Cambridge International Law Journal, Vol. 13 No. 2, pp. 286–299

Climate change litigation: the role of international law*

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The 13th Cambridge International Law Journal Conference, where this article was originally presented as a keynote speech, was dedicated to 'The Intersection of Peace and Sustainability in International Law'. This article addresses the conference's theme by analysing the role of international law in the burgeoning practice of climate change litigation. Specifically, it considers how international law has been used in litigation brought against States before national and international bodies. In so doing, the article provides an international law perspective on a topic that is immensely popular in current legal scholarship. It demonstrates that international law obligations and adjudication are playing an increasingly important role in this dynamic area of legal practice and reflects on possible future developments.

Keywords: *climate change litigation, environmental law, human rights, State responsibility*

1 INTRODUCTION

The keynote speech that forms the basis of this article was delivered on the same day that the European Court of Human Rights (ECtHR) issued its first-ever judgment on the merits of a climate change-related complaint. As I pondered on this momentous development, I was reminded of a question raised by Diane Desierto in the blog of the European Society of International Law in 2019. After yet another disappointing conference of the parties to the international climate change treaties, Desierto queried whether 'the invisible college of international lawyers' should not revive 'the blunt edge of climate change-based national, regional, or international litigation, adjudication, and arbitration towards reaching sufficiency … and actual monitoring and enforcement of all climate pledges'.[1]

Five years on, her rallying call has certainly not gone unheard. Advisory proceedings on climate change have been initiated before three distinct international tribunals. Multiple international bodies have considered climate change-related complaints brought by individuals and groups, and, as noted above, an international tribunal

* This article was originally presented as a keynote speech at the 13th Annual Conference of the Cambridge Journal of International Law held in Cambridge on 9 April 2024.

1. Diane Desierto, 'COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?' (EJIL: Talk!, 19 December 2019) <https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/> accessed 16 July 2024.

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has delivered the first judgment on a non-State actor-led complaint against a State. Furthermore, a tidal wave of lawsuits before domestic courts increasingly references international law, placing national judges at the forefront of the enforcement of States' international obligations concerning climate change.

However, what is 'climate change litigation'? This term is commonly used in the literature to describe lawsuits raising questions of law or fact regarding climate science, policy or law, which are brought before international or domestic judicial, quasi-judicial and other investigatory bodies.[2] As I noted elsewhere,[3] this aggregation of rather diverse lawsuits brings together a heterogeneous set of 'cases', only some of which are judicial in nature and filed before courts of law. While this compilation exercise has served to develop a rich body of literature interrogating the expanding phenomenon of climate litigation,[4] this is not without its complications. First, bringing together cases filed before judicial and non-judicial bodies blurs the boundaries between formal processes for the enforcement of the law and mere 'soft' review mechanisms. Second, mixing cases that rely on diverse law sources unavoidably overlooks fundamental differences between laws and their respective roles in adjudication.

It is precisely because of the recognised need for greater rigour in determining the role of different legal sources in adjudication that I decided to specifically focus my keynote address on the use of international law in climate litigation. My reflections are based on the findings of a global comparative study of climate litigation carried out by the World Commission on Environmental Law of the International Union for Conservation of Nature (IUCN), to which I contributed.[5] These findings have been revised and updated to focus on the role of international law in climate litigation. This article, therefore, examines the most significant developments in climate change litigation brought against States before both national and international bodies. It begins by exploring litigation in national courts, then moves on to consider developments before international courts and quasi-judicial bodies. The article concludes by assessing the role of international law in this dynamic area and makes predictions about possible future developments.

2 THE USE OF INTERNATIONAL LAW BY DOMESTIC COURTS

As I noted elsewhere,[6] domestic courts' engagement with international law is generally on the rise. This shift in judicial practice may be attributed to a transformation in

2. This definition is adapted from David Markell and J B Ruhl, 'An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?' (2012) 64 Florida Law Review 15, 17.
3. Riccardo Luporini and Annalisa Savaresi, 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' (2023) 32 Review of European, Comparative & International Environmental Law 267, 268.
4. See eg the literature reviews in Joana Setzer and Lisa C Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10(3) Wiley Interdisciplinary Reviews: Climate Change e580; Jacqueline Peel and Hari M Osofsky, 'Climate Change Litigation' (2020) 16 Annual Review of Law and Social Science 21.
5. Annalisa Savaresi, 'State Responsibility' in Sarah Mead and Margaretha Wewerinke-Singh (eds), *Cambridge Handbook on Climate Change Litigation* (CUP, Cambridge 2024) (forthcoming).
6. Ibid 1.

international law itself, which increasingly encompasses so-called 'inward-looking' obligations.[7] These obligations typically require States to undertake specific actions within their own jurisdiction, such as adopting certain legal frameworks, granting certain rights or refraining from specific activities. The latter type of obligation is particularly common in international environmental and human rights law. Therefore, it is not surprising that international obligations related to the protection of the environment and human rights are increasingly invoked before national courts. However, there is no uniform approach to the treatment of international law in domestic judicial practice.[8] This makes it especially important to carefully consider extant case law, to understand how national courts interpret and apply international law in climate change-related complaints. The most relevant precedents in this regard are the landmark judgments delivered by Dutch courts in the case brought by the non-governmental organisation (NGO) Urgenda against the State of the Netherlands.

