Leiden Journal of International Law (2023), **36**, 593–615
doi:10.1017/S0922156522000772

ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

National climate litigation and the international rule of law

Andreas Buser*

Free University of Berlin, Faculty of Law, Berlin 14195, Germany
Email: andreas.buser@fu-berlin.de

Abstract

This article assesses the implications of national climate litigation for what is termed 'the international rule of law'. Starting from the finding that the current international climate treaty regime lacks several elements of an international rule of law, such as legal bindingness, clarity, and justiciability, the author explores what national courts contribute to filling these gaps. Deviating from a linear progression narrative, which is prevalent in existing literature, this article provides a more nuanced and complex picture. Whereas successful climate litigation is hardly imaginable without reliance on internationally agreed-upon *facts* – such as reports by the Intergovernmental Panel on Climate Change and global average temperature levels deemed 'dangerous' – doctrinally decisions do not represent a turn toward a stricter rule of international climate *law*. Instead of applying and progressively developing climate treaties, courts thus far have primarily used these provisions only to develop national constitutional law and regional human rights law. The created system of highly contextual national rule(s) of climate law is a fragmented one which is regionally limited to a few states predominantly located in Western Europe. Consequently, it is a far cry from a truly global rule of international climate law.

Keywords: climate law; climate litigation; international rule of law; national courts; Paris Agreement

1. Introduction

The pros and cons of climate litigation as a broad phenomenon remain hotly debated. Proponents of such litigation applaud court decisions in favour of litigants as a means of strengthening democracy and the rule of law in climate matters.[1] In terms of effectiveness, they stress the symbolic value of cases – even the lost ones – and depict litigation as a last resort in the face of the failure of governments to provide adequate protection.[2] Opponents are not convinced by doctrinal

*The author is a post-doc researcher with the DFG Berlin/Potsdam Research Group 'International Rule of Law – Rise or Decline?'. He wants to thank Heike Krieger and Felix Lange for their most valuable comments on earlier drafts of this article and the two anonymous reviewers for their much-appreciated constructive feedback.

[1]B. Preston, 'The Contribution of the Courts in Tackling Climate Change', (2016) 28 *Journal of Environmental Law* 11; C. P. Carlarne, 'The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis', in B. Mayer and A. Zahar (eds.), *Debating Climate Law* (2021), 111, at 111, 113, 118, 127; L. Burgers, 'Should Judges Make Climate Change Law?', (2020) 9(1) *Transnational Environmental Law* 55.

[2]J. Peel and H. M. Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (2015), 52–3, 338–40.

arguments and highlight restrictions on 'court activism' from a separation of powers perspective.[3] Others are sceptical of the effectiveness of litigation in contributing to global climate protection.[4]

What has aroused particular attention lately is rights-based climate litigation. Here, several studies exist on the relevance of international climate treaty law for interpreting human rights and constitutional law, but much remains disputed.[5] Considerably less attention was paid to the repercussions of rights-based litigation on international climate law.[6] Rather than asking what climate litigation does for international law, scholars are preoccupied with discussing how international climate law influences national legal doctrine. This is unfortunate given that climate litigation repercussions for international climate law – for example, juridification, hybridization of legal norms,[7] and fragmentation – are theoretically and practically significant. For theorists of 'pluralism' and 'global law', climate litigation could be proof of their central argument, that boundaries between the domestic and the international have become blurred.[8] From a practical point of view, most scholars embrace national climate litigation as a 'gap filler',[9] an instrument to 'push international law to new directions',[10] a compliance booster,[11] a tool to increase pressure on negotiators[12] or simply as one instrument 'in the battle to save the climate system from catastrophe'.[13] Even scholars who initially highlighted the centrality of international negotiations and the danger of distraction have become more supportive of national climate litigation.[14]

Both positive and negative repercussions for international climate law are worthy of in-depth assessment, given that international law may currently face a 'crisis of unusual proportions', of which the Russian invasion of Ukraine is only the most recent symptom.[15] These more general

[3]F. Thornton, 'The Absurdity of Relying on Human Rights Law to Go After Emitters', in Mayer and Zahar, *supra* note 1, at 159; B. Wegener, 'Urgenda – World Rescue by Court Order? The "Climate Justice" Movement Tests the Limits of Legal Protection', (2019) 16(2) *Journal for European Environmental & Planning Law* 125.

[4]E. A. Posner, 'Climate Change and International Human Rights Litigation: A Critical Appraisal', (2007) 148 *Chicago Public Law and Legal Theory Working Papers*; G. Dwyer, 'Climate Litigation: A Red Herring among Climate Mitigation Tools', in Mayer and Zahar, ibid., at 128.

[5]See, e.g., on international climate law as a 'minimum standard' under human rights law: M. Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights Under International Law* (2015), 132; vs. the more limited reading of human rights as 'windows' of applicability for customary rule of climate protection: B. Mayer, 'Climate Change Mitigation as an Obligation Under Human Rights Treaties?', (2021) 115(3) AJIL 409, at 444.

[6]For limited exceptions see A. Hunter, 'The Implications of Climate Change Litigations for International Environmental Law-Making', (2008) 14 *Washington College of Law Research Paper* 1; L. Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?', (2020) 9(1) TEL 17, at 3; for outlining a research agenda in that regard: A.-J. Saiger, 'Domestic Courts and the Paris Agreement's Climate Goals: The Need for a Comparative Approach', (2020) 9(1) TEL 37, at 51–3.

[7]See, on the notion of hybrid norms, A. Roberts, 'Comparative International Law?: The Role of National Courts in Creating and Enforcing International Law', (2011) 60(1)ICLQ 57, at 89–92.

[8]See, in that direction, M. Goldmann, 'Judges for Future', *Verfassungsblog*, 30 April 2021, available at www.staging.verfassungsblog.de/judges-for-future/; see, generally, A. von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law', (2008) 6(3–4) IJCL 397; N. Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (2012).

[9]A. Savaresi and J. Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries', (2019) 9(3) *Climate Law* 244, at 245.

[10]See Hunter, *supra* note 6, at 12.

[11]See, e.g., I. Alogna and E. Clifford, 'Climate Change Litigation: Comparative and International Perspectives', (2020), available at www.biicl.org/publications/climate-change-litigation-comparative-and-international-perspectives, 21; T. Bach, 'Human Rights in a Climate Changed World: The Impact of COP21, Nationally Determined Contributions, and National Courts', (2016) 40(1) *Vermont Law Review* 1, at 21, 36.

[12]See Hunter, *supra* note 6, at 11.

[13]C. Voigt, 'Introduction', in W. Kahl and M.-P. Weller (eds.), *Climate Change Litigation: A Handbook* (2021), 1, at 19.

[14]Recounting his own initial scepticism: D. Bodansky, 'The Role of the International Court of Justice in Adressing Climate Change: Some Preliminary Reflections', (2017) 49(1) *Arizona State Law Journal* 689, at 692.

[15]H. Krieger and G. Nolte, 'Introduction', in H. Krieger et al. (eds.), *The International Rule of Law - Rise or Decline?* (2019), 3; see, on the notion of tipping points for the international legal order, J. D'Aspremont and J. D. Haskell (eds.), *Tipping Points in International Law: Commitment and Critique* (2021).

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

symptoms of a legal crisis are not unrelated to the factual climate crisis. As Voigt warns, catastrophic climate impacts 'could set an end to the order as we know it and give rise to unilateralism, instability, insecurity and the use of might (if not chaos and anarchy)'.[16] Starting from this narrative, climate litigation could be a measure of crisis prevention. However, from a more pessimistic point of view, climate litigation could also be read as a challenge to the universal ambition of international (climate) law.[17] Legally dubious and overly ambitious findings by national judges about the content of international climate law could frustrate governments and lead them to withdraw or limit obligations through national reform.[18]

This article promotes a nuanced reading of climate litigation repercussions for what I characterize as the international rule of climate law. It finds that national courts regularly engage with international climate law, with courts being receptive to international climate treaties as 'a setting'.[19] Some courts partially developed individual obligations of governments to contribute to the objective of international climate law. However, by predominantly relying on national laws, constitutional law, and regional human rights, courts do not promote accountability and compliance with international climate law as much as uphold national or regional rule of law. Whereas the juridification of soft law and 'international facts'[20] via regional human rights law – as practiced mostly by Dutch courts – could be seen to complement the United Nations' climate treaty regime, the so-created order at present is geographically limited to Western Europe. Thus, climate litigation is far removed from establishing a truly global rule of climate law which would be required to legally tackle the 'super-wicket'[21] common action problem of climate change.

To substantiate this argument, I proceed as follows: First, I introduce what I mean when referring to the 'international rule of law'. Second, I briefly recap the rise and decline of the idea of an international rule of law through the evolution of the international climate treaty regime. This situates the recent post-Paris Agreement phase – characterized by the turn to climate litigation – within the broader and non-linear evolution of the international rule of law in climate matters. In the article's main part, I provide a detailed analysis of national court decisions in climate mitigation cases and their repercussions for the international climate treaty regime.

2. The rule of international law and the role of national courts

The notion of an international rule of law is old and has experienced ups and downs but no linear development.[22] In the past three decades, the very idea that there could be something like an international rule of law may have arisen from the 1990s onwards but by now seems to have given way

[16]See Voigt, *supra* note 13, at 3.

[17]See, generally, A. Nollkaemper, *National Courts and the International Rule of Law* (2011), Ch. 9 ('Fragmentation').

[18]On national resistance and backlash to pro-climate litigation see Peel and Osofsky, *supra* note 2, at 300–7; M. Miller, 'The Right Issue, the Wrong Branch: Arguments Against Adjudicating Climate Change Nuisance Claims', (2010) 109(2) *Michigan Law Review* 257.

[19]'Setting' in this context means that courts reference international climate treaties mostly in introductory statements or the facts of the case to highlight the relevance of climate change and the associated threats but without substantially engaging with these treaties' content and interpretation. See on the term in this context also C. Franzius and A. Kling, 'The Paris Climate Agreement and Liability Issues', in Kahl and Weller, *supra* note 13, at 197.

[20]The term international fact is used here to refer to scientific findings on climate change restated in IPCC reports or other non-binding documents on which wide consensus exists at the international level.

[21]See, e.g., J. Brunnée, 'The Rule of International (Environmental) Law and Complex Problems', in Krieger et al., *supra* note 15, at 211.

[22]For an early acknowledgement of 'the rule of law among nations', Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UN Doc. A/RES/2625 (XXV) (1970), Preamble, para. 3; for early scholarly treatises, L. Brierly, 'The Rule of Law in International Society', (1936) 7 *Nordisk Tidsskrift for International Ret* 3; G. Schwarzenberger, 'The Rule of Law and the Disintegration of International Society', (1939) 33 AJIL 56.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

to disillusionment.[23] Nonetheless, the concept remains important for practice as an aspiration and for research as an analytical tool.

