

# Climate Change Litigation and Rights-Based Strategies: Why International Human Rights Approaches to Climate Change Are Not Easily Transplanted to the American Legal System

Konadu Amoakuh\*

I. INTRODUCTION.....	196
II. BODIES OF LAW RELEVANT TO THE RIGHTS-BASED APPROACH TO CLIMATE LITIGATION .....	198
A. International Environmental Law .....	198
B. International Human Rights .....	201
III. CURRENT CASES ARE EXPLORING HOW TO APPLY THE EXISTING INTERNATIONAL HUMAN RIGHTS FRAMEWORK TO CLIMATE CHANGE.....	208
IV. CAN THIS INTERNATIONAL HUMAN RIGHTS STRATEGY BE TRANSPLANTED TO U.S. CLIMATE LITIGATION? .....	213
A. Domestic Legal Barriers to the Rights Strategy .....	213
B. Lack of Treaty Obligations.....	216
V. EXAMINING THE <i>JULIANA</i> CASE PROVIDES INSIGHT INTO THE CHALLENGES THAT DOMESTIC RIGHTS-BASED CLIMATE CLAIMS CURRENTLY FACE .....	218
VI. REASONS ADVOCATES HAVE NOT BEEN ABLE TO TRANSPLANT THE INTERNATIONAL HUMAN RIGHTS STRATEGY TO U.S. LITIGATION.....	227
VII. CONCLUSION .....	230

---

\*J.D., Stanford Law School, 2023.

## I. INTRODUCTION

As of February 2022, the Earth's global average temperature has risen 0.81 degrees Celsius above the twentieth-century average, largely due to an increase in anthropogenic carbon dioxide emissions, as well as other anthropogenic changes to environments and ecosystems like deforestation.<sup>1</sup> This rise in temperature is linked to extreme climatic events, global sea level rise, and ocean acidification, among many other dramatic global environmental changes that encompass the phenomenon known as climate change.<sup>2</sup> In 2018, the Intergovernmental Panel on Climate Change (IPCC) predicted that, should the current rate of emissions continue, the global average temperature will increase by 1.5 degrees Celsius above pre-industrial levels sometime between 2030 and 2052.<sup>3</sup> Such an increase would accelerate habitat loss, exacerbate water scarcity, raise sea levels by another 1-2 feet, and expose 1 billion people to deadly heatwaves.<sup>4</sup> Even if global emissions reach net-zero in the coming decades, warming caused by anthropogenic emissions from the pre-industrial period to the present will inevitably cause long-term changes in the climate system because of how long already-emitted carbon will remain in the atmosphere.<sup>5</sup> Reaching and sustaining net zero global carbon emissions by 2050 could, however, prevent the earth from reaching or surpassing the 1.5-degree threshold identified in the 2018 IPCC report.<sup>6</sup> Over 130 countries as well as hundreds of companies, cities, and financial institutions have now set or are considering a target for reducing their emissions to net-zero by mid-century.<sup>7</sup> The fundamental challenge is how to ensure countries

---

1. *State of the Climate: Global Climate Report for February 2022*, NOAA NAT'L CTRS. FOR ENV'T INFORMATION (Mar. 2022), <https://www.ncei.noaa.gov/access/monitoring/monthly-report/global/202202>; see also *Climate Action*, EUROPEAN COMM'N, [https://ec.europa.eu/clima/climate-change/causes-climate-change\\_en](https://ec.europa.eu/clima/climate-change/causes-climate-change_en) (last visited Apr. 1, 2022).

2. *Climate Change: How Do We Know?*, NASA GLOBAL CLIMATE CHANGE: VITAL SIGNS OF THE PLANET, <https://climate.nasa.gov/evidence/> (last visited Mar. 25, 2021).

3. IPCC, *Summary for Policymakers*, in GLOBAL WARMING OF 1.5°C. AN IPCC SPECIAL REPORT ON THE IMPACTS OF GLOBAL WARMING OF 1.5°C ABOVE PRE-INDUSTRIAL LEVELS 4 (V. Masson-Delmotte et al. eds., 2018).

4. Brad Plumer & Henry Fountain, *A Hotter Future is Certain, Climate Panel Warns. But How Hot is Up to Us*, N.Y. TIMES (Nov. 11, 2021), <https://www.nytimes.com/2021/08/09/climate/climate-change-report-ipcc-un.html>.

5. Tim Kruger, *After Net Zero, We Will Need to Go Much Further and Clean Up Historic Emissions*, THE CONVERSATION (June 10, 2021, 5:16 AM EDT) <https://theconversation.com/after-net-zero-we-will-need-to-go-much-further-and-clean-up-historic-emissions-162332>.

6. IPCC, *supra* note 3, at 12.

7. *Climate Action: The Global Coalition for Net-Zero Emissions is Growing*, UNITED NATIONS, <https://www.un.org/en/climatechange/net-zero-coalition> (last visited Jan. 21, 2022) (discussing the growing global efforts to reach net zero).

follow through on their commitments to make the deep emissions cuts necessary to reach these targets.

Due to both scientific uncertainty about specific policy interventions and the difficulty of identifying legally responsible parties, progress on international climate policy is often halted by collective action problems and lack of consensus about how to approach the complex socio-economic and socio-political issues inherent in tackling climate change.<sup>8</sup> Because of this, over the past thirty years, individuals and organizations have increasingly looked to courts and legal systems worldwide in order to bring claims for injuries suffered as a result of climate change.<sup>9</sup> Many of these cases, both internationally and in the United States, have relied on a “rights-based” strategy to climate litigation, emphasizing plaintiffs’ right to a healthy environment in order to hold states accountable for their failure to decrease carbon emissions and mitigate the effects of climate change.<sup>10</sup> Many international lawyers view litigation as an effective alternative to political and economic mechanisms because of its potential to force governments to review their policy priorities.<sup>11</sup> International litigation against states might also generate press attention, mobilize public interest groups, galvanize citizens, and secure compensation for victims.<sup>12</sup>

International litigation aimed at addressing climate change has pursued two primary strategies in international fora. One focuses on imbuing existing obligations to protect the global environment with an *erga omnes* character in order to provide standing for non-injured, non-state parties before international courts, like the International Court of Justice (ICJ).<sup>13</sup> This strategy allows claimants to attempt to hold states responsible for environmental damage, despite not otherwise meeting traditional standing requirements under the law of state responsibility.<sup>14</sup> The other approach, known as the “rights strategy,” employs international human rights law: claimants pursue remedies for environmental damages by filing petitions in

---

8. Maiko Meguro, *Litigating Climate Change Through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN J. INT’L L. 933, 933 (2020).

9. See JOANA SETZER & REBECCA BYRNES, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2020 SNAPSHOT 1, 14 (2020).

10. *Id.* at 12.

11. Meguro, *supra* note 8, at 934.

12. Eric A. Posner, *Climate Change and International Human Rights Litigation: A Critical Appraisal*, 155 U. PA. L. REV. 1925, 1931 (2007).

13. Meguro, *supra* note 8, at 934-35.

14. *Id.* at 934.

international human rights fora.<sup>15</sup> In addition to harnessing the normative weight of human rights law, this approach can make use of existing human rights tribunals, courts, and committees to allow individuals and communities to bring claims.<sup>16</sup> This paper is not a comprehensive analysis of international or domestic climate litigation. Instead, this paper will focus on how the rights strategy in international climate litigation has seen early success. Additionally, it will assess concerns that advocates may not be able to translate similar rights-based strategies to United States-based climate litigation, using *Juliana v. United States* as a case study.

## II. BODIES OF LAW RELEVANT TO THE RIGHTS-BASED APPROACH TO CLIMATE LITIGATION

### A. *International Environmental Law*

The longstanding paradigm amongst the global community has been that climate change is an issue to be dealt with using international environmental law.<sup>17</sup> Though progress in this area of law has been gradual and dependent on the availability of new scientific evidence,<sup>18</sup> international environmental law began to solidify as a body of law in the twentieth century when states began to recognize transboundary environmental harm resulting from their activities.<sup>19</sup> In the seminal case, the 1941 *Trail Smelter* arbitration, the arbitral award compensated United States citizens for damages suffered as a result of noxious fumes emanating from the stacks of the Consolidated Mining and Smelting Company of Canada.<sup>20</sup> Most notably, the tribunal held that “no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein.”<sup>21</sup> This “no harm” principle demonstrates that international

---

15. *Id.* at 935; *see also* Whaling in the Antarctic (Austl. v. Japan; N.Z. intervening), Judgment, 2014 I.C.J. Rep. 226 (Mar. 31) (finding Australia could institute proceedings against Japan over its large-scale whaling program despite not being an injured state party).

16. Posner, *supra* note 12, at 1925-26.

17. Cinnamon Carlarne, *Delinking International Environmental Law & Climate Change*, 4 MICH. J. ENV'T. & ADMIN. L. 1, 1 (2014).

18. *See id.* at 41-42.

19. MARTE JERVAN, THE PROHIBITION OF TRANSBOUNDARY ENVIRONMENTAL HARM: AN ANALYSIS OF THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF THE NO-HARM RULE 21 (PluriCourts ed., 2014).

20. *Trail Smelter Case* (U.S./Can.), 3 R.I.A.A. 1905, 1965 (1941), *as reprinted* in 35 AJIL 684, 716 (1941).

21. *Id.*

environmental law did not originally focus on environmental protection but rather on the protection of sovereign interests, property, and corresponding financial compensation for harm.<sup>22</sup> The framework articulated in the *Trail Smelter* case also established a bilateral approach to transboundary environmental issues in international law, where only states that are victims of the transboundary harm, not private parties, can bring the polluting state to account.<sup>23</sup>

By the 1950s, the international community began developing a legal framework to address oceanic oil pollution. In subsequent decades, this was followed by stricter scrutiny of the regional consequences of water and air pollution, as well as the destruction of flora and fauna.<sup>24</sup> Various international treaties concerning climate change eventually followed, beginning with the Montreal Protocol in 1987.<sup>25</sup> Though intended to tackle ozone depletion, not climate change, the Montreal Protocol became a model for future climate change diplomacy and was eventually ratified by every country in the world.<sup>26</sup> The 1992 United Nations Framework Convention on Climate Change (UNFCCC), ratified by 197 countries, later became the first global treaty to explicitly address climate change.<sup>27</sup> The annual Conference of the Parties (COP) it established would later produce the Kyoto Protocol in 2005 and the Paris Agreement in 2015.

The Kyoto Protocol, which was signed but not ratified by the United States, was the first legally binding treaty on climate change. It required developed countries to reduce emissions by at least five percent below 1990 levels and established a system to monitor countries' progress.<sup>28</sup> The Paris Agreement requires all countries to

---

22. Jutta Brunnée, Book Review, 102 AM. J. INT'L L. 395, 395 (2008) (reviewing REBECCA M. BRATSPIES & RUSSELL A. MILLER, *TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION* (2006)).

