

Climate change and human rights-based strategic litigation

Summary

- Rights-based climate litigation is helping to bridge the gap between international pledges and governmental action at the national level, constituting an important ‘bottom-up’ form of pressure on governments to do their ‘fair share’ in tackling climate change.
- Human rights-based cases against governments are taking a range of formats: challenging not just inaction on climate change (as in the *Urgenda* case against the Netherlands), but also governments’ failure to honour existing commitments (as in the *Leghari* case against Pakistan) and climate change strategies that themselves contribute to human rights violations.
- Global South countries that have led the way in socioeconomic rights jurisprudence are likely to be particularly fertile jurisdictions for human rights-based climate cases in future.
- Cases against corporations are set to increase, aided by the trend for human rights due diligence laws that concretize corporate responsibilities on human rights into hard law.
- An increasing proportion of rights-based cases are being brought by young people on behalf of future generations, including high profile cases before the European Court of Human Rights (such as *Duarte Agostinho and Others v Portugal*) and a petition by Greta Thunberg and 15 others before the UN Committee on the Rights of the Child that represents a major step forward for child rights cases.

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Introduction

The 2021 Assessment Report of the Intergovernmental Panel on Climate Change (IPCC) underlines in stark terms the link between human activity and climate change and warns of the need for urgent action to address the crisis.¹

In addition to other well-known impacts, climate change interferes with the enjoyment of a wide range of human rights recognized and protected by international law. In 2014, 27 UN Special Rapporteurs and other independent experts issued a joint letter on the implications of climate change for human rights. They noted that a ‘safe, clean, healthy and sustainable environment is indispensable to the full enjoyment of human rights, including rights to life, health, food, water and housing, among many others’.² Reports of the UN’s Office for the High Commissioner on Human Rights (OHCHR) and resolutions of the UN’s Human Rights Committee have also emphasized the adverse effects that climate change can have on a range of human rights,³ and that states have obligations to take steps to protect human rights from the harmful effects of climate change.⁴

Litigation is a relatively recent tool used by activists to pressure states to respond better to climate change. Litigation based on the impact of climate change on human rights is growing fast: prior to 2015, there were only a handful of rights-based climate cases but since 2015, 40 cases have been brought in 22 countries and before three international bodies.⁵

Rights-based litigation still makes up a comparatively small proportion of all climate change litigation: of 1,841 climate change cases that are ongoing or concluded, human rights arguments have been used in 112⁶ – 93 against governments and 16 against corporations.⁷ But scholars have observed a ‘rights turn’ in climate change litigation in the last few years,⁸ galvanized by the success of a small number of prominent cases such as *The State of the Netherlands vs the Urgenda Foundation* (*‘Urgenda’*). According to a study by the Climate Litigation Accelerator, over 90% of climate cases are now argued on rights grounds.⁹ This trend is set to continue.

¹ IPCC (2021), *Climate Change 2021: The Physical Science Basis*, <https://www.ipcc.ch/report/ar6/wg1>.

² OHCHR (2014), *A New Climate Change Agreement Must Include Human Rights Protections For All*, https://www.ohchr.org/Documents/HRBodies/SP/SP_To_UNFCCC.pdf.

³ See, for example, UN Human Rights Council Resolution, *Human rights and climate change* (adopted on 22 June 2017), UN Doc. No. A/HRC/RES/35/20.

⁴ OHCHR (2009), *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. No. A/HRC/10/61. For further discussion of the human rights implications of climate change, see UN Environment Programme (2015), *Climate Change and Human Rights*, <http://columbiaclimatelaw.com/files/2016/06/Burger-and-Wentz-2015-12-Climate-Change-and-Human-Rights.pdf>.

⁵ Rodríguez-Garavito, C. (2020), ‘Climate litigation and human rights: averting the next global crisis’, *Open Global Rights*, 26 June 2020, <https://www.openglobalrights.org/climate-litigation-and-human-rights-averting-the-next-global-crisis>.

⁶ Setzer, J. and Higham, C. (2021), *Global trends in climate change litigation: 2021 snapshot*, London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, p. 6, https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2021/07/Global-trends-in-climate-change-litigation_2021-snapshot.pdf.

⁷ *Ibid.*, p. 5.

⁸ Peel, J. and Osofsky, H. M. (2018), ‘A Rights Turn in Climate Change Litigation’, *Transnational Environmental Law* 7 (1): p. 37–67, doi:10.1017/S2047102517000292.

⁹ Rodríguez-Garavito, C. (2021), ‘Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action’, in Rodríguez-Garavito, C., *Litigating the Climate Emergency: How Human Rights, Courts and Legal Mobilization Can Bolster Climate Action* (forthcoming), Cambridge University Press, p. 2.

The objectives of this paper are twofold. First, it highlights the diverse and innovative ways in which human rights are being used as the basis for climate change litigation. These include the use of litigation: to pressure governments to increase their efforts to mitigate climate change; to enforce current climate obligations and targets; to protect human rights when governments undertake actions on climate change; and to establish the responsibilities of corporations.

Second, the paper considers the challenges inherent in rights-based climate cases and the extent to which human rights-based litigation is having – and can have in the future – an impact on climate change policy at the national and international level. To what extent is rights-based litigation an effective tool to push forward action on climate change by governments, and to generate greater awareness among policymakers, the public and the press of the need for action?

Different types of rights-based climate change litigation

There is well-established jurisprudence on the duties that states have to respect, protect and fulfil the human rights of individuals within their jurisdiction. These arguments have been developed and honed in the context of human rights-based environmental litigation over the past 20 years. Increasingly, we are seeing litigators seek to extend these arguments to the climate change context.

Adoption of adequate response measures to address climate change

Over 80% of rights-based climate cases are aimed at pressuring governments to do more to mitigate climate change, for example through challenging emission reduction plans.¹⁰ The 2015 Paris Agreement on climate change provides a useful baseline for such claims, by setting benchmarks against which to assess governments' climate action. The Paris Agreement was the first climate treaty to explicitly recognize the relevance of human rights to climate change, and that actions to address climate change must comply with human rights obligations.¹¹ The Agreement also commits states to minimize the economic, social and environmental impacts that may result from the implementation of response measures to mitigate or adapt to climate change.