2.1. Core requirements of an international rule of law

States of diverse backgrounds and agendas embrace, in principle, the concept of the rule of law among states.[24] Arguably, this consensus is possible only because of the vagueness of the concept.[25] Still, an analysis of statements made by member states at the UN level reveals some core requirements of an international rule of law, namely, non-arbitrariness (as opposed to 'might makes right'), consistency (as opposed to selectivity), and predictability (of which clarity of substantial rules and the availability of general rules on sources and interpretation are elements).[26]

Numerous differing concepts of the international rule of law exist within literature, but some core requirements can be identified on which consensus exists. Most scholars agree that elements of national rules of law must not simply be transplanted to the international level because of structural differences and for cultural and historic reasons.[27] This said, most conceptions of the international rule of law rely on national rule of law elements that are deemed appropriate for international relations.[28]

Most scholars also agree – although details are disputed – that the rule of law has not been fully realized in international relations.[29] Thus, the rule of law is an external standard rather than a reality at the international level. Whether the full realization of this standard is normatively desirable is another story. Put in simplistic terms, for classicists, the rule of law over power is the *raison d'etre* of international law, whereas for critical scholars, law is simply the pursuit of politics and power by other means, and scholarly conceptions of a liberal rule of international law are nothing

[23]See Krieger and Nolte, *supra* note 15, at 5–7; A. Orford, 'A Global Rule of Law', in J. Meierhenrich and M. Loughlin (eds.), *The Cambridge Companion to the Rule of Law* (2021), 538, at 542–52.

[24]See, e.g., United Nations Millennium Declaration, UN Doc. A/RES/55/2 (2000), para. 9; 2005 World Summit Outcome, UN Doc. A/RES/60/1 (2005), para. 11; Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, UN Doc. A/RES/67/1 (2012); BRICS, New Delhi Declaration (2021), available at www.brics.utoronto.ca/docs/210909-New-Delhi-Declaration.html, para. 2.

[25]I. Hurd, 'The International Rule of Law: Law and the Limit of Politics', (2014) 28(1) *Ethics & International Affairs* 39, at 39; B. Fassbender, 'What's in a Name? The International Rule of Law and the United Nations Charter', (2018) 17 *Chinese Journal of International Law* 761, at 784; A. Watts, 'The International Rule of Law', (1993) 36 *German Yearbook of International Law* 15, at 15.

[26]N. Arajärvi, 'The Core Requirements of the International Rule of Law in the Practice of States', (2021) 13(1) *Hague Journal on the Rule of Law* 173.

[27]S. Chesterman, 'Rule of Law', in *Max Planck Encyclopedia of Public International Law* (2007), para. 41; J. Crawford, 'International Law and the Rule of Law', (2003) 24(1) *Adelaide Law Review* 3, at 12; B.Z. Tamanaha, *On the Rule of Law* (2004), 129–31; H. Owada, 'The Rule of Law in a Globalizing World—An Asian Perspective', (2008) 8(2) *Washington University Global Studies Law Review* 187, at 192; J. Waldron, 'Are Sovereigns Entitled to the Benefit of the International Rule of Law?', (2011) 22 (2) EJIL 315; Hurd, *supra* note 25, at 40; R. McCorquodale, 'Defining the International Rule of Law: Defying Gravity?', (2016) 65(2) ICLQ 277, at 290; Fassbender, *supra* note 25, at 763.

[28]See Crawford, ibid., at 4, 10; S. Chesterman, 'An International Rule of Law?', (2008) 56(2) *American Journal of Comparative Law* 331, at 359; Tamanaha, ibid., at 131–3; McCorquodale, ibid., at 292; for an analysis of the relationship between the national and the international rule of law M. Kanetake, 'The Interfaces Between the National and International Rule of Law: a Framework Paper', in M. Kanetake and A. Nollkaemper (eds.), *The Rule of Law at the National and International Levels: Contestations and Deference* (2016), 11.

[29]See Watts, *supra* note 25, at 44; McCorquodale, *supra* note 27, at 296–303; in a similar direction: S. Beaulac, 'The Rule of Law in International Law Today', in G. Palombella and N. Walker (eds.), *Relocating the Rule of Law* (2009), 197, at 209 ('emerging international rule of law'); for more critical accounts relying *inter alia* on the absence of compulsory judicial dispute settlement: T. Bingham, *The Rule of Law* (2011), 128–9; R. Higgins, 'The Rule of Law: Some Sceptical Thoughts', Lecture Given at The at British Institute of International and Comparative Law, 16 October 2007, in R. Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law* (2009), 1333.

more than 'ruling-class chatter'.[30] Notions of an international rule of law on north-south lines may be perceived as another tool to perpetuate unequal distribution of wealth and patterns of exploitation.[31] Thus, efforts to strengthen the rule of climate law on mitigation may be seen as an instrument to slow non-Western economic development. Conversely, many developing states support the rule of international law on loss and damage to obtain financial compensation from states with high historic greenhouse gas (GHG) emissions.[32]

For these reasons, the international rule of law here is neither understood as a reality nor as an ideal,[33] but as a descriptive category and analytical tool. The concept may well stand in a liberal tradition and not all of its elements may have universal appeal.[34] Nonetheless, it helps to understand where current developments in international law are heading and whether they depart from current understandings of the international rule of law. To display nuances, the international rule of law is conceptualized as a matter of degree rather than an all-or-nothing concept.[35] To provide for such nuances, it is also helpful to distinguish between a thin and a thicker rule of international law.[36]

The thin approach conceptualizes the international rule of law in a formal, procedural and functional sense, all of which are interrelated.[37] In a formal and functional sense, the rule of law first demands that laws are prospective, accessible and clear to provide for foreseeability and stability as well as at least some limits to arbitrary exercise of power.[38] Clarity is not unrealistically imagined as absolute here;[39] rather, the rule of law is conceptualized in a functional and procedural sense as relying on a particular form of argument, including a limited set of sources and interpretative tools, that tends to restrict the open pursuit of self-interest.[40] This functional understanding, which is closely connected to interactional accounts of the rule of international law, provides for predictability while at the same time accommodating and guiding change.[41] For various reasons other forms of norms such as 'soft law' may, at times, be preferable to legal rules and principles.[42] However, in my understanding, a trend towards informality is a symptom

[30]J. Shklar, 'Political Theory and the Rule of Law', in A. C. Hutchinson and P. J. Monohan (eds.), *The Rule of Law: Ideal or Ideology* (1987), 1, at 1; for an overview for critical approaches perspective on the national rule of law, M. Tushnet, 'Critical Legal Studies and the Rule of Law', in Meierhenrich and Loughlin, *supra* note 23, at 328; on the international rule of law see, for a critique, M. Koskeniemmi, 'The Politics of International Law', (1990) 1(1) EJIL 4; Orford, *supra* note 23; for a 'classicist' perspective see D. Georgiev, 'Politics or Rule of Law: Deconstruction and Legitimacy in International Law', (1993) 4(1) EJIL 1.

[31]On this 'material danger' see Tamanaha, *supra* note 27, at 136.

[32]For a TWAIL perspective on loss and damage (Art. 8 Paris Agreement) see M. Rao, 'A TWAIL Perspective on Loss and Damage from Climate Change: Reflections from Indira Gandhi's Speech at Stockholm', (2022) *Asian Journal of International Law* 1.

[33]See Chesterman, *supra* note 28, at 360; M. Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model', (2003) 44(1) *Vanderbilt Journal of International Law* 19, at 32; Arajärvi, *supra* note 26, at 174; Fassbender, *supra* note 25, at 797; C. Pavel, *Law Beyond the State: Dynamic Coordination, State Consent, and Binding International Law* (2021), Ch. 3.

[34]See Orford, *supra* note 23, at 564.

[35]See McCorquodale, *supra* note 27, at 291.

[36]R. P. Peerenboom, 'Varieties of Rule of Law', in R. P. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* (2004), 1, at 2; Chesterman, *supra* note 28, at 340; Tamanaha, *supra* note 27, at 91–113.

[37]See Tamanaha, ibid., at 91; McCorquodale, *supra* note 27, at 281–2; see also but ultimately also taking in substantial criteria: Watts, *supra* note 25, at 16, 22.

[38]See Chesterman, *supra* note 28, at 342; Beaulac, *supra* note 29, at 209, drawing on Dicey, Hayek and Raz; see also Watts, ibid., at 26–8.

[39]See Watts, ibid., at 28; Beaulac, ibid., at 206.

[40]See Krisch, *supra* note 8, at 278 with further references.

[41]See Brunnée, *supra* note 21, at 217; J. Brunnée and S. J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (2010); Arajärvi, *supra* note 26, at 189.

[42]See Brunnée, ibid., at 222, who highlights that informal norm-setting is faster, allows for more experimentation and the application to a wider set of actors as. See also J. Pauwelyn, R. A. Wessel and J. Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking', (2014) 25 *European Journal of International Law* 733.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

towards the decline of the rule of *law*, at least if soft law does not develop into hard law.[43] If soft law elements characterize a treaty, what looks like law is actually an empty formality.[44]

Further elements of the international rule of law which are strongly supported in the literature are non-arbitrariness and equality before the law.[45] Equality before the law in the international setting would be provided if international law were generally applicable. Non-arbitrariness requires a minimum of consistency in the application of international law to comparable cases.[46] Thus, this conception of the international rule of law favours non-arbitrariness in terms of application and universality in terms of norm addressees.[47]

Four caveats are necessary: First, equality must not be absolute but allows for differentiation on objective grounds.[48] Second, equality under the thin dimension of an international rule of law refers to relations between states, not between states and individuals, but the latter is captured by the thick rule of international law.[49] Third, compliance must not be mistaken for the sole element of an international rule of law.[50] Such a view confuses the *rule* of international law with the *rules* of international law[51] and overemphasizes stability over adaptability. Otherwise, developing customary law through non-compliance would be incompatible with the rule of law.

Fourth, there may exist a trilemma insofar as it is often complicated to synchronously achieve ambitious and clear content, widespread participation and compliance.[52] For example, it may well be that a 'rule of negotiation' paradigm,[53] a complex mostly procedural structure of 'hard, soft and non-obligations'[54] and 'constructive ambiguity',[55] was necessary to accommodate competing interests of the parties to the Paris Agreement. However, it is not impossible to achieve widespread participation, ambitious and clear content as well as compliance – or at least a reasonable level of each – for which one may point to the UN Charter and the World Trade Organization agreements.

