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Human Rights and the Climate Crisis:
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Identifying Achilles' Heels: An Assessment of the Effectiveness of Human Rights Law in Climate Change Litigation

Abstract

Cases involving climate change have been litigated in the courts for some time but new directions and trends have started to emerge in recent years. Among these trends, the use of human rights law is gaining increasing importance as a means to hold government and corporations accountable for climate change harms. Although different scholars have highlighted the potential of using human rights arguments in climate change cases, there seems to be a limited understanding of their true effectiveness in shaping climate law and policies globally. The present article, drawing on a robust literature concerning the relationship between climate change and human rights looks towards this direction and is aimed particularly at establishing how human rights arguments have been used before the courts, identifying two main strategies and possible limitations in pursuing this kind of instrument in a climate change case. It attempts to identify and classify the ways in which human rights obligations are invoked by various plaintiffs before domestic courts with the ultimate aim of assessing the judges' receptivity to these kind of arguments. The ultimate goal is to provide a brief overview concerning the inherent difficulties in using human rights law when submitting a legal complaint about climate change that could constitute a starting point for further research on this topic.

Keywords

climate litigation; human rights; climate justice; European Convention on Human Rights; constitutional rights

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I. INTRODUCTION

Climate change is one of the most urgent and existential challenges facing humanity in our time. However, the international community seems to have failed to understand the devastating effects that climate change is likely to have (and indeed already have) on the environment and on the enjoyment of human rights. Last November, the United Nations Environment Programme (UNEP) released its tenth Emissions Gap Report, providing yet another “bleak” assessment of the large gap between what countries have committed to, in terms of future emission reductions, and what would be needed to meet the Paris Agreement targets¹. The day before the report was released, serious concerns were also voiced by the World Meteorological Organization (WMO) which stated that the concentration of climate-heating greenhouse gases has it a new record high². According to the WMO’s Greenhouse Gas Bulletin, since 1990, the increase of the so-called “long-lived” greenhouse gases levels has made the heating effect of the atmosphere 43% stronger; in this respect, carbon dioxide (CO₂) represents the largest contributor but the concentration of methane and nitrous oxide also rose in 2018³. Unfortunately, reports of this kind are now practically routine and they probably are the highest expression of the uncertainty surrounding the implementation and the effectiveness of the international climate change regime as a tool to solve the climate problem in time⁴. The continuing disappointing outcomes⁵ of the Conference of the Parties (COP) to the United

¹ See UN ENVIRONMENT, EMISSION GAP REPORT 2019, UNITED NATIONS ENVIRONMENT PROGRAMME (Nov. 2019) (finding that total greenhouse gas emissions have risen by 1.5 percent per year over the past decade, and that even if all current commitments made under the Paris Agreement were implemented, global temperatures would rise by 3.2°C).

² See Damien Carrington, *Climate-Heating Greenhouse Gases Hit New High*, *UN Reports*, THE GUARDIAN (Nov. 25 2019), <https://www.theguardian.com/environment/2019/nov/25/climate-heating-greenhouse-gases-hit-new-high-un-reports>.

³ WORLD METEOROLOGICAL ORGANIZATION, WMO GREENHOUSE GAS BULLETIN (GHG BULLETIN) - No. 15: THE STATE OF GREENHOUSE GASES IN THE ATMOSPHERE BASED ON GLOBAL OBSERVATIONS THROUGH 2018 (Nov. 2019) (finding that the concentration of methane has more than doubled compared to pre-industrial levels and that nitrous oxide emission levels are 23% higher than in 1750).

⁴ The Paris Agreement is the cornerstone of the international climate law regime and is the first climate treaty to engage the whole world imposing obligations on all parties to contribute to the global climate change response. See Conference of the Parties Twenty-First Session, U.N Framework Convention on Climate Change, *Paris Agreement*, U.N. Doc FCCC/CP/2015/10/Add.1, Annex (Dec. 12, 2015) [hereinafter Paris Agreement]. For a first, general overview of the provisions of the treaty see Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT’L L. 288 (2016); Annalisa Savaresi, *The Paris Agreement: a New Beginning?*, 34 J. ENERGY & NAT. RESOURCES L. 16 (2016). Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT’L & COMP. L.Q. 493, 502 (2016) (highlighting the bottom-up approach of the new climate treaty as opposed to the top down model of its predecessor, the Kyoto Protocol). The new approach adopted in the Paris Agreement allows the parties to the treaty to choose their respective contributions following a “nuanced” understanding of the concept of self-differentiation. For details see Christina Voigt & Felipe Ferreira, *Dynamic Differentiation’: The Principles of CBDR-RC, Progression and Highest Possible Ambition in the Paris Agreement*, 5 TRANSNAT’L ENV. L. 285 (2016).

⁵ The outcome of the last Conference of the Parties in Madrid (COP25) is the most recent example. See Sebastien Duyck & Erika Lennon, *A Process on the Brink of Collapse Confronts a World on the Move*, HEINRICH BÖLL STIFTUNG – THE GREEN POLITICAL FOUNDATION (Dec. 20, 2019), <https://www.boell.de/index.php/en/2019/12/20/process-brink-collapse-confronts-world-move>.

Nations Framework Convention on Climate Change (UNFCCC)⁶, the highly dubious effectiveness of some of legal mechanisms contemplated in the Paris Agreement⁷ and more broadly the challenges associated with the implementation of multilateral environmental agreements⁸, are all expressions of the urgent need of an “all-hands-on-deck” approach⁹ in the fight against climate change. Against this background, the use of other legal instruments and actors seems crucial. Thus this article focuses on the role of human rights law as tool to force states and corporate actors to take action to reduce emissions and more generally to bring about more ambitious climate protection measures in the context of the so-called climate change litigation cases. Litigation may be an avenue through which spur more climate action and produce the urgent solutions that all we need. In the wake of a clear failure of the international community to solve the climate crisis, courts action can assist efforts to reduce greenhouse gas emissions and adapt to climate change impacts and represents an alternative pathway emerging in the global climate governance¹⁰. Courts action might function as a valuable gap-filler in climate change policies¹¹. As noted by Tessa Khan “for as long as governance fail to take the steps necessary to avert dangerous climate change, courts can be expected to act as vital checks on political inaction”¹². In recent years there has been an exponential growth of climate change cases brought in more than twenty-nine countries across six

⁶ United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. (entered into force Mar. 21, 1994). The United Nations Framework Convention on Climate Change is the first climate treaty and marks the beginning of the efforts to address climate change at the international level. The central objective of the Convention is to stabilize greenhouse gas concentrations “at a level that would prevent dangerous anthropogenic interference with the climate system” (UNFCCC art. 2). The Convention does not impose legally binding emissions reductions targets, its role being limited to providing an overarching goal, general principles and a basis for developing further climate protocols. See generally David Freestone, *The United Nations Framework Convention on Climate Change: The Basis for the Climate Change Regime*, in THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 97 (Cinnamone P. Carlane et al eds., 2016).

⁷ See e.g. Romain Weikmans, Harro van Asselt & J. Timmons Roberts, *Transparency Requirements under the Paris Agreement and their (Un)likely Impact on Strengthening the Ambition of Nationally Determined Contributions (NDCs)*, CLIMATE POL’Y, (2019 forthcoming) (highlighting the difficulty in assessing and comparing progress made by Parties towards achieving their NDCs due to heterogenous, qualitative and conditional NDCs). Nationally Determined Contributions (NDC) are the heart of the Paris Agreement and represent each country’s efforts to reduce emissions. See *Paris Agreement*, supra note 4, art. 3.

⁸ See generally Jutta Brunnée, *Promoting Compliance with Multilateral Environmental Agreements*, in PROMOTING COMPLIANCE IN AN EVOLVING CLIMATE REGIME 38 (Jutta Brunnée et al eds., 2011)

⁹ Remi Moncel & Harro van Asselt, *All Hands on Deck! Mobilizing Climate Change Action beyond the UNFCCC*, 21 REV. EUR. COMP. & INT’L ENVTL. L. 163 (2012).

¹⁰ Harro Van Asselt, Michael Mehling & Clarisse K. Siebert, *The Changing Architecture of International Climate Change Law*, in RESEARCH HANDBOOK ON CLIMATE CHANGE MITIGATION LAW 3 (Geert Van Calster et al eds., 2015).

