12

International Law

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12.1 INTRODUCTION

The nature of climate change as an urgent global problem renders international law a logical source of guidance in climate litigation. A survey of case law to date reveals that litigants and courts frequently draw on international law, particularly the UN Framework Convention on Climate Change (UNFCCC or the Convention) and the Paris Agreement, in climate change litigation. This has fostered a global judicial dialogue regarding the interpretation of States' obligations under international law.

This chapter explores how courts around the world have treated international law in climate litigation. Beginning with an introduction to the international legal instruments most frequently invoked in climate litigation and their usage by courts, the chapter proceeds with a descriptive section on general trends and approaches (Section 12.2), followed by an analytical section that identifies emerging best practices and explains why it qualifies as such (Section 12.3). Subsequently, the chapter discusses the issue of replicability (Section 12.4) and concludes with some final thoughts.

In line with the overall approach of the Handbook, this chapter focuses on case law that offers helpful lessons for judges and litigants. For this chapter, such a selective approach is also necessitated by the sheer volume of potentially relevant case law. The primary focus is on how courts have engaged with international environmental law, particularly international climate change law. While international human rights law is also frequently invoked in climate litigation, it is addressed in detail in Chapter 7.

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12.1.1 *International Climate Change Law*

International climate change law encompasses a 'complex web of principles, rules, regulations and institutions'.[1] At its core sit three treaties: the UNFCCC,[2] the Kyoto Protocol,[3] and the Paris Agreement. These treaties are supplemented by a vast array of principles that comprise international environmental law and intersect with various other fields of international law, in particular international human rights law. This section provides a brief overview of the two main treaties now in operation – the UNFCCC and the Paris Agreement – to provide context for the subsequent discussion.

Adopted in 1992, the near universally ratified UNFCCC aims 'to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.[4] The Convention sets out various commitments for States towards achieving this objective,[5] such as developing national inventories of greenhouse gas (GHG) emissions and formulating national and regional programmes to mitigate GHG emissions and facilitate adaptation.[6] Additionally, developed countries 'commit themselves specifically' to adopting national policies and taking measures to reduce GHG emissions.[7] The Convention establishes several principles to guide State action 'to achieve the objective of the Convention and to implement its provisions'[8] including common but differentiated responsibilities (CBDR), intergenerational equity, precaution, the special circumstances of developing countries, and sustainable development.[9]

The Paris Agreement, adopted in 2015, seeks to enhance the implementation of the Convention and 'strengthen the global response to the threat of climate change'.[10] To that end, it aims to hold 'the increase in the global average temperature to well below 2°C above pre-industrial levels and pursu[e] efforts to limit the temperature

[1] Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 10.

[2] United Nations Framework Convention on Climate Change (entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC).

[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change (entered into force 16 February 2005) UN Doc FCCC/CP/L7/Add1. The Kyoto Protocol set internationally binding targets for developed country parties for the period 1990–2012 to reduce GHG emissions. The Doha Amendment extended the Protocol to 31 December 2020.

[4] UNFCCC (n 2) art 2. See UNFCCC – Status of Ratification <https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=IND&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en> accessed 9 February 2024.

[5] ibid UNFCCC art 4.

[6] ibid art 4(1)(a).

[7] ibid art 4(1).

[8] ibid art 3.

[9] ibid.

[10] Paris Agreement (entered into force 4 November 2016) 3156 UNTS 79 (Paris Agreement) art 2.

increase to 1.5°C above pre-industrial levels'.[11] The Agreement covers several action areas: mitigation, adaptation, loss and damage, and finance,[12] but it is the provisions relating to mitigation that have proven most relevant to climate litigation to date. Under the Agreement, State parties 'must prepare, communicate and maintain successive nationally determined contributions' (NDCs) and pursue domestic mitigation measures 'with the aim of achieving the objectives' of their NDCs.[13] In terms of content, NDCs are to reflect parties' 'highest possible ambition' towards achieving the Agreement's objectives,[14] with developed country parties continuing to take the lead by setting economy-wide absolute emission reduction targets and providing support for developing country parties.[15] Setting the regime's 'direction of travel',[16] the Agreement also requires that updates of NDCs 'represent a progression' over time in terms of ambition, taking into account the outcome of the global stocktake.[17]

In addition to these treaties, climate litigation frequently invokes international environmental law principles such as harm prevention,[18] precaution,[19] intergenerational equity,[20] and sustainable development.[21]

12.1.2 *International Law Before National Courts*

The treatment of international law by national courts formally depends on the legal system within which the litigation takes place. Legal systems are often categorised as monist or dualist. A monist system treats international law as automatically

[11] ibid art 2(1).
[12] ibid art 2(1).
[13] ibid art 14(2).
[14] ibid art 4(2), 4(3) and 4(9)
[15] ibid art 4(4).
[16] Lavanya Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics' (2016) 65 ICLQ 493, 496.
[17] Paris Agreement (n 10) arts 4(2) and 14(3).
[18] See Chapter 15 on State Responsibility. The harm prevention principle imposes a responsibility on states 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'. See United Nations, 'Declaration of the United Nations Conference on the Human Environment' (1972) 11 ILM 1416 principle 21; United Nations 'Declaration of the United Nations Conference on Environment and Development' (1992) 31 ILM 874 (Rio Declaration) principle 2; UNFCCC (n 2) preamble, eighth paragraph.
[19] The precautionary principle states that if there are 'threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation'. See ibid Rio Declaration principle 15; UNFCCC (n 2) art 3(3).
[20] See Chapter 14 on Intergenerational Equity. The principle of intergenerational equity articulates a concept of fairness among generations in the use and conservation of the environment and its natural resources. See UNFCCC (n 2) art 3(1); Paris Agreement (n 10) art 2(2) (equity).
[21] The principle of sustainable development is defined as development 'that meets the needs of the present generation without compromising the ability of future generations to meet their own needs'. See UNGA 'Our Common Future: Brundtland Report' UN Doc A/42/427 (1987); Rio Declaration (n 18) principle 3; UNFCCC (n 2) art 3(4); Paris Agreement (n 10) art 2(1).

