

# The Existence of Climate Law: One More Response to Zahar

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## Abstract

This manuscript is a response to Alexander Zahar’s review of my book, *The International Law on Climate Change Mitigation* (Oxford University Press, 2022), in Alexander Zahar, ‘The Nature of Climate Law’ 35(2) *Journal of Environmental Law* 295-306 (2023). Zahar laments that I “continue to recycle” arguments despite his “sustained attack” against them “for almost a decade now”. Zahar’s reader may wish to read my response to these charges. In this latest response to Zahar, I show that Zahar’s objections are either beside the point or otherwise unconvincing. In particular, I explain that addressing climate change requires international cooperation, and that states have agreed on obligations on the mitigation of climate change that scholars and judges can identify and apply.

## Introduction

Alexander Zahar presents his article on ‘The Nature of Climate Law’<sup>1</sup> as a review of my latest monograph, *International Law Obligations on Climate Change Mitigation*.<sup>2</sup> Zahar colourfully disagrees with about anything the book says, and also with a number of things the book does not actually say.<sup>3</sup> He claims, among other things, that there is no need for a book on international climate law because ‘the main action’ is on the domestic plane;<sup>4</sup> that there is no substantive obligation for states to mitigate climate change under international law;<sup>5</sup> that climate treaties only ‘affirm a state’s entitlement to continue to spew out greenhouse gases indefinitely’;<sup>6</sup> and that my interpretation of the international law on climate change is untenable because it does not fully rely on ‘non-subjective standard’ to distinguish lawful and unlawful conduct.<sup>7</sup> My book is not only ‘wrong’,<sup>8</sup> irrelevant,<sup>9</sup> too long,<sup>10</sup> unresponsive to objections,<sup>11</sup> ‘absurd’,<sup>12</sup> and unpersuasive;<sup>13</sup> it is also ‘fomenting a civil war’ by seeking to ‘substitute the will of states with that of the scholar-activist’.<sup>14</sup>

Neither the tone, nor the content of these objections is new. This article is, indeed, the latest instance of a ‘sustained attack’ that Zahar has been waging against various aspects of my work ‘for almost a decade’.<sup>15</sup> But while accusing me of leaving his objections ‘unaddressed’,<sup>16</sup> he chooses to ignore my repeated refutations of his objections, first in publications directly responding to his attack—none of

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<sup>1</sup> Alexander Zahar, ‘The Nature of Climate Law’ (2023) 35 *Journal of Environmental Law* 295.

<sup>2</sup> Benoit Mayer, *International Law Obligations on Climate Change Mitigation* (Oxford University Press 2022).

<sup>3</sup> See for instance text at footnotes 25, 60, 76, 82, 93, 110, 136, and 151.

<sup>4</sup> Zahar (n 1), 296.

<sup>5</sup> *ibid*, 298, 306.

<sup>6</sup> *ibid*, 302.

<sup>7</sup> *ibid*, 304.

<sup>8</sup> *ibid*, 296.

<sup>9</sup> *ibid*, 296–97, 303.

<sup>10</sup> *ibid*, at 297.

<sup>11</sup> *ibid*, at 302.

<sup>12</sup> *ibid*, at 303.

<sup>13</sup> *ibid*, at 305.

<sup>14</sup> *ibid*, at 306.

<sup>15</sup> *ibid*, 302. See, for example, Alexander Zahar, ‘Mediated versus Cumulative Environmental Damage’ (2014) 4 *Climate Law* 217; Alexander Zahar, ‘Methodological Issues in Climate Law’ (2015) 5 *Climate Law* 25; Alexander Zahar, *Climate Change Finance and International Law* (Taylor & Francis 2016) 51–60; Alexander Zahar, ‘The Contested Core of Climate Law’ (2018) 8 *Climate Law* 244.

<sup>16</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 302.

which are cited in his article<sup>17</sup>—and, again, at various points in the book he purports to review.<sup>18</sup> Zahar shows no interest, for instance, in discussing authorities relevant to the interpretation of international law, such as the Vienna Convention on the Law of Treaties, various works of the International Law Commission, international judicial decisions, or general international law scholarship<sup>19</sup>—despite the obvious relevance of such authorities to a book on the identification of international law obligations on climate change mitigation. Instead, he proceeds by assertions, some of which are puzzling, contradictory, or straightforwardly absurd, as I will show.

In this piece, I will respond one last time to Zahar’s objections with the view of allowing the reader of the *Journal of Environmental Law* to form their own opinion. In doing so, I will also engage with some of what Zahar has been writing when he was not busy attacking my work, with the view of assessing whether he has an alternative vision of ‘the nature of climate law’ to offer. This will lead me to observe that Zahar disagrees with himself almost as often as he does with me.

The structure of this piece parallels that of Zahar’s article, with each section of my piece responding to the section of his.

## 1. Climate Change as an International Law Issue

In the first lines of his article, Zahar declares that it is ‘wrong’ for the book to argue that ‘climate change is a problem for international law’.<sup>20</sup> Yet Zahar provides no coherent explanation for this statement. In the following paragraph, he merely weighs the roles of national and international law in the mitigation of climate change. He submits that domestic law matters *more* than international law, and he seems to presume that I hold the opposite view. For him, ‘[t]he *main* interference is not state-on-state but of a government with its people’,<sup>21</sup> since it is within countries that rules are adopted and implemented to limit and reduce greenhouse gas (GHG) emissions. Accordingly, it is on the domestic plane that ‘the *main* action is, legally’.<sup>22</sup>

Surely, however, Zahar does not suggest that climate change is *exclusively* a domestic issue. He acknowledges ‘the global nature of the problem ... and the international cooperation needed for its management’.<sup>23</sup> He also concedes that the international law on climate change ‘can be studied separately’.<sup>24</sup> As such, Zahar seems to agree, after all, with the premise that climate change is (also) a problem for international law.

In the other hand, my book is evidently not suggesting that climate change is *exclusively* an international law issue.<sup>25</sup> Climate law is, quite obviously, an issue for both international and national law to address. Nor is anything in the book ‘extolling the centrality of international law to climate law’,<sup>26</sup> as Zahar claims, except for the fact that the book zooms in on international law as one aspect of climate law.

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<sup>17</sup> See Benoit Mayer, ‘The Applicability of the Principle of Prevention to Climate Change: A Response to Zahar’ (2015) 5 *Climate Law* 1; Benoit Mayer, ‘The Place of Customary Norms in Climate Law: A Reply to Zahar’ (2018) 8(3) *Climate Law* 261; Benoit Mayer, ‘The Emergence of Climate Assessment as a Customary Law Obligation’ in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (Cambridge University Press 2021), 285.

<sup>18</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 14–16, 24–25, 32–34, 52, 106–110, 113–120.

<sup>19</sup> The only exception concerns the *Nuclear Tests* case, where Zahar wrongly claims that Australia ‘had claimed reliance on an announcement by France of a cessation of its nuclear testing’. See Zahar, ‘The Nature of Climate Law’ (n 1), 300–01.

<sup>20</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 295 (emphasis added).

<sup>21</sup> *ibid.*, 296.

<sup>22</sup> *ibid.*

<sup>23</sup> *ibid.*

<sup>24</sup> *ibid.*

<sup>25</sup> To the contrary, see Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 3–4.

<sup>26</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 298.

Certainly, if Zahar wanted to read about the national law on climate change, he picked the wrong book, as he could have guessed by reading the first word of the book's title.

