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The Use of Human Rights Law in Climate Change Litigation

An Inquiry into the Human Rights
Obligations of States in the Context
of Climate Change; and the Use of
Human Rights Law in Urgenda and
Other Climate Cases

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FOREWORD

The European Master's Degree in Human Rights and Democratisation (EMA) is a one-year intensive programme launched in 1997 as a joint initiative of universities in all EU Member States with support from the European Commission. Based on an action- and policy-oriented approach to learning, it combines legal, political, historical, anthropological and philosophical perspectives on the study of human rights and democracy with targeted skills-building activities. The aim from the outset was to prepare young professionals to respond to the requirements and challenges of work in international organisations, field operations, governmental and non-governmental bodies, and academia. As a measure of its success, EMA has served as a model of inspiration for the establishment of six other EU-sponsored regional master's programmes in the area of human rights and democratisation in different parts of the world. These programmes cooperate closely in the framework of the Global Campus of Human Rights, which is based in Venice, Italy.

Ninety students are admitted to the EMA programme each year. During the first semester in Venice, students have the opportunity to meet and learn from leading academics, experts and representatives of international and non-governmental organisations. During the second semester, they relocate to one of the 41 participating universities to follow additional courses in an area of specialisation of their own choice and to conduct research under the supervision of the resident EMA Director or other academic staff. After successfully passing assessments and completing a master's thesis, students are awarded the European Master's Degree in Human Rights and Democratisation, which is jointly conferred by a group of EMA universities.

Each year the EMA Council of Directors selects five theses, which stand out not only for their formal academic qualities but also for the originality of topic, innovative character of methodology and approach, potential usefulness in raising awareness about neglected issues, and capacity for contributing to the promotion of the values underlying human rights and democracy.

The EMA Awarded Theses of the academic year 2018/2019 are:

- Ay, Emine, *Remembering without Confronting. Memorialization as a Reparation without Coming to Terms with the Past: Case study: Ulucanlar Prison Museum*. Supervisor: Gabor Olah, Masaryk University, Brno.
- Basso, Francesca, *In Pain Thou Shalt Bring Forth Children? For a Human Right to Pain Relief in Childbirth*. Supervisor: Helena Pereira De Melo, New University of Lisbon.
- Dewaele, Janne, *The Use of Human Rights Law in Climate Change Litigation. An Inquiry into the Human Rights Obligations of States in the Context of Climate Change; and the Use of Human Rights Law in Urgenda and other Climate Cases*. Supervisor: Claire Vial, Université de Montpellier.
- Gómez del Valle Ruiz, Álvaro, *“A Community of Shared Destiny”: How China Is Reshaping Human Rights in Southeast Asia*. Supervisor: Karol Nowak, Lund University.
- Veit, Meredith, *Blockchain and Journalism: The Intersection between Blockchain-Based Technology and Freedom of the Press*. Supervisor: Jónatas Machado, University of Coimbra.

The selected theses demonstrate the richness and diversity of the EMA programme and the outstanding quality of the work performed by its students. On behalf of the Governing Bodies of EMA and of all participating universities, we congratulate the authors.

Prof. Manfred NOWAK
Global Campus Secretary General

Prof. Thérèse MURPHY
EMA Chairperson

Dr Wiebke LAMER
EMA Programme Director
University of Lisbon.

This publication includes the thesis *The Use of Human Rights Law in Climate Change Litigation. An Inquiry into the Human Rights Obligations of States in the Context of Climate Change; and the Use of Human Rights Law in Urgenda and other Climate Cases* by Janne Dewaele and supervised by Claire Vial, Université de Montpellier.

DISCLAIMER: as this work was finalized in July 2019, some of the information in it is not accurate or up to date anymore.

BIOGRAPHY

Before graduating from the European Master's Programme in Human Rights and Democratisation in Venice, Janne obtained a master's degree in Law at Ghent University in Belgium. Janne currently works at the European Commission's DG for Justice and Consumer. She is passionate about sustainability and the link between human rights and the environment.

ABSTRACT

Climate litigation has become very popular in recent years. Increasing numbers of citizens are taking their governments to court for their lack of action to combat climate change. Many of these lawsuits are (partly) based on human rights law. Surely, climate change can, already has and will continue to have a massive impact on the lives and living conditions of people and thus also on the protection of their human rights. Using human rights as a basis for a climate change claim against a government is not waterproof, however. It is not that easy to attribute climate-change related harm to acts or omissions of specific states and classify these impacts as human rights violations. There are also issues of admissibility and justiciability. This dissertation therefore examines which human rights obligations states exactly have in the context of climate change, and whether or not this entails an obligation to limit greenhouse gas emissions. To this end, the obligations that have been established on the United Nations level (with soft law status), and under the European Convention on Human Rights (with hard law status) are discussed. This thesis further assesses whether or not these obligations can be used successfully in climate change cases. Different lawsuits, brought by citizens against their governments, that seek to increase the governments' mitigation ambitions or hold them accountable for already existing climate commitments by using existing human rights provisions, are examined. It is assessed how human rights law is used within the claims and/or the verdicts of these different cases, and how certain legal hurdles are being dealt with. The research findings indicate that there is growing consensus on the fact that there is a human rights obligation to limit greenhouse gas emissions. Still, this only has soft law status, and the exact implications of this obligation need to be fine-tuned. It is also possible to use human rights law as the basis of a climate claim successfully, but multiple difficulties remain. The success rate will depend, inter alia, on what the factual situation of the case is, what the national provisions on admissibility are, which human treaties the state has ratified, and which constitutional provisions can be invoked. Even when these things work in the applicant's favour, it will often still be necessary for the judge to be a bit inventive, as the current human rights mechanisms are not well-suited to the complex collective problem of climate change. This thesis can be a first step towards a more structured comparison of the use of human rights law within climate litigation. The verdict of many currently pending cases will allow a more in-depth and systematic analysis of this topic.

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Dankjewel, allemaal!

Janne Dewaele

Waregem, 2019

TABLE OF ABBREVIATIONS

CEDAW	Committee Committee on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CO ₂	Carbon dioxide
COP	Conference of the Parties
CRC	Children's Rights Committee
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GHG	Greenhouse gas
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Law Commission
IPCC	Intergovernmental Panel on Climate Change
OHCHR	Office of the High Commissioner for Human Rights
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNEP	United Nations Environment Programme
UNFCCC	United Nations Framework Convention on Climate Change
WHO	World Health Organization

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1.

INTRODUCTION

1.1 CLIMATE CHANGE

Our climate is changing. While the emission and reabsorption of carbon dioxide (CO₂) is a natural phenomenon, humans have come to play an instrumental role in the composition of our atmosphere.¹ By burning fossil fuels on a massive scale, while at the same time cutting down trees, more CO₂ is emitted than can be reabsorbed. CO₂ and other greenhouse gases (GHG) then trap heat in the atmosphere, warming our earth and oceans. All major climate changes we know of, distinguishing ice ages and some warmer periods, took place within a range of CO₂ atmospheric concentrations of 180ppm (parts per million) to 300 ppm.² In May 2019, the atmospheric CO₂ exceeded 415ppm.³ This is the highest it has been in three million years. 1.0°C of global warming compared to pre-industrial levels has already occurred, and the past four years have been the warmest on record.⁴ As there is a delayed effect of increased GHG emissions on the global temperature (for example because of the slow rate at which oceans absorb heat), we are now experiencing the effects of CO₂ emitted a long time ago. The warming of our planet will thus persist for centuries.⁵ Global warming is likely to reach 1.5°C between 2030 and 2052 if it continues to increase

¹ Roger HJ Cox, *Revolution Justified* (The Planet Prosperity Foundation 2012) 129.

² *ibid* 131-132.

³ Isabelle Gerretsen, 'CO₂ levels at highest for 3 million years – when seas were 20 meters higher' (CNN, 4 April 2019) <<https://edition.cnn.com/2019/04/04/health/co2-levels-global-warming-climate-intl/index.html>> accessed 2 May 2019.

⁴ The Intergovernmental Panel on Climate Change (IPCC), 'Special Report - Global Warming of 1.5°C - Summary for Policymakers' (2018) 4; World Meteorological Organization (WMO), 'WMO Statement on the State of the Global Climate in 2018' (2019) 6.

⁵ *ibid* 5.

at the current rate.⁶ However, if we would manage to reach and sustain net zero global anthropogenic CO₂ emissions, we could still halt anthropogenic global warming on multi-decadal time scales.⁷

The impact that this global warming has and will continue to have on natural and human systems is well-established: rising sea levels lead to more coastal storms, heat waves and wildfires become more frequent and more intense, severe droughts and desertification have an impact on the liveability of grounds, species go extinct and extreme weather phenomena like typhoons and hurricanes occur more often.⁸ These consequences of climate change will create a high risk of violent conflict in certain areas and could be drivers of displacement.⁹ ‘Anthropogenic climate change is the largest, most pervasive threat to the natural environment and human rights of our time.’¹⁰

While scientists found in 1957 that anthropogenic CO₂ emissions would lead to global warming, the rest of the world has been very slow to react to this crisis.¹¹ In 1972, UN member states decided to set up the United Nations Environment Programme (UNEP), that then in 1988 established the Intergovernmental Panel on Climate Change (IPCC).¹² The IPCC can be seen as an independent scientific organisation that determines the state of knowledge on climate change.¹³ The IPCC’s first Assessment Report of 1990 stated that ‘the potentially serious consequences of climate change give sufficient reasons to begin adopting response strategies that can be justified immediately even in the face of significant uncertainties’.¹⁴ This has led to the adoption of the 1992 United Nations Framework Convention on Climate Change (UNFCCC), a treaty now ratified by 196 states and the European Union, to achieve ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that

⁶ IPCC (n 4) 4.

⁷ *ibid* 5.

⁸ IPCC, ‘Fifth Assessment Report - Synthesis Report - Summary for Policymakers’ (2014).

⁹ OHCHR, ‘Report of the OHCHR on Relationship between Climate Change and Human Rights’ (2009) A/HRC/10/61 21.

¹⁰ United Nations Environment Programme (UNEP), ‘Climate Change and Human Rights’ (2015) 1.

¹¹ Cox (n 1) 144.

¹² *ibid* 144-145, 148.

¹³ *ibid* 148.

¹⁴ IPCC, ‘First Assessment Report - Overview’ (1992) 57.

would prevent dangerous anthropogenic interference with the climate system'.¹⁵ The threshold for this 'dangerous' level of climate change was then set on a maximum rise in global average temperature of 2°C above the pre-industrial level. Later, the Kyoto Protocol to the UNFCCC imposed emission reduction targets on state parties, placing the heavier burden on developed nations.¹⁶

A real momentum for the faith of humanity was achieved when world leaders of 195 states adopted the Paris Agreement in 2015. They agreed to hold the global average temperature to well below 2°C above pre-industrial levels and to do everything in their power to not let temperatures rise above 1.5°C.¹⁷ To this end, all state parties pledged nationally determined contributions (NDCs), and had to clarify which steps they would take to meet these targets.¹⁸ Developed countries are hereby expected to take the lead, and support developing countries to meet their own goals (the so-called 'common but differentiated responsibilities').¹⁹ The Paris Agreement, as the first international instrument that really deals with the coordination issue of international action on GHG emissions, has gained unprecedented international support.²⁰ Compared to the Kyoto Protocol, where only 15% of GHG emissions were represented, the Paris Agreement represents more than 90%.²¹ The treaty leads the way to make the transition from fossil fuels to renewable energy.²² However, it is also heavily criticised. It was watered down seriously through the different drafts, and lacks a sense of urgency.²³

¹⁵ United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107 (UNFCCC) art 2.

¹⁶ Centre for International Environmental Law (CIEL), 'Climate Change & Human Rights : A Primer' (2011) 7.

¹⁷ Paris Agreement under the United Nations Framework Convention on Climate Change (adopted 12 December 2015) UN Doc FCCC/CP/2015/10/Add, 1 (Paris Agreement) art 2.1a.

¹⁸ *ibid* art 4.2; Judith Blau, *The Paris Agreement - Climate Change, Solidarity, and Human Rights* (Springer Nature 2017) ix.

¹⁹ Paris Agreement (n 17) art 4.4-4.5.

²⁰ Blau (n 18) vii; UNEP, 'The Status of Climate Change Litigation: A Global Review' (2017) 8.

²¹ As stated in a presentation by Professor Asim Zia (University of Vermont), 'How equitable are greenhouse gas emission entitlements in the Paris agreement? Overcoming politics of knowledge in international climate governance' (World Forum on Climate Justice, Glasgow, 21 June 2019).

²² Blau (n 18) vii.

²³ Mary Robinson, *Climate Justice - Hope, Resilience and the Fight for a Sustainable Future* (Bloomsbury Publishing 2018) 137.

It is not particularly effective as there is a lack of implementation.²⁴ As the latest report of the IPCC makes it very clear that the difference between a 1.5°C and 2°C global warming would be massive (this 0.5°C difference could mean reducing the number of people vulnerable to climate-related risks by up to 457 million²⁵), the general goal of the Paris Agreement is already too weak. To make things worse, there is a serious ‘emissions gap’. As each state could decide for itself what commitments it wanted to put forward, these proposed contributions counted together do not go far enough.²⁶ ‘Full implementation of the intended contributions would lead to emission levels in 2030 that will likely cause a global average temperature increase of well over 2°C, and quite possibly over 3°C.’²⁷ Environmental organisations also criticise the fact that the Paris Agreement does not mention the need to reduce fossil fuel extraction explicitly, while it is one of the main causes of climate change. In conclusion, the Paris Agreement can be seen as a broad but shallow treaty.

1.2 CLIMATE CHANGE AND HUMAN RIGHTS

While climate change debates traditionally revolved around scientific, environmental and economic aspects, the attention for the human and social dimensions of the topic increased in previous years.²⁸ Climate change can, already has and will continue to have a massive impact on the lives and living conditions of people and thus also on the protection of their human rights. The rights to life, health, water, food, housing and an adequate standard of living are particularly affected.²⁹

²⁴ Esmeralda Colombo, ‘The Quest for Cosmopolitan Justice in Climate Matters’ (2017) 2 *Nordic Environmental Law Journal* 25, 29; Felix Ekardt, Jutta Wieding and Anika Zorn, ‘Paris Agreement, Precautionary Principle and Human Rights: Zero Emissions in Two Decades?’ (2018) 10 *Sustainability* 1, 10.

²⁵ HRC, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (2019) UN Doc A/HRC/41/39.

²⁶ HRC, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2016) UN Doc A/HRC/31/52.

²⁷ *ibid.*

²⁸ OHCHR (n 9) 3; Bridget Lewis, *Environmental Human Rights and Climate Change* (Springer Nature 2018) 153.

²⁹ UNEP (n 10) viii.

Climate change has certain direct impacts on human rights: extreme weather events and climate change-related pollution lead to more deaths and damages to property and physical infrastructure. People are losing their houses due to floods, storms and erosion. Small-island states like Kiribati, Tuvalu or the Marshall Islands are sinking, threatening the very livelihoods of their inhabitants. These small-island nations have played a massive role in getting the 1.5°C mark into the Paris Agreement, through their famous *1.5 to Stay Alive* campaign.³⁰

Climate change acts as a ‘threat multiplier’ as well, as it exacerbates socio-economic inequalities. In certain areas of the world, droughts and floods, combined with rapidly growing populations, seriously affect food and water security.³¹ Moreover, as CO₂ goes up, crops contain less micro-nutrients and vitamins.³² Some estimate that an additional 600 million people will face malnutrition because of climate change.³³ Around 14% of the global population could suffer from a severe reduction in water resources with a 2°C rise in global average temperature.³⁴ Combined with other health issues, like cardiorespiratory and infectious diseases or the spread of malaria, health care systems will experience increasing pressure.³⁵ The World Health Organization (WHO) estimates that climate change will cause around 250,000 additional deaths per year between 2030 and 2050 (mostly due to heat exposure, diarrhoea, malaria and childhood undernutrition).³⁶ Droughts and floods further affect the source of revenue of families all around the world, forcing children to be removed from their schools.³⁷ Climate change could force more than 100 million people into extreme poverty.³⁸ The Special Rapporteur on extreme poverty and human rights has put it very clearly in a report of June 2019:

³⁰ As stated in the opening address by Mary Robinson (former UN High Commissioner for Human Rights), ‘Climate Justice: The Way to Accelerate Ambition for a Safe World’ (World Forum on Climate Justice, Glasgow, 19 June 2019).

³¹ OHCHR (n 9) 10-11.

³² As stated in a keynote speech by Professor Kristie L Ebi (University of Washington), ‘Health risks of a changing climate can increase climate injustice’ (World Forum on Climate Justice, Glasgow, 21 June 2019).

³³ OHCHR (n 9) 10.

³⁴ HRC, ‘Report of the Special Rapporteur’ A/HRC/31/52 (n 26) 8.

³⁵ OHCHR (n 9) 29.

³⁶ World Health Organization (WHO), ‘Quantitative Risk Assessment of the Effects of Climate Change on Selected Causes of Death, 2030s and 2050s’ (2014) 1, 13.

³⁷ OHCHR, ‘Understanding Human Rights and Climate Change’ (2015) 20.

³⁸ HRC, ‘Report of the Special Rapporteur’ A/HRC/41/39 (n 25) 5.

Even under the best-case scenario [of climate change], hundreds of millions will face food insecurity, forced migration, disease, and death. Climate change threatens the future of human rights and risks undoing the last fifty years of progress in development, global health, and poverty reduction.³⁹

Lastly, climate change will have an impact on human security. Climate change-related conflicts could lead to massive displacement and an increase in (gender-based) violence. Democracy and the rule of law, together with civil and political rights, are at risk.⁴⁰

Climate change does not just lead to human rights violations, but human rights violations also increase the vulnerability to climate change.⁴¹ People whose standards of living are inadequate are more affected by natural disasters like storms than others; people that are fleeing persecution or wars often have to live on lands exposed to droughts and floods; and people without access to health care are more vulnerable to diseases like malaria.⁴² 'The degree to which an individual or group of people enjoys human rights is strongly associated with their capacity to adapt to climate change.'⁴³

Furthermore, those least responsible for the emission of GHG are often the ones that feel the impact of climate change in the most severe way.⁴⁴ The negative consequences of climate change are not evenly distributed among exposed populations.⁴⁵ 'The world's poor are especially vulnerable to the effects of climate change (...) and also tend to have more limited adaptation capacities.'⁴⁶ Sub-Saharan Africa, South Asia and the Middle East will be disproportionately affected by the negative health consequences of climate change.⁴⁷ For indigenous communities, climate change also has a specific impact: when their traditional livelihoods are under pressure, they have to relocate, jeopardising their cultural identity which is closely linked to their traditional lands.⁴⁸

³⁹ HRC (N 38) 1.

⁴⁰ *ibid* 17.

⁴¹ Jon Barnett, 'Human Rights and Vulnerability to Climate Change' in Stephen Humphreys (ed), *Human Rights and Climate Change* (CUP 2010) 258.

⁴² *ibid* 258-259.

⁴³ *ibid* 259.

⁴⁴ *ibid* 267.

⁴⁵ *ibid* 259.

⁴⁶ HRC, 'HRC Resolution 7/23: Human Rights and Climate Change' (2008).

⁴⁷ OHCHR (n 9) 2.

⁴⁸ *ibid* 17.

To further complicate things, it is not just climate change itself that affects humans and their fundamental rights. The fight against climate change can also affect them negatively. Mitigation and adaptation measures, like the construction of hydroelectric dams, can negatively affect the exercise of human rights, by displacing local people and destroying traditional livelihoods.⁴⁹ The *Gilets Jaunes* movement in France started as a protest against higher taxes on diesel fuel, claiming that these affect the poorest in the society disproportionately. Sometimes there seems to be some sort of conflict between the fight against climate change and the right to development. It will thus be crucial for states to integrate human rights considerations into their climate policies. This is where the concept of ‘climate justice’ comes into play. ‘Climate justice links human rights and development to achieve a human-centred approach, safeguarding the rights of the most vulnerable people and sharing the burdens and benefits of climate change and its impacts equitably and fairly.’⁵⁰

In general, it is very clear that there is a strong connection between the environment, climate change and human rights. This link has also long been acknowledged by the United Nations Human Rights Council (HRC), special procedures and other bodies. The Stockholm Declaration of 1972 reflects the first acknowledgement of the interdependence of human rights and the environment.⁵¹ In later years, the focus shifts to climate change in specific, rather than the environment in general. In 2007, representatives of small island developing states adopt the Malé Declaration on the Human Dimension of Global Climate Change, expressing concern about the effect climate change has on the enjoyment of human rights, including the right to life.⁵² In 2008, the HRC adopted its first resolution on climate change and human rights. Resolution 7/23 states that ‘climate change poses an immediate and far-reaching threat to people and communities around the world and has implications for the full enjoyment of human rights’.⁵³ Following up on that resolution, the Office of the High Commissioner for Human Rights (OHCHR) published a report on the topic, in which it examines factors

⁴⁹ OHCHR (n 9) 22; UNEP (n 10) viii, 8-9.

