

Whose rights? Whose justice? (Second part)

An interview with Marta Torre#Schaub on climate liability and climate justice

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Völkerrechtsblog is pleased to present the second part of the interview with Marta Torre#Schaub. In this section, we will discuss the status of the Amazonian forest in international law, the importance of national litigation for climate protection and questions of climate justice for the most vulnerable states and groups. This completes the picture of legal liability under international law for environmental damage in the field of climate change.

Given the vulnerable state of the Amazonian region, to which Prof. Walt refers in his [article](#) and which we discussed in the first part of this interview, the question arises: is international law too weak to protect the environment?

The report commissioned by the UN General Assembly in May 2018 points out the shortcomings of international environmental law. It outlines the many significant gaps that prevent international law from an effective environmental protection. International environmental law is considered limited, fragmentary, inconsistent and insufficiently binding. Limited application of certain fundamental principles such as the availability of information, participation in decision-making and access to justice figure among the main problems. In addition, some problems, such as air or water pollution, are treated as regional problems while their effects are actually global. The “right to a healthy environment” is struggling to assert itself, as are the long-awaited principles of “non-regression” and “progress”. The report also highlights the limitation and fragmentation of the existing legal tools and instruments.

Forests, more specifically, occupy over 31% of the Earth’s surface. They are considered the “lung” of the planet, a notion that reminds us how vital it is to protect them effectively. However, despite their essential role in regulating the global climate system, there is currently no international treaty that envisages the full and global protection of forests. It is, therefore, important to recall that, at the international level, forests are only protected in a fragmented manner, making it difficult to establish liability for activities harmful to forests.

While many of the existing international treaties contain provisions to regulate forest-related activities, there is no global legal instrument covering the protection of forests as its main object, nor is there an international treaty that addresses all environmental, social, and economic aspects of forest ecosystems. There are international agreements that grant specific treatment to forests. However, the current strategy to strengthen synergies between these multilateral instruments is

unlikely to sufficiently ensure sustainable forest protection. Nevertheless, several solutions could potentially be combined to this end. The issue of national sovereignty could be balanced if precepts that exist in most of our national constitutions and legal systems were respected, such as the right to a healthy environment, the right to administrative authorisations for projects and activities affecting the environment (and forests), the right to environmental impact assessments, the duty to liability for damage caused to nature and the environment. The rights of “environmental democracy” are also relevant in this regard. Such rights are enshrined in the Aarhus European Convention and the Escazu Agreement, ratified by various Latin American States, including Brazil. They ensure that populations affected by activities with adverse environmental impacts are effectively informed in advance, that they can participate in decision-making and, above all, that they have access to justice in environmental matters. In other words: rights conferred on civil society to be able to take legal action.

Could the notion of ecocide strengthen the normative force of international law in the field of environmental protection?

The notion of ecocide seduces by its idealistic character. However, for the moment it remains too vague. Moreover, it does not fit to the situations we are currently facing. Indeed, a crime of ecocide would, first, need to be included in the international and national legal regime, which is not the case. Secondly, this would require making the notion of genocide equivalent to that of crimes against the environment. For this to happen, one would need to establish that damage to the environment has caused the disappearance of a considerable part of an ecosystem or that its elimination has been systematically and deliberately planned. The difficulty would be to prove this criminal “intention”, inherent in the very notion of the crime of genocide, for an activity harmful to the environment. Finally, the notion of ecocide would require the identification of one or more responsible persons. However, in environmental matters, responsibilities are shared: a State might be responsible for inaction, but other actors might have committed the actions directly – without necessarily having a deliberate intention – and citizens or customers, by consuming this or that good, could also be responsible at the end of the causal chain. In short, the concept of ecocide poses more difficulties than it offers solutions.

At the international level, as pointed out earlier, there remains the mobilisation of traditional international law that sanctions the actions of one State against another – for example, in the case of industrial pollution or activities causing damage to the environment. However, it would be highly desirable for the international community to mobilise around a Global Forest Protection Treaty: by including environmental, climatic and ecosystem aspects as well as economic aspects – timber marketing, prohibition of deforestation, banned trade in rare species, etc. – as in the Paris Agreement. This would require to entirely rethink our notion of development and agrifood models, which is also necessary in the context of climate change and biodiversity protection, as reflected in the latest IPCC Special Report on Land Use.

