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Separation of Powers and Climate Litigation: International Law as a Guide Between Judicial Activism and Legislative Prerogatives

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ABSTRACT

This article examines the principle of separation of powers in the context of climate litigation, asking whether and to what extent courts may legitimately intervene when political authorities fail to act on climate change. Starting from the premise that separation of powers is historically and contextually relative, the article shows how this relativity is reflected in judicial practice on climate change. Notably, a comparative analysis of domestic and international case law identifies three distinct approaches: strict deference to political institutions, moderate review, and active intervention, illustrating how different legal systems draw the boundary between law and politics in climate matters. In light of this variability, the article argues that international law can offer a unifying normative framework by constraining political discretion and supporting judicial scrutiny: through binding obligations under climate and human rights law, as well as norms on access to justice, international law enables a functional understanding of the separation of powers in which courts legitimately uphold legal commitments in response to political inaction.

Keywords: separation of powers, climate change litigation, human rights, judicialization of international law, access to justice, IPCC

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1. Introduction

The Paris Agreement sets a clear objective: to limit the global temperature increase to well below 2°C and to pursue efforts to cap it at 1.5°C above pre-industrial levels. This threshold is widely recognized, most notably by the Intergovernmental Panel on Climate Change (IPCC), as the critical line beyond which the impacts on ecosystems, public health, and global stability would become increasingly severe and irreversible (IPCC, 2023). Yet, despite this scientific consensus and the clarity of the temperature goals, political organs of Member States have consistently failed to adopt measures commensurate with the scale of this global threat[1].

One of the reasons for this persistent inertia lies in the design of international climate law's mitigation framework, which is primarily composed of programmatic norms: they articulate collective, long-term objectives while leaving States considerable discretion in determining the means to achieve them (Klabbers, 2018; Kulovesi and Recio, 2023). Thus, although the Paris Agreement sets the aforementioned temperature goal, its implementation relies on Nationally Determined Contributions (NDCs), which are unilaterally defined and updated by each State (Dupuy and Viñuales, 2018, 187 ff.).

In response to this persistent gap between international commitments and actual implementation, particularly affected individuals, non-governmental organizations (NGOs) and small islands States with low-lying coasts have increasingly turned to the judiciary as a means to enforce climate obligations. Hence, strategic climate litigation, i.e., judicial action aimed at compelling more robust climate policies, has gained considerable momentum in recent

[1] See Climate Action Tracker, "an independent scientific project that tracks government climate action and measures it against the globally agreed Paris Agreement aim of "holding warming well below 2°C and pursuing efforts to limit warming to 1.5°C", https://climateactiontracker.org/.

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years, with a significant rise in climate-related cases globally (United Nations Environment Programme (UNEP), 2023).

At the domestic level, applicants have invoked legal standards such as the duty of care, tort law, and human rights provisions to bring claims against States and corporations contributing significantly to greenhouse gas emissions (Savaresi and Setzer, 2022; Maxwell, Mead and van Berkel, 2022; Misonne, Torre Schaub and Adam, 2025).[2]

At the international level, regional human rights courts and UN treaty bodies have played a pivotal role, as individuals and NGOs have brought claims arguing that inadequate State action to reduce emissions amounts to a violation of fundamental rights: cases such as *KlimaSeniorinnen*[3] before the European Court of Human Rights ("ECtHR"), *Sacchi et al.*[4] before the UN Committee on the Rights of the Child (CRC), and *Billy et al.*[5] before the UN Human Rights Committee (HRC) have paved the way to climate litigation through human rights fora (Peel and Osofsky, 2018; Savaresi, Auz, 2019; Luporini, Kodiveri 2021; Rodriguez-Garavito, 2022; Luporini, Savaresi, 2023). This trajectory has been further reinforced by the recent advisory opinion issued by the Inter-American Court of Human Rights ("IACtHR"), which adopts a particularly progressive stance on States' climate obligations under the American Convention on Human Rights[6] (Feria-Tinta, 2023; Riemer, Scheid, 2024). Lastly, the advisory opinion to be issued by the African Court on Human and Peoples' Rights ("AfCHPR")[7], following a

[2] For updated data, see Sabin Center for Climate Change Law, Climate Change Litigation Databases, https://climatecasechart.com/.
[3] *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, 2024 Eur. Ct. H.R. (2024).
[4] Committee on the Rights of the Child, "Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communication No. 104/2019", UN Doc CRC/C/88/D/104/2019 (11 November 2021) (*Sacchi* et al *v Argentina* et al).
[5] Human Rights Committee, "Views Adopted by the Committee under Article 5 (4) of the Optional Protocol, Concerning Communication No. 3624/2019", UN Doc CCPR/C/135/D/3624/2019 (22 September 2022) (*Daniel Billy* et al *v Australia*).
[6] IACtHR, "Opinión Consultiva Oc-32/25 de 29 de Mayo de 2025 Solicitada por la República de Chile y la República de Colombia - Emergencia Climática y Derechos Humanos".
[7] AfCHPR, "In the Matter of a Request by the Pan African Lawyers Union (Palu) for an Advisory Opinion on the Obligations of States with Respect to the Climate Change Crisis" (2nd May 2025).

