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Drops in the Ocean: The Hidden Power of Rights-Based Climate Change Litigation

Craig Martin †

Abstract

An increasing number of legal challenges to government climate change policies are being advanced on the basis that states are violating the human rights or constitutional rights of applicants. A number of high-profile cases in Europe have upheld such claims and ordered governments to adjust their policies. But questions remain regarding how effective such rights-based cases may be in the effort to enforce climate change law obligations or encourage government responses to the crisis. This Article explores how such rights-based cases may exercise greater influence than is typically understood.

After explaining briefly the relevant human rights and climate change law, this Article examines in some detail a sample of rights-based climate cases that reflect a common pattern of features that provide the basis for such an explanation. The cases illustrate the incorporation of both international human rights law norms, and international climate change law obligations and standards, which are used to assess the legitimacy of government climate change policy. The courts increasingly rely upon the science of climate change institutions and the arguments and doctrines developed by foreign courts and international tribunals, including new doctrines for rejecting typical "drop in the ocean" causation and justiciability arguments traditionally relied upon to dismiss climate change cases.

The features of the common pattern reflected in these cases conform neatly with a number of well-established theories in international and comparative constitutional law, which in turn provide insight into how these cases may exercise powerful indirect influence. These theories help explain how the incorporation and internalization of international law norms, along with the migration of ideas from abroad, help shape national policy and form powerful pre–commitment devices. They also show how judicial decisions contribute to that process, and how courts

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help shape public perceptions and opinions regarding the validity of government policy. Viewed through the lens of these theories, the features of these cases suggest that they exercise greater influence than is generally understood.

I. Introduction

The climate change crisis is arguably the most intractable global collective action problem that humanity has ever faced. It is a so-called "wicked" collective action problem, requiring a coordinated and cooperative international response that will be fiendishly complex, enormously expensive, and massively disruptive along social, political, economic, technological, and cultural dimensions.[1] One might be excused for thinking that courts are unlikely to provide much in the way of significant assistance in either mobilizing compliance with existing climate change law obligations, or galvanizing action to increase the ambitiousness of national climate change policy responses. The contribution any one court case could make is arguably entirely insignificant in the context of the overall crisis. There is even a legitimate concern that courts in different jurisdictions could undermine climate change efforts by reaching conflicting or unhelpful results.

What is more, the legal bases upon which litigants have challenged state climate change policies have also been very uncertain. On the one hand, there has been uncertainty as to how climate change implicates individual rights, or whether there is some individual right to a safe

1. *See, e.g.*, Frank P. Incropera, Climate Change: A Wicked Problem (2016); on wicked problems generally; *see* Brian Head, Wicked Problems of Public Policy: Understanding and Responding to Complex Challenges (2022).

climate.[2] On the other hand, each country is contributing to the causes of climate change to varying extents, but all countries will also suffer from the consequences of climate change.[3] Thus, each country's contribution is argued to be but an insignificant "drop in the ocean" that is neither creating the crisis nor the proximate cause of any particular harm, and every country is to some extent both perpetrator and victim, making it problematic to establish responsibility. Rights-based litigation claims have thus been viewed as both difficult and ineffective as tools for helping to enforce climate change law and policy.[4]

Nonetheless, in the last few years, several landmark rights-based climate change cases have arguably had a significant impact on the national climate change policies of the countries in which they were decided.[5] Additionally, the number, geographic spread, and sophistication of such climate change cases have rapidly increased in the last decade.[6] Indeed, the Intergovernmental Panel on Climate Change (IPCC) recognized for the first time the impact of litigation on climate change governance and response in its Sixth Assessment Report in 2022.[7] Such developments suggest that climate change litigation deserves further consideration as to whether it is a viable and effective tool for advancing and enforcing climate change law.

There has been a growing study of climate change litigation, and there are now a number of organizations that track, analyze, and report on climate change litigation worldwide.[8] At last count, there have been over 2,300 such cases commenced around the world.[9] This number includes a range of different kinds of cases, including those that seek to

2. *See infra* Part II(A) (discussing the development on the right to a safe climate).

3. *See* Hannah Ritchie et al., *Green House Gas Emissions*, Oxford: Our World in Data https://ourworldindata.org/greenhouse-gas-emissions [perma.cc/EQ6K-W8K6] (Jan. 2020) (showing data on each state's greenhouse gas emissions); *see also Greenhouse Gas Inventory Data-Detailed Data by Party,* UNFCCC, https://di.unfccc.int/detailed_data_by_party [perma.cc/6XUJ-WWJ2].

4. *E.g.*, Benoit Mayer, The International Law on Climate Change 238–48 (2018).

5. *See infra* Part III(A).

6. *See* Joana Setzer & Catherine Higham, Global Trends in Climate Change Litigation: 2023 Snapshot 2–3 (2023); Kumaravdivel Guruparan & Harriet Moynihan, Climate Change and Human Rights-Based Strategic Litigation 2, 18 (2021) [hereinafter Chatham House Report].

7. Intergovernmental Panel on Climate Change [IPCC], AR6 Synthesis Report: *Climate Change 2023,* at 110 (2022) [hereinafter IPCC, AR6], available at: https://www.ipcc.ch/report/sixth-assessment-report-cycle/.

8. *See, e.g,* Setzer & Higham, *supra* note 6, at 18; *see also* Chatham House Report, *supra* note 6, at 16.

9. Setzer & Higham, *supra* note 6, at 18.

enjoin governments to implement specific climate standards for both mitigation and adaptation, climate tort cases against corporations, so-called climate-washing cases, and even cases that seek to block specific policy responses to climate change.[10] And with the increasing variety and sophistication of cases, there has been a corresponding development in the various schemas for categorizing and assessing this growing body of litigation.[11] This Article focuses primarily on the category of rights-based cases referred to as "framework," "strategic," or "systemic mitigation" cases. These cases challenge the government's failure to adequately address the threat posed by climate change, alleging that governmental climate change policy failures violate international human rights or related constitutional rights. The initial questions these evoke, are: first, how effective are these rights-based framework cases in advancing the effort to mitigate the causes of climate change; and second, to the extent they are effective, through what precise mechanisms or processes do they operate to impact policy.

This Article examines a small selection of rights-based climate cases to address these questions. It is not an empirical study of all such cases, but a qualitative study of a small sample, comprising three of the most famously successful cases as well as some lesser known and unsuccessful cases, for the purpose of illustrating certain common features.[12] The cases share the common approach of attempting to directly employ human rights or constitutional rights as a means of enforcing the government's international climate change law obligations to reduce greenhouse gas (GHG) emissions. More important, however, are the common patterns observed in the judicial reasons in these cases. First, the courts have either incorporated rights that relate to the right to healthy environment from international human rights law, or interpreted constitutional rights in a manner informed by such human rights law. Second, the courts have incorporated and relied upon international climate change law obligations and standards for purposes

10. For an explanation and analysis of these different categories *see id.*, at 22–25; *see also* Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 Transnat'l Env't L. 37, 46 (2018).

11. Setzer & Higham, *supra* note 6, at 21; Jacqueline Peel et al., Review of Literature on Impacts of Climate Litigation: Report 16, tbl.2 (2022); Chatham House Report, *supra* note 6, at 9.

12. HR 20 december 2019, ECLI:NL:HR:2019:2006, 19/00135 m. nt. van Wiersma, H.W. (State of the Netherlands/Urgenda Foundation); BVerfGE, 1 BvR 2656/18, Mar. 27, 2021, ¶ 1 (Ger.), *translated in* Climate Change Litigation Databases, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2021/03/rs20210324_1bvr265618en.pdf?___blob=publicationFile&v=5 [hereinafter *Neubauer*]; Leghari v. Federation of Pakistan (2015) W.P. No. 25501/2015 (Pak.); Juliana v. United States, 217 F. Supp. 3d 1224, 1249–50 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159, 1165 (9th Cir. 2020); Mathur v. His Majesty the King in Right of Ontario, [2023] 480 D.L.R. 4th 444 (Can. Ont. S.C.J.) (appeal pending).

of assessing the sufficiency of state climate change policy. And third, they reflect a migration and borrowing of ideas regarding the framing of the climate change problem by international climate change institutions, as well as the arguments of courts in other jurisdictions. Significantly, there has been the spread of judicial positions rejecting the traditional causation and justiciability arguments traditionally employed to bar climate change claims—namely that the state cannot be held responsible for a global crisis in which its contribution is no more than a "drop in the ocean" and is in any event impossible to attribute to any specific harm.

The courts in several of these cases ordered governments to revise their climate change policies to comply with their international legal obligations.[13] This alone would suggest the need for some re-evaluation of how effective a tool climate change litigation may be. However, many recent studies of climate change litigation also suggest that the indirect influence of these cases may be more important[14]—yet there has been little analysis or theorizing of precisely how such indirect influence might be exercised. In this Article I also explore how several well-known and established theories in other areas of international law and comparative constitutional law—theories relating to international law compliance, constitutional incorporation of international law, constitutions as pre–commitment devices, judicial review as a mechanism of internalizing and disseminating norms and information regarding government malfeasance, and the transnational migration of legal norms—may help explain the mechanisms through which this indirect influence is being exercised.[15] The patterns observed in these cases, of incorporating international human rights and climate change law obligations, of relying on and legitimating the expertise of international climate change institutions, and the borrowing and validating of ideas across jurisdictions—fit neatly with how these theories operate.[16] These theories in turn provide insight into the operation of specific dynamics that are reflected in the form and substance of these rights-based climate change cases, and may thus help us better understand how these cases—even those that are not successful in obtaining any concrete remedy—may exercise an unexpectedly powerful influence on national responses to climate change.

13. *See, e.g., Urgenda*, *supra* note 12; *see also Neubauer*, *supra* note 12.

14. *See, e.g.*, Setzer & Higham, *supra* note 6, at 23–27; *see also* Chatham House Report, *supra* note 6, at 16–18.

15. *See infra* Part IV.

16. *Id.*

II. The International Human Rights & Climate Change Law

It may be helpful to begin with a brief review of the development of the relevant human rights and international climate change law obligations that are the basis of these climate change cases.

A. The Individual Rights

Many of the so-called framework cases invoke the right to a healthy environment or adjacent international human rights or constitutional rights. There is, of course, a close but multi-faceted relationship between this right and the response to climate change.[17] While the idea of a right to healthy environment has now been incorporated into a number of domestic constitutions,[18] the concept of an international human right to a clean, healthy, and sustainable environment developed over several decades since an early iteration of the idea was formally articulated in the Stockholm Declaration in 1972.[19] The 1972 Stockholm Declaration proclaimed that man's environment is "essential to his well-being and to enjoyment of basic human rights – even the right to life itself."[20] The first principle of the Stockholm Declaration provides that "[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations."[21] Perhaps surprisingly, this proclamation did not lead to the codification of an explicit right to a safe and healthy environment in any broad multilateral treaty.[22] However, there have been frequent instances of

17. *See, e.g.*, John H. Knox (Special Rapporteur on the Human Rights Obligations Relating to Climate Change), *Rep. on the Issue of Human Rights Obligations to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 30, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016); *see also* James May, *The Case for Environmental Human Rights: Recognition, Implementation, and Outcomes,* 42 Cardozo L. Rev. 983, 1004–08 (2021).

18. Over 100 states provided for some constitutional protection. *See David R. Boyd,* (Special Rapporteur on the Human Rights Obligations Relating to Climate Change), *Good Practices of States at the National and Regional Levels with Regard to Human Rights Obligations Relating to the Environment,* ¶ 3, U.N. Doc. A/HRC/43/54 (Mar. 20, 2020) [hereinafter Special Rapporteur Report].

19. Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, 3, U.N. Doc. A/CONF.48/14 (June 5–16, 1972) [hereinafter Stockholm Declaration].

20. *Id.* preamble.

21. *Id.* Principle 1.

22. For example, the San Salvador Protocol was only ratified by sixteen states in the Inter-American system. San Salvador Protocol, Additional Protocol to the American Convention on Human Rights in the Area of Economic,

institutions recognizing the relationship between the protection of the environment and other human rights. Moreover, the idea of a right to a healthy environment has influenced jurisprudence, been incorporated into some constitutions, and been more clearly articulated and recognized by a range of international institutions in recent years. [23]

In 2018, the Inter-American Court for Human Rights issued an advisory opinion in which it recognized the right to a healthy environment as an autonomous right that could be derived from other rights in the American Convention of Human Rights and the Charter of the Organization of American States, and held that pursuant to this right the environment itself must be protected.[24] Moreover, the court held that states will be responsible for any environmental harm they cause in violation of this right, whether internally or extraterritorially.[25] The court enforced the right in a contentious case in 2020, holding Argentina responsible for environmental harm that indigenous peoples had suffered and which Argentina had a duty to prevent.[26]

This recognition by the Inter-American Court was quickly followed by developments within United Nations institutions. The U.N. Human Rights Council passed a resolution in October 2021, which provided

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Social and Cultural Rights art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69; *Protocol of San Salvador*, OAS, http://www.oas.org/en/sare/social-inclusion/protocol-ssv/docs/protocol-san-salvador-en.pdf [https://perma.cc/4WHV-WK8N].