¹¹ See also Jolene Lin, *Litigating Climate Change in Asia*, 4 CLIMATE L. 140, 142 (2014) (the aim of litigation is “to plug the regulatory gap where possible...”) and Benjamin Ewing & Douglas A. Kysar, *Prods and Pleas: Limited Government in an Era of Unlimited Harm*, 121 YALE L. J. 350, 354 and 379 (stressing the “signaling” function of the courts through which they “prod” other government institutions to act).

¹² Tessa Khan, *How Climate Change Battles are Increasingly Being Fought, and Won, in Court*, THE GUARDIAN (Mar. 8, 2017), <https://www.theguardian.com/environment/2017/mar/08/how-climate-change-battles-are-increasingly-being-fought-and-won-in-court>.

continents as well as in regional and international fora¹³. Climate change litigation¹⁴ has been described as a “phenomenon that has unfolded with breathtaking speed”¹⁵ and “has been transformed from a creative lawyering strategy to a major force in transnational regulatory governance of [greenhouse gas] emissions”¹⁶. As of November 2019, almost 1300 climate lawsuits were identified¹⁷ with the US being at the center of the climate litigation “storm” with more than 1000 cases on the docket¹⁸, followed by Australia with 97 cases¹⁹. The majority of these cases have involved, for the most part, statutory law causes of action dealing mainly with government failures in taking into account climate change considerations in decision-making processes, often challenging the authorization of fossil fuel development projects and emissions standards²⁰. As part of this “first generation”²¹ climate lawsuits, the *Massachusetts v. Environmental Protection Agency*²² case is widely known as the first relevant regulatory case in the US where the applicants successfully challenged the decision of the US Environmental Protection Agency (EPA) not to regulate greenhouse gas emissions from motor vehicles under the Clean Air Act²³. Following this first wave of climate cases, scholarly literature concerning climate litigation has literally exploded²⁴ in an attempt to classify the different cases and strategies employed by the applicants as

¹³ The cases are tracked on the LSE Grantham Research Institute on Climate Change & the Environment and The Columbia Law School’s Sabin Center for Climate Change Law. For the present analysis the Sabin Center database has been used to track specifically rights based climate cases. See The Columbia Law School – Sabin Center for Climate Change Law & Arnold & Porter Kaye Scholer LLP, at <http://climatecasechart.com/?cn-reloaded=1> [hereinafter Sabin Center database].

¹⁴ The definition of climate change litigation has been the subject of fierce scholarly debate. Markell and Ruhl defined it as “any piece of federal, state, tribal, or local administrative or judicial litigation in which the party filings or tribunal decisions directly and expressly raise an issue of fact or law regarding the substance or policy of climate change causes and impacts”. See David Markell & J. B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual*, 64 FLA. L. REV. 15, 19 (2012).

¹⁵ Robert F. Blomquist, *Comparative Climate Change Torts*, 46 VAL. U. L. REV. 1053, 1053 (2012).

¹⁶ William C.G. Burns & Hari M. Osofsky, *Overview: The Exigencies that Drive Potential Causes of Action for Climate Change*, in ADJUDICATING CLIMATE CHANGE: STATE, NATIONAL, AND INTERNATIONAL APPROACHES 1 (William C.G. Burns & Hari M. Osofsky eds., 2009).

¹⁷ For a general overview see UN ENVIRONMENT & COLUMBIA UNIVERSITY, SABIN CENTER OF CLIMATE CHANGE LAW, THE STATUS OF CLIMATE CHANGE LITIGATION: A GLOBAL OVERVIEW, UNITED NATION ENVIRONMENTAL PROGRAMME 4 (May. 2017) available at <https://wedocs.unep.org/bitstream/handle/20.500.11822/20767/climate-change-litigation.pdf?sequence=1&isAllowed=y> (according to which the general increase of the number of climate lawsuits is largely attributable to the worsening climate conditions which make courts an attractive forum for drawing public attention to the climate change problem and the urgent need to tackle it).

¹⁸ See Sabin Center database, *supra* note 12, US Climate Change Litigation at <http://climatecasechart.com/us-climate-change-litigation/>.

¹⁹ For details of Australian climate cases see also the database of the University of Melbourne at <https://apps.law.unimelb.edu.au/climate-change/index.php#overview>.

²⁰ For an analysis of these cases see generally JAQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY (2015).

²¹ Jacqueline Peel, Hari M. Osofsky & Anita Foerster, *Shaping the 'Next Generation' of Climate Change Litigation in Australia*, 41 MELB. U. L. REV. 793 (2017) (discussing the new causes of action that have emerged worldwide in climate cases and their potential replicability in the Australian legal context as opposed to the traditional “first generation” forms of climate litigation in the Continent).

²² *Massachusetts v. Environmental Protection Agency*, 549 US 497 (2007).

²³ 42 U.S.C. §7401 et seq. (1970).

²⁴ The literature on the topic is vast: see e.g. Chris Hilson, *Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back in)*, in CLIMATE CHANGE: LA RISPOSTA DEL DIRITTO 421 (Fabrizio Fracchia & Massimo Occhiena eds., 2010); Navraj-Singh Ghaleigh, “Six Honest Serving Men”: *Climate Litigation as Legal Mobilization and the Utility of Typologies* 1 CLIMATE L. 31 (2010); Brian J. Preston, *Climate Change Litigation (Part 1)* 5 CARBON & CLIMATE L. REV. 3 (2011); Brian J. Preston, *Climate Change*

part of a broader framework of the polycentric climate governance²⁵. However, in recent years scholars have begun to focus on novel strategies to hold government and corporations accountable: among these strategies²⁶ the use of human rights law has emerged forcefully in different context and for different reasons. The present article, drawing on a robust literature concerning the relationship between climate change and human rights²⁷, looks towards this direction and is aimed particularly at establishing how human rights argument have been used before the courts, identifying two main strategies and possible limitations in pursuing this kind of instrument in a climate change case. If it is true that in strategic climate litigation claimants will always have to make choices about what legal avenues best serve their case for increasing the likelihood of success²⁸, an analysis of human rights arguments in climate cases seems crucial for evaluating their potential effectiveness as a tool to shape climate policies worldwide. The analysis also appears necessary given the paucity of literature on the subject²⁹ and the ever-increasing role that such arguments are playing in climate lawsuits³⁰. Against this background the article proceeds as follows: after a brief overview of the linkages between climate change and human rights obligations emerged at the international level (Section 2), the article attempts to identify and classify the ways in

Litigation (Part 2) 5 CARBON & CLIMATE L. REV. 244 (2011) Jolene Lin, *Climate Change and the Courts*, 32 LEGAL STUD. 35 (2012); Elizabeth Fisher, *Climate Change Litigation, Obsession and Expertise: Reflecting on the Scholarly Response to Massachusetts v. EPA*, 35 L. & POL'Y 236 (2013); Meredith Wilensky, *Climate Change in the Courts: An Assessment of Non-U.S. Climate Litigation* 26 DUKE ENVTL. L. & POL'Y F. 131 (2015); For more recent analyses see Joana Setzer & Mook Bangalore, *Regulating Climate Change in the Courts*, in TRENDS IN CLIMATE CHANGE LEGISLATION 175 (Alina Averchenkova et al eds, 2017).

²⁵ Jacqueline Peel, Lee Godden & Rodney J. Keenan, *Climate Change Law in an Era of Multi-level Governance*, 1 TRANSNAT'L ENV. L. 245 (2012).

²⁶ Other strategies include for example a new wave of litigation against major fossil fuels companies and the possibility to litigate climate change before international courts. For these trends see e.g. Geetanjali Ganguly, Joana Setzer & Veerle Heyvaert, *If at First You Don't Succeed: Suing Corporations for Climate Change* 38 OXFORD J. LEGAL STUD. 841 (2018) and Daniel Bodansky, *The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections* 49 ARIZ. ST. L.J. 689 (2017).

²⁷ See e.g. STEPHEN HUMPHREYS, HUMAN RIGHTS AND CLIMATE CHANGE (2009); John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163 (2009); Daniel Bodansky, *Introduction: Climate Change and Human Rights: Unpacking the Issues*, 38 GA. J. INT'L & COMP. L. 511 (2010); SIOBHAN MCINERNEY-LANKFORD, MAC DARROW & LAVANYA RAJAMANI, HUMAN RIGHTS AND CLIMATE CHANGE: A REVIEW OF THE INTERNATIONAL LEGAL DIMENSION (World Bank, 2011); S. ATAPATTU, HUMAN RIGHTS APPROACHES TO CLIMATE CHANGE: CHALLENGES AND OPPORTUNITIES (2016); ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE (Sebastien Duyck et al eds., 2018); Special Issue: *Implementing the Paris Agreement: Lessons from the Global Human Rights Regime*, 9 CLIMATE L. 159 (2019).

