The European Journal of International Law Vol. 34 no. 4
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Book Reviews

Marie-Catherine Petersmann. ***When Environmental Protection and Human Rights Collide: The Politics of Conflict Management by Regional Courts***. Cambridge: Cambridge University Press, 2022. Pp. 288. €99.00. ISBN: 978-1-316-151580-8.

Why has international environmental law failed? There are many accounts of how we got to a point where the environmental catastrophe is no longer a threat but a fact. Accordingly, there is good reason to question the efficacy of legal responses to pressing global environmental problems that challenge nothing less than the very existence of the planet. Yet the traditional narrative of international environmental law still clings to a story of progress. Starting from the founding myth of the Stockholm Conference on the Human Environment in 1972, international environmental law is still commonly presented as a relatively new body of law that transcends the limits of national jurisdictions and represents the international community's interest in the protection and preservation of the world's resources.

The progress narrative is underpinned by another discourse that highlights the linkage of environmental protection with the other dominant legal discourse since the 1970s: human rights. Ever since the Stockholm Conference, human rights have appeared as a mobilizing factor for environmental protection and have initiated a development that can also be characterized by the semantic shift from 'nature' to 'environment'. The first two principles of the Stockholm Declaration stake out the field:

> [1] Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being and he bears a solemn responsibility to protect and improve the environment for present and future generations. … [2] The natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.[1]

The connection between environmental protection and individual rights was strengthened by the concept of 'sustainable development' that was introduced in 1987 by the Brundtland Commission to reconcile the opposing concepts of economic growth and environmental protection. Fifteen years later, the Rio Conference on Environment and Development framed environmental protection as part of human 'development' and solemnly recognized the 'integral and interdependent nature of the Earth, our home'.[2] After more than 150 states had granted a 'human right to a healthy environment' in their constitutions, domestic legislation or regional agreements, the development experienced its preliminary climax with the

1 Stockholm Declaration on the Human Environment 1972, 11 ILM 1416 (1972), Principles 1, 2.
2 Rio Declaration on Environment and Development 1992, 31 ILM 874 (1992), preamble.

adoption of United Nations General Assembly (UNGA) Resolution 76/300 of 2022, which declares access to a clean, healthy and sustainable environment a universal human right.[3] Based on Resolution 48/13, adopted by the United Nations (UN) Human Rights Council a year earlier,[4] the UNGA resolution affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.

The resolution has been called a 'historic move'.[5] In this perspective, we have witnessed a process of progressive convergence between international environmental and human rights law that is based on the realization that the enjoyment of many human rights depends on a healthy environment and that human rights, especially on a procedural level, enable individuals and communities to claim environmental protection measures. This idea of a synergistic relationship between environmental protection and human rights has proven remarkably resilient despite evident regulatory problems that affect both international environmental and human rights law. These problems are usually relegated to the sphere of implementation, and whole libraries have been filled with contributions that engage with the question of how to ensure compliance with multilateral environmental agreements or human rights treaties.

Marie-Catherine Petersmann's *When Environmental Protection and Human Rights Collide: The Politics of Conflict Management by Regional Courts* challenges 'the mainstream anthropocentric and synergistic framing of the relationship between environmental and human rights protection' (at 80). Her account traces the origins of this framing or what she even more pointedly characterizes as a 'mantra of synergy' (at 97). Questioning the common harmonious interpretation of the relationship between environmental protection and human rights, her study focuses not on the synergies but, rather, on the conflicts and tensions between human rights and environmental protection. According to Petersmann, the relevant task is not to report ever higher degrees of synergy between the two realms. Instead, for her, the decisive question is how the conflicts between the different regimes play out and what their patterns can teach us about legal solutions for global environmental problems. It is one of the many achievements of Petersmann's work that she not only points out how the focus on synergy suppresses the inherent conflicts between environmental protection and human rights but also meticulously traces the balancing of these tensions in the jurisprudence of regional courts.