A procedural thin notion of the rule of law could further include some form of accountability of states, ideally to be upheld by independent judicial dispute settlement mechanisms.[56] As accountability hinges on independent courts, it is this element of an international rule of law that is often deemed to be lacking.[57] Nevertheless, states' approaches towards international dispute settlement and the role of courts within states, particularly when it comes to applying international law, differ significantly. At the UN level, state support for accountability as an element of the international rule of law is strong, but supporters do not form a majority.[58] Moreover, international judicial dispute settlement, which has been on the rise since 1990, has faced considerable opposition

[43]In that direction see Krieger and Nolte, *supra* note 15, at 2, 11.

[44]G. Nolte, *Treaties and Their Practice - Symptoms of Their Rise or Decline* (2018), 25, 170.

[45]See Watts, *supra* note 25, at 30, 32; Chesterman, *supra* note 28, at 360; McCorquodale, *supra* note 27, at 291, 296; Beaulac, *supra* note 29, at 209.

[46]See Chesterman, ibid., at 360; Arajärvi, *supra* note 26.

[47]See Watts, *supra* note 25, at 27; Beaulac, *supra* note 29, at 209; Brunnée, *supra* note 21, at 218, 231.

[48]See only Bingham, *supra* note 29, third sub-principle of the rule of law.

[49]See Kanetake, *supra* note 28, at 16.

[50]See Krieger and Nolte, *supra* note 15, at 7; but see Kumm, *supra* note 33, at 22.

[51]See Watts, *supra* note 25, at 15; see also McCorquodale, *supra* note 27, at 290; Hurd, *supra* note 25, 42–3.

[52]J. L. Dunoff, 'Is Compliance an Indicator for the State of International Law? Exploring the "Compliance Trilemma"', in Krieger et al., *supra* note 15, at 183.

[53]See Bodansky, *supra* note 14, at 692.

[54]L. Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations: Table 1', (2016) 28(2) *Journal of Environmental Law* 337.

[55]See Roberts, *supra* note 7, at 85.

[56]See Watts, *supra* note 25, at 35–8; McCorquodale, *supra* note 27, at 289, 298; Nollkaemper, *supra* note 17, at 3–5; Kumm, *supra* note 33, at 22; Chesterman, *supra* note 28, at 342, 359.

[57]See, e.g., Nollkaemper, ibid., at 5; but see on the increased role of international judicial dispute settlement K. J. Alter, *The New Terrain of International Law: Courts, Politics, Rights* (2014).

[58]See Arajärvi, *supra* note 26, at 189–90 noting that within the UNGA 76 States supported accountability.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

in recent years.[59] Therefore, accountability and the availability of mandatory judicial dispute settlement are treated here only as an element of a thicker notion of the international rule of law.

The second element of a thicker conception is a substantial one, namely, the compatibility of international legal norms with human rights.[60] Despite many contestations, human rights, at present, remain the central normative standard of our age.[61] The understanding here is not that the establishment of human rights at the international level suffices to speak of a thick international rule of law. Rather, human rights are taken as an internal-external standard to normatively evaluate the very content of different areas of international law.[62]

2.2 National courts and the international rule of law

In the absence of compulsory dispute settlement in many areas of international law, scholars long ago began to look at national courts as guardians of an international rule of law.[63] This role does not fall naturally to domestic courts. From an international law perspective, courts are mere organs of the state whose compliance with international law is in question; thus, they appear as judges in their own matters.[64] The fact that national courts perform judicial as well as legislative functions further complicates their role from an international law perspective.[65] As court decisions qualify as state practice, they contribute to the formation, consolidation and reinforcement of customary law and general principles, and as subsidiary practice, they may influence the content of treaty law.[66] Although states in international relations mostly act through their governments the International Law Commission (ILC) clarified that there is no predetermined hierarchy among the various forms of practice.[67] Still, court decision (especially final ones by higher courts) often appear to be the last word of a state, if it is not undermined by succeeding actions of other state organs.[68]

This dual role of enforcement and development of international law by domestic courts is also present in the practice of interpreting international norms. Whereas some would say that

[59]Examples include the current dysfunctionality of the WTO Appellate Body Mechanism; apparent disregard of many States for decisions of human rights courts (e.g., Russia and the ECrHR) or other decisions (e.g., South China Sea Arbitration); for more examples see Orford, *supra* note 23, at 559–60.

[60]According to Arajärvi, *supra* note 26, at 189, 57 states at the UN supported human rights as an element of the international rule of law; on human rights as an element of an international rule of law also see Pavel, *supra* note 33, Ch. 3; and more limited see also McCorquodale, *supra* note 27, at 293.

[61]See McCorquodale, ibid., at 293; see in a similar direction also S. R. Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (2015).

[62]A. Buser, *Emerging Powers, Global Justice and International Economic Law: Reformers of an Unjust Order?* (2021), 146; on human rights as a moral standard to assess the content of international law see Ratner, ibid.

[63]H. Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law', (1929) 10 *British Yearbook of International Law* 65, at 67–8; G. Scelle, *Précis de droit des gens: Principes et systématique, Vol. 1: 'Introduction, Le milieu intersocial'* (1932), 56. Among more recent contributions see E. Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts', (1993) 4(1) EJIL 159; A. Tzanakopoulos and C. Tams, 'Introduction: Domestic Courts as Agents of Development of International Law', (2013) 26(3) *Leiden Journal of International Law* 531.

[64]See Nollkaemper, *supra* note 17, at 299.

[65]See Roberts, *supra* note 7, at 60.

[66]ILC Draft Conclusions on Identification of Customary International Law, with commentaries, 2018 YILC, Vol. II (Part Two), 132 et seq., Conclusion 5 and 6, para. 2; ILC, General Principles of Law, Consolidated text of Draft Conclusions 1 to 11 provisionally adopted by the Drafting Committee, A/CN.4/L.971 (2022), Draft Conclusion 5, para. 3; ILC Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, 2018 YILC, Vol. II (Part Two), Conclusion 5, para. 1; International Law Association, Final Report of the Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Principle 9, reproduced in *The International Law Association: Report of the Sixty-Ninth Conference* (ILA, London, 2000); see Nollkaemper, *supra* note 17, at 267.

[67]ILC Draft Conclusions on Identification of Customary International Law, with commentaries, ibid., at 133.

[68]See Nollkaemper, *supra* note 17, at 271; see, in a similar direction, Roberts, *supra* note 7, at 62.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

interpretation is a mere form of application, the line to creation and destruction is thin.[69] Such law creation[70] is not formally binding on other states, except when thresholds of customary law or subsequent practice are met, but to correctly assess the contents of law, other courts must consider judgements as an expression of state practice and often engage with other courts through some form of judicial dialogue.[71]

Despite all complexity, it is clear that the dual role of national courts is strongly connected to debates on the international rule of law.[72] National courts are often the only forum in which states can be held accountable for violations of international law. In applying and interpreting international law, national courts may increase consistency and clarity and expand the scope of international law. In that regard, uniformity must not necessarily be seen as the ideal, as national judges may be required to adjust international law to local circumstances.[73] Still, I take a common direction of various interpretations – for example, whether particular provisions of a treaty are binding – as a sign for a rise in international rule of law. This is because legal bindingness stands for juridification, which enables accountability. Apparently, this also matters for states – otherwise, treaty language would not be such a central element of climate negotiations.

3. The rise and decline of the international rule of climate law

In the following part, I capture the rise and decline of the rule of international law through the evolutionary phases of global climate treaty law.[74] Only by evaluating where international climate law stands is it possible to analyse in which direction climate litigation – which, in my view, is the characteristic feature of the latest post-Paris Agreement phase – leads the system. Particular emphasis is put on legal bindingness, clarity, membership and scope of obligations, the availability of international judicial dispute settlement, and the relevance of human rights.

3.1 UNFCCC

Based on these criteria, the United Nations Framework Convention on Climate Change (UNFCCC) can be seen as a first step, albeit a small one, in the establishment of a thin rule of law in climate matters. Notably, the UNFCCC introduced the essential objective of the climate regime, namely, the 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' and important principles, such as 'common but differentiated responsibilities'.[75] The UNFCCC also established a procedural regime according to which parties are required to formulate, implement, publish and regularly update national programs, and in terms of substance set the soft ('with the aim of') mitigation target for Annex I parties ('developed states') to roll back emissions to the levels of 1990 by 2000.[76]

[69]R. Y. Jennings, 'The Judiciary, International and National, and the Development of International Law', (1996) 45(1) ICLQ 13; Nollkaemper, ibid., at 271.

[70]See Roberts, *supra* note 7, at 68.

[71]A. Tzanakopoulos, 'Judicial Dialogue as a Means of Interpretation', in H. P. Aust and G. Nolte (eds.), *The Interpretation of International Law by Domestic Courts: Uniformity, Diversity, Convergence* (2016), 72, at 73; on the role of judicial dialogue in establishing subsequent practice see also ILC, Draft Conclusions on Subsequent Agreements and Subsequent Practice in Relation to the Interpretation of Treaties, *supra* note 66, at 57 (Conclusion 7, para. 18).

[72]Explicitly, see Nollkaemper, *supra* note 17; Kumm, *supra* note 33.

[73]See, for an overview of positions taken, H. P. Aust, 'Between Universal Aspiration and Local Application: Concluding Observations', in Aust and Nolte, *supra* note 71, at 336–8.

[74]For the sake of brevity the analysis focuses on the three central climate treaties, but it is noted that international climate law in a broader sense may include further treaty regimes and customary law, see, e.g., D. Bodansky et al., *International Climate Change Law* (2017); B. Mayer, *The International Law on Climate Change* (2018).

[75]See Art. 2 UNFCCC for the objective and Art. 3.1 UNFCCC for the CBDR principle.

[76]UNFCCC, Art. 4(1), Art. (2)(b).

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

Regarding judicial dispute settlement, the UNFCCC contains no mandatory mechanism, only a rarely used option for parties to accept the jurisdiction of the International Court of Justice in advance.[77] Relevant for the human rights element is that the treaty text acknowledges that climate change may, on the one hand, 'adversely affect natural ecosystems and humankind' and, on the other hand, that the growing share of GHG emissions in developing countries may be necessary 'to meet their social and development needs'.[78] However, as the mitigation goal was decent, soft and limited to Annex I parties, the UNFCCC, in legal terms, did little to *protect* rights to physical integrity and others. Conversely, there was no real danger of conflict between mitigation commitments and states' requirements under economic, social and cultural rights.