23. Special Rapporteur Report, *supra* note 18, ¶ 3.

24. Specifically, the Court held that the right could be derived from Article 26 of the Convention, which in turn provides that the states undertake to adopt measures to progressively achieve the realization of the economic, social, educational, scientific, and cultural standards set forth in the Charter. The Environmental 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, Inter-Am. Ct. H.R., (ser. A) No. 23, ¶¶ 56–64 (Nov. 15, 2017).

25. *Id.* ¶ 32; Maria L. Banda, *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights*, Am. Soc'y Int'l L. (May 10, 2018), https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human [https://perma.cc/HP3V-NN4W]; Rafaela Sena, *The Intersection of Human Rights and Climate Change in the Inter-American Human Rights System: What to hope for?*, 38 Wisc. Int'l L. J. 331, 363 (2021).

26. Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 420, ¶ 305 (Feb. 6, 2020); *see* Maria A. Tigre, *Inter-American Court of Human Rights Recognizes the Right to a Healthy Environment*, Am. Soc'y Int'l L. (June 2, 2020), https://www.asil.org/insights/volume/24/issue/14/inter-american-court-human-rights-recognizes-right-healthy-environment [https://perma.cc/KK9Z-JUJM].

that the Council "recognizes the right to a clean, healthy and sustainable environment as a human right that is important for the enjoyment of human rights."[27] Aside from recognizing that this right was a condition precedent to enjoying other human rights, the resolution also, as with the Stockholm Declaration, noted that the right was related to other rights and existing international law. Less than a year later, the U.N. General Assembly similarly passed a resolution recognizing the same right.[28] Both the Human Rights Council and the General Assembly resolutions recognized climate change as one of the most serious threats to a healthy environment and to the ability of current and future generations to enjoy other human rights.[29] Finally, in the summer of 2023, the Committee on the Rights of the Child issued a General Comment "on children's rights and the environment, with a special focus on climate change" (the CRC Comment).[30] The objectives of the CRC Comment included the aim of "emphasizing the urgent need to address the adverse effects of environmental degradation, with a special focus on climate change, on the enjoyment of children's rights."[31]

The CRC Comment, in its introduction and brief review of the evolution of international human rights law relating to the environment, emphasized the relationships that are central to our analysis. It too noted the centrality of a healthy environment to the enjoyment of other rights and the impact of the climate emergency on such a healthy environment. It claimed that the right to a clean, healthy, and sustainable environment was implicit in the Convention and directly linked to the rights explicitly provided for in the Convention. It proceeded to examine each of those rights that are likely to be impacted by the degradation of the environment, the most significant being the right to life. Moreover, it noted the importance of the primary international climate change law regime, developing jurisprudence at the regional and domestic level, and incorporation of these principles into domestic constitutions and other legislation, as all being crucial to the implementation of the right to a healthy environment.[32]

27. U.N. Human Rights Council, United Nations Human Rights Council Resolution 48/13 Doc. No. A/HRC/RES/48/13, (2021).

28. G.A. Res. 76/L.75, at 2–3 (July 26, 2022).

29. *Id.* at 3.

30. U.N. Committee on the Rights of the Child, General Comment No. 26 (2023) on Children's Rights and the Environment, with a Special Focus on Climate Change, U.N. Doc. CRC/C/GC/26 (Aug. 22, 2023).

31. *Id.* ¶ 12.

32. *Id.* ¶ 10.

B. – The Climate Change Law Framework

The United Nations Framework Convention on Climate Change (UNFCCC), the foundation of the current international climate change law regime, provides that its "ultimate objective" is the stabilizing of GHG concentrations at a "safe level," which is defined only as a level that would "prevent dangerous anthropogenic interference with the climate system."[33] Since the adoption of the UNFCCC, the parties have not agreed on specific concentrations, but rather have developed objectives in terms of the temperature change associated with specific GHG concentrations.[34] The Conference of the Parties to the UNFCCC (the COP), in the 2010 Cancun Agreements, established the objective of limiting the increase in average global temperature to no more than 2° Celsius above pre–industrial levels.[35] The Paris Agreement, an international treaty established under the auspices of the UNFCCC that incorporates its ultimate objective, revised those objectives to limit warming to "well below 2° Celsius above pre–industrial levels" and to pursue best efforts to limit the increase to 1.5° Celsius.[36] But the Paris Agreement also provides that this temperature goal is to be achieved through, among other things, peaking GHG emissions as soon as possible and achieving rapid reductions in GHG concentrations thereafter.[37] To put this into context, the Intergovernmental Panel on Climate Change (IPCC) has developed a number of estimated temperature pathways based on a range of different GHG emission concentrations and certain other assumptions regarding mitigation efforts.[38] These pathways (referred to as Representative Concentration Pathways, or RSPs, and Shared Socioeconomic Pathways, or SSPs) describe different temperature scenarios at the end of the century, and in the IPCC's most recent Sixth Assessment Report issued in 2022, these pathways range from a temperature increase of 1.5°–2° Celsius at

33. United Nations Framework Convention on Climate Change, art. 2, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

34. *See* Daniel Bodansky et al., International Climate Change Law 130 (2017).

35. Framework Convention on Climate Change Conference of the Parties, *The Cancun Agreements, Outcome of the Work of the Ad Hoc Working Group on Long Term Cooperative Action Under the Convention*, ¶ 4, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011).

36. Paris Agreement art. 2, *opened for signature* Apr. 22, 2016, 3156 U.N.T.S. 79 [hereinafter Paris Agreement].

37. *Id.*, art. 4.

38. *See* Intergovernmental Panel on Climate Change [IPCC], *Climate Change 214: Impacts, Adaptation, and Vulnerability*, at 9–10 (2014) [hereinafter IPCC AR5].

the lowest and most optimistic end of the scale, to a worst-case scenario of well above 4° Celsius.[39]

The most salient features of the Paris Agreement, for the purposes of this Article, relate to the way it is used as a benchmark against which to measure national policy. Despite much confusion over this in the mainstream media and elsewhere, the Paris Agreement is an international treaty as defined by the Vienna Convention on the Law of Treaties (VCLT) and is binding upon the parties to it by the provisions of the VCLT.[40] Among the legal obligations of conduct under the Paris Agreement is the requirement of each party to pursue domestic mitigation measures and to periodically submit their Nationally Determined Contributions (NDCs) to the global response to climate change, which are to include the GHG emission reduction targets the party has established for itself.[41] As an aside, this is where the popular confusion regarding the binding nature and legal status of the Paris Agreement arises—the treaty does not establish legally binding GHG emission targets for states in the manner that the Kyoto Protocol did, but it provides for each state to set such targets for itself.[42] However, there is a legally binding obligation on each party to establish, submit, and account for those targets.[43] This implies a good faith effort to achieve the objectives provided for in their NDCs.[44] What is more, while the NDCs are voluntarily determined, there is an argument that once submitted and proclaimed to the world, they become unilateral acts that assume the character of binding obligations.[45] In addition, and significantly for our purposes, the Paris Agreement requires each party to submit NDCs every five years, and it articulates the expectation that each party is to develop and submit progressively more ambitious NDCs, which are to "reflect its highest possible ambition."[46] Finally, these NDCs are to be registered publicly and maintained by the secretariat.[47] Each state party is required to provide a biennial national inventory report of GHG emissions and removals to facilitate the

39. IPPC AR6, *supra* note 7, at 9, 77.

40. Vienna Convention of the Law on Treaties, art. 2(1)(a), *opened for signature* May 23, 1969, 1155 U.N.T.S. 331; U.S. Const. art. II, § 2; Bodansky et al., *supra* note 34, at 210; *see* Mayer, The International Law on Climate Change, *supra* note 4, at 46–47.

41. Paris Agreement, *supra* note 36, art. 4.

42. *Id.*; *see* Bodansky et al., *supra* note 34, ch. 7 (discussing the operation of the Paris Agreement).

43. Paris Agreement, *supra* note 36, arts. 3, 4(4).

44. Bodansky et al., *supra* note 34, at 231

45. Frédéric G. Sourgens, *Climate Commons Law: The Transformative Force of the Paris Agreement*, 50 N.Y.U. J. Int'l L. & Pol. 885, 923, 925 (2018).

46. Paris Agreement, *supra* note 36, arts. 4(3), 4(9).

47. *Id.* art. 4(12); *see also* Bodansky et al., *supra* note 34, at 232–33, 241.

tracking of progress in achieving mitigation NDCs.[48] As such, there is significant transparency and accountability in this process, and particularly about the so-called "ambition-cycle."[49]

There are several other principles, in the form of customary international law and general principles of law, that operate as part of the overall climate change law framework. Perhaps the most important of these is the "no-harm" principle. Originating in the *Trail Smelter* case of 1941, in which an arbitration panel found that no state has the right to use or permit its territory to be used in such a manner as to cause environmental harm within the territory of another state,[50] it has developed into a more general principle that obligates states to prevent their territory from being used in any way that may cause harm to other states.[51] The no-harm principle has been recognized in the environmental and climate context in a number of international instruments and decisions of the ICJ.[52] This principle relates directly to the causation issues and the "drop in the ocean" defenses in climate rights litigation. From one perspective, since all states are emitting GHGs and thus contributing to climate change, not all GHG emissions can constitute wrongful transboundary harm, even though all such GHG emissions contribute to the overall harm caused by climate change.[53] Nonetheless, while there remains debate, the dominant view is that precisely because the substantive obligations of the no-harm principle are preventative in nature, and they include obligations of conduct as well as of result, the principle and its obligations can indeed

48. Paris Agreement, *supra* note 36, arts. 13(4), 13(7); U.N. Framework Convention on Climate Change Conference of the Parties, *Adoption of the Paris Agreement*, ¶ 90, U.N. Doc. FCCC /CP/2015/10/Add.1 (Jan. 29, 2016); *see* BODANSKY ET AL., *supra* note 34, at 243.

49. BODANSKY ET AL., *supra* note 34, at 233–36, 241–44; *see also* Lavanya Rajamani & Daniel Bodansky, *The Paris Rulebook: Balancing International Prescriptiveness with National Discretion*, 68 INT'L & COMPAR. L.Q. 1023, 1028–34 (2019).

50. Trial Smelter Arbitration (U.S. v. Can.), 3 R.I.A.A. 1905, 1965 (1941).

51. *See* Corfu Channel (U.K. v. Albania), Judgment, 1949 I.C.J. 4, at 22 (Apr. 9); *see also* Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. U.S.), Judgment, 1986 I.C.J. 392, ¶ 115 (June 27).

52. UNFCCC, *supra* note 33, preamble; Stockholm Declaration, *supra* note 19, principle 21; U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter Rio Declaration]; Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

53. *See* Alexander Zahar, *Mediated Versus Cumulative Environmental Damage and the International Law Association's Principles on Climate Change*, 4 CLIMATE L. 217, 224–27 (2014); *contra* MAYER, THE INTERNATIONAL LAW ON CLIMATE CHANGE, *supra* note 4, at 70-72.

apply to the GHG emissions of states in the context of climate change risks.[54]

Another principle is the duty to cooperate, which parties to the UNFCCC initially agreed to in the *Rio Declaration* and *Stockholm Declaration,* and in the UNFCCC itself.[55] In the context of environmental law, it is now arguably a principle of customary international law.[56] It creates an obligation on states to cooperate in, among other things, achieving the specific objectives of the UNFCCC.[57] Finally, there is the precautionary principle, which has become a fundamental principle of climate change law (among other regimes),[58] and is articulated in most of the important instruments. The *Rio Declaration* defines the principle as requiring that "[w]here there are threats of serious irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[59] The International Tribunal for the Law of the Sea (ITLOS) has held that the precautionary principle is integral to the obligations of due diligence in the no-harm principle, in that states are to err on the side of precaution in decision-making and policy formulation in the event of uncertainty.[60] As reflected in the discussion of the cases below, several domestic courts have referred to these principles, with a particular emphasis on the precautionary principle.

54. *See* Jutta Brunée, *Procedure and Substance in International Environmental Law: Confused at a Higher Level?*, EUR. SOC'Y INT'L L., https://esil-sedi.eu/post_name-123/ [https://perma.cc/2CZW-C9KU]; *see also* Christina Voigt, *State Responsibility for Climate Change Damages*, 77 NORDIC J. INT'L L. 1, 15 (2008).

55. *See* Stockholm Declaration, *supra* note 19, principle 24; *see also* Rio Declaration, *supra* note 52, principles 5, 7, 9, 12–14, 27.

56. *See, e.g.*, BENOIT MAYER, INTERNATIONAL OBLIGATIONS ON CLIMATE CHANGE MITIGATION 103–05 (2022); MAYER, THE INTERNATIONAL LAW ON CLIMATE CHANGE, *supra* note 4, at 74–75; PHILLIPPE SANDS ET AL., PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 197, 215–17 (3rd ed. 2010); The MOX Plant Case (Ir. v. U.K.), Case No. 10, Order of Dec. 3, 2001, ITLOS Rep. 95, ¶ 82; Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), Case No. 12, Order of Oct. 8, 2003, ITLOS Rep. 10, ¶ 92.