The *Urgenda* judgment of 2019 was the first case in the world to establish that there was a legal duty on a government to prevent dangerous climate change.¹² In that case, the claimants sought an injunction to compel the Dutch government to reduce its greenhouse gas emissions, on the basis that the government had taken inadequate action. The NGO *Urgenda* asked the Dutch Supreme Court to set an exact standard for carbon emissions – a reduction of 25%. The litigants argued that human rights impose positive duties on governments

¹⁰ *Ibid.*, p. 5.

¹¹ Para 11 of Preamble to Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UN Doc. FCCC/CP/2015/L.9/Rev/1.

¹² Setzer, J. and Byrnes, R. (2020), p. 16.

to adopt adequate measures, including legislation to reduce greenhouse gas emissions and to adapt to the impacts of climate change. The court held that reducing emissions with the highest possible level of ambition amounts to a ‘due diligence standard’ for complying with these human rights obligations.

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In *Urgenda*, human rights arguments were technically peripheral to the grounds of the case, which centred on Dutch tort law. But they ended up being decisive to the result¹³ as they were utilized by the court to fill in the content of due diligence standards owed under the duty of care considered by the court. The case is a progressive example of how regional and domestic courts can actively use the substantive and procedural provisions of international human rights law, together with soft law provisions such as targets agreed under the Paris framework, to interpret domestic law, and to bridge the gap between the international law obligations of the state concerned and its domestic law.¹⁴ The Dutch Supreme Court’s finding that risks of climate change fell within the European Convention on Human Rights (ECHR) – especially Articles 2 (right to life) and 8 (right to private and family life) – has provided a useful precedent for future rights-based cases.

The court used the ‘common ground’ approach pioneered by the European Court of Human Rights (ECtHR), under which a respondent state need not have ratified the entire collection of instruments applicable. Rather, it is sufficient if the instruments concerned represent ‘a continuous evolution in the norms and principles applied in international law or in the domestic law of the majority of member States of the Council of Europe and shows, in a precise area, that there is common ground in modern societies’.¹⁵ This common ground approach is increasingly invoked in climate mitigation cases, enabling a court to draw on a ‘baseline of norms’ (arising from both hard law treaties and soft law instruments such as the Paris Agreement and IPCC reports) in relation to climate rights.¹⁶

International law was also used by a court to help interpret domestic law in the case of *Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others*,¹⁷ brought against the South African government in 2017. The South African Constitution requires domestic law to be interpreted in line with both

¹³ Savaresi, A. and Setzer, J. (2021), ‘Mapping the Whole of the Moon: An Analysis of the Role of Human Rights in Climate Litigation’, SSRN, <https://ssrn.com/abstract=3787963>.

¹⁴ Rodríguez-Garavito, C. (forthcoming), *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, p. 7.

¹⁵ Demir and Baykara vs Turkey (2008), Council of Europe/European Court of Human Rights, (GC) -34503/97, 113.

¹⁶ Rodríguez-Garavito, C. (forthcoming), *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, p. 14.

¹⁷ *Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others* (65662/16) (2017).

South Africa’s Bill of Rights¹⁸ and international law.¹⁹ The High Court read the constitutional provision protecting the right to environment, along with the UN Framework Convention on Climate Change (UNFCCC)²⁰ to which South Africa is a party, to find for the claimant that South Africa had to consider climate change as part of the environmental impact assessment required prior to deciding on the authorization of a coal-fired power plant.²¹

Another successful case that sought to require the adoption by a government of adequate measures in relation to climate change was *Future Generations vs Ministry of Environment, Colombia (2018)*. In that case, 25 youth plaintiffs sued several bodies within the Colombian government, Colombian municipalities and several corporations for failure to enforce their claimed rights to a healthy environment, life, health, food and water, as a result of the failure to tackle deforestation of the Amazon or make adequate efforts to reach targets set in relation to the Paris Agreement and National Development Plan.²²

The Colombian Supreme Court held that the Colombian Amazon is a “subject of rights”, entitled to protection, conservation, maintenance and restoration by the State and the territorial agencies.²³ The court ordered various government agencies, with the participation of the claimants, the affected communities and the interested population in general, to formulate short-, medium-, and long-term action plans within four months, ‘to counteract the rate of deforestation in the Amazon, tackling climate change impacts.’²⁴

Regional human rights courts are also being used by litigants to bring rights-based climate cases. The Inter-American Commission on Human Rights is currently considering a petition filed in September 2019 by organizations from multiple Latin American countries about the impact of climate change on indigenous peoples, claiming violations of their right to health, property and culture²⁵ – particularly the right of indigenous people to follow their practices.²⁶ The court is also hearing a petition filed by a Canadian indigenous group alleging lack of action on the part of Canada to prevent the melting of Arctic glaciers, on the basis that it is affecting their health, property, way of life and livelihood.²⁷

¹⁸ Constitution of the Republic of South Africa, (1996), section 39.

¹⁹ Ibid., section 223.

²⁰ Earthlife Africa Johannesburg vs Minister of Environmental Affairs and Others (2017), paragraph 83.

²¹ Ibid., paragraph 91.

²² *Future Generations vs Ministry of the Environment and Others* (Colom Sup Ct, 11001-22-03-000-2018-00319-01, 5 April 2018).

²³ Dejusticia (2018), ‘Climate Change and Future Generations Lawsuit in Colombia: Key Excerpts from the Supreme Court’s Decision’, 13 April 2018, <https://www.dejusticia.org/en/climate-change-and-future-generations-lawsuit-in-colombia-key-excerpts-from-the-supreme-courts-decision>.

²⁴ Ibid., p. 45.

²⁵ Organization of American States (OAS), American Convention on Human Rights (adopted 22 November 1969). Article 4 provides for the Right to Life, Article 17 the Right of the Family, Article 21 the Right to Property.