3.2 Kyoto Protocol

Based on the criteria of clarity, compliance and enforceability, the Kyoto era was the climax of the rule of international climate law – at least for industrialized states (so-called Annex I parties). The Kyoto Protocol contains multilaterally negotiated and legally binding quantitative emission caps.[79] These quantitative caps were meant to collectively reduce emissions by Annex I parties by at least 5 per cent below 1990 levels in the period 2008–2012. The Kyoto Protocol's dispute settlement mechanism came closest to being a judicial one. Individual mitigation targets were subject to a mandatory compliance system, described by commentators as 'the most ambitious and elaborate of the multilateral environmental agreements' compliance regimes in operation today'.[80] Both expert review teams and other parties could initiate review procedures, which they did in at least 12 cases.[81] Parties even installed an appeal mechanism.[82] As legal remedies, they foresaw the subtraction of excess emissions (multiplied by a rate of 1.3) from national GHG budgets, among other actions.[83] In terms of compliance, it bears notice that Annex I parties together surpassed the mitigation goal by approximately 17 per cent.[84]

Other elements of the international rule of law were less developed. First, the protocol's mitigation commitments addressed only Annex I parties, ignoring China and other huge GHG emitters and thus scoring badly on generality and universality.[85] Although historical emissions can be considered a legitimate reason for differentiation, they may not justify a complete exemption. With the decision of the United States in 2001 not to ratify the Kyoto Protocol, another major gap opened, which is not justifiable on reasonable grounds. In the end, the Kyoto Protocol's mitigation commitments governed only an estimated 24 per cent of global GHG emissions.[86] Additionally, the temporal limitation to five-year commitment periods meant that the Kyoto Protocol was incapable of providing much foreseeability.[87] Although a second commitment period was adopted in 2012 to cover the years 2013–2020, its coverage was even more limited, as Canada had withdrawn from the Kyoto Protocol in 2012 and Japan, New Zealand and

[77]Only the Netherlands, the Salomon Islands, and Tuvalu issued acceptances under Art. 14(2) UNFCCC (www.unfccc.int/process/the-convention/status-of-ratification); other practically irrelevant provisions are: Art. 7(2) and Art. 13 ('multilateral consultative process'; which was never established).

[78]UNFCCC Preamble, paras. 3, 4.

[79]Art. 3 Kyoto Protocol and Ann. B.

[80]See Bodansky et al., *supra* note 74, at 196; see also S. Oberthür, 'Compliance under the Evolving Climate Change Regimen', in K. Gray et al. (eds.), *The Oxford Handbook of International Climate Change Law* (2016), 120 ('most judicial').

[81]Dec. 27/CMP.1, Ann., Section VII, para. 1; for an overview of cases see www.unfccc.int/process/the-kyoto-protocol/compliance-under-the-kyoto-protocol.

[82]Dec. 27/CMP.1, Ann., Section II, paras. 2–3; V, para. 4.

[83]Dec. 27/CMP.1, Section XV, paras. 5(a)–(c), 6, 7.

[84]UNFCCC 2015, Kyoto Protocol 10th Anniversary: Timely Reminder Climate Agreements Work, UN Climate Change News Room, available at www.unfccc.int/news/kyoto-protocol-10th-anniversary-timely-reminder-climate-agreements-work.

[85]See Brunnée, *supra* note 21, at 231.

[86]See Bodansky et al., *supra* note 74, at 173.

[87]See Brunnée, *supra* note 21, at 230.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

Russia refused to accept new emission targets.[88] Consequently, the second commitment period covered less than 12 per cent of global GHG emissions and, due to initially low number of acceptances, entered into force only late in 2020 when the period it aimed to govern ended.[89]

3.3 Paris Agreement

The Paris Agreement differs remarkably from the Kyoto Protocol in two respects, both of which are relevant for the international rule of law but that contradict each other. In terms of generality, the Paris Agreement must be seen as a huge success, as negotiators abandoned the distinction between Annex I parties and others. With the US ratification of the Paris Agreement as of 20 January 2021, all of the world's largest emitters are parties to the treaty, including China, the United States, the European Union and its member states, India and Russia.[90] Thus, the agreement in principle governs approximately 99 per cent of global GHG emissions.[91]

The central cause for this success is the adoption of the so-called bottom-up approach. In essence, states discarded internationally negotiated and binding individual GHG reduction commitments in favour of a more flexible approach, entrusting governments to set nationally determined contributions (NDCs). This flexible approach resulted in considerable confusion about the legal nature of the agreement's substantial contents, which is why the Paris Agreement, in terms of legal quality and clarity, represents a decline of the rule of international climate law compared to the Kyoto Protocol.

Vagueness permeating the Paris Agreement and undermining the rule of law begins with the global temperature objective.[92] The temperature target certainly is an important step towards clarifying parties' understanding of what constitutes 'dangerous climate change' and, therefore, could be seen as an increase in the rule of law in climate matters. Nevertheless, the legal quality, if any, of the temperature target remains strongly disputed. First, the content of the objective remains dubious, as the meaning of 'well below' 2°C remains unsettled.[93] Second, the targets of the objective are unclear, since the wording neither directly addresses individual parties nor the parties as a collective. Nonetheless, some scholars have interpreted the objective as being legally binding on individual states.[94] More common is the qualification of the objective as a collective obligation.[95] Others oppose the notion of a collective obligation and qualify it as a merely aspirational non-legal commitment.[96]

In any case, it remains unclear exactly when GHG emissions are expected to peak and when net zero – the balance between the amount of GHGs produced and the amount removed from the atmosphere – is to be achieved. Notably, parties only stress their intention ('aim to') to reach

[88]Canada's withdrawal took effect on 15 December 2012, available at treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-a&chapter=27&clang=_en#2.

[89]UN Climate Press Release of 2 October 2020, available at www.unfccc.int/news/ratification-of-multilateral-climate-agreement-gives-boost-to-delivering-agreed-climate-pledges-and.

[90]The Paris Agreement was signed by 195 States of which 191 ratified the agreement.

[91]See Bodansky et al., *supra* note 74, at 249.

[92]Paris Agreement, Art. 2.

[93]B. Mayer, 'Temperature Targets and State Obligations on the Mitigation of Climate Change', (2021) 33(3) *Journal of Environmental Law* 585.

[94]G. Winter, 'Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation', (2020) 9(1) TEL 137, at 144; M. J. Mace and R. Verheyen, 'Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement', (2016) 25(2) RECIEL 197, at 212.

[95]See, e.g., Rajamani, *supra* note 54; T. Crosland et al., 'The Paris Agreement Implementation Blueprint: Legal Avenues to Blueprint Implementation (Part 2)', (2016) 24(5) *Environmental Liability* 114, at 116; M. Meguro, 'Litigating Climate Change Through International law: Obligations Strategy and Rights Strategy', (2020) 33(4) *Leiden Journal of International Law* 933, at 947.

[96]See Mayer, *supra* note 93; Franzius and Kling, *supra* note 19, at 201, 203.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

the global peak of GHG emissions 'as soon as possible' and to achieve net zero 'in the second half of this century'.[97]

Moreover, the Paris Agreement does not clarify whether these objectives must inform individual states' NDCs. Given that the objective is vague and that no agreement has been reached regarding the distribution method of the allowable global GHG budget – with the principles of common but differentiated responsibility and equity providing only vague guidance – several scholars argue that individual parties enjoy vast (if not full) discretion in setting their NDCs.[98] Others assume that Article 4, paragraph 3, of the agreement at least establishes an 'obligation' of non-regression.[99] Accordingly, states would not be allowed to reduce their ambitions in subsequent NDCs compared to their initial pledge. However, others characterize non-regression as a mere 'normative expectation' rather than a legal obligation.[100]

This lack of clarity continues when it comes to the legal bindingness of NDCs after their establishment. Depending on their content, NDCs may qualify as binding unilateral declarations, and the Paris Agreement may impose an obligation of conduct to pursue domestic measures with the aim of achieving targets listed in the NDCs.[101] Others characterize NDCs as an 'expectation of good faith'.[102] The problem is exacerbated by the fact that no clear standards exist as to the contents of NDCs. Whereas some NDCs are worded in obligatory language,[103] most refrain from establishing clear judiciable targets.[104]

No clarification of these disputed issues is expected at the international level, given the rather weak compliance mechanism foreseen in the Paris Agreement. Moving away from the rather strong judicial enforcement mechanism of the Kyoto Protocol, the Paris Agreement only establishes a Facilitation and Compliance Committee, which is not a judicial body in a narrow sense.[105] The so-called global stocktake, which is due to take place in 2023, may officially reveal whether parties are on track to meet the collective objective, but it is unlikely that this mechanism will contribute to further clarification of disputed legal questions.[106] Notably, this process is not meant to assess individual countries' progress in a naming-and-shaming manner but only the collective progress of parties.[107]

This does not mean that no paths exist to bring a climate case before an international judicial body with repercussions for international climate law.[108] In particular, the notion of requesting an advisory opinion from the International Court of Justice or the International Tribunal of the Law

[97]Paris Agreement, Art. 4 para. 1.

[98]See Franzius and Kling, *supra* note 19, at 201; Meguro, *supra* note 95, at 943–4.

[99]C. Voigt and F. Ferreira, '"Dynamic Differentiation": The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement', (2016) 5(2) TEL 285, at 295–6.

[100]L. Rajamani and J. Brunnée, 'The Legality of Downgrading Nationally Determined Contributions under the Paris Agreement: Lessons from the US Disengagement', (2017) 29(3) *Journal of Environmental Law* 537; S. Oberthür and R. Bodle, 'Legal Form and Nature of the Paris Outcome', (2016) 6(1–2) *Climate Law* 40, at 49.

[101]B. Mayer, 'International Law Obligations Arising in relation to Nationally Determined Contributions', (2018) 7(2) TEL 251; J. E. Viñuales, 'The Paris Climate Agreement: An Initial Examination', available at www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2704670, 5; H. Winkler, 'Mitigation (Article 4)', in R. Klein et al. (eds.), *The Paris Agreement on Climate Change: Analysis and Commentary* (2017), 163.

[102]See Wegener, *supra* note 6, at 24, 27.

[103]See, e.g., EU, Updated NDC (2020), para. 27 ('are committed to a binding target'); all NDCs are available online at www.unfccc.int/process-and-meetings/the-paris-agreement/nationally-determined-contributions-ndcs/nationally-determined-contributions-ndcs#eq-2.

[104]See, e.g., China, Updated NDC (2021), at 2 ('aims to'); Uzbekistan, Updated NDC (2021), at 2 ('intends to achieve').

[105]Paris Agreement, Art. 15.

[106]Ibid., Art. 14.

[107]J. Friedrich, 'Global Stocktake (Article 14)', in Klein et al., *supra* note 101, at 322.

[108]While only the Netherlands, the Salomon Islands, and Tuvalu accept compulsory arbitration under Art. 14, para. 2 UNFCCC (available at www.unfccc.int/process/the-convention/status-of-ratification), a number of potential respondents accept compulsory jurisdiction of the ICJ under Art. 36, para. 2, ICJ Statute; see, in more depth, A. Savaresi, 'Inter-State Climate Change Litigation: "Neither a Chimera nor a Panacea"', in I. Alogna et al. (eds.), *Climate Change Litigation:*

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

of the Sea has recently gained traction.[109] In addition, human rights bodies already play a role in developing international climate law, although so far, a limited one.

