RESEARCH PROPOSAL – DOCTORAL THESIS

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Human rights-based climate litigation and international law

Doctoral Candidate: Rebecca McMenamin

Matriculation number: 12205533

Rebecca.mcmenamin@univie.ac.at

Supervised by Prof Dr Michael Waibel

Dept of International, Comparative and European Law, University of Vienna

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SYNOPSIS

1 Background

The historic Paris Agreement at the 21st UN Framework Convention on Climate Change ("UNFCCC") Conference of Parties secured global political commitment to hold the increase in the global average temperature to well below 2°C above pre-industrial levels.[1] But the Paris Agreement does not contain substantive obligations necessary to achieve that temperature limit nor does it establish binding obligations to implement states' nationally determined contributions ("NDCs") to cut greenhouse gas emissions.[2] The world, already at 1.1 degrees of warming,[3] is on track for a 2.2-3.5 degree world by 2100 without the strengthening of emission reduction policies.[4] But states are failing to implement their NDCs.[5] In the context of an international climate treaty regime that lacks teeth, litigants have turned to domestic courts to prompt sufficient climate action to achieve those temperature goals and secure emission reductions and, among other focuses, human rights, generating a body of climate litigation.

2 Practice in recent years

Climate litigation is proliferating: there are now over 2150 climate change cases around the world,[6] one quarter of which have been filed since 2020.[7] In 2022, for the first time, the Intergovernmental Panel on Climate Change ("IPCC") recognised that climate litigation has a role to play in accelerating adaptation action.[8] Strategic litigation is becoming increasingly complex as the body of cases grows and dicta from cases one country is tested in others.

Since the Paris Agreement, there has been a so-called "rights turn" in the scholarship and practice

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1 UNFCCC, Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016) UN doc FCCC/CP/2015/L.9/Rev.1, art 2(1)(a). See Daniel Bodansky, Jutta Brunnée, Lavanya Rajamani, *International Climate Change Law* (OUP 2017) ch 5; and Benoit Mayer, *The International Law on Climate Change* (CUP 2021), ch 3.

2 Art 4(9) of the Paris Agreement requires states to communicate a nationally determined contribution every five years. See Daniel Klein et al, *The Paris Climate Agreement on Climate Change: Analysis and Commentary* (OUP 2017), especially ch 5; and Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25(2) RECIEL 142.

3 And projected likely to reach 1.5 degrees, at least temporarily, by 2027, and with increasing frequency thereafter: World Meteorological Organisation, 'Global Temperatures Set To Reach New Records in Next Five Years' (press release, 17 May 2023).

4 IPCC, 'Summary for Policy Makers' in PR Shukla et al (eds) *Climate Change 2022: Mitigation of Climate Change – Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change* (CUP 2022), [C1].

5 Ibid, [B6]; and see UN Environment Programme *Emissions Gap Report 2022: The Closing Window – Climate Crisis Calls for Rapid Transformation of Societies* (October 2022).

6 Using figures from LSE's Grantham Research Institute database (www.climate-laws.org).

7 Joanna Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot' (Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy; LSE May 2022).

8 HO Pörtner et al, IPCC Report of the Working Group II, *Climate Change 2022: Impacts, Adaptation and Vulnerability* (IPCC AR6, CUP 2022), [TS.D.10.7].

of climate litigation.[9] There are now around 120 climate cases against states pleading human rights causes of actions,[10] including cases that rely on and/or invoke human rights treaties.[11] I term this climate-rights litigation. The majority of climate-rights cases can be seen as seeking to provide the post-Paris Agreement regime with procedural and substantive mechanisms for transforming NDCs into domestically binding obligations.[12] Human rights law is a helpful field of law to rely on because emissions themselves are not unlawful;[13] but when emissions (and consequence climate change) are so great that they violate the enjoyment of human rights, then states' acts and omissions to regulate emissions will be unlawful.

3 State of the research

My research (questions detailed below)[14] examines and analyses how courts have applied and interpreted human rights law in climate litigation and what this means for international law. Climate-rights cases fall at the intersections of international environmental and climate law and human rights law. This section of my Proposal details the state of the research at or on these intersections and identifies research gaps.

A Human rights law

The last fifteen years have seen the establishment of a link between human rights law and the effects of climate change, in scholarship but more importantly, by international legal actors. In 2012, the UN established a Special Rapporteur on human rights and the environment to promote, clarify, and report on the realization of human rights obligations relating to the environment.[15] The Special Rapporteur produced 14 reports, and summarised his findings in a mapping report. Those findings were that, under existing international human rights law, states owed procedural obligations to assess environmental impacts on human rights and make environmental information public. Further, states owed substantive obligations to adopt legal and institutional frameworks that protect against environmental harm that interferes with the enjoyment of human rights, including harm caused by private actors, and non-discrimination obligations relating to vulnerable groups, including children and indigenous peoples.[16] Both the Human Rights Council and the

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9 Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 TEL 37.

10 Grantham Institute database; the Sabin Centre for Climate Change Law's database; and Table 1.1 of César Rodríguez-Garavito (ed), *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action* (CUP 2023), 40.

11 Benoit Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115 AJIL 409, 410.

12 Rodríguez-Garavito (n 10), 16.

13 As pointed out by Jacqueline Peel, 'Climate Change' in André Nollkaemper and Ilias Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (CUP 2017), ch 38, 1031.

14 See page 14.

15 Human Rights Council, 'Human Rights and the Environment' UN doc A/HRC/RES/19/10 (2012); Human Rights Council, 'Human Rights and the Environment' UN doc A/HRC/RES/28/11 (2015)

16 John Knox, 'Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment: Mapping report' UN doc A/HRC/25/53 (2013). For the

General Assembly have also recognised the right to live in a clean, healthy and sustainable environment.[17] Another of the most notable works is the 2019 Joint Statement of five UN human rights treaty bodies on human rights and climate change, which is clear that states have both climate mitigation and adaptation obligations under human rights treaties, as well as duties to co-operate in good faith to establish global responses to address climate-related loss and damage, with "particular attention to safeguarding the rights of those who are at particular risk of climate harm".[18] The Paris Agreement is the first climate treaty to refer to human rights.[19]

Human rights litigation has been used because of its "gap-filling" function; filing cases does not rely on the existence of climate law frameworks to hold public and private actors accountable. Human rights litigation can thus be used as a bottom-up mechanism to bridge accountability and enforcement gaps to provide "domestic traction for the international legal and scientific consensus on climate action".[20] The other key benefit is that human rights law operates at the international level, which potentially creates avenues for trans-judicial dialogue between countries or even between domestic and regional or international levels. It is a global framework, with claims to be universal and inalienable;[21] and it provides legal infrastructure of regional courts and international treaty-monitoring bodies.

However, the effectiveness of human rights law (and litigation) may be somewhat limited, largely due to inherent limitations of human rights law. One of these areas is extraterritorial application. There is a lot of scholarship on extraterritorial application of human rights law.[22] There is less scholarship exactly on extraterritorial application of human rights to environmental damage,[23] with

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other fourteen reports, see OHCHR, 'Mapping Report' <www.ohchr.org/en/special-procedures/sr-environment> (accessed 10 May 2023).

17 In particular, see Human Rights Council, 'The human right to a clean, healthy and sustainable environment' UN doc A/HRC/RES/48/13 (2021); and UN General Assembly, 'The human right to a clean, healthy and sustainable environment' UN doc A/RES/76/300 (2022).

18 Committee on the Elimination of Discrimination against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities *Joint Statement on Human Rights and Climate Change* (OHCHR 2019) <www.ohchr.org> [1].

