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THE APPLICABILITY OF INTERNATIONAL HUMAN RIGHTS LAW IN CLIMATE CHANGE: ALL OR NOTHING AT ALL?

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Abstract: This article seeks to transcend two extreme positions—all or nothing at all—concerning the application of international human rights law to climate change, in order to find a reasonable place for human rights within the climate change discourse. The application of international human rights law in the context of climate change serves as an alternative approach to the absence of binding human rights obligations within climate change treaties. This application challenges the traditional territorial, temporal and, subject-matter scope of international human rights law, thereby giving rise to conflicting divergences on issues such as the principle of systematic integration in treaty interpretation, the status of the right to a safe climate under customary international law, extraterritorial human rights obligations, and the human rights of future generations. It is necessary to acknowledge that international human rights law plays a limited role in determining conclusions within the 'violation-remedy' model of climate change litigation. Reconceptualizing international law through its indeterminacy permits a re-examination of the role of human rights in climate change. Transcending opposing positions requires climate-related stakeholders to afford more time and space for the interaction of human rights and climate change. This will allow for a longer evolutionary cycle for legal norms and a broader conceptual space for rights-climate synergy.

Keywords: International Human Rights Law; Climate Change; Systematic Integration; Right to a Safe Climate; Extraterritorial Human Rights Obligations; Rights of Future Generations

1. Introduction

Climate change is regarded as 'the greatest threat to human rights in the 21st century'.[1] At the beginning of the second quarter of the 21st century, climate change litigation has exhibited two interrelated trends.[2] First, the forum for climate change litigation are shifting from domestic courts to international judicial bodies or quasi-judicial mechanisms; second, the legal basis for human rights claims in climate change cases has transitioned from domestic law to international human rights law (IHRL). For example, as an international court adjudicating general disputes between states, the International Court of Justice (ICJ) was requested to '[have] particular regard to … the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights … the rights recognized in the Universal Declaration of Human Rights'.[3] These two trends together converge on one fundamental legal question: whether, and to what extent, does the IHRL apply to climate change?

It should first be clarified that the applicability of IHRL in climate change discussed herein does not necessarily equate to the applicability of human rights in climate change, nor to a human rights approach to climate change in the general sense. IHRL constitutes a coherent and comprehensive legal regime, whereas human rights, as such, remain largely an open-textured legal discourse. In this regard, for example, the Advisory Opinion on Climate Change and International Law issued by International Tribunal for the Law of the Sea (ITLOS) similarly referenced that 'climate change represents an existential threat and raises human rights concerns',[4] yet the human rights issues it addressed related to the application of the United Nations Convention on the Law of the Sea (UNCLOS); another example is the case of *Milieudefensie et al. v. Royal*

1 See Mary Robinson Foundation – Climate Justice, *Position Paper: Human Rights and Climate Justice*, 1.

2 Concerning the general trends of climate change litigations, see generally Setzer and Higham, "Global Trends in Climate Change Litigation".

3 United Nations, *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change*.

4 International Tribunal for the Law of Sea. *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, Case No. 31, para 66.

Dutch Shell plc. decided by the District Court of the Hague, Netherlands.[5] This case is regarded as the milestone litigation against a multinational corporation for human rights violations arising from carbon emissions, yet this application of human rights obligations on multinational corporations is also grounded separately within the framework of Dutch Civil Code, the European Convention on Human Rights (ECHR) and the Internation Covenant on Civil and Political Rights (ICCPR).[6] In other words, the application of human rights in climate change does not necessarily depend on IHRL as its normative vehicle. As will be elaborated in detail below, the convergence of climate change and human rights discourse is in fact a consequence of human rights mainstreaming. The application of IHRL to climate change constitutes merely one of the approaches within this mainstreaming process, and indeed may represent only an alternative approach where international law-making in the climate change domain encounters obstruction.

Compared to the convergence of climate change and human rights discourse, the key issues concerning the applicability of IHRL relate to its scope and extent of application. As for its scope, each law operates within its own scope, generally encompassing four conditions: *ratione materiae*, *ratione personae*, *ratione loci*, *ration temporis*. Upon determining that an issue falls outside the law's scope of application, the case will be dismissed immediately at the jurisdictional stage, without even proceeding to the merits phase. As for its extent, the examination is necessary because climate change may contribute to many human 'wrongs': disease, malnutrition, and flooding of coastal communities.[7] However, it is far from self-evident that these facts of human 'wrongs' would constitute a legal conclusion of human rights violations or, more precisely, breaches of a state's obligations under IHRL.

The purpose of this article is to find a reasonable place for IHRL within the global climate governance. The structure of this article is as follows: after a brief introductory part, part 2 will explore possible pathways for establishing a theoretical connection between IHRL and climate change within the framework of human rights mainstreaming. This paper contends that applying IHRL to climate change should be

5 The Hague District Court, *Milieudefensie and Others v. Royal Dutch Shell PLC and Others*, ECLI:NL:RBDHA:2021:5337, Judgment of 26 May 2021.

6 See paras 4.4.1 and 4.4.9.

7 Bodansky, "Introduction: Climate Change and Human Rights: Unpacking the Issues", 512.

understood as a substitute for the absence of binding human rights provisions within climate change treaties. Parts 3 and 4 will respectively examine two opposing positions on the applicability of IHRL to climate change. Part 5 will seek to secure an appropriate place for IHRL within the climate change discourse.

2. Human Rights Mainstreaming and the Application of IHRL in Climate Change

2.1. Mainstreaming Human Rights in the Context of Climate Change

If climate change is the primary human rights concern of the 21st century, then the current international human rights system and its discourse remain, to a large extent, products of the 20th century. Taking the core international human rights treaties as examples, even the Convention on the Rights of Persons with Disabilities[8] and the International Convention for the Protection of All Persons from Enforced Disappearance[9]—both adopted in the 21st century—can trace their drafting and negotiation processes back to the 20th century, let alone the International Bill of Human Rights, whose fundamental framework was established as early as the 1940s. Thus, applying 20th-century human rights to climate change, the entirely new human rights threat of the 21st century, necessitates conceptual tools to establish normative connections.

These attempts to connect human rights with other social-developmental issues typically reflect the process of human rights mainstreaming. Human rights mainstreaming is generally understood as the process of integrating human rights rules and principles into the activities of governments or intergovernmental organisations, and is sometimes alternatively understood as a rights-based approach and perspective.[10] It should be noted that the advocacy for human rights mainstreaming was in fact linked to the United Nations reform process at the turn of millennium and

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8 *Convention on the Rights of Persons with Disabilities*, Adopted 13 December 2006, Entered into Force 3 May 2008, 2515 UNTS 3.

9 *International Convention for the Protection of All Persons from Enforced Disappearance*, Adopted 20 December 2006, Entered into Force 23 December 2010, 2716 UNTS 3.

10 See United Nations, *Renewing the United Nations: A Programme for Reform, Report of the United Nations Secretary-General*, UN Doc. A/51/950, 14 July 1997, para 78; Oberleitner, "A Decade of Mainstreaming Human Rights in the UN: Achievements, Failures, Challenges", 359-362.

the ineffectiveness and weakness of international human rights mechanisms on the eve of the 50th anniversary of the Universal Declaration of Human Rights. According to the 1997 UN Secretary-General's report "Renewing the United Nations: A Programme for Reform", human rights were suggested to be a cross-cutting issue and incorporated into all principal United Nations activities and programmes.[11] The UNDP's 2000 Human Rights and Human Development report further provided the theoretical foundation for this movement of mainstreaming: 'The basic idea of human development—that enriching the lives and freedoms of ordinary people is fundamental—has much in common with the concerns expressed by declarations of human rights'.[12] The most notable achievement of human rights mainstreaming to date is its prominence in the United Nations 2030 Agenda for Sustainable Development, where human rights appears 15 times.[13] Nearly every Sustainable Development Goal is directly linked to human rights or reflects a human rights-based approach.

