15

State Responsibility

*Annalisa Savaresi**

15.1 INTRODUCTION

State responsibility is increasingly invoked in climate change litigation. It typically arises when an action or omission that is attributable to a State breaches an international obligation. However, as the International Court of Justice (ICJ) has noted, compliance with domestic law and compliance with international law are different questions.[1]

International courts typically apply the general law of State responsibility as codified and elaborated by the International Law Commission.[2] Conversely, national courts tend to apply domestic rules when they consider arguments concerning a breach of an international obligation and pay limited attention to what the law of State responsibility says on these matters.[3] The ICJ recognised this inconsistency when it stated that 'what is a breach of treaty may be lawful in the municipal [domestic] law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision'.[4] As this chapter explains, however, the distinction between domestic and international law is sometimes blurred, especially in the dynamic field of climate change litigation.

Generally, domestic courts' engagement with international law obligations is on the rise. This reflects a shift in the nature of international law itself, which has historically been concerned with 'outward-looking' State-to-State obligations to be implemented through conduct on the international plane. Now, the focus is increasingly turning towards 'inward-looking' obligations – whereby States are required to undertake certain conduct within their own jurisdiction, such as

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1 *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 1551 (*ELSI*) [73].

2 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) UN Doc A/RES/56/83 (2001), 53 UN GAOR Supp (No 10) at 43, Supp (No 10) A/56/10 (IV.E.1) (ILC Draft Articles).

3 André Nollkaemper, 'Internationally Wrongful Acts in Domestic Courts' (2007) 101 AJIL 760, 761.

4 *ELSI* (n 1) 73.

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adopting a specific legal framework, according certain rights, or abstaining from taking particular actions.[5] The latter type of international obligations are common in international environmental and human rights law. It is therefore not a surprise that international law obligations concerning environmental and human rights protection are, more and more, being invoked before national courts,[6] especially in the context of climate change litigation.[7] Domestic courts have thus inadvertently found themselves on the frontline of the enforcement of international obligations concerning climate change. There is, however, no uniform approach to the treatment of international obligations in general, and to the use of the law of State responsibility in particular, in domestic judicial practice.

This chapter expounds the fundamental tenets of the law of State responsibility, with a view to clarifying how this set of norms is used in the context of climate litigation. It starts with a succinct introduction to the law of State responsibility, illustrating its constituting elements and how they may apply to climate change. The chapter then considers how State responsibility has been framed in national judicial practice so far and what may be regarded as emerging best practice. This chapter does not consider legal redress that may be provided once responsibility for injury arising from a failure to fulfil that legal obligation has been established. The matter of damages is instead addressed in another chapter of this Handbook.[8]

15.2 THE LAW OF STATE RESPONSIBILITY

State responsibility typically arises when an action or omission that is attributable to a State breaches an international obligation,[9] regardless of the origin or character of that obligation.[10] As such, State responsibility requires neither fault nor damage.

Any 'injured' State, whose rights have been violated by said breach, may invoke State responsibility in an international dispute.[11] This may occur in a *bilateral* setting – for the breach of an obligation owed by one State to another – or in a *multilateral* setting – for the breach of an obligation due to multiple States, or indeed to all States.[12] The latter includes the possibility that the breach is 'of such a character

[5] See Study Group on Principles on the Engagement of Domestic Courts with International Law, 'Mapping the Engagement of Domestic Courts with International Law – Final Report' in International Law Association Report of the Seventy-Seventh Conference (International Law Association, London 2016) (ILA Domestic Courts and International Law Final Report) 12.

[6] ibid.

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

[8] See Chapter 18 on Remedies.

[9] ILC Draft Articles (n 2) art 2.

[10] ibid art 12.

[11] ibid art 42.

[12] Christian Dominicé, 'The International Responsibility of States for Breach of Multilateral Obligations' (1999) 10 EJIL 353, 361.

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as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation'.[13] In both instances, an injured State must be specifically affected by the breach of an international obligation, for example because the wrongful act was committed against its citizens or on its territory.[14] The remedies available under the law of State responsibility range from cessation of the wrongful act, to assurances of non-repetition, restitution, compensation, and satisfaction.[15]

In addition, any State may invoke State responsibility for the breach of obligations in the collective interest (so-called *erga omnes* or *erga omnes partes* obligations), even where it is not itself specifically affected.[16] Thus, in the case of *erga omnes* obligations – such as, for example, the prohibition of genocide – the law of State responsibility may be invoked for wrongful acts committed against the citizens of another State and on the territory of another State.[17] In these instances, however, the applicant State can only demand cessation of the internationally wrongful act and the performance of the duty to make reparation for the benefit of any injured States.[18]

In order to instigate a dispute for a breach of an international obligation concerning climate change, therefore, a set of conditions need to materialise:

1. A State has international obligations that directly or indirectly concern climate change;
2. One or more of these obligations have been breached, through an act or omission by the same State;
3. The breach is attributable to said State;
4. One or more States have been injured by said breach *or* the breached obligation is *erga omnes/erga omnes partes*.

The remainder of this section considers how the conditions to instigate an inter-State dispute for a breach of an international obligation concerning climate change may be fulfilled.

15.2.1 *International Obligations Concerning Climate Change*

As other chapters in this volume explain in further detail,[19] there are several international law obligations concerning climate change. These obligations are primarily – though not exclusively – enshrined in international climate treaties, namely,

[13] ILC Draft Articles (n 2) art 42(2).
[14] Robert Kolb, *International Law of State Responsibility: An Introduction* (Edward Elgar 2018) 196.
[15] ILC Draft Articles (n 2) arts 30–31.
[16] ibid art 48.
[17] See for example *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* [2022] ICJ Rep 477.
[18] ibid.
[19] See Chapter 9 on Duty of Care and Chapter 12 on International Law.

