

# **The Place of Customary Norms in Climate Law: A Reply to Zahar**

Benoit Mayer

The Chinese University of Hong Kong, Faculty of Law

bnt.mayer@gmail.com

## **Abstract**

In his essay on the thesis of my book, Alexander Zahar objects to my characterization of customary international law as one of the sources of the international law on climate change and, in particular, to my conclusion about the relevance of the no-harm principle. I respectfully disagree. In the first part of his essay, Zahar's analysis of the no-harm principle is limited to arguments by analogy, but a valid international legal argument can be based on deduction from axiomatic premises of the international legal order. In the second part of his essay, Zahar claims that the UNFCCC regime excludes the application of the no-harm principle when, in reality, the UNFCCC regime really seeks to facilitate the implementation of general international law.

## **Keywords**

General international law; sources of international law; fragmentation of international law; no-harm principle.

## **1. Introduction**

*The International Law on Climate Change* seeks to provide a survey of the international law on climate change suitable for a wide audience. Besides describing treaty negotiations under the UNFCCC and other treaty regimes, I directed meticulous attention to the relevance of general international law, including the no-harm principle and the law of state responsibility, and tried to analyse the whole as a consistent normative system. Thus, without necessarily identifying a distinct 'core' of the international law on climate change, I described the no-harm principle as a principle of particular relevance to the field.<sup>1</sup>

In his review of my book, Alexander Zahar argues that the no-harm principle 'does not apply to the problem of climate change because climate change is not a transboundary problem'. He also submits that, even if the no-harm principle were applicable to climate change, it would be 'displaced by the climate change regime'.<sup>2</sup> I will use this short response not to reiterate my entire analysis of the no-harm principle<sup>3</sup> or to revert to

<sup>1</sup> This position, incidentally, was confirmed by the Inter-American Court of Human Rights while the book was still in production. See Inter-American Court of Human Rights, *Advisory Opinion OC-23/17 Requested by the Republic of Colombia, 'Environment and Human Rights'*, 15 November 2017 (in Spanish only), para. 98.

<sup>2</sup> Zahar, 'The Contested Core of Climate Law', this volume, abstract.

<sup>3</sup> See generally Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press, 2018); Benoit Mayer, 'The Relevance of the No-Harm Principle to Climate Change Law and Politics', 19 *Asia-Pacific Journal of Environmental Law* 79 (2016); Benoit Mayer, 'Construing International Climate Change Law as a Compliance Regime', 7(1) *Transnational Environmental Law* 115 (2018) (hereinafter 'Compliance Regime').

arguments that I have already laid out in a previous response to Zahar in a previous issue of *Climate Law*,<sup>4</sup> but only to address, point by point and in order, Zahar's objections to my characterization of the international law on climate change.

## **2. Zahar's Contention That the No-Harm Principle 'Is Not Extendable to Cover the Novel Case of Climate Change'**<sup>5</sup>

Zahar contends that I 'want ... to extend a pre-existing rule of law to a novel case', namely 'the rule against transboundary harm' to the novel case of climate change. Therefore, Zahar states that my argument *must* take the form of an argument by analogy. In other words, Zahar assumes that I must prove that the rule which has been applied in an old case could now be applied to a new case. This, in his view, would be the only logical way to make my point about the applicability of the no-harm principle to climate change. As traditional cases of transboundary environmental harm (e.g. the *Trail Smelter* case) are quite different from climate change, Zahar concludes that the rule recognized in the former cannot be 'extended' to the latter. Zahar implies that there is no prohibition of excessive greenhouse gas emissions under general international law *because* this prohibition was never recognized by a court in this case or any similar cases.

This critique is based on the rather extraordinary premise that analogy is the sole available argument capable of proving the application of a rule of international law. It is not clear to me that analogy has any place at all in general international law reasoning,<sup>6</sup> except as a heuristic instrument, a practical way to guess what the law is most likely to be without the need for a complete demonstration. It is all too well known that arguments by analogy are fallible and capable of leading to contradictory conclusions when a case can be compared with more than one precedent.<sup>7</sup> It is also a deeply conservative<sup>8</sup> line of reasoning: by definition, analogies do not permit a court to apply a rule which has never been applied,<sup>9</sup> or to apply it to circumstances where it has never been applied. If Zahar is right to assume that no jurisdiction can apply a rule when there is no judicial precedent, the arbitral tribunal in the *Trail Smelter* should not have recognized a principle prohibiting transboundary environmental harm: there was no

<sup>4</sup> See Alexander Zahar, 'Mediated versus Cumulative Environmental Damage and the International Law Association's Legal Principles on Climate Change', 4(3-4) *Climate Law* 217 (2014); Christoph Schwarte and Will Frank, 'Reply to Zahar', 4(3-4) *Climate Law* 234 (2014); Benoit Mayer, 'The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar', 5(1) *Climate Law* 1 (2015); Alexander Zahar, 'Methodological Issues in Climate Law', 5(1) *Climate Law* 25 (2015).

<sup>5</sup> See Zahar, *supra* note 2, section 2.1.

<sup>6</sup> This may be different in specific fields of international law, in particular international criminal law. By contrast to the situation in general international law described *infra* note 13, arguments from analogy with precedents are admissible before the International Criminal Court under Rome Statute of the International Criminal Court, 2187 UNTS 3 (17 July 1998), art. 21.2. This, however, does nothing to exclude the validity of other possible legal arguments.

