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Book review

Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press, 2018) 302 pp.

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Climate law has evolved into a vibrant field of legal scholarship with scholars and experts offering profound analyses of its conceptualization and transformation, factors driving such transformation, and the implications of such transformation at the international, regional and local level.¹ In this book, *The International Law on Climate Change*, Benoit Mayer provides what could be the first comprehensive textbook of the emerging field of international climate change law as a discipline. The book seeks to bring together all components of the international law on climate change in a unique, comprehensive and coherent account of what international climate change law is all about. The author examines the agreements by states within the United Nations Framework Convention on Climate Change (UNFCCC) regime and other relevant fields by creatively fitting in analysis of relevant rules, norms and principles of general international law.²

The book is structured into 16 chapters. In Chapter 1, the author lays the foundation for subsequent chapters by first taking stock of the scientific basis of climate change; and second, identifying the principal goals of climate law and politics. He observes that, ‘as one of the greatest challenges of our time, efforts to address climate change are higher than conventional questions in international law such as global peace, social welfare and economic development’.³ Climate change has indeed been acknowledged as the ‘defining human development issue of our generation’.⁴ Alluding to the daunting nature of addressing the climate change crisis due to the major transformations needed in areas of economics, politics, society and culture, he advocates for fundamental transformation in the existing models of development by taking into account the carrying capacity of the planet, and underscores the pivotal role of the law in facilitating these changes. The author further expresses his ambivalence of the capacity of current governance institutions in undertaking the task ahead. The author however does well by providing an in-depth understanding of the scientific basis of climate change such as explaining the ‘greenhouse effect’, the origin of anthropogenic greenhouse gas (GHG) emissions and their impact, projections of future changes and the possibilities of altering these projections through law and science.

1. Ronald B Mitchell, ‘Climate Law: Accomplishments and Areas for Growth’ (2018) 8 *Climate Law* 135–50, 136.
2. Benoit Mayer, *The International Law on Climate Change* (Cambridge University Press, 2018) xiv.
3. *Ibid.*, 1.
4. UNDP, Overview: Human Development Report (2007)/08, available at: http://hdr.undp.org/sites/default/files/reports/268/hdr_20072008_en_complete.pdf, accessed 7 February 2019.

One of the foundational concepts in this book is that of ‘climate justice’. This notion implies that while least developed states contributed minimally to climate change, they are facing its adverse effects the most due to their direct dependence on natural resources. This view is shared by many scholars and experts. For example, Sumudu Atapattu observes that ‘those who are the most affected by climate change are those who contributed the least to the problem, thus raising serious ethical and justice issues’.⁵ Benoit Mayer rightly argues that ‘[i]t is now common knowledge that the impacts of climate change reinforces existing economic and social inequalities at multiples scales’.⁶ However, due to its cross-border nature, developed states are not immune from the adverse impacts of climate change including epidemics, food crises, migration and extreme weather events.⁷ The author consequently highlights the argument in favour of the adaptation action of developing states both as a form of assistance and as an issue of responsibility due to the historical contribution of developed states to climate change. First, ‘the notion of vulnerability implies that the finance concerned is adaptation finance whereas in fact the bulk of climate finance is earmarked for mitigation purposes’.⁸ Second, he supports the claim by Norway in its National Communications that ‘there is no internationally agreed definition of which developing country parties are “particularly vulnerable”, nor is there any likelihood that such a definition will be agreed in the foreseeable future making the definition of which countries are most vulnerable up to each contributing country’.⁹

In Chapter 2, Mayer, taking the debate further from the scientific and economic bases examined in Chapter 1, examines the diverse social and moral imperatives justifying and shaping international action on climate change. The chapter involves a detailed examination of the wide-ranging impacts of GHG emissions on global average temperatures that has led to a political consensus that scientific knowledge of climate change determines action on climate change. The author however argues that science alone cannot compel any specific action on climate change and attributes the inclusion of the two degree Celsius target in the 2009 Copenhagen Accord to rushed drafting during the last hours of protracted negotiations.¹⁰ Concurring with Saleemal Huq, the author observes that climate science cannot determine what increase in global temperature is acceptable since such determination is only possible based on particular values and interests.¹¹ The key argument in this chapter is that the justification for climate action should take the form of syllogism as defined by David Hume. This syllogism, according to the author, needs to involve normative and factual premises – it needs to involve values as well as science, since science is necessary but insufficient to define the rationale for climate action.¹² He therefore argues that

5. Sumudu Atapattu, *Human Rights Approaches to Climate Change: Challenges and Opportunities* (Routledge, 2016) 69.

6. Mayer (n 2) 11.

7. See Andrew T Guzman, *Overheated: The Human Cost of Climate Change* (Oxford University Press, 2013).

8. Alexander Zahar, *Climate Change Finance and International Law* (Routledge, 2017) 12.

9. *Ibid.*, 32; Government of Norway, Norway’s Sixth National Communication under the Framework Convention on Climate Change (2014) 162.