19 Paris Agreement (n 1), preamble.

20 Rodriguez-Garavito (n 10), 15; and Annalisa Savaresi and Joana Setzer, 'Rights-based litigation in the climate emergency: mapping the landscape and new knowledge frontiers' (2022) 13(1) Journal of Human Rights and the Environment 7, 13.

21 See Shalini Iyengar, 'Human Rights and Climate Wrongs: Mapping the Landscape of Rights-Based Climate Litigation' (2023) RECIEL 1, 2; and Daniel J Whelan, *Indivisible Human Rights: A History* (University of Pennslyvania Press 2010).

22 A leading text is Malcolm Langford et al (eds), *Global Justice, State Duties* (1st ed, CUP 2012). See also Philipp Janig and Christof Heyns, 'Extraterritorial Application of Human Rights' in *Edward Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022).

23 See Jorge E Viñuales, 'A Human Rights Approach to Extraterritorial Environmental Protection? An Assessment' in Nehal Bhuta (ed), *The Frontiers of Human Rights* (OUP 2016); Samantha Besson, 'Due Diligence and Extraterritorial Human Right Obligations - Mind the Gap!' (2020) 9 ESIL Reflections (online ed); Ginevra Le Moli, 'The Human Rights Committee, Environmental Protection and the Right to Life' (2020) 69 ICLQ 735; Vincent Bellinkx et al, 'Addressing Climate Change through International Human Rights Law: From (Extra)Territoriality to Common Concern of Humankind' (2022) 11 TEL 69.

recent research focused on the impact of the handful of cases that have ruled on extraterritoriality in the environmental or climate change context.[24] Another of these areas is the considerable debate around whether human rights law can properly address climate mitigation.[25] Benoit Mayer's monograph published in 2022 adds to this body of climate-rights literature a detailed focus on mitigation, arguing that human rights treaties may sometimes imply obligations to mitigate climate change but only if and insofar as the state's mitigation action can effectively advance the protection of the rights within the scope of the treaty.[26] Yet another area is the limitation of human rights norms in dealing with the complex causality and temporality of climate change.[27]

Finally, a recent trend in legal practice is the attempt to draw a link between human rights law and climate change *law*; that is, litigants and scholars are advancing the argument that human rights law should be read in light of the Paris Agreement or other principles of international environmental law.[28]

B International environmental law

Some core environmental texts now consider human rights law. To detail just one example,[29] the *Oxford Handbook on International Environmental Law* (2nd ed, 2021)[30] has a chapter on human rights law. The chapter author, John Knox (former UN Special Rapporteur, mentioned above), details three major developments at this intersection of law. First, that efforts to achieve recognition of a human right to a healthy environment, while ineffective at the UN, have achieved widespread success at the national and regional levels. Second, that some multilateral

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[24] *Sacchi et al v Argentina et al* UN doc CRC/C/88/D/104/2019 (UN Committee on the Rights of the Child 2021); and *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) in relation to articles 1(1) and 2 of the American Convention on Human Rights)* (Advisory Opinion) Case No OC-23/17 (hereafter "IACtHR advisory opinion (2017)"). See for example: '*Sacchi v Argentina*: Committee on the Rights of the Child Extends Jurisdiction over Transboundary Harms; Enshrines New Test' (2022) 135 Harv LR 1981; Maria Antonia Tigre and Victoria Lichet, 'The CRC Decision in Sacchi v Argentina' (2021) 25 ASIL (online ed); and Melanie Murcott, Maria Antonia Tigre and Nesa Zimmermann, 'Climate Change Litigation: What the ECtHR Could Learn from Courts in the Global South' [2022] Völkerrechtsblog <www.voelkerrechtsblog.org> accessed 16 March 2023.

[25] See for example Alexander Zahar, 'Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions' (2022) 23 Human Rights Rev 385; Fanny Thornton, 'The Absurdity of Relying on Human Rights Law to Go After Emitters' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (CUP 2021); Mayer (n 26); *cf* Corina Heri, 'Legal Imagination, and the Turn to Rights in Climate Litigation: A Rejoinder to Zahar' (*EJIL: Talk!*, 6 October 2022) <www.ejiltalk.org/>.

[26] Benoit Mayer, *International Law Obligations on Climate Change Mitigation* (OUP 2022).

[27] Rodriguez-Garavito (n 10), 15.

[28] As set out by UN Human Rights Committee *General Comment No 36* UN doc CCPR/C/GC/36 (2019), [62].

[29] See also Cinnamon Carlarne, Kevin Gray and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law* (2016), ch 19-21 (on climate change litigation, with ch 21 analysing the broadening of a right to the environment); Bodansky, Brunnée and Rajamani (n 1) especially ch 9 (addressing the intersections between climate law and human rights law); and Benoit Mayer, *The International Law on Climate Change* (n 1) (a doctrinal analysis of the international law on climate change mitigation that seeks to determine the content of the law as a court would interpret it).

[30] Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law* (2nd ed, OUP 2021).

environmental instruments have incorporated human rights norms, especially rights of access to information, public participation, and remedy. Third, how human rights tribunals and other monitoring bodies have 'greened' human rights law by applying a wide range of human rights to environmental harm.[31] While most of the recent international environmental law texts address human rights law, there is a need for an assessment of the implications of regime interaction and consideration of the adjudication of these environmental challenges.

C Intersections

Few texts directly address the intersection of these areas of international law in depth. One of the most thorough is Margarethe Wewerinke-Singh's 2019 monograph, *State Responsibility, Climate Change and Human Rights under International Law*, which draws together human rights law, climate law and state responsibility.[32] She analyses the ways in which the sources of international law interact and overlap and argues that existing norms of international law from climate law, human rights, and state responsibility, are sufficient to establish state responsibility for acts and omissions that lead to climate change resulting in violations of human rights. This was a major contribution, particularly in its engagement and revival of ideas of state responsibility in this context. A limitation of the timing of this monograph is that there were few international cases on which Wewerinke-Singh could draw, and it was not the focus of her work to analyse the contribution of domestic courts; therefore adjudication was addressed only lightly.

While my proposed PhD does not ask questions of state responsibility for climate change, it is useful to note some of the foundational work on this topic as it is relevant. The first comprehensive assessment of states' legal duties to prevent climate change and the possibility of the breach of those duties giving rise to state responsibility was Roda Verheyen's 2005 monograph, *Climate Change Damage and International Law: Prevention Duties and State Responsbility*,[33] although she did not focus on human rights law. Leading scholars who have considered state responsibility specifically in the climate change context include Jacqueline Peel,[34] and Nataša Nedeski and André Nollkaemper.[35] The latter analyse the basic framework for how collective causation may be treated in litigation, as well as shared responsibility for reparation. Benoit Mayer has argued that reparation measures should be limited to partial compensation and symbolic measures of satisfaction such that would incentivise mitigation of climate change.[36] Where there remains much

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[31] John Knox, 'Human Rights' in Rajamani and Peel (n 30), ch 45.

[32] Margarethe Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019).

[33] Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsbility* (Martinus Nijhoff 2005).

[34] Peel (n 13).

[35] Nataša Nedeski and André Nollkaemper, 'A Guide to Tackling the Collective Causation Problem in International Climate Change Litigation' (*EJIL: Talk!*, 15 December 2022).

[36] Benoit Mayer, 'Climate Change Reparations and the Law and Practice of State Responsibility' (2017) 7 Asian JIL 185.

room to be explored is how these theories play out in practice in the context of climate-rights litigation.