In *Urgenda Foundation v The State of The Netherlands*, an NGO famously sued the Dutch State for failing to take adequate action to reduce greenhouse gas emissions.[9] This lawsuit was principally based on tort law, but the Dutch courts made influential statements on State responsibility for breaches of international obligations. Much has been written about the *Urgenda* judgments and my purpose is not to revisit the extensive academic commentary on these landmark court victories for climate applicants.[10] The point of discussing *Urgenda* here is instead to examine how the Dutch courts have utilised international law obligations as a yardstick to evaluate the State's climate change response measures.[11]

7. See Antonios Tzanakopoulos, 'Principles on the Engagement of Domestic Courts with International Law' (Preliminary Report, International Law Association Study Group, 2012) para 12 <https://www.ila-hq.org/en_GB/documents/preliminary-report> accessed 16 July 2024.
8. Ibid paras 12 and 15.
9. *Urgenda Foundation v The State of The Netherlands (Ministry of Infrastructure and the Environment)* [2015] ECLI:NL:RBDHA:2015:7196 (District Court of the Hague) (court-issued translation) (*Urgenda I*); *The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation* [2018] ECLI:NL:GHDHA:2018:2610 (The Hague Court of Appeal) (court-issued translation) (*Urgenda II*); *The 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) (court-issued translation) (*Urgenda III*).
10. See eg Josephine van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?' (2015) 4 Transnational Environmental Law 339; Marjan Peeters, 'Urgenda Foundation and 886 Individuals v The State of the Netherlands: The Dilemma of More Ambitious Greenhouse Gas Reduction Action by EU Member States' (2016) 25 Review of European, Comparative & International Environmental Law 123; Jonathan Verschuuren, 'The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce Its Greenhouse Gas Emissions' (2019) 28 Review of European, Comparative & International Environmental Law 94; Emily Barritt, 'Consciously Transnational: Urgenda and the Shape of Climate Change Litigation: The State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Urgenda Foundation' (2020) 22 Environmental Law Review 296; Lucy Maxwell, Sarah Mead and Dennis van Berkel, 'Standards for Adjudicating the Next Generation of Urgenda-Style Climate Cases' (2022) 13(1) Journal of Human Rights and the Environment 35; André Nollkaemper and Laura Burgers, 'A New Classic in Climate Change Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (EJIL: Talk!, 6 January 2020) <https://www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case/> accessed 16 July 2024.
11. This section of the article builds on the analysis in Savaresi (n 5).

In a world first, the State's due diligence obligations concerning climate change under domestic law were interpreted in light of international law. In doing so, the Dutch courts established that international law obligations are pertinent in determining the contours of the State's duty of care owed to its citizens under tort law. Specifically, the Dutch Supreme Court held that, due to the grave risk of dangerous climate change to the lives and welfare of people in the Netherlands, the State had a duty to take adequate measures to reduce greenhouse gas emissions from Dutch territory.[12] This duty was construed on the basis of obligations enshrined in the European Convention on Human Rights (ECHR),[13] the United Nations Framework Convention on Climate Change (UNFCCC)[14] and the Paris Agreement.[15] The Court also relied on the customary international law obligation to do no harm, determining that the Dutch State must take action to prevent harm to the territory of other countries arising from climate change.[16] In this context, the Supreme Court explicitly referenced the International Law Commission's Draft Articles on State Responsibility,[17] which address situations involving multiple States in the breach of an international obligation.

The Dutch courts asserted that other States's failure to meet their obligations was no justification for the Dutch State to neglect its own obligations.[18] They remarked that Urgenda did not have the option to summon all eligible States to appear in a Dutch court.[19] They noted that the fact that Dutch emissions are relatively modest – the so-called 'drop in the ocean' argument – was no ground for non-performance. Instead, they reasoned that no single emission reduction is negligible and that each can have a positive effect in diminishing dangerous climate change.[20] Consequently, State authorities were ordered to revise national climate targets in line with climate science, as outlined in the reports of the Intergovernmental Panel on Climate Change.

