State Responsibility and the Global Environmental Crisis

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This post explores some aspects of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts ('ARSIWA') as they concern the global environmental crisis. The understanding of environmental degradation has changed over time from a bilateral/horizontal issue to a community one. Even within the latter frame, the enormity of the challenge is now much better understood. The ARSIWA captures some aspects of both framings, but others are left ambiguous or simply out.

There are three main systems of 'secondary rules', i.e. rules describing the consequences of behavior inconsistent with rules requiring environmental protection: the ARSIWA, which cover 'State responsibility' triggered by a 'breach' (and the analogous draft for international organisations); the system of Multilateral Environmental Agreements (MEAs), which include both primary and secondary rules, the latter mostly in the form of compliance systems triggered by 'non-compliance'; and treaty-based civil liability regimes (on nuclear power or oil pollution damage) applicable to certain private or public entities (including States as operators and tanker owners) triggered by the occurrence of harm (irrespective of fault).

The ARSIWA only define secondary rules triggered by 'breach' by 'States' only. Within this narrower space, two main framings are possible, which are visible in the understanding of both the primary rules (a wide range of environmental protection duties) and the ARSIWA secondary rules: the bilateral and 'horizontal' frame and the community or 'vertical' frame. At the level of primary rules, the first refers to the basic scenario involving a bilateral relationship between two States, in which the primary rule protects State interests (not the environment as such) (see e.g. *Trail Smelter Arbitration*, 1941). The second scenario, instead, covers situations where the obligation breached is owed to a group of States or the international community as a whole, as in the case of pollution of the high seas or the Area, climate change or biodiversity loss.

In an environmental context, in both the bilateral/horizontal and community/vertical frames, several issues arise at the three levels of the ARSIWA: (i) the definition of the triggering event the ARSIWA (Part I); (ii) the specific legal consequences resulting from an international wrongful act (Part II); and (iii) the processes partly described in the ARSIWA (Part III).

Environmental harm as a problem of *bon voisinage*

In the traditional bilateral frame, the triggering event is in principle straightforward. Yet, the fact that environmental degradation is often the result of action of a variety of entities separate from the State introduces some complications at the level of either attribution of conduct or, when the conduct at stake is a State omission to regulate, of degree of diligence. Whether due diligence is a matter of primary or secondary rules is less important here than the fact that, under some key primary rules (e.g. the prevention

principle or Article 192 UNCLOS), a State may be deemed diligent despite the fact that private operators have effectively caused significant harm (e.g. *South China Sea Arbitration*, 2016, para. 972–975). That opens an important loophole, with even greater repercussions for the global commons (e.g. unsustainable fishing practices in the high seas).

At the level of consequences, the ICJ has somewhat modernized the conception of what is reparable, indeed compensable, in *Costa Rica v. Nicaragua* (2018), where it noted that 'damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international law' (para. 42). The Court recognised, without implying any change in customary law, that the ordinary rules of reparation are flexible enough to encompass notions such as ecosystemic services, as argued by Costa Rica.

As for implementation, the most complex issue concerns environmental harm caused in a cumulative manner by the action of a plurality of States the effects of which are felt by many or all States. In a bilateral context, the typical example would be pollution by several riparian States (or by a range of entities in each riparian State) of a shared watercourse. In addition to the aforementioned attribution/diligence-related complications, two others arise from the cumulative or 'composite' nature of the breach and the plurality of responsible/injured States. The ARSIWA specifically addressed this scenario in Articles 15(1) (composite acts), 46 (plurality of injured States) and 47(1) (plurality of responsible States), but some ambiguities remain. One concerns composite acts made of acts/omissions of several States which do not constitute, for any or for some of those States, a composite breach of an obligation. Another is the lack of clarity regarding the relations among responsible States. A third more general issue concerns the non-linearities involved in environmental processes. To put it simply, should a State that adds the straw that breaks the camel's back be responsible for placing an additional straw or for breaking the camel's back?

Environmental harm as a regulatory problem

The community frame refers to breaches to environmental obligations that are generally owed either to all States parties to a treaty (*erga omnes partes*) or to the community of States as a whole (*erga omnes*), including peremptory norms. This specificity of some primary rules may have important consequences for secondary rules.