⁵⁰ Mary Robinson Foundation, ‘Principles of Climate Justice’ <www.mrfci.org/principles-of-climate-justice/> accessed 21 June 2019.

⁵¹ OHCHR (n 9) 7.

⁵² *ibid* 3.

⁵³ HRC Resolution 7/23 (n 46).

determining vulnerability to climate change.⁵⁴ Later in 2009, the HRC adopted another resolution, focusing on this disproportionate impact climate change will have on people that are in vulnerable situations, for example because of poverty, gender, age or indigenous status.⁵⁵ The resolution also recalls the adverse impact of climate change on a wide range of human rights ‘including, inter alia, the right to life, the right to adequate food, the right to the highest attainable standard of health, the right to adequate housing, the right to self-determination’.⁵⁶ In 2012, the HRC decided to appoint an Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment; clarifying that, while the relationship between human rights and the environment is already quite clear, ‘the obligations that human rights law imposes regarding environmental protection are less clearly understood’.⁵⁷ This Expert (later renamed Special Rapporteur), John H Knox, and other special procedures like the Special Rapporteur on adequate housing, the Special Rapporteur on the human rights of migrants, and the Special Rapporteur on the right to food, have issued multiple reports on the effects of climate change on the rights under their mandates.⁵⁸ On Human Rights Day in 2014, all 73 UN Special Procedures mandate-holders issued a joint statement, unanimously calling on states to make sure that human rights be ‘pivotal in the ongoing negotiations and [that] the [Paris] agreement (...) be firmly anchored in the human rights framework’.⁵⁹ During the meetings in Paris in 2015, the UN High Commissioner for Human Rights also ‘made a powerful statement that urgent, effective and ambitious action to combat climate change is not only a moral imperative, but also necessary in order to satisfy the duties of

⁵⁴ OHCHR (n 9) 15.

⁵⁵ HRC, ‘HRC Resolution 10/4: Human Rights and Climate Change’ (2009).

⁵⁶ *ibid.*

⁵⁷ HRC, ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2012) UN Doc A/HRC/22/43.

⁵⁸ See for example UNGA, ‘Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in This Context’ (2009) UN Doc A/64/255; UNGA, ‘Report of the Special Rapporteur on the Human Rights of Migrants’ (2012) UN Doc A/67/299; UNGA, ‘Interim Report of the Special Rapporteur on the Right to Food’ (2015) UN Doc A/70/287.

⁵⁹ OHCHR, ‘Statement of the United Nations Special Procedures Mandate Holders on the occasion of the Human Rights Day Geneva, 10 December 2014’ <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15393&LangID=E> accessed 21 June 2019; HRC, ‘Report of the Special Rapporteur’ A/HRC/31/52 (n 26) 5.

States under human rights law'.⁶⁰ The final draft of the Paris Agreement eventually stated that all states 'should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights'.⁶¹ While the Paris Agreement is thus 'the first multilateral environmental agreement to explicitly make this link' between climate change and human rights,⁶² many people were disappointed to see the human rights reference be hidden away in the preamble.⁶³ In conclusion, while different UN bodies have long acknowledged the link between climate change and human rights, it has remained a marginal concern on the international human rights agenda for far too long.⁶⁴

1.3 CLIMATE CHANGE LITIGATION

Today, climate change is (finally) becoming a 'hot' topic: all over the world young students go on climate strikes with the Fridays for Future movement, Greta Thunberg has been honoured with Amnesty International's Ambassador of Conscience Award for 2019 and organisations like Extinction Rebellion gain more ground. But next to protesting, people are finding other ways to urge their governments to do something about the global warming. Backed by new treaties like the Paris Agreement, or national climate laws, increasing numbers of people have decided to explore legal options. Climate litigation received its first major boost in 2015, when 886 citizens managed to hold the Dutch government accountable for contributing to climate change in front of a court.

In March 2017, the UNEP stated that 654 climate change cases had been filed in the United States (US) and over 230 cases in 23 other countries.⁶⁵ By May 2019, that number has risen to 28 countries, in addition to cases before the Court of Justice of the EU (CJEU), the Inter-American Court on Human Rights, the Inter-American Commission on Human Rights and the UN Human Rights Committee.⁶⁶ In the majority of these cases (more

⁶⁰ HRC, 'Report of the Special Rapporteur' A/HRC/31/52 (n 26) 6.

⁶¹ Paris Agreement (n 17) preamble.

⁶² David R Boyd, 'Statement on the Human Rights Obligations Related to Climate Change, with a Particular Focus on the Right to Life' (2018) 4. See also Annalisa Savaresi, 'Climate Change and Human Rights' in *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 35.

⁶³ Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) 6 *Climate Law* 109, 116.

⁶⁴ HRC, 'Report of the Special Rapporteur' A/HRC/41/39 (n 25) 6.

⁶⁵ UNEP (n 20) 10.

⁶⁶ Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation : 2019 Snapshot' (2019) 3.

than 80%), governments are the defendants.⁶⁷ While most of them have been started in high-income countries, there are increasing examples of cases in low and middle-income countries.⁶⁸ There are different types of ‘climate litigation’: some people challenge the validity or application of existing national and international climate laws, others try to force their governments to implement more ambitious climate policies.⁶⁹ Some petitioners challenge climate policies in general, others focus on specific projects that will have an impact on climate change (like the expansion of coal mines).⁷⁰ More cases on climate change-induced migration can be expected.⁷¹

There are different reasons why climate litigation has become so popular. While the impacts of climate change, and the facts of climate science, are becoming more visible and known to the public, the current climate policies of governments are often built around what is politically feasible rather than what is scientifically proven to be necessary.⁷² This situation, combined with new laws and frameworks addressing and codifying certain aspects of the problem of climate change, has given litigants important tools to fight climate change in courts.⁷³ The Paris Agreement in particular provides an interesting framework to place national objectives, commitments and policies within a wider perspective. However, it does not provide litigants with a cause of action by itself: the member countries’ NDCs are not enforceable as such.⁷⁴

That is why more claimants try to turn to human rights as a legal tool against climate change.⁷⁵ In 2005, a group of Inuit from the Canadian and Alaskan Arctic filed a case against the US at the Inter-American Commission on Human Rights, stating that their rights had been violated because of the impact of climate change. They alleged that the US, by failing to control its GHG emissions, was responsible for these human rights violations.⁷⁶ However, their claim was dismissed on the ground that the information the

⁶⁷ UNEP (n 20) 14; Setzer and Byrnes *ibid* 4.

⁶⁸ UNEP *ibid* 5; Setzer and Byrnes *ibid* 7.

⁶⁹ UNEP (n 20) 4.

⁷⁰ *ibid* 14.

⁷¹ *ibid* 25.

⁷² *ibid* 4.

⁷³ *ibid*; Colombo (n 24) 29; Myanna Dellinger, ‘See You in Court : Around the World in Eight Climate Change Lawsuits’ (2018) 42 *William & Mary Environmental Law and Policy Review* 525, 526

⁷⁴ UNEP (n 20) 9; Esmeralda Colombo, ‘Enforcing International Climate Change Law in Domestic Courts: A New Trend of Cases for Boosting Principle 10 of the Rio Declaration?’ (2017) 35 *UCLA Journal of Environmental Law and Policy* 98, 107.

⁷⁵ Setzer and Byrnes (n 66) 8.

⁷⁶ UNEP (n 10) 12.

Inuit provided did not allow the Inter-American Commission ‘to determine whether the alleged facts would tend to characterize a violation of rights protected by the American Declaration’.⁷⁷ In 2013, the Arctic Athabaskan peoples filed a similar claim to the Inter-American Commission, stating that Canada’s lack of sufficient climate policies led to rapid Arctic warming, which was a violation of their human rights to health, culture and property.⁷⁸ There is no decision on this claim available yet.

However, the world’s attention was only really drawn to the topic of climate change litigation and human rights with the Urgenda case in the Netherlands. In 2013, Urgenda Foundation, a Dutch citizens’ platform for the transition to a sustainable society, together with 886 individual plaintiffs, filed a case against the Dutch government. Their claim, that the state is legally (amongst others, on the basis of human rights law) obliged to take action to reduce GHG emissions, was accepted by the District Court in The Hague.⁷⁹ The Urgenda case was the first successful climate case using the human rights discourse, and has inspired similar cases all over the world.⁸⁰ While some of these climate change and human rights-cases focus on existing human rights, like the right to life, as the basis of their claims (the so-called ‘greening’ of these rights), others try to fight for a new specific right to a healthy environment.

Using human rights as the basis for a claim against climate change is not waterproof. While it is clear that there is a link between climate change and human rights, and that fighting climate change will be crucial to protect these fundamental rights, it is not that easy to attribute climate-change related harm to acts or omissions of specific states, and classify these impacts as human rights violations.⁸¹ Next to this problem of establishing a causal link, there are also issues of standing and how to evaluate future impacts.⁸²

⁷⁷ Inter-American Commission on Human Rights, ‘Decision on Petition N° P-1413-05’ (2006). See also Eleanor Stein and Alex Geert Castermans, ‘Case Comment - Urgenda v The State of the Netherlands: The “Reflex Effect” - Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care’ (2017) 13 McGill Journal of Sustainable Development Law 303, 317.

⁷⁸ Stein and Castermans (n 77) 318.

⁷⁹ Urgenda Foundation, <www.urgenda.nl/en/themas/climate-case/> accessed 23 March 2019.

⁸⁰ Stein and Castermans (n 77) 317.

⁸¹ OHCHR (n 9) 30; International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014) 68.

⁸² OHCHR *ibid* 23; International Bar Association *ibid* 68.

1.4 WHAT I WILL DISCUSS IN THIS THESIS

In this thesis I therefore want to go deeper into these strengths and weaknesses of using human rights law in climate litigation. Can human rights law provide a basis for a climate change claim against a government, or is its power limited to being an interpretative tool?

To be able to assess the power of human rights law within climate litigation, it will be important to first clarify which human rights obligations states have in the context of climate change. I will hereby focus on obligations related to substantive rights (those at risk from environmental harm, like the right to life) rather than on procedural rights (those whose implementation upkeeps better environmental policies, like the right to participation). As a big part of the climate litigation seeks to hold governments accountable for their emissions (or their failure to reduce them),⁸³ it will be most interesting to see whether or not a specific obligation to mitigate GHG emissions can be established.

After assessing human rights obligations in the context of climate change, I will discuss different climate cases that use human rights law in their lawsuits. I will only focus on cases that have the following elements in common: they are brought before administrative or judicial bodies; the defendants are governments (or groups of governments/international institutions); the lawsuits seek to increase the governments' mitigation ambitions, or hold them accountable for their already existing climate-related commitments; and the claimants use existing human rights as part of their arguments. I discuss cases that focus on the harmful impact climate change has on human beings (the so-called 'greening' of existing human rights), rather than on the environment itself. I thus leave the discussion whether or not there should be a specific right to a healthy environment as such, aside. In other words, I focus on cases that rely on existing human rights provisions rather than cases that seek to articulate a new human right. I will not discuss claims filed against companies, nor cases that focus on particular projects like the expansion of a mine. I will not discuss cases where the matter of climate change is merely incidental, nor claims that focus on environmental issues in general rather than specifically on the topic of climate change. I will start by

⁸³ HRC, 'Report of the Special Rapporteur' A/HRC/41/39 (n 25) 18.

discussing cases that were successful, then cases that failed and finally cases that are still pending, doing so each time in chronological order, starting from the first claim. As the Urgenda decision in the Netherlands is often seen as the starting point of this new strand of climate litigation,⁸⁴ I will discuss that one most extensively. By no means the list of cases I discuss is exhaustive, but most of the best-known cases are discussed or mentioned.

For each case, I will check how human rights law is used within the claim. I will examine whether human rights provisions are used as an interpretative tool or rather as the legal basis of the claim. Then, I will examine how these cases deal with some typical legal difficulties. In climate litigation justiciability is often an issue. Firstly, most of the times standing is only granted when there is a plausible causal connection between the injury and the action (or inaction) of the government. With climate change this causal link is often difficult to establish for the plaintiffs.⁸⁵ Secondly, the problem of separation of powers arises: courts have to be careful not to interfere with government policy.⁸⁶

By examining what (substantive) human rights obligations states have in the context of climate change, and whether or not these obligations can be successfully used in courts, I want to find out if we can claim that our fundamental rights are violated if our governments do nothing (or not enough) to mitigate the effects of climate change, and how they can be held accountable for that.

⁸⁴ Colombo (n 24) 29.

⁸⁵ UNEP (n 20) 5.

⁸⁶ *ibid.*

2.

GENERAL HUMAN RIGHTS OBLIGATIONS OF STATES IN
THE CONTEXT OF CLIMATE CHANGE

As the previous chapter has showed, there is broad consensus on the fact that climate change has, and will continue to have, a negative impact on the full enjoyment of human rights. This has been acknowledged by multiple UN agencies and national governments.⁸⁷ However, it remains unclear what the exact obligations of states in this regard are, and under which circumstances state (in)action concerning climate change actually leads to a human rights violation.⁸⁸ The OHCHR, in its submission to the 21st Conference of the Parties (COP) to the UNFCCC in 2015, stated that ‘States (duty-bearers) have an affirmative obligation to take effective measures to prevent and redress (...) climate impacts, and therefore, to mitigate climate change, and to ensure that all human beings (rights-holders) have the necessary capacity to adapt to the climate crisis’.⁸⁹ Still, it will be crucial to clarify the exact content of these obligations, to be able to use human rights law as the basis of a legal claim against a government. As stated before, it will be most interesting to examine to what extent human rights obligations prescribe a particular level of climate action, and thus a specific percentage of GHG emission reduction, both at the national as on the international level.

⁸⁷ United Nations Environment Programme (UNEP), ‘Climate Change and Human Rights’ (2015) 1.

⁸⁸ Margaretha Wewerinke-Singh, ‘State Responsibility for Human Rights Violations Associated with Climate Change’ in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 1.

⁸⁹ OHCHR, ‘Understanding Human Rights and Climate Change’ (2015) 2.

2.1 STATE RESPONSIBILITY

While some authors claim that the general rules of state responsibility, as established in the International Law Commission's draft articles on 'the Responsibility of States for International Wrongful Acts',⁹⁰ are not completely compatible with international human rights conventions, they can still be relevant to interpret human rights obligations. This has also been recognised by numerous international human rights bodies.⁹¹ That is why I will connect the following general principle of state responsibility with the more specific obligations that can be established in the context of climate change.

'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; (b) and constitutes a breach of an international obligation of the State.'⁹²

2.1.1 *Attributable to the state*

To use human rights as a basis for a legal claim, applicants will thus first have to prove that the contested acts or omissions are attributable to the state. The rules of attribution of conduct to a state are quite broad:

The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.⁹³

Omissions can also be attributed to a state. According to one author, together, these rules on attribution 'suggest that a contextual analysis of a State's conduct and the obligations by which it is bound is the most appropriate method for determining whether a human rights violation has occurred'.⁹⁴

⁹⁰ International Law Commission (ILC), 'Draft Articles on Responsibility of States for Internationally Wrongful Acts' (2001) Supplement no 10 A/56/10.

⁹¹ Wewerinke-Singh (n 88) 3.

⁹² ILC (n 90) art 2.

⁹³ *ibid* art 4.1.

⁹⁴ Wewerinke-Singh (n 88) 6.

In general, states are only obliged to protect, respect and fulfil the human rights of everyone within their own territory or subject to their jurisdiction.⁹⁵ However, in certain circumstances, human rights law could have extra-territorial application.⁹⁶ In *Delia Saldias de López v Uruguay*, the UN Human Rights Committee stated for example that:

it would be unconscionable to so interpret the responsibility under article 2 of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory.⁹⁷

According to Boyle, this means that states can be held responsible for the effects of transboundary pollution and environmental harm stemming from within their own territory.⁹⁸ As I will show in the next part, some of the UN human rights bodies are of the same opinion. However, this would prove difficult to apply in practice and it is beyond the scope of this paper to go into more detail.

2.1.2 *Breach of an international obligation*

Second, the acts or omissions of the government need to constitute a breach of an international obligation of the state. States must respect, protect and fulfil human rights, and thus have both positive and negative obligations.

The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.⁹⁹

⁹⁵ Alan Boyle, 'Human Rights and the Environment: A Reassessment' (A.E.Boyle 2010) 26.

⁹⁶ *ibid* 27.

⁹⁷ Human Rights Committee (CCPR) 'Delia Saldias de Lopez v Uruguay, Communication No. 52/1979' (1984) UN Doc CCPR/C/13/D/52/1979, para 12.3.

⁹⁸ Boyle (n 95) 27.

⁹⁹ OHCHR, 'International Human Rights Law' <www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> accessed 17 June 2019.

We can also divide human rights obligations into procedural and substantive obligations.¹⁰⁰ Here, I will focus on substantive rather than on procedural obligations.

To assess the scope of these obligations under international human rights law, I will look at different sources like the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and some specific treaties.¹⁰¹ Depending on which treaties a certain state has ratified, obligations will of course differ. Still, a significant part of the content of some of the most important human rights instruments has become customary international law, binding on all states.¹⁰² It is also important to differentiate between hard law (like the provisions in these binding treaties) and soft law (like comments from UN treaty bodies), and to keep in mind that statements of UN Special Procedures should be seen as having interpretative value rather than binding force.¹⁰³

To clarify what the general human rights obligations of states signify exactly in the context of climate change, there is not much hard law one can rely on. There are no specific climate provisions in most famous human rights treaties, and international and regional (human rights) courts have shunned away from making binding decisions on this topic (definitely when it comes to whether or not there is a duty to mitigate GHG emissions).¹⁰⁴ For now, we thus mostly have to rely on soft law and statements with interpretative value. I will therefore start with discussing the different obligations that have been established on the UN level. Since in some of the cases I will discuss later, applicants rely on the European Convention on Human Rights (ECHR), I will also go deeper into that specific human rights treaty.

¹⁰⁰ UNEP (n 87) 15-17.

¹⁰¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR)

¹⁰² *ibid* 11.

¹⁰³ *ibid* 16.

¹⁰⁴ *ibid* 22.

a. United Nations

Office of the High Commissioner for Human Rights

In this regard, it is interesting to look at what the OHCHR has commented on this topic. In the famous 2009 OHCHR Report on the relationship between climate change and human rights, there was still a lot of uncertainty about ‘whether, and to what extent’ the negative effects of climate change on the realisation of human rights ‘can be qualified as human rights violations in a strict legal sense’.¹⁰⁵ The OHCHR refers to problems of causation, attribution and future harm.¹⁰⁶ Still, it concluded that states have a duty to address the effects of climate change on human rights, as ‘human rights law requires each State to do more than merely refrain from interfering with human rights itself, it also requires the State to undertake due diligence to protect against such harm from other sources’.¹⁰⁷ The OHCHR refers to some obligations like the obligation to protect individuals against foreseeable threats related to climate change, to provide access to information and participation in decision-making and to cooperate internationally.¹⁰⁸

In 2015, the OHCHR submitted a report to the 21st COP to the UNFCCC, in which it highlighted some essential obligations for states, starting with the obligation to mitigate climate change and prevent its negative human rights impacts.¹⁰⁹ The OHCHR clearly states that ‘States must act to limit anthropogenic emissions of greenhouse gases (...) in order to prevent to the greatest extent possible the current and future negative human rights impacts of climate change’.¹¹⁰ The OHCHR clarifies that ‘failure to prevent foreseeable human rights harms caused by climate change, or at the very least to mobilize maximum available resources in an effort to do so, constitutes a breach of this obligation’.¹¹¹ ‘State commitments therefore require international cooperation, including financial, technological and capacity-building support, to realise low-carbon, climate-resilient, and sustainable development, while also rapidly reducing greenhouse gas emissions.’¹¹²

¹⁰⁵ OHCHR, ‘Report of the OHCHR on Relationship between Climate Change and Human Rights’ (2009) A/HRC/10/61 23.