The *Urgenda* judgments marked a paradigm shift in global climate litigation, setting a pattern followed in subsequent case law. Their line of argumentation and the resulting judicial reasoning have influenced dozens of similar cases filed worldwide, often achieving broadly similar outcomes.[21] While these so-called '*Urgenda*-style' cases have been adapted to fit national legal circumstances, some

12. *Urgenda III* (n 9) [6.1].
13. Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended by Protocols Nos 11 and 14) (ECHR), art 30.
14. United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107.
15. Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) 3156 UNTS 79.
16. *Urgenda III* (n 9) [5.7.5].
17. International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries' (2001) UN Doc A/RES/56/83, 53 UN GAOR Supp (No 10) at 43, Supp (No 10) A/56/10 (IV.E.1).
18. *Urgenda III* (n 9) [5.7.7].
19. *Urgenda II* (n 9) [64].
20. *Urgenda III* (n 9) [5.7.8].
21. Examples of '*Urgenda*-style' litigation include *VZW Klimaatzaak v Kingdom of Belgium and Others* [2021] 2015/4585/A (Brussels Court of First Instance) (unofficial translation); *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 (German Federal Constitutional Court) (court-issued translation); *Notre Affaire à Tous and Others v France* [2021] No 1904967, 1904968, 1904972 1904976/4-1 (Administrative

core characterising elements can be identified.[22] One of these is reliance on international law obligations to determine the content of the State's duties and obligations under national law. '*Urgenda*-style' litigation has thus positioned national judges at the forefront of enforcing States' international obligations regarding climate change.

3 THE USE OF INTERNATIONAL LAW BY INTERNATIONAL BODIES

While the practice of challenging States' climate inaction in domestic courts initiated by the *Urgenda* judgments has spread rapidly worldwide, until recently, international courts and bodies have been less involved in this area. The prospect of initiating an inter-State dispute for a breach of an international obligation concerning climate change has been the subject of intense scholarly speculation, but remains, for now at least, only a theoretical possibility.[23] In recent years, however, individuals and NGOs have increasingly filed climate change-related complaints against States before numerous international human rights bodies.[24] Furthermore, advisory proceedings on climate change have been initiated before three separate international courts.[25] This section reviews developments in these critical areas of practice to determine how international law is utilised in adjudication by international bodies.

Court of Paris) (unofficial translation); *Milieudefensie v Royal Dutch Shell* (2021) ECLR:NL:RBDHA:2021:5339 (District Court of the Hague) (court-issued translation).

22. Maxwell et al (n 10).

23. See eg Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Martinus Nijhoff, Leiden 2005); Philippe Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law' (2016) 28 Journal of Environmental Law 19; Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 Arizona State Law Journal 689; Alan Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) 34 The International Journal of Marine and Coastal Law 458; Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing, Oxford 2019); Millicent McCreath, 'The Potential for UNCLOS Climate Change Litigation to Achieve Effective Mitigation Outcomes' in Jolene Lin and Douglas Kysar (eds), *Climate Change Litigation in the Asia Pacific* (CUP, Cambridge 2020) 120.

24. See the review of this area of practice in Luporini and Savaresi (n 3).

25. Request for Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Order of 16 December 2022, ITLOS Reports 2022–2023 (COSIS Request); Request for an Advisory Opinion on the Climate Emergency and Human Rights Submitted to the Inter-American Court of Human Rights by the Republic of Colombia and the Republic of Chile (9 January 2023) (Colombia and Chile Request); Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change (adopted 29 March 2023) UNGA Res 77/276 (UNGA Request). See Annalisa Savaresi, 'Advisory Opinions on Climate Change: Leading from the Bench?' (Questions of International Law Zoom In, 30 November 2023) <http://www.qil-qdi.org/advisory-opinions-on-climate-change-leading-from-the-bench/> accessed 16 July 2024.

3.1 International human rights bodies

Academics[26] and United Nations (UN) treaty bodies[27] have long acknowledged the links between a State's international obligations under climate change and human rights law. Since 2005, several international human rights bodies have been asked to consider complaints related to climate change. Yet, until 2022, no international body had made a finding in favour of climate applicants, prompting commentators to ponder on the reasons for this lack of success.[28] The scholarly commentary on this subject matter has been abundant.[29] For the present purposes, we need to consider two crucial milestones, namely, the UN Human Rights Committee's 2022 decision in the complaint of *Daniel Billy et al v Australia*[30] and the 2024 judgment of the ECtHR in the case of *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*.[31]

With the first, the UN Human Rights Committee, which monitors the implementation of the International Covenant on Civil and Political Rights,[32] became the first international body to uphold the claims of climate applicants. Specifically, in *Daniel Billy et al v Australia*, indigenous peoples alleged violations of their rights due to Australia's failure to take adequate measures both to mitigate and to adapt to climate change.

26. The literature on this subject matter is abundant. Some of the key titles on the matter include John H Knox, 'Climate Change and Human Rights Law' (2009) 50 Virginia Journal of International Law 163; Marc Limon, 'Human Rights Obligations and Accountability in the Face of Climate Change' (2009) 38 Georgia Journal of International and Comparative Law 543; Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP, Cambridge 2010); Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Handbook on Human Rights and Climate Governance* (Routledge, Taylor & Francis Group, London 2018); Wewerinke-Singh (n 23); Alan Boyle, 'Climate Change, the Paris Agreement and Human Rights' (2018) 67 International & Comparative Law Quarterly 759.