23. *Id.* at 396 (2008).

24. PHILIP SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 4 (2d ed. 2003); see also James Paley, *35 Vintage Photos Taken by the EPA Reveal what American Cities Looked Like Before Pollution was Regulated*, BUS. INSIDER (Aug. 14, 2019, 9:55 AM), <https://www.businessinsider.com/what-us-cities-looked-like-before-epa-regulated-pollution-2019-8> (documenting pervasive water and air pollution in U.S. cities before the federal government began regulating in the 1970s).

25. See Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (entered into force Jan. 1, 1989).

26. Lindsay Maizland, *Global Climate Agreements: Successes and Failures*, COUNCIL ON FOREIGN RELATIONS (updated Nov. 17, 2021, 2:30 PM), <https://www.cfr.org/backgrounder/paris-global-climate-change-agreements>.

27. *Id.*; see United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107.

28. See Kyoto Protocol to the United Nations Framework Convention on Climate Change,

set emission-reduction pledges, with the goal of preventing the global average temperature from rising two degrees Celsius above pre-industrial levels.<sup>29</sup> In addition to encouraging global net-zero carbon emissions, the Agreement aims to keep global temperature rise to below two degrees Celsius—and preferably below 1.5 degrees Celsius—compared to pre-industrial levels.<sup>30</sup> Scientists predict that even this half-degree margin would create additional risks of severe weather events, biodiversity loss, and threats to public health, food security, and livelihoods.<sup>31</sup> The Paris Agreement has, however, been criticized by climate advocates, who argue that its “bottom-up approach” is too weak to compel national policy change and will not achieve its temperature goals.<sup>32</sup> In particular, critics argue that, by allowing each party to prepare its own nationally determined contribution, the Agreement enables states to set contributions that do not go far enough in ensuring that the world avoids disastrous consequences for human rights, which will likely occur even at levels below two degrees Celsius.<sup>33</sup> At the time of signing, most climate advocates, as well as the parties themselves, recognized that states’ initial reduction pledges under the agreement were not sufficient to limit climate change to below the two degrees Celsius limit, and would likely only limit temperature increase to 2.7 degrees Celsius.<sup>34</sup>

Others argue that, as a legally binding instrument, the Paris Agreement has the potential to spark greater compliance with emission reduction goals. Although the Agreement includes non-binding elements, it applies to both developed and developing

---

Dec. 10, 1997, 2303 U.N.T.S. 162.

29. Melissa Denchak, *Paris Climate Agreement: Everything You Need to Know*, NAT. RES. DEF. COUNCIL (Feb. 19, 2021), <https://www.nrdc.org/stories/paris-climate-agreement-everything-you-need-know>.

30. See Paris Agreement to the United Nations Framework Convention on Climate Change art. 2, Dec. 12, 2015, T.I.A.S. No. 16-1104.

31. IPCC, *supra* note 3, at 7-9.

32. Yann Robiou du Pont & Malte Meinshausen, *Warming Assessment of the Bottom-Up Paris Agreement Emissions Pledges*, NATURE COMMUNICATIONS 1, 2 (2018), <https://doi.org/10.1038/s41467-018-07223-9>.

33. John H. Knox, *The Paris Agreement as a Human Rights Treaty*, in HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT 1, 341 (Dapo Akande et al. eds., 2018). Adverse climate impacts related to warming of even two degrees Celsius above pre-industrial levels, which is likely given the current trajectory of state goals, would adversely impact the rights to life, health, food, and water as a result of climate-related disasters, displacement, and resource scarcity. Joint *Statement by UN Special Procedures on the Occasion of World Environment Day: Climate Change and Human Rights*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM’R (June 5, 2015), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16049&LangID=E>.

34. Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT’L L. 288, 290 (2016).

countries; furthermore, it requires states to periodically review their collective progress, institutionalizing a long-term iterative structure to achieve its targets.<sup>35</sup>

These mechanisms, however, do not fully address the issue of states not actually implementing the commitments they have already taken on under the Paris Agreement. This is where some litigants have found that international human rights law might be useful. The international human rights legal framework, discussed in Part I.B below, sets binding standards in the context of human rights violations, potentially including those caused by climate change. By contrast, some plaintiff's attorneys view international environmental law, as codified in instruments like the Paris Agreement and Kyoto Protocol, as a voluntary "carrot rather than stick approach," which, while valid in the diplomatic system, will not achieve the necessary reductions in carbon emissions to minimize disastrous consequences.<sup>36</sup> Deeper cuts in carbon emissions, these advocates contend, can thus be better accomplished via binding international human rights treaties guaranteeing rights currently at risk due to climate change.

International environmental law has thus evolved from *Trail Smelter's* "no harm" principle to international cooperation via multilateral agreements such as the Paris Agreement. Advocates have now begun to turn to an existing body of law, international human rights law, to prompt more aggressive state action on climate change. While these strategies of international environmental law continue to play important roles in ensuring state carbon reduction, sometimes even aiding human rights litigants in their arguments,<sup>37</sup> the human rights strategy has proven unique in allowing individual and non-state litigants to bring climate claims.

### B. *International Human Rights*

Over the past decade, human rights treaties have been invoked in an increasing number of climate cases, creating what some scholars have called a "rights turn" in climate litigation.<sup>38</sup> The shift to rights-

---

35. *Id.*

36. Telephone Interview with Scott Gilmore, Of Counsel, Hausfeld (Mar. 4, 2021).

37. In *Urgenda*, the Court repeatedly stated that, for the Netherlands to meet its obligations under the Paris Agreement to keep temperatures under two degrees Celsius, the country would need to institute more stringent emissions controls. *Urgenda*, C/09/456689/HA ZA 13-1396.

38. Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 *TRANSNAT'L ENV'T LAW* 37 (2018).

based claims can partly be explained by the greater capacity of human rights law to hold states to binding obligations as compared to international environmental law. Along with customary international law, a series of both United Nations treaties and regional human rights instruments adopted since 1945 have strengthened the legal framework of international human rights.<sup>39</sup> Generally, these treaties and instruments require states to assume obligations and duties under international law to “respect, protect, and fulfill human rights,” often requiring governments to put in place domestic measures to facilitate their treaty obligations.<sup>40</sup> When these governments fail to fulfill their treaty obligations, international human rights instruments help ensure human rights standards are enforced, offering mechanisms for filing individual complaints at the regional or international level.<sup>41</sup>

Most international human rights bodies require petitioners to establish that the body has jurisdiction over their complaint.<sup>42</sup> The petitioner does not need to be a national or resident of the defendant state.<sup>43</sup> They must, however, make a prima facie case that their human rights were or are being violated as a result of activities over which the defendant state had control.<sup>44</sup> This presents an advantage for climate litigation, where complainants can likely establish that a state’s emission activity is the cause or one of the causes of their climate-related injury.

Despite this advantage, the transboundary nature of climate change and climate-related harms also creates difficulties for litigating these harms through international human rights frameworks. Climate litigators face two major challenges in bringing human rights claims: first, identifying the damages for which a state is individually responsible, and second, proving that holding a single government accountable will provide some redress for the harms experienced by petitioners.<sup>45</sup> Compared to international environmental law, where state liability for transboundary harm is

---

39. *International Human Rights Law*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> (last visited Apr. 1, 2021).

40. *Id.*

41. *Id.*

42. Margaretha Wewerinke-Singh, *Remedies for Human Rights Violations Caused by Climate Change*, 9 CLIMATE L. 224, 232 (2019).

43. *Id.*

44. *Id.*

45. Meguro, *supra* note 8, at 940.



well established,<sup>46</sup> there is a general presumption in international human rights law that state obligations do not apply extraterritorially.<sup>47</sup> For example, the European Court of Human Rights (ECtHR) has found that, under the European Convention on Human Rights, its jurisdiction is primarily territorial. Exceptions to this rule apply in only a handful of circumstances,<sup>48</sup> such as military action or occupation that causes a state to exercise effective control over an area or persons.<sup>49</sup>

However, promising recent developments in international human rights courts indicate a willingness to widen states' extraterritorial human rights obligations. In *Andreou v. Turkey*, the ECtHR found Turkey had jurisdiction over the shooting of Greek-Cypriot civilians and two British U.N. Peacekeeping Force in Cyprus (UNFICYP) soldiers by Turkish forces inside the U.N. buffer zone in Cyprus, which the Turkish government argued was outside of its territory and control despite the presence of its troops.<sup>50</sup> Both the International Court of Justice (ICJ)<sup>51</sup> and UN treaty-monitoring bodies<sup>52</sup> have recently reached similar decisions. A 2019 joint statement by five human rights treaty bodies also confirmed that state parties have obligations, including extraterritorial obligations, to respect, protect, and fulfill the human rights of all peoples. Failure to take measures to

---

46. See *Trail Smelter*, *supra* note 20, at 1905.

47. See Maarten den Heijer & Rick Lawson, *Extraterritorial Human Rights and the Concept of 'Jurisdiction'*, in *GLOBAL JUSTICE, STATE DUTIES: THE EXTRATERRITORIAL SCOPE OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW* 153, 190 (Malcolm Langford et al. eds., 2012).

48. *Ben El Mahi v. Denmark*, 2006-XV Eur. Ct. H.R. 365.

49. *Id.*; see, e.g., *Assanidze v. Georgia*, 2004-II Eur. Ct. H.R. 221; *Ilaşcu v. Moldova*, 2004-VII Eur. Ct. H.R. 179.

50. *Andreou v. Turkey*, App. No. 45653/99, 2009 Eur. Ct. H.R. (2009) (finding the actions of Turkish officials were the direct and immediate cause of the applicant's territories, thus giving the court jurisdiction over the case). This case indicated there can be state responsibility for extraterritorial harm, even where that state possesses no effective control.

51. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 at 191-92 (July 9) (finding that Israel, as an occupying power, had human rights obligations toward individuals in the occupied Palestine territories under the Convention on the Rights of the Child and the International Covenant on Civil and Political Rights).