²⁶ Climate Case Chart (2019), ‘Hearing on Climate Change Before the Inter-American Commission on Human Rights’, <http://climatecasechart.com/climate-change-litigation/non-us-case/hearing-on-climate-change-before-the-inter-american-commission-on-human-rights>.

²⁷ Arctic Athabaskan Council (2021), ‘Petition To The Inter-American Commission On Human Rights Seeking Relief From Violations Of The Rights Of Arctic Athabaskan Peoples Resulting From Rapid Arctic Warming And Melting Caused By Emissions Of Black Carbon By Canada’, <http://climatecasechart.com/climate-change-litigation/non-us-case/petition-inter-american-commission-human-rights-seeking-relief-violations-rights-arctic-athabaskan-peoples-resulting-rapid-arctic-warming-melting-caused-emissions>.

In September 2020, in *Duarte Agostinho and others vs Portugal and 32 other states*, six Portuguese youths alleged inaction on climate change on the part of Portugal and 32 other Council of Europe member states.²⁸ The applicants' claim alleges not just violations of the right to life and right to privacy, but also age-based discrimination on the basis that 'children and young adults are being made to bear the burden of climate change to a far greater extent than older generations'.²⁹ A number of organizations, as well as a group of UN Special Rapporteurs, have filed supporting briefs in this case.

Enforcement of existing commitments and targets

Some cases have been brought on the basis that states have positive duties to enforce legislation in which they have committed to address climate change, and to provide redress to those suffering the impacts of climate change. The rights basis of this argument is that states cannot respect, protect and fulfil human rights while breaching legislation they themselves have adopted.³⁰

Courts in jurisdictions where environmental rights are directly provided for in the state's constitution, as is more commonly the case in the Global South, have sometimes found it easier to adapt rights-based claims to the climate change context. For example, in *Leghari vs Federation of Pakistan (2015)*,³¹ the Lahore High Court held that the right to life, right to human dignity, right to property and right to information under Articles 9, 14, 23 and 19A of the Constitution, which already had been interpreted to provide for the right to a healthy environment, must now also extend to cover climate change.

The court found that these provisions 'provide the necessary judicial toolkit to address and monitor the Government's response to climate change'³² and ordered the government to appoint a climate change focal point in certain departments. It also ordered the government to publish an adaptation action plan realizable within a few months of the order and to establish a Climate Change Commission to monitor progress.

In another such case, *PSB et al. vs Brazil*, the applicants are alleging that the Brazilian government's failure to implement its Action Plan for the Prevention and Control of Deforestation in the Legal Amazon has violated the fundamental rights of indigenous people and future generations and contributed to dangerous climate change.³³

²⁸ Savaresi and Setzer (2021), p. 9.

²⁹ ECtHR (2020), *Duarte Agostinho and others vs Portugal and 32 other states*, ECtHR no 39371/20, [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-206535%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-206535%22]}).

³⁰ Savaresi and Setzer, (2021), p. 9.

³¹ *Leghari vs Federation of Pakistan* (2015), Lahore High Court, W.P. No. 25501/2015.

³² *Ibid.*

³³ *PSB et al. vs Brazil* (Pending) (2020), Supreme Court of Brazil, ADPF 760.

Obligations on states to protect human rights when undertaking actions on climate change

A growing number of rights-based climate change cases focus not on the inadequacy of states' responses to climate change, but rather on the argument that states' negative obligations require them to ensure that their mitigation and adaptation activities in response to climate change do not *themselves* contribute to human rights violations.³⁴ The Paris Agreement preamble focuses only on states' response measures, not the human rights implications of climate change itself. The OHCHR advocates a broader approach, underlining that states should not authorize activities or adopt policies leading to environmental impacts that in turn affect the enjoyment of human rights (for example, the right to life, family life or property).³⁵ The UN's Human Rights Committee has also sought to emphasize the importance of incorporating human rights concerns into climate advocacy.³⁶

For example, applicants have challenged measures to reduce emissions that they allege encroach on traditional land uses and livelihoods. Such cases often allege violation by the state of procedural obligations, including inadequate consultation with, or provision of information to, affected groups. There have been several cases in Mexico brought by indigenous people alleging that the authorization of wind farms took place without a process of fair, prior and informed consent.³⁷

This kind of litigation puts pressure on governments to expand their approach to tackling climate change beyond purely a regulatory one to a more holistic strategy that takes account of the intersection between climate change and other social justice issues. As governments increasingly have to make trade-offs between the pursuit of climate objectives (such as the achievement of net zero) and other societal concerns, including the position of vulnerable or minority groups such as the poor, farmers and indigenous people, we are likely to see an increase in this kind of litigation.³⁸

Cases against corporations

As noted above, most human rights-based climate litigation cases to date have been brought against states rather than against businesses. This is unsurprising, as traditionally states are the bearer of human rights obligations, and the issue of whether corporations have similar obligations remains contested. The UN Guiding Principles on Business and Human Rights (UNGPs) set out the responsibility of businesses not to cause (directly or indirectly) harm to human rights as a result of their business activities. But the UNGPs are non-binding soft law, which makes litigation more of a challenge.

³⁴ Savaresi and Setzer (2021), p. 13, describing these as 'anti climate cases'.

³⁵ OHCHR (2015), *Understanding Human Rights and Climate Change*, <https://www.ohchr.org/Documents/Issues/ClimateChange/COP21.pdf>.

³⁶ UN Human Rights Council (2021), 'Human Rights and Climate Change' (adopted on 12 July 2021), HRC/RES/47/24.

³⁷ Velasco Herrejon, P. and Savaresi, A. (2020), 'Wind Energy, Benefit-Sharing and Indigenous Peoples: Lessons from the Isthmus of Tehuantepec, Southern Mexico', *OGEL: Oil, Gas and Energy Law Journal*, 1(2020), <https://www.ogel.org/article.asp?key=3870>.

³⁸ Savaresi and Setzer (2021), p. 16.

Nevertheless, rights-based climate cases against corporations are also on the rise. In the domain of environmental law, there exists a wide body of jurisprudence of how corporations can be held accountable for human rights violations, which is now starting to inform climate change litigation.

