Human rights climate litigation against governments: a comparative overview of current cases and the potential for regional approaches

Anna Romaniszyn*

In the past few years there has been a noticeable rise in human rights climate litigation against public authorities all around the world. Supporting their claims by a combination of legal and non-legal arguments (such as scientific evidence, environmental principles and climate justice claims), applicants allege that governmental failure to accurately respond to climate change in a decisive and comprehensive ways constitutes failure to carry out protective duties towards their human and constitutional rights. The relief sought by the applicants is usually that of an injunction or mandamus to adopt stricter and more effective combination of laws and policies that would prove (more) effective to avert the climate crisis. The paper undertakes a comparative study of the most relevant cases comprising this new wave of human rights climate litigation. In part I, it identifies reoccurring arguments and obstacles, how they are being approached (and overcome), and how transferable they are across different jurisdictions. Among issues considered are strategies to demonstrate plaintiffs' standing, arguments aimed at establishing governmental duty to act and accountability for inaction, as well as demands to enjoin the state to undertake specific mitigation or adaptation measures. In part II, the paper ponders on the potential of existing regional human rights mechanisms for constructing and advancing similar cases and elevating the human rights climate litigation from national level. After doing so, the analysis concludes with reflections on the benefits and limitations of human rights-based climate litigation against governments and its general suitability for solving the climate change issue, arguing that such litigation, notwithstanding its positive influence, cannot be considered as a silver bullet to the climate problem.

Ces dernières années, on a constaté une augmentation considerable des litiges relatifs aux droits humains et au climat contre les autorités publiques à travers le monde entier. Soutenant leurs revendications par une combinaison d'arguments juridiques et non juridiques (tels que des preuves scientifiques, des principes environnementaux et des arguments de justice climatique), les requérants allèguent que l'incapacité des gouvernements à répondre avec précision au changement climatique de manière décisive et globale constitue un non-respect des obligations en matière de protection de leurs droits humains et constitutionnels. La réparation demandée par les requérants est généralement une injonction ou un mandamus pour adopter une combinaison de lois et de politiques plus strictes et plus efficaces qui s'avèreraient (plus) efficaces pour éviter la crise climatique. Ce document entreprend une étude comparative des cas les plus pertinents qui composent cette nouvelle vague de litiges climatiques relatifs aux droits humains. Dans la première partie, il identifie les arguments et les obstacles récurrents, la manière dont ils sont abordés (et surmontés) et leur transférabilité entre les différentes juridictions. Parmi les questions examinées figurent les stratégies utilisées pour démontrer la qualité pour agir des plaignants, les arguments visant à établir l'obligation d'agir du gouvernement et sa responsabilité en cas d'inaction, ainsi que les demandes visant à enjoindre à l'État de prendre des mesures spécifiques d'atténuation ou d'adaptation. Dans la deuxième partie, ce document s'interroge sur le potentiel des mécanismes régionaux des droits humains existants pour construire et faire avancer des cas similaires et élever le litige climatique des droits humains au niveau national. Ensuite, l'analyse se termine par des réflexions sur les avantages et les limites des litiges climatiques fondés sur les droits humains contre les gouvernements et sur leur aptitude générale à résoudre la question du changement climatique, en faisant valoir que ces litiges, malgré leur influence positive, ne peuvent être considérés comme une solution miracle au problème climatique.

***Titre en français :** Litige climatique relatif aux droits de l'homme contre les gouvernements : un aperçu comparatif des affaires en cours et des possibilités d'approches régionales*

* Anna Romaniszyn is a trainee in Directorate-General for the Environment at the European Commission. She holds a Master's in Law from the University of Wroclaw, Poland, and an LL.M. with Concentration in Global Sustainability and Environmental Law from the University of Ottawa. The author wishes to thank Professor Nathalie Chalifour for her supportive research guidance, as well as the anonymous Reviewers and the Editorial Board of this Journal for their comments and insights.

Disclaimer: This piece was submitted to the Journal in November 2019. Cases cited in this piece may have been appealed, dismissed, or overturned since the time of writing.

1. INTRODUCTION

Climate change is one of the biggest challenges to the future of the planet and all life it maintains. Available science clearly indicates that progressing global warming, caused mainly by emissions of green-house-gases (GHG) into the atmosphere, already affects weather patterns, vegetation processes, and composition of the oceans. Natural resources, crops and fresh water are depleting, and a growing number of areas has become inhabitable for humankind. If not eliminated or reduced in the very near future, ecological disruption could eventually cause social, economic and political unrest of an exceptional scale.[1] Climate change mitigation and adaptation has, therefore, become one of the most pressing challenges for all national governments and the international community. Actions undertaken thus far still does not suffice to effectively prevent the approaching climate crisis.[2] The apparent inefficiency and apathy of governmental climate strategies have resulted in a strong citizen response. Communities around the world are demanding stronger and more decisive climate action through various political and legal means.[3] Some, seeking judicial assistance, resorted to so-called climate litigation. The term itself encompasses a vast scope of various legal disputes, all revolving around the issue of climate change and its possible negative effects on social and economic systems. Until recently, however, these disputes varied considerably in what legal base they invoked, what relief they sought or even who the plaintiffs were. Often they had

---

1 See generally Core Writing Team, RK Pachauri & LA Meyer (eds), "Climate Change 2014: Synthesis Report, Contribution of Working Groups I, II, and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change" (2014) online (pdf): *IPCC* <ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf> [Climate 2014 Synthesis Report]; Valérie Masson-Delmotte et al [eds], "Summary for Policymakers" (2018), online (pdf): *IPCC* <ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf>.

2 See Dan Tong et al, "Committed emissions from existing energy infrastructure jeopardize 1.5°C climate target" (2019) 572 Nature 373.

3 Among most recent political actions are youth-organized protests, so-called Fridays for Future, see "Fridays for Future: Students hold international climate change protests" (15 March 2019), online: *DW* <www.dw.com/en/fridays-for-future-students-hold-international-climate-change-protests/a-47927393>. Global operations of a new civil-disobedience movement called Extinction Rebellion are another example of such intensified political activity, see "Extinction Rebellion" (last visited 8 July 2020), online: *Extinction Rebellion* <www.rebellion.earth>.

little political significance beyond the closest vicinity of the case in question.[4] Some of these cases challenged individual statutory provisions, policies or environmental impact assessments of single projects, while others protested the specific operations of private or public companies and corporations, such as oil extraction of gas-flaring.[5]

In the past few years, however, there has been a noticeable turn towards utilizing the human rights doctrine in climate litigation.[6] Among these, a subcategory of very specific cases, constructed in a similar or corresponding way despite existing in different jurisdictions, can be identified. Supporting their claims by a combination of subsequent legal and non-legal arguments (such as scientific evidence, environmental principles and climate justice claims), applicants allege that governmental failure to accurately respond to climate change in a decisive and comprehensive ways constitutes failure to carry out protective duties towards their human and constitutional rights. They refer to a number of recognized rights from the right to life and security to the right to health, right to property, right to equal treatment to rights of children and future generations. The relief sought by the applicants is usually not one of damages for harms which have already occurred or a quash of a specific singular policy, but rather of an injunction or mandamus to adopt stricter and more effective combination of laws and policies that would prove (more) effective to avert the climate crisis.[7]

The paper undertakes a comparative study of the most relevant cases comprising this new wave of human rights climate litigation.[8] First, it identifies reoccurring arguments and obstacles, how they are being approached (and overcome), and how transferable they are

---

4 See Giulio Corsi, "A bottom-up approach to climate governance: the new wave of climate change litigation" (2017) 57 ICCG Reflection at 2 [Corsi, "A bottom-up approach"].

5 The Sabin Center for Climate Change Law at Columbia University has created a comprehensive database on U.S. and non-U.S. climate litigation, providing a wide range of relevant documents and commentaries, see "Climate Change Litigation Database" (last visited 8 July 2020), online: *Climate Case Chart* <climatecasechart.com>. For general discussion on climate litigation see e.g. Michal Nachmany et al, *Global trends in climate change legislation and litigation* (London: Graham Research Institute on Climate Change and the Environment, 2017); Jacqueline Peel, "Issues in Climate Change Litigation" (2011) 5:1 Carbon & Climate L Rev 15; Ronald G. Peresich, "Climate Change Litigation" (2016) 45:4 Brief 28; United Nations Environment Programme, "The Status of Climate Change Litigation – A Global Review" (2017), online (pdf): *UN Environment* <columbiaclimatelaw.com/files/2017/05/Burger-Gundlach-2017-05-UN-Envt-CC-Litigation.pdf>.

6 See Jacqueline Peel & Hari M Osofsky, "A Rights Turn in Climate Change Litigation?" (2018) 7:1 Transnational Environmental L 37.

7 See the cases under "Human Rights" (last visited 8 July 2020), online: *Climate Case Chart* <climatecasechart.com/non-us-case-category/human-rights/>.

8 Climate litigation encompasses various types of cases – arguments made in them often intertwine. A lot of cases not discussed in this paper might also fit within its scope to some extent (for example on standing or causality). However, due to the objective of this paper, as well as time and resource constraints of the research, only cases with specific chosen characteristics are being reviewed and compared. The paper discusses, therefore, claims based predominantly or in a substantial part on human rights, filed by individual citizens or their representatives against the government. Additionally, the main aim of the petition should be to enjoin the state to adopt more ambitious climate-related policies. Therefore, cases against private companies, filed by municipalities or requesting quashing of a singular policy or measure, for example, are not the subject of this paper and are generally not mentioned. Similarly, as the UN HR system does not offer any judicial mechanism, the recent petition to the Committee on the Rights of the Child filed in late 2019 will not be a part of this paper.

across different jurisdictions. Among issues considered are strategies to demonstrate plaintiffs' standing, arguments aimed at establishing governmental duty to act and accountability for inaction, as well as demands to enjoin the state to undertake specific mitigation or adaptation measures. The novelty and universality of many of the arguments presented, render a review and comparison of such disputes instrumental to understand the trend as such.[9] By considering the general strengths and weaknesses of cases that comprise this „new wave", the paper contributes to the very current discussion on the possibilities of climate litigation, as well as its future shape in a global scale. Although research and literature on human rights climate litigation exists, it often focuses on the very first landmark cases.[10] Inclusion of the newest developments in claims less known or still pending allows for a more comprehensive analysis.