The Inter-American Court of Human Rights in its Advisory Opinion on human rights and the environment already accepted that climate change impacts human rights.[110] Further, the Court referenced the UNFCCC several times, *inter alia* in establishing a human rights obligation of States to prevent 'significant environmental damage' within and outside their territories and in finding that the precautionary principle applies in human rights law.[111] However, given its limited mandate under questions raised, the Court did not address any of the more specific and controversial questions raised above and cited the Paris Agreement only once without interpreting its content.[112]

Other human rights bodies cursorily addressed climate change in human rights terms in public statements,[113] general comments,[114] and concluding observations on parties' periodic reports.[115] Several individual complaints that rely partially on international climate law are pending before the European Court of Human Rights.[116] In two cases, UN human rights bodies decided individual complaints dealing explicitly with climate mitigation.[117]

In *Sacchi et al.*, the Committee on the Rights of the Child progressively affirmed its jurisdiction and accepted that '[f]ailure to take measures to prevent foreseeable human rights harm caused by climate change, or to regulate activities contributing to such harm, could constitute a violation of States' human rights obligations'.[118] The Committee also referred to the principle of common but differentiated responsibility to rebut the argument that the general nature of the causation of climate change would absolve state parties of individual responsibility.[119] However, it had not had the chance to further develop these arguments as it found the complaint to be inadmissible for failure to exhaust domestic remedies.[120] In *Billy et al.* v. *Australia*, the Committee on Civil and Political Rights somewhat avoided exploring climate mitigation responsibilities by focusing on

Global Perspectives (2021), 366 at 367; A. Boyle, 'Litigating Climate Change Under Part XII of the LOSC', (2019) 34(3) *International Journal of Marine and Coastal Law* 458.

[109]See generally P. Sands, 'Climate Change and the Rule of Law: Adjudicating the Future in International Law', (2016) 28(1) *J Environmental Law* 19, at 32.

[110]IACtHR, Advisory Opinion OC-23/18, (ser. A) No. 23 (15 November 2017), para. 44.

[111]Ibid., paras. 134–40, 174–81.

[112]Ibid., para. 22, n. 24.

[113]Joint Statement on 'Human Rights and Climate Change', *UNHRC*, 16 September 2019, available at www.ohchr.org/en/statements/2019/09/five-un-human-rights-treaty-bodies-issue-joint-statement-human-rights-and?LangID=E&NewsID=24998; CESCR, Statement: Climate Change and the International Covenant on Economic, Social and Cultural Rights, UN Doc. E/C.12/2018/1 (2018), para. 6.

[114]See, e.g., Human Rights Committee, General Comment No. 36, Art. 6: Right to Life, UN Doc. CCPR/C/GC/36 (2019), para. 62; Committee on Economic, Social and Cultural Rights, General Comment No. 25, on science and economic, social and cultural rights, UN Doc. E/C.12/GC/25 (2020), para. 81. Notably, the Committee on the Rights of the Child in 2021 announced to draft a General Comment No. 26 on 'Children's rights and the environment with a special focus on climate change'.

[115]See recently, e.g., CESCR, Concluding Observations, Third Periodic Report of the Czech Republic, para. 7, UN Doc. E/C.12/CZE/CO/3 (2022) and Committee on the Rights of the Child (CRC); Concluding Observations, Combined Fifth and Sixth Periodic Reports of Australia, UN Doc. CRC/C/AUS/CO/5-6 (2019), paras. 40–41.

[116]See *Duarte v. Portugal*, App. no. 39371/20 (7 September 2020), available at www.hudoc.echr.coe.int/eng?i=002-13055; *Verein KlimaSeniorinnen Schweiz v. Switzerland*, App. No. 53600/20 (17 March 2021), available at www.hudoc.echr.coe.int/eng?i=002-13212; *Mex M. v. Austria*, (submitted 25 March 2021); *Greenpeace et al. v. Norway* (submitted 15 June 2021).

[117]See, for another decision in which climate change played a major role but which did not concern climate mitigation in a narrower sense, UN Human Rights Committee (HRC), *Ioane Teitiota v. New Zealand*, CCPR/C/127/D/2728/2016, Decision of 7 January 2020.

[118]Committee on the Rights of the Child, *Chiara Sacchi et al. v. Argentina, Brazil, France, Germany and Turkey,* CRC/C/88/D/107/2019 et al., Decisions of 8 October 2021, at 13, para. 9.6.

[119]Ibid., at 13, para. 9.10.

[120]Ibid., at 15, paras. 9.15–9.20.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

climate adaption.[121] Accordingly, international climate law played no role in finding a violation of the rights of complainants.[122]

Regarding human rights as an element of the international rule of climate law, it is also notable that the Paris Agreement is the first climate treaty that references human rights. Many commentators thus hailed the treaty for breaking new ground on the connection between climate change and human rights.[123] Nevertheless, a more careful evaluation is due.[124] The human rights provision was not included in the operative part of the agreement and is also worded in soft-law language ('parties should'). It is also unclear whether the formulation 'when taking action to address climate change' only reaffirms the rather uncontroversial finding that climate change mitigation measures must respect fundamental rights (e.g., the right to property) or whether it also addresses the question of whether states need to protect human rights by implementing adequate mitigation policies.[125]

Although the text of the preamble appears to be open to a broader interpretation and, in principle, should inform interpretation of the treaty's operative part,[126] many states continue to appear reluctant to frame climate change mitigation as a human rights issue. Negotiations after 2015 concerning the inclusion of a human rights reference into the so-called rulebook proved to be controversial. Advocates of a human rights approach to mitigation had argued that human rights should inform the design and ambition of NDCs and that state parties should be required to provide information on how human rights informed their NDCs.[127] However, parties tellingly opted to omit such an explicit reference.[128] Thus, the reference to human rights in the preamble has not led to any practical outcomes and, in terms of a rise of a thicker human rights conception of the international rule of law in climate matters, it may be seen as only a very small step. More important is the work by UN human rights bodies and regional human rights courts but much depends on how future 'case law' unfolds.

4. Domestic climate litigation – a new era for the international rule of climate law?

For those activists who are frustrated by the outcomes of various Conferences of the Parties in recent years as well as states' insufficient NDCs, the turn to climate litigation is, first and foremost, a continuation of their struggle with other means. According to this logic, every case won is a win for the climate and, thus, for the objective of international climate law. In a similar vein, some scholars appear to be of the view that every reference to an international climate treaty in a national court's decision is a sign of the relevance of international law. I argue that the situation

[121]Whereas the Committee addressed climate mitigation in its admissibility decision (para. 7.8 et seq.), the topic is mostly absent in the decision on the merits (only mentioned briefly in para. 9.2): CCPR, *Billy et al. v. Australia*, CCPR/C/135/D/3624/2019, Decision adopted on 22 September 2022; it must be noted that several individual opinions to the decision engaged more substantively with climate mitigation, see Individual Opinion by Committee Member Duncan Laki Muhumuza, paras. 10–17.

[122]Although the Committee found that 'other treaties' could be considered relevant for the interpretation of the Covenant (ibid., para. 7.5) it did not engage with international climate treaties in the following. But see Individual Opinion by Committee Member Gentian Zyberi, paras. 3–5.

[123]J. H. Knox, 'The Paris Agreement as a Human Rights Treaty', in J. H. Knox (ed.), *Human Rights and 21st Century Challenges* (2020), 323; J. Knox and R. Pejan (eds.), *The Human Right to a Healthy Environment* (2018), 1 ('revolutionary'); L. Rajamani, 'Integrating Human Rights in the Paris Climate Architecture: Contest, Context, and Consequence', (2019) 9(3) *Climate Law* 180, at 201 ('milestone in the integration of human rights concerns in the climate regime').

[124]See also B. Mayer, 'Human Rights in the Paris Agreement', (2016) 6 *Climate Law* 109, at 117; S. Adelman, 'Human Rights in the Paris Agreement: Too Little, Too Late?', (2018) 7(1) TEL 17; A. Boyle, 'Climate Change, the Paris Agreement and Human Rights', (2018) 67(4) ICLQ 759, at 777.

[125]M. P. Carazo, 'Contextual Provisions (Preamble and Article 1)', in Klein et al., *supra* note 101, at 114–15.

[126]See Rajamani, *supra* note 123, at 191; Mayer, *supra* note 124, at 113, 114.

[127]See Rajamani, ibid., at 192.

[128]See Katowice Rulebook, UNFCC, CP/2018/3/Add, 1 (19 March 2019) and UNFCC, CP/2018/10/Add. 1 (19 March 2019).

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

is more complicated; accordingly, this section focuses on cases related to international climate law, in particular, those that seek to require governments to raise their climate mitigation ambitions and/or to fulfil their self-established goals.[129] The latter comprises cases aimed at holding states accountable for fulfilling set reduction targets as well as cases challenging infrastructure projects. Cases dismissed for procedural reasons are not covered in the following.[130]

4.1 Juridification, clarity, and compliance

The focus of the following analysis is on whether national courts can be said to hold states accountable for internationally agreed-upon obligations (compliance), whether they have improved clarity in a concise manner and whether they have further juridified 'soft' treaty provisions. Moreover, I highlight how courts have established constitutional rights and human rights as the predominant standard according to which climate policy and international climate law are to be assessed.

4.1.1 Towards individual responsibility for temperature goals?

Early after the conclusion of the Paris Agreement, the New Zealand High Court was rather reluctant to hold the government accountable for meeting internationally agreed-upon temperature goals. In *Thomson* v. *Minister for Climate Change Issues,* the court, without much ado, found that under the Paris Agreement, '[t]here is no requirement for countries to adopt a target, that if adopted by all, would achieve this goal' of keeping the global average temperature increase well below 2.0°C.[131] In other words, states are free to establish their domestic targets at a level they deem appropriate and cannot be individually held accountable.[132]

At first glance several later decisions point in the opposite direction. The Supreme Court of the Netherlands, the *Hoge Raad,* in the much-cited *Urgenda* case, explicitly accepted 'partial responsibility' by the Netherlands.[133] Although the court grounded its argument primarily on the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR), it went so far as to state that 'the UNFCC and the Paris Agreement are both based on the individual responsibility of states'.[134] To support individual responsibility, the court primarily referred to Article 47, paragraph 1, of the International Law Commission's Articles on State Responsibility, including a direct quote from the commission's commentary therein.[135] Unfortunately, the court does not engage with these legal provisions in more depth. With regard to Article 47 of the Articles of State Responsibility, it is disputed whether the clause addresses only situations in which an act qualifies as a wrongful act for each state[136] or whether it covers situations in which several acts of states together become wrongful (e.g., under a collective obligation,

[129]This approach must not be mistaken as an argument against the importance of other forms of climate litigation in achieving the overall goal of protecting the planet and its inhabitants. See generally, on the importance of small-scale indirect cases, K. Bouwer, 'The Unsexy Future of Climate Change Litigation', (2018) 30(3) *Journal of Environmental Law* 483.