Against this backdrop, climate change has emerged as a prime example of human rights mainstreaming in action during recent years. Indeed, as early as the 1972 Stockholm Declaration, international environmental law had begun to converge with human rights principles, with its preamble stating that '[b]oth aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights'.[14] Although the two core international legal instruments in the field of climate change—the 1992 United Nations Framework Convention on Climate Change and the 1997 Kyoto Protocol—do not explicitly employ the term human rights nor impose human rights obligations on State Parties, their concern for human health and welfare inherently embodies a human rights-based approach.[15] Subsequently, in parallel with the process of human rights mainstreaming, two soft-law instruments deserve particular attention. First, in 2007, the Malé Declaration on the Human Dimension of Global Climate Change,[16]

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11 United Nations, *Renewing the United Nations: A Programme for Reform, Report of the United Nations Secretary-General*, UN Doc. A/51/950, 14 July 1997, para 78.

12 United Nations Development Programme, *Human Rights and Human Development*, 1 January 2000, https://hdr.undp.org/content/human-development-report-2000, 19.

13 United Nations, *Transforming Our World: The 2030 Agenda for Sustainable Development*.

14 United Nations. *Declaration of the United Nations Conference on the Human Environment*, 3.

15 *United Nations Framework Convention on Climate Change*; *Kyoto Protocol*.

16 *Malé Declaration on the Human Dimension of Global Climate Change*.

drafted primarily by Small Island Developing States, marked the first attempt by any group of states to establish linkages between human rights and climate change.[17] Responding to the Malé Declaration's appeal, the United Nations Human Rights Council convened a session on human rights and climate change in 2008 and adopted Resolution 7/23 by consensus.[18] This resolution marked the first official UN document to explicitly state that climate change 'has implications for the full enjoyment of human rights'.[19] Second, in 2010, the Cancun Agreements[20] inserted human rights language into international climate change instruments for the first time.[21] With the 2015 United Nations Climate Change Conference (Paris Conference), the incorporation of international human rights standards into a legally binding climate change treaty seemed a natural progression, and this conference indeed culminated in the adoption of the Paris Agreement,[22] a landmark instrument that would become the core legal framework for global climate governance.

However, the mainstreaming of human rights in the context of climate change has not proceeded as smoothly as anticipated. While the Paris Agreement made a groundbreaking inclusion of human rights in its preamble, it stopped there.[23] Although, under the rules of treaty interpretation provided by the 1969 Vienna Convention on the Law of Treaties (VCLT), the content of a preamble may, under certain conditions, acquire binding force through certain techniques such as systematic interpretation, the legislative history of this agreement regrettably precludes this possibility. In early drafts of the Paris Agreement, provisions such as 'respecting human rights and promoting gender equality' and 'taking human rights into account appeared in Articles 2 and 4 respectively, constituting substantive obligations for contracting parties.[24] However, this approach was explicitly opposed by certain states, notable

17 Aktypis, Decaux and Leroy. "Systemic integration between climate change and human rights at the United Nations?", 222.

18 United Nations Human Rights Council, *Human Rights and Climate Change*, A/HRC/RES/7/23.

19 Limon, "Human Rights Obligations and Accountability in the Face of Climate Change", 547.

20 *Cancun Agreements*, Decision 1/cp.16, recital 8.

21 Mayer, "Human Rights in the Paris Agreement", 110.

22 *Paris Agreement*, Adopted 12 December 2015, Entered into Force 4 November 2016, 3156 UNTS 79.

23 *Paris Agreement*, Adopted 12 December 2015, Entered into Force 4 November 2016, 3156 UNTS 79, Preamble.

24 *Draft Paris Agreement*, FCCC/ADP/2015/L.6, 5 December 2015, Annex I, Articles 2 and 4.

examples including Norway, the United States and Saudi Arabia,[25] and finally led to the absence of direct human rights language in the binding parts of the agreement. The specific reasons why the Paris Agreement exclude provisions on human rights at its substantive part may be highly complex, particularly in light of the fact that many countries spoke in favour of incorporating human rights language. However, according to the objections raised by some states, they preferred the climate deal remaining a purely environmental agreement and expressed concern that a binding commitment to human rights – currently proposed in the draft text – could open the door to greater legal liabilities.[26] Consequently, the Paris Agreement represents to some extent only a failure to human rights mainstreaming in the context of climate change, a situation that persists to this day.

Therefore, alternative approaches must be explored to impose human rights obligations on states in the context of climate change.

2.2. The Application of IHRL in Climate Change as an Alternative Approach

Given the obstruction in advancing the international law-making process for mainstreaming human rights in the climate change context, applying IHRL to climate change scenarios through treaty interpretation has emerged as an alternative solution.

In general, the enforcement mechanisms of IHRL—whether the Universal Periodic Review (UPR), which is primarily political in nature, or the individual communication and litigation mechanisms as (quasi-)judicial procedures—are more robust than those of international environmental law, which often lacks specified dispute settlement mechanisms. In this regard, Benoit Mayer has noted that, 'States have broad obligations to mitigate climate change under international environmental treaties, and possibly even broader obligations under customary

[25] See generally, Human Rights Watch, *Human Rights in Climate Pact Under Fire: Norway, Saudis, US Blocking Strong Position*, 7 December 2015, https://www.hrw.org/news/2015/12/07/human-rights-climate-pact-under-fire; and specially for example, Government of Norway, *COP 21: Indigenous Peoples, Human Rights and Climate Change*, 7 December 2015, www.regjeringen.no/no/aktuelt/cop21-indigenous-peoples-human-rights-and-climat-changes/id2466047.

[26] Rowling, "Keep human rights in U.N. deal to secure climate justice: Robinson", *Reuters*, 8 December 2015, https://www.reuters.com/article/world/keep-human-rights-in-u-n-deal-to-secure-climate-justice-robinson-idUSL8N13X2KM/.

international law, but plaintiffs typically lack standing to invoke any of these obligations',[27] this very limitation highlights the comparative advantage of IHRL enforcement mechanisms. By utilising more robust human rights mechanisms, it becomes possible to hold states accountable under human rights law in the context of climate change.

Within the UPR procedure of the Human Rights Council and the periodic reporting procedure of treaty bodies, the core focus lies in the obligations of states under international human rights instruments. While under the UNFCCC and the Paris Agreement, mitigation and adaptation constitute the core obligations of States in international climate law, referring respectively to human interventions to progressively reduce greenhouse gas emissions and to enhancing adaptive capacity, strengthening resilience and reducing vulnerability. If a state's obligations to adopt mitigation and adaptation measures in the context of climate change can be interpreted as constituting an integral part of these human rights obligations and thus integrated into the process of reporting and reviewing, the 'name and shame' function of these mechanisms will be activated.[28] In fact, according to statistics from the Danish Institute for Human Rights, there have already been 557 recommendations related to states' obligations to take adaptation measures across the UPR, special procedures, and treaty body periodic reporting procedures.[29] For instance, in the periodic reporting procedures of the International Covenant on Economic, Social and Cultural Rights (ICESCR), China received the following recommendations from the Committee on Economic, Social and Cultural Rights (CESCR):

> 75. The Committee recommends that the State party take all the adaptation measures necessary to protect the environment and address environmental degradation, […] operationalize without delay its National Climate Change Adaptation Strategy 2035 accordingly, making its implementation a governance, institutional performance and budgetary priority.[30]

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27 Mayer, "Climate Change Mitigation as an Obligation Under Human Rights Treaties?", 410.

28 See Schoner, "Naming and shaming in UN treaty bodies: Individual petitions' effect on human rights".

29 The Danish Institute for Human Rights, *Human Rights Obligations and Adaptation to Climate Change: An Analysis of Recommendations to States From International Human Rights Mechanisms*, 5.

30 Committee on Economic, Social and Cultural Rights, *Concluding Observations on the Third Periodic Report of China, including Hong Kong, China, and Macao, China*, E/C.12/CHN/CO/3, 22 March 2023, para 75.