²⁸ Jacqueline Peel & Hari M. Osofsky, *Litigation as a Climate Regulatory Tool*, in INTERNATIONAL JUDICIAL PRACTICE ON THE ENVIRONMENT: QUESTION OF LEGITIMACY 311 (Christina Voigt ed., 2019).

²⁹ The present Author identifies just three articles dealing specifically with the subject: Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation*, 7 TRANSNAT'L ENV. L. 37 (2018); Abby R. Vollmer, *Mobilizing Human Rights to Combat Climate Change Through Litigation*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE, *supra* note 27 at 359; Annalisa Savaresi & Juan Auz, *Climate Change Litigation and Human Rights: Pushing the Boundaries* 9 CLIMATE L. 244 (2019). For a first introductory framework see however Marilyn Averill, *Linking Climate Litigation and Human Rights* 18 REV. EUR. COMP. & INT'L ENVTL. L. 139 (2009).

³⁰ At the time of writing, some Italian climate activists are planning a lawsuit based on human rights arguments to force the Italian government to adopt a stronger emissions reduction plan. Following the campaign launched by the Italian NGO Giudizio Universale the appeal will shortly be submitted before the Civil Court of Rome. See Kaitlin Sullivan, *In Italy, Activists Rally Support for Upcoming Climate Lawsuit*, CLIMATE LIABILITY NEWS (Jun. 6, 2019), <https://www.climateliabilitynews.org/2019/06/06/italy-climate-change-lawsuit/>.

which such obligations are invoked by various plaintiffs before domestic courts with the ultimate aim of assessing the judges' receptivity to these kind of arguments and eventually the limits embedded in this type of “human rights framing” (Section 3). In light of this, Section 3 specifically identifies two “human rights strategies” used by the plaintiffs and the possible limits (if any) associated with each of them; it highlights, in that connection, the relevance of using domestic constitutional rights provisions as an instrument to challenge government mitigation or adaptation failures and, with regard to European jurisdictions, the invocation of the rights guaranteed by the European Convention on Human Rights. The ultimate goal is to provide a brief overview concerning the inherent difficulties in using human rights law when submitting a legal complaint about climate change that could constitute a starting point for further research on this topic. In the face of a looming climate crisis, if the human rights paradigm still wants to play its part before domestic courts, the need to devise new legal avenues as well as new conceptual underpinnings that can ultimately overcome the drawbacks embedded in the application of human rights law in the context of climate change is more than ever necessary and the role of judges in this respect is crucial. Having said that, before proceeding, I should like to quickly make the following points. First, the present analysis does not intend to discuss in detail all the human rights climate cases that have been litigated so far or that are currently pending³¹, its aim being just to highlight some problematic issues that judges have encountered when called upon to adjudicate rights based climate claims and their receptivity to these arguments. Secondly, the analysis does not take into account the recent developments that are taking place at the international level³², particularly before the human rights treaty bodies. Despite the relevance of these monitoring bodies, the novelty of the claims put before them, the non-binding nature of their decisions and the complexity associated with their procedures makes such an analysis beyond the scope of this study.

³¹ An in-depth analysis of all these cases is provided elsewhere: See Fabrizio Vona, *Climate Change Litigation and Human Rights: An Assessment* (Ph.D dissertation, Sapienza University of Rome, forthcoming, 2021).

³² I am referring firstly to the complaint filed by eight Torres Strait islanders against the Australian government alleging that by failing to take action to mitigate or adapt to climate change Australia has violated the plaintiffs' human rights under the International Covenant on Civil and Political Rights. The complaint was lodged with the United Nation Human Rights Committee in May 2019 but, as far as to the author's knowledge, is not publicly available. See generally Miriam Cullen, *'Eaten by the Sea': Human Rights Claims for the Impacts of Climate Change Upon Remote Subnational Communities* 9 J. HUM. RTS. & ENV'T. 171 (2018). In September 2019 another complaint was filed before the United Nation Committee on the Rights of the Child by a group of 16 children from five continents, including Swedish climate activist Greta Thunberg, alleging that five countries violated their rights by not doing enough to address the climate crisis. See Karen Savage, *Thunberg, 15 Kids Petition UN to Force Countries to Fight Climate Change*, CLIMATE LIABILITY NEWS (Sept. 23, 2019) <https://www.climateliabilitynews.org/2019/09/23/greta-thunberg-un-convention-child-rights/>. See also Stephan Gerbig, *Thank you, Greta & Friends!*, VÖLKERRECHTSBLOG – INTERNATIONAL LAW & INTERNATIONAL LEGAL THOUGHT (Oct. 2, 2019) available at <https://voelkerrechtsblog.org/thank-you-greta-friends/> (providing a first overview of the procedural aspects of the case).

II. CLIMATE CHANGE AND HUMAN RIGHTS OBLIGATIONS: AN INEXTRICABLE NEXUS

There is now little doubt that climate change is having and will continue to have an impact on a wide range of human rights. Climate change threatens several human rights recognized under international law instruments including the rights to life, liberty, security³³, health and a good standard of living³⁴, food³⁵ and subsistence³⁶. The devastating impacts of climate change have started to become manifest in various parts of the world with increasing storm surges, droughts and wildfires. As temperatures rise, problems such as vector bleeding and coral bleaching are aggravated and extreme weather events could cause massive displacements of people. Climate change is contributing to the degradation of natural resources that millions of people rely on for their livelihood and well-being; this include declining freshwater resources that are suitable for drinking and the degradation of marine ecosystems including fisheries. Against this background, in the last decade, discussions concerning the relationship between climate change and human rights law have started to emerge forcefully in the scholarly literature³⁷. Humphreys in one of his first study on the topic stressed the fact that “[h]uman rights occupy much of the space of justice discourse and therefore represent an essential term of reference to address justice and equity questions in the context of climate change”³⁸. Starting with 2008, the HRC has also increasingly devoted attention to the issue; over the years a series of HRC resolutions have been adopted³⁹, highlighting the potential of human rights obligations to “inform and strengthen” climate change law by “promoting policy coherence, legitimacy

³³ International Covenant on Civil and Political Rights, arts. 6, 9(1), *adopted* Dec. 19, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368 [hereinafter ICCPR].

³⁴ International Covenant on Economic, Social and Cultural Rights arts. 11-12, *adopted* Dec. 16, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 [hereinafter ICESCR].

³⁵ *Id.* art. 11.

³⁶ *Id.* art. 1(2).

³⁷ *See supra* note 27. This “scholarship explosion” was probably the result of the efforts promoted by small island developing states which in 2007, spearheaded by the Maldives, convinced the Human Rights Council (HRC) to direct the Office of the High Commissioner on Human Rights (OHCHR) to undertake a study on the relationship between human rights and climate change. In its 2009 report, the OHCHR confirmed that climate change impacts trigger a number of human rights violations. *See* Office of the U.N. High Comm’r for Human Rights, Rep. on the Relationship Between Climate Change and Human Rights, U.N. Doc. A/HRC/10/61 (Jan. 15 2009). *See also* John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENVTL. L. REV. 477, 482-484 (2009) (discussing the Maldives’ role in linking climate change and human rights at the UN).

³⁸ Stephen Humphreys, *Competing Claims: Human Rights and Climate Harms* in HUMAN RIGHTS AND CLIMATE CHANGE 37 *supra*, note 27 at 45.

