Suing States: The Role of Courts in Promoting States' Responsibility for Climate Change

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Abstract

In the era of climate change, decisive action is needed from States. However, it is dismaying to see the lack of ambitious efforts in climate treaty negotiations, which is reflected downstream in the ambiguous nature of non-binding or soft mitigation obligations. In that light, this article argues that courts can be agents of change and pressure States, *cum grano salis*, to take decisive action. Domestic courts may be better positioned to compel States to adopt stringent mitigation measures, but all courts (international or domestic, general or specialised) may *press for regulation* or *assess regulation*. In both cases, courts are helpful in mapping States' obligations under international law (including, but not exclusively, the UNFCCC legal framework).

Keywords

Climate change · Courts · International responsibility · Mitigation obligations

1 The Devil Is in the Detail—States' Climate Inaction

Climate change is the main challenge we face as a species. As a challenge, it could be considered as formidable and daunting as preventing an asteroid from colliding with our planet—but unlike asteroids, climate change is triggered by *human* activities. Since mankind has rewritten the rules of the game, we now live in the so-called 'eighth day of creation' (Beck 2002): the day humankind gained possession of the technical and technological means to master nature. As a result, nature is no longer 'natural,' but rather a man-made meta-reality (Beck 2002, p. 37); in the age of the Anthropocene, "[m]an is the maker of his life *qua* human, bending circumstances to his will and needs" (Jonas 1984).

In very simple terms, climate change is the result of excessive greenhouse gas (GHG) emissions, which contribute to global warming and ultimately to climate change. More particularly, climate change is caused upstream by the aggregate concentration of GHG poured into the atmosphere by *all* States, and not just one State alone. Therefore, the atmosphere is the best example of a global commons affected by negative externalities. Since GHG emissions are *transboundary* by nature, global warming is indeed *global*, and the climate system is *shared* at the planetary level, we are all affected by climate change phenomena. Having said that, the emitter and/or beneficiary of GHG emissions is

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not necessarily the party *most* affected by such emissions and climate disruption. Yet, climate change is not *just* an example of a negative externality: "global warming [and the resulting climate change] is the Goliath of all externalities" (Nordhaus 2013); it affects the entire planet and every single aspect of our lives.

This has deep implications in terms of the behaviour to be expected from States. For instance, it explains why *all* States must act decisively in order to curb GHG emissions and, in so doing, avoid crossing a dangerous threshold of climate disruption, but also why one State *alone* is a simple and helpless bystander. Therefore, climate change is the ultimate example of a problem requiring global cooperation between all States. To that end, States have adopted the 1992 UN Framework Convention on Climate Change,[1] the 1997 Kyoto Protocol, the 2015 Paris Agreement, and other instruments of ambiguous nature under this umbrella.[2] But the devil is often in the detail, or, one might say, in the costs. Mitigation efforts are costly and adaptation costs may be even higher or difficult to quantify (e.g. what price should be put on the loss of a species?), and, in the short-term, States tend to focus on the negative impact of mitigation policies on their citizens. More importantly, mitigation efforts may be costly for a particular State, but they benefit the entire planet. Thus, free riding is possible and seems to be encouraged: if States can benefit from mitigation efforts undertaken by others, why would they impose costs upon their own citizens? Why would they adopt such mitigation efforts if others are not pursuing the same efforts also? This helps to explain why States adopt unambitious mitigation efforts or underperform in relation to mitigation targets, or even why States prefer not to commit too much at the international level (Bodansky 2015).

In this context, my argument is that courts can be pivotal in ensuring that the goals and efforts contained in climate treaties are *ambitious* and *accomplished*. To that end, this article examines the role of courts in the legal system and assesses the possible avenues courts can take to *promote* State's responsibility *for* climate change (within the UNFCCC legal framework or otherwise). Accordingly, this article focuses on both domestic and international courts, while bearing in mind that often their different position explains a different role.

2 Empowering Courts—Or Empowered by Courts

Climate litigation (before international or domestic bodies) has been on the rise in recent years. Curiously, the UNFCCC established a particular system for settlement of disputes[3]—but that system has generally kept climate litigation at bay. Cases brought before the courts are diverse, but the purpose of climate litigation seems to be simple: to enhance States' mitigation and adaptation efforts. In the light of the dismaying outcomes of the successive negotiations and States' systemic under-performance in achieving climate goals, some players (e.g. private entities and small island States) have pondered resorting to the courts to put pressure on States, requiring them to regulate their GHG emissions or check the adequacy of their regulatory framework to cope with climate change.