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Petersmann presents her comprehensive study of the intricate relationship between environmental protection and human rights in two parts: Part 1 (Constructing Synergies: Framing the Environment-Human Rights Interface) explores how perspectives of mutually beneficial reinforcement gained institutional traction and merged

3 GA Res. 76/300, 28 July 2022.

4 Human Rights Council, Resolution 48/13: The Human Right to a Clean, Healthy and Sustainable Environment, Doc. A/HRC/RES/48/13, 8 October 2021.

5 United Nations Environment Programme, 'In Historic Move, UN Declares Healthy Environment a Human Right', 28 July 2022, available at https://www.unep.org/news-and-stories/story/historic-move-un-declares-healthy-environment-human-right.

environmental concerns with the modernist human development agenda. The subsequent analysis then shows how this perspective was accommodated and enforced at different levels (law-making, adjudication, doctrinal analysis). Part 2 (Conflict Mediation Through Universalisation) takes a deep dive into the role that regional human rights courts have played in both defining and resolving conflicts between environmental protection and human rights.

Building on the hypothesis of a 'constructed synergy' (at 15), Chapter 1 starts with a historical account and shows how international legal instruments have defined the relationship between humans and (their) environment. Petersmann begins her analysis with what she calls 'the "early glimmers" of international environmental law, rooted in and shaped by colonisation and imperialism' (at 18). Here, she detects romantic ideals that sought to restore nature to a pristine and 'wild' state. While Petersmann concludes that these early forms of environmental law were governed by 'a strict separation between humans and "nature", driven by the conviction that any human presence would disturb the ecosystems that these instruments aimed to protect' (at 25), she also identifies aspects that, at first glance, do not support her narrative. Her account acknowledges 'intellectual traditions that considered "nature" … as amenable to "human" appropriation and exploitation' (at 19) and highlights the ensuing racialized relationships between colonizers and colonized that supported it. Petersmann also points out that, following this extractivist logic, several early multilateral environmental agreements[6] were not protective of nature *per se* but of natural resources (as commodities) and thus pursued anthropocentric objectives (at 25). However, in Petersmann's reading, this does not change the fact that these early environmental instruments were marked by a deep disconnection between environmental protection and human rights. Environmental protection was driven by protecting nature *per se* or ensuring the economic exploitation of natural resources, which were not yet framed in relation to human rights – that is, in relation to concerns for health or access to food, water or sanitation (at 26).

Against this background, her first chapter then traces the progressive integration of environmental protection and human rights and identifies a 'mantra of synergy' (at 97) that manifests itself in different forms: the recognition of human rights protection as a pre-condition for the fulfillment of environmental protection; the recognition of environmental protection as a pre-condition for the fulfillment of human rights; and the recognition of a stand-alone human right to a healthy environment (at 55). In line with the developments outlined above, Petersmann traces a shift from an overarching narrative of protecting nature *from* humans to protecting nature *for* humans (at 17). Instead of portraying humans as disruptive agents that nature needs to be protected against to thrive, humans now appear as stewards of nature and existentially who are reliant on environmental protection for the full enjoyment of their human rights.

[6] Treaty concerning the Regulation of Salmon Fishery in the Rhine River Basin (adopted 30 June 1885, entered into force 7 June 1886). London Convention Designed to Ensure the Conservation of Various Species of Wild Animals in Africa That Are Useful to Man or Inoffensive (1900) 56 British Parliamentary Papers 825; Convention for the Protection of Birds Useful to Agriculture (adopted 19 March 1902, entered into force 6 December 1905).

Chapter 2 explores how the jurisprudence of international and regional judicial bodies has defined and reproduced these understandings. It shows how a synergistic and anthropocentric perspective on environmental protection simultaneously emerged in rulings of regional human rights courts. Petersmann's analysis looks at different cases and judicial cross-references that over time produced a robust narrative of a mutually beneficial relationship between human rights and environmental protection. Chapter 3 then goes on to examine how the relationship between humans and the environment has been discussed (sometimes critically) in legal scholarship. Here, Petersmann identifies a 'common front in the literature that largely contributed to advancing both the agenda of environmental and human rights protection as well as their ever-closer intertwinement' and that reinforced the 'mainstream anthropocentric and synergistic framing' outlined above (at 80). While acknowledging critical discussions in the literature, Petersmann is critical of the 'problematic emphasis on synergies that take the mutually beneficial linkages between environmental and human rights protection for granted' (at 81). In the overall picture, all three frames of her analysis (law-making, judicial, doctrinal) lead to the same conclusion: the relationship between environmental protection and human rights continues to be framed in an anthropocentric and synergistic way.