¹⁰⁶ UNEP (n 87) 13; OHCHR *ibid.*

¹⁰⁷ UNEP (n 87).

¹⁰⁸ *ibid.*; OHCHR (n 105) 24-27.

¹⁰⁹ OHCHR (n 89) 2.

¹¹⁰ *ibid.*

¹¹¹ *ibid.* 10.

¹¹² *ibid.*

In another document the OHCHR puts it very clearly as well: ‘States should be accountable to rights-holders for their contributions to climate change including for failure to adequately regulate the emissions of businesses under their jurisdiction regardless of where such emissions or their harms actually occur’.¹¹³ This declaration of the existence of a substantive obligation to regulate GHG emissions, while non-binding, can be of crucial importance in the light of climate litigation I will discuss later. Other obligations established in this report include the obligation to ensure that all persons have the necessary capacity to adapt to climate change, to ensure accountability and effective remedies and to mobilise maximum available resources.¹¹⁴

Independent Expert/Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment

Another important source of information is the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean and healthy environment.¹¹⁵ His mandate was exactly established to clarify the exact obligations of states: while the relationship between human rights and the environment is already quite clear, ‘the obligations that human rights law imposes regarding environmental protection are less clearly understood’.¹¹⁶

In the first year of his mandate, this expert, John H Knox, conducted very extensive research on these human rights obligations; he put together a mapping report outlining different statements of UN treaty bodies, other UN agencies, regional human rights systems and international environmental instruments, where they recognise various human rights obligations relating to the general topic of environmental protection.¹¹⁷ One of his results is that multiple sources agree on certain procedural obligations, like assessment of environmental impacts and

¹¹³ OHCHR, ‘Key Messages on Human Rights and Climate Change’, <www.ohchr.org/Documents/Issues/ClimateChange/KeyMessages_on_HR_CC.pdf> accessed 26 June 2019.

¹¹⁴ OHCHR (n 89) 2-4.

¹¹⁵ *ibid* 13.

¹¹⁶ HRC, ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2012) UN Doc A/HRC/22/43, 12.

¹¹⁷ UNEP (n 87) 11; HRC, ‘Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2013) UN Doc A/HRC/25/53.

access to information, facilitating public participation and providing access to remedies.¹¹⁸ There is also some consensus on certain substantive obligations in environmental issues. While the content of these duties depends of course on the particular substantive rights that are threatened, most sources agree that states have obligations ‘(a) to adopt and implement legal frameworks to protect against environmental harm that may infringe on enjoyment of human rights; and (b) to regulate private actors to protect against such environmental harm’.¹¹⁹ The Independent Expert hereby states that ‘the obligation to protect human rights from environmental harm does not require States to prohibit all activities that may cause any environmental degradation’ but that ‘States have discretion to strike a balance between environmental protection and other legitimate societal interests’.¹²⁰ While there is a lack of clarity on extraterritorial obligations, ‘most of the sources reviewed (...) do indicate that States have obligations to protect human rights, particularly economic, social and cultural rights, from the extraterritorial environmental effects of actions taken within their territory’.¹²¹ When it comes to members of groups particularly vulnerable to the effects of climate change, states have ‘heightened’ obligations.¹²²

In June 2014, following up on this mapping exercise, the Independent Expert prepared a focus report on human rights and climate change, dedicated to the specific references to climate change (rather than general environmental harm) in the previous mapping exercise.¹²³ In 2016, after his mandate was renamed to Special Rapporteur,¹²⁴ he presented these findings to the HRC. I will discuss his findings considering the UN treaty bodies separately.¹²⁵ In general, the Special Rapporteur mentioned that, while ‘in some respects, the application of these obligations is relatively straightforward’, ‘the

¹¹⁸ HRC, ‘Report of the Independent Expert’ A/HRC/25/53 (n 117) 8.

¹¹⁹ *ibid* 12-13.

¹²⁰ *ibid* 21.

¹²¹ *ibid* 17.

¹²² *ibid* 21; HRC, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2015) UN Doc A/HRC/31/53.

¹²³ John H Knox, ‘Focus Report on Human Rights and Climate Change’ (2014).

¹²⁴ HRC, ‘Resolution 28/11: Human Rights and the Environment’ (2015).

¹²⁵ *ibid* 26-28.

scale of climate change introduces complicating factors'.¹²⁶ An interesting argument of the Special Rapporteur in this regard is that 'whether or not climate change legally violates human rights norms is not the dispositive question'.¹²⁷ He claims that, even if that is not the case, states still have certain human rights obligations. That would mean that, even if a state cannot be held responsible for the effects of climate change as such, they can be held responsible for not respecting certain precautionary obligations. 'States should protect against foreseeable environmental impairment of human rights, whether or not the environmental harm itself violates human rights law, and even whether or not the States directly cause the harm.'¹²⁸ This is of course a very interesting statement for possible climate litigation, as it would make it a lot easier to establish state responsibility. On extraterritorial obligations, the Special Rapporteur also has some interesting thoughts: he believes it is not useful to talk about them. Instead of looking at individual contributions to climate change, we should focus on climate change as a global problem, and thus on the duty of international cooperation.¹²⁹ Another remark of the Special Rapporteur that is worthy to mention concerns the balancing of environmental protection and other societal goals such as economic development. To check whether this balance is reasonable, we should consider 'whether the level of environmental protection resulted from a decision-making process that satisfies the procedural obligations (...); whether it accords with national and international standards; whether it is not retrogressive; and whether it is non-discriminatory'.¹³⁰ What is also remarkable in the light of the cases that I will discuss later, is that the Special Rapporteur believes the obligation to implement effective adaptations measures to climate change is quite clear. The obligation to do something about mitigation is more complicated.¹³¹

Most countries do not emit GHG in quantities that cause, by themselves, appreciable effects on their own people or on those living in other countries.¹³² This does not mean that states have no obligations under human rights law to mitigate their own emissions, but it does suggest that to understand the nature of those obligations, it is helpful to look at the duty of international cooperation.¹³³

¹²⁶ HRC, 'Report of the Special Rapporteur' A/HRC/31/52 (n 26) 9.

¹²⁷ *ibid* 10.

¹²⁸ *ibid*.

¹²⁹ *ibid* 11.

¹³⁰ *ibid* 16.

¹³¹ *ibid* 17.

¹³² *ibid*.

¹³³ *ibid*.

This is not completely in line with the declaration by the OHCHR that there is a clear substantive obligation to regulate GHG emissions.¹³⁴

In 2018 John H Knox presented the Framework Principles on Human Rights and the Environment.¹³⁵ While they do not focus on climate change, it is interesting to quickly list some of the most important principles, as they are ‘a reflection of actual or emerging international human rights law’.¹³⁶ The first two principles show how the connection between climate change and human rights works in both ways: states should ensure a healthy and sustainable environment in order to respect human rights, but should also respect human rights in order to ensure a healthy and sustainable environment.¹³⁷ States should further prohibit discrimination in this regard, provide access to information, conduct prior impact assessments, ensure access to effective remedies and take additional measures to protect those that are most vulnerable.¹³⁸ Furthermore, there is also an obligation of international cooperation ‘to prevent, reduce and remedy transboundary and global environmental harm that interferes with the full enjoyment of human rights’.¹³⁹

The current Special Rapporteur on Human Rights and the Environment, David R Boyd, intervened in 2018 in an Irish climate case. In this case, a non-profit called Friends of the Irish Environment had filed a claim against their government.¹⁴⁰ They claimed that the Irish National Mitigation Plan of 2017 was insufficient and violated Ireland’s Climate Act, the constitution and human rights obligations (for example under the ECHR). While it is outside the scope of this paper to discuss this case extensively (and the specific legal reasons why it recently failed), it is interesting to look at the expert statement of Mr Boyd. Herein he focuses on the right to life and whether or not the Irish government has positive human rights obligations to mitigate climate change. He refers to the ICCPR, the ECHR and the Charter of Fundamental Rights of the EU in this regard. He believes that these treaties indeed bring with

¹³⁴ *ibid* 23.

¹³⁵ John H Knox, ‘Framework Principles on Human Rights and the Environment’ (2018).

¹³⁶ *ibid* 3.

¹³⁷ *ibid* 6.

¹³⁸ *ibid* 7, 11, 12, 15, 20.

¹³⁹ *ibid* 13.

¹⁴⁰ For more information and all documents see The Sabin Center for Climate Change Law Colombia Law School <<http://climatecasechart.com/non-us-case/friends-of-the-irish-environment-v-ireland/>> accessed 29 June 2019.

them a positive and enforceable obligation for states to take measures to mitigate climate change, and mobilise maximum available resources to do so.¹⁴¹ ‘Therefore, Ireland must act to limit its emissions of greenhouse gases in order to prevent, to the greatest extent possible, the current and future negative human rights impacts of climate change.’¹⁴² A failure to do so would breach the human rights obligations of Ireland. It cannot be clearer than that: David Boyd is definitely of the opinion that states have a positive human rights obligation to limit GHG emissions as rapidly as possible, for which they can be held accountable.¹⁴³

Boyd has recently also issued his first report on climate change in specific, in which he (again) uses very strong wordings to describe the detrimental impact of climate change on the protection of human rights. He writes that ‘first, climate change and its impacts threaten a broad range of human rights, and second, as a result, States and private actors have extensive human rights obligations and responsibilities’.¹⁴⁴ He then refers to the Urgenda case to emphasise that international environmental law and the ‘no harm’ rule of customary international law reinforces these human rights obligations.¹⁴⁵ He uses clearer language than ever before:

A failure to fulfil international climate change commitments is a prima facie violation of the State’s obligations to protect the human rights of its citizens (...) To comply with their human rights obligations, developed States and other large emitters must reduce their emissions at a rate consistent with their international commitments.¹⁴⁶

It is very interesting to note that he explicitly refers to developed states in the last sentence.

¹⁴¹ David R Boyd, ‘Statement on the Human Rights Obligations Related to Climate Change, with a Particular Focus on the Right to Life’ (2018) paras 27, 53, 59.

¹⁴² *ibid* para 54.

¹⁴³ *ibid* para 59.

¹⁴⁴ UNGA, ‘Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment’ (2019) UN Doc A/74/161, para 55,

¹⁴⁵ *ibid* para 66.

¹⁴⁶ *ibid* paras 74-75.

UN treaty bodies

Some of the UN treaty bodies have given considerable attention to the topic of climate change and human rights, through thematic discussions, state reporting procedures and to a lesser extent their general comments.¹⁴⁷ The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), the Children's Rights Committee (CRC) and the Committee on Economic, Social and Cultural Rights (CESCR) stand out in this regard.¹⁴⁸ These sources have established an obligation to mitigate the effects of climate change. In 2017, the CESCR told Australia 'to reduce its greenhouse gas emissions and to take all the necessary and adequate measures to mitigate the adverse consequences of climate change'.¹⁴⁹ The fact that a UN body states that a country violates human rights obligations by not addressing climate change sufficiently was an interesting first.¹⁵⁰ The treaty bodies get very specific sometimes, by focusing on the impact of fossil fuel extraction for example. In 2017, the CEDAW Committee told Norway that the 'continuing and expanding extraction of oil and gas in the Arctic (...) undermines obligations to ensure women's substantive equality with men'.¹⁵¹ 'The Committee recommended that the State party review its climate change and energy policies, and specifically its policy on extraction of oil and gas'.¹⁵² The CRC on the other hand stressed the importance of 'urgent and aggressive reductions in greenhouse gases' for states to meet their obligations regarding children's rights.¹⁵³ Another obligation that can be deducted from the work of these bodies is the obligation to prevent third party transboundary environmental harm.¹⁵⁴

¹⁴⁷ Centre for International Environmental Law (CIEL) and The Global Initiative for Economic Social and Cultural Rights, 'States' Human Rights Obligations in the Context of Climate Change - 2019 Update' (2019) 5.

¹⁴⁸ Centre for International Environmental Law (CIEL) and The Global Initiative for Economic Social and Cultural Rights, 'States' Human Rights Obligations in the Context of Climate Change' (2018) 4.

¹⁴⁹ Knox, 'Focus Report on Human Rights and Climate Change' (n 123) 4.

¹⁵⁰ Eleanor Stein and Alex Geert Castermans, 'Case Comment - Urgenda v The State of the Netherlands: The "Reflex Effect" - Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care' (2017) 13 McGill Journal of Sustainable Development Law 319.

¹⁵¹ CIEL and The Global Initiative for Economic Social and Cultural Rights, 'States' Human Rights Obligations in the Context of Climate Change' (n 148) 10.

¹⁵² *ibid.*

¹⁵³ CIEL and The Global Initiative for Economic Social and Cultural Rights, 'States' Obligations under the Convention on the Rights of the Child, in the Context of Climate Change' (2018) 2.

¹⁵⁴ Knox, 'Focus Report on Human Rights and Climate Change' (n 123) 4.

In October 2018, after the publication of the latest IPCC report on the effects of a 1.5°C global warming,¹⁵⁵ the CESCR adopted an attention-grabbing statement on climate change.¹⁵⁶ Interestingly, the Committee reiterated that ‘apart from (...) voluntary commitments made under the climate change regime (...), all States have human rights obligations, that should guide them in the design and implementation of measures to address climate change’.¹⁵⁷ The Committee then explicitly stated that, as the current NDCs are insufficient to avoid dangerous climate change, they should be revised ‘in order to act consistently with (...) human rights obligations’.¹⁵⁸ It hereby referred to national climate litigation, stating that national courts ‘have taken an active role in ensuring that States comply with their duties under existing human rights instruments to combat climate change’.¹⁵⁹ The Committee then specified how it sees the duties to respect, protect and fulfil human rights in the context of climate change:

This requires respecting human rights, by refraining from the adoption of measures that could worsen climate change; protecting human rights, by effectively regulating private actors to ensure that their actions do not worsen climate change; and fulfilling human rights, by the adoption of policies that can channel modes of production and consumption towards a more environmentally sustainable pathway.¹⁶⁰

It thus seems that the treaty bodies are putting more emphasis on mitigation obligations than before and dare to be more specific in this regard. They explicitly state that states can be held responsible in courts for violating human rights in the context of climate change policies.¹⁶¹ Other examples from 2018 include the CESCR telling Argentina to ‘reconsider the large-scale exploitation of unconventional fossil fuels

¹⁵⁵ The Intergovernmental Panel on Climate Change (IPCC), ‘Special Report - Global Warming of 1.5°C’ (2018).

¹⁵⁶ CIEL and The Global Initiative for Economic Social and Cultural Rights, ‘States’ Human Rights Obligations in the Context of Climate Change - 2019 Update’ (n 147) 6.

¹⁵⁷ OHCHR, ‘Committee releases statement on climate change and human rights’ (8 October 2018) <www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23691&LangID=E> accessed 17 June 2019.

¹⁵⁸ *ibid.*

¹⁵⁹ *ibid.*

¹⁶⁰ *ibid.*

¹⁶¹ CIEL and The Global Initiative for Economic Social and Cultural Rights, ‘States’ Human Rights Obligations in the Context of Climate Change - 2019 Update’ (n 147) 9; HRC, ‘Report of the Special Rapporteur on Extreme Poverty and Human Rights’ (2019) UN Doc A/HRC/41/39, 7-8.

through hydraulic fracturing (...) in order to ensure compliance with its obligations under the Covenant'.¹⁶²

In April 2019, the Human Rights Committee also took an important step, asking the US government to clarify which steps they are taking to 'address significant threats to the right to life posed by impacts of climate change such as flash floods, coastal flooding, wildfires, infectious disease, extreme heat and air pollution'.¹⁶³ This message seems to refer more to adaptation measures than mitigation obligations. Still, the fact that the oldest human rights treaty body raises the issue is significant to say the least.¹⁶⁴

Other Special Rapporteurs and Independent Experts

Other Special Rapporteurs and Independent Experts have also addressed some obligations in the context of climate change and human rights. The Special Rapporteur on Adequate Housing, for example, stated that 'human rights standards require all countries to seek to reduce their harmful emissions to the global atmosphere' and added that these emission reductions 'must be sufficient to adequately stabilize the Earth's climate'.¹⁶⁵ 'This will require global greenhouse gas emissions (...) to be reduced to approximately 50 per cent of the current level by the year 2050'.¹⁶⁶ Of all the statements discussed so far regarding emission reduction obligations, this is the clearest one; the Special Rapporteur leaves no room for interpretation.

United Nations Environment Programme

It is also interesting to look at the statements of the UNEP. In a famous report on climate change and human rights of 2015, UNEP commented on both procedural obligations in the context of climate change (like ensuring access to information and public participation in environmental decision-making) as on substantive obligations.¹⁶⁷ I will focus on the latter. UNEP claims that 'States must enact legal and

¹⁶² CIEL and The Global Initiative for Economic Social and Cultural Rights, 'States' Human Rights Obligations in the Context of Climate Change - 2019 Update' (n 147).

¹⁶³ Human Rights Committee (CCPR), 'List of Issues Prior to Submission of the Fifth Period Report of the United States of America' (2019) UN Doc CCPR/C/USA/QPR/5 para 15.

¹⁶⁴ *ibid.*

¹⁶⁵ Knox, 'Focus Report on Human Rights and Climate Change' (n 123) 22.

¹⁶⁶ *ibid.*

¹⁶⁷ UNEP (n 87) 16-19.

institutional frameworks to protect against and respond to [the] impacts’ of climate change on human rights.¹⁶⁸ UNEP derives five specific types of obligations in this regard: (1) adaptation obligations, requiring states to implement strategies to protect people against the effects of climate change; (2) domestic mitigation obligations, compelling states to regulate the sources of GHG emissions; (3) international cooperation obligations, demanding states to participate in international negotiations for a global climate solution, (4) transboundary mitigation obligations, requiring states to mitigate the effect of their activities on the human rights of persons outside of their jurisdiction; and (5) an obligation to ensure that mitigation and adaptation activities do not themselves contribute to human rights violations.¹⁶⁹ Some of these obligations require immediate implementation rather than progressive realisation: states must refrain from undertaking actions that cause violations of human rights and must ensure non-discrimination in all these policies.¹⁷⁰ Lastly, UNEP mentions the importance of the non-discrimination principle and the fact that certain groups are more vulnerable to climate change-related harm (like women, indigenous peoples or children) and are therefore entitled to more specific protection.¹⁷¹

While this second type of obligations UNEP identifies, the obligation to mitigate GHG emissions, is crucial in the context of this thesis, UNEP stays more vague than other bodies. ‘States “may” also have an obligation to respond to the core causes of climate change-anthropogenic emissions of GHGs.’¹⁷² UNEP hereby refers to the fact that many countries only make relatively small contributions to climate change, and the ‘common but differentiated responsibilities’-principle established by the UNFCCC.¹⁷³

As mentioned in UNEP’s fifth type of obligations, it is also important that mitigation policies themselves respect human rights. To achieve full climate justice, it would not be sufficient that states only have obligations to fight against climate change without making sure that these mitigation policies do not adversely impact human rights on their own. Climate mitigation policies must thus be implemented with

¹⁶⁸ UNEP (n 87) 19.

¹⁶⁹ *ibid.*

¹⁷⁰ *ibid* 20.

¹⁷¹ *ibid* 27.

¹⁷² *ibid* 22.

¹⁷³ *ibid* 23.

a human rights-based approach; ‘States must reconcile obligations to protect peoples and individuals against the adverse effects of climate change with co-existing obligations to realise the rights of those who have obtained negligible benefits from emission-producing activities.’¹⁷⁴

b. European Court of Human Rights

While the general human rights obligations established on the UN level discussed in this previous part can be relevant for all cases I will examine, they are not binding. This is different for specific human rights treaties. As some of the lawsuits I will discuss later are based on the ECHR, I will now discuss shortly what can be found in this convention regarding the environment and examine the case law of the European Court of Human Rights (ECtHR) in this regard. The obligations I discuss here will thus only be relevant for the Council of Europe member states.

While the ECHR does not contain any references to the environment, the ECtHR has developed quite some case law on the topic. Regarding article 2 of the ECHR, the right to life, the ECtHR has held that states have positive obligations to take legislative and other measures to ensure that the right to life is adequately protected against risks emanating from ‘dangerous activities’.¹⁷⁵ This happened in *Öneryıldız v Turkey* in 2004, a case concerning a landslide on a rubbish tip that had killed several people living in slums on this land without authorisation. The ECtHR ruled that Turkey had violated the right to life, as it had not taken sufficient measures to avoid this risk.¹⁷⁶ In *Budayeva and others v Russia* in 2008, the ECtHR further held that states must also take reasonable measures to protect against foreseeable risks of natural disasters.¹⁷⁷ While the authorities knew there was a risk of mud-slides, they did not protect citizens against this risk, which was a violation of the substantial limb of article 2.¹⁷⁸ This could be interesting in the context of climate change as well; even if a state would say that they cannot be held responsible for climate change-related harm, they would

¹⁷⁴ Wewerinke-Singh (n 88) 12.