In 2021, the Dutch courts delivered a pioneering victory for rights-based climate change litigation, in one of the world's first human rights claims against a corporation in relation to climate change.³⁹ In *Milieudefensie et al. vs Royal Dutch Shell PLC (2021)*,⁴⁰ 17 NGOs and more than 17,000 individuals filed an action before the Hague District Court against Royal Dutch Shell PLC (Shell). The claimants sought a declaration that the annual CO₂ emissions of the global Shell group constituted an unlawful act against the claimants for which Shell was responsible. The claimants argued that Shell has a tort law duty of care under Article 6:162 of the Dutch Civil Code interpreted in light of Articles 2 (right to life) and 8 (right to a private life, family life) ECHR.

Increasingly the human rights responsibilities of companies are being concretized into binding legal obligations through domestic legislation mandating human rights due diligence by companies.

As in the *Urgenda* case, the court used human rights law, including international treaties and the UNGPs, to define the parameters of the corporate duty of care and of due diligence obligations under Dutch law.⁴¹ The court noted that while the UNGPs are not legally binding, they 'are suitable as a guideline in the interpretation of the unwritten standard of care'.⁴² The court concluded that Shell should be ordered to reduce its CO₂ emissions by a net rate of 45% at the end of 2030, relative to 2019 figures, through its group corporate policy. Shell is appealing the decision.⁴³

While the *Shell* case is currently an exception, increasingly the human rights responsibilities of companies are being concretized into binding legal obligations through domestic legislation mandating human rights due diligence by companies. Several governments have recently enacted, or are enacting, laws that require companies to safeguard human rights and the environment, including in their global supply chain operations (e.g. in Australia, France, Germany and the EU). These binding obligations can then form the basis of rights-based legal challenges in the courts, as they did in *Notre Affaire à Tous and Others vs Total*

³⁹ *Milieudefensie et al. vs Royal Dutch Shell PLC*, (2021) C/09/571932, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:5339&showbutton=true>.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, paragraph. 4.4.9, Book 6, Section 162 of the Dutch Civil Code.

⁴² *Ibid.*, paragraph. 4.2.4.

⁴³ Shell PLC (2021), 'Shell confirms decision to appeal court ruling in Netherlands climate case', 20 July 2021, <https://www.shell.com/media/news-and-media-releases/2021/shell-confirms-decision-to-appeal-court-ruling-in-netherlands-climate-case.html>.

(2021),⁴⁴ a claim based on France's corporate due diligence legislation.⁴⁵ The claimants sought a court order requiring Total to issue a corporate strategy that identifies the risks resulting from its greenhouse gas emissions, the risks of serious climate-related harms being committed by Total as outlined in the IPCC special report of October 2018, and the action the company will take to ensure its activities align with a trajectory compatible with the climate goals of the Paris Agreement.

Although the Court of Appeal ultimately held that the Commercial Court should hear the case, the case has inspired other claimants seeking to hold major companies to higher standards of climate responsibility. In a case brought against the global retailer Groupe Casino in France in March 2021, claimants relied on the same due diligence law, and international indigenous rights law, to demand that Casino supermarkets take all necessary measures to exclude beef tied to deforestation and the taking of indigenous territories from its supply chains in Brazil, Colombia and elsewhere.⁴⁶

In April 2021, the environmental law NGO ClientEarth filed an action against the National Bank of Belgium for buying bonds in carbon-intensive corporations. Among other things, the suit bases its claims on the EU Charter on Fundamental Rights, which imposes duties in relation to environmental protection.⁴⁷

Challenges facing rights-based climate change litigation

Rights-based climate change litigation faces a number of challenges, including establishing a causal link between the failure of a government to act in relation to climate change and the impact on human rights ('causation'); whether or not a court has a mandate to hear a claim about executive decisions on climate change ('justiciability'); issues of eligibility to file a case in court ('standing'); difficulties in dealing with complex scientific evidence; and the fact that litigation is expensive, time-consuming and – with cases brought against governments and corporations – laden with resource and power asymmetries. The first two challenges, which to date have been particularly problematic, are considered below.

⁴⁴ *Notre Affaire à Tous and Others vs France*, (2021). No. 1904967, 1904968, 1904972, 1904976/4-1, Paris Administrative Court.

⁴⁵ Article L. 225-102-4.-I of the Commercial Code (Loi 27 Mars 2017 sur le devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre).

⁴⁶ Rodríguez-Garavito, C. (forthcoming), *Litigating the Climate Emergency: The Global Rise of Human Rights-Based Litigation for Climate Action*, p. 21.

⁴⁷ European Union, *Charter of Fundamental Rights of the European Union*, Brussels: Official Journal of the European Union, 55, 26 Oct. 2012. doi:10.3000/1977091X.C_2012.326.eng. Article 37 reads as follows: 'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

Establishing a causal link

The complex and global nature of climate change can make it difficult for a court to attribute responsibility for climate change to a particular government or corporate entity alone. Further, as an individual cannot claim alone to be affected by climate change, issues of standing can also arise, particularly where the impact is claimed to be on behalf of future generations.

It has proved difficult to bring compensation claims against governments based on principles of state responsibility under international law, partly due to political hurdles and partly the challenge of establishing a causal link given the fragmentation of responsibility between the states implicated. But litigants are increasingly overcoming challenges of causation in rights-based climate cases through the framing of the claim in terms of states' obligations to protect against the infringement of human rights by climate change. John Knox, former UN Special Rapporteur on the issue of a safe, clean, healthy and sustainable environment, cites the 2008 ECtHR case of *Budayeva and others vs Russia*, which concerned mudslides in the Caucasus that killed eight people. The government did not cause the mudslide, but the court held that it nevertheless had a responsibility to take appropriate steps to safeguard the lives of those within its jurisdiction.⁴⁸

Advances in climate attribution – that is, robust evidence to establish a strong causal connection between historic and future greenhouse gases, an increase in surface temperature and the likelihood of severe weather as a result – are helping litigants to establish greater causality in climate change cases.⁴⁹