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pending request (Suedi, 2025), is also expected to further influence the legal landscape in this area. Another major development is the increasing recourse to international courts through requests for advisory opinions concerning climate-related obligations beyond the human rights sphere. Small island nations, acutely vulnerable to the existential threats posed by climate change, have led the way in seeking legal clarification of States' responsibilities by engaging international courts with inter-State jurisdiction. One such initiative resulted in the advisory opinion recently delivered by the International Tribunal for the Law of the Sea (ITLOS), which clarified States' duties under the United Nations Convention on the Law of the Sea in relation to climate change (Longo, 2024; Macchia, 2024; Yallourides and Deva, 2024). Even more prominently, the advisory proceedings currently pending before the International Court of Justice (ICJ) aim to define the scope of States' obligations under general international law and international human rights law to prevent, mitigate, and redress the impacts of climate change, particularly with respect to the rights of present and future generations (Bodansky, 2023; Buszman, 2024; Savaresi, 2024; Priess, 2025).

In short, there is no doubt that, in today's legal landscape, domestic and international courts have thus emerged as key actors in the legal response to climate change, playing a central role in holding major emitters accountable. However, a closer look at these developments raises broader questions of great interest to public law scholars, as it challenges several long-established categories of legal theory. Chief among them is the traditional understanding of the separation of powers: can a judge invoke broadly formulated norms, such as human rights provisions or domestic tort law, to direct the legislative and executive branches on how to act in the face of climate change? And if so, to what extent may courts do so when the dispute involves inherently political choices and public policy considerations? (Guarna Assanti, 2021; Pane, 2023).

The answer to these questions cannot but be relative. It necessarily depends on the conception of the separation of powers one adopts as a reference point.

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This notion, indeed, is inherently flexible, and its concrete definition is closely tied to specific historical and political contexts. What may be seen as judicial overreach in one legal culture might be viewed as legitimate adjudication in another. In light of the above, the present article argues that strategic climate litigation reveals diverging understandings of the separation of powers, and it aims to identify which of these conceptions aligns more closely with the current international legal framework.

To this end, the second section will explain why the separation of powers must be regarded as a relative, context-dependent concept; the third section will examine key judgments in strategic climate litigation to illustrate the different ways in which this principle has been understood; the fourth section will explore the role that international law plays in shaping and legitimizing these judicial interventions; finally, the fifth section will draw some general conclusions.

2. The Inherent Relativity of the Notion of Separation of Powers

Throughout the history of modern constitutionalism, the concept of separation of powers has been interpreted in various ways, influenced by the historical and political context in which different legal experiences and theories have been shaped (Eckes, 2021a, 1316). This relativity is reflected both in the theoretical understanding of the concept and in the concrete institutional arrangements through which it has been implemented across different legal systems.

As for the theoretical origins of the separation of powers, they are most commonly traced back to Montesquieu's *L'Esprit des Lois*, where the Enlightenment thinker introduced the idea that government functions should be divided among three distinct branches: the legislative, responsible for making laws; the executive, charged with implementing them; and the judiciary, competent to sanction those who violate them (Montesquieu, 1748). This tripartite model, though famously systematized by Montesquieu,

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had already found an earlier formulation in John Locke's *Two Treatises of Government*, which distinguished between legislative, executive, and federative powers (Locke, 1689). In Montesquieu's thought, each branch must operate independently and without encroaching on the others' spheres. Thus, Montesquieu's work is often associated with the image of the judge as *bouche de la loi*, that is, a mere mechanical applicator of legislative texts (Spector, 2015).

However, this conception must be understood in light of the historical context in which it emerged: the Enlightenment's reaction against absolutism. From this perspective, the idea underpinning the separation of powers is not rigid division for its own sake but rather a system of checks and balances designed to prevent any one branch from dominating the others, thereby avoiding the concentration of power characteristic of absolute monarchies. This inherent flexibility makes the doctrine of separation of powers primarily a mechanism to maintain equilibrium among branches of government, ensuring no single authority can wield unchecked power (Hazo, 1968, 1965).

