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International law as fuel for climate litigation

Sandrine Maljean-Dubois

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**International law as fuel for
climate change litigation**

Sandrine Maljean-Dubois

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Arno Dal Ri Junior

Editorial BJIL: International law as fuel for climate change litigation*

Sandrine Maljean-Dubois**

As dramatically shown by the last IPCC Working Group III report,¹ climate change is a serious and urgent global threat that calls for profound changes in our societies. It constitutes a challenge for our legal systems, revealing their inadequacy to deal with such a vital issue. Climate change exemplifies and accelerates changes in the ways in which the law is made and applied in a globalised context. For all these reasons, climate change undoubtedly constitutes a good “laboratory” for governance, seeing as it requires permanent interaction between States, international organisations, non-state actors, businesses, experts, and citizens. In order to be powerful, these forces must push in the same direction and thus, at the very least, coordinate their actions through vertical and horizontal interactions.²

From this point of view, the slowness and lack of ambition of climate policies have led, in recent years, to the development of climate litigation. Almost 2,400 climate-related lawsuits have been tried or are pending, and this number is still growing.³ Various States in the North and South have already been ruled against by national courts because of the inadequacy of their action to reduce greenhouse gas emissions, and litigation is multiplying throughout the world. Legal action has also been brought by towns, cities, NGOs, groups of citizens (American children from Our Children’s Trust, Swiss senior women, a law student from New-Zealand...) against major corporations whose activities are allegedly causing global warming. Globalised and transnational, these proceedings in some respects break down national borders.⁴ Faced with what is perceived as a failure on the part of public authorities and companies, the law is increasingly relied on and used as a “weapon” to serve various objectives: to encourage public authorities or companies to take stronger measures to mitigate climate change, to implement more ambitious policies, to obtain compensation for damage suffered, to stop a project that emits large quantities of greenhouse gas, etc.

Here, the international climate regime is likely to make a contribution the magnitude of which was somewhat unexpected. Indeed, the Paris Agreement, which was adopted on 12 December 2015 and quickly entered into force, and which now counts 193 Parties, is a relatively flexible treaty, leaving a very wide discretion to States as to its implementation. However, the way it was designed, and even though its provisions have no or little direct effect, the Agreement increases the pressure on States, including, and perhaps most importantly, at the domestic level. Little by little, we see how the Paris Agreement, thanks to the involvement of civil society, has provided fuel

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¹ IPCC, Summary for Policymakers, IPCC AR6 WG III, SPM-1, Working Group III Contribution to the IPCC Sixth Assessment Report (AR6) (last accessed on 7 April 2022).

² Mireille Delmas-Marty, *Aux quatre vents du monde*, Seuil, Paris, 2016, p.120.

³ See the Sabin Center Climate Change Litigation databases <http://climatecasechart.com/climate-change-litigation/> (last accessed on 7 April 2022).

⁴ See for instance Roxana Baldrich, “Litigating for climate justice,” *Ecologist*, 12 October 2021.

for climate litigation in a decisive manner and offered national courts the opportunity to position themselves as key players in climate governance. However, the Paris agreement and international climate law are not the only tools being mobilised. The rules of the international climate regime are combined both with general rules (such as customary obligations of due diligence) and with other specific rules. The combination of international climate law rules and international human rights law rules is, for instance, increasingly – and successfully – invoked. Human rights courts and treaty bodies such as the United Nations Committee on the Rights of the Child or the European Court of Human Rights are also asked to read the States’ obligations regarding the protection of human rights in the light of their climate obligations. An interstate dispute may even arise tomorrow before the International Tribunal for the Law of the Sea or the International Court of Justice. Although not all cases are successful, and even if, in climate trials, international law is rarely applied directly, claimants and judges often show great creativity. The IPCC recognizes that, with a large number of cases in some developed countries, and with a much smaller number in some developing countries, it has, in some cases, influenced the outcome and ambition of climate governance.⁵ Without addressing all aspects of this widespread phenomenon, this special issue of the Brazilian Journal of International Law offers a timely overview of the wide range of cases, from the emblematic ones to the less well-known, and of the diversity of courts and tribunals’ contributions all over the world.

⁵ IPCC, Summary for Policymakers, IPCC AR6 WG III, SPM-1, Working Group III Contribution to the IPCC Sixth Assessment Report (AR6) (last accessed on 7 April 2022).

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