This recommendation serves as an example of how relevant institutions 'leverage' international human rights mechanisms to achieve the goal of global governance of climate change. Of course, compared to the recommendations made during the UPR of the Human Rights Council, the core function of the CESCR, as a treaty body,[31] lies in monitoring the implementation of obligations by States Parties. In fact, the CESCR has already stated in its own documents that it presumes that taking climate change adaptation measures constitutes part of the human rights obligations undertaken by states under IHRL.[32] Notably, the CESCR is not alone in this position. In 2019, five treaty bodies issued a Joint Statement on 'Human Rights and Climate Change', urging all States to take into consideration their human rights obligations as they review their climate commitments.[33] As indicated at the conclusion of this joint statement, these committees will continue to 'keep under review the impacts of climate change and climate-induced disasters on the rights holders … and provide guidance to States on how they can meet their obligations under these instruments, in relation to mitigation and adaptation to climate change'.[34]

Of course, the most obvious instances of applying IHRL to climate change are in individual communication procedures before human rights treaty bodies or in litigation within specialised human rights courts; for example, in 2024, the European Court of Human Rights (ECtHR) examined two landmark climate change cases from the perspective of the human rights obligations assumed by States Parties, namely *Verein Klimaseniorinnen Schweiz and Others v. Switzerland* and *Duarte Agostinho and Others v. Portugal and Others*. That said, the possibilities are not

[31] Strictly speaking, the CESCR was established by the United Nations Economic and Social Council in 1985 through Resolution E/RES/1985/17, not an expert body established by a human rights treaty. However, given that, like other treaty bodies, it is composed of independent experts and functions to review State Party reports and issue general comments, this committee has been generally recognised as a quasi-treaty body.

[32] In fact, CESCR expressed the same position in the 2018 statement. See Committee on Economic, Social and Cultural Rights, *Statement: Climate Change and the International Covenant on Economic, Social and Cultural Rights*, para 6.

[33] 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, *Joint Statement on human rights and climate change*, HRI/2019/1, 16 September 2019.

[34] Ibid., para 18.

limited. Several non-human rights-specialised international judicial bodies, including the ICJ and the ITLOS, have been requested to provide advisory opinions on the human rights obligations of States in the context of climate change. For example, ICJ has been requested by the UN General Assembly to provide an advisory opinion on state obligations, '[h]aving particular regard to … the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, … the rights recognized in the Universal Declaration of Human Rights'.[35] Besides, in monist states that treat international treaties as part of their domestic law, international human rights treaties can be directly invoked in domestic climate litigation. A landmark case is *Urgenda Foundation v. State of the Netherlands*,[36] where the plaintiffs directly asserted that the Dutch government violated its state obligations under the ECHR, specifically concerning the right to life and the right to a private and family life.[37]

Considering the inherent structural differences between politically-oriented reporting/review mechanisms and (quasi-)judicial individual communication/litigation procedures—and given that different judicial bodies may adopt divergent stances and interpretative techniques regarding IHRL—various possibilities and potential fragmentations in the application of IHRL thus emerge.

3. The Applicability of IHRL in Climate Change: Overly Optimistic?

3.1. The Attempt to Apply IHRL in Climate Change through Different Approaches

Based on the practices of various international institutions, the application of IHRL manifests through two distinct possibilities. This article categorizes these as the Direct Application Path and the Indirect Application Path, distinguished by whether they recognize a climate-related human right as a startpoint.

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[35] United Nations, *Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change*, p. 3.

[36] See Supreme Court of the Netherlands, *State of the Netherlands v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, Judgment of 20 December 2019.

[37] Supreme Court of the Netherlands, *State of the Netherlands v. Stichting Urgenda*, ECLI:NL:HR:2019:2007, Judgment of 20 December 2019, para 5.2.1.

The Direct Application Path involves interpreting IHRL in a manner that explicitly identifies state obligations to mitigate climate change and implement adaptation measures, thereby allowing IHRL to be applied directly to climate issues. This path can be further divided into two sub-approaches based on the different sources of IHRL incurred in the application, one grounded in treaty-based human rights obligations, another emerging from the customary IHRL. Conversely, the Indirect Application Path establishes the applicability of human rights obligations by focusing on the adverse impacts of climate change on existing recognized rights—such as the right to life, the right to health, the right to private and family life, and the right to an adequate standard of living.

3.1.1. Direct Application

As for the Direct Application Path, the optimal scenario entails the direct incorporation of international climate change legal frameworks into the interpretation of international human rights treaties. This approach asserts that states undertake specific obligations under human rights law to adopt climate mitigation and adaptation measures. Fundamentally, this involves the issue of systemic integration between disparate subregimes of international law—specifically, this refers to using one treaty to interpret another. As noted in the International Law Commission's (ILC) renowned report on the Fragmentation of International Law, the objective of systemic integration is to 'connect the separate treaty provisions … as aspects of an overall aggregate of the rights and obligations of the States'.[38]

The treaty bodies of the core international human rights treaties serve as the principal proponents of this systemic integration approach. On 16 September 2019, five UN human rights treaty bodies issued a joint statement on Human Rights and Climate Change. The statement emphasized that 'in order to comply with their human rights obligations, and to realize the objectives of the Paris Agreement, States must adopt and implement policies aimed at reducing emissions'.[39] Furthermore, these policies must reflect 'the highest possible ambition, foster climate resilience and ensure that public and private investments are consistent

[38] Report of the Study Group of the International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law.*

[39] *Statement on Human Rights and Climate Change*, para 11.

with a pathway towards low carbon emissions and climate-resilient development'.[40]

Indeed, if we consider climate change governance as part of international environmental law, attempts by human rights treaty bodies to integrate environmental and human rights treaties have precedents. As the Human Rights Committee noted in its General Comment No. 36:

> The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant [the Right to Life], and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law.[41]

Building on this foundation, in the individual communication of *Portillo Cáceres et al. v. Paraguay*,[42] the Committee explicitly noted that the 'State party is also bound by the Stockholm Convention on Persistent Organic Pollutants' when evaluating national obligations regarding the right to life'.[43] Although the victim in that case died from pesticide poisoning—a matter of traditional environmental pollution—the Committee's decision to introduce an external international environmental treaty as an interpretative norm represents a significant trend.

Subsequently, this logic was further expanded in the individual communication of *Daniel Billy et al. v. Australia* (*Torres Strait Islanders* case).[44] Counsel Monica Feria-Tinta, representing the victims, argued that Australia 'has not taken adaptation and mitigation measures, … and has not met its obligations under the Paris Agreement'.[45] While the Committee acknowledged it lacks the competence to formally determine compliance with other international treaties, it explicitly affirmed the validity of referencing climate change treaties as external standards to interpret a State's obligation under this Covenant on the grounds that 'authors are not seeking relief for violations of the other treaties

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40 *Statement on Human Rights and Climate Change*, para 11.

41 Human Rights Committee, *General Comment 36: Right to Life*, para 62.

42 Human Rights Committee, *Cáceres et al. v. Paraguay*, Communication No. 2751/2016.

43 Human Rights Committee, *Cáceres et al. v. Paraguay*, Communication No. 2751/2016, para 7.3.

44 Human Rights Committee, *Daniel Billy et al. v. Australia*, Communication No. 3624/2019.

45 Human Rights Committee, *Daniel Billy et al. v. Australia*, Communication No. 3624/2019, para 3.4.

before the Committee but rather refer to them in interpreting the State party's obligations under the Covenant'.[46] In a 2024 article, Feria-Tinta recognized this case as the first successful attempt to directly apply human rights treaties to climate change, optimistically predicting its landmark influence on the then-pending advisory opinions on climate change.[47] Similarly, in the ITLOS Advisory Opinion, although the application of systemic integration in that case primarily addressed the relationship between the UNCLOS and climate change treaties, the UN Special Rapporteurs on Human Rights and Climate Change (Ian Fry), Toxics and Human Rights (Marcos Orellana), and Human Rights and the Environment (David Boyd) jointly submitted an *amicus brief* to the Tribunal. They asserted that '[t]he text of UNCLOS cannot be interpreted and applied without reference to international environmental law and international human rights law', and explicitly invoked Article 31(3)(c) of the VCLT.[48] Both instances, despite their distinct procedural natures, reveal a shared discursive strategy of systemic integration rhetoric in climate-related proceedings.