57. MAYER, THE INTERNATIONAL LAW ON CLIMATE CHANGE, *supra* note 4, at 75.

58. BODANSKY ET AL., *supra* note 34, at 43–44.

59. Rio Declaration, *supra* note 52, principle 15; MAYER, THE INTERNATIONAL LAW ON CLIMATE CHANGE, *supra* note 4, at 73; SANDS ET AL., *supra* note 56, at 229.

60. Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, Advisory Opinion Feb. 1, 2011, ITLOS Rep. 10, ¶ 131; *see also* Brunée, *supra* note 54.

It is also important to note how the climate change law regime formally relates to human rights. The Paris Agreement is the first of the climate change treaties to refer explicitly to human rights.[61] However, it only does so in the preamble, and even there, it provides that parties should "respect, promote, and consider their respective obligations on human rights" when "taking action to address climate."[62] This has been interpreted as implicating only human rights obligations already outlined in other instruments.[63] More importantly, it has been perceived as addressing solely the potential human rights issues arising from state responses to climate change, rather than suggesting the existence of, or the necessity for, human rights imperatives to be taken into account when determining the scope and ambition of mitigation policy.[64] The Office of the High Commissioner for Human Rights (OHCHR) had, in the run-up to the final negotiations of the Paris Agreement, advocated for stronger language that imposed obligations requiring states to "take affirmative measures to prevent human rights harms caused by climate change," and called for it to be placed in the operative provisions of the treaty—but that was not done.[65]

Nonetheless, while the Paris Agreement may not appear to provide much in the way of explicit support for human rights-based arguments for more ambitious mitigation on the part of states, it is the other aspects of the treaty just examined that are providing courts and litigants with an important foundation in rights-based climate cases—to which I turn to next. And, what is more, despite the lack of explicit language regarding any human right to a safe climate, courts have begun to characterize the Paris Agreement as constituting a source of human rights.[66]

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61. Bodansky et al., *supra* note 34, at 227–28 (explaining how limited the reference is).

62. Paris Agreement, *supra* note 36, preamble.

63. Bodansky et al., *supra* note 34, at 227–28; *see also* Sébastien Duyck et al*., Human Rights and the Paris Agreement's Implementation Guidelines: Opportunities to Develop a Rights-Based Approach*, 3 Carbon & Climate L. Rev. 191, 192 (2018).

64. Bodansky et al., *supra* note 34, at 227–28, 295.

65. *Id.* at 227–28; *see* Office of the High Commissioner for Human Rights, Understanding Human Rights and Climate Change (Nov. 27, 2015), https://www.ohchr.org/sites/default/files/Documents/Issues/ClimateChange/COP21.pdf [https://perma.cc/7GM9-EQ7W].

66. *See, e.g.*, PSB et al. v. Brazil (on Climate Fund), ADPT 708 (2022), *translated in* Climate Change Litigation Databases, https://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/ [https://perma.cc/8UVF-8JWW] (holding that the Paris Agreement is a human rights treaty that enjoys "supranational status," such that any domestic law that was inconsistent with the Paris Agreement could be invalidated).

III. The Rights-Based Climate Change Cases

This Part of the Article turns to explore in some detail a sample of the rights-based "framework" climate change cases, as well as some significant cases before international tribunals, highlighting the patterns they reveal, as discussed in the Introduction. It is a sample that is exemplary of certain common features that, for reasons explored in Part IV, may help explain the underappreciated power of rights-based climate change cases.

A. Incorporation and Migration of Norms in Rights-Based Climate Change Cases

The seminal case of *Urgenda v. Netherlands*,[67] decided by the Supreme Court of the Netherlands at the end of 2019, is considered important for several reasons, perhaps foremost among them being its relatively dramatic outcome—the court ordered the government to raise its GHG emission reduction targets to 25% relative to its 1990 emissions, and the government largely complied with the order.[68] But the case is also extremely significant because of the manner in which the reasoning in the court's judgment has been influential in other cases around the world.[69]

The primary claim of the applicants, represented by the environmental organization named Urgenda Foundation, was that the inadequacy of the Dutch government's efforts to reduce GHG emissions, and thus its failure to do its share in addressing the climate change crisis, was violating the applicant's rights to life and to private and family life under the European Convention on Human Rights (ECHR).[70] The Dutch government acknowledged in 2009 that a reduction of GHG emissions of 25% to 40% by 2020, relative to 1990 levels, was necessary to be consistent with the 2° Celsius target adopted under the UNFCCC.[71] But after 2011, the government adjusted its 2020 target down to 20%, claiming it could essentially make up for lost ground later.[72] This shift in position was the basis of the challenge.

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67. *Urgenda, supra* note 12.

68. *Id.* ¶¶ 8.1, 8.3.4–8.3.5.

69. Dennis van Berkel, *Landmark Decision by Dutch Supreme Court*, Urgenda Samen Sneller Duurzaam, https://www.urgenda.nl/en/themas/climate-case/ [https://perma.cc/UYZ3-WQL3]; *see also*, Setzer & Higham, *supra* note 6, Chatham House Report, *supra* note 6.

70. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5, arts. 2, 8 [hereinafter ECHR].

71. *Urgenda*, *supra* note 12, § 2.1(27).

72. *Id.*, ¶ 7.4.2; *see* Harv. L. Rev. Ass'n, *Comparative Law—Climate Change—Hague Court of Appeal Requires Dutch Government to Meet Greenhouse Gas Emission Reductions by 2030*, 132 Harv. L. Rev. 2090,

The *Urgenda* decision stands out for the extent to which it relied upon and clearly explained the work of international climate change institutions. The decision described the work of the IPCC[73] and the relationship between GHG concentrations and temperature increase, noting the IPCC's conclusion that concentrations above 450 parts per million (ppm) would likely lead to temperature increases of over 2° Celsius by the year 2100, and that the consequences of such an increase would be a dangerous, irreversible change to the climate system.[74] It noted that a high degree of consensus had formed around this conclusion since the IPCC's Fourth Assessment Report (AR4), and that it had not been superseded or altered by the IPCC's Fifth Assessment Report (AR5) in 2014.[75] It also referred to United Nations Environment Plan (UNEP) annual "Emissions Gap" reports, which assess the difference between the targets each state has established, and the emission levels required to meet the 2° Celsius objective.[76] The court then analyzed both EU and Netherlands policy regarding the objectives under the UNFCCC, the pathways set by AR4, and in relation to the most recent UNEP Emissions Gap reports. The judgment spent considerable time explaining in some detail the nature of the potentially catastrophic consequences of warming over the 2° Celsius target.[77]

The decision of the district court was in June of 2015, before the conclusion of the Paris Agreement at COP 21 in December of that year.[78] As such, there is no significant reliance in the judgment on the Paris Agreement, or the Dutch NDCs submitted thereunder.[79] It may be noted, however, that in March 2015, the European Union submitted its intended collective NDC under the Paris Agreement, committing each member to reduce their GHG emissions by 40% by 2030.[80] This

2090–97 (2019) (discussing the intermediary Hague Court of Appeal decision).

73. It particularly relied upon IPCC, 2007: *Climate Change 2007: Synthesis Report, Contribution of Working Groups I, II, and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (2007) [hereinafter AR4]; IPCC AR5, *supra* note 38.

74. *Urgenda*, *supra* note 12, ¶ 7.2.4.

75. *Id.* ¶ 7.2.7.

76. *Id.* ¶ 2.1; *see generally* U.N. Environment Programme, *The Closing Window*, DEW/2477/NA (2022).

77. *Urgenda*, *supra* note 12, ¶¶ 2.1, 4.1–4.8.

78. *Urgenda*, *supra* note 12; *see generally* Paris Agreement, *supra* note 36.

79. *See Urgenda*, *supra* note 12, ¶ 2.1(21).

80. This "intended" NDC was confirmed once the EU states ratified the Paris Agreement in 2016. The initial submission is no longer available at the UNFCCC registry of the NDCs, but the details can be found in the EU press release. European Commission Press Release, Environment Council Approves the EU's Intended Nationally Determined Contribution to the New Global Climate Agreement (Mar. 6, 2015).

was updated in December 2020, to reduce GHG emissions by 55% by 2030, and to achieve net-zero by 2050.[81]

The Dutch government claimed that there was no basis in either international or domestic law for a duty on states to achieve the kinds of GHG emission reductions claimed by the applicants. It argued that the targets set forth in the IPCC's Assessment Reports were not law, that no rights in the ECHR gave rise to any such obligation, and that there is no other right in international law to a safe environment or climate.[82] The government also argued that the claims were, in any event, non-justiciable since climate change is a global threat, in terms of both its causes and its consequences, for which no one state could be responsible—the classic "drop in the ocean" argument.[83] The manner in which the court tackled these arguments is the primary reason the case is such an important rights-based climate change precedent.

To take the rights arguments first, the court began its analysis by holding that Article 2 of the ECHR protects the right to life and that, according to its own jurisprudence, this right encompasses an affirmative obligation to take appropriate steps to safeguard the lives of those within the state's jurisdiction. This includes action in response to possible natural or environmental disasters.[84] The obligation is triggered where the state is aware of a real and immediate risk—which means a genuine risk that is imminent, in the sense that it is directly threatening the persons involved, whether in the short or long term. It made a similar analysis of Article 8, which protects the right to respect for private and family life, and which the court held also relates to environmental issues. Specifically, it tied the right to a broader right to a safe environment, and argued that it encompasses an affirmative obligation to take reasonable measures to protect individuals from serious damage to the environment.[85] The court emphasized that the affirmative obligations of Article 8 and those implied by Article 2 "largely overlap" when it comes to activities that are hazardous to the environment, and thus, the case law relating to one right in the context of the environment applies equally to the other.[86] Additionally, just because the risk will materialize decades later, and affects large parts

81. *Submission by Germany and the European Commission on Behalf of the European Union and its Member States*, ¶¶ 3, 27, https://unfccc.int/sites/default/files/NDC/2022-06/EU_NDC_Submission_December%202020.pdf.

82. *Urgenda*, *supra* note 12, ¶ 3.4.

83. *Id.* ¶¶ 2.3.2, 5.1.

84. *Id.* ¶ 5.2.2.

85. *Id.* ¶ 5.2.3.

86. *Id.* ¶ 5.2.4.

of the population rather than specific individuals or groups, does not make the rights any less applicable.[87]

Turning to the question of whether there were legal obligations to mitigate the causes of climate change and the claim that the state could not be responsible for what is a global threat contributed to by all countries, the court developed extensive reasons for why each state is obliged to do "its part" to prevent dangerous climate change, and how that obligation related to the human rights at issue.[88] Significantly, it anchored this argument in the language of specific principles provided for in the UNFCCC and reiterated in the Paris Agreement, which require collective action and cooperation in mounting an effective response to achieve the ultimate objectives of the regime. The court argued that each state, therefore, had an obligation to take the necessary measures to do its fair share.[89]

It further drew upon the "no harm principle," noting that countries can be held responsible under this principle for failing to do their part in contributing to the reduction of GHG emissions. What is more, the court held that the no-harm principle justifies partial responsibility—"each country is responsible for its part and can therefore be held to account in that respect."[90] The court rejected both the idea that state responsibility could be avoided on the grounds that other countries were not complying with their responsibility, and that the state's emissions were an insignificant part of the global problem—the "drop in the ocean" argument.[91] On the contrary, the court held that every state must be held responsible, and from the perspective of a limited carbon budget, each GHG emission reduces the remaining budget, and thus, each reduction in GHG emissions is significant.[92] Finally, the court held that these obligations were very much related to the human rights in question, in that "Articles 2 and 8 of the ECHR relating to the risk of climate change should be interpreted in such a way that these provisions oblige the contracting states to do 'their part' to counter that danger."[93]

In concrete terms, the court held that it could assess whether "the measures taken by the State are too little in view of what is clearly the lower limit of its share in the measures to be taken worldwide against dangerous climate change."[94] After a detailed analysis of the AR4 and

87. *Id.* ¶ 5.6.2.

88. *Id.,* ¶¶ 5.7.1–5.7.9.

89. *Id.* ¶¶ 5.7.2–5.7.3.

90. *Id.* ¶ 5.7.5.

91. *Id.* ¶ 5.7.7.

92. *Id.* ¶¶ 5.7.7–5.7.8.

93. *Id.* ¶ 5.8.

94. *Id.* ¶ 6.3.