incorporated into national law (incorporation), while a dualist system treats international law as an external body of law that requires transformation into national law, typically through legislative action (transformation).[22] In practice, this distinction is more nuanced: various rules, including those applied by courts, modify how international law is received into the domestic legal system.[23] The result is a 'moderation of the opposing main positions of incorporation and transformation', softening the stark contrast between the two approaches and yielding similar outcomes despite differences in local constitutional set-ups.[24]

An evolution in the nature of international law has expanded the role of national courts in interpreting and applying international law. Traditionally, international law primarily focused on relations between States, leaving a limited role for national courts.[25] Modern international law, by contrast, is often described as 'inward-looking' as it concerns the internal affairs of States.[26] This shift is most evident in international human rights law but can also be seen in the field of international environmental law. The so-called 'bottom up' structure of States' mitigation obligations under the Paris Agreement, whereby contributions are 'nationally determined', showcases this shift.[27] As Wegener explains:

> Although the Paris Agreement does not contain substantive provisions comparable with the mitigation provisions of the Kyoto Protocol, it nonetheless sets up a normative architecture of internationally agreed standards and expectations. These are in need of translation into domestic governance and, finally, domestic action. While this may be primarily a task for legislatures, domestic courts can contribute by 'holding their governments to account, and … ensuring that … commitments are given practical and enforceable effect'. Rather abstract provisions, such as the collective temperature goal, which are not directly justiciable, are given practical effect when invoked in domestic courts… Moreover, by referring to the non-binding standards set by the Paris Agreement and NDCs, national courts help to strengthen the legitimacy of those standards.[28]

[22] Study Group on Principles on the Engagement of Domestic Courts with International Law, 'Mapping the Engagement of Domestic Courts with International Law – Final Report' in International Law Association Report of the Seventy-Seventh Conference (International Law Association, London 2016) (ILA Domestic Courts and International Law Final Report) 8.

[23] ibid [16].

[24] ibid [29].

[25] Eyal Benvenisti and George W. Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law' (2009) 20 EJIL 59, 62; ILA Domestic Courts and International Law Final Report (n 22) 5.

[26] ILA Domestic Courts and International Law Final Report (n 22); Antonios Tzanakopoulos and Christian J. Tams, 'Introduction: Domestic Courts as Agents of Development of International Law' (2013) 26 LJIL 531.

[27] Bodansky, Brunnée, and Rajamani (n 1) 214.

[28] Lennar Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9(1) TEL 35, citing Lord Robert Carnwath, 'Climate Change Adjudication after Paris: A Reflection' (2016) 28(1) JEL 9.

12.2 CASE LAW DEVELOPMENT: STATE OF AFFAIRS

A review of the case law to date demonstrates that courts usually rely on international law indirectly in climate litigation to interpret standards under national law, rather than applying international law directly. The most common source of norms are the UNFCCC and the Paris Agreement, specifically the collective goals, principles, and individual mitigation commitments contained therein. Often looking beyond whether a commitment or obligation is binding *per se* in international law, courts are asking questions such as:

- Has the government committed (in law or policy) to implementing the commitment or obligation?
- Is the commitment or obligation relevant in defining the government's duty to its citizens under domestic tort law, human rights law, or environmental law?
- Is the commitment or obligation helpful in defining the powers, duties, and functions of government decision-makers when making policy or decisions that might support or hinder efforts to meet the commitment?

The case law also shows an emerging distinction – whether justified or not – between common and civil law courts in the treatment of international law.

The *Urgenda* case illustrates how courts can draw on international law both directly and indirectly in the context of climate litigation.[29] In 2019, the Supreme Court of the Netherlands ruled that the Dutch government must take measures to reduce emissions in the country by at least 25 per cent below 1990 levels by 2020. The Court relied directly on international law in the form of the European Convention on Human Rights (ECHR), which has a direct effect in the Netherlands, as the source of the breached obligation.[30] After determining that climate change poses a real and foreseeable risk of harm under Articles 2 and 8 of the ECHR, the Court concluded that the State had a positive obligation to take reasonable and adequate measures to address that risk.

The Supreme Court indirectly utilised various norms of international law to determine the scope of the State's obligation under the ECHR. For example, the Court referred to international law (i.e. the UNFCCC, the no harm principle, and the international law on state responsibility) to determine that the State had an individual responsibility to mitigate climate change, despite it being a global problem.[31]

[29] For a more detailed discussion of how the courts in the *Urgenda* case engaged with international law see Sarah Mead and Lucy Maxwell, 'Climate Change Litigation: National Courts as Agents of International Law Development' in Edgardo Sobenes, Sarah Mead, and Benjamin Samson (eds), *The Environment through the Lens of International Courts and Tribunals* (Asser Springer 2022).

[30] Pursuant to arts 93 and 94 of the Dutch Constitution, Dutch courts must apply every provision of the ECHR that is binding on all persons.

[31] *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) *(Urgenda Supreme Court)* [5.6.1]–[5.8].