Consequently, Montesquieu's vision of the judge has been interpreted by emphasizing two different aspects. On one hand, the judge as a *juge automate*, a figure whose role is limited to the strict and mechanical application of statutory law, without room for discretion or interpretive reasoning; on the other hand, the judiciary's function as a check on the legislative and executive powers, those branches most directly tied to the will of the majority. From this perspective, the judiciary is not merely a passive instrument but an essential counterbalance, tasked with preventing the concentration or abuse of power (Schoukens, 2024, 187-188).

This fundamental ambivalence in Montesquieu's thought is mirrored in the subsequent theoretical evolution of the separation of powers throughout the 19th century. In fact, the restrictive understanding of judicial authority gave rise to doctrines such as the "political question doctrine", which posits the existence of a sphere of political discretion that is entirely insulated from

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judicial oversight. According to this theory, certain matters, especially those involving foreign policy or national security, are deemed non-justiciable, falling exclusively under the purview of elected officials. In practice, courts in several jurisdictions have invoked this doctrine to rule that executive decisions in the field of international relations are beyond judicial review, thereby excluding them from legal scrutiny and from the binding reach of international law itself (Amoroso, 2012; Amoroso, 2015; Magi, 2021).

By contrast, the interpretation of the separation of powers as a means primarily intended to ensure equilibrium among branches of government gave rise, particularly with the emergence of the welfare state and twentieth-century constitutionalism, to a more *functional* and *relational* reading of the principle. According to this view, the separation of powers is not an end in itself, nor a rigid framework designed to compartmentalize institutional roles (Ackermann, 2000, 633). Rather, it is a tool that serves the broader goal of liberal democracies: the protection of both *collective* and *individual autonomy* (Möllers, 2013).

Collective autonomy is safeguarded through democratic decision-making processes, whereby the will of the majority is translated into law via politically accountable institutions. Individual autonomy, on the other hand, is ensured through the imposition of legal limits on that majority will, limits which are upheld by institutions with technical or counter-majoritarian legitimacy, such as the judiciary. In this context, the separation of powers becomes an architecture of mutual oversight and cooperation, rather than one of strict institutional isolation. This perspective emphasizes that the principle must be understood in a dynamic and context-sensitive way: it is the *interaction* between powers, not their insulation, that ensures a just and balanced exercise of authority. This relationship, therefore, is fluid and dynamic, resulting in a continuous redefinition of the boundary between the *political* and the *legal* (Eckes, 2021b).

This challenge to draw a sharp distinction between these domains becomes all the more evident when one turns from the theoretical aspects to the way in

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which the role of the judge has been concretely realized across different legal systems (Cappelletti, 1984). In this respect, the role of ordinary judges varies depending on the legal tradition in which they operate; for instance, between common law and civil law systems. At the same time, the emergence of supreme, constitutional, and supranational courts has introduced an additional layer of complexity, as these bodies often occupy a more ambiguous position within the separation of powers (Biondi, Zanon, 2014).

When it comes to the varying role of judges across different legal traditions, important divergences emerge. For example, in some common law systems, such as the United States, some ordinary judges are elected and therefore enjoy a form of popular and political legitimacy. Such an arrangement would be inconceivable in many civil law jurisdictions, where judicial authority is rooted in technical expertise (Bartole, 1996; Caianiello, 1998). Moreover, different forms of judicial restraint shape the activity of courts in common law systems. In the United States, for example, doctrines such as constitutional avoidance, the presumption of constitutionality, and strict standing requirements serve to limit judicial intervention, especially in politically sensitive matters. This is particularly relevant in areas like environmental law, where identifying clear rights holders can be difficult. In such contexts, standing, the admissibility of public interest litigation, and the protection of diffuse interests are not merely procedural matters; they contribute in a substantive way to defining the role of the judiciary within a constitutional system and reshaping the balance of powers (on this issue, see Weill, 2023).

As for the role played by Supreme Courts, in many jurisdictions they are entrusted with what is often described as a *nomophylactic* function, i.e., ensuring the uniform interpretation and application of the law across the judicial system. While formally a legal task, in practice this role may acquire a creative dimension, particularly when the process of consolidating a unified interpretation requires choices that carry significant normative or policy

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implications. The boundary between law and politics thus becomes increasingly porous (Grossi, 2012; Grossi, 2016).