³⁹ Human Rights Council Res. 7/23, U.N. Doc. A/HRC/RES/7/23 (Mar. 28, 2008); Human Rights Council Res. 10/4, U.N. Doc. A/HRC/RES/10/24 (Mar. 25, 2009); Human Rights Council Res. 18/22, U.N. Doc. A/HRC/RES/18/22, (Sept. 30, 2011); Human Rights Council Res. 26/27, U.N. Doc. A/HRC/RES/26/27, (Jun. 27, 2014); Human Rights Council Res. 29/15, U.N. Doc. A/HRC/RES/29/15, (Jul. 2, 2015); Human Rights Council Res. 32/33, U.N. Doc. A/HRC/RES/32/33, (Jul. 1, 2016); Human Rights Council Res. 34/20, U.N. Doc. A/HRC/RES/34/20, (Mar. 24, 2017); Human Rights Council Res. 35/20, U.N. Doc. A/HRC/RES/35/20, (Jun. 22, 2017); Human Rights Council Res. 38/4, U.N. Doc. A/HRC/RES/38/4, (Jul. 5, 2018); Human Rights Council Res. 41/21, U.N. Doc. A/HRC/RES/41/21, (Jul. 12, 2019).

and sustainable outcomes”⁴⁰. With his reports, Professor John Knox, who served as the first UN Special Rapporteur on human rights and the environment between 2012 and 2018 has made an important contribution to the field⁴¹. In 2016, he released a dedicated report on climate change which delineated the framework of human rights obligation relating to climate change, mapping state practices⁴². Focusing on the states’ human rights obligations in the context of climate change, Knox identified procedural and substantive obligations. Procedural obligations require that states assess the impacts of both climate change and of measures adopted to tackle it, making public the information collected⁴³. Equally states have the obligation to provide for and facilitate public participation in decision-making over action adopted in response to climate change⁴⁴ and the obligation to provide access to effective remedies for climate-related human rights violations⁴⁵. Substantive obligations required that states take both preventive measures to avert the impact of climate change on human rights and remedial measure to address such impacts once they occurred⁴⁶. Such obligations require taking action to reduce emissions and to adapt to foreseeable changes such as rising sea levels and floods. States must engage in international cooperation to deal with the transboundary nature of climate change⁴⁷. Once substantive standards have been adopted, states should ensure their effective enforcement against both private and public actors. Despite the fact that states have some discretion to strike a balance between legitimate interests, Knox highlights that the balanced reached cannot be ‘unreasonable or result in unjustified, foreseeable infringements of human rights’⁴⁸. Factors relevant to the assessment of a correct balance include: whether the decision-making process satisfied the procedural obligations described above; whether its outcome is consistent with all relevant national and international standards; whether the substantive standards are non-discriminatory and not retrogressive. Moreover states owe specific obligations to those most at risk from climate harms⁴⁹. In March 2018 Professor Knox, in his last report to the HRC,

⁴⁰ *Id.* That expression is repeated in almost all the resolutions. See generally Felix Kirchmeier & Yves Lador, *From Copenhagen to Paris at the UN Human Rights Council: When Climate Change Became a Human Rights Issue*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 145, *supra* note 27 (providing a comprehensive analysis of the work of the HRC on the issue).

⁴¹ Knox’s reports have mapped and interpreted state practice concerning human rights and the environment, clarifying the contents of states’ human rights obligations and identifying good practices. See John H. Knox, *The United Nations Mandate on Human Rights and the Environment*, 2 CHINESE J. ENVTL. L. 83 (2018).

⁴² Human Rights Council, John H. Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016).

⁴³ *Id.*, §§ 54-55.

⁴⁴ *Id.*, § 59.

⁴⁵ *Id.*, § 63.

⁴⁶ *Id.*, § 33.

⁴⁷ *Id.*, §§ 43-44.

⁴⁸ *Id.*, § 67.

⁴⁹ *Id.*, § 81.

summarized all these obligations in a broader perspective adopting the ‘Framework Principles on Human Rights and Environment’⁵⁰. In recent years human rights bodies have also started to monitor and sanction human rights violations associated with climate change impacts⁵¹. All these developments are just few examples but maybe the clearest expression of the fact that states and international human rights mechanisms acknowledge the relevance of human rights law in the fight against climate change⁵² and that states have clear obligations in that respect. However how such obligations can be enforced before a court of law is far from clear.

III. HUMAN RIGHTS LAW IN CLIMATE CHANGE LITIGATION

Writing in 2012, Hall and Weiss stressed that human rights provide ‘a tangible legal framework for analyzing state actions that lead to climate change’⁵³. However, the 2009 report of the OHCHR warned that ‘while climate change has obvious implications for the enjoyment of human rights, it is less obvious whether, and to what extent, such effects can be qualified as human rights violations in a strict legal sense’⁵⁴. More specifically the report stated that ‘it would be virtually impossible to disentangle the complex casual relationships linking emissions from a particular country to a specific effect’ and noted that the ‘adverse effects of global warming are often projections about future impacts, whereas human rights violations are normally established after the harm has occurred’⁵⁵. In short, the application of states’ human rights obligations in the context of climate change face a number of obstacles associated with the global nature of the phenomenon. In particular, an individual who wants

⁵⁰ Human Rights Council, John H. Knox, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment: Framework Principles on Human Rights and Environment, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018).

⁵¹ For a recent review see CENTRE FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL), STATES’ HUMAN RIGHTS OBLIGATIONS IN THE CONTEXT OF CLIMATE CHANGE 2019 UPDATE (Mar. 2019) available at <https://www.ciel.org/wp-content/uploads/2019/03/HRTB-Feb.-2019-update-2019-03-25.pdf>.

⁵² Relevant developments have also occurred under the auspices of the UNFCCC where the human rights dimension of climate change has started to figure prominently during the climate negotiation that led to the adoption of the Paris Agreement. While the Paris Agreement did not mention human rights in its operative provisions, it is the first international environmental treaty that explicitly reference human rights. Its preamble specifies that Parties “... should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity” (Paris Agreement, *supra* note 4, Preamble, recital 11). For a detailed analysis of the intense lobbying efforts in the lead-up to the Paris negotiations see Sebastien Duyck, *The Paris Climate Agreement and the Protection of Human Rights in a Changing Climate* 26 Y.B. INT’L ENVTL. L. 3 (2015). See also John H. Knox, *The Paris Agreement as a Human Rights Treaty*, in HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT (Dapo Akande et al eds., forthcoming 2020) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3192106.

⁵³ Margaux J. Hall & David C. Weiss, *Avoiding Adaptation Apartheid: Climate Change Adaptation and Human Rights Law*, 37 YALE J. INT’L L. 309, 311 (2012).

⁵⁴ OHCHR Report, *supra* note 37, § 70. In 2010 Bodansky noted that ‘legally, climate change no more violates human rights than does a hurricane, earthquake, volcanic eruption, or meteor impact. See Daniel Bodansky, *Introduction: Climate Change and Human Rights: Unpacking the Issues*, 38 GA. J. INT’L & COMP. L. 511, 519 (2010).

⁵⁵ See OHCHR Report, *supra* note 37, § 70.

to pursue a rights-based climate claim is forced to deal with a series of challenges that can be summarised as follows: first he needs to establish a relationship between a country's or company's greenhouse gas emissions, or a state failure to implement adaptation policies and the resulting climate change impacts which in turn adversely affect his human rights; Secondly, the typical reactive nature of human rights law means that it is difficult for an individual to establish a human rights violation in the context of a future and eventual damage associated with a specific climate impact not yet occurred. Thirdly, the difficulty of applying rights protections extraterritoriality in terms of holding governments and corporations accountable for actions that harm the individual who is located outside the state's territory.⁵⁶ Despite these apparently insurmountable obstacles, human rights arguments are increasingly being used in climate lawsuits. After all, reliance on rights to secure environmental outcomes is not a new phenomenon⁵⁷ but litigating rights in the context of climate change is a relatively new trend⁵⁸. At the time of writing the database of the Sabin Center lists a total of 26 lawsuits against governments in non-US jurisdictions that make some reference to human rights⁵⁹. These include cases argued exclusively on human rights grounds⁶⁰

⁵⁶ See Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIRE'S CLIMATE CHANGE e580, 10 (2019) (highlighting the 'causality challenge', the 'cross-temporal challenge' and the 'extra-territorial challenge').

⁵⁷ See e.g. Dina Shelton, *Human Rights, Environmental Rights, and the Right to Environment* 28 STAN. J. INT'L L. 103 (1992); ALAN E. BOYLE & MICHAEL R. ANDERSON, *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* (1998); DONALD K. ANTON & DINA L. SHELTON, *ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS* (2011); RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT (Anna Grear & Louise J. Kotzè eds., 2015). At the international level, the European Court of Human Rights has developed a substantial body of case law interpreting substantive human rights guarantees as incorporating environmental rights. See Jonathan M. Verschuuren, *Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe*, in REGIONAL ENVIRONMENTAL LAW: TRANSREGIONAL COMPARATIVE LESSONS IN PURSUIT OF SUSTAINABLE DEVELOPMENT 363 (Werner Sholtz & Jonathan M. Verschuuren eds., 2015). At the national level south asian judiciaries have been particularly active in interpreting the right to life as including a right to a healthy environment. See Sumudu Atapattu, *The Role of Human Rights Law in Protecting Environmental Rights in South Asia*, in CLOSING THE RIGHTS GAP: FROM HUMAN RIGHTS TO SOCIAL TRANSFORMATION 105 (Haglund LaDawn & Robin Stryker eds., 2015).

