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Reports & Essays on Climate Change Litigation

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Reports & Essays on Climate Change Litigation, edited by Elena D'Alessandro and Davide Castagno

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1. *The Warnings of Cassandra*

In the Greek mythology, Cassandra was a Trojan priestess who received the divine gift of making true prophecies, but who was eventually cursed with the fate of never being believed. In the case of global warming and climate change, scientists and civil society movements are the modern version of Cassandra: despite their repeated warnings about the negative consequences of global warming which results from human enhanced greenhouse effect, State action is still short to meet the basic goals of the UNFCCC[1] or the Paris Agreement[2].

In a nutshell, the causes of the problem are simple to understand but far from simple to deal with: climate change is the downstream result of an excessive concentration of GHG[3] in our planet's atmosphere, which enhances its greenhouse effect, and therefore lead to an overall increase in the global average temperature at the Earth's surface and ultimately to the disruption of our climate system. As there are no natural causes that can explain the increased concentration of GHG in the atmosphere, the human footprint is undeniable. Therefore, to grapple with climate change, States need "only" to reduce their GHG emissions sharply. "Only" suggests the challenge lying ahead of us is apparently simple, but in practice this is the modern version of another tale from the Greek mythology: the Labours of Hercules, which referred to a set of

1. United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 *UNTS* 107.
2. Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 *UNTS*. See also Z. Hausfather - G. Peters, *2020: Emissions – The 'Business as Usual' Story is Misleading*, in *Nature*, 777, 2020, 618 ff.
3. I.e., greenhouse gases.

labours that were assigned to Hercules since their performance required his demi-God strength[4].

In fact, as our economies are carbon-driven, every single aspect of our lives is directly or indirectly connected with GHG emissions in general. Accordingly, the reduction of GHG emissions implies sharp changes in how our societies and globalised economy work, as well as in our living standards. In this framework, it is unsurprising that States are non- or underperforming their commitments (and not necessarily obligations) to reduce GHG emissions. Of course that most emissions are not directly attributed to States, in the sense that they are the product of non-State actors activity, namely corporations engaged in carbon-intensive or carbon-driven businesses. However, as States hold the monopoly of the legitimate use of force (including the competence to prescribe and enforce mandatory rules), they have the constitutional and human rights obligation to orchestrate non-State actors' conduct in order to guide our society towards a carbon neutral future[5]. In this sense, excessive emissions of GHG, even if not directly attributed to States, are only possible because of a permissive State regulatory framework that fails to reduce their emissions from its jurisdiction. Accordingly, GHG emissions are at least the product of a failure in the prescription or enforcement of domestic rules.

In this light, civil society and some particularly affected or concerned States have been bringing climate change into the international and domestic judiciary. Cases are manifold and differ from jurisdiction to jurisdiction, but in common they ask courts to step-in and compel States to adopt more ambitious climate mitigation and adaptation policies. In the end, applicants do not necessarily seek for a compensation but rather to force State action; they do not perceive judges as mere «*bouches qui*

4. A. Rocha, Amicus Curiae *before the International Tribunal for the Law of the Sea: The Prospect of an Advisory Opinion on Climate Change and the Law of the Sea*, in *Católica Law Review*, 6, 2022, 87 f.

5. *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity - Interpretation and Scope of Articles 4 (1) and 5 (1) of the American Convention on Human Rights)*, Advisory Opinion OC-23/17 (IACtHR 15 November 2017) §§115-122; *Comunidad de La Oroya v Peru* (IACommHR Decision of 19 November 2020) §142; *Hatton and Others v the United Kingdom*, App No 36022/97 (ECtHR, 8 July 2003) §98; *Öneryildiz v Turkey*, App No 48939/99 (ECtHR, 30 November 2004) §§89-90; *Fadeyeva v Russia*, App No 55723/00 (ECtHR, 9 June 2005) §89; *Tătar v. Romania*, App No 67021/01 (ECtHR, 27 January 2009) §§87-88.

pronounce les paroles de la loi», but rather as agents of change that might contribute to the pursuit of climate action. But can courts be agents of change, or will their rulings be "warnings of Cassandra" also?

2. *The Role of Courts in Clarifying States' Obligations in Relation to Climate Change*

Even though the UNFCCC legal complex has a specific dispute settlement system[6], it has never been used and it is unlikely that it will be used in the near future. As a result, climate litigation is rising before domestic courts, hand in hand with an ingenious use of human rights and advisory proceedings at the international level.