On a side note, whether one agrees with Zahar's assertion that the 'main action' in climate law is on the domestic plane depends on what is meant with 'main action'. International law has long been a central theme in climate law scholarship (not least in Zahar's own teaching<sup>27</sup> and writings,<sup>28</sup> and in the pages of the journal *Climate Law* he founded over a decade ago).<sup>29</sup> There has certainly been a growing emphasis on domestic law in recent years as laws and policies were adopted and lawsuits were filed in multiple jurisdictions. As such, an emerging legal practice might well focus on the domestic plane. Yet, these domestic legal developments were—as Zahar himself once wrote—'normally pursuant to international treaty obligations',<sup>30</sup> or otherwise inspired by international legal developments.

I do agree with (today's) Zahar on the importance of acknowledging the importance of national, political processes through which states define their policy on climate change.<sup>31</sup> Yet, again, this does not exclude the relevance of international law arguments, if only to inform these national processes. Zahar suggests that citing international law will not 'encourage people into low-emission lifestyles'.<sup>32</sup> Yet, the very turn to domestic legislation that we observe at present was seemingly prompted by the adoption of the Paris Agreement. Climate change is essentially a collective action issue, whereby each nation is interested in trying to free-ride on mitigation action implemented by others; addressing it requires international cooperation, and international law is probably the best tool we have to prompt such cooperation.

## 2. The Existence of International Obligations on Climate Change Mitigation

The second section in Zahar's article does not review my book, but only comments on 'its size'.<sup>33</sup> By contrast to the 328 pages I wrote, Zahar boasts that his own interpretation of the international law on climate change mitigation 'can be fitted onto one side of a paper napkin', with 'wide margins'.<sup>34</sup> Zahar then uses the notes he took on a napkin to assess the validity of my 'weighty opus'.<sup>35</sup>

Zahar's theory is simple, but it is also simplistic. Zahar first reduces the international law on climate change mitigation to a single source—the Paris Agreement—and then again to its 'core substantive component', so that it can fit on a napkin.<sup>36</sup> Further, he claims that this 'core' boils down to a single substantive obligation,<sup>37</sup> which originates from the second sentence of article 4(2) of the Paris

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<sup>27</sup> *ibid*, 297, pointing that he has been 'teaching the topic of international climate law since 2008'. Zahar is affiliated with the school of *international* law at the Southwest China University of Political Science and Law, in China.

<sup>28</sup> See, for example, Zahar, 'The Contested Core of Climate Law' (n 15), 258–260 (seeking to identify the 'core' of climate law in either a 'global-commons ... problem' or in a treaty target). Of the four books that Zahar authored or co-authored on climate law, two are concerned with international law, and two others approach domestic law (in Australia and China) 'in global context'. See Alexander Zahar, Jacqueline Peel and Lee Godden, *Australian Climate Law in Global Context* (Cambridge University Press 2013); Alexander Zahar, *International Climate Change Law and State Compliance* (Routledge 2015); Zahar, *Climate Change Finance and International Law* (n 15); Xiangbai He, Hao Zhang and Alexander Zahar (eds), *Climate Change Law in China in Global Context* (Routledge 2020).

<sup>29</sup> See, for instance, the four special issues on the Paris Agreement and its implementation (volumes 6(1-2) (2016), 9(3) (2019), 9(4) (2019), 11(3-4) (2021)). See also 'Editorial' (2010) 1 *Climate Law* 1, presenting climate law as, essentially, a field of international law.

<sup>30</sup> Zahar, 'Mediated versus Cumulative Environmental Damage' (n 15), 218.

<sup>31</sup> See, for example, Benoit Mayer, 'The Contribution of Urgenda to the Mitigation of Climate Change' (2023) 35 *Journal of Environmental Law* 167, at 180–81; Benoit Mayer, 'Prompting Climate Change Mitigation Through Litigation' (2023) 72 *International & Comparative Law Quarterly* 233, 241.

<sup>32</sup> Zahar, 'The Nature of Climate Law' (n 1), 296.

<sup>33</sup> *ibid*, 297.

<sup>34</sup> *ibid*.

<sup>35</sup> *ibid*, 298.

<sup>36</sup> *ibid*, 297.

<sup>37</sup> *ibid*, 297–98.

Agreement: Parties must take domestic mitigation measures intended to achieve the objectives of their nationally determined contributions (NDCs).<sup>38</sup> Finally, he asserts that this is not actually an obligation at all, since ‘assessment of the performance’s result is deferentially left to be determined by the state’.<sup>39</sup>

Here lies Zahar’s trick to disappear the napkin: a mere assertion that courts cannot assess states’ compliance with an obligation they have agreed to include in a treaty. He hammers that ‘[s]tates did not concede, and thus certainly did not subject themselves to, *any mitigation obligation* under international treaty law’.<sup>40</sup> And, again: ‘[t]he now-thirty-year-old unwavering state stance on the problem of climate change’ is that ‘[i]t will be fixed through voluntary domestic action’.<sup>41</sup> Abracadabra: no more napkin, no more international climate law. Just a toothpick, maybe.

This will not surprise the reader accustomed to Zahar’s ‘sustained attack’ against climate law. Beside his argument against customary law and NDCs, Zahar has promoted his lawless conception of climate law by seeking to prove that no legal norm relevant to climate change mitigation could ever be inferred from tort law,<sup>42</sup> human rights law,<sup>43</sup> or even procedural rules on impact assessments.<sup>44</sup> Like a broken clock, Zahar’s conclusions may be right from time to time; yet his overall argument builds on misleading premises: the belief that there cannot be any law on climate change unless there are very clear, well-defined, and specific rules—e.g. a statute on climate change, a climate treaty, or at the very least a judicial precedent specifically on climate change. This approach is, of course, inconsistent with the way international law is interpreted by international courts. Custom, for instance, never really seems to fit into Zahar’s black letter approach to climate law, and yet it is central to the decisions of international courts and tribunals.<sup>45</sup>

In support of this black letter approach to climate law, Zahar alludes repeatedly to Thomas Nagel’s philosophical classic, *The View from Nowhere*, on the relation between objectivity and subjectivity.<sup>46</sup> Yet it is unclear how Nagel’s philosophy could support Zahar’s assumption that courts do not apply the law unless they can rely on an ‘objective’ rule. For one, Nagel refuses any clear dichotomy between objective and subjective views, arguing that ‘the distinction ... is really a matter of degree’.<sup>47</sup> There is, in other words, no ‘view from nowhere’ in an absolute sense; there are only attempts at stepping back from personal views in order to ‘acquire a *more* objective understanding of some aspect of life or the world’.<sup>48</sup> As such, there cannot be, in Nagel’s theory, the sort of (absolutely) ‘non-subjective standard[s]’ that Zahar assumes courts would need if they were to apply any legal norms to climate change.<sup>49</sup> Thus, I read Nagel’s book as essentially an attack against the sort of ‘skepticism or nihilism’<sup>50</sup> that Zahar seems to defend by pointing to the absence of absolutely objective standard. Nagel argues that ‘[i]t is worth trying to bring one’s beliefs, one’s actions, and one’s values more under the influence of an impersonal standpoint even without the assurance that this could not be revealed from a still more

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<sup>38</sup> See Paris Agreement, art 4(2), second sentence.

<sup>39</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 298.

<sup>40</sup> *ibid* (emphasis added).

<sup>41</sup> *ibid*, 306.