¹⁷⁵ *Öneryıldız v Turkey* [GC] ECHR 2004-XII 79, paras 89-90.

¹⁷⁶ Council of Europe (CoE), ‘Factsheet: Environment and the European Convention on Human Rights’ (2018) 1.

¹⁷⁷ *Budayeva and others v Russia* (extracts) ECHR 2008-II 267 para 137; UNEP (n 87) 9; CoE, ‘Factsheet’ *ibid* 3.

¹⁷⁸ *Budayeva and others v Russia* *ibid* paras 149, 160; UNEP *ibid* 20; CoE *ibid* 3.

still have the responsibility to protect their citizens against this harm.¹⁷⁹

Similar case law can be found on article 8 of the ECHR, the right to a family life. The protection afforded by the ECtHR under this article is very broad, and includes several aspects, such as protection of the environment. In *Lopez Ostra v Spain* in 1994, for example, the ECtHR ruled that environmental pollution (in this case pollution from a waste-treatment plant) can interfere with article 8 of the ECHR.¹⁸⁰ In *Tătar v Romania* (2009), the ECtHR focused on the ‘precautionary principle’, according to which ‘the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the State in adopting effective and proportionate measures’.¹⁸¹ Even though the applicants failed to show a causal link between exposure to a certain industrial pollution and their health issues, Romania should have taken suitable measures to prevent this risk.¹⁸²

States thus have a positive obligation to adopt measures to protect against grave environmental damages. In the *Fadeyeva v Russia* case of 2005, this entailed implementing legislature to control the volume of toxic discharges by industries to an acceptable level.¹⁸³ In *Di Sarno v Italy*, the fact that petitioners challenged a situation that affects the entire population of a country or region did not prevent the ECtHR from assuming that an individual complainant suffers individualised harm or is at individualised risk.¹⁸⁴ Another interesting case is the *Brincat and others v Malta* case of 2014, concerning employers that had been exposed to asbestos.¹⁸⁵ The ECtHR found a violation of both articles 2 and 8, stating that ‘in view of the seriousness of the threat, and despite the State’s margin of appreciation as to the choice of means, the Government had failed to satisfy their positive obligations, to legislate or take other practical measures, under Articles 2 and 8’.¹⁸⁶

¹⁷⁹ HRC, ‘Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment’ (2016) UN Doc A/HRC/31/52, 10.

¹⁸⁰ *López Ostra v Spain* (1994) Series A no 303-C para 51; CoE, ‘Factsheet’ (n 176) 11.

¹⁸¹ *Tătar v Romania* App no 67021/01 (ECtHR, 27 January 2009) para 69; CoE, ‘Factsheet’ ibid 13.

¹⁸² CoE, ‘Factsheet’ ibid.

¹⁸³ *Fadeyeva v Russia* ECHR 2005-IV 255, paras 92, 133.

¹⁸⁴ *Di Sarno and others v Italy* App no 30765/08 (ECtHR, 10 January 2012); CoE, ‘Factsheet’ (n 176) 21.

¹⁸⁵ *Brincat and others v Malta* App nos 60908/11 and 4 others (ECtHR, 24 July 2014).

¹⁸⁶ ibid para 116; CoE, ‘Factsheet’ (n 176) 10.

The Maltese government had been aware (or should have been aware) of the consequences of asbestos exposure. The ECtHR has established a ‘reasonable standard of care’ in this regard; states have a duty to adopt reasonable and appropriate measures.¹⁸⁷ Still, this responsibility cannot impose ‘an impossible or disproportionate burden’ on the authorities.¹⁸⁸

Neither the ECHR nor the ECtHR have ever mentioned climate change specifically.¹⁸⁹ Some authors suggest however that this line of jurisprudence on environmental damage can also be applied to climate change.¹⁹⁰ States have an obligation to take measures to prevent environmental harm from interfering with citizens’ human rights, depending on the foreseeability of the risk, and ‘it seems safe to assume that in a similar vein, climate change-related threats must be mitigated through effective legislation in order to protect human life’.¹⁹¹ Regarding the ‘reasonable standard of care’, applicants should show that the authorities know or ought to know that there is a real risk to life. In this regard one could look at the reports of the IPCC and other UN documents to establish that this knowledge is widespread.¹⁹²

However, multiple difficulties remain when wanting to use this ECtHR case law in climate litigation. One problem is, for example, that it is not the community at large that is protected in the ECtHR’s case law, but only those individuals whose rights are directly affected.¹⁹³ For example in *Kyrtatos v Greece* (2003), the ECtHR held that the destruction of a physical environment (through urban development) was not of such nature that it directly affected the applicants rights.¹⁹⁴ This rules out using the ECHR in ‘public interest litigation’ to obtain a particular kind of environment.¹⁹⁵ Next to this requirement of a direct effect, the harms must also reach a sufficient degree of seriousness.¹⁹⁶ If claimants want

¹⁸⁷ *Osman v UK* ECHR 1998-VIII 3124 paras 115-116; CoE, ‘Factsheet’ (n 176) 21; Wewerinke-Singh (n 88) 11.

¹⁸⁸ HRC, ‘Report of the Special Rapporteur’ A/HRC/31/52 (n 179) 10.

¹⁸⁹ Knox, ‘Focus Report on Human Rights and Climate Change’ (n 123) 43.

¹⁹⁰ Roger HJ Cox, *Revolution Justified* (The Planet Prosperity Foundation 2012) 273; Megan Chapman, ‘Climate Change And The Regional Human Rights Systems’ (2010) 10 Sustainable Development Law & Policy 37, 38; Wewerinke-Singh (n 88) 10; Boyd (n 141) para 33.

¹⁹¹ Boyle (n 95) 16; Wewerinke-Singh (n 88) 10.

¹⁹² Cox (n 190) 255; Wewerinke-Singh (n 88) 11.

¹⁹³ *Fadeyeva v Russia* ECHR 2005-IV 255 para 68; Boyle (n 95) 17.

¹⁹⁴ *Kyrtatos v Greece* (extracts) ECHR 2003-VI 257 para 53; CoE, ‘Factsheet’ (n 176) 20.

¹⁹⁵ Boyle (n 95) 32.

¹⁹⁶ *Kyrtatos v Greece* (extracts) ECHR 2003-VI 257 para 54; *Fadeyeva v Russia* ECHR 2005-IV 255 para 70; CoE, ‘Factsheet’ (n 176) 20.

to use the ECHR in their climate litigation, they will thus have to show that climate change is inherently different from general environmental damages, so that this direct link has to be interpreted differently.

c. Legal experts

In 2015, legal experts from around the world examined the question of the extent to which human rights law obliges states to reduce their GHG emissions. As a result, they published the Oslo Principles on Global Climate Obligations.¹⁹⁷ The Oslo Principles can be seen as having important interpretative value but are not binding on any states.¹⁹⁸ While they are interesting to mention, the scope of this thesis does not allow for further elaboration on them.

2.1.3 Consequences

When states commit a wrongful act, they are ‘under an obligation: (a) to cease that act, if it is continuing; (b) to offer appropriate assurances and guarantees of non-repetition, if circumstances so require’.¹⁹⁹ Additionally, the state has an obligation ‘to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed’.²⁰⁰ According to one author, the consequences of this cessation and restitution obligation in the context of climate change-related wrongful conduct would be drastic for the state, definitely when the violation involves a series of wrongful acts and omissions.²⁰¹ Furthermore, the state will be under an obligation ‘to make full reparation for the injury caused by the internationally wrongful act’.²⁰² In this case, it will be important to establish to what extent the harm was a ‘reasonably foreseeable consequence’ of the action taken.²⁰³ In the context of climate change, one could look at the assessment reports of the IPCC to claim that a broad range of risks could be considered as ‘reasonably foreseeable consequences’.²⁰⁴

¹⁹⁷ Expert Group on Global Climate Obligations, ‘Oslo Principles on Global Climate Change’ (2015).

¹⁹⁸ Stein and Castermans (n 150) 320.

¹⁹⁹ ILC (n 90) art 30.

²⁰⁰ *ibid* art 35.

²⁰¹ Wewerinke-Singh (n 88) 17.

²⁰² ILC (n 90) art 31.

²⁰³ Wewerinke-Singh (n 88) 18.

²⁰⁴ *ibid*.

2.2 CONCLUSION

States have obligations under international human rights law to respect, protect and fulfil human rights in the context of climate change. Both acts and omissions can be attributed to a state in this regard. While the specific obligations of a certain state will depend on which treaties it has ratified, some statements of UN human rights bodies can be used as guidelines for interpretation. These bodies have clarified some general procedural and substantive obligations. States must protect individuals against foreseeable threats related to climate change and implement legal frameworks to this end. They must provide access to information and ensure access to effective remedies. They must also make sure that their climate policies themselves do not negatively impact human rights and need to have particular attention for members of vulnerable groups.

Different bodies have also clarified to what extent human rights obligations prescribe a particular level of climate action, more particularly GHG emissions reductions. The OHCHR has clearly stated that states must limit anthropogenic emissions of GHG in order to prevent to the greatest extent possible the negative human rights impact of climate change. The Committee on Economic, Social and Cultural Rights puts even more emphasis on a mitigation obligation and is also more specific in this regard, for example by focusing on fossil fuels. The latest Special Rapporteur on Human Rights and the Environment, David Boyd, is also of the opinion that states have enforceable human rights obligations to limit GHG emissions ‘as rapidly as possible’. The previous Special Rapporteur, John Knox, on the other hand, thinks this mitigation obligation is less clear. He highlights the obligation of international cooperation instead. UNEP is of the same opinion and focuses on the ‘common but differentiated responsibilities’ principle of the UNFCCC.

In conclusion, human rights forums and UN bodies have all highlighted some different aspects of human rights obligations in the context of climate change, and the development of this field thus stays fragmented.²⁰⁵ However, while there used to be a lot of uncertainty about the specific content of these obligations, we can now say that more and more obligations are clearly established. Also, as John H

²⁰⁵ HRC, ‘Report of the Independent Expert’ A/HRC/22/43 (n 116) 13.

Knox has pointed out ‘the lack of a complete understanding as to the content of all environmentally related human rights obligations should not be taken as meaning that no such obligations exist’.²⁰⁶ While the value of some of these statements stays limited because of their soft law status, Knox believes that ‘taken together, they provide strong evidence of converging trends towards greater uniformity and certainty in the human rights obligation relating to the environment’.²⁰⁷ He then encourages states to ‘accept these statements as evidence of actual or emerging international law’.²⁰⁸ Still, a lot of work needs to be done to remove the remaining uncertainties about states’ obligations.²⁰⁹

When we then look at a binding human rights treaty like the ECHR, we see that states indeed have certain obligations to take reasonable measures to protect against foreseeable risks of natural disasters and grave environmental damages. While neither the ECHR nor the ECtHR have ever mentioned climate change in specific, these obligations could be applied to the context of climate change.

While it thus could be possible to use these obligations as a basis for climate claims against states, multiple difficulties remain. It is not clear if these positive obligations require immediate implementation or if progressive realisation can suffice. The obligation to reduce GHG emissions will have to be balanced against other human rights obligations of states, like those in the context of the right to development.²¹⁰ The fact that multiple states are responsible for the same damage will further require states to work together to provide reparations.²¹¹ When talking about reparations, it will be difficult to establish who can be seen as a victim and what the severity and scale of the damage is exactly.²¹² When looking at specific human rights mechanisms like the ECHR, similar difficulties arise. In general, these mechanisms are not well-suited to the complex collective problem of climate change.²¹³ It will thus be a big task for the (international) human rights community to develop theories on when the responsibility of states can be engaged exactly, and why a

²⁰⁶ HRC (n 205) 18.

²⁰⁷ HRC, ‘Report of the Independent Expert’ A/HRC/25/53 (n 117) 8.

²⁰⁸ *ibid.*

²⁰⁹ HRC, ‘Report of the Special Rapporteur’ A/HRC/41/39 (n 161) 18.

²¹⁰ Bridget Lewis, *Environmental Human Rights and Climate Change* (Springer Nature 2018) 176.

²¹¹ Wewerinke-Singh (n 88) 21.

²¹² *ibid.*

²¹³ Lewis (n 210) 36, 171.

more progressive interpretation of certain human rights obligations is justified in the context of climate change.²¹⁴ As long as these obligations under human rights law are not completely clear yet, one could look at international environmental law instruments, like the UNFCCC and the Paris Agreement, for guidance.²¹⁵

²¹⁴ Sébastien Duyck, Sébastien Jodoin and Alyssa Johl, 'Integrating Human Rights in Global Climate Governance: An Introduction' in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 8-9; International Bar Association, *Achieving Justice and Human Rights in an Era of Climate Disruption* (2014) 118-124.

²¹⁵ HRC, 'Report of the Independent Expert' A/HRC/25/53 (n 117) 18.

3.

DISCUSSING CASE LAW

As explained before, I will now discuss some well-known cases, in which citizens have sued their government for their (in)action on climate change by using human rights law in their claim. After giving a general overview of the case, I will examine whether human rights law is used as an interpretative tool or rather as the legal basis of the claim. Then, I will check how petitioners managed (or tried to) overcome some of the most important legal hurdles for public interest litigation on climate change. Justiciability is often an issue, with the problem of standing, the necessity of a plausible causal connection between the injury and the action (or inaction) of the government, and the problem of separation of powers.²¹⁶ This causal link can also be discussed in the merits of the case.

3.1 SUCCESSFUL CASES

3.1.1 The Netherlands: Urgenda

a. Overview of the case

2015: Court of first instance

In 2013, the Urgenda Foundation, a Dutch citizens' platform for the transition to a sustainable society, filed a case against the Dutch government, both on its own behalf and on behalf of 886 individual plaintiffs. They claim that the state is legally obliged to take action to

²¹⁶ United Nations Environment Programme (UNEP), 'Climate Change and Human Rights' (2015) 5; Suryapratim Roy and Edwin Woerdman, 'Situating Urgenda v the Netherlands within Comparative Climate Change Litigation' (2016) 34 *Journal of Energy and Natural Resources Law* 165, 169.

reduce greenhouse gas emissions.²¹⁷ As current global GHG emission levels threaten to lead to a global warming of over 2°C and thus to severe consequences for society, Urgenda claims that an emission reduction norm of 25 to 40% by 2020 compared to pre-industrial times is necessary for states to fulfil their ‘duty of care’. To back up these numbers they refer to reports of the IPCC and to the UNFCCC. By not living up to this reduction norm, the Dutch state is ‘violating international law, committing an unlawful act and contributing to the endangerment of the citizens of the Netherlands, the EU and the globe’.²¹⁸ Moreover, ‘this leads to the violation of human rights, including the right to life, the right to good health and the right to respect for private and family life’.²¹⁹ The class-action suit is based both on Dutch national tort law as on international law. Within international law, the subpoena refers to the ‘no harm’-principle and the different UN treaties on climate as norms with ‘indicative effect’, and to articles 2 and 8 of the ECHR as ‘directly binding provisions’.²²⁰ Through these claims, Urgenda sought a declaratory judgment from the court that, by failing to achieve a (minimum) 25% reduction of GHG emissions and thus adding to the dangerous situation of climate change, the state is acting unlawfully.²²¹ Next to this declaratory ruling, Urgenda also sought a mandatory injunction by the court to compel the state to take the necessary measures to reduce these emissions.²²² The Urgenda Foundation did not claim compensation for damages.

The Dutch state, represented by the Department of Infrastructure and Environment, recognised the facts on climate change and the need for action in its defence. It argued however that it cannot be legally obliged to reduce a certain percentage of emissions. It claimed that Urgenda, insofar as it defends the rights and interest of current or future generations in other countries, has no cause of action.²²³ Next to that, ‘there is no (real threat of) unlawful actions towards Urgenda attributable to the State’.²²⁴

²¹⁷ Urgenda Foundation, <www.urgenda.nl/en/themes/climate-case/> accessed 23 March 2019.

²¹⁸ Urgenda Foundation, ‘Summons’ (2015) para 28.

²¹⁹ *ibid.*

²²⁰ *ibid.* paras 150-151.

²²¹ RHJ Cox, ‘The Liability of European States for Climate Change’ (2014) 30 *Utrecht Journal of International and European Law* 125, 126.

²²² *ibid.*

²²³ *Urgenda Foundation v The State of the Netherlands*, 24 June 2015, District Court of The Hague, ECLI:NL:RBDHA:2015:7196, C/09/456689/HA ZA 13-1396 (English translation) para 3.3.

²²⁴ *ibid.*

Even if Urgenda's claims were accepted, this would make almost no difference in the worldwide GHG emission and therefore would make no difference to the danger of climate change.²²⁵ Dutch emissions are not unlawful (not under national nor under international law) so that an action in tort is not permissible. There is no breach of articles 2 or 8 of the ECHR. The state also believes that the claim is a political question over which the Court has no decision-making power. Moreover, the state claimed that the current Dutch climate policies are sufficient, aimed at achieving the global 2°C objective, and in compliance with all the legally binding agreements made in the context of (international) climate negotiations.²²⁶

On 24 June 2015, the District Court of The Hague issued its judgment, ruling that the state must take more robust action to reduce greenhouse gas emissions in the Netherlands. The state's current policy²²⁷ is below what is deemed necessary in climate science to avert dangerous climate change, and the state thus has not been able to prove that its policy is adequate and effective to prevent harms from this climate change.²²⁸ Therefore, the court ruled that the state has to reduce the emission of greenhouse gases by 2020 by at least 25% compared to 1990.²²⁹ This stems from the obligation to avert the imminent danger caused by climate change, in view of its duty of care to protect and improve the living environment.²³⁰ While the court stated that Urgenda Foundation cannot directly rely on the UNFCCC, the Kyoto Protocol or the 'no harm' principle, it believed they can have a 'reflex effect' in national law.²³¹ At the same time, the court considered that Urgenda cannot be seen as a victim under article 34 of the ECHR, and therefore cannot rely directly on articles 2 and 8 of the ECHR. However:

²²⁵ Marc Loth, 'Climate Change Liability after All: A Dutch Landmark Case' (2016) 21 *Tilburg Law Review* 5, 11.

²²⁶ Urgenda Foundation, 'Statement of Reply' (2015) para 8.

²²⁷ The policy of the Netherlands at that time aimed at a 17% emission reduction by 2020 compared to 1990.

²²⁸ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223) para 4.31; Roy and Woerdman (n 216) 181.

²²⁹ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223) para 4.93; Loth (n 225) 5.

²³⁰ Urgenda Foundation, 'Informal translation of the reading out of the summary of verdict of the District Court of the Hague, in the case of Urgenda and 886 citizens against the Dutch State' <www.urgenda.nl/wp-content/uploads/InformaltranslationVerdictDutchClimateCase.pdf> accessed 3 July 2019.

²³¹ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223) paras 4.42- 4.43.

both articles and their interpretation given by the ECtHR, particularly with respect to environmental right issues, can serve as a source of interpretation when detailing and implementing open private-law standards (...) such as the unwritten standard of care of the Dutch Civil Code.²³²

The court thus uses these standards as interpretative tools to conclude that the state has a duty of care towards the Dutch citizens to prevent dangerous climate change.²³³ The state ‘has acted negligently and therefore unlawfully towards Urgenda by starting from a reduction target for 2020 of less than 25% compared to the year 1990’.²³⁴ The court thus accepts Urgenda’s reduction order but deems it unnecessary to allow the remaining declaratory claims.²³⁵

This ruling of the District Court of The Hague caused a great deal of controversy around the world.²³⁶ The successful use of climate change liability came as a surprise to many.²³⁷ Some praised it as a global precedent, in the sense that it is the first time that citizens manage to hold their state accountable for contributing to climate change.²³⁸ Before, it was often deemed impossible that individuals could do that. Still, the way the court used the ECHR may raise some eyebrows, to say the least. As article 34 of the ECHR of course only regulates access to the ECtHR, it was very surprising that the Dutch court uses this as an argument to state that Urgenda cannot invoke articles 2 and 8 of the ECHR in the domestic proceedings.

