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Editorial

One Swallow Does Not a Summer Make, but Might the Paris Agreement on Climate Change a Better Future Create?; *EJIL* on Your Tablet or Smartphone; In this Issue

I have invited Laurence Boisson de Chazournes, member of our Editorial Board, to write the Editorial for this issue.

One Swallow Does Not a Summer Make, but Might the Paris Agreement on Climate Change a Better Future Create?

The Conference of the Parties in Paris in December 2015, with the subsequent adoption of the Paris Agreement on Climate Change, was a significant event, from both a political and a legal perspective.[1] It is politically significant not least because it is the first universal agreement on climate change, involving 195 countries and the EU, to be adopted.[2] However, the event was also legally significant for a host of reasons upon which this Editorial will touch. Overall, it represents an evolution in legal technique, especially with regard to the measures and procedures used to achieve the intended objective. Legal events like this are noteworthy in the way that they introduce innovations and provoke reflection.

The Paris Agreement is indeed an interesting legal creature. In trying to shape a better future than is foreseeable, if present consumption patterns of fossil fuels continue, the Agreement adopts a legal technique that breaks new ground. It envisages the elimination of the use of fossil fuel energy by the end of the 21st century. This would be quite an achievement, given that fossil fuel energy has shaped the economy of the 20th century in so many different ways. The Agreement is intended to come into force in 2020, and the objective it sets is to be achieved in the second part of this century, which is indeed several decades from now. It goes without saying that a great number of us will no longer be here when the goals of the Agreement are to be realized, and we are thus being asked to act for the generations to come. Interestingly, in addition to building a long-term future, the Agreement makes provision for meetings, as well as for tasks to be achieved at these meetings, in the near future. Some of these meetings

[1] Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

[2] At the High-Level Signature Ceremony in New York on 22 April 2016, 176 countries and the EU signed the Paris Agreement. The Seychelles and Gambia have since signed the Agreement. See https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&lang=en (last visited 3 May 2016).

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will take place in 2018, 2023, 2025 and thereafter. The path to the longer-term objective is thus paved with the fulfilment of shorter-term commitments.

Another feature of the Paris Agreement is the legal form that it takes. The divide between soft law and hard law is blurred, to say the least. It is difficult to distinguish the Agreement from the Decision of the Contracting Parties. The latter was negotiated with as much vigour as the former. As a matter of fact, when one refers to the Paris Agreement, it should be considered alongside the Decision, which was negotiated at the same time as the treaty and which allowed for its adoption. They are almost like Siamese twins in the way that they are so closely linked to one another. In addition, the main actions to be undertaken for reducing greenhouse gas emissions are not laid down in the Agreement or in the Decision of the Contracting Parties. I am referring here to the 'nationally determined contributions' that have been made voluntarily by each state, outside of the Agreement. This bottom-up approach is in contrast to an approach whereby targets are imposed from 'above' in a treaty. The Kyoto Protocol[3] has become a symbol of this failed top-down approach, and, hence, the idea of a new approach has since prevailed, creating an opportunity for another normative model in which voluntary 'offers' contribute to rather precise intermediate and final objectives.

This said, governments have committed to meet every five years with a view to setting more ambitious targets each time. The Paris Agreement does not define targets, but states are asked to continually do more than they have committed to do up to that point in time. Some have noted that this marks the emergence of a new principle known as the principle of non-regression – never below the target, always above. Others even qualify it as the principle of progression. In this way, states will be held to their word through legal techniques that are both procedural and substantive.

Also of note are the implementation tools that are intended to give the Paris Agreement its teeth. A variety of tools, each with varying degrees of novelty, have been adopted. For example, the Agreement envisages fairly standard measures to increase climate change awareness, while, at the same time, it speaks of an 'enhanced transparency framework for action and support'. The latter envisages an augmented reporting mechanism that is concerned with the action and support of states. In addition, trust is often mentioned in the Agreement. Trust and mutual confidence are indeed major building blocks of the Paris Agreement, which, interestingly, offers insight into how to ensure compliance with these morally connoted notions throughout its life. This is a pioneering feature of the Agreement, and it illustrates the way in which transparency has begun to play an important role.