Then, the paper ponders on the potential of existing regional human rights mechanisms for constructing and advancing similar cases and elevating the human rights climate litigation from national level. For years now, the regional human rights courts have been participating in the discussion on environmental rights and their jurisprudence bears wide consequences on judicial and political systems of European, American and African states. It is therefore justified to consider whether a climate case similar to those already argued at national level could stand and succeed also on a regional stage. After doing so, the analysis concludes with reflections on the benefits and limitations of human rights-based climate litigation against governments and its general suitability for solving the climate change issue, arguing that such litigation, notwithstanding its positive influence, cannot be considered as a silver bullet to the climate problem.

2. PART I CURRENT HUMAN RIGHTS CLIMATE CHANGE LITIGATION

Recently, citizens across the globe have increasingly turned towards utilising human rights in climate litigation against public authorities. Rather than protesting the contribution to climate change that individual projects or statutes could have, plaintiffs started questioning the very ambitions of governmental climate actions in their entirety. One of the first cases of this kind was the 2005 petition of an Inuk woman filed against the United States to the Inter-American Commission on Human Rights. The applicant claimed the government's actions and omissions contributed to climate change and its adverse impacts on her rights.[11] In 2013, the Commission received a similar petition, this time from the Arctic Athabaskan Council

---

9 It should be noted, however, that a more detailed analysis of any given case referred to in this work must take into account important jurisdictional differences. Where it is relevant to the comparative study undertaken in this research, the paper highlights and discusses these variations.

10 On human rights climate litigation, see e.g. Peel & Osofsky, *supra* note 6; Veronica de la Rosa James, "Climate Change and Human Rights Litigation in Europe and the Americas" (2015) 5:1 Seattle J of Environmental L 165; Tessa Khan, "Accounting for the Human Rights Harms of Climate Change" (2017) 14:25 Sur File On Natural Resources & Human Rights 89; Dustin W Klaudt, "Can Canada's "Living Tree" Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?" (2018) 31:3 J Envtl L & Prac 185; Marc A Loth, "Too big to trial? Lessons from the *Urgenda* case" (2018) 23:2 Unif L Rev 336; Annalisa Savaresi & Juan Auz, "Climate Change Litigation and Human Rights: Pushing the Boundaries" (2019) 9:3 Climate L 244.

11 See "Petition to the Inter-American Commission on Human Rights seeking Relief from Violations Resulting from Global Warming caused by Acts and Omissions of the United States" (7 December 2005), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf>.

against Canada.[12] Neither of the cases succeeded (the first case has been rejected; the latter have been stuck in the Commission for almost seven years at the time of writing this paper).[13] A breakthrough came in 2015, when the district court in The Hague famously ruled against the Dutch government for its insufficient GHG mitigation policies (the decision was upheld by the the Hague Court of Appeal in late 2018 and by the Dutch Supreme Court in late 2019).[14] Later the same year, a similar case, although dealing with adaptation measures rather than mitigation, was won by a farmer in Pakistan.[15] Since then, citizens and non-governmental organizations around the world, drawing from the experience of the Dutch and Pakistani claimants, have been taking their own governments to court, which resulted in a significant rise of climate litigation based on human rights. Currently, courts in *inter alia* Pakistan, Colombia, Germany, Switzerland, Ireland, the United Kingdom, France, Canada, the US, and the European Union have heard and decided on (or are yet to decide) the state's obligations to fight climate change more decisively.[16]

The core of the applicants' claims is the violation of their human rights by state inaction and failure to address the climate crisis appropriately, constituting a breach of governmental protective legal duties. Due to the practical and theoretical challenges posed by the human rights-based approach to climate change,[17] litigants need to reach for innovative and often multi-layered arguments and lines of reasoning. The most notable reoccurring characteristics of this type of climate litigation are:[18]

---

12 See "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" (23 April 2013), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2013/20130423_5082_petition.pdf> ["April 23 Petition"].

13 *Ibid.* There seems to be no specific explanation as to why the petition has still not been resolved.

14 See The Hague District Court, Den Haag, 24 June 2015, *Urgenda Foundation v the State of the Netherlands* (2015), C/09/456689 (The Netherlands) [*Urgenda Foundation* Hague Dist Ct]; The Hague Court of Appeal, Den Haag, 9 October 2018, *Urgenda Foundation v the State of the Netherlands* (2018), 200.178.245/01 (The Netherlands) [*Urgenda Foundation* Hague CA]; Supreme Court of the Netherlands, Den Haag, 13 January 2020, *Urgenda Foundation v the State of the Netherlands* (2020), 19/00135 (The Netherlands).

15 See *Ashgar Leghari v Federation of Pakistan* (4 September 2015), WP No 25501/2015 (Lahore High Court, Green Bench) [*Leghari*].

16 See Sabin Center, *supra* note 5.

17 For more of a general discussion on the human rights-based approach to climate change, its advantages and short-comings, see e.g. Sumudu Atapattu, *Human Rights Approaches to Climate Change. Challenges and Opportunities* (London: Routledge, 2016); Daniel Bodansky, "Introduction: Climate Change and Human Rights: Unpacking the Issues" (2010) 38:3 Ga J Intl'l & Comp L 511; John H Knox, "Bringing Human Rights to Bear on Climate Change" (2019) 9 Climate Law 165; John H Knox, "Human Rights Principles and Climate Change" in Gray, Tarasofsky & Carlarne, eds, *The Oxford Handbook of International Climate Change Law* (Oxford: OUP, 2016); Katherine Lofts, "Analyzing rights discourses in the international climate regime" in Sebastien Duyck et al, eds, *The Routledge Handbook of Human Rights and Climate Governance* (Oxon: Routledge, 2018); Ole W Pedersen, "European Environmental Human Rights and Environmental Rights: A Long Time Coming" (2008) 21:1 Geo Int'l Envtl L Rev 73.

18 A similar classification of the over-arching themes has been introduced by Corsi, "A bottom-up approach", *supra* note 4.

a. strategies to address the procedural issue of standing;

b. the use of human rights claims supported by a wide range of legal and non-legal instruments to establish governmental duty to act;

c. the use of science and international recognition of the climate crisis to establish a causal link between the state's negligence and its liability for the harms claimed; and

d. the relief sought, which is often that of an injunction and an order to adopt more stringent measures to fight climate change, rather than damages or quashing of a single policy or decision. This, however, raises questions about the separation of powers and the extent of governmental discretion.

The following part will provide an overview of several past and pending cases to illustrate the similarities and differences in approaching these concerns in different jurisdictions and legal systems. First, the part discusses the procedural issue of standing, then it turns to how the core argument is being built by the use of human rights commitments and scientific findings, and ends with considerations on the relief being requested.

2.1. Right holders and their standing

The first issue worth closer consideration is the applicants themselves and the strategies through which they assert their standing in court. Despite commonly recognized universality of human rights, potential claimants still need to meet certain requirements to establish standing and effectively seek judicial redress. Although specific conditions may vary based on the jurisdiction, in many cases sufficient personal interest in the outcome of the case that surpasses the general interest of the public must be demonstrated.[19] Often to meet such standards, the interest needs to be substantial, direct, immediate and/or individual, which usually requires proving some level of causation between the event and the harm claimed and/or establishing injury-in-fact.[20] This of course can be extremely difficult to demonstrate, especially in the context of climate change, where impacts are often slow in onset, still difficult to predict with certainty, and the global character and complexity of global warming make it unusually challenging to draw a sufficient causal link between the harm inflicted or the damage suffered and the specific cause.[21]

Through a review of the cases presented below, it becomes apparent that the applicants usually choose between two different pathways, depending on what is allowed by procedural

---

19 See eg. cases: *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others*, A-2992/2017, [2018]; *Juliana et al. v United States of America et al.*, Case No. 6:15-cv-01517-TC; *Environnement Jeunesse v Attorney General of Canada*, 2019 QCCS 2885; *Armando Ferrão Carvalho and Others v The European Parliament and the Council,* T-330/18.

20 See Corsi, "A bottom-up approach", *supra* note 4 at 2–3; United Nations Environment Programme, *The Status of Climate Change Litigation – A Global Review* (Nairobi: United Nations Environment Programme, 2017) at 28.

21 For more on causation between climate change and human rights violations and attribution science, see e.g. M Burger, J Wentz & R Horton, "The Law and Science of Climate Change Attribution" (2020) 45:1 Colum J Envtl L 59; Sophie Marjanac & Lindene Patton, "Extreme weather event attribution science and climate change litigation: an essential step in the causal chain" (2018) 36:3 J Energy & Natural Resources L 265 [Marjanac & Lindene].

law in their jurisdictions: a) public interest litigation or b) by gathering representatives of a specific vulnerable social group which will suffer adverse effects of climate change to a bigger and more extreme extent that the rest of society.

2.1.1. Public interest litigation

A number of cases employ public interest litigation, which can be explained as a strategy, sometimes also a recognized type of legal action, that uses the law "to advance human rights and equality, or raise issues of broad public concern. It helps advance the cause of minority or disadvantaged groups or individuals."[22] In other words, it provides potential claimants with a sort of open standing, where they might not necessarily be the ones to suffer the harm or where violations are more widespread and systematic. There are two main reasons why public interest litigation is of special importance in climate change litigation: first, it is political in its nature, thus allowing the applicants to push for a policy change and shielding them from allegations of non-justiciability or political character of their case; second, "[it] is by definition representative of the public interest and as such, no injury or causation need to be shown to have access to Court".[23] The possibility of invoking public interest as grounds for standing depends, however, on the rules of each specific jurisdiction and, as is apparent in the following examples, can stem from explicit recognition in the state's law or jurisprudence, or needs to be interpreted from more general obligations.

Most notably, public interest litigation was used to assert standing in the famous *Urgenda* case.[24] The claim was brought by Urgenda, a foundation established under Dutch law; its statutory aim is "to stimulate and accelerate the transition process to a more sustainable society, beginning in the Netherlands". Urgenda was also representing 886 individual citizens.[25] Dutch law explicitly allows non-governmental organizations to file a claim in public interest, as long as the representation of general or collective interests is based on the NGO's bylaws.[26] Considering this provision and its statutory aim, the court granted Urgenda standing "to defend the rights of both current and future generations to availability of natural resources and a safe and healthy environment."[27] Interestingly enough, however, the court rejected the claim of the individual claimants, stating they have no sufficient individual interests beside that of Urgenda's.[28]

Similarly, open standing is being asserted in a case recently commenced in France, *Notre Affaire à Tous and Others v France*.[29] A group of non-governmental organizations focused on

---

22 "About Public Interest Litigation" (2019), online: *The PILS Project* <www.pilsni.org/about-public-interest-litigation>.