AR5 pathways (the RSPs and SSPs discussed earlier), the court decided that there was a "high degree of consensus" within the international community that developed countries (the Annex I states under the UNFCCC) had to reduce GHG emissions by 25% to 40% by 2020 if the world was to have any chance of meeting the 2° Celsius goal.[95] While that target was for all Annex I countries as a group, the UNFCCC and the Paris Agreement established individual obligations and responsibilities of states, and thus, "in principle, the target from AR4 also applies to the individual states within the group of Annex I countries."[96] Moreover, the court found evidence that this was precisely how the Netherlands had itself interpreted the obligation.[97] And, indeed, the Netherlands had one of the higher per-capita emission rates within the EU, for which reason the Netherlands had agreed to a higher share reduction target in an EU Effort Sharing Decision established in 2009.[98]

Thus, the court concluded that the change of policy after 2011, reducing the emissions reduction targets to 20% by 2020, and thereby shifting the burden of heavier GHG emission reductions to the post–2020 period, was inconsistent with the foregoing obligation. Moreover, the court explained that each such postponement of emission reductions would mean that later reductions would have to be more costly, onerous, and ultimately more uncertain and riskier. The court found that it was doubtful that the Netherlands could meet its longer-term targets if it relaxed its 2020 target to 20%.[99] It thus confirmed the Court of Appeal's Order requiring the government to increase its target to 25% reductions relative to 1990.[100]

In sum, it is worth exploring the *Urgenda* decision in some detail for several reasons. First, it was a groundbreaking case in terms of a domestic court finding a state's climate change policies inadequate to the point of violating the human rights of its residents, and ordering the state to revise its climate change policies.[101] In so doing, as discussed, it established the relationship between such rights as the right to life and the right to a private and family life, as well as the right to a healthy environment and protection from climate change. Second, in establishing the relationship between these human rights and

95. *Id.* ¶¶ 7.2.1–7.3.6.

96. *Id.* ¶ 7.3.2.

97. *Id.* ¶¶ 7.3.2, 7.4.1.

98. *Id.* ¶ 7.3.4; For details of the EU Effort Sharing Decision, see Decision No. 406/2009/EC of the European Parliament and the Council of Apr. 23, 2009, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.2009.140.01.0136.01.ENG.

99. *Urgenda, supra* note 12, ¶¶ 7.4.1–7.4.6.

100. *Id.* ¶¶ 7.3.3, 7.3.6., 7.5.3.

101. *See, e.g.*, Chatham House Report, *supra* note 6, at 3–4.

climate change, it validated the obligations of states under the international climate change law regime, particularly the obligation to reduce GHG emissions, and established that violation of such obligations could ground human rights claims. And third, in the process, it rejected the classic "drop in the ocean" arguments raised to shield states from responsibility for climate change at both the admissibility and causation stages of arguments. It provides an outstanding illustration of the incorporation of the combination of international human rights principles and climate change law obligations. It is for these reasons that, as will explored further below, *Urgenda* has been influential in many other jurisdictions—both as a precedent in domestic litigation and potentially in policy formulation.[102] It illustrates the kind of migration of norms that will be discussed further in Part IV.

Another highly significant case, which similarly resulted in a high court finding that the government's climate change policy violated human rights obligations, is the German case *Neubauer et al. v. Germany*.[103] The case combined four constitutional challenges, including one brought by individuals in Nepal. While an important case, its results were somewhat mixed. The claimants had argued that the specific policies promulgated under the Federal Climate Change Act, the purpose of which was ostensibly to implement Germany's obligations under the Paris Agreement, were inadequate to meet the preferred target of 1.5° Celsius. Thus, they claimed that this government policy constituted a failure to protect their right to life and the fundamental right to an "ecological minimum standard of living,"[104] rights which were derived from both the Basic Law and Articles 2 and 8 of the ECHR as in *Urgenda*.[105] The Federal Climate Change Act, and specifically the policy implementing it, was less ambitious than prior climate action programs issued by the government, particularly for the period up to 2030. As in the Netherlands, the government had lowered the reduction targets for the period up to 2030, with the rationale that more aggressive reductions could be made thereafter.[106]

In assessing these claims, the court analyzed the shifting government targets in some detail, in relation to both the Paris

102. Isabella Kaminski, *The Legal Battles Changing the Course of Climate Change*, BBC (Dec. 8, 2023, 9:00 AM), https://www.bbc.com/future/article/20231208-the-legal-battles-changing-the-course-of-climate-change [https://perma.cc/3K7F-RZAK].

103. BVerfGE, 1 BvR 2656/18, Mar. 27, 2021, ¶ 1 (Ger.), *translated in* Climate Change Litigation Databases, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/2021/03/rs20210324_1bvr265618en.pdf?__blob=publicationFile&v=5.

104. *Id.* ¶ 38.

105. *Id.* ¶ 60.

106. *Id.*

Agreement and Germany's NDCs under that treaty, as well as in relation to the IPCC reports, and conducted a detailed review of the science of climate change and the threat it poses.[107] It noted that Germany was responsible for a disproportionate amount of historical GHG emissions and currently had a higher-than-average per capita rate of emissions.[108] The court found that the right to life provided for in Article 2(2) of the Basic Law imposes a general duty on the state to protect the life and physical integrity of individuals, and that the scope of this right extends to protecting people from environmental hazards such as climate change.[109] It relied on a number of decisions of the European Court of Human Rights in finding that the right to life enshrined in both the Basic Law and in Article 2 of the ECHR extends to protection against impairments caused by environmental hazards.[110]

Significantly, as in *Urgenda*, the court held that the constitutional challenges were not inadmissible merely because large numbers of the population were subject to the harm in question, or because the German state was incapable of halting climate change. It held that all the complainants had standing and that most of the claims challenging the constitutionality of specific provisions of the Climate Change Act as violating the right to life were admissible.[111] The global nature of the causes of climate change and the global impact of its consequences did not absolve the state of the obligation to do its part in protecting the population from the resulting harm, and in particular, to "engage in internationally oriented activities to tackle climate change at the global level."[112] Thus, as in *Urgenda*, the "drop in the ocean" arguments by the state were rejected. On the other hand, the attempt by some of the complainants to derive from Article 20a of the Basic Law, a right to a "fundamental right to an ecological minimum standard of living" was rejected at the admissibility stage of the reasons.[113]

On the merits, the Constitutional Court held that the claimants did indeed have a right to life that included a right to be protected from the threats posed by climate change, through the adoption of concrete policies designed to both mitigate the causes and adapt to the consequences of climate change, even if the threats it posed remained as yet unrealized in the future.[114] But, it could not be determined that the government's climate policy had thus far violated those rights and

107. *Id.* ¶¶ 16–37, 158–68.

108. *Id.* ¶¶ 29–30.

109. *Id.* ¶ 148.

110. *Id.* ¶ 148.

111. *Id.* ¶ 97.

112. *Id.* ¶ 149.

113. *Id.* ¶¶ 112–13.

114. *Id.* ¶¶ 144–49.

the state's duty of protection.[115] This was due to a combination of the "margin of appreciation" that the court afforded the government, and the fact that the government had been making significant efforts to address climate change, including an ultimate target of net-zero emissions by 2050, albeit not to the extent that some of the claimants believed necessary.[116] The court held that the measures would have had to have been manifestly unsuitable or completely inadequate to establish a violation of the rights in question, and on the facts, its policy did not fall to that level.[117] It is worth noting that the court analyzed the government's policy against the Paris Agreement target of 1.5° Celsius and the IPCC AR5 pathways and found that the legislator's policy "may be regarded as politically too unambitious"—but again gave the legislature some leeway in light of the fact that the IPCC itself had differing levels of confidence in relation to the different temperature ranges in the various pathways laid out in AR5.[118] In short, the shift in policy did not violate the right to life.

The court did, however, find a constitutional violation of the complainants' right to protection given how the legislation shifted to the future the burden of emissions reduction, and thus both the risks of harm and the burden of far more drastic restrictions on carbon-emitting activity. The court noted that the Basic Law "imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations."[119] It held that given the Paris Agreement targets and the objective of carbon neutrality by 2050, the Climate Change Act, with its relaxed targets for 2030 and shifting of the burden to subsequent decades, violated this concept of intertemporal freedom, and the constitutional protections owed to people in the post–2030 period.[120] The shifting of the risk and burden to a later period, in the court's view, could not be justified. In essence, the court held that the intergenerational inequity inherent in the policy shift violated Article 20a of the Basic Law, which requires that, being "mindful of its responsibility towards future generations, the state shall protect the natural foundations of life . . . "[121]

There are, of course, many more of these framework cases, which reflect to a lesser and greater extent this kind of reliance on both international human rights law ideas, the international climate change

115. *Id.* ¶ 143.

116. *Id.* ¶¶ 152–55.

117. *Id.* ¶¶ 152–54.

118. *Id.* ¶¶ 159–62.

119. *Id.* ¶ 183.

120. *Id.* ¶¶ 180, 182–83.

121. *Id.* ¶193; Grundgesetz [GG] [Basic Law], art. 20a, translation at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf.

law obligations and standards, and foreign precedents that have similarly done so before them.[122] While they cannot all be explored in depth here, some are worth noting briefly. For instance, *Leghari v. The Federation of Pakistan* is a case famous for the extent to which the Lahore High Court directed a more ambitious climate change policy.[123] It is also significant as a case from the Global South, and as one of the more successful cases from a common law jurisdiction. Initiated in 2015, the applicants challenged the government's climate change policy as being inadequate, in terms of mitigation and adaptation, such that it violated the constitutional right to a healthy and clean environment (Article 9) and the right to human dignity (Article 14).[124]

The court agreed, explaining that there is a move from the more domestically oriented *environmental justice* to the more global concept of *climate justice*, and noting that the fundamental rights to life, human dignity, and property all lay at the foundation of both forms of justice.[125] The court further suggested that these rights included, in the context of climate justice, the precautionary principle, and the principle of sustainable development from the international climate change law regime.[126] Once again, therefore, the case reflects an analysis of constitutional rights as informed by human rights law, particularly the right to life, and the idea that these rights are violated by the government's failure to meet its obligations established in international climate change law.[127] While the judgment focused to some extent on the government's failures in the area of adaptation, it also emphasized the government's shortcomings in doing its fair share in the area of mitigation—which is quite significant for a country in the Global South with very little responsibility for historical GHG emissions.[128] Remarkably, as a remedy for the claimed violations, the court established a climate change commission to oversee the effective implementation of the national climate change policy, ordering that the commission was required to report back to the court on the progress made and that the court itself remain seized of the issue for several years.[129]

122. *See generally* Setzer & Higham, *supra* note 6; *see also* Chatham House Report, *supra* note 6.

123. Leghari v. Federation of Pakistan (2015) W.P. No. 25501/2015 (Lahore High Court, Pak.) [hereinafter Leghari, initial order].

124. *Id.* ¶ 7.

125. *Id.* ¶¶ 6–7.

126. Leghari v. Federation of Pakistan (2018) W.P. No. 25501/2015 ¶¶ 12, 20–23 (Lahore High Court, Pak.) [hereinafter Leghari, supplementary order].

127. *See id.*

128. *Id.* ¶ 7.

129. *Id.* ¶¶ 13, 19.

There are also many cases that were ultimately unsuccessful for one reason or another. However, these cases too are important, exhibiting the features and patterns referred to earlier, and which will be analyzed in more detail in Part IV. In some cases, the influence of international law and foreign precedent is more obvious than in others. In *Juliana v. United States*, for instance, the influence of both international law and foreign jurisprudence appear far less prominent, yet the reasons share many of the features of the arguments in *Urgenda*.[130] *Juliana* was commenced by a number of young plaintiffs who challenged the federal government for enabling and facilitating excessive GHG emissions and thereby contributing to climate change, which they argued violated their constitutional rights.[131] They sought an order directing the government to develop policies to reduce GHG emissions.

In a decision on a preliminary motion to dismiss in 2016, the district court judge in the case quite remarkably developed an entirely new fundamental right within the liberty interest of the Fifth Amendment to the U.S. Constitution under the doctrine of substantive due process. She framed this new fundamental right as "the right to a climate system capable of sustaining human life"[132]—a right that bears a striking resemblance to the right to a safe environment as applied in the climate change context. The court explained that the case involved allegations that government action is "affirmatively and substantially damaging the climate system in a way that will cause human deaths, shorten human lifespans, result in widespread damage to property, threaten human food sources, and dramatically alter the planet's ecosystem," and that such allegations, if proven at trial, would implicate the due process right.[133]

The judge did not reference international human rights law sources or foreign judgments in articulating this new right. However, the plaintiff's brief filed on the motion relied upon UNFCCC targets and ambitions, and referred to the lower court decision in *Urgenda* (the appeals in that case had not yet been decided at the time of judgment in *Juliana*).[134] Similarly, the Magistrate Judge's Order, from which the motion arose, and which was confirmed and adopted in her reasons by the District Court judge, discussed the lower court *Urgenda* decision at

130. *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1249–50 (D. Or. 2016).

131. *Id.* at 1233–34.

132. *Id.* at 1249–50. It should be noted that this was based on a line of jurisprudence relating to the substantive due process doctrine that has been cast in serious doubt by the decision of the Supreme Court in Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 239–40 (2022).

133. Juliana, 217 F. Supp. 3d at 1250.

134. Memorandum of Plaintiffs in Opposition to Federal Defendants' Motion to Dismiss, at 8–9, Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016) (No. 6:15-cv-01517-TC).

some length, albeit within the standing analysis.[135] It explained that the Dutch court had rejected the "drop in the ocean" defense. The magistrate judge noted that the Dutch court had, significantly, ordered the government to reduce its GHG emissions, as discussed earlier.[136] The District Court judge not only adopted these reasons but similarly dismissed the "drop in the ocean" type arguments in her analysis of the standing issues.[137]

The Ninth Circuit Court of Appeals overturned this decision on appeal but significantly left undisturbed the establishment of the new right to a climate that sustains human life.[138] Similarly, it even left in place the district court's holding that the plaintiffs had claimed concrete and particularized injuries, and that there was a genuine factual dispute as to whether the government policies had been a "substantial factor" in causing those injuries.[139] It overturned the decision only on the basis of the third element in the test for standing, namely that the court was not in a position to provide a remedy that could redress the injury. On that element, the court held that it was beyond its powers to design, order, and supervise the implementation of policies to combat climate change.[140] Even here, however, the Court of Appeals did not suggest that it was beyond the power of the government to take such action.[141] In short, therefore, while ultimately unsuccessful for the plaintiffs, *Julianna* appears to have both established a new substantive due process right to a climate that sustains human life, and rejected "drop in the ocean" defenses in a manner that was both similar to and informed by foreign jurisprudence and international climate change law.

