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The Limits of Human Rights Law: A Reply to Corina Heri

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Abstract

In this reply to Corina Heri, I argue that her article confuses human rights violations associated with the impacts of climate change with a putative class of violations going to the causation of climate change. Because the latter class has no prospect of being realized, the scope of Heri's argument is much narrower than she makes out. Human rights law is limited to impact cases. It adds nothing to climate change mitigation law.

Corina Heri's article 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' augments an already long line of well-intentioned, yet, as I will show, flawed, papers on human rights law and climate change.[1] To wish to commandeer an existing body of law to address a new problem type is understandable, especially where the problem is universal and life-threatening and the relevant treaty law – in this case, the 2015 Paris Agreement on Climate Change – is a business-as-usual agreement.[2] But an onus rests on those who take this route to examine, rather than presume, the commandeered law's applicability to the

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1 Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability', 33 *European Journal of International Law* (2022), 925. See the special issue of *Climate Law*, vol. 9(3) (2019), the special issue of *Journal of Human Rights and the Environment*, vol. 13(1) (2022), and the various works on the topic cited by Corina Heri in her article.

2 Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015. This treaty locks in a practice adopted in 2010, according to which a state pledges a self-determined emission-reduction target that can be heavily qualified and that is not legally enforceable. A recent synthesis of these pledges, called 'Nationally Determined Contributions', or NDCs, by the secretariat body to the Paris Agreement finds that a moderately optimistic assessment of their collective effect entails that greenhouse gas emissions in 2030 will be *16.3 per cent higher than in 2010*. For a modest chance of keeping global warming from exceeding 1.5 degrees Celsius above the pre-industrial level, net anthropogenic carbon-dioxide emissions (leaving aside other types of greenhouse gas) must decline *by about 45 per cent from the 2010 level* by 2030. UNFCCC Secretariat, *Nationally Determined Contributions under the Paris Agreement: Synthesis Report by the Secretariat*, UN Doc. FCCC/PA/CMA/2021/8, 17 September 2021, available at https://unfccc.int/documents/306848, paras 10 and 13.

new factual situation. Heri and others promoting the application of human rights law to climate change fail to do this. Harm is harm, they seem to say,[3] and if human rights law is applicable to one sort, it is applicable to another also. Difficulties are acknowledged but only as surmountable challenges soon to be overcome through better court strategy (imaginative submissions and the use of the latest science, among other 'extraneous considerations', as Heri puts it) and a modicum of judicial forbearance.[4]

So as not to repeat arguments that can be found elsewhere,[5] I will limit my reply to a discussion of the essential flaw in Heri's account: the conflation of adaptation and mitigation issues (a difference that I will explain) and the presumption that, because a human rights court can sensibly decide the former, it can also decide the latter. The first third of Heri's article is at best ambiguous about the kind of issue she intends to address. 'The European Court of Human Rights has never considered the human rights impacts of anthropogenic climate change', we read in the introduction; as for domestic courts, they have only just begun 'engaging with climate change caused by greenhouse gas emissions as a human rights issue'.[6] But as which issue? As one of climate change impacts or as one of climate change causes? We readily appreciate that a state may be found negligent for a failure to protect against impacts. All sorts of impact cases have resulted in a finding against a state for a human rights violation. An impact caused to some extent by climate change is either indistinguishable from, or an extension of, impacts in impact cases already decided aplenty in favour of the plaintiff. To label an impact case a climate change case is not inaccurate; yet it barely prevents it from blending in with other varieties of the species. The designation does little more than allude to the fact that, in the course of the case, proof of what the state knew or should have known drew on climate science.

By contrast, causation of climate change is a whole different kettle of fish. You can sensibly pose Heri's key question – '[Did] the state fail[] to adopt reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm[?]' – about an impacts case – any impacts case, from a dangerous industrial activity to a mudslide – but you cannot sensibly ask it about a causes case where the thing caused is climate change.[7] There is no measure reasonably available to a state having a real prospect of altering climate change itself or mitigating its harm. The *Cordella* steelworks case, which is made so much of in the article, is a case where the thing emitted (the pollution) is the impact, and the impact is happening right here and

[3] '[Harms that] threaten the enjoyment of many of the rights protected by [the European Convention on Human Rights]' – expressed here as an entirely open-ended class of harms – 'are of urgent relevance to the work of human rights bodies'. Heri, *supra* note 1, at 928. But is it true that all of them are urgent? Some obviously are not (lightening strikes), some are mostly unavoidable (new pathogens), whereas the really urgent ones are close to the extreme of state genocide.