23 Corsi, "A bottom-up approach", *supra* note 4 at 3.

24 See *Urgenda Foundation* Hague Dist Ct, *supra* note 14.

25 Roger Cox, "A Climate Change Litigation Precedent: Urgenda Foundation v The State of the Netherlands" (2015) 79 CIGI Papers at 5 [Cox].

26 See Art 3:305a Civil Code (Netherlands).

27 *Urgenda Decision* Hague Dist Ct, *supra* note 14 at paras 4.4–4.10.

28 See Cox, *supra* note 25 at 5.

29 See "Letter of Formal Notice" (last visited 8 July 2020) at 15–16, online (pdf): Notre Affaire à Tous <notreaffaireatous.org/our-material-in-english/> [Notre Affaire à Tous].

environmental protection and fighting against climate change, and protection of fundamental rights, base their claim for standing in public interest on French law and jurisprudence. According to the French Environmental Code, any association the purpose of which is the protection of nature and the environment may institute proceedings before the administrative tribunals for any grievance relating to this protection.[30] Additionally, established case law provides that "an association or a foundation for the protection of the environment may argue moral prejudice when the rights and collective interests it defends are infringed upon."[31] The applicants argue that the "faults committed by the State in the fight against climate change harm the collective interests defended by the organizations and the foundation, as they constitute an obstacle to the achievement of their statutory object".[32]

In two Pakistani cases, of which one was decided in 2015 and one is still pending on its merits, open standing has also been successfully invoked by the applicants, mostly due to the well-established public interest litigation practice in the country's legal system.[33] In *Leghari,* the court recognized the applicant's open standing to assert his own rights and the rights of other citizens, especially those "vulnerable and weak segments of the society who are unable to approach this Court".[34] In *Ali v Federation of Pakistan,*[35] a seven-year-old girl, represented legally by her father, argued that the actions of her government "seriously infringe upon the constitutionally guaranteed [f]undamental [r]ights of youth Petitioner and the people of Pakistan."[36] Although her standing was denied at first, the Pakistani Supreme Court eventually confirmed that "minors can file a legal petition in the interest of public at large."[37]

Not every jurisdiction, however, explicitly allows for an open standing in court. Therefore, a few of the cases filed in courts across Europe resort to states' international obligations on environmental procedural rights in order to establish standing on the basis of public interest. Of special importance in this context are provisions of the so-called Aarhus Convention,[38]

---

30 Art L141-1 Code de l'environnement.

31 See e.g. CE, 18 May 1979, *Association judaï que Saint-Seurin,* [1979] Rec 218; CE, 19 February 1982, *Comité de défense du quartier Saint-Paul, [*1982] Rec 746; Cour Administrative d'Appel, Nantes, 1 December 2009, *Ministre d'état, ministre de l'écologie, de l'énergie, du dë veloppement durable et de la mer c Association « Halte aux marë es vertes » et autres*, Rec n° 07NT0377.

32 "Brief Juridique Sur La Requete Deposee au Tribunal Administratif de Paris le 14 Mars 2019" (14 March 2019) at 13 online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190314_NA_complaint-1.pdf> [Brief Juridique].

33 On public interest litigation in Pakistan see e.g. Muhammad Amir Munir, "Public Interest Litigation in Supreme Court of Pakistan" (4 August 2007), online (pdf): *SSRN* <papers.ssrn.com/sol3/papers.cfm?abstract_id=1984583>.

34 *Leghari*, *supra* note 15 at para 6.

35 "Ali v Federation of Pakistan" (1 April 2016), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20160401_Constitutional-Petition-No.-___-I-of-2016_petition-1.pdf> [Ali].

36 *Ibid* at 13–14.

37 Zofeen T Ebrahim, "Seven-year-old girls sues Pakistan government over climate change" (5 July 2016), online: *DAWN* <www.dawn.com/news/1269246>.

38 See *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 447 (entered into force 30 October 2001) [Aarhus

to which 46 European countries and the European Union are parties. The treaty grants procedural environmental rights to citizens and their associations, more specifically the right of access to environmental information, the right to public participation in environmental decision-making, and the right of access to justice. Art. 9 enshrines the right to access to justice, providing that every party must ensure that members of the public have a possibility of judicial review to challenge the substantive and procedural legality of any decisions, acts or omissions of public authorities covered by the provisions of this Convention. It further establishes that non-governmental organizations that promote environmental protection and have met requirements under national law, shall be considered as having sufficient interest for the purpose of this provision.[39] Although there are some legal disagreements regarding the specific scope of these provisions[40] and not all states comply with the standards set out, the Aarhus Convention bears great consequences for public interest litigation in environmental matters, *inter alia* climate litigation, especially because it encompasses the whole European continent, including the European Union and its institutions, and all states individually.[41] It has been employed in order to establish standing in public interest several times.

For example, following the success of *Urgenda*, a human rights climate case was filed in court by a Belgian organization Klimaatzaak, alleging that the Belgian government continues to fail to adopt appropriate climate policies and demanding a legal injunction for more a stringent action.[42] The case is still pending on the merits (there has been a long procedural battle over the language of the proceedings), but open standing for environmental non-governmental organization was granted, although it is not explicitly recognized in Belgian law. This was possible due to a 2013 decision of the Belgian Court of Cassation. In the ruling the Court confirmed the right of NGO to claim standing, invoking Belgian obligations stemming from the Aarhus Convention.[43]

Convention].

39 *Ibid* at art 9(2) in conjunction with art 2(5).

40 The Compliance Committee interprets the provisions very broadly (see e.g. "Aarhus Convention Implementation Guide" (2014) at 57–58, online (PDF): *UNECE* <https://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng.pdf>); similarly the Court of Justice of the European Union, with regard to access to justice granted to NGOs before national courts, interprets the provision as precluding national procedural rules that limit the right to participate in the proceedings only to parties (see e.g. *Protect Natur-, Arten- und Landschaftschutz Umweltorganization*, C-664/15 [2017] InfoCuria 987 at para 81). On the other hand, the CJEU jurisprudence and the EU law concerning access to justice at the EU level, have been relatively restrictive, despite the EU accession to the Convention (see: Part II, subsection 4.2. of this paper).

41 For the list of signatories see "Status of ratification" (last visited 8 July 2020), online: *UNECE* <www.unece.org/env/pp/ratification.html>.

42 Information on the case pending, also in English, is available on the organization's website: "Principal Conclusions" (June 28, 2019) at 15, online (pdf): *Klimaatzaak* <affaireclimat.cdn.prismic.io/affaireclimat/82c94786-08b2-4c96-9277-dca158ac67be_20190628%2Bkz%2Bconclusions%2Bprincipales%2Bfinales%2B-%2Bpdf.pdf>.

43 Court of Cassation of Belgium, Brussels, 11 June 2013, P.12.1389.N (Belgium) at paras 4–6. The judgment of the Court can be found online (in Flemish): "Hof van Cassatie van België" (last visited 8 July 2020), online (pdf): <jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20130611-12>.

Similarly, a case filed in late 2018 before German administrative court, *Family Farmers & Greenpeace*,[44] argued standing in public interest through a combination of national laws and Aarhus (and other European law-based) commitments. The applicants, a group of families supported by Greenpeace Germany, asserted their standing in two ways: individual claimants argue their individual and direct interest, drawing a causal link between climate change and its effect and the harms they suffer;[45] Greenpeace, on the other hand, claimed to support individual rights of the families and invoked the right of environmental non-governmental organizations to participate in the proceedings as a party. The NGO relied on German and European jurisprudence in light of the Aarhus Convention and the right to an effective remedy and to a fair trial granted in the European Union's human rights law, most importantly the EU Charter of Fundamental Rights.[46,47] Unlike the courts in the Netherlands and Belgium, however, the German court rejected the standing claim in its recent judgment, albeit mainly due to the executive character of the contested policies which in turn prevented individuals from invoking constitutional and international protection of their rights (more on the discussion about the nature of climate policies in subsection 2.3. of the paper).[48]

Aarhus standards were also invoked in a case filed by a non-governmental organization in Ireland, *Friends of the Irish Environment*,[49] albeit in the end the court based its decision mainly on domestic case law. Public interest litigation is generally not allowed in Irish law except under very limited circumstances.[50] The government, as the defendant, argued that the petition does not fulfil the allowed exceptions and therefore the organization cannot assert a breach of other's rights in this case.[51] whereas the applicants pointed to Ireland's obligations from the Aarhus Convention.[52] Although in the end the court rejected the central claims of the

---

44 See Administrative Court, Berlin, 25 October 2018, *Family Farmers and Greenpeace Germany v German Government* (2018) VG 10 K 412.18 (Germany) [*Family Farmers*]. The application is available online: "Family Farmers and Greenpeace Germany v German Government" (last visited 8 July 2020), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181025_0027117R-SP_complaint-1.pdf> [The Application].

45 They do so with use of scientific evidence and wide recognition of climate change and human rights connection (The Application, *supra* note 44 at s IV(3)).

46 See *The Charter of Fundamental Rights of the European Union,* 12 December 2007, OJ C 326/391 (entered into force 1 December 2009) at art 47 [*The Charter*].

47 The Application, *supra* note 44 at s IV(4).

48 *Family Farmers*, *supra* note 44.

49 See *Friends of the Irish Environment CLG v Ireland* [2018] EHC 740 (Ireland); "Climate Case Ireland Judgment of the High Court" (last visited 8 July 2020) at para 80, online (pdf): *Climate Case Ireland*: <climatecaseireland.ie/wp-content/uploads/2019/11/Climate-case-approved-FIE-v-Government-of-Ireland-2019_IEHC_747.pdf> [Climate Case Ireland Judgment] (Ireland's High Court has not agreed to make documents in the case public—all available information on claimant's and respondent's arguments is provided by the applicant on their official website and through media coverage).

50 See e.g. "Barriers to Public Interest Litigation" (last visited 8 July 2020), online: *Public Interest Law Alliance* <www.pila.ie/what/promoting-publicinterestlitigation/barriers-to-public-intere.html>.