<sup>7</sup> See for instance *Adams v. New Jersey Steamboat Co.*, 151 N.Y. 163 (N.Y. 1896), a dispute about whether a steamer carrying overnighting passengers and providing them with rooms was to be compared with a hotel or with a night train.

<sup>8</sup> An argument can be conservative, but international law does not have to be, as Zahar suggests.

<sup>9</sup> This does not mean a 'new' rule. A rule can exist, yet never have been brought before a court.

international precedent.<sup>10</sup> In fact, it is hard to see what rule an international court or tribunal could ever have applied, based on Zahar's assumption: the first international tribunal ever constituted, having no precedent to follow, would have been unable to make any decision, not even a decision on its own inability to make any decision.

Arguments by analogy are central in common law traditions in application of the doctrine of the binding precedent (*stare decisis*).<sup>11</sup> Even then, however, the rigidity of this doctrine is nuanced by the ability of the highest courts to overrule their own precedents and by the need for lower courts to decide cases even when there is no binding precedent. But general international law is different. Save for some particular regimes,<sup>12</sup> the doctrine of the binding precedent does not apply to international law, and judges have no power to create general rules.<sup>13</sup> While international courts and tribunals often *refer* to previous decisions, they do not *rely* on them as binding authorities, but use them as shortcuts for longer reasoning—a handy way, along with scholarly publications, to determine rules of international law.<sup>14</sup> As Alain Pellet put it: 'Central to the question is the persuasiveness of the legal reasoning' in the previous case.<sup>15</sup> For instance, the ICJ in *Certain Activities* referred to its previous judgment in *Pulp Mills* not as an authoritative source of law creating the no-harm principle, but as the demonstration of the existence of this principle.<sup>16</sup> There was no discussion in *Certain Activities* about the distinction between *ratio* and *obiter* or about the material elements in *Pulp Mills*, and indeed no explicit comparison of the facts in the two cases; the point was simply that a previous judgment had articulated a largely agreed-upon<sup>17</sup> description of the law which was of relevance in the later case.

To identify rules of international law, international courts and tribunals rely on formal sources of international law (e.g. treaties, custom, general principles<sup>18</sup>), either directly or by inference when one rule necessarily implies another one. Treaty rules can be identified through treaty interpretation. Custom can be derived from empirical evidence, through a survey of the general practice of states accepted as law. Rules of international

<sup>10</sup> The tribunal referred to decisions by domestic jurisdictions, but those are no authority on the interpretation of international law, although they may be the expression of a general principle recognized by various nations. See *Trail Smelter (U.S. v. Canada)*, Arbitral Award of 11 March 1941 (1949), III UNRIAA 1938, at 1965.

<sup>11</sup> As such, it is no surprise that Zahar relies on a common law scholar writing in a domestic law review to characterize reasoning by analogy. See Zahar, *supra* note 2, note 16.

<sup>12</sup> See *supra* note 6 (international criminal law).

<sup>13</sup> See ICJ Statute, article 59: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' See also, *ibid.*, art. 38.1, where, subject to the above-mentioned provision, 'judicial decisions' are treated as 'subsidiary means for the determination of the rules of law' on an equal footing with 'the teachings of the most highly qualified publicists of the various nations'. See generally Guido Acquaviva and Fausto Pocar, 'Stare decisis', in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2007).

<sup>14</sup> ICJ Statute, art. 38.1(d).

<sup>15</sup> Alain Pellet, 'Decisions of the ICJ as Sources of International Law?', 2 *Gaetano Morelli Lecture Series* 7 (2018), at 38.

<sup>16</sup> *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, I.C.J. Reports 2015, p. 665, para. 104 (hereinafter *Certain Activities*).

<sup>17</sup> The parties to the dispute, at least, admitted the existence of the principle.

<sup>18</sup> See ICJ Statute, art. 38.1. Other sources have since been admitted, in particular unilateral declarations of states capable of creating legal obligations.

law can also be inferred from one another.<sup>19</sup> For instance, the ICJ has deduced a number of rules of general international law from axiomatic premises of the international legal order.<sup>20</sup> As an example of the deductive method, in *Corfu Channel*, the ICJ noted that the overarching principle of sovereign equality<sup>21</sup>—the idea that all states are equal, at least formally—implies an obligation for every state ‘not to allow knowingly its territory to be used for acts contrary to the rights of other States’.<sup>22</sup> In turn, its judgments in the cases of *Pulp Mills* and *Certain Activities*, the ICJ inferred the no-harm principle from this ‘due diligence obligation that is required of a State in its territory’<sup>23</sup> in order for each state to respect the equal rights of other states. The no-harm principle is law, as recognized by the ICJ, because it is an inevitable implication of other, widely accepted principles of general international law.