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the 1992 United Nations Framework Convention on Climate Change (UNFCCC), the 1997 Kyoto Protocol, and the 2015 Paris Agreement.[20] The numerous bodies created by these treaties have produced secondary rules that further articulate and substantiate parties' obligations. While formally not legally binding, decisions of bodies like the Conference of the Parties (COP) to the UNFCCC provide authoritative guidance on the interpretation of climate treaties. States normally implement these decisions and regard them as part and parcel of the obligations under said treaties.[21]

Other international treaties, however, also provide obligations that are relevant to climate change.[22] For example, the Multilateral Environmental Agreements (MEAs) on matters such as air quality, the protection of the ozone layer, biodiversity, and the conservation of the marine environment. Similarly, international law-making bodies other than those established under the climate treaties – like the International Civil Aviation Organisation and the International Maritime Organization – have produced international norms on specific climate related matters – such as, for example, emissions from aviation or maritime transport.[23]

Similarly, climate change triggers States' human rights obligations. It is by now widely recognised that climate change affects the enjoyment of virtually all human rights,[24] as well as that measures to respond to climate change can have significant human rights implications. The preamble of the Paris Agreement specifies that parties 'should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights'.[25] The UN Human Rights Council has adopted a series of resolutions emphasising the relevance of human rights obligations to climate change action, and the need to systemically interpret States' obligations and corporate responsibilities in this connection, both at the national and international levels.[26]

[20] United Nations Framework Convention on Climate Change (entered into force 19 June 1993) 1771 UNTS 107 (UNFCCC); Kyoto Protocol to the United Nations Framework Convention on Climate Change (entered into force 16 February 2005) UN Doc FCCC/CP/L7/Add1 (Kyoto Protocol); Paris Agreement (entered into force 4 November 2016) 3156 UNTS 79 (Paris Agreement).

[21] Robin R. Churchill and Geir Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 AJIL 623; Jutta Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' (2002) 15 LJIL 1.

[22] See for example the review of practice in Rosemary Rayfuse and Shirley Scott, *International Law in the Era of Climate Change* (Edward Elgar 2012); Harro van Asselt, *The Fragmentation of Global Climate Governance: Consequences and Management of Regime Interactions* (Edward Elgar 2014); Annalisa Savaresi, 'Climate Change and Human Rights: Fragmentation, Interplay and Institutional Linkages' in Sébastien Duyck, Sébastien Jodoin, and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge, Taylor & Francis Group 2018).

[23] Kyoto Protocol (n 20) art 2(2).

[24] OHCHR, 'Report of the Office of the UN High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (2009) UN Doc A/HRC/10/61 16.

[25] Paris Agreement (n 20) preamble.

[26] The UN Human Rights Council has adopted a series of resolutions, all titled 'Human Rights and Climate Change', UN Docs A/HRC/RES/7/23 (2008); A/HRC/RES/10/4 (2009); A/HRC/RES/18/22 (2011); A/HRC/RES/26/27 (2014); A/HRC/29/15 (2015); A/HRC/RES/32/33 (2016); A/HRC/35/20 (2017); A/HRC/38/4 (2018); A/HRC/RES/41/21 (2019); A/HRC/RES/44/7 (2020); A/HRC/RES/47/24 (2021).

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Finally, the body of customary international law includes obligations – such as those associated with the prohibition and prevention of transboundary harm[27] – which are explicitly mentioned amongst the general principles that should guide State parties to the UNFCCC as they set out to achieve the objective and implement the provisions of climate treaties.[28]

15.2.2 *Breach of an International Obligation*

Establishing a breach of an international obligation requires careful examination of the content of the obligation and of the particular conditions required for it to be breached. This section provides a few examples, looking specifically at obligations enshrined in customary international law, in international climate change treaties, in other MEAs, and in human rights treaties.

15.2.2.1 Customary International Law Obligations

State obligations as established by customary international law may apply to climate change mitigation and adaptation. A State may, for instance, invoke a breach of the obligation to refrain from causing harm to the territory of another State and/or to areas beyond national jurisdiction. Under customary international law, an applicant State must prove that another State has caused transboundary harm or has breached the related obligation to prevent harm or the associated procedural duties to cooperate and to carry out an environmental impact assessment.[29] In relation to climate change, this requires demonstrating that the applicant State's territory or an area beyond national jurisdiction has suffered significant harm (i.e. loss of life, loss of property, and/or environmental damage) as a result of activities producing greenhouse gas emissions carried out under the jurisdiction or control of the respondent State.

General international law, however, does not provide strict liability for transboundary harm arising from activities that fall within the exercise of a State's sovereign rights.[30] An applicant State would therefore have to identify relevant due diligence obligations which have been breached by the respondent State. The fact that the respondent State has exercised reasonable diligence would be sufficient to exclude

[27] The so-called 'no harm' principle is recognised in both the UNEP 'Declaration of the United Nations Conference on the Human Environment' (1972) UN Doc A/CONF/48/14 (Stockholm Declaration) principle 21 and United Nations 'Declaration of the United Nations Conference on Environment and Development' (1992) 31 ILM 874 (Rio Declaration) principle 2. The International Court of Justice has acknowledged the customary international law status of the no harm principle in *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 241–242 [29].

[28] UNFCCC (n 20) art 3(a).

[29] As noted also in Daniel Bodansky, Jutta Brunnée, and Lavanya Rajamani, *International Climate Change Law* (Oxford University Press 2017) 45.

[30] Alan Boyle, 'Globalising Environmental Liability: The Interplay of National and International Law' (2005) 17 JEL 3, 6.

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responsibility under international law, even if some significant harm has been suffered. Thus, an applicant State should provide proof that the respondent State has not put in place adequate procedures to assess and predict risks, to measure their probability and gravity, and to prevent and mitigate any harm.[31] In international adjudication, therefore, ascertaining compliance with the obligation of due diligence to prevent, reduce, or control transboundary harm typically places a heavy burden of proof on prospective litigants to identify flaws in the discharge of due diligence obligations that are broadly worded and imprecise.[32] States may, however, turn to the obligations enshrined in international environmental or human rights treaties, which substantiate what a State is expected to do in greater detail, as the next sections explain.

15.2.2.2 International Environmental Obligations

International climate treaties typically include obligations of conduct and obligations of result, which may be used to determine the contours of the general obligation to refrain from causing harm to the territory of another State and/or to areas beyond national jurisdiction. For example, Parties to the Paris Agreement must periodically prepare, communicate, and maintain plans – so-called 'nationally determined contributions' (NDCs) – detailing how they intend to reduce emissions and by how much, in order to contribute to holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C.[33] NDCs are therefore a crucial resource to assess State parties' conduct under the climate treaties. The Paris Agreement requires parties to periodically submit revised NDCs,[34] and failure to submit a revised NDC may be regarded as a breach of a State's obligations of conduct under the Paris Agreement.