<sup>42</sup> Alexander Zahar, ‘The Missing Relational Element in Tort Cases on Greenhouse Gas Emissions’ (2022) 12 *Climate Law* 216.

<sup>43</sup> Alexander Zahar, ‘Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions’ (2022) 23(2) *Human Rights Review* 385; Alexander Zahar, ‘The Limits of Human Rights Law: A Reply to Corina Heri’ (2022) 33(3) *European Journal of International Law* 953.

<sup>44</sup> Alexander Zahar, ‘Environmental Impact Assessment for Greenhouse Gas Emissions Is Pie in the Sky’, in Mayer and Zahar (eds), *Debating Climate Law* (n 17) 297.

<sup>45</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 21–23. See also most international court decisions.

<sup>46</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 299, 303.

<sup>47</sup> Thomas Nagel, *The View from Nowhere* (Oxford University Press 1986) 5.

<sup>48</sup> *ibid* 4 (emphasis added).

<sup>49</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 304.

<sup>50</sup> Nagel (n 47) 8.

external standpoint as an illusion'.<sup>51</sup> My book is precisely an attempt at proposing a better understanding of what climate law is—a more objective understanding of it.<sup>52</sup>

Seemingly unnoticed to Zahar, the introduction highlights some of the reasons why his black letter approach to climate law is untenable.<sup>53</sup> Consider a contentious case between two states before an international court. The applicant is particularly vulnerable to future impacts of climate change, whereas the respondent is causing a sizeable share of global GHG emissions. The applicant claims that the respondent must take reasonable measures to reduce GHG emissions. Zahar would argue, I suppose, that the Court should dismiss the case, as there is no obligation for the respondent to mitigate climate change. Zahar has asserted many times that States have an unrestrained 'freedom',<sup>54</sup> 'right',<sup>55</sup> or 'entitlement'<sup>56</sup> to emit GHGs. But if there is no applicable law, how could a court identify this right to emit GHGs? Even if the court did assume that a default principle of freedom applies in the absence of more specific law, the court would still need to decide *whose* freedom prevails—the freedom of the respondent to emit GHGs or the freedom of the applicant to enjoy a stable climate.<sup>57</sup> In other words, what Zahar does not seem to realise is that a right to emit GHGs comes at a cost for the rights of others, including the applicant state in this hypothetical case.<sup>58</sup>

Most international law scholars agree that a court cannot refuse to decide a contentious case on the ground that the law is unclear ('*non liquet*')—so decide it must, and this must be by application of the law.<sup>59</sup> Consequently, there must be a law—if there are no clear and specific legal rules, there must be principles on which courts can fall back to decide such disputes. It is in this sense, and in this sense only, that I (along with far more knowledgeable scholars) wrote about the 'completeness' of international law—absolutely not, as Zahar suggests,<sup>60</sup> to indicate that the law is anyhow satisfactory (how would I assess this?), or even that it is genuinely clear (if it was, my book would not be needed).<sup>61</sup> Identifying the principles on which courts can fall back is essentially the aim of the book that Zahar purported to review. While Zahar's position boils down to asserting that the right to emit GHGs (and all that comes with it) should always and fully prevail over the right to a stable climate (and all that

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<sup>51</sup> *ibid* 7.

<sup>52</sup> See, for example, Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 16, 177, 204–205, 231–250, 267–279, 322. See also Benoit Mayer, 'The Judicial Assessment of States' Action on Climate Change Mitigation' (2022) 35(4) *Leiden Journal of International Law* 801.

<sup>53</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 14–16.

<sup>54</sup> Zahar, 'The Nature of Climate Law' (n 1), 306.

<sup>55</sup> Zahar, 'Methodological Issues in Climate Law' (n 15), 32; Zahar, 'The Contested Core of Climate Law' (n 15), 256–257.

<sup>56</sup> Zahar, 'The Nature of Climate Law' (n 1), 302.

<sup>57</sup> See Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 45; Alain Pellet, 'Lotus que de sottises on profère en ton nom! Remarques sur le concept de souveraineté dans la jurisprudence de la Cour Soudiale', in Francois Alabrune, *L'État souverain dans le monde d'aujourd'hui: Mélanges en l'honneur de Jean-Pierre Puissechet* (Pedone 2008) 221.

<sup>58</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 23–24.

<sup>59</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 14–15. See also Hersch Lauterpacht, 'Some Observations on the Prohibition of "Non Liqueet" and the Completeness of the Law' in Jan HW Verzijl, *Symbolae Verzijl: présentées au professeur J.H.W. Verzijl à l'occasion de son LXXème anniversaire* (Martinus Nijhoff 1958) 200; Ian Brownlie, 'Politics and Law in International Adjudication' (2003) 97 *ASIL Proceedings* 282, 285.

<sup>60</sup> Zahar, 'The Nature of Climate Law' (n 1), 306 ('Disparate elements of international law, Mayer argues, can be recruited and elaborated into a complete body of mitigation obligation through which the regulation of climate change may properly be accomplished' (emphasis added); *ibid*, 299 ('Mayer's creation what he imagines to be the quality of a complete system encompassing a normative plenitude standing ready to assist judges to decide cases brought against states for an insufficient effort to mitigate climate change' (emphasis added)).

<sup>61</sup> See Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 32 ('There is no formal legal gap in international law with regard to climate change mitigation, even though the relevant norms arguably lack both clarity and ambition'), 16 ('the prohibition of findings of *non liquet* does not mean that the content of the law is always clear').

follows from it), my interpretation of international law suggests that the court needs to balance the rights at issue.

On a side note, it is remarkable that, when Zahar is not busy disagreeing with about everything I write, he gayly departs from the black letter approach to climate law that he seeks to impose onto others. For instance, he recognised the existence of ‘international treaty obligations under the UNFCCC or the Kyoto Protocol’,<sup>62</sup> insisting that ‘[t]here is no doubt that an international court, asked to decide a dispute over state responsibility, would say that each party to the UNFCCC has a legal obligation to take measures to abate climate change’.<sup>63</sup> He later extended similar arguments to the Paris Agreement by interpreting the broad language of article 3 of the Paris Agreement—‘Parties are to undertake and communicate ambitious efforts’—as an indication that the implementation of NDCs was ‘mandatory’, and further claiming that Parties had an obligation to achieve the 2°C goal of the Paris Agreement.<sup>64</sup>

Elsewhere, Zahar contended that states had accepted a broad ‘obligation to regulate’ in the context of climate negotiations.<sup>65</sup> Strikingly, this conclusion was not entirely unlike my own argument about general mitigation obligations.<sup>66</sup> Yet while my ‘weighty opus’ tries to explain how I come to identify these obligations, Zahar proceeded exclusively by way of assertions, writing precisely nothing about the source of this ‘obligation to regulate’. To interpret this obligation, he put forward that ‘the polluter-pays principle, tempered by equity ... supplies a legal standard against which state conduct may be judged’.<sup>67</sup> For the avoidance of doubt, he confirmed that, in his view, states had to follow this principle ‘as a matter of legal obligation’.<sup>68</sup>

Zahar did not explain how he identified a polluter-pays principle as sources of legal obligations in international environmental law.<sup>69</sup> He asserted that the principle had ‘been incorporated into climate change treaty law’,<sup>70</sup> even while acknowledging that no climate treaty mentions it.<sup>71</sup> Such a polluter-pays principle would be rather unhelpful in differentiating states’ mitigation obligations: poorer states cannot be expected to pay as much per unit of emissions as richer ones.<sup>72</sup> What Zahar called ‘equity’ would then need to do the horse’s work in determining the content of each state’s obligation. Unfortunately, Zahar wrote nothing about what ‘equity’ is or how it would be implemented. One can

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<sup>62</sup> Zahar, ‘Mediated versus Cumulative Environmental Damage’ (n 15), 218.

