Law, Volume 84 (pp. 281-349). Oxford: Oxford University Press. Pg. 310.
Mutua, M., 'What is TWAIL?', Proceedings of the Annual Meeting (American Society of International Law), Vol. 94 (2000), 31-39, 31.
Prott LV, " 'Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War', "[1997] The Spoils of War 225 p. 230.
Anghie, A., 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harvard International Law Journal 1.
Chimni, B.S., 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 European Journal of International Law 1, 7.
Rajagopal, B., 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2006) 27 Third World Quarterly 767, 774.

ICCH would also be responsible for developing legal principles related to cultural heritage and including perspectives of developing countries. ICCH would provide a platform for developing countries to have their voices heard in matters related to cultural heritage, ensuring that the legal principles developed are more reflective of the needs and concerns of these countries.

ICCH would allow for a greater balance between local and international standards. This is crucial since the international community is composed of various cultures and legal traditions, each with its distinct perspectives on cultural heritage. Such a court could also provide a neutral and impartial forum for resolving disputes, particularly in cases where national courts are unable or unwilling to provide adequate remedies. Moreover, a court of cultural heritage could help to promote the principles of cultural diversity and intercultural dialogue by recognizing the value of non-Western cultural practices and traditions. Additionally through ICCH, cultural heritage disputes could be resolved in a way that takes into account both international standards and local cultural perspectives, allowing for a fair and just resolution for all parties involved. Furthermore, the soft law principles created by non-governmental organizations and international organizations could also be considered by ICCH. These principles are not legally binding, but they reflect the shared values and beliefs of the international community about cultural heritage. ICCH could consider these principles when making its decisions, thereby ensuring that the cultural heritage is protected and preserved in a way that is in line with the broader goals of the international community. Aside from these factors, two additional elements must be considered when evaluating the benefits of creating ICCH. Firstly, the value of local cultural heritage as a common heritage. Therefore protection is a global common concern. Secondly, scholarly suggestions must be accounted as they argue that such a court would provide a clear legal framework for resolving disputes, thereby reducing the likelihood of litigation and enhancing the protection of cultural

Chirwa, D. (2010). Reconfiguring international law and development: Third World Approaches to International Law. Cambridge University Press.

De Vries, P. (2012). The potential and pitfalls of an international court for cultural heritage. Journal of International Criminal Justice, 10(5), 1147-1166.

Otomo, Y. (2016). Cultural heritage and international law: objects, means and ends of international protection. Cambridge University Press.

Gagliani, Gabriele, 'The International Court of Justice and Cultural HeritageInternational Cultural Heritage Law Through the Lens of World Court Jurisprudence?', in Anne-Marie Carstens, and Elizabeth Varner (eds), Intersections in International Cultural Heritage Law (Oxford, 2020; online edn, Oxford Academic, 18 June 2020), https://doi.org/10.1093/oso/9780198846291.003.0010, accessed 8 Mar. 2023.
See Generally Id 21.
Id.
Kingsbury, B. (2015). TWAIL and the culture of international law. European Journal of International Law, 26(3), 573-593.
Xue, H. (2011). International cultural heritage law. Oxford University Press and De Vries, P. (2017). The role of international criminal law in the protection of cultural heritage: A critical appraisal. European Journal of International Law, 28(2), 427-456.

heritage. Overall, the creation of a new court could enhance the protection and preservation of cultural heritage, ensuring that it remains a vital part of our shared global heritage.

Highlighting Challenges using TWAIL and Determining Desirability Of ICCH

The establishment of an international court of cultural heritage is not without its challenges.
This critique is particularly relevant when considering the ways in which international law addresses the resolution of heritage disputes in dealing with colonial legacies and inequities. The determination of ownership and restitution are central to heritage conflicts, as former colonial powers often retain looted or unlawfully acquired cultural artifacts.

1. International law lacks a comprehensive framework for the restitution of these objects, and existing instruments, such as the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, are limited in scope and application.
2. Furthermore the role of International Organizations and Institutions such as UNESCO and the World Heritage Committee, play a crucial role in the protection and preservation of cultural heritage. However, these organizations can inadvertently perpetuate power imbalances, as their decision -making processes are often dominated by the interests of developed nations.
3. The TWAIL perspective calls for the democratization of these institutions to ensure that developing nations have a meaningful voice in shaping international heritage law and policy.

The TWAIL perspective also highlights the complex intersection between culture, identity, and sovereignty in heritage conflicts. The protection of cultural heritage is not only a matter of preserving artifacts and monuments but also involves safeguarding the collective memory and identity of communities. International law struggles to address these complexities adequately, often prioritizing state sovereignty and security concerns over the rights and interests of marginalized communities

From the TWAIL standpoint, the establishment of an international cultural heritage court has both potential benefits and drawbacks, as highlighted above. Proponents of the TWAIL perspective may argue that an international cultural heritage court can help redress historical injustices and

See generally, Attila Tanzi, The Means for the Settlement of International Cultural Property Disputes: An Introduction, «TRANSNATIONAL DISPUTE MANAGEMENT», 2020, 17, pp. 1 - 12] and Chechi Alessandro, "Alternative Dispute Settlement Mechanisms", in Francioni Francesco and Vrdoljak F. Ana (eds.), The Oxford Handbook of International Cultural Heritage Law, Oxford University Press, 2020, pp. 718-736. Chechi Alessandro, "Evaluating the Establishment of an International Cultural Heritage Court", Art Antiquity and Law, 2013, pp. 31-57.