Building on the analysis of the jurisprudence of regional human rights courts in Chapter 2 and concluding the first part of the book, Chapter 4 seeks to counter the synergy mantra by mapping the conflicts that occur between human rights and environmental protection. These conflicts are numerous and multifaceted. Drawing on a case law analysis of regional human rights courts, the chapter starts by identifying four main types of conflicts. The first category comprises conflicts between environmental protection measures and the rights of Indigenous peoples or cultural minorities that arise when states designate areas of environmental protection. The second category, according to Petersmann, has gained much less attention; it includes conflicts between animal welfare concerns and cultural or religious freedoms of certain communities. Conflicts between landscape preservation policies and land ownership make up Petersmann's third category, which seems closely related to the first. The fourth category is comprised of conflicts between energy policies and the rights to adequate living conditions and to property, which increasingly reach the European courts in Strasbourg and Luxembourg. While Petersmann mentions the four categories, she does not structure her chapter according to her own typology. As a result, the analysis of the case law presented in her fourth chapter is not always easy to follow, but Petersmann succeeds in highlighting how multifaceted the conflicts between environmental protection and human rights are.

This is already a rich account, but Petersmann does not leave it at that. Building on a theoretical framework that sees courts as vectors of normative transformation, the second part of her book is dedicated to the role that regional human rights courts play in defining and balancing conflicts between environmental protection concerns and human rights. Here, Petersmann identifies two universalization strategies that courts have embraced when seeking to balance the competing claims for environmental protection and human rights. Chapter 5 explores how – as a first universalization strategy – courts tend to frame the interest in environmental protection as being 'general' or 'universal' to legitimize restrictions on competing human rights. Since it

often remains unclear how courts determine this 'general interest', Petersmann uses Martti Koskenniemi's critique of legal indeterminacy and the politics of international adjudication to point out how patterns of determinacy emerge when courts regularly invoke the concept of 'general interests' (at 174). The analysis looks at cases from the jurisprudence of the Court of Justice of the European Union (CJEU), the European Court of Human Rights, the African Commission on Human and People's Rights and the Inter-American Court of Human Rights.

In line with her initial thesis that regional courts employ a largely undefined concept of a 'general interest' as a 'universalization strategy' to legitimize human rights restrictions, Petersmann focuses on cases where the general interest in environmental protection prevailed. The case law taken into consideration is quite diverse and ranges from cases that have a close link to the European single market to cases under the African and Inter-American human rights system that concern conflicts between conservation measures and land rights of Indigenous peoples. While Petersmann focuses on the courts' reasoning *vis-à-vis* an assumed 'general interest' in environmental protection, the facts of the cases suggest that there might be very different rationales at play. To illustrate, in the *Endorois* case, the African Commission held that the government of Kenya, by forcibly removing the Endorois people from their ancestral land when creating a game reserve, violated their human rights.[7] In the *Hauer* case,[8] the CJEU upheld Council Regulation (EEC) no. 1162/76 on Measures Designed to Adjust Vine-growing Potential to Market Requirements[9] and used it to justify an interference with Liselotte Hauer's right to property and her freedom to choose a professional occupation. While Petersmann reads the latter decision as part of an emerging environmental protection jurisprudence, it could also be argued that the Court in *Hauer* used the 'general interest' of the then European Economic Community to protect the single market and – in the wake of the *Solange I* decision of the German Federal Constitutional Court five years earlier[10] – to develop a coherent fundamental rights doctrine. This suggests that, in her attempt to distill a common 'universalization strategy' pursued by different courts, Petersmann may have cast the net rather wide. However, her discussion of a range of highly diverse cases clearly shows how complex the links between environmental protection, economic interests and human rights are.

