Climate Change, Resulting Natural Disasters and the Legal Responsibility of States: An International Law Perspective , written by Alexandra Birchler

Mc Dermott, Rónán

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1 Introduction

Successive IPCC reports have reported the adverse observed and projected impacts of climate change with increased confidence. While there has been considerable discussion around the moral and political injustice that those who have contributed least to the problem tend to have been and will be impacted most severely, this book addresses primarily the *legal* responsibility of one key set of actors in this regard, namely States. It does so by examining climate-related disasters, which represent a sub-category of the impacts wrought by climate change. Amongst the book's key contributions to wider IDL scholarship is the prominent role given to the potential for financing arrangements to discharge the responsibility of States with respect to climate-related disasters. As such, the manner in which the legal responsibility of States may influence the scale and nature of existing and potential new financial modalities such as compensation, insurance and reconstruction funding is considered throughout. Furthermore, the book focuses upon the responsibilities not only of States directly affected by a climate-related disaster but also the responsibilities of other unaffected States. This reflects the structure of the book; following an introductory overview of the key definitions and relevant legal frameworks, the first part focuses on the responsibility of developed States and emerging economies that bear historical and current responsibility for GHG emissions vis-à-vis States most exposed and vulnerable to climate-related disasters. In the second part, the book turns to examining the responsibilities of States that are directly affected by a given climate-related disaster before providing well-grounded conclusions and recommendations that receive close attention below.

2 Responsibilities of States to Other States Facing Climate-Related Disasters

Following a compelling justification for focusing on improving early warning systems to reduce disaster-related losses and damage, an overview of the various regimes that govern early warning internationally and the obligations they impose is provided. While the Sendai Framework for Disaster Risk

Reduction 2015–2030 partly addresses early warning and has been endorsed by the UN General Assembly, it does not impose legal obligations. The way the international environmental law principles of prevention, cooperation and precaution inform the common but differentiated responsibilities and capabilities principle that is central to the climate change regime is outlined. The need to adapt to existing and future impacts of climate change increasingly features within the regime over time, culminating in art. 7 of the Paris Agreement being devoted entirely to this aspect of climate governance. Although there is considerable reference within the Paris Agreement to financial flows from developed States to developing States in order to support adaptation as well as mitigation, the author makes a cogent case that the obligations imposed are insufficiently strong and precise. Moreover, the Kyoto Protocol and the Paris Agreement, which together have provided the main enforcement modality within the UN Framework Convention on Climate Change (UNFCCC) to date, mainly rely upon reporting followed by subsequent review and as such no punitive consequences are foreseen. The commitment of developed States to mobilise US$100 billion for adaptation annually that was included in the 2009 Copenhagen Accord and taken note of at COP15 is not to be considered legally binding.[1]

The extent to which the extraterritorial application of human rights imposes obligations on States to support early warning, disaster response and reconstruction in other States is also considered. The lack of the requisite level of control by external States within disaster-affected States largely absolves them of responsibility in this respect. However, there is a discussion of how the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, while not legally binding, and the responsibility to protect doctrine may potentially provide scope for extraterritorial responsibilities in certain circumstances. The ILC Draft Articles on the Protection of Persons in the Event of Disasters (Draft Articles) also do not envisage an obligation to support early warning extraterritorially as disaster risk reduction is considered an internal matter for each State.[2] At best there is only a general duty on States to cooperate in this domain.[3]

Considering this acknowledgement of the absence or deficiency of binding obligations within the Sendai Framework, UNFCCC/Paris Agreement and

1 UNFCCC, 'Report of the Conference of the Parties on its fifteenth session' (Copenhagen 2009) FCCC/CP/2009/L.7, para. 8.

2 ILC, 'Report of the International Law Commission: Sixty-Eighth Session' (2 May–10 June and 4 July–12 August 2016) UN Doc A/71/10, 2016, draft art. 9.

3 *Ibid.*, draft art. 7.

international human rights law, the author unpacks the potential implications of germane principles of international environmental law. It is possible to argue for example that that those States that have contributed disproportionately to greenhouse emissions have a legal obligation under the no-harm principle to financially support early warning in disaster-prone developing States. It is also highlighted that the continued accumulation of greenhouse gas emissions in the atmosphere renders the principle of the common but differentiated responsibilities and respective capabilities principle a dynamic one, ratcheting up the obligations placed on the main emitter States. Ultimately, through engagement with relevant aspects of the climate change regime a strong case is made that it ought to be considered as an increasingly important component of the corpus of international disaster law.