D Climate litigation

In very recent years, a number of texts have been published on climate litigation more generally.[37] Of the works most similar to the scope of my research, the most prominent is the edited text *Litigating the Climate Emergency: How Human Rights, Courts, and Legal Mobilization Can Bolster Climate Action*.[38] It addresses the rights turn in climate litigation, legal strategies (including for example climate litigation through an equality lens), as well as lessons from particular cases (such as *Friends of the Irish Environment*).[39] It has a broader focus than my project, and includes litigation against major fossil fuel companies. However, it largely takes a high-level view, including practical considerations beyond the law but still in the court room (such as attribution science and narrative-based evidence as a litigation strategy). It fills a research gap by undertaking a systemic analysis of the 'rights turn' and, at a practical level, its implications for climate action. My project differs by taking an international law lens, and a doctrinal analysis view of the underlying law itself (as opposed to a pragmatic and strategy-based view).

The other closest text is *Climate in Court: Defining State Obligations On Global Warming Through Domestic Climate Litigation*,[40] which focuses on 'unweaving the legal tapestry' of domestic climate change litigation, under the framework of international climate law, principles of international environmental law, and human rights law. The research question is, in de Vilchez Moragues' words, whether there is a clear legal obligation for states to reduce their GHG emissions to a level that may avoid crossing tipping points that would bring calamitous consequences upon humankind. He answers this by focussing on the domestic sphere, with particular focus on the separation of powers and the standing of plaintiffs. My project focuses less on institutional structures and matters of procedure, and more on matters of substantive law – the scope of human rights obligations, extraterritoriality, and causation.

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[37] Other than the ones discussed in text, see also: Wolfgang Kahl and Marc-Philippe Weller (eds), *Climate Change Litigation: A Handbook* (Bloomsbury 2021) (which focuses on climate protection from different legal perspectives including international law, European law and national public and civil law; and in particular addresses the issue of "climate protection by courts"); Francesco Sindico and Makane Moïse Mbengue, *Comparative Climate Change Litigation: Beyond the Usual Suspects* (which takes a state-by-state approach to all climate litigation regardless of the cause of action or area of law and includes jurisdictions often not covered in depth – if at all – in the scholarship, sometimes because there is currently little litigation in those states at this stage, which the authors address by taking a scenario-based approach); William CG Burns and Hari M Osofsky (eds), *Adjudicating Climate Change: State, National, and International Approaches* (CUP 2009) (which includes tort, public trust and insurance litigation, as well as indigenous rights and the use of litigation for international environmental law-making).

[38] Rodríguez-Garavito (n 10).

[39] *Friends of the Irish Environment v Ireland* [2020] IESC 49 (Supreme Court Ireland).

[40] Pau de Vilchez Moragues, *Climate in Court: Defining State Obligations On Global Warming Through Domestic Climate Litigation* (Edward Elgar 2022).

There is also *Climate Change Litigation: Global Perspectives*,[41] which presents a comprehensive picture of how climate change litigation is evolving in a global sense, highlighting opportunities and constraints, with perspectives from both the Global South and Global North. It has chapters on different regions and countries to support a comparative study, for example, the United States, Australia, India and Pakistan, France, Brazil, Russia, South Africa and China. The text, published in 2021, then considers cases filed in regional and international fora, particularly prospects for litigation at the ICJ and ITLOS (and we now know that advisory opinions have been sought in these fora). It is an incredibly helpful text because of the breadth of the analysis. But, because the aim is to construct a truly global view, the view is necessarily somewhat fragmented. By contrast, my proposal takes an integrated approach (rather than having a separate chapter for each national jurisdiction or international court of tribunal, as *Climate Change Litigation* does). Critically, *Climate Change Litigation* does not start from the legal point of view of human rights law and does not focus on human rights law, except to the extent the authors assess human rights cases as part of the bigger, global picture of climate litigation.

A further part of the picture is international adjudication on climate change (either its effects, causes, or climate law itself). The scholarship has focused primarily on the prospect of the International Court of Justice ("ICJ") or other international adjudicatory bodies such as the Inter-American Court of Human Rights ("IACtHR") squarely considering climate change,[42] and the quantity of this research has increased substantially in the last few years since Vanuatu proposed to ask the UN General Assembly to request an advisory opinion from the ICJ. (A resolution doing so was adopted in late March 2023).[43]

None of the above-mentioned climate litigation texts clearly set out the big-picture linkages between these areas of law in detail, or looks at the *international* law aspects of climate-rights litigation as a body of law. In particular, there has been very little focus on the position of domestic climate-rights judgments in international law and of the linkages between domestic climate-rights

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[41] Ivano Alogna and Christine Bakker et al (eds), *Climate Change Litigation: Global Perspectives* (Brill Nijhoff 2021).

[42] Including: Jacob David Werksman, 'Could a Small Island Successfully Sue a Big Emitter?' in Michael Gerrard and Gregory Wannier, *Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate* (CUP 2013); Philippe Sands KC, 'Climate Change and the Rule of Law: Adjudicating the Future of International Law' (2016) 28 Journal Environmental Law 19; Daniel Bodansky, 'The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections Symposium: The Forefront of International Law' (2017) 49 Arizona State LJ 689; Annalisa Savaresi, Kati Kulovesi and Harro van Asselt, 'Beyond COP26: Time for an Advisory Opinion on Climate Change?' (*EJIL: Talk!*, 17 December 2021) <www.ejiltalk.org>; Benoit Mayer, 'International Advisory Proceedings on Climate Change' (2023) 44 Mich JIL 41; Malgosia Fitzmaurice and Agnes Viktoria Rydberg, 'Using International Law to Address the Effects of Climate Change: A Matter for the International Court of Justice?' (2023) 4 Yearbook of International Disaster Law Online 281; BIICL seminar featuring Dr Margaretha Wewerinke-Singh, Monica Feria-Tinta, and Nicola Peart, 'Promoting Climate Justice Through International Law: Climate Litigation & Climate Advisory Opinions' (author attended 1 Feb 2023); and Juan Auz and Thalia Viveros-Uehara 'Another Advisory Opinion on the Climate Emergency? The Added Value of the Inter-American Court of Human Rights' (*EJIL: Talk!*, 2 March 2023) <www.ejiltalk.org/>.

[43] *Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change*, UN General Assembly, UN doc A/77/L.58 (2023).

litigation and *international law*, and domestic climate-rights litigation and *international climate-rights litigation*. This is despite well-established literature on domestic courts and international law in general,[44] and a relatively substantial body literature on the role of courts and judges in determining the climate crisis (from both academia and the judiciary).[45] There is also remains a gap for deep and systematic research into the specific human rights that are invoked, interpreted and applied by courts.[46]

My proposed PhD will contribute to filling these gaps with the research questions set out below. This is an important contribution because international law can be and sometimes is determined in domestic courts, and this has an impact on the systemic nature of the answer international law provides to one of the greatest challenges of our times.

4 Selection of cases

A Defining climate-rights cases

Climate-rights cases are cases brought under human rights causes of action about the effects of or actions taken relation to climate change.

The main categories of cases brought under human rights causes of action are aimed towards domestic accountability for climate targets made by *governments*. The Grantham Institute, which runs a climate litigation database, refers to these cases as 'framework' cases. Most of the framework cases are in the Global North (but few are in the United States).[47] *Leghari v Pakistan* was such a case and was the first climate-rights case won by a claimant. The High Court of Lahore held that the Pakistani government had breached Mr Leghari's constitutional rights to life and

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[44] Notably, André Nollkaemper, August Reinisch, Janik Ralph and Florentina Simlinger, *International Law in Domestic Courts: A Casebook* (OUP 2018); see also David L Sloss and Michael P Van Alstine, 'International Law in Domestic Courts' in *Research Handbook on the Politics of International Law* (Edward Eglar 2017). See also Christopher John Greenwood, 'The Contribution of National Courts to the Development of International Law' (Annual Grotius Lecture, London, 2014) <https://www.biicl.org/newsitems/6044/summary-and-video-of-biicl-annual-grotius-lecture-2014> accessed 13 January 2023.