Causation was raised by the Dutch government in the *Urgenda* case as part of its argument that Articles 2 and 8 ECHR do not contain obligations on the state to offer protection against the risks of climate change. The government argued that the risks would not be sufficiently specific, that they would be of a global nature (and hence not a responsibility that can be attributed to the Netherlands alone), and in any case that the environment was not protected under the ECHR. The court drew on the UNFCCC to find that while the problem is of a global nature, each state has a duty to do its part, as acknowledged by parties to the UNFCCC, including the Netherlands. This standard was informed by the emerging notion that in light of climate change and human rights obligations, governing countries have to contribute a 'fair share' to global climate mitigation,⁵⁰ as well as the well-established 'no harm principle', which gives rise to an obligation on states to prevent activities within their jurisdiction that cause cross-boundary environmental damage.⁵¹

In October 2021, the UN's Committee on the Rights of the Child made groundbreaking findings on jurisdiction, victim status and causation. This high profile case was brought by 16 youth activists, including Greta Thunberg, alleging that Argentina, Brazil, France, Germany and Turkey violated their rights under the UN Convention on the Rights of the Child by making insufficient cuts to

⁴⁸ Knox, J. and UNHCR (2016), *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, p. 10.

⁴⁹ Setzer, J. and Byrnes, R. (2020), *Global trends in climate change litigation: 2020 snapshot*, p. 19.

⁵⁰ *Ibid.*, para 5.7.5.

⁵¹ *Ibid.*, para 4.3.9.

greenhouse gases and failing to encourage the world's biggest emitters to curb carbon pollution.⁵² Drawing on a 2017 advisory opinion of the Inter-American Court of Human Rights on environmental rights, the Committee found that the Convention gives rise to extraterritorial obligations on states to address climate change, and that the collective nature of climate change does not absolve states of their individual responsibilities. On causation, the Committee found that the claimants had *prima facie* established a real and significant harm to justify their victim status. While the complaints were ultimately unsuccessful due to the claimants' failure to first exhaust domestic remedies, the findings in this case represent a major step forward for future child rights cases.⁵³

The causal link between the activities of corporations such as the 'carbon majors' (usually referring to major industrial carbon producers in the oil, natural gas, coal and cement sectors) and climate change is also becoming more established. In the *Carbon Majors Inquiry* in the Philippines, the National Human Rights Commission concluded in December 2019 that 47 of the world's biggest fossil fuel producers – including BP, Chevron, ExxonMobil, Repsol and Shell – play a clear role in human-induced climate change and can be held accountable for violating the rights of its citizens for the damage caused by global warming, where domestic law provides a basis of claim, as civil law does in the Philippines.⁵⁴

Justiciability

Some rights-based climate cases – particularly those brought in the US and Canada – have foundered on the question of justiciability. In *Juliana et al. vs United States of America* (2020), a rights-based challenge to government inaction on climate change in the US, the US Ninth Circuit Court of Appeal refused to order the government to formulate a comprehensive scheme to combat climate change on the basis that this would require 'a host of complex policy decisions which for better or worse must be entrusted to the wisdom of the legislative and executive branches.'⁵⁵

Similarly, in *Lho'imgin et al. vs Her Majesty the Queen* (2020),⁵⁶ a case filed under section 91 of the Canadian Constitution and sections 7 and 15 of Canada's Charter of Rights and Freedoms, the claimants asked the Federal Court of Canada to order the Canadian government to amend each of its environmental assessment statutes that apply to high greenhouse gas emitting projects. Addressing the issue of policy complexity, the court noted that 'when the issue spans across various governments,

⁵² *Sacchi et al. vs Argentina, Brazil, France, Germany and Turkey* (2019), UN Committee on the Rights of the Child. See further: Arnoldy, B., 'Greta and 15 Kids Just Claimed Their Climate Rights at the UN', *Earthjustice* blog, 23 September 2019, <https://earthjustice.org/blog/2019-september/greta-thunberg-young-people-petition-UN-human-rights-climate-change>.

⁵³ Nolan, A. (2021) 'Children's Rights and Climate Change at the UN Committee on the Rights of the Child: Pragmatism and Principle in *Sacchi v Argentina*', *EJIL: Talk!* blog, 20 October 2021, <https://www.ejiltalk.org/childrens-rights-and-climate-change-at-the-un-committee-on-the-rights-of-the-child-pragmatism-and-principle-in-sacchi-v-argentina>.

⁵⁴ Kaminski, I. (2019), 'Carbon Majors Can Be Held Liable For Human Rights Violations, Philippines Commission Rules', *Business and Human Rights Resource Centre*, 9 December 2019, <https://www.business-humanrights.org/en/latest-news/carbon-majors-can-be-held-liable-for-human-rights-violations-philippines-commission-rules>.

⁵⁵ *Juliana vs United States*, (9th Cir. 2020) 947 F.3d 1159, p. 525.

⁵⁶ *Lho'imgin et al. vs Her Majesty the Queen* (2020), FC 1059.

involves issues of economics and foreign policy, trade, and a host of other issues, the courts must leave these decisions in the hands of others'.⁵⁷ The Federal Court came to a similar decision in *La Rose vs Her Majesty the Queen (2020)*.⁵⁸

The case of *R (Plan B Earth & others) vs Secretary of State of Business (2018)*,⁵⁹ a challenge to the refusal of the UK government to revise the 2050 carbon target under the UK's Climate Change Act 2008, alleging among other things that it violated the Human Rights Act 1998 and Articles 2 and 8 ECHR, also failed on justiciability grounds. The High Court held that: '... the executive has a wide discretion to assess the advantages and disadvantages of any particular course of action, not only domestically but as part of an evolving international discussion.'⁶⁰

Sometimes courts will be prepared to find a violation of international human rights law but not be prepared to order remedies in response, due to concerns about exceeding their mandate. In *VZW Klimaatzaak vs Kingdom of Belgium & Others*,⁶¹ a 2021 case challenging the inadequacy of Belgium's response to climate change, the Brussels Court of First Instance found a violation of both domestic law and the ECHR (Articles 2 and 8) but held that it was beyond its powers to impose specific emission targets.⁶²

Other courts have taken a different approach. In the Canadian case of *Mathur vs Her Majesty the Queen (2020)*,⁶³ seven youth claimants challenged the Province of Ontario's 2030 greenhouse gas reduction target of 30% below 2005 levels, for violating their Section 7 and 15 Charter rights. The Superior Court of Ontario commented that unlike in *La Rose*, the court was being asked to look at the compatibility of a particular act with the Charter of Rights and Freedoms, as opposed to reviewing the whole of Canada's climate change policy, and hence that the claim was justiciable,⁶⁴ paving the way for a full hearing of the case.