Accordingly, what Zahar describes as ‘the rule against transboundary harm’ is only the part of a larger continent that international courts and tribunals have already visited; the no-harm principle that can be inferred from general international law, following the same line of argument by inference, is broader. The principle of equal sovereignty, an axiomatic premise of the international legal order, requires each state to respect the rights of other states. Besides the general prohibition of the use of force, this implies that every state must refrain from causing disproportionate harm to other states, including by taking due diligence with regard to activities carried out within its jurisdiction. This reasoning, which led international courts and tribunals to infer a prohibition against harm caused directly across a border, applies a *fortiori*<sup>24</sup> in relation to activities, such as massive greenhouse gas emissions, capable of causing havoc in planetary systems and substantial harm to multiple states—even substantial loss of

<sup>19</sup> See generally Stefan Talmon, ‘Determining Customary International Law: The ICJ’s Methodology between Induction, Deduction and Assertion’, 26(2) *European Journal of International Law* 417 (2015). A remarkable example is the inference of the international legal personality of international organizations from the functions and rights devolved to them. See *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, p. 174, at 179.

<sup>20</sup> See Christian Tomuschat, ‘What is General International Law?’, Audio-visual Library of International Law, <<http://legal.un.org/avl/ls/Tomuschat.html#>>.

<sup>21</sup> This obligation is a foundation of the current regime of international law. It is recognized, *inter alia*, in article 2.1 of the Charter of the United Nations. See e.g. Juliane Kokott, ‘States, Sovereign Equality’, in *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2011).

<sup>22</sup> *Corfu Channel case*, Judgment of 9 April 1949, I.C.J. Reports 1949, p. 4, at 22.

<sup>23</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, para. 101; *Certain Activities*, *supra* note 16, para. 104. See also *Iron Rhine Railway (Belgium v. Netherlands)*, XXVII UNRIAA 35 (2005), para. 222.

<sup>24</sup> If any distinction is to be made between localized transboundary harm and harm to the global environment, this should be to emphasize the greater gravity of the latter, where, beyond individual states, the entire human civilization is potentially at stake. One could relate this (by analogy) to the reasoning of Judge Weeramantry in relation to the humanitarian impacts of nuclear weapons, including the impacts that he envisaged on the global environment: ‘If humanitarian law regulates the lesser weapons for fear that they may cause the excessive harm which those principles seek to prevent, it must *a fortiori* regulate the greater.’ See the dissenting opinion of Judge Weeramantry in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 429, at 487. A rule is supposed to apply no less strictly, and perhaps more strictly, in cases where the problem it addresses is more acute—one would surely not expect a legal system to prohibit murder *unless* it is part of a genocide. In procedural terms, the obligation not to cause transboundary environmental harm takes an *erga omnes* dimension when the harm affects the planetary system: responsibility could therefore be invoked before an international court or tribunal by a state other than an injured state. See in particular (for illustration, not precedent): *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 3, para. 33.

territory of islands and coastal countries. The reasoning is the same whether harm is caused to a particular area or to the whole planet, over short or long distances, to neighbouring states or states far away, rapidly or slowly, directly or indirectly (as long as consequences are reasonably foreseeable), and by a single source or many sources, because these distinctions are not related to the rationale for the prohibition of harm: the obligation of each state to respect the rights of other states. The essential question is not *how* a state's greenhouse gas emissions cause serious environmental harm, as Zahar suggests, but whether these emissions unduly interfere with the sovereign rights of other states.

Zahar then raises questions of a different nature, which relate to the application of the rule to particular states, rather than to the existence of the rule prohibiting excessive greenhouse gas emissions. Climate change is not caused by any single state in isolation, yet some contribute much more to the issue than others. What is relevant here is not the quantity of emissions by a state in a single year, as Zahar assumes, but its emissions over decades as a result of consistent policy decisions made and maintained by national governments and other state agents over time. It is far from inconceivable that the greenhouse gas emissions occurring in the United States or China on a decadal scale would have significantly impacted planetary systems even in the absence of any significant source of greenhouse gas emissions in any other country. After all, a small share of an immense global environmental harm may not be negligible. Admittedly, the same argument may be more difficult to develop in relation to much smaller countries, including the example selected by Zahar (certainly not because of its importance to global greenhouse gas emissions): the Vatican.<sup>25</sup> What Zahar decides to ignore is the relevance of the principle of cooperation.<sup>26</sup> States must cooperate in addressing harm to the global environment.<sup>27</sup> This means that each state is bound to take measures within its jurisdiction which, if other states were to take similar steps, would prevent serious harm to the global environment. The no-harm principle creates an obligation of conduct (i.e. a due diligence obligation), compliance with which can be assessed independently from the desired outcome (i.e. preventing global environmental harm).

At its core, Zahar's critique appears to be directed at the international law on climate change as a field, rather than to its account in my book. Contrary to what Zahar claims, my work is not a work of advocacy. I certainly do not claim that the international law on climate change is entirely well-established or knowable. Important modalities of general principles such as the no-harm principle and the principle of cooperation remain indeterminate, including virtually all questions relating to proportion, although some

<sup>25</sup> The other example selected by Zahar, Italy, is an EU member state. The European Union has a shared competence on climate change mitigation according to article 4 of the Treaty on the Functioning of the European Union. There is no ground to exclude the application of customary international law to international organizations within the scope of their functions and personality. As the third largest greenhouse gas emitter, the European Union is certainly not as irrelevant as Zahar implies.

<sup>26</sup> This is described, though probably too briefly, in Mayer, *The International Law on Climate Change*, *supra* note 3, at 75.