Using courts to enhance climate policies seems to be at odds with the traditional function assigned to courts. Traditional views state that each branch of the State has its own role in dealing with climate change effects, but courts should be detached from politics, and therefore their function should not be to enhance a particular cause or movement. Nonetheless, courts exercise both a private and a public function: the former involves settling disputes between parties, while the latter involves clarification of the legal rules and principles applicable to virtually all future disputes (Lowe 2012), such as States' liability for GHG emissions, or the compensation owed to those affected by climate change events.

[1] Hereinafter referred to as the 'UNFCCC'.

[2] Hereinafter referred to as a whole as 'the UNFCCC legal framework'.

[3] Articles 14 of the UNFCCC, 19 of the Kyoto Protocol, and 24 of the Paris Agreement.

Exercising this public function erodes the boundaries between interpreting and creating the law[4]—but irrespective of one's position regarding the role of courts, they do play a major role in the downstream making of (international) law (Boyle and Chinkin 2007). This is not a minor conclusion: when courts settle disputes or issue an opinion, selecting, interpreting and applying the law is an opportunity for them to make a 'meaningful contribution' to tackling climate change issues (Preston 2016). They may not be able to decide which mitigation efforts are to be pursued by the political community, but they can establish facts and clarify whether the mitigation efforts so far undertaken are adequate to meet States' obligations or to accomplish the goals of the UNFCCC legal framework. As such, they can hold the executive branch accountable for its conduct and ask it to comply with the laws on climate change—the same way they ensure that private actors comply with the dictates of climate change law applicable to them (Preston 2016, p. 13). In other words, when settling climate change cases, courts are *empowered* and can contribute decisively to establishing States' (*ex ante* and *ex post*) responsibility.

Furthermore, enhancing mitigation efforts means more than enlightening the players of the legal system on the applicable rules and principles. From a sociological perspective, courts can also exercise an *empowerment* function, and thus enhance climate action, since courts are a public forum where States, individuals or other entities affected by climate change can bring and discuss their justiciable rights. Third-party enforcement mechanisms have a *protest* role (Lobel 2004), meaning that they can be used to promote societal changes and function as "arenas where political and social movements agitate for, and communicate, their legal and political agenda" (Lobel 2004, p. 479). Therefore, "winning in court is not as essential" for this purpose (Lobel 2004, p. 480), because the simple submission of a case can be a catalyst for disseminating a particular message or exerting pressure over a specific entity (Lobel 2004, p. 487; Lin 2012). Submitting a claim with only this purpose in mind might be objectionable, and perhaps even an abuse of the right to bring a claim, as it goes against the very heart of what is commonly understood as the role and function of courts in a legal community. However, from a sociological standpoint, courts also have this function (Rocha 2021). In that role, courts do not replace States, but they act as "purveyors of legitimacy", namely when they "raise consciousness on a particular matter", and "help us understand what needs to be done, or what is being done inadequately or not at all" (Sands 2016, p. 24). This was particularly visible in the *Urgenda* case; more than the legal intricacies of the decisions adopted by the Dutch courts, the most important outcome was the buzz in public opinion and the boost to global and transnational climate litigation. Providing legitimacy in this case was possible because courts share an institutional authority and their decisions are taken seriously. This is important for climate litigation, where the symbolic meaning of a court's decision is key. Even if a case is won, winning is not enough, since courts cannot replace or compensate the loss of biodiversity and cannot ask nature to stop warming the planet. But because symbols matter, courts' decisions can raise awareness and trigger public policies. In the end, if the court's decision is purely symbolic (i.e. it unveils States' mitigation obligations under the UNFCCC legal framework, but does not condemn States to any specific action), it creates a precedent which, because it does not require any tangible compliance and thus States cannot logically fail compliance, increases the court's reputation and that of the idea conveyed in that decision (Dothan 2015)—i.e. it contributes to its institutional empowerment as an agent enhancing climate action. This function is relevant for two reasons: first, unlike political bodies, courts cannot decline to decide on the merits of an admissible case based on the absence, inconsistency, or lack of clarity of the law, or based on the political sensitivity of a case (prohibition of *non-liquet*) (Preston 2016, p. 12); second, since politicians

[4] As Dworkin (1998, p. 229) said, 'the distinction between author and interpreter [is] more a matter of different aspects of the same [mental] process.'

are afraid of the recalcitrant electorate and want to shield behind another institution, courts' decisions can be a useful means of outsourcing guilt and justifying compliance with that decision in order to adopt more ambitious mitigation efforts.