[4] *Ibid.*, at 928.

[5] See 'Debate 6', in B. Mayer and A. Zahar (eds), *Debating Climate Law* (2021), at 145–169; Zahar, 'Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions', 23 *Human Rights Review* (2021) 385, available at https://doi.org/10.1007/s12142-021-00648-8. Heri cites neither of these works.

[6] Heri, *supra* note 1, at 926.

[7] *Ibid.*, at 932.

is lingering in the state's back yard, and it is awful.[8] But it is not so with greenhouse gases, which are harmless as such and settling nowhere in particular. Global warming is so different from an industrial activities case as to be almost logically different.

Heri's key question becomes, then, a warning to her: causes (mitigation of climate change) cases are in nature different from impacts (adaptation to climate change) cases and must be analysed separately. But the force of this simple distinction is not appreciated. 'Climate cases' before a human rights court, Heri writes, are any case '[wh]ere it can be argued that the state knew or ought to have known of the dangers of climate change and failed to adequately regulate the matter or provide effective protection for those endangered by it'.[9] Adaptation and mitigation cases are thus lumped together. *Cordella* is used not to illustrate the distinction but, rather, to abolish it: '[I]f the ECtHR examines climate change under a *Cordella* approach, it could require states to adopt and implement risk-sensitive regulations to mitigate emissions. This would mean an obligation to adopt and implement a legislative framework capable of evaluating and mitigating the effects of climate change'.[10]

At no point are we told how this desired outcome would work, whether in the reasoning of a court decision or in the actions of a state seeking to comply with it. Perhaps Heri thinks it is obvious – that a state may be held to a rights violation in a mitigation case seems to be taken for granted. Heri appears to believe that, somewhere along the line of papers she is bookending, the issue was settled: 'The main arguments against climate-related ECHR violations are not substantive ones. Instead, they relate to institutional, remedial, procedural or subsidiarity matters'.[11] But which prior work, exactly, dispensed with the substantive arguments against? The article becomes question begging onward from this point. It preaches to the converted. And the converted seem not to mull much on the fact that the use of fossil fuels avoids at least as much human suffering as it creates. How likely is it, really, that a human rights court will risk messing with this balance?[12]

[8] ECtHR, *Cordella and Others v. Italy*, Appl. nos 54414/13 and 54264/15, Judgment of 24 January 2019.

[9] Heri, *supra* note 1, at 939.

[10] *Ibid.*, at 939.

[11] *Ibid.*, at 940. Note also: '[T]his analysis accepts that the question is no longer whether, but how, human rights courts should address the impacts of environmental harms and, specifically, climate change harms'. *Ibid.*, at 928; internal quotation marks removed. We are never told where and how the 'whether' question was decided.

[12] Human rights law cuts both ways. Consider coal use. Most developing countries still regard coal, in particular, as essential to development. India, in its NDC pursuant to the Paris Agreement, which is written in the style of a diatribe on human rights, declares that 'more than half of India of 2030 is yet to be built'. This doubling of India will happen on the back of coal: 'coal will continue to dominate power generation in future'. India, *Intended Nationally Determined Contribution*, submitted 2 October 2016, available at https://unfccc.int/NDCREG, at 6 and 10. (This version of India's NDC, which remains in force, was updated on a couple of points not relevant here in a submission dated 26 August 2022.) Indeed, '[t]he total power capacity from coal increased by 110 GW from 2017 to 2022', note Jan Steckel and Michael Jakob. Steckel and Jakob, 'To End Coal, Adapt to Regional Realities', 607 *Nature* (2022) 29, at 29. And it is not only additional power that people in the poorer countries need. The steel plant in Taranto, which Heri focuses on, reminds us that the other great good that flows from coal is steel. Modelling from the Organisation for Economic Development and Co-operation (OECD) predicts a demand growth for steel

Emotions and politics thicken the crisis of climate change and obscure the adaptation/mitigation conflation that should otherwise be easy to see. Human rights law does not create any obligation for a state to reduce its greenhouse gas emissions because human rights law applies only to cases where one party harms another. In the type of case in issue (mitigation, not adaptation), the state in no way harms its people. Instead, it is the people who, through their own deliberate conduct – their emissions that contribute to climate change and ceaselessly exacerbate it – harm themselves. 'The people' are well aware of this by now, having been told about how it works for more than 30 years. In each round of elections, they instruct their state on how to calibrate the country's mitigation policy. And the people are rightly cautious, on average, about what they instruct their state in this manner to do because they know that nothing it can do can 'prevent harm' (that standard phrase in human rights law). Only the collective of states can prevent it, and the collective can do so only through cooperation and ongoing negotiation and renegotiation of individual state mitigation burdens.