<sup>27</sup> See, e.g., UNFCCC, recital 7; Rio Declaration on Environment and Development, principle 27; and ITLOS, *The MOX Plant Case (Ireland v. United Kingdom)*, Order for Provisional Measures of 3 December 2001, para. 82.

general indications can be inferred from the practice and statements of states.<sup>28</sup> The no-harm principle does not prohibit minute environmental harm: what constitutes excessive greenhouse gas emissions is an essential question, yet it remains an open question in the present state of the international law on climate change. Likewise, while states have an obligation to cooperate, the modalities of cooperation are largely indeterminate.

*The International Law on Climate Change* could not do more than acknowledge these limitations of the law as it is. Indeterminate rules of international law are to be clarified through a somewhat creative exercise when they are interpreted and applied. Over time, authoritative studies<sup>29</sup> and even judicial decisions<sup>30</sup> will help to establish a more specific understanding of the modalities of application of general international law to climate change. Already, treaty practice may have started to forge a consensus on the relevance of certain criteria in assessing tolerable as well as excessive greenhouse gas emissions, including population, development needs, and geographical circumstances.<sup>31</sup>

### **3. Zahar's Contention That Existing Treaties Exclude the Application of the No-Harm Principle<sup>32</sup>**

Zahar thereafter claims that the UNFCCC regime 'displaces any ... application of the no-harm principle'.<sup>33</sup> In a first attempt to demonstrate this assertion, Zahar pulls out of a hat the notion of a 'complete regime' which, somehow, excludes the application of any other rule of international law to the same subject area. What constitutes a 'complete regime', how it can be recognized, or why it has such an effect, are for the reader to guess. Oddly, it is also for the reader to guess whether the UNFCCC regime or any part of it constitutes such a 'complete regime'. While Zahar claims that the climate treaties are seemingly '*intended to create a complete regime*', he then notes that the Paris Agreement '*represents a progression towards completeness*'—but he does not state that either the UNFCCC regime as a whole or the Paris Agreement in particular has *achieved* completeness yet. Instead, leaving 'completeness' completely aside, Zahar turns abruptly to another question: what matters is that the Paris Agreement 'covers the field', which he claims is proven by the fact that the Paris Agreement is aimed at being 'effective'. On the basis of this rather banal statement (any rule-making exercise pursues some form of effect), Zahar pulls out of another hat—or is it the same one?—the conclusion that, as the Paris Agreement 'covers the field, it displaces everything that was there before'. *Abracadabra, tabula rasa, quod erat demonstrandum*: the magic is done, customary international law is banished.

<sup>28</sup> For instance, it is clear that the threshold is not limited to the condition of a 'risk of interstate conflict', as suggested, without any justification, in Zahar, *supra* note 2. A state has the right not to be affected by significant environmental harm whether or not it has defense capacity.

<sup>29</sup> See in particular the Draft Guidelines on the Protection of the Atmosphere (drafted by Special Rapporteur Shinya Murase), adopted by the International Law Commission in first reading at its seventieth session on 9 August 2018, in *Report of the International Law Commission at its Seventieth Session*, UN Doc A/73/10 (forthcoming).

<sup>30</sup> See for instance the Advisory Opinion of the Inter-American Court of Human Rights mentioned *supra* note 1.

<sup>31</sup> Mayer, *The International Law on Climate Change*, *supra* note 3, at 90-98.

<sup>32</sup> See Zahar, *supra* note 2, section 2.2.

<sup>33</sup> *Ibid.*

What strikes me here is the untenable implication Zahar's rather perplexing thread of argument: Virtually every treaty seeks to be 'effective' (otherwise, why go through all the trouble of negotiating, adopting, and ratifying a treaty?), *therefore* every treaty 'covers the field' and 'displaces everything that was there before'. The International Covenant on Civil and Political Rights of 1966 erases, according to this reasoning, the European Convention on Human Rights of 1950 and the Convention on the Status of Refugees of 1951—among other human rights treaties. Or the UNFCCC itself would accordingly exclude not only the no-harm principle but also the application of any pre-existing norm of human rights law or trade law which would otherwise have been relevant to climate-related measures, or even other treaty regimes that seek to address particular aspects of climate change mitigation or adaptation. It is not necessary to refer to sources that prove these propositions to be false. A treaty that addresses a particular field does not exclude all pre-existing rules relating to the same subject matter. The principle that 'later law supersedes earlier law' (*lex posterior derogate legi priori*) only applies with regard to *incompatible* rules.<sup>34</sup>

Likewise, it is well established that treaties do not automatically exclude the application of customary international law: there is no hierarchy between sources of international law.<sup>35</sup> Even in a 'self-contained regime', it is well recognized that customary international law applies unless it is excluded by a particular provision, whether explicitly or implicitly, and then only to the extent that that provision excludes its application.<sup>36</sup> Martti Koskenniemi, who conducted an authoritative study on the fragmentation of international law under the aegis of the ILC, identified a principle according to which 'when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.<sup>37</sup> Nothing excludes the application of a pre-existing rule of international law when a treaty seeks to effectively address a subject matter.

