The No-Harm Principle as the Foundation of International Climate Law

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Chapter 1

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This chapter argues that the customary 'no-harm' principle, conceived by the ICJ as a principle according to which States must prevent activities within their jurisdiction from causing extraterritorial environmental harm,[1] applies to the regulation of greenhouse gas emissions (GHG) that are interfering with the global climate system. As a helpful complement to (invaluable) treaty-based obligations, this principle should help put pressure on States and lead them to reduce their GHG emissions.

1. The no-harm principle applies to the regulation of the causes of climate change

The customary nature of the no-harm principle is now firmly established.[2] As a general obligation of due diligence from which a number of procedural obligations arise, this principle has significant consequences for States. As such, it forms the bedrock of international environmental law in general,[3] and of international climate change law in particular.

1.1. A due diligence obligation

The obligation not to harm the environment in the territory of other States or in areas beyond national jurisdictions is a long-established rule, first identified in the 1941 *Trail Smelter* arbitration case,[4] that recent case law has clarified while highlighting some of its implications. In particular, the obligation not to cause damage has been understood as a positive obligation, and more specifically a duty of due diligence (an obligation of conduct and not of result).[5] States must act with due diligence in order to ensure to the highest possible extent that activities that are carried out on their territory or within their jurisdiction do not cause harmful consequences to other States or to areas beyond their national jurisdiction. This obligation has been construed by the International Tribunal for the Law of the Sea (ITLOS)'s Seabed Disputes Chamber in 2011 as "an obligation to deploy adequate means, to exercise best possible efforts, to do the utmost, to obtain this result".[6] It is seen as broad and demanding obligation "which entails not only the adoption of appropriate rules and measures,

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[1] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010*, p. 14, §101.

[2] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 241, §27.

[3] P. Sands, J. Peel, *Principles of International Environmental Law*, Cambridge University Press, (3rd ed., 2012), p. 191.

[4] *Trail Smelter case (United States, Canada)* (Award) [16 April 1938 and 11 March 1941], *Report of International Arbitral Awards,* Vol III (1920).

[5] On the distinction between obligation of conduct and obligation of result (and some confusion in the early work of the International Law Commission), see generally P.M. Dupuy, 'Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility'. European Journal of International Law 10, no. 2 (1 January 1999): 371–85.

[6] ITLOS, *Responsibilities and Obligations of States with respect to Activities in the Area,* 2011, p. 41, §110.

but also a certain level of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators".[7] Thus, this due diligence obligation requires States to regulate the conduct of private actors. This approach is all the more relevant in a matter like climate change where the direct obligation of a State to deploy adequate means may have an indirect impact on private actors whose activities, within the State's territory or jurisdiction, are responsible for a very large part of global GHG emissions.

Originally aimed at fostering good neighbourly relationships between equal States, the no-harm principle was first recognized in a transboundary context, but it also applies to global threats like climate change. As pointed out by Benoît Mayer, "The rationale which justifies a prevention of activities that cause local transboundary damage applies *a fortiori* to circumstances where the stakes include the prosperity, viability or survival of other states and human civilization as a whole".[8] On the one hand, as GHGs promptly mix up in the atmosphere, the effects of emissions are not related to the location of their source. The increase in GHG in a particular country or region of the world can thus have diffuse consequences around the world. On the other hand, as Christopher Campbell-Duruflé recognizes,[9] scientists are increasingly capable of attributing specific extreme weather events to anthropogenic greenhouse gas emissions.[10] The causal link is even easier to establish with regard to slow-onset events that could result in the "sinking" of island States, transformation of ecosystems, or change in traditional land use.

1.2. Procedural dimensions

It is also well established that a number of procedural obligations arise as corollaries of the general due diligence obligation: information, notification, cooperation, impact assessment and continuous monitoring.[11] Particularly relevant in the context of climate change, this set of procedural obligations lead States, on the one hand, to cooperate and, on the other hand, to continuously assess, monitor and improve their climate policy, taking into account scientific and technological progress.

2. The due diligence obligation as a helpful complement to treaty-based obligations

The material scope of the general obligation of due diligence is extremely wide. It can be seen as an "umbrella" or a chapeau obligation. It does not conflict with treaty-based obligations, but rather could make up for the potential shortcomings of treaties.