The substantive content of NDCs may be scrutinised in the context of parameters embedded in the Paris Agreement.[35] For example, the principle of 'highest possible ambition'[36] may be interpreted as a due diligence standard that requires States to

[31] ibid.

[32] Christina Voigt, 'State Responsibility for Climate Change Damages' (2008) 77 Nordic Journal of International Law 4; Bodansky, Brunnée, and Rajamani (n 29) 45.

[33] Paris Agreement (n 20) art 2(1)(a).

[34] UNFCCC, Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1 (29 January 2016) [25] says: 'Parties shall submit to the secretariat their nationally determined contributions referred to in Article 4 of the Agreement at least 9 to 12 months in advance of the relevant session of the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement'. COP26 was expected to take place in November 2020, so the deadline envisioned in this decision has passed already. Only a handful of parties, however, have submitted their revised NDCs. See NDC Registry (*UNFCCC*) <www.unfccc.int/sites/ndcstaging/Pages/LatestSubmissions.aspx> accessed 24 February 2024.

[35] Alan Boyle, 'Progressive Development of International Environmental Law: Legislate or Litigate?' (2019) 62 GYIL 305, 337.

[36] Paris Agreement (n 20) art 4(3).

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act proportionately in line with the risk at stake and the means at their disposal.[37] Scientists have repeatedly warned that the level of ambition embedded in NDCs submitted to date is insufficient to secure the achievement of the temperature goal envisioned in the Paris Agreement.[38] By and large, most extant NDCs do not adequately consider and mitigate the risk of harm to the territory of other States and to areas beyond national jurisdiction. NDCs that do not adequately contribute to the achievement of the temperature goal enshrined in the Paris Agreement may be regarded as a breach of a State's obligations under that treaty.

Finally, international environmental obligations concerning the prevention of some specific forms of harm may also be invoked in the context of climate litigation. For example, the UN Convention on the Law of the Sea (UNCLOS) makes parties responsible for regulating and controlling the risk of marine pollution resulting from the activities of the private sector through an obligation of due diligence.[39] In fulfilling their obligations, UNCLOS parties are required to take into account 'internationally agreed rules, standards and recommended practices and procedures'.[40] The due diligence obligations derived from UNCLOS may be read in light of obligations enshrined in climate treaties as well as decisions and guidance provided by their treaty bodies.[41] Therefore, NDCs may be used as a yardstick to ascertain whether UNCLOS State parties are adequately considering and mitigating the risk of harm to the marine environment associated with climate change.

15.2.2.3 International Human Rights Obligations

Applicants in climate lawsuits increasingly invoke State responsibility for breaches of international obligations concerning the protection of human rights.[42] This trend is part and parcel of a consolidated jurisprudential tradition, whereby a State's human rights obligations are interpreted to encompass the duty to prevent and reduce environmental harm that interferes with the full enjoyment of human rights, providing for remedies for any remaining harm.[43] The obligation to protect human rights

[37] See Chapter 9 on Duty of Care.

[38] UNEP, 'The Emissions Gap Report 2021' (*UNEP*, 2021) <www.unep.org/resources/emissions-gap-report-2021> accessed 24 February 2024.

[39] United Nations Convention on the Law of the Sea (entered into force 16 November 1994) 1833 UNTS 3 (UNCLOS) arts 192–194; Alan Boyle, 'Litigating Climate Change under Part XII of the LOSC' (2019) IJMCL 458, 465.

[40] ibid arts 207(1), 212.

[41] Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 39) 466.

[42] Jacqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 TEL 37; Annalisa Savaresi and Juan Auz, 'Climate Change Litigation and Human Rights: Pushing the Boundaries' (2019) 9 Climate Law 244; Annalisa Savaresi and Joana Setzer, 'Rights-Based Litigation in the Climate Emergency: Mapping the Landscape and New Knowledge Frontiers' (2022) 13 JHRE 7.

[43] See the analysis of practice in Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment UN Doc A/HRC/37/59 (2018).

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does not require States to prohibit all activities that may cause environmental harm. Instead, States have discretion to strike a balance between environmental protection and other legitimate societal interests. As both the first and the second Special Rapporteur on human rights and the environment have noted, however, this balance must not be 'unjustifiable or unreasonable' or result in unjustified, foreseeable infringements on human rights.[44]

Over the years, judicial and quasi-judicial international human rights bodies have developed a rich practice providing remedies affording relief to victims of human rights abuses, drawing on the law of State responsibility and domestic jurisprudence.[45] Even if human rights treaties are not designed to protect the environment as such – and only some expressly guarantee a right to a safe, clean, healthy, and sustainable environment – human rights bodies have increasingly awarded indirect protection to environmental interests, insofar as they are linked to the enjoyment of human rights.[46] The unique supernational remedies provided by international human rights instruments have been increasingly used also as a means to bridge the compliance and accountability gaps that characterise environmental governance. And even when they do not have the power to award remedies, these bodies exert influence over domestic judicial practice interpreting the scope and content of human rights obligations.[47] As Section 15.3 of this chapter shows, in recent years, this practice has become apparent with regard to climate change.[48]

Human rights bodies generally recommend that States strike an appropriate balance between evidential burdens of proof between the claimant and the defendant, whereby account is taken of the differences in power and capacity of the parties.[49] According to the Committee on Economic, Social and Cultural Rights, for example, 'shifting the burden of proof may be justified where the facts and events relevant for resolving a claim lie wholly or in part within the exclusive knowledge of the corporate defendant'.[50] As Section 15.3 of this chapter shows in greater detail, this interpretation of the evidential burden of proof is yet another reason why climate applicants increasingly resort to human rights arguments.

[44] ibid 33.

[45] Dinah Shelton, *Remedies in International Human Rights Law* (Oxford University Press 2015) 2.

[46] See for example Inter-American Commission on Human Rights, 'Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources – Norms and Jurisprudence of the Inter-American Human Rights System' (Inter-American Commission on Human Rights 2009) OEA/Ser.L/V/II; 'Manual on Human Rights and the Environment', (*Council of Europe*, 2022) <https://rm.coe.int/manual-environment-3rd-edition/1680a56197> accessed 24 February 2024.

[47] Shelton (n 45) 91.