Considering States' responsibility for climate change, how can *empowered* courts *empower* further action on climate change? Adopting Jolene Lin's classification (Lin 2012, p. 36), in my view, courts can be agents of change in two ways: first, courts can *press for regulation*, namely in cases where this is lacking or incomplete (e.g. if a State has ratified but not conferred direct effect to a treaty within its domestic legal order); second, courts can *assess regulation*, namely by identifying cases of poor regulation (i.e. the existing mitigation obligations are inadequate to comply with the goals of the UNFCCC legal framework), or by clarifying or unveiling States' obligations under international law, which may include filling regulatory gaps (e.g. deciding on issues regarding judicial standing, the liability of States for excessive GHG emissions, or their duties of care under human rights treaties). In both cases, courts can be decisive in mapping States' obligations under international law.

3 Mapping States' Obligations Under International Law—Yes, the Devil IS in the Detail

Since climate litigation can help map States' obligations under international law, courts can be agents of regulatory change. The scope of these obligations is a politically divisive topic in climate negotiations. Apart from the costs that mitigation efforts carry, it does not help that this topic is often intertwined with climate justice topics (such as developed States' reparation for historical GHG emissions, or their obligation to lead the mitigation efforts under the principle of common but differentiated responsibilities),[5] and often discussions mix States' *ex ante* and *ex post* responsibility. Moreover, lawyers and State representatives in the negotiations share an unwelcome bias: they (we) often "think about violation only if there is a norm. But, with global risks, a new global horizon is emerging from the experience of the past and expectation of future catastrophes. The sequence is turned upside down—the violation comes *before* the norm" (Beck 2016). In other words, in the age of climate change we ought to conceive the violation itself as being a norm-generator: it ought not to be the consequence of a violation *only*, but the source of the norm *also*. Regardless of what was or is the state of knowledge we had or have, the simple fact that climate change effects are daunting should be the source of an obligation to mitigate and adapt *and* the violation and resulting responsibility for that norm's violation. But that would require a deep change in the way we conceive the operation of law.

In any case, the grim reality is that States have not been very eager to establish hard obligations to mitigate climate change. As the IPCC pointed out, "[b]ecause greater legal bindingness implies greater costs of violation, states may prefer more legally binding agreements to embody less ambitious commitments, and may be willing to accept more ambitious commitments when they are less legally binding" (Stavins et al. 2014). As a result, treaties such as the Paris Agreement (the most sophisticated climate change treaty so far devised) include a few binding obligations, but mostly contain soft or non-binding obligations (Rajamani 2016). Ultimately, the main achievement of the Paris Agreement was the inclusion of "provisions that either have weak normative content or seem to be wholly lacking in it. These provisions do not create rights and obligations for States, (...) rather they provide context, offer reassurances and construct narratives" (Rajamani 2016, p. 337). The same can be said with respect to the UNFCCC or the Kyoto Protocol, where one can observe "the crushingly vague nature of the obligations, invariably drafted in such a way as to make it impossible to argue that any particular provision gives rise to a cause of action" (Sands 2016). In this context, how can courts be helpful at all?

[5] Article 4(4) of the Paris Agreement.