In the more recent Canadian case of *Mathur v. Ontario*, decided at the end of 2022, the explicit influence of both international climate change standards and foreign precedents is much more pronounced than in *Juliana*.[142] Like *Juliana*, the case involved young plaintiffs challenging the climate change policy of the Province of Ontario, arguing that the GHG emission targets set by the provincial government in its Cap and Trade Cancellation Act, 2018, violated their rights under the Canadian Charter of Rights and Freedoms (the Charter).[143] Specifically, they

135. Juliana, 217 F. Supp. 3d at 1269.

136. *Id.*

137. *Id.* at 1243–46.

138. Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020).

139. *Id.* at 1168–69.

140. *Id.* at 1168–71.

141. *See id.* at 1168–72.

142. Mathur v. His Majesty the King in Right of Ontario, [2023] 480 D.L.R. 4th 444 (Can. Ont.S.C.J.) (appeal pending).

143. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, C 11 (U.K.), § 7

argued that the policy violated their right to life, liberty, and security of the person, which is protected under section 7 of the Charter, and that the policy discriminated against them on the basis of age in violation of their right to equality under section 15 of the Charter.[144] They sought, among other things, an order requiring the Ontario government to revise its GHG emission targets to be consistent with Canada's obligations under the Paris Agreement.[145] They grounded their argument in part on the fact that Canada's current NDC under the Paris Agreement was to reduce GHG emissions by 40–45% below 2005 levels by 2030, which was more stringent than the Ontario policy, which had set a target of a mere 30% reduction by 2030.[146]

There are several aspects of the decision that are significant for the analysis here. First, the decision quite explicitly relied upon the Paris Agreement and other aspects of the international climate law regime, as well as the IPCC special report issued in 2018, *Global Warming of 1.5°C* (the 1.5C Report),[147] as its frame of reference for assessing the adequacy of the Ontario climate policy. The court noted that to be consistent with the IPCC's 1.5C Report and with the agreement of the COP in Glasgow in 2021, Ontario would have had to increase its target to reduce GHG emissions to 52% below 2005 levels.[148] Second, the court analyzed and accepted as valid many of the arguments developed by the Dutch Supreme Court in its judgment in *Urgenda*, which the Ontario Superior Court cited approvingly.[149] In particular, the court rejected "the notion that because climate change is 'an inherently global problem,' each individual province's GHG emissions cause no 'measurable harm' or do not have 'tangible impacts on other provinces.'"[150] The court went on, quoting both the Dutch Supreme Court in *Urgenda* and the Australian case *New South Wales court in Gloucester Resources Limited v. Minister of Planning*,[151] for the proposition that every contribution of GHG emissions contributes to climate change and is thus significant, adding that the logic of the defendant's argument would "apply equally to all individual sources of

[hereinafter Charter of Rights and Freedoms]; Cap and Trade Cancellation Act, 2018, S.O. 2018, c. 13 (Can.).

144. Mathur, *supra* note 12, ¶¶ 48–58, 68–74.

145. *Id.* ¶ 2.

146. *Id.* ¶ 9.

147. *Id.* ¶¶ 13, 20; Intergovernmental Panel on Climate Change [IPCC], *Global Warming of 1.5°C* (2018) [hereinafter IPCC 1.5 Report].

148. Mathur, *supra* note 12, ¶¶ 20–21.

149. *See id.* ¶¶ 146–49, 179–80.

150. *Id.* ¶ 17 (citing References re Greenhouse Gas Pollution Pricing Act, 2021, SCC 11 (Can. S.C.) at ¶ 188).

151. Gloucester Resources Limited v. Minister of Planning [2019] NSWLEC 7 (Austl. H.C.).

emissions everywhere, so it must fail."[152] This is yet another rejection of the "drop in the ocean" argument, and again based on precedents migrating from abroad.

While the court found most of the plaintiffs' claims to be justiciable, it did hold that the question of what constituted Canada's or Ontario's "fair share" of the carbon budget was not. The court accepted and spent considerable time explaining much of the expert testimony on the "fair share" of contributions to climate change. However, it then held that given the uncertainty created by the ranges of possible fair shares presented by the evidence, and the scientific expertise required to assess it, the court did not have the institutional capacity to determine the "fair share" of either the country or the province.[153] But that did not interfere with the court's ability to assess whether the Ontario target was adequate in relation to Canada's NDCs under the Paris Agreement and was not fatal to the constitutional challenge.[154] More specifically, within the Charter analysis, the court accepted that there was sufficiently proximate causation to trigger the rights analysis.[155] For this, it relied on the international consensus that GHG emissions must be reduced by approximately 45% below 2010 levels by 2030 and must reach "net zero" by 2050 to meet the 1.5° Celsius target, together with the evidence that Ontario would have to increase its target by 73% to be consistent with meeting those targets.[156] By not taking the necessary steps to limit GHG emissions consistent with the international consensus, Ontario was directly contributing to the risk to the life and security of the claimants, establishing causation. Here again the court cited and adopted the reasoning of *Urgenda*.[157]

Concerning the section 7 claim that the inadequate Ontario policy thereby violated the right to life, liberty, and security of the person, the court began by recognizing that it was indisputable that climate change created for Ontarians an increased risk of death and an increased risk to their security of the person—but the key question was whether the provisions of the legislation specifically increased that risk. As in *Urgenda* and *Neubauer*, the court held that it had.[158] But the essential question underlying the challenge was whether the government had a constitutional obligation to do more to address that risk. At this stage of the analysis, the unique features of section 7 of the Canadian Charter became more determinative of the result of the judgment. There is an unsettled question in Canadian constitutional jurisprudence as to

152. Mathur, *supra* note 12, ¶¶ 188–89.

153. *See id.* ¶¶ 26–30, 109–10.

154. *Id.* ¶ 111.

155. *See id.* ¶¶ 120–24, 143–48.

156. *Id.* ¶ 144.

157. *Id.* ¶¶ 146–47.

158. *Id.* ¶ 150.

whether section 7 of the Charter creates affirmative rights[159]—but, perhaps remarkably, the court was willing to accept that the existential threat posed by climate change to human life and security, created the kind of "special circumstances that could justify the imposition of positive obligations."[160] Thus, at this point of the analysis, the decision was already precedent-setting, having found that climate change posed a risk to the life and security of the person of residents of Ontario and that it created a sufficiently grave risk to ground a claim that section 7 of the Charter imposes an affirmative obligation of protection.

Unfortunately, however, the applicants' claims came to grief on another unique aspect of section 7 of the Charter. The provision in full provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[161] The applicants had to establish, therefore, that the right to life and security of the person was being violated in ways that were contrary to the principles of fundamental justice, which they ultimately could not do.[162] We need not delve into the details of that part of the argument.[163] But the decision again reflects the incorporation of ideas regarding the relationship between the right to life and the right to a healthy environment and climate, the detailed incorporation of the international climate change law principles and standards as the basis for rights claims, the rejection of "drop in the ocean" arguments on admissibility and causation, and the influence of international and foreign law regarding all of these issues.[164]

There are many other framework cases that have been examined in some detail in other studies and articles.[165] Several of those from common law countries were ultimately unsuccessful.[166] Nonetheless,

159. *Id.* ¶¶ 125–26 (citing Gosselin v. Quebec (Attorney General), 2002 SCC 84 (Can. S.C.)).

160. Mathur, *supra* note 12, ¶ 138.

161. Charter of Rights and Freedoms, *supra* note 143, section 7.

162. Mathur, *supra* note 12, ¶¶ 152–71.

163. The court might have benefitted from a closer reading of *Neubauer* regarding how the principle of proportionality and intergenerational equity might have been applied in this context as a principle of fundamental justice.

164. An appeal of the case was heard by the Ontario Court of Appeal in January 2024, with a decision expected later in the year. *Grand Council Treaty #3 Appears at Ontario Court of Appeal in Mathur et al v His Majesty in Right of Ontario*, JFK L. LLP (Jan. 17, 2024), https://jfklaw.ca/grand-council-treaty-3-appears-at-ontario-court-of-appeal-in-mathur-et-al-v-his-majesty-in-right-of-ontario/ [https://perma.cc/4XNL-GAMR].

165. *See generally* Setzer & Higham, *supra* note 6; *see also* Chatham House Report, *supra* note 6.

166. *See, e.g.,* Friends of the Irish Environment v. Ireland [2020] IR § 8 (Ir.); *see also* Plan B Earth and Others v.The Secretary of State for Business,

many of the cases illustrate a similar approach of incorporating international climate change law principles and standards, and then determining whether the state's failure to comply with international climate change law obligations constituted a violation of either international human rights, or constitutional rights informed by such human rights law. What is more, they exhibit the migration of ideas from other jurisdictions, relying on the arguments of both foreign and international tribunals. As will be explored in Part IV, even when unsuccessful, these cases arguably exercise more influence on national climate change policy than might be appreciated.

B. International Cases Expanding Climate Rights

Another area of climate change litigation that is a significant part of the overall development of rights-based claims is the climate change litigation occurring before international courts and tribunals. These cases are important because they too recognize and enforce the human rights at issue and implement the international climate change law regime as the basis for enforcing such rights. They thus further reinforce and amplify the normative power of these legal norms and principles in a manner that makes them more likely to be relied upon by domestic courts, and to exert pressure on national policymakers. As discussed in Part IV, they play a role in the mechanisms that make domestic litigation so effective. Unfortunately, some of the most significant cases, which are likely to be hugely influential in shaping the scope of rights and obligations in relation to climate change, are being argued and decided as of the writing of this Article. Thus, this part of the discussion is necessarily somewhat tentative in nature. Nonetheless, there have already been some developments of great importance, which may provide some basis for optimism regarding the likely outcome of the pending cases.

Two now famous Human Rights Committee cases require a brief discussion. Indeed, these cases may play a role in the development of the emerging norm or principle of customary international law regarding the right to a safe and healthy environment.[167] The first case is *Teitiota v. New Zealand*,[168] issued in 2020, which involved the claim of a national from Kiribati alleging that New Zealand had violated his rights under the International Covenant on Civil and Political Rights (ICCPR) for returning him to Kiribati, given the increasing risks that the consequences of climate change posed to the population of Kiribati.

Energy, and Industrial Strategy [2018] EWHC (QB) 1892, ¶¶ 51–53 (U.K.).

167. *See supra* Part II(A) (discussing this development); *see also* May, *supra* note 17, at 999–1000 (discussing the role of these HRC cases in the development of the right).

168. Teitiota v. New Zealand, U.N. Doc. CCPR/C/127/D/2728/2016, Decision (Hum. Rts. Comm., Sept. 23, 2020).

Given the standing requirements of the Optional Protocol to the ICCPR, that a claimant must establish a past or currently ongoing violation of a right, the Committee noted that the issue before it was whether the claimant faced, upon his deportation, a real risk of irreparable harm to his right to life.[169] The Committee held that at least for admissibility purposes, he had indeed established that the consequences of climate change in Kiribati, particularly the impact of sea level rise, created a real risk of impairment to his right to life under Article 6 (the right to life) of the ICCPR when he was removed to Kiribati.[170] It noted, in terms significant to the analysis here on the relationship between the right to life and the emerging right to a safe and healthy environment, that states may be in violation of Article 6's right to life "even if such threats and situations do not result in the loss of life . . . environmental degradation, climate change, and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[171] Famously, the Committee pronounced that "without robust national and international efforts, the effects of climate change in receiving states may expose individuals to a violation of their rights under Article 6 [right to life] and 7 [right not to be subject to torture or cruel, inhuman, or degrading treatment] of the Covenant, thereby triggering the non-refoulement obligations of sending states."[172] In the final result, however, and based on its interpretation of the factual record before it, the Committee determined that the claimant did not yet confront a sufficiently grave risk to establish a violation of Article 6.[173]

The Human Rights Committee issued another significant decision in 2022, *Billy et al. v. Australia* (also often referred to as the *Torres Strait Islanders* case),[174] which similarly dealt with the threat climate change posed to the populations of low-lying island states. Here, however, the issue was whether Australia had violated its obligations to implement climate change adaptation programs sufficient to protect the indigenous population of the Torres Strait Islands, a region under Australian jurisdiction. This failure, the complainants argued, violated their rights under the ICCPR, particularly their right to life under Article 6.[175] Echoing its decision in *Teitiota v. New Zealand*, the

169. *Id.* ¶¶ 8.4–8.5.

170. *Id.* ¶ 8.6

171. *Id.* ¶ 9.4 (citing Human Rights Committee, General Comment no. 36, ¶ 65, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018)).