[48] See the review in Riccardo Luporini and Annalisa Savaresi, 'International Human Rights Bodies and Climate Litigation: Don't Look Up?' (2023) 32(2) RECIEL 267.

[49] OHCHR, 'Improving Accountability and Access to Remedy for Victims of Business-Related Human Rights Abuse' (2016) UN Doc A/HRC/32/19 12.

[50] UN Committee on Economic, Social and Cultural Rights, 'General Comment No 24 (2017) on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities' (10 August 2017) UN Doc E/C.12/GC/24 [45].

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15.2.3 *The Breach is Attributable to a State*

The law on State responsibility includes rules of attribution of conduct of persons or entities to a State.[51] In the case of a plurality of responsible States, the general rule is that each State is separately responsible for conduct attributable to it.[52]

Attributing breaches of obligations enshrined in climate treaties can be relatively straightforward. For example, submitting NDCs is a formalised process that clearly entails State agency. Therefore, if a State omits to submit an NDC, or submits a wholly inadequate NDC, these actions and omissions can be attributed to said State. It seems in other words unlikely that, in instances such as these, State agency may come under dispute.

Climate lawsuits frequently allege human rights violations associated with the emissions produced on the territory of the respondent States, or as a result of activities carried out on the State's territory, which in turn are predicted to have an effect on global climate.[53] In both cases, the State's responsibility arises from failure to regulate a hazardous activity within its jurisdiction or control.

While traditional interpretations of human rights treaties have often equated the scope of a State party's jurisdiction with the State's territory,[54] human rights bodies have progressively recognised the extraterritorial reach of a State's human rights obligations.[55] In a groundbreaking Advisory Opinion, the Inter-American Court of Human Rights (IACtHR) has suggested that States have the obligation to prevent any significant environmental harm inside or outside their territory, produced by themselves or third parties within their jurisdiction.[56] According to the Court, when transboundary harm or damage occurs, a person is under the jurisdiction of the State from which the harm originated if there is a causal link between a conduct that occurred within the territory of that State and the negative impact on the human rights of persons outside the territory of that State.[57]

[51] ILC Draft Articles (n 2) arts 4–11.

[52] ibid art 47(3).

[53] See for example the Writ of Summons in *Greenpeace Nordic Association v Ministry of Petroleum and Energy* (Oslo District Court) (*People v Arctic Oil District Court*) [35]–[36]. All documents of the case can be found at <https://climatecasechart.com/non-us-case/greenpeace-nordic-assn-and-nature-youth-v-norway-ministry-of-petroleum-and-energy/> accessed 24 February 2024. See also the review of practice in Savaresi and Setzer (n 42).

[54] The ICJ has recognised that the International Covenant on Civil and Political Rights applies extraterritorially, in specific circumstances in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 [107]–[113].

[55] UNHR Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 052/1979', 29 July 1981 (UN Doc CCPR/C/13/D/52/1979 (*Sergio Euben Lopez Burgos*) [12.3]; *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)*, Advisory Opinion OC-23, Inter-American Court of Human Rights Series A No 23 (15 November 2017) (IACtHR OC-23/17).

[56] ibid IACtHR OC-23/17 [59].

[57] ibid [140].

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15.2.4 *Injured State/Erga Omnes Obligations*

Under international law, a State needs to be specifically affected by a breach of an international obligation to invoke the law of State responsibility, most commonly because the wrongful act was committed against its citizens or on its territory.[58] States that are particularly vulnerable to the adverse effects of climate change are already singled out in the climate treaties as deserving special attention and support and benefit from special treatment.[59] These States could therefore claim to be injured by breaches of international obligations due to human rights violations suffered by their citizens as a result of climate change.

Alternatively, any State may invoke the responsibility of another State for a breach of *erga omnes partes* obligations. For example, some human rights obligations – like the prohibition of torture – are *erga omnes*.[60] Furthermore, some obligations arising from the Paris Agreement – such as, for example, that to submit an NDC – may be regarded as *erga omnes partes*.[61]

15.3 STATE OF AFFAIRS

15.3.1 *International Practice*

While the possibility to instigate an international dispute alleging State responsibility for a breach of an international obligation concerning climate change has been at the centre of much scholarly speculation, no such litigation has materialised so far. At the time of writing, however, three parallel initiatives concerning the request of an advisory opinion on climate change from international courts are underway.[62] Advisory opinions 'constitute *advice*' and 'do not legally bind either the requesting entity or any other body or State to take any specific action pursuant to the opinion'.[63] Even so, advisory opinions might provide crucial guidance to better define the contours of States' obligation of due diligence to prevent, reduce, or control transboundary harm associated with climate change.

In the first initiative, the Pacific Island State of Vanuatu has launched a campaign to seek an advisory opinion from the ICJ, with a view 'to clarify[ing] the legal

[58] Kolb (n 14) 196.

[59] UNFCCC (n 20) preamble, arts 3(2), 4(3), and 4(10); Paris Agreement (n 20) preamble, arts 7(2),(5),(6),(9), 9(4), and 11(1).

[60] Margaretha Wewerinke-Singh, *State Responsibility, Climate Change and Human Rights under International Law* (Hart Publishing 2019) 160.

[61] See Chapter 12 on International Law.

[62] Annalisa Savaresi and others, 'Beyond COP26: Time for an Advisory Opinion on Climate Change?' (*EJIL: Talk!*, 17 December 2021) <www.ejiltalk.org/beyond-cop26-time-for-an-advisory-opinion-on-climate-change/> accessed 24 February 2024.

[63] Hugh Thirlway, 'The International Court of Justice' in Malcolm Evans (ed), *International Law* (Oxford University Press 2014) 589.

