

Book Review

State Responsibility, Climate Change and Human Rights under International Law, by Margaretha Wewerinke-Singh

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Wewerinke-Singh offers an insightful doctrinal study of the circumstances under which the impacts of climate change on the enjoyment of human rights may entail a state's responsibility for an internationally wrongful act. The author argues that 'existing norms of international law are sufficient to establish state responsibility for acts and omissions that lead to dangerous climate change and associated violations of human rights'.¹ While jurisdictional barriers hinder litigation based on climate treaties and the no-harm principle, human rights, Wewerinke-Singh argues, could be instrumental in bringing climate change mitigation to courts.

The book is organised in two parts. Following a brief introduction, the first part contains three chapters that identify and interpret rules arising respectively from international human rights law, international climate law, and the law of state responsibility. A last chapter suggests the need for an integrated interpretation of these three fields of law, building on the work of the International Law Commission on the risk of fragmentation in international law. The second part of the book analyses the responsibility of states for the impacts of climate change, approached as breaches of international human rights law. Two chapters explore the condition for a state's responsibility for an internationally wrongful act, namely the existence of a breach of international law and its attribution to the state. The last two chapters discuss the possible remedies and the possible litigation pathways.

The publication of this book is highly timely. It engages directly with ongoing academic discussions on the relation between climate change and human rights, as well as debates on the prospects for litigation on climate change. As the author highlights, human rights law is an attractive legal basis for climate litigation because of easier conditions for standing and the availability of dedicated international quasi-

judicial bodies.² In fact, the publication of the book coincided with the judgment of the Supreme Court of the Netherlands (where Wewerinke-Singh is now based, at Leiden University) in *Urgenda v the Netherlands*, which upheld an interpretation of the European Convention on Human Rights as requiring the Netherlands to achieve 25 percent emission reduction by 2020, compared with 1990.³ Moreover, several human rights treaty bodies have recently included consideration for states' climate change mitigation and adaptation action in their observations on the compliance of these states with their human rights obligations.⁴

While it is often assumed that human rights law requires states to mitigate climate change, this book is one of the first attempts at outlining a complete and coherent doctrinal defence of this idea. The task reveals particularly difficult. Climate change affects the enjoyment of human rights, which states have an obligation to protect. Yet, most of the impacts of climate change take place oversea, and the causal link between a state's greenhouse gas emissions and the loss of enjoyment of a human right is, at best, very tenuous.

Three major obstacles to the argument can be noted. First, it is far from clear that states have obligations (especially positive ones) to protect the enjoyment of human rights in other countries.⁵ Second, the causal relation between greenhouse gas emissions and any human rights violation is problematic: it is

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1 Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart 2019) 10.

2 *ibid* 80.

3 *Urgenda v the Netherlands* (Supreme Court Judgment) (20 December 2019), ECLI:NL:HR:2019:2006.

4 See for instance Committee on Economic, Social and Cultural Rights (CESCR) 'Concluding Observations on the Sixth Periodic Report of Germany' UN Doc E/C.12/DEU/CO/6 (27 November 2018) paras 18–19; and CESCR 'Concluding Observations on the Fourth Periodic Report of Argentina' UN Doc E/C.12/ARG/CO/4 (1 November 2018) paras 13–15.

5 See *The Environment and Human Rights* (2017) IACTHR Series A No 23, suggesting that a person affected by transboundary environmental impacts is within the 'jurisdiction' of the state of origin and, therefore, within the geographical scope of that state's human rights obligations.

unclear whether a state's greenhouse gas emissions can really be viewed as causing 'a real and immediate risk to life' requiring the state to 'do all that could be reasonably expected' to avoid it, as Wewerinke-Singh suggests.⁶ Third, the content of states' human rights obligations in relation to climate change would be challenging to interpret: if states must mitigate climate change in order to protect the enjoyment of human rights, what *precisely* are they required to do – how many percent points of emission reductions?

Wewerinke-Singh flags these issues and seeks to address them. On the third issue, the author notes that a state's internal laws and policies, or its international commitments, could be used as benchmarks.⁷ As such, human rights law may provide a 'legal back-up for provisions that are not legally binding per se'.⁸ At other points, a careful reader may however observe some instances where the book's concision seems to come at the expense of a rigorous analysis. One may not be fully convinced, for instance, by the author's argument that human rights treaties require states to protect the human rights of everyone anywhere. It is unavoidable that this six-page argument,⁹ which goes against the text of most human rights treaties,¹⁰ judicial decisions¹¹ and the literature,¹² leaves many objections unaddressed. Likewise, the author's characterisation of 'the norms contained in the [Universal Declaration of Human Rights]' as applicable customary international law is unsubstantiated – the only reference that follows, an Advisory Opinion of the International Court of Justice,¹³ does not mention human rights or the UDHR. The reader could also not be convinced by the interpretation of the right of self-determination

as *jus cogens* far beyond its context of decolonisation in which this right was recognised.¹⁴ Yet, none of these points prevents Wewerinke-Singh from developing, in general, a strong, important and interesting argument.

The reader may wonder whether human rights law – despite its strategic perks – really provides a useful lens to examine climate change and its impacts. Even if some physical events can be attributed to climate change,¹⁵ one would then need to establish that the harm caused by such events on the enjoyment of human rights is also caused by climate change, and not mostly by the failure of the local government to take appropriate measures to protect its population. From a more strategic perspective, a focus on human rights law risks highlighting the obligation of the territorial state to protect individuals within its jurisdiction, rather than the responsibility of polluting states. And, in any case, a human rights perspective would only capture a small share of the impacts of climate change, most of which affect broader human interests, the interests of future generations, or ecological values, that do not fall within the scope of any human rights.