[130]*Carvalho et al. v. European Parliament et al.*, Judgement of 25 March 2021, C-565/19 P, European Court of Justice; *Friends of the Irish Environment CLG v. The Government of Ireland et al.*, Judgment of 31 July 2020, Appeal No: 205/19, Supreme Court of Ireland, paras. 7.23–7.24. Although the latter case was not dismissed entirely, Friends of the Irish Environment (an NGO) was not granted standing under the ECHR or constitutional rights and the implications of the rest of the case for international climate law are negligible.

[131]*Thomson v. Minister for Climate Change Issues*, Judgment of 2 November 2017, CIV 2015-485-919, High Court of New Zealand, paras. 38, 176; see, in a similar direction, *Friends of the Earth et al. v. Heathrow Airport*, Judgment of 1 May 2019, Appl. no. [2019] EWHC 1070 (Admin), UK High Court of Justice, para. 607.

[132]See *Thomson v. Minister for Climate Change Issues*, ibid., para. 91.

[133]*Urgenda v. Netherlands*, Judgment of 20 December 2019, Appl. no. 19/00135, Hoge Raad, para. 5.7.1 et seq.

[134]Ibid., para. 7.3.2; see also para. 5.7.3 with reference to Art. 3(1) and Art. 3(3) UNFCCC.

[135]Ibid., paras. 5.7.1–5.7.7.

[136]See Mayer, *supra* note 5, at 430.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

or when emissions by several states together cause harm).[137] Under the first interpretation, no individual responsibility arises for climate change, as it is difficult to conceive of each and every GHG emission as illegal. This is glossed over by the finding that partial responsibility cannot be evaded by simply pointing to other states or to a state's minor contribution to global warming ('no reduction is negligible').[138]

The court then concretized the content of this responsibility by using the so-called common ground method established by the European Court of Human Rights (ECtHR).[139] By referring to a plethora of international documents and the Paris Agreement's temperature targets, the Hoge Raad established the 2°C target as the 'maximum target to be deemed responsible'.[140]

Doctrinally, this could be read to mean that states under international climate treaty law are individually responsible for fulfilling this 'maximum target'. Accordingly, commentators suggest that human rights in this case were misused as a 'Trojan horse' enabling the Hoge Raad to enforce international climate law.[141]

However, the Hoge Raad refers to 'consensus in the international community and climate science' – not international *law* as such – to establish its 'absolute minimum'.[142] Consensus in that regard must not be read as a reference to customary international law or subsequent practice. The Hoge Raad's reference to an absolute minimum is not so much a representation of international climate law but an appraisal of *consented* scientific evidence of what is tolerable in terms of temperature increase to adequately protect human rights to life and physical integrity. Accordingly, the court does not make an argument about the legal bindingness and content of international climate law but regards these documents as 'international facts'.

This view is more explicitly promoted in the judgement of the Hague District Court in *Milieudefensie* v. *Royal Dutch Shell (RDS)*. Here, judges dismissed the Paris Agreement as 'non-binding on the signatories and ... non-binding for RDS'.[143] Instead, the court used reports from the Intergovernmental Panel on Climate Change (IPCC) as 'international facts' based on which it concludes that 'the goals of the Paris Agreement represent the best available scientific findings in climate science' and that these 'non-binding goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change'.[144]

The climate decision by the German Federal Constitutional Court (*Bundesverfassungsgericht*) points in a similar direction. This court followed the *Hoge Raad* on individual responsibility, albeit with slightly different reasoning.[145] According to the court, constitutional rights and the basic law's (*Grundgesetz*) environmental clause have an international dimension.[146] Thus, the government, in principle, must seek international solutions when its own means are limited. This international dimension, however, does not lead to a primacy of international climate law and is not meant to dismiss individual accountability. Rather, 'state organs are obliged to take climate action irrespective of any such agreement', for example, when 'it proves impossible for international

[137]See for such an interpretation, Wewerinke-Singh, *supra* note 5, at 93.

[138]See *Urgenda v. Netherlands*, *supra* note 133, paras. 5.7.7–5.7.8.

[139]See, on the common ground method, e.g., K. Dzehtsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (2015).

[140]See *Urgenda v. Netherlands*, *supra* note 133, para. 7.2.11. Following the Hoge Raad on individual responsibility, the Brussels Administrative Court questions whether the 1.5°C target would not be more adequate but ultimately did not decide the issue for separation of power concerns; see *Gillet et al. v. the Belgian State et al.*, Judgment of 17 June 2021, 2015/4585/A, Tribunal de première instance francophone de Bruxelles, paras. 61–6, 83–4.

[141]See Mayer, *supra* note 5, at 442, 450–1.

[142]See *Urgenda v. Netherlands*, ibid., paras. 7.2.11, 7.5.1.

[143]*Milieudefensie et al. v. Royal Dutch Shell PLC*, Judgment of 26 May 2021, No. C/09/571932/HA ZA 19-379, Hague District Court, para. 4.4.26.

[144]Ibid., para. 4.4.27.

[145]*Neubauer et al. v. Germany*, Decision of 24 March 2021, 1 BvR 2656/18 and others, Bundesverfassungsgericht, para. 202.

[146]Ibid., para. 201.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

cooperation to be legally formalized in an agreement'.[147] The need to unilaterally adopt strong climate policy – despite the fact that this alone may not prevent climate crisis – is justified by the argument that, to achieve effective climate action, Germany must 'avoid creating incentives for other states to undermine ... cooperation'. Here, the Paris Agreement comes in but only to illustrate the court's argument that the international climate regime is not based on hard legal obligations but on mutual trust.[148]

To nurture that trust, the court requires the government to pursue climate policies aimed at the Paris temperature objectives. Factually, this finding elevates international collective objectives between states to an individual obligation towards individuals.[149] Nevertheless, the court did not engage with the legal quality of the Paris Agreement as such. Rather, the judges argued that the legislators' reference to the Paris objectives in the Federal Climate Protection Act (*Klimaschutzgesetz*, KSG) is the 'constitutionally relevant specification of the climate goal contained in the basic law'[150] that 'goes beyond the consent given by the German legislator to the Paris Agreement in passing the act of approval'.[151] From that perspective, the Paris Agreement is only a tool through which the German state is fulfilling its obligations stemming from constitutional rights and the basic law's environmental clause.[152]

Again, this is evidence of the court's understanding regarding hierarchy between the basic law and international obligations.[153] Notably, the court even feels the need to briefly acknowledge that the so-specified temperature objective appears sufficient from a constitutional perspective at present but also that, in the case of new scientific evidence, the objective would have to be adjusted; depending on the evidence, both upward as well as downward corrections appear possible.[154] Thus, the court upholds a thick (national) rule of law, with constitutional rights as an external standard to evaluate the content of international climate law.

Interpreting the 'constitutionally relevant specification of the climate goal', the court allowed state authorities much discretion. The closest the court could get to a numerical climate objective was in stating that a 1.75°C degree limit 'is certainly within the range of what is legally permissible'.[155] Thereby the court rejected the plaintiff's argument that state action must be sufficient to achieve the 1.5°C objective.

What the Dutch and German cases have in common is that courts found respondents to be individually responsible for contributing to international climate objectives. Doctrinally, this must not be mistaken for an interpretation of climate objectives to be legally binding as such. As indicated, the *Hoge Raad* relied primarily on 'international facts' and the German Constitutional Court on the climate protection act's reference to the Paris temperature goal. These approaches are replicable in states that either adopted climate protection acts with respective references or that are parties to the ECHR. However, these findings are highly context-specific and do not support the view that all parties to the Paris Agreement are individually responsible for realizing the temperature goals.

[147]Ibid., para. 201.
[148]Ibid., para. 203.
[149]A. Buser, 'Of Carbon Budgets, Factual Uncertainties, and Intergenerational Equity–The German Constitutional Court's Climate Decision', (2021) 22(8) *German Law Journal* 1409, at 1415.
[150]See *Neubauer et al. v. Germany*, *supra* note 145, para. 209.
[151]Ibid., paras. 209–10 with reference to § 1 para. 1 KSG.
[152]Ibid., para. 210.
[153]Ibid., para. 211.
[154]Ibid., para. 212.
[155]Ibid., para. 242.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

4.1.2 Clarifying the fair share of industrialized states

Based on the finding that their home states can be held accountable under constitutional law and human rights law, respectively, courts next had to establish the 'fair share' of GHG reductions due by individual states. Both the *Hoge Raad* and the Brussels Court applied the common ground method to derive an international minimum standard of required reductions to protect human rights under the ECHR but came to different conclusions.[156] According to the *Hoge Raad*, there is an international consensus that, for an Annex I party such as the Netherlands, a reduction of 25 per cent by 2020 compared to 1990 levels presents 'an absolute minimum' of appropriate protection under Articles 2 and 8 of the ECHR, as it 'offers a good chance of not exceeding the limit of warming of more than 2°C'.[157] In particular, this goal was taken from the non-binding Fourth IPCC Assessment Report from 2004 and several non-binding Conference of the Parties resolutions.[158] In contrast, the Brussels Court refused to rely on non-binding documents such as IPCC reports or conference outcome documents.[159] In essence, the only binding obligation for Belgium that the court found was a 20 per cent reduction commitment for 2020 stemming from the second commitment period of the Kyoto Protocol.[160] Thus, the court dismissed applicants' claims for more ambitious targets for 2025, 2030 and 2050 (net zero), as it found no support for such quantified targets in the Paris Agreement or elsewhere.[161] This did not stop the court from finding that the government was failing to take 'all necessary measures' to protect fundamental rights to life and privacy, but it refrained from establishing numerical targets.[162]

The German Federal Constitutional Court took a different path – as it had earlier dismissed ECHR rights as not going beyond requirements under constitutional fundamental rights – and therefore did not apply the common ground method.[163] Rather, the court attempted to derive and concretize the national GHG budget based on the Paris temperature goals established as specified constitutional law. The court noted that the 'Paris Agreement does not specify any greenhouse gas reduction quotas or emission ceilings that would have to be met in order to achieve the targets'.[164] Therefore, it first relied on IPCC estimates regarding the global GHG budget allowable to achieve the 1.5°C and the 2.0°C goals, respectively. The problem that remained was that the target, in itself, is rather vague, and scientific estimates of the global budget remaining to achieve certain levels of global average temperatures differ.[165]