Turning to the responsibilities of States to contribute to reconstruction in the aftermath of climate-related disasters, the book considers firstly how loss and damage incurred by States is being accounted for as part of the international climate change regime. At COP 21, the COP at which the Paris Agreement was adopted, it was decided that the inclusion of a reference to loss and damage in art. 8(1) is not to provide the basis for liability and compensation.[4] Nonetheless, there is mounting pressure on developed States within successive, more recent recent COPs to further institutionalise loss and damage within the climate regime, including through the mobilisation of additional finance.

The author also considers the extent to which the no-harm rule and polluter-pays principles in customary international environmental law may present a pathway towards assigning legal responsibility for funding reconstruction. In enforcing such responsibilities, the author criticises what is described as a "failing argument" that state responsibility as per the Draft Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) represents an appropriate pathway towards responsibility for climate impacts. Amongst the barriers to invoking state responsibility for reconstruction in the aftermath of climate-related disasters are the inappropriateness of the consequences of an internationally wrongful act for these purposes as well as the onerous burden involved in demonstrating a strict causal link between the emissions of a particular State and any particular climate-related disaster. Despite the difficulty of establishing the latter, consideration is given to the possibility that mounting domestic litigation concerning the link between a State's emissions and climate impacts might eventually yield a general principle of international law within the meaning of art. 38(1)(c) of the Statute of the International Court of Justice.

4 UNFCCC, 'Report of the Conference of the Parties on its twenty-first session' (Paris 2015) FCCC/CP/2015/10/Add.1, Decision 1/CP.21, paras. 48–52.

Ultimately, it is considered preferable to regard reconstruction in the aftermath of a climate-related disaster as a preventive measure in line with the no-harm rule. No breach of obligation would need to be demonstrated under such an approach as contributing financially to reconstruction would itself constitute the obligation. Furthermore, such a clear causational chain between emissions in one State and harm in another State would not need to be demonstrated. A number of successful macro-insurance regimes for insuring States against the impacts of extreme events drawn from Mexico, as well as in Africa and the Pacific and Caribbean regions, are discussed as a possible means to discharge such an obligation to financially contribute.

3 Responsibilities of Affected States before, during and in the Aftermath of Climate-Related Disasters

In the second half of the book, attention is turned to the responsibility of a State before, during and in the aftermath of a disaster occurring within its own jurisdiction. It is underlined that art. 5 of the ILC Draft Articles confirms that human rights continue to apply even in the context of disaster. The relevant sources contained in universal and regional treaties as well as both general and specialised treaties (e.g. Convention on the Rights of the Child) relating to what are considered by the author to be the key human rights of relevance during and in the aftermath of a disaster are outlined as well as the nature of the obligations placed on States in such a context. These rights include the right to life as well as economic, social, and cultural rights, including the rights to an adequate standard of living, adequate food, safe drinking water and sanitation, adequate housing, and the right to the highest attainable standard of health. The lack of enforcement mechanisms under regional and international systems in the South-East Asia and Pacific regions is highlighted as a weakness within the IHRL framework, given the regions' considerable exposure to climate-related hazards and their underlying vulnerabilities.

In considering the obligation on States to provide humanitarian assistance within their own jurisdiction the author aligns with the extant literature identifying the lack of a distinct right to receive humanitarian assistance within the UN human rights system and, with the exception of the African system, in regional systems. Relevant soft law sources include the 1993 San Remo Principles, the Mohonk Criteria and the Bruges Resolution are considered together with the remote but possible prospect of their crystallisation into international customary law in a manner that would generate obligations within the scope of the book.

Art. 10 of the ILC Draft Articles places a duty on States to protect persons and provide disaster relief assistance in their territory when affected by a disaster. As a corollary, there is an obligation to seek international assistance when the capacity of the affected State is overwhelmed. The relevance of ARSIWA as a potential source of secondary rules for the Draft Articles is also considered. A State failing to respond or withholding international aid arbitrarily when its capacities are overwhelmed could constitute a breach of a primary obligation, a necessary trigger for the measures of state responsibility. ARSIWA offers measures such as full reparation that may not be suitable in the disaster context but does countenance others such as cessation and non-repetition that could be considered more suitable.

International human rights law is given consideration with respect to determining the responsibility of the affected State before the onset of a disaster. The positive obligations imposed on States related to the right to life are thoroughly discussed, including the commonalities and contrasts in approach amongst the regional systems. In particular, the pioneering work of the European Court of Human Rights with respect to the obligation to take positive steps to inform those exposed to the risk of disasters is considered. The increasing information around climate change impacts available to States, for example due to the constant advances in attribution science, may increasingly seize States in terms of their responsibility to address risks through *inter alia* early warning.