Similarly, in *Friends of the Irish Environment vs Government of Ireland (2020)*,⁶⁵ the Irish Supreme Court held that the National Mitigation Plan – a main plank of the Irish government's climate change policy – was vague and imprecise in relation to the targets specified under Ireland's Climate Act. The claimants argued that the Plan violated Ireland's Climate Action and Low Carbon Development Act 2015, the Constitution of Ireland⁶⁶ and obligations under the European Convention on Human Rights, particularly the right to life and the right to private and family life. The court refused to consider the matter as one for the executive alone to decide, holding that '[c]onstitutional rights and obligations and matters of policy do not fall into hermetically sealed boxes', and that 'the Court can and must act to vindicate such rights and uphold the Constitution.'⁶⁷

⁵⁷ Ibid., paragraph 56.

⁵⁸ *La Rose vs Her Majesty the Queen*, (2020) FC 1008.

⁵⁹ *Plan B Earth and Others vs The Secretary of State for Business, Energy, and Industrial Strategy*, (2018) EWHC 1892.

⁶⁰ Ibid., paragraph 49.

⁶¹ *VZW Klimaatzaak vs Kingdom of Belgium & Others*, (2021) case 2015/4584/A.

⁶² Ibid.

⁶³ *Mathur vs Ontario*, (2020) ONSC 6918.

⁶⁴ Ibid., paragraph 134.

⁶⁵ *Friends of the Irish Environment vs Government of Ireland*, (2020) IESC 49.

⁶⁶ Constitution of Ireland, 1 July 1937. Article 40.3.1^o states that 'the State guarantees in its laws to respect and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen'.

⁶⁷ *Friends of the Irish Environment vs Government of Ireland*, (2020) paragraph 8.16.

Summary of trends

The ‘rights turn’ is here to stay

It is clear that litigants are learning from past rights-based cases, for example improving the prospects of justiciability of their own cases by framing arguments in relation to the compatibility of specific legislation with rights, rather than challenging government policy as a whole.

The range of cases highlighted above also shows that rights-based climate litigation is being conducted both in the Global North and the Global South. In the latter, there is generally more scope to base claims on constitutional rights in general, or on socioeconomic rights, and to apply for a broader range of remedies.⁶⁸ Rights-based climate cases in Colombia, India, Pakistan, the Philippines and South Africa have been able to draw on doctrines and remedies developed over the years in the context of claims challenging the violation of socioeconomic rights such as the right to housing, health, food and work in these jurisdictions.⁶⁹ Indigenous rights litigation has also provided a useful body of case law relevant to climate change litigation, including on the requirement for free, prior and informed consultation and consent of relevant communities.⁷⁰ Global South countries that have led the way in socioeconomic rights litigation and jurisprudence are therefore likely to be particularly fertile jurisdictions for human rights-based climate cases in future.⁷¹

In the Global South, the type of remedies available may also be broader. For example, in South Asia, courts have a history of pressurising the executive and legislature to promulgate instruments and set up supervisory mechanisms to monitor the efficacy of executive plans. This is reflected both in the *Leghari* case discussed above and in the Nepali Supreme Court’s 2015 decision to direct parliament to pass legislation on climate change.⁷²

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The trend for bringing human rights-based climate change cases is likely to continue as governments come under increasing pressure to do more in this area, and as courts and human rights bodies elucidate and entrench the relationship between rights and climate change through caselaw. On 8 October 2021, the UN’s

⁶⁸ Setzer and Byrnes (2020), p. 14.

⁶⁹ Rodríguez-Garavito, C. (2020), ‘Human Rights: The Global South’s Route to Climate Litigation’, in Peel, J. and Lin, J. (2020), *Transnational Climate Litigation: The Contribution of the Global South*, Cambridge: Cambridge University Press, p. 3.

⁷⁰ *Ibid.*, p. 4.

⁷¹ *Ibid.*, p. 5.

⁷² *Shrestha vs Office of the Prime Minister et al.*, (2015) Supreme Court of Nepal, NKP Part. 61 Vol. 3.

Human Rights Council voted 42–1 in favour of a resolution to recognize the right to a safe, clean, healthy and sustainable environment as a human right.⁷³ While not legally binding, this political statement is likely to strengthen the basis of rights-based climate litigation before national courts, especially in countries where such a right is not explicitly recognized by domestic law. A General Comment on children’s rights and the environment with specific reference to climate change, which the UN’s Human Rights Committee is in the process of preparing, is likely to do the same.

Whereas to date most rights-based cases have been brought on the basis of substantive obligations rather than procedural issues, we are likely to see more cases raising procedural questions. This will include challenges to governments on the basis of the right to access information, to access justice or the right to participation. In a recent procedural challenge in the UK case of *R (Plan B Earth & others) vs Secretary of State for Transport (2018)*, the applicants argued that the government should have considered the Paris Agreement goals in its policy framework for the expansion of Heathrow Airport.⁷⁴

Growth in cases brought by youth activists

It is striking how many rights-based cases – including *Future Generations vs Minister of the Environment, Neubauer et al. vs Germany (2021)* and *Juliana* – involve young people using the courts to hold governments to account for the effects of climate change, both now and for future generations. Grounding the cases in human rights enables litigants to highlight the disproportionate impact that the failure to tackle climate change is having on vulnerable groups, including children. Organizations mobilizing these litigation efforts are increasingly drawing the public into the litigation process.