Of course, since treaties are only binding upon their state parties, a systemic integration approach based solely on treaty interpretation may inevitably suffer from inherent limitations. In such instances, a second possibility for the Direct Application Path arises: asserting that the state obligation to adopt climate mitigation and adaptation measures originates from customary IHRL.

UN charter-based bodies have been the primary proponents of this sub-approach. In recent years, the process of normative evolution of the Right to a Clean, Healthy, and Sustainable Environment and its application in context of climate change has provided new possibilities for this argument. For example, in 2019, David Boyd, the UN Special Rapporteur on Human Rights and the Environment, concluded that '[a] safe climate is a vital element of the right to a healthy environment and

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[46] Human Rights Committee, *Daniel Billy et al. v. Australia*, Communication No. 3624/2019, para 7.5.

[47] Feria-Tinta, "The master key to international law: systemic integration in climate change cases", 22.

[48] *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law,* Amicus brief submitted to the International Tribunal for the Law of the Sea by the UN Special Rapporteurs on Human Rights & Climate Change (Ian Fry), Toxics & Human Rights (Marcos Orellana), and Human Rights & the Environment (David Boyd), Case No. 31, 30 May 2023.

is absolutely essential to human life and well-being'.[49] Then, in 2022, the United Nations General Assembly Adopted Resolution 76/300 recognizing the right to a clean, healthy and sustainable environment as a human right.[50] Leveraging these institutional developments, certain authors have advanced proposals for a distinct Right to a Safe Climate, arguing that the ethical foundation of human population vulnerability and systematic compliance with human rights yardsticks support such an extension.[51]

Beyond the UN human rights system, more significant progress has emerged from the Inter-American human rights system, where the right to a healthy environment is explicitly articulated in the American Convention on Human Rights (ACHR). In 2021, the Inter-American Commission on Human Rights emphasized in its resolution on 'Climate Emergency' that states have an obligation to cooperate in good faith to prevent global pollution and ensure a safe climate that enables the exercise of rights. The specific requirements of this obligation involve 'exchanging resources, technology, knowledge and capacities to build societies that operate in a low-emission environment, move towards a clean and just energy transition, and protect people's rights'.[52] Furthermore, in the case of *La Oroya Population v. Peru*,[53] the Inter-American Court of Human Rights (IACtHR) for the first time defined the substantive elements of the right to a healthy environment, which includes climate alongside air, water, food, and ecosystems.[54] In its 2025 Advisory Opinion on 'Climate Emergency and Human Rights', the Court ultimately affirmed that the right to a healthy climate is an independent human right derived from the right to a healthy environment. This reinforces the legal foundation for identifying climate crisis-related human rights obligations and facilitates the delimitation of 'the specific

49 United Nations. *Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, para 95.

50 United Nations. *The Human Right to a Clean, Healthy and Sustainable Environment*.

51 See Jegede, "Arguing the Right to a Safe Climate under the UN Human Rights System", 184-212.

52 Inter-American Commission of Human Rights. *Climate Emergency: Scope of Inter-American Human Rights Obligations*, para 11.

53 Inter-American Court of Human Rights. *La Oroya Population v. Peru*, Judgment of 27 November 2023.

54 Inter-American Court of Human Rights. *La Oroya Population v. Peru*, Judgment of 27 November 2023, para 118.

State obligations in relation to the climate crisis' that are 'independently of other duties related to environmental protection'.[55]

In conclusion, whether through the principle of systemic integration via treaty interpretation or by establishing a right under customary international law, the Direct Application Path represents an ideal framework for achieving climate governance goals by leveraging the substantive obligations and procedural mechanisms of IHRL.

3.2. Indirect Application

Compared to the Direct Application path, the indirect application path does not rely on a specific human right to a safe climate. Instead, it asserts that climate change has an adverse impact on the enjoyment and realization of a series of human rights which have been already recognized under existing international human rights norms, including but not limited to the right to life, the right to health, the right to housing, and the right to respect for private and family life. In its 2025 Final Report of the Study Group on Sea-Level Rise in Relation to International Law, the ILC, on the one hand, acknowledges that current international legal frameworks potentially applicable to the protection of persons affected by sea-level rise—a major consequence of climate change—are fragmented, whilst also confirming that 'such persons remain rights holders and that States have a duty to respect, protect and fulfil their human rights obligations', thereby establishing the applicability of classic IHRL system in this context.[56] In this regard, the indirect path can also be regarded as another manifestation of human rights mainstreaming, as it maintains that climate change may be relevant to almost all human rights and attempts to activate the role of existing human rights norms in the context of climate change.

Of course, this path also implies the need to comply with the traditional framework of human rights violations—that is, 'there needs to be not only a harmful state of affairs but a human rights violation – an actor must be under a duty to act (or not act) in a certain way but fail

[55] Inter-American Court of Human Rights. *Climate Emergency and Human Rights*, para 300.

[56] International Law Commission, *Final Report of the Study Group on Sea- Level Rise in relation to International Law*, para 42.

to do so'.[57] Given that (quasi-)judicial human rights proceedings are typically anchored in specific jurisdictional bases, the indirect path necessitates a significant expansion of the jurisdictional reach of IHRL at both the spatial (*ratione loci*) and temporal (*ratione temporis*) levels.

Firstly, the indirect path has to address the spatial scope of state obligations under IHRL. Under the most traditional Westphalian understanding, the spatial scope of state obligations under international law strictly corresponds to its territorial boundaries. This restrictive view historically excluded the possibility of holding a greenhouse gas-emitting state responsible for the human rights of individuals outside its borders who are adversely affected by climate change. However, international case law has increasingly recognized that a state's obligations depend on its jurisdiction - a functional concept—rather than fixed territorial boundaries.[58] As a well-recognised standard, extraterritorial human rights obligations are triggered when a state exercises effective control over an area or a person.[59] In 2011, the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, drafted by a group of scholars, not only expanded the scope of extraterritorial human rights obligations from traditional civil and political rights to the realm of economic, social and cultural rights, but also proposed more progressive theoretical models for extraterritorial human rights obligations, for instance in 'situations over which State acts or omissions bring about foreseeable effects' on the enjoyment of human rights.[60] This theoretical paradigm of extraterritorial effect was subsequently developed and further elaborated by the I-ACtHR in its 2017 and 2025 advisory opinions concerning environmental and climate emergencies respectively.[61]

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[57] Raible, "States' Extraterritorial Jurisdiction in Relation to ghg Emissions After Duarte Agostinho v Portugal", 4.

[58] See European Court of Human Rights, *Al-Skeini and Others v. the United Kingdom*, paras 149-150; As for the theory of "functional jurisdiction", see for example, Moreno-Lax, Violeta. "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the 'Operational Model.'", 385-416.

[59] In literature see for example, Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, 136.

[60] See Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, 28 September 2011, https://www.etoconsortium.org/en/the-maastricht-principles/.

[61] See Inter-American Court of Human Rights. *The Environment and Human Rights*, Advisory Opinion OC-23/17 of 15 November 2017 (Requested by the Republic of Colombia); Inter-American

Secondly, concerning temporal jurisdiction, the indirect path faces a structural hurdle: the adverse effects of climate change often involve 'projections about future impacts', whereas a human rights violation traditionally requires that the enjoyment of human rights has already been adversely affected or that such an effect is imminent.[62] To overcome this, the indirect path employs the concept of rights of future generations as a interpretative tool to extend the temporal scope of IHRL. This concept has deep political-philosophical roots, particularly in John Rawls' theory of intergenerational justice.[63] When Weiss introduced the principle of intergenerational equity into international environmental law, she articulated it as a duty that 'provides for a minimum floor for all generations and ensures that each generation has at least that level of planetary resource base as its ancestors'.[64] This logic is now being read into IHRL, as evidenced by the 2023 Maastricht Principles on the Human Rights of Future Generations, which argue that states must act with due diligence to prevent foreseeable future rights violations.[65] In recent international jurisprudence, this concept has gained significant attention and normative development. In its 2025 Advisory Opinion on Climate Change, the ICJ recognized that 'due regard for the interests of future generations and the long-term implications of conduct are equitable considerations that need to be taken into account' under international law.[66] Similarly, the I-ACtHR has acknowledged the collective dimensions of human rights in which they are owed to both present and future generations.[67]

Indeed, if we examine the applicability of IHRL in climate change through the lens of its application in judicial cases, even the direct application path can be understood as an expansion of the substantive scope, *ratione materiae*, of IHRL, because this approach directly creates a state

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Court of Human Rights. *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025 (Requested by the Republic of Chile and the Republic of Colombia).