172. *Id.* ¶ 9.11.

173. *Id.* ¶¶ 9.14–10.

174. Billy v. Australia, U.N. Doc. CCPR/C/135/D/3624/2019, Decision (Hum. Rts. Comm., Sept. 22, 2022).

175. *Id.* ¶ 3.1.

Committee held that the right to life includes a right to enjoy a life with dignity, and that threats to the right to life "may include such adverse climate change impacts, and recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life."[176] It noted, as it had in *Teitiota v. New Zealand*, that regional human rights tribunals had similarly established that environmental degradation could constitute a threat to the right to life.[177]

As in *Teitiota v. New Zealand*, however, the Committee concluded that based on the evidence before it, Australia's adaptation measures were not so insufficient as to create a direct threat to the claimants' right to life.[178] Nonetheless, the Committee did go on to hold that the claimants had established that Australia's failure to implement adequate adaptation measures to protect their home, private life, and family did constitute a violation of their rights under Article 17 of the ICCPR—that is, the right not to be subjected to arbitrary or unlawful interference with privacy, family, home or correspondence, and the right to protection of law against such interference.[179] It also constituted a violation of their rights to maintain their indigenous culture and traditional way of life under Article 27 of the ICCPR, and the Committee ordered reparations for these violations.[180] This was a precedent-setting conclusion and echoes the reasoning in *Urgenda* that the Netherlands' policy violated the right to privacy and family life under Article 8 of the ECHR.[181] Moreover, the case reflects once again the ideas that climate change and insufficient climate change policies may constitute a threat to the right to life, privacy, and family life and that there is a close relationship between these rights and the right to a safe and healthy environment in the context of climate change.

176. *Id.* at ¶ 8.3 (citing Hum. Rts. Comm., General Comment No. 36, ¶¶ 7, 62, U.N. Doc. CCPR/C/GC/36 (Sept. 3, 2019)).

177. *Id.* ¶ 8.5 (citing Portillo Cáceres v. Paraguay, U.N. Doc. CCPR/C/126/D/2751/2016, Decision, ¶ 7.4 (Hum. Rts. Comm., Sept. 20, 2019)); In Teitiota v. New Zealand, *supra* note 168, the committee cited for this proposition: The Environment and Human Rights, Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23, ¶ 47 (Nov. 15, 2017); Kawas Fernández v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 196, ¶ 148 (Apr. 3, 2009); African Comm. on Hum. and Peoples' Rts., ¶ 3 (Dec. 12, 2015); Cordella v. Italy, App. No. 54414/13, 54264/15, ¶ 157 (Jan. 24, 2019), https://hudoc.echr.coe.int/eng?i=001-213690 [https://perma.cc/UX4H-P8A2].

178. Billy v. Australia, *supra* note 174, ¶¶ 8.7–8.8.

179. *Id.* ¶ 8.12.

180. *Id.* ¶¶ 8.14, 11.

181. *Urgenda, supra* note 12, ¶¶ 5.6.2, 5.8.

There are other notable cases, including the regional human rights cases cited by the Human Rights Committee and the decisions of other tribunals. The Committee on the Rights of the Child, for instance, issued a significant decision in 2019, *Sacchi v. Argentina*,[182] a case in which a number of children argued that several states had violated their rights under the Convention on the Rights of the Child by failing to make sufficiently ambitious reductions in GHG emissions. The Committee ultimately dismissed the claim because the applicants had not exhausted local remedies. Significantly though, it held that states are indeed responsible for the harms caused to children outside of their territory by the GHG emissions that originate within the territory of the state.[183] The Committee adopted the reasoning of the Advisory Opinion of the Inter-American Court of Human Rights, in which that Court held that states have extraterritorial obligations and responsibility regarding extraterritorial effects of their GHG emissions.[184]

Turning to the pending cases, three in particular may have a huge impact on the development of human rights obligations relating to climate change and their implementation as a means of enforcing international climate change law. The first is actually a collection of cases to be decided by the European Court of Human Rights in 2024.[185] These involve a case called *Schweiz v. Switzerland*, in which a group of senior nuns challenged the climate policy of Switzerland in part because they are particularly vulnerable to heat due to their age;[186] a case called *Carême v. France*, challenging the insufficient mitigation policies of France;[187] and a third, *Duerte v. Portugal*, commenced by a group of young applicants challenging the inadequacy of mitigation measures by all states of the Council of Europe.[188] These have been described as

182. Sacchi v. Argentina, U.N. Doc. CRC/C/88/D/104/2019, Decision, (Comm. on Rts. Child, Nov. 11, 2021).

183. *Id.* ¶ 10.14.

184. *Id.* ¶¶ 10.5 and 10–7.

185. Ole W. Pedersen, *Climate Change Hearings and the ECtHR*, EJIL:TALK! (Apr. 4, 2023), https://www.ejiltalk.org/climate-change-hearings-and-the-ecthr/ [https://perma.cc/4XD7-CJRK] (analyzing all three cases).

186. Schweiz v. Switzerland, App. No. 54600/20, art. 13 (Apr. 2021), https://hudoc.echr.coe.int/?i=002-13212 [https://perma.cc/458Y-H98E].

187. Carême v. France, App. No. 7189/21, art. 8, https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-13678%22]} [https://perma.cc/438X-ZV54] (summarizing the case).

188. Linnéa Nordlander & Alessandro Monti, *A New Variety of Rights-Based Climate Litigation: A Challenge Against the Energy Charter Treaty Before the European Court of Human Rights*, EJIL:TALK! (Jun. 30, 2022), https://www.ejiltalk.org/a-new-variety-of-rights-based-climate-litigation-a-challenge-against-the-energy-charter-treaty-before-the-european-court-of-human-rights/ [https://perma.cc/LAP2-F2W8].

"systemic mitigation" claims, quite similar to the domestic framework cases we discussed above.[189]

The oral arguments in the first three cases were heard in September 2023, and the arguments relied significantly on international climate change law and analyses of whether the respective states' climate change policies were consistent with their NDCs under the Paris Agreement, and whether both the NDCs and the policies were sufficient to satisfy the targets, as viewed in the context of IPCC and other scientific analysis of potential pathways.[190] Similarly, the court was invited to interpret the obligations of states under the Convention in a manner consistent with international environmental and climate change law.[191] There was considerable discussion of the kinds of arguments made in the *Urgenda* and *Neubauer* judgments discussed earlier.[192] The *Duerte* case, which has sparked considerable academic and media attention, was being argued just as the United Kingdom, one of the defendants in the case, was resiling from some of its climate mitigation commitments.[193] The decisions in these cases are likely to significantly impact all the issues we have been considering here.

The other cases of considerable significance are the climate change advisory opinions requested from the ICJ,[194] the Inter-American Court of Human Rights,[195] and, perhaps to a lesser extent, the International

189. *Id.*

190. Pedersen, *supra* note 185; To view the oral arguments for each of these cases, *see also Webcasts of Hearings*, ECHR, https://www.echr.coe.int/webcasts-of-hearings [https://perma.cc/FK72-5W6W] [hereinafter Oral Arguments].

191. Pedersen, *supra* note 185; Oral Arguments, *supra* note 190 (*see, e.g.*, around 20 minutes into applicant's arguments).

192. *See generally* Pedersen, *supra* note 185; *see also* Oral Arguments, *supra* note 190.

193. Sandra Laville, *UK One of 32 Countries Facing European Court Action Over Climate Stance*, The Guardian (Sept. 23, 2023), https://www.theguardian.com/environment/2023/sep/23/uk-one-of-32-countries-facing-european-court-human-rights-action-over-climate-stance [https://perma.cc/XGK3-EBNZ].

194. Elisa Granzotto, *The International Court of Justice's Advisory Opinion on Climate Change and Protection of Human Rights*, Nat'l Univ. Singapore Ctr. Int'l L. Blog (Aug. 1, 2023), https://cil.nus.edu.sg/blogs/the-international-court-of-justices-advisory-opinion-on-climate-change-and-protection-of-human-rights/ [https://perma.cc/CK5E-TXWM]; G.A. Res. 77/276 (Mar. 29, 2023).

195. Maria Antonia Tigre et al., *A Request for an Advisory Opinion at the Inter American Court of Human Rights: Initial Reactions*, Sabin Ctr. Climate Change L. (Feb. 17, 2023), https://blogs.law.columbia.edu/climatechange/2023/02/17/a-request-for-an-advisory-opinion-at-the-inter-american-court-of-human-rights-initial-reactions/ [https://perma.cc/5JFX-QFTX]; Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted by the Republic of Colombia

Tribunal for the Law of the Sea.[196] The ICJ has been asked to consider and opine on (i) the obligations that states have under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of GHGs; and (ii) what legal consequences there should be for states that, by act or omission, cause significant harm to the climate system and the environment, particularly concerning the more vulnerable states, and peoples and individuals of the present and future generations harmed by the adverse effects of climate change.[197] Depending on how the ICJ answers these questions, the decision may significantly impact the human rights we have been considering and the obligations of states under international climate change law.

The request for the climate change advisory opinion from the Inter-American Court of Human Rights is far more elaborate. But, in general, it requests the court to clarify six aspects of the human rights obligations of states in relation to climate change.[198] One of these aspects relates to the obligations a state has under human rights law to mitigate activities within its jurisdiction that contribute to climate change.[199] A robust affirmative response on this issue would lay a very strong foundation for the kinds of arguments examined in the domestic cases above, and potentially crystallize the emerging right to a safe and healthy environment in the context of climate change. The Inter-American Court of Human Rights has already provided a strong impetus to the right, as explained earlier,[200] and there is some guarded optimism that it will issue an opinion that does indeed expand the scope of human rights obligations in relation to mitigation and adaptation to climate change.[201]

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and the Republic of Chile, Inter-Am. Ct. H.R. (Jan. 9, 2023), https://www.corteidh.or.cr/docs/opiniones/soc_1_2023_en.pdf. [hereinafter Inter American Court Advisory Opinion Request].

196. Carlos Antonio Cruz Carillo, *ITLOS Advisory Opinion on Climate Change and Oceans: Possibilities and Benefits*, Opinio Juris (Jul. 21, 2021), http://opiniojuris.org/2021/07/21/itlos-advisory-opinion-on-climate-change-and-oceans-possibilities-and-benefits/ [https://perma.cc/6PJU-GWBU].

197. G.A. Res 77/276, *supra* note 194, at 3.

198. Inter American Court Advisory Opinion Request, *supra* note 195, at 8-14; Juan Auz & Thalia Viveros-Uehara, *Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights*, EJIL:Talk! (Mar. 2, 2023), https://www.ejiltalk.org/another-advisory-opinion-on-the-climate-emergency-the-added-value-of-the-inter-american-court-of-human-rights/ [https://perma.cc/PQW2-MEM5].

199. Inter American Court Advisory Opinion Request, *supra* note 195, at 8–9.

200. *See supra* Part II(A).

201. Inter American Court Advisory Opinion Request, *supra* note 195; *see also* Tigre et al., *supra* note 195.

IV. THE THEORETICAL EXPLANATION OF INFLUENCE

Some rights-based climate cases have had highly significant direct positive impacts on climate policy, including the *Urgenda*, *Neubauer,* and *Leghari* cases examined above. The Dutch and German governments were required to, and did, make significant changes to GHG emission targets, requiring radical changes in policy in some respects.[202] Such successes tend to support a view that this kind of litigation can be an effective tool for forcing governments to act more ambitiously in response to climate change—certainly not sufficient, but definitely helpful and maybe even necessary. But some academics question the benefits and long-term effectiveness of even such successful litigation.[203] And next to the rare successes, many of these "framework cases" are unsuccessful or fail to obtain any remedy, as demonstrated by *Juliana* and *Mathur,* and so have no direct impact whatsoever. There is thus an alternative perspective that such litigation is not effective for advancing, enforcing, or implementing climate change law and policy, and may even be counterproductive.[204]

Yet another view, however, is that quite aside from the direct impact these cases may have had on climate policies, their indirect influence is far broader than is apparent, and through such influence they exercise effective power to advance climate policy.[205] Yet, there has not been much exploration of the theoretical explanations for how this influence might operate.[206] This Part of the Article examines several

202. *Climate Policy*, GOV'T OF THE NETHERLANDS, https://www.government.nl/topics/climate-change/climate-policy [https://perma.cc/2NHD-JBLE] (describing direct changes to the Dutch government's climate policy); *but see* Benoit Mayer, *The Contribution of Urgenda to the Mitigation of Climate Change,* 35 J. ENV. L 167, 168–69 (2023) (arguing that the *Urgenda* decision contributed little and may have hindered climate change policy in the Netherlands).

203. *See, e.g.*, Mayer, *Contribution of Urgenda*, *supra* note 202, at 169.

204. *See generally* Benoit Mayer*, Can Rights-Based Litigation Bolster Climate Action: Book Review Essay*, 13 CLIMATE L. 57 (2023); *see also* Alexander Zahar, *The Limits of Human Rights Law: A Reply to Corina Heri*, 33 EUR. J. INT'L L. 953 (2022).

