

## **Critiquing the Role of Courts and Tribunals in Developing Environmental Law Jurisprudence**

*By: Peter Mwangi Muriithi \**

### **Abstract**

*Environmental law jurisprudence contributes significantly to the protection of the environment and promote sustainable development. Courts and tribunals have a vital role to play in the growth of environmental law jurisprudence. This paper argues that the place of courts and tribunals in the growth of environmental law jurisprudence cannot be underrated. In so doing, the paper shall examine some of the seminal decisions by courts and tribunals. This is with a view of outlining the specific contribution by courts and tribunals in developing environmental law jurisprudence.*

*Succinctly, the paper shall; give a brief introduction, discuss the basis of application of environmental law jurisprudence developed by courts and tribunals in Kenya, outline the specific role played courts and tribunals in developing environmental law jurisprudence and lastly, the paper shall give a conclusion.*

### **1. Introduction**

The starting point of this discourse is defining what constitutes environmental law. What is, or is not, properly the province of "environmental law" will depend very much on the definition of "environment" which is adopted. Perhaps the simplest and most memorable definition of "environment" is that given by *Albert Einstein*, who once said, "...the environment is everything that isn't me."<sup>1</sup> The only problem with adopting this definition is that there will be very little activity which does not have an "environmental" impact.<sup>2</sup> This illustrates that defining environment is challenging due to the scope of what can be regarded as part of the environment.

A succinct definition of environment is that it is a combination of elements whose complex interrelationships make up the settings, the surroundings and the conditions of life of the individual and society as they are and as they are felt. (EC Council Regulation 1872/84, Action by the Community Relating to the Environment, 1984.)<sup>3</sup> A legal definition of the term *environment in Kenya is provided by Section 2 of the Environmental Management and Co-ordination Act*<sup>4</sup> which states that:

*"Environment" includes the physical factors of the surroundings of human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and the built environment"*

Given the above understanding of what is the environment, one can then appreciate what is environmental law. *Environmental Law* can be described as the body of law that is concerned with

---

\*LL.B-University of Nairobi, PGDL, Patent Agent, Court Accredited Mediator, MCI Arb, LL.M-University of Nairobi & Publisher

<sup>1</sup><[https://www.brainyquote.com/quotes/albert\\_einstein\\_165189](https://www.brainyquote.com/quotes/albert_einstein_165189)> accessed on 14/04/20

<sup>2</sup> Justine Thornton & Silas Beckwith, *Environmental Law* (Sweet and Maxwell 1997) Pg.2

<sup>3</sup> Mark Stallworthy, *Environmental Law* 1<sup>st</sup> Edition ,pg.2

<sup>4</sup> Act No. 8 of 1999

protecting the natural resources of land, air, water (the three "environmental media") and the flora and fauna which inhabit them.<sup>5</sup>

The *Black's Law Dictionary 9<sup>th</sup> edition* defines *environmental law* as the field of law dealing with the maintenance and protection of the environment, including preventive measures such as the requirements of environmental-impact statements, as well as measures to assign liability and provide clean-up for incidents that harm the environment.<sup>6</sup> It's noteworthy that there are four main principles enshrined in environmental law. These are; preventative principle, the polluter pays principle, the precautionary principle and sustainable development. Principles such as these, along with other environmental policies and aims are sometimes referred to as 'soft law' and overtime have been expounded and applied by courts and tribunals in their decisions where applicable. In comparison, 'hard law' refers to actual laws which can be enforced.<sup>7</sup> This paper seeks to enunciate the role of courts and tribunals in developing environmental law jurisprudence.