27. See the compilation of guidance provided in CIEL, 'States' Human Rights Obligations in the Context of Climate Change: Guidance Provided by the UN Human Rights Treaty Bodies' (CIEL, 3 May 2023) <https://www.ciel.org/reports/human-rights-treaty-bodies-2023/> accessed 16 July 2024.

28. Writing in 2023, Luporini and Savaresi (n 3) identified 18 such complaints, with only one decided in favour of climate applicants. The numbers have since risen significantly. See Joana Setzer and Catherine Higham, *Global Trends in Climate Change Litigation: 2024 Snapshot* (LSE, 2024), 2.

29. See eg Joanna Harrington, 'Climate Change, Human Rights and the Right to Be Cold' (2006) 18 Fordham Environmental Law Review 513; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 Climate Law 244; Sébastien Jodoin, Shannon Snow and Arielle Corobow, 'Realizing the Right to Be Cold? Framing Processes and Outcomes Associated with the Inuit Petition on Human Rights and Global Warming' (2020) 54 Law & Society Review 168; Annalisa Savaresi and Joana Setzer, 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) 13 Journal of Human Rights and the Environment 7; César Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (CUP, Cambridge 2022).

30. UNHR Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 3624/2019' (21 July 2022) UN Doc CCPR/C/135/D/3624/2019.

31. *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20 (ECtHR, 9 April 2024).

32. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

The UN Human Rights Committee found a breach of the State's obligations for lack of timely and adequate action on adaptation. The Committee held that Australia had failed to comply with its positive obligation to protect the applicants' home, private and family life, their collective ability to maintain a traditional way of life, and their ability to transmit their customs and culture to future generations.[33] The Committee, however, held that no violation of the right to life had occurred, as the applicants had failed to provide evidence of concrete and reasonably foreseeable risks or effects on their health. Instead, the Committee opined that, before the islands become uninhabitable, Australia could undertake preventative measures and, if necessary, relocate the applicants.[34] Even with this proviso, *Daniel Billy et al v Australia* marked an important milestone. For the first time, an international body recognised and enforced a State's obligation to address human rights violations resulting from a failure to implement measures to adapt to the impacts of climate change.[35] The Committee, however, attracted some criticism for leaving unaddressed the applicants' grievances regarding Australia's alleged responsibility for breaches of the obligation to adopt adequate measures to reduce its greenhouse gas emissions.[36] In doing so, it neither confirmed nor disproved the interpretation of these obligations provided in the *Urgenda* judgments.[37]

This matter was instead addressed in the second case under consideration here. With *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*, the ECtHR became the first international court to deliver a judgment on a climate change complaint. The case was but one of thirteen applications lodged with the ECtHR and one of three selected for consideration by its Grand Chamber.[38] The Grand Chamber typically hears

33. UNHR Committee (n 30) paras 8.9–8.14 and 9.
34. Ibid para 8.7.
35. See eg OHCHR, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (1 February 2016) UN Doc A/HRC/31/52 paras 68–70; OHCHR, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (15 July 2019) UN Doc A/74/161, paras 84–86; OHCHR, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change' (26 July 2022) UN Doc A/77/226.
36. See eg Christina Voigt, 'UNHRC Is Turning up the Heat: Human Rights Violations Due to Inadequate Adaptation Action to Climate Change' (EJIL: Talk!, 26 September 2022) <https://www.ejiltalk.org/unhrc-is-turning-up-the-heat-human-rights-violations-due-to-inadequate-adaptation-action-to-climate-change/> accessed 16 July 2024.
37. See eg the discussion in Riccardo Luporini, 'Strategic Litigation as a Tool to Advance Climate Change Adaptation? Challenges and Prospects' (2023) 4 Yearbook of International Disaster Law Online 202.
38. *Humane Being and Others v the United Kingdom* App no 36959/22 (ECtHR, 1 December 2022); *Plan B. Earth and Others v the United Kingdom* App No 35057/22 (ECtHR, 13 December 2022); *Asociacion Instituto Metabody v Spain* App No 32068/23 (ECtHR, 5 October 2023); *Duarte Agostinho v Portugal and 32 Other States* App No 39371/20 (ECtHR, 9 April 2024); *Verein KlimaSeniorinnen* (n 31); *Müllner v Austria* App No 18859/21 (ECtHR, pending); *Greenpeace Nordic and Others v Norway* App No 34068/21 (ECtHR, pending); *The Norwegian Grandparents' Climate Campaign and Others v Norway* App No 19026/21 (ECtHR, pending); *Carême v France* App No 7189/21 (ECtHR, 9 April 2024); *Uricchio v Italy and Others* App No 14165/21 (ECtHR, pending); *De Conto v Italy and Others* App No 14620/21 (ECtHR, pending); *Soubeste and Others v Austria and 11 Other States* App Nos 3195/22, 31932/22, 31938/22, 31943/22 and 31947/22 (ECtHR, pending); *Engels v Germany* App No 46906/22 (ECtHR, pending).