205. *See, e.g.*, SETZER & HIGHAM, *supra* note 6, at 27; *see also* CHATHAM HOUSE REPORT, *supra* note 6, at 16; *see also* Peel & Osofsky, *supra* note 10, ¶¶ 86–88; Lucy Maxwell et al., *Standards for Adjudicating the Next Generation of* Urgenda*-Style Climate Cases*, 13 J. HUM. RTS. & ENV. 35, 36 (2022); César Rodriguez-Garavito, *Litigating the Climate Emergency: The Global Rise of Human Rights–Based Litigation for Climate Action*, *in* LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION 9 (César Rodriguez-Garavito, ed., 2023).

206. César Rodriguez-Garavito, *Introduction*, *in* LITIGATING THE CLIMATE EMERGENCY: HOW HUMAN RIGHTS, COURTS, AND LEGAL MOBILIZATION CAN BOLSTER CLIMATE ACTION 2–3 (César Rodriguez-Garavito, ed., 2023).

theoretical explanations drawn from areas of international and comparative constitutional law that might help provide a better understanding of how this influence may operate and the extent of its reach—which will, in turn, help illustrate the significance and power of such litigation.

A. International Law – Incorporation and Compliance

The theories of international law compliance provide a useful starting point. These theories are well known efforts to explain how and why international law manages to mobilize compliance, notwithstanding the absence of Austinian characteristics of law, namely the commands of a sovereign backed up by robust enforcement mechanisms.[207] These theories may offer insights into how the judicial incorporation and normalization of international human rights norms and international climate change law standards can influence a range of important entities and agents implicated in one way or another in national climate change policy formulation. Three of these theories seem particularly salient.[208]

The so-called "transnational process theory" of compliance, primarily associated with Harold Koh, argues that state behavior is shaped by a complex web of interactions between various institutions and entities at various levels in both international and domestic systems, comprising what is termed the "transnational legal process."[209] This process involves an iterative interaction between actors at the domestic and international levels, with an ongoing interpretation of the international law norms at issue, which, over time, causes domestic systems to internalize these norms.[210] One way the international norms can be thus "internalized" is through incorporation into the legal system via legislation or judicial judgment—a process illustrated by the courts in the cases examined in Part III, by incorporating international climate change law standards and norms in their assessment of national policy. Importantly for the purposes of this analysis, the theory suggests that these norms then become part of institutional standard operating procedures or part of the policy norms, and domestic decision-makers gradually become "enmeshed" in these internalized international

207. *See generally* Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 Yale L.J. 2599 (1997) (providing a good overview of these theories).

208. This section draws in part on prior work by the author. *See* Craig Martin, *Taking War Seriously: A Model for Constitutional Constraints on the Use of Force in Compliance with International Law*, 76 Brooklyn L. Rev. 611, 663–73 (2011).

209. While most closely associated with Harold Koh, it is also related to the earlier "New Haven School" process theory approaches to international law. *See* Koh, *supra* note 207, at 2616–17, 2645–46.

210. *Id.* at 2649.

norms.[211] Over time, when fully internalized, the norms can re-constitute national identity and the perceptions regarding state interests, such that they often develop the power to shape domestic policy.[212] When the internalization operates at each of the social, political, and legal levels of the domestic system, the norms develop such a degree of public legitimacy that there is widespread pressure for obedience to them, and they are accepted by the political elites.[213]

A closely related theory of international law compliance is the so-called "liberal theory of international law compliance."[214] Theorists such as Anne-Marie Slaughter emphasize the importance of understanding the interactions among the numerous actors within the domestic socio-political-legal system that together shape the configuration of state preferences in foreign policy and international relations. These domestic-level preferences, which in aggregated form represent the individual interests and preferences of the dominant actors within the domestic polity, are the primary influence on shaping the state's foreign policy.[215] But, as in transnational process theory, these individual interests and preferences tend to be in turn influenced by the internalization of international law norms and the interaction with international institutions. And because the government represents and is responsive to a particular mix of dominant entities and groups within the domestic society, the formulation of foreign policy will be influenced by the interests and preferences of these domestic elements.[216] Moreover, it is not only the interaction within the state, but also the interaction of internal state actors across borders with the corresponding internal actors within other states (especially other liberal democratic states)—and this may indeed include courts—forming networks that are increasingly important in explaining state behavior.[217] The greater the

211. *Id.* at 2632–34, 2654–65.

212. *Id.*

213. *Id.* at 2656–57.

214. *See* Koh, *supra* note 207, at 2634; *see also* Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 508 (1995) [hereinafter Slaughter, *Liberal States*]; *see generally* Andrew Moravscik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513 (1997); *see also* MARKUS BURGSTALLER, THEORIES OF COMPLIANCE WITH INTERNATIONAL LAW 165–68 (2005).

215. Slaughter, *Liberal States*, *supra* note 214, at 508–09, and BURGSTALLER, *supra* note 214, at 165–66.

216. *See, e.g.,* Slaughter, *Liberal States, supra* note 214, at 512–16; *see also* Anne-Marie Slaughter and William W. Burke-White, *The Future of International Law Is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L.J. 327, 350–52 (2006).

217. BURGSTALLER, *supra* note 214, at 174; Slaughter & Burke-White, *supra* note 216, at 334–35.

direct and indirect influence of international law on domestic institutions and actors, the more likely it is that the emerging foreign policy will comply with the international law norms.[218]

It should be emphasized that this process extends well beyond the actors within the formal foreign policy formulation process, and beyond the executive branch of government. The domestic legitimacy of policy will be fundamentally determined by various elements that exercise powerful influences on social identities within the state.[219] That influence can shape the commitment of domestic groups and organizations to specific institutions and norms, which in turn can impact the formulation of foreign policy that is representative of dominant domestic shared preferences and interests.[220] Thus, high-profile cases such as *Urgenda* and *Neubauer*, with their articulation of a strong relationship between human rights and climate change and their incorporation of international climate change law standards, can exercise influence not only at home, but on the domestic constituencies in other countries in a manner that may, over time, have a significant impact on the positions those constituencies take in the process of formulating their national climate change policy.[221]

A third well-known theory of international law compliance is Thomas Franck's normative theory of "legitimacy." It argues that international law commands obedience and compliance even in the absence of powers of coercion due to the extent to which it is characterized by the properties of legitimacy.[222] Various properties can lend a particular rule legitimacy, but for the analysis here, the most significant is "symbolic validation" and "adherence." Adherence refers to the perception among states that there is widespread adherence to the rule or principle, which encourages compliance in line with the adherence of others.[223] Symbolic validation is the "cultural and anthropological" component of legitimacy, which relates to how rituals and other forms of recognition and validation help to bestow legitimacy and authenticity upon a particular rule, and operate as a signal that

218. Burgstaller, *supra* note 214, at 170.

219. *Id.* at 169–70.

220. *Id.*

221. On the importance of domestic courts, *see* Koh, *supra* note 207, at 2627–29; *see generally* Richard A. Falk, *The Role of Domestic Courts in the International Legal Order*, 39 Ind. L.J. 429 (1964); *see also* Roger Fisher, Improving Compliance with International Law 39–41 (1981).

222. Thomas Franck, The Power of Legitimacy Among Nations 3, 16 (1990), and Thomas Franck, *Legitimacy in the International System*, 82 Am. J. Int'l L. 705 (1988); *see also* Burgstaller, *supra* note 214, at 113–14; Koh, *supra* note 207, at 2628.

223. Burgstaller, *supra* note 214, at 117.

there is an expectation of compliance with the rule.[224] Viewed through the lens of this theoretical perspective, the accumulation of judgments of domestic courts and international tribunals all recognizing the relationship between international human rights law and the international climate change law obligations, and viewing those obligations as legitimate, authoritative, and requiring obedience, provides powerful "symbolic validation" for these norms. Similarly, when countries like the Netherlands and Germany quickly comply with such decisions, this further confers validation and the property of "adherence" upon the decisions and the norms they articulate, expanding their legitimacy and power of influence.[225]

B. Comparative Constitutional Law – Incorporation, Migration and Dissemination

There are also several theories in comparative law, constitutional law, and regarding the interface of international and domestic law, which can help provide another theoretical grounding for understanding the indirect but powerful influence these rights-based climate change cases may exert. Such perspectives may also provide some entry points for further empirical research on the extent and significance of this influence.

Beginning with the incorporation of international law, the compliance theories discussed above, of course, contemplate a form of incorporation.[226] But there is a separate line of analysis on how states more explicitly incorporate international law norms to entrench and reinforce constitutional commitments.[227] Constitutional and legislative incorporation of international law principles is not itself novel. There has been an increasing "convergence" of international and constitutional law, resulting in part from this process of domestic implementation of international law norms.[228] Many constitutions promulgated or significantly amended in the post–Cold War years have, for instance, incorporated the language and principles of international

224. Franck, *Legitimacy in the International System, supra* note 222, at 712, 725–28.

225. It is fair to note, however, that to the extent that cases like *Julianna* and *Mathur*, to name but two unsuccessful framework cases, fail to order compliance, the "adherence" element of this theory is less valid. Thanks to Paul Rink for this point.

226. *See, e.g.*, Koh, *supra* note 207, at 2656–57.

227. Aspects of this section draw on prior analysis by the author, *see* Martin, *supra* note 208.

228. Anne Peters, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, 3 Vienna Online J. Int'l Const. L. 170, 174 (2009); *see also*, Pierre-Hughes Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 Am. J. Int'l L. 514 (2015).

human rights regimes.[229] This phenomenon is also reflected in the growing number of constitutions, in the Global South in particular, that have included provisions regarding the protection of the environment and even the specific right to a healthy environment.[230] In exploring why this might occur—why states would voluntarily incorporate international law norms that would constrain government conduct—it has been argued that modern constitutions, particularly those adopted in new transitional democracies, have employed international law as a means of locking-in specific democratic principles and norms.[231] This is done not only by ratifying specific treaties and thus assuming the international law obligations, but also by directly incorporating the norms of customary international law or treaty law into the text of the constitution itself.[232] These developments arguably reflect examples of constitutional design used to employ international law to strengthen the "pre–commitment" mechanisms of the constitution, and employing constitutions to reinforce the "pre–commitment" mechanisms provided by ratifying treaties.[233]

This argument is an aspect of the broader idea that constitutions and treaties may serve as "pre–commitment devices."[234] In other words, drafters create constitutional provisions or enter treaties to constrain or bind the government's behavior in the future, on the assumption that there may be circumstances in which a future government might act irrationally or intemperately, and in the absence of such constraints would act contrary to the values and objectives of those crafting such

229. *See, e.g.*, Thomas Buergenthal, *Modern Constitutions and Human Rights Treaties*, 36 COLUM. J. TRANSNAT'L L. 211, 216–20 (1997); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 245–46 (2000) (showing how emerging democracies used international human rights enforcement regimes as a means of locking in compliance with such democratic principles).

230. *See, e.g.*,CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 225 (Braz.); CONSTITUCIÓN POLÍTICA DE LA REPUBLICA DE COSTA RICA, Nov. 7, 1949, art. 50; S. AFR. CONST. 1996, 2(24); for complete list, *see* Report of the Special Rapporteur, *supra* note 18.

231. Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT'L L. & POL. 707, 757 (2006); *see also* Tom Ginsburg et al., *Commitment and Diffusion: How and Why National Constitutions Incorporate International Law*, 2008 U. ILL. L. REV. 201, 202 (2008).

232. Ginsburg, *Locking in Democracy, supra* note 231, at 724, 727.

233. *Id.* at 724.

234. JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 39–40 (1979); CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 96–101 (2001); *see, e.g.,* Stephen Holmes, *Precommitment and the Paradox of Democracy, in* CONSTITUTIONALISM AND DEMOCRACY 195, 226 (Jon Elster & Rune Slagstad eds., 1988).

devices.[235] This is most obviously an aspect of constitutional provisions that limit the action of one or more branches of the government. But the use of international law as a pre–commitment device, by entering into treaties as a means of constraining the state's own future behavior, enjoys the advantage of not being susceptible to change by local actors—the only option to avoid its constraints in the future is to abrogate or violate the treaty, which imposes different kinds of costs than the act of avoiding constitutional constraints.[236] Even more central to our analysis here is the use of combined international and domestic mechanisms—the use of constitutions, legislation, and especially judicial decisions to incorporate and normalize the principles of treaties already ratified—which serves to internalize the pre–commitment and subject it to domestic enforcement mechanisms, thereby further increasing the costs and difficulty of violating the bonds.[237] In other words, through the lens of this theoretical perspective, the judicial incorporation and validation of such international human rights law norms as the right to life and the right to a healthy environment, and international climate change law obligations such as the duty to reduce GHG emissions and otherwise address climate change, will operate to strengthen the state's commitments to those norms, and the constraints they impose on state action.