2.1. Absence of conflict

With regard to GHG emissions, there is no conflict or inconsistency between the no-harm principle and obligations arising from climate treaties. The Paris Agreement does not say anything different from customary law — in particular, it does not create any legal right or entitlement to emit any quantity of GHGs. On the contrary, the Parties' acceptance of the no-harm principle is reflected in the Preamble of the UNFCCC, which recalls that States "have the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

[7] *Pulp Mills on the River Uruguay (Argentina v Uruguay)* above p. 14, §197.

[8] B. Mayer, "Construing International Climate Change Law as a Compliance Regime", *Transnational Environmental Law*, 7:1 (2018) p. 121.

[9] See Campbell-Duruflé, this volume, chapter 2.

[10] Bulletin of the American Meteorological Society, *Explaining Extreme Events from a Climate Perspective*, BAMS Special Report (December 13, 2017), p. 1.

[11] See in particular *Certain Activities…*.

jurisdiction".[12] The objective of the UNFCCC, to which both the Kyoto Protocol and the Paris Agreement refer, is "to achieve (…) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".[13] To avoid any risk of misunderstanding, some States – among them small Pacific island states – have made declarations specifying for instance that their ratification "shall, in no way, constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change, and that no provisions in the Convention can be interpreted as derogating from the principles of general international law".[14] In such a situation, when two rules applicable to the same subject-matter are not incompatible, the "principle of harmonization" mentioned by the ILC in its work on the fragmentation of international law, applies. This principle implies that, unless States decide otherwise, the interpreter is to try to read different rules as compatible.[15]

2.2. Complementarity

The due diligence obligation is a general obligation – applicable to all States regardless of whether or not they have ratified any treaties. It is binding on all States, including those who lack specific mitigation commitments under the Kyoto Protocol or Paris Agreement.

Most of the time, it applies alongside conventional obligations. In this case, it remains an interesting basis that could be relied on, in addition to such obligations. Indeed, the customary obligation of due diligence complements conventional obligations, keeping in mind that, to this day, the commitments to reduce emissions pursuant to climate treaties are inadequate and insufficient to "prevent dangerous anthropogenic interference with the climate system".[16] In other words, climate treaties do not yet fully embody the customary due diligence obligation. A State may comply with its conventional commitments while failing to meet its customary obligation, with regard either to the substantial or procedural components of this obligation. As for conventional obligations (in particular arising out of the UNFCCC, Kyoto Protocol, Paris Agreement, and related decisions of the Parties), they must be interpreted in the light of the customary obligation, which can result in additional obligations. In practice, conventional and customary due diligence obligations mutually feed and shed light on one another. The recent award on the South China Sea perfectly reflects the mutually reinforcing relation that can take place between these different kinds of obligations: in this instance, the Tribunal found that the no-harm rule "informs the scope of the general obligation in Article 192" of the United Nations Convention on the Law of the Sea.[17]

Thus, despite being general in substance, the customary basis can still be relevant, including in the case of a dispute between two (or more) States that are Parties to the Paris Agreement. It could inform, for instance, the assessment of the ambition of national contributions. Submitting and implementing an NDC is a means to implement the due

[12] UNFCCC, Preamble.

[13] UNFCC, Article 2.

[14] Fiji Declaration upon ratification, UNFCCC, 25 September 1993. Kiribati, Nauru, Papua New Guinea and Tuvalu have made similar declarations. Under the Kyoto Protocol, Cook Island, Kiribati, Nauru and Niue have done the same. Even more such declarations have been made pursuant to the Paris Agreement (Marshall Islands, Micronesia, Nauru, Niue, Philippines, Solomon Islands, Tuvalu and Vanuatu). The wording differs slightly sometimes and some are more specific. See, for instance, Cook Islands Declaration upon ratification of the Paris Agreement, 1st September 2016.

[15] *Fragmentation of international law: difficulties arising from the diversification and expansion of international law, Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi*, A/CN.4/L.682, 13 April 2006, p. 119.

[16] UNFCCC, Art. 2.