10. Mayer (n 2) 20.

11. Saleemal Huq has reportedly argued that ‘[w]hile two degrees is safe for many countries, and many ecosystems, it is not safe for all countries, and ecosystems’. See Helen Burley, ‘The Climate Negotiator’ (International Institute for Environment and Development, 15 February 2016) www.iied.org/climate-negotiator, accessed 7 February 2019.

12. Mayer (n 2) 22.

determining the right course of action for addressing climate change requires a balancing of values. These values include environmental protection, the interests of present and future generations, promoting human development and respecting the intrinsic value of the non-human environment, of accepting small risks of cataclysmic futures or preferring to remain on the safe side.¹³ There are therefore multiple concomitant moral narratives capable of justifying international action on climate change.

In Chapters 3, 4 and 5, the author explores the sources of the international law on climate change, tracing it from the UNFCCC regime established in 1992 in Rio up to the 2015 Paris Agreement. Chapter 3 specifically focuses on the UNFCCC regime including the Kyoto Protocol, the Copenhagen Accord, the Cancun Agreements and the Paris Agreement, among others. Relevant norms of general international law are also discussed in-depth in Chapter 3 while Chapter 4 delves into the relevant developments under other non-specific treaty regimes. The author recognises the UNFCCC regime as the *lex specialis* in addressing climate change. He systematically discusses the major achievements of the various international climate change agreements mentioned above. He proclaims that the adoption of the Paris Agreement is one of the great achievements under the UNFCCC regime, as it provides a fresh institutional basis for sustaining international climate change negotiations over the next few decades. Another significant progression is the near universal agreement of virtually every state to take some action to address climate change. He nevertheless sounded a caution that enhanced international action is required if the Paris Agreement's objective of limiting the increase in global average temperature by the end of the twenty-first century to two (let alone 1.5 degree Celsius above pre-industrial level) is to be realized.

Concerning relevant norms of general international law, the author argues that some of these norms, especially the no-harm principle and remedial obligations, require states to take specific steps with respect to climate change. The author in this respect sums up states' obligation relating to these principles as being that:

[s]tates must prevent activities within their territories or control from causing serious trans-boundary harm, including through excessive GHG emissions; and they must act consistently with the principles of international environmental law such as the principle of sustainable development and the principle of cooperation; if they breach any of these obligations, they must pay adequate compensation to remedy the resulting injury.¹⁴

The author, however, underscores that international agreements on climate change do not substitute these norms of general international law. For example, he contends that systematic derogation of international climate agreements from the norms of general international law would likely fall short of legitimate expectations of some relevant actors, and be considered unfair.

Taking the discussion further, in Chapters 7 to 12, the author discusses the substantive focus of international law on climate change with special emphasis on mitigation. The key argument running through these chapters is that states' obligation under general international law is arguably more demanding than what it suggests as states have obligations to prevent activities under their jurisdictions which cause harm to the global environment, such as excessive GHG emissions. For example, the author argues that, 'under the law of [s]tate responsibility, inasmuch as their breach of this international obligation is continuing, [s]tates are under an obligation to take all relevant measures

13. Ibid, 32.

14. Ibid, 66.

to guarantee the cessation of such breaches'.¹⁵ He asserts that cessation is a more serious action than the notion of mitigation under the UNFCCC regime. He however observes that the objectives and national commitments for action established under the climate agreements are clearer and more specific than the obligations of states under general international law. The chapter also underscores the apparent markedly less ambitious nature of international climate agreements than the objectives of state responsibility.