51 "'No legal standing' to argue for citizens' constitutional rights" (24 January 2019), online: *Green News.ie* <greennews.ie/environmental-group-not-locus-standi-argue-human-rights/>.

52 See "Environmental NGO goes to High Court in fight to get landmark ruling for legal aid" (3 April 2019), online: *Friends of the Irish Environment* <www.friendsoftheirishenvironment.org/news-archive/17637-

suit, it concluded the organization did in fact have standing. Interestingly, the judge invoked mainly domestic jurisprudence, according to which a bona fide general interest of the applicant to protect a certain right is decisive in such cases. Considering the constitutional rights at stake and the wide impact environmental degradation has on the general public, the court found the organization had such interest.[53]

2.1.2. Standing of representatives of vulnerable groups

Public interest litigation is not always possible, however. In Europe, the Aarhus Convention has been an important step towards more broadly accessible environmental justice, but some states still do not fully comply with its provisions.[54] Many jurisdictions explicitly require claimants to demonstrate direct and individual concern to establish standing before courts, whereas cases brought in collective interest (*actio popularis*) are often not allowed.[55] Therefore, as illustrated by a few cases discussed below, a second strategy has been adopted: compiling a class action from representatives of a specific group especially vulnerable to climate change and its impacts, which distinguishes them from the general public. Usually these are: youth and future generations; senior citizens; or farmers and indigenous peoples who rely on a sustainable and prosperous environment in a more direct way than the rest of the society. The assertion of their standing is rooted not only in a traditional approach to human rights, but also more broadly in climate justice and the principles of inter- and intra-generational equity. They also utilise the latest scientific findings to support their claims of disproportionate hardship they experience in relation to the general public.

The most important example of such an approach is the Colombian case *Future Generations v Ministry of the Environment and Others,*[56] eventually won in late 2018. A group of children and young adults filed a complaint (*tutela*) in which they claimed the government has failed to adopt appropriate measures against Amazon deforestation, which contributes to climate change and adversely affects their fundamental rights. Although the lower court rejected the complaint on procedural grounds, stating a *tutela* is not an appropriate form of action because

environmental-ngo-goes-to-high-court-in-fight-to-get-landmark-ruling-for-legal-aid>.

53 See Climate Case Ireland Judgment, *supra* note 49 at paras 123–132.

54 See Compliance with the Aarhus provisions is overseen by the Compliance Committee. See e.g. *Excerpt from the addendum to the report of the sixth session of the Meeting of the Parties. Decision VI/8 on general issues of compliance*, UNECEOR, 6th Sess, ECE/MP.PP/2017/2/Add.1 (2017).

55 For example, in Switzerland applicants challenging federal law on grounds that it affects their rights and obligations must prove they are affected more strongly than general public and have "interest worthy of protection", see arts 25a & 48(1)(b) Federal Act on Administrative Procedure (Switzerland) & Cordelia Christiane Bähr et al, "KlimaSeniorrinnen: Lessons from the Swiss senior women's case for future climate litigation" (2018) 9:2 J of Human Rights & the Environment 194 at 203 [Bähr]. Before the Court of Justice of the European Union individuals have standing to contest acts of the EU if the "act [is] addressed to that person" or "which is of direct and individual concern to them", see *Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 326 2012 (consolidated version from 2012), art. 263 [*Treaty on the Functioning of the European Union]*.

56 See *Future Generations v Colombian Ministry of the Environment et al.*, 2018 Supreme Court of Colombia STC4360-2018. Unofficial summary of the judgment available online: "Future Generations v Colombian Ministry of the Environment and Others" (last visited 8 July 2020), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180405_11001-22-03-000-2018-00319-00_decision-1.pdf>.

of the collective nature of the problem, the Supreme Court of Colombia reversed this decision and granted standing to the applicants.[57] In its decision, the Court recognized that human and fundamental rights "are substantially linked and determined by the environment and the ecosystem" and that the environmental deterioration, caused by *inter alia* climate change has an extremely adverse impact on the enjoyment of these rights.[58] It asserted that the protection of fundamental rights involves "the other", which includes also the "unborn", which in this case directly translated into environmental rights of future generations.[59] The court explicitly derived its conclusion from "the ethical duty of the solidarity of the species" and "the intrinsic value of nature",[60] directly embracing a more holistic, eco-centric and equitable approach to the question of climate rights and climate justice.

Parallel strategies, aimed at asserting standing by representatives of young people or those yet unborn, have been adopted by plaintiffs in the famous United States *Juliana* case[61] and a class action of youth from the province of Québec (*ENJEU*),[62] who argue their rights are disproportionately affected due to the escalating climate crisis that will bear more severe consequences in the future. Unfortunately, these cases have been less successful than their Colombian counterpart. Although first granted by the Federal Oregon Court,[63] standing of the *Juliana* claimants have been recently rejected by the US Court of Appeals of the Ninth Circuit. The Court of Appeals did reiterate the view of the first instance that plaintiffs established sufficient injury in fact and causation, directly pointing at established science on climate change and its negative influence on human well-being. It did not find, however, the third requirement to assert standing - redressability of the claim by a favourable judicial decisions - to be met.[64] Same fate befell the case of the Quebec youth, although it was dismissed for a different reason. The Quebec court refused to authorize the motion for a class action. According to the judge, the inclusion of every Quebec citizens of certain age and the claim of the organization to present the whole youth of the province was too arbitrary and subjective. It also prevented the court from fairly and objectively identifying the group and its members, which is necessary to authorize a class action. The judge, however, underlined that a claim brought by one person,

---

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

58 This is based on science referred to by the applicants. Summary of the decision, *supra* note 56 at 3.

59 *Ibid* at 4–5.

60 *Ibid*.

61 See *Juliana et al. v United States of America et al.*, Case No. 6:15-cv-01517-TC. Documents in this case are available online: "Juliana v United States" (last visited 8 July 2020), online: *Climate Case* Chart <climatecasechart.com/case/juliana-v-united-states/>.

62 The youth in this suit are supported and represented by an environmental organization ENvironnement JEUnesse and the designated member Catherine Gauthier. All available documents are available online: "ENvironnement JEUnesse v Canada" (last visited 8 July 2020), online: *Climate Case Chart* <climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government/>.

63 See *Kelsey Cascadia Rose Juliana et al v United States of America*, 217 F Supp (3d) 1224 at paras 18–28 (D Or 2016) [*Juliana*].

64 See *Kelsey Cascadia Rose Juliana et al v United States of America,* 947 F (3d) 1159 (9th Cir 2020) [Juliana Appeal]. This will be elaborated on further in the article as closely connected to the issue of political question.

if successful, could have virtually the same *erga omnes* effect on climate policies of Quebec or even the whole Canada, that the young plaintiffs were seeking.[65] The Quebec youth appealed recently and the proceedings are pending.[66]

Not only young people struggle to assert their standing with such strategy. Other segments of the population also found it difficult to succeed in the procedural stage of arguing their cases. In 2016, for example, an association of Swiss senior women filed a request to stop governmental omissions in climate mitigation, claiming the state has violated its protective duties to safeguard constitutional and human rights and act with respect to constitutional environmental principles.[67] According to the applicants, as senior citizens ("members of most vulnerable group") they were disproportionately affected by climate change (especially heat waves) and their individual rights were thus being infringed upon by the state's negligence.[68] This assertion relied on scientific evidence of increased health risks that climate change poses for older women.[69] Procedurally, the complaint was based on the articles 25*a* and 48(1)(b) of the Swiss Administrative Procedure Act which allow persons "affected more strongly than the general public" and with "a special, noteworthy, close connection to the matter in dispute" to contest acts based on federal public law that affect their rights and obligations.[70]

The applicant's argument was first rejected by the Federal Department of the Environment, Transport, Energy and Communications, which did not, however, contest the scientific findings or the severity of the climate crisis. Instead, the authority held that the climate-related negative impacts are not restricted to the applicants and that they have not demonstrated that they suffer a sufficient disadvantage. According to the Department, the applicants did not seek individual remedy to the infringements but rather a general change of the Swiss climate policy, which they can influence by democratic means of participation. Thus, acting in *actio popularis* as opposed to an individual interest and not meeting the requirements, they do not have standing under Swiss law to file such a request.[71] In judicial review the Federal Administrative

---

65 See *Environnement Jeunesse v Attorney General of Canada*, 2019 QCCS 2885 at paras 135–144.

66 See *Environnement Jeunesse v Attorney General of Canada* (16 August 2019), Montreal 500-06-000955-183 (QCCA).

67 See *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others*, A-2992/2017, [2018]. Documents in this case are available online under: *Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others* (last visited 8 July 2020), online: *Climate Case Chart* <climatecasechart.com/non-us-case/union-of-swiss-senior-women-for-climate-protection-v-swiss-federal-parliament/>.

68 See "Unofficial Translation and Summary of the Petition" (last visited 8 July 2020) at 7, online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161025_No.-A-29922017_petition.pdf>.

69 See Bähr, *supra* note 55 at 200–201.

70 *Ibid* at 203.

71 See "Unofficial Translation and Summary of the Governmental Decision" (last visited 8 July 2020), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181127_No.-A-29922017_decision.pdf>.

Court upheld this decision and the reasoning of the Department.[72] The appeal proceedings are pending.[73]

The main obstacle that prevented *Swiss Seniors* to be heard on merits - insufficiently direct and personal interest - was likewise met by a group of claimants that filed a case in the Court of Justice of the European Union (so called *People's Case*).[74] A group of ten families, predominantly farmers, both citizens and non-citizens of the Union, claimed the EU's institutions infringed their fundamental rights by adopting unambitious climate policies (a series of legislative acts). Their request was based on art. 263 of the Treaty on the Functioning of the European Union[75] which allows persons to contest acts of the EU "on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers" (…) "which is of direct and individual concern to them". The claimants relied on the latest scientific findings to support their claims that as farmers, they will suffer disproportionately compared to the general public. Like in the Swiss case, the *People's Case* was struck down because the court, relying on its previous case law and stringently interpreting the requirements for *locus standi*, did not find the protested acts to be of direct and individual concern. As such, it ruled that the applicants have not established "that the contested provisions of the legislative package infringed their fundamental rights and distinguished them individually from all other natural or legal persons".[76] Again, the court asserted that climate change will affect almost everyone, but decided that "the fact that the effects of climate change may be different for one person than they are for another does not mean that, for that reason, there exists standing to bring an action against a measure of general application".[77] The applicants appealed the decision.[78]

---

72 See Federal Administrative Court, Zurich, 27 November 2018, *Verein KlimaSeniorinnen Schweiz v Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation UVEK*, A-2992/2017 (Switzerland). See "Unofficial Translation and Summary of the Federal Administrative Court Decision" (last visited 8 July 2020), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181127_No.-A-29922017_decision.pdf>.