More fundamental principles of general international law may offer a more comprehensive basis to assess states' rights and obligations, and their responsibilities, with regard to climate change. States' own rights – their right to exploit their natural resources,¹⁶ for instance – imply the existence of obligations born by other states.¹⁷ As Wewerinke-Singh justly notes, the no-harm principle should be interpreted as prohibiting excessive greenhouse gas emissions, since such emissions would affect the rights of other states.¹⁸ State responsibility would likely be viewed

6 Wewerinke-Singh (n 1) 110.

7 *ibid* 132.

8 *ibid* 133. See also Benoit Mayer, 'Interpreting States' General Obligations on Climate Change Mitigation: A Methodological Review' (2019) 28 *Review of European, Comparative & International Environmental Law* 107, 115–117.

9 Wewerinke-Singh (n 1) 34–40.

10 See eg International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 2(1).

11 See eg European Court of Human Rights, *Al Skeini and others v. the United Kingdom*, Application No. 55721/07, [2011] ECHR 1093.

12 See eg Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (Oxford University Press 2011).

13 *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, para. 79 (recognizing 'many rules of humanitarian law applicable in armed conflict', but not any rules of human rights law, as customary international law).

14 Wewerinke-Singh (n 1) 98–104.

15 *ibid* 18–19. See however Mike Hulme, 'Attributing Weather Extremes to "Climate Change": A Review' (2014) 38 *Progress in Physical Geography: Earth and Environment* 499.

16 Rio Declaration on Environment and Development in 'Report of the United Nations Conference on Environment and Development' UN Doc A/CONF.151/26 (vol I) (12 August 1992) Annex 2, Principle 2.

17 See e.g. *Corfu Channel (United Kingdom v Albania)* (Judgment) [1949] ICJ Rep 22.

18 Wewerinke-Singh (n 1) 55–59. See generally Benoit Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics' (2016) 19 *Asia Pacific Journal of Environmental Law* 79; Alexander Zahar, 'Mediated versus Cumulative Environmental Damage and the International Law Association's Legal Principles on Climate Change' (2014) 4 *Climate Law* 217; Benoit Mayer, 'The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar' (2015) 5 *Climate Law* 1; Alexander Zahar, 'Methodological Issues in Climate Law' (2015) 5 *Climate Law* 25; Alexander Zahar, 'The Contested Core of Climate Law' (2018) 8 *Climate Law* 244; Benoit Mayer, 'The Place of Customary Norms in Climate Law: A Reply to Zahar' (2018) 8 *Climate Law* 261.

far more comprehensively from this approach, since states, which in principle are intemporal, can claim reparation for harm to its territory (including its natural resources) and its subjects¹⁹ that are yet to unfold.

Notwithstanding the primary rules at issue, applying the law of state responsibility in relation to climate change would raise additional challenges, as Wewerinke-Singh notes. One such difficulty would be to determine the responsibility of a state in relation to the harm that results from the cumulative action of many states over decades or centuries. Wewerinke-Singh relies on Article 47 of the Draft Articles on State Responsibility, regarding the plurality of responsible states, to suggest that states' responsibility could be joint and several.²⁰ This article relates to cases where the responsibility of several states arises from the *same* internationally wrongful act – 'a single course of conduct'.²¹ It is not clear whether such is really the case when many states breach the same international law obligation at the same time but without acting in concert. Here again, a more thorough inquiry would be necessary in support of any firm conclusions.

There is eventually a risk, as Wewerinke-Singh notes, that 'the consequences of a duty to make full reparations exceed what the responsible state can bear on its own'.²² In fact, the obligation to make full reparation, codified in the Draft Articles on State Responsibility, has never been applied in cases where reparation would have been extraordinarily costly

for the responsible state. In such cases, it has been suggested that an 'appropriate reparation' could take more innovative forms.²³ One could argue that the emphasis should be heavily on the cessation of the wrongful act rather than on reparation for its consequences. Some innovative forms of symbolic reparation, such as a memorial policy (e.g. construction of museums and monuments), could acknowledge the wrongfulness of continuing high levels of greenhouse gas emissions and, thus, help induce stronger global efforts on climate change mitigation.

While many questions remain open, Wewerinke-Singh's book is a pioneering study which ought to be read by anyone interested in the relation between climate change and human rights in general, and by the prospect of climate litigation based on human rights law in particular.

19 See *The Mavrommatis Palestine Concessions (Greece v United Kingdom)* (1924) PCIJ Rep Series A No 2, 12 (recognizing that each state has the 'right to ensure, in the person of its subject, respect for the rules of international law').

20 Wewerinke-Singh (n 1) 92–96.

21 International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts' in *Yearbook of the International Law Commission, 2001, Volume II*, UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) (2001), Commentary on Article 47, para 3.

22 Wewerinke-Singh (n 1) 139.

23 Benoît Mayer, 'Less-than-Full Reparations in International Law' (2016) 56 *Indian Journal of International Law* 463; Benoît Mayer, 'Climate Change Reparations and the Law and Practice of State Responsibility' (2017) 7 *Asian Journal of International Law* 185.