

Whose rights? Whose justice? (First part)

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

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The urgent need to combat climate change seems widely accepted. Nonetheless, the measures taken so far have remained ineffective while irreparable environmental damages are constantly augmenting and threats to the human existence increase. For instance, last summer's Amazon fires have caused concern around the globe.

Prof. Stephen M. Walt (*Harvard*) recently raised the [question](#) of whether “states have the right – or even the obligation – to intervene in a foreign country in order to prevent it from causing irreversible and possibly catastrophic harm to the environment”. Given international law's failure to limit the emission of greenhouse gases (GHG), we would like to ask this question in legal terms. *Völkerrechtsblog* had the pleasure to talk with Prof. Marta Torre#Schaub, Research director at the CNRS – Université Paris 1 Panthéon Sorbonne and director of the Réseau Droit et Climat – *ClimaLex*.

This is the first part of the interview. The second part will follow tomorrow. See [here](#) for the original French version.

You have been engaged for a long time in questions of legal liability in the realm of climate change. Considering that environmental liability is a highly contested field, what would your answer to Prof. Walt be from a legal perspective?

Despite an increasing environmental awareness of the international community during the last decades, the current situation is ambivalent. A series of international Conventions has been adopted, regulating the use of natural resources by private persons and legal entities. But preventive measures, which are key to all those Conventions, are not satisfactory. Forty#seven years after the Stockholm Declaration and twenty#seven years after the Rio Convention, air pollution, desertification, deforestation and noise pollution continue to occur, climate change has increasingly harmful consequences and future generations seem to be seriously threatened. However, some positive developments can be noted, such as the *Amoco Cadiz* case, which concerns an oil spill from 16 March 1978. In this case, the Chicago District Court admitted the ecological damage by concluding that AMOCO CORPORATION was mainly liable and that the ASTILLEROS ESPANIOLES shipyards were partially liable. Or the case of the Seveso plant in Italy on 10 July 1976, which caused the formation of a toxic cloud of dioxins spread in several Member States of the European Union and which gave rise to the famous European

Seveso directive aimed at regulating activities of so-called “classified” installations, which are highly polluting and dangerous for human health and the environment.

What international law regime or concept could be applied to establish international liability for environmental damage?

For a long time, international environmental law had almost entirely relied on civil law to establish the liability of polluters damaging the environment. In recent years, we can observe an empowerment of international environmental law, especially regarding the regulation of the harmful consequences of environmental damage. Not without difficulties, there is now an environmental civil liability, i.e. a liability distinct from the civil liability. Unlike the latter, it is objective. It has also made it possible to broaden the category of victims by taking into account indirect victims, as well as to broaden access to justice by accepting, inter alia, the actions of legal persons governed by private law such as associations, foundations and non-governmental organisations (NGOs) acting for the defence and protection of the environment. Another aspect of the originality of environmental damage compensation is the consideration of the notions of risk and loss of opportunity in determining liability.

In that respect, international law has evolved considerably since 1977, when the question of “liability for injurious consequences arising out of activities not prohibited by international law” was placed on the agenda of the United Nations International Law Commission. Due to the emergence and consolidation of an individual right to a healthy environment and the development of positive State obligations, States are more frequently held responsible. Moreover, reparations now include measures to protect and restore the environment. In this way, gradually responding to the challenges of repairing environmental damage, the definition of reparable damage is being broadened.

On 2 February 2018, the International Court of Justice (ICJ) ruled on the issue of State responsibility for environmental damage in a case between Costa Rica and Nicaragua. In this [landmark decision](#) the Court considered that damage to the environment, as well as its resulting degradation and loss of ability to provide goods and services, leads to compensation under international law. To establish the amount of compensation, the Court estimated the costs of restoring the damaged environment as well as the costs of environmental degradation suffered pending restoration. For the first time, the Court recognised the right to compensation for ecological damage in general international law under the condition that it was the consequence of an internationally wrongful act. Until then, compensation was restricted to economic damage resulting from environmental degradation.

Despite the above-mentioned ruling, international law’s inclusion of damage caused by climate change still has a long way to go. For example, the issues of addressing victims and repairing damage caused by climate change have entered the institutional debate only recently. From a legal point of view, there are hardly any “climate cases” before the ICJ. However, rhetorical strategies of NGOs and vulnerable States have evolved and are beginning to focus on designating responsible persons and legal entities and compensating victims for the damage they have suffered as a result of climate change. Fuelled by the long-standing

debate on the ecological debt of industrialised countries to developing countries, these claims entered international climate negotiations and led to the inclusion of the “loss and damages” clause in the 2015 Paris Agreement.

What is the role of human rights in the protection of the environment through international law?

The human rights system offers interesting prospects. The respect, protection and implementation of all human rights are factors for sustainable development and a healthy environment. Conversely, human rights violations are aggravated by poor development and environmental degradation. In this regard, UN bodies stress that “the fight against climate change is one of the greatest human rights challenges of our time”. Also, several bodies within the United Nations, but also at the regional level (Inter-American Commission and Court of Human Rights and European Court of Human Rights) remain continuously concerned and attentive to the interdependence between environmental protection and respect for human rights, particularly with regard to the poorest and most vulnerable populations. In several opinions, reports and court decisions, attention is paid to the consequences of environmental problems on the enjoyment and promotion of human rights. The development of this work has created interesting synergies between human rights protection mechanisms and those that make it possible to better protect the environment.

What are the advantages and risks of this approach? Who is, ultimately, the object of protection: humans, the environment or both in their connectivity?

At first glance, the interconnectedness of human rights, development, and environment is of factual nature, as I have stated above. In a second place, it is also legal: there is a human right to development and several human rights have a strong environmental dimension. First, the right to life and to private and family life, then the right to health and the right to culture, and finally, procedural rights to information, consultation and access to justice, play an important role in this respect, as highlighted by the independent United Nations experts on the environment and human rights, John Knox and, later, Alan Boyle, in their latest reports. The aim is now to deepen the anchoring of environmental protection in international law and to adopt a rights-based approach. This approach calls on States, but also on the international community, to consider human rights as legal framework for their policies of development and environmental protection.

Nevertheless, this approach encounters multiple limitations and difficulties. First, human rights only protect the individual – and, to a lesser extent, groups of individuals, whereas the environment concerns humanity as a whole. Second, human rights as enshrined in various texts are limited to the present generation, whereas the environmental and ecological crisis calls for a vision of protection and responsibility that looks to the future. Finally, the operational connection of environmental protection mechanisms and human rights only exist at the regional level (via the Inter-American Convention on Human Rights and the European Convention on Human Rights) and the protection granted to the environment is

indirect, because there are no specific provisions to protect the environment as such in a direct way in these two legal mechanisms.

It is important to extend these rights and to include a right to environmental protection: “the right to a healthy environment”. Until this right can be enshrined, court decisions have become a promising path by affirming “rights to future generations” in relation to environmental protection. Finally, it should not be forgotten that the protection through human rights currently remains too anthropocentric. In order to better protect nature and the natural environment as a whole, it would be important to expand the ICJ’s competences to deal with “environmental crimes”. Furthermore, a “human right to a healthy environment” ought to be included in various human rights conventions. If such a right is objective and independent of any damage to humans, it would help to better protect nature.

In its preamble, the Paris Agreement outlines “Climate Justice” in relation to the rights of Mother Earth (or *Pachamamà*). This climate justice – a concept that is still in its infancy – could undoubtedly link international law with the rights of peoples affected by climate change and the protection of the Earth and ecosystems as a whole.

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