It is a process that has gone on for decades and will continue for many more (as long as cooperation continues). Any reduction obligation that a state may have flows from the terms of its cooperation with the collective – that is, the treaties and the collective decisions taken pursuant to them. Unfortunately, so far, no treaty-based quantified mitigation obligations have been determined. Heri refers to the global warming limitation objectives provided for in the Paris Agreement – 'well below two degrees Celsius' and 1.5 degrees Celsius – but these are not obligatory at the collective level,[13] and nothing at all has been agreed to about how to bring them down to the state level. The Paris Agreement's gimmick is that each state is entitled to determine its own, legally unchallengeable, mitigation 'contribution'; to proceed to 'stocktake' the collective result in a plenary session every five years; to decide on another individual contribution for the next five years and so on, around and around again. In this, there could be no clearer negation of Heri's supposition that a source of law exists somewhere, over and above anything that might be found in a state's own domestic legislation, which obliges a state 'to adhere to' a particular mitigation target.[14]

Why does the mitigation context feel so different from the run-of-the-mill impact case? Climate change is a collective action problem, as Heri well knows. But not all such problems are alike. One form is meaningfully reducible to individual action. In environmental cases, this form can be analysed into the constituent material contributions of individual actors, having different points of origin but a common direction,

in developing countries in the range of 2.5 percent to 4 percent through to 2050 (with a zero to slightly negative growth rate in developed countries over the same period). As there is no real alternative to coking coal in steelmaking, a human rights court that interferes with coal supply *ipso facto* interferes with the construction of homes, schools, hospitals, bridges, dams, trucks, solar panels, wind turbines, electric vehicles and every other good that relies on steel for strength. OECD, DSTI Steel Committee, *Draft Summary Record: 83rd Session of the Steel Committee*, Doc. DSTI/SC/M(2017)2, 22 December 2017, para. 26.

[13] Zahar, 'Collective Obligation and Individual Ambition in the Paris Agreement', 9 *Transnational Environmental Law* (2020) 165.

[14] Heri, *supra* note 1, at 934.

which concentrates the relevant harmful substance at an identifiable physical location, where it acts, and whose effect at that location can be calculated and whose quantity can be attributed proportionately to its origins – as when a group of farms pollutes a shared waterway with nitrogen runoff, changing the water's life-sustaining qualities and harming people downstream. The second form of collective action problem is, by contrast, irreducible to individual action except in a trivial sense, because such action has no relevant physical impact on its own, not even when joined to all neighbouring ones, and the best example of an irreducible collective action problem is climate change itself, a conceptually and physically indivisible global phenomenon caused by an increasing concentration of a medley of substances, not in any one location but, rather, in atmospheric space (or, simply, in space) as such, which for more than 200 years now has been trapping a correspondingly increasing amount of solar energy close to the earth's surface, with consequences so various and multilayered that the most recent report of the Intergovernmental Panel on Climate Change takes more than 3,600 pages just to outline them and classify them into ranges that capture how certain or uncertain we are in our knowledge of each of them.[15] This sort of problem is not meaningfully reducible to individual contributions.

I have talked about 'the people' harming themselves, meaning of course in a collective sense. We talk loosely when we say that each one of us contributes to climate change because we do not literally mean that each one of us, himself or herself, makes climate change worse since we do not (cannot possibly) know this. Individual contributions are an infinitesimally small part of the historical build-up. Theory makes our own personal contribution relevant – not any demonstrable physical impact that it has. The most we can mean about the nature of individual action is something like 'you and I and the rest of us are all in this together'. None of the relational oppositionality characteristic of human rights cases is found here. And this returns us to a point I introduced earlier – namely, that the collective action problem of climate change is irreducible, not in the mere sense that we all contribute to it, but in the sense that we all contribute to it because it is a shared way of life. The systematic emission of greenhouse gases – the emission of these gases as normality itself – dates, as we know, to the 18th century when humanity began to break free of the constraints of the 'biological old regime',[16] transitioning to an era of mineral-based (foundationally coal-based) economies.