[17] *PCA Case Nº 2013-19 in the Matter of the South China Sea Arbitration before an Arbitral Tribunal constituted under annex VII to the 1982 United Nations Convention on the Law of the Sea, between the Republic of the Philippines and the People's Republic of China*, Award, ICGJ 495, §941.

diligence obligation, provided that the NDC is sufficiently ambitious and equitable, and not an empty shell. This was *mutatis mutandis* the reasoning followed by the Supreme Court of the Netherlands regarding the State's 2020 target ("Cancun pledge") in the *Urgenda* Case. After mentioning "the 'no harm principle', a generally accepted principle of international law which entails that countries must not cause each other harm [...] also referred to in the preamble to the UNFCCC", the Court stated that States "can be called to account for the duty arising from this principle. Applied to greenhouse gas emissions, this means that they can be called upon to make their contribution to reducing greenhouse gas emissions".[18]

Considerations as to the capacity of a State to take preventive action and the proportionality of the measures chosen to reduce the harm will be relevant to the determination of the standard of care that such State should follow.[19] But this "standard of care" is not set in stone. It evolves over time alongside scientific and technological knowledge, and in space, depending on the different capacities of States, which themselves also evolve over time. As years go by, States' obligations become increasingly onerous. Foreseeability of harm continuously increases, thanks in particular to the work of the IPCC, with States approving – and, in a way, endorsing – their Summary for Policymakers. Proportionality also evolves with scientific knowledge. However, the risk involved for some States, in particular small island States, is so great, including substantial or even total loss of territory, that only very significant GHG reduction measures could be considered proportionate.[20] Admittedly, States may have different interpretations of what it means for a State to be acting diligently, and a court or tribunal would have a considerable margin of appreciation. This margin of appreciation is inherent in the process of adjudication, and, indeed, international courts are used to dealing with fuzzy or variable notions such as the principles of reasonableness or equity.[21]

3. The due diligence obligation provides a legal basis for State responsibility claims in connection with climate change damage

As the no-harm principle is a due diligence obligation, a State can be held responsible on the basis that it has failed to take necessary and adequate measures to prevent adverse impacts on the climate system, that is to say to regulate adequately emitting activities carried out within its territory or jurisdiction. In its substantial and procedural dimensions, it provides a legal basis for State responsibility claims in connection with climate change damage. Beyond its preventive role, it paves the way for raising litigation claims based on an improving knowledge of the thresholds not to be crossed in order to "prevent dangerous anthropogenic interference with the climate system".[22]

3.1. An *erga omnes* obligation

States' due diligence obligation to regulate climate change is, by nature, an *erga omnes* one. *Erga omnes* obligations are owed to the international community as a whole and as such, any State has the right to invoke their performance. Already, the ICJ has repeatedly referred to

[18] ECLI:NL:HR:2019:2007, Hoge Raad 20-12-2019, Civiel recht Cassatie, Climate case Urgenda, English translation by Urgenda (https://www.urgenda.nl/wp-content/uploads/Translation-Summons-in-case-Urgenda-v-Dutch-State-v.25.06.10.pdf), §5.7.5.

[19] J Peel, "The Practice of Shared Responsibility in relation to Climate Change", in A. Nollkaemper, I. Plakokefalos (eds), *The Practice of Shared Responsibility in International Law*, Cambridge University Press (2016) pp. 1009-50.

[20] C Voigt, "State Responsibility for Climate Change Damages" (2008) 77 *Nordic Journal of International Law* pp. 1-22.

[21] See J. Salmon, *Droit international et argumentation*, Bruylant, 2014, in particular Chapters 3 and 4.

[22] UNFCCC, Art. 2.

this notion, for instance regarding the Genocide Convention.[23] The principle underlying this concept is that all States have a legal interest to act when such an obligation is breached.[24] It was confirmed recently by the ICJ, which stated about the *erga omnes* obligations in the Genocide Convention that "any State party (…) and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end".[25] The idea here is not to invoke a subjective right anymore, but rather an objective interest for the respect of legality. The 2001 ILC Draft articles on State responsibility allow for the possibility that any State other than an injured State may invoke the responsibility of another State if "a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the group; or b) the obligation breached is owed to the international community as a whole".[26] It follows from commentaries issued by the ILC that paragraph a) concerns mainly obligations related to the protection of the environment.[27] Indeed the ITLOS Chamber has found that "each State Party may also be entitled to claim compensation in light of the *erga omnes* character of the obligations relating to the preservation of the environment of the high seas and in the Area".[28] This important clarification could facilitate the invocation of the responsibility of a State or of a group of States with respect to violations of the no-harm principle causing climate damage.