A first role courts can play is to *press for regulation*. This can happen in cases where regulation is lacking or is incomplete, namely if a State has not ratified the UNFCCC, the Kyoto Protocol, or the Paris Agreement, of if it has not conferred direct effect within its domestic legal order.[6] One can imagine an international court claiming that States are not complying with treaty provisions despite the lack of direct effect within the domestic legal order, but it cannot force a State to ratify a climate treaty. For their part, domestic courts can be helpful and pressure their own State. For instance, they may apply the treaty irrespective of any domestic provision conferring direct effect (Rocha 2021, pp. 71–75); and they can resort to domestic law provisions to enhance climate action. However, it is unlikely that domestic courts will use this avenue, since filling a regulatory gap erodes the boundary not only between the judicial and legislative branches but also between law and science, which leads to courts being placed outside the traditional judicial role. As a result, one can expect courts to be very cautious and take refuge in the lack of constitutional competence to press for regulation, unless they are able to resort to domestic means such as that of unconstitutionality by omission.

A second role courts can play is to *assess regulation*. In this case, the problem is not regulation that is lacking or incomplete (in the sense mentioned before), but rather poor regulation. This may arise from the insufficiency and/or unsuitability of the climate measures adopted at the domestic level, but also from the vague wording of the treaty provisions adopted by States. Initially, domestic courts were reluctant to exert such pressure or to fill regulatory gaps, and voiced concerns over the separation of powers. Recent cases, however, show that domestic courts are now more comfortable with stepping in and asking States to take adequate measures (Banda and Fulton 2017, p. 10122). The leading and landmark *Urgenda* case is a prime example of this audacious approach, although it is primarily based on the constitutional duty of care that binds States. [7] More recently, the same approach was followed by the German Constitutional Court in its landmark decision of 24 March 2021,[8] which connected the duties under the German Constitution with the State's obligations under the UNFCCC legal framework.

In fact, courts cannot create the law, but they can provide enlightenment on the applicable law and pinpoint gaps in States' compliance. Their task, therefore, is to assess whether there is any mitigation obligation (i.e. an obligation to reduce GHG emissions or to increase sinks and reservoirs), and what the results of this are. Given the many doubts that exist regarding this topic, courts can be decisive in unveiling States' mitigation obligations under the UNFCCC legal framework. In fact, resorting to the general principles of law, it is not difficult to say that, under the no harm principle, States have an obligation to prevent a dangerous level of climate change, or that they have an obligation to avoid excessive anthropogenic emissions of GHG within their jurisdiction (Sands 2016, p. 31; Mayer 2018, p. 109). The climate treaties also include references to a possible mitigation obligation, but their wording is slim. The first reference to such an obligation can be found in Article 2 of the UNFCCC, according to which "[t]he ultimate objective of this Convention (. . .) is to achieve stabilization of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system". Thus, a collective goal was defined, but the UNFCCC failed to establish binding quantitative targets and timelines. Article 4 of the UNFCCC adds some mitigation-related obligations, mostly of a procedural nature, including a binding obligation on developed States that requires each of them to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of [GHG] and enhancing its

[6] For example, on the grounds of lack of publication in the official journal.

[7] *Urgenda Foundation v. The Netherlands*, The Hague District Court (24 June 2015) §§ 4.52 and 4.53.

[8] Cases no. BvR 2656/18, 1 BvR 78/20, m1 BvR 96/20 and 1 BvR 288/20.

[GHG] sinks and reservoirs",[9] with a view to "returning individually or jointly to their 1990 levels".[10] As such, the UNFCCC is certainly an interesting basis for interpreting State's obligations, but it is not the source of any binding obligation. At most, it created a "non-binding quasi-target and -timetable" (Bodansky et al. 2017). But at least it triggered a discussion regarding mitigation, and, specifically, whether such efforts should be quantified in a binding treaty provision, which (positive or negative) emissions should be eligible, which States should pursue such mitigation efforts (and who should lead those efforts), and whether States can rely on mitigation projects developed in another State's territory (Bodansky et al. 2017, p. 132).

The first step towards quantification was taken in 1997, through the Kyoto Protocol, Article 3(1) of which establishes that "[t]he Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic [GHGs] (...) do not exceed *their assigned* amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B (...), with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012". As such, the Kyoto Protocol set out, for the first time, a binding, treaty-based obligation to reduce GHG emissions. At the end of the first commitment period (2008–2012), it was possible to see that the goals were being achieved and, as a result, the Doha Amendment established a second commitment period (2013–2020), in which States agreed to "individually or jointly" reduce their GHG emissions "by at least 18 per cent below 1990 levels".[11]