[45] Notably, Christina Voigt and Zen Makuch, *Courts and the Environment* (Edward Elgar Publishing 2018). See also, among others, Joana Setzer and Lisa C Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 WIREs Climate Change 580. For examples from the judiciary, see Judge Robert Spanó, then-president of the ECtHR, who said at an October 2020 conference on human rights for the planet: "No one can legitimately call into question that we are facing a dire emergency that requires concerted action by all of humanity. For its part, the European Court of Human Rights will play its role within the boundaries of its competences as a court of law forever mindful that Convention guarantees must be effective and real, not illusory": Robert Spanó, 'Should the European Court of Human Rights become Europe's environmental and climate change court?' (European Court of Human Rights, 2020). See also Brian Preston, 'The Role of Courts in Relation to Adaptation to Climate Change' (Australia National University College of Law, 2008); Susan Glazebrook 'The Role of Judges in Climate Governance and Discourse' (Asia Pacific Judicial Conference on Climate Change: Adjudication in the Time of COVID-19, 2020).

[46] Savaresi and Setzer (n 20), 20.

[47] Setzer and Higham, 'Global Trends in Climate Change Litigation: 2022 Snapshot' (n 7), 3.

human dignity by failing to implement its climate change policy.[48] Of the eight framework cases that have been decided by a state's highest court, six have outcomes favourable for climate action. Most famous (and also in 2015, the same year as *Leghari*), the Urgenda Foundation and 900 Dutch citizens successfully argued that the government of the Netherlands had breached a legal duty of care (in tort law) owed to Dutch citizens by having insufficient emission reduction targets.[49] Dutch appellate courts upheld that ruling, applying human rights law and establishing – for the first time in the world – that states' climate inaction violates internationally recognised human rights.[50]

Similar 'framework' cases also been filed and/or determined in Belgium,[51] Brazil,[52] Canada,[53] France,[54] Germany,[55] India,[56] Ireland,[57] Nepal,[58] Norway,[59] Spain,[60] Sweden,[61] Switzerland,[62] the United Kingdom[63] and the European Court of Human Rights ("ECtHR").[64] Other climate-rights cases focussing on young people or indigenous people have been filed for example in Australia,[65] Brazil,[66] Colombia,[67] Germany,[68] Indonesia,[69] New Zealand,[70] Pakistan,[71] the Philippines,[72] South Korea[73] and the ECtHR.[74]

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48 *Leghari v Pakistan* 92015 WP No 25501/201.

49 *Urgenda Foundation v the Netherlands* Case no C/09/456689 (District Court The Hague 2015).

50 *Urgenda* Case no 200.178.245/01 (Court of Appeal Netherlands 2018); Case no 19/00135 (Supreme Court Netherlands 2019), referring to arts 2 and 8 of the European Convention of Human Rights.

51 *VZW Klimaatzaak v Belgium* Case no 2015/4585/A (to be heard in the Belgian Court of Appeal in September-October 2023).

52 *Partido Socialista Brasileiro (PSB) and others v União Federal* Case no ADPF 708 (Supreme Court Brazil 2020).

53 *Lho'imggin v Canada* [2020] FC 1059 (Federal Court of Canada).

54 *Commune de Grande-Synthe* Case no 427301 (Council of State France 2021); and *In re Climate Resilience Bill* Decision no 2021-825 (Constitutional Council France).

55 *Neubauer v Germany* Case no 1 BvR 2656/18 (and others) (Constitutional Court Germany 24 March 2021).

56 *Pandey v India* Case no 187/2017 (National Green Tribunal India 2019).

57 *Friends of the Irish Environment v Ireland* [2020] IESC 49 (Supreme Court Ireland).

58 *Shrestha v Nepal* Order no 074-WO-0283 (Supreme Court Nepal 25 December 2018).

59 *People v Arctic Oil* Case no 20-051052SIV-HRET (Supreme Court Norway 22 December 2020).

60 *Greenpeace v Spain (II)* Case no 82/21 (Supreme Court Spain, pending).

61 *Foley and 600 Ors v Sweden* (Nacka District Court Sweden, pending).

62 *Verein KlimaSeniorinnen Schweiz v Bundesrat* Case no A-2992/2017 (Supreme Court Switzerland 20 May 2020).

63 *Planet B Earth v Secretary of State for Business, Energy and Industrial Strategy* [2018] EWHC 1892 (Admin).

64 *Verein KlimaSeniorinnen Schweiz v Switzerland* App no 53600/20 (ECtHR Grand Chamber); *Carême v France* App no 7189/21 (ECtHR Grand Chamber), both heard 29 March 2023. Six other climate-rights cases have been adjourned in the interim, and two others declared inadmissible: Council of Europe/ECtHR, 'Factsheet – Climate Change' (March 2023) <www.echr.coe.int>.

65 *Pabai Pabai v Commonwealth of Australia* Case no VID622/2021 (Federal Court Australia, filed March 2023).

66 *Fires in the Pantanal and the Amazon Forest* Case no ADPF 746 (Federal Supreme Court Brazil, filed 1 January 2020).

67 *Demanda Generaciones Futuras v Colombia* Case no STC4360-2018 (Supreme Court Colombia 5 April 2018).

68 See n 55 above.

69 *Indonesian Youth v Indonesia* (National Human Rights Commission Indonesia, filed 14 July 2022).

70 *Smith v Attorney-General* [2022] NZHC 1693 (High Court New Zealand 2022).

71 *Maria Khan v Pakistan* Case no 8960/2019 (High Court Lahore, pending).

72 *In re Greenpeace South Asia* Case no CHR-NI-2016-0001 (Commission on Human Rights Philippines 2022).

73 *Do-Hyun Kim et al v South Korea* Case no 2020-hun-man-389 (filed 28 September 2020).

74 Such as *Duarte Agostinho v Portugal and 32 Other States* App no 39371/20 (set down for September 2023).

Other cases against governments challenge specific projects and policies that produce greenhouse gas emissions alleging that these emissions are on a scale that is incompatible with states' duties to act against global warming.

Climate-rights cases (both framework cases as well as for specific projects) have also been brought against *companies.* This is an emerging trend;[75] these cases make up around 15 per cent of cases.[76]

Within the scope of climate-rights cases, there are also 'just transition' cases – these claims challenge the way in which climate action is carried out or its impact on the enjoyment of human rights.[77] These fall in the category of 'non-climate-aligned' cases which, along with just transition cases, includes anti-regulatory cases aimed at delaying climate action.[78]

Climate-rights cases also include criminal cases, namely those brought against climate protestors for challenging either policies or projects that contribute to the climate emergency.

B Scope of cases selected for my research

My research is on climate-aligned cases brought against states explicitly referencing human rights and climate change,[79] whatever the forum. The aim is to illuminate and/or bring coherency and consistency to a set of cases that at first glance might appear unrelated. Much of the contentious climate-rights litigation is in domestic courts at this stage, with the notable exception of the three human rights treaty body cases and the handful of cases before the ECtHR. Because of the relatively close relationship between international and domestic human rights law, I have included cases about constitutionally-protected rights, instead of limiting the scope of my research to cases directly applying international or regional treaty human rights law (of which there are few). More often, the cases use international human rights law as an interpretive tool. Because I am taking a foreign relations law lens (wider than a pure public international law lens), the exact relationship between each constitutional right and each international provision for that right does not necessarily need to be tested. Further, the use of domestic cases is important because the enforcement of international human rights law by domestic courts plays a key role in all international and regional human rights treaty systems.[80] As one of the aims of this project is to understand how human rights law is being applied to address the climate change problem and examining climate-rights cases as a discrete category, then I would be missing an important part by excluding constitutional law cases. There are also relevant advisory opinions before the ICJ and IACtHR.

