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Primary obligations to combat climate change

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Symposium
Climate Justice

Judging climate change obligations: Can the World Court rise to the occasion?

Part I: Primary obligations to combat climate change

30.04.2020

The SARS-CoV-2 pandemic piles crisis atop crisis. As confirmed infection rates cross 2.5 million and attributed deaths pass 170,000 (at time of writing, in April 2020), it is increasingly being accepted that biodiversity loss has reduced the resilience of natural systems when faced with the emergence of new diseases. At the same time, ever closer contact between humans and animals (through intensive farming, habitat encroachment and other factors) has increased the likelihood of diseases arising in animals crossing into human populations, becoming novel 'zoonoses' (diseases transmitted from animals to humans) against which no one has an acquired immunity. Zoonoses are the sharp end of the wedge: they are but one—and hardly the most concerning—of the many threats biodiversity loss poses to our societies.

Set in today's context, a third level of crisis—that of irreversible climate change—continues not only to present a threat to human life and health in its own right, but serves as a driver and multiplier of biodiversity loss and the degradation of natural systems. Although COVID-19 is expected to produce the largest ever annual fall in CO_2 emissions, the overall trend of carbon dioxide levels in the atmosphere remains stubbornly upward, with March 2020 recording an average of 414.50 ppm CO_2 in the atmosphere at the Mauna Loa observatory, compared to 411.97 ppm in March of 2019.

As international legal scholars, we want to reflect on the potential and limitations of the object of our shared professional engagement: international law. Can it play a positive role in averting and tackling this present and worsening injustice? In this two-part post, we make two contributions to this special symposium, as to identify two key areas where international lawyers need to consider the potential for our discipline to contribute *strategically* to the fight against climate change, bringing the normative potential of international law to bear as an instrument or forum for global collective action against this phenomenon.

This first Part relates to the substance of primary rules of international environmental law, and its ability to grasp, apprehend and capture the complexity of phenomena such as carbon emissions collectively. Faced with the absence of clear obligations under the Paris Agreement, we offer some preliminary reflections on the potential of the No Harm rule (which we will capitalise here as 'No Harm' for emphasis) in allocating climate change mitigation obligations; which could be a likely subject of future litigation. The second Part of this post will address the tactics available under international law: Faced with persistently slow progress of international negotiations, combined with States' disappointing responses to the Paris Agreement's strategy of nationally determined contributions, the focus is increasingly turning to strategic litigation, which involves the conscious design of legal claims to advance the clarification, respect, protection and fulfilment of climate change mitigation obligations. In the second part, we will reflect on the potential advantages and challenges of international adjudication in judging climate change obligations, with a particular focus on the option of a contentious case before the ICJ.

Primary obligations to combat climate change: the content of a shared No Harm obligation

The last few decades of international climate negotiations have demonstrated that States (major emitters in particular) are patently unwilling to agree to a legal framework that specifies the scope and content of State obligations to combat dangerous climate change. While it has been recognised that holding the increase in global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels will significantly reduce the risks and impacts of climate change (Paris Agreement, Article 2(1)(a)), it remains unresolved what each State is legally required to do in order to achieve this common goal.

In the context of catastrophic climate change legal analysis must understand State responsibility collectively: as *shared responsibility*. Climate change can only be truly tackled by the collective efforts of many (if not all), and it will be impossible to trace a particular harm caused by climate change to the conduct of any single State. It should be noted at the outset that one may certainly find a degree of recognition of this shared responsibility in the climate change regime: see for example the principle of common but differentiated responsibilities reflected in Articles 3(1) and 4(1) UNFCC. This inescapable collective dimension gives rise to various legal challenges not only at the level of allocating primary obligations (as will be discussed in this first Part), but also at the level of adjudicating climate change and seeking remedies in a future contentious case (to be discussed in Part II). These challenges are not in the least due to the obstacle of *causation*, a notion which remains understudied in the law of international responsibility in general and international environmental law in particular.

The No Harm obligation is likely the primary candidate to ground the argument that States should do more to prevent dangerous climate change. No Harm has long been international environmental law's workhorse; it is a catch-all, which restrains action within States' territories even in the absence of a specific prohibition, where those activities cause significant harm in the territory of other States. Originally articulated in the Trail Smelter arbitration, it was included in the (soft law) Stockholm and Rio declarations of 1972 (principle 21) and 1992 (principle 2). In its 1996 advisory opinion in Threat or Use of Nuclear Weapons, the ICJ confirmed that the obligation to ensure that activities within a State's jurisdiction respect the environment of other States or of areas beyond national control has the status of customary international law (at paragraph 29). In the absence of more specific norms in the major climate change conventions which could give rise to a cause of action, it seems likely that the No Harm rule will again be pressed into service in this domain.