The Court then drew on both hard and soft norms of international law to determine the minimum amount by which the State must reduce its GHG emissions as a way of 'concretising' the obligation, including UNFCCC provisions, Conference of the Parties (COP) decisions, Intergovernmental Panel on Climate Change (IPCC) reports, EU law, and international environmental law principles such as the precautionary principle.[32] The Supreme Court concluded that 'there is a high degree of consensus in the international community on the need for … Annex 1 countries to reduce greenhouse gas emissions by 25 per cent to 40 per cent by 2020',[33] with the lower limit representing the 'absolute minimum' for the State to discharge its positive obligations under Articles 2 and 8 of the ECHR.[34]

The approach of drawing on international law indirectly to interpret open standards at the national level is particularly evident in European case law. For example, the Brussels Court of First Instance in the Belgian case of *Klimaatzaak* drew on a range of international law norms to determine whether the respondent governments had breached their obligations under the ECHR – as per the Dutch courts in *Urgenda*.[35] The Council of State in the French case of *Grande-Synthe* did the same. The case, which was brought by a coastal municipality (Grande-Synthe) and its mayor, argued that the French Government was not doing enough to combat climate change. The Council of State ultimately limited its review to whether the State was complying with its own climate mitigation target to reduce GHG emissions by 40 per cent by 2030 compared to 1990. This was based on its view that the plaintiffs could not rely directly upon the UNFCCC and the Paris Agreement to challenge the government's inaction. The Council of State nevertheless was clear that the State's obligations under international law were relevant to interpreting national law. The Council of State explained:

> According to these stipulations and provisions, the European Union and France, as signatories of the UNFCCC and the Paris Agreement, have committed to combating the harmful effects of climate change caused notably by the increase, during the industrial era, in greenhouse gas emissions attributable to human activities, by implementing policies aimed at reducing the level of these emissions in gradual stages, in order to assume, based on the principle of an equitable contribution by all states parties to the objective of reducing greenhouse gas emissions, their common but differentiated responsibilities according to their contribution to the level of emissions and their capacity and resources for reducing them in the future, in light of their level of economic and social development. While the stipulations of the UNFCCC and the Paris Agreement cited in point 9 require further actions to be taken to produce effects in respect of individuals and accordingly, do not have

[32] ibid [6.1]–[7.3.6].
[33] ibid [7.2.7].
[34] ibid [7.5.1].
[35] *VZW Klimaatzaak v l'État Belge* [2021] 2015/4585/A (Tribunal de première instance francophone de Bruxelles, Section Civile).

> any direct effect, they must nevertheless be taken into consideration in interpreting the provisions of national law, notably those cited in point 11, which, in referring to the targets they set, are specifically aimed at their implementation.[36]

Civil law courts outside of Europe have engaged with international law in a similar way. The Supreme Court of Colombia in the case of *Future Generations* identified a broad range of 'hard and soft law' instruments 'which constitute a global ecological public order and serve as guiding criteria for national legislation'.[37] Among the most relevant instruments identified were the International Covenant on Economic, Social and Cultural Rights, the Stockholm Declaration, and the Paris Agreement. The decisions in *Leghari* and *Shrestha*, two landmark cases from Pakistan and Nepal respectively, also draw liberally on international environmental law to inform the interpretation of the relevant domestic law provisions of human rights law – as discussed in more detail in Section 12.1.2.[38]

By contrast, common law courts have taken a more cautious approach to using international law in the context of climate litigation. This is evident in the Australian case of *Sharma*. The case was brought by eight young people who sought an injunction to prevent the Minister from approving a coal mine extension. Reversing the first instance decision, the Full Federal Court of Australia ultimately found that the Minister did not owe the youth plaintiffs a duty of care. In coming to its decision, the Court (in three separate judgments) did not consider the climate treaty regime relevant to determining the standard of care. While acknowledging that the relevant Act 'is founded in significant part on the translation of international agreements into Commonwealth law', Allsop CJ reasoned that the relevant international agreements had not been 'translate[d]' into domestic law – referring to the dualist orientation of the Australian legal system.[39]

The UK Supreme Court in the *Heathrow Extension* case adopted a similar approach. The case challenged the legality of the UK Government's Airport National Policy Statement, which gave in-principle support to the extension of Heathrow Airport. Among the claims, Plan B argued that the Government's

[36] *Commune de Grande-Synthe v France* [2020] N°427301 (Conseil d'Etat) [12].

[37] *Future Generations v Ministry of the Environment and Others (Demanda Generaciones Futuras v Minambiente)* [2018] 11001 22 03 000 2018 00319 00 (Supreme Court of Justice of Colombia) (*Demanda Futuras Generaciones*).

[38] *Asghar Leghari v Federation of Pakistan etc* PLD 2018 Lahore 364; *Advocate Padam Bahadur Shrestha v Prime Minister and Office of Council of Ministers and Others* [2018] Order No 074-WO-0283 (2075/09/10 BS) (Supreme Court of Nepal) (*Shrestha v Office of Council of Ministers*).

[39] *Sharma and others v Minister for the Environment* [2021] FCA 560 [5] (Allsop CJ). The decision of the New Zealand Court of Appeal in *Smith v Fonterra* also contains very limited references to international law beyond acknowledgement of the existing framework of international law (including the UNFCCC, the Kyoto Protocol, and the Paris Agreement). The Court noted that the existence of international obligations was a 'crucial factor telling against a duty'. See *Michael John Smith v Fonterra Co-Operative Group Limited and Others* CA 128/2020 [2021] NZCA 552 (*Smith Court of Appeal*).

commitment to the Paris Agreement was part of 'government policy', and that the Government had therefore breached Section 12.5(8) of the Planning Act. The Court found that the reference to 'government policy' in the Planning Act excluded the Paris Agreement, noting:

> The fact that the United Kingdom had ratified the Paris Agreement is not itself a statement of Government policy in the requisite sense. Ratification is an act on the international plane. It gives rise to obligations of the United Kingdom in international law which continue whether or not a particular government remains in office and which, as treaty obligations, 'are not part of UK law and give rise to no legal rights or obligations in domestic law'.[40]