<sup>63</sup> Zahar, ‘Methodological Issues in Climate Law’ (n 15), 33.

<sup>64</sup> Alexander Zahar, ‘Collective Obligation and Individual Ambition in the Paris Agreement’ (2020) 9 *Transnational Environmental Law* 165, 169–170. See also Zahar, *Climate Change Finance and International Law* (n 15), 88. See Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 52, 252–254, refuting these arguments.

<sup>65</sup> Alexander Zahar, ‘The Polluter Pays Principle and its Ascendancy in Climate Change Law’ (2019) 114 *National Taipei University Law Review* 129, 157.

<sup>66</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 189–195.

<sup>67</sup> Zahar, *Climate Change Finance and International Law* (n 15) 93.

<sup>68</sup> *ibid* 91.

<sup>69</sup> Zahar only cites a vague provision of the Rio Declaration on Environment and Development. See Zahar, ‘The Polluter Pays Principle and its Ascendancy in Climate Change Law’ (n 65), 150–151; Zahar, *Climate Change Finance and International Law* (n 15) 87. Learned commentaries suggest otherwise. See Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (4th edition, Cambridge University Press 2018) 240 (noting that ‘[t]he polluter pays principle has not received the same degree of support accorded over the years to the principle of preventive action, or attention accorded to the precautionary principle’); *The Rhine Chlorides Arbitration concerning the Auditing of Accounts (The Netherlands v France)* (2004) PCA Case No 2000-02, para 103 (noting that the tribunal did ‘not view this principle as being a part of general international law’).

<sup>70</sup> Zahar, ‘The Polluter Pays Principle and its Ascendancy in Climate Change Law’ (n 65), 167. See also at 148 (‘the Kyoto Protocol *did* incorporate the polluter pays principle’, without reference to any particular provision). The discussion of climate treaties only shows that these treaties aim at mitigating climate change by regulating GHG emissions, not that they ‘incorporate’ a polluter-pays principle (unless, of course, this principle boils down to the idea that GHG emissions must be regulated).

<sup>71</sup> *ibid*, 164–5.

<sup>72</sup> See UNFCCC, art 3(1), affirming a principle of common but differentiated responsibilities and respective capabilities.

suggest that it would involve a relatively subjective assessment<sup>73</sup>—something Zahar would object to, had it been suggested by anyone else than himself.<sup>74</sup>

### 3. Identifying Mitigation Obligations

It is in the third section of his article that Zahar starts discussing the book under review. He first focuses on Part One (Chapters II to IV), where the book identifies international law obligations on climate change mitigation.

Unfortunately, Zahar mischaracterizes the book's argument. He suggests that the book identifies mitigation obligations from three sources: the Paris Agreement, NDCs, and customary international law.<sup>75</sup> In particular, he claims that the obligation under article 4(2) of the Paris Agreement, on the implementation of NDCs, is the book's 'one and only mitigation obligation derived from the climate treaties'.<sup>76</sup> This misses much of the picture. Among the things that Zahar did not seem to notice is one entire chapter that identifies the mitigation obligations implied from human rights treaties<sup>77</sup> and suggests that mitigation obligations could also be inferred from multilateral environmental agreements.<sup>78</sup> Even more importantly, Zahar failed to account for the identification of 'central'<sup>79</sup> obligations arising under the UNFCCC—which, as the book put it, 'stand out as creating general, open-ended obligations'.<sup>80</sup> The interpretation of these general commitments, along with general obligations arising from customary law, is the focus of Part Two of the book.

Were it not for the obligations that Zahar refuses to read about, the book would be much shorter, though not short enough to fit on a napkin. The following replies to the objections Zahar had on identification of the few mitigation obligations that he was willing to mention.

#### 3.1 The Paris Agreement

Zahar purports to 'speedily refute'<sup>81</sup> the identification of obligations from the three sources he did account for. With regard to the first two, he does so, again, by distorting my argument. My book does not argue that article 4(2) of the Paris Agreement 'creates an obligation of substantial *fulfilment*'.<sup>82</sup> I see this provision as creating an obligation of conduct (i.e., an obligation for states to try and fulfil the objectives of their NDC) rather than an obligation of result (i.e., of fulfilment).<sup>83</sup> I do note that, 'in most circumstances', compliance with an obligation of conduct will secure the fulfilment of the NDC: when states make their best efforts, they will usually achieve their objectives.<sup>84</sup> But this presents fulfilment of the NDC as the likely consequence, not the necessary condition, of compliance with the obligation.

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<sup>73</sup> See Mayer, 'The Judicial Assessment of States' Action on Climate Change Mitigation' (n 52), 822.

<sup>74</sup> See text at note 145.

<sup>75</sup> Zahar, 'The Nature of Climate Law' (n 1), 298.

<sup>76</sup> *ibid*, 299.

<sup>77</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 129–179

<sup>78</sup> *ibid* 132–3.

<sup>79</sup> *ibid* 41.

<sup>80</sup> *ibid* 39. See also, e.g. 28, 38–42, 52, 54, 59, 72, 112–113, 120–122, 128, 166, 178, 183, 191, 209–211, 215, 224, 252, 260–261, 286.

<sup>81</sup> Zahar, 'The Nature of Climate Law' (n 1), 299.

<sup>82</sup> *ibid* (emphasis added).

<sup>83</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 59–60, 191–192. See also Benoit Mayer, 'International Law Obligations Arising in relation to Nationally Determined Contributions' (2018) 7 *Transnational Environmental Law* 251, 259; Benoit Mayer, 'Obligations of conduct in the international law on climate change: A defence' (2018) 27 *Review of European, Comparative and International Environmental Law* 130.

<sup>84</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 60. See also, for example, Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 *Review of European, Comparative & International Environmental Law* 142, 145, cited in Zahar, 'The Nature of Climate Law' (n 1), at 300, noting the US's view that an obligation of conduct is little different from an obligation of result with regard to the implementation of NDCs.

Zahar's hasty refutation relies entirely on quotes from two 2016 articles by Daniel Bodansky as 'learned commentary' infirming my interpretation of article 4(2).<sup>85</sup> Regrettably, Zahar does not find it useful to mention that the book responds to Bodansky's argument.<sup>86</sup> Overall, this appeal to authority is selective, even somewhat tendentious, for three reasons. First, apart from Bodansky, most learned commentaries support an interpretation of article 4(2) as the source of an obligation of conduct.<sup>87</sup> Second, the two documents that Zahar quotes, when read in their entirety, are far less supportive to his claims than he suggests. In his earlier article, Bodansky does acknowledge that article 4(2) does at least 'reiterate' the general mitigation commitments under the UNFCCC.<sup>88</sup> And the later publication abandons most of the argument emphasised by Zahar in the earlier one,<sup>89</sup> conceding that article 4(2) 'establish[es] what some describe as an obligation to pursue measures in good faith'<sup>90</sup>—that is, in essence, an obligation of conduct. Third, Bodansky's own position seems to have evolved since 2016. In several more recent publications, he has presented article 4(2) as the source of 'binding obligations of conduct in relation to [parties'] nationally determined contributions'.<sup>91</sup>

### 3.2 Unilateral Declarations

The book envisages the possibility that NDCs or other national communications (or series of such communications) could constitute unilateral declarations capable of creating legal obligations on climate change mitigation.<sup>92</sup> Contrary to what Zahar suggests, I do not believe that this doctrine is 'very productive'.<sup>93</sup> To the contrary, the book acknowledges that the application of the doctrine is restrained by multiple conditions, including the will of a Party to be bound by its declaration, and that these multiple conditions need to be assessed on a case-by-case basis.<sup>94</sup> Zahar concedes that 'a state may choose to convert its ... NDC into a binding declaration',<sup>95</sup> which is essentially what the book argues.