cases that raise 'a serious question affecting the interpretation' of the ECHR.[39] Two out of the three climate applications before it was dismissed due to the lack of exhaustion of domestic remedies and lack of compliance with victimhood requirements, respectively.[40] This left *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* as the only climate case to be adjudicated on its merits. The judgment was, therefore, highly anticipated and has already received ample academic commentary.[41]

While an extensive review of this 260-page strong judgment exceeds the scope of this article, what is important for the present purposes is that the ECtHR aligned with the growing body of domestic jurisprudence spearheaded by the *Urgenda* judgments.

Verein KlimaSeniorinnen was brought by four individual applicants and one NGO, who alleged breaches of Switzerland's human rights obligations due to the impacts of climate change suffered by elderly women. The ECtHR found their complaint admissible, recognising for the first time that climate change poses a serious current and future threat to the enjoyment of human rights.[42] The Court went on to articulate the obligations of States to progressively reduce greenhouse gas emissions under Article 8 of the ECHR. This provision protects the right to respect for private and family life and home and represents the bedrock of the Court's environmental jurisprudence.[43] It is, therefore, particularly important that the Court relied on this provision, outlining in great detail how climate change fits in with its well-established case law concerning human rights breaches associated with environmental harms.

Specifically, the ECtHR asserted that Article 8 of the ECHR requires that 'each Contracting State undertake measures for the substantial and progressive reduction of their respective GHG [greenhouse gas] emission levels, with a view to reaching

39. ECHR (n 13) art 30.
40. *Duarte Agostinho* (n 38) and *Carême* (n 38).
41. See eg Corina Heri, 'Climate Change Before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' (2022) 33 European Journal of International Law 925; Ole W Pedersen, 'The European Convention of Human Rights and Climate Change – Finally!' (EJIL: Talk!, 22 September 2020) <https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/> accessed 16 July 2024; Marko Milanovic, 'A Quick Take on the European Court's Climate Change Judgments' (EJIL: Talk!, 9 April 2024) <https://www.ejiltalk.org/a-quick-take-on-the-european-courts-climate-change-judgments/> accessed 16 July 2024; Antoine Buyse and Kushtrim Istrefi, 'Climate Cases Decided Today: Small Step or Huge Leap?' (ECHR Blog, 9 April 2024) <https://www.echrblog.com/2024/04/climate-cases-decided-today-small-step.html> accessed 16 July 2024; Ole W Pedersen, 'Climate Change and the ECHR: The Results Are In' (EJIL: Talk!, 11 April 2024) <https://www.ejiltalk.org/climate-change-and-the-echr-the-results-are-in/> accessed 16 July 2024; Annalisa Savaresi, Linnea Nordlander and Margaretha Wewerinke-Singh, 'Climate Change Litigation before the European Court of Human Rights: A New Dawn' (GNHRE, 12 April 2024) <https://gnhre.org/?p=17984> accessed 16 July 2024; Chris Hilson and Oliver Geden, 'Climate or Carbon Neutrality? Which One Must States Aim for Under Article 8 ECHR?' (EJIL: Talk!, 29 April 2024) <https://www.ejiltalk.org/climate-or-carbon-neutrality-which-one-must-states-aim-for-under-article-8-echr/> accessed 16 July 2024; See also the series of posts published by Verfassungblog: <https://verfassungsblog.de/category/debates/the-transformation-of-european-climate-litigation/> accessed 16 July 2024.
42. *Verein KlimaSeniorinnen* (n 31) [436].
43. Council of Europe, *Manual on Human Rights and the Environment* (3rd edn, Council of Europe, Strasbourg 2022) 33–50 <https://rm.coe.int/manual-environment-3rd-edition/1680a56197> accessed 16 July 2024.

net neutrality within, in principle, the next three decades'.[44] The Court outlined the criteria it plans to use to assess compliance with State's obligations under this provision. These criteria revolve around whether the competent domestic authorities have had due regard to the need to (1) establish a timeline for achieving carbon neutrality and a carbon budget or equivalent method to set future greenhouse gas emissions reductions, in line with national and/or international law obligations; (2) set intermediate reduction targets and pathways to meet national targets within set time frames; (3) provide evidence of compliance or progress towards meeting targets as per (1) and (2); (4) regularly update reduction targets based on the best available evidence; and (5) act promptly and consistently in creating and implementing relevant legislation and measures.[45]

The ECtHR asserted that pursuant to their obligations under Article 8, States must put in place measures aimed at preventing an increase in greenhouse gas concentrations in the Earth's atmosphere and a rise in the global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights. As in the *Urgenda* judgments, the ECtHR said that these measures should align with international law obligations under the UNFCCC and the Paris Agreement and the scientific evidence provided by the Intergovernmental Panel on Climate Change.[46]

As it applied its newly minted interpretation of the State's obligations under Article 8 to the complaint brought by *Verein KlimaSeniorinnen*, the Court found 'critical lacunae' in the Swiss process for establishing the relevant domestic regulatory framework, including a failure to quantify national greenhouse gas emissions limitations, either through a carbon budget or through other means.[47] The Court also noted that Switzerland had failed to meet its past emission reduction targets and had not acted in a timely, appropriate and consistent manner to design and implement new legislative and administrative measures.[48] Due to these critical shortcomings, the Court found a breach of the State's obligations under Article 8 of the ECHR.