The distinction between civil and common law courts does not, however, provide clear direction as to how national courts approach international law. In the New Zealand case of *Thomson*, the High Court applied the presumption of consistency to interpret the scope of the Minister's discretion in setting the country's emissions reduction targets.[41] Under the Climate Change Response Act, the Minister had the power to set, amend, or revoke New Zealand's climate targets at any time. The plaintiff challenged the Minister's failure to review the 2050 target following the release of the IPCC's Fifth Assessment Report (AR5). The Court ultimately dismissed the application for judicial review. However, it found that the Minister was required to review the 2050 target following the release of AR5 in order to 'give effect to the Act, and what New Zealand ha[d] accepted, recognised and committed to under the international instruments'.[42] In doing so, it made an important pronouncement:

> The Paris Agreement has been entered into in 'pursuit of' the Convention's objective and guided by its principles. As a matter of statutory interpretation, s 224(2) can and therefore must be interpreted consistently with New Zealand's international obligations under these instruments. I consider s 224(2) is also to be interpreted consistently with matters that New Zealand has recognised and accepted in these instruments, as these aid in interpreting our obligations.[43]

[40] *R (on the application of Plan B Earth and others) v Heathrow Airport Ltd (Heathrow Expansion)* [2020] UKSC 52 [108]. See also *Plan B Earth and others v Prime Minister and others* [2021] EWHC 3469 (Admin), in which the Court denies permission for judicial review of the UK Government's policies relating to climate change. Among the reasons for dismissing the claim, the High Court notes that: 'claims based on breaches of the Paris Agreement were hopeless because the Courts have no jurisdiction to determine whether the Government has acted in breach of its obligations under an unincorporated international treaty'.

[41] *Thomson v Minister for Climate Change Issues* [2017] NZHC 733. For a more in-depth discussion on the *Thomson* case and international law, see Mead and Maxwell (n 29). Among the purposes of the Act is to provide a framework to guide the development of policies to 'contribute to the global effort under the Paris Agreement to limit the global average temperature increase to 1.5° Celsius above pre-industrial levels'. Art 3(1)(aa)(i). However, the 'presumption of consistency' as applied by courts in New Zealand is not dependent on this. See Section 12.4 for further discussion.

[42] ibid [94].

[43] ibid [88].

In the Australian case of *Rocky Hill*,[44] the Court similarly considered the Paris Agreement as a factor to be considered when deciding whether to grant approval for the proposed mine. In reaching its decision to deny approval for the mine, the Court noted that – although the Paris Agreement did not prohibit new coal mine approvals –:

> the exploitation and burning of a new fossil fuel reserve, which will increase GHG emissions, cannot assist in achieving the rapid and deep reductions in GHG emissions that are necessary in order to achieve 'a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century' (Article 4(1) of the Paris Agreement) or the long term temperature goal of limiting the increase in global average temperature to between 1.5C and 2C above pre-industrial levels (Article 2 of the Paris Agreement).[45]

In a limited number of cases, there is a conspicuous lack of references to the role of international law. For example, in the United States, neither the majority nor dissenting opinions in the appeal judgment in the *Juliana* case refer to international law in their reasoning, despite its obvious relevance.[46]

12.3 EMERGING BEST PRACTICE

12.3.1 *Utilising International Law to Interpret National Law Standards*

The most important element of emerging best practice in case law to date is the critical role international law, including non-binding soft law norms, can play in shaping domestic law through the act of interpretation. Where the duty of care being invoked in a case involves an open standard or open-textured norm, jurisprudence shows how courts have employed international law to provide substance or content to those standards. Although the source of the duty differs from case to case, a consistent factor is the use of international law norms to establish the standard against which the act or omission in question is assessed.

The *Urgenda* case exemplifies this. While the District Court ruled that Urgenda could not rely on international law directly, it recognised that international law still has a 'reflex effect' in national law, in this instance, to interpret the standard of care related to the tort of hazardous negligence. The Court explained:

> [I]t follows that an international-law standard – a statutory provision or an unwritten legal standard – may not be explained or applied in a manner which would mean that the state in question has violated an international-law obligation, unless no

[44] *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 (*Gloucester Resources*).

[45] ibid [527]. The case was an appeal of a ministerial decision where the court reached its own conclusion, as opposed to a judicial review. The Court therefore effectively concluded that the Paris Agreement was relevant in making its own decision about whether to approve the mine, rather than finding that the original decision-maker was reasonable in considering international law.

[46] *Juliana v United States* 947 F.3d 1159 (9th Cir 2020).

> other interpretation or application is possible. This is a generally acknowledged rule in the legal system. This means that when applying and interpreting national-law open standards and concepts, including social proprietary, reasonableness and propriety, the general interest or certain legal principles, the court takes account of such international-law obligations.[47]

The Supreme Court also utilised a broad range of international law norms to interpret the ECHR, which formed the basis of its decision. In the Court's view, any interpretation of the ECHR 'must … take into account … relevant rules of international law' and state practice, in accordance with the jurisprudence of the European Court of Human Rights.[48] This was consistent with Article 31(3) of the Vienna Convention on the Law of Treaties which notes that 'any relevant rules of international law applicable in the relations between the parties' shall be taken into account when interpreting a treaty. The District Court and the Supreme Court therefore ultimately used international law to similar effect, despite the different bases for their decisions.[49]

12.3.2 *International Law and the 'Greening' of Human Rights*

The interconnected nature of international environmental law and international human rights law is well established in national, regional, and international jurisprudence. As human rights law increasingly forms the basis for climate cases, courts are adopting the best practice of drawing on international environmental law to define the scope and content of those human rights obligations.