3.2. A light standard of proof

Based on the IPCC reports and in light of the Paris Agreement's long-term temperature goal, it will be relatively easy to show that a State has failed to take all the measures it should have taken. Proof must be provided not as to the existence of an injury but as to the lack of implementation by the State of legislation and regulations that would have enabled such State to take measures in order to avoid the injury's occurrence. Proof of such failure is not particularly difficult to establish. Furthermore, it is not necessary to prove the causal link between the breach of international law and damage where the allegation is a breach of due diligence — one must simply prove that a State has failed to meet its obligations of conduct by not taking all the measures that should have been taken. The ICJ did this in in the *Certain Activities* case, when concluding that "Costa Rica was under an obligation to conduct an environmental impact assessment prior to commencement of the construction works", even if the construction of the road did not cause significant transboundary harm, simply because the activity was creating a risk that some environmental impacts may occur.[29] The same reasoning could apply to a procedural or to a substantive obligation that is a component of the due diligence required from States under the no-harm principle. Since it is undisputed that GHG emissions contribute to climate change and thereby impact other States and areas beyond national jurisdictions, States have to "deploy adequate means, to exercise best possible efforts, to do the utmost" [30] to reduce their emissions consistently with their

[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I.C.J. Reports 1996,* p. 595, §31.

[24] *Barcelona Traction, Light and Power Company, Limited, Judgment, I.C.J. Reports 1970,* §33; see also *Legal Consequences of the Construction of a Wa11 in the Occupied Palestinian Territory, Advisory Opinion, I. C.J. Reports 2004,* p. 136, §§87-88.

[25] *Application of the convention on the prevention and punishment of the crime of genocide* (the Gambia v. Myanmar), Order, 23 January 2020, not pub., §41.

[26] ILC, *Responsibility of States for Internationally Wrongful Acts, with commentaries* (2011), Art. 48.

[27] ILC above p. 345.

[28] ITLOS, *Responsibilities and Obligations…* above, §180.

[29] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015*, p. 665, §159, §217.

[30] Quoting ITLOS, *Responsibilities and Obligations…* above, §110, p. 41.

customary due diligence obligations and make sure that the planet stays within a "safe operating space".[31] In this regard, the IPCC reports are a good compass. Even if they are "policy neutral", they are without question "policy relevant"[32], and several domestic courts' decisions assign significant weight to their least-cost mitigation pathways and scenarios.

3.3. An individual and separate responsibility

The responsibility of a State is not limited by the fact that one or several other States are also responsible for the same internationally wrongful act.[33] Each State can be held separately and individually responsible. For instance, according to the 2019 *Urgenda* decision, each State must, according to the no-harm principle, make its own contribution to reducing greenhouse gas emissions, and do "its part" to reach the target considered necessary by the international community. The court argued for a "partial responsibility": each country is "responsible for its part and can therefore be called to account in that respect".[34] The Supreme Court used an IPCC reports to determine the "part" that the Netherlands should play in global efforts.[35] The extent of a State's contribution to the damage will be taken into account at the compensation stage.

3.4. Different forms of reparation

A first consequence when a State is found responsible is that the internationally wrongful act must cease if it is still ongoing. For instance, if the NDC of a State was considered insufficiently ambitious in light of the prevention principle, this State would need to adjust it in view of enhancing its level of ambition. Moreover, the responsible State is "under an obligation to make full reparation for the injury caused by the internationally wrongful act".[36] This reparation "takes the form of restitution, compensation and satisfaction, either singly or in combination".[37]

It might in fact be physically impossible to restore the situation *ex ante*.[38] But the ICJ has confirmed that compensation, or satisfaction (or both combined) may be appropriate forms of reparation, particularly in cases regarding environmental harm where restitution is materially impossible or unduly burdensome.[39] However, it also held that, in order to award compensation, the Court has to determine "whether there is a sufficiently direct and certain causal nexus between the wrongful act … and the injury suffered by the Applicant".[40] Except by interpreting causation in a very loose way or by applying probabilistic tools, it will be difficult in the current state of scientific knowledge to establish a "direct and certain causal nexus" between a climate damage and the emissions of a particular State or group of States.

Meanwhile, it is worth noting that the ICJ has no difficulty with the notion of compensation for environmental damage. It considered in 2018 that "it is consistent with the principles of international law governing the consequences of internationally wrongful acts, including the principle of full reparation, to hold that compensation is due for damage caused

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[31] J. Rockström, W. Steffen, K. Noone *et al.,* "A safe operating space for humanity", *Nature* (2009) p. 461.