Therefore, the sole fact that the UNFCCC regime (or more specifically the Paris Agreement) seeks to address climate change does not mean that any rule of international law must be dispensed with. Rather, the UNFCCC regime should, as far as possible, be interpreted consistently with other rules of international law, including the no-harm principle, as part of a broader, consistent normative system: international law. It is only when particular provisions of the UNFCCC regime cannot be interpreted consistently—

<sup>34</sup> See *Vienna Convention on the Law of Treaties*, 1155 UNTS 331 (23 May 1969), art. 30.3; 'Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law', in *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, para. 24 (hereinafter 'Conclusions on the Fragmentation of International Law'). In the case where there is a conflict between two provisions, this principle applies with certain nuances, and concurrently with other principles as detailed in the ILC conclusions.

<sup>35</sup> See for instance 'Conclusions on the Fragmentation of International Law', *supra* note 34, para. 31: 'The main sources of international law ... are not in a hierarchical relationship *inter se*.'

<sup>36</sup> See for instance Korea—Measures Affecting Government Procurement, Report of the Panel of 1 May 2000 (WT/DS163/R), para. 7.96: 'Customary international law applies generally to the economic relations between the WTO Members', adding that it applies 'to the extent that the WTO treaty agreements do not "contract out" from it. To put it another way, to the extent that there is no conflict or inconsistency, or an expression in a covered WTO agreement that applies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.'

<sup>37</sup> 'Conclusions on the Fragmentation of International Law', *supra* note 34, para. 4.

when they ‘point to incompatible decisions so that a choice *must* be made between them’—that one rule supersedes the other.<sup>38</sup> This would be the case if two rules are contradictory (for instance when two rules attribute the same territory to two different states), or if one rule clearly indicates that it excludes the application of the other.<sup>39</sup> In such cases, international courts may revert, among other things, to the principle that ‘priority should be given to the norm that is more specific’ (*lex specialis derogate legi generali*).<sup>40</sup> Therefore, the question is not whether the UNFCCC regime forms a ‘complete regime’ or ‘covers the field’ (whatever these expressions mean), but whether the UNFCCC regime excludes, through an explicit provision or by necessary implication, the application of the no-harm principle.

In the three climate change treaties and the hundreds of decisions on their implementation—spanning thousands of pages—Zahar found *two words* which led him to conclude that the whole UNFCCC regime excludes entirely the application of general international law. Zahar contends that the phrase ‘*assigned amounts*’, in article 3, paragraph 1, of the Kyoto Protocol, is not only inconsistent with the no-harm principle, it also reflects an intention of the parties to the Kyoto Protocol—and presumably to the UNFCCC and the Paris Agreement—to exclude the application of the no-harm principle to climate change entirely.<sup>41</sup>

This argument is not supported by the words of the treaty: ‘assigned amounts’ does not *necessarily* imply—as Zahar contends—that Annex I parties are ‘legally entitled to emit up to the limits of their budget’. Article 3, paragraph 1, creates an obligation for Annex I parties to ensure that their greenhouse gas emissions ‘*do not exceed* their assigned amounts’. Annex B contains quantified emission limitation or reduction *commitments*, not quantified emissions *entitlements*. An obligation not to exceed a level of emissions does not necessarily come with a legally protected entitlement, or right, to a corresponding amount of emissions.<sup>42</sup> Further, the object and purpose of the Kyoto Protocol—to reduce greenhouse gas emissions, in particular those of Annex I parties—offers no support to an interpretation of this treaty as protecting the right of Annex I parties to emit greenhouse gases. The terms and object of the treaty are clear enough, but its context confirms that, as the Cook Islands put it, ‘no provision in the Protocol can be interpreted as derogating from the principles of general international law’.<sup>43</sup>

<sup>38</sup> Ibid., para 2 (emphasis added).

<sup>39</sup> See e.g. *ibid.*, para. 5: ‘For the *lex specialis* principle to apply it is not enough that the same subject matter is dealt with by two provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.’

<sup>40</sup> Ibid., para. 5.

<sup>41</sup> Zahar apparently assumes that this phrase excludes the no-harm principle not only during the first commitment period, but also beyond.

<sup>42</sup> This is perhaps best explained by analogy. Think for instance of speed limitations for road vehicles. In various countries, truck and bus drivers must respect special speed limitations. These special speed limitations do not exclude the application of general speed limitation. Take the driver of a truck which, as a particularly heavy vehicle, is constrained by a special speed limitation at 80 kilometres per hour (kmph). Imagine that this driver enters a town where a speed limitation at 30 kmph is enforced. What Zahar suggests is that the truck can cross the town at 80 kmph, notwithstanding the general obligation applicable in town to reduce speed to 30 kmph. In fact, the two obligations apply. A special obligation does not create a right to ignore the general obligation.

<sup>43</sup> Cook Islands, Declaration upon signature of the Kyoto Protocol (16 September 1998).