The World Wide Web has become the holder of records of the international community of states and non-state actors. Each entity can monitor, assess, criticize, condemn, and so on. This transparency is intended to extend 360 degrees; however, it is not exactly evident how this emphasis on transparency will actually operate in practice. Testing the various means used in the pursuit of redress and correction will reveal how effective the Agreement really is. Non-governmental organizations, scientific associations and other actors now have new tools at their disposal, and it will be interesting to see how they take advantage of them.

[3] Kyoto Protocol 1997, 37 ILM 22 (1998).

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Whether the Paris Agreement is a success story remains to be seen, and there are many chapters yet to be written. However, while one swallow does not a summer make, the innovative approach of the Paris Agreement is a promising sign of the intended direction of development in the international community. At the very least, it offers pause for thought at a time when states are so reluctant to make commitments for the better. In this context, it is particularly interesting that non-regression has emerged, and we might ask whether it ought to be more widely applied – for instance, in the fields of human rights law, refugee law and humanitarian law, to mention just three important domains.

Laurence Boisson de Chazournes

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In this Issue

This issue opens with a pair of articles that address questions of normative coherence and contestation in two central areas of international law. In the first article, Monica Hakimi and Jacob Katz Cogan address the presence of a puzzling incoherence in the legal regime relating to the use of force. Their article theorizes that this incoherence derives from the combination within the regime of two distinct 'codes', thus offering a useful framework for thinking through interpretive debates in the field. In our second article, Karen Alter, James Gathii and Laurence Helfer offer an insightful and timely discussion of the causes and consequences of state backlash against sub-regional courts across the African continent. Their article usefully highlights the work of courts that may remain unfamiliar to many of our readers, while casting new light on a range of theoretical debates relating to international courts. Our EJIL: Live! interview with Karen Alter deepens the discussion.

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The next three articles likewise address important questions of normative authority in international law. Nicole Roughan argues that international law's claims to authority should be understood as claims to relative authority, dependent upon the relationships and interactions with other institutions. Elisa Morgera offers some conceptual clarity in the little-investigated notion of fair and equitable benefit-sharing, identifying shared normative elements from different regimes to help develop a common core to this concept. Finally, David McGrogan provides an incisive analytical framework for understanding both the growth of the culture of human rights indicators and its unintended consequences, showcasing the competing priorities of certainty and uniformity on the one hand, and experiential and conversational approaches on the other.

Our occasional series on *The European Tradition in International Law* returns in this issue, featuring a remarkably rich and varied collection dedicated to the controversial 19th-century Scottish jurist, James Lorimer. The collection opens with a short overview by Stephen Tierney and Neil Walker, highlighting the tension between Lorimer's remarkable foresight in relation to a number of developments in international law, cast against his deeply embedded racial prejudice. This darker side of Lorimer's legal science is examined further by Martti Koskenniemi, whose article considers the importance of racial hierarchies that underpinned Lorimer's conception of statehood. Gerry Simpson traces the legacies of these attitudes in international law, including the extension of Lorimer's hierarchies in legally codified power. Karen Knop likewise explores the continuing resonances of Lorimer's thought in the present day, focusing in particular on his notion of 'private citizens of the world'. Stephen Neff discusses Lorimer's views on war and neutrality, highlighting the remarkable modernity of his approach in seeking a systematic global regulatory framework.

Roaming Charges in this issue features a photograph of pupils at the Jean Paul II High School, Kibera, Nairobi.

In the last article in this issue, appearing in our regular series *Critical Review of International Jurisprudence*, Katie Sykes explores the use of science in the emerging field of 'global animal law', through an analysis of two recent and important international legal decisions, the first by the Appellate Body of the World Trade Organization in the *EC–Seal Products* dispute, and the second by the International Court of Justice in *Whaling in the Antarctic*.

The Last Page in this issue, entitled 'Reasons', is by Liam McHugh-Russell.

JHHW

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