

ZOOM OUT

The Question:

Litigating global crises: What role for international courts and tribunals in the management of climate change, mass migration and pandemics?

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Crises are crucial for international lawyers. As James Crawford vividly put it '[i]f there were no international crises, many of us would not be international lawyers' as '[w]e validate calling ourselves international lawyers by reference to some international crisis which touched us in one way or another'.¹ In a quite more critical vein, Hilary Charlesworth wrote instead that international lawyers' 'concern with crises skews the discipline of international law'.² By focusing on crises – which are by their very nature, contingent and exceptional circumstances – international lawyers are unable to deal with 'issues of structural justice that underpin everyday life'.³

As much as these criticisms are able to catch some drawbacks in the narrative of crisis, it is hard to deny that global watersheds at times may lead to dramatic shifts in international legal relations. To mention one, Second World War gave birth to the United Nations system. And one may easily find a great number of other historical critical moments that have led to pressure for institutional and normative changes. The present Zoom-out moves from the premise that international courts and tribunals may play a key role in encouraging and shaping these processes.

When speaking – rightly or wrongly – about 'crises', international lawyers are used to refer to situations in which international peace is in

¹ J Crawford 'Reflections on Crises and International Law' in G Ulrich, I Ziemele (eds), *How International Law Works in Times of Crisis* (OUP 2019) 10.

² H Charlesworth, 'International Law: A Discipline of Crisis' (2002) *The Modern L Rev* 377, 391.

³ *ibid.*

danger.⁴ Indeed, cases of conflicts characterized by the threat or use of force epitomize the idea of ‘crisis’ that international law is called to cope with.

Recent times, however, have witnessed the emergence of new and different events on a global scale that have nothing, or very little, to do with the use of armed force, but that nonetheless lend themselves to the narrative of ‘crisis’. Climate change, mass migration and, more recently, pandemics are among such events.

Climate change has long been considered a global concern and today more than ever is getting resonance in the international legal debate. Notwithstanding the existing legal regime, prominently featured by the 2015 Paris Agreement, the negative impact of climate change is taking its course and States’ rights and obligation in this field are still to be fully clarified, not to speak of States’ real willingness to tackle the issue, which remains a longstanding question. In terms of litigation, climate change-related disputes are increasingly brought before national courts, with individuals acting against States’ inaction in facing the issue. While the role of international courts is still rather limited in this area, there is certainly a potential for their increasing involvement, not only through individual applications but also at the inter-state level.⁵

Pandemics, as the word suggests, are a phenomenon that occurs on a global scale and involves virtually every country in the world. As the spread of COVID-19 revealed, measures taken (or not taken) by States to cope with a pandemic may give rise to unprecedented contentious issues of international law that could cause a significant litigation burden for international courts and tribunals. The matters of dispute amidst the outbreak of a pandemic are manifold and diverse and, just like the case of climate change, may involve interstate disputes and disputes between individuals and states. As a matter of fact, measures aimed at preventing the outbreak of pandemics, as well as containment measures adopted by States, are likely to engender complaints not only under WHO law, but also under other international law regimes, including trade, investment, and human rights law.

⁴ See eg S Rosenne, ‘A Role for the International Courts of Justice in Crisis Management?’ in G Kreijen et al (eds), *State, Sovereignty, and International Governance* (OUP 2002) 195.

⁵ See ‘Plugging the Enforcement Gap: The Rise and Rise of Human Rights in Climate Change Litigation’ (2021) 77 *QIL-Questions Intl L* 1-3, introduced by A Savaresi.



When it comes to mass migration, the term crisis is abused in the public discourse. The language of crisis in this field often serves to draw a direct link between an increase in migration and national security issues. Leaving aside oversimplified narratives, one cannot but observe that the terms ‘migrant crisis’ or ‘refugee crisis’ cyclically come into common use in order to refer to unprecedented or abrupt increase of migratory movements from one country (or area of the world) to another. The so-called ‘European refugee crisis’, for example, alludes to the growing scale of migration pressure from Arab spring countries, that begun in the early 2010s and touched its peak in 2015. It is not by chance then that European courts have been increasingly called to deal with migration issues and their role has been perceived as crucial by States in order to endorse or reject their migration policies. Increasing political pressure on judicial organs in this field is clear evidence of their potential role in shaping migration processes and patterns.

What these ‘global crises’ have in common is precisely that they have triggered, or are likely to trigger, a bulk of litigation before national and international courts. Besides providing an overview of the abovementioned crises in their ‘contentious’ dimension, the aim of this Zoom-Out is to offer a perspective on the role of international courts in dealing with this sort of matters. Resort to international courts in order to assess international responsibility of States for alleged breach of obligations pertaining to these three areas – climate change, migration and pandemics – raise a number of questions that get at the heart of the nature and role of international tribunals in contemporary international law.

Ever since international courts and tribunals started proliferating in the Nineties, scholars began to enquire on the role of international courts, noting the coexistence – and sometimes the tensions – between a ‘private, retrospective function’ of settling a particular dispute and a ‘public, prospective function’ of making and developing of the law, as well as the setting of the condition to negotiate solutions at the political level.⁶ The litigation of global crises before international courts provides a notable testing ground for such issues. Whether international tribunals are well-suited to address global crises and whether they can contribute to clarify and develop international law in the fields concerned, are just a few of

⁶ See among others V Lowe, ‘The Function of Litigation in International Society’ (2012) ICLQ 213.



the questions that this kind of litigation raise. A related set of questions concerns the relationship between judicial and political organs in the management of global crises: should international tribunals adhere to judicial restraint and leave as much room as possible to political bodies when dealing with such sensitive and crucial challenges? And yet, when addressing global crises, are judicial organs really able to promote international cooperation and multilateralism, or resort to courts has more often the effect of producing unilateralism and States' isolation from international institutions? What is the ultimate outcome of such litigation: awarding full reparation to the single claimant or obtaining assurances and guarantees of non-repetition that may prompt a more structural (normative) change in the related fields?

It is against this background that QIL asked five prominent international lawyers to address 'global crises' through the lens of the actual or potential role that international courts play in the process of management of these crises. Introductory reflections are entrusted to Tullio Treves, who sets the scene discussing legal and political hurdles for engaging international courts in disputes involving global crises. Sandrine Maljean-Dubois provides an overview of the complex substantive and procedural issues pertaining to climate change litigation before international courts. Pedro Villareal addresses the role of international adjudication in public health emergencies, questioning the effective need of bringing such issues before international courts. Marie-Benedict Dembour and Marie Rota address international adjudication in the field of migration, critically comparing the practice of the European Court of Human Rights and the Inter-American Court of Human Rights.