Further, the court struggled to estimate the national budget for Germany, but it is noteworthy that it did not dismiss such an undertaking upfront:

> Germany's contribution in this regard must be determined in a way that promotes mutual trust in the willingness of the Parties to take action, and does not create incentives to undermine it (see para. 203 above). Certain indications regarding the distribution method can be derived from international law, such as from Art. 2(2) and Art. 4(4) PA (on the principle of common but differentiated responsibilities, see also Art. 3 nos. 1 and 4 of the United Nations Framework Convention on Climate Change of 9 May 1992).[166]

[156] See *Urgenda v. Netherlands*, *supra* note 133, para. 7.2.1; *Gillet v. Belgium*, *supra* note 140, 66 et seq.
[157] *Urgenda*, ibid., para 7.2.1.
[158] Ibid.
[159] See *Gillet v. Belgium*, *supra* note 140, at 66, 82.
[160] Ibid., 66.
[161] Ibid., 80.
[162] Ibid., 83.
[163] See *Neubauer et al. v. Germany*, *supra* note 145, para. 147.
[164] Ibid., para. 9.
[165] Ibid., para. 212.
[166] Ibid., para. 225.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

Even with these 'indications', the court refrained from taking the carbon budget calculated for Germany by the national German Climate Council – based on a per-capita share and a 1.75° C temperature goal – as an 'exact numerical benchmark'.[167] Nonetheless, the court required the government to 'take into account' the budget so calculated in devising its climate policy.[168] What this means more precisely remains an open debate.[169]

In that sense the *Bundesverfassungsgericht* does not develop a clear numerical reduction commitment but only a 'due diligence obligation'.[170] In contrast, the *Hoge Raad* establishes a clear numerical goal comparable to the 'Kyoto approach'.[171] However, all courts refrain from strengthening clarity or developing legal bindingness of the Paris Agreement. According to the *Bundesverfassungsgericht,* Germany is constitutionally obliged to protect the climate irrespective of international climate treaties. While the German court cites a plethora of climate treaty provisions to concretize constitutional law, it does not make claims about the legal character of the former or even their precise legal meaning. As noted, the *Hoge Raad* relies on regional human rights law concretized by international facts rather than on international climate *law* as such. It is also doubtful whether Dutch courts are willing to develop further numerical goals for the post-2020 phase, given the lack of inter-governmental consent in that regard.[172] So the *Urgenda* decision did not establish clarity and foreseeability as its applicability is temporally limited. Therefore, both decisions establish only limited national rule(s) of law in climate matters but do not represent a rise of the international rule of climate law.

4.1.3 Compliance strictu sensu

The foregoing parts only partially addressed 'compliance' with the Paris Agreements temperature objective as the focus was on creative development and juridification. In the following, I address compliance in a stricter sense, namely via efforts to enforce goals set in Nationally Determined Contributions (NDCs) including lawsuits brought against individual projects.

4.1.3.1 Nationally determined contributions. Some scholars portray climate litigation as an instrument to hold states accountable for their NDCs and thereby to increase compliance with international climate law.[173] Practical support for that finding is slim and not concise. The New Zealand High Court qualified NDCs as non-binding in international law,[174] and both the Brussels Court and the German Federal Constitutional Court characterize the mechanism to establish NDCs as 'voluntary'.[175]

A more differentiated approach is apparently pursued by the UK Supreme Court, which qualifies the European Union's NDC as binding but suggests that the Paris Agreement does 'not impose an obligation on any state to adopt a binding domestic target'.[176] Under that reading the bindingness of NDCs depends on their content.

Another court that may have taken an NDC as legally binding is the Colombian Supreme Court. In *Future Generations v. Ministry of the Environment,* the court seems to argue that

[167]Ibid., para. 236.

[168]Ibid., para. 247.

[169]See, e.g., H. P. Aust, 'Klimaschutz aus Karlsruhe: Was verlangt der Beschluss vom Gesetzgeber?', *Verfassungsblog,* 5 May 2021, available at www.verfassungsblog.de/klimaschutz-aus-karlsruhe-was-verlangt-das-urteil-vom-gesetzgeber/.

[170]See *Neubauer et al. v. Germany*, *supra* note 145, paras. 229, 237.

[171]See also Meguro, *supra* note 95, at 949–50.

[172]But see M. Wewerinke-Singh and A. McCoach, 'The State of the Netherlands v Urgenda Foundation: Distilling Best Practice and Lessons Learnt for Future Rights-Based Climate Litigation', (2021) 30(2) RECIEL 275, at 280, 282, who argue that based on temperature objectives and the concept of a national budget (accepted by the court) future cases are imaginable.

[173]J. Peel and J. Lin, 'Transnational Climate Litigation: The Contribution of the Global South', (2019) 113(4) AJIL 679.

[174]See *Thomson v. Minister for Climate Change Issues*, *supra* note 131, paras. 38, 159–160.

[175]See *Gillet v. Belgium*, *supra* note 140, at 26; *Neubauer et al. v. Germany*, *supra* note 145, para. 204.

[176]See *Friends of the Earth v. Heathrow Airport*, *supra* note 131, para. 71.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

the pledge to stop deforestation, as included in its NDCs, is a binding commitment of the state.[177] However, one must be cautious here, as the decision's wording is not entirely clear and the findings on international climate law are only a brief *obiter dictum* after the court established a violation of national law.

One pending case that could shed further light on the bindingness of NDCs and the legal implications of 'progression' is a case brought by several youths against the government of Brazil.[178] However, it remains to be seen whether the court accepts the standing of individuals to bring such a case.[179]

Apart from these direct invocations of NDCs, a broader range of cases is relevant here for factual reasons. These cases seek to hold states accountable for self-established policy objectives or legal targets. In states where these commitments are synchronous to the content of NDCs – or even more strict – these cases qualify as 'factual' enforcement of NDCs.[180]

Such an approach apparently is less likely to succeed in states where no legally binding national targets exist[181] or where individuals do not have legal standing to hold governments accountable for national climate acts. However, in jurisdictions where climate laws fall together with broad interest-based standing requirements, such as France, enforcement cases play an important role. Notably, the Paris Administrative Court, in *L'Affaire du Ciecle*, held France accountable for fulfilling its nationally established objectives, as well as EU objectives, and ordered the state to take actions to reduce GHG emissions.[182] In a similar way, the *Conseil d'État* in *Grand Synthe* required the government to take all necessary measures to achieve the self-determined goal to achieve a 40 per cent reduction in GHG emissions by 2030 compared to 1990 levels.[183]

In these cases, international climate law played a role but only a marginal one. Notably, the *Conseil d'État* denied the direct effect of the UNFCCC and the Paris Agreement, but nonetheless argued that national laws must be interpreted in light of international mitigation goals.[184] This statement, however, did not extend beyond mere lip service, as national laws were sufficiently clear, and the court did not further specify how international climate law influenced its decision.

4.1.3.4 Challenging individual projects. In a final set of cases, plaintiffs relied on international climate law to challenge individual projects or policies. This group of cases is related to international climate law insofar as plaintiffs argue that it is necessary to stop certain GHG-intensive projects to comply with the Paris Agreement.

These cases overwhelmingly face the obstacle that individual projects and policies contribute little to climate change in relative terms. Thus, the Norwegian Supreme Court dismissed a case on the grounds that the individual project posed no 'real and immediate' threat to the right to private

[177] *Demanda Generaciones Futuras v. Minambiente*, Appl. no. 11001-22-03-000-2018-00319-01, Judgment of 5 April 2018, Supreme Court of Colombia, para. 11.3 (in Spanish); see also Wegener, *supra* note 6, at 30; but see, for a discussion of the case from a domestic law perspective, M. Del Pilar García Pachón et al., 'Climate Change Litigation in Colombia', in F. Sindico and M. M. Mbengue (eds.), *Comparative Climate Change Litigation: Beyond the Usual Suspects* (2021), 53, at 60.

[178] *Six Youths v. Minister of Environment and Others*, Popular Action No. 5008035-37.2021.4.03.6100/SP, 14th Federal Civil Court of Sao Paulo.

[179] See, on that obstacle, A. Lehmen, 'Advancing Strategic Climate Litigation in Brazil', (2021) 22(8) *German Law Journal* 1471, at 1482.

[180] Cf. Wegener, *supra* note 6, at 29.

[181] See, e.g., for Ghana: B. Erinosho, 'Climate Change Litigation in Ghana: An Analysis of the Role of Courts in Enforcing Climate Change Law', (2020) 114 *AJIL Unbound* 51; for India: E. Chaturvedi, 'Climate Change Litigation: Indian Perspective', (2021) 22(8) *German Law Journal* 1459; for the dismissal of German policy commitments as non-binding: *Greenpeace et al. v. Germany*, Administrative Court of Berlin, Appl. no. 10 K 412.18, Judgment of 31 October 2019.

[182] *Notre Affaire à Tous and Others v. France ('L'affaire du siècle')*, Paris Administrative Court, case nos. 1904967, 1904968, 1904972, and 1904976/4, Judgment of 3 February 2021 and Judgment of 14 October 2021.

[183] *Grande Synthe et al. v. the French Republic*, Judgment of 19 November 2020, No. 427301, Conseil d'État and Decision of 1 July 2021, No. 427301.

[184] *Grande Synthe et al.*, ibid., paras. 12–13.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

life and family and the right to life.[185] Similarly, the UK Supreme Court concluded that, given remaining uncertainty as to future policies and the availability of climate-neutral technologies, a permit for another terminal at Heathrow Airport was not 'unreasonable' even if it covered the period after 2050, when, according to UK policy, the country should achieve 'net-zero' GHG emissions.[186] Most recently, the Australian Federal Court *inter alia* found that the approval of a coal mine extension would not cause 'personal injury' to the plaintiffs.[187]

The New South Wales Land and Environment Court, in *Gloucester Resources Limited* v. *Minister for Planning,* went further in at least considering whether GHG emissions stemming from an individual project could create emissions beyond the global budget required to achieve the long-term objective of net neutrality and the global average temperature goal under the Paris Agreement.[188] However, the court did not provide further guidance on how to determine the national budget and the concrete meaning of cited provisions of the climate change accord. As the court considered the poor visual, environmental and social impacts of the project as sufficient to justify refusal of the permit, GHG emissions only presented a 'further reason for refusal'.[189]

Only a few cases can be found that seem to promote more comprehensive prohibitions of GHG-intensive projects. One case in point is the deforestation matter before the Supreme Court of Colombia referred to above.[190] Another is the case of the *Society for Protection of Environment and Biodiversity* in front of the Indian Green Tribunal. In this case, the tribunal found an exemption for the Indian construction industry from an environmental approval process to be incompatible with the government's commitments under the Paris Agreement.[191] However, the decision lacked a justification of that view going beyond mere 'cursory reference to the need to reduce carbon emissions'.[192] In that regard, the decision connects to a number of cases in which courts referred to international climate law to justify the notion that climate mitigation is a public interest.

