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Seeking climate justice in customary international law

International agreements have been adopted, in the last quarter of a century, in order to mitigate climate change and to promote adaptation to its adverse impacts. Their success has been limited. National commitments to limit or reduce greenhouse gas emissions are inconsistent with the global objectives defined in the Cancún Agreements and the Paris Agreement. These global objectives would be insufficient to avoid significant harms, including by rendering low-lying island States fully uninhabitable. Claims for reparation have only led to limited international funding in support to adaptation and some discussions on the best ways to address loss and damage. Recent developments have taken place in other international legal regimes (e.g. International Civil Aviation Organization, Montreal Protocol on ozone depleting substances), but they will not suffice to solve the gap between what States do and what States agree they should do.

Are these agreements really all international law has to say about climate change? My research suggests that it is not. Turning to customary international law, it suggests that States have well-established obligations relevant and applicable in the context of climate change, including an obligation to prevent excessive greenhouse gas emissions under their jurisdiction and, if this primary obligation is breached, secondary obligations to make adequate reparation.

- No-harm principle

The "cornerstone" of international environmental law,[1] recognized as customary international law by the International Court of Justice,[2] the no-harm principle involves an obligation for States not to cause serious environmental harm beyond their border as well as an obligation to prevent activities causing such harm from taking place under their jurisdiction. Although the no-harm principle was established in cases of classical transboundary pollution, there is no valid reason to exclude its application to damages to the global environment – the no-harm principle should apply *a fortiori* when the very existence of nations and, possibly, the survival of humankind are at risk.[3]

- Law of State responsibility

A breach of the international obligation of a State entails an obligation to make adequate reparation for the resulting injury. An injury is constituted by the "proximate" consequence of a wrongful act, whether direct or indirect.[4] Arguably, a breach of the no-harm principle through excessive greenhouse gas emissions entails – arguably – an obligation to make adequate reparation for the impacts of climate change.

This argument has many obstacles which cannot be all addressed here.[5] Moreover, an intellectual exercise in assessing States' obligations will not automatically translate in concrete steps towards climate justice. At least, however, I hope that this research will promote the use of law as a tool for justice, among others through judicial activism at all levels of governance, by rebutting the idea that climate change agreements exclude the application of principles of international justice.

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[1] P. Sands and J. Peel, *Principles of International Environmental Law* (Cambridge University Press, 2012), at 191
[2] Advisory Opinion on The Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p. 226, at para. 29.
[3] See e.g. my debate with Alexander Zahar in (2014) 4 Climate Law 217 and (2015) 5 Climate Law 1.
[4] See ILC, Articles on the Responsibility of States for Internationally Wrongful Acts (2001) and Commentary thereof.
[5] I am preparing an exhaustive discussion in Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press, under contract).