In the *Asghar Leghari* case, a Pakistani farmer complained that the Government had failed to implement its own climate change policies, which constituted a breach of his constitutional rights. In its judgment, the Court drew on a variety of international environmental law principles to interpret the scope of the relevant rights. The Court explained:

> Fundamental rights, like the right to life (Article 9) which includes the right to a healthy and clean environment and right to human dignity (Article 14) read with constitutional principles of democracy, equality, social, economic and political

[47] *Urgenda Foundation v The State of The Netherlands* [2015] ECLI:NL:RBDHA:2015:7196 (District Court of the Hague) (*Urgenda District Court*) [4.43].

[48] *Urgenda Supreme Court* (n 31) [5.4.2].

[49] See further *Advisory Opinion on Cassation Appeal of the Procurator General in the Matter between the Netherlands v Urgenda* ECLI:NL:PHR:2019:1026 No 19/00135 (Supreme Court of the Netherlands 2019) [2.30] ("The common ground method is somewhat comparable to the reflex effect that national courts, in implementing open standards into national law, can attribute to treaty provisions and 'soft law' that have no direct effect. This explains why the Court of Appeal in its contested judgment reached the same conclusion on the basis of arts 2 and 8 ECHR as the District Court did on the basis of art 6:162 (Dutch Civil Code): for the concrete implementation of the reduction obligation, the District Court and the Court of Appeal sought to draw on the same climatological insights, objectives of international climate policy and principles of international law'). See also [2.7.2].

> justice include within their ambit and commitment, the international environmental principles of sustainable development, precautionary principle, environmental impact assessment, inter and intra-generational equity and public trust doctrine. Environment and its protection has taken a center stage in the scheme of our constitutional rights. It appears that we have to move on. The existing environmental jurisprudence has to be fashioned to meet the needs of something more urgent and overpowering ie Climate Change.[50]

Similarly, in the case of *Shrestha*, the Supreme Court referred to the UNFCCC, the Kyoto Protocol, and the Paris Agreement when determining that the State had not fulfilled its constitutional obligations to protect the petitioner's right to life with dignity and a clean environment.[51] The case was brought by a Nepalese lawyer, Padam Bahadur Shrestha, who alleged that the Government's failure to set and implement adequate climate law and policies breached his rights under the Constitution and violated Nepal's commitments under the UNFCCC and the Paris Agreement. Finding in favour of the plaintiff, the Court found that 'a new law dealing with climate change adaptation and mitigation, ensuring environmental justice while taking measures for maintaining clean environment with environmental conservation, and regulating production that causes impact on food, species, and ecosystem, and health seems imperative'. In addition to being necessary to protect constitutional rights, the Court noted that such a law 'would also facilitate in effectuating the commitments under the Paris Agreement on Climate Change, 2015'.[52]

The Brazilian case, *PSB et al v Brazil (on Climate Fund)*, represents a significant development in the greening of human rights. The case concerned the administration of the National Climate Fund (Fundo Clima) which had been created by law but inoperative for several years. The Supreme Court found that the executive branch has a constitutional duty to execute and allocate the funds of the Climate Fund to mitigate climate change, based on both the separation of powers and the constitutional right to a healthy environment. In this context, it determined that environmental treaties, including the Paris Agreement, 'are a species of the genus human rights treaties and enjoy, for this reason, supranational status'.[53] This means that any Brazilian law or decree that contradicts the Paris Agreement, including the NDC, may be invalidated. In coming to this view, the decision recalls the statement made by a UN Environment Programme representative during the hearing that '[t]here are no human rights on a dead or sick planet'.[54]

The interconnected relationship between environmental protection and human rights is also reflected in the jurisprudence at the regional and international levels.

[50] *Asghar Leghari* (n 38) [12].
[51] *Shrestha v Office of Council of Ministers* (n 38) [5].
[52] ibid [12].
[53] *PSB et al v Brazil (on Climate Fund)* [2022] ADPF 708 (Federal Supreme Court of Brazil) [17].
[54] ibid.

The Inter-American Court of Human Rights (IACtHR), in its landmark Advisory Opinion No 23, noted 'the existence of an undeniable relationship between the protection of the environment and the realization of other human rights, in that environmental degradation and the adverse effects of climate change affect the real enjoyment of human rights'.[55] It accordingly concluded that it could 'avail itself of the principles, rights and obligations of international environmental law' when determining the scope of the State's obligations under the American Convention.[56]

Turning to the international level, the Committee on the Rights of the Child similarly drew on international environmental law in its *Sacchi* decision. The complaint was brought by sixteen children from around the world who alleged that their rights under the Convention on the Rights of the Child had been violated due to insufficient mitigation and adaptation action on the part of the respondent States. The Committee ultimately found the complaint to be inadmissible for failing to exhaust domestic remedies. The Committee's decision nevertheless shows the relevance of international environmental law to interpreting international human rights law. For instance, in determining the State's individual responsibility for the harm that may arise as a result of its GHG emissions, the Committee drew on the Paris Agreement and the principle of CBDR.[57] The Committee also pointed to the UNFCCC and the Paris Agreement as evidence that the respondent States were aware of the potential harm associated with their GHG emissions.[58]

12.3.3 *Range of International Law Norms, Including Soft Law*

Emerging best practices in climate litigation involve courts relying on a broad range of international law norms when adjudicating climate cases. These norms include international treaty law (e.g. the UNFCCC and the Paris Agreement), general principles of international environmental law (e.g. the principles of precaution and no harm), and soft law instruments (e.g. decisions of COP and the UN Guiding Principles).