However, only the NGO was found to have standing to challenge said human rights violation. The Court reasoned that the organisation had been a 'vehicle of collective recourse aimed at defending the rights and interests of individuals against the threats of climate change in the Respondent State'.[49] The Court outlined the criteria that an NGO must meet to lodge an application for a State's alleged failure to take adequate measures against the adverse effects of climate change. Pursuant to these, an association must (1) be lawfully established or have standing to act in the State concerned; (2) demonstrate that it pursues a dedicated purpose in accordance with its statutory objectives and (3) show that it is genuinely qualified and representative to act on behalf of members or other affected individuals within the jurisdiction of a State Party.[50]

In *Verein KlimaSeniorinnen*, the Court found that the applicant NGO had also been a victim of a violation of Article 6, which protects the right to a fair and public hearing.[51] This finding was widely expected, as the applicants had exhausted domestic remedies without managing to have their case heard on the merits. In delivering its findings

44. *Verein KlimaSeniorinnen* (n 31) [548].
45. Ibid [550].
46. Ibid [546].
47. Ibid [573].
48. Ibid [573].
49. Ibid [523].
50. Ibid [502].
51. Ibid [638].

on this point, the Court explicitly referenced the Aarhus Convention,[52] which includes provisions concerning access to justice in environmental matters.[53] The Court emphasised the role of domestic courts in the enforcement of state obligations concerning climate change, recounting the jurisprudence initiated with the *Urgenda* judgments and the importance of access to justice in challenging State authorities' lack of compliance with national climate change law.[54]

Verein KlimaSeniorinnen marks an important paradigm shift in climate change litigation, with an international court holding a State accountable for its failure to take adequate measures to reduce emissions for the first time. It highlights the pivotal role of international law in this connection, setting the contours of States' climate change-related obligations under human rights treaties. Given the extent to which the Court has outlined its approach to deciding this case, it can be anticipated that the pending cases before the ECtHR[55] will be decided based on the criteria established in *Verein KlimaSeniorinnen*.

The importance of this judgment, however, extends well beyond the ECtHR. Similar to the Dutch courts, the ECtHR interpreted the State's obligations under the ECHR in conjunction with those under international climate treaties. This understanding of the interplay of the obligations of States under discrete international regimes is not novel,[56] but has struggled to find positive affirmation in the case law of international human rights bodies.[57] As an international law interpretation technique, systemic integration provides a tool to engender coherence by postulating that, when creating new obligations, States are assumed not to derogate from obligations in international law sources that are both 'relevant' and 'applicable' between the parties, unless they explicitly say otherwise.[58] For several years now, international institutions have facilitated systemic integration, by encouraging States to interpret and implement their obligations under climate treaties in a way that is mutually supportive, rather than conflicting with, other international law obligations,[59] including

52. Ibid [602].
53. United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447, art 9.
54. *Verein KlimaSeniorinnen* (n 31) [629] and [635].
55. *Müllner* (n 38); *The Norwegian Grandparents' Climate Campaign* (n 38); *Greenpeace Nordic and Others v Norway* (n 38); *Uricchio* (n 38); *De Conto* (n 38); *Soubeste* (n 38); *Engels* (n 38).
56. See eg Stephen Humphreys, 'Conceiving Justice: Articulating Common Causes in Distinct Regimes' in Humphreys (n 26); and Annalisa Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages' in Duyck et al (n 26).
57. See the commentary in Savaresi and Luporini (n 3).
58. Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), art 31(3)(c); ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (13 April 2006) UN Doc A/CN.4/L.682, 38. See Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention' (2005) 54 International and Comparative Law Quarterly 279, 318; Bradnee Chambers, *Interlinkages and the Effectiveness of Multilateral Environmental Agreements* (United Nations UP, New York 2008) 248.
59. See eg Margaret Young, 'Climate Change and Regime Interaction' (2011) 5 Carbon and Climate Law Review 147; Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar, Oxford 2014); Jeffrey

human rights ones.[60] Although the ECtHR did not explicitly reference Article 31(3)(c) of the Vienna Convention of the Law of Treaties,[61] its interpretation of the law in *Verein KlimaSeniorinnen* clearly aligns with that provision.