In these claims on behalf of future generations, international human rights law is being invoked in a forward-looking way, distinct from the more linear, backward-looking responsibility model of typical human rights claims.⁷⁵ Cases filed on behalf of young plaintiffs connect future human rights violations to the present by showing that people alive today will suffer the negative impacts predicted for 2050 and beyond.⁷⁶ In *Neubauer et al. vs Germany*, the German Federal Constitutional Court, upholding the complainants’ challenge, stated that ‘fundamental rights [are] intertemporal guarantees of freedom’,⁷⁷ positioning human rights as dynamic rather than static, and extending into the future as well as into the past.

Youth activists are also petitioning UN bodies (as in the case brought by Greta Thunberg and others cited on p. 10) and regional human rights courts. In *The People vs Arctic Oil*, an ECtHR case brought by six individuals aged 20–27, as well as Greenpeace and Young Friends of the Earth, the claimants are arguing that

⁷³ Human Rights Council Resolution 48/13.

⁷⁴ *Plan B Earth and Others vs The Secretary of State for Transport*, (2018) EWCA Civ 214. The Supreme Court ultimately ruled in favour of the government: <https://www.supremecourt.uk/cases/docs/uksc-2020-0042-press-summary.pdf>.

⁷⁵ Rodríguez-Garavito, C. (2020), ‘Human Rights: The Global South’s Route to Climate Litigation’, p. 23.

⁷⁶ *Ibid.*

⁷⁷ *Neubauer et al. vs Germany*, (2021). 1 BvR 2656/18, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20.

Norway's oil drilling in the Arctic deprives young people of their future.⁷⁸ In the high profile ECtHR case of *Duarte Agostinho and others vs Portugal and 32 other states*, the six youth applicants allege not just violations of the right to life and right to privacy, but also discrimination against the youth, on the basis that 'children and young adults are being made to bear the burden of climate change to a far greater extent than older generations'.⁷⁹

If the case is held to be admissible by the court, the applicants will argue that the respondent states share a responsibility for dangerous climate change that, on its current trajectory, far exceeds the Paris Agreement's 1.5°C target and may expose them to the possibility of living to see as much as 4°C of global warming. This argument puts the burden on the respondent states to demonstrate the adequacy of their climate change mitigation efforts. The outcome of the case will set the tone, not just for the ECtHR's approach to climate change, but for all 47 contracting states within the Council of Europe.

Impact of rights-based climate change litigation

Rights-based climate change litigation needs to be understood and assessed in conjunction with other strategies such as policy advocacy and public campaigns,⁸⁰ and as one of an array of tools being used to highlight the human rights risks of climate change, including legal institutions and mechanisms, alliances and mass mobilization.

Rights-based litigation has to be run strategically and sensitively in order to have impact, otherwise there is a risk that a case can polarize opinion and provoke a backlash. The human rights dimension also has to be carefully situated and explained. Rights activists are increasingly acting in concert with other activists and movements, and drawing on and involving other parts of the international human rights law ecosystem – including interventions by UN Special Rapporteurs, submissions before UN human rights treaty bodies and the participation of human rights NGOs – in building rights-based cases before domestic and regional courts.

It is too early to reach thorough conclusions about the impact of the 'rights turn' in climate litigation, as it remains a relatively recent trend. Many rights-based cases are either pending or on appeal, and their implementation can take years. But some initial observations can be made.

Direct impact

Even if a case is successful, its impact will substantially depend on proper implementation of the judicial remedy by the government or corporate respondent. Some of the cases cited in this paper led to direct regulatory impacts, such as a change of law or a government decision to adopt more robust targets.

⁷⁸ *The People vs Arctic Oil*, (2021) ECtHR; see Greenpeace Norge (2021), 'People vs. Arctic Oil', <https://www.greenpeace.org/norway/people-vs-arctic-oil>.

⁷⁹ *Duarte Agostinho and others vs Portugal and 32 other states*, (2020) ECtHR, 39371/20.

⁸⁰ Setzer and Byrnes (2020), p. 23.

Following *Urgenda*, for example, the Dutch government adopted 30 of the proposals in *Urgenda's 54 Climate Solutions Plan*,⁸¹ which was drawn up in collaboration with 800 civil society groups and other organizations.⁸² The government plan to comply with the court's decision also included a 75% reduction in capacity at the country's three coal-fired power stations, opened within the last five years,⁸³ and a €3 billion package of measures to reduce Dutch emissions by 2020. The response of the German parliament to the *Neubauer et al.* case was similarly swift – in June 2021, the Bundestag passed an amendment to legislation that commits Germany to become greenhouse gas neutral by 2045, five years ahead of its previous target. A 65% reduction in greenhouse gas emissions is also required by 2030.⁸⁴

But in other cases, implementation of the remedy has not been so forthcoming or is more challenging due to appeals by the government or company involved. For example, in the *Earthlife* decision against the government of South Africa, following the High Court's ruling that the government's review of plans for a new coal-fired power plant was invalid, the Minister of Environmental Affairs again gave authorization for the plant. It was only when the claimants brought a further case challenging the decision that an agreement was reached to set aside all government authorizations for the plant.⁸⁵

Indirect impact

Run strategically, rights-based climate cases can have a mobilizing power beyond the individual case concerned, by building a narrative about the need for stronger action to tackle climate change, which increases public awareness. These cases can also play a role in reducing misinformation through evidence, and by promoting a shared understanding of reality on climate action. Such cases can also lead to greater sensitization of legal institutions to the nature of climate change, and increased perception among governments that they may be challenged and held to account in court for their actions.⁸⁶

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⁸¹ Urgenda (2020), *54 Climate Solutions Plan*, <https://www.urgenda.nl/en/themas/climate-case/dutch-implementation-plan>.

⁸² Watts, J. (2020), Dutch officials reveal measures to cut emissions after court ruling, *The Guardian*, 24 April 2020, <https://www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling>.

⁸³ Ibid.