73 See Appeal (translated to English) available online: "Beschwerde in öffentlich-rechtlichen Angelegenheiten, Verein KlimaSeniorinnen Schweiz et al. gegen Eidgenössisches Departement für Umwelt, Verkehr, Energie und Kommunikation UVEK" (last visited 8 July 2020), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190121_No.-A-29922017_appeal-1.pdf>.

74 See *Armando Ferrão Carvalho and Others v The European Parliament and the Council*, 2018 the Court of Justice of the European Union (the General Court), Case no. T-330/18 [People's Case]. Documents in this case are available online on the official website of the case: "Documents" (last visited 8 July 2020), online: *People's Climate Case* <peoplesclimatecase.caneurope.org/documents/>.

75 See *Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 326 2012 (consolidated version from 2012) [TFEU].

76 See *Armando Ferrão Carvalho and Others v The European Parliament and the Council*, T-330/18, [2018] OJ, C 285/34 at para 49.

77 *Ibid* at para 50.

78 Summary of the appeal available: "Briefing Note: People's Climate Case Appeal…" (last visited 8 July 2020), online (pdf): *People's Climate Case* <peoplesclimatecase.caneurope.org/wp-content/uploads/2019/07/summary-of-the-appeal-3.pdf>.

2.2. Central arguments in human rights climate litigation

After overcoming the hurdles, I drew attention to above, and asserting their standing, plaintiffs need to argue the central premise of their cases: that, by lacking in ambition and decisiveness, governmental climate policies constitute a failure in executing state's protective duties towards citizens. From a strategic perspective, to sue the government or, more generally the state, seems to have a lot of potential for successfully advancing better climate protection: parliaments and executives create and enforce laws and policies that form the whole legal framework within which everyone, from an individual citizen to a transnational corporation, must operate. They are also still the primary actors at the international level who conduct climate negotiations and produce necessary agreements. To successfully compel a state, through a legal action, to take on a more ambitious approach to climate crisis could influence the behaviour of all other entities and, by creating a proper legal environment, have a more encompassing and coherent impact on how quickly and efficiently whole societies move towards a more sustainable future.[79] In traditional human rights law, states are still primary duty bearers towards individuals and this duty, although depending on the specific system, often encompasses obligation not only to not infringe but also to protect from other entities and assert proper enjoyment of guaranteed rights.

What other legal arguments, however, support the claims of plaintiffs in this type of litigation? What are the state's duties and obligations in the context of climate change rooted in and on what grounds are they justiciable before a court? How can accountability or liability be assigned to the specific government for harms caused by a phenomenon so global, so cross-cutting and still so challenging to measure? These are the questions all the courts have to answer in cases of this nature. In this new wave of climate litigation, applicants allege that governmental inaction or insufficiency of the steps undertaken so far infringes on citizen's fundamental rights. This relatively novel and complex argument creates a series of hurdles that have to be overcome by adopting a multidimensional approach. Human rights claims are often supported and interpreted by a variety of other legal obligations and when they are not necessarily directly justiciable before a court, another pathway needs to be found to establish governmental duty. Moreover, some innovative arguments have to be made when asserting a causal link and attributing an individual state's accountability for the harm claimed by the plaintiffs. This part discusses these claims and arguments.

2.2.1. Establishing governmental duty to act

First, plaintiffs need to establish that their government has a legal duty to protect them and their human and constitutional basic rights from climate change and its adverse impacts. To do so, claimants generally invoke two types of governmental human rights obligations, often complementarily: those guaranteed by national constitutions and subsequent laws, and those embodied in international and regional acts and mechanisms.[80] In *Urgenda*, the foundation relied *inter alia* on the right to life and the right to respect for private and family life granted by the European Convention on Human Rights (ECHR),[81] the two most often utilized

[79] See Cox, *supra* note 25 at 4.

[80] See also Corsi, "A bottom-up approach", *supra* note 4 at 5–6.

[81] See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) [ECHR].

provisions of the Convention in environmental matters brought before the European Court of Human Rights (ECtHR).[82] The same grounds were implemented by the claimants in the *Swiss Seniors* case.[83] Both *Leghari* and *Ali* resorted to fundamental rights "to life, liberty, property, human dignity, information and equal protection of the law"[84] embedded in the Pakistani Constitution.[85] In the Colombian case of *Future Generations,* plaintiffs invoked fundamental rights to life, health, the minimum subsistence, freedom and human dignity, as well as the right to "enjoying a healthy environment".[86] In the *People's Case*, the claimants relied on the series of rights guaranteed by the Charter of Fundamental Rights of the European Union (such as the right to life and health, the rights of children, or the right to equal treatment);[87] *in Family Farmers & Greenpeace,* the claimants relied upon a combination of constitutional rights (the right to life and health, the right to property) and once again, rights from the ECHR;[88] and in the *ENJEU* case, the claim was based on fundamental rights embedded in both the Canadian Charter of Rights and Freedoms and the Quebec's Charter of Human Rights and Freedoms.[89]

Depending on the jurisdiction, however, these traditional human rights are not necessarily directly justiciable before the court in the realm of environmental and climate protection. Although it is widely established in the scholarly discourse and among the international community that environmental degradation and climate change can adversely affect fundamental rights,[90] the claimants are usually required to establish that the government has a *positive* legal duty to fight climate change, maintain a healthy environment and prevent these infringements.[91] This can be burdensome especially because the claims are brought not necessarily against specific GHG emissions attributable directly to the state itself, but against national laws and policies allowing a certain level of emissions more generally (*ergo* also emissions originated by private persons and companies). To support their claims, petitioners

---

82 These rights are enshrined in Articles 2 and 8 of the ECHR. See Cox, *supra* note 25 at 4.

83 Unofficial Translation and Summary of the Petition, *supra* note 68 at para 1a.

84 See Ali, *supra* note 35 at 5.

85 In *Leghari,* the petitioner invoked art 9 (security of person: life and liberty) and art 14 (dignity); see *Ashgar Leghari v Federation of Pakistan* (14 September 2015), WP No 25501/2015 (Lahore High Court, Green Bench) [*Leghari* Supplemental].

86 Unofficial summary of the judgment, *supra* note 56 at 1.

87 "Application delivered…" (last visited 8 July 2020), online (pdf): *People's Climate Case* <peoplesclimatecase.caneurope.org/wp-content/uploads/2018/08/application-delivered-to-european-general-court.pdf>, section H1.

88 *Ibid*, subsection V.4.

89 See Unofficial translation of the petition available online: "ENvironnement JEUnesse v Canada" (last visited 8 July 2020), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181126_500-06-000955-183_application-2.pdf>, section F.

90 See e.g. Derek Bell, "Does anthropogenic climate change violate human rights?" (2011) 14:2 Critical Review of International Social and Political Philosophy 99; Bodansky, *supra* note 17; Marc Limon, "Human Rights Obligations and Accountability in the Face of Climate Change" (2010) 38:3 Ga. J. Int'l & Comp. L. 543. *Also*: Fpr a list of UN documents and activities at "OHCHR and Climate change" (last visited 8 July 2020), online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/HRClimateChangeIndex.aspx>.

91 See e.g. Corsi, "A bottom-up approach", *supra* note 4 at 5–7.

rely upon various correlated sources of law, building a complex argument that includes national and international laws and commitments, jurisprudence of national courts and international tribunals, and a combination of international and constitutional principles. When necessary, the civil law principle of *duty of care* or the doctrine of *public trust* present in common law are employed.

The case of *Urgenda* is, famously, a prime example of assessing governmental duty through multiple layers of legal claims. Because, as a non-natural person, the foundation could not directly rely on invoked rights from ECHR (an assertion overruled by the Appeal Court since),[92] the claimants resorted to tort law and the state's duty of care recognized in the Dutch civil code. As Roger Cox, the leading lawyer for Urgenda, noticed, this strategy, due to the "open standard (…) with respect to formulating the duty of care", allowed the court to weigh a combination of various factors when interpreting the duty.[93] To establish what level of care the government owes to its citizens in this respect, Urgenda referred to international commitments of the Netherlands stemming from the UNFCCC, Kyoto Protocol and the no-harm rule, as well as the European Union law, *inter alia* the general environmental objectives of the European treaties and specific regulations on environmental protection and combating climate change. Additionally, the foundation invoked art. 21 of the Dutch Constitution, which requires the state to maintain "livability of the country and the protection and improvement of the living environment". Additionally, human rights obligations from the European Convention were claimed to also influence the level of the duty of care.[94]

However, none of the instruments, according to the Dutch court, were directly applicable in this case. International and European commitments were ruled to not create binding state obligations towards individual citizens.[95] The constitutional duty to maintain a healthy environment, the court found, allowed for a margin of appreciation for the government and the specific manner of carrying out this task was covered by the state's own discretionary powers.[96] Nonetheless, the court did consider all of these arguments as crucial interpretative tools in establishing what level of care the Dutch government owes to Urgenda and subsequently Dutch citizens. It was found that the state is expected to be willing to meet its international commitments and thus a national-law standard (in this case the civil law duty of care) cannot be interpreted in a way that would essentially allow the state to violate these obligations (so called "reflex effect").[97] Similarly, European laws and regulations, and European human rights obligations together with ECtHR jurisprudence on positive duties of states to prevent or

---

92 The court found only natural persons can be victims of rights violations; see Cox, *supra* note 25 at 10. The Appeal Court, however, albeit generally upholding the decision of the I instance, disagreed with the District Court on this issue. It ruled that the art. 34 of the ECHR, which prevents class actions and was instrumental to this part of the decision of the lower court, has no application before Dutch courts. The Appeal Court decided that Urgenda, representing Dutch citizens, can directly rely on human rights enshrined in the ECHR and found the state in breach of these rights; see *Urgenda Foundation* Hague CA, *supra* note 14.

93 See Cox, *supra* note 25 at 3.

94 See *Ibid* at 4.

95 See *Urgenda Foundation* Hague Dist Ct, *supra* note 14 at para 4.39.

96 *Ibid* at para 4.36.