3.2 Advisory proceedings

As noted above, after much speculation on the desirability and feasibility of instigating advisory proceedings to clarify States' international law obligations concerning climate change,[62] three campaigns were initiated before three separate international courts.[63]

The first was initiated in 2022 and involved the International Tribunal on the Law of the Sea (ITLOS). While the 1982 UN Convention on the Law of the Sea (UNCLOS)[64] does not explicitly mention climate change, scholars have long argued that greenhouse gases could be regarded as pollutants, falling within the scope of Parties' obligations to regulate and control the risk of marine pollution.[65] The request for an advisory opinion was submitted by the Commission of Small Island States on Climate Change and International Law.[66] The questions before the ITLOS concerned the obligations of

Dunoff, 'A New Approach to Regime Interaction' in Margaret A Young (ed), *Regime Interaction in International Law: Facing Fragmentation* (CUP, Cambridge 2012) 157.

60. Savaresi (n 56); Annalisa Savaresi, 'UN Human Rights Bodies and the UN Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change: All Hands on Deck' (2023) 4 Yearbook of International Disaster Law Online 396, 398.

61. VCLT (n 58) art 31(3)(c); ILC (n 58) 38.

62. See eg Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections' (2017) 49 Arizona State Law Journal 689; Boyle (n 23); Annalisa Savaresi, Harro van Asselt and Kati Kulovesi, 'Beyond COP26: Time for an Advisory Opinion on Climate Change?' (EJIL: Talk!, 17 December 2021) <www.ejiltalk.org/beyond-cop26-time-for-an-advisory-opinion-on-climate-change/> accessed 16 July 2024; Philippa Webb, 'EJIL: The Podcast! Episode 18 – "Be Careful What You Ask For"' (EJIL: Talk!, 28 February 2023) <www.ejiltalk.org/ejilthe-podcast-episode-18-be-careful-what-you-ask-for/> accessed 16 July 2024; Philippe Sands, 'Opinion: A Momentous Climate Case Could Force Countries to Do More' (Financial Times, 1 September 2023).

63. See the commentary in Savaresi (n 25); Irini Papanicolopulu, 'The Climate Change Advisory Opinion Request at the ITLOS' (Questions of International Law Zoom In, 30 November 2023) <https://www.qil-qdi.org/the-climate-change-advisory-opinion-request-at-the-itlos/> accessed 16 July 2024; Margaretha Wewerinke-Singh, Ayan Garg and Jacques Hartmann. 'The Advisory Proceedings on Climate Change before the International Court of Justice' (Questions of International Law Zoom In, 30 November 2023) <https://www.qil-qdi.org/the-advisory-proceedings-on-climate-change-before-the-international-court-of-justice/> accessed 16 July 2024; Monica Feria-Tinta, 'An Advisory Opinion on Climate Emergency and Human Rights before the Inter-American Court of Human Rights' (Questions of International Law Zoom In, 30 November 2023) <https://www.qil-qdi.org/an-advisory-opinion-on-climate-emergency-and-human-rights-before-the-inter-american-court-of-human-rights/> accessed 16 July 2024.

64. United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS).

65. Ibid arts 192–194. See Boyle (n 23) 464.

66. Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (adopted and entered into force 31 October 2021) 3447 UNTS. See Brian McGarry and Francis Chávez Aco, 'The Competence of the International Tribunal for the Law of the Sea in Its New Advisory Proceedings on Climate Change' (EJIL: Talk!,

State Parties to the UNCLOS to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects of climate change and to protect and preserve the marine environment in relation to the impacts of climate change.[67] The ITLOS received written statements from various governmental and non-governmental organisations – including the Centre for International Environmental Law (CIEL), Greenpeace, the IUCN and the World Wide Fund for Nature[68] – and conducted a series of hearings in September 2023.[69] It delivered its opinion on 21 May 2024.[70] An extensive review of this milestone development exceeds the scope of this article. For present purposes, it is important to note that the ITLOS specifically underscored the possibility and necessity of interpreting States' international obligations under UNCLOS and the climate treaties in a mutually supportive fashion.[71] Consequently, the tribunal went on to articulate in quite some detail State's obligations to tackle anthropogenic emissions as a source of pollution under Article 194 of UNCLOS[72] and to protect and preserve the marine environment in relation to climate change impacts and ocean acidification, respectively.[73] These findings are of great significance and are poised to influence the thinking in other pending advisory proceedings. They may furthermore be used as a basis to instigate contentious proceedings before the ITLOS.[74]

The second set of proceedings is the result of a request for an advisory opinion from the International Court of Justice (ICJ) by the UN General Assembly in 2023.[75] The advisory proceedings concern the obligations of States to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for both present and future generations. They also address the legal consequences for States that, through their acts and omissions, have caused significant

16 December 2022) <https://www.ejiltalk.org/the-competence-of-the-international-tribunal-for-the-law-of-the-sea-in-its-new-advisory-proceedings-on-climate-change/> accessed 16 July 2024.