The book discusses several cases where parties (e.g. the EU, Ghana, China, Norway, and Bhutan) may have seemed to express their mitigation targets as binding commitments.<sup>96</sup> Zahar will have none of it. Rather, he speculates that no state would rationally bind itself to mitigating climate change unilaterally, that is, without ensuring that other states make similar commitments.<sup>97</sup> It strikes me that, at this point, Zahar acknowledges what he denied a few pages earlier: international law's essential role in prompting international cooperation on climate change mitigation. If a state would not implement mitigation action

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<sup>85</sup> Zahar, 'The Nature of Climate Law' (n 1), 300. See also Bodansky (n 84) 146; Daniel Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (2016) 110(2) *American Journal of International Law* 288, 304.

<sup>86</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 57–59.

<sup>87</sup> See e.g. Lavanya Rajamani and Jutta Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement' (2017) 29(3) *Journal of Environmental Law* 537, 542; Priyadarshi R Shukla and others, *Climate Change 2022: Mitigation of Climate Change* (Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press 2022) 158; *R (Friends of the Earth) v Heathrow* [2020] UKSC 52, [2021] 2 All ER 967 [71], [122].

<sup>88</sup> Bodansky, 'The Legal Character of the Paris Agreement' (n 84), 146.

<sup>89</sup> Zahar, 'The Nature of Climate Law' (n 1), 300, quote before footnote 19.

<sup>90</sup> Bodansky, 'The Paris Climate Change Agreement: A New Hope?' (n 85), 304. Bodansky's most critical claims in his earlier publication, cited by Zahar before footnote 19, no longer appear in his later publication.

<sup>91</sup> Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 231. See also Lavanya Rajamani and Daniel Bodansky, 'The Paris Rulebook: Balancing International Prescriptiveness with National Discretion' (2019) 68(4) *International & Comparative Law Quarterly* 1023, 1027–1028, 1034; Daniel Bodansky, 'Paris Agreement' (*Audiovisual Library of International Law*, July 2021), at 4, available at <<https://perma.cc/K3H9-HA29>>, accessed 29 May 2023.

<sup>92</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 63–78.

<sup>93</sup> Zahar, 'The Nature of Climate Law' (n 1), 300.

<sup>94</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 72.

<sup>95</sup> Zahar, 'The Nature of Climate Law' (n 1), 301.

<sup>96</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 72, 76–78.

<sup>97</sup> Zahar, 'The Nature of Climate Law' (n 1), 301, e.g. 'What rational polity of electors would mandate a government to lock itself into a legal position internationally, condemning it to effective isolation?'



without a ‘guarantee that other states will follow’,<sup>98</sup> then it would not adopt domestic law either without an international legal framework in place to offer such a guarantee.

There is clear evidence that, rationally or not, some parties have created mechanisms binding themselves to implementing mitigation action, at least under domestic law. Zahar recognises as much, but he contends that these domestic law commitments are less onerous, as they ‘can be modified by the legislature of the state’.<sup>99</sup> This underestimates the political and possibly even legal (e.g., constitutional) obstacles that a legislature would face if it attempted to revise existing mitigation targets. Zahar also seems to ignore that domestic instruments have greater prospects of being enforced, so that, from a political perspective, they are certainly no less onerous than international commitments.<sup>100</sup>

### 3.3 Customary Law

The book identifies general mitigation obligations arising from two sources: the general commitments of the UNFCCC and customary international law. Like treaties, custom is derived from the will of states (contrary to what Zahar suggests),<sup>101</sup> albeit in a different way.<sup>102</sup> The content of customary law on climate change mitigation may differ from that of climate treaties because climate treaties are adopted based on consensus (i.e., each negotiating state has, in principle, a right of veto on any decision), whereas customary law reflects more of a ‘weighted majority’<sup>103</sup> (e.g. *general acceptance*).<sup>104</sup> Overall, while treaties can be silent on a subject matter, customary law must play a gap-filling role if one accepts the premise that international judges must be able to decide any case before them in application of the law.

The question, therefore, is not *whether* customary law applies to GHG emissions, as Zahar assumes, but *what* it says about it. By arguing once more that customary law does not contain any obligation on climate change mitigation, Zahar implies the existence of a norm of customary international law granting states an unrestrained freedom to emit GHGs. Needless to say, he provides no evidence for the existence of such a norm under customary law.

Building on the literature on the identification of customary international law, the book relies on a syncretic method combining deduction and induction.<sup>105</sup> On the one hand, a customary obligation on climate change mitigation can be deduced from the basic tenets of contemporary international law, such as the principle of sovereign equality: if states have the right to make the most of their natural resources, they must also have an obligation not to interfere with the same right of other states,<sup>106</sup> including, if

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<sup>98</sup> Ibid, 301.

<sup>99</sup> *ibid*.

<sup>100</sup> See e.g. Conseil d’État (CE) [State Council], 6e et 5e ch., 10 May 2023, No. 467982, art 2 (Fr.) (*Grande-Synthe v France*), ordering the French government to take ‘all useful additional measures’ (‘toutes mesures supplémentaires utiles’) to ensure compliance with national emission targets. For Zahar, however, this probably does not create any legal obligation as there is, as he would put it, no ‘non-subjective standard that distinguishes sufficient from insufficient’ measures. See Zahar, ‘The Nature of Climate Law’ (n 1), 304–05, and discussion in text at note 145.

<sup>101</sup> See e.g. Zahar, ‘The Nature of Climate Law’ (n 1), 306.

<sup>102</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 19–23.

<sup>103</sup> Jonathan I Charney, ‘The Persistent Objector Rule and the Development of Customary International Law’ (1986) 56 *BYBIL* 1, 19.

<sup>104</sup> See discussion in Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 32–33, 89.

<sup>105</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 94. See also an extended discussion in Benoit Mayer, ‘Climate Change Mitigation as an Obligation under Customary International Law’ (2023) 48(1) *Yale Journal of International Law* 105.