62 A/HRC/10/61, para 70. See also Human Rights Committee, *Aalbersberg et al. v. Netherlands*, para 6.3.

63 See Rawls, *A Theory of Justice*, 284-293.

64 Weiss, "Our Rights and Obligations to Future Generations for the Environment", 200.

65 See *Maastricht Principles on the Human Rights of Future Generations*.

66 International Court of Justice, *Obligations of States in respect of Climate Change (Advisory Opinion)*, 23 July 2025, para 157.

67 Inter-American Court of Human Rights. *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 of 29 May 2025, para 308.

obligation of climate mitigation—rather than relying on the adverse effects caused by climate change as an intermediary—and it effectively bypasses the conventional doctrinal hurdles of proving immediate harm and direct territorial causation.

In summary, whether through the idealistic direct path or the more pragmatic indirect path, the applicability of IHRL to climate change is predicated upon an unprecedented expansion of the existing human rights system. This indeed reflects the optimism held by some international law scholars regarding IHRL, particularly within the backdrop of human rights mainstreaming, where it is viewed as the foundational value benchmark for resolving all international governance challenges.[68] In this regard, the most far-reaching precedent is the *Sacchi et al v. Argentina et al.* case examined by the Committee on the Rights of the Child.[69] Although the Committee ultimately declared the case inadmissible solely on the grounds that the complainant had not exhausted domestic remedies, when addressing jurisdictional issues, the Committee cited the advisory opinion of the I-ACtHR and noted that:

> [W]hen transboundary harm occurs, children are under the jurisdiction of the State on whose territory the emissions originated for the purposes of article 5(1) of the Optional Protocol if there is a causal link between the acts or omissions of the State in question and the negative impact on the rights of children located outside its territory, when the State of origin exercises effective control over the sources of the emissions in question.[70]

4. The Non-Applicability of IHRL in the Climate Context: Confrontational Critiques

In contrast to the optimistic perspectives outlined above, numerous pessimistic viewpoints persist in practice, contending that IHRL cannot

[68] Moyn argues that viewing human rights as 'the highest moral precepts and political ideals' essentially represents a utopian aspiration for global order. See Moyn, *The Last Utopia*, 1-10.

[69] Committee on the Rights of the Child, *Chiara Sacchi and Others v. Argentina*, Communication No. 104/2019.

[70] Committee on the Rights of the Child, *Chiara Sacchi and Others v. Argentina*, Communication No. 104/2019, para 10.7.

be applied to climate change. Among these, Venn identifies five central challenges:

> the exclusivity of climate law and international human rights law; operational barriers within the UN human rights system; specific legal challenges facing the UN Treaty Body mechanisms; causation challenges associated with attributing responsibility for climate harm to states; and, finally, the extraterritorial application of international human rights law.[71]

This article does not intend to address each aspect comprehensively, but will instead present counterarguments to the various approaches for applying IHRL to climate change mentioned above, for the purpose of comparison.

4.1. Critique of Direct Applicability: Boundaries of Subject-Matter Jurisdiction

4.1.1. The Principle of Systemic Integration in Treaty Interpretation

If, as Counsel Monica Feria-Tinta asserted, the *Torres Strait Islanders* case represents the first successful attempt to directly apply human rights treaties to climate change,[72] then Australia's defense in this matter deserves closer scrutiny. Australia contended that the communication was inadmissible *ratione materiae*, arguing that the alleged violations of international climate change treaties fell 'outside the scope of the present Covenant'.[73] This position was underscored by the different aims and scopes of the Paris Agreement and the ICCPR, compounded by the fact that sixteen State parties to the former have not ratified the Covenant. Thus, interpreting the obligations under the Covenant through the aims of the Paris Agreement would be contrary to the fundamental principles of international law, 'the ordinary meaning of one treaty cannot be used to override the clear language of the Covenant'.[74] While the Committee

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[71] Venn, "Rendering International Human Rights Law Fit for Purpose on Climate Change", 1.

[72] Feria-Tinta, "The master key to international law: systemic integration in climate change cases", 22.

[73] Human Rights Committee, *Daniel Billy et al. v. Australia*, Communication No. 3624/2019, para 4.1.

[74] Ibid., para 4.1.

maintained that it was merely referencing climate change treaties as external standards to interpret the substantive obligations of State parties—rather than independently providing remedies under climate change law for the alleged victims—this response failed to address the fundamental issues of the principle of systemic integration. Consequently, it did little to alleviate the core concerns shared by Australia and many other states regarding the applicability of IHRL to the climate change.

The crux of the problem lies in the constitutive conditions and inherent risks of systemic integration within treaty interpretation. Pursuant to Article 31(3)(c) of the VCLT, the interpretative process must account for 'any relevant rules of international law applicable in the relations between the parties'. Among these, 'Relevance'—or the Proximity Criterion—emerges as a critical yet often neglected term which requires examining 'which rules are to be considered 'relevant'.[75] This criterion serves as a microcosmic reflection of the entire interpretative process and seeks to answer the same questions (how, what, who, when) that help the interpreter in identifying the intention of the parties; however, this criterion also sets boundaries for the principle of systemic integration, where the interpreter is merely to reveal the meaning of the provision as intended by the parties, and not to rewrite or substitute it.[76] In an article specifically addressing the systemic integration in international human rights treaties, Rachovitsa warned that 'when the interpreter loses sight of the appropriate weight that should be attached to other treaties in the construction of the treaty being analysed',[77] and it may give rise to some significant interpretative and jurisdictional concerns: 'uncritically employing systemic integration may result in the indirect application of and supervision over other treaties under the guise of interpretation, thereby raising serious implications for a court's mandate and legitimacy'.[78]

Therefore, it is understandable that Thin offered the sharp critique of 'Playing Fast and Loose' regarding the ITLOS Advisory Opinion on Climate Change for having integrated a number of elements of international environmental law in its interpretation of state party obligations

[75] Merkouris, "Principle of Systemic Integration", para 34.
[76] Merkouris, "Principle of Systemic Integration", para 37.
[77] Rachovitsa, "The Principle of Systemic Integration in Human Rights Law", 561.
[78] Rachovitsa, "The Principle of Systemic Integration in Human Rights Law".

under the UNCLOS.[79] For instance, in its advisory opinion, ITLOS invoked an argument analogous to Australia's position in the *Torres Strait Islanders* case, asserting that the UNFCCC and the Paris Agreement–along with their obligations concerning climate mitigation–constitute *lex specialis*.[80] Consequently, 'the Convention should not be interpreted as imposing obligations with respect to such omissions that … go beyond the obligations in the climate treaties'.[81] In practice, whether it is the introduction of the law of the sea system in the ITLOS Advisory Opinion or the international human rights system in cases before human rights courts or treaty bodies, it already implies treating external legal rules as a minimum standard, nearly allowing them to displace the original connotation of the rules rather than serving merely as interpretative tools. Such an expansive and selective approach to systemic integration, as Mayer describes, may become a 'Trojan Horse',[82] potentially diverting human rights treaties from their primary objective—the protection of individual rights—toward the singular aim of climate change mitigation, and ultimately leading to the erosion of legal certainty and the undermining of state consent.

The aforementioned dissenting positions on systemic integration in the *Torres Strait Islanders* case and the ITLOS Advisory Opinion readily bring to mind the objections raised by certain states regarding the introduction of substantively binding human rights provisions into climate-related treaties, especially the Paris Agreement. There is no doubt that systemic integration remains a theoretical solution to the difficulties arising from the fragmentation of public international law; however, given that the current process of international law-making is still largely premised on state consent, the treaty law conditions for introducing human rights obligations in the field of climate change through systemic integration have yet to be fully met.