This ambiguity is even more pronounced in the case of constitutional courts. With the advent of constitutionalism, such courts have come to act as guardians of constitutional order, through the power to review legislation. In Kelsen's conception, the constitutional court stands not within, but above the classical separation of powers, functioning in many respects as a kind of "negative" unelected legislator (Kelsen, 1928; Kelsen, 1942). Although it is not part of the political sphere in a conventional sense, the court exercises a function that is inherently political (Drigo, 2025). Its legitimacy derives not from democratic representation, but from legal expertise and its role in upholding fundamental rights and constitutional principles (Kelsen, 1945; Ragone, 2025).

A striking example of this dynamic can be found in the United States Supreme Court, which famously asserted its interpretive supremacy in the landmark case of *Marbury v. Madison* (1803), declaring that "[I]t is emphatically the province and duty of the judicial department to say what the law is"[8]. With this pronouncement, the Court positioned itself as the ultimate arbiter of constitutional meaning, effectively elevating its role above the traditional three branches of government in its capacity as guarantor of the constitutional framework.

As for supranational courts, legal scholars refer to the concept of *vertical* separation of powers, which denotes the distinction between what falls exclusively within the sovereign prerogatives of States and what lies within the *ratione materiae* jurisdiction of international courts (Polzin, 2022). In the past, this boundary was clear-cut, as the voluntary nature of jurisdiction has always been a fundamental principle of international law (Orakhelashvili, 2020). Over time, however, international law has undergone progressive judicialization, evolving from ad hoc arbitral tribunals handling specific

[8] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), 177.

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disputes to permanent courts tasked with overseeing compliance with multilateral treaties (Iovane, 2017; Follesdal, Ulfstein, 2018). Today's legal landscape is shaped by a form of so-called multilevel constitutionalism, where, based on the understanding of treaties as living instruments, the *ratione materiae* jurisdiction of certain courts, especially those relying on broad and inherently vague standards such as human rights, continues to be redefined and expanded, particularly in contexts where States fall short in fulfilling their obligations (Zarbyiev, 2012). This dynamic development generates tension with States, which remain the *treaty masters* and, viewing this phenomenon with suspicion, emphasize principles such as subsidiarity and the margin of appreciation. One of the clearest illustrations of this can be found in the European context, where the Court of Justice of the European Union and the ECtHR, both initially designed to ensure State compliance with international treaties, have progressively assumed a quasi-constitutional role. This transformation has not gone uncontested: it has prompted increasing resistance from member States, wary of the expanding jurisdiction and normative influence of these supranational courts (Hofmann, 2018; Breuer, 2021).

Against the backdrop of this already multifaceted scenario, contemporary legal systems have seen the concept of separation of powers come under renewed pressure (Azzarriti, Dellavalle, 2014). As it has been noted, indeed, there is a "darkening of political representation and an appropriation of lawmaking by 'communities,' particularly the 'legal community' and, within it, judges in a preeminent position - community versus State" (Staiano, 2018, 37). This phenomenon is the result of a deeper dysfunction: the persistent inability of political institutions to address the structural and urgent challenges of our time has rendered them "formally legitimate, but substantively no longer legitimate," and thus, in practice, "tyrants".

According to the relational conception of the separation of powers, it is precisely this form of tyranny that justifies a rebalancing intervention by the judiciary. In this vein, strategic climate litigation, both at the domestic and

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international levels, exemplifies this ongoing crisis within the separation of powers framework: applicants seek to liberate themselves from the "omissive tyranny" of political power, thereby aligning with the functional and relational conception of separation of powers (Eckes, 2021a, 1310).

Whether this encroachment aligns with the separation of powers principle depends largely on the conceptual framework adopted: it is incompatible with the nineteenth-century view of judges as mere *bouche de la loi*, but fits within a more substantive, purposive understanding of the principle that has developed in opposition to that traditional view. Moreover, much depends on the legal system in which the case is situated and on the specific role of the court seized (e.g., whether it is a constitutional court, a supreme court, or an ordinary court) as each may be entrusted with different functions and degrees of authority within its respective institutional framework.

Therefore, it is crucial to examine relevant case law to understand how different courts involved in strategic climate litigation have interpreted and applied the concept of separation of powers (Saltalamacchia, 2024).