A groundbreaking aspect of the *Shell* decision was its use of human rights law, including soft law, to interpret the standard of care applicable to a company in its global operations – in this case, Royal Dutch Shell. The plaintiff, a Dutch NGO called Milieudefensie, relied on the same provision of the Dutch Civil Code in

[55] *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (IACtHR OC-23/17) [47].

[56] ibid [55].

[57] UN Committee on the Rights of the Child, 'Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, concerning Communication No 104/2019', UN Doc CRC/C/88/D/104/2019 (*Sacchi*) [10.10].

[58] ibid [10.11].

combination with Articles 2 and 8 of the ECHR as in the *Urgenda* case. The case alleges that Royal Dutch Shell has violated its duty of care by failing to adopt policies that will reduce the company's emissions in line with the Paris Agreement's long-term temperature goal. Finding in favour of the plaintiffs, the Court ordered Shell to reduce its emissions by 45 per cent by 2030 relative to 2019 (roughly in line with the global average) across all of its activities, including both its own emissions and end-use emissions.[59] In its interpretation of the standard of care, the Court treated the non-binding goals of the Paris Agreement as 'a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change'.[60] It also considered the protections afforded by international human rights law, including the International Covenant on Civil and Political Rights and the ECHR. While acknowledging that human rights law does not give rise to binding obligations on Shell (as a non-State actor), the Court considered human rights to be important – also given the extent of Royal Dutch Shell's emissions which exceed that of the Netherlands. The Court noted that '[d]ue to the fundamental interest of human rights and the value for society as a whole they embody, human rights may play a role in the relationship between Milieudefensie et al. and RDS. Therefore, the court will factor in the human rights and the values they embody in its interpretation of the unwritten standard of care'.[61] The Court also cited various soft law instruments, including the UN Guiding Principles on Business and Human Rights (UNGPs), to support its finding that companies must respect human rights. The reliance on these sources did not depend on the company having endorsed them, nor a finding that these sources were binding on the jurisdictions in which Shell operates.

The Commission on Human Rights of the Philippines adopted a similar approach in its decision relating to the *Carbon Majors* inquiry.[62] The inquiry assessed the responsibility of the 'Carbon Majors' – i.e. those corporations that have historically contributed the most to climate change – for human rights violations arising from climate impacts in the Philippines. In its decision, the Commission found that enterprises 'must comply with the Nationally Determined Commitments of States who are parties to the Paris Agreement', as a result of their obligations under the UNGP to respect the principles of international human rights.[63] The Commission therefore relied on the UNGP to establish not only the responsibility of enterprises towards human rights but also the duty of States to regulate the activities of enterprises in accordance with international human rights obligations.

[59] *Milieudefensie v Royal Dutch Shell* [2021] ECLR:NL: RBDHA:2021:5339 (District Court of the Hague). The Court of Appeal of the Hague overturned this decision in November 2024, following the completion of this manuscript.

[60] ibid [4.4.27].

[61] ibid [4.4.9].

[62] *In re Greenpeace Southeast Asia and Others* [2022] Case No CHR-NI-2016-0001 (Commission on Human Rights of the Philippines).

[63] ibid [98].

12.3.4 *International Law as Relevant to Determining the Minimum Standard*

It is emerging best practice for courts to use a combination of international law and the best available science to determine the minimum standard (of care) that, for example, a government must meet to fulfil its legal duties. This is particularly relevant in cases which require a court to determine whether a State's mitigation policies are sufficient to meet its 'fair share' of global emissions reductions. Courts have generally acknowledged that the UNFCCC, the Paris Agreement, and the IPCC science reports do not themselves set a precise standard against which to assess States' mitigation policies. Nevertheless, courts have been willing to set conservative minimum standards based on the international consensus reflected in these sources.[64]

The German *Neubauer* case serves as a useful illustration of this emerging best practice. The case concerned a legal challenge to Germany's Federal Climate Protection Act on the basis that the mitigation target contained therein violated the youth plaintiffs' human rights, as protected under the German Constitution. The Court approached the complaint from two angles: firstly, asking whether the Act violated the State's duty to protect (i.e. as a breach of a positive duty) and secondly, asking whether the Act violated the State's duty not to interfere with fundamental freedoms (i.e. a breach of a negative duty).[65] In relation to the first question, the Court found that the dangers presented by climate change are sufficiently real and serious to give rise to a duty to protect under the German Constitution. Given the wide margin afforded the State in relation to positive duties, however, the Court did not consider that any such duty had been breached in the present case as the approach adopted in the German Act was not 'manifestly unsuitable or completely inadequate'.[66] The Court did, however, find that the State had breached its negative duty not to interfere with the fundamental freedoms of the complainants in the future. In the Court's view, Article 20a of the Constitution concerning the protection of the natural foundations of life and animals requires the government to take climate action.[67] While the government has 'considerable leeway' to design the content of its climate action, the Court considered that its role was to 'review whether the boundaries of Article 20a are respected'.[68] International law played a key role in determining those boundaries. The temperature limit set out in the Act – which

[64] See Lucy Maxwell, Sarah Mead, and Dennis van Berkel, 'Standards for Adjudicating the next Generation of Urgenda-Style Climate Cases' (2022) 13(1) JHRE 35.

[65] For an explanation of this distinction in the context of German Constitutional law, see Petra Minnerop, 'The "Advance Interference-Like Effect" of Climate Targets: Fundamental Rights, Intergenerational Equity and the German Federal Constitutional Court' (2021) JEL 41, 42–43.

[66] *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court) (*Neubauer*) [152].

[67] ibid [206].