## **2. The basis of application of environmental law jurisprudence developed by Courts and Tribunals in Kenya**

The *Judicature Act Cap 8* under section 3 allows the court to refer to common law as a source of law. The common law doctrines can be referred to in environmental protection. Common law is in various aspects. Common law reflected the view that free people must take responsibility for their actions and must be held responsible for their actions, with the courts providing an important avenue for holding them accountable. Illustrating the seminal role of courts and tribunals in developing environmental law jurisprudence, the classical case of *Ryland's v Fletcher* established the doctrine of strict liability in the torts of negligence and nuisance, in the control of environmental damage and pollution. Courts and tribunals have applied common law in resolving environmental cases.

The courts and tribunals in their decision making when handling environmental cases amounts to lawmaking hence developing environmental law jurisprudence. Buttressing this role of courts in making laws. Judge *John M. Mativo* in the case of *County Government of Kiambu & another v Senate & others [2017] eKLR*<sup>8</sup> stated verbatim; "...while interpreting the law, the court should bear in mind that they should make laws when necessary to make the ends of justice. Legal systems world over could not grow as has been the case without a great amount of judicial law-making in all fields, Constitutional law, Common Law and statutory interpretation. However, to the extent that judges make laws, they should do so with wisdom and understanding. Judges should be informed on the factual data necessary to good policymaking. This includes not only the facts peculiar to the controversy between the litigants before them but also enough of an understanding of how our society works so that they can gauge the effect of the various alternative legal solutions available in deciding a case."

Buttressing the importance of judicial decisions, Article 38 paragraph 1 of the Statute of the International Court of Justice recognizes judicial decisions as a source of international law. International law form part of the laws of Kenya. By dint of *Article 2(5) and 2(6) of the Constitution of Kenya 2010*, all *International Conventions that have been ratified by Kenya now form part of Kenyan law*. Article 2(5) of the Constitution incorporates general rules of international law into our municipal law.<sup>9</sup> Article

---

<sup>5</sup> Ibid No. 3

<sup>6</sup> Bryan A. Garner, *Black's Law Dictionary 9<sup>th</sup> Edition*

<sup>7</sup> Brenda Short, *Environmental Law 1<sup>st</sup> Edition*, Pg.12

<sup>8</sup> Constitutional Petition No. 229 of 2015

<sup>9</sup> Article 2(5) states: The general rules of international law shall form part of the law of Kenya.

2(6) of our Constitution transforms rules of treaty/conventions into our municipal Law.<sup>10</sup> This forms the basis of application of environmental law jurisprudence developed by courts and tribunals in Kenya.

### **3. The Role of Courts and Tribunals in Developing Environmental Law Jurisprudence**

Many decisions have been made over time by courts and tribunals. These decisions are considered to have contributed significantly to the growth of environmental law jurisprudence necessary for environmental protection, especially in Kenya. As D. Kaniaru, L. Kurukulasuriya, and C. Okidi<sup>11</sup> stated: “*The judiciary plays a critical role in the enhancement and interpretation of environmental law and the vindication of the public interest in a healthy and secure environment. Judiciaries have, and will most certainly continue to play a pivotal role both in the development and implementation of legislative and institutional regimes for sustainable development. A judiciary, well informed on the contemporary developments in the field of international and national imperatives of environmentally friendly development will be a major force in strengthening national efforts to realise the goals of environmentally friendly development and, in particular, in vindicating the rights of individuals substantively and in accessing the judicial process.*” The courts and tribunals role in developing environmental law jurisprudence has taken several forms as discussed below.

#### **Forms in which Domestic Courts and Tribunal have developed environmental law jurisprudence:**

##### **a) Articulating and implementing environmental law principles**

There are various environmental law principles. These principles are recognized in the Constitution of Kenya 2010 and international environmental instruments. The Constitution and sectoral laws on natural resources have translated these principles into legally binding norms.<sup>12</sup> These principles are the ones that are mainly encompassed in almost all the international treaties that relate to the environment and are universal.