3. Climate Change Judgments and Separation of Powers

The first group of cases has adopted a rigid view of the separation of powers, denying any possibility for judges to rule on climate matters. This group corresponds primarily to the "first generation" of strategic climate litigation, in which U.S. judges played a leading role. In cases such as *American Electric Power Company Inc.*[9] and *Comer*[10], U.S. courts applied the political question doctrine to climate change, holding that decisions on emissions reduction require a reasoned balancing of conflicting interests (Kuh, 2019). Therefore, this task falls within the remit of the legislative or executive branches, particularly through international cooperation. This approach was recently

[9] *American Electric Power Company Inc. et al. v Connecticut*, 564 U.S. 410 (2011).
[10] *Comer v. Murphy Oil USA*, No. 1:05-CV-00436-LG-RHW, 2007 WL 6942285 (S.D. Miss. Aug. 30, 2007); *City of Oakland v. BP p.l.c.,* No. 3:17-cv-06011-WHA (N.D. Cal. June 2018).

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reaffirmed by the Ninth Circuit Court of Appeals in its ruling on the well-known *Juliana* case, in which the court unequivocally stated that

> "it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs' requested remedial plan. As the opinions of their experts make plain, any effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches"[11] (p. 25) (Colby, Ebbersmeyer, Heim and Røssaak, 2020; Nedevska, 2021; Montgomery, 2021).

However, this restrictive approach is not exclusive to U.S. jurisprudence (Pane, 2023). Two examples are the *Klimaatzaak*[12] case, decided by the Brussels Court of First Instance in 2021 (see Briegleb, De Spiegeleir, 2023), and the *Giudizio Universale*[13] case, ruled on by the Rome Tribunal in 2024 (Luporini, 2021; Bruno, 2022; Butti, 2024; Cecchi, 2024; Palombino, 2024; Vinken, Mazzotti, 2024).

In the first case, Belgian judges reached a paradoxical conclusion: the Belgian State and the three Regions composing it, who were the defendants in the lawsuit, had violated Article 1382 of the Civil Code, which requires them to act with prudence and diligence, as well as Articles 2 and 8 of the European Convention on Human Rights (ECHR), which guarantee, respectively, the right to life and the right to respect for private and family life. Indeed, the defendants, despite being aware of the risks that climate change poses to the country's population, had failed to take the necessary measures to prevent those risks from materializing. Nevertheless, the principle of separation of powers prevented the court from ordering the

[11] *Juliana v. United States*, 947 F.3d 1159 (9th Cir. 2020), p. 25.
[12] Tribunal de première instance francophone de Bruxelles, Section Civile, 4ème Chambre, 17 juin 2021, No. 2015/4585/A. It is worth noting that this judgment was overturned by the Brussels Court of Appeal, which, in addition to confirming the violations, ordered the authorities to reduce greenhouse gas emissions. See Cour d'appel de Bruxelles, Section Civile, 2ème Chambre, 30 novembre 2023, Nos. 2021/AR/1589, 2022/AR/737 and 2022/AR/891.
[13] Tribunale ordinario di Roma, Seconda Sezione Civile, 26 febbraio 2024, No. 39415/2021.

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government to modify its emissions reduction targets, as this matter falls within the exclusive competence of the legislative and executive branches (Petel and Vander Putten, 2023). Therefore, although the violation was established, the Brussels Court of First Instance held that it could not issue a ruling on the matter.

Similarly, the Rome Tribunal declared that "The interest whose protection is sought through compensation for damages under Articles 2043 and 2051 of the Civil Code does not fall within the scope of subjectively protected legal interests, since decisions regarding the methods and timelines for addressing the phenomenon of anthropogenic climate change, which involve discretionary assessments of a socio-economic nature and a cost-benefit analysis across various sectors of collective life, fall within the remit of political bodies and cannot be subject to judicial review in the present case. Through the civil action brought, the plaintiffs are essentially asking the Court to annul primary and secondary normative provisions […] which represent the implementation of political decisions made by the legislature and the government in line with internationally and European-assumed objectives (both short- and long-term), which would constitute a violation of a fundamental principle of the legal system: the separation of powers" (p. 12).[14]

A second set of cases reflects a different approach, in which courts have found it compatible with the principle of separation of powers to assess the adequacy of emission reduction plans adopted by the legislative and executive branches, without, however, going so far as to impose specific thresholds to respect. A landmark example is the 2021 ruling of the German Federal Constitutional Court in the *Neubauer* case.[15] In that decision, the Court held that parts of the German Climate Protection Act (*Bundesklimaschutzgesetz*) were incompatible with fundamental rights. It emphasized that Article 20a of the German Basic Law imposes a duty on the legislature to protect the climate, particularly by ensuring an equitable distribution of the carbon

[14] Giudizio Universale, cit., p. 12 [translation by the author].
[15] *Neubauer*, BVerfG, 1 BvR 2656/18, 2021, par. 206.