Anghie, Antony. 'Imperialism, Sovereignty, and the Making of International Law.' (Cambridge University Press, 2004).

Id.

Rajagopal, Balakrishnan. 'International Law from Below: Development, Social Movements and Third World Resistance.' (Cambridge University Press, 2003).

Francioni, Francesco, and Federico Lenzerini, eds. 'Cultural Human Rights.' (Martinus Nijhoff Publishers, 2008).

facilitate the repatriation of cultural property plundered during colonial times. Conventions such as those discussed above could serve as legal frameworks that recognize the importance of protecting cultural heritage and returning unlawfully acquired artifacts. Critics within the TWAIL movement might argue that the establishment of an international cultural heritage court could further entrench existing power imbalances by potentially prioritizing the interests of powerful nations over those of developing countries. They may point to the International Court of Justice as an example of how international legal institutions can perpetuate these imbalances. Additionally, concerns may arise that such a court could be susceptible to political pressure or may struggle to enforce its decisions, given the often-contentious nature of cultural heritage disputes and the sovereignty concerns of states. Another potential issue highlighted by the TWAIL perspective is the question of what constitutes "cultural heritage" and who gets to define it. This concern is raised in relation to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two Protocols, which aim to safeguard cultural heritage during armed conflicts. The TWAIL critique suggests that the dominant definitions of cultural heritage may not adequately encompass the diverse cultural expressions and traditions of the Global South, which could lead to inequitable outcomes if an international cultural heritage court were to be established.

Conclusion

In conclusion, the potential establishment of ICCH presents an opportunity to address the complexities surrounding the protection and preservation of cultural heritage. This court could provide a neutral and impartial forum for resolving disputes, as well as develop legal principles that take into account the diverse perspectives of the global community, including those of developing countries. By adopting the TWAIL perspective, the ICCH could work to rectify historical injustices and imbalances within the international system, thereby fostering a more equitable and democratic legal framework. The consideration of soft law principles and non-Western cultural practices would also contribute to the promotion of cultural diversity and intercultural dialogue. However, the success of the ICCH will depend on its ability to address these concerns and effectively represent the interests of all nations and communities involved in cultural heritage disputes. If executed appropriately, the establishment of ICCH could significantly contribute to the protection and preservation of our shared cultural heritage for future generations.

ChHague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215; First Protocol to the Hague Convention (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 358.

BIBLIOGRAPHY

PRIMARY SOURCES:

Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975) 1037 UNTS 151.
Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property', UNESCO, 14 November 1970, 823 UNTS 231.
Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215.
International Council on Monuments and Sites, 'ICOMOS Statutes' (adopted 22 June 1978, as amended 6 December 2014) art 1.
Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 8(2)(b)(ix).
United Nations Convention against Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, art 6.

SECONDARY SOURCES:

Anghie, A., 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 Harv Int'l LJ 1.
Attila Tanzi, 'The Means for the Settlement of International Cultural Property Disputes: An Introduction' (2020) 17 Transnational Dispute Management 5.
Chimni, B.S., 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 Eur J Int'l L 1, 7.
Chirwa, D. (2010). Reconfiguring international law and development: Third World Approaches to International Law. Cambridge University Press.
De Vries, P. (2012). The potential and pitfalls of an international court for cultural heritage. Journal of International Criminal Justice, 10(5), 1147-1166.
International Law Commission, 'Draft Articles on the Protection of Persons in the Event of Disasters' (2016) UN Doc A/71/10, art 11.
International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) 53 YB Int'l L Comm (Part II) 3, 82, art 36(2).
International Law Commission, 'Protection of Cultural Property' (2021) UN Doc A/CN.4/L.942, at 5.
James A R Nafziger, 'The Emerging Role of the International Court of Cultural Heritage' (2022) 27 Int'l J Cultural Prop 1.
Mutua, M., 'What is TWAIL?', Proceedings of the Annual Meeting (American Society of International Law), Vol. 94 (2000), 31-39, 31.
Prott LV, " 'Principles for the Resolution of Disputes Concerning Cultural Heritage Displaced During the Second World War', "[1997] The Spoils of War 225 p. 230.
Rajagopal, B., 'Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy' (2006) 27 Third World Quarterly 767, 774.

INTERNATIONAL LAW ASSOCIATION

"To promote international law in all aspects in the Caribbean"

Branch Officers:

President : Dr. Chantal Ononaiwu

Honorary Treasurer: Ms. Alana Malinde Lancaster

Honorary Secretary: Justice Dr. Anthony Gafoor

Contact Details:

Justice Dr. Anthony Gafoor
Hon. Secretary & Editor
ILA Caribbean Branch
Newsletter
gafooranthony@gmail.com