They include: the principle on transboundary environmental damage, sustainable development, sustainable use, prevention principle, precautionary principle, the polluter pays principle, reasonable use and equitable utilization, international cooperation in the management of natural resources, common but differentiated responsibilities and state sovereignty over their natural resources.<sup>13</sup> The courts and tribunals in Kenya have overtime applied these environmental principles in making decisions and emphasized their importance. To a great extent, the courts and tribunals have interpreted these environmental principles to solve environmental disputes in Kenya.

In so doing, the courts and tribunals tailor-make these environmental principles to fit the Kenyan context. The importance of these environmental principles was buttressed by the case of; *Kenya Association of Manufacturers & 2 others v Cabinet Secretary - Ministry of Environment and Natural Resources & 3 others* [2017] eKLR<sup>14</sup>, the Court stated,

---

<sup>10</sup> Article 2(6) states: Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

<sup>11</sup> D. Kaniaru, L. Kurukulasuriya, & C. Okidi, *UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development*, in Conference Proceedings 22 (presented to the Fifth International Conference on Environmental Compliance and Enforcement in Monterey, California in Nov. 1998), available at <<http://www.inece.org/5thvol1/lal.pdf>>

<sup>12</sup> Kariuki Muigua, Didi Wamukoya Francis Kariuki, *Natural resources and Environmental Justice in Kenya* page 17

<sup>13</sup> Ibid No 10

<sup>14</sup> eKLR Petition No 32 of 2017

“...in determining environmental disputes at any stage, Kenyan courts are obliged to be guided by and promote the constitutional framework on the environment... In this regard, Articles 42, 69 and 70 of the Constitution and the **broad environmental principles** set out in Section 3 of the EMCA are important tools in the interpretation of the law and adjudication of environmental disputes.”

**b) Acting as a gatekeeper for environmental law (both domestic and international) in Kenya**

Over time, the courts and tribunal in Kenya have acted as guardians of environmental law in Kenya. In so doing the courts and tribunals develop environmental law jurisprudence through interpretation and enforcement of environmental law in Kenya in a progressive manner. For example;

*i) Classifying various actions that destroy the environment as torts to protect the environment*

The courts in Kenya have over-time classified various actions as either tort of nuisance or negligence. These actions were classified as torts to protect landowner in the enjoyment of his or her property. It can be public or private property.

In the case of; *Peter K. Waweru v Republic [2006] eKLR<sup>15</sup>* nuisance was seen by the actions of the accused person to direct raw sewage into the public water source. This constituted an act of nuisance. In the case of; *Gitiriku Wainaina & Another v Kenafic industries & another [2007] eKLR<sup>16</sup>* where the Plaintiff claimed that the Defendants had constantly caused noxious and offensive gases, smells and vapours to come into his premises causing a nuisance. The court established there were nuisance and negligence on the part of the Defendants.

*ii) Developing jurisprudence on an easement*

Easement seeks to address the loss of wildlife and their habitat outside protected areas. Easement seeks to limit the use of land to activities which negatively affect wildlife habitat like erecting fences or barriers that impede wildlife movement e.t.c This enables animals to easily migrate from one area to another. This was seen in the case of; *East Africa Wildlife Society and 2 others v Kenya National Highways Authority<sup>17</sup>* where the NEMA was faulted for allowing KENHA (Kenya National Highway Authority) to construct a road through Nairobi National Park.

*iii) Developing jurisprudence on public interest litigation and locus standi on environmental matters*

The Constitution of Kenya 2010 allows public interest litigation when it comes to environmental cases. This is a great improvement brought by the Constitution of Kenya 2010. Previously, as was evidenced in the case of; *Wangari Maathai v Kenya Times Media Trust Ltd [1989] eKLR<sup>18</sup>*, where the applicant was denied redress in court on the basis that she lacked *locus standi*. In accordance with the Constitution of Kenya 2010, the courts have developed jurisprudence that supports public interest litigation on environmental matters. This allows concerned citizens to move to court to enforce the rights of those that are affected. In the case of *Peter Kinuthia Mwaniki and 2 others vs. Peter Njuguna eKLR<sup>19</sup>* the Plaintiffs were not the owners of the land to be affected by waste from a slaughterhouse, their application was allowed. In this case, the Plaintiffs had moved to court to stop the construction of a