2018: Court of Appeal

In 2015, the Dutch state announced its intention to appeal the judgment. In its statement of objection, it first argues that its emission policies are in line with international commitments. The norm that the court prescribes, a minimum of 25% in 2020, is not laid down in any international agreements or EU law, and there is no scientific consensus that this reduction by 2020 is necessary to prevent dangerous climate

²³² *ibid* para 4.46.

²³³ Loth (n 225) 12.

²³⁴ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223) para 4.93.

²³⁵ *ibid* para 4.105.

²³⁶ Marc A Loth, ‘Too Big to Trial? Lessons from the Urgenda Case’ (2018) 23 SSRN Electronic Journal 336 1; Roy and Woerdman (n 216).

²³⁷ Loth (n 225) 6-7.

²³⁸ *Urgenda Foundation* (n 217).

change.²³⁹ The interference of the court is therefore too far-reaching and does not respect the discretionary power of the state.²⁴⁰ The state further contests that it is acting unlawfully, as it does not agree with the way the court has shaped the duty of care. It also contests that its current climate policy causes damage and that this damage can be imputed to the state.²⁴¹

Urgenda decided to lodge a cross-appeal against the court's verdict. The foundation states that it can rely directly on articles 2 and 8 of the ECHR. The District Court should not have applied the 'reflex effect' principle but can use these provisions with direct effect.²⁴²

On 9 October 2018, the Court of Appeal found all the defences of the state unconvincing and upheld the 2015 District Court decision. Interestingly, the court accepted Urgenda's cross-appeal, thus basing its decision on a different reasoning than the District Court: the court now rules that failure of the Dutch government to reduce its greenhouse gas emissions by 25% by 2020 would amount to a violation of the human rights of Dutch citizens.²⁴³ The court states that the District Court failed to acknowledge that article 34 of the ECHR '(only) concerns access to the European Court of Human Rights'.²⁴⁴

All of the above leads to the conclusion that the State is acting unlawfully (because in contravention of the duty of care under Articles 2 and 8 ECHR) by failing to pursue a more ambitious reduction as of end-2020, and that the State should reduce emissions by at least 25% by end-2020.²⁴⁵

2019: *Supreme Court*

In 2019, the Dutch government filed its grounds of appeal to the Supreme Court. It continued to contest the existence of a 'duty of

²³⁹ GJH Houtzagers and EHP Brans, 'Pleitnota Overheid' (2018) paras 1.8, 1.16 (as translated by author).

²⁴⁰ Eleanor Stein and Alex Geert Castermans, 'Case Comment - Urgenda v The State of the Netherlands: The "Reflex Effect" - Climate Change, Human Rights, and the Expanding Definitions of the Duty of Care' (2017) 13 McGill Journal of Sustainable Development Law 303, 323.

²⁴¹ De Staat der Nederlanden, 'Memorie van Grieven Deel 1' (2016) para 1.23 (as translated by author).

²⁴² Urgenda Foundation, 'Respondent's Notice on Appeal' (2017) paras 8.77, 11.

²⁴³ Urgenda Foundation (n 217).

²⁴⁴ *The State of the Netherlands v Urgenda Foundation* (9 October 2018 The Hague Court of Appeal) ECLI:NL:GHDHA:2018:2610, 200 178 245/01 (English translation) para 35.

²⁴⁵ *ibid* para 76.

care’ to act on climate change, and the specific threshold of 25-40% in this regard.²⁴⁶ It contests the use of articles 2 and 8 of the ECHR, claiming that there is no ‘real and immediate risk’ of violation of those articles by ‘concretely identifiable’ groups.²⁴⁷ The ECHR only protects individual rights and not a right to a healthy environment as such.²⁴⁸ The state further claims it has a margin of appreciation that extends to the moment when, and the pace at which it has to take certain measures.²⁴⁹ The state also brings up the separation of powers again, stating that this specific reduction norm is a violation of this principle.²⁵⁰

The Urgenda Foundation again refuted all these allegations in its defence. The organisation hereby gave an extensive explanation of how human rights law should be interpreted, which I will discuss further below.

The Supreme Court heard oral arguments from both sides and will examine whether or not the lower courts have applied Dutch law correctly. A final decision is expected by the end of 2019.

b. The use of human rights law within the claim

In this part I will explore more thoroughly how human rights law is used and applied in the Urgenda case.

In its summons for the 2015 case, Urgenda referred to HRC Resolution 10/4 from 2009 and to the UNFCCC when stating that climate change poses a serious threat to the enjoyment of human rights.²⁵¹ ‘This makes it clear that Dutch emissions of GHG can – and must – be tested against human rights treaties to which the state is bound.’²⁵² Urgenda uses socio-economic human rights like the right to a high level of human health protection and the protection of the environment, as protected under the Treaty on the Functioning of the European Union.²⁵³ Mainly however, the organisation invokes article 2 (the right to life) and article 8 (the right to private and family life) of the ECHR. The organisation claims that these articles carry with them the positive obligation for

²⁴⁶ De Staat der Nederlanden, ‘Procesinleiding Vorderingsprocedure Hoge Raad’ (2019) paras 4-5 (as translated by author).

²⁴⁷ *ibid* para 1.1.

²⁴⁸ *ibid* para 3.1.

²⁴⁹ *ibid* para 1.3.

²⁵⁰ *ibid* para 9.4.

²⁵¹ Urgenda Foundation, ‘Summons’ (n 218) paras 33, 218.

²⁵² *ibid* para 218.

²⁵³ Treaty on the Functioning of the European Union (TFEU) arts 168 and 191.

the state to take preventative measures against climate change.²⁵⁴ For article 2, Urgenda refers to the *Öneryildiz* case to conclude that ‘the state has the obligation to take all the necessary measures that, having regard to its competences, can reasonably be expected to prevent the coming into being of a life-threatening situation of which it is aware or ought to be aware’.²⁵⁵ Under article 8 they refer to the *López Ostra* case that establishes a positive obligation to protect citizens against the consequences of environmental pollution, even when this pollution is not life threatening.²⁵⁶ The *Budayeva* case is brought up to clarify that this obligation exists even if the time at which a violation would occur is unpredictable.²⁵⁷ The Urgenda Foundation claims that the ECHR is directly applicable in the national legal system, and articles 2 and 8 can therefore form the basis for an action in tort: ‘a violation of the rights and obligations contained in [the ECHR] is considered a violation of a statutory duty as worded in article 6:612 of the Dutch Civil Code’.²⁵⁸ On the one hand, Urgenda thus uses human rights as the basis for a violation of a statutory duty within national law.²⁵⁹ On the other hand, the foundation clarifies in its statement of reply that it also uses human rights as the basis for a separate claim, calling directly upon articles 2 and 8 to state that the Dutch government committed a separate breach of their fundamental rights.²⁶⁰ ‘The State violates both its negative obligation and its positive obligation under articles 2 and 8 of the ECHR.’²⁶¹

While the District Court mainly focuses on the other parts of Urgenda’s argumentation (mostly the duty of care stemming from national law), it does use human rights in its analysis.²⁶² As stated before, the court considers that Urgenda cannot be seen as a victim under article 34 of the ECHR, and therefore cannot rely directly on articles 2 and 8 of the ECHR. However, these human rights standards can serve as a source of interpretation.²⁶³ In its verdict, the court does not

²⁵⁴ Urgenda Foundation, ‘Summons’ (n 218) para 233.

²⁵⁵ *ibid* para 240.

²⁵⁶ *ibid* para 244.

²⁵⁷ *ibid* para 246.

²⁵⁸ *ibid* para 236.

²⁵⁹ Jacqueline Peel and Hari M Osofsky, ‘A Rights Turn in Climate Change Litigation?’ (2018) 7 *Transnational Environmental Law* 37, 49-50.

²⁶⁰ Urgenda Foundation, ‘Statement of Reply’ (n 226) paras 214, 319.

²⁶¹ *ibid* para 319.

²⁶² Peel and Osofsky (n 259) 49-50.

²⁶³ Text to n 232

find a violation of the petitioners' human rights based on the ECHR, and also stays quite vague when it comes to how it uses these rights as an interpretative tool exactly. Still, it does use these provisions to determine the necessary standard of care, and seems to agree with the fact that positive obligations for the state can stem from it.²⁶⁴ This is thus for sure a big step, as it is the first time a court gives human rights a central role in climate litigation.²⁶⁵ By using human rights only as a complementary factor, the court avoids some thorny issues such as the width of the discretionary powers of the state.²⁶⁶ Still, as stated before, the way the court uses the ECHR and more specifically article 34 shows a lack of expertise on human rights law.²⁶⁷

In its statement of objection to the 2015 verdict, the state claims that this ambiguity does not allow to verify whether the unwritten duty of care, as interpreted by the court, is in accordance with the ECHR.²⁶⁸ The state does not talk much about the content of these human rights provisions, but merely complains about the fact that the court attached importance to them to establish the duty of care.²⁶⁹ As described above, the Urgenda Foundation therefore decided to lodge a cross-appeal, where it claimed that it can rely directly on articles 2 and 8 of the ECHR.²⁷⁰ In this way the organisation wants to strengthen the legal basis of its claim.²⁷¹ Urgenda claims that article 34 'merely determines the admissibility of applications to the European Court of Human Rights'.²⁷² 'The question whether Urgenda would have standing at the ECtHR has no impact on the question whether it can invoke Articles 2 and 8 in Dutch proceedings.'²⁷³

In 2018, as outlined above, the The Hague Court accepted this cross-appeal.²⁷⁴ 'As individuals who fall under the State's jurisdiction

²⁶⁴ Roy and Woerdman (n 216) 172, 183; Loth (n 225) 15-16; Stein and Castermans (n 240) 313; Peel and Osofsky (n 259) 38-51.

²⁶⁵ Stein and Castermans (n 240) 305, 317; Peel and Osofsky (n 259) 38.

²⁶⁶ FM Fleurke and A de Vries, 'Urgenda: Convergentie Tussen Klimaat En Mensenrechten?' [2016] Milieu en recht 5.

²⁶⁷ Text to n 232

²⁶⁸ De Staat der Nederlanden, 'Memorie van Grieven Deel 4' (2016) paras 14.55-14.59 (as translated by author).

²⁶⁹ Urgenda Foundation, 'Respondent's Notice on Appeal' (n 242) para 8.160.

²⁷⁰ Text to n 242

²⁷¹ Urgenda Foundation, 'Respondent's Notice on Appeal' (n 242) para 11.3.

²⁷² *ibid* para 11.6.

²⁷³ *ibid* para 11.13.

²⁷⁴ Text to n 243

may invoke Articles 2 and 8 ECHR in court, which have direct effect, Urgenda may also do so on their behalf under Book 3 Section 305a of the Dutch Civil Code.²⁷⁵ The court further states that:

under Articles 2 and 8 ECHR, the government has both positive and negative obligations relating to the interests protected by these articles, including the positive obligation to take concrete actions to prevent a future violation of these interests (in short: a duty of care).²⁷⁶

The state, while having a wide margin of appreciation, should take all reasonable actions for which it is authorised in the case of a real and imminent threat, which it knew or ought to have known.²⁷⁷ Next, ‘a future infringement of one or more of these interests is deemed to exist if the interest concerned has not yet been affected, but is in danger of being affected as a result of an act/activity or natural event’.²⁷⁸ The court hereby mentions that the infringement should exceed the minimum level of severity.²⁷⁹

In short, the State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible.²⁸⁰

In this case,

the Court believes that it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life. As has been considered above by the Court, it follows from Articles 2 and 8 ECHR that the State has a duty to protect against this real threat.²⁸¹

²⁷⁵ *The State of the Netherlands v Urgenda Foundation* (2018) (n 244) para 35.

²⁷⁶ *ibid* para 41.

²⁷⁷ *ibid* para 42.

²⁷⁸ *ibid* para 41.

²⁷⁹ *ibid*.

²⁸⁰ *ibid* para 43.

²⁸¹ *ibid* para 45.

While the court mentions that the government has a ‘wide margin of appreciation’ in this regard,²⁸² some authors believe that the court, by obliging the state under the ECHR to take specific measures, does not sufficiently respect this margin.²⁸³ What is sure, is that this reasoning of The Hague Court definitely puts human rights on the foreground, in comparison to the vague verdict of the District Court. Suddenly the Urgenda case turned into a full-blown human rights case. This came as a surprise to many. The court apparently deems that climate-change related (future) harms can fall within the scope of application of articles 2 and 8 of the ECHR, and that they can directly affect those rights.

The Dutch state strongly disagreed with this argumentation. In its last grounds of appeal the state complains that, for the adoption of positive obligations in connection with an imminent impairment of the right to life or the right to family life, it is required that there is a real and immediate risk of an impairment of the rights of individuals or groups of individuals who are within the jurisdiction of the state and who are specifically identifiable. According to the state, the court erred in law in this respect.²⁸⁴ The court has not clarified if, and to what extent, the negative consequences of climate changes will have an effect on the people within the state’s jurisdiction in specific, and how this will harm their right to a (family) life.²⁸⁵ The risks are not immediate, as the court focuses on the consequences of a 2°C warming, which will not happen shortly.²⁸⁶ The precautionary principle does not change the fact that an imminent and clearly identifiable risk for a certain area needs to be established.²⁸⁷ There is no right to a clean environment as such, and the ECHR does not protect the community at large.²⁸⁸ This implies that the Court of Appeal should have established a more direct and concrete link between the general consequences of climate change referred to by the Court of Appeal and the negative impact this will

²⁸² *The State of the Netherlands v Urgenda Foundation* (2018) (n 244) para 42.

²⁸³ Fleurke and de Vries (n 266) 5; Benoit Mayer, ‘Case Note: State of the Netherlands vs Urgenda Foundation, Ruling of the Court of Appeal of the Hague (9 October 2018)’ (2018) 1396 SSRN Electronic Journal 1, 17.

²⁸⁴ De Staat der Nederlanden, ‘Procesinleiding Vorderingsprocedure Hoge Raad’ (n 246) para 1.1.

²⁸⁵ *ibid* para 2.5.

²⁸⁶ *ibid*.

²⁸⁷ *ibid*.

²⁸⁸ Text to n 193

have on individuals in a defined area within the Netherlands.²⁸⁹ These arguments are in line with the difficulties I had foreseen when using the ECHR in climate litigation.²⁹⁰ The individual logic of the ECHR is hard to apply to a collective problem like climate change. However, the Court of Appeal never stated that it was protecting the environment as such, but rather very concrete harms to people. The state also claims it has a margin of appreciation that extends to the moment when, and the pace at which it has to take certain measures.²⁹¹ The state further believes that, under article 2 and/or article 8 of the ECHR, it can only be required to take mitigation measures to counter the consequences of climate change with respect to persons subject to the jurisdiction of the state.²⁹² The state therefore could not be obliged to take measures that cannot effectively counteract the risks in question.²⁹³ It wants to focus on adaptation measures instead. To me these last arguments make no sense. No government can say that they will only reduce their emissions to the extent that these emissions have a direct effect on their own citizens, and to the extent that this reduction can solve that problem.²⁹⁴ Surely, the Dutch state is aware that it is impossible to look at global climate change like that. Also, mitigation measures cannot just be replaced by adaptation measures.

The Urgenda plaintiffs, on the other hand, argue that the risks of climate change for the current generation of Dutch people are concrete, real and big enough to be able to use the ECHR.²⁹⁵ They talk about heat waves, floods and the effects of global unrest. While some of these risks are indeed not immediate and would only manifest after a 2°C warming, the current inaction of the government will irreversibly be decisive for this warming. In this regard, the delayed impact of GHG emissions on the climate system must also be taken into account.²⁹⁶ In that sense, the argument of the state that the risks are not sufficiently ‘immediate’

²⁸⁹ De Staat der Nederlanden, ‘Procesinleiding Vorderingsprocedure Hoge Raad’ (n 246) para 2.3.

²⁹⁰ Text to n 193-196

²⁹¹ De Staat der Nederlanden, ‘Procesinleiding Vorderingsprocedure Hoge Raad’ (n 246) para 1.3.

²⁹² *ibid* para 2.2.

²⁹³ *ibid* para 8.2.1.

²⁹⁴ Bridget Lewis, *Environmental Human Rights and Climate Change* (Springer Nature 2018) 176.

²⁹⁵ Urgenda Foundation, ‘Verweerschrift’ (2019) para 89 (as translated by author).

²⁹⁶ *ibid* para 397.

would not be applicable.²⁹⁷ Urgenda further argues that the ECHR is a ‘living instrument’ that should be interpreted in such a way as to provide effective protection.²⁹⁸ If it would be necessary to be able to determine precisely when and how the harmful impacts of climate change will be felt exactly, to establish a violation of the ECHR, a legal protection vacuum would arise.²⁹⁹ This would be incompatible with the purpose of the treaty, in light of (i) the international developments in the field of human rights and climate change, and (ii) the scientific consensus on the absolute necessity of taking maximum mitigation action now.³⁰⁰ Still, Urgenda also believes that, even with the current more traditional approach of the court concerning environmental matters, the same result could be obtained.³⁰¹ The organisation refers to the *Öneryildiz* and *Taskin* cases again, where uncertain and future harms were at stake.³⁰² Concerning the margin of appreciation, Urgenda first argues that the ECtHR’s justifications for applying the margin of appreciation doctrine do not apply in the same way to the national court, as this is an expression of the subsidiarity principle.³⁰³ The primary responsibility for safeguarding the ECHR lies with the member states, and the ECtHR therefore assesses only marginally whether treaty rights are sufficiently guaranteed.³⁰⁴ Furthermore, even if this margin would be applied the same way, the state cannot hide behind this.³⁰⁵ As the consequences of delayed emission reduction are clear, it does matter when and at which pace the state takes certain measures, as the consequences.³⁰⁶ The absolute bottom line, a 25% reduction by 2020 should be the limit of the margin.³⁰⁷ Overall, the Urgenda Foundation still uses both article 6:162 of the Civil Code and articles 2 and 8 of the ECHR as the basis to support the ‘duty of care’ to protect against the negative consequences of climate change. It thus seems that the organisation is reluctant to base its claim on human rights law entirely on its own.³⁰⁸

²⁹⁷ Urgenda Foundation (n 295) para 106.

²⁹⁸ *ibid* paras 351, 358, 360.

²⁹⁹ *ibid* para 356.

³⁰⁰ *ibid* para 357.

³⁰¹ *ibid* para 351.

³⁰² *ibid* para 387.

³⁰³ *ibid* para 499.

³⁰⁴ *ibid*.

³⁰⁵ *ibid* para 505.

³⁰⁶ *ibid* para 257.

³⁰⁷ *ibid* para 520.

³⁰⁸ *ibid* paras 459, 576.

In principle, I support the reasoning of the Urgenda Foundation. Of course, there are certain weaknesses in their arguments: the Dutch government's action or inaction will not determine whether or not we will achieve a 2°C warming, and a lot of risks related to climate change will manifest themselves in any case. Also, the interpretation principles of 'effectiveness' and a 'living instrument' are primarily intended for the court itself, not for individual states. However, if we remain stuck in the traditional individualistic views on the ECHR, we overlook the inherently different nature of climate change compared to other environmental problems. In the *Kyrtatos* case, which revolves around urban development, the ECtHR indeed stated that the destruction of physical environment and the damage to certain species 'was not of such a nature as to directly affect [the applicants'] own rights [under the ECHR]'.³⁰⁹ However, the deterioration of a given physical environment is of a very different nature from the risks posed by climate change. In my view, situations like heat waves that cause deaths, floods that costs lives or cause the spread of diseases, can fall within the scope of application of articles 2 and 8 of the ECHR. These types of disasters clearly do directly affect people's rights under the convention. Of course, a great deal of good will on the part of judges will be needed to interpret the ECHR (and other human rights treaties) in this way. If this case were to reach the ECtHR, the court would probably be very reluctant to establish a violation. After all, when the various member states ratified the ECHR, they did not have such consequences in mind at all. Nevertheless, in my view, the ECtHR could draw inspiration from the various obligations that have been developed at the UN level. While certain legal difficulties will always continue to exist, I believe that the topic of climate change has such massive consequences on the protection of human rights that a new way of interpreting the ECHR is justified. Roger Cox, one of the lawyers for the Urgenda Foundation, puts it as follows:

It will be (...) vital that the judiciary make full use of any room for interpretation offered by existing laws (...) in such a way that old and perhaps obsolete (...) provisions can still be made to align with the current situation and scientific knowledge.³¹⁰

³⁰⁹ Text to n 194

³¹⁰ Roger HJ Cox, *Revolution Justified* (The Planet Prosperity Foundation 2012) 239.

c. Legal hurdles

I have not yet specified how the petitioners in the Urgenda case manage to overcome some of the most important hurdles for public interest litigation on climate change, aside from some of the human rights aspects. Therefore, I will briefly discuss what is said on the problem of standing, the liability of states for general harm without a clear causal link and the problem of the separation of powers.³¹¹

The Urgenda plaintiffs managed to overcome the issue of standing in both cases, thanks to provisions in the Dutch Civil Code that allow associations to bring claims on behalf of citizens, and a provision that makes it possible to hold the state responsible for failing its duty of care.³¹² The Urgenda Foundation claims to represent the interest of present and future generations in the Netherlands and abroad.³¹³ In 2015, the court confirmed that there can be liability for at least the current generations of citizens within the Netherlands, but did not decide on additional grounds.³¹⁴ Urgenda has sufficient interests, as a foundation that has the goal to develop to a sustainable society. The claims of the 886 individual plaintiffs were rejected however, as they do not have sufficient individual interests other than those already served by Urgenda.³¹⁵ In 2018, the court then specified that class actions, within Dutch law, may also concern the interests of an indeterminable, very large group of individuals.³¹⁶ Urgenda can have standing, even just on the basis of ‘idealistic interests’.³¹⁷ In 2019, the state claimed again that this cannot be the case insofar as Urgenda bases its claim on the ECHR.³¹⁸

On this causal link, the Urgenda Foundation believes that the fact the Dutch pollution is relatively small compared to the total amount of pollution, does not affect the individual obligations of the Dutch state.³¹⁹ Urgenda talks about a pro rata liability; the polluter, in this case the state, is liable for its part of the global emissions and the dangerous

³¹¹ Roy and Woerdman (n 216) 169.