52. Hum. Rts. Comm., *Concluding Observations of the Human Rights Committee: Israel*, UN Doc. CCPR/CO/78/ISR, at 11 (2003) (noting that "the provisions of the Covenant apply to the benefit of the population of the Occupied Territories, for all conduct by its authorities or agents in those territories that affect the enjoyment of rights enshrined in the Covenant and fall within the ambit of state responsibility of Israel under the principles of public international law"); see also *Comm. on Econ., Soc., and Cultural Rts., Concluding Observations on Israel*, U.N. Doc. E/C.12/1/Add.90, at 15 (2003) (expressing concern about Israel's position that the Covenant does not apply to areas not subject to its sovereign territory and jurisdiction).

prevent foreseeable human rights harms caused by climate change, these treaty bodies concluded, could constitute a violation of a state's human rights obligations.<sup>53</sup>

In addition to establishing jurisdiction, petitioners must also show that the harms they have suffered due to climate change constitute a breach of a state's human rights obligations. Many regional human rights treaties explicitly include a right to a healthy environment or related rights in their articles. For example, in the Inter-American system, the 1999 Protocol of San Salvador contains provisions explicitly recognizing a universal right to a healthy environment.<sup>54</sup> The American Democratic Charter, adopted by the Organization of American States (OAS) General Assembly in 2001 by all thirty-five member states, also explicitly mentions environmental protections.<sup>55</sup> The African Charter on Human & Peoples' Rights (Banjul Charter), which came into force in 1981, guarantees a right to a "general satisfactory environment favorable to their development"<sup>56</sup> and free disposal of wealth and natural resources,<sup>57</sup> which could be read to be more or less protective of the environment than other instruments. Though it does not create any regional court, the Arab Charter on Human Rights (ACHR) also cites a right to control over wealth and natural resources.<sup>58</sup>

Of the nine core international human rights instruments created under the United Nations,<sup>59</sup> only the Convention on the Rights of the Child (CRC) specifically protects against disease, malnutrition, and negative health impacts due to the risks of environmental pollution.<sup>60</sup>

---

53. Statement on Human Rights and Climate Change, U.N. Doc. HRI/2019/1 (including the Committee on the Elimination of Discrimination Against Women, the Committee on Economic, Social and Cultural Rights, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities).

54. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador," art. 11, *opened for signature* Nov. 17, 1988, O.A.S.T.S. No. 69, (entered into force Nov. 16, 1999).

55. Inter-American Democratic Charter, Preamble, Sept. 11, 2001, O.A.S. Doc. OEA/SerP/AG/Res.l.

56. The African (Banjul) Charter on Human & Peoples' Rights art. 24, *opened for signature* June 27, 1981, 21 I.L.M. 59 (entered into force Oct. 21, 1986).

57. *Id.* at art. 21.

58. League of Arab States, Arab Charter on Human Rights art. 2, *opened for signature* May 22, 2004, *reprinted in* 12 Int'l Hum. Rts. Rep. 893 (2005) (entered into force Mar. 15, 2008).

59. *The Core International Human Rights Instruments and Their Monitoring Bodies*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/professionalinterest/pages/coreinstruments.aspx> (last visited Apr. 2, 2021).

60. *See* Convention on the Rights of the Child art. 24, *opened for signature* Nov. 20, 1989

Though universal treaties like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) do not explicitly mention a right to a healthy environment, a 2009 Office of the High Commissioner for Human Rights report emphasized that all UN human rights treaty bodies recognize an intrinsic link between the environment and the realization of individual rights to life, health, food, water and adequate housing, a collective right to self-determination, and procedural rights concerning access to information and participating in decision-making regarding environmental risks.<sup>61</sup> UN Special Rapporteurs and independent experts have also been mandated by the UN Human Rights Council (HRC) to address these themes, which were discussed at the fifteenth COP in Copenhagen in December 2009 and the sixteenth COP in 2010.<sup>62</sup> In 2012, John Knox was granted a mandate as an Independent Expert by HRC, which was later renewed as a special rapporteur mandate on human rights and the environment in 2015.<sup>63</sup> In his role as special rapporteur, Knox created a mapping report containing all the statements by human rights bodies and other important sources on human rights obligations relating to the enjoyment of a safe, clean, and healthy environment,<sup>64</sup> substantiating that these rights are recognized in international human rights law.

This recognition, in addition to a greater emphasis in the climate change regime on adaptation, has brought the international environmental law regime into closer alignment with international human rights, as demonstrated by lobbying efforts leading up to the UNFCCC negotiations in 2015 to mention human rights in the Paris Agreement.<sup>65</sup> Though the draft text including language on human rights ultimately did not make into the final document, this language was included in the preamble, stating:

---

(entered into force Sept. 2, 1990).

61. U.N. Human Rights Off. of the High Comm'r, *Report on the Relationship between Climate Change and Human Rights*, ¶ 18, U.N. Doc. A/H.R.C./10/61 (Jan. 15, 2009); see also Peel & Osofsky, *supra* note 38, at 43.

62. Knox, *supra* note 33, at 326.

63. *Id.* at 326-27.

64. John H. Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/H.R.C./25/53 (Dec. 30, 2013).

65. Peel & Osofsky, *supra* note 38, at 45; *Human Rights Must Be Part of any Climate Change Agreement in Paris*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <http://www.ohchr.or//ewsEvent/age/OP21.aspx> (last visited Apr. 2, 2021); see also Knox, *supra* note 33, at 329-30.

Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women, and intergenerational equity.<sup>66</sup>

Because every party to the UNFCCC belongs to at least one human rights treaty, this language makes clear that states have human rights obligations relevant to climate change.<sup>67</sup>

If a petitioner is able to demonstrate that a state party failed to meet these human rights obligations, that petitioner must also show their claims can be redressed. Petitioners can often invoke the law of state responsibility when seeking redress in international human rights bodies. Under this principle, a state that violates its obligations must “so far as possible wipe out all the consequences of the illegal act and reestablish the situation which would have existed had that act not been committed.”<sup>68</sup> This establishes that states must do more than pay damages or discontinue activities to redress human rights violations, but must take affirmative action to prevent a violation of obligations in the future.<sup>69</sup> This is supported by the International Law Commission’s Articles on State Responsibility for Internationally Wrongful Acts, which declares that a state that violates international obligations must continue to perform its original obligations and cease the wrongful conduct, and the HRC, which recognizes both a duty of cessation and obligation to prevent the recurrence of a violation.<sup>70</sup>

Similarly, the Articles on State Responsibility recognize a distinct obligation under human rights law to “make full reparation” for an injury caused by a wrongful act.<sup>71</sup> As demonstrated in the *Velasquez-Rodriguez* case in the Inter-American Court of Human Rights (IACtHR), restitution is also the primary remedy for violations of international human rights law and involves the restoration of the prior situation, reparation of the consequences of the violation, and

---

66. U.N. Framework Convention on Climate Change, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1, pmbl., T.I.A.S. No. 16-1104 (Dec. 12, 2015).

67. Knox, *supra* note 33, at 8-9.

68. *Factory at Chorzów* (Germ. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 47 (Sept. 13).

69. G.A. Res. 56/83, annex, Responsibility of States for Internationally Wrongful Acts, art. 30(b) (Dec. 12, 2001) [hereinafter ARSIWA]

70. Wewerinke-Singh, *supra* note 44, at 235.

71. ARSIWA, *supra* note 69, at art. 31(1).

indemnification for patrimonial and non-patrimonial damages, including emotional harm.<sup>72</sup> This approach has also been endorsed in the jurisprudence of the ECtHR and the African Commission on Human and Peoples' Rights (ACHPR)<sup>73</sup>, demonstrating the willingness of many regional and international bodies to grant some reparation or compensation to victims of human rights violations. In addition to these forms of redress, "satisfaction" or acknowledgment of the breach, expression of regret, and sometimes fact-finding and full public disclosure of truth is another form of redressing a violation of international human rights law.<sup>74</sup> Because "[m]ost states belong to human rights treaties, and many of the obligations embodied in these treaties have become norms of customary international law," the international human rights framework "give[s] individuals (as opposed to foreign governments) claims against states" implicated in alleged rights violations, which can be an effective way of holding states accountable.<sup>75</sup>

However, there are also many limitations to the international human rights regime. Beyond the fact that human rights treaty-body decisions are generally non-binding, there are limitations to the mandates of some regional human rights bodies as far as remedies are concerned.<sup>76</sup> The IACtHR is considered to have the most comprehensive mandate, as it provides that, upon establishing a violation, the Court should rule that the injured party should be ensured the enjoyment of his right or freedom that was violated and, if appropriate, that the consequences of the breach be remedied and fair compensation be paid.<sup>77</sup> The African Court on Human and Peoples' Rights (AfCHPR) also has a broad mandate to make appropriate orders to remedy the violation.<sup>78</sup> The ECtHR is more limited in that Article 41 of the European Convention on Human Rights (ECHR) provides that, "if the internal law of the High Contracting Party allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured

---

72. Wewerinke-Singh, *supra* note 44, at 239.

73. *Id.*

74. ARSIWA, *supra* note 69, at art 37(1).

75. Posner, *supra* note 12, at 1927.

76. See Wewerinke-Singh, *supra* note 44, at 230-32.

77. See Organization of American States (OAS), American Convention on Human Rights, "Pact of San José, Costa Rica" art. 63, Nov. 22, 1969, 1144 U.N.T.S. 144, 159; Wewerinke-Singh, *supra* note 44, at 230.

78. See Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, art. 27, *adopted* June 10, 1998.

party.”<sup>79</sup> The variation in the scope of these mandates will have bearing on the potential a rights-based climate claim brought in regional and international human rights courts.

### III. CURRENT CASES ARE EXPLORING HOW TO APPLY THE EXISTING INTERNATIONAL HUMAN RIGHTS FRAMEWORK TO CLIMATE CHANGE

While the human rights approach to climate change litigation is not entirely new, success in this arena is a more recent phenomenon. “The Inuk Petition,” a petition filed by members of the Inuit with the Inter-American Commission on Human Rights (IACHR) in 2005, is widely considered the first such attempt at this approach in an international human rights body.<sup>80</sup> In the petition, the petitioners explained how climate change was interfering with and would continue to affect Inuit human rights relating to culture, identity, property, and economy because of increasing temperatures and resulting melting of snow and sea ice.<sup>81</sup> It laid out how, as the largest greenhouse gas emitter at the time, the United States had failed to make real efforts to reduce emissions and was thus responsible for climate-related rights violations in the Arctic. Ultimately, the Commission declined to accept the petition, stating that there was not enough information to determine if the facts provided constituted a violation of protected human rights.<sup>82</sup> Despite this result, many consider the petition to have raised awareness and publicity of the impacts of climate change on the Arctic and the potential effectiveness of human rights framed tribunals as appropriate venues for addressing the “cross-cutting” issues inherent in climate change.<sup>83</sup>

---

79. Council of Europe, European Convention on Human Rights art. 41, *opened for signature* Nov. 4, 1950, C.E.T.S. No. 005 [hereinafter ECHR].

80. Knox, *supra* note 33, at 2; *see also* Peel & Osofsky, *supra* note 38, at 46.

81. 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, Inter-Am. Comm’n H.R., ¶ 1 (Dec. 7, 2005), [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208\\_na\\_petition-1.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition-1.pdf).

82. *Letter from the Inter-American Commission on Human Rights Declining to Process Inuk Petition* (Nov. 2006), [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116\\_na\\_decision-1.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision-1.pdf).

83. Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples’ Rights*, 31, AM. INDIAN L. REV., 675, 696 n.82 (2007) (citing a 2006 Westlaw search revealing twenty-five news articles in the preceding year that contained the words “Inuit” and “Inter-American”). The former UN Special Rapporteur on human rights and the environment also stated that “the Inuit petition was the first harbinger of a sea-change in how the international community thinks about climate change.” U.N. ENV’T PROGRAMME & COLUMBIA LAW SCHOOL, CLIMATE CHANGE AND HUMAN RIGHTS, at vii (2015).

Researchers have found that, from 2015 to May 2020, litigants brought thirty-six lawsuits against states and three lawsuits against corporations for human rights violations related to climate change.<sup>84</sup> These cases were filed in twenty-three national jurisdictions, two regional, and two global judicial or quasi-judicial bodies, compared to only five rights-based climate cases filed in the world prior to 2015.<sup>85</sup> These cases argued that, to comply with human rights obligations, states are required to reduce greenhouse gas emissions with the highest possible level of effort, given the state's available resources and that they are informed by the notion of 'common but differentiated responsibilities.'<sup>86</sup>

This uptick in rights-based cases is exemplified by the initial decision in the *Urgenda v. State of the Netherlands* case in 2015, the first case to establish a national government's legal duty to prevent the dangerous effects of climate change.<sup>87</sup> Since then, the Supreme Court of the Netherlands has released a final judgement in 2019 upholding the decisions of the District Court and the Hague Court of Appeal that the state had a duty, under Articles 2 and 8 of the ECHR, to take climate mitigation measures.<sup>88</sup> Using rights assured under the ECHR, the court was able to push the government toward more effective implementation of its international commitments. On this basis, the court found that the Netherlands must ensure Dutch emissions of greenhouse gases in 2020 are at least 25% lower than the level of emissions in 1990, based on the general duty of care under Dutch law and the scientific consensus that, to keep the global average temperature below two degrees Celsius, developed countries must lower their emissions 25-20% from 1990 levels.<sup>89</sup> The Dutch Supreme Court also made clear that, even without finding rights in

---

84. Setzer & Byrnes, *supra* note 9, at 14.

85. *Id.*; see also César Rodríguez-Garavito, *Human Rights: The Global South's Route to Climate Litigation*, 114 AM. J. INT'L L. UNBOUND 40, 4044 (2020).

86. See, e.g., Rb. Den Haag [RBDHA] [District Court of The Hague] 24 juni 2015, ECLI:NL:RBDHA:2015:7145 (Stichting Urgenda/De staat der Nederlanden (ministerie van infrastructuur en milieu)) (Neth.), translated in RBDHA 24 juni 2015, ECLI:NL:RBDHA:2015:7196 (Urgenda Found./The State of the Netherlands (Ministry of Infrastructure and the Environment)) (Neth.); Communication to the Committee on the Rights of the Child, *Saachi v. Argentina*, (Sept. 23, 2019) [hereinafter *Saachi* Communication]; see also Setzer & Byrnes, *supra* note 9, at 15.

87. *Urgenda*, C/09/456689/HA ZA 13-1396; see also Setzer & Byrnes, *supra* note 9, at 16.

88. Hoge Raad der Nederlanden [HR] 20 December 2019, Nederlandse Jurisprudentie [NJ] 2020, 19/00135 m.nt (Staat der Nederlanden/Stichting Urgenda).

89. *Urgenda*, No. C/09/456689 / HA ZA 13-1396 ¶ 4.86; see also Knox, *supra* note 33 at 25.

the ECHR or existing case law, the national court could still provide an opinion on the precise scope of the state's positive obligations.<sup>90</sup> Basing its decision on rights assured under the ECHR, the court was able to push the government toward more effective implementation of its international commitments. Though a decision in a domestic court, the fact that the decision was upheld based on the Netherlands' obligations under an international human rights instrument signifies a noteworthy success for these international rights-based claims.

Another domestic case, *Ashgar Leghari v. Federation of Pakistan*, represents an important landmark for successful rights-based climate cases. The Pakistani appellate court in that case considered a claim from a Pakistani farmer that the government's failure to implement its national policy violated his right to a clean and healthy environment and thereby his right to life.<sup>91</sup> The court found not only that these rights were violated, but also ordered government agencies to take specific action and established a Climate Change Commission.<sup>92</sup>

A 2017 Advisory Opinion requested by Colombia in the Inter-American Court of Human Rights went even further than the *Urgenda* and *Leghari* cases, which only addressed the obligations each state had toward its own citizens. In the Advisory Opinion, the court clarified environmental obligations under the American Convention, declaring that states have the obligation to prevent causing transboundary harm.<sup>93</sup> A combination of the arguments used in *Urgenda* and in the Advisory Opinion helped form the basis for the communication submitted to the Committee on the Rights of the Child in *Saachi v. Argentina*,<sup>94</sup> which was recently declared inadmissible on the grounds that the child-petitioners had failed to exhaust all domestic remedies in the five respondent states.<sup>95</sup>

Cases continue to be brought in front of international human

---

90. Setzer & Byrnes, *supra* note 9, at 16.

91. *Ashgar Leghari v. Federation of Pakistan*, W.P. No. 25501/2015 (2015) (Pak.).

92. *Id.*

93. The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity: Interpretation and Scope of Articles 4(1) and 5(1) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/18, Inter-Am. Ct. H.R. (ser. A), No. 23 (Nov. 15, 2017) [http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171115\\_OC-2317\\_opinion-3.pdf](http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2017/20171115_OC-2317_opinion-3.pdf).

94. Gilmore, *supra* note 36.

95. *Saachi v. Argentina* (CRC/C/88/D/104/2019), Decision, Comm. on the Rights of the Child ¶¶ 10.15-10.21 (Nov. 11, 2021), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/322/87/PDF/G2132287.pdf?OpenElement>.



rights bodies with varying success. In 2020, the U.N. Human Rights Committee held in *Teitiota v. New Zealand* that it was not in a position to conclude that Ioane Teitiota, who had filed for refugee status in New Zealand, had his rights under Article 6 of the ICCPR violated when he was deported back to Kiribati in September 2015, where he and his family faced economic, health, and safety challenges as a result of climate change and sea level rise.<sup>96</sup> Even though the HRC found Teitiota's claim did not meet the high threshold of imminence required to trigger non-refoulement obligations, the case is viewed as significant and historic by the U.N. OHCHR and international practitioners because the HRC acknowledged state obligations to respect and ensure the right to life when it comes to the threats that severe environmental degradation can pose to individuals.<sup>97</sup>

Litigants will likely continue to bring climate cases in international human rights fora to hold states accountable for climate-related harm. Though no petition in a regional or international human rights forum has yet seen success, it is important to examine what aspects of international human rights law a successful petition might rely on to determine if it could prove a useful avenue for pursuing and apportioning state liability for climate change claims. Like any other type of human rights claim, climate change international human rights litigation requires establishing a causal link between the state's climate laws, policies, or practices and a harm suffered by the complainant to make a *prima facie* case that rights have been violated.<sup>98</sup> Once this is demonstrated, there are a number of ways that customary international law and international human rights law could be applied to redress the injuries of victims in international human rights fora.

The HRC's duty of cessation, discussed above, could be used in the climate context to obligate states to adopt and implement enforceable

---

96. *Teitiota v. New Zealand* (CCPR/C/127/D/2728/2016), U.N. Human Rights Committee, Jan. 7, 2020.

97. See, e.g., *Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims*, U.N. HUMAN RIGHTS OFF. OF THE HIGH COMM'R (Jan. 21, 2020), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482>; Adaena Sinclair-Blakemore, *Teitiota v New Zealand: A Step Forward in the Protection of Climate Refugees under International Human Rights Law?*, OXFORD HUMAN RIGHTS HUB (Jan. 28, 2020), <https://ohrh.law.ox.ac.uk/teitiota-v-new-zealand-a-step-forward-in-the-protection-of-climate-refugees-under-international-human-rights-law/>; Lauren Martin, *The Significance of Teitiota v New Zealand: McAdam Speaks at the British Institute of International and Comparative Law*, UNSW KALDOR CTR. FOR INT'L REFUGEE LAW (Mar. 30, 2021), <https://www.kaldorcentre.unsw.edu.au/news/significance-teitiota-v-new-zealand-mcadam-speaks-british-institute-international-and>.

98. Wewerinke-Singh, *supra* note 44, at 232.

legislation to protect human rights from future climate impacts.<sup>99</sup> This might entail courts attempting to determine what levels of emission reductions are required of states to fulfill their human rights obligations. Courts that have been willing to do this, such as in *Urgenda*, have based their determinations on the best available scientific evidence, technical possibilities for precautionary measures, and estimated costs and benefits.<sup>100</sup> Determining reparations for climate-related injuries is more difficult because of the scientific uncertainty surrounding climate change and the difficulty of apportioning responsibility for reparations between states.<sup>101</sup> Some petitions get around this issue by not asking for reparations at all, therefore bypassing this apportionment challenge.<sup>102</sup>

Another approach would be to allocate responsibility for reparations according to the states' respective contributions to historical emissions.<sup>103</sup> While compelling this restitution will likely be a more difficult remedy, given the extreme nature of climate-related harms and associated high financial cost, doing so will likely be key to addressing climate change human rights violations, since harms to culture and traditions cannot be remedied by compensation alone.<sup>104</sup> The *Saachi* petition to the Committee on the Rights of the Child (CRC) recognized both that states would not be able to fully compensate these types of violations and that, because of the global nature of climate change, it could open up potentially limitless liability for a state if framed as a compensation case.<sup>105</sup> On the other hand, remedial or injunctive relief, such as the recommendations the petitioners in *Saachi* asked the CRC to adopt,<sup>106</sup> would provide a more realistic legal remedy to prevent future imminent harms. It remains to be seen whether this particular strategy will be successful.

---

99. *Id.* at 235.

100. *Urgenda v. The Netherlands*, C/09/456689/HA ZA 13-1396, (The Hague Court of Appeal, Civil-law Division, Oct. 9, 2018), ¶¶ 4.63, 4.86.

101. Wewerinke-Singh, *supra* note 44, at 237-38.

102. *Saachi* Communication, *supra* note 86; *see also* Gilmore, *supra* note 36.

103. Wewerinke-Singh, *supra* note 44, at 237-38.

104. *Id.* at 239-241.

105. *See* Gilmore, *supra* note 36.

106. *Saachi* Communication ¶ 33, [http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923\\_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey\\_petition.pdf](http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190923_Communication-No.-1042019-Argentina-Communication-No.-1052019-Brazil-Communication-No.-1062019-France-Communication-No.-1072019-Germany-Communication-No.-1082019-Turkey_petition.pdf).