---

<sup>15</sup> Misc. Civil Application No. 118 of 2004

<sup>16</sup> Tribunal Referral Net 8 of 2006

<sup>17</sup> ELC Appeal No. 16 of 2015

<sup>18</sup> Civil Case No 5403 of 1989

<sup>19</sup> Civil Case 313 of 2000

slaughterhouse by the Defendant. The court found the Defendant to have infringed on the right to a clean and healthy environment. In this regard the court in its judgment stated

*“...the plaintiffs, though not the owners of the land in dispute, nevertheless have the authority to sue, such authority being derived from Section 3(3) of the Environmental Management and Co-ordination Act, 1999...”*

The Court of Appeal in the case of; *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR*<sup>20</sup> observed that the conservative requirements of locus that existed in the old regime that treated litigants, other than those directly affected, as mere or meddling busybodies had the negative effect of limiting access to justice. These are the ills that existed in our law that the Act and more recently the Constitution 2010 intended to cure and which must be emphasized. The Supreme Court in the same case; *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (supra)*<sup>21</sup> remarked on the importance of public interest litigation which had been thwarted under the old constitutional regime and stated as follows;

*“...Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution’s aim in enlarging locus standi in human rights & constitutional litigation. Locus standi has a close nexus to the right of access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case by case basis, to evaluate the terms and public nature of the matter vis-a-vis the status of the parties before it*

### **c) Promoting the seminal principle of sustainable development**

Sustainable development seeks to limit environmental damage arising from anthropogenic activities and to lessen the depletion of non-renewable resources and pollution of the environment while promoting economic growth.<sup>22</sup> *The Brundtland Commission*<sup>23</sup> considered sustainable development to be “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

Courts and tribunals have been called upon in the quest for enforcing sustainable development policies owing to their traditional role in dispute resolution and interpretation of laws.<sup>24</sup> The courts and tribunals in Kenya have been in forefront seeking to enforce sustainable development policies and laws. In the case of; *Save Lamu & 5 Others v. National Environmental Impact Assessment & Another*<sup>25</sup> Recognizing the important role of the concept of sustainable development the tribunal opined: “*The purpose of the Environment Impact Assessment (EIA) process is to assist a country in attaining sustainable development when commissioning projects. The United Nations has set Sustainable Development Goals (SDGs), which are an urgent call for action by all countries recognizing that ending poverty and other*

---

<sup>20</sup> Civil Appeal No. 290 of 2012

<sup>21</sup> Petition No. 12 of 2013

<sup>22</sup> Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003) page 8 to 9

<sup>23</sup> *The Brundtland Commission* was established by the United Nations in 1983 to address the problem of deterioration of natural resources.

<sup>24</sup> Patricia Kameri-Mbote, Collins Odote *Courts as Champions of Sustainable Development: Lessons from East Africa* page 1

<sup>25</sup> Tribunal Appeal No. Net 196 of 2016



*deprivations must go hand-in-hand with strategies that improve health and education, reduce inequality, and spur economic growth – all while tackling climate change and working to preserve our oceans and forests.”*

### **Forms in which International Courts have developed environmental law jurisprudence:**

This discourse shall primarily focus on the International Court of Justice. International environmental law jurisprudence has developed primarily through negotiations among States rather than judicial decisions. This being the case, the contribution of the International Court of Justice to international environmental law has been comparatively modest.<sup>26</sup>

However the increasing judicialization<sup>27</sup> of international law in recent decades has included an uptick in environmental litigation, most of this litigation has taken place in specialized tribunals such as the regional human rights courts, the International Tribunal for the Law of the Sea, and the World Trade Organization’s Dispute Settlement Mechanism, not the International Court of Justice.<sup>28</sup>

