Interstate liability for climate change-related damage
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Introduction

In 1999, Kiribati’s uninhabited islands Tebua Tarawa and Abanuea disappeared underwater. In 2007, the ocean engulfed a sandy islet in Micronesia’s Pohnpei State and another islet split due to coastal erosion. Two more islands in the Chuuk Sea lagoon have now been completely submerged. Suparibhanga and Lochacharra on the Indian side of the vast Sunderbans, where the Ganges and Brahmaputra empty in the Bay of Bengal, have sunk and a dozen more nearby islands are under threat. A contemporary Inupiaq community of Shishmaref located on the island of Sarichef in Northwest Alaska has determined that the best way to adapt to the destructive beachfront erosion is to relocate the entire community to mainland Alaska. Devastating heat waves, wild fires, floods, droughts and hurricanes across the continents make the news on a continuous basis.

These reports conjure up fantastical images of the Plagues of Egypt and evoke the tale of Atlantis whose abysmal fate the inhabitants of island states and coastal communities now hope to avoid. The manifold manifestations of change affecting the climate system are expected to result in injurious consequences that will threaten sustainable habitation of the Earth.¹ Current and imminent damage from slow onset events (e.g. the rising sea levels, ocean acidification, desertification) and extreme weather events warrants a comprehensive response from the international community and local societies.

Climate change can be addressed locally through adaptation to its injurious consequences and internationally through concerted mitigation action. Largely based on mitigation and adaptation, today’s international climate policy aims to prevent dangerous anthropogenic interference with the climate system.² Although mitigation and adaptation could significantly reduce the risks of climate change, they cannot avoid all climate change impacts,³ and some degree of harm is unavoidable. Yet, the international climate regime does not address the injurious consequences of climate change. In 2010, the Conference of the Parties to the United Nations Framework Convention on Climate Change (also UNFCCC, or the Convention) established a work programme on approaches to address loss and damage associated with climate change impacts in developing countries that are

¹ See Chapter 1.
particularly vulnerable to the adverse effects of climate change. In 2012, parties to the Convention agreed to establish institutional arrangements, such as an international mechanism, to address loss and damage, but that will not happen before the nineteenth Conference of the Parties (COP) in 2013.

In 2002, Tuvalu, a small island developing nation in the Pacific vulnerable to the rising sea levels, considered bringing a claim before the International Court of Justice (ICJ) against the United States (US) and Australia, major emitters in the industrialized world. Possibly due to legal or political considerations, this plan never came to fruition. Instead, Tuvalu, together with other developing countries that are particularly vulnerable to the adverse effects of climate change, has been pursuing a multilateral negotiations strategy directed towards a comprehensive global agreement that would address climate-related risk management and risk reduction, including risk-sharing and risk-transfer mechanisms. Risk management and transfer mechanisms, alongside with carbon dioxide capture and storage in geological formations (CCS), may become effective adaptive strategies. However, many developing states do not have the economic capacities or the technological know-how to ensure timely preparation of their socio-economic infrastructure to the injurious effects of climate change. As more and more climate change impacts are felt around the world and given the slow pace of the international negotiations towards an effective international agreement, litigation may come as an attractive option, especially to states that are particularly vulnerable to climate change impacts.

The present work assesses the suitability of the law of state responsibility for climate change litigation. The research question can be formulated as follows: can injunctive relief, i.e. a court or arbitral tribunal order requiring a party to do – or to refrain from doing – something, provide an effective legal remedy for climate change-related damage within the framework of the law of state responsibility?

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5 Approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change to enhance adaptive capacity, FCCC/CP/2012/L.4/Rev.1 (UNFCCC decision number not available at the time of writing), 8 December 2012, para. 9.
7 See e.g. Views on the work programme to consider approaches to address loss and damage, submission of Grenada, on behalf of AOSIS, FCCC/SBI/2011/MISC.1 (28 February 2011).
8 See Modalities and procedures for carbon dioxide capture and storage in geological formations as clean development mechanism project activities, UNFCCC Decision 10/CMP.7 (2011).
Chapter 1 sets the scientific background by describing the physics of climate change, including its causes, consequences, manifestations, and impacts on regions as well as on systems and sectors. It also addresses the main response strategies recommended by science, namely mitigation and adaptation. Chapter 2 sets the legal context by introducing the international climate regime governed by the 1992 United Nations Framework Convention on Climate Change, 1997 Kyoto Protocol (also KP, or the Protocol), and decisions taken by the COP and Conference of the Parties serving as Meeting of the Parties to the Kyoto Protocol (CMP). Chapter 3 identifies international liability regimes relevant to climate change-related damage. It distinguishes between state responsibility and state liability and outlines the various conceptual approaches to the latter based on: (1) the obligation to pay compensation; (2) the obligation to negotiate a redress settlement; (3) the obligation to ensure prompt, adequate, and effective compensation; and (4) the obligation to take response action. In the absence of interstate claims related to climate change, Chapter 4 turns to domestic litigation in order to identify some general principles of law which operate as barriers to a successful claim. It is argued that those legal principles could potentially cause obstacles to liability also at the interstate level. In dealing with liability for climate change-related damage in domestic courts, Chapter 4 analyses three groups of cases from a number of different jurisdictions: claims related to procedural injury; claims for compensation; and claims for injunctive and/or declaratory relief. Chapter 5 takes the analysis to an international level by applying the legal framework of the law of state responsibility to the climate change problem. It identifies the relevant primary obligations of states: international obligations on climate change mitigation; obligations on climate change adaptation; and the customary obligation to prevent significant transboundary harm. In determining the origins of state responsibility for breaches of the relevant obligations, four groups of states are distinguished in accordance with the principle of common but differentiated responsibilities and respective capabilities encapsulated in the UNFCCC:\footnote{1992 UNFCCC, Art. 3(1).} industrialized states party to the KP; countries in transition to a market economy (EITs); industrialized states not party to the KP; and developing states. Chapter 5 then proceeds to address the content and the implementation of state responsibility for breaches of those obligations. Finally, Chapter 6 brings the analysis together by making some concluding remarks.

Focusing on liability, the present work does not address adaptive strategies related to CCS or risk assessment and transfer in respect of loss and damage associated with the adverse effects of climate change. From a methodological point of view, the research is largely descriptive insofar as it deals with climate change science
(Chapter 1) and the international climate regime (Chapter 2). An analytical approach is adopted in Chapter 3 where the various international liability regimes are identified and the suitability of the existing conceptual approaches to liability to climate change-related damage is assessed. Chapter 4 is likewise analytical in its approach insofar as it seeks to explore some general principles of law from climate change liability lawsuits litigated in domestic courts. In applying the legal framework of the law of state responsibility to breaches of state obligations related to climate change, Chapter 5 contains some normative elements.