⁵⁸ The Inuit petition to the Inter-American Commission on Human Rights is generally regarded as the first attempt to use human rights law before an international court. The petitioners claimed that the United States was responsible for rights violations brought about by climate change in the Arctic and requested the court to recommend that the country adopt mandatory measures to limit its GHG emissions. They also requested the establishment and implementation of a plan to protect Inuit culture and more generally to cooperate in global efforts to tackle climate change. Despite the rejection of the petition, scholars noted that it 'probably has had some indirect regulatory influence, particularly in terms of changing norms and values through increasing the public profile of Arctic climate change impacts'. See Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia* 35 LAW & POL'Y 150, 160 (2013). For a detailed analysis see Hari M. Osofsky, *The Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights*, 31 AM. INDIAN L. REV. 675 (2007).

⁵⁹ The present article does not analyse some rights based climate cases that have emerged in the United States as part of the so-called atmospheric trust litigation. These cases are part of an American campaign which seeks to extend to include the planet's atmosphere in the public trust doctrine. The public trust doctrine is a common law doctrine which has its roots in Roman law according to which the state, as a trustee, holds natural resources in trust and is required to utilize these resources in a manner that is in the interest of the general public. See generally Mary C. Wood & Charles W. Woodward IV, *Atmospheric Trust Litigation and the Constitutional Right to a Healthy Climate System: Judicial Recognition at Last* 6 WASH. J. ENVTL. L. & POL'Y 633 (2016). Despite the fact that public trust cases do not raise human rights claims it is suggested that 'there is a clear relationship between governments' public trust obligations which require the maintenance and preservation of common environmental resources for the benefit of current and future generations and governments' human rights obligations'. See THE STATUS OF CLIMATE CHANGE LITIGATION, *supra* at 23.

⁶⁰ See e.g. Asghar Leghari vs. Fed'n of Pakistan, (2015) W.P. No. 25501/2015 (Lahore High Court) (Pak).

and others in which claimants use human rights as an instrument to bolster other legal arguments often grounded in various statutory provisions⁶¹. Rights based climate litigation can be considered as part of the so-called proactive climate litigation⁶² in which civil-society actors generally start proceedings in order to spur political action for the adoption of more stringent climate regulation. However, as evidenced by the climate cases litigated so far, human rights arguments are being used for different purposes and in various context. In the famous *Urgenda* case⁶³, for example, the applicants claimed under the European Convention on Human Rights that the national government had not taken sufficient measures to prevent climate change by not adopting a sufficiently ambitious medium term target. In the case of *Leghari v. Federation of Pakistan*⁶⁴, Ashar Leghari, a Pakistani farmer, initiated a lawsuit arguing that inaction and delay by the federal and provincial governments in implementing adaptation laws violated his constitutional rights to life and dignity. In *Future Generations v. Ministry of the Environment*⁶⁵, a youth group invoked constitutionally recognized rights to a healthy environment, health, food, water and life, arguing that the government's inaction with regard to deforestation in the Amazon region contributed to a significant extent to the increasing of greenhouse gas emissions, causing climate change. In a Norwegian lawsuit⁶⁶, Greenpeace and Nature and Youth sued the national government seeking review of the government's decision to grant oil drilling licenses in the Arctic, arguing that petroleum exports, even though burnt abroad, contribute significantly to climate change and constitute a violation of the right to a healthy environment granted by the Norwegian Constitution. In the case of *EarthLife Africa Johannesburg v. Minister of Environmental Affairs*⁶⁷, the petitioners challenged a coal-fired power plant on climate change grounds; EarthLife Africa appealed the grant of authorization issued by the Minister of the Environment to the Thabametsi Power Company, stating that climate change impact assessment was mandatory before issuing an environmental authorization for a new coal-fired power station. The African NGO contended that the EIA legislation at issue

⁶¹ *EarthLife Africa Johannesburg v. Minister of Environmental Affairs*, 2 All SA 519 (GNP 2017) (S. Afr).

⁶² See Hilson, *supra* note 24.

⁶³ Hof Den Haag 09 oktober 2018, ECLI:NL:GHDHA:2018:2610, (Stichting Urgenda/Nederlanden) (Neth.), [hereinafter *Urgenda II*] translation at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>.

⁶⁴ Leghari, *supra*, note 60.

⁶⁵ Corte Suprema de Justicia [C.S.J.] [Supreme Court], Sala Civil abril 5, 2018, M.P.: Luis Armando Tolosa Villabona, STC4360-2018 (Colom). For an unofficial english translation of relevant excerpts from the decision, see *Future Generations v. Ministry of the Environment and Others*, Sabin Center Database, *supra* note 12, <http://climatecasechart.com/non-us-case/future-generation-v-ministry-environment-others/>.

⁶⁶ Oslo Tingrett [Oslo Dist. Ct.] Jan 4, 2018, Greenpeace Nordic Ass'n v. Ministry of Petroleum & Energy, No. 16-166674TVI-OTIR/06 (Nor), translation at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180104_16-166674TVI-OTIR06_judgment-2-pdf.

⁶⁷ *EarthLife Africa*, *supra* note 61.

should be interpreted in light of section 24 of the South African Constitution which guarantees a right to a healthy environment. These examples show that there are basically two ways of articulating human rights arguments in a climate case: first applicants may complain about the fact that there has been a state's failure to act, for example by not adopting a sufficiently ambitious climate policy that results in a human rights violation. Secondly applicants may oppose the granting of an authorization or licenses to extract fossil fuels or aimed at allowing deforestation which ultimately leads to a human rights violation. More broadly, a variety of human rights norms are invoked in climate litigation and jurisdictions differ considerably as to their methods of interpretation of these norms. The following paragraphs describe briefly two main ways through which human rights norms are used in a climate lawsuit, focusing on their potential and possible limitations.

A. A POSITIVE OBLIGATION TO PREVENT CLIMATE CHANGE: THE ROLE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The decision in *Urgenda v. The Netherlands* by the Hague Court of Appeal on 9 October 2018⁶⁸ has arguably been the first and most successful of the recent climate change cases drawing on international human rights standards⁶⁹. The case concerned the claim of a group of private petitioners represented by Urgenda, a Dutch citizens' non-governmental organization whose aim is to strive for a fast transition towards a sustainable society. The applicants asserted that the Dutch government has acted unlawfully towards Urgenda because of its failure to commit to a more stringent emission reduction target so that the cumulative volume of Dutch greenhouse gas emissions would have been reduced by at least 25% relative to 1990 levels, by the end of 2020. After a thorough assessment of the available scientific evidence and the internationally agreed temperature goal of the Paris Agreement, the Court of Appeal upheld the order issued by the Hague District Court⁷⁰ requiring the Dutch

⁶⁸ *Urgenda II*, *supra* note 63.

⁶⁹ It has been described as 'the most important judicial decision yet on the application of human rights law to climate change'. See John Knox, Former Special Rapporteur on Human Rights and Environment, @JohnKnox, TWITTER (Oct. 9, 2018). The decision has received a great deal of attention amongst scholars: see e.g. Jonathan M. Verschuuren, *The State of the Netherlands v Urgenda Foundation: The Hague Court of Appeal Upholds Judgment Requiring the Netherlands to Further Reduce its Greenhouse Gas Emissions* 28 REV. EUR. COMP. & INT'L ENVTL. L. 94 (2019); Benoit Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague (9 October 2018)* 8 TRANSNAT'L ENV. L. 167 (2019). The judgment has been recently upheld by the Dutch Supreme Court: see Isabella Kaminski, *Historic Urgenda Climate Ruling Upheld by Dutch Supreme Court* CLIMATE LIABILITY NEWS (Dec. 20, 2019) <https://www.climateliabilitynews.org/2019/12/20/urgenda-climate-ruling-netherlands-supreme-court/>.