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budget across generations (Bäumler, 2021; Minnerop, 2022; Di Martino 2024). Under this framework, the Court found that the plan was insufficient, as it allowed the current generation to consume a disproportionate share of the CO_2 budget, thereby shifting the burden of emissions reductions onto future generations (Eckes, 2021c). Nonetheless, the Court clarified that "it is not the role of the judiciary […] to translate the vague language of Article 20a of the Basic Law into quantifiable global warming thresholds or specific emission limits or reduction targets" (para. 206).

Another clear example of this approach is the recent *KlimaSeniorinnen* judgment by the ECtHR. In that decision, Strasbourg judges found, among others, that Switzerland's insufficient action in reducing greenhouse gas emissions substantiated a violation of Article 8 of the ECHR. The Court held that climate change has harmful effects on the life, health, and quality of life of the applicants, and that the State, by failing to take adequate measures despite being aware of these risks, had breached its positive obligations under that article (Milanovic, 2024; Buyse, Istrefi, 2024; Pedersen, 2024; Savaresi, Norlander, Wewerinke-Singh, 2024; Humphreys, 2024; Letwin 2024; Hilson, Geden, 2024; Letsas, 2024; Guarna Assanti 2024; Ragni 2024).

In making this finding, the Court was careful to acknowledge the respective competences of the legislature and, given its status as an international court, also considered the principle of separation of powers in its vertical dimension. On this point, the Court emphasized that "[J]udicial intervention, including by this Court, cannot replace or provide any substitute for the action which must be taken by the legislative and executive branches of government" (para. 412). However, it added that when a matter concerns rights protected under the Convention, "this subject matter is no longer merely an issue of politics or policy but also a matter of law having a bearing on the interpretation and application of the Convention" (para. 450). Accordingly, the Court is entitled to review the measures adopted by States to reduce greenhouse gas emissions, insofar as an unchecked rise in emissions could lead to serious and irreversible human rights violations. This does not

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mean, however, that the Strasbourg judges can dictate the specific measures that a respondent State must adopt; such choices remain the prerogative of the national legislature and fall within its margin of appreciation (Blattner, 2024).

Lastly, a third group of cases has gone even further. In these instances, courts have not only found that legislative inaction constitutes a breach of tort law or of human rights obligations but have also identified specific standards that lawmakers are required to meet (Morvillo, 2019). The landmark case in this category is *Urgenda*, decided by the Dutch Supreme Court in 2019, following earlier rulings by the District Court of The Hague (2015) and the Court of Appeal (2018)[16] (Bergkamp, 2015; Lin, 2015; De Graaf, Jans, 2015; van Zeben, 2015; Peeters, 2016; Verschuurenm 2019; Mayer, 2019). In this decision, the Dutch judiciary held that the government of the Netherlands had violated Articles 2 and 8 of the ECHR by failing to take sufficient action to reduce greenhouse gas emissions. Acknowledging the real and imminent threat posed by climate change to the lives and well-being of those under its jurisdiction, and despite being fully aware of it, the government had not adopted all reasonably available measures to mitigate that risk (para. 5.6.2). This failure also amounted to a breach of the duty of care owed to individuals under its jurisdiction, giving rise to non-contractual liability (Passarini, 2020; Pedersen, 2020; Spier, 2020; Wewerinke-Singh, McCoach, 2021).

Importantly, the *Hoge Raad* went further: relying on scientific assessments by the Intergovernmental Panel on Climate Change (IPCC) and on the international legal framework on climate change, the Court established a concrete emissions reduction obligation: the Netherlands was required to reduce its emissions by at least 25% relative to 1990 levels by 2020. In doing so, the Court imposed a binding target on the legislature, leaving discretion only as to the choice of means for achieving it (Schoukens, 2024, 190).

This overview of the main judicial approaches to the separation of powers in climate litigation, ranging from strict deference to active intervention,

[16] *Staat der Nederlanden v. Stichting Urgenda*, Hoge Raad der Nederlanden, 20 de diciembre de 2019, ECLI:NL:HR:2019:2006.

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highlights the lack of a uniform standard across national legal systems. In this fragmented landscape, international law can serve as a shared global interpretive framework, helping domestic courts to find the complex balance between judicial intervention and legislative discretion. The question then arises as to how international law can concretely provide such guidance.

4. Understanding Separation of Powers in Climate Matters Through the Lens of International Law

For our purposes, international law offers a useful framework through two main categories of norms. First, there are substantive standards which, when interpreted in light of the best available science, may limit political discretion on climate change and thereby allow for judicial scrutiny. Second, there are norms concerning access to justice.