The International Court of Justice has taken a rather conservative approach, lending the Court’s authority to well-established principles rather than breaking new ground. To the extent the Court’s jurisprudence has contributed to international environmental law, its contributions have taken the following forms:

#### **1) Articulating foundational principles**

Until the 1990s, the International Court of Justice contributed to international environmental law only indirectly, by embracing the foundational concepts<sup>29</sup> of;

- a) *Sic utero tuo* (use your property in such a manner as not to injure that of another) in *the Corfu Channel (United Kingdom v. Albania)*<sup>30</sup>

*The Corfu Channel Case* concerned damage to British warships rather than harm to the environment but is usually considered part of the Court’s ‘environmental’ jurisprudence because it articulated the principle, *sic utere tuo ut alienum laedas* – ‘use your property in such a manner as not to injure that of another’ – which underpins much of international environmental law. In *Corfu Channel*, the United Kingdom argued that Albania violated international law by failing to provide notice of a minefield within its waters.

The Court agreed, finding a ‘general and well-recognized principle’ that every State has an obligation ‘not to allow knowingly its territory to be used for acts contrary to the rights of other States’.<sup>31</sup> The *Corfu Channel* case bolstered the environmental principle of prevention by placing it in the broader framework of international law.

---

<sup>26</sup> Daniel Bodansky , *International Environmental Law* page 1

<sup>27</sup> Andreas Føllesdal and Geir Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (Oxford: Oxford University Press 2018).

<sup>28</sup> James Harrison, *The annual surveys of international environmental litigation* (The Journal of Environmental Law.)

<sup>29</sup> Daniel Bodansky , *International Environmental Law* page 2

<sup>30</sup> *Corfu Channel Case, Judgment*, (1949) ICJ 4.

<sup>31</sup> *Corfu Channel*, p. 22.

- b) *Obligations erga omnes* (obligations owed by a state towards the community of states as a whole) *Barcelona Traction Case (Belgium v. Spain)*<sup>32</sup> The International Court of Justice made its next contribution to the development of international environmental law in another non-environmental case, *Barcelona Traction Case*, where it articulated the concept of *obligations erga omnes* that is, *obligations owed not bilaterally between States but to the international community as a whole*.

Although the Court's discussion in *Barcelona Traction* case of obligations erga omnes did not include any environmental obligations in its list of examples, obligations to protect global commons such as the atmosphere and the high seas would appear excellent candidates for erga omnes status, since by their nature they involve the interests of the international community generally, not individual States. *Barcelona Traction Case* thus complements *Corfu Channel's case* focus on transboundary harms by helping to lay the foundation for the protection of the global commons.

## 2) Acting as a gatekeeper for customary international law

The International Court of Justice has lent its weight to claims about the customary international law status of widely recognized rules such as the duty to prevent significant transboundary pollution and the duty to undertake environmental impact assessments. In doing so, the International Court of Justice has served as the 'gatekeeper and guardian' of general international law, which includes International environmental law as Jorge Viñuales puts it.<sup>33</sup> Using *Legality of the threat or use of Nuclear Weapons case (1996 ICJ pg 90)* as an example the ICJ held that UN General Assembly resolutions can in certain circumstances provide evidence important for establishing the existence of a customary rule or the emergence of an opinion Juris et necessitatis.

## 3) Elaborating existing principles

The International Court of Justice has taken the role of elaborating existing environmental principles. For example by holding that the duty of due diligence entails procedural duties to assess, notify, and consult. This is demonstrated in the case of *Pulp Mills and Costa Rica v. Nicaragua* cases. The *Pulp Mills Case (Argentina v. Uruguay)*<sup>34</sup> is perhaps the Court's most important environmental case to date because of its extensive discussion of the duty to prevent and the related duty to perform environmental impact assessments of activities that risk significant transboundary harm.