⁸⁴ Boldis, A. and Lütkehaus, C. (2021), 'How a court ruling changed Germany's Climate Protection Act', *Pinsent Masons*, 20 July 2021, <https://www.pinsentmasons.com/out-law/analysis/court-ruling-germany-climate-protection-act>.

⁸⁵ *EarthLife Africa Johannesburg vs Minister of Environmental Affairs and Others* (2016), 65662/16 (2020).

⁸⁶ For further analysis of how human rights and strategic litigation can be leveraged in the climate context, see Open Global Rights' 'Litigating the Climate Emergency' blog series, <https://www.openglobalrights.org/up-close/climate-emergency-litigation/#up-close>.

Even where rights-based climate cases are unsuccessful – of the 40 cases mentioned in the introduction, outcomes have been evenly split so far – they may still influence future litigation by helping to establish normative standards that have impact beyond the particular project or issue under consideration. In *Ioane Teitiota vs New Zealand (2020)*⁸⁷ the UN Human Rights Committee’s individual petition procedure was invoked to raise the issue of rising sea levels and its implications for low-lying islands and communities. The claimant relied upon the duty of states under Article 6 of the International Covenant on Civil and Political Rights not to deport a person when there is a real risk of irreparable harm to the right to life.

In its January 2020 decision, the Human Rights Committee accepted Teitiota’s claims that rising sea levels are likely to render Kiribati uninhabitable in 10–15 years’ time, but found that there was enough time for the Kiribati state to take remedial measures, so that the decision to deport was not unlawful. While the case failed, the Committee noted that, ‘without robust national and international efforts, the effects of climate change in receiving States may expose individuals to a violation of their rights under articles 6 or 7 [the right to life and the right not to be subject to cruel inhuman or degrading treatment] of the Covenant, thereby triggering the non-refoulement obligations of sending States.’⁸⁸ This decision is likely to have useful precedential value for future challenges relating to asylum protection from the effects of climate change.⁸⁹

Even strong dissenting decisions can be useful in moving public opinion, as in the *Juliana* case, where Judge Staton’s dissent – ‘The majority laments that it cannot step into the shoes of the political branches... but appears ready to yield even if those branches walk the Nation over a cliff.’⁹⁰ – is having a galvanizing effect on youth activists.⁹¹

Cases against corporations, even if unsuccessful, put businesses such as the ‘carbon majors’ on notice of the legal and financial risk to which they are increasingly exposed through their operations.⁹² Shareholder activism and commercial law avenues for holding corporations to account for climate change are also likely to be strengthened by developments in human rights-based climate change litigation, nudging behavioural change in the business community.

As in other domains such as technology regulation, international human rights law has an important role to play in providing a substantive and procedural framework for climate litigation. At a substantive level, it provides hard rights which, when combined with the Paris framework targets, create a lens through which to hold

⁸⁷ *Ioane Teitiota vs New Zealand* (2020), UN Human Rights Committee (HRC), UN Doc CCPR/C/127/D/2728/2016.

⁸⁸ *Ibid.*, paragraph 9.11

⁸⁹ OHCHR (2020), ‘Historic UN Human Rights Case Opens Door to Climate Change Asylum Claims’, 21 January 2020, <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25482>.

⁹⁰ *Juliana vs United States* (2020), 18-36082, p. 49, <https://static1.squarespace.com/static/571d109b04426270152febe0/t/5e22101b7a850a06acdff1bc/1579290663460/2020.01.17+JULIANA+OPINION.pdf>.

⁹¹ Meyer, R. (2020), ‘A Climate-Lawsuit Dissent That Changed My Mind’, *The Atlantic*, <https://www.theatlantic.com/science/archive/2020/01/read-fiery-dissent-childrens-climate-case/605296>.

⁹² Ganguly, G., Setzer, J., and Heyvaert, V. (2018), ‘If at First You Don’t Succeed: Suing Corporations for Climate Change’, *Oxford Journal of Legal Studies*, 38(4), p. 841–868, doi:10.1093-ojls.gqy029.

governments to account. We are likely to see an increased range of rights invoked in future, including the right to housing and family life, given predictions that there may be up to one billion climate refugees by 2050.⁹³

At the procedural level, human rights law helps to elaborate due diligence standards and procedural guarantees for both governments and corporations. In this way, rights-based claims can also help fill the enforcement gap between national and international law, as seen in *Urgenda*.

While rights-based litigation has scored some notable and impactful wins, ultimately the success of any strategic litigation initiative is not in the immediate outcome of particular cases but the extent to which such efforts give impetus to popular discourse and policy outcomes. In the US, *Brown vs Board of Education* in 1954 preceded and probably influenced the Civil Rights Act of 1964, but it would be not until many decades later that the impact of the change from that initiative took effect. In relation to climate change, however, there is no time for a long learning curve.

Conclusion

Rights-based climate litigation faces a number of challenges, but litigants are increasingly surmounting these through innovative strategies. Rights-based cases constitute an important ‘bottom-up’ form of pressure on governments to do their ‘minimum fair share’ in tackling climate change, and to take account of the link between current climate harms and future human rights violations in doing so. In addition to the growing raft of cases challenging governments’ climate mitigation measures, we are likely to see a rising number of cases challenging the impact of proposed climate change policies on a range of human rights, as well as an increase in litigation against corporations.

Litigation is necessarily reactive and undertaken on a case-by-case basis, as opposed to more proactive tools such as legislation. Human rights cases are no substitute for the need for reasoned and urgent policy action from the executive and legislative branches of government. The response to climate change must be effective, but it must also take place where different interests have a seat at the table, can negotiate and resolve differences.

The first place for that is the political arena – both domestically and in international forums such as the Conference of the Parties (COP) to the UNFCCC – rather than the courts. But where governments and companies fail to act, they can increasingly expect human rights law to be invoked in court to hold them to account for the impact of climate change on the fundamental rights of today’s citizens – and those of tomorrow.

⁹³ Rodríguez-Garavito, C. (2020), *Climate litigation and human rights: averting the global crisis*.

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Cover image: Greta Thunberg speaking at a press conference given by a group of 16 youth climate activists in New York, USA on 23 September 2019.

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