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obligations of all countries to prevent and redress the adverse effects of climate change'.[64] The proposed questions are:

> (1) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for present and future generations?;
> (2) What are the legal consequences under these obligations for States which, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment, with respect to:
> (a) States, including, in particular, small island developing States, which, due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
> (b) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?[65]

In March 2023, the proponents secured support for a formal request for an advisory opinion by the UN General Assembly, as required by the UN Charter.[66]

In the second initiative, the Commission of Small Island States on Climate Change and International Law[67] has sought an advisory opinion from the International Tribunal on the Law of the Sea.[68] As noted earlier, while the UNCLOS does not deal with greenhouse gases specifically, these gases may be regarded as pollutants, falling within the scope of parties' due diligence obligations to regulate and control the risk of marine pollution.[69] The questions before the court are:

> What are the specific obligations of State Parties to the United Nations Convention on the Law of the Sea (the 'UNCLOS'),

[64] 'Pacific Firm to Lead Global Legal Team Supporting Vanuatu's Pursuit of Advisory Opinion on Climate Change from International Court of Justice' (*Blue Ocean Law*, 23 October 2021) <www.blueoceanlaw.com/blog/pacific-firm-to-lead-global-legal-team-supporting-vanuatus-pursuit-of-advisory-opinion-on-climate-change-from-international-court-of-justice> accessed 24 February 2024.

[65] The text of the adopted UNGA resolution is available at <www.vanuatuicj.com/resolution> accessed 24 February 2024.

[66] Under art 96(a) of the Charter of the United Nations, '[t]he General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question'. Charter of the United Nations (entered into force 24 October 1945) XV UNCIO 335, amendments in 557 UNTS 143, 638 UNTS 308 and 892 UNTS 119.

[67] Agreement for the Establishment of the Commission of Small Island States on Climate Change and International Law (entered into force 31 October 2021) 61(5) ILM 739.

[68] The tribunal may give an advisory opinion 'if an international agreement related to the purposes of the [UN Convention on the Law of the Sea] specifically provides for the submission to the Tribunal of a request for such an opinion'. See UNCLOS (n 39) Annex VI art 21.

[69] ibid arts 192–194. See Boyle, 'Litigating Climate Change under Part XII of the LOSC' (n 39) 464.

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(a) to prevent, reduce and control pollution of the marine environment in relation to the deleterious effects that result or are likely to result from climate change, including through ocean warming and sea level rise, and ocean acidification, which are caused by anthropogenic greenhouse gas emissions into the atmosphere?
(b) to protect and preserve the marine environment in relation to climate change impacts, including ocean warming and sea level rise, and ocean acidification?[70]

The tribunal has invited selected international organisations and stakeholders to present written statements and held hearings in September 2023.[71]

Finally, in January 2023, Chile and Colombia asked the IACtHR for an advisory opinion on climate change and human rights, with a view to support a fair, sustainable, and timely response to the climate emergency, taking into account the obligations arising from international human rights law.

The guidance delivered as a result of these requests for an advisory opinion would be particularly helpful in the context of climate litigation before domestic and regional courts, where arguments concerning the breach of international obligations are increasingly made.

In the meantime, some human rights-based complaints related to climate change have already been brought before international *quasi-judicial* (namely, the UN Human Rights Committee,[72] the Committee on the Rights of the Child[73]) and *non-judicial* human rights bodies (namely, various Special Procedures of the Human Rights Council).[74] The vast majority of these complaints remain pend-

[70] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)* (12 December 2022) <www.itlos.org/en/main/cases/list-of-cases/request-for-an-advisory-opinion-submitted-by-the-commission-of-small-island-states-on-climate-change-and-international-law-request-for-advisory-opinion-submitted-to-the-tribunal/> accessed 24 February 2024.

[71] *Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law (Request for Advisory Opinion submitted to the Tribunal)* (Order of 16 December 2022) <www.itlos.org/fileadmin/itlos/documents/cases/31/C31_Order_2022-4_16.12.2022_01.pdf> accessed 24 February 2024.

[72] UNHR Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 2728/2016', 24 October 2019 UN Doc CCPR/C/127/D/2728/2016 *(Teitiota)*; UNHR Committee, 'Views Adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No 3624/2019', 21 July 2022, UN Doc CCPR/C/135/D/3624/2019 (*Billy*).

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

[74] Rights of Indigenous People in Addressing Climate-Forced Displacement, AL-USA 16/20 <http://climatecasechart.com/non-us-case/rights-of-indigenous-people-in-addressing-climate-forced-displacement> accessed 24 February 2024 (*Five tribes*); Violations of human rights by Federation of Bosnia Herzegovina (BiH) and China due to coal fired plants in BiH, AL BIH 2/2021 and AL CHN 2/2021 <https://climatecasechart.com/non-us-case/violations-of-human-rights-by-to-federation-of-bosnia-herzegovina-bih-and-china-due-to-coal-fired-plants-in-bih/> accessed 24 February 2024 (*Coal fired plants*); *Environmental Justice Australia v Australia* <https://climatecasechart.com/non-us-case/environmental-justice-australia-eja-v-australia/ (*Environmental Justice*).

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ing or have failed to reach adjudication on the merits due to admissibility constraints.[75] Three important decisions have already been issued.

In *Teitiota*, one asylum seeker lodged a complaint with the UN Human Rights Committee against New Zealand. He alleged that New Zealand's refusal to grant him asylum threatened the enjoyment of his right to life, as a result of risks associated with climate change-induced displacement. The Committee found that the applicant's complaint did not concern 'a hypothetical future harm, but a real predicament' and that 'the risk of a violation of the right to life had been sufficiently substantiated'.[76] It nevertheless rejected the complaint at the merits stage,[77] as it was not satisfied that the applicant would have been personally affected by a serious individualised risk should he be sent back to Kiribati.[78] The Committee reasoned that only in 'extreme cases' can it find a violation of the non-refoulement obligation stemming from the right to life based on a situation of 'a serious and generalized risk' in the country of origin. According to the Committee, the general situation in Kiribati did not qualify as an extreme case, as the country could, with the assistance of the international community, 'take affirmative measures to protect and, where necessary, relocate its population'.[79] Even though the complaint was unsuccessful, the UN Human Rights Committee's reasoning concerning State obligations vis-à-vis threats to life associated with climate change is important to determine the scope of a State's obligations under human rights law. The Committee acknowledged that climate change constitutes 'one of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life'[80] and that the effects of climate change may expose individuals to a violation of their rights under the Covenant, 'thereby triggering the non-refoulement obligations of sending States'.[81] The Committee's reasoning has already made strides in domestic judicial practice. In 2021, the Italian Court of Cassation cited the Committee's decision in *Teitiota*, asserting that national judges should consider environmental or climate degradation that may put at risk personal dignity of asylum seekers in the country of origin.[82]

In *Sacchi et al*, a group of children from multiple countries filed a complaint before the Committee on the Rights of the Child against multiple States. They lamented that the defendant States had breached their rights to life, health, culture, and best interest of the child, as a result of failure to adopt adequate measures for climate change mitigation.[83] Although their complaint was dismissed at the

[75] See Chapter 5 on Admissibility.
[76] *Teitiota* (n 72) [8.5].
[77] ibid [9.9].
[78] ibid.
[79] ibid [9.11].
[80] ibid [9.4].
[81] ibid [9.11].
[82] See *IL v Italian Ministry of the Interior and Attorney General at the Court of Appeal of Ancona*, Ordinance No 5022/2021 (Corte Suprema di Cassazione).
[83] *Sacchi* (n 73) [260]–[275].