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[79] Thin, "Playing Fast and Loose with Article 31(3)(c) VCLT: Lessons on Systemic Integration from the ITLOS Climate Change Opinion", 31-57.

[80] See Human Rights Committee, *Daniel Billy et al. v. Australia*, Communication No. 3624/2019, para 4.1

[81] International Tribunal for the Law of Sea, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion*, Case No. 31, 21 May 2024, para 220.

[82] Mayer, "Climate Change Mitigation as an Obligation under Human Rights Treaties?", 442.

4.1.2. The Status of the Right to a Safe Climate as Customary International Law

The primary arguments supporting the right to a safe climate under customary IHRL stem from UN charter-based bodies and regional human rights judicial organs. However, since interpretations by regional judicial bodies apply only to regional treaties, and according to Conclusion 12 of the ILC's draft conclusions, UN General Assembly resolutions do not possess an inherent customary character; but rather 'provide evidence of its existence or contribute to its development'.[83] Consequently, the arguments put forward by various institutions regarding the Identification of Customary International Law still require rigorous scrutiny from a methodological perspective.

In an article examining whether an 'Obligation of Climate Change Mitigation' exists under customary international law, Mayer offers a critical methodological foundation: the ascending approach and the descending approach. The former corresponds to the traditional method of identifying custom, 'relying on induction from empirical evidence of state practice and acceptance as law' the latter reflects a more modern approach, 'relying on deduction from other norms of customary law and from the premises of the international legal order'.[84] Given that state practice in climate change mitigation falls far short of the material or objective element required to identify customary international law—namely, '[t]he relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent'[85]—and since it remains impossible to ascertain whether these limited state practices stems from a sense of legal obligation or constitutes purely political strategy, the right to a safe climate, according to the ascending approach, is still far from having attained the status of customary international law. While his final conclusion acknowledges that states still undertake a certain degree of mitigation obligations under the 'broad obligation of Due diligence and Prevention under Customary International

[83] International Law Commission, *Draft Conclusion on Identification of Customary International Law, with Commentaries*, A/73/10, Conclusion 12.

[84] Mayer, "Climate Change Mitigation as an Obligation under Customary International Law", 119-124.

[85] International Law Commission, *Draft Conclusion on Identification of Customary International Law, with Commentaries*, A/73/10, Conclusion 8.

Law',[86] his argumentation largely highlights the self-contradictory nature of the right's customary status. The reliance on two diametrically opposed logics of identification not only fails to provide mutual corroboration but may also cause methodological challenges to the claim that the right to a safe climate has formed a norm of customary international law.

The ICJ's Advisory Opinion on Obligations of States in respect of Climate Change should have served as the ideal opportunity to confirm whether the right to a safe climate possesses customary status. In both written and oral proceedings, there was a stark contrast to the voting patterns on UN resolutions: Resolution 76/300 was adopted by an overwhelming majority of 161 votes in favour and 8 abstentions,[87] but many states, particularly key players in climate mitigation, raised opposing views.[88] Ultimately, while the ICJ devoted significant space in its advisory opinion to the broad link between climate change and human rights—acknowledging the right to a healthy environment as a precondition and essential requirement for the realization of other rights under international law—it consistently stopped short of explicitly declaring the right as an independent norm of customary international law.[89] Predictably, several ICJ judges expressed regret;[90] yet, this does not alter the fact that in the most universal forum for international dispute resolution, the right to a safe climate cannot yet be applied as custom to the climate crisis.

In this light, asserting that the right to a safe climate constitutes a human right recognized by customary international law, remains premature.

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[86] See Mayer, "Climate Change Mitigation as an Obligation under Customary International Law", 131.

[87] See United Nations, Press Release GA/12437, 28 July 2022.

[88] See for example, International Court of Justice, *Obligations of States in respect of Climate Change (Request for Advisory Opinion)*, Written Statement of Australia, para 4.18; Written Statement of the European Union, para 262; Written Statement of New Zealand, para. 114; Written Statement of the United States of America, para 4.39; Written Statement of Germany, para 104.

[89] International Court of Justice, *Obligations of States in respect of Climate Change (Advisory Opinion)*, 23 July 2025, paras 372-393.

[90] See for example, International Court of Justice, *Obligations of States in respect of Climate Change (Advisory Opinion)*, 23 July 2025, Declaration of Judge Tladi, paras 24-33.

4.2. Critique of Indirect Applicability: Boundaries of Jurisdictional Extension in Space and Time

To some extent, the advocacy for indirect applicability arises precisely from an acknowledgment of and a desire to overcome the aforementioned challenges to direct applicability. However, even the indirect application approach—which strictly adheres to the scope of subject-matter jurisdiction and possess a relatively solid legal foundation—remain subject to multifaceted skepticism. Unlike the oppositions to direct applicability, which come from various parties, the current critique primarily originates from scholars.

4.2.1. The Spatial Scope of State Obligations under IHRL

While the extraterritorial application of IHRL remains contentious, opposition to expanding its spatial scope to encompass climate change is not merely a rejection of extraterritorial human rights obligations *per se*. On the contrary, many dissenting scholars have made significant contributions to the theory of extraterritorial human rights obligations. For instance, there is a prevailing view distinguishing between positive and negative extraterritorial human rights obligation: negative obligations are generally seen as having no territorial limits, whereas positive obligations are subject to jurisdictional requirements linked to the victim or the territory.[91] However, Besson posits that jurisdiction should be viewed as the threshold for human rights obligations,[92] while Raible further elaborates on what jurisdiction specifically entails within IHRL.[93] Consequently, these dissenting views argue against the disorderly extraterritorial application of IHRL.

Mayer's opposition is built upon a comparison between climate-induced human rights harms and traditional transboundary environmental damage. If direct transboundary harm is similar to the classic metaphor—'a bullet had been shot at someone across an international border'—then in the climate context, the causal link lacks both a smoking

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[91] See for example, Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, 210.

[92] Besson, "The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To", 857-884.

[93] Raible, *Human Rights Unbound: A Theory of Extraterritoriality*, 130-158.

gun and a point-source polluter. In practice, while he does not deny the I-ACtHR advisory opinion that states may affect the alleged victims in a 'direct and reasonably foreseeable manner' through transboundary harm, a state's capacity to achieve marginal reductions in global GHG emissions does not equate to any form of effective control over the victims. Therefore, it is untenable to claim that climate change impacts can be viewed as the direct and reasonably foreseeable result of a state's actions—thereby bringing them within that state's effective control—solely on the ground of the 'state's ability to achieve marginal reductions in global GHG emissions'.[94]

Raible provides an even deeper critique: it is precisely the global nature of greenhouse gas emissions and climate change that precludes a determination of jurisdictional authority over overseas victims. As a cause of human rights impairment, GHG emissions are essentially diffuse and cumulative, quantifiable only through shares and percentages. However, jurisdiction as the threshold for extraterritorial obligations 'requires identifying and apportioning power and control to a state where such power or control takes effect'. Furthermore, she critiques the capacity-impact model of jurisdiction in transboundary environmental harm. In this model, elements like foreseeability, capacity to act, and proximity trigger jurisdiction; regrettably, this model conflates the threshold for an obligation (jurisdiction) with the responsibility that arises after a breach (attribution). As she summarizes: '[an obligation] needs to exist before it can be violated and, by extension, must be able to exist without being violated'.[95] It is therefore unsurprising that in the climate change cases heard by the ECtHR, the Court maintained an extremely cautious stance regarding the scope of application of the state obligation, particularly its spatial reach. In *Duarte Agostinho and Others v. Portugal and Others*,[96] the Court explicitly denied that such damage or harm would bring any affected individuals under the jurisdiction of the State from which the damage or harm originated. Consequently, it declared

[94] Mayer, "Climate Change Mitigation as an Obligation under Human Rights Treaties?", 427.

[95] See Raible, "States' Extraterritorial Jurisdiction in Relation to ghg Emissions After Duarte Agostinho v Portugal", 1-10.