³¹² *ibid* 169-170. See also Dutch Civil Code arts 3:303 and 3:305.

³¹³ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223) para 3.3; Mayer (n 283) 7-8.

³¹⁴ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223) paras 4.5, 4.8 and 4.79; Mayer (n 283) 8.

³¹⁵ Loth (n 225) 23.

³¹⁶ *The State of the Netherlands v Urgenda Foundation* (2018) (n 244) para 38.

³¹⁷ *ibid*; Mayer (n 283) 8.

³¹⁸ De Staat der Nederlanden, ‘Procesinleiding Vorderingsprocedure Hoge Raad’ (n 246) para 3.5.

³¹⁹ Urgenda Foundation, ‘Summons’ (n 218) 16-17, para 33.

climate change that results from them.³²⁰ The organisation further explains that, as it is not seeking compensation, ‘the requirement of the existence of damage and the requirement that there must be a causal link between the alleged damage and the contested conduct are not relevant here’.³²¹ These requirements are only applicable in actions for damages, not for preventative actions for a court order or injunction.³²² If the court would accept Urgenda’s claim, this would not lead to future claims for damage due to climate change:

the specific difficulty of establishing the causal link in an individual case between damage and climate change is an important and strong argument in favour of a declaration demanding generic and preventative measures against climate change, such as is claimed in these proceedings.³²³

Urgenda uses the concept of ‘generic causality’: while individual links are difficult to establish, there is (considerable) scientific certainty that, if no action is taken, negative effects will occur on a massive scale.³²⁴ In 2015, the District Court ruled that the fact that Dutch emission reductions alone cannot solve the global climate problem cannot be an excuse for the state not to act.³²⁵

A sufficient causal link can be assumed to exist between the Dutch greenhouse gas emissions, global climate change and the effects (now and in the future) on the Dutch living climate. The fact that the current Dutch greenhouse gas emissions are limited on a global scale does not alter the fact that these emissions contribute to climate change.³²⁶

Climate change is indeed a combination of multiple factors, but with the concept of *pro rata* liability, each source of harm (here each emitter of GHG) assumes liability for its share.³²⁷ This reasoning does not solve all problems though: it is difficult to see how we can take into account past emissions or deal with the evidentiary burden for example.³²⁸ In 2018 the court upheld the same reasoning and pointed out that causality

³²⁰ Loth (n 225) 10; RHJ Cox and JM van den Berg, ‘Is de Staat Aansprakelijk Voor Klimaatverandering?’ (2014) 2 Aansprakelijkheid, Verzekering & Schade 5, 10.

³²¹ Urgenda Foundation, ‘Respondent’s Notice on Appeal’ (n 242) para 8.270.

³²² *ibid* para 8.7.

³²³ Urgenda Foundation, ‘Summons’ (n 218) para 280.

³²⁴ Urgenda Foundation, ‘Statement of Reply’ (n 226) paras 166, 180, 181, 187, 190.

³²⁵ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223).

³²⁶ *ibid* para 4.90.

³²⁷ Roy and Woerdman (n 216) 171.

³²⁸ Loth (n 225) 25-29.

only plays a limited role in a claim for imposing an order, in comparison to a claim for damages.³²⁹ Some authors believe that both courts lack a sufficient justification for these findings.³³⁰

One of the state's main defences against Urgenda's claim regards the separation of powers: the court has no decision-making power over it, as that would interfere with the state's discretionary power.³³¹ Moreover, the decision could 'harm the State's negotiating position in international politics'.³³² While Urgenda acknowledged that its claims have political consequences, it argued that the protection it seeks can only be provided by the state.³³³ 'The absence of the possibility to hold the State liable for the level of Dutch CO2 emissions would result in the absence of an effective remedy against the violations of the rights of Urgenda.'³³⁴ The 25% norm should be seen as an absolute minimum that leaves enough room for policy.³³⁵ In its 2015 decision, the court stated that the claim 'essentially concerns legal protection and therefore requires a "judicial review"'.³³⁶ It clarified that courts can provide legal protection in cases against the government, as long as they respect the government's scope for policymaking. It is in this regard that the court only ordered a reduction of 25%, the lower limit of the 25-40% norm, which leaves the state enough discretionary power to determine how it will comply with this.³³⁷ Some authors do not agree with this point of view and believe that the court overstepped its limits: the state now has to adjust its climate policy in a specific way.³³⁸ In 2018, the court rejected in even stronger words the argument of the state that measures to reduce CO2 emissions are drastic and therefore it is not up to the courts to make the attendant policy choices.

This argument is rejected in this case, also because the State violates human rights, which calls for the provision of measures, while at the same time the order to reduce emissions gives the State sufficient room to decide how it can comply with the order.³³⁹

³²⁹ *The State of the Netherlands v Urgenda Foundation* (2018) (n 244) para 64.

³³⁰ Mayer (n 283) 11.

³³¹ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223) para 3.3.

³³² *ibid.*

³³³ Urgenda Foundation, 'Respondent's Notice on Appeal' (n 242) paras 9.3, 9.4, 9.12.

³³⁴ Urgenda Foundation, 'Summons' (n 218) para 292.

³³⁵ Urgenda Foundation, 'Verweerschrift' (n 295) para 125.

³³⁶ *Urgenda Foundation v The State of the Netherlands* (2015) (n 223) para 4.98.

³³⁷ *ibid* para 4.98, 4.101; *The State of the Netherlands v Urgenda Foundation* (2018) (n 244) para 68; Loth (n 225) 11, 19-20.

³³⁸ Roy and Woerdman (n 216) 177-178; Loth (n 225) 29.

³³⁹ *The State of the Netherlands v Urgenda Foundation* (2018) (n 244) para 67.

3.1.2 Pakistan: Leghari

a. Overview of the case

At around the same time the District Court issued its judgment in the Urgenda case in 2015, Mr Ashgar Leghari, a farmer from Pakistan, also filed a case against his (national and regional) governments, claiming that their failure to implement measures to help him and others adapt to climate change is a violation of his fundamental rights.³⁴⁰ He hereby referred to the lack of implementation of the National Climate Change Policy of 2012 and the Framework for Implementation of Climate Change Policy 2014-2030. Mr Leghari stated that climate change leads to an increase in frequency and intensity of climate extremes, based on overwhelming scientific evidence.³⁴¹ ‘In the absence of any strategy by the government to conserve water or move to heat resilient crops, he will not be able to sustain his livelihood.’³⁴² In view of Pakistan’s high vulnerability to the harms of climate change, and as Mr Leghari is feeling these effects already, the focus is put on adaptation rather than on mitigation measures. This is a big difference from the Urgenda case.³⁴³ Water, food and energy security are threatened, and adaptation actions must develop capacity and resilience to deal with these disruptive harms.³⁴⁴

The Lahore High Court Green Bench issued a decision in September 2015. It concluded that the government’s failure to implement the 2012 Policy and the 2014-2030 Framework ‘offends the fundamental rights of the citizens which need to be safeguarded’.³⁴⁵ The court refers to the right to life, the right to a healthy and clean environment, the right to human dignity, the right to property and the right to information under the constitution.³⁴⁶ While the government had put certain legislation in place, progress in implementation was lacking.³⁴⁷ As the effects of climate change in Pakistan, with devastating floods and a particular impact on the access to water and food, have already been devastating,

³⁴⁰ *Leghari v Federation of Pakistan* (14 April 2015) Lahore High Court WP no 25501/2015, HCJD/C-121 (2015) para 4.

³⁴¹ *ibid* paras 1, 3; Stein and Castermans (n 240) 319.

³⁴² *Leghari v Federation of Pakistan* (25 January 2018) Lahore High Court WP no 25501/2015, HCJDA38 (2018) para 3.

³⁴³ UNEP, ‘The Status of Climate Change Litigation: A Global Review’ (2017) 15.

³⁴⁴ *Leghari v Federation of Pakistan* (2018) (n 342) para 10.

³⁴⁵ *Leghari v Federation of Pakistan* (4 April 2015) Lahore High Court WP no 25501/2015, HCJD/C-121 (2015) para 8; UNEP (n 343) 15.

³⁴⁶ *Leghari v Federation of Pakistan* *ibid* para 7; UNEP *ibid*.

³⁴⁷ *Leghari v Federation of Pakistan* *ibid* para 1; Esmeralda Colombo, ‘The Quest for Cosmopolitan Justice in Climate Matters’ (2017) 2 *Nordic Environmental Law Journal* 31.

immediate implementation is crucial.³⁴⁸ To fulfil its domestic climate commitments, the government of Pakistan must therefore create a Climate Change Commission that can facilitate action on the effects of climate change, like heavy floods and droughts, and monitor progress in this regard. Different ministries should also appoint a ‘climate change focal person’ and have to present points of action by the end of 2015.³⁴⁹ Two weeks later the court appointed 21 people to be a part of the Climate Change Commission.³⁵⁰ As the court recognised that Pakistan has a small impact on the global GHG emissions, the focus is put on adaptation measures.³⁵¹ Still, the country has an obligation towards the global community to take mitigation measures as well.³⁵²

In 2018, the Climate Change Commission reported to the court that by the end of 2017 progress had been made in 60% of the priority areas from the 2014-2030 Framework.³⁵³ It was then decided to dissolve the commission. The government still has to implement the 2014-2030 Framework, and a Standing Committee on Climate Change has been put in place. This committee will act as a link between the court and the governments.³⁵⁴

b. The use of human rights law within the claim and the legal hurdles

Not much in-depth information can be found on how the court deals exactly with human rights and with some legal hurdles. It is for example not mentioned how the inaction of the government affects Mr Leghari’s family and income exactly.³⁵⁵ The court admitted that it is still uncertain ‘about the timing and exact magnitude of many of the likely impacts of climate change’.³⁵⁶ The case is referred to as ‘public interest litigation’ in the court order.³⁵⁷ The court just establishes that it has jurisdiction without further analysis and does not discuss the issue of standing.³⁵⁸

While the success of this case was thus rather unusual, we can deduct some aspects from it that can help to successfully hold a government

³⁴⁸ *Leghari v Federation of Pakistan* (2015) (n 340) para 3; Stein and Castermans (n 240) 319.

³⁴⁹ *Leghari v Federation of Pakistan* (2015) (n 345) para 8; UNEP (n 343) 16.

³⁵⁰ *Leghari v Federation of Pakistan* (2015) (n 340) para 6.

³⁵¹ *Leghari v Federation of Pakistan* (2015) (n 345) para 1, 3; Stein and Castermans (n 217) 319.

³⁵² *Leghari v Federation of Pakistan* (2015) (n 340) para 8; Stein and Castermans *ibid.*

³⁵³ *Leghari v Federation of Pakistan* (2018) (n 342) para 18.

³⁵⁴ *ibid.* paras 24, 25.

³⁵⁵ Colombo (n 347) 31.

³⁵⁶ *Leghari v Federation of Pakistan* (2015) (n 340) para 9.

³⁵⁷ UNEP (n 343) 29; Colombo (n 347) 31.

³⁵⁸ *ibid.*

accountable for not doing enough to fight climate change. It is for sure a benefit when there is a right to a healthy environment enshrined in the constitution.³⁵⁹ Furthermore, an unfulfilled mandate to act on climate change can provide a clear reference framework against which to compare the steps that have been taken.³⁶⁰ Lastly, a lot will depend on the willingness of the judiciary to interpret human rights provisions in a progressive manner.³⁶¹ The importance of this judgment cannot be underestimated, as it was the first successful climate case in a developing country, and the first one being based solely on human rights provisions.³⁶² It is also worth noting that the court refers to the principle of ‘climate justice’.³⁶³

3.1.3 Colombia

In 2018, 25 young Colombians brought a lawsuit against their government (alongside local governments and some corporations), claiming that the government’s failure to reduce deforestation in the Amazon puts some of their fundamental rights at risk.³⁶⁴ The government is not on its way to meet its zero-net deforestation target in the Amazon by 2020 (established in the National Development Plan 2014-2019 and under the NDCs in the context of the Paris Agreement), which affects GHG emissions and drives climate change, endangering the applicants’ fundamental rights.³⁶⁵ In their *tutela* (a legal mechanism in Colombia to protect fundamental rights), the applicants refer to the right to a healthy environment, the right to life, the right to health, the right to food and the right to water.³⁶⁶

³⁵⁹ Abby Rubinson Vollmer, ‘Mobilizing Human Rights to Combat Climate Change through Litigation’ in Sébastien Duyck, Sébastien Jodoin and Alyssa Johl (eds), *Routledge Handbook of Human Rights and Climate Governance* (Routledge 2018) 363.

³⁶⁰ *ibid.*

³⁶¹ *ibid.*

³⁶² Colombo (n 347) 31.

³⁶³ *Leghari v Federation of Pakistan* (2018) (n 342) para 21.

³⁶⁴ See the *Demanda Generaciones Futuras v Minambiente* case, *Future Generations v Ministry of the Environment and others* STC4360-2018, Number: 11001-22-03-000-2018-00319-01; more information can be found on DeJusticia, <www.dejusticia.org/wp-content/uploads/2018/04/Tutela-English-Excerpts-1.pdf> accessed 3 July 2019 (DeJusticia, ‘Key Excerpts from the Supreme Court’s Decision, Selected and Translated by DeJusticia’ (2018)).

³⁶⁵ *ibid* para 2.2.

³⁶⁶ DeJusticia, ‘In historic ruling, Colombian Court protects youth suing the national government for failing to curb deforestation’ (*Dejusticia*, 5 April 2018) <www.dejusticia.org/en/en-fallo-historico-corte-suprema-concede-tutela-de-cambio-climatico-y-generaciones-futuras/> accessed 2 July 2019.

Contrary to an earlier decision of a lower court, the Supreme Court ruled in favour of the applicants on 5 April 2018. This swift decision is possible as *tutelas* are a fast-track mechanism to protect fundamental rights. The court indeed found that deforestation leads to climate change, ‘causing short, medium, and long term imminent and serious damage to the children, adolescents and adults who filed this lawsuit, and in general, all inhabitants of the national territory, including both present and future generations’.³⁶⁷ The court refers to the International Covenant on Economic, Social and Cultural Rights in this regard. The court further recognises that future generations (including the unborn) can be subject to rights.³⁶⁸ Interestingly, the Supreme Court also looks at the Amazon itself as a subject of rights.³⁶⁹ The government is ineffective in addressing the intensified deforestation, and thus also in ‘granting protection for the breach of fundamental guarantees to water, air, a dignified life, health, among others in connection with the environment’.³⁷⁰ The government has to address deforestation in the Amazon more properly, and present an action plan in this regard. It must create an ‘intergenerational pact for the life of the Colombian Amazon’ aimed at reducing deforestation to zero and greenhouse gas emissions. Some local governments and corporations also have to adopt and implement action plans in this regard.³⁷¹

This fast and far-reaching judgment (definitely when it comes to the rights of future generations and even nature itself) can give hope to similar lawsuits all over the world. The fact that the Colombian constitution contains a right to a clean and healthy environment was definitely instrumental in the success of the applicants.³⁷² It seems unlikely that this case can be repeated in other contexts, given also that the judge did not give a proper explanation about why standing was granted or how the applicants were affected by human rights violations in specific.

³⁶⁷ DeJusticia, ‘Key Excerpts from the Supreme Court’s Decision, Selected and Translated by Dejusticia’ (2018) (n 364).

³⁶⁸ *ibid* para 5.2.

³⁶⁹ *ibid* para 14.

³⁷⁰ *ibid* para 12.

³⁷¹ *ibid* para 14.

³⁷² Samvel Varvastian, ‘The Human Right to a Clean and Healthy Environment in Climate Change Litigation’ (2019) 9 MPIL Research Paper Series 1, 11.

3.2 CASES THAT FAILED

3.2.1 Switzerland: *KlimaSeniorinnen*a. *Overview of the case*

In November 2017, a group of elderly women, the *KlimaSeniorinnen*, filed a claim against the Swiss government, stating that the national climate emission reduction targets and mitigation measures are insufficient.³⁷³ According to the plaintiffs, the Paris Agreement defined a goal to prevent dangerous climate change (1.5 and 2°C warming), which should be the scientific and legal standard for Switzerland.³⁷⁴ Switzerland is not on its way to meet this goal, and therefore violates the constitution and human rights law.³⁷⁵ The plaintiffs invoked articles 2 and 8 of the ECHR. They note they are members of a ‘most vulnerable group with regard to the effects of climate change’: older women’s life and health are more severely impacted by heat waves than the rest of the population.³⁷⁶ The women asked the court to order the government to increase its national mitigation targets for 2020 to (at least) a 25% reduction and for 2050 to a 50% reduction. The government should also take measures to achieve those targets.³⁷⁷

The government department for the protection of natural resources, DETEC, as the ‘authority of first instance’ claimed that the plaintiffs do not fulfil the prerequisites for entering the case under the Administrative Procedure Act, as I will explain below.³⁷⁸ The Swiss Federal Administrative Court follows this interpretation in December 2018.

The *KlimaSeniorinnen* have appealed this decision to the Federal Supreme Court.

³⁷³ For more information and all documents see *KlimaSeniorinnen*, <<https://klimaseniorinnen.ch/english/>> accessed 28 June 2019; *KlimaSeniorinnen Schweiz*, ‘Verein *KlimaSeniorinnen Schweiz* et al v Federal Department of the Environment, Transport, Energy and Communications (DETEC), Application 25 October 2016 (Unofficial Translation on Behalf of *KlimaSeniorinnen*)’ (2016) 6-7 (*KlimaSeniorinnen Schweiz* (2016)).

³⁷⁴ UNEP (n 343) 17.

³⁷⁵ *KlimaSeniorinnen Schweiz* (2016) (n 373) 6-7.

³⁷⁶ *ibid* 7.

³⁷⁷ *ibid* 3-5.

³⁷⁸ Federal Department of the Environment, Transport, Energy and Communications (DETEC), ‘Verein *KlimaSeniorinnen Schweiz* et al v Federal Department of the Environment, Transport, Energy and Communications (DETEC), Order 26 April 2017 (Unofficial Translation of the Juridical Relevant Part Prepared on Behalf of *KlimaSeniorinnen*)’ (2017) 1.

b. The use of human rights law within the claim and legal hurdles

There is not much information available on how the plaintiffs justify their human rights claim in particular. They do not base it solely on the ECHR, but also on the sustainability principle, the precautionary principle and the right to life under the constitution.³⁷⁹ They believe the state has positive duties to protect these human rights ‘which in this instance (...) have and continue to be insufficiently carried out’.³⁸⁰ The KlimaSeniorinnen refer to article 6 of the ECHR to claim that, as their ‘request concerns civil claims and obligations pursuant to’ this article, they are ‘entitled to have their application examined and judged’.³⁸¹ They hope to prove their legal standing by claiming that they are particularly vulnerable to climate change effects such as heat waves.