The number and diversity of cases is overwhelming[7]. This upsurge in interest and use of contentious (and even advisory) means is unprecedented but is a clear response from civil society to the non- or under-ambitious States' climate action and to the lack of corporations' *ex ante* and/or *ex post facto* responsibility[8]. The background for these cases is the lack of States' (sufficiently ambitious) climate action – but also the lack of any prospect for a successful outcome of the coming meetings of the Conference of the Parties to the UNFCCC and the Paris Agreement, or for States' water-changing domestic policies. In the light of this systemic non-performance in achieving climate goals, civil society and some affected or concerned States (*e.g.*, small island States, or the advisory opinions requesting States) have resorted to international and domestic courts to put pressure on States, requiring them to regulate GHG emissions from their jurisdiction or to check the adequacy of their regulatory framework to curb down GHG emissions and/or to adapt to the consequences of climate change[9].

6. Articles 14 of the UNFCCC, 19 of the Kyoto Protocol, and 24 of the Paris Agreement.

7. See www.climatecasechart.com, run by the Sabin Center for Climate Change Law of Columbia Law School, which runs a repository of domestic and international climate change-related cases.

8. *E.g.*, M. Burger - M.A. Tigre, *Global Climate Litigation Report: 2023 Status Review*, New York, Sabin Center for Climate Change Law, Columbia Law School & United Nations Environment Programme, 2023, available at www.law.columbia.edu (accessed on 5 September 2023).

9. A. Rocha, *Suing States: The Role of Courts in Promoting States' Responsibility for Climate Change*, in M. da Glória Garcia - A. Cortês (eds.), *Blue Planet Law – The Ecology of Our Economic and Technological World*, Cham, Springer, 2023, 100.

At first sight, using courts strategically to pressure States to adopt more stringent climate policies seems to be at odds with the traditional function assigned to courts in a legal system. In the end, applicants are not necessarily asking courts to settle a dispute – but only asking them to declare an infringement of States' constitutional or international obligations; and eventually to pressure States to comply with such obligations. This is not particularly new in the legal system: provided an obligation is sufficiently characterised, the creditor may ask courts to enforce such obligation by pressuring the debtor to comply with it, including through compulsory means. The problem, however, is that constitutional or international obligations in relation to climate change are all but clear or sufficiently characterised. As a result, it is unclear, even for courts, if there is any obligation which has been infringed, and much less how can States comply with it; and if courts even try to provide a little clarity to States and define one specific measure to be adopted, they might end up being entangled in complex trade-offs and value-based choices which are proper of the political and administrative branches of the government. In this sense, the risk is that judicial rulings in relation to climate change might place courts in the sphere of politics and international diplomacy, and perhaps interfere with the current decision-making processes at the domestic or international levels.

Nonetheless, decision-making processes are already stalled. At most, courts can highlight the inability of traditional decision-making processes to deliver the needed outcomes to address climate change and thus to fulfil their societal function. Furthermore, courts societal function is not confined to settle disputes (private, retrospective function), but also includes the contribution to the judicial development of law (public, prospective function)[10]. In this latter case, the ability of courts to contribute to the development of the understanding of States' obligations in relation to climate change derives from their eventual mandatory jurisdiction (as happens with domestic courts and with some human rights bodies), hand in hand with their institutional authority, record, and reputation as adjudicators. Clarifying the expected States' behaviour can mean, for instance, explaining what compensation is owed to individuals affected by climate change-related events, or what is the individual obligation of each State[11]. What this means is that whenever courts settle a dispute

10. V. Lowe, *The Function of Litigation in International Society*, in *ICLQ*, 61, 2012, 209, 212-214.

11. A. Rocha, *Suing States*, cit., 100.

or render an advisory opinion on a climate change-related case, the selection of the laws applicable (especially, in the light of a much needed cross-regime interaction), their interpretation, and their application to specific facts is a "meaningful contribution" to develop a straightforward understanding of what is the expected States' behaviour to comply with their constitutional or international obligations to mitigate and adapt to climate change[12]. Because the devil is in the detail, courts cannot replace domestic decision-makers and micromanage mitigation and adaptation measures – but at least they can establish facts and science, flag a better interpretation of States' obligations, and clarify if the measures so far adopted domestically meet the expected behaviour under constitutional or international law.