⁷⁰ Rb Den Haag 24 juni 2015, ECLI:NL:RBDHA:2015:7196, (Stichting Urgenda/Nederlanden) (Neth.), translation at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>. See Eleanor Stein & Alex G. 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* 13 MCGILL J. SUST. DEV. L. 304 (2017).

Government to reduce its greenhouse gas emissions by at least 25% by 2020. However, contrary to the District Court's verdict, the Hague Court of Appeal based the decision on different reasoning, concluding that the Dutch government's current actions to combat climate change are not sufficiently ambitious in the light of the state's human rights obligations under Article 2 (right to life) and 8 (right to respect for private and family life) as enshrined in the European Convention on Human Rights⁷¹ and as such a duty of care followed from these provisions. Particularly interesting for our purposes is the approach taken by the court in extending the environmental jurisprudence of the European Court of Human Rights (ECHR) to cases concerning future and abstract harms even though the ECHR itself has not yet ruled on climate change issues. The issue can be summarized as follows: is it possible to apply the environmental jurisprudence of the ECHR where there are no occurrences of rights' violations against which assess the action and omissions of the state? As noted '[c]ourts are generally not equipped to deal with predictions of future injuries, except where the harm is expected to be quite imminent⁷². As *Urgenda*, most of rights based climate cases involve indefiniteness which seems not to fit the circumstances in which the environmental jurisprudence of the ECHR has evolved⁷³. Moreover climate change is not a problem that affects single individuals or a specific group of people in the context of an industrial accident or regarding one particular polluting plant⁷⁴. However, a close analysis of the 'green' jurisprudence of the ECHR⁷⁵ reveals that the 'human rights reasoning' of the *Urgenda* appeal decision is not incompatible with the case law of the ECHR. First, it is worth noting that the environmental jurisprudence of the Court is not necessarily restricted to cases where the material harm has already occurred but also to situations where there is a risk of exposure to such harm. For example in *Brândușe v. Romania*⁷⁶, a prison inmate complained of the risk to which he was exposed for being incarcerated in a prison located in close proximity to a landfill site. Despite the inmate suffering no physical harm, the Court highlighted the importance of disclosure of information which

⁷¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221. The Court of first instance had ruled that the European Convention was not directly applicable to establish a duty of care and based its reasoning on tort law arguing that the state had acted negligently towards its citizens.

⁷² See Averill, *supra* note 29 at 141.

⁷³ See Önerlydiz v. Turkey, 2004-XII Eur. Ct. H. R. 1, 115 (concerning a methane explosion on a rubbish tip which killed nine persons who lived near the area).

⁷⁴ See e.g. Lopez Ostra v. Spain, App. No. 16798/90, 20 Eur. H. R. Rep. 277 (1994). In that sense see also Ingrid Leijten, *Human Rights v. Insufficient Climate Action: The Urgenda Case* 37 NETH. Q. HUM. RTS. 112, 114 (2019) (arguing that '[b]esides dealing with future events [climate change cases] neither concern one particular plant, airport, or activity, nor a specific risk such as the likely flooding of a particular area involving a somewhat clear group of potential victims').

⁷⁵ Alan Boyle, *Human Rights and the Environment: Where Next?* 23 EUR. J. INT'L L. 613 (2012).

⁷⁶ *Brândușe v. Romania*, App. No. 6586/03 Eur. Ct. H. R. (2009).

would allow the applicant to assess the environmental risk posed by the landfill and condemned the Romanian government for violating Article 8⁷⁷. Similarly in *Tâtar v. Romania*, the Court highlights that when individuals are exposed to material risks arising from both industrial activities and natural hazards states have the obligations to put in place a legislative and administrative framework that regulate the licensing, start-up, operation and control of the hazardous activity and must include appropriate public surveys and studies allowing the public to assess the risks and effects associated with the relevant activities⁷⁸. This is a significant aspect because it clearly shows that the application of human rights law in environmental cases is not exclusively reactive⁷⁹. Therefore, according to the jurisprudence of the ECHR, states are under a positive obligation to take reasonable measures to prevent the identified risk from occurring⁸⁰. The fact that in the *Urgenda* case, the Hague Court of Appeal applied this kind of jurisprudence to the global problem of climate change does not seem to be particularly problematic. The risks caused by climate change are sufficiently real and immediate to bring them within the scope of Article 2 and 8. The Court of Appeal concluded stating that ‘it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generations of citizens will be confronted with loss of life and/or a disruption of family life’⁸¹. However, contrary to this line of reasoning, other courts express doubts about the relevance of the European Convention on Human Rights and are not inclined to find rights violations. In this regard the recent judgment in *Friends of the Irish Environment v. Ireland*⁸² is relevant. In that case, Friends of the Irish Environment argued before the High Court that the Irish government’s approval of the National Mitigation Plan (‘the Plan’) in 2017 was inconsistent with Ireland’s Climate Action and Low Carbon Development Act 2015 (‘the Act’), the Constitution of Ireland, and obligations under the European Convention on Human Rights (Articles 2 and 8). According to the NGO, the Plan violates human rights because it is not designed to achieve substantial short-term emissions reductions. On September 19, 2019, the High Court rendered its decision concluding that the government had acted appropriately, exercising its policy making discretion

⁷⁷ See also *Di Sarno and Others v. Italy*, App. No. 30765/08 Eur. Ct. H. R. (2012) (‘Article 8 may be relied on even in the absence of any evidence of a serious danger to people’s health’ § 108).

⁷⁸ *Tâtar v. Romania*, App. No. 67021/01 Eur. Ct. H. R. (2009) (§ 88).

⁷⁹ See Ole W. Pederson, *The European Court of Human Rights and International Environmental Law*, in *THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT* 86, 89 (John H. Knox & Ramin Pejan eds. 2018).

⁸⁰ See also *Fadeyeva v. Russia*, 2005-IV XII Eur. Ct. H. R. 255, (assessing whether the state could reasonably be expected to act in order to prevent an infringement of the applicant’s rights, § 89).

⁸¹ *Urgenda II*, *supra*, note 63, § 45.

⁸² *Friends of the Irish Environment v. The Government of Ireland & Ors* (2019) IEHC 747 (H. Ct) (Ir.).

afforded by the Act and that since the Plan was the first of many steps towards Ireland’s mid-century climate goals, it could not find that it constitutes a violation of human rights law⁸³. The Court ruled that ‘it cannot be concluded that ‘it is the Plan which places these rights at risk’⁸⁴ and that it is ‘but one, albeit extremely important, piece of the jigsaw’⁸⁵. In considering the alleged breach to Article 8 of the Convention, the Court stated that one of the factors that determines a violation of Article 8 rights is the legality of the impugned legislation⁸⁶. These statements are particularly relevant from a human rights perspective because a careful reading of the decision makes it clear that the lack of specificity in the Plan precluded it from constituting an *ultra vires* policy (as previously stated in the judgment), ensuring its lawfulness. Noteworthy is also the fact that the Court, unlike *Urgenda*, did not discuss the relevance of the environmental jurisprudence of the ECHR and its applicability to climate change. The Court simply stated that the *Urgenda* case considered an issue (climate change) that the ECHR has not yet addressed⁸⁷ highlighting that there’s no jurisprudence of the ECHR specifically on positive human rights obligations in the context of climate change. In the Ireland climate lawsuit, the human rights dimension of the case is probably hidden behind questions concerning the government’s discretion and the margin of appreciation which in the end prevent a thorough analysis of whether human rights constitute an independent source of obligations⁸⁸. A comparison between *Urgenda* and the Irish Climate case, makes it clear that invoking the European Convention in a climate case is not a guarantee of success and that litigation outcomes based on it largely depend on a number of factors among which the nature of the contested policy and the judges’ receptivity to human rights arguments are crucial⁸⁹.

⁸³ See Michael Burger & Hillary Aidun, *The Significance of the High Court’s Decision in Friends of the Irish Environment v. Ireland*, CLIMATE LAW BLOG – SABIN CENTER FOR CLIMATE CHANGE LAW (Oct. 2, 2019), <http://blogs.law.columbia.edu/climatechange/2019/10/02/the-significance-of-the-high-courts-decision-in-friends-of-the-irish-environment-v-ireland/>.

⁸⁴ Friends of the Irish Environment CLG, *supra* at 133.

⁸⁵ *Id.*

⁸⁶ *Id.* at 144.

⁸⁷ *Id.* at 139.