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75 Setzer and Higham (n 7), 2.
76 Rodríguez-Garavito (n 10), 14.
77 Setzer and Higham (n 7), 3.
78 Setzer and Higham (n 7), 7.
79 This is the same approach taken by Rodríguez-Garavito (n 10), 10, who in turn followed Peel and Ofosky (n 9).
80 Rainer Grote, 'Domestic Enforcement of Human Rights' in *Edward Elgar Encyclopedia of Human Rights* (Edward Elgar Publishing 2022).

I have largely adopted the robust methodological approach taken to scoping relevant cases in *Litigation the Climate Emergency*, which focuses on climate mitigation cases. This focus is justified by the fact that since 2015, approximately 94 per cent of climate-rights cases are 'primarily geared toward expanding and speeding up climate mitigation'.[81] In addition, I have included adaptation cases because of the debate about the utility of human rights litigation to address mitigation.[82]

C Feasibility

I do not have major feasibility concerns about the cases within the scope of my research being available. There are a number of existing reliable and up-to-date databases. The Sabin Centre's Climate Change Litigation Databases are the largest global climate change litigation databases compiled to date.[83] The Grantham Institute at the London School of Economics hosts the other major global database, called Climate Change Laws of the World.[84] In the last few years, other institutes and scholars have created climate-rights specific databases: the Climate and Human Rights Litigation Database (University of Zurich),[85] and *Litigating the Climate Emergency*.[86] Relevant is also Translitigate, a European Union-funded multidisciplinary research project to understand how transnational collaboration contributes to environmental (including climate) litigation.[87]

The greater feasibility challenge is that this project involves a moving feast: many of the cases within scope are either pending or on appeal.[88] However, I do not consider this makes my PhD project infeasible. First, while there are over 120 climate-rights cases (and we can expect more to be filed given the growth of this area of litigation), some cases 'fail' for other reasons than those three areas which are the focus of my study, and detailed reasons are often not given in these cases. For example, in *Alec L v McCarthy*, the first climate-rights case to have child plaintiffs, a federal Court of Appeal in the United States dismissed the case for lack of subject matter jurisdiction[89] and determined that the issues did not warrant a published opinion.[90] Another example is cases where there are procedural rules to exhaust administrative remedies or other remedies before turning to litigation, and these judgments are also very brief. By the time I plan to complete my PhD (2026), there will have been more than ten years of post-Paris Agreement climate-rights

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81 Rodríguez-Garavito (n 10), 14.
82 Indicated above n 25.
83 www.climatecasechart.com (Sabin Centre for Climate Change Law at Columbia Law School, New York, established 2011).
84 www.climate-laws.org (Grantham Institute on Climate Change and the Environment, London School of Economics).
85 www.climaterightsdatabase.com/database (Climate Rights and Remedies Project, University of Zurich).
86 Rodríguez-Garavito (n 10), table 1.1.
87 www.translitigate.nl (Tilburg University, funded by the European Union).
88 Rodríguez-Garavito (n 10) 22, Fig 1.3.
89 As the case concerned public trust doctrine, which is a matter of state law.
90 *Alec L v McCarthy* Case no 13-5192 (DC Cir 2014).

litigation. Therefore, the actual number of substantive cases will be enough but also manageable for the scope and timeframe of a PhD.

Second, the categorisation I have undertaken so far show it is clear that there are established types of cases: under specific rights, as well as framework or project-based. I can add further categories if and as they arise, but this is unlikely given the deliberately transnational network of climate litigators and non-governmental agencies that bring cases or provide legal and financial support to other plaintiffs.[91] It is also interesting to track the development of argument by plaintiffs and reasons by judges from first instance to appeal.

Finally, any research in developing fields will have the challenging question of 'when to stop'. But early research in developing fields can usefully contribute to the lawful development of the field, especially as ideas in scholarship are tested by litigants.

OUTLINE OF DOCTORAL PROPOSAL

1 Overview of research questions

The theme of my research is to examine and analyse how courts have applied and interpreted human rights law in climate litigation and what this means for international law. I have three research questions:

1. How have domestic courts applied and interpreted human rights law in climate rights cases with respect to the following three aspects of human rights law: (a) content/scope of the rights; (b) territoriality of the obligations; and (c) causation.

2. Are the positions taken by domestic courts on content/scope, territoriality and causation consistent with international human rights law (including as it is adjudicated by courts and treaty bodies)?

3. What are the mechanisms by which international (and regional) adjudicatory bodies can consider climate-rights litigation, and what are the applicable principles from that jurisprudence for international adjudicatory bodies when adjudicating the same or similar issues?

2 Methodology

In the first chapter of the PhD, I will explain the empirical data set of climate-rights cases relied on and justify the scope of that data set (as discussed above). In doing so, I will establish the basis on which I can analyse how human rights law (as it stands) may answer the climate change problem.

[91] As discussed in Iyengar (n xx).

Questions 1 and 2 will follow a similar methodology of first describing the relevant cases relied on, weaving the descriptive work through the issue-by-issue analysis. In the empirical analysis, I will categorise cases based on claims made (to the extent they are recorded in the judgments, or pleadings and submissions if those are publicly available) and how those claims are determined. The former will identify in particular whether (and if so, how) international law is relied on by plaintiffs. The latter requires an analysis of how thorough each courts' reasoning is, which may be critiqued (doctrinally, as well as potentially through a realist or normative lens).

My Question 1 analysis will also compare judicial decisions in climate-rights cases in different countries, examining patterns across legal families or similar human rights provisions, and identifying connections such as cross-citing between the cases.

Question 2, in addition to the case law methodology discussed above, will involve a doctrinal study of the human rights treaties relied on in international litigation, including using the variety of interpretive tools permitted by the Vienna Convention on the Law of Treaties.[92]

Question 3 requires a doctrinal analysis of the procedures and rules of the International Court of Justice and the International Tribunal on the Law of the Sea. The latter part of the Question 3 is again comparative – this time between domestic, regional and international legal systems – and will draw heavily on the analysis in Questions 1-2. It will also involve application of the doctrine of applicable law and examination of scholarship of the relevance of domestic court decisions in international litigation.

3 Expected research contribution

Like many others, I am interested in whether and how the law can answer the problem of climate change, one of the most pressing challenges of our era. Climate litigation is a new phenomenon in attempts to answer the climate change problem. We know these attempts (and decisions) are occurring, in various courts and areas of law. But we do not clearly understand how they relate to each other or what the body of case law means for the system of international law.

Many existing climate-rights cases are in domestic courts, and I will bring clarity to the role of domestic courts in applying international law (specifically, human rights law at its intersections with climate law). By examining human rights law principles through reviewing the case law of different courts and analysing the application of those principles, I aim to bring cohesion to the developing field of climate-rights law. My work goes further by analysing the international law implications of these cases: whether courts apply international law consistently (with each other, and between systems of law), and what international adjudicatory bodies can do with the growing jurisprudence of climate-rights cases. My PhD will contribute both to the international legal community's understanding of human rights law as it is stretched to apply to novel circumstances

[92] Vienna Convention on the Law of Treaties 1155 UNTS 331 (opened for signature 23 May 1969, entered into force 27 January 1980).

as well as to the climate-rights litigation community's understanding of human rights law and adjudication of climate-rights at the international level. My biggest contribution will be relating the domestic and international levels of law and litigation to each other, tying them together. My PhD will also add to doctrinal scholarship on the role of domestic courts in international law, again based in the novel context of climate change.