#### IV. CAN THIS INTERNATIONAL HUMAN RIGHTS STRATEGY BE TRANSPLANTED TO U.S. CLIMATE LITIGATION?

Most climate litigation worldwide occurs in the United States, by a significant margin. From 1986 to May 2020, there were 1213 climate cases filed in the United States, with the second-most being Australia at 98.<sup>107</sup> Many of the notable climate litigation claims in American courts have been based around statutory interpretation; for example, in the landmark case *Massachusetts v. EPA*, the plaintiffs brought claims alleging that the United States Environmental Protection Agency (EPA) abused its discretion by refusing to regulate GHG emissions pursuant to the Clean Air Act.<sup>108</sup>

##### A. Domestic Legal Barriers to the Rights Strategy

There are often higher barriers to bringing a case in domestic court compared to international courts because of the difficulties of establishing standing, causation, and attribution, as well as the challenge of discerning environmental standards in abstract human rights provisions.<sup>109</sup> While regional human rights courts do have admissibility criteria for petitioners, they have tended to be more open to accepting climate cases than American federal courts. Recently, in February 2021, the American Ninth Circuit Court of Appeals affirmed a district court decision in *Juliana v. United States* which found that, while the plaintiffs in that litigation met the standards for injury and causation to establish standing, they failed to show that their injuries could be redressed through actions by the federal defendants, thus foreclosing the chance for a federal court to hear the case on the merits.<sup>110</sup> Litigation targeting the United States government for failing to regulate greenhouse gas emissions can also be less likely to succeed because of sovereign immunity.<sup>111</sup>

Domestic climate litigation in the United States may be a more promising avenue than litigation in international tribunals, both because of the limited power of international tribunals to enforce judgments and the potential to use the Alien Tort Statute (ATS) to address climate-related human rights abuses by domestic companies

---

107. Setzer & Byrnes, *supra* note 9, at 6.

108. *Massachusetts v. E.P.A.*, 549 U.S. 497 (2007).

109. Wewerinke-Singh, *supra* note 44, at 229.

110. See Press Release, Our Children's Trust, 9th Circuit Denies *En Banc* Review for *Juliana v. United States*; Youth Plaintiffs will Take Their Case to Supreme Court (Feb. 10, 2021), <https://static1.squarespace.com/static/571d109b04426270152febe0/t/6024303eba0e5b78c9b7a2fd/1612984382920/2021.02.10.Juliana+Press+Release.pdf>.

111. Posner, *supra* note 12, at 1927.

in United States courts.<sup>112</sup> In order to qualify as a tort, the plaintiff's injuries would need to be the result of global warming, or constitute an injury to life, health, or property due to flooding, disease, or some other phenomenon connected to global warming.<sup>113</sup> ATS claims also require a violation of international law, typically involving egregious corporate misconduct that has an identifiable and strong transnational dimension.<sup>114</sup> As mentioned, though there are references to the right to a healthy environment in many regional treaties, there is consensus among scholars that these do not by themselves create an international human right to a healthy environment or an environment free of global warming or of pollution.<sup>115</sup> Thus, plaintiffs bringing climate claims under the ATS are left to rely on rights to life and health, which some American courts have previously said do not constitute international human rights.<sup>116</sup>

Since many ATS claims involve human rights,<sup>117</sup> plaintiffs may be able to rely on human rights law as the underlying substantive law on which to base an ATS suit.<sup>118</sup> Though states are not currently required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory, they may be allowed to do so as long as there is some recognized jurisdictional basis, which the ATS could provide for federal courts.<sup>119</sup> Though there are some recognized violations of international law that may give rise to an ATS claim when state action is involved, such as arbitrary detention, forced disappearance, or extrajudicial killing, it would likely be difficult to prove state actions in suits against United States corporations, unless the theory is that a state's regulatory inaction is seen as authorizing the relevant corporations to continue harmful activity within United States territory.<sup>120</sup> This is essentially the same argument that was made in the 1941 *Trail Smelter* arbitration and has

---

112. *Id.* at 1928. It is worth noting that the Alien Tort Statute is limited and cannot be used to bring claims against the U.S. government.

113. *Id.*

114. Myanna Dellinger, *Post-Jesner Climate Change Lawsuits under the Alien Tort Statute*, 44 COLUM. J. ENV'T L. 241, 243 (2019).

115. Posner, *supra* note 12, at 1930-31.

116. *Id.*

117. *See, e.g.*, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013).

118. Dellinger, *supra* note 114, at 268.

119. *Id.* at 268-69; *see also* John Ruggie, *Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, at 7, U.N. Doc. A/HRC/17/31 (Mar. 21, 2001).

120. Dellinger, *supra* note 114, at 272-73.

since come to be known as the “no-harm principle.”<sup>121</sup> Yet this argument has not been tested in United States courts since, and would likely require more judicial goodwill towards climate change litigation than is presently available in order to be successful.<sup>122</sup>

Although there are other avenues of addressing harmful climate-related activity by governments or companies through litigation, they are unlikely to succeed. One such avenue would be for plaintiffs to file claims for damages framed as an issue of international law under 28 U.S.C. § 1331 federal question doctrine. In other contexts, the Supreme Court has acknowledged that the law of the United States incorporates international law.<sup>123</sup> Assuming this is also true in the human rights context, claimants could argue that a violation of international law arguably falls within federal question jurisdiction as “law or treaties of the United States.”<sup>124</sup> The “near-closing” of the ATS door for cases arising on foreign soil might lead some plaintiffs for the first time to test this proposition in court.<sup>125</sup> However, even if plaintiffs can access federal courts under federal question jurisdiction, neither the Law of Nations nor federal law authorizes damage awards in a civil claim, meaning this may not be a fruitful path for litigation.<sup>126</sup> In addition, unless such a case presented a substantial United States interest, it is unlikely that the current Supreme Court would see this as a viable claim.<sup>127</sup>

Another option for plaintiffs would be to sue in state court for international law violations—assuming that greenhouse gas emissions are considered a violation of international law—since state courts enjoy general jurisdiction. Although the Supreme Court would not have the final say as to the extent to which federal common law incorporates the law of nations in these cases, there is also reason to believe that state courts will follow many federal courts in using the political question doctrine to reject hearing climate cases on the merits.<sup>128</sup> Plaintiffs could instead sue in state court under rules of foreign law addressing climate change and human rights, either if the case is brought in contract or tort and foreign laws apply under the

---

121. *Id.* at 273.

122. *Id.*

123. Pierre N. Leval, *Beyond Kiobel: The Future of Human Rights Litigation in US Courts*, 19 UCLA J. INT’L L. & FOREIGN AFFS., 1, 14-15 (2015) (citing *The Paquete Habana*, 175 U.S. 677 (1900); and *Brown v. United States*, 12 U.S. 110 (1814)).

124. 28 U.S.C. § 1331.

125. Leval, *supra* note 123, at 16.

126. *Id.*

127. Dellinger, *supra* note 114, at 291.

128. *Id.* at 292.

state's choice of law rules or if a state's highest court rules that customary international law has been incorporated into that state's common law.<sup>129</sup> However, this hypothetical approach runs up against the dominant view among courts and commentators that providing human rights remedies is a foreign relations function reserved to the federal government,<sup>130</sup> making its success uncertain.

Lastly, plaintiffs may sue in federal court by claiming a violation of their due process rights, which the plaintiffs in *Juliana* did. As discussed in Part IV below, this approach is vulnerable under the political question doctrine. In general, using international law creates difficulties for suits aimed at state and not corporate liability because, though there are many possible defendants that emit greenhouse gases, international law creates obligations for states and not corporations or individuals.<sup>131</sup> As a result, even if a successful case can be brought against a state, major private emitters, including international emitters, may evade liability. This feature could enable a defendant state to argue that the court cannot grant a remedy that will redress the plaintiffs' injuries. It also supports the argument that these cases hinge on non-justiciable political questions about whether states or private emitters should bear the cost of global warming.<sup>132</sup> Because states are usually protected by sovereign immunity in United States courts, invoking international law is also often not a viable option.

#### B. *Lack of Treaty Obligations*

The relative failure of the United States to accede to international human rights treaty obligations as compared to other nations is one reason for the difficulty in bringing rights-based climate claims against the government in United States courts. For example, the judgment in the *Urgenda* case was largely dependent on the Netherlands' regional human rights treaty obligations, as the court found that the Dutch government had an obligation under the ECHR to protect its citizens from the threat that climate change poses to

---

129. Leval, *supra* note 123, at 17 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 694-95, 692, 2744 (2004)) (referencing *Sosa* as an example of the Supreme Court incorporating the Law of Nations into the federal common law and extrapolating that states could perhaps do the same).

130. Seth Davis & Christopher A. Whytock, *State Remedies for Human Rights*, 98 B.U. L. REV. 397, 398 (2018).

131. See Posner, *supra* note 12, at 1930-31.

132. See *Native Vill. of Kivalina v. ExxonMobil Corp.*, 663 F. Supp. 2d 863, 876-77 (N.D. Cal. 2009), *aff'd*, 696 F.3d 849 (9th Cir. 2012).

their right to life under Article 2,<sup>133</sup> as well as their right to private life, family, home and correspondence under Article 8.<sup>134</sup> The *Urgenda* court responded to the Dutch government's argument that it was making legislation, in violation of its role under the Dutch constitution, by reaffirming that its role was to apply the provisions of treaties to which the Netherlands is a party.<sup>135</sup> Unlike the Netherlands, the United States is not bound to any self-executing human rights treaty that would obligate it to protect and ensure these rights. It is important to note that the Dutch Supreme Court also made clear that even without finding rights in the ECHR or existing case law, the court could still provide an opinion on the precise scope of the state's positive obligations.<sup>136</sup>

This highlights another difficulty for this type of litigation in United States courts: the fact that the United States Constitution has been seen by the vast majority of judges and legal scholars as providing only "negative rights, which require the government to refrain from certain conduct, as opposed to positive rights, which impose affirmative duties on the government to take actions or expend resources to meet the needs of citizens."<sup>137</sup> This negative rights construction restricts the ability of American courts to determine the scope of the government's obligations toward the public in the absence of a treaty provision.

By contrast, environmental rights are usually written as positive rights in constitutions, making them incompatible with the focus on negative rights in the United States.<sup>138</sup> Therefore, though many state constitutions establish *positive* environmental rights in their constitutions, United States courts generally have not taken constitutional guarantees of environmental rights seriously and have instead viewed them as statements of public policy rather than

---

133. ECHR, *supra* note 77, at art. 2.

134. *Id.* at art. 8.

135. Rb. Den Haag [District Court of The Hague] 24 juni 2015, ECLI:NL:RBDHA:2015:7145, ¶¶ 4.94-4.102 (Stichting Urgenda/De staat der Nederlanden (ministerie van infrastructuur en milieu)) (Neth.), *translated in* RBDHA 24 juni 2015, ECLI:NL:RBDHA:2015:7196 (Urgenda Found./The State of the Netherlands (Ministry of Infrastructure and the Environment)) (Neth.); *see also* Knox, *supra* note 33, at 345-46.