As the framework of Part 2 suggests, Petersmann is interested not only in the details of specific cases but also in more general questions concerning the competence, capacity and legitimacy of courts to deal with these complex balancing processes between a presumed general interest in global environmental protection and competing human rights. In this vein, Chapter 6 engages with a second 'universalization strategy' that is employed to counter legal indeterminacy in conflicts between environmental protection and human rights: the recourse to scientific data and expert knowledge. Regional human rights courts frequently rely on expert knowledge to resolve these conflicts. Again, Petersmann not only seeks to highlight the role of expert knowledge

[7] ACommHPR, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, Communication 276/2003 (4 February 2010).

[8] Case C-44/79, *Liselotte Hauer v. Land Rheinland-Pfalz* (EU:C:1979:290).

[9] OJ 1976 L 135/32.

[10] BVerfGE 37, 271 – *Solange I* (1974).

in specific cases but also takes a more comprehensive approach. Based on an assessment of the role of expert studies and scientific and technical data in international environmental law, her sixth chapter analyses the impact of both scientific experts and specialized human rights experts in the adjudication of conflicts between environmental laws and human rights.

In her examination of the relevant CJEU jurisprudence, Petersmann develops several points of criticism (at 201). First, she points out that the Court relies on forms of scientific expert evidence that it is unable to substantively review. Second, she points out how the reliance on scientific data and expert knowledge fosters an 'expert-based managerial approach' (at 188) that presumes a concept of law that privileges scientific evidence as a source of determinacy and thereby hides the politics of expertise. Finally, Petersmann takes a critical look at the role of human rights experts in the adjudication of environmental cases by regional human rights courts (at 235). Here, her analysis of the relevant case law reveals that reliance on expertise affirms prevalent stereotypes about how Indigenous peoples and cultural minorities live 'in harmony with nature' (at 232). Her subsequent analysis highlights the ambivalent role of human rights experts who can both effectively strengthen the legal protection of Indigenous peoples or cultural minorities but often risk reproducing and reinforcing specific stereotypes that narrow the scope of self-determination and possibilities for alternative ways of life.

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In the final section of her conclusion, Petersmann directly addresses the questions that flow from her meticulous analysis: 'What do these findings and arguments mean for human rights and environmental lawyers moving forward? What do these insights tell us about the relationship between environmental protection and human rights?' (at 250). In stating that the contribution of her book is 'diagnostic rather than prescriptive' (at 251), Petersmann avoids answering these questions herself. If we try to offer our own response – guided by Petersmann's diagnostics and her emphasis on the conflicts between environmental protection and human rights – the evident fallacies of the mainstream anthropocentric and synergistic narratives about this relationship constitute an obvious starting point. Proceeding from this starting point, one might have expected human rights considerations generally to prevail over environmental concerns. However, notwithstanding the anthropocentric framing of environmental protection, this is not how the various conflicts between environmental and human rights protection, analysed in detail in this study, have typically been resolved.

When asking why this is so, we need to look beyond the overarching narrative of protecting nature *from* humans to protecting it *for* humans that lies at the centre of Petersmann's analysis. Instead, we need to ask: who is the 'human' we refer to both in international environmental and human rights law? Asking this question takes us back to the 'early glimmers' of international environmental law that Petersmann described in the first chapter of her book: imperial rule was largely based on the exploitation of the natural resources of the colonies. This extractivist logic has been deeply

inscribed in international law ever since Francisco de Vitoria defined the concept of *dominium* as absolute power of disposal over the natural environment and, thus, as a relationship between subject and object.[11] The sovereignty (*dominium*) of the Indigenous population over natural resources finds its limits in the *ius gentium*. Furthermore, sovereignty is already conceived as a right of appropriation.[12] In Vitoria's concept, sovereignty depended, amongst other things, on a society's ability to use nature productively. Non-European societies were therefore categorized according to their degree of control over nature.