As such, courts have a more relevant societal function than the mere reading of black letter law. But applicants do not aim to empower courts and embolden them to be more decisive in their contribution to the clarification of States' obligations in relation to climate change. Because, once again, the devil is in the detail, courts may find themselves unable to provide an extraordinarily relevant contribution to the clarification of climate change law and still contribute decisively to enhance States' climate action. In fact, courts are also «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»[13]. This is possible, because from a sociological angle, courts are a public forum where the applicants (whatever their legal nature) can bring and discuss openly their justiciable rights. In this sense, judicial bodies provide a «forum of protest»[14], i.e., they are «arenas where political and social movements agitate for, and communicate, their legal and political agenda»[15]. In fact, from the applicants' standpoint, «winning in court is not as essential»[16], because the simple fact that a case is brought to the judicial spotlight can be enough to gain attention and disseminate a message, to create pressure regarding the need for State climate action, and eventually to secure a more diffuse, long-term compliance

12. B.J. Preston, *The Contribution of the Courts in Tackling Climate Change*, in *Journal of Environmental Law*, 28, 2016, 11.
13. P. Sands, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, in *Journal of Environmental Law*, 28, 2016, 19, 24.
14. J. Lobel, *Courts as Forums for Protest*, in *UCLA Law Review*, 52, 2004, 477.
15. *Ivi*, 479.
16. *Ivi*, 480.

with States' constitutional and international obligations to mitigate and adapt to climate change[17].

This is particularly visible in the *Urgenda*, the *Neubauer*, or the recently issued the *Held v. Montana* case, whose rulings were reported in most countries and got a global attention from the public. Because courts' rulings are taken seriously by the public in general, the simple fact that a judge declares that States are not adopting sufficiently ambitious climate policies can be enough to pressure State authorities to pursue such mitigation and adaptation policies. In fact, in some cases, public authorities are recalcitrant of adopting economically and socially costly measures that may be criticised by an equally recalcitrant electorate – but using courts as a scapegoat to adopt such measures can be enough to trigger decisive State action[18].

This ability to trigger State action is key in climate litigation: courts cannot demand the planet to stop warming, or ask the climate system not to produce extreme weather events. Perhaps their best, more tangible contribution is actually to raise public awareness and to trigger State mitigation and adaptation policies[19].

At first sight, this seems to be a minor contribution – but Rome was not built in a day. Small-scale, but decisive judicial contributions are helpful if they adjust the sense and speed of direction of State climate action. In fact, there are at least two ways in which courts can contribute to the development and clarification of States' obligations in relation to climate change: on the one hand, courts can "pressure for regulation", namely in cases where regulation is lacking or is under-ambitious, by flagging the insufficiency of States' efforts; on the other hand, courts can "assess the existing regulation", namely by identifying cases of poor or non-implemented regulation, by finding (and filling) regulatory gaps, or by clarifying States' obligations under constitutional and international law.

3. *A Challenge for Courts?*

This upsurge in climate litigation is an exciting opportunity for lawyers and academics in general – but perhaps too much of a challenge for decision-makers and judges alike. In fact, not only climate change poses a

17. *Ivi*, 487; J. Lin, *Climate Change and Courts*, in *Legal Studies*, 2012, 32, 35.
18. A. Rocha, *Suing States*, cit., 101.
19. *Ibidem*.

challenge to the subsistence of life as we know it – it challenges the fabric of the legal system as we know it also. This is visible in the use of concepts and doctrines such as victimhood and *locus standi*, causation link, burden of proof, or separation of powers. The mainstream understanding of these concepts and doctrines was elastic enough to adapt to different challenges, but suddenly they seem to provide odd outcomes in climate change-related cases. Take, for instance, victimhood, where the definition of "direct or indirect impact" of the harm produced requires the demonstration of the indirect, downstream, aggregate, time-delayed, warming and climate disruptive effect of GHG emissions[20]. In this case, a flexible understanding of the causal link considers literally every single human being as a victim of GHG emissions, but an orthodox understanding of the causal link in this regard means no one can claim to be a victim[21].

The task lying ahead of courts, however, is much more complex than the mere adaptation of established concepts and doctrines to the context of climate change. To begin with, the scope of States' obligations is unsettled in international law and is a politically divisive topic domestically and internationally. On the one hand, divisiveness results from the high social and economic costs that are placed upon a political community if they adopt ambitious mitigation and adaptation policies, especially if other States do not adopt the same level of ambitiousness in their domestic policies. On the other hand, divisiveness results from intertwining the assessment of what are States' obligations under constitutional and international law with other topics such as historical reparations for past GHG emissions or the common but differentiated responsibility principle[22]. Furthermore, concepts and doctrines are supposed to be results-oriented, in the sense that they are only meaningful if they are a valuable tool for courts to settle a dispute or render an advisory opinion. In other words, they only add value to the legal system if they allow courts to make a meaningful contribution, *e.g.*, to clarify States' obligations in relation to climate change. But if courts are unable make such contribution, *e.g.*, because they are afraid of step-in the realm of the legislative and administrative branches of government, or because they are only able to pinpoint pro-