I now turn to detailing my three research questions, which demonstrates how I expect to make that contribution.

4 Question 1

> *How have domestic courts applied and interpreted human rights law in climate rights cases with respect to the following three aspects of human rights law: (a) content and scope of the right(s); (b) territoriality of the obligation(s); and (c) causation.*

Domestic courts are the ground on which I am building my PhD for two main reasons. The first is that most climate-rights litigation thus far has occurred in domestic courts. The second is that national courts contribute to the development of international law yet may consider international law differently from international courts.[93] This creates an interesting dynamic between domestic and international legal systems.

Climate change poses all sorts of challenges from a litigation standpoint, and many of the hurdles to applicants succeeding involve novel application of law. These hurdles include standing (for example, whether a non-governmental organization can bring a human rights claim, and on behalf of whom), jurisdiction (both whether the court has jurisdiction to hear the particular type of claim, as well as whether the treaty is engaged at all if the damage which is the subject of the claim was done extraterritorially), the potential use of provisional measures (for example, to injunct a particular emissions-producing project such as mining), the content of the legal obligations themselves (and whether they apply in the context of climate change), the proximity or causal links between acts regarding emissions or projects and effects of climate change, the standard of proof, use of expert scientific evidence, and remedies.

I have chosen three of these topics: (a) scope and content of applicable right(s); (b) territoriality of the obligation(s); and (c) causation. This is because the issues of standing,[94] provisional measures, and expert evidence and examination of witnesses are ones of litigation strategy, and this thesis predominantly takes a doctrinal, rather than practice- or strategy-based approach to the questions it asks (although what turns out to be a good strategy or not will be highlighted in the analysis of the case law). I have chosen not to focus on the role of judges and courts in climate governance as

[93] Greenwood (n 41).
[94] See n 40 above.

these issues have been well-explored in the scholarship and are more matters of domestic constitutional law than international law[95] and usually involve socio-legal research.

Moreover, the issues of the content of the rights relied on by applicants is under-addressed, both in judgments, as well as so far in scholarship,[96] but this is a critical issue needing examination because human rights law is rights-specific. Such an examination will also add to the international legal community's understanding of the scope of the relied-on rights at the international human rights level where applicants invoke international standards as interpretive methods or norm-setting thresholds for constitutional right protection.

The issue of territoriality does not arise in the same way for domestic cases as it does for international cases, because the general position taken is that applicants sue their own governments for climate policies in their own country; thus there is no need to consider whether an international treaty covers a particular set of people who are not nationals of the sued state. However, it is still relevant to consider territoriality where it arises in domestic case law because it feeds into issues of causation. It is also important from a climate justice and global perspective to examine how domestic courts treat the issue of extraterritorial effects of climate change because these issues have been raised in cases brought against developed countries (particularly those that allow the extraction of oil that is ultimately exported and emitted elsewhere).[97]

Causation is particularly interesting and challenging to examine because the causal chain is potentially very long. The orthodox legal position would require applicants to prove causation between a specific act of emission of greenhouse gases (or policy) and the experience of an impact of anthropogenic climate change on ones' rights, a process which is muddled by time and numerous actors emitting to different degrees.[98] However, law is changed by judges' application of it to new situations, and this has happened in some climate-rights cases. These courts have insisted that states are not necessarily not-liable simply because climate change effects are collectively caused;[99] but some other courts have addressed causation relatively lightly, creating a lack of clarity about applicable tests for causation in the climate change context.

Most domestic courts are applying domestic constitutional or human rights provisions. Some of these applicants (and courts) have included reference to the broader system of human rights law, including treaties. Many cases also refer to cases determined in other jurisdictions, giving rise to

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95 See n 45 above.

96 With a few notable exceptions, including Margarethe Wewerinke-Singh (n 32), ch 7. This was identified as a gap by Savaresi and Setzer (n 20), 20 and has been only partially filled by the texts detailed above at 3D Climate litigation.

97 *Eg* in Norway (n 59).

98 See *eg* Alexander Zahar, 'Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions' (2022) 23 HR Rev 385.

99 See *eg Urgenda* (n 50).

transnational judicial dialogue. This transnational judicial dialogue assumes particular importance when it addresses the content of human rights obligations, often derived from international law.

5 Question 2

> *Are the positions taken by domestic courts on content/scope, territoriality and causation consistent with international human rights law (including as it is adjudicated by courts and treaty bodies)?*

The aim of asking this question is to examine whether and where national courts consider international human rights law differently from international courts. But unlike de Vilchez Moragues, who interrogated two of those reasons – standing, and how courts deal with politically sensitive issues – I will be considering this issue from its relevance to the substance of international law.

This Question is a comparative exercise between the position of domestic courts and existing international law (including as it is determined by international courts, tribunals and UN human rights treaty bodies). It asks whether there is a thread of precedent into which the judgments analysed in Question 1 fit, and/or whether those climate-rights judgments are externally consistent (whether they align with relevant principles of international human rights law). As such, it involves identifying and determining the content of international law on content/scope of rights, territoriality and causation before that comparative analysis can be undertaken. It also involves looking at the influence of international human rights jurisprudence in domestic cases – where that arises – because this is indicative of domestic courts either striving to be consistent with or distinguish that jurisprudence.[100]

As to content/scope, international human rights law tends to be broader than domestic human rights law. This is in part because of the practice of treaty reservations, or because of the way international law has been adopted into domestic law (such as, whether it has direct applicability, or whether a state is 'dualist' and requires the legislature to ratify a treaty before it takes effect). The recent jurisprudence of the UN Human Rights Committee establishes that state inaction on climate change can violate the right to life as it is protected by the International Covenant on Civil and Political Rights ("ICCPR").[101] My early research shows that while some states have publicly disagreed with this jurisprudence,[102] other domestic courts have been satisfied to find that state

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[100] Generally, on the application of international judgments by domestic courts, see Christoph C Shreuer, *Decisions of International Institutions Before Domestic Courts* (Oceana Publications 1981); and Raffeala Kunz, 'Judging International Judgments Anew? The Human Rights Courts before Domestic Courts' (2020) 30 EJIL 1129.

[101] International Covenant on Civil and Political Rights 999 UNTS 171 (adopted 16 December 1966, entered into force 23 March 1976) ("ICCPR"). See *Teitiota v New Zealand* UN doc CCPR/C/127/D/2728/2016 (2020), [9.5]-[9.5]; *Billy v Australia* UN doc CCPR/C/135/D/3624/2019 (2022), [8.3]; and *General Comment No 36* (n 28), [62].

[102] The link was contentious in the drafting of *General Comment No 36*. See *eg* Comments by the Government of Canada (23 October 2017) <www.ohchr.org> [17]-[19]; and Submission of the Australian Government (undated) <www.ohchr.org> [7].

inaction on climate change *can* and indeed in some circumstances *does* violate the right to life.[103] So far these differences have been underexplored in the literature, although it is clear from my engagement at conferences that scholars consider a broader focus on other rights is necessary.

The position is less clear-cut on territoriality. In international environmental law, no state has the right to use or permit the use of its territory in such a manner as to cause transboundary harm.[104] But the effects of climate change are different to transboundary pollution in that they are inherently borderless (although they are not evenly distributed across the globe, with some regions warming faster than others, and some regions less capable of adaptation than others). Yet the law requires a sufficient link between an actor (here, the state) and a wrong (here, human rights violation) to establish responsibility in law. Often, this link is territorial. This has led to parallel challenges in practice and in scholarship about how the legal test of jurisdiction can be applied.