<sup>106</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2), 97–99. See, for example, *Island of Palmas (Netherlands v US)* (Award) (1928) 2 *RIAA* 829, 839; *Corfu Channel (UK v Albania)* (Merits) [1949] *ICJ Rep* 4, 22; Robert Jennings and Arthur Watts (eds), *Oppenheim’s International Law: Volume 1 Peace* (9th edn, Oxford University Press 2008) 408; Brownlie (n 59) 359; Samantha Besson, ‘La due diligence en droit international’ (2020) 409 *RdC* 153, 179–205; Jutta Brunnée, ‘Sic utere tuo ut alienum non laedas’, in *Max Planck Encyclopedia of Public International Law* (online edn, Oxford University Press 2010) para 4.

need be, through international cooperation.<sup>107</sup> On the other hand, this conclusion is only valid if and to the extent that evidence can be induced from empirical evidence of acceptance as law and state practice—neither of them is entirely lacking, as most states are taking some measures to mitigate climate change<sup>108</sup> and are emphasizing the need for cooperation on climate change mitigation.<sup>109</sup>

Zahar does not acknowledge this argument, let alone engage with it. Rather, he falsely claims that my reasoning is mainly based on ‘analogy ... in lieu of an argument’.<sup>110</sup> Further, he intends to show that the absence of analogy proves the absence of law.<sup>111</sup> This leads him to a long-debunked claim that ‘[c]ourts have confined the rule in the *Trail Smelter* case ... to ... cases of point-to-point cross-border intrusions of substances or disturbances causing or potentially causing significant harm or nuisance’.<sup>112</sup> He reiterates this claim, once more, without providing any evidence of such judicial confinement of what he calls ‘the rule in *Trail Smelter*’.<sup>113</sup> There has in fact been, since the 1941 award, a growing body of judicial decisions applying a prevention or no-harm principle in cases that depart from the premises Zahar identifies.<sup>114</sup>

None of this is of much relevance anyway because, contrary to what Zahar seems to assume, we are not pleading a case before a lower national court seeking to stay in line with the precedent set by higher courts. Even if Zahar were right to claim that no judicial decision identified a customary international law applicable to climate change mitigation, this would not demonstrate that no such law exists; this would only demonstrate that judicial decisions are unhelpful in determining the content of the law. Courts do not create international law, but help in determining its content;<sup>115</sup> they do not create customary international law, but ‘identify’ it.<sup>116</sup> As such, customary norm may exist even when no court has ever applied it—that is, even in the absence of any relevant judicial decisions.

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<sup>107</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 103–05. See e.g. Pierre-Marie Dupuy, ‘The Place and Role of Unilateralism in Contemporary International Law’ (2000) 11 *European Journal of International Law* 19, 22–23; International Law Commission, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities’ [2001] II(2) YBILC 155, art 4; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (4th edn, Oxford University Press 2021) 200.

<sup>108</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 101–103.

<sup>109</sup> *ibid* 110–13.

<sup>110</sup> Zahar, *The Nature of Climate Law* (n 1), 302.

<sup>111</sup> *ibid*. See also e.g. Zahar, ‘Mediated versus Cumulative Environmental Damage’ (n 15), 224–231; Zahar, ‘The Contested Core of Climate Law’ (n 15), 247–255.

<sup>112</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 302. See e.g. Christoph Schwarte and Will Frank, ‘Reply to Zahar’ (2014) 4 *Climate Law* 234, 234–236; Mayer, ‘The Applicability of the Principle of Prevention to Climate Change’ (n 17), 7–15; Mayer, ‘The Place of Customary Norms in Climate Law’ (n 17), 262–268.

<sup>113</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 302.

<sup>114</sup> See e.g. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 242, para 29 (defining an obligation to ‘respect the environment of other States or of areas beyond national control’); *Iron Rhine Railway (Belgium v The Netherlands)* (Award) [2005] 27 RIAA 35, para 59; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14, paras 101–103 (applying the obligation of prevention to a shared resource) (hereinafter ‘*Pulp Mills*’); *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] ITLOS Rep 10, para 148 (finding that the language of the decision in *Pulp Mills* ‘seems broad enough to cover activities in the Area’ beyond national jurisdiction); *The Indus Waters Kishenganga Arbitration (Pakistan v India)* (Partial Award) [2013] PCA Case No 82842, para 451; *South China Sea Arbitration (Philippines v China)* (Award) [2016] PCA Case No 2013-19, ICGJ 495, para 941 (‘The corpus of international law relating to the environment, which informs the content of the general obligation in Article 192, requires that States “ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control”’ (hereinafter ‘*South China Sea Arbitration*’)).

<sup>115</sup> ICJ Statute, art. 38(1)(d).

<sup>116</sup> ILC, ‘Draft Conclusions on Identification of Customary International Law, With Commentaries’ [2018] II(2) YBILC.

Then follows Zahar's renewed attempt at a *reductio ad absurdum*.<sup>117</sup> Zahar claims that if a customary international law obligation on climate change mitigation existed, '[i]t would follow that all [GHG] emissions from a state's territorial jurisdiction would need to cease immediately'.<sup>118</sup> Zahar shows over an entire paragraph that this conclusion is absurd. It is indeed about as absurd as Zahar's own contention that every state has an unrestricted right to emit any quantity of GHGs whatsoever under customary international law.

Yet Zahar has no time to spare to consider how the book addresses this objection. The book does so by highlighting that the obligation of a state not to interfere with the rights of other states 'is an obligation to minimize the risk of harm, not necessarily to avoid it entirely'.<sup>119</sup> From a deductive perspective, the customary law on climate change mitigation aims at balancing the rights of polluting states with those of other states: how much GHG emissions are tolerable depends therefore on the cost of avoiding these emissions, among other things.<sup>120</sup> From an ascending approach, this due diligence obligation is to be interpreted in light of general state practice and acceptance as law.<sup>121</sup> As states have not generally stopped GHG emissions entirely, this surely is not the norm under customary international law. Likewise, as states have long taken measures to limit their emissions, an unfettered freedom to emit GHGs is also not an option under customary law.

Eventually, Zahar decides to get rid of customary law just as he got rid of his napkin. He writes that 'customary international law is excluded from the subject matter of the climate treaties by the climate treaties themselves, which stand to it in a relationship of *lex specialis*'.<sup>122</sup> In other words, Zahar claims (once more) that climate treaties preclude the application of customary international law to their 'subject matter'.<sup>123</sup>

For almost a decade, I (and sometimes others) have put it to Zahar that this theory does not hold water.<sup>124</sup> Pointing to the work of the International Law Commission on the fragmentation of international law, I have shown that what Zahar calls 'a relationship of *lex specialis*' does not automatically preclude the application of the general norm. As the International Law Commission put it: 'when several norms bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations'.<sup>125</sup> It is only when the special law is *incompatible* with the general law that the latter may become inapplicable.<sup>126</sup> Zahar's response to this is rather surprising: Zahar now purports to demonstrate the incompatibility of climate treaties with customary mitigation obligations by asserting that climate treaties 'affirm a state's entitlement to continue to spew out [GHGs] indefinitely'.<sup>127</sup>

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<sup>117</sup> For previous iterations, see e.g. Zahar, 'Mediated versus Cumulative Environmental Damage' (n 15), 231; Zahar, *Climate Change Finance and International Law* (n 15), 57; Zahar, 'The Contested Core of Climate Law' (n 15), 258.

<sup>118</sup> Zahar, 'The Nature of Climate Law' (n 1), 302.

<sup>119</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 108–109. See e.g. Ilias Plakokefalos, 'Prevention Obligations in International Environmental Law' (2012) 23 Yearbook of International Environmental Law 3, 37–38; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd edn, Oxford University Press 2009) 153.

<sup>120</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 102–103, 189–191, and 227–280.

<sup>121</sup> *ibid* 94.

<sup>122</sup> Zahar, 'The Nature of Climate Law' (n 1), 303. See also e.g. Zahar, 'Mediated versus Cumulative Environmental Damage' (n 15), 230; Zahar, 'The Contested Core of Climate Law' (n 15), 255–258.

<sup>123</sup> On the condition of incompatibility, which Zahar seems to accept implicitly, see Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) at 115.