In support of his improbable claim that the Kyoto Protocol entitled developed countries to pollute, Zahar mentions the flexibility mechanisms which, in his view, seek to ‘encourage’ Annex I parties to sell unused emission allowances—as if the goal of the flexibility mechanisms was to ensure that the Protocol would not exceed its objective of reducing overall greenhouse gas emissions in Annex I parties by 5 per cent. This is in spite of decision 2/CMP.1 on the principles, nature, and scope of flexibility mechanisms—which Zahar refers to in his next paragraph!—according to which ‘the Kyoto Protocol has not created or bestowed any right, title or entitlement to emissions of any kind on Parties included in Annex I’,<sup>44</sup> a provision which aims, precisely, to exclude this very contention. Flexibility mechanisms seek to reduce the cost of climate change mitigation, not to limit overall mitigation outcomes in order to protect an improbable right to pollute. This provision, included in a decision adopted by consensus<sup>45</sup> by the UNFCCC parties, and later by the Kyoto Protocol parties, confirms<sup>46</sup> what was already strongly suggested by the ordinary meaning of the terms of the treaty in the light of its object and purpose and corroborated by its context: the Kyoto Protocol created *obligations* to reduce greenhouse gas emissions, not *rights* to emit greenhouse gases.

Zahar then goes on to suggest that the Paris Agreement allows states to emit greenhouse gases up to an increase in global average temperature of 1.5°C. In his view, the Paris Agreement secures a right to pollute to each state party. Commentaries on the Paris Agreement so far have shown considerable caution in identifying any substantive obligations,<sup>47</sup> despite the presence of highly suggestive terms<sup>48</sup> and their consistency with the object and purpose of the treaty. Zahar is testing the reader’s faith by bringing up, absent any textual basis and despite its object and purpose, that the Paris Agreement created rights for states to emit greenhouse gases. Here, Zahar does not even attempt to provide any textual or contextual support to this assertion—and, indeed, no support can be found. Reading Zahar, one would expect to find in the Paris Agreement a provision to the effect that the parties ‘may emit greenhouse gases up to the amount claimed in their nationally determined entitlements’; instead, Article 4, paragraph 2, provides that the parties ‘shall pursue domestic mitigation measures, with the aim of achieving the

<sup>44</sup> Kyoto Protocol, *Decision 2/CMP.1, Principles, Nature and Scope of the Mechanisms Pursuant to Articles 6, 12 and 17 of the Kyoto Protocol* (30 November 2005) (first adopted as UNFCCC Decision 15/CP.7, 10 November 2001).

<sup>45</sup> It is both unsurprising and irrelevant that, as Zahar notes, this phrase was inserted at the insistence of developing States.

<sup>46</sup> See *Vienna Convention on the Law of Treaties*, *supra* note 34, arts. 31.1, 31.2 and 31.3.

<sup>47</sup> See for instance Daniel Bodansky, ‘The Paris Climate Change Agreement: A New Hope’, 110 *American Journal of International Law* 288 (2017), at 295; Christine Bakker, ‘The Paris Agreement on Climate Change: Balancing “Legal Force” and “Geographical Scope”’, 15 *Italian Yearbook of International Law* 299 (2015), at 307; Lavanya Rajamani, ‘The 2015 Paris Agreement: Interplay between Hard, Soft and Non-Obligations’, 25 *Journal of Environmental Law* 337 (2016), at 354; James Crawford, ‘The Current Political Discourse Concerning International Law’, 81 *Modern Law Review* 1 (2015), at 21; Peter Lawrence and Daryl Wong, ‘Soft law in the Paris Climate Agreement: Strength or weakness?’, 26 *Review of European, Comparative and International Environmental Law* 276 (2016), at 276; and, for my own take on the question, Benoit Mayer, ‘Obligations of Conduct in the International Law on Climate Change: A Defence’, 27(2) *Review of European, Comparative and International Environmental Law* 130 (2018) (hereinafter ‘Obligations of conduct’).

<sup>48</sup> For instance, the ‘shall’ language in article 4, paragraph 2, second sentence, is strongly suggestive of the existence of an obligation.

objectives of' NDCs. Zahar's contention is not just contrary to my theory: it is contrary to the text as well as the object and the purpose of the Paris Agreement, which seeks to reduce pollution, not to allow it, and requires states to increase their ambition over time,<sup>49</sup> not to defend dubious 'entitlements'. Moreover, NDCs and related declarations may, under certain conditions, constitute an autonomous source of international law,<sup>50</sup> but such unilateral declarations are capable of creating only legal obligations, not legal rights opposable to third Parties.<sup>51</sup>

The 1.5°C target is not 'a colossal contradiction' with my position, as Zahar contends. The target in question is of course a mitigation target, not a warming target; states are accordingly to reduce their greenhouse gas emissions, not to maintain them; and this target goes in the very direction suggested by the no-harm principle—towards the cessation of excessive greenhouse gas emissions. Along with the UNFCCC's objective of preventive dangerous anthropogenic interference with the climate system, one could even plausibly interpret the 1.5°C target as, in effect, an interpretation (albeit incomplete) of the no-harm principle—a statement about what this principle means in relation to climate change.<sup>52</sup> In other words, the 1.5°C target could be viewed as an attempt by states to draw a line between national levels of greenhouse gas emissions that are excessive—and hence at the same time incompatible with the climate regime and prohibited under the no-harm principle—and those that are permitted under general international law. This reading of the 1.5°C target as an interpretation of the no-harm principle is made plausible, in my view, by two elements. First, states have broadly endorsed the 1.5°C target (which is no mean achievement).<sup>53</sup> Second, scientists tend to agree that the 1.5°C target is about as ambitious a target as can be achieved through reasonably available policy pathways that do not disproportionately disrupt social and economic systems<sup>54</sup>—a more demanding target would require more than the due diligence standard under the no-harm principle. However, this characterization of the 1.5°C target as a partial interpretation of the no-harm principle in the context of climate change has to come with two caveats.