97 *Ibid* at para 4.43.

eliminate environmental damage, were recognized to have substantial impact when assessing the standard of care. The court derived principles that underscore international and European commitments, *inter alia* fairness principle (which the court interpreted as intergenerational equity), the precautionary principle and sustainability principle, and utilized them in order to further specify the state's duty of care.[98] Therefore, although not directly applicable, all these arguments combined together have led the court to the conclusion that the government of the Netherlands has a specific duty to prevent and mitigate negative effects of climate change.

In *Notre Affaire à Tous*, the applicants also reach to a combination of international and national law and argue that the French state has an obligation to tackle climate change that is two-fold: an obligation of general nature stems from the national Charter for the Environment, the European Convention on Human Rights, and the "general principle law providing the right of every person to live in a preserved climate system."[99] Specific obligations to adopt effective mitigation and adaptation measures, are found in a series of European Union law and national French law.[100] Referring to the Charter for the Environment, the petition invokes the "right to live in a balanced environment which shows due respect for health"[101] and the obligation of environmental care. It further relies on French jurisprudence[102] to assert that "public authorities have to meet this obligation (…) and implement all appropriate measures (…)", not only to identify but also to prevent or eliminate the risk.[103] Applicants support this assessment of a positive duty by citing the ECtHR case law on art. 2 and 8 of the European Convention in the context of environmental protection.[104] Additionally, they argue that a general principle of law creating the right to live in a sustainable climate system exists, although not explicitly recognized, by means of wide international and scholar recognition of the relation between climate change, environmental degradation and the enjoyment of human rights.[105]

The claimants in *Family Farmers & Greenpeace* relied firstly on constitutional provisions that grant the right to personal security and that bestow the state with a duty to protect natural resources and animals (not only before the current citizens but also those of future generations), through specific laws and policy measures. The general doctrinal commentary on these provisions implies that this creates an objective obligation to act (and not only a non-binding suggestion).[106] They argued that present legal instruments do not suffice to fulfil these obligations as they do not define specific levels of protection or specific goals.[107] Additionally, the applicants claimed that the government, by adopting Climate Plan 2020 (a policy measure

98 See Cox, *supra* note 25 at 9–10.

99 See Brief Juridique, *supra* note 32 at 9 [translated by author].

100 *Ibid* at 11.

101 See Article 1 of the French Charter for the Environment.

102 See Cons const, 8 April 2011, *Trouble de voisinnage et l'environment*, (2011) Rec 2011-116 QPC; CE, 14 September 2011, *5ème et 4ème sous-sections réunies* (2011) Rec 348394.

103 See Brief Juridique, *supra* note 32 at 10.

104 See *Öneryıldız v Turkey,* No. 48939/99 [2004] ECHR 657; *Tatar v Romania, N*o. 67021/01 (2009) ECHR 61; see also *Boudayeva v Russia,* No. 15339/02 (2009) ECHR 202.

105 See Brief Juridique, *supra* note 32 at 11.

106 See The Application*, supra* note 44 at s III(2)(b)(aa).

107 *Ibid* at s III(2)(b)(bb).

rather than binding law), has, nonetheless, obliged itself to achieve the set out objectives.[108] Finally, the petition referred to human rights obligations, supported by the jurisprudence of the German Federal Constitutional Court, which establishes a positive duty of the state to protect fundamental rights.[109] As cited in their petition, the Court recognizes that threats to fundamental rights, even sanctioned by national regulations can be against the Basic Law and that the state owes protection against them to their citizens.[110] They supported this by also invoking the rights from the ECHR.[111] Based on this standard, the applicants argued that the national plan on climate change and other relevant instruments allow for a level of GHG emissions that does not prevent the negative climate change induced impacts; therefore the state is in breach of its protective duties.

Similarly, the *Swiss Seniors*, relied on the European Court's established jurisprudence on positive obligations to prevent or eliminate environmental risks,[112] directly invoking the rights guaranteed by the Federal Constitution and the ECHR, as well as constitutionally recognized principles of precaution and sustainability.[113] Likewise, the Irish case argued the state's duty to act from a combination of European and international human rights and environmental obligations.[114]

The *People's Case,* due to its supranational character*,* cited the Union's higher rank legal obligations derived from the Charter of Fundamental Rights, which the plaintiffs believe to impose positive duties to "respond to, reduce and prevent these threats [to respective rights]" to current and future generations and to EU citizens and non-citizens,[115] as well as international commitments of the Union, like the no-harm rule and the Paris Agreement. The applicants referred to established jurisprudence to argue that international treaties and customary law, being of higher rank than EU legal acts, can render them inapplicable.[116] They also relied on EU's own provisions on prevention of environmental damage and combating climate change enshrined in the treaties (highest, most authoritative acts in the EU legal and institutional framework).[117]

---

108 *Ibid* at s III(2)(c).

109 See e.g. Bundesverfassungsgericht [Federal Constitutional Court], Karlsruhe, (8 August 1978), 2 BvL 8/77 (Germany); Bundesverfassungsgericht [Federal Constitutional Court], Karlsruhe, (15 March 2018), 2 BvR 1371/13 (Germany).

110 See The Application, *supra* note 44 at s V(4)(a)(bb)(2).

111 *Ibid* at subsection V.4.d.

112 See *Öneryıldız v Turkey*, No. 48939/99 [2004] ECHR 657; *Tatar v Romania,* No. 67021/01 (2009) ECHR 61; *Boudayeva v Russia*, No. 15339/02 (2009) ECHR 202; L.C.B. v the United Kingdom, No. 23413/94 [1998] ECHR 108; *Özel and Others v Turkey*, No. 14350/05 (2017) ECHR.

113 See Bähr, *supra* note 55 at 211; Unofficial Translation and Summary of the Petition, *supra* note 55 at para 4.

114 See Anna Kusmer, "Landmark legal challenge against Irish Government on climate change" (24 March 2019), online (blog): *FIE* <www.friendsoftheirishenvironment.org/climate-case>.

115 These multi-dimensional obligations the applicants base on the right to equal treatment interpreted in the light of intra- and intergenerational equity. See The applicants' petition, *supra* note 87, section H1.

116 *Ibid* at subsection H2.a.

117 *Ibid* at subsection H2.d.

In *Future Generations*, on the other hand, the court has adopted a broader climate justice-infused perspective involving principles of precaution, intergenerational equity, and solidarity,[118] as well as utilized the international environmental framework, in order to establish the governmental duty to act. Acknowledging that the rights of youth and those yet unborn are under dire threat from anthropogenic climate crisis on a global scale, the court stated that numerous binding and soft-law regulations of international providence "constitute a global ecological public order and serve as guiding criteria for national legislation".[119] Among the instruments cited were: the International Covenant on Economic, Social and Cultural Rights,[120] the Rio Declaration on Environment and Developmentm,[121] and the UNFCCC,[122] as well as various internationally recognized commitments on conservation of the Amazon forest.[123,124] The Colombian court concluded that, due to these constitutional and international commitments, "it is up to the authorities to respond effectively to the specific questions of the problem, among which, it is important to highlight the urgent need to adopt mitigation and corrective measures (…)".[125]

Furthermore, in cases brought before courts in the common law system, the doctrine of public trust often additionally supports fundamental rights claims. The concept is based on the premise that certain "things" or elements, like the air, running water, the sea, its shores and bed, are intrinsically part of the common good that all humankind should have a right to access and use and that should not be subject to private ownership.[126] These natural resources are a unique kind of trust property that all members of the general public collectively are the beneficiaries of and that the state, as a trustee, has a fiduciary duty to protect and deal with in the collective interest.[127] Such a duty can also be enshrined in statutory or constitutional law[128] (in that sense obligations to maintain or protect national environment in some European constitutions are parallel concepts). In the context of climate litigation, the claimants, of course, argue that climate change causes environmental degradation having a negative effect on the trust, which should trigger a governmental duty, as a trustee, to undertake steps to eliminate or prevent such threat.

---

118 See Unofficial summary of the judgment, *supra* note 56 at 3.

119 *Ibid* at 5.

120 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) .

121 See *Rio Declaration on Environment and Development*, 13 June 1992, 31 ILM 874 .

122 See *United Nations Framework Convention on Climate Change*, 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994).

123 See *Treaty for Amazonian Co-operation,* 3 July 1978, 1202 UNTS 51 .

124 See Unofficial summary of the judgment, *supra* note 56 at 5–7.

125 *Ibid* at 8.

126 See Brian J Preston, "Recent climate litigation concerning environmental rights" (Paper delivered at the Asia Pacific Judicial Colloquium on Climate Change, Lahore, 26 February 2018) [unpublished], at 1–2, online (pdf): <www.pja.gov.pk/system/files/3%20-%20Recent%20Climate%20Litigation%20Concerning%20Environmental%20Rights%20-%20Paper.pdf>.

127 *Ibid*.

128 *Ibid* at 2.

The Pakistani cases, *Leghari* and *Ali*, relied on the doctrine of public trust, together with other international environmental principles, such as sustainable development, precautionary principle, environmental impact assessments, and intergenerational equity, to support their fundamental rights claims.[129] In *Ali*, the applicant assesses that "atmosphere is a crucial natural resource that must be protected under the Doctrine of Public Trust and kept free from dangerous levels of CO2 pollution for human life to flourish". Furthermore, "[t]he State as a trustee is under a legal duty to protect and conserve the natural resources", which implies "non-discretionary, fiduciary duty to help reduce atmospheric CO2 levels in order to conserve and protect the atmosphere, restore the stability of the Climate system and restore the energy balance of mother Earth at large" that does not depend on interstate reciprocity.[130]

Famously, the issue was also addressed in the pre-trial proceedings of *Juliana*. In its order rejecting the defendants' motion to dismiss the action (since then overturned), the District Court for the District of Oregon acknowledged the applicability of the public trust doctrine in the context of climate change. The court noted climate change-related impacts on territorial seas (recognized as public trust resources in the US Supreme Court case law) and respective federal government's duties as trustees.[131] Regarding fundamental rights claims brought up in the action, which were rooted in constitutional rights to due process and to life, liberty and property, the Court asserted that the US Constitution is a living document that requires judicial interpretation determined by "reasoned judgment" of the court. Exercising such reasoned judgment and reaching to jurisprudence, the bench ruled that plaintiffs' right to "a climate system capable of sustaining human life is fundamental to a free and ordered society".[132] Although the due process clause does not automatically bestow an affirmative obligation to act on the government, a so-called "danger creation" exception was applied, which relies on the premise that the state knowingly and deliberately exposed plaintiffs to risks they would otherwise have not faced.[133] This, as closely related to the issue of causal link and attributing accountability, will be elaborated on in the next part of the paper. It is evident at this stage, however, that to demonstrate the government's protective human-rights based duty to actively respond to climate change, plaintiffs support traditional constitutionally and internationally recognized human rights with various environmental legal instruments, doctrines and international agreements.