Prima facie, No Harm appears promising. Climate change is indisputably causing harm—and will increasingly do so—to States at a level which is "significant". But discerning the normative content of that obligation to judge the concrete behaviour of one State will not be an easy task. This is in the first place because the nature of the obligation is inherently flexible. As an obligation of conduct, the No Harm rule requires a State to take reasonable measures to prevent activities within its jurisdiction from causing serious transboundary damage, but does not specify the precise form such measures should take. Rather, States are required to act with *due diligence* to prevent the activities within their jurisdictions from causing significant harm to the territories of others (see *Pulp Mills*, paragraph 101).

Due Diligence

Yet the standards of conduct demanded by due diligence also remain to be clarified in this field, and may vary from case to case, dependent for example on the capabilities of the duty-bearer in question. Bodansky, Brunnée and Rajamani have highlighted the concern that the 'evolution of the UN Climate regime may have made it easier for States to demonstrate their due diligence' by implicitly linking that standard to the achievement of the goals the State sets for itself in its Nationally Determined Contribution under the Paris Agreement (see their *International Climate Change Law* (OUP 2017), at p. 45-46). In such a reading of the standard, a State need do no more than meet the threshold of action it has set for itself (however low that be) to have acted with "due diligence", which is clearly, as they indicate, insufficient.

In the context of international adjudication, the No Harm rule has been forged in the context of classical bilateralism; applied to situations where activities on one State's territory cause serious environmental harm to one other State. The fact that, when it comes to combatting climate change, this obligation is incumbent on all States simultaneously will surely complicate any exercise aimed at interpreting the content of that obligation. Since only the concerted efforts of States will stand a chance at preventing the transboundary harm caused by climate change, the content of the No Harm obligation for one respondent State may very well be influenced by what can reasonably be expected of other duty-bearers in their collective pursuit of reducing the risk of dangerous climate change. An interesting question would be whether the no-harm rule in the context of climate change requires States, as part of the reasonable measures they are expected to take, to engage with one another and take those measures that are available to them to ensure that *other* States do their part, considering in particular that any (future) harm caused would be the result of the conduct of many States.

Causation

Importantly, in order to establish a violation of the obligation to prevent transboundary harm, a causal link will need to be established between the activities occurring within a respondent State's jurisdiction and the (potential) harm caused by climate change. The first step would be *scientific causation*, in which it must be shown that the direct harm caused to the applicant State (or, indeed, to global commons) – be it rising sea levels, drought, extreme weather, or any of many other effects – is indeed *the result of* human-induced climate change. As Evangelidis has discussed on this blog, that link is far from straightforward to draw, requiring as it does the uneasy marrying together of scientific probabilistic standards of proof with law's demand for certainty. ICJ case law is hardly encouraging. In *Pulp Mills* (para 162), an environmental dispute, the Court insisted on well-worn principle of *onus probandi incumbit actori* – the burden of proof laying on the party making an allegation. In *Application of the Genocide Convention (Croatia v Serbia)*, the ICJ insisted in that evidence be "fully conclusive" (para 178) in situations where the charges are of 'exceptional gravity', though it is possible that the latter would be restricted to a breach of a peremptory norm.

Moreover, it would be necessary to show that activities within any particular respondent State's jurisdiction or control have *causally contributed* to the collective harm of global warming; a task which, in light of the contributions of others to the same harm and the unclear concept of causation in international law, will likely prove daunting. The fact that climate change is the result of the combined conduct of many may prove to be an alluring counter-argument for a respondent State, particularly if its contribution to global emissions consists of a small share, a claim which can be made by virtually all States other than a select few such as the USA and China. Together the USA, China and the EU account for 59.7 per cent of cumulative global emissions as of 2017, with the next-ranked State, Russia, only accounting for about 6 per cent. Together the entirety of Africa, South America and Oceania account for just 7.2 per cent of cumulative global emissions.

Nonetheless, there are glimmers of hope from domestic courts. In the recent *Urgenda* case, the Government of the Netherlands had contended that it had not breached its duty of care under Dutch tort law, as its contribution to global emissions is minor, and reducing its emissions would make little difference on a global scale). That argument was ultimately rejected by the Dutch *Hoge Raad* (Supreme Court), which underlined the importance of calling a State to account for its share of emissions because each reduction of greenhouse gas emissions has a positive effect on combating dangerous climate change and, accordingly, no reduction is negligible. A similar finding of State duties on the international plane would have a great potential to shape the legal landscape across the broad field of community interests in international litigation, with consequences far beyond the climate crisis.

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