[96] European Court of Human Rights, *Duarte Agostinho and Others v. Portugal and 32 Others*, Application No. 39371/20, Decision as to the Admissibility of 9 April 2024.

inadmissible any claims against states other than Portugal, where the applicants resided.[97]

This necessitates a return to Besson's warning of mind the gap in terms of extraterritoriality. Whether it concerns traditional transboundary environmental harm, human rights violations committed by related companies abroad, or the more groundbreaking impacts of climate change, claims regarding extraterritorial obligations—though based on the understanding of jurisdiction as control - often conflate control over the victim with control over the source of harm. According to Besson, conflating the two risks 'reducing human rights jurisdiction to a mere capacity to harm', which in turn 'risks diluting the relational specificity of human rights and, by extension, undermining the coherence of international human rights law as a whole'.[98]

4.2.2. The Temporal Scope of State Obligations under IHRL

Regarding the temporal dimension of (indirectly) applying IHRL to climate change—specifically the strategy of litigating for the rights of future generations—the most enduring yet unavoidable critique is that this strategy of litigation remains merely a rhetorical trope.

As one scholar who advocates for the rights of future generations acknowledges, 'a number of difficulties arise in considering how to translate this concept into legal terms'.[99] Among these, it fails to resolve the fundamental issue of standing (*locus standi*) within international human rights mechanisms, nor is it a truly transformative claim of rights. Currently, nearly all dispute settlement clauses of the UN core human rights conventions or their optional protocols provide that a communication may only be brought by individuals 'claiming to be victims of a violation'. As early as 1980, in a case involving toxic waste disposal in Canada, the Human Rights Committee noted that 'the question as to whether a communication can be submitted on behalf of 'future generations' does not have to be resolved in the circumstances of the present case'. Instead,

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[97] European Court of Human Rights, *Duarte Agostinho and Others v. Portugal and 32 Others*, Application No. 39371/20, Decision as to the Admissibility of 9 April 2024, para 181.

[98] See Besson, "Due Diligence and Extraterritorial Human Rights Obligations – Mind the Gap!", 1-9.

[99] Lewis, "Human Rights Duties towards Future Generations and the Potential for Achieving Climate Justice", 215.

the Committee only treat such reference to future generations as an expression of rhetorical concern of this issue.[100] As recently as 2024, Judge Eicke, in his individual opinion in the *Klimaseniorinnen case*, expressed concerns regarding the issue of standing arising from the rights of future generations

> there is no basis for deriving any enforceable obligation from the current text of the Convention to combat … a 'future risk' in respect of 'future generations', i.e. by or on behalf of individuals who, by definition, are not even before the Court.[101]

Even though many proceedings assert the interests of future generations in the name of children's rights, the examination of standing remains consistent with other cases: Committee only has a mandate to consider communications concerning individuals who are alleged to be themselves victims of a violation of any of the rights set forth in the Covenant.[102] Thus, in the aforementioned *Torres Strait Islanders* case, despite the existence of specific children's rights provisions within the ICCPR and the author's representation of six children in advancing a quintessential future generations claim under children's rights, the Committee, in finding the State party in breach of Articles 17 and 27 of the ICCPR, stated that there was no need to consider claims under Article 24(1).[103] In this regard, it is particularly noteworthy that, although the ICJ pioneered the introduction of intergenerational equity in its advisory opinions, it has largely treated this concept as an interpretative principle rather than establishing future generations as direct rights-holders.[104] Consequently, the temporal scope of current IHRL constitutes the primary obstacle to its (indirect) application to climate change.

Even stepping beyond the framework of *lex lata* to examine the applicability of IHRL to climate change from a *lex ferenda* perspective,

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[100] Human Rights Committee, *E.H. P. v. Canada*, para 8.

[101] European Court of Human Rights, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland,* Application No. 53600/20, Judgment of 9 April 2024, Partly Concurring Partly Dissenting Opinion of Judge Eicke, para 42.

[102] Human Rights Committee, *Shirin Aumeeruddy-Cziffra and 19 other Mauritian Women v. Mauritius,* para 8.2.

[103] Human Rights Committee, *Daniel Billy et al. v. Australia*, para 10.

[104] See International Court of Justice, *Obligations of States in respect of Climate Change (Advisory Opinion),* para 105.

the temporal dimension remains markedly incompatible. The most significant critique in this regard stems from Dehm's critical discourse on the 'Temporalities of Environmental Human Rights'. Compared to other human rights, environmental rights, including those relating to climate change, confront issues of intergenerational justice more directly. Although environmental human rights have incorporated a 'progressive temporality marked out in human rights terms' within their normative framework, striving to address ethical demands concerning intergenerational justice, this framework remains reliant on 'assumes an individual, autonomous, presently-existing and anthropocentric subject suffering a contemporaneously-caused harm'.[105] It thus fails to overcome the structural limitations inherent in human rights norms. Warwick, in introducing temporal concepts within IHRL, also noted that the timeline and temporal priorities of the UN Sustainable Development Goals diverge from those of IHRL. For instance, the urgency of the 2030 deadline for achieving these sustainable goals 'can help accelerate human rights, but the human rights framework is also concerned with consistent progress and constantly updated targets'.[106] Can the current slowdown in progress on other human rights issues then constitute an acceptable trade-off for mitigating the long-term impacts of climate change? Although Warwick contends that these tensions between climate change and human rights timelines can easily be overcome,[107] the existing legal framework still lacks bridges to resolve these tensions and initiate dialogue between the two timelines.

The abovementioned *lex ferenda*-level discord ultimately prompts Humpherys's fundamental challenge to the future generation framework: 'If a responsibility towards future generations invokes sacrifice, it is coy as to whom, precisely, this sacrifice falls upon'.[108] Given the global structural inequalities rooted in historical injustices, the ethical demands of intergenerational justice risk disproportionately burdening populations already marginalized by the historical legacy of climate inaction.

105 Dehm, "The Temporalities of Environmental Human Rights".
106 Dehm, "The Temporalities of Environmental Human Rights".
107 Warwick, "Temporalised International Human Rights: Complicated Times".
108 Humphreys, "Against Future Generations".

4.3. General Skepticism Toward International Human Rights Litigation

In view of the aforementioned legal and procedural challenges, it is not surprising that many scholars maintain a pessimistic or explicitly oppositional stance toward the general applicability of IHRL in climate change. This opposition typically operates on two levels.

Alexander Zahar represents an opposition grounded in an internal legal perspective.[109] He argues that the human rights impacts of climate change may fail to meet the threshold for a breach of state obligation under IHRL due to the difficulty of proving causality and non-triviality; thus, climate impacts may never technically reach the degree of a human rights violation. Furthermore, he posits that IHRL, as a framework designed to protect the weak from the powerful is fundamentally mismatched with the global climate governance regime, which is built on collective political negotiation. Within the global climate crisis, all individuals—including members of vulnerable communities in small island States—occupy the dual role of both perpetrator (contributor) and victim. As Zahar concludes, 'if everyone is guilty, then no one really is',[110] this paradox renders the ultimate goal of climate justice elusive within the framework of IHRL.

Eric Posner, on the other hand, represents an external or meta-legal critique.[111] He argues that because climate policy involves complex resource allocation and socio-economic trade-offs, its formulation belongs to the exclusive prerogative of the political branches (legislative and executive). Therefore, intervention by any judicial body—whether domestic, regional, a quasi-judicial treaty body, or an international court—constitutes a serious overstep. From this perspective, the unfortunate reality is that such litigation is often not designed to achieve a legal victory on the merits, 'but to attract public attention and pressure governments to reach political solutions, including treaties and domestic laws'.[112]

In summary, contrary to the optimistic stance held by international or regional, specialised or general judicial bodies, human rights treaty

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[109] Zahar, "Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions", 385-411.
[110] Zahar, "Human Rights Law and the Obligation to Reduce Greenhouse Gas Emissions", 402.
[111] Posner, "Climate Change and International Human Rights Litigation: A Critical Appraisal", 1925-1945.
[112] Posner, "Climate Change and International Human Rights Litigation: A Critical Appraisal", 1944.

bodies, and some authors, there remain many sharp objections to the applicability of international human rights law in the context of climate change. These objections form a logical loop encompassing both the direct and indirect modes of application of international human rights law, as well as every intermediate step within these two modes, and argue that IHRL is doomed to futility in relation to climate change. These two opposing positions constitute the broader jurisprudential context of the legal relationship between human rights and climate change.