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admissibility stage due to lack of exhaustion of domestic remedies, the Committee's reasoning concerning the scope of the respondent States' jurisdiction is particularly important. The respondent States had argued that the applicants were not within their jurisdiction. The Committee rejected this argument, applying the IACtHR's reasoning mentioned earlier. It noted that emissions originating in the respondent States contribute to climate change and that the adverse effects thereof have implications on the enjoyment of human rights by individuals 'both within as well as *beyond the territory of the State party*'.[84] The Committee noted that, due to their ability to adopt and enforce regulations on emitting activities, the respondent States had 'effective control' over the source of the harm.[85] The Committee established that, under the principle of common but differentiated responsibilities and respective capabilities, every State is responsible for its own share of greenhouse gas emissions, as the collective nature of the problem does not absolve individual States of their responsibility for 'the harm that the emissions originating within its territory may cause to children, *whatever their location*'.[86] The Committee noted that the transboundary harm at the centre of the applicants' complaint was foreseeable, due to the scientific evidence on climate change impacts and the fact that the respondent States had signed international treaties on climate change.[87]

Finally, in *Daniel Billy*, Australian indigenous peoples alleged violations of the right to culture, right to privacy, family, and home, and right to life, as a result of Australia's failure to take adequate measures to mitigate and adapt to climate change. The UN Human Rights Committee granted their complaint only with regard to Australia's lack of timely and adequate action over climate change adaptation. The Committee found that the applicants had provided sufficient information on how they had personally been affected by the impacts of climate change.[88] It asserted that Australia had failed to comply with its positive obligation to protect the applicants' home, their private and family life, and their collective ability to maintain a traditional way of life and to transmit their customs and culture to future generations.[89] As in *Teitiota*, however, the Committee did not find a violation of the right to life, as the applicants had not demonstrated a concrete and reasonably foreseeable risk that their life would be exposed to, or the effects that climate change had already had on their health. Instead, the Committee emphasised that, in the period of time in which the islands would allegedly become uninhabitable, Australia could undertake preventive measures and, if necessary, relocate the applicants.[90]

[84] ibid [10.9]–[11] (emphasis added).
[85] ibid [10.9].
[86] ibid [10.10] (emphasis added).
[87] ibid [10.11].
[88] *Billy* (n 72) [7.10].
[89] ibid [8.9]–[8.14].
[90] ibid [8.7].

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15.3.2 *Regional Practice*

Regional human rights bodies, too, have been increasingly asked to consider complaints concerning climate change.[91] At the time of writing, fourteen climate complaints have been filed before regional human rights bodies[92] – ten with the European Court of Human Rights (ECtHR),[93] three with the and the Inter-American Commission on Human Rights,[94] and one with the European Committee of Social Rights.[95]

These applications build on the consolidated case law of the ECtHR and IACtHR on environmental matters and typically rely on the human rights that these courts have over the years identified as relevant to the protection of environmental interests – such as the right to life, the right to respect for private and family life, home and correspondence, the rights of indigenous peoples – especially, those to culture and to communal property – and procedural rights associated with access to participation, information, justice, and remedies.[96]

In the only complaint that has been adjudicated on the merits to date – *Marangopoulos Foundation for Human Rights (MFHR) against Greece* – the applicants lamented breaches of their right to health, as a result of the operation of lignite mining. The case therefore addressed climate change concerns only indirectly. The European Committee of Social Rights declared that Greece had not applied legislation satisfactorily and had not provided sufficiently precise

[91] Peel and Osofsky (n 42); Savaresi and Auz (n 42); César Rodríguez-Garavito, *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action* (Cambridge University Press 2022); Savaresi and Setzer (n 42); Luporini and Savaresi (n 48).

[92] This data was compiled as of 30 September 2022 consulting the databases curated by the Sabin Center for Climate Change Law at Columbia Law School <http://climatecasechart.com/> accessed 24 February 2024 and by the Grantham Research Institute on Climate Change and the Environment at the London School of Economics <www.climate-laws.org> accessed 24 February 2024. For a review of this data, see Luporini and Savaresi (n 48).

[93] *Duarte Agostinho v Portugal and 32 other States* App No 39371/20 (ECtHR); *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* App No 53600/20 (ECtHR); *Müllner v Austria* App No 18859/21 (ECtHR); *Greenpeace Nordic and others v Norway* App No 34068/21 (ECtHR); *Carême v France* App No 7189/21 (ECtHR); *Uricchio v Italy and others* App No 14165/21 ECtHR); *De Conto v Italy and others* App No 14620/21 (ECtHR); *Soubeste and Others v Austria and 11 other states* App Nos 3195/22, 31932/22, 31938/22, 31943/22, and 31947/22 (ECtHR); *Plan B Earth and others v the United Kingdom*, not communicated ('*Plan B Earth*'); *Humane Being v the United Kingdom*, not communicated ('*Humane Being*').

[94] Petition To the Inter-American Commission on Human Rights Seeking Relief from Violations Resulting from Global Warming Caused by Acts and Omissions of the United States, [2005] Inter-American Commission on Human Rights 1413-05. The Commission dismissed the petition at a very initial phase with a letter to the petitioner. See also Petition Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada, [2013] Inter-American Commission on Human Rights.

[95] *Marangopoulos Foundation for Human Rights (MFHR) v Greece* (Decision on the Merits) (6 December 2006), ECSR Complaint No 30/2005, Resolution CM/ResChS (2008).

[96] For a review of these, see Luporini and Savaresi (n 48).