One of these cases is *Earth Life Africa v. Minister of Environmental Affairs et al.* In this case, the court interpreted national environmental law 'consistently with international law' – citing the precautionary principle and Article 4(1)(f) of the UNFCCC – to justify its finding that environmental impact assessments must take into account GHG emissions and even 'the decline trajectory as outlined in the NDC'.[193] Such a reading does not predetermine the outcome of the approval process[194] but at least requires national agencies to take the objectives of international climate law into consideration when granting permits for GHG-intensive projects. However, as emphasized by the High Court, the question raised by the case was 'not whether new coal-fired power stations are permitted under the Paris Agreement and the NDC'.[195]

[185]*Nature and Youth Norway et al. v. Norway*, Judgment of 22 December 2020, Appl. no. 20-051052SIV-HRET, Supreme Court of Norway, paras. 168, 171.

[186]See *Friends of the Earth v. Heathrow Airport*, *supra* note 131, paras. 124 et seq., 154 et seq.

[187]*Minister for the Environment v. Sharma*, Appl. no. 35 VID 389, Judgment of 15 March 2022, Federal Court of Australia, para. 886 (Justice Wheelahan).

[188]*Gloucester Resources Limited v. Minister for Planning*, Judgment of 8 February 2019, Appl. no. 2017/383563, Land and Environment Court New South Wales, paras. 446–447 (summarizing expert opinion), para. 527.

[189]Ibid., para. 556.

[190]For a critique see Mayer, *supra* note 5, at 439.

[191]*Society for Protection of Env't & Biodiversity v. UoI*, Appl. no. 677/2016, Decision of 8 December 2017, National Green Tribunal.

[192]S. Ghosh, 'Litigating Climate Claims in India', (2020) 114 *AJIL Unbound* 45, at 46.

[193]*Earth Life Africa v. Minister of Environmental Affairs et al.*, Case No: 21559/2018, Order of 19 November 2020, High Court of South Africa, para. 90.

[194]The Minister of Environmental Affairs ultimately conducted a climate impact assessment but granted the permit nonetheless. For an overview of the case see climatecasechart.com/non-us-case/4463/.

[195]See *Earth Life Africa v. Minister of Environmental Affairs*, *supra* note 193, para. 90

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

In a similar way, the Federal Administrative Court of Austria considered commitments stemming from the national climate protection act, the Kyoto Protocol and unspecified 'obligations' from the Paris Agreement as part of the public concerns that outweighed competing public interests in the construction of a third runway at the Vienna International Airport.[196] However, the Austrian Constitutional Court overturned the decision in 2017 as it held that international obligations stemming from the Kyoto Protocol and the Paris Agreement were not directly applicable.[197]

Taken together, these cases are evidence of an increased awareness for the contribution of individual projects to climate change. In the analysed cases, international climate agreements played a role in establishing climate change as a public concern to be considered in balancing decisions. Nonetheless, in terms of enforcing international climate law – and, thus, for the international rule of law in climate matters – these cases are negligible.

4.2 Generality: Towards a universal rule of (international) climate law?

Even if one accepts for a moment that courts in cited cases developed and enforced international climate law, to speak of an international rule of climate law would require some degree of generality and widespread participation. As seen, climate litigation, even in the narrow sense as defined here, is not merely a Western phenomenon. Nonetheless, justiciable individual responsibility for meeting international targets is limited thus far to a handful of states. Although Peel and Lin highlight the more subtle contributions of cases in the Global South for the overall objective of mitigating climate change,[198] I tend to see rather limited impact of these cases on an international rule of climate law. As demonstrated, international climate law has little to say about infrastructure projects, and courts have refrained from developing international law in that regard. Although the lack of national climate laws in many states of the Global South could induce plaintiffs to base arguments on international climate law and human rights law, the concept of common but differentiated responsibility and the lack of a clear minimum standard for developing states in terms of national budgets could prove to be major obstacles.[199]

That said, several important cases are pending in major GHG emitters such as Brazil and India, and, despite initial setbacks,[200] additional cases could follow.[201] However, generality and universality may remain an elusive goal, as many important states are likely to remain outside the climate regime established by national courts. No ambitious climate litigation relevant for the international rule of climate law is known to have been decided or to be pending in Russia, the fourth-largest GHG emitter, or in China, currently the largest GHG emitter.[202] Commentators emphasize the lack of academic discussion, scepticism among public and political elites, and formal legal hurdles, such as the lack of climate laws, to explain these gaps.[203] In China, domestic climate policies increasingly seem to influence the outcome of civil actions between individuals

[196] *Schwechat Airport Expansion*, Appl. no. W109 2000179-1/291E, Decision of 2 February 2017, Bundesverwaltungsgericht, at 117, 126.

[197] *Schwechat Airport Expansion*, Appl. no. E 875/2017, E 886/2017, Verfassungsgerichtshof Österreich, 7.

[198] See Peel and Lin, *supra* note 173, at 690; see also, on climate litigation in the Global South, J. Setzer and L. Benjamin, 'Climate Litigation in the Global South: Constraints and Innovations', (2020) 9(1) TEL 77.

[199] Whereas it appears reasonable to calculate national budgets on a per-capita basis for developed countries, as this is the least intrusive methodology realistically adopted for these states, no such minimum exists for developing states who should 'benefit' from 'common but differentiated responsibility', see Buser, *supra* note 149, at 1421–2.

[200] See notably *Pandey v. Union of India and others*, Case No. 187/2017, Order of 15 January 2019, Green Tribunal Delhi.

[201] On pending Brazilian cases see Lehmen, *supra* note 179; on the potential of climate litigation in India and on pending cases see Chaturvedi, *supra* note 181.

[202] For an overview and prospects of such cases see A. Y. Kapustin, 'Prospects for Climate Change Litigation in Russia', in Alogna et al., *supra* note 108, at 225; C. Zhou and T. Qin, 'Prospects for Climate Change Litigation in China', in ibid., at 244.

[203] Y. Yamineva, 'Opportunities for Climate Litigation in Russia: the Impossibility of Possible', in Sindico and Mbengue, *supra* note 177, at 534; T. Qin and M. Zhang, 'Climate Change and the Individual: a Perspective of China', in ibid., at 378–80;

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

and public interest actions by state prosecutors, but these cases are based exclusively on domestic law and climate policies without formal regard for international climate law.[204]

Finally, it is questionable whether a case comparable to those in Belgium, France, Germany and the Netherlands could be successful in the United States, the second-largest GHG emitter at present. In absolute terms, the United States is the jurisdiction with the greatest number of climate cases.[205] However, there is only one case that is comparable in terms of ambition to *Urgenda* and *Neubauer et al.*, and it was recently dismissed.[206] Even if a case would reach the US Supreme Court its current composition most likely would not allow progressive findings that could contribute towards achieving the Paris Agreement's climate objectives.

5. Conclusion

It has become fashionable to describe climate law as 'multi-layered'[207] and characterized by 'cross-level'[208] or 'transnational interactions'.[209] Multiple layers certainly exist, but this article found that doctrinal interactions among different levels are limited and work in only one direction.[210] Some courts, such as the New Zealand High Court, simply dismissed the Paris Agreement climate objectives as non-binding. Others, such as the *Hoge Raad*, primarily relied on 'international facts' rather than international climate law to specify a government's fair share of responsibility. Even courts that extensively cited climate treaty provisions to concretize constitutional law, such as the *Bundesverfassungsgericht*, refrained from comprehensively engaging with their content and legal quality. On clarifying disputed questions under the Paris Agreement and, more generally, in juridifying its content, court decisions thus far have provided little help.

The few court decisions that have allowed nongovernmental organizations and individuals to hold governments accountable for implementing national climate laws arguably support the objectives of international climate law and, in some instances, must be conceptualized as factual enforcement of NDCs. Thus far, however, such cases are a particular feature of the French jurisdiction where interest-based litigation falls together with specific climate protection laws and – albeit less clear – of the Colombian deforestation case. Whereas manifest failure to fulfil national targets may also be justiciable in Germany[211] and the Netherlands[212] under regional human rights law and constitutional law, it remains to be seen whether courts in other jurisdictions will follow such an approach.

At present, only a few courts – primarily located in Europe – hold their governments accountable for maintaining national GHG budgets derived from constitutional and regional human

see generally also C. Cai, 'International Law in Chinese Courts', in C. A. Bradley and C. Cai (eds.), *The Oxford Handbook of Comparative Foreign Relations Law* (2019), 547.

[204]M. Zhu, 'The Rule of Climate Policy: How Do Chinese Judges Contribute to Climate Governance without Climate Law?', (2022) 11(1) TEL 119; Y. Zhao et al., 'Prospects for Climate Change Litigation in China', (2019) 8(02) TEL 349; see Peel and Lin, *supra* note 173, at 693, 718; see Qin and Zhang, ibid., at 380–2.

[205]UNEP, Global Climate Litigation Report: 2020 Status Review, available at www.unep.org/resources/report/global-climate-litigation-report-2020-status-review.

[206]*Juliana et al. v. United States*, Case No. 18-36082, Opinion of 17 January 2020, United States Court of Appeals for the Ninth Circuit, at 25; the current status of the case and ongoing motions to amend the initial complaint, available at climatecasechart.com/case/juliana-v-united-states/.

[207]J. Peel et al, 'Climate Change Law in an Era of Multi-Level Governance', (2012) 1(2) TEL 245.

[208]See Wegener, *supra* note 6, at 18.

[209]D. Bodansky, 'Climate Change', in T. C. Halliday and G. Shaffer (eds.), *Transnational Legal Orders* (2015), 287.

[210]Partially this can be explained by domestic contexts including laws on procedural review; see, e.g., Saiger, *supra* note 6, at 51.

[211]See *Neubauer et al. v. Germany*, *supra* note 145, paras. 169–70.

[212]See Wewerinke-Singh and McCoach, *supra* note 172, at 280, 282.

https://doi.org/10.1017/S0922156522000772 Published online by Cambridge University Press

rights law, thus promoting a thick rule of national and regional law on climate mitigation. The reach of this order may expand towards some states of the Global South, but important actors such as China, Russia and the United States are likely to remain outside. Consequently, one may speak of national rules of climate law or even a hybrid rule of climate law, but not a truly *international* or even *global* rule of climate law.

Cite this article: Buser A (2023). National climate litigation and the international rule of law. *Leiden Journal of International Law* **36**, 593–615. https://doi.org/10.1017/S0922156522000772