

## CONCLUSION

### Benoit Mayer and Alexander Zahar

*'I am likely to be a little bit wiser than he in this very thing: that whatever I do not know, I do not even suppose I know.'*<sup>1</sup>

This book would have achieved one of its goals if the reader was to leave with more doubt about the right answer on the various topics examined in this book than she had when first opening it. Climate law is still a young discipline, with many unanswered existential and other fundamental questions. There is some wisdom in at least acknowledging the deep divisions.

Our collection of staged debates, along with our set of 'reflections' on heavily debated topics, reveal the existence of three fundamental questions for climate law.

#### What Are States' Obligations?

Several debates reveal that we still know very little about what, precisely, states are required to do, whether under international or domestic law, in relation to climate change. Room is created for this kind of debate when states, unable to achieve a comprehensive agreement, agree on constructive ambiguities.<sup>2</sup> For sure, states must mitigate climate change, but how much effort are they required to make? Looking at climate finance, for instance, one has some difficulty interpreting the obligation of Annex II parties to 'provide ... financial resources'<sup>3</sup> to support climate action in developing countries—in practice it is challenging, perhaps even impossible, to determine when this obligation has been achieved.<sup>4</sup> The principle of common but differentiated responsibilities provides limited guidance in this respect.<sup>5</sup> One of its elements, historical responsibility, is morally attractive but it remains politically contentious, in no small measure due to the difficulty of assessing historical emissions.<sup>6</sup> An emerging practice of integrating climate change mitigation in environmental impact assessment also faces some difficult questions, for instance with regard to the determination of a threshold of 'significance'.<sup>7</sup>

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<sup>1</sup> Plato, *Apology of Socrates* (Thomas G West trans, Cornell UP 1979) 21d.

<sup>2</sup> See generally Susan Biniaz, 'Comma but Differentiated Responsibilities: Punctuation and 30 Other Ways Negotiators Have Resolved Issues in the International Climate Change Regime' (2016) 6 *Michigan J Env'tl & Admin L* 37.

<sup>3</sup> UN Framework Convention on Climate Change (adopted 9 May 1992, EIF 21 March 1994) 1771 UNTS 107, art 4(3).

<sup>4</sup> Yulia Yamineva, 'A Legal Perspective on Climate Finance Debates: How Constructive Is the Current Norm Ambiguity?' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (CUP 2021).

<sup>5</sup> Daria Shapovalova, 'In Defence of the Principle of Common but Differentiated Responsibilities and Respective Capabilities' in *Debating Climate Law* (n 4); Thomas Leclerc, 'The Notion of Common but Differentiated Responsibilities and Respective Capabilities: A Commendable but Failed Effort to Enhance Equity in Climate Law' in *Debating Climate Law* (n 4).

<sup>6</sup> Sarah Mason-Case and Julia Dehm, 'Redressing Historical Responsibility for the Unjust Precarities of Climate Change in the Present' in *Debating Climate Law* (n 4); Alexander Zahar, 'Historical Responsibility for Climate Change Is Political Propaganda' in *Debating Climate Law* (n 4).

<sup>7</sup> Benoit Mayer, 'The Emergence of Climate Assessment as a Customary Law Obligation' in *Debating Climate Law* (n 4); Alexander Zahar, 'Environmental Impact Assessment for Greenhouse Gas Emissions Is Pie in the Sky' in *Debating Climate Law* (n 4).

## What Are the Foundations of Climate Law?

Other debates look beyond specific instruments (eg, climate treaties), attempting to identify one or more general principles at the core of climate law. Diverging views exist as to the applicability of customary international law principles, in particular the no-harm principle, to climate change.<sup>8</sup> Likewise, there is no consensus yet as to the possibility of interpreting the obligation of states to protect the enjoyment of human rights as an obligation to mitigate climate change.<sup>9</sup> Nor do states (or scholars) agree on who should bear the loss and damage caused by climate change.<sup>10</sup> These debates point to fundamental jurisprudential issues—does the law (in particular international law) create a system of general principles that are always readily applicable to new situations, such as climate change, or is the law best read as a set of ‘black letter’ rules specific to climate change?<sup>11</sup> One’s view on this question informs what one regards as the legitimate role of the International Law Commission in promoting the progressive development of climate law.<sup>12</sup> It also informs one’s view on the prospects and legitimacy of climate litigation,<sup>13</sup> and about the functions and prospects of compliance procedures.<sup>14</sup>

## How Does Climate Change Transform the Law?

The application of the law to problems of climate change often leads to new developments or concepts that prompt the evolution of the law. Responses to climate change challenge, for instance, our conception of who are the legitimate actors. Whilst the primacy of states remains uncontested, few if any fields have seen an equally prominent role played by non-state actors.<sup>15</sup> Climate change also confronts us with new physical-legal phenomena, such as the geo-political disappearance of states from sea-level rise, which challenge our

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<sup>8</sup> Sandrine Maljean-Dubois, ‘The No-Harm Principle as the Foundation of International Climate Law’ in *Debating Climate Law* (n 4); Christopher Campbell-Durufié, ‘The Significant Transboundary Harm Prevention Rule and Climate Change: One-Size-Fits-All or One Size Fits None?’ in *Debating Climate Law* (n 4).