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information and screening of the health hazards related to lignite mining. The Committee cited the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts,[97] which provide that, when a State is under an international obligation to take preventive action against a certain event, but fails to do so, the State remains in breach over the entire period during which the event continues. Consequently, the Committee considered that the issues raised in the complaint constituted a breach of the obligation to prevent damage arising from air pollution for as long as the pollution continued, and that the breach might even be compounded progressively, if no sufficient measures were taken to put an end to it.[98]

15.3.3 *Domestic Case Law*

As noted earlier, international law obligations have become a common yardstick that domestic courts use to ascertain the lawfulness and adequacy of national law measures to tackle climate change and their impacts, and lack thereof. There is by now a rather long series of climate cases in which national courts rely on a combination of national and international law to order State authorities to take more ambitious action on climate change mitigation or adaptation.[99] These judgments variably rely on a blend of tort, public, or human rights law obligations, interpreted and reviewed in light of international law obligations.[100] Admittedly, this is a rather artificial distinction, given that in most cases the courts rely on multiple legal grounds to justify their findings. Nevertheless, some commonalities between successful climate cases concerning State responsibility do exist. These judgments recognise that State responsibility can be established for failure to adopt laws and policies that adequately deal with the climate emergency. Compliance with international law obligations is used as a yardstick to assess the adequacy of domestic climate law measures. Here we provide some examples of judgments from all over the world, combining international and domestic law arguments, which have delivered decisions favourable to climate applicants.

In *Ashgar Leghari v Federation of Pakistan et al*, Pakistani courts ordered the creation of a Climate Change Commission, tasked to monitor the implementation of the National Climate Change Policy, as a means to address the grievance of a farmer, who had lamented that lack of enforcement of existing national policies on climate change adaptation had breached his human rights.[101] The court relied on Pakistan's

[97] Specifically, ILC Draft Articles (n 2) art 14 on extension in time of a breach of an international obligation.
[98] *MFHR v Greece* (n 95) [193].
[99] See the review of practice in Maxwell and others (n 7) 37.
[100] ibid.
[101] *Asghar Leghari v Federation of Pakistan etc* PLD 2018 Lahore 364 [11].

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international environmental obligations, read in conjunction with established case law deriving the right to a healthy environment from extant constitutional rights.[102]

In *Salamanca Mancera v Presidencia de la República de Colombia*,[103] Colombian courts ordered the government to stop deforestation in the Amazon, finding that the State had breached the human rights of the young applicants, as well as its obligations under international climate treaties.[104]

In *Commune de Grande-Synthe v France*,[105] the French Council of State found that the French government's failure to reduce greenhouse gas emissions violated its duty of care. The court relied on the French Civil Code's provisions concerning tortious liability for environmental damage and construed the State's duty on the basis of international obligations enshrined in the European Convention of Human Rights and in the Paris Agreement.

In *Neubauer and others v Germany*, the German Constitutional Court formulated the State's duty to align climate laws with the best available climate science,[106] in light of international law obligations enshrined in the Paris Agreement.[107] According to the Court, the duty to protect arising from constitutional rights and the obligation to take climate action 'possesses a special international dimension'.[108] The Court specifically pointed to the necessity to implement a State's own climate measures at the national level and not to create incentives for other States to undermine international cooperation.

In *re Greenpeace Southeast Asia and Others*, the Commission on Human Rights of the Philippines carried out an inquiry on the impact of climate change on the human rights of the Filipino people, and on the role of the so-called Carbon Majors in this regard. The Commission asserted that States' obligations to respect, protect, and fulfil human rights require them to adopt and implement measures to prevent human rights violations, including those carried out by non-State actors.[109] The Commission relied on the IACtHR's Advisory Opinion to affirm that States have the responsibility to ensure that activities under their jurisdiction do not interfere with the enjoyment of human rights of people outside their jurisdiction.[110] It further noted that, for the purposes of finding that a State is in violation of its human right obligations in the context of climate change, 'it is sufficient to establish the absence

[102] ibid [7].
[103] *Salamanca Mancera and others v Presidencia de la República de Colombia and others*, 29 January 2018 (Tribunal Superior de Bogotá) [5.2]–[5.6].
[104] ibid [17].
[105] *Commune de Grande-Synthe v France* [2020] N°427301 (Conseil d'Etat) (*Grande-Synthe*).
[106] *Neubauer and Others v Germany* [2021] 1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20 (German Federal Constitutional Court) (*Neubauer*).
[107] ibid [211].
[108] ibid [149], [199].
[109] *In re Greenpeace Southeast Asia and Others* [2022] Case No CHR-NI-2016-0001 (Commission on Human Rights of the Philippines).
[110] ibid [72]–[73].

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of meaningful State resolve and action to address the major anthropogenic actors and factors driving global warming'.[111]

The Dutch courts have, however, made the most consequential statements regarding State responsibility for climate change, in the judgments in *Urgenda Foundation v the State of the Netherlands*.[112] While *Urgenda* is examined in greater detail elsewhere in this Handbook,[113] for the purposes of the present chapter, these judgments delivered the following key findings. First, international law obligations are relevant to determine the contours of the State's responsibility for climate change under domestic law; and second, domestic courts may order State authorities to address a breach of an international obligation.

The Dutch courts defined the contours of the State's responsibility under domestic law, in light of obligations enshrined in international law. Under the Dutch Constitution, provisions of international law that are 'binding on all persons' are directly applicable in national courts.[114] In *Urgenda*, the Dutch Supreme Court found that, because there is a grave risk that dangerous climate change would endanger the lives and welfare of many people in the Netherlands, the State had a responsibility 'to take adequate measures to reduce greenhouse gas emissions from Dutch territory'.[115] This duty to take the 'necessary measures' to mitigate climate change, in accordance with the State's specific responsibilities and capabilities, was construed on the basis of rights enshrined both in the European Convention on Human Rights – a treaty commonly regarded as having direct effect in the Netherlands – and in the UNFCCC and the Paris Agreement – which do not have direct effect.[116] The Court also relied on the no harm principle enshrined in customary international law to find that the Dutch State must take action to prevent harm to other countries arising from climate change, even if they are only partially responsible.[117] The Supreme Court explicitly referenced rules from the International Law Commission's Draft Articles on State Responsibility concerning situations where there are multiple States involved in a breach of an international obligation.[118] Since Urgenda did not claim damages and instead only asked the courts for an order to

[111] ibid [87].