67. COSIS Request (n 25).

68. See the submissions available on ITLOS's webpage: ITLOS, 'Cases' (ITLOS) <www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/> accessed 16 July 2024.

69. The hearings are recorded and accessible on the ITLOS's webpage: ITLOS, 'Cases: Webcast Archives: Case No. 31' (ITLOS) <https://www.itlos.org/en/main/cases/webcast/webcast-archives-case-no-31/> accessed 16 July 2024.

70. Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion, ITLOS Case No 31, 21 May 2024, available at: ITLOS, 'Cases' (ITLOS): <https://www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/> accessed 16 July 2024.

71. Ibid [128]–[137]. See the commentary in Jacqueline Peel, 'Unlocking UNCLOS. How the ITLOS Advisory Opinion Delivers a Holistic Vision of Climate-Relevant International Law' (Verfassungsblog, 24 May 2024) <https://verfassungsblog.de/unlocking-unclos/> accessed 16 July 2024.

72. Ibid [193]–[367].

73. Ibid [384]–[440].

74. Margaretha Wewerinke-Singh and Jorge E Viñuales, 'More Than a Sink: The ITLOS Advisory Opinion on Climate Change and State Responsibility' (Verfassungsblog, 7 June 2024) <https://verfassungsblog.de/more-than-a-sink/> accessed 16 July 2024.

75. UNGA Request (n 25).

harm to the climate system and other parts of the environment. This includes the impacts on States – particularly small island developing States – as well as peoples and individuals affected by the adverse effects of climate change. These questions clearly concern the interpretation of States' obligations under international environmental and human rights law. The ICJ may, therefore, be influenced by the views expressed by the ITLOS and by the ECtHR's, even though it is rare for the ICJ to reference the case law of regional human rights courts. Currently, the ICJ is in the process of receiving written statements on the questions before it and has granted authorisation to participate in the proceedings to the UN and its Member States and to selected international organisations.[76]

In the third and, at least for now, last advisory proceedings, Chile and Colombia have sought an Advisory Opinion from the Inter-American Court of Human Rights, concerning States' obligations on climate change stemming from international human rights law.[77] The intricate array of questions presented to the Court revolves around State obligations derived from the duties of prevention and protection of human rights in the climate emergency. It encompasses States' 'shared and differentiated' obligations to preserve the right to life and survival, the rights of children and new generations, and those of environmental defenders. The Court has received hundreds of submissions, largely by civil society organisations and held hearings in May 2025. The close resonance of some of the questions before the Inter-American Court of Human Rights with those adjudicated in *Verein KlimaSeniorinnen* makes it likely that the Court will take note of the findings in the latter judgment. This cross-fertilisation practice is indeed common in the jurisprudence of regional human rights courts.[78]

4 CONCLUSIONS

This article has shown that international law has played a pivotal role in the burgeoning practice of climate change litigation. International obligations on climate change and human rights law are being invoked with increasing frequency, both before national and international courts. Admittedly, only a fraction of this litigation has reached final adjudication. Despite the uncertainty surrounding the outcomes of pending litigation, precedents like *Urgenda* and *Daniel Billy* have sanctioned the links between different sources of States' international law obligations concerning climate change in the practice of enforcement of national law. More recent developments, such as *Verein KlimaSeniorinnen* and the ITLOS advisory opinion, are likely to continue to advance cross-fertilisation and States' accountability for compliance with their obligations to tackle climate change.

76. This includes the IUCN; the European Union; the African Union; the Organization of the Petroleum Exporting Countries; the Organisation of African, Caribbean, and Pacific States; and the Melanesian Spearhead Group and the Forum Fisheries Agency. For a full list, see ICJ, 'Obligations of States in respect of Climate Change: Latest Developments' <https://www.icj-cij.org/case/187> accessed 16 July 2024.
77. Colombia and Chile Request (n 25).
78. See eg Francis G Jacobs, 'Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice' (2003) 38 Texas International Law Journal 547; Eduardo Ferrer Mac-Gregor, 'What Do We Mean When We Talk about Judicial Dialogue? Reflections of a Judge of the Inter-American Court of Human Rights' (2017) 30 Harvard Human Rights Journal 89.

While litigation is clearly not the solution to the climate crisis, it can be instrumental in generating momentum, driving policy and legal reforms. The 'invisible college of international lawyers' is prominently engaged in this endeavour, and this state of affairs is likely to continue in the coming years. Without prejudging the findings of the ICJ in its much-awaited advisory opinion, it seems likely that the growing body of practice in this area will eventually lead to an inter-state dispute concerning harms associated with the impacts of climate change. International law will play a crucial role in such proceedings, and the practice reviewed in this article will provide important terms of reference in this connection. The future of international law in climate change litigation has, therefore, never looked brighter and appears poised for significant expansion.