In this case, Argentina brought the case in 2006, claiming that construction by Uruguay of two pulp mills on the River Uruguay violated a bilateral treaty between the two countries governing the use of the river. The Court found that the Parties' obligation under the agreement to 'protect and preserve the aquatic environment and, in particular, to prevent pollution' is a due diligence obligation that entails both 'adopting appropriate rules and measures' as well as exercising 'a certain level of vigilance in their enforcement'.<sup>35</sup>

It further found that the practice of undertaking an environmental impact assessment when there is a risk of significant transboundary harm 'has gained so much acceptance among States that it may now be considered a requirement under general international law' and is an element of due diligence.<sup>36</sup>

<sup>32</sup> *Barcelona Traction, Light and Power Company, Judgment*, (1970) ICJ 3.

<sup>33</sup> Jorge E. Viñuales, (2008) 32 *Fordham International Law Journal* 232, 258 (2008).

<sup>34</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, (2010) ICJ 14.

<sup>35</sup> *Ibid* No.30 page 79, paragraph 197.

<sup>36</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, (2010) ICJ page 83 paragraph 204.

However, in the Court's view, international law allows States to determine in their domestic legislation the 'scope and content' of the assessment, rather than specifying these itself.<sup>37</sup> After a lengthy review of Uruguay's actions, the Court concluded that Uruguay had breached various procedural obligations under the bilateral treaty with Argentina, but that there was 'no conclusive evidence' showing a failure to exercise due diligence.<sup>38</sup>

#### **4) Interpreting environmental agreements**

Although the Court has played a limited role in interpreting multilateral environmental agreements (since most create their own compliance systems rather than provide for compulsory dispute settlement by the Court), Australia and Japan's acceptance of the Court's compulsory jurisdiction under the Optional Clause gave the Court the opportunity, in the *Japanese Whaling case*, to interpret the International Whaling Convention's exemption for scientific whaling. *Japanese Whaling (Australia v. Japan)*<sup>39</sup>

This case that was brought before ICJ was premised on a multilateral environmental agreement. Australia brought the case against Japan in 2010, contending that the taking of whales by Japan under its 'scientific' whaling program did not qualify for the scientific research exemption provided in Article VIII (1) of the International Whaling Convention.<sup>40</sup> The Court's decision turned on the relatively narrow question of whether Japan's program was 'for purposes of scientific research', rather than examining the program's consistency with the object and purpose of the Whaling Convention more generally. The Court held that, although Article VIII (1) gives Parties discretion in designing scientific research programs, it establishes an objective standard that requires that a program's 'design and implementation be reasonable in relation to its stated research objectives'.<sup>41</sup>

Applying this reasonableness standard, the Court decided by a 12-4 vote that the Japanese program was not 'for purposes of scientific research', did not, therefore, qualify for the Article VIII exemption, and hence violated Japan's obligations under the Schedule to the Convention.

#### **5) Valuing environmental harms**

The court has recently ventured into the realm of valuation of environmental harms to award environmental damages. This was vividly demonstrated in the case of *Costa Rica v. Nicaragua*<sup>42</sup> which discussed the methodology of environmental damage valuation. The case further incorporated environmental considerations into other areas of international law. In this case, there were claims by both Costa Rica and Nicaragua concerning violations of international environmental law resulting from activities in the border region between the two countries. The Court in its judgment discussed customary rules relating to transboundary pollution and was supplemented by ten separate opinions. In brief, the Court reiterated its conclusions in Pulp Mills case that States have a duty under customary international law to use due diligence to prevent significant transboundary harm, to conduct environmental impact

---

<sup>37</sup> Ibid No.30 page 83, paragraph 205.

<sup>38</sup> Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, (2010) ICJ page 101, 106, paras. 265, 282(1).

<sup>39</sup> Whaling in the Antarctic (Australia v. Japan), Judgment, (2014) ICJ 226.