⁸⁸ See Suryapratim Roy, *Is Climate Change an Issue of Human Rights?* THE IRISH TIMES (Oct. 15, 2019) (highlighting that ‘The mantra underlying the judgment is non-interference with government discretion under Irish constitutional law, which is found to be exactly on par with the “margin of appreciation” in ECHR law, where states get a wide “margin” in fulfilling their positive obligations’). <https://www.irishtimes.com/opinion/is-climate-change-an-issue-of-human-rights-1.4050155>.

⁸⁹ Note that the potential for a successful climate claim based on the European Convention also depends on others factors, including how the Convention is implemented in European state parties or whether NGO petitioners can be considered victims or make claims of injury to human rights. See generally Peel & Osofsky, *supra*, note 29 at 64.

B. CONSTITUTIONAL RIGHTS CLAIMS AND CLIMATE CHANGE

Domestic constitutional rights litigation represents another trend grounded in the human rights paradigm that has recently emerged as tool in the fight against climate change. An increasing number of courts have turned to constitutional rights, including the rights to life and health, as well as environmental rights, to advance climate justice. In particular, judiciaries around the world have actively developed environmental rights leading to the emergence of the so-called ‘global environmental constitutionalism’⁹⁰. In this regard, recent years have been characterized by a real ‘environmental rights revolution’ with over 100 countries worldwide that have incorporated some kind of environmental rights in their constitutions⁹¹. The inclusion of a constitutional right of a healthy environment in states’ constitutions is an important element to consider for those who intend to bring a climate lawsuit framed in human rights terms.⁹² However the existence of environmental rights in states’ constitution is not a guarantee of success; open standing requirements⁹³ and the existence of an appropriate climate legal framework⁹⁴ are key factors for a successful rights based lawsuit. Moreover, in rights based climate litigation, granting standing to future generations and recognising that their human rights are being violated is particularly problematic and human rights law as currently conceived is ill equipped to address the issue⁹⁵. Even if arguments based on the rights of future generations have started to emerge powerfully in some recent climate lawsuits (and in some cases with an unexpected success)⁹⁶ domestic courts are not so clear in their decisions when

⁹⁰ See generally JAMES E. MAY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM* (2015); Roderic O’Gorman, *Environmental Constitutionalism: A Comparative Study*, 6 *TRANSNAT’L ENV. L.* 435 (2015).

⁹¹ DAVID R. BOYD, *THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS. AND THE ENVIRONMENT* (2011).

⁹² See e.g. Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of The Global South* 113 *AM. J. INT’L L.* 680, 712-713 (2019) (explaining the prevalence of rights based climate claims in the Global South as a consequence of the inclusion of environmental rights in national constitutions and predicting the development of this kind of litigation due to the existence of a rich environmental constitutional jurisprudence in these countries).

⁹³ Courts in India, Pakistan and Bangladesh have allowed broad standing for individuals and organizations to vindicate environmental harms. See Aman Ullah *Public Interest Litigation in India and Pakistan: Innovate Approaches to Refuse Standing*, 9 *J. QUALITY & TECH. MGMT.* 91 (2013). Moreover, even in the absence of a substantive right to a healthy environment in their constitutions, South Asian countries have developed a robust practice of public interest environmental litigation to challenge the inaction by states in environmental matters relying on other constitutionally protected rights. Both the Supreme Court of India and the Supreme Court of Bangladesh have interpreted their right to life clauses as enshrined in their constitutions to include a right to a clean environment and relaxing the requirements relating to standing. See Atapattu *supra*, note 54 at 109-112, citing Subhash Kumar v. State of Bihar, AIR 1991 SC 420 (India); M.C. Mehta v. Union of India and Others WP(Civil) No. 860 of 1009 (Supreme Court of India) (India).

⁹⁴ See ENVIRONMENTAL LAW ALLIANCE WORLDWIDE (ELAW), *Holding Corporations Accountable for Damaging the Climate* (2014) (stressing how a robust body of climate legislation provides a solid basis for rights based litigation against corporate actors).

⁹⁵ Bridget Lewis, *Human Rights Duties Towards Future Generations and the Potential for Achieving Climate Justice* 34 *NETH. Q. HUM. RTS* 206 (2016) (articulating a theoretical framework for granting human rights to future generations).

⁹⁶ See *Future Generations v. Ministry of the Environment*, *supra* note 65.

it comes to attributing standing to unborn generations⁹⁷. For the time being, a lawsuit with a ‘present generational time frame’ that emphasises not just the impacts of climate change on future generations, but also the actual impacts that affect current generations in the present might be preferable⁹⁸ and a judge might be more persuaded by this framing. Incorporating a climate change clause in domestic constitutions⁹⁹ with a specific climate cause of action could also represent a valuable tool for prospective claimants who want to invoke human rights arguments before a court: judges won’t be able to simply ignore it¹⁰⁰. More generally, constitutional rights claims in the context of climate change can have also some theoretical drawbacks. For our analysis, the above mentioned case of *Leghari*¹⁰¹ is particularly emblematic not only due to the Lahore High Court’s activist stance¹⁰² but also for its inherent weakness and ‘dangerousness’ from a climate justice perspective. The case concerned a Pakistani farmer who sued the government for violations of his fundamental and constitutional rights, including the rights to life, to dignity, and property due to its inaction on climate change; in particular, Leghari challenged the government’s failure to implement its 2012 National Climate Change Policy and the Framework for Implementation of Climate Change Policy (2014-2030). After stating that ‘[c]limate [c]hange is a defining challenge of our time and has led to dramatic alterations in our planet’s climate system...’¹⁰³, the Green Bench of the Lahore High Court ruled against the government noting that the failure to adapt to climate change breached Leghari’s fundamental rights as enshrined in the Pakistani Constitution and recall the need to read such constitutional rights in conjunction with a series of international environmental law principles¹⁰⁴. The Court mandated the creation of a Climate Change Commission to monitor the progress in the implementation of the

⁹⁷ For example, in *Urgenda II*, the Hague Court of Appeal ruled that it was not required to decide the inadmissibility of the *Urgenda*’s claim insofar as the rights of future generations were at stake. It was sufficient that the admissibility of the claim raised issues concerning the interests of the present generation. See *Urgenda II*, *supra* note 63 § 37.

⁹⁸ See Chris Hilson, *Framing Time in Climate Change Litigation*, 9 OÑATI SOCIO-LEGAL SERIES 361, 367-370 (2019) (describing how plaintiffs conceptualize past, present and future climate harms in different lawsuits and the ‘sense of continuity’ that comes with it).

⁹⁹ At least seven countries have incorporated climate change references in their constitutions. See James R. May & E. Daly, *Global Climate Constitutionalism and Justice in the Courts* in RESEARCH HANDBOOK ON GLOBAL CLIMATE CONSTITUTIONALISM 235, 240 (Jordi Jaria-Manzano et al. eds., 2019) (citing The Dominican Republic, Venezuela, Ecuador, Vietnam, Tunisia, Cote d’Ivoire and Thailand).

¹⁰⁰ See Ademola O. Jegede, *Climate Change and Environmental Constitutionalism: A Reflection on Domestic Challenges and Possibilities*, in IMPLEMENTING ENVIRONMENTAL CONSTITUTIONALISM: CURRENT GLOBAL CHALLENGES 84, 97-98 (Erin Daly & James R. May eds., 2018) (noting that ‘[t]he inclusion of a climate change clause will take climate change beyond the wave of partisan politics and commit the governed and government to combatting the threat of climate change’ and that ‘[a climate change clause] can aid civil society in holding government and non-state actors accountable... in human rights complaints mechanisms’).

¹⁰¹ *Leghari*, *supra* note 60.

¹⁰² See Emily Barrit & Boitumelo Sediti, *The Symbolic Value of Leghari v Federation of Pakistan: Climate Change Adjudication in the Global South* 30 K.L.J. 203, 205 (2019) (discussing the relevance of the directive judicial approach of the Court).

¹⁰³ *Id.*, at 6.

¹⁰⁴ *Id.* at 7. The court went on stressing ‘the delay and lethargy of the State in implementing the Framework [which] offends the fundamental rights of the citizens which need to be safeguarded’. *Id.* at 8.