The authority of first instance focuses on formal matters and claims that the applications do not show that their individual legal positions are affected.³⁸² ‘The applicants’ petitions do not serve to realize specifically such positions, but rather aim for general-abstract regulations and communications to be adopted.’³⁸³ The requests of the KlimaSeniorinnen must be regarded as an inadmissible *actio popularis*.³⁸⁴ The Federal Administrative Court agrees that the claimants did not manage to show close proximity to the matter in dispute that goes beyond the proximity of the general public.³⁸⁵ Women older than 75 are ‘not particularly affected by the impacts of climate change’, and have therefore no sufficient interest worthy of protection.³⁸⁶ The applicants’ claim based on the Administrative Procedure Act must be qualified as inadmissible, and ‘further claims to the issuance of a material ruling do not result from the ECHR either’.³⁸⁷

³⁷⁹ KlimaSeniorinnen Schweiz (2016) (n 373) 7.

³⁸⁰ *ibid.*

³⁸¹ *ibid* 7-8.

³⁸² Federal Department of the Environment, Transport, Energy and Communications (DETEC) (n 378) 2.

³⁸³ *ibid.*

³⁸⁴ Federal Administrative Court of Switzerland, ‘Verein KlimaSeniorinnen Schweiz et al v Federal Department of the Environment, Transport, Energy and Communications (DETEC), Judgment A-2992/2017 of 27 November 2018 (Unofficial Translation Prepared on Behalf of KlimaSeniorinnen)’ (2018) para 3.3.

³⁸⁵ *ibid* para 7.4.1.

³⁸⁶ *ibid* para 7.4.3.

³⁸⁷ *ibid* para 9.

3.2.2 EU: *People's Climate Case*

a. *Overview of the case*

It is also interesting to mention the People's Climate Case against the EU Parliament and Council. In May 2018, ten families filed a claim in the EU General Court that the 2030 climate target of the EU is insufficient to protect against dangerous climate change, or to protect their fundamental rights of life, health, occupation and property.³⁸⁸ The families, all working in agriculture and tourism, are from EU countries like France, Germany, Portugal, Italy and Romania, but also from Kenya and Fiji. The Swedish Sami Youth Association Sáminuorra is also an applicant. They claim they are (and will increasingly be) 'adversely affected in their livelihoods and physical well-being by climate change effects such as droughts, flooding, heat waves, sea level rise and the change of seasons'.³⁸⁹ The 2030 target – a 40% domestic GHG emission reduction compared to 1990 – that is manifested in three recent legal acts,³⁹⁰ is inadequate to protect the citizens and their fundamental rights of life, health, physical integrity, the right to engage in work and pursue a freely chosen or accepted occupation, the right to property and the right of equal treatment.³⁹¹ The effects are different for each applicant: a family carrying out forestry work in Portugal is losing income because of forest fires; droughts affect the survival of the livestock herded by a Kenyan family; and coral bleaching leads to depletion of fish stock that a family in Fiji relies on.³⁹²

On the one hand, the plaintiffs apply for annulment of three acts (the Emissions Trading Directive, the Effort Sharing Regulation and

³⁸⁸ For more information and all documents see People's Climate Case, <<https://peoplesclimatecase.caneurope.org/documents/>> accessed 18 June 2019.

³⁸⁹ Case T-330/18 *Armando Ferrao Carvalho and Others v European Parliament and Council of the EU* [2019] ECR II-324, para 1.

³⁹⁰ These three acts are (i) Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2018] OJ L76/3, (ii) Regulation (EU) 2018/842 of the European Parliament and of the Council of 30 May 2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement and amending Regulation (EU) No 525/2013 [2018] OJ L156/26 and (iii) Regulation (EU) 2018/841 of the European Parliament and of the Council of 30 May 2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework, and amending Regulation (EU) No 525/2013 and Decision No 529/2013/ EU [2018] OJ L156/1.

³⁹¹ People's Climate Case, 'Armando Ferrao Carvalho and Others vs. European Parliament and Council of the EU, Case T-330/18, Application 2 July 2018' (2018) para 111.

³⁹² *ibid* paras 21, 24, 34, 35, 42.

the LULUCF Regulation; together the GHG Emissions Acts) pursuant to article 263 of the Treaty on the Functioning of the European Union (TFEU), as they permit the continued emissions of dangerous GHG levels.³⁹³ These acts are not in line with higher ranking laws, like the Charter of Fundamental Rights of the European Union (CFR) and article 191 of the TFEU (that includes the duty to protect human health and the environment).³⁹⁴ The GHG Emission Acts are also not in line with the duties under the UNFCCC Paris Agreement (like the duty to common but differentiated responsibilities). The acts should be declared null and new acts should be implemented.³⁹⁵

On the other hand, the plaintiffs also claim for an injunction based on non-contractual liability pursuant to article 340 of the TFEU, ‘requiring the Union to set deeper emission reduction targets’.³⁹⁶ The applicants do not ask for a specific percentage of reduction (in contrast with the Urgenda claim), but leave it up to the EU lawmakers to define a higher level of reduction that would be in line with the level required by law and their commitments under the Paris Agreement.³⁹⁷

The Parliament and the Council both argue that the case is inadmissible, as the contested acts do not directly affect the legal situation of the plaintiffs.³⁹⁸ On 24 May, the court followed this argumentation and ruled the case inadmissible. I will go deeper into this argumentation below.

b. The use of human rights law within the claim

The applicants claim that the EU has both positive and negative human rights duties. It should ‘refrain from allocating the quantity of emissions allowances permitted’ but also ‘adopt positive steps to reduce emissions even if these are attributed to private actors’.³⁹⁹ As I will explain below, the applicants also use human rights law to claim that the admissibility standards should be interpreted differently. It is also interesting that the applicants claim that individuals living outside of the EU are entitled to invoke EU fundamental rights.⁴⁰⁰ They take quite a big

³⁹³ Federal Administrative Court of Switzerland (n 384) paras 2, 4, 162.

³⁹⁴ *ibid* paras 109, 146.

³⁹⁵ *ibid* para 8.

³⁹⁶ *ibid* paras 5, 274.

³⁹⁷ *ibid* para 5; People’s Climate Case, ‘Frequently Asked Questions about the People’s Climate Case’ (2018).

³⁹⁸ Case T-330/18 (n 389) para 14.

³⁹⁹ People’s Climate Case ‘Application’ (2018) (n 391) paras 112-114.

⁴⁰⁰ People’s Climate Case ‘Application’ (2018) (n 391) paras 130-131; People’s Climate Case ‘Frequently Asked Questions’ (2018) (n 397).

risk with this. The applicants do not base their entire claim on human rights. The application for nullification of these GHG Emissions Acts is based on their incompatibility with higher ranking laws, including the CFR but also the TFEU. The claim for an injunction based on non-contractual liability does not mention human rights specifically.

However, as the court dismissed the case on procedural grounds, we do not know how the court would have reacted to these arguments under the merits.

c. Legal hurdles

This case failed at the admissibility stage because of strict EU rules. Article 263 of the TFEU states that individuals may institute proceedings against an EU act when it is ‘addressed to that person or (...) of direct concern to them and does not entail implementing measures’.⁴⁰¹ The CJEU has clarified that this means that a measure must directly affect the legal situation of the individual, and that there must be no discretion left to the addressees who are responsible for its implementation.⁴⁰²

The applicants claimed that all of them are directly and individually concerned by the GHG Emissions Acts, as they lead to an infringement of their individual fundamental rights.⁴⁰³ They do not allege insufficiency of the individual state implementation measures, but the reduction target as such.⁴⁰⁴ However, the applicants also challenged the restrictive interpretation of the admissibility standard of ‘individual concern’ by itself, stating that it is not well suited to environmental issues, and endangers access to justice.⁴⁰⁵ ‘The more widespread the damaging effects of a measure, the more restrictive the access to courts will be.’⁴⁰⁶ Furthermore, as fundamental rights are at stake, and the EU Court is the ‘sole arbiter’ in this regard, ‘it should be held that a person is “individually concerned” where the person is “affected in a fundamental right”’.⁴⁰⁷

⁴⁰¹ TFEU art 263.

⁴⁰² People’s Climate Case ‘Application’ (2018) (n 391) para 68.

⁴⁰³ Case T-330/18 (n 389) paras 31, 68.

⁴⁰⁴ People’s Climate Case ‘Application’ (2018) (n 391) para 71.

⁴⁰⁵ *ibid* paras 82, 83, 85; Case T-330/18 (n 389) para 32.

⁴⁰⁶ People’s Climate Case ‘Application’ (2018) (n 391) para 85.

⁴⁰⁷ *ibid* para 92.

The Council and Parliament strongly contested this broader interpretation of the applicants. They stated that the plaintiffs, while providing a lot of information about the effects on their factual situation, have not shown that the contested acts directly affect their legal situation.⁴⁰⁸

The court reiterated that the ‘individual concern’ condition requires that applicants show that contested acts affect them in a peculiar way, distinguishing them individually from all other persons.⁴⁰⁹ The court then found that the ‘applicants have not established that the contested provisions (...) infringed their fundamental rights and distinguished them individually from all other natural or legal persons concerned by those provisions’.⁴¹⁰ Furthermore, the strict admissibility principles do not violate access to justice:

(...) the protection conferred by Article 47 of the Charter of Fundamental Rights [on the right to an effective remedy] does not require that an individual should have an unconditional entitlement to bring an action for annulment of such a legislative act of the Union directly before the Courts of the European Union.⁴¹¹

It would have been very surprising that a group of random applicants from both inside as well as outside the EU, all having some sort of damages that can be linked to climate change, would have been able to order the EU to change its climate policy. Still, a lot of people were hoping that the court would abandon its restrictive interpretation on admissibility, or otherwise reserve its decision on admissibility to discuss the merits.⁴¹² As access to EU courts is subject to very specific rules, we cannot really apply this litigation to other case law. However, it is clear that it is, for now, very difficult to file a general climate case contesting EU acts.

⁴⁰⁸ Case T-330/18 (n 389) paras 25, 27.

⁴⁰⁹ *ibid* para 45.

⁴¹⁰ *ibid* para 49.

⁴¹¹ *ibid* para 52.

⁴¹² *ibid* para 19.

3.3 PENDING CASES

3.3.1 *Belgium: Klimaatzaak**a. Overview of the case*

In 2014, the non-profit organisation Klimaatzaak brought a lawsuit against the four different Belgian authorities with climate competences (the three regions and the federal state).⁴¹³ Around 60,000 people signed up as supporters of the claim. Their main demand was that the court should order the authorities to reduce their collective greenhouse gas emissions by 48% or at least 42% by 2025 compared to 1990, 65% or at least 55% by 2030, and achieve zero net emissions by 2050.⁴¹⁴ At the start of these proceedings, Belgium was not even on its way to meet the lower commitments of the EU level (20% by 2020).⁴¹⁵ Boldly, the claimants also asked the court to impose a penalty payment on the government of 1,000,000 euros for each month it delays working on the new reduction goals.⁴¹⁶

Klimaatzaak claims that the defendants act unlawfully in different ways: their (non-)actions are a violation of their duty of care and also a violation of fundamental rights.⁴¹⁷ This is already causing damage, including more deaths during summers with exceptional heat, more allergies and moral damage. The fact that the extent of future damage cannot be measured exactly does not affect the duty of the state to repair or prevent it when possible.⁴¹⁸

The case has been extremely delayed by legal disputes over language legislation,⁴¹⁹ but these have been resolved since April 2018. A verdict is expected by the end of 2020.⁴²⁰ My discussion will remain superficial.

⁴¹³ For more information and all documents see Klimaatzaak, <www.klimaatzaak.eu/en> accessed 3 June 2019.

⁴¹⁴ Equal, 'Hoofdconclusies' para 16 (as translated by author).

⁴¹⁵ VZW Klimaatzaak and Philippe & Partners, 'Dagvaarding' para 42 (as translated by author).

⁴¹⁶ Equal, 'Hoofdconclusies' (n 414) para 296.

⁴¹⁷ *ibid* para 1.

⁴¹⁸ VZW Klimaatzaak and Philippe & Partners, 'Dagvaarding' (n 415) paras 97-100, 105.

⁴¹⁹ The competent court for the lawsuit is the French-speaking court of first instance in Brussels. Since one of the defendants (the Walloon Region) is domiciled outside Brussels, the case must be brought in French in accordance with language legislation. The Flemish Region asked for the language of the legal proceedings to be changed to Dutch, and if this is not possible, to split the procedure up in two parts. This would mean that two proceedings would have to be conducted: one in Dutch and one in French. In addition to doubling the legal costs, there is a risk that two different sentences would be pronounced. The French-speaking court of first instance, and later the District Court and the Court of Cassation, all rejected the application of the Flemish Region. See Klimaatzaak, <www.klimaatzaak.eu/en> accessed 3 June 2019.

⁴²⁰ Koen Vidal, 'Klimaatbeleid Is Schending van Mensenrechten' *De Morgen* (2018) 16 (as translated by author).

b. The use of human rights law within the claim

Klimaatzaak asserts that the violation of human rights constitutes an autonomous legal basis for its claims.⁴²¹

Firstly, the organisation refers to article 2 of the ECHR. It brings up the *Öneryildiz v Turkey* case, where the ECtHR made it clear that article 2 contains positive obligations for all life-threatening risks, including environmental risks. Public authorities must take all necessary measures which may reasonably be expected to avoid a real and immediate threat to life, of which the state is or should have been aware.⁴²² The organisation also claims that article 8 of the ECHR, the right to a family life, has been violated. Klimaatzaak refers to *López Ostra v Spain*, where the ECtHR established a positive obligation to protect citizens against the consequences of environmental pollution, even if it is not life-threatening.⁴²³ Again, like the Urgenda Foundation, the organisation also brings up *Tatar v Romania* and *Öneryildiz v Turkey*; this obligation to take measures exists even if there is only an increased risk of violation of the right to a private life. The obligation of the state is thus not affected in case of scientific uncertainty or if the damage has not yet occurred.⁴²⁴

Interestingly, Klimaatzaak asserts that climate change has some particular features that should be taken into account when determining which measures the defendant state should have taken. The organisation refers to the global dimension of the problem (and the fact that damage often cannot be individualised), the temporal dimension (where some effects of climate change are not visible yet while they are already there) and the ‘anticipation’ problem (where measures have to be taken now, to prevent future damage).⁴²⁵ The organisation believes that these features distinguish climate change from other environmental issues the ECtHR has already dealt with, and that a stricter approach is therefore justified.⁴²⁶

On the other hand, in the first documents that are available on the arguments of the defendants, it seems that it will be argued that articles 2 and 8 of the ECHR do not have direct effect in the Belgian legal order

⁴²¹ VZW Klimaatzaak and Philippe & Partners, ‘Dagvaarding’ (n 415) para 44.

⁴²² *ibid* paras 52, 53.

⁴²³ *ibid* paras 60, 69.

⁴²⁴ *ibid* para 61.

⁴²⁵ Equal, ‘Hoofdconclusies’ (n 414) paras 465-468.

⁴²⁶ *ibid* paras 463-464.

to the extent that they impose positive obligations on the state. Neither non-profit organisation Klimaatzaak, nor the co-plaintiffs, could thus invoke these provisions in order to obtain a stricter climate policy.⁴²⁷

c. Legal hurdles

In the writ of summons, Klimaatzaak tried to anticipate a few legal barriers. It claims that both the organisation and the co-claimants have standing, based on national and international law and recent developments in the field of access to justice in environmental cases.⁴²⁸ The claimants will not be able to escape negative consequences like heath, drought, floods and geopolitical instability.⁴²⁹ The admissibility of the claim is contested by the state; given the vastness of its statutory purpose, both geographically and over time, the claim of Klimaatzaak is an inadmissible *actio popularis*. The individual co-plaintiffs have not demonstrated sufficient interest; they would need to show a personal, direct, certain, definite and current interest in the case.⁴³⁰

According to Klimaatzaak, it is also indisputable that there is a causal link between the wrongful act (negligence) of the authorities and the damage that claimants suffer and will continue to suffer.⁴³¹ In general, Belgian law takes into account all wrongful acts that contributed to the actual damage. Although Belgium's proportional share of global emissions seems small, it has contributed to the current situation.⁴³² The state disputes that there have been wrongful acts that can lead to government liability, and that the causal link is not demonstrated.⁴³³

The applicants mention that there is no issue with the separation of powers, provided that the court does not indicate how the ordered emission reduction should be achieved.⁴³⁴ The state, on the other hand, claims that the court does not have jurisdiction to impose emission reduction targets. These reduction targets would de facto oblige the state and the regions to conclude a cooperation agreement and would thus violate the separation of powers.⁴³⁵

⁴²⁷ VZW Klimaatzaak, 'De Eerste Conclusies van de Staat En de Gewesten: Samenvatting' para 5 (as translated by author).

⁴²⁸ Equal, 'Hoofdconclusies' (n 414) para 12.

⁴²⁹ *ibid* para 165.

⁴³⁰ VZW Klimaatzaak, 'De Eerste Conclusies' (n 427) para 4.

⁴³¹ VZW Klimaatzaak and Philippe & Partners, 'Dagvaarding' (n 415) para 111.

⁴³² *ibid* paras 110-111.

⁴³³ VZW Klimaatzaak, 'De Eerste Conclusies' (n 427) para 5.

⁴³⁴ Equal, 'Hoofdconclusies' (n 414) para 14.

⁴³⁵ VZW Klimaatzaak, 'De Eerste Conclusies' (n 427) para 3.

3.3.2 US: *Juliana case*

a. Overview of the case

Another case that has attracted a lot of attention is the Juliana case. In August 2015, 21 young people filed a claim against the federal US government.⁴³⁶ They assert that this government has actively contributed to causing climate change, which constitutes a violation of their constitutional rights to life, liberty and property.

The plaintiffs assert that the US government has known for over 50 years that burning fossil fuels was causing global warming and dangerous climate change, ‘and that continuing to burn fossil fuels would destabilize the climate system on which present and future generations of [the] nation depend for their wellbeing and survival’.⁴³⁷ Still, they continued their fossil fuel policies, knowing the harmful impact of these actions would significantly endanger the plaintiffs.⁴³⁸ The government can be seen as primarily responsible for authorising and incentivising fossil fuel production, consumption and combustion, creating dangerous levels of atmospheric CO₂ concentrations.⁴³⁹ The plaintiffs also mention that the US has been responsible for emitting 25.5% of the world’s cumulative CO₂ emissions to the atmosphere between 1751 and 2014.⁴⁴⁰ They state:

As a result, defendants have infringed on plaintiffs’ fundamental constitutional rights to life, liberty and property. Defendants’ acts also discriminate against these young citizens, who will disproportionately experience the destabilized climate system in our country.⁴⁴¹

The different plaintiffs refer to negative effects of droughts, lack of snow or forest fires on their recreational activities, their psychological wellbeing and their health (for example asthma attacks).⁴⁴² The claimants

⁴³⁶ For more information and all documents see The Sabin Center for Climate Change Law Columbia Law School <<http://climatecasechart.com/case/juliana-v-united-states/>> accessed 2 June 2019.

⁴³⁷ Our Children’s Trust, ‘Juliana et al v The United States of America, Case 6:15-Cv-01517-TC, Complaint 8 December 2015’ (2015) para 1.

⁴³⁸ *ibid* para 1.

⁴³⁹ *ibid* para 130.

⁴⁴⁰ *ibid* para 151.

⁴⁴¹ *ibid* para 8.

⁴⁴² *ibid* paras 17, 19, 97.

asked the court to declare that the government has thus violated their fundamental constitutional rights. They further asked the court to order the government to reduce their CO₂ emissions to a level of less than 350ppm in the atmosphere by 2100, and to develop an action plan to this end.⁴⁴³

From the beginning, the applicants received a lot of opposition from the government. In November 2015 the federal government tried to get the case thrown out of court prematurely by asking the District Court to dismiss the action.⁴⁴⁴ The government claimed that the plaintiffs lack standing, fail to state a claim under the constitution, and that the court lacks jurisdiction.⁴⁴⁵ I will discuss these claims in detail below.