[32] Appendix A to the Principles Governing IPCC Work, *Procedures for the preparation, review, acceptance, adoption, approval and publication of IPCC reports* (2013), p. 9.

[33] ILC, above, Art. 47.

[34] Climate case Urgenda above, §5.7.5.

[35] *Ibid.* §7.4.1. ss.

[36] ILC, above, Art. 31.

[37] *Ibid.* Art. 34.

[38] On the feasibility of a large deployment of negative emissions techniques, see chapters …

[39] *Pulp Mills …* above, pp. 103-104, §273.

[40] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Compensation, Judgment, I.C.J. Reports 2012*, p. 332, §14. Quoted in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua), Compensation, Judgment, I.C.J. Reports 2018*, p. 15, §32.

to the environment, in and of itself, in addition to expenses incurred by an injured State as a consequence of such damage"[41]. Moreover, the ICJ recalled that "the absence of adequate evidence as to the extent of material damage will not, in all situations, preclude an award of compensation for that damage" and that "in such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate".[42] It thus opened the door to a flexible application of reparation in relation to climate change.[43]

Admittedly, "in the determination of reparation, account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State or any person or entity in relation to whom reparation is sought".[44] This issue is particularly relevant with respect to climate change, but even beyond that, with respect to a significant number of cross-border pollution cases. International law will have to provide some answers. A few principles could be relied upon, such as the principle of common but differentiated responsibilities and respective capabilities in the light of national circumstances, but they do not offer complete solutions. As already mentioned, there have been major developments in attribution science, enabling the linkage of certain extreme weather events with human-caused climate change and quantifying the contribution made by particular states or companies.[45] However, despite positive overtures and recent developments, compensation for the environmental damage in the case of an interference with a planetary system with consequences across the world would still be difficult. In such a case, in addition to the cessation of the wrongful act, other forms of reparation could be more suited, as demonstrated in the following example.

Let us imagine a small island developing State A seeking to hold liable an industrialised State B for damage incurred on its territory (sea level rise and ultimately disappearance of land, extreme weather events, etc.) on the basis of B's failure to comply with its due diligence obligation. By bringing a claim based on due diligence, A avoids the delicate issues surrounding the attribution to B of the conduct of private individuals and companies that have emitted most of the GHG causing climate change. Furthermore, A no longer has to prove the responsibility of B for the damages A is suffering from. It must simply establish that B did not make sufficient efforts to reduce GHG emissions within its territory. Thanks in particular to the work of the IPCC, which provides factual evidence informing the legal standard to define what a State is required to do under due diligence, it may be possible to establish that B has failed to act with the required due diligence.

Material compensation of the harm caused will be more delicate; the question will arise as to whether, and to what extent, the harm can be attributed to B. As it happens, it is impossible to trace the gas emitted within B's territory or jurisdiction and to ascertain its share of responsibility for the harm done to A (except for relying on presumptions made from emission data). But, even though the delicate issues surrounding compensation are thus not all resolved, an international court or tribunal could find that B breached its due diligence obligation, even if the court may not be able to provide other forms of reparation. A would most likely not see it as an adequate response but it could have an impact on B's conduct, as

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[41] *Certain activities…* 2018 above, §41. See in the same way Corte Interamericana de Derechos Humanos, Opinión Consultiva oc-23/17 de 15 de noviembre de 2017 solicitada por la República de Colombia, Medio ambiente y derechos humanos, §72.

[42] *Ibid.,* §35, quoting the *Trail Smelter case (United States, Canada)* above, p. 1920.

[43] B. Mayer, "Climate Change Reparations and the Law and Practice of State Responsibility", *Asian Journal of International Law*, Volume 7, Issue 1, January 2017 , pp. 185-216.

[44] ILC above, Art. 39.