[68] ibid.

reflected that in the Paris Agreement – was identified 'as providing fundamental orientation for climate action'.[69] The Court explained:

> Rather than being purely an expression of political will, the chosen temperature limit must indeed also be understood as being a specification of the climate action required under constitutional law. This is primarily supported by the fact that the climate target specified in [the Act] is the internationally agreed temperature limit of Article 2(1)(a) Paris Agreement, which the legislator has deliberately and explicitly taken as a basis. Its constitutional law significance goes beyond the consent given by the German legislator to the Paris Agreement in passing the act of approval. The fact that the Paris target is explicitly named as the basis of Germany's Federal Climate Change Act is closely related to the obligation to take climate action arising from Article 20(a) GG. Due to the genuinely global dimension of climate change, the state can ultimately achieve the objective of slowing down climate change enshrined in Article 20(a) GG only through international cooperation. It has taken action to this end by ratifying the Paris Agreement, which provides the framework within which it is now also fulfilling its more extensive climate action obligations arising from Article 20(a) GG […]. By adopting the temperature limit of Article 2(1)(a) Paris Agreement, the legislator has set the fundamental course of national climate change law in a direction that gives the German state an opportunity to effectively fulfil its constitutional mandate to take climate action through its own efforts embedded within an international framework.[70]

Reliance on best available science when assessing obligations relating to climate change can also be considered a requirement derived from international law. The Paris Agreement's preamble recognises 'the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge', while Article 4(1) refers to the need for emissions to peak and for parties 'to undertake rapid reductions thereafter in accordance with best available science'.[71] The Glasgow Climate Pact (2021) further recognises 'the importance of the best available science for effective climate action and policymaking'[72] and the need for 'accelerated action in this critical decade, on the basis of the best available scientific knowledge and equity'.[73]

The New Zealand case of *Thomson* (discussed earlier) linked the need to rely on best available science with the government's obligations under international law. Under the Climate Change Response Act, there was no express requirement for the

[69] ibid [208]. Section 1 of the relevant Act noted 'The basis of the Act is the obligation according to the Paris Agreement, under the United Nations Framework Convention on Climate Change, to limit the increase in the global average temperature to well below two degrees Celsius and, if possible, to 1.5 degrees Celsius, above the pre-industrial level'.

[70] ibid [209].

[71] Paris Agreement (n 10) art 4(1).

[72] UNFCCC, Glasgow Climate Pact, FCCC/PA/CMA/2021/10/Add.1 1/CMA 3 (13 November 2021) [1].

[73] ibid [23]; ibid [18].

Minister to review the 2050 target following the release of a new IPCC Assessment Report. However, the Court found that there was an implied mandatory consideration to give effect to the Act and New Zealand's international commitments.[74] In the Court's view, the provisions of the climate treaty regime together 'underline the pressing need for global action, that global action requires all Parties individually to take appropriate steps to meet the necessary collective action, and that Parties should do so in light of relevant scientific information and update their individual measures in light of such information'.[75] The Court therefore concluded:

> The IPCC reports provide the most up to date scientific consensus on climate change. New Zealand accepts this. To give effect to the Act and what New Zealand has accepted, recognised and committed to under the international instruments, and in light of the threat that climate change presents to humankind and the environment, I consider the publishing of a new IPCC report requires the Minister to consider whether a target set under s 224 should be reviewed. That is, it is a mandatory relevant consideration in whether an existing target should be reviewed under s 224(2).[76]

12.3.5 *International Law as Relevant to Interpreting Statutory Discretion*

Finally, courts have shown a willingness to draw on international law when interpreting the scope of a statutory discretion – whether afforded to the State or one of its representatives such as a Minister – usually with a narrowing effect. This can also be treated as an element of emerging best practice.

In *EarthLife Africa*, South Africa's High Court was asked to determine whether the climate-related impacts of a new coal-fired power station needed to be taken into account before approval for the project was granted.[77] The Court acknowledged that the relevant legislation did not expressly refer to climate change. However, with reference to the Paris Agreement, the Court held that climate change was a 'necessary and relevant' consideration for the environmental review of the project, and that the failure to take it into account rendered the approval process for the project unlawful. The Court noted:

> The respondents further argued that the power station project is consistent with South Africa's NDC under the Paris Agreement, which envisages that South Africa's emissions will peak between 2020 and 2025. Again I agree with EarthLife that this contention misses the point. The argument is not whether new coal-fired

[74] *Thomson* (n 41) [94].
[75] ibid [91].
[76] ibid [94].
[77] *EarthLife Africa Johannesburg v Minister* [2017] 65662/16 <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2017/20170306_Case-no.-6566216_judgment-1.pdf> accessed 27 March 2023.

> power stations are permitted under the Paris Agreement and the NDC. The narrow question is whether a climate change impact assessment is required before authorising new coal-fired power stations. A climate change impact assessment is necessary and relevant to ensuring that the proposed coal-fired power station fits South Africa's peak, plateau and decline trajectory as outlined in the NDC and its commitment to build cleaner and more efficient than existing power stations.[78]

The Canadian Supreme Court in *Greenhouse Gas Pollution Pricing Act* is similarly illustrative of the role that international law can play in interpreting statutory discretion.[79] The case concerned the constitutional validity of Canada's Greenhouse Gas Pollution Pricing Act (GGPPA) in light of the division of power between the federal and provincial levels of government in Canada.[80] In considering the respective governments' powers, the Court referred to the urgent need to reduce GHG emissions, Canada's obligations under the UN climate treaty regime, and the reference to the Paris Agreement in the preamble of the GGPPA. This led the majority of the Court to find that climate change is a global challenge that cannot be left exclusively to the provinces to address. A carbon pricing backstop was an effective way for the Federal Government to ensure progress on its commitments under the Paris Agreement, while still leaving room for provinces to develop their own mitigation policies.