<sup>40</sup> International Convention for the Regulation of Whaling, Washington, D.C., 2 December 1946, in force 10 November 1948, 161 UNTS 72.

<sup>41</sup> Whaling in the Antarctic, paragraph 88.

<sup>42</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, (2015) ICJ 665.



assessments of activities that risk causing significant harm to other States, and to notify and consult with potentially affected states.<sup>43</sup>

Applying these rules, the Court concluded that:

- i) Nicaragua's dredging activities did not create a risk of significant transboundary harm, and therefore did not violate either its procedural obligations related to assessment, notification, or consultation or its substantive duty not to cause significant transboundary harm.<sup>44</sup>
- ii) Costa Rica violated its duty under international environmental law to conduct an environmental impact assessment of its planned road construction.
- iii) Nicaragua was responsible for the environmental damage to Costa Rica caused by its construction of a canal in Costa Rica. In a subsequent decision in 2018, the Court awarded compensation based on a lengthy analysis of environmental damages valuation.<sup>45</sup>

#### **6) Incorporating environmental considerations into other areas of international law**

Lastly, apart from contributing to international environmental law as a distinct field, the International Court of Justice has helped diffuse environmental considerations into other areas of international law, including international humanitarian law. This is demonstrated in; *Nuclear Weapons Advisory Opinion*<sup>46</sup> where the Court said that environmental damage should be included in necessity and proportionality analysis and the law of state responsibility in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*<sup>47</sup> where the Court acknowledged that damage to the environment could create a state of ecological necessity that would excuse an otherwise wrongful act.

#### **4. Conclusion**

Courts and tribunals play a seminal role in developing environmental law jurisprudence that is necessary for the protection of the environment as illustrated above. Environmental law jurisprudence developed by courts and tribunals overtime contributes significantly towards the realization of sustainable development goals. Hence, the role of courts and tribunals in the development of environmental law jurisprudence is unquestionable.

---

<sup>43</sup> Costa Rica v. Nicaragua, Judgment, page 706-707, paragraph 104.

<sup>44</sup> Costa Rica v. Nicaragua, Judgment, page 710, paragraph 112.

<sup>45</sup> Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Judgment on Compensation, (2018) ICJ 15.

<sup>46</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, (1996) ICJ 226.

<sup>47</sup> Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, (1997) ICJ 7.

## **References**

Andreas Føllesdal and Geir Ulfstein (eds.), *The Judicialization of International Law: A Mixed Blessing?* (Oxford: Oxford University Press 2018).

Brenda Short, *Environmental Law* 1<sup>st</sup> Edition

Bryan A. Garner, *Black's Law Dictionary* 9<sup>th</sup> Edition

Cullet P., *Differential Treatment in International Environmental Law and its Contribution to the Evolution of International Law* (Aldershot: Ashgate, 2003)

Daniel Bodansky, *International Environmental Law* page 1

D. Kaniaru, L. Kurukulasuriya, & C. Okidi, *UNEP Judicial Symposium on the Role of the Judiciary in Promoting Sustainable Development*, in *Conference Proceedings* 22

[https://www.brainyquote.com/quotes/albert\\_einstein\\_165189](https://www.brainyquote.com/quotes/albert_einstein_165189)>

James Harrison, *The annual surveys of international environmental litigation* (The Journal of Environmental Law.)

Jorge E. Viñuales, (2008) 32 *Fordham International Law Journal* 232, 258 (2008).

Justine Thornton & Silas Beckwith, *Environmental Law* (Sweet and Maxwell 1997)

Kariuki Muigua, Didi Wamukoya Francis Kariuki, *Natural resources and Environmental Justice in Kenya*

Mark Stallworthy, *Environmental Law* 1<sup>st</sup> Edition.

Patricia Kameri-Mbote, *Collins Odote Courts as Champions of Sustainable Development: Lessons from East Africa*.

The Brundtland Commission was established by the United Nations in 1983 to address the problem of deterioration of natural resources.