[112] *Urgenda Foundation v The State of The Netherlands* [2015] ECLI:NL:RBDHA:2015:7196 (District Court of the Hague) (*Urgenda District Court*); *State of the Netherlands v Stichting Urgenda* [2018] ECLI:NL:GHDHA:2018:2591 (Court of Appeal) (*Urgenda Court of Appeal*); *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* [2019] ECLI:NL:HR:2019:2007 (Supreme Court of the Netherlands) (*Urgenda Supreme Court*).

[113] See e.g. Chapter 7 on Human Rights and Chapter 9 on Duty of Care.

[114] Constitution of the Kingdom of the Netherlands art 93.

[115] *Urgenda Supreme Court* (n 112) [6.1].

[116] André Nollkaemper and Laura Burgers, 'A New Classic in Climate Litigation: The Dutch Supreme Court Decision in the Urgenda Case' (*EJIL: Talk!*, 6 January 2020) <www.ejiltalk.org/a-new-classic-in-climate-change-litigation-the-dutch-supreme-court-decision-in-the-urgenda-case> accessed 24 February 2024.

[117] *Urgenda Supreme Court* (n 112) [5.7.9].

[118] ibid [5.7.5]–[5.7.6].

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perform an obligation, the Supreme Court did not explore how multiple States should share reparation or compensation in relation to climate change. Still, the Court emphasised that the fact that other States fail to meet their responsibility is no ground for the State not to perform its obligations.[119]

The Supreme Court also found that the fact that Dutch emissions are relatively modest is no ground for non-performance. Otherwise, a State could simply avoid responsibility by pointing to the responsibility of other nations for emissions.[120] The Court suggested that no single reduction is negligible, since every reduction has a positive effect in diminishing dangerous climate change.[121] As noted in other chapters of this Handbook,[122] the Dutch judges specifically rejected the 'drop in the ocean' defence put forward by the government, noting that 'Urgenda does not have the option to summon all eligible States to appear in a Dutch court'.[123] The Court of Appeal established that causality 'only plays a limited role' when the matter of the dispute is not the award of damages.[124] Instead, the Court reasoned, when damages are not at stake, 'a real risk' of a danger for which measures must be taken is sufficient for a complaint to be admissible.[125]

15.4 BEST PRACTICE AND REPLICABILITY

This chapter has considered the extent to which climate judgments rely on State responsibility. It illustrated the core elements of this notion in international law and analysed extant international, regional, and national practice. It has shown that domestic courts have established State responsibility on several occasions, relying on multiple legal grounds to justify their findings, including by reading tort, human rights, or constitutional law in light of international law. There are commonalities between successful climate cases invoking State responsibility. The applicants typically argue that the State's climate laws or policies concerning mitigation are either not ambitious enough or not adequately implemented. Judicial and non-judicial bodies alike have rejected the 'drop in the ocean' arguments and recognised that State responsibility can be established, for failure to adopt laws and policies that adequately deal with climate change. Not only are these decisions replicable, but, as more and more States adopt climate legislation, litigation demanding greater alignment between international law obligations and national legislation is likely to become more common.

[119] ibid [5.7.7].
[120] ibid.
[121] ibid [5.7.8].
[122] See Chapter 9 on Duty of Care and Chapter 16 on Causation.
[123] *Urgenda Supreme Court* (n 112) [64].
[124] ibid.
[125] ibid.

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The *Urgenda* judgments are illustrative of how national courts may rely on the law of State responsibility, and specifically, on breaches of international law – including the European Convention on Human Rights, the UNFCCC, and the Paris Agreement – to order a State to take (better) measures to tackle climate change. Admittedly, making this kind of argumentation is easier in 'monist' States, like the Netherlands, where international law obligations are directly applicable in domestic law.[126] For example, in another monist State, Belgium, domestic courts adjudicated a case that was filed on grounds that were broadly similar to those put forward in the *Urgenda* lawsuits, with similar judicial outcomes.[127] However, as this chapter has already shown, national courts in dualist States have also been willing to accept arguments on State responsibility similar to those made in the *Urgenda* judgments.[128]

At the time of writing, *Daniel Billy* remains the only decision of an international human rights body granting the claims of climate applicants. The decision was construed on the basis of the rights to culture and home, private and family life, and recognised human rights violations resulting from the State's failure to undertake measures to ensure climate change adaptation. The decision has affirmed that States must take adaptation measures to comply with their human rights obligations.[129] The decision, however, has left unaddressed questions over States' human rights obligations concerning mitigation, neither confirming nor disproving the interpretation of these obligations provided in the *Urgenda* judgements.[130]

The judgments and decisions reviewed in this chapter have broken new ground and will continue to inform and influence future judicial practice interpreting the scope and contours of State responsibility. At least with reference to climate change, questions of compliance with domestic and international law may not be very different, after all.

[126] On the relations between international and domestic law, see Eileen Denza, 'The Relationship between International and National Law' in Malcolm Evans (ed), *International Law* (5th ed., Oxford University Press 2018).

[127] *VZW Klimaatzaak v l'État Belge* [2021] 2015/4585/A (Tribunal de première instance francophone de Bruxelles, Section Civile) (*VZW Klimaatzaak First Instance*); *VZW Klimaatzaak v Kingdom of Belgium and Others* [2023] 2022/AR/891(Cour d'appel de Bruxelles) (*VZW Klimaatzaak Appeal*).

[128] See the review of practice in Maxwell and others (n 7).

[129] See e.g. OHCHR, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2016) UN Doc A/HRC/31/52 68–70; OHCHR, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (2019) UN Doc A/74/161, 84–86; OHCHR, 'Report of the Special Rapporteur on the Promotion and Protection of Human Rights in the Context of Climate Change' (2022) UN Doc A/77/226.

[130] See for example the discussion in Benoit Mayer, 'Climate Change Mitigation as an Obligation under Human Rights Treaties?' (2021) 115 AJIL 409; Corina Heri, 'Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability' (2022) 33 EJIL 925; Alexander Zahar, 'The Limits of Human Rights Law: A Reply to Corina Heri' (2022) 33 EJIL 953; Riccardo Luporini, 'Strategic Litigation as a Tool to Advance Climate Change Adaptation? Challenges and Prospects' (2023) Yearbook of International Disaster Law Online.

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