<sup>124</sup> See e.g. Schwarte and Frank, 'Reply to Zahar' (n 112), 236–237; Mayer, 'The Applicability of the Principle of Prevention to Climate Change' (n 17), 15–20; Mayer, 'The Place of Customary Norms in Climate Law' (n 17), 268–275.

<sup>125</sup> ILC, 'Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' [2006] II(2) YBILC, 178.

<sup>126</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 115–116.

<sup>127</sup> Zahar, 'The Nature of Climate Law' (n 1), 302. See also Zahar, 'Methodological Issues in Climate Law' (n 15), 32.

Here, one needs to take a moment to a step back and take stock of Zahar’s interpretation of climate treaties. Climate treaties are, at the most basic level, treaties aimed at addressing climate change<sup>128</sup>—they are not, even by a stretch of the imagination, aimed at perpetuating or worsening it. These treaties may not be as effective as one may wish, though it is generally accepted that they are not entirely ineffective<sup>129</sup>—but their efficacy is not relevant in assessing their aim, which is, once more, to address climate change. One could therefore be rather surprised by Zahar’s contention, not only that these treaties contain no substantive *obligation* to mitigate climate change, but also that they establish a *right* of states to emit as much GHGs as they wish.

This contention begs many questions. Why would any of vulnerable countries have agreed to the treaties Zahar imagines? Why would any state have ever hesitated to participate in these rights-asserting treaties? Why would so many climate action advocates have ever pleaded for any state to ratify these treaties? If Zahar is suggesting that everyone—states, scholars, advocates—has fundamentally misunderstood climate treaties, then he holds a formidable burden of proof: a mere assertion will not do.

Yet, Zahar presents no evidence whatsoever in support of his claim. He gives up on a dubious interpretation of the Kyoto Protocol that he had put forward in the latest iteration of this thesis,<sup>130</sup> and thus no longer points to any treaty provision reflecting this alleged entitlement of states to GHG emissions. He shows no interest in explaining how this interpretation can be reconciled with the treaties’ object and purpose, or indeed with their context—including multiple, unchallenged state declarations that climate treaties do *not* preclude the application of general international law.<sup>131</sup>

Were it to provide such evidence, Zahar would still need to explain how this right to emit GHGs is necessarily incompatible with customary international law obligations.<sup>132</sup> An obligation can curtail a right without denying its existence: tax law is not necessarily incompatible with the right to property.<sup>133</sup> Zahar would have to demonstrate that the right to GHG emissions he somehow identifies in climate treaties is an absolute one—one that allows no restrictions whatsoever.

#### 4. Applying Mitigation Obligations

Part Two of the book considers how an international court could apply the mitigation obligations identified in Part One, in particular the general obligations under the UNFCCC and customary international law. Chapter V shows that these general mitigation obligations are obligations of conduct or due diligence: states must do their best to mitigate climate change. Building on international judicial decisions, I show that such obligations of conduct are generally implemented by inferring what I

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<sup>128</sup> UNFCCC, art 2; KP, recital 2; PA, arts 2, 4(1).

<sup>129</sup> See, for example, Anthony Patt and others, ‘International Cooperation’, in Shukla and others (n 87) 1451, at 1475 (‘Most studies have concluded that Kyoto did cause emissions reductions.’), 1477 (suggesting that the Paris Agreement will likely achieve significant mitigation outcomes, in particular by extrapolation from the Cancun pledges).

<sup>130</sup> Zahar, ‘The Contested Core of Climate Law’ (n 15), 256, arguing that the ‘assigned amounts’ of emissions in article 3 of the Kyoto Protocol (which were used to calculate a Party’s ‘quantified emission limitation and reduction commitments’) implied such an entitlement. But see Kyoto Protocol, Decision 2/cmp.1, Principles, Nature and Scope of the Mechanisms Pursuant to Articles 6, 12 and 17 of the Kyoto Protocol (30 November 2005), preamble 6 (‘the Kyoto Protocol has not created or bestowed any right, title or entitlement to emissions of any kind’); Mayer, ‘The Place of Customary Norms in Climate Law’ (n 17), 271–272.

<sup>131</sup> See in particular the declarations made by Fiji, Kiribati, Papua New Guinea, and Tuvalu in connection to the UNFCCC, by the Cook Islands, Kirabati, Nauru, and Niue in connection to the Kyoto Protocol, and by the Cook Islands, the Marshall Islands, Micronesia, Nauru, the Solomon Islands, Tuvalu, and Vanuatu in connection to the Paris Agreement.

<sup>132</sup> If one follows Zahar’s thoughts further, one realizes that there cannot be any incompatibility between customary international law and treaty law on climate change, as both are the sources of an unfettered right of states to emit GHGs.

<sup>133</sup> See discussion in Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) at 118; C Wilfred Jenks, ‘The Conflict of Law-Making Treaties’ (1953) 30 BYBIL 401, 426–27.

propose to call ‘corollary duties’.<sup>134</sup> For instance, the ICJ identified the conduct of an environmental impact assessment as a corollary of the obligation to prevent transboundary environmental harm.<sup>135</sup> This comes with some caveats, in particular regarding the need for corollary duties to be accepted by states and reflected in state practice.

The following chapters envisage two implications of this theory. Chapter VI discusses the possibility of a judicial assessment of a state’s requisite level of mitigation action (what some have referred to as a state’s ‘fair share’). Albeit sceptical, I do not fully exclude that the decision of the Supreme Court of the Netherlands in *Urgenda* might be replicated, perhaps even in international law. Chapter VII presents a more convincing alternative, relying on an overall assessment of the fulfilment of multiple, more specific corollaries. Courts could control whether a state has done enough to mitigate climate change, for instance, by verifying whether it has adopted a long-term strategy and a consistent medium-term plan, implemented measures in line with this strategy and this plan, and reviewed this action regularly. In other words, I suggest that a state could be found to be in breach of its general mitigation obligations if it fails systematically to take multiple important steps.

Here again, Zahar repeatedly mischaracterises my argument. He wrongly states that the second part of my book is about ‘the law as it should be’, even though he himself pointed that the aim of my book is ‘to help courts decide mitigation cases’ by application of the law.<sup>136</sup> Zahar might think that courts create law when they make a decision, as they do in the common law tradition; he keeps forgetting that, in international law, judicial decisions are merely ‘subsidiary means for the determination of rules of law’,<sup>137</sup> in just the same way as legal scholarship. International judges do the same thing as climate law scholars do when they engage in doctrinal research: they try to determine what the law *is*.

Zahar turns to my treatment of the obligation and duty of cooperation. He speculates that Winston Churchill would disagree with the identification of a general obligation of cooperation,<sup>138</sup> but Churchill has not written much on international law since his passing in 1965. In contrast, Zahar did not find the other authorities and pieces of evidence mentioned in the book worth mentioning or discussing—including judicial decisions,<sup>139</sup> writings from some of the most highly qualified publicists (e.g. Rüdiger Wolfrum, Pierre-Marie Dupuy, and Wolfgang Friedmann),<sup>140</sup> some of the work of the International Law Commission,<sup>141</sup> UN General Assembly resolutions,<sup>142</sup> multilateral declarations,<sup>143</sup> and treaties.<sup>144</sup> There is indeed a degree of generalisation in my claim that the obligation of cooperation applies in principle to *every* issue of common concern, but Zahar’s Churchill is welcome to point to any exceptions he might identify.