Most of the cases discussed above in Part III illustrated the courts considering, interpreting, and internalizing these kinds of combined international and domestic commitments. But more importantly, they also reflected the way courts may serve an important role in enforcing the pre–commitment devices in question. To varying degrees, the cases involved circumstances in which the governments had enacted legislation and adopted policies designed to implement treaty obligations under international climate change law. The government had thus created pre–commitment devices, in terms of both entering climate change treaties and then incorporating their obligations into legislation and regulation, but had then, over time, tried to deviate from those obligations. Indeed, *Urgenda*, *Neubauer*, and *Mathur*, were all about states that were attempting to resile from their obligations, with vague commitments that they could meet them later in time (and in the Fall of 2023, the government of the United Kingdom was reported to be resiling from its commitments in very much the same way).[238] In

235. Elster, Ulysses and Other Sirens, *supra* note 234.

236. Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 Tex. L. Rev. 2055, 2059–60 (2003); Ginsburg, *Locking in Democracy, supra* note 231, at 727.

237. Ginsburg, *Locking in Democracy, supra* note 231, at 724–30; *see also* Lys Kulamadayil, *Between Activism and Complacency: International Law Perspectives on European Climate Litigation*, 10 ESIL Reflections, Nov. 11, 2021, at 3.

238. Rowena Mason et al., S*unak Planning to Drop Net-Zero Policies in Pre–Election Challenge to Labour*, The Guardian (Sept. 19, 2023, 16:32),

each case the applicants were trying to use the state's human rights or constitutional law obligations to enforce the government's international and domestically legislated commitments regarding climate change objectives. And, as discussed earlier, in *Urgenda* and *Neubauer*, the courts enforced the pre–commitments and ordered governments to adjust their climate policies.[239]

What is more, in all these cases, even in those cases such as *Mathur* in which the commitments were not actually enforced, the courts explained, normalized, and internalized the treaty obligations in a manner that arguably still imposed political costs for attempting to avoid the commitments. The courts play a crucial role in how they have incorporated and normalized the relevant international law principles, thereby amplifying and strengthening how the pre–commitment made at the international level is entrenched and implemented within the domestic system.[240] And when courts hand down decisions such as *Urgenda*, the prospect of such judicial enforcement of the international pre–commitments on climate change may well cause other governments to reconsider their desire to resile from their treaty obligations. Leaked documents revealed, for instance, that the British government was warned by senior bureaucrats early in 2023 that the government's failure to implement concrete policies to reach its net-zero target by 2050, ran the risk of being challenged in the courts.[241]

Yet another theoretical perspective on the role of courts and judicial review in democratic constitutional systems helps to further illuminate the potential importance of these rights-based climate cases. Political scientists and constitutional scholars have identified so-called "agency problems" in the relationship between the government and the people in democratic systems.[242] The government is understood to be an agent for the public, while the public serves as the principal in a principal-agent relationship.[243] One of the serious agency problems in this

https://www.theguardian.com/environment/2023/sep/19/rishi-sunak-planning-drop-net-zero-policies-pre-election-challenge-labour [https://perma.cc/MX4G-A44V]; Fiona Harvey, *UK Likely to Miss Paris Climate Targets by Wide Margin, Analysis Shows*, The Guardian (Dec. 5, 2023), https://www.theguardian.com/environment/2023/dec/05/uk-miss-paris-climate-targets-emissions [https://perma.cc/]; *see supra* Part III(A).

239. *See supra* Part III(A).

240. *See supra* Part IV(A).

241. Toby Helm, *Revealed: Cabinet Ministers Warned of Legal Action Over UK's Failure to Tackle Climate Crisis*, The Guardian (Mar. 4, 2023, 13:34), https://www.theguardian.com/environment/2023/mar/04/revealed-cabinet-ministers-warned-of-legal-action-over-uks-failure-to-tackle-climate-crisis [https://perma.cc/H2TU-XB86].

242. *See, e.g.,* Craig Borowiak, Accountability and Democracy: The Pitfalls and Promise of Popular Control 53–78 (2011).

243. *Id.* at 60.

particular relationship is the significant informational asymmetry between the agent and the principal.[244] It is extremely difficult for the population to obtain information regarding government malfeasance, misjudgment, or even basic government decision-making. For instance, if the government adjusts its GHG emission targets, apparently shifting some of the burden to a later period, the public has few avenues for obtaining information that explains such a policy shift, or for interrogating the validity of the government's proffered reasons.

Certain perspectives on the role of courts in democracy suggest that the judicial review of government conduct serves a vital monitoring function that helps to reduce this asymmetry.[245] The litigation process and judicial decisions provide information to the population regarding the extent to which the political branches engage in conduct outside of their constitutional authority or act in a manner that violates specific limits or constraints on how they are to exercise power or develop policy.[246] What is more, the judgments of courts provide particularly accessible and legitimate explanations of government action and opinions regarding the legitimacy of government conduct, and such judgments tend to be widely disseminated by the media.[247] These not only provide information in the form of findings of fact and judgments relating to the conduct of the other branches of government, but they also serve an important coordination function. Judicial decisions help shape public beliefs in terms of the factual circumstances regarding the violation of commitments, and in shaping the public's normative views as to what constitutes legitimate conduct and valid policy.[248] One feature of the rights-based climate change litigation under consideration here is that the court decisions received considerable coverage in domestic and international media.[249] Moreover, this informing and

244. *Id. at* 55.

245. *See* David S. Law, *A Theory of Judicial Power and Judicial Review*, 97 Geo. L.J. 723, 744 (2009) (reviewing this theoretical explanation of judicial review).

246. *Id.* at 744–45.

247. *Id.* at 744–45, 751.

248. *Id.* at 756–57.

249. *See, e.g.,* John Shwartz, *In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*, N.Y. Times (Dec. 20, 2019), https://www.nytimes.com/2019/12/20/climate/netherlands-climate-lawsuit.html [https://perma.cc/B3BY-7QPJ]; Joos Akkermans & Ellen Proper, *Dutch Supreme Court Orders 25% Cut in CO2 Starting Next Year*, Bloomberg (Dec. 20, 2019, 3: 32 PM), https://www.bloomberg.com/news/articles/2019-12-20/dutch-supreme-court-upholds-landmark-greenhouse-ruling [https://perma.cc/S4LY-8XGV]; Kate Connolly, '*Historic' German Ruling Says Climate Goals Not Tough Enough*, The Guardian (Apr. 29, 2021, 11:44), https://www.theguardian.com/world/2021/apr/29/historic-german-ruling-says-climate-goals-not-tough-enough [https://perma.cc/S4LY-8XGV]; Carolyn Kormann, *The Right to a Stable Environment is the Constitutional Question of the Twenty-First Century*, The New

coordination function operates even when the litigation is unsuccessful on the merits—a feature that is highly significant in light of such cases as *Julianna* and *Mathur* discussed earlier.[250]

When rights-based climate change cases are viewed from the perspective of this idea of courts as monitors and disseminators of information on government policy, cases like *Urgenda*, *Neubauer*, *Juliana,* and *Mathur* all provide illustrations of this theory in operation. But the theory also provides insights into how these kinds of climate change cases may exercise far more influence than might be otherwise expected. In all these cases the judgments provided detailed information regarding the government's failure to comply with its international climate change law obligations, explained what those obligations were, and further educated the public on how the failure to comply with those obligations also potentially constituted a violation of the peoples' human rights.[251] Even in *Juliana* and *Mathur*, readers are left with the strong sense that rights were violated, even if no remedy was available—and that is indeed how some of the media reported them.[252] These cases not only help to disseminate important information in a manner that is widely accessible and intelligible, but they thereby help shape public opinion on these issues, which in turn will create greater pressure for policy change in a democratic society.

Finally, the analysis so far has explained how the courts in these cases have been influenced by the arguments of courts in other countries. That is to say, there has not only been the incorporation and internalization of international law but there has been the reliance upon and incorporation of arguments and doctrines developed in foreign courts—even courts from very different legal systems, as reflected in the common law court of Ontario relying heavily on the judgment of

YORKER (Jun. 15, 2019), https://www.newyorker.com/news/daily-comment/the-right-to-a-stable-climate-is-the-constitutional-question-of-the-twenty-first-century [https://perma.cc/9J53-SE5V]; Leyland Cecco, *Judge Says Ontario's Weak Climate Plans Increase Risk of Death for the Young*, THE GUARDIAN (Nov. 1, 2023), https://www.theguardian.com/world/2023/apr/19/ontario-judge-dismisses-youth-climate-crisis-lawsuit-canada [https://perma.cc/K85E-GCWCo]; Anam Gill, *Farmer Sues Pakistan's Government to Demand Action on Climate Change*, REUTERS (Nov. 13, 2015, 9:33 AM), https://www.reuters.com/article/idUSL8N1383YJ/ [https://perma.cc/692S-48JT].

250. This insight is part of a well-developed line of argument in Japanese legal discourse about the important role that litigation against the government has played in shaping both public opinion and government policy notwithstanding lack of success on the merits. *See e.g.*, JOHN HALEY, THE SPIRIT OF JAPANESE LAW 53 (2006); *see also* JOHN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 169 (1991).

251. *See supra* Part III(A).

252. *See, e.g.*, Kormann, *supra* note 249; *see also* Cecco, *supra* note 249.

the civil law courts in the Netherlands.[253] This process tends to bear out certain theories regarding the "migration of constitutional law."[254] More importantly, such theories of migration help explain the process observed in these climate change cases, and provide deeper insights into the significance and effectiveness of such migration. The metaphor of migration and theories about cross-pollination of norms, doctrines, and arguments among courts is neither limited to constitutional law nor to exchanges between national jurisdictions, but also to the migration between international and national institutions—as contemplated by the transnational process theory discussed earlier.[255] One of the driving forces for this kind of migration of ideas is recognition by both courts and policy-makers that certain problems are common to all jurisdictions, and that the approaches to those problems in other jurisdictions may be both valid and persuasive.[256] This may lead to some degree of convergence in approach. And given that climate change is a global and collective action problem that requires high levels of coordination and cooperation, such convergence is likely beneficial.[257]

V. Conclusion

A recurring question in the discourse around climate change law and policy is the utility of employing international human rights law to enforce international climate change law obligations or encourage more ambitious responses to the crisis.[258] There have been some marked successes in Europe, but many of these cases continue to be dismissed for various reasons.[259] Nonetheless, many studies of climate change litigation suggest that such framework cases may exercise considerable indirect influence, and the IPCC even acknowledged the impact such cases may have.[260] Yet, there has not been much theorizing on precisely how these cases may exercise this influence. This article has examined a sample of cases that reflect a common pattern that, I argue, may form

253. Mathur, *supra* note 12, ¶¶ 146–49; *see supra* Part III(A).

254. *See generally* Sujit Choudhry, *Migration as a New Metaphor in Comparative Constitutional Law, in* The Migration of Constitutional Ideas 1 (Sujit Choudhry ed., 2006) (developing the metaphor of the migration of constitutional ideas between different constitutional systems).

255. *Id*; *see supra* Part IV(B).

256. *See* Choudhry, *supra* note 254, at 4.

257. *See, e.g.*, Incropera, *supra* note 1, at xxiv, 176.

258. *See supra* Part III(B).

259. *See, e.g.*, Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020)*; see also* Mathur, *supra* note 12; *see also Gloucester Resources Limited*, *supra* note 151; *Friends of the Irish Environment*, *supra* note 166; *Plan B Earth and Others, supra* note 166.

260. *See supra* Introduction, Part III(B).

one basis for explaining the indirect influence of rights-based climate change cases. This common pattern includes, first, the feature of incorporating and relying upon international human rights law, such as the rights to life and family, thereby strengthening the emerging new right to a healthy environment. Second, the courts in these cases further incorporated international climate change targets, obligations, and standards, to assess the adequacy of national and sub-national climate change law and policy, and thereby determined whether states were violating human rights obligations. In so doing, they internalized and disseminated both within their own jurisdiction and abroad, these norms from both international climate change law and human rights law regimes.

Moreover, the cases revealed that courts are relying upon foreign precedents and the arguments developed by foreign courts, both in terms of incorporating international human rights and climate change law, but also for purposes of developing new grounds and doctrines for rejecting defendant states' "drop in the ocean" causation and justiciability arguments. In doing so, the courts have tended to explain and embrace the science and expertise of the international climate change institutions. Even when applicants have been ultimately unsuccessful, the decisions have tended to accept that the right to life is threatened by climate change, that the state's failure to comply with its climate change obligations may violate that right, and that every state must do its fair share in addressing the climate change crisis.[261]

The features of this common pattern do not alone explain the indirect influence or effectiveness of these cases. But there are several well-established theories in international law and comparative constitutional law that describe and explain specific dynamics that map onto this pattern and are reflected in the form and substance of these cases. These include the incorporation and internalization of international law norms in ways that influence the formulation of national policy, the use of domestic law to lock-in forms of international law commitments, the migration of legal norms and ideas across jurisdictions and between international and national institutions, and the role of courts in disseminating information regarding government policy and its compliance with commitments.[262] In short, these theories help to explain the mechanisms by which international law works its way into domestic systems in ways that influence national policy, and how courts and judicial decisions can be part of this process. And these rights-based framework cases exhibit features and characteristics that conform closely to the mechanisms and dynamics described by the theories. Viewed from this perspective and given the patterns reflected by these cases, the theories may provide some insight into how these cases may exercise a powerful influence on the development of national

261. *See supra* Part III(A).

262. *See supra* Part IV.

climate change policy. This form of rights-based climate change litigation thus may play a surprisingly important role in advancing the struggle to coordinate an increasingly ambitious response to climate change.