Increasingly, national litigation is seen as the only way to hold governments accountable. In Colombia, the Corte Suprema has [decided](#) that the protection of the rights of future generations and the rights of the Amazonian forest

would require an end of deforestation. What does this tell us about international law? Do you see a possibility that ecocentric elements, as in the example of the rights of nature in Colombia, reflect at the international level?

The absence of a textual basis at the international legal level for particularly vulnerable States, indigenous communities or individuals, and the absence of a text protecting forests in a global manner, have led some NGOs to appeal to national courts by developing different strategies of litigation. Some groups particularly exposed to the effects of massive deforestation in the Amazon have tried, in a fruitful way, to hold the State accountable before the national judge. This is shown by the Colombian example: in this case, the High Court ruled in favour of a group of 25 children and young people who, accompanied by an NGO called *Dejusticia*, sued the State for failing to guarantee their constitutional rights to life and the environment. In its judgment, the Court granted “tutela” [legal instrument to claim the violation of individual rights, editorial comment] to those young people and children who claimed that Amazon deforestation activities violated their rights to health, the environment and well-being (“buen vivir”). It found that, in order to protect the constitutional rights of the plaintiffs, the State was under the obligation to create and implement an intergenerational action plan to stop deforestation and protect this lung of the planet.

As I had the opportunity to highlight in a related [comment](#), the above-mentioned judgment is a landmark decision, as it affirms both the protection of vulnerable populations from deforestation and climate change, while specifying that this protection must be achieved through “the rights of nature” and “the right to a healthy environment”, in order to protect both these populations and future generations. This decision may well serve as an inspiration for others to come. It constitutes an interesting legal avenue for the development of climate litigation before national courts, dealing with a global and transgenerational issue. In light of current developments in general international law and international environmental law, this decision can be interpreted from three different angles: first, it is a clear reminder of the need to address environmental issues in a holistic and systemic manner (forests, climate, biodiversity). Second, it points toward the inclusion of future generations, as a new category to be legally protected. Third, it highlights the importance of constitutional rights as a tool for protecting nature and climate, a trend that is already being perceived at the international level.

In 2010, you [wrote](#) that “the environment, by its nature transboundary, concerns humanity all over the globe”. As the environment is a global common good, we are facing a conflict between national sovereignty and a global need to act. If we are talking about an obligation to protect the global environment by putting pressure on individual states, what about the risk to act more easily against countries of the global South without recognising the pollution caused by the North? What are the implications for climate justice?

Climate justice has its roots precisely in the search for “more equity” and “justice” in addressing inequalities resulting from climate change in the most disadvantaged countries. The concept of climate justice aims to redress or at least combat the inequalities caused by climate change. These inequalities are reflected at the international level (developed and developing countries) but also within States

(disadvantaged, vulnerable or poorer populations, indigenous, religious or cultural minorities). The purpose of climate justice is to balance these inequalities and to promote mechanisms to prevent and combat them at the international level. The notion appears in the preamble of the Paris Agreement, but there it seems to focus more on “cultural rights” in relation to the nature of indigenous peoples than on social and economic inequalities.

In this situation of injustice, several solutions are at hand: on the one hand, as we have seen, litigation at the international, but also at the regional level, trying to recognise a concept of “damage to the environment”. This damage could be extended to the climate issue. On the other hand, as has also been mentioned, the development of climate litigation before national courts. These disputes have the advantage to be based on national law, which is often more comprehensive in environmental matters. The disadvantage is that they remain, of course, limited to the national sphere.

In addition, the gaps in international environmental law must be filled by proposing “unifying principles”, which is the aim of the Global Environment Pact proposed to the United Nations in September 2018 and discussed on several occasions in special sessions in Nairobi within the United Nations Environment Programme (UNEP).

Finally, it is important to enhance the Conferences of the Parties to the United Nations Framework Convention on Climate Change (UNFCCC) in the context of the forthcoming negotiations on the Paris Agreement to ensure that the concept of climate justice is understood in the broadest possible sense, extending it to issues of social, economic, and environmental inequality between States. It must be legally mobilized by making it one of the pillars of climate responsibility between States.

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