20. A. Rocha - R. Sampaio, *Climate Change before the European and the Inter-American Court of Human Rights: Comparing Possible Avenues before Human Rights Bodies*, in *Review of European, Comparative, and International Environmental Law*, 32, 2023, 279, 286.
21. J. Peel, *Issues in Climate Change Litigation*, in *Carbon and Climate Law Review*, 5, 2011, 15, 22.
22. A. Rocha, *Suing States*, cit., 102.

cedural, soft, or even non-binding obligations, then courts' contribution to clarifying States' obligations in relation to climate change is marginal and basically confined to triggering public attention. And in fact, a reader of the UNFCC, the Kyoto Protocol, or the Paris Agreement immediately notices «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»[23]. The Paris Agreement, for example, does not explicitly require States to reduce GHG emissions from their jurisdiction – Article 4(2) rather says that States «shall prepare, communicate and maintain successive nationally determined contributions [but not obligations or commitments] that it [freely] intends to achieve», and that States «shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions», but not explicitly with the aim of achieving such contributions or the goals of the UNFCCC and the Paris Agreement. This framework is not particularly heartening. In the light of such vague framework of States obligations, what can be the role of courts in mapping and clarifying such obligations? A challenge for courts, therefore, is to make these concepts and doctrines valuable in order to deliver a meaningful content from a substantive angle also.

At this point, a special attention should be given to domestic courts and to comparative studies on climate litigation – and this is where this book tries to bring forward a meaningful contribution. In fact, domestic courts are the first port of call for the enforcement of international obligations in general, namely by individuals who may rely on an entitlement derived from an international treaty. In this context, domestic courts may be uneased by a particular sensitive topic such as the separation of powers principle, the role of science, or the assessment of *locus standi* and victimhood requirements. Nonetheless, judges are human beings and, as a result, they are also biased. For instance, judges' training in a particular legal context and their life in a particular political and cultural community imply they will likely deal with such sensitive topics according to the legal and conceptual toolbox they were taught as meta-positive and pursuant to the worldview and conception of fairness and order they learned from and in that community. Judges' different cultural imprint, dogmatic affiliation, perspectives of order and fairness, and conceptions of law's and courts' societal function help explaining the differences in the content of the rulings from different jurisdictions. Difference, however, can be an added value, namely if judges from different jurisdictions are more

23. P. Sands, *Climate Change*, cit., 28.

sensitive to, and uneased with, different topics. If that is the case, it means courts can learn from the experience of courts from other jurisdiction and consider settling a dispute or rendering an advisory opinion according to the lessons (and the lenses) from these latter.

For instance, this book's chapters regarding European and African countries show how domestic courts from the Global North and the Global South share different understandings of the separation of powers principle and the role of courts in providing order to a political community – being the first concerned with not stepping outside the traditional function assigned to courts, while the second rather keen on providing creative and socially meaningful rulings; or being the first more concerned with tradition and keeping aligned with a coherent case law lineage, whereas the second feel more free to detach from tradition and to outline what can be future solutions adopted by political decision-makers regarding mitigation and adaptation action. Of course courts' rulings are only binding *inter partes* and authoritative within their domestic jurisdiction – but rulings from other jurisdictions can be a useful lodestar (i.e., an unacknowledged and informal "precedent") in finding creative solutions for the specific challenges posed in climate litigation. Since climate change is a common challenge to the entire world, a coherent and cohesive patchwork of domestic judicial decisions from different jurisdictions could influence national decision-makers and help providing coherence and cohesiveness to States' mitigation and adaptation efforts.

In this sense, finding the commonalities among domestic judicial decisions from different jurisdictions can be a helpful tool to help courts deciding climate change-related cases – but also in boosting their contribution to pressuring States to adopt a proper regulatory framework and to clarifying States' obligations in relation to climate change. This book is an attempt to provide a comparative analysis of domestic and supranational climate litigation, based on that premise that judges are not passive players or mere bystanders. However, taking lessons from other jurisdictions also faces its own challenges: not only some motives and lines of argument are not susceptible of legal transplant, but also – and more importantly – biases are unconscious and powerful barriers to innovation: a judge who was trained in a specific legal tradition and cultural cosmos is unlikely to detach too much from his legal genetic origin.