Regarding international action on adaptation, the author identifies two approaches – adaptation as a matter of protection or as a matter of remediation. Protection-based adaptation is described as challenges that states need to address within their territory, such as human rights protection and promoting sustainable development. On the other hand, he describes remedial-based adaptation as addressing the adverse effects of climate change as a product of a wrongful act, thus, failure of states to prevent excessive GHG emissions involving the responsibility of the responsible states and the obligation to pay adequate reparation to the affected states.¹⁶ The author however observes that protection-based adaptation has largely dominated the discourse on adaptation within the UNFCCC regime. Unlike mitigation, he notes the limited role of international action with regard to climate change adaptation due to its bottom-up nature. For instance, he notes that there are no overarching collective action issues that require international cooperation since a state's ability to protect its citizens is not reliant on the conduct of other states. Adaptation thus only gradually became equally recognized as mitigation in terms of importance and priority through the efforts of developing states. International action on climate change adaptation however remains very politicized.

In the final chapters, the author argues that the UNFCCC regime can be understood as an effort to promote states' compliance with their obligations under general international law, especially those related to the no-harm principle and the law of state responsibility. From this perspective, climate agreements can be interpreted as successive efforts to bridge the compliance gap on emissions and to a lesser extent, on reparations.¹⁷ He consequently argues that the success of the international law on climate change can be assessed by its ability to reduce simultaneously the gaps in collective objective, national ambition and state conduct, thus genuinely ensuring compliance with states' obligations under general international law.¹⁸ The author notes the efforts made by the UNFCCC regime to present participation in climate agreements and compliance with states' obligations under these agreements as states' own interest. It has been observed elsewhere by the author, that the participation of many developing states was incentivized by the conditional provision of international support.¹⁹ The author summarises the principal objective of the international law on climate change as an attempt by states to act together gradually to comply with their obligations under general international law, in particular the no-harm principle, but perhaps with the secondary obligation to pay adequate reparation for injury caused by an internationally wrongful act.²⁰ Climate change and international responses to

15. Ibid, 108.

16. Ibid, 161.

17. Ibid, 219.

18. Ibid, 220.

19. Benoit Mayer, 'Construing International Climate Law as a Compliance Regime' (2018) 7 *Transnational Environmental Law* 115.

20. Mayer (n 2) 237.

address it may certainly lead to new developments in general international law and further refinements as the norms of general international law evolved due to given circumstances.

The book integrates a wide range of the existing scholarship on climate change, a defining problem of this generation. The approach adopted by the author is more holistic than many others writing on the subject, perhaps by building on these earlier works. The book thus achieves something that other books on climate law cannot. For example, other recent books have looked at human rights and climate governance,²¹ international climate change law,²² climate change law,²³ and climate finance and international law,²⁴ but without a comprehensive treatment of the international law on climate change. These books each provide a unique perspective on their specific focal areas but Mayer manages to draw on and carefully weave together those perspectives in a targeted manner while also providing convincing and novel insights and a comprehensive assessment of ongoing developments, along with a persuasive argument making a strong case for international law on climate change as a new discipline of law.

In the author's own words, 'a more consistent understanding of the international law on climate change could facilitate international negotiations by determining a benchmark for reasonable expectations of a fair and equitable outcome'.²⁵ The book provides a constructive outline of the international law on climate change but, by so doing, also reveals the political and legal challenges of this emerging area of international law, especially its limited ability to deliver binding obligations to guide international responses to climate change. It is unclear how the evolving international law on climate change could engender creative reflections on climate governance specifically and on international environmental law in general. For the most part, this book highlights the need for a continued reflection of the law of state Responsibility, international Cooperation and the no-harm principle in addressing climate change at all levels of governance. The major weakness of the book is its failure to discuss the principal focuses of the international law on climate change – adaptation (Chapter 10), mitigation (Chapter 7) and Finance (Chapter 12) – in much depth. This is however partially addressed by its broad coverage of other relevant aspects of the international law of climate change such as differentiation, loss and damage, ambition and compliance, where the author examines how they contribute to international responses to climate change. The author achieves his objective as the book is carefully written and offers opportunities for both undergraduates and postgraduate students of international environmental law, climate law and mainstream international law to engage in critical intellectual debates as well as meaningful case studies. It should be of considerable interest to legal scholars, both emerging and established or anyone interested in how international law responds to the global climate crisis.

21. Sebastien Duyck, Sebastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge, 2018).

22. Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press, 2017).

23. Daniel A Farber and Marjan Peeters, *Climate Change Law* (Edward Elgar Publishing, 2016).

24. Zahar (n 8).

25. Mayer (n 2) xiv.