136. Knox, *supra* note 33, at 346; *see also* Setzer & Byrnes, *supra* note 9, at 16.

137. Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 410 (1990); *see also* Jorge M. Farinacci-Fernos, *Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to Their Nature, Effect, and Reach*, 41 HASTINGS INT'L & COMPAR. L. REV. 31, 31 (2018).

138. Joshua J. Bruckerhoff, *Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights*, 86 TEX. L. REV. 615, 626-27 (2008).

enforceable rights, or as “voicing aspirations rather than creating substantive law.”<sup>139</sup> Under this view, positive rights also usually cannot be individually invoked and thus enforced.<sup>140</sup> One strategy to bypass this issue could be to frame environmental rights as negative rights that do not require further legislative action to enforce.<sup>141</sup> Thus, instead of requiring the government to provide a healthy environment to citizens, these rights can be framed as barring the government from acting in ways that foreseeably harm the environment.<sup>142</sup> Commentators have proposed an environmental rights amendment to the United States constitution that does just this.<sup>143</sup> Others have advocated for framing existing state environmental constitutional rights in a similar way,<sup>144</sup> though enforcement of such a right would still depend on courts interpreting it as self-executing.

Rights-based claims in the United States have also recently begun to rely on the public trust doctrine in addressing governmental action with regard to climate change.<sup>145</sup> While the public trust doctrine has been historically incorporated into the common law to hold common natural resources, such as waterways and lakes, in trust for the benefit and use of citizens, claimants have recently argued in favor of expanding the resources to be protected to include the atmosphere.<sup>146</sup> In this context, the public trust doctrine, though it does not use the language of rights, establishes the public’s right to access, use, and enjoy a clean and healthy atmosphere and a stable environment.<sup>147</sup> However, as seen in the *Juliana* case, this framing has not yet overcome some of the issues anticipated due to a lack of constitutional or treaty right to a healthy environment.

## V. EXAMINING THE *JULIANA* CASE PROVIDES INSIGHT INTO THE CHALLENGES

---

139. Bryan P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627, 628 (2004).

140. Bruckerhoff, *supra* note 138, at 626.

141. *Id.* at 627.

142. *Id.* at 626-27.

143. See, e.g., J.B. Ruhl, *An Environmental Rights Amendment: Good Message, Bad Idea*, 11 NAT. RES. & ENV'T 46, 46 (1997).

144. Bruckerhoff, *supra* note 138, at 636-37.

145. Brian J. Preston, *The Evolving Role of Environmental Rights in Climate Change Litigation*, 2 CHINESE J. ENV'T L. 131, 135 (2018).

146. *Id.* at 135.

147. *Id.* at 135-36; see also Peel & Osofsky, *supra* note 38, at 55-58.



## THAT DOMESTIC RIGHTS-BASED CLIMATE CLAIMS CURRENTLY FACE

Though preceded by other United States cases, such as *Kanuk v. State of Alaska*,<sup>148</sup> *Sanders-Reed v. Martinez*,<sup>149</sup> and *Chernaik v. Brown*<sup>150</sup> (all of which failed to reach the merits), *Juliana v. United States* is considered a breakthrough public trust case. The plaintiffs in the case claimed that the United States government's inaction in regulating carbon dioxide emissions resulted in climate change-related harm to them.<sup>151</sup> The district court went "further than any other court ever has in declaring a fundamental obligation of government to prevent dangerous climate change"<sup>152</sup> when it declined to dismiss the action in 2016. It found that the public trust doctrine could, contrary to the government's assertions, provide some substantive due process protections for the plaintiffs' claims.<sup>153</sup> The district court ultimately held that the public trust doctrine applied to the federal government.<sup>154</sup> The most recent Ninth Circuit panel opinion from January 17, 2020, also acknowledged that the record compiled by the plaintiff:

[left] little basis for denying that climate change is occurring at an increasingly rapid pace[,] . . . that [the] unprecedented rise [in carbon levels] stems from fossil fuel combustion and will wreak havoc on the Earth's climate if unchecked[,] . . . [and] that the federal government has long understood the risks of fossil fuel use and increasing carbon dioxide emissions.<sup>155</sup>

The court also found the record sufficient to establish that the government's contribution to climate change was caused not only by inaction, but also by the government's promotion of fossil fuel use through beneficial tax provisions, permits for imports and exports, and subsidies, among other policies.<sup>156</sup>

---

148. *Kanuk v. State*, No. A-5681, 1996 WL 33686440 (Alaska Ct. App. Mar. 13, 1996).

149. *Sanders-Reed ex rel. Sanders-Reed v. Martinez*, 350 P.3d 1221 (N.M. Ct. App. 2015).

150. *Chernaik v. Brown*, 475 P.3d 68 (Or. 2020).

151. Preston, *supra* note 145, at 138.

152. Eric Holthaus, *The Kids Suing the Government Over Climate Change Are Our Best Hope Now*, SLATE (Nov. 14, 2016 1:56 PM), <https://slate.com/technology/2016/11/the-kids-lawsuit-over-climate-change-is-our-best-hope-now.html> (quoting Michael Gerrard, Director of the Sabin Center for Climate Change Law at Columbia Law School).

153. Preston, *supra* note 145, at 138.

154. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1256 (D. Or. 2016), *rev'd and remanded*, 947 F.3d 1159 (9th Cir. 2020).

155. *Juliana v. United States*, 947 F.3d 1159, 1166 (9th Cir. 2020).

156. *Id.* at 1167.

Yet ultimately, the Ninth Circuit found that the plaintiffs in *Juliana* did not have standing to bring the suit. It held that, while the district court correctly found the injuries suffered by the plaintiffs were concrete and particularized,<sup>157</sup> and the causal chain between the plaintiffs' injuries and U.S.-based carbon emissions from fossil fuel production, extraction, and transportation was sufficiently established,<sup>158</sup> the plaintiffs' injuries were not redressable.<sup>159</sup> It is nevertheless significant that even a "generalized grievance" like climate change can still meet the injury requirement, regardless of how many persons are injured, if the plaintiff's injuries are concrete and cognizable.<sup>160</sup> The fact that plaintiffs bringing similar suits must meet all three requirements in order to get to a judgment on the merits raises the question of what was missing in this case—and in American climate rights-based litigation in general—that prevented plaintiffs from establishing standing.

In the *Juliana* case, the court primarily took issue with the plaintiffs' requested remedy of an injunction requiring the government both to cease permitting, authorizing, and subsidizing fossil fuel use, and also prepare a plan to decrease harmful emissions that would be subject to judicial approval.<sup>161</sup> Because reducing the global consequences of climate change would require more than the government ceasing to promote fossil fuels, but rather a "fundamental transformation of this country's energy system," the court found that the requested injunction was not sufficiently likely to redress the plaintiffs' injuries, as required under the first prong of the Article III redressability test.<sup>162</sup>

The court also found that the second prong was not met, because ordering, designing, supervising, or implementing the suggested plan to decrease fossil emissions would require complex policy decisions entrusted to the executive and legislative branches rather than to the court.<sup>163</sup> Therefore, the plaintiffs' claims were deemed nonjusticiable and remanded to the district court for dismissal.<sup>164</sup> The dissent argued that the immense magnitude of the threat from climate change and its irreversible harms meant that "the perpetuity of the

---

157. *Id.* at 1168 (finding that a plaintiff's claim of being forced from her home due to water scarcity constituted a concrete injury).

158. *Id.* at 1169.

159. *Id.* at 1170-71.

160. *Id.* at 1168 (citing *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007)).

161. *See id.* at 1170.

162. *See id.* at 1170-71.

163. *See id.* at 1172.

164. *See id.* at 1174-75.

Republic” was at stake in this claim.<sup>165</sup> Judge Staton thus contended, because the continued vitality of the Republic is a “guardian of all other rights” in American constitutional structure, plaintiffs justifiably invoked the Fifth and Fourteenth Amendment Due Process Clauses, which has been held to safeguard certain fundamental interests such as this one.<sup>166</sup> Thus, the dissent argued, this perpetuity principle does not require courts to determine the optimal level of environmental regulation or other complex policy matters, but instead simply “prohibited . . . the willful dissolution of the Republic.”<sup>167</sup> In other words, climate change is such an immense issue that it threatens the future of our government. And this threat means that courts have the duty under the perpetuity principle to act to prevent this dissolution, not by attempting to write policy for climate change writ large, but by requiring the government to take some action to reduce emissions to put it on a path to constitutional compliance.

The plaintiffs in *Juliana* filed to amend their complaint in March 2021 after the Ninth Circuit upheld its decision to dismiss the case in February 2021.<sup>168</sup> The amended complaint narrowed the remedy sought to include only a declaratory judgement that the nation’s fossil fuel-based energy system is unconstitutional, omitting the specific injunctive relief sought in the original complaint.<sup>169</sup>

Although the *Juliana* case does not directly resemble the rights-based claims being advanced in international human rights bodies, or the domestic cases that have invoked international human rights obligations, there is one principle of international law that can be useful in strategizing how to frame similar claims moving forward. In the *Juliana* case, neither the original complaint nor the newly proposed second amended complaint makes use of the precautionary principle, which has been put forward as a way to address the “proof problem” inherent in climate lawsuits.<sup>170</sup>

The precautionary principle is an environmental standard<sup>171</sup> that

---

165. See *id.* at 1177-78 (Staton, J., dissenting).

166. See *id.*

167. *Id.* at 1179.

168. Plaintiffs’ Motion for Leave to Amend and File Second Amended Complaint for Declaratory and Injunctive Relief; Motion to Lift the Stay Pursuant to Fed. R. Civ. P. 15, *Juliana v. United States*, No. 15-cv-01517-AA (D. Or. filed Mar. 9, 2021).

169. *Id.*

170. Lydia Akinyi Omuko, *Applying the Precautionary Principle to Address the “Proof Problem” in Climate Change Litigation*, 21 TILBURG L. REV. 52, 64-66 (2016).

171. It is also considered by some to be a principle of customary international law. See Jonathan Remy Nash, *Standing and the Precautionary Principle*, 108 COLUM. L. REV. 494, 499

requires decision makers to take measures to prevent a polluting substance from causing harm, even when there is no conclusive scientific proof linking the particular activity to the harm or when there is scientific uncertainty about the level of harm it would cause (and therefore how much a reduction in emissions would reduce harm).<sup>172</sup> The precept is also a key element of environmental law for many countries in the European Union, although it is not an explicit aspect of United States environmental legal principles.<sup>173</sup>

Though the Ninth Circuit did not take issue with the causation prong of the plaintiffs' standing, in examining the first element of redressability, it did express concern that the plaintiffs' experts admitted uncertainty about whether the proposed injunction would do anything significant to "reduc[e] the global consequences of climate change."<sup>174</sup> Thus, because plaintiffs were not asserting a procedural right and did not have sovereign status, showing that the requested relief might to some extent ameliorate injuries was not enough.<sup>175</sup> Utilizing the precautionary principle to frame how the court should think about redressability might have been useful here, especially because it is featured prominently in international and domestic legal instruments such as the Rio Declaration on Environment and Development, the UNFCCC guiding principles, and the Lisbon Treaty.<sup>176</sup>

In public lawsuits like *Juliana*, the success of a case usually depends on proving causation and linking impacts to GHG emissions from a specific activity that needs to be regulated.<sup>177</sup> Some courts take a flexible approach, like in *Massachusetts v. EPA*, where a majority of the Supreme Court found that there was an adequate link between GHG emissions from the United States transportation sector and injuries to Massachusetts caused by rising sea levels and coastal erosion.<sup>178</sup> The *Juliana* Court took a similarly liberal approach by not requiring rigorous step-by-step proof of a causal link, but this liberality did not extend to their examination of redressability.