For its part, the Paris Agreement set out, in Article 2(1), that it "aims to strengthen the global response to the threat of climate change (...) including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels". The drafters refrained from using rights-based or duty-based wording, and instead opted for a goals-oriented approach. They did, however, include a reference to an individual and binding mitigation obligation: pursuant to Article 4(2), "[e]ach Party shall prepare, communicate and maintain successive nationally determined contributions[12] that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objective of such contributions". States are required to communicate new NDCs every five years,[13] taking into account that each successive NDC 'will represent a progression over time.'[14] The magic formula, thus, was to allow States to determine their own mitigation obligations. This solution certainly encourages treaty ratification—but it does not prevent the submission of unambitious NDCs (Mayer 2018, p. 48), despite the explicit reference to "ambitious efforts" in Article 3. At most, one can say that at least nominally each NDC must appear to be more ambitious than the previous one, and where there is a systemic and persistent lack of reasonable ambition in the NDCs submitted, a State is not complying with its obligations under the Paris Agreement (Mayer 2018, p. 114). Moreover, the wording of Article 4 is peculiar and includes elements of soft and hard obligations (Rajamani 2016, p. 453). In fact, a treaty obligation is not necessarily a binding obligation; it depends on the wording (e.g. 'shall' v. 'should'), the detail of the obligation elements, or even the enforcement mechanisms available (Werksman 2010). In the Paris Agreement, the mix of soft and hard obligation elements is puzzling at best.

This framework is not particularly heartening. There is an international obligation to reduce GHG emissions, but its content is slim and bleak. So, what can courts do to map States' obligations? Before an answer can be provided to this question, one point must be made

[9] Article 4 (2) (a).

[10] Article 4 (2) (b).

[11] Article 3 (1*bis*) of the Kyoto Protocol, added by Article 1, § C, of the Doha Amendment.

[12] Hereinafter referred to as 'NDCs'.

[13] Article 4 (9) of the Paris Agreement.

[14] Articles 3 and 4(3) of the Paris Agreement.

regarding the dispute settlement mechanisms available for climate change litigation.

Treaty enforcement is always radically problematic, regardless of the treaty. Having in mind Article 36(2) of the Statute of the International Court of Justice,[15] Article 14 of the UNFCCC devised a form of advance consent to the compulsory jurisdiction of the ICJ and/or an arbitration tribunal. This solution was transposed into the Kyoto Protocol[16] and the Paris Agreement.[17] In theory, this solution is welcome, but so far, only the Netherlands has accepted the jurisdiction of both the ICJ and an arbitration tribunal, whereas Tuvalu and the Solomon Islands have recognised the jurisdiction of an arbitration tribunal. Therefore, only with a leap of faith can one imagine, in the near future, State-to-State litigation under the UNFCCC legal framework (Henin 2019). At most, since States can issue a similar declaration under Article 36(2) of the ICJ Statute itself, this provision may be used to bring a case before the ICJ. If a dispute is ever brought before the ICJ or an arbitration tribunal, one would expect, initially, some cautious behaviour from the court, followed by a more activist and creationist attitude later on. The benefits of that activist behaviour might be clarification as to, for example, a State's precise mitigation obligations under climate treaties (i.e. what its individual efforts in terms of reducing GHG emissions are); how the *ex ante* responsibility relates to other States' (and all States') symmetric obligations; whether an infringement is attributable to one State or to more (or all) States; the role played by the shared responsibility principle as expressed in Article 47 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts?;[18] the legal consequence in case of infringement (e.g. should States cease the conduct and not repeat it, as mentioned in Article 30 of the ARSIWA? Should States compensate for the injury caused, as mentioned in Article 31 of the ARSIWA? If so, to whom should compensation be paid?); the exact scope of the no harm principle and the principle of common but differentiated responsibilities, and the respective capabilities principle; or how the *Monetary Gold* principle should be applied in the context of climate litigation.