5. Finding the Right Place for IHRL in the Climate Change Discourse

As an advisory proceeding with an unprecedented level of global participation, the 2025 ICJ Advisory Opinion had a historic opportunity to definitively settle the debate regarding the applicability of IHRL to the climate change. However, caught between two opposing positions, the ICJ not only fell short of providing a definitive clarification over the applicability of IHRL but even further exacerbated certain controversies. For instance, regarding the complex issue of the extraterritorial application of human rights treaties in the climate context, the Court did not analyze whether or to what extent a State's transboundary conduct constitutes jurisdiction under specific climate circumstances. Instead, it offered a modular and rather cautious conclusion, stating that 'any such determination depends on the provisions of each treaty'.[113] This conclusion not only failed to respond to the skepticism of some scholars regarding extraterritorial application in the climate context but may even further intensify the fragmentation of the extraterritorial application of IHRL. Accordingly, the purpose of this article is not to provide a binary, certain answer regarding the applicability of IHRL to climate change, but rather to examine the dilemmas of IHRL within the climate change discourse through the contention between these two opposing positions, seeking its appropriate position and role.

[113] International Court of Justice, *Obligations of States in respect of Climate Change (Advisory Opinion)*, para 402.

5.1. The Role of IHRL in Climate Change: Transcending Panaceas and Futility

Despite the starkly polarized positions on the applicability of IHRL to climate change, both sides share common ground on many issues. For example, regarding extraterritorial application, both sides actually recognize that existing models may be inadequate for climate change. Proponents advocate for the introduction of breakthrough practices from regional human rights courts to expand the spatial scope of extraterritorial obligations, even suggesting a complete departure from current territorial limits toward a global human rights obligation based on principles like international cooperation. This essentially treats human rights as an omnipotent panacea. Conversely, opponents do not reject extraterritorial application *per se*, but formally insist on existing rules on treaty interpretation, maintaining jurisdiction as the threshold for IHRL. They argue that the structural characteristics of IHRL—designed to address the traditional vertical inequality between the powerful state and the vulnerable individual—make it unfit for polycentric global governance issues like climate change, where everyone acts as both contributor and victim.

This tension mirrors Martti Koskenniemi's description on the structure of international legal argument as a duality of Apology and Utopia.[114] On one hand, human rights often play a Utopian role, representing universal moral appeals transcending state will. On the other hand, they often end up as Apologies for state interests. Drawing on the 'From Apology to Utopia' paradigm, IHRL in the climate context is neither an omnipotent panacea nor a futile exercise, but a distinct discourse 'situated somewhere between politics and natural morality (justice) without being either'. Only by embracing the inherent indeterminacy of international law, or in Koskenniemi's terms, viewing it as an argumentative practice 'integrating both normativity and concreteness', can one navigate the precarious terrain between apologism and utopianism.[115]

[114] See Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 17.
[115] Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument*, 21.

5.2. The Interaction of Human Rights and Climate Change: Affording More Time and Space

Reconceptualizing international law through its indeterminacy rather than its perceived objectivity allows for a systemic reexamination of IHRL's role in the climate change. This article contends that the value of IHRL lies not in a definitive answer on applicability or non-applicability, but in the argumentative process through which these conflicting legal paradigms are constructed.

First, the opposition between direct and indirect application, though appearing as objective rules of subject-matter jurisdiction (*ratione materiae*), reflect the mutual construction between climate change and IHRL. On one hand, the mainstreaming of human rights implies that these standards are increasingly functioning as factual benchmarks across all international legal regimes. The setbacks that human rights discourse was not codified as legal obligations within the Paris Agreement framework do not represent a failure nor an end of law-making process; rather, they necessitate more persuasive, rights-based strategies that address structural inequalities and historical responsibilities to achieve climate justice. Concurrently, the push to embed mitigation obligations within human rights instruments—and the subsequent expansion of spatial and temporal jurisdiction (*ratione temporis* and *ratione loci*)—demonstrates an expansionist trajectory that is already reshaping international law through soft-law mechanisms.

Furthermore, the debate over spatial and temporal and boundaries often remains trapped in a narrow 'violation-remedy' mindset, overlooking the potential of IHRL in capacity building and risk prevention. As pointed out in the Vienna Declaration and Programme of Action, 'all human rights are universal, indivisible, interdependent and interrelated.[116] Human rights in their 'plural form' do not exist in isolation within the legal system; they are interdependent and mutually reinforcing, collectively enriching the legal toolbox for climate governance. In this regard, certain human rights that seem unrelated to climate change and unlikely to be directly impacted by it may actually facilitate the goal of climate justice. For example, as an empowering right, the right to education under Article 13 of the ICESCR is a means to enjoy and realize other

[116] *Vienna Declaration and Programme of Action*, A/CONF.157/24, 25 June 1993, para 5.

rights.[117] Similarly, the right to participate in public affairs and the right to vote under Article 25 of the ICCPR are recognized as the 'heart of democratic government based on the will of the people and in conformity with Covenant principles'.[118]

Last but not least, human rights also provide a lens of humanity by highlighting how climate impacts are magnified by vulnerability. In this context, human rights provide strategies for addressing equality and non-discrimination at three levels: first, climate change may pose direct and realistic impacts on the rights of specific groups, such as people in small island States and low-lying coastal areas who are forced to be displaced by sea-level rise. Second, for groups already vulnerable in society—such as women, children, persons with disabilities, and the elderly—climate change may further exacerbate the discrimination and inequality they face. For instance, environmental degradation, water pollution, and health issues caused by climate change, as well as the reduction of employment opportunities due to mitigation efforts, may worsen the situation of these groups. Third, particular attention must be paid to the intersectional impact of these identities or circumstances, such as 'climate refugees' appearing in recent human rights cases. It is estimated that since 2008, over 376 million people have been displaced by climate disasters; by 2050, 1.2 billion people may become climate refugees due to natural disasters and ecological threats.[119] Currently, IHRL primarily seeks relief for climate refugees through the 'non-refoulement' obligation of host States. However, how to allocate the responsibility for receiving climate refugees and how host States can ensure their non-discriminatory integration into local life remain long-term challenges for IHRL.

Ultimately, affording more time and space for the interaction of human rights and climate change allows for a longer evolutionary cycle for legal norms and a broader conceptual space for rights-climate synergy, ensuring that the unique normative value of human rights is fully realized in global climate governance.

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[117] Committee on Economic, Social and Cultural Rights. *General Comment No. 13: Right to Education,* para 1.

[118] Human Rights Committee. *General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote),* para 1.

[119] European Parliamentary Research Service, The concept of "climate refugee": Towards a possible definition, https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698753/EPRS_BRI(2021)698753_EN.pdf, p. 1.

6. Concluding Remarks

This article seeks to examine the applicability of IHRL in the context of climate change. Given IHRL's scope of application *ratione materiae*, *ratione loci*, and *ratione temporis*, its applicability necessitates certain technical interpretative work. It is precisely differing positions and methodologies regarding this interpretative work that have led to the current diametrically opposed polarised stances on the applicability of IHRL to climate change. However, this article contends that the applicability of IHRL to the climate crisis is neither a one fit for all panacea nor an exercise in nothing at all futility. To enable human rights discourse to genuinely fulfil its role in climate change, we must transcend the binary analysis of applicability versus non-applicability.

In fact, the significance of IHRL in any context extends beyond determining its applicability in litigation or whether it is observed or violated. Merely focusing on those human rights directly impacted by climate change or whether the baseline standards established by IHRL has been met, is insufficient to address the global governance crisis triggered by climate change. IHRL should be regarded as a value-based compass for risk prevention. Whether in the present, where the impacts of climate change impacts are already felt by everyone, or in the long-term future, the respect, protection, and fulfilment of every human right for every individual concerns the tangible interests of every person affected by climate change and the sustainable development of human society. Let us afford IHRL more time and space, anticipating that human rights will occupy a significant position in long-term global governance frameworks.

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