<sup>9</sup> Nicolas Pain, ‘Human Rights Law Can Drive Climate Change Mitigation’ in *Debating Climate Law* (n 4); Fanny Thornton, ‘The Absurdity of Relying on Human Rights Law to Go After Emitters’ in *Debating Climate Law* (n 4).

<sup>10</sup> Alice Venn, ‘Legal Claims for Reparation of Loss and Damage’ in *Debating Climate Law* (n 4).

<sup>11</sup> On the liceity of a finding of *non liquet* (i.e. where a court refuses to make a substantive decision on the grounds that the applicable law is ‘not clear’), see Hersch Lauterpacht, *Function of Law in the International Community* (OUP 2011) 73–74; but see *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 263 [97]; and generally Daniel Bodansky, ‘Non Liqueur’ in *Max Planck Encyclopedia of Public International Law* (online edn, OUP 2006) [14].

<sup>12</sup> Peter H Sand, ‘The International Law Commission’s Role in Developing International Law to Protect the Earth’s Atmosphere as It Relates to Climate Change’ in *Debating Climate Law* (n 4); Géraud de Lassus St-Geniès, ‘Why the ILC Should Not Seek to Codify Climate Law’ in *Debating Climate Law* (n 4).

<sup>13</sup> Cinnamon Piñon Carlarne, ‘The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis’ in *Debating Climate Law* (n 4); Guy Dwyer, ‘Climate Litigation: The Red Herring among Tools to Mitigate the Effects of Climate Change’ in *Debating Climate Law* (n 4).

<sup>14</sup> Meinhard Doelle, ‘In Defence of the Paris Agreement’s Compliance System: The Case for Facilitative Compliance’ in *Debating Climate Law* (n 4); Anna Huggins, ‘The Paris Agreement’s Article 15 Mechanism: An Incomplete Compliance Strategy’ in *Debating Climate Law* (n 4).

<sup>15</sup> Mikko Rajavuori, ‘The Role of Non-State Actors in Climate Law’ in *Debating Climate Law* (n 4).

understanding of current legal institutions.<sup>16</sup> In other circumstances, however, there may be a tendency to put old wine in new bottles, for instance by re-branding ‘development’ as ‘adaptation’<sup>17</sup> or ‘migration’ as ‘climate (im)mobilities’.<sup>18</sup>

When the law develops in response to climate change, values necessarily play a role.<sup>19</sup> There is no purely objective way, for instance, to solve the conflicts that are bound to emerge between climate change mitigation and ecological protection,<sup>20</sup> or to assess the role that aesthetics should play in guiding climate action.<sup>21</sup> Similarly, whether one accepts reliance on negative-emission technologies<sup>22</sup> or even on solar radiation management<sup>23</sup> as lawful largely depends on the values one assumes are integrated into the law. By addressing these values, our responses to climate change in the coming decades will inevitably transform the law in ways that cannot fully be predicted, but in which scholarship will surely play a role. Understanding why we disagree about climate law may help to determine how we could agree and, thus, how the law can assist in addressing what is unquestionably one of the greatest issues of our time.

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<sup>16</sup> Ori Sharon, ‘State Extinction through Climate Change’ in *Debating Climate Law* (n 4).

<sup>17</sup> Benoit Mayer, ‘Climate Change Adaptation Law: Is There Such a Thing?’ in *Debating Climate Law* (n 4).

<sup>18</sup> Ingrid Boas, ‘“Climate Mobility” Is a Proper Subject of Research and Governance’ in *Debating Climate Law* (n 4); Calum TM Nicholson, ‘Climate Mobility’ Is Not a Proper Subject of Research and Governance’ in *Debating Climate Law* (n 4).

<sup>19</sup> See Mike Hulme, *Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity* (CUP 2009).

<sup>20</sup> Olivia Woolley, ‘Climate Law and Environmental Law: Is Conflict Between Them Inevitable?’ in *Debating Climate Law* (n 4).

<sup>21</sup> Benjamin J Richardson, ‘Climate Change Law and Aesthetics: A Primer’ in *Debating Climate Law* (n 4).

<sup>22</sup> Gareth Davies, ‘An Emission-Reduction Commitment is a Plan for the Future: Developing and Using New NETs Should Be at the Heart of that Plan’ in *Debating Climate Law* (n 4); Duncan McLaren and Wil Burns, ‘It Would Be Irresponsible, Unethical, and Unlawful to Rely on NETs at Large Scale Instead of Mitigation’ in *Debating Climate Law* (n 4).

<sup>23</sup> Jesse L Reynolds, ‘Solar Geoengineering Could Be Consistent with International Law’ in *Debating Climate Law* (n 4); Kerry Anne Brent, ‘Solar Geoengineering Is Prohibited under International Law’ in *Debating Climate Law* (n 4).