Jurisdiction under human rights law is not about whether a state is entitled to act (to prescribe rules of domestic law and enforce them, potentially extraterritorially),[105] but rather it is "primarily about delineating as appropriately as possible the pool of persons to which a state ought to secure human rights".[106] In other words, jurisdiction clauses in the human rights treaties act as a threshold criterion, which must be satisfied in order for a state's treaty obligations to arise.[107] International human rights instruments differ in the way they legally define the group of individuals to which states owe human rights obligations. For example, the ICCPR speaks of "all individuals within its territory and subject to its jurisdiction".[108] Other treaties do not refer to territory: for example, the European Convention on Human Rights speaks of "everyone within their jurisdiction";[109] and the Convention on the Rights of the Child uses "each child within their jurisdiction".[110]

The extraterritorial application of human rights law remains contested, both in scholarship and in the courts. It is well-established that extraterritorial conduct *can* engage the human rights obligations of states in at least two situations where a state exercises actual power extraterritorially,

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[103] For example, *Urgenda* (n 50).

[104] Declaration of the United Nations Conference on the Human Environment ("Stockholm Declaration"), UN doc A/CONF 48/14/Rev.1 (16 June 1972), Principle 21; and Rio Declaration on Environment and Development, UN Doc No A/CONF.151/26.Rev.1 (13 June 1992), Principle 2. See also *Trail Smelter Arbitration (United States v Canada)* (1938 and 1941) 3 UNRIAA 1905; *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, [29]; and *Pulp Mills (Argentina v Uruguay)* [2006] ICJ Rep 113, [101].

[105] Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 32.

[106] Maarten den Heijer and Rick Lawson, 'Extraterritorial Human Rights and the Concept of 'Jurisdiction'' in Malcolm Langford et al (eds), *Global Justice, State Duties: The Extraterritorial Scope of Social, Economic and Cultural Rights in International Law* (CUP 2012) 163.

[107] Milanovic (n 105) 19.

[108] ICCPR (n 101), art 2(1).

[109] Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention of Human Rights, as amended), art 1.

[110] Convention on the Rights of the Child 1577 UNTS 3 (adopted 20 November 1989, entered into force 2 September 1990), art 2(1).

either having effective overall control over foreign territory,[111] or having effective overall control over persons outside its territory.[112] There is a question of whether extraterritorial application of human rights law to climate change is any different from other contexts.

Very few climate-rights cases so far dealing with issues of extraterritoriality and jurisdiction have been determined (mainly because this is a difficult case to bring).[113] But in the recent UN human rights treaty body decision *Sacchi and others v Argentina v others,* the Committee on the Rights of the Child held that when transboundary harm (such as climate change) occurs, children are under the jurisdiction of the state on whose territory the emissions originated if there is a causal link between the acts or omissions of the state in question and the negative impact on the rights of children *located outside its territory*, when the state of origin exercises "effective control over the sources of the emissions" in question.[114] The Committee explicitly adopted the IACtHR's test for jurisdiction.[115] Whether this will be adopted by domestic courts outside the ambit of the IACtHR remains to be seen, as does whether this test is adopted in any of the pending ECtHR cases.

Causation is a complicated issue, not just as a matter of fact because climate change is caused by different actors to different degrees, but also because causation is treated differently in different areas of law. In human rights law, causation goes to establishing a legal wrong. By contrast, under the customary law of state responsibility as codified in the ARSIWA, causation goes to reparation (for example, restitution and compensation), rather than to establishing an internationally wrongful act or attributing that act to the state.[116] Relevant to Question 2, recent UN treaty body cases have either expressly or impliedly dealt with issues of factual causation – primarily in the human rights (substantive) law sense. Both the Human Rights Committee in *Billy v Australia* and the Committee on the Rights of the Child in *Sacchi* have determined that the collective nature of the causation of climate change does not absolve an individual state from its individual human rights treaty obligations and responsibilities.[117]

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[111] Human Rights Committee, *Fifteenth Annual Report of the Human Rights Committee* UN doc A/46/40 at 652 (1991); and *Legal Consequences for States of the Continued Presence of South Africa in Namibia* [1971] ICJ Rep 16, 118-122.

[112] *Lopez Burgos v Uruguay* UN doc CCPR/C/13/D/52/1979 [12.3]; *Al-Skeini v United Kingdom* Case No 55721/07 (ECtHR 2011), 137 and 142.

[113] Cf *Billy v Australia* (n 101), where the problem did not arise because the Torres Strait Islander claimants challenge their own governments' climate policy relating to climate change effects in Australian territory.

[114] *Sacchi* (n 24) (*v Argentina, Brazil, France* [10.12]; *v Turkey, Germany* [9.12]).

[115] IACtHR advisory opinion (2017) (n 24).

[116] International Law Commission *Articles on the Responsibility of States for Internationally Wrongful Acts* (2001) ("ARSIWA"), art 31. See also *Commentaries on ARSIWA* (November 2001) Supp No 10 (A/56/10), chp.IV.E.1, art 31 [9]-[10].

[117] *Billy v Australia* (n 101) [7.8]; and *Sacchi* (n 24) [10.10] and [10.14].

6 Question 3

> *What are the mechanisms by which international (and regional) adjudicatory bodies can consider climate-rights litigation, and what are the applicable principles from that jurisprudence for international adjudicatory bodies when adjudicating the same or similar issues?*

This Question is relevant because it addresses the practical reality that international and regional courts are – for the first time – now seized with climate-rights cases. The aim is to examine how and whether these courts can or (once decided – do) use the existing body of climate-rights jurisprudence that has emerged from domestic courts on substantive human rights issues of: (a) content/scope of the right; (b) territoriality; and (c) causation.

Part of this contribution is to sources doctrine: I will add further scholarship in particular on art 38(1)(d) of the ICJ Statute, but also on how decisions of domestic courts are relevant as state practice for the purposes of establishing CIL per art 38(1)(b) and general principles per art 38(1)(c), although the latter two remain in their infancy at this stage. Another part of the contribution is to building an understanding of transnational judicial dialogue and the extent of willingness of international tribunals to learn from the experience of national courts. This question could be asked in any area of law but it is particularly prominent in the climate-rights context due to the nature of human rights law and the novelty of this growing area of case law.

The preliminary table of contents below demonstrates the logical method for answering this question. The first part is to conduct a detailed assessment and analysis of the mechanisms by which international adjudicatory bodies may have jurisdiction over issues similar to those dealt with in the above-canvassed climate-rights litigation. This will be based on the procedural rules and constituent treaties of the international adjudicatory bodies. I will then conduct a doctrinal analyses of the rules governing applicable law. I will analyse how, as a matter of law under art 38(1)(d) of the Statute of the ICJ, the International Court can (or indeed, as I argue, must) treat cases from UN human rights treaty bodies and other specialist human rights courts as applicable "judicial decisions". More briefly, I will deal with the same questions in respect of domestic court decisions; I will also consider how these judgments can be interpreted as other sources of international law, namely as state practice (opinio juris).

My dissertation will then turn to analysing the existing practice. The most prominent international court consideration of climate-rights jurisprudence is the upcoming advisory opinion by the ICJ.[118] This was an extensive diplomatic effort led by Vanuatu and the resolution was ultimately co-sponsored by 105 states. It followed similar efforts by Palau and the Marshall Islands over a decade earlier, which ultimately did not reach the stage of formal negotiations.[119] Other relevant

[118] See n 43 above.