The first caveat is that this interpretation of the no-harm principle is contingent, among other things, on scientific knowledge and technological capacity. The 1.5°C ceiling as an interpretation of the no-harm principle may need to be revised if, for instance, climate scientists were to realize that a 1.5°C increase in global average temperature would lead to far more serious consequences than currently thought, or if unanticipated

<sup>49</sup> See, in particular, Paris Agreement, arts. 3 (second sentence), 4.3, and 14.

<sup>50</sup> See Benoit Mayer, 'International Law Obligations Arising in Relation to Nationally Determined Contributions', 7(2) *Transnational Environmental Law* 251 (2018).

<sup>51</sup> A state may assert its rights through a unilateral declaration, but corresponding obligations cannot be unilaterally imposed on third persons—and a right is not legally protected unless corresponding obligations are imposed on third persons. See 'Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations', in *Yearbook of the International Law Commission*, 2006, vol. II, Part Two, principle 9.

<sup>52</sup> See Mayer, *The International Law on Climate Change*, *supra* note 3, at 237; Mayer, 'Compliance Regime', *supra* note 3.

<sup>53</sup> No parties to the Paris Agreement have registered any dissatisfaction with this target in interpretative declarations on the treaty. By contrast, several states stated their understanding that the ambition embodied in the Kyoto Protocol was insufficient.

<sup>54</sup> See Joeri Rogelj et al., 'Scenarios Towards Limiting Global Mean Temperature Increase Below 1.5°C', 8 *Nature Climate Change* 325 (2018).

technological development were to make far greater emission reductions or negative emissions possible, as such changes would meaningfully alter the costs and benefits of additional mitigation efforts. Unfortunately, this interpretation of the no-harm principle would also need to be reconsidered if states were to fail to act quickly enough to make it possible to achieve the 1.5°C target.

The second caveat is that, if the 1.5°C target is a step towards an interpretation of the no-harm principle in relation to climate change, many other steps are necessary. It is not clear, for instance, what this temperature target means for global greenhouse gas emission trajectories, as there is significant scientific uncertainty as to feedbacks in planetary systems.<sup>55</sup> There is also no consensus about how the overall mitigation action necessary to achieve this target is to be apportioned among states. One way would be to distribute expected mitigation *outcomes* to states (e.g. through quantified emission-reduction targets), as happens under the Kyoto Protocol. Another way, which in my view is more in line with the obligation of conduct at the core of the Paris Agreement, would be to distribute the overall mitigation *effort* among states (for instance in terms of carbon price, financial investment, targets on technological deployment), acknowledging that the translation of a state's mitigation effort into actual mitigation outcomes depends in part on extraneous circumstances, such as economic circumstances or technological innovation.<sup>56</sup> If NDCs were, one day, to lead all countries in a collective pathway consistent with the 1.5°C target, the Paris Agreement and by extension the UNFCCC regime may achieve, temporarily at least, a comprehensive interpretation of the obligation of states under general international law to cease their excessive greenhouse gas emissions. But this, at the moment, is not the case, as there is a wide and widely acknowledged gap between national commitments and the 1.5°C target.<sup>57</sup> Mitigation obligations under the climate regime do not presently suffice to implement states' due diligence obligation under the no-harm principle and, therefore, do not displace the latter.

#### 4. Conclusion

An analysis of climate law arbitrarily limited to treaties, which Zahar advocates, would be incompatible with the general understanding of the sources of international law.<sup>58</sup> Likewise, while moral principles are important material sources that influence the evolution of international law, they do not automatically create rules of international law. Neither the rights of future generations, nor the polluter-pays principle enjoy, at present, a level of recognition in international law comparable to that of the no-harm principle. I certainly agree with Zahar that the no-harm principle is not the best principle

<sup>55</sup> See David G. Victor and Charles F. Kennel, 'Climate Policy: Ditch the 2 °C Warming Goal', 514 *Nature* 30 (2014); Reto Knutti et al., 'A Scientific Critique of the Two-Degree Climate Change Target', 9 *Nature Geoscience* 13 (2016).

<sup>56</sup> See Paris Agreement, art. 4.2. See also discussion in Mayer, 'Obligations of Conduct', *supra* note 47.

<sup>57</sup> See UNEP, *The Emissions Gap Report 2017: A UN Environment Synthesis Report* (November 2017), at xiv: 'there is an urgent need for accelerated short-term action and enhanced longer-term national ambition, if the goals of the Paris Agreement are to remain achievable'.

<sup>58</sup> See ICJ Statute, *supra* note 13, art. 38.1. See also for instance Hugh Thirlway, *The Sources of International Law* (Oxford University Press, 2014).

on the basis of which to address climate change,<sup>59</sup> among other things because it does not sufficiently relate to essential characteristics of climate change as a global and intergenerational collective-action problem; but these critiques are critiques of the law, not of its account in my book.