2.2.2. The use of science and political recognition to establish causal link and attribute accountability

The new surge of human rights-based climate litigation is also noteworthy for the way and extent to which it utilizes the newest advances in climate science at every stage of the argument. Additionally, international and governmental recognition of the crisis and its human rights implications supports the applicants in their reasoning on the causal nexus. To support claims of standing, especially when direct or individual interest needs to be established, claimants refer to scientific findings, literature and reports to demonstrate and validate causal link

129 See *Leghari* Supplemental, *supra* note 15 at para 4.

130 Ali, *supra* note 35 at 30–31.

131 See Juliana, *supra* note 63 at paras 36–51, 65.

132 *Ibid* at para 48.

133 *Ibid* at paras 49–52.

between governmental inaction and harms they are suffering or will suffer in the future, as well as to manifest high probability of intensification of these negative ramifications overtime.[134] Science also assists in establishing the positive governmental duty to address climate change, especially when claimants are unable to rely on explicit or justiciable environmental rights or environmental obligations. In such cases, claimants refer to climate science to establish that climate change causes environmental degradation and adversely impacts human health and well-being, and thus traditional human rights.[135] Most importantly, these two factors, scientific evidence and wide official awareness and acceptance of it, serve as a crucial aid in establishing the breach of proclaimed duties and attributing accountability.

Determining causality between GHG emissions and human rights violations is extraordinarily challenging. Building a causal chain requires a multitude of steps: emissions of GHGs cause temperature rises, which contributes to environmental degradation that in the end leads to actual infringements of human rights.[136] Especially in systems that lack specific environmental rights protections, violations of traditional human rights become *secondary*, *indirect* consequence of anthropogenic GHG emissions.[137] Then there is the issue of identifying perpetrators and attributing harms to the lack of state action, especially difficult in the context of climate change, due to its global and complex nature, the extreme plurality of entities contributing to emissions and additional factors aggravating the issue.[138] Some governments emphasize the country's relatively small share in emissions on a global scale and the need for a coordinated international action.[139] They claim that a more stringent approach of an individual state will be insufficient to reduce the risks and will not mitigate the problem.[140] Other governments raise that the contested plans implement emission cuts that the country committed to at the international level.[141] Moreover, the aspect of future harms, especially in the context of the next generations, burdens applicants with establishing state's liability for events that have not yet occurred.

---

134 See e.g. Bähr, *supra* note 55 at 200–201; *People's Case*, the applicant's petition, *supra* note 74, section D; The Application, *supra* note 44 at s IV(3)(a).

135 See e.g. *People's Case*, the applicant's petition, *supra* note 87 at section C; *Urgenda Foundation* Hague Dist Ct, *supra* note 14 at paras 4.16–4.17; The Application, *supra* note 44 at s II(1).

136 At this moment, scientific evidence is fairly clear that the change in climate and environmental degradation are caused by anthropogenic operations. As illustrated throughout the paper, the scientific evidence does play an important role in human rights climate litigation. Nonetheless, it still remains extremely difficult, if not impossible, to pinpoint whose emissions (or omissions to prevent them) contributed to or caused whose harm.

137 Ottavio Quirico, "Climate Change and State Responsibility for Human Rights Violations: Causation and Imputation" (2018) 65:2 Nethl Intl L Rev 185 at 190.

138 Climate change is sometimes described as a problem of "many hands" – one that has many culprits, on the one hand, and requires many in order to fix it, on the other. See Loth, *supra* note 10; *ibid* at 186.

139 See e.g. Cox, *supra* note 25 at 5.

140 See Loth, *supra* note 10 at 341.

141 See Kevin O'Sullivan, "Group seeks 'hugely onerous climate-change obligations', court hears", *The Irish Times* (24 January 2019), online: <www.irishtimes.com/news/environment/group-seeks-hugely-onerous-climate-change-obligations-court-hears-1.3769739>.

To counter these arguments the applicants in the previously discussed cases resort to citing ever more accurate and definitive scientific evidence on climate change.[142] They refer to scientific reports, prepared by international and national committees and institutions to establish how much the state has contributed to the crisis, what level of reduction is needed to mitigate it, or at least prevent it from exaggerating, and whether action undertaken so far have been and will be successful to achieve these aims. Most importantly, they do so, by invoking reports of the Intergovernmental Panel on Climate Change, which are officially acknowledged by states. Due of this official recognition, as the leading attorney of Urgenda noticed, "there is little to nothing a national government can do from a legal perspective to contest these findings".[143] The reports prove that governments officially recognize the severity of the crisis and are aware of the necessary level of reductions to be undertaken, which confirms the wrongfulness or unlawfulness of the negligence. Besides the IPCC reports, negotiations and agreements conducted on the international stage, as well as national frameworks and policies support this claim of governmental conscious negligence. *Swiss Seniors*, for example, based its request on reports and findings of the IPCC, the Subsidiary Body for Scientific and Technological Advice, and the Swiss Federal Department of the Environment, Transport, Energy and Communications (the defendant itself). In light of these findings, the applicants reasoned that both reduction targets set by the government and measures adopted to achieve these reductions are insufficient to prevent harmful effects of global warming. This rendered the actions of the Swiss state unlawful and against its legal human rights obligations towards the plaintiffs. They also rejected any suggestions that inadequate climate policies of other states justify Switzerland's omissions or could be classified as higher power that would limit the Swiss government's liability.[144] Similarly, the applicants in *People's Case*, supported by scientific analysis, established that further GHG emissions on a level allowed by the European Union's current policies exceed the maximum permissible levels of emissions implied by the Paris Accord and will contribute to further exacerbating the crisis. The EU, they argue, has no justification for such actions, as more stringent reductions are well within the Union's technical and economic capability.[145] Similar line of reasoning, supported by scientific and political statements, occurs in virtually every case of this kind.[146]

The strategy to utilize the newest scientific findings, so far, has proven to be successful in a number of cases. Where courts allow the case to be heard on merits and recognize the state's positive duty to guard its citizens from negative effects of environmental deterioration, the issue of causality and accountability is resolved by reaching, quite straightforwardly, to the extensive scientific evidence, interpreted in light of recognized environmental and/or climate justice principles to establish what level of duty the state should have achieved and whether it is liable for its breach. Establishing a sufficient causal nexus is of course the easiest in cases brought in open standing and where far-reaching positive governmental duties have been

142 On progressing attribution science in the context of climate change, see e.g. M Burger, J Wentz & R Horton, *supra* note 21; Marjanac & Patton, *supra* note 21.

143 See Cox, *supra* note 25 at 3.

144 Bähr, *supra* note 55 at 198–200, 213.

145 The applicants' petition, *supra* note 87 at section J.

146 See e.g. *Family Farmers, supra* note 44; Climate Case Ireland Judgment, *supra* note 49; *Juliana*; *ENJEU*; *Leghari, supra* note 15.

recognized, since it limits the need to establish direct and clear link from a specific action to a specific harm. Pointing to general and universal negative effects of climate change on the public (widely evidenced in science and political statements) and the state's general inaction, also judged through existing scientific analysis, seem to suffice.

The Pakistani court in *Leghari*, recognizing the dire threat posed to the people of Pakistan by global warming, agreed with the plaintiff's argument that the state has shown negligence in executing its duty to adapt to climate change. Although a climate plan and an implementation document ("the Framework") have been adopted, they did not, according to the bench, constitute an end in itself, but shall enable a proper response to climate change-induced threats in all policies. The court ruled that "no material exercise has been done on the ground to implement the Framework", which was in line with the plaintiff's assertions leading to the conclusion that such omission is against state's fundamental rights obligations.[147]

In *Urgenda*, the relatively small share in global GHG emissions of the Dutch state and the inefficiency of individual state's stringent policy measures in light of general international inaction have been the main arguments of the government to dismiss the case. Although the state agreed with Urgenda about the need to reduce the rise in global temperature to below 2°C, it suggested that current policies (which are in line with international agreements and European Union standards) should allow the government to achieve this goal.[148] The court, however, rejected these claims. Basing its reasoning on scientific assessment relied upon by the foundation, first and foremost the reports of IPCC, and political arrangements at the international and national scale, the court found that mitigation measures introduced by the Dutch state so far (reduction goal of 20% by the year 2020) are not sufficient to revert negative consequences of climate change, regardless of the fact that the state's contribution to global emissions is limited.[149] As a sovereign state, exercising control over national emissions, the Netherlands has a responsibility to reduce its contribution to global climate change, which it expressly accepted by adhering to the Kyoto Protocol. As an Annex I country with high per capita emission levels, the Dutch state was declared as legally obliged to lead the global efforts and undertake more stringent measures than previously adopted. The court determined that adequate reduction of emissions is "both a joint and individual responsibility" of UNFCCC parties, and that no country can downright reject its liability based on the fact that its contribution to global emissions may be minor.[150] Principles of intergenerational equity and fairness, and the precautionary principle further infused the court's assessment that the government's conduct did not suffice to the necessary level of standard of care and was therefore unlawful.[151]

In *Future Generations*, the plaintiffs claimed that, according to the state's own agencies, the average temperature in Colombia is rising, that both Paris Agreement and national laws recognize the dire need to stop Amazon deforestation in the context of climate change and that despite this recognition, Amazon deforestation progresses which will have numerous negative

147 *Armando Ferrão Carvalho and Others*, *supra* note 76 at paras 9, 11.

148 Cox, *supra* note 25 at 5.

149 *Ibid* at 7, 12.

150 *Ibid* at 12.