The farming example, by contrast, is a practice, not a way of life, and even when it is tolerated, it is aberrant behaviour. Human rights law, as a law about individual (state, company, personal) responsibility for aberrant behaviour that is aberrant because it results in harm made unlawful by the law's protection of certain human interests, can only be applied to collective action problems of the kind meaningfully reducible to individual aberrant behaviour. Reformist arguments, such as those employed by

[15] Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (2022).

[16] Marks, 'The (Modern) World since 1500', in J.R. McNeill and E.S. Mauldin (eds), *A Companion to Global Environmental History* (2012), at 58.

Heri, present climate change as a problem having this form. They fail to recognize its near-logical difference from the commonly litigated form, which is different in more than just degree. The former is not reducible to an individual's (or group's) aberrant behaviour.

What I mean by a near-logical difference is that the distance between individual action (emitting or non-mitigating conduct) and a force of nature operating as one thing on a global scale (climate change) is absolutely unbridgeable in our world as it is. It is perhaps because the difference between the two forms of a collective action problem is not purely logical that climate activists see an opening to think creatively about how to shrink the earth in space and time and inhabit it with giants (states, companies) that perform gigantic feats (setting a mitigation policy for a country and operating coal mines and national utilities and the *Cordella* steelworks).[17] The suspension of disbelief that this legal fiction requires of us includes the pretence that the billions of people that inhabit the earth and make the everyday decisions that generate greenhouse gas emissions – now aggregated into the personhood of the 'giants' – have vanished or are mere automatons with no will of their own. The US District Court for the Northern District of California, in a public nuisance case (not hugely different from a human rights case) against a petroleum giant, put it thus:

> [O]ur industrial revolution and the development of our modern world has literally been fueled by oil and coal. Without those fuels, virtually all of our monumental progress would have been impossible. All of us have benefitted. Having reaped the benefit of that historic progress, would it really be fair to now ignore our own responsibility in the use of fossil fuels and place the blame for global warming on those who supplied what we demanded?[18]

'All of us have benefitted' in this passage can also be read as 'All of us are in this together'.

The literature on climate law, including Heri's contribution, has tried to play a helpful role in constructing legal bases for mitigation obligations in the face of a state reluctance to permit the development of a substantive climate law, certainly as international law. Such imaginative contributions must contort themselves to fit the facts, in ways that may remind us of the epicycles that reconciled a geocentric conception of the solar system with the actual observed movement of the heavens. Galileo's heliocentrism, which dispensed with the epicycles, is almost logically different from the worldview that went before it. While the same almost logical gap separates an ordinary harm problem like *Cordella* from that of climate change, the approach in the climate law literature has been to make light of the differences and instead emphasize the similarities between climate change as a collective action problem and the case of a cumulative local effect resulting from the carelessness of individuals. The correct approach is to begin with a clear understanding of the nature – better, the logic – of climate change and proceed to consider whether any established body of law fits it. One soon discovers that none does.

[17] See, e.g., Heede, 'Tracing Anthropogenic Carbon Dioxide and Methane Emissions to Fossil Fuel and Cement Producers 1854–2010', 122 *Climatic Change* (2014) 229.

[18] *City of Oakland v. BP P.L.C.*, 325 F. Supp. 3d 1017, 1018, at 1023 (N.D. Cal. 2018).

Heri writes that 'the [Strasbourg] Court should recognize the risks and harms of climate change for various human rights as well as the need for urgent and sufficient state action to prevent and mitigate these harms. Because states are patently failing to take sufficient action, especially to mitigate emissions, climate change has long crossed the line from political talking point to human rights emergency'.[19] The line of literature that Heri extends has always depended on innocuous-sounding sentences like the last one. Yet, substitute 'states' with 'people' in that last sentence, and the result is nonsense. Its very syntax, we realize, concocts contest and opposition between the state and the people. It is the reason why the substitution does not work. But the tension is bogus, and the implied 'violation' is a category mistake in the mitigation context. Activism should focus instead on keeping up the pressure on states to strengthen mitigation commitments under climate change treaty law. The European Court of Human Rights is well equipped to deal with the adaptation cases – actual or imminent preventable harm arising from actual or imminent breach of state duty.

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Corina Heri continues the debate with a Rejoinder on EJIL: Talk!

[19] Heri, *supra* note 1, at 951.