Among the substantive standards, two areas of international law stand out: climate change mitigation obligations and human rights law. As previously noted, the first are rooted in the Paris Agreement, which establishes legally binding temperature goals, most notably the objective of limiting global warming to well below 2°C, and to pursue efforts to cap it at 1.5°C above pre-industrial levels. While States retain discretion over the means to achieve these goals through their NDCs, scientific evidence from the IPCC has made it clear that current climate policies are insufficient to meet these targets. As such, a failure to adjust policy trajectories risks amounting to a breach of international legal obligations, transforming the issue from a matter of political discretion to one of legal non-compliance (Ritz, 2024). A similar dynamic applies to human rights obligations. As previously noted, IPCC findings have established that exceeding certain temperature thresholds, such as the 1.5°C limit, would result in serious and foreseeable harm, potentially infringing upon fundamental rights. In this light, the best available science becomes essential not only for informing policy but also for interpreting the scope of legal obligations under human rights law. For example, as clarified

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by the ECtHR in *KlimaSeniorinnen*, insufficient action on climate change may amount to a violation of Article 8 ECHR, which protects the right to private and family life. In such cases, political discretion is again constrained, as the failure to take adequate measures is no longer a matter of policy choice but of non-compliance with binding human rights standards (Gallarati, 2024).

In both instances, when interpreted in light of the best available science, these international norms reveal that legislative discretion is no longer unbounded. Therefore, given that political inaction may entail violations of binding international obligations, particularly those related to mitigation and human rights, judicial intervention appears justified.

The second category, access to justice, can in turn be understood along two complementary lines: environmental procedural rights, and access to justice as guaranteed under human rights treaties.

As for environmental procedural rights, a key instrument is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). Article 9(3) of the Convention provides that "each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment" (Mezzetti, 2011; Passarini, 2023); furthermore, Article 9(4) specifies that "the procedures referred to in paragraphs 1, 2 and 3 above shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive" (Ryall, 2019). On this point, the Implementation Guide to the Convention, published by the United Nations, clarifies that

> "in situations where a violation is ongoing or further harm may occur, or where damage can be remedied or its effects mitigated, courts and administrative authorities should be empowered to issue decisions that put an end to the situation or require corrective

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> action". (United Nations Economic Commission for Europe, UNECE, 2014, 200-201).

Therefore, it is reasonable to infer that the Convention is applicable not only to environmental matters, but also to climate litigation (Eckes, Trapp, 2024).

Consequently, States are under an obligation to consider such claims and to provide an adequate remedy to the claimants in climate matters when the established legal requirements are met. While this obligation is, strictly speaking, addressed to the legislator, requiring the provision of appropriate legal tools and procedural avenues for courts to adjudicate the types of disputes described, it may also serve an important interpretative function for judges (Smyth, 2022; Richelle, 2022). Specifically, the Convention might be used to choose a more flexible understanding of the principle of separation of powers, allowing courts to embrace broader interpretations of existing standards, such as extra-contractual liability or human rights. Since these legal standards are often formulated in open or vague terms, the Aarhus Convention, though formally directed at lawmakers, can offer normative support for judicial interpretations that expand access to justice in climate litigation and align national adjudication with international environmental commitments.

Although the Aarhus Convention has a regional focus limited to Europe, it is important to note that similar legal frameworks exist in other regional contexts. As a result, the underlying reasoning can be extended to those jurisdictions as well (e.g., the *Acuerdo Regional sobre el Acceso a la Información, la Participación Pública y el Acceso a la Justicia en Asuntos Ambientales en América Latina y el Caribe*, known as Escazú Agreement, on which see Medici-Colombo, Ricarte, 2024, 160).

Added to this are the elements provided by international human rights law on access to justice. One notable example is the protection afforded by Articles 6 and 13 of the ECHR, as interpreted by the aforementioned *KlimaSeniorinnen* judgment.

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With regard to Article 6, in the *KlimaSeniorinnen* case the claimant association had been denied standing before the domestic courts. The ECtHR found that the conditions for the applicability of Article 6 were met, as there was a genuine and serious dispute concerning a civil right (namely, the right to life and physical integrity, derived from Article 10 of the Swiss Constitution) and the outcome of the proceedings was "directly decisive" for the association. The Court also emphasized the essential role of associations in promoting specific causes related to environmental protection, and the importance of collective action in the context of climate change. Thus, it found that domestic courts had failed to deal with the claim in a serious or adequate manner: they had neither engaged with the substance of the allegations nor provided compelling reasons for dismissing them. Moreover, they had not adequately examined the available scientific evidence on climate change and its present and future effects on human rights, nor had they properly assessed the standing of the association, which would have required an independent evaluation of the situation of the individual claimants (para. 615 ff.).