[45] J. Hijazi, "Science might help win climate cases. Here's how", *E&E News reporter Climatewire,* July 23, 2019, https://www.eenews.net/stories/1060775163.

well as, down the line, the conduct of other large emitters. In that case, responsibility is not about compensation for a material prejudice but about restoring legality and preventing further harm. It is worth mentioning the decision of the ICJ in the *Certain activities* case, in which the Court found that its "declaration that Costa Rica violated its obligation to conduct an environmental impact assessment is the appropriate measure of satisfaction for Nicaragua" since this violation of international law has not caused a specific damage.[46] An international court could also request the parties to find a solution to their dispute through negotiation and cooperation in good faith. This would be consistent with the work of the ILC on the protection of the atmosphere[47] and with international case law.[48] More "creative" remedies, inspired by the Inter-American Court of Human Rights' case-law ordering the construction of public memorials for past crimes,[49] could even be conceived – for instance awareness-raising measures.

Hence judicial avenues are obviously limited, but not non-existent.[50] Therefore, supposing that a forum with jurisdiction is found to bring a claim, litigation could help put pressure on States and even lead States to increase the level of ambition of their NDCs under the Paris Agreement, thereby not hindering (as Christopher Campbell-Duruflé fears) but on the contrary fostering international cooperation. Multi-party proceedings could even be envisaged and be more suited than unilateral action to a global and collective problem.

4. Requesting an advisory opinion is also an avenue to explore

Requesting an advisory opinion from the ICJ, or even from the ITLOS, could be another pathway for an authoritative interpretation of the no-harm principle in relation to climate change – and to do so in a multilateral rather than bilateral context. In 2011, Palau, a small island developing State, initiated a campaign for the United Nations General Assembly to request an advisory opinion from the ICJ, but had to back out after the launch of the Durban negotiations and a fortiori when the United States threatened to interrupt the provision of development aid.[51] A sort of wait-and-see attitude then imbued the preparation and launch of the Paris Agreement, (almost) everyone now deeming the content of the Agreement to be insufficient but in any event both fragile and better than nothing. While the relevance of a request for an advisory opinion from the Court could have been called into question during the negotiations that led to the adoption of the Paris Agreement in 2015, the situation is now different. Knowing that advisory opinions have no binding force, but provide an authoritative statement on questions of international law, as States' national contributions are clearly insufficient to reach the objectives of the Paris Agreement, this could be the right time for the Court to clarify the rights and obligations of States on the matter, including, most importantly,

[46] *Certain Activities* ... 2015 above, p. 665, §159, §217.

[47] C. Voigt, "The potential roles of the ICJ in climate change related claims", in DA Farber and M. Peeters (eds), *Climate change law* Edward Elgar (2016) pp.152-166. See also Peter Sand, this volume, chapter …..

[48] For instance *Pulp Mills* ... §81 ss. See also *Land Reclamation in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, ITLOS Reports 2003*, p. 10. At the provisional measures stage, ITLOS prescribed the two States to cooperate and enter into consultations. They concluded a Settlement agreement that, in 2005, made the Montego Bay Annex VII Tribunal decision (Award on Agreed Terms of 1 September 2005).

[49] Inter-American Court of Human Rights, *Miguel Castro-Castro Prison* v. *Peru*, Judgment of 25 November 2006, para. 463; *19 comerciantes* v. *Colombia*, Judgment of 5 July 2004, para. 273; *Masacres de Río Negro* v. *Guatemala*, Judgment of 4 September 2012, paras. 279 and 280.

[50] S. Maljean-Dubois, "Climate litigation", *Max Planck Encyclopedia of International Procedural Law*, 2019.

[51] S. Beck, E. Burleson, "Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations" (2014) 3 *Transnational Environmental Law*, p. 17.

on the basis of customary law. Vanuatu and other Pacific Island governments are exploring this avenue.[52]

Conclusion

As I demonstrated, customary and treaty-based rules are complementary, and both are necessary to address the critical challenge of climate change. Mobilising customary law would undoubtedly help to close the "compliance gap on emissions" constituted by the "failure of states to comply with their obligation to avoid and prevent activities within their jurisdiction from causing serious harm to the environment of other states" under the international climate regime.[53] Finally, the application of the no-harm rule in the context of climate change illustrates how crucial it is to approach new issues based on established principles, not just on negotiations whose result is, to date, manifestly inadequate and insufficient, if only in respect of the Paris Agreement goals.

[52] T. Stephens, "See you in court? A rising tide of international climate litigation", *The Interpreter*, 30 October 2019, https://www.lowyinstitute.org/the-interpreter/see-you-court-rising-tide-international-climate-litigation.

[53] B. Mayer (2018) above, p. 127.