With respect to the triggering event, the attribution and diligence-related problems discussed in relation to the bilateral framing remain relevant, and they are further complicated by the need to determine what primary rules protecting the environment may amount to a 'peremptory norm' and what composite acts/omissions may amount to a 'serious breach' under Article 40 ARSIWA. There is evidence that the prevention principle as enshrined in the UNCLOS entails *erga omnes* obligations (*Responsibilities in the Area*, 2011, para. 180), but there is also evidence that it is not a peremptory norm (Conclusions 38, Study on the Fragmentation of International Law, 2006 ILC; *Responsibilities in the Area*, 2011, para. 125-135; *Indus Waters Kishenganga case*, Final Award, 2013, para. 111). Is that enough to trigger the aggravated consequences of Article 41?

The ARSIWA suggests the negative, but the ICJ derived these aggravated consequences, textually taken from the ARSIWA, from breaches of *erga omnes* obligations of humanitarian law by Israel (*Wall Opinion*, 2004, paras. 155-158; but see Separate Opinion of Judge Kooijmans, para 37-51). An additional complication here concerns the differential character of consequences. If two States, in their bilateral relations, have agreed to derogate from the prevention principle, which is possible as observed by the tribunal in *Indus Water Kishenganga*, can other States hold the State implementing this derogation responsible (in the case, limiting the amount of water flowing in a watercourse for environmental purposes)? And then, perhaps the most complex issue of all, is that of the reparation of inaction/action leading to the crossing of environmental tipping points. That issue entirely exceeds the architecture of the ARSIWA and, indeed, of any system of secondary rules so far.

Finally, the shortcomings of the 2001 ARSIWA with respect to the processes of invocation of State responsibility by States 'other than the injured State' are well-known and very relevant here. The case law of the ICJ suggests some degree of activation of the rule underlying Article 48 (*Whaling in the Antarctic*, 2014, paras. 30-50; *Belgium v. Senegal*, 2012, paras. 64–70; *The Gambia v. Myanmar*, Provisional Measures, 2020, para 39-42), but only the ITLOS Seabed Chamber has referred to it explicitly (*Responsibilities in the Area*, 2011, para. 180). Paragraph 7 of the ARSIWA commentary had anticipated this possibility. By contrast, the question of counter-measures by States other than injured States against a State massively contributing to global climate change or ecosystems collapse remains open, as it was left by Article 54 ARSIWA.

Filling Gaps

Some of the gaps and ambiguities of the ARSIWA to handle environmental harm are addressed in the other systems of secondary rules.

With respect to the bilateral framing, 'civil liability' systems organise the reparation of damage, irrespective of the loophole mentioned earlier. Liability is channeled towards the economic operator who conducts the regulated activity (e.g. the owner of the tanker transporting oil or of the nuclear facility producing electricity), the industry that benefits (e.g. the oil industry for additional layers of compensation) or the State (which provides this additional compensation in the nuclear liability regimes). However, this comes at a price. Their strict liability systems cover only very specific situations (nuclear accidents and oil pollution damage) and they are not applicable to States as subjects of international law. With the exception of damage caused by space objects (Convention on International Liability for Damage Caused by Space Objects, 1972, Art. 2), there is no regime of strict liability of States in international law. In the efforts of the ILC to design such a system, strict liability of States – which was the very core of the initiative – was eventually left out, with the process resulting only in a set of 2001 Articles on Prevention (focusing on primary norms) and a set of 2006 Principles of Allocation of Loss in the case of Transboundary Harm arising out of Hazardous Activities' (mere guidelines focusing on civil liability of operators, not States).

Similarly, a possible alternative to the shortcomings of the community frame is constituted by compliance management regimes in MEAs. These processes do not require

either harm or even breach to be triggered, and they can set in motion by a wide range of actors, including other State parties but also Secretariats and in some cases the public. However, this approach also comes at a price. The secondary rules triggered by possible 'non-compliance' can only lead to non-binding recommendations. Their content is defined by the relevant Committee's terms of reference and it never includes compensation. Another alternative avenue would be to enforce the primary rules of these agreements in the context of broader standards of due diligence provided for in domestic law or human rights. Climate litigation is growing exponentially, and it has led to some remarkable success stories (see here, here and here). Yet, these cases have so far unfolded at the domestic level and under secondary rules of domestic law, even when human rights were at stake (see here, here, here). They signal, however, the potential for public interest litigation at the international level, illustrated by applications pending before the European Court of Human Rights (e.g. discussed here, here, and here; on the applicability of the European Convention on Human Rights, see here).

All in all, the global environmental crisis is increasingly showing the significant limitations of systems of secondary rules, not only the ARSIWA but also those systems specifically designed to tackle environmental degradation. In the environmental context, unsurprisingly, the best form of reparation is to prevent harm in the first place.