As this brief summary indicates, in giving social meaning to nature, law not only defines binary and hierarchical relationships between nature and humans but also differentiates between different humans (and their relationship to nature). In Vitoria's original concept, nomadic societies were the furthest from sovereignty as they did not utilize the productive capacity of nature through consistent agriculture and farming. The land they inhabited remained *terra nullius*. In this account, nature thus features both as a justification for, and a driving force of, colonialism. Many contributions have shown how this extractivist logic of colonial environmental law was transferred to the post-decolonization period and framed in new categories such as 'economic development'.[13] If we look at these continuities, we see the persisting links connected to extractivism – poverty, economic inequality, racism and Indigenous dispossession – and recognize how current international law still favours historically privileged racialized groups.[14]

This longer-term perspective emphasizes continuity rather than caesuras. Rather than the shift to a synergistic understanding of environmental protection and human rights (which informs Petersmann's account given in her first chapter), it is the continuity between the extractivist logic of formal colonialism and an informal colonialism over natural resources after decolonization that determines the current conflicts between environmental protection and human rights. The longer-term perspective brings home that legal concepts devised to determine how we share the world's resources entail distributive processes among humans. In these distributive processes, some humans have more entitlements than others. The exploitation of nature by humans is thus paralleled by the exploitation of humans by other humans.[15] More specifically, the *anthropos* that forms the centre of international environmental law's anthropocentrism, whose economic activity is exceeding ecosystem limits and is

[11] F. de Vitoria, *De Indis et de Jure Belli* (1917).

[12] *Ibid.*, vol. 1, at 23, 24, 170ff; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2005), at 13ff.

[13] Anghie, *supra* note 13, at 196ff; Pahuja, 'Conserving the World's Resources', in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (2012) 398.

[14] Gonzalez, 'Racial Capitalism and the Anthropocene', in S.A. Atapattu, C.G. Gonzalez and S.L. Seck (eds), *The Cambridge Handbook of Environmental Justice and Sustainable Development* (2021) 72; Natarajan, 'Who Do We Think We Are? Human Rights in a Time of Ecological Change', in J. Dehm and U. Natarajan (eds), *Locating Nature: Making and Unmaking of International Law* (2022) 200; Ntina Tzouvala, *Capitalism as Civilisation: A History of International Law* (2020) 212.

[15] B. Latour, *We Have Never Been Modern* (1993), at 8.

often protected by international human rights norms, is a citizen of an industrialized country of the global North rather than a bearer of human rights from the global South. Viewed from this vantage point, the synergy-versus-conflict debate tends to miss the point that the conflicts in and between international environmental law and human rights law are preconfigured by extractivist relationships and racialized distinctions between different groups.

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These comments are not meant in any way to diminish Petersmann's achievements. As Petersmann notes herself, it was not her goal to dive into the questions of international law's anthropocentrism but, rather, to explore 'the problematic emphasis on synergies that take the mutually beneficial linkages between environmental and human rights protection for granted' (at 81). And Petersmann fully delivers on this research agenda. She conducts a stringent and meticulous analysis of the relevant case law of regional courts. At the same time, she raises fundamental questions about judicial reasoning in environmental cases and highlights the problematic role of expert knowledge and data in this context, providing a lucid account of the politics of 'expertise' in regional human rights courts. It is the combination of these different aspects that makes her analysis intriguing and fruitful for further research.

Petersmann's significant general contributions are threefold. Her first achievement is to intervene in a discourse that has for some time now evolved around the synergy mantra and largely ignored the conflicts between environmental protection and human rights. Stepping away from this synergy-centred perspective, her analysis makes us see a plethora of conflicts emerging between environmental protection and the property rights of private persons or companies or Indigenous peoples' or cultural minorities' rights. Second, Petersmann provides a thorough analysis of the jurisprudence of regional courts that carefully examines cases in which the general interest in environmental protection has prevailed. This is highly instructive and provides an overview not only of the relevant case law but also of its doctrinal and legislative background. Finally, the book goes beyond analysing the balancing processes undertaken by regional courts in specific cases and engages with structural issues of judicial legal reasoning in cases where environmental protection and human rights collide: 'general interests' and the politics of international adjudication, the inclusion of expert knowledge and the ambivalent role of human rights experts. Petersmann's 'diagnosis' opens the door for further research, urges us to question the 'buy one, get two' narrative of a synergistic relationship between environmental protection and human rights in both directions and encourages us to think deeper about international law's conflicts, outsides and fissures.

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https://doi.org/10.1093/ejil/chad064