4 Evaluating the Book's Conclusions and Recommendations

While the book takes a broadly black-letter approach, it is sensitive to the broader political context in which legal obligations in this area arise. This is reflected not least in the recommendations made on the basis of the analysis proffered. In recognising the fragmented nature of international disaster law, it is recommended that the Draft Articles be recognised as they currently stand as having considerable value. Moreover, while the danger of States reducing the obligations imposed as it is converted into treaty form is acknowledged, such an effort is nonetheless also recommended to be undertaken as soon as possible.

A promising recommendation based on considerable analysis throughout the book is the implication of legal responsibilities for financial mechanisms such as macro-insurance that can practically serve to address the impacts of climate change. There is a role for developed States and emerging markets to contribute financially in order to render such mechanisms more affordable. In particular, the expansion of the loss and damage remit of the UNFCCC process is recommended. This is already underway due in large part to the political

mobilisation of the most vulnerable States arising from the flexibility afforded by the UNFCCC and the annual COP meetings. However, the incommensurability of loss and damage – the difficulty to assign a financial value to what is being lost and damaged because of the impacts of climate change – should not be overlooked. Arguably, the acknowledgement of such incommensurability would shift the burden of responsibility further toward climate mitigation and the rapid reduction by States of greenhouse gas emissions.

5 Final Remarks

The disaster management cycle is used throughout to structure the book and to determine the nature of obligations before, during and after such disasters. While the different components of the cycle identified – early warning, response, and reconstruction – are heuristically useful, doubtlessly present distinct legal issues and serve to systematically structure the book, the representation of these phases as inevitably cyclical in nature is problematic.[5] It potentially distracts from the important reference throughout to potentially cycle-breaking approaches, exemplified by the use of concepts such as resilience and building back better as well as discussion of the prevention, no-harm and precautionary principles and the positive human rights obligations placed on States to prevent risks to life. In defining the book's scope, careful reflection on the definition of disaster is evident, whereby it is recognised that disasters are better understood in terms of a complex situation involving significant human contribution rather than a one-off event arising from a natural hazard. This approach to understanding disasters reflects wider scholarship within the disaster studies field that eschews the consideration of disasters as stand-alone events but rather consider them the result of complex interacting processes operating at multiple levels and across long timescales and involving root causes such as poverty, marginalisation and environmental degradation.

Nonetheless, the term natural disaster is included prominently in the title and throughout the book. Increasing criticism of the term stems from the empirically grounded assertion that it is necessary that human-related factors combine with a natural hazard present in order to generate a disaster. A critical position towards the term is especially warranted given the stated focus

5 Lee Bosher, Ksenia Chmutina and Dewald van Niekerk, 'Stop going around in circles: towards a reconceptualisation of disaster risk management phases' (2021) 30 4/5 Disaster Prevention and Management: An International Journal, 525–537.

of the book on disasters of a type that are being exacerbated in terms of both frequency and intensity as a result of human activities.

Although the book focuses primarily on obligations in international law with respect to climate-related disasters, it does address the important comparative dimension and the proliferation of climate- and disaster-related litigation in recent years as exemplified by the *Urgenda* case in the Netherlands.[6] While outside the scope of the book, the responsibility of non-state actors such as private companies for the impacts of climate change also cannot be overlooked. The implications for such actors are immense given not only the contribution many have made to historical and ongoing emissions but also the capacities that they have to help to reduce the impact of the resulting disasters.

This book is a timely one considering the increased focus on loss and damage as part of the UNFCCC process and the mounting evidence of both the observed and projected impacts of climate change. It will be all the more important for disaster lawyers to engage more comprehensively with the evolving climate change regime given the increasing impacts and the likely attendant increase in the range and consequences of the obligations. A strong case is made for considering the role of international climate change law to a greater extent alongside other relevant bodies of law as a key component of international disaster law. This book will serve as an excellent reference book for scholars of international disaster law in this regard. It will also be a helpful teaching resource at the upper undergraduate and postgraduate levels in the relevant fields, including international law, environmental governance, and disaster management.

Ronan McDermott
Assistant Professor in Climate Adaptation Governance,
Department of Global and Local Governance, Campus Fryslân,
University of Groningen, Netherlands

6 *The State of the Netherlands v. Urgenda Foundation*, Supreme Court of the Netherlands, No. 19/00135, 20 December 2019.