However, the federal District Court of Oregon is on the applicants' side. In April 2016, a magistrate judge in the District Court issued an opinion recommending denial of the motions to dismiss the case, rebutting the government's statements on standing, jurisdiction and the political question.⁴⁴⁶ In November 2016, (days after the election of President Trump) the District Court then issued an order in line with this opinion, clearing the way for the case to proceed to trial.⁴⁴⁷ The court believed that the plaintiffs have adequately alleged concrete and actual injuries, a causal link between the defendant's conduct and these alleged injuries, and that the requested relief could address these injuries.⁴⁴⁸ The judge then framed the fundamental right at issue as 'the right to a climate system capable of sustaining human life', and states that the plaintiffs have adequately alleged the infringement of this fundamental right.⁴⁴⁹

The follow-up to this ruling is a complex legal battle. While some fossil fuel industry groups⁴⁵⁰ had asked to intervene in the beginning

⁴⁴³ Our Children's Trust (n 437) para 12.

⁴⁴⁴ Attorneys for Federal Defendants, 'Juliana et al v The United States of America, Case 6:15-Cv-01517-TC, Federal Defendant's Motion To Dismiss 17 November 2015' (2015).

⁴⁴⁵ *ibid* 1.

⁴⁴⁶ *Juliana et al v The United States of America* (8 April 2016) United States District Court for the District of Oregon, Order and Recommendation, Case 6:15-Cv-01517-TC (2016).

⁴⁴⁷ *Juliana et al v The United States of America* (10 November 2016) United States District Court for the District of Oregon, Opinion and Order, Case 6:15-Cv-01517-TC (2016); Grace Nosek, 'Climate Change Litigation and Narrative : How to Use Litigation to Tell Compelling Climate Stories' (2018) 42 *William & Mary Environmental Law and Policy Review* 733, 787.

⁴⁴⁸ *Juliana et al v The United States of America* 'Opinion and Order' (2016) (n 448) 21, 26, 27.

⁴⁴⁹ *ibid* 32, 33.

⁴⁵⁰ These groups are the American Fuel & Petrochemical Manufacturers (AFPM), the American Petroleum Institute (API) and the National Association of Manufacturers (NAM).

of the lawsuit, they filed motions to withdraw after the government's motions to dismiss were denied. It seems these companies became more aware of the potential impact the lawsuit could have on their public image.⁴⁵¹ In various ways the US government keeps trying to delay and thwart the procedure through the Ninth Circuit Court of Appeals and the Supreme Court.⁴⁵² Currently, the latest government appeal is pending before the Ninth Circuit Court of Appeals. In January 2019, the Ninth Circuit Court agreed to fast-track the appeal, on the demand of the plaintiffs. In June 2019, the Circuit Court heard oral arguments from both sides. It now has to decide whether the District Court can consider the merits of the case, and if a constitutional right to 'a climate system capable of sustaining human life' exists and whether the court can rule on the adequacy of the US climate policies. An answer is expected within six months to a year.

b. The use of human rights law within the claim

In their 2015 complaint, the plaintiffs refer to the fundamental constitutional rights to be free from government actions that harm life, liberty and property.⁴⁵³

Defendants' aggregate acts of increasing CO2 concentrations in the atmosphere have been and are harming Plaintiffs' dignity, including their capacity to provide for their basic human needs, safely raise families, practice their religious and spiritual beliefs, maintain their bodily integrity, and lead lives with access to clean air, water, shelter, and food.⁴⁵⁴

They claim that these rights belong both to them as to future generations.⁴⁵⁵ They also claim a violation of the constitutional right to equal protection: 'the affirmative aggregate acts of Defendants unconstitutionally favor the present, temporary economic benefits of certain citizens, especially corporations, over Plaintiffs' rights to life, liberty, and property'.⁴⁵⁶ Next to fundamental rights, their claim is also based on the public trust doctrine, according to which the federal government is a trustee over important national resources and has rights

⁴⁵¹ Nosek (n 447) 788.

⁴⁵² n 436.

⁴⁵³ Our Children's Trust 'Complaint' (2015) (n 437) paras 130, 278.

⁴⁵⁴ *ibid* para 283.

⁴⁵⁵ *ibid* para 278.

⁴⁵⁶ *ibid* paras 130, 292, 301.

and obligations in this regard.⁴⁵⁷ The plaintiffs do not bring up other human rights treaties.

While the government contends that the applicants are asserting a non-existing right to be free from pollution or climate change, the District Court judge made clear that this is a mischaracterisation of the original claim.⁴⁵⁸ She clarified that ‘fundamental liberty rights include both rights enumerated elsewhere in the Constitution and rights and liberties which are either (1) deeply rooted in this Nation’s history and tradition or (2) fundamental to our scheme of ordered liberty’.⁴⁵⁹ She then decided to reframe the fundamental right at issue, to a ‘right to a climate system capable of sustaining human life’.⁴⁶⁰ The judge believes that the constitution affords protection against government’s knowingly poisoning air or water, and that plaintiffs thus ‘have adequately alleged infringement of a fundamental right’.⁴⁶¹

This is for sure very bold of the judge. Claiming that governments would ‘knowingly poison air or water’ is very black-and-white to say the least. The reality of climate change policies is of course more complex: governments must balance different interests at stake. This is not a decision on the merits yet, and the judge thus has not stated whether this ‘new’ fundamental right has been violated or not. Still, the fact that she claims it exists is already ground-breaking (hence the massive media coverage of the case).⁴⁶² Especially when you look at the circumstances of the case, where the plaintiffs cannot bring forward much specific damage (they mention for example the mental stress that climate change brings, or the recreational activities that they had to quit because of a lack of snow), it is striking that the judge is so accommodating. This is precisely what climate litigation critics always warn against; that accepting these claims would create a snowball effect. Everyone, even without having to prove specific harm, could file complaints against their government for implementing policies that are against ‘the public interest’.

⁴⁵⁷ Our Children’s Trust ‘Complaint’ (2015) (n 437) paras 130, 273.

⁴⁵⁸ Attorneys for Federal Defendants ‘Motion to dismiss’ (2015) (n 444) 19, 20; *Juliana et al v The United States of America* ‘Opinion and Order’ (2016) (n 447) 32.

⁴⁵⁹ *Juliana et al v The United States of America* ‘Opinion and Order’ (2016) (n 447) 30.

⁴⁶⁰ *ibid* 32, 33.

⁴⁶¹ *ibid*.

⁴⁶² Nosek (n 447) 788; Varvastian (n 372) 10.

c. Legal hurdles

Throughout the whole procedure, the government’s main claims are that the plaintiffs lack standing, fail to state a claim under the constitution and that the court lacks jurisdiction. On standing, the government reiterates that claimants must show a concrete and particularised injury that can be linked to the challenged action, and that a favourable decision would redress this injury.⁴⁶³ The government then states that in this case, the plaintiffs ‘alleged injuries are not particular to them but (...) shared by every person in the Nation, living or yet to be born’.⁴⁶⁴ They further do not show how these harms can be connected to the defendant’s acts specifically.⁴⁶⁵

The court on the other hand believes that the plaintiffs do have adequately alleged concrete and actual injuries, a causal link between the defendant’s conduct and these alleged injuries, and that the requested relief could address these injuries.⁴⁶⁶ The alleged harm is indeed widespread, but still affects the plaintiffs in a concrete and personal way.⁴⁶⁷ Furthermore, the court deems that for now, it is sufficient that the government’s inaction ‘with respect to the regulation of greenhouse gases allegedly results in the numerous instances of emissions that purportedly cause or will cause the plaintiffs harm’.⁴⁶⁸ The court also does not agree that a favourable decision could not address the injuries:

If plaintiffs can show, as they have alleged, that defendants have control over a quarter of the planet’s greenhouse gas emissions, and that a reduction in those emissions would reduce atmospheric CO2 and slow climate change, then plaintiffs’ requested relief would redress their injuries.⁴⁶⁹

The court further believes that discussing the merits of this lawsuit would not be a violation of the separation of powers, as individual fundamental rights are allegedly violated.⁴⁷⁰ In conclusion, according to

⁴⁶³ Attorneys for Federal Defendants, ‘Motion to dismiss’ (2015) (n 444) 7, 8.

⁴⁶⁴ *ibid* 8.

⁴⁶⁵ *ibid* 12.

⁴⁶⁶ *Juliana et al v The United States of America* ‘Opinion and Order’ (2016) (n 447) 21, 26, 27.

⁴⁶⁷ *Juliana et al v The United States of America* ‘Order and Recommendation’ (2016) (n 446) 6, 8; *Juliana et al v The United States of America* ‘Opinion and Order’ *ibid* 21.

⁴⁶⁸ *Juliana et al v The United States of America* ‘Order and Recommendation’ (2016) (n 446) 10.

⁴⁶⁹ *Juliana et al v The United States of America* ‘Opinion and Order’ (2016) (n 447) 26, 27.

⁴⁷⁰ *Juliana et al v The United States of America* ‘Order and Recommendation’ (2016) (n 446) 13, 14; *Juliana et al v The United States of America* ‘Opinion and Order’ (2016) *ibid* 16.

the judge, it is not because the lawsuit is ground-breaking and recognising this fundamental right to a climate system capable of sustaining human life would be unprecedented, that this requires a dismissal of the case.⁴⁷¹

It is interesting to note that the District Court magistrate judge refers to the Urgenda decision when motivating its opinion.⁴⁷² While legal difficulties will be different in every climate case, depending on the national laws, courts clearly find inspiration in how other jurisdictions managed to overcome these hurdles.

3.3.3 *Other pending cases*

There are currently many other climate cases pending that use human rights law within their claims. Most of them are clearly inspired by the successful cases I have discussed above.

In Germany, for example, a couple of farmer families started a lawsuit against the government in 2018, stating that the fact that the government is not on its way to meet its 2020 GHG emission reduction target, is a violation of their constitutional rights to life, health, property and occupational freedom.⁴⁷³

In France, the non-profit organisations Fondation pour la Nature et l'Homme, Greenpeace France, Notre Affaire à Tous and Oxfam France have launched a legal challenge against the government, basing themselves on the '*Charte de l'environnement*', the ECHR and a general principle of law that protects the right to live in a sustainable climate system.⁴⁷⁴

Another case to watch is the one a group of Torres Strait Islanders started before the UN Human Rights Committee against the government of Australia in May 2019.⁴⁷⁵ They claim that Australia's climate plans are insufficient and therefore a violation of article 6 (the right to life), article

⁴⁷¹ *Juliana et al v The United States of America* 'Opinion and Order' (2016) (n 447) 53.

⁴⁷² *Juliana et al v The United States of America* 'Order and Recommendation' (2016) (n 446) 11.

⁴⁷³ For more information and all documents see The Sabin Center for Climate Change Law Columbia Law School, <<http://climatecasechart.com/non-us-case/family-farmers-and-greenpeace-germany-v-german-government/>> accessed 17 June 2019.

⁴⁷⁴ For more information and all documents see The Sabin Center for Climate Change Law Columbia Law School, <<http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/>> accessed 20 June 2019.

⁴⁷⁵ For more information see 350.org Ltd Australia, <<http://ourislandsourhome.com.au/>> accessed 6 July 2019.

17 (the right to family life) and article 27 (the right to enjoy your own culture for ethnic, religious or linguistic minorities) of the ICCPR.⁴⁷⁶ The case is the first of its kind and shows that people keep searching for new ways to hold governments accountable for a lack of climate commitments.

In most recent news, Greta Thunberg and 15 other young activists have filed a complaint to the UN Committee on the Rights of the Child, stating that the inaction of five big emitters (Germany, France, Brazil, Argentina and Turkey) is a violation of their children's rights.⁴⁷⁷

⁴⁷⁶ Katharine Murphy, 'Torres Strait Islanders take climate change complaint to the United Nations' *The Guardian* (London, 12 May 2019) <www.theguardian.com/australia-news/2019/may/13/torres-strait-islanders-take-climate-change-complaint-to-the-united-nations> accessed 12 May 2019.

⁴⁷⁷ Gabriella Borter, 'Young climate activists accuse world leaders of violating child rights through inaction' (Reuters, 23 September 2019) <www.reuters.com/article/us-climate-change-un-complaint/young-climate-activists-accuse-world-leaders-of-violating-child-rights-through-inaction-idUSKBN1W82AS> accessed 29 September 2019.

4.

CONCLUSION

Climate litigation is on the rise. All over the world citizens are trying to hold their governments accountable for their lack of effective action against global warming. In a lot of these cases, petitioners claim that this inaction amounts to a violation of the states' obligations under human rights law. In this thesis I examined which human rights obligations states exactly have in the context of climate change, and whether or not human rights law can be used successfully in these climate change cases.

It is clear that climate change can and will have a massive impact on the protection of human rights. The impact of climate change on human rights can be direct, but climate change can also act as a 'threat multiplier', and can affect human security. Furthermore, certain vulnerable groups, often those least responsible for the emission of greenhouse gases, feel the impact of climate change in the most severe way. This link between climate change and human rights has long been acknowledged on the UN level. Still, it is not completely clear yet what the exact human rights obligations of states are in the context of climate change.

We know that states have obligations under international human rights law to respect, protect and fulfil human rights in the context of climate change. While the specific obligations of a certain state can differ depending on which human rights treaties it has ratified, it is also clear that, in general, states must protect individuals against the foreseeable threats related to climate change and implement legal frameworks to this end. States must make sure that their climate policies themselves do not negatively impact human rights and need to have particular attention for members of vulnerable groups. Amongst different UN human rights bodies, there seems to be agreement that this entails an obligation to limit GHG emissions (the main cause of climate change). The OHCHR,

the Committee on Economic, Social and Cultural Rights and the latest Special Rapporteur on Human Rights and the Environment have all given clear statements in this regard. Other UN bodies, like UNEP, tend to focus more on an obligation of international cooperation instead. While the value of these statements stays limited because of their soft law status, they can be taken as evidence of actual or emerging international law. However, it is less clear if this obligation requires immediate implementation and to what extent states can be held legally responsible for violating this obligation. In this regard, environmental law instruments, like the UNFCCC and the Paris Agreement, could be useful instruments of interpretation.

In the Netherlands, Pakistan and Colombia, we have seen that it is possible to hold a government accountable for the lack of climate action based on human rights provisions. In other instances, like the KlimaSeniorinnen against Switzerland and the People's Climate Case against the EU, procedural hurdles proved to be too difficult to overcome. The success of the Urgenda case can thus definitely not just be copied in other jurisdictions.

Based on these abovementioned cases, we can list some aspects that can help to successfully hold a government accountable for not doing enough to limit GHG emissions. First, lenient national provisions on standing and justiciability in general will make it easier for applicants to get their case to the merits stage. Some jurisdictions allow class actions where people can sue based on injuries that are general to the public, as was the case in the Urgenda case. Strict admissibility rules on the other hand, like the ones at the EU Court, will make it a lot harder to be successful. Second, cases are more likely to be fruitful when the steps the government is taking to combat climate change are clearly insufficient or even non-existing. Sometimes national climate laws can serve as a basis for litigation and provide a clear reference framework against which to compare the steps that have been taken. In Pakistan the government was not implementing its own climate policies, for example, and in Colombia the government was not on its way to meet its own deforestation targets. On the contrary, it will be more difficult to successfully sue a government when the steps they have taken are in line with these national climate laws or with their commitments under the Paris Agreement. Furthermore, if claimants have suffered specific individual harm already (their house was destroyed because of floods, their harvest is failing because of droughts, etc) it will be easier

for courts to establish a direct link between this harm and the inaction of the government. This was the case in Pakistan, where the effects of climate change have already been devastating. Lastly, the changes of success will depend on which human rights provisions can be used. A constitutional right to a healthy environment, as exists in Colombia, for example, can be an interesting basis for litigation.

Next to these aspects that will differ from jurisdiction to jurisdiction, a lot will depend on whether or not the judge can (and is willing to) interpret human rights provisions in a progressive way. In the Colombia case, the court recognised that future generations, and even nature itself, can be subjects of rights. In the *Juliana* case, the judge reframes the fundamental rights at issue, to a 'right to a climate system capable of sustaining human life'. In *Urgenda*, the Court of Appeal deems that climate-change related (future) harms can fall within the scope of application of articles 2 and 8 of the ECHR, and that they can directly affect those rights. This is for sure a progressive interpretation that is different from the more traditional approach of the ECtHR in the *Kyrtatos* case. Based on the knowledge brought together in this thesis, this progressive interpretation can be justified. The risks posed by climate change are of a very different nature from the deterioration of a physical environment in general, crucial rights like the right to life are at stake, and judges must provide effective protection against these human rights harms.

Getting everyone on board with this progressive interpretation will be a big task for the international human rights community. There is a clear need to further clarify the exact human rights obligations of states in the context of climate change. It will be crucial to refine whether the obligation to reduce GHG emissions is an obligation of progressive realisation, and what then the minimum level of action is, or if it requires immediate implementation. The levels established within environmental law agreements like the Paris Agreement could be used as a minimum level of action in this regard. Looking at the bigger picture, it seems very clear: climate change has a massive impact on a wide range of human rights, emitting less GHG is the main solution for climate change, and thus governments should be obliged to limit their GHG emissions, at least to a level as established in international environmental agreements. When looking closer, multiple legal difficulties remain however, and the current human rights mechanisms are not exactly built to deal with these kinds of situations. The human rights community must therefore

develop a better argumentation as to why climate-change related harms are inherently different from general environmental harms, and how this justifies a progressive interpretation of human rights obligations.

By examining what (substantive) human rights obligations states have in the context of climate change, and whether or not these obligations can be successfully used in courts, I wanted to find out if we can claim that our fundamental rights are violated if our governments do nothing (or not enough) to mitigate the effects of climate change, and how they can be held accountable for that. My conclusion is that there is growing consensus on the fact that there is a human rights obligation to limit GHG emissions. Still, this only has soft law status, and the exact implications of this obligation need to be fine-tuned. It is also possible to successfully use human rights law as the basis of a climate claim, but multiple difficulties remain. The success rate will depend on what the factual situation of the case is, what the national provisions on admissibility are, which human treaties the state has ratified and which constitutional provisions can be invoked. Even when these things work in the applicant's favour, it will often still be necessary for the judge to be a bit inventive.

This thesis can be a first step towards a more structured comparison of the use of human rights law within climate litigation. The verdict of many of the pending cases will allow a more in-depth and systematic analysis of this topic. After the current wave of national climate litigation, more complaints to regional human rights courts and international human rights systems can also be expected. The Torres Strait Islanders case at the Human Rights Committee will be very interesting in this regard. Finally, further research into the weaknesses of the current human rights mechanisms in the context of climate change will be crucial. We need to assess how existing human rights mechanisms can be adapted to better deal with the complex, collective and future damage of global warming.

We will not avert the dangers of climate change and protect the lives and rights of all people on our planet with climate litigation alone. It will be crucial that international organisations, governments, companies and individuals all take steps to reduce GHG emissions and work on a more sustainable future. Still, the importance of climate litigation cannot be underestimated. The Inuit case at the Inter-American Commission in 2005 was a complete novelty but drew attention to the problems of vulnerable people caused by climate change, and the responsibilities of states in this regard. The success of the Urgenda case at the lower

District Court amazed the world. While people did not believe that this case would survive an appeal, the Court of Appeal went the extra mile, claiming that the lack of climate action could amount to a human rights violation. A farmer in Pakistan and a group of young people in Colombia managed to force their governments to implement climate change action plans. All over the world, courts and governments are now obliged to think about the impacts of climate policies on human rights. Ordinary citizens sign up as co-plaintiffs and spread the word about the consequences of climate change. These cases can thus have a massive impact, even if its just symbolic.

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Global Campus Europe. The European Master's Programme in Human Rights and Democratisation (EMA)

EMA is a one-year intensive master's programme with participation of 41 prestigious universities representing all EU Member States. It is based on an action- and policy-oriented approach to learning and combines legal, political, historical, anthropological, and philosophical perspectives on the study of human rights and democracy with targeted skill-building activities. As a measure of its success, EMA has served as a model of inspiration for the establishment of EU-sponsored master's programmes in several other regions of the world, all of which are being coordinated and cooperate in the framework of the Global Campus of Human Rights.

The Global Campus Europe - EMA Awarded Theses

Each year the EMA Council of Directors selects five theses, which stand out not only for their formal academic qualities but also for the originality of topic, innovative character of methodology and approach, potential usefulness in raising awareness about neglected issues and capacity for contributing to the promotion of the values underlying human rights and democracy.

The present thesis - ***The Use of Human Rights Law in Climate Change Litigation. An Inquiry into the Human Rights Obligations of States in the Context of Climate Change; and the Use of Human Rights Law in Urgenda and other Climate Cases*** by Janne Dewaele and supervised by Claire Vial, Université de Montpellier - was submitted in partial fulfillment of the requirements for the European Master's Programme in Human Rights and Democratisation (EMA), coordinated by EIUC.