Behind Zahar's argument is, I believe, an ideological attraction to treaties, holding them somehow higher than customs as a source of international law. Treaties are, after all, easier to interpret, at least in most cases. Lawyers excel at textual interpretation, a technique routinely used (though with some variations) in domestic legal systems. In contrast to treaties, custom is far messier, uncertain, and vague, and far less familiar in most domestic legal systems in which scholars are trained before turning to international law. The orthodox, inductive approach of identifying a general practice of states and its acceptance as law is so impractical that it is seldom used, whether by scholars or by international courts and tribunals.<sup>60</sup> Because a rule is difficult to identify, non-compliance with custom is also difficult to establish and often comes at a much lower reputational cost. Zahar is right to note that climate negotiations do not presently turn on customary international law.

Nevertheless, there are two key reasons why one cannot just turn one's back from the relevance of customary international law when approaching the international law on climate change. The first reason is that international courts and tribunals do apply custom no less than they apply treaties. Customary international law might be shapeless and even, in some milieus, straightforwardly unpopular, but our task as international lawyers is not to focus on what we expect that state agents are likely to contemplate, but what courts are likely to consider.<sup>61</sup> For the reasons discussed above and elsewhere, I believe that there are strong bases to conclude that an international court or tribunal would apply general international law—including the no-harm principle—in any case regarding a state's obligations to control greenhouse gas emissions within its jurisdiction or a state's rights to reparation in connection with breaches of such obligations. There is no choice here, no advocacy of any sort: custom is a source of law, and—unless a convincing argument could be made to justify why climate law would be an exception—it needs to be accounted for.

The second reason not to turn one's back to customary international law is of a different nature. The beneficiaries of climate law are not lawyers but societies, ecosystems, and future generations; the virtue of the law is not its clarity but its fairness. Treaties are created through state consent following political negotiations. It is no mystery that, in the course of such negotiations, some states are more influential than others. Through treaties, some states often get what they want, others seldom do.<sup>62</sup> In other words, treaties are often the instrument in which the powerful asserts its rights against the

<sup>59</sup> The point was also made, in passing (and arguably without sufficient nuance), by Kokott, *supra* note 21, para. 59.

<sup>60</sup> See Daniel Joyner, 'Why I Stopped Believing in Customary International Law', 9(1) *Asian Journal of International Law* (forthcoming, 2019).

<sup>61</sup> See, for instance, the Advisory Opinion of the Inter-American Court of Human Rights mentioned *supra* note 1.

<sup>62</sup> See Antony Anghie, *Imperialism, Sovereignty and International Law* (Cambridge University Press, 2012) at 72-74, 85-86, 241.

powerless, which is made to ratify through the use of power.<sup>63</sup> It is no coincidence that the UNFCCC regime could never impose strong obligations on the few states which contribute the most to greenhouse gas emissions, as those states happen to be the most powerful, or that it could never provide substantial reparations to those states most vulnerable to climate change, as those states happen to be the least powerful. Treaties are clear and precise, but they are often unjust towards the weak and powerless.

This is not to say that non-written sources of international law are always just.<sup>64</sup> Custom has long been viewed as ‘limited to the civilized and Christian people of Europe or to those of European origin’,<sup>65</sup> whereas the ‘savage’ could only be seen as an object of law. To date, the UN Charter bears the rather awkward mark of colonial domination when defining as a source of law ‘the general principles of law recognized by civilized nations’<sup>66</sup> (even though ‘civilized’ is now obsolete).<sup>67</sup> But over time, most such sharp edges have been eroded through successive disputes, political advocacy, and changes in state practice. The requirement of discursive consistency pushes each powerful state, having relied on a particular rule of customary international law to defend its interests in a particular case, not to deny the existence of the same rule in a subsequent case, even if this goes against its interests. Over time, general international law comes to form a system of norms that reflect what most states consider most of the time as acceptable enough not to protest against loudly. Such norms are not always a perfect fit to address new cases, but they provide a better basis than the alternative—the arbitrary use of power.

This is the reason why I would not find it desirable to dispense with customary international law in the international law on climate change—which is what, fundamentally, Zahar is advocating for. But the decision is not mine, nor is it Zahar’s, nor does it belong to any particular state or any particular court. The decision that states would have to comply with customary international law when faced with any relevant issues, old or new, was made long ago, gradually over centuries, as states agreed to form a society of equals, regulated by certain basic principles, including respect for the rights of one another. General international law will not lose its relevance to climate law—not in the work of international courts and tribunals, at least—until states bring climate change to a halt and ensure that no state, having been disproportionately affected as a result of the conduct of other states, is left without adequate remedy.<sup>68</sup>

<sup>63</sup> This is not peculiar to international law. Municipal law systems generally have provisions to protect weak parties from abusive contractual provisions, thus recognizing that free will sometimes permits the exploitation of the powerless by the powerful.

<sup>64</sup> See generally B.S. Chimni, ‘Customary International Law: A Third World Perspective’, 112(1) *American Journal of International Law* 1 (2018).

<sup>65</sup> Wheaton (1825), cited in Antony Anghie, *Imperialism, Sovereignty and International Law* (Cambridge University Press, 2012), at 54.

<sup>66</sup> ICJ Statute, *supra* note 13, art. 38.1(c).

<sup>67</sup> See e.g. Pellet, *supra* note 15, at 15.

<sup>68</sup> I am grateful to Professor Zahar for his review, for the opportunity to reply, and for the comments he gave on my reply. I regret that I may not have yet convinced him.