Application of the precautionary principle is generally triggered

---

(2008) (citing Mark Geistfeld, *Implementing the Precautionary Principle*, 31 ENV'T L. REP. 11326, 11326 (2001)).

172. Omuko, *supra* note 170, at 62-63.

173. Jacqueline Peel, *Issues in Climate Litigation*, 5 CARBON & CLIMATE L. REV. 15, 20 (2011).

174. *Juliana v. United States*, 947 F.3d 1159, 1170-71 (9th Cir. 2020).

175. *See id.* at 1171.

176. Omuko, *supra* note 170, at 62.

177. *See id.* at 56.

178. *Id.* at 59.

by: (1) threat of serious or irreversible damage; (2) scientific uncertainty linking activity to damage; and (3) proportionality.<sup>179</sup> Had the court approached the issue of redressability while taking each of these elements into account, it is possible that the *Juliana* majority decision would have resembled the reasoning of the dissent. Judge Staton's dissent first addresses the efficacy prong of redressability by stating that "it is not measured by our ability to stop climate change in its tracks and immediately undo the injuries that plaintiffs suffer today...but to curb by some meaningful degree what [is] otherwise [an] inevitable march to the point of no return." Thus, Judge Staton seems to be incorporating the precautionary principle, without using that language, into her analysis of the efficacy of the requested relief, saying that a perceptible (even if small) reduction in the advance in climate change would be enough.<sup>180</sup>

The precautionary principle allows courts to consider the increased likelihood of the impacts of climate change, despite scientific uncertainty as to the specific impacts of climate change in a particular area.<sup>181</sup> While the majority in *Juliana* did not seem to doubt that there was some risk of future harm or existing injuries to the plaintiffs due to climate change, they grounded their grant of dismissal on the uncertainty surrounding the effect of the *remedies* the plaintiffs requested and whether they would redress their injuries. The precautionary principle has previously been used in other countries to lessen the level of certainty needed to take action in the face of climate risk. In Australia, for example, the Victorian Civil and Administrative Tribunal applied the precautionary principle to the impact of sea level rise on coastal environments when it was evident there will be some increased risk of harm, even if the magnitude of that consequence could not be ascertained by current technology.<sup>182</sup>

Without using the explicit language of the precautionary principle, the Supreme Court has used flexible approaches to standing and particularly redressability in the past that evoke the principle. In *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, the Court held that for the injury requirement, a person's reasonable concerns about the defendant's pollutant discharges were sufficient to establish standing, and for redressability, that those

---

179. *Id.* at 63.

180. *See* *Juliana v. United States*, 947 F.3d 1159, 1182 (9th Cir. 2020) (Staton, J. dissenting).

181. *See* Peel, *supra* note 173, at 21.

182. *Id.*

injuries could be redressed by civil penalties that would deter ongoing and future violations of law even though these penalties would not be paid to the plaintiffs.<sup>183</sup> Though this decision was outside of the climate context and therefore did not deal with the same causal complexities, it could be read to suggest that deterrence and prevention constitute sufficient redress for injuries that stem from “reasonable concern” or risk. Climate-related harm would certainly seem to fit the bill here, given that the *Juliana* court acknowledged that the plaintiffs suffered injury-in-fact and that new government policies or penalties would similarly deter future emissions. However, the fact that polluting activity in *Laidlaw* was *illegal* also seemed to be an important point for the majority,<sup>184</sup> making it unclear whether this lower burden for redressability could be applied in the climate context where there are fewer comprehensive laws regulating CO<sub>2</sub> emissions in the United States.

In *Massachusetts v. EPA*, the Court also said it retained jurisdiction to decide “whether the EPA ha[d] a duty to take steps to *slow* or *reduce* [global warming]” and that the fact that developing countries were poised to increase emissions was not dispositive because a “reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.”<sup>185</sup> This again suggests that the Supreme Court is willing to take a precautionary approach to redressing climate harms despite causal uncertainty. However, it is important to note that this seminal decision on standing rested on firmer ground than *Juliana* in that the EPA had statutory authority under the Clean Air Act (according to the court) to regulate greenhouse gases, but merely refrained from doing so. Regardless, the reasoning still suggests that courts should not shy away from climate cases on the grounds that any remedies might not completely remedy the effects of climate change. This interpretation was echoed in *Connecticut v. American Electric Power Co.*, in which the Second Circuit found that the plaintiffs—eight states, a city, and three land trusts—had redressable claims in a public nuisance suit against power companies operating fossil-fuel-fired plants for their contribution to global warming, demonstrating that the same

---

183. *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc.*, 528 U.S. 167, 184-88 (2000) (“It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description.”).

184. *See id.* at 185-186 (emphasizing the importance of a sanction that deters “illegal conduct” and encourages defendants to discontinue current and future “violations”).

185. *Massachusetts v. EPA*, 549 U.S. 497, 499-500 (2007).

reasoning, as of now, can also be applied to suits against private companies.<sup>186</sup>

There is also evidence that United States courts have applied the precautionary principle by deferring to agency policy judgments that encourage regulators to err on the side of caution when implementing policy and that allow them to relax evidentiary requirements for protective policy goals.<sup>187</sup> Historically, the precautionary principle was first used in worker health and safety law, in cases like *Industrial Union Department, AFL-CIO v. Hodgson*. Here, the court deferred to agency discretion to promulgate more stringent asbestos standards even where there was “insufficient data” because the agency rested its decision on a policy judgment “concerning the relative risks of under-protection as opposed to overprotection.”<sup>188</sup> The Second Circuit in *Society of Plastics Industry v. Occupational Safety and Health Administration* later reiterated a duty for the secretary of OSHA to “act to protect the workingman, and to act where existing methodology or research is deficient,” implying a mandatory precautionary approach in this area of regulation.<sup>189</sup>

Later, in interpreting standard-setting for criteria pollutants under the Clean Air Act, the Court in *Lead Industries Association v. EPA*, the DC Circuit agreed with the EPA that Congress had directed the administrator to err on the side of caution in making the necessary decisions under the statute.<sup>190</sup> Though the DC Circuit later departed from this precautionary approach in reviewing agency decisions regulating hazardous air pollutants in *Natural Resources Defense Council v. EPA*, courts have clearly been willing to use a precautionary approach when there is a risk to human health and safety in the past. It remains to be seen whether the rationale underlying these cases involving specific government agencies and their discretion over agency decisions would extend to a suit against the federal government as in *Juliana*. However, this historical

---

186. *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 348 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011). The Second Circuit’s exercise of jurisdiction was affirmed by an equally divided court. *Am. Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 420 (2011).

187. Nicholas A. Ashford, *The Legacy of the Precautionary Principle in US Law: The Rise of Cost-Benefit Analysis and Risk Assessment as Undermining Factors in Health, Safety and Environmental Protection*, in *IMPLEMENTING THE PRECAUTIONARY PRINCIPLE: APPROACHES FROM THE NORDIC COUNTRIES, EU AND USA* 352, 354-55 (Nicolas de Sadeleer ed., 2007).

188. *Id.* at 362 (citing *Indus. Union Dep’t, AFL-CIO v. Hodgson*, 499 F.2d 467, 474-75 (D.C. Cir. 1974)) (interpreting the D.C. Court of Appeals decision as a “permissive use of the precautionary principle”).

189. *Id.* at 362 (citing *Soc’y of Plastics Indus., Inc. v. Occupational Safety & Health Admin.*, 509 F.2d 1301, 1308 (2d Cir. 1975)).

190. *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1153 (D.C. Cir. 1980).

application of the precautionary principle does show that courts, at least in some circumstances, feel comfortable with this approach whether determining standing or reviewing agency decisions.

Critics have argued that the precautionary principle is too vague and arbitrary to ensure rational decision-making as compared to other economics-based approaches, such as cost-benefit analyses.<sup>191</sup> Scholars also disagree on the scope of the principle and its meaning, including how it manages the tradeoffs between the risks associated with regulating an activity and the risks associated with non-regulation.<sup>192</sup> Application of the precautionary principle to standing and redressability could address these concerns by being limited to contexts in which the harm at issue is “catastrophic” or “irreversible,” as is usually the case with climate harms.<sup>193</sup> Because the principle would be applied specifically to the standing analysis, there is less of a need for the court to grapple with the risks of implementing the remedies requested and balancing costs and benefits. Instead, they can focus on whether the proposed remedies might redress these harms, given the uncertainty surrounding the injury and the risk of inaction.

Some scholars have suggested that future plaintiffs, post-*Juliana*, could identify more specific and easy-to-administer remedies to be implemented by the executive branch to successfully plead redressability.<sup>194</sup> These could include implementing stricter vehicle mileage standards, ending fossil fuel leasing on public lands, or ceasing government approvals for new pipeline projects, relying on the discretion of both the president and agencies like the Department of Transportation to set such standards or review such applications.<sup>195</sup> Though these more limited remedies could cause a court to emphasize causation in its review, asking whether the emissions associated with a specific government policy are a “major causal factor in the plaintiffs’ injuries,”<sup>196</sup> this might be another opportunity to apply the precautionary principle to shift the causal burden off the plaintiffs. Despite the uncertainty associated with the particular effect of government policy on actual emissions, under the

---

191. Ashford, *supra* note 187, at 366.

192. See Nash, *supra* note 171, at 501-503.

193. See *id.* at 496.

194. Matt Lifson, Camila Bustos & Natasha Brunstein, *Redressability of Climate Change Injuries After Juliana*, LEGAL PLANET (June 12, 2020), <https://legal-planet.org/2020/06/12/guest-contributors-matt-lifson-camila-bustos-and-natasha-brunstein-redressability-of-climate-change-injuries-after-juliana/>.

195. *Id.*

196. *Id.*



precautionary principle, some scientific causal relationship between the two could be enough to establish that these limited remedies redress the plaintiffs' injuries.