Given that no alternative legal avenues or procedural safeguards were available, the ECtHR concluded that the restriction placed on the association's access to justice impaired the very essence of the right itself. The judgment also highlighted the crucial role of national courts in climate litigation and underlined the importance of access to justice in this field, in line with jurisprudence developed across various Council of Europe member States (para. 630 ff.).

For its part, Article 13 of the ECHR provides that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority". To rely on this guarantee, applicants must raise a claim that is arguable under the Convention. As already noted, the *KlimaSeniorinnen* ruling confirmed that a failure to adequately reduce emissions may, under certain conditions, amount to a violation of Article 8. Consequently, claimants in strategic climate litigation

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may be regarded as presenting arguable claims under the ECHR and are therefore entitled to invoke Article 13. However, since the *KlimaSeniorinnen* judgment considers that the assessments relating to Article 13 are encompassed within those of Article 6, it does not explicitly address this aspect (para. 641 ff.).

Similar reasoning has also emerged from the Inter-American Court of Human Rights in its very recent advisory opinion on States' climate obligations under the American Convention on Human Rights. The Court adopts a notably progressive approach, affirming that States must ensure effective judicial remedies for those affected by the climate crisis. This includes guaranteeing procedural mechanisms that reflect the urgency and complexity of climate litigation, applying the *pro actione* principle, ensuring broad standing in both individual and collective claims, easing evidentiary burdens, and providing adequate resources for environmental justice. These elements are presented as essential to making access to justice effective in the context of the climate emergency (para. 540 ff.).

In light of the above, international legal standards can serve to expand the scope for judicial intervention in climate matters, thus supporting a broader reading of the separation of powers. How these standards are operationalised, however, depends both on the type of court involved and on the degree to which a given legal system is open to international law. In many jurisdictions where international norms enjoy supra-legislative status, constitutional courts may use them as benchmarks to assess the compatibility of domestic laws with constitutional principles. For instance, legislation that fails to demonstrate sufficient ambition in climate mitigation efforts, contrary to the substantive standards that limit legislative discretion, or that does not ensure effective access to justice in climate-related cases may be found unconstitutional. Ordinary judges, for their part, may rely on international access to justice standards to adopt a more flexible interpretation of domestic procedural rules, such as standing or admissibility requirements. Substantive obligations under international law may also inform the interpretation of

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domestic tort law or duties of care, particularly where judicial mandates include the protection of fundamental rights. Lastly, international and supranational courts, in their role as guardians of the treaties they are called to interpret and apply, may rely on interpretive tools such as Article 31(3)(c) of the Vienna Convention on the Law of Treaties to incorporate other relevant international norms, particularly those concerning climate obligations, human rights, and access to justice. The integration of these norms can broaden the interpretive scope of the treaties themselves, thereby expanding the space for judicial intervention and allowing courts to relax certain procedural requirements in order to ensure effective access to justice.

In all these contexts, international law enables judges to act not as political decision-makers, but as guardians of binding legal standards. Whether and how these norms are applied, however, will ultimately depend on which courts are seized and the normative framework within which they operate.

5. Conclusions

In conclusion, this article has demonstrated that the concept of separation of powers is both historically and geographically relative. The boundary between the legal and the political remains difficult to define, not only in institutional practice but also at the level of constitutional theory. This ambiguity is further reflected in the comparative analysis of climate judgments, which reveals divergent understandings of the very notion of separation of powers. Yet, international law offers a unifying framework that supports a more inclusive and functional reading of the separation of powers in the context of climate litigation. On the one hand, substantive standards, such as those established under the Paris Agreement and interpreted in light of the best available science, serve to limit legislative discretion by setting legally binding targets that courts may be called upon to uphold. On the other hand, international norms on access to justice, whether enshrined in environmental conventions or human rights treaties, empower judges to

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interpret procedural rules more flexibly, thereby enhancing judicial protection in climate cases.

Ultimately, while the separation of powers is not a fixed or universal concept, international law tends to favour an understanding of it in the context of climate change litigation that reinforces judicial accountability where State inaction threatens to undermine legal obligations. In this sense, judicial intervention in climate matters should not be seen as an undue encroachment upon a fundamental constitutional principle or as a challenge to democratic legitimacy. Rather, it constitutes a means of ensuring compliance with binding international standards.

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