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<sup>134</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 213–225. See also e.g. Jutta Brunnée, ‘Procedure and Substance in International Environmental Law’ (2019) 405 *Collected Courses of the Hague Academy of International Law* 81, 143; Benoit Mayer, ‘The Pitfalls of Ineffective Conceptualization: The Case of the Distinction between Procedure and Substance’ (2022) 33(4) *European Journal of International Law* 1307, 1324–1325.

<sup>135</sup> *Pulp Mills* (n 114), para 204. See also, for example, *South China Sea Arbitration* (n 114), para 941; *Request for Advisory Opinion by the Sub-Regional Fisheries Commission* (Advisory Opinion) [2015] ITLOS Rep 4, para 131; *Osman v UK* (1998) ECHR 1998-/VIII 3124, para 1115.

<sup>136</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 303.

<sup>137</sup> ICJ Statute, art 38(1)(d).

<sup>138</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 304.

<sup>139</sup> E.g. *Lax Nanous* (Award) [1957] 12 TIAA 281, at 317; *Request for Advisory Opinion by the Sub-Regional Fisheries Commission* (n 135), para 210.

<sup>140</sup> E.g. Dupuy (n 107), 22–23; Birnie, Boyle and Redgwell, *International Law and the Environment* (n 107) 200.

<sup>141</sup> ILC, ‘Draft Articles on Prevention of Transboundary Harm from Hazardous Activities’ (n 107), art 4. See also ILC, ‘Draft Guidelines on the Protection of the Atmosphere with Commentaries’ [2021] II(2) YBILC, guideline 8.

<sup>142</sup> E.g. United Nations General Assembly Resolution 60/1 (16 September 2005), para 71.

<sup>143</sup> E.g. Rio Declaration, principle 7.

<sup>144</sup> E.g. UNFCCC, recital 6; UNCLOS, art 197.

Further, Zahar suggests that the corollary duty of cooperation could not exist, or else could not be applied, on the ground that there is no ‘non-subjective standard that distinguishes sufficient from insufficient cooperation in matters of climate change’.<sup>145</sup> The remark is factually right: there is no clear touchstone to determine whether a state is doing enough. As mentioned above, Part Two of the book seeks to address this issue. However, the same could be said of any due diligence obligation, and this difficulty has not prevented court from identifying and applying such due diligence obligations as the obligation to prevent transboundary environmental harm, to protect human rights, or to preserve the marine environment, among other things. Zahar assumes that the law cannot be implemented unless there is a fully objective standard, that is essentially a simple algorithm that a judge could apply mechanically to decide a case—but, whether Zahar likes it or not, courts do sometimes, even quite often, look beyond black letter law.

Zahar makes essentially the same argument about another corollary duty, regarding the implementation of an environmental assessment. Before approving a project likely to result in large amounts of GHG emissions (e.g. a coal plant), states generally conduct a study aimed at assessing these emissions and at considering ways to minimise these emissions, typically as part of a broader environmental impact assessment.<sup>146</sup> In the book, I argue that a state’s failure to do so would be an indicium that the state is not taking its general mitigation obligations seriously.<sup>147</sup> If this indicium coincide with other indicia, a court could reasonably infer that the state appears to be in breach of this general mitigation obligation. Zahar disagrees, again, because of the lack of a clear threshold: there is no obvious standard to determine what project would need to undergo this assessment procedure. This, he claims, would mean that ‘almost every domestic “activity” of the state ... down to the installation of street lights ... would be an activity subject to international law’.<sup>148</sup>

But Zahar keeps ignoring (despite our previous exchanges) that international courts did not find this absence of a clear threshold a valid objection when they identified a customary obligation to conduct environmental impact assessments for projects liable to cause significant transboundary environmental harm.<sup>149</sup> Zahar seems unable to understand how one can reasonably determine whether street lights are liable to causing ‘significant’ transboundary environmental harm (e.g. through light pollution) in the absence of a comprehensive set of rules and standards. Courts make these decisions as fairly as they can—albeit imperfectly. They try to find a reasonable interpretation of the law. It is better to apply ill-defined legal norms as well as one can than not to apply the law at all.

Relying on corollary duties, the book acknowledges, is not entirely foolproof. A state may have good reasons for its failure to take steps that it would normally have been expected to take. My theory addresses this caveat by relying on refutable presumptions. If enough preliminary evidence is gathered from the non-fulfilment of corollary duties, a court would not immediately make a definitive finding of a breach of the general mitigation obligation; rather, it would shift the burden of proof, asking the respondent to demonstrate that it has complied with its general mitigation obligation.<sup>150</sup>

Zahar disagrees, again, because he misreads this argument. He presumes that international courts would normally decide cases on the balance of probabilities,<sup>151</sup> and that anything lower than that would be problematic. The balance of probabilities is indeed the common standard in common law courts when deciding civil cases, and indeed Zahar’s argument relies on an English case law.<sup>152</sup> Yet he ignores that international courts have generally assumed a more demanding standard than the balance of

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<sup>145</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 304–05.

<sup>146</sup> Benoit Mayer, ‘Climate Assessment as an Emerging Obligation under Customary International Law’ (2019) 68(2) *International & Comparative Law Quarterly* 271.

<sup>147</sup> Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 303–306.

<sup>148</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 305.

<sup>149</sup> See references *supra* note 135.

<sup>150</sup> See Mayer, *International Law Obligations on Climate Change Mitigation* (n 2) 283.

<sup>151</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 305.

<sup>152</sup> *ibid*, footnote 47.

probabilities, especially in ‘claims against States involving charges of exceptional gravity’,<sup>153</sup> where they asked to be ‘fully convinced’ by the party claiming the breach.<sup>154</sup> Cases challenging a state’s mitigation action could have immense economic implications for the respondent state and, thus, courts could be inclined impose a relatively high standard of proof. My argument would result, in effect, in the burden of proof being reduced, though it would not ordinarily go below the balance of probabilities.

## 5. Conclusion

Many of Zahar’s objections are not new. The main exception is Zahar’s accusation that I am ‘fomenting a civil war’<sup>155</sup> but, on this point, I have decided to exercise my right against self-incrimination. That apart, Zahar systematically fails to acknowledge that I have already replied to his objections in previous publications and, again, in the book; at no point does he show any interest in engaging with my responses.

Some of Zahar’s claims are simply beside the point. For instance, suggesting that ‘the main action’ on climate change is on the domestic plane does not imply that there was no need for a book on international law. Overall, these and other claims are simply unconvincing. Would anyone seriously believe that climate treaties create no obligations on climate change mitigation, but only ‘affirm a state’s entitlement to continue to spew out greenhouse gases indefinitely’?<sup>156</sup> On this and other claims, Zahar proceeds almost exclusively by way of assertion and refuses to engage with the arguments of the book he purported to review. While many questions discussed in the book deserve more investigation, I doubt that Zahar’s increasingly polemic interventions are helping to achieve a better collective understanding of the field.

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<sup>153</sup> Aniruddha Rajput, ‘Standard of Proof’ in *Max Planck Encyclopedia of Public International Law* (n 106), para 10.

<sup>154</sup> *The Corfu Channel Case (UK and Northern Ireland v Albania)* (Merits) [1949] ICJ Rep 4, para 17. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43, para 210 (‘the Court requires proof at a high level of certainty appropriate to the seriousness of the allegation’).

<sup>155</sup> Zahar, ‘The Nature of Climate Law’ (n 1), 306.

<sup>156</sup> *Ibid* at 302.