These principles also overflow into Staton's analysis of the second prong of redressability: the power of the court to act in this sphere. The majority suggests that judicial review is not appropriate because of the complex policy considerations and decades-long supervision the proposed plan would require. Scholars have interpreted this as being the court's true basis for failing to find the plaintiffs' claims redressable, noting that much of the majority's suggestion that the claims could not be redressable unless the court's remedy "solve[ed] global climate change" was dictum.<sup>197</sup>

Staton responds in her dissent that the court is constitutionally empowered to undertake these tasks precisely *because* it is the role of the court to curb acts of other branches that contravene fundamental tenets of American life, such as a "right to be free from irreversible and catastrophic climate change."<sup>198</sup> In other words, as the precautionary principle suggests, judicial intervention here may still be legitimate even if the supporting evidence is incomplete or the costs of regulation are high, particularly when there are reasonable grounds for concern.<sup>199</sup> This suggests that not only is climate change a justiciable political question, but that a lack of judicial standards or scientific uncertainty should not stop the court from acting on difficult policy questions precisely *because* of the seriousness of the threat of damage. Thus, Staton's analysis of the power of the court to act also incorporates some of the considerations that would trigger application of the precautionary principle, suggesting if this principle were used and accepted by the court, the analysis of standing might look different.

#### VI. REASONS ADVOCATES HAVE NOT BEEN ABLE TO TRANSPLANT THE INTERNATIONAL HUMAN RIGHTS STRATEGY TO U.S. LITIGATION

Even if American plaintiffs begin to incorporate aspects of international law, like the precautionary principle, in their claims, it is unclear how successful domestic cases like *Saachi* or international judgements, like the 2017 Inter-American Commission Advisory

---

197. *Id.*

198. *Juliana v. United States*, 947 F.3d 1159, 1182 (9th Cir. 2020) (Staton, J., dissenting).

199. *Cf.* EUROPEAN COMMISSION, THE PRECAUTIONARY PRINCIPLE: DECISION-MAKING UNDER UNCERTAINTY 4 (Sept. 2017) (explaining the precautionary approach under EU regulatory law).

Opinion, can inform American climate litigation. The difficulty the *Juliana* plaintiffs had even getting to the merits of the case demonstrates this. One difference is simply a lack of legislation in the United States pertaining directly to climate change. Though there is not necessarily a direct correlation between the amount and comprehensiveness of legislation in a jurisdiction and litigation brought, researchers have found that more than half of the 1,200 climate-related lawsuits identified by the Sabin Center have been brought under only four categories of legislation: the National Environmental Policy Act (NEPA), the Clean Air Act (CAA), state environmental impact assessment laws, and wildfire protection statutes.<sup>200</sup> Though the United States ratified the UNFCCC in 1992 and mandated greenhouse gas reporting under the CAA and other appropriations acts, the other main pieces of legislation passed or proposed in the United States regarding climate change have been tax credits, carbon pricing, and energy legislation that includes research and development for clean energy technologies, tax incentives and phasing down the production and consumption of hydrofluorocarbons.<sup>201</sup> None of these pieces of legislation provide a cause of action for citizens injured by climate-related events caused by these emissions. In the past decade, over twenty bills have been proposed in Congress to create a federal market-based carbon emissions cap, and none have been signed into law.<sup>202</sup>

Unlike countries that have a progressive legal or policy framework on climate change,<sup>203</sup> such as Peru, which can provide grounds for litigation to fill enforcement gaps, the lack of such a framework in the United States might both encourage litigants to bring more cases in an effort to push more ambitious policies,<sup>204</sup> as demonstrated by the high incidence of cases brought in American courts, which can make it more difficult to actually succeed on these claims. Based on recent data, the United States and the Netherlands have the same range of 11-20 laws on climate change.<sup>205</sup> Though

---

200. Setzer & Byrnes, *supra* note 9, at 9.

201. *Congress Climate History*, CTR. FOR CLIMATE AND ENERGY SOLUTIONS, <https://www.c2es.org/content/congress-climate-history/> (last visited Apr. 3, 2021).

202. PETRA BARTOSIEWICZ & MARISSA MILEY, *THE TOO-POLITE REVOLUTION: UNDERSTANDING THE FAILURE TO PASS U.S. CLIMATE LEGISLATION*, 4 (2014).

203. *Framework Law No. 30754 on Climate Change*, GRANTHAM RSCH. INST. ON CLIMATE CHANGE AND THE ENV'T, <https://climate-laws.org/geographies/peru/laws/framework-law-no-30754-on-climate-change> (creating a national commission that can propose adaptation and mitigation measures).

204. Setzer & Byrnes, *supra* note 9, at 9.

205. *Id.* at 10.

number or comprehensiveness of laws is not determinative of success in climate litigation claims, the fact that United States courts have been markedly less willing than Dutch courts to make judgments about the appropriate level of emissions regulation may be the result of the ability of plaintiffs in the latter system to rely on binding human rights treaty obligations. Outside of the United States, judges appear to be more inclined to support climate action, particularly in the Global South where human rights norms have been especially important for climate litigation.<sup>206</sup>

Another issue is that, unlike the Netherlands, the United States government has not fully adopted any regional human rights treaty as federal law. Between 1988 and 1994, the United States signed and ratified the Convention on the Prevention and Punishment of the Crime of Genocide, the ICCPR, the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>207</sup> This is unusually low compared to other Western nations such as the United Kingdom, France, Germany, or Canada, which have either ratified or acceded to the above treaties in addition to the other three foundational international human rights treaties—the ICESCR, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the CRC—and other regional human rights instruments and optional protocols.<sup>208</sup>

These treaties often provide greater protection for individual rights than is available under United States constitutional or statutory law.<sup>209</sup> However, when the United States ratified the ICCPR, CAT, and CERD, it included a declaration stating that the substantive articles of the treaty are not self-executing, meaning Congress would need to enact additional legislation before those rights could be judicially enforceable.<sup>210</sup> This also means private litigants could not invoke the treaty provisions. Though some have justified these non-self-executing declarations as a way of assuring that changes in United States law will reflect the democratic process through legislation, this practice has also been criticized by some as against

---

206. *See id.* at 14.

207. Penny M. Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 100 (2011).

208. *See id.* at 101.

209. David Sloss, *The Domestication of International Human Rights: Non-Self-Executing Declarations and Human Rights Treaties*, 24 YALE J. INT'L L. 129, 131 (1999).

210. *Id.* at 130-31.

the spirit of Article VI of the Constitution and original intent, which provides expressly for lawmaking by treaty.<sup>211</sup> This can be especially problematic given that, of the treaties it has ratified, the United States has only enacted implementing legislation for the Genocide Convention and some, but not all, of the implementing legislation necessary to enforce the CAT.<sup>212</sup> The committees overseeing the ICCPR, CAT, and CERD have also expressed concerns that the United States has rejected some of these treaty norms.<sup>213</sup> Though the United States was influential in shaping the UN Charter and the Universal Declaration, it has signed but not ratified the American Convention on Human Rights creating the IACHR and IACtHR.<sup>214</sup>

The United Nations has also not yet provided global, intergovernmental recognition of the right to a healthy and sustainable environment, though it is clear that the right exists at regional and national levels, further cementing the importance of regional human rights instruments.<sup>215</sup> Therefore, although the universal recognition of a right to a healthy environment under any of these instruments is still not a foregone conclusion, the inability for plaintiffs to fall back on international human rights obligations as a framework under which to bring rights claims might explain why these types of claims have not been as successful thus far.

## VII. CONCLUSION

As suits claiming harm due to climate change continue to be filed domestically and internationally,<sup>216</sup> there is an emerging

---

211. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 346 (1995).

212. Michelle S. Friedman, *The Uneasy U.S. Relationship with Human Rights Treaties: The Constitutional Treaty System and Nonself-Execution Declarations*, 17 FLA. J. INT'L L. 187, 232, 235 (2005).

213. Doug Cassel, *The United States and Human Rights Treaties: Can We Meet Our Commitments?*, AM. BAR ASS'N, (Apr. 1, 2015), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/2015—vol—41-/vol—41—no—2—human-rights-at-home/the-united-states-and-human-rights-treaties—can-we-meet-our-com/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2015—vol—41-/vol—41—no—2—human-rights-at-home/the-united-states-and-human-rights-treaties—can-we-meet-our-com/).

214. Joseph Diab, *United States Ratification of the American Convention on Human Rights*, 2 DUKE J. COMPAR. & INT'L L. 323, 323-24 (1992).

215. Dellinger, *supra* note 114, at 271; *see also* John Knox, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, ¶ 16, UN Doc. A/HRC37/59, July 19, 2018.

216. In September 2020, six petitioners from Portugal who had experienced extreme heat and wildfires submitted a historic complaint to the ECtHR against thirty-three European countries, and in November 2020, the Court ordered the defendant countries to respond to the claims in the petition. *See* Ciara Nugent, *Does Climate Change Violate Children's Human Rights? A European Court May Soon Decide*, TIME (Nov. 30, 2020, 1:57 PM),

convergence of international human rights and international environmental law. The inclusion of human rights principles in the Paris Agreement is one illustration of this convergence, as newer instruments emerge in environmental law while international human rights instruments remain relatively stagnant. The global nature of climate change and difficulty of attributing impacts make international litigation attractive, while domestic courts have the power to force national governments to adhere to their emission commitments. At the same time, debates continue around the inclusion of environmental rights in human rights discourse and whether environmental rights should be formalized in the international human rights scheme. International success in rights-based climate claims is likely to have an impact on American litigation. While differences in the force and efficacy of international human rights treaties and constitutional limits mean that successful rights-based claims in the United States will look different from those in international fora or foreign courts, these cases still inform how United States climate litigation can continue to push forward.

One such point of influence might be an increased prevalence of plaintiffs advocating for the court to take a precautionary approach to standing requirements. Although the most recent *Juliana* ruling might have come out the same under the precautionary approach, had the court “erred on the side of caution” in examining redressability in the case, the plaintiffs’ requested remedy of an injunction might have redressed their injuries despite its inability to solve global climate change. While the *Juliana* plaintiffs have filed a motion to amend their complaint and remove the remedies the Ninth Circuit took issue with, future plaintiffs making rights-based claims may be able to look to how European courts and even some United States courts, albeit informally, have applied the precautionary principle to past environmental suits.

---

<https://time.com/5916362/climate-change-human-rights-portugal/>. In March 2021, the ECtHR accepted a complaint filed by the Senior Women for Climate Protection Switzerland and Greenpeace Switzerland in an effort to force Switzerland to take effective climate measures to protect rights to life and health. *See* Press Release, Senior Women for Climate Protection Switzerland (KlimaSeniorinnen) & Greenpeace Switzerland, European Court of Human Rights Greenlights Swiss Seniors’ Climate Case (Mar. 3, 2021), <https://klimasenioren.ch/wp-content/uploads/2021/03/European-Court-of-Human-Rights-greenlights-Swiss-seniors-climate-case.pdf>. These petitions, among many others, show the continuing importance of climate litigation’s reliance on the international human rights framework.