Framework and, in the years that followed, retained a supervisory jurisdiction to assess its work. On January 25, 2018 the Court with a new judgment, dissolved the Commission after commending the progress made and established a Standing Committee to assist the government to further implementation. The Leghari case constitutes a valuable example for prospective applicants who intend to pursue a climate lawsuit using constitutionally protected rights since it is aimed at addressing government failures with respect to adaptation. This aspect is relevant because rights based climate lawsuits focusing on adaptation failures do not raise extraterritoriality issues, and fit well with the traditional vertical alignment of human rights law¹⁰⁵, remaining confined within national borders. Moreover, an adaptation-focused rights claim obviates the necessity of establishing a causal link between government action or inaction and climate change impacts resulting in a human rights violation¹⁰⁶. It must be considered however, that such legal advantages must be viewed in the broader context of climate justice (especially for developing countries) and, in that sense, human rights law present some limitations. As pointed out by Knox, human rights bodies have made clear that states should protect against foreseeable environmental impairment of human rights whether or not the states directly cause the harm¹⁰⁷. Applying this reasoning to climate change, states have obligations to protect their citizens against the harm caused by climate change even though they did not contribute considerably to the problem: ‘that a government did not cause a particular harm is not an excuse for its failure to act in the face of it’¹⁰⁸. Against this background, developing countries who had little role in causing climate change are nonetheless responsible for protecting the rights of their citizens and therefore they can be sued for adaptation failures that breach human rights. However such positive obligations are difficult to fulfill for a developing country that might not have sufficient resources

¹⁰⁵ See generally MARKO MILANOVIC, *EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES* (2011). See also John. H. Knox, *Diagonal Environmental Rights*, in UNIVERSAL HUMAN RIGHTS AND EXTRATERRITORIAL OBLIGATIONS 82 (Mark Gibney & Sigrun Skogly, eds., 2010) (discussing the complexities associated with ‘diagonal human rights law’ in the context of environmental rights).

¹⁰⁶ The causation dilemma is well documented in climate litigation scholarship: see Jaqueline Peel, *Issues in Climate Change Litigation* 1 CARBON & CLIMATE L. REV. 15, 18 (2011); Sophie Marjanac & Lindene Patton, *Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?* 36 J. ENERGY & NAT. RESOURCES L. 265 (2018) (discussing the emerging science of extreme weather event attribution and the implications this new science may have for climate litigation); For a human rights perspective see Ottavio Quirico, *Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation*, 65 NETH. INT’L. REV. 185 (2018) (discussing extraterritoriality, causation and attribution and highlighting the potential role of the recognition of a human right to a healthy environment at the international level).

¹⁰⁷ John H. Knox, *Human Rights Principles and Climate Change* in, THE OXFORD HANDBOOK OF INTERNATIONAL CLIMATE CHANGE LAW 213, *supra* note 6 (mentioning the case of Budayeva, where the Russian government was found responsible for not having taken the necessary measures to protect the lives of those within its jurisdiction despite the fact that it did not cause the mudslide). See *Budayeva v. Russia*, 2008-II Eur. Ct. H.R. 267.

¹⁰⁸ Hall & Weiss, *supra* note 53 at 346.

to uphold its human rights obligations¹⁰⁹. Moreover, from a climate justice point of view, it seems unfair to bring an individual action against the government of a developing country for a human rights violation largely caused by another (developed) state. In the context of climate change, human rights law has traditionally been viewed as an instrument to hold large emitters accountable for the disastrous consequences of climate change¹¹⁰. Invoking human rights arguments before a domestic court in a developing country for a failure to adapt seems to be contrary to any climate justice principle¹¹¹. As noted by Atapattu ‘while states remain under an obligation to protect their populations from the adverse consequences of climate change irrespective of their contribution to greenhouse gas emissions, a justice framework is necessary at the international level to ensure that the global community shares the burden in an equitable manner’¹¹². Furthermore a number of issues emerge with specific regard to a possible constitutional rights-based climate claim to address mitigation failures. In this context, the inherent limitations embedded in human rights law are evident. Firstly, in some domestic jurisdictions, it may not be so desirable and useful for individuals affected by climate change to hold their governments accountable. For example, in countries such as Tuvalu, Kiribati, Burkina-Faso and Niger who have contributed almost nothing to climate change, the normative persuasiveness of a rights based lawsuit is almost nothing. Countries with negligible greenhouse gas emissions will not be able to protect their citizens’ constitutionally protected rights from the adverse effects of climate change; the citizens of the most vulnerable countries risk to find their constitutional rights unenforceable because other developed and foreign states ‘have compromised the ability of some nations to unilaterally protect their citizen’s rights’¹¹³. In this context, transnational litigation¹¹⁴ may offer some recourse to justice where victims of vulnerable states cannot obtain a remedy before their domestic courts¹¹⁴. Individuals may also resort to quasi-judicial human rights Commissions, as happened before the Commission of Human Rights

¹⁰⁹ See BERTH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLICY* 359 (2009) (noting that ‘[t]here is little doubt that most governments do not have the capacity to implement every aspect of their international legal obligations. Most operate under administrative and resource constraints; these are severe in the poorest countries. In no area is this truer than in the provision of positive rights’).

¹¹⁰ See generally Marc Limon, *Human Rights and Climate Change: Constructing A Case for Political Action* 33 HARV. ENVTL. L. REV. 439, 440 (2009).

¹¹¹ For a clear articulation of this line of arguments see Zackary L. Stillings, *Human Rights and the New Reality of Climate Change: Adaptation's Limitations in Achieving Climate Justice* 35 MICH. J. INT'L L. 637, 668-670 (2014) (referring to all four dimensions of climate justice).

¹¹² Sumudu Atapattu, *Environmental Justice, Climate Justice and Constitutionalism: Protecting Vulnerable States and Communities*, in RESEARCH HANDBOOK ON GLOBAL CLIMATE CONSTITUTIONALISM, *supra* note 99 at 213.

¹¹³ Deepa Badrinarayana, *A Constitutional Rights to International Legal Representation: The Case of Climate Change*, 93 TUL. L. REV. 47, 98, 103 (2018) (acknowledging that climate change presents a constitutional law problem and highlighting the necessity to reflect in future climate change documents the constitutional challenges posed by climate change).

¹¹⁴ For a US perspective see Michael Byers, Kelsey Franks, & Andrew Gag, *The Internationalization of Climate Damages Litigation* 7 WASH. J. ENVTL. L. & POL'Y 264 (2017).

of the Philippines in a groundbreaking human rights petition against corporate actors¹¹⁵. Finally, a direct petition before international human right bodies is conceivable as the non-availability of domestic remedies in the abovementioned circumstances is evident.

IV. CONCLUSION

Without question climate change poses unprecedented risks to human rights. However, serious doubts exist as to whether climate negotiations will be able to curb emissions more quickly and deeply to prevent the disastrous human consequences of climate change. In an effort to overcome the limits of international climate change law, citizens and groups have resorted to courts alleging that climate change violated their human rights, including the right to life, liberty, property and the right to a healthy environment. Human rights arguments have started to play a prominent role in climate litigation. However, even if some of these rights based climate lawsuits succeed in changing climate policies and lead to rapid emissions reductions, ‘human rights framing’ presents various obstacles. Whether based on the European Convention on Human Rights or grounded in constitutionally protected rights, the success of these human rights arguments depends on a wide range of factors among which the role of judges figures prominently. Hurdles associated with standing requirements, causation, prospective harms and extraterritoriality are just some of the stumbling blocks that create barriers to individuals who intend to frame a climate lawsuit in human rights terms. Human rights law as it currently stands is ill-equipped to deal with global environmental challenges such as climate change and judges must be aware of the fact that it’s up to them to ensure that the ‘essential term of reference’¹¹⁶ for addressing climate change continues to do its job.

¹¹⁵ See Greenpeace Petition, *Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations Resulting from the Impacts of Climate Change*, CHR-NI-2016-0001 (May 6, 2016) available at https://secured-static.greenpeace.org/seasia/ph/PageFiles/735291/Human_Rights_and_Climate_Change_Consolidated_Reply_2_10_17.pdf. The inquiry was initiated by Human Rights Commission of the Philippines to establish the responsibility of the world’s largest corporate emitters for human rights violations resulting from the impacts of climate change For a human rights analysis of the case see Annalisa Savaresi & Jacques Hartmann, *Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry* in CLIMATE CHANGE LITIGATION IN THE ASIA PACIFIC (Jolene Lin & Douglas Kysar eds., forthcoming 2020) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3277568.

¹¹⁶ Humphreys, *supra* note 38 at 45.