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# Should An International Climate Crimes Tribunal Be Established?

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**Given the urgency of effective action on climate change, the idea of an international environmental court warrants careful consideration.**

**Authors note:** *This draws on her chapter joint with Patrick J. Keenan and Charlotte Ku, 'The creation of a climate change court or tribunal' in Shirley V Scott and Charlotte Ku, eds. Climate Change and the UN Security Council (Edward Elgar, 2018). For a more extensive coverage of the politics of international courts and tribunals, see also chapter five 'International Courts and Tribunals' in Shirley V. Scott, International Law in World Politics. An Introduction 3<sup>rd</sup> ed. (Lynne Rienner, 2017).*

The international legal system has grown enormously over the last century. One of the most striking developments of recent decades has been the expansion in the number of international courts and tribunals, as evidenced by the dispute resolution system of the World Trade Organization, the Law of the Sea Tribunal, and the International Criminal Court. Recent controversy over the International Criminal Court (ICC), including its perceived bias against Africa, together with the prospect that the operation of the WTO's Appellate Body will be stymied by Trump's refusal to appoint new judges, highlight the complexity of designing international courts that function fairly and are perceived to function fairly.

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The idea of an international environmental court is not new. Indeed, when the WTO dispute settlement system was created, there was concern that even if by default, this would encourage governments to prioritise economic factors over the environment, human rights, and social equity and it was suggested that the answer might be to re-balance via the creation of an international environmental court. To date, this has not happened but the idea has re-surfaced in connection with the possibility of establishing an international court or tribunal to deal with international climate crimes.

Given the urgency of effective action on climate change and the fact that we are still looking for effective governance mechanisms, the suggestion at a minimum warrants careful consideration. Fundamental questions and issues include who could establish such a body and how, the law to be applied by such a court, whether its jurisdiction would be optional or compulsory, and what the prospects for success are.

### **Learning from other courts**

The experiences with other recently created courts evidences at least two ways by which such a body might be brought about. The ICC exemplifies the creation of an international court through a vote at an international diplomatic conference. The International Criminal Tribunal for the Former Yugoslavia (ICTY) exemplifies an ad hoc international criminal tribunal established via a vote of the United Nations Security Council. Notably, the ICTY and the International Criminal Tribunal for Rwanda established by the Council on an ad hoc basis, paved the way for the subsequent creation of a permanent international criminal court (i.e. a court that operates on an ongoing basis).

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If this experience was mimicked, the first step could be for the creation of an ad hoc climate change crimes tribunal by the UN Security Council using its compulsory (chapter VII) authority. The threshold requirement for the Council to invoke chapter VII is its determining the 'existence of any threat to the peace, breach of the peace, or act of aggression'. Although there is ongoing debate regarding the nexus between climate change and security, it is up to the Council to decide whether or not this threshold has been reached, and the Council has already recognised the adverse effects on regional stability in the Lake Chad Basin of climate change and ecological changes.

The legal document establishing a new court or tribunal, which in this case would be a resolution of the UN Security Council, includes details regarding the body of law to be applied. International criminal tribunals are distinctive because they hold individuals, usually high-ranking political or military figures, to account. To date, there is no legalized international climate crime although 'ecocide' has been proposed, as has the failure to mitigate greenhouse gases. So long as it could avoid retrospectivity, the Council could define one or more crimes, or it could pass a resolution requiring states to recognise one or more new climate-related crimes. In the alternative, the Security Council could use its chapter VII powers to create a court or tribunal that applies another or other bodies of international law, such as international environmental law or the law of the UNFCCC regime, or indeed domestic law.

The challenge here would be more political than legal insofar as the resolution would need to avoid the veto despite the fact that members of the P5 might reasonably be concerned at the risk of themselves being held to account by such a court. The dangers for the P5 and their allies would be particularly evident if the Court were to apply international climate change law, given the

centrality within that regime of the principle of common but differentiated responsibilities. This principle accords greater responsibility to those with historical responsibility for, and a greater present capacity to address, climate change and variability. Whereas the rich may previously have drawn comfort from the fact that it would be hard to attribute responsibility to individuals, companies or governments, the science of attribution has made great strides, prompting a rise in domestic climate litigation including in the United States and Australia.

### **The way forward?**

When international climate change policy is mentioned, most people think first of mitigation and it is true that the international climate change regime at first emphasised mitigation over adaptation; along similar lines, courts are most typically associated with punishment and deterrence. There may well be issues related to adaptation that could benefit from formalised third-party intervention but that do not fit neatly within a mitigation-crime-punishment construct. Consider, for example, the question as to where to re-settle those displaced by rising sea levels.

Courts and quasi courts can be a governance mechanism by which to distribute responsibilities and to allocate available funds and warrants further and more detailed consideration in relation to specific issues within the broad agenda of responding to climate change. The lessons from previous and current international courts could be brought to bear. Perhaps the most important of these is to at all costs avoid creating a purportedly universal court against which the most powerful intend to protect themselves whilst subjecting others. Perceived hypocrisy on the part of powerful countries is one of the most potent

weapons against an effective international rule of law and it may well be preferable not to proceed at all rather than to risk over-reach in this manner.

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## About the Author

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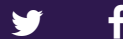


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