151 *Ibid*.

consequences on the plaintiffs, due to the deforestation's influence on global warming.[152] In its ruling the court has decisively acknowledged the "irreversibility of the damage and the scientific certainty" with regards to the on-going deforestations connection to climate change, what it means to the environment and subsequently to the plaintiffs' rights. It found that the Colombian state's actions are contrary to the principles of precaution and intergenerational equity, as it is sufficiently clear from the current state of scientific knowledge that climate change, exacerbated by deforestation, will bear negative consequences disproportionately on youth and future generations. The court further ruled that according to the principle of solidarity, the Colombian state is co-responsible to stop processes that contribute to GHG emissions and is thus urgently required to undertake necessary mitigation measures. The apparent ineffectiveness of governmental measures, according to the court, constitutes a breach in protective duty towards Colombian citizens.[153]

2.2.3. The relief sought and the subsequent question of the separation of powers

One more characteristic differentiates this new wave of human rights climate litigation from earlier cases, namely the relief sought by the claimants and the subsequent questions about limits of discretionary powers of the executive and *trias politica*. Plaintiffs in their actions do not (usually) request damages for harms already suffered; instead, they petition that the court issues a number of orders which will result in adopting new more ambitious climate policies. Sometimes a declaratory ruling acknowledging the risks and unlawfulness of governmental omissions is sought,[154] and some plaintiffs do claim compensation.[155] Most importantly, however, they request that the court legally requires the government to adopt new targets and adequate mitigation measures. The NGO Friends of the Irish Environment sought a ruling quashing the National Mitigation Plan and ordering an adoption of a new one.[156] The youth supported by ENJEU also applied for an injunction to adopt measures that will curb climate change (as an appropriate compensation to all plaintiffs is impracticable).[157] In *Notre Affaire à Tous*, the applicants request the court to order the government to take proper measures to reduce greenhouse gas emissions in the atmosphere at a level compatible with the objective of stopping the global temperature rise below the 1.5°C threshold, as well as all necessary mitigation and adaptation measures.[158]

In some cases, rulings ordering adoption of much more specific targets or measures are sought, again drawing from scientific evidence on what is necessary to properly mitigate

---

152 See Unofficial summary of the judgment, *supra* note 56 at 1–2.

153 *Ibid* at 7–9.

154 See e.g. Ali, *supra* note 35 at 10, 37; *Family Farmers, supra* note 44; *Armando Ferrão Carvalho and Others v The European Parliament and the Council*.

155 See e.g. *Family Farmers, supra* note 44; see also Notre Affaire à Tous, *supra* note 29 at 42.

156 See Kevin O'Sullivan, "Group seeks 'hugely onerous climate-change obligations', court hears", *The Irish Times* (24 January 2019), online: <www.irishtimes.com/news/environment/group-seeks-hugely-onerous-climate-change-obligations-court-hears-1.3769739>.

157 See "Unofficial translation of the petition" (last visited 8 July 2020), online (pdf): *Climate Case Chart* <blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20181126_500-06-000955-183_application-2.pdf> at 22–24.

158 See Brief Juridique, *supra* note 32 at 2.

negative consequences of climate change. In *Family Farmers & Greenpeace*, for example, it was petitioned that the government has *inter alia* a legal obligation to adopt such policies and measures that will guarantee reduction of GHG emissions by 40% by the year 2020 in relation to levels from 1990.[159] In the *People's Case* the applicants sought an order nullifying the allegedly unlawful legal acts and directing adoption of measures sufficient for reduction of GHG emissions by 50-60 % by the year 2030 vide 1990 (or other, which the court finds appropriate).[160] Urgenda also applied with a request to legally oblige the Dutch state to reduce its emissions by 25-40% by the year 2020.[161] In *Ali* the applicant included a long list of necessary measures that the court should direct the state to adopt, for example: establishing a Pakistani carbon budget, keeping coal reserves in the ground, or even measures as specific as systemic repair of all electric lines/boxes/wiring of above average transmission and distribution losses of energy.[162] This clearly shows that the litigants' strategies is aim at changing the overall direction of the country's behaviour in relation to the climate crisis and in that sense is more of an advocacy tool than just adjudication of an individual dispute.

These specific requests, however, have incited a discussion on whether the court is within its jurisdiction to order such specific measures or whether it would constitute a violation of the separation of powers. This issue is, of course, closely connected to the matter discussed previously – whether a government has a specific legal obligation towards the general public or the claimants to fight climate change and if so, with what means. Defendants in these new climate cases argue that the choice of what targets should be set out and what measures should be adopted in order to achieve them are an intrinsically political question that is solely within the discretionary powers of the executive. Therefore, the court is constitutionally not authorized to decide on this matter, especially not to issue an injunction to adopt specific targets or measures. To issue such a ruling is a judicial trespassing on the state's field of competence that interferes with the democratic doctrine of separation of powers or could even undermine the state's position in international negotiations.[163] In *Swiss Seniors*, the issue of political question even contributed to the decision that the applicants have no standing in this case. The authorities argued, and the court upheld their decision rejecting the request, that the petition sought a solution that serves the general public rather than a remedy for an infringement of the claimants' fundamental rights[164] – a matter that they can influence by democratic means of participation and exercising their political rights.[165]

A similar issue caused the US Court of Appeal to reverse the positive decision on plaintiffs' standing in *Juliana.* The bench found that "(…) it is beyond the power of an Article III court to order, design, supervise, or implement the plaintiffs "requested remedial plan" and that "(…) any effective plan would necessarily require a host of complex policy decisions entrusted,

---

159 See The Application, *supra* note 44 at 5.

160 See The applicant's petition, *supra* note 87 at subsection L.311.

161 See Cox, *supra* note 25 at 4.

162 See Ali, *supra* note 35 at 38–39.

163 See Cox, *supra* note 25 at 5.

164 The order sought was to undertake any necessary action to reduce emissions of GHGs to the effect of meeting reduction targets consistent with the "well-below-2-degree-C-target" (20% by 2020 and 50% by 2030 below 1990 levels).

165 Unofficial Translation and Summary of the Governmental Decision, *supra* note 71, subsection 1.2.

for better or worse, to the wisdom and discretion of the executive and legislative branches."[166] Therefore, because the requirement of redressability of the issue by a judicial decisions has not been met, the bench, although with a dissenting voice, concluded that the case should be brought before the political branches of the government or to the electorate rather than in the court of law.[167]

In some other cases, however, courts have been rather favourable to the applicants' requests. After establishing that the steps taken by the government in response to climate change thus far constitute a failure to carry out protective duties and infringe the applicants' fundamental rights, courts both in Pakistan and Colombia issued rulings with very specific measures to be adopted in order to fulfil the governmental obligations. In *Leghari* the court found that the government did not envision any proper implementation measures envisioned to the existing framework of climate policies. The court has, therefore, enjoined the government to establish a "climate change commission" with members, powers and by-laws pre-determined by the judicial order.[168] In the case of *Future Generations*, the bench has, again, found the government in breach of its duty towards claimants' fundamental rights and determined very specific actions to be undertaken in order to fulfil the state's obligation. The agencies were ordered to formulate "a short, medium, and long term action plan (…) to counteract the rate of deforestation" and to construct "an intergenerational pact for the life of the Colombian Amazon – PIVAC to adopt measures aimed at reducing deforestation to zero"; additionally, the court requested numerous implementation strategies and municipal plans "which should encompass preventative, mandatory, corrective, and pedagogical measurable strategies".[169]

Unfortunately, the courts' deliberations on the issue of separation of powers are not available in these cases, if there were any.[170] The case of *Urgenda*, however, can serve as an example of how the Dutch court established its jurisdiction over the matter in question. The bench referred to the attribution of powers between different branches of the government, underlining that they balance each other rather than being completely independent and exclusive. Asserting its own constitutional role and responsibility to offer legal protection and adjudicate legal disputes when asked to do so, including legal disputes between governmental authorities and citizens, the court stressed that, although not directly elected, the judiciary finds its democratic legitimization in national laws that grant them adjudicating powers. The issue, it was found, constitutes a legal question, namely whether the government has a legal duty and whether it has breached it, even if it bears political consequences. The bench did recognize, however, the need for cautiousness in establishing what reduction target the government should adopt, due to the complexity and transnationality of the climate challenge. In the end, the government was ordered to adjust its climate policies by adopting a reduction target of 25% by 2020 rather than the previous one of 20%. The court, as previously mentioned, established the target through interpretation of science and international commitments, and restricted due to the necessary cautiousness (Urgenda has initially petitioned 40%).[171] The specific implementation

166 See Juliana Appeal, *supra* note 64 at 5, 25.

167 *Ibid* at 11.

168 *Leghari*, *supra* note 85 at paras 11–14.

169 Unofficial summary of the judgment, *supra* note 56 at 9–10.

170 Available are only summaries or translations of the judgments.

171 See Cox, *supra* note 25 at 13; Loth, *supra* note 10 at 348.

measures have been left to the discretion of the executive – another argument in support of the legality of the court's decision and its compliance with separation of powers.

On the other hand, some tribunals, especially in the newest decisions, prove to be more cautious about stepping in the executive's shoes. Both in the Irish case and the *Family Farmers*, while recognizing the urgency of the climate crisis, the courts ultimately decided that the contested policies are well within the government's discretion. Even if the measures and goals foreseen in them are insufficient, according to the presiding judges, the law of both Ireland and Germany does not require any specific actions or targets that could be demanded before court. Both decisions pointed at the policy nature of the contested acts and that they envision initial steps that can still be developed on a later stage - on which the decision belongs to the executive.[172] As the dismissal of the Irish court has been appealed,[173] it remains to be seen what final outcome the case will have and whether the higher courts in Ireland take a more proactive outlook.

3. PART II REGIONAL POTENTIAL FOR HUMAN RIGHTS CLIMATE CHANGE LITIGATION

Traditionally, this new wave of human rights climate litigation has taken place before national courts, albeit with few exceptions. Although some of the cases seem to be successful, others still met with obstacles difficult to overcome. What if, however, litigants were to seek judicial redress in this matter at the international level? Why even consider the possibility? Currently, human rights judicial protection scheme exists in three regions – in Europe,[174] the Americas[175] and Africa.[176] All provide an avenue for individuals to claim violations of their fundamental rights and bestow an independent judicial body with far-reaching powers to adjudicate such claims. The systems, especially in Europe and the Americas, have been fairly successful, issuing robust jurisprudence and establishing their position within the continent's legal traditions. They also have mechanisms that ensure implementation of judgments, which are mostly respected by the states.[177] In the