[119] Stuart Beck and Elizabeth Burleson, 'Inside the System, Outside the Box: Palau's Pursuit of Climate Justice and Security at the United Nations' (2014) 3 TEL 17.

international adjudicatory bodies include the treaty bodies[120] and ITLOS, which was asked to render an advisory opinion on climate law in late 2022.[121] In this part, I will also consider the outcome of those cases (which will be delivered within the next two years, well in time for my PhD to consider them), as well as the merits of advisory opinions from the perspective of advancing climate justice in the context of an under-enforceable climate treaty regime. There are also regional court considerations of climate-rights jurisprudence in the IACtHR and the European Court of Human Rights ("ECtHR").[122] The African Commission on Human and Peoples' Rights has not yet determined any climate-rights cases.[123] The most significant practice from the regional courts is the IACtHR's advisory opinions (on the environment and human rights treaty obligations, delivered 2017;[124] and the forthcoming advisory opinion on climate change and human rights treaty obligations, requested in January 2023).

Finally, Chapter 4 will identify and categorise the existing jurisprudence from Chapters 2 and 3 that is applicable law for international and regional adjudicatory bodies, and then assessing whether the international and regional adjudicatory bodies tasked with determining the same issues have actually applied that law.

For example, the IACtHR in its 2017 advisory opinion found that states had jurisdiction (in human rights terms) over an individual where its extraterritorial acts or extraterritorial effects of its acts violate rights, regardless of where the individual is located.[125] Under the practice of the International Court of Justice, this may properly be treated as a judicial decision that is a subsidiary source of international law under art 38(1)(d) of the Statute of the International Court of Justice, provided the ICJ is considering the human rights treaty invoked in that case.[126] More convincing is that the ICJ must give "great weight" to the interpretation of UN treaty bodies interpreting their treaties (for instance, the UN Human Rights Committee interpreting the ICCPR, or the UN Committee on the Rights of the Child interpreting the Convention on the Rights of the Child).[127] The same line of jurisprudence about jurisdiction expounded in the 2017 IACtHR advisory opinion was adopted by the Committee on the Rights of the Child in *Sacchi*.[128] Whether the ICJ or other international adjudicatory bodies that have been asked to render an advisory opinion apply this

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[120] See related discussion at nn 18, 101 and 114.

[121] ITLOS, 'Rules of the Tribunal' ITLOS/8 (25 March 2021), r 138; and Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (signed and entered into force 31 October 2021), art 2(2). For commentary, see Malgorzata Materna, 'Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law' 61 ILM 739 (2022).

[122] See n 64 above.

[123] But see *Center for Food and Adequate Living Rights v Tanzania and Uganda* (filed 6 November 2020), pending in the East African Court of Justice (a human rights-environmental impact assessment case about an oil pipeline).

[124] IACtHR advisory opinion (2017) (n 24).

[125] ibid [81].

[126] *Diallo (Guinea v Democratic Republic of the Congo)* (Merits) [2010] ICJ Rep 639, [67]: The ICJ must take "*due account* of the interpretation" of a regional human rights treaty by a regional human rights court on the basis the court is independent and was "specifically created" "to monitor the sound application of the treaty in question".

[127] Ibid, [66].

[128] *Sacchi* (n 24), [10.12].

jurisprudence remains to be seen. There is a good argument that the ICJ must do so, at least in the case of the UN human rights treaty bodies given that the framing of the Question posed to the ICJ refers to international human rights treaties.

7 Preliminary Table of Contents

1. Introduction and Background
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        iii. Honing in on specific rights: right to life, right to culture, right to a healthy environment, right to self-determination, right to health, pragmatic view that all the rights become involved in the near future; but human rights law is rights-specific, and so the content of the specific right matters
    c. Climate litigation
        i. Why has there been this growth in climate litigation – treaty progress stalled
        ii. Define climate litigation
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2. How have domestic courts applied and interpreted human rights law in climate-rights cases?
    a. Introduce focus on three particular aspects and explain why these are chosen
    b. Content/Scope of the right(s)
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        ii. State of the research – literature
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    b. Territoriality
        i. Jurisprudence of treaty bodies (cases + general comments)

ii. State of the research – literature

iii. Comparative analysis (domestic/international)

c. Causation

i. Jurisprudence of treaty bodies (cases + general comments)

ii. State of the research – literature; identify ways forward

iii. Comparative analysis (domestic/international)

d. Consequences of this comparison: are different bodies treating the law differently; can it be explained on the basis of different functions and situations (detail jurisdiction and functions of international bodies); are there trends; introduction of the idea of trans-judicial dialogue (between national *or* international bodies as well as between national *and* international bodies)

4. International adjudication on climate change in light of existing climate-rights adjudication

a. What are the mechanisms by which international adjudicatory bodies can consider domestic rights-based climate change litigation, and what principles could (or should) international adjudicatory bodies apply from that jurisprudence when adjudicating the same or similar issues?

b. What is there?

i. IACtHR advisory opinion 2017, now requested again 2023

ii. ICJ advisory opinion (upcoming)

1. Sources and applicable law – art 38 Statute of the ICJ work

iii. ITLOS advisory opinion (less relevant, not directly on human rights law)

c. Analysis of merits of advisory opinion route (cf contentious litigation, other legal pathways)

d. Principles to be drawn from climate litigation discussed in Chapters 2 and 3

e. Have principles from that litigation been applied in international adjudication? If not, why not, and should they have been?

5. Conclusions

RESEARCH PLAN

Semester	PhD drafting	Courses and other academic activities
Semester 1 (2022W)	• Develop research questions • Start drafting background material (IPCC report, rise of climate litigation) • Develop case law tables • Start scope of right research – Qs 1 and 2 • Start international adjudication research – Q3	• Methods course (UniVie) • Attended *Climate Change Litigation*, BICCL, London, November 2022 • Presented at *The Climate Regime and Public International Law PhD Workshop*, University of Cambridge, Dec 2022 • *Wellbeing in Academia* (UniVie Centre for Doctoral Studies, November 2022) • *Expose Writing in English* (UniVie Centre for Doctoral Studies, Dec 2022)
Semester 2 (2023S)	• Continue to identify research gap and prepare literature review • Start territoriality / jurisdiction research – Qs 1 and 2 • Start causation research – Qs 1 and 2 • Complete case law tables (up to date as at August 2023) • Draft research proposal for Joint Seminar	• Joint Seminar for Doctoral Students – Public International Law (UniVie) • Seminar: International Criminal Justice *(**de-registered due to recovery from accident at Christmas)* • Attended and presented at *3rd Public International Law Early Career Researcher Forum*, Universität Bundeswehr, Munich, March 2023 • Attended *Climate change cases before human rights courts and treaty bodies* (EUI, Florence, April 2023) • Presented at related PhD Colloquium (EUI, Florence, April 2023) • Publishing: submit paper from Cambridge workshop for peer review in *Climate Law*
Semester 3 (2023W)	• Draft ch 1 • Preliminary draft chs 2-3 • Preliminary draft ch 4	• Present at Vienna ARS Juris conference Sept 2023 • Complete Curriculum requirements for Seminars
Semester 4 (2024S)	• Draft ch 1 • Preliminary draft chs 2-3 • Preliminary draft ch 4	• Consider Hague Academy / other summer schools • Aim to present/public chs 2-3
Semester 5 (2024W)	• Review and update chs 2-3	• Consider short research stay abroad (potentially LSE, BIICL, Zurich, Columbia)
Semester 6 (2025S)	• Review and update ch 4	• Complete Curriculum requirements for Seminar
Semester 7 (2025W)	• Synthesising drafts	• Start considering further publication (chapters or potentially monograph)
Semester 8 (2026S)	• Finalise PhD	• Aim to present/publish ch 4

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