An alternative option, then, may be to resort to the ICJ's advisory jurisdiction, as has been advocated by Pacific island States.[19] Pursuant to Article 96 of the UN Charter, the UN General Assembly, the Security Council, or any other organ or agency of the UN (provided it is so authorised by the General Assembly) may request an advisory opinion from the ICJ.[20] The purpose of an advisory opinion is not to adjudicate between parties but to enlighten the players of the international community on a particular reading of an international legal rule or principle. As such, advisory opinions do not have binding effect on a specific jural relationship, but they still carry the institutional *auctoritas* to clarify the law existing and binding upon States. Therefore, an advisory opinion cannot decide if a particular State is liable for past GHG emissions or establish a causation link between such GHG emissions and a particular loss, but it can explain *urbi et orbi* under what conditions such liability may arise or what causation criteria could be used. If the goal of an advisory opinion is to clarify the law, it may be preferable in a contentious case, where the analytical intricacies of the dispute may disturb future readings (Oellers-Frahm 2011). Moreover, advisory opinions may also have the advantage of allowing more States to bring in their views on an equal footing, and to allow the ICJ to draft its reasons in more general terms, thus avoiding issues such as the establishment of causation links. However, this alternative avenue is not risk free; requests for advisory opinions need to be *politically* approved by the UN General Assembly, and the more generic nature of advisory opinions may lead the ICJ to take a more conservative and cautious approach when determining States' *ex ante* or *ex post* responsibilities

[15] Hereinafter referred to as the 'ICJ'.

[16] Article 19 of the Kyoto Protocol.

[17] Article 24 of the Paris Agreement.

[18] Hereinafter referred to as 'ARSIWA'.

[19] 50th Pacific Islands Forum (13 to 16 August 2019). Forum Communiqué, § 16.

[20] Article 96 of the UN Charter.

with regards to GHG emissions (Sands 2016, p. 20; Mayer 2018, p. 241). This means that it all comes down to the sensitivity of the question asked; while a question on the no harm principle would be unlikely to raise any alarm at The Hague, a question put to the ICJ on historical reparation would almost certainly not be so welcome (Mayer 2018, p. 242).

If it is not realistic to expect the ICJ to decide on a climate change-related case, domestic courts may be used to enhance States' obligations under the UNFCCC. In fact, domestic courts are the first port of call for the enforcement of any international obligation. This article focuses on international bodies, but in the light of the difficult access to international courts and the insufficiently characterised nature of most obligations under the UNFCCC legal framework, domestic courts play a pivotal role in climate litigation (Mayer 2018, p. 238). They cannot adjudicate *urbi et orbi*, but they can establish a 'precedent' (relevant for the international community but also in terms of setting out a transnational pattern of judicial regulatory behaviour) with regards to what mitigation efforts are binding on their own State and how these should be calculated, what criteria can be used to assess attribution of conduct to States or to determine causation links, when responsibility or liability for loss and damage arises, or what adaptation measures are required. Furthermore, whereas international courts can only consider States' international obligations, domestic courts can also connect international and domestic obligations in a meaningful way, in the same way that they can assess, in the light of their domestic law, whether the NDC submitted by the particular State is adequate to comply with that State's international obligations. This shows that the relationship between international and domestic law (as between international and domestic courts) is not one of two nations who do not know each other, but rather one that entails cooperative moments.

Finally, some words must be dedicated to considering the possible role of *other* international courts. In fact, the widespread effects of climate change challenge the very fabric of international law *and* its special regimes. One field which has been specifically affected is human rights law. One only needs to consider the impact global warming can have on human health, access to water or food, or our quality of life, to see how climate change may jeopardise the enjoyment of human rights (See, *inter alia*, Humphreys 2012; Bodansky et al. 2017, pp. 295–313; Boyle 2018; Wewerinke-Singh 2021). In that light, in 2005, the Inter-American Commission on Human Rights received the *Inuit Petition Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States*. This was a pioneer claim which primarily sought not to compensate the claimants for any climate-related harm, but rather to raise global awareness regarding the effects of climate change (Lin 2012, pp. 53–54). In 2009, another petition was submitted, this time before the World Heritage Committee, regarding *The Role of Black Carbon in Endangering World Heritage Sites Threatened by Glacial Melt and Sea Level Rise*. In 2015, a citizen of Kiribati brought a case to the UN Human Rights Council; [21] and, just to finish this short list of examples, in 2020, a group of Portuguese children lodged an application before the European Court of Human Rights. [22] In all cases, the applicants brought a climate change-related issue before a human rights body. In fact, the applicants selected a (different) segment of the same climate change-related facts and asked the human rights body if the State was complying with the relevant human rights treaties—not if it was complying with the UNFCCC legal framework. Jolene Lin qualifies these as 'marginalised concerns' (Lin 2012, p. 40), in the sense that they are not conveyed in the UNFCCC legal framework, but that does not mean that climate change concerns are not shared by other fields of international law, and, in particular, it does not prevent cross-regime interaction, as mandated by Article 31(3)(a) of the 1969 Vienna Convention on the Law of Treaties. Quite the contrary, since

[21] *Ionae Teitiota v. New Zealand*, Communication No. 2728/2016.