12.4 REPLICABILITY

Many aspects of how courts have engaged with international law in climate litigation to date are replicable in other jurisdictions, including the emerging best practices identified earlier. There are two key reasons for this. Firstly, the most relevant international treaties – the UNFCCC and the Paris Agreement – enjoy almost universal ratification, providing litigants and judges with a common source of norms in the context of climate litigation.[81] Consequently, interpretations and applications of these instruments by courts in one jurisdiction may offer valuable guidance to courts in other jurisdictions, even in the absence of any formal binding effect. Secondly,

[78] ibid [90].

[79] *Saskatchewan et al v Greenhouse Gas Pollution Pricing Act* (2021) SCC 11 (*Saskatchewan and others*). See also the District Court decision in *Urgenda*, where the Court noted that – while the relevant norms of international law cannot be relied on directly – they help determine 'what degree of discretionary power the State is entitled to in how it exercises the tasks and authorities given to it' and thus 'constitute an important viewpoint in assessing whether or not the State acts wrongfully', *Urgenda District Court* (n 47) [4.52].

[80] In Canada, provinces have primary jurisdiction over many of the activities that contribute to Canada's GHG emissions, while the Federal Government has the power to negotiate and ratify treaties such as the Paris Agreement.

[81] See United Nations Treaty Collection <www.treaties.un.org>.

the primary way in which international law has been invoked in the jurisprudence (i.e. indirectly) lends itself to replicability. This is because *how* and *to what extent* the applicable international law norm is formally incorporated into the national legal system is less relevant.

Each legal system has its own rules regarding the reception of international law which operate to regulate how courts engage with international law. However, as noted in Section 12.1.2, various rules and practices have the effect of blunting or moderating the rules that dictate whether a particular legal system is considered 'monist' or 'dualist'. New Zealand, for example, is a dualist system – requiring international law to be translated into domestic law via legislation for it to become part of the domestic legal system. Still, the presumption of consistency applied by New Zealand courts favours an interpretation of statutory law that is consistent with international law where possible. This is similar to the 'reflex effect' described by the Dutch District Court in the *Urgenda* case, despite the Netherlands being a monist system. Writing extrajudicially, the current Chief Justice and two Judges of the Supreme Court of New Zealand noted that:

> New Zealand courts apply a presumption to the interpretation of statutes that Parliament did not intend to legislate contrary to New Zealand's international obligations. We anticipate that international treaties in the climate change area will increasingly be used in this way in litigation and it may be that courts will, as they respond to the magnitude of the issue, seek to strengthen the presumption.[82]

There is therefore considerable scope – even accounting for how different legal systems receive international law – for courts to draw on how courts from other traditions have treated international law in climate litigation.

12.5 CONCLUSION

A survey of the relevant case law to date highlights the extent to which courts across diverse jurisdictions have drawn on international law in adjudicating climate cases. This is unsurprising given the inherently global nature of climate change. As explained by the Canadian Supreme Court in its decision in *Greenhouse Gas Pollution Pricing Act* regarding the unique features of climate change:

> First, [climate change] has no boundaries; the entire country and entire world are experiencing and will continue to experience its effects. Second, the effects of climate change do not have a direct connection to the source of GHG emissions. Provinces and territories with low GHG emissions can experience effects of climate change that are grossly disproportionate to their individual contributions to

[82] Helen Winkelmann, CJ, Susan Glazebrook, and Ellen France, 'Climate Change and the Law' (2019) Asia-Pacific Judicial Colloquium <www.courtsofnz.govt.nz/assets/speechpapers/ccw.pdf> accessed 9 February 2024.

> Canada's and the world's total GHG emissions…Third, no one province, territory or country can address the issue of climate change on its own. Addressing climate change requires collective national and international action. This is because the harmful effects of GHGs are, by their very nature, not confined by borders.[83]

The most important conclusion to be drawn from the cases reviewed is that international law can significantly influence domestic law interpretation to help overcome obstacles litigants face when seeking recourse for climate change-related harms. The details will vary from jurisdiction to jurisdiction, but the trend is clear and important. Even non-binding sources of international law offer important context for helping to shape domestic law to fairly and effectively deal with climate cases. The legitimacy of legal systems depends on this, which serves to encourage courts to draw on international law in their deliberations and legal analysis.

The role of international courts and tribunals in addressing climate change is also receiving increasing attention. At the time of writing, the International Tribunal for the Law of the Sea,[84] the IACtHR,[85] and the International Court of Justice have each received requests seeking an advisory opinion seeking to clarify the obligations of States in light of the climate crisis.[86] Each opinion will serve as a critical opportunity for these international courts to build on the foundation established by national courts in emerging best practices. Clearly, courts at all levels have important roles to play in further clarifying and enforcing the obligations of States and non-State actors in the context of the climate crisis.

[83] *Saskatchewan and others* (n 79) [12].

[84] On 16 December 2022, the Commission of Small Island States on Climate Change and International Law requested an advisory opinion from the International Tribunal for the Law of the Sea. The request seeks the Tribunal's opinion on the obligations of State Parties to the UN Convention on the Law of the Sea (UNCLOS) in relation to certain provisions of the Convention in light of climate change.

[85] On 9 January 2023, Chile and Colombia requested an advisory opinion from the Inter-American Court of Human Rights aiming to clarify States' human rights obligations in light of the climate emergency.

[86] On 29 March 2023, the General Assembly of the United Nations requested an advisory opinion from the International Court of Justice on the obligations of States with respect to climate change. The question seeks the Court's opinion on both the obligations of States under international law in relation to climate change, and the legal consequences for States where they, by their act and omissions, have caused significant harm to the climate system.