[22] *Duarte Agostinho and Others v. Portugal and 32 Other States,* App. No. 39371/20.

systemic interpretation is mandatory and international law is a unified legal system, a human rights body may decide on the effects of climate change on the enjoyment of human rights. What are the merits of such an avenue? Two, at least.

Firstly, resorting to specialised international courts and bodies may be relevant if private access is granted (as is the case of human rights bodies). In fact, the procedural strategy of States might make them refrain from litigating, for fear of damaging their diplomatic relations or retaliation in future proceedings; or they might just consider a specific legal point to be tangential within the general line of arguments (Stephan 2011). Why would a State complain against another State's NDC, when it may also be under-complying with its obligations, or if it may create a precedent that could backfire in the future? However, evidence suggests that non-State actors are more likely to withstand economic interests, and less likely to be captured by these interests (Stephan 2011, p. 1617), and they do not face the same constraints as States, since they do not stand behind prior claims before international bodies, and do not have to fear future proceedings against them (Stephan 2011, p. 1642). Moreover, whereas human rights bodies are relatively open to receive any case that relates to their constituent treaty, the ICJ has expressed the need to be politically cautious, namely in stating that it can decline 'to adjudicate on the merits of an application' if such adjudication 'would be inconsistent with its judicial function'.[23] Secondly, whereas the UNFCCC legal framework is wanting in terms of characterising States' obligations with respect to mitigation or adaptation measures, the duty of care and the doctrine of positive obligations may be used as a tool to pinpoint such mitigation and adaptation obligations towards individuals. As such, enlarging State's climate change-related obligations may be a surprising effect of the access of private actors to the international arena.

Finally, the effects of climate change on the marine environment justify possible use of the law of the sea to also complement the UNFCCC legal framework. Hence, the United Nations Convention on the Law of the Sea[24] may also be used to identify climate change-related States' obligations (e.g. the duty to protect and preserve the marine environment) (Boyle 2012), or to identify possible avenues for addressing climate change effects (e.g. the impact of sea-level rise, or deep-sea carbon storage). Accordingly, another option is the use of the advisory competence of the International Tribunal for the Law of the Sea,[25] in order to obtain an authoritative position on ocean affairs and climate change. This option was considered by disappearing island States, to whom climate-driven sea level rise is an existential threat. Thus, on 31 October 2021, Antigua and Barbuda and Tuvalu signed a Treaty on the Commission of Small Island Developing States on Climate Change and International Law, with a view to requesting an advisory opinion from the ITLOS (United Nations Climate Change 2021), namely on climate change, sea-level rise, the protection and preservation of the marine environment, and States' international responsibilities. The advisory opinion has not yet been requested, but clearly this prospect is not simply a figment of the imagination. If cherry-picking is a normal operation of international dispute settlement, the ITLOS option has the advantage of circumventing the difficult majorities in the UN General Assembly.

4 Final Remarks

Traditional views consider courts as passive players, in the sense that they cannot look for cases, but wait for cases to be submitted to them. However, the fact is that once their jurisdiction is triggered, courts do play a role in boosting a specific action, including climate action. Although on different terms, this empowerment role can be played by domestic and international courts, whether specialised or not. In that

[23] *Northern Cameroons (Cameroon v. UK)* (Preliminary Objections) [1963] ICJ Rep 15, 37.

[24] Hereinafter referred to as the 'LOSC'.

[25] Hereinafter referred to as the 'ITLOS'.

capacity, courts can press for regulation, namely if the State lacks climate regulation or has not completed the regulatory process, and they can also assess climate regulation in order to check if it is adequate to cope with climate change. In both cases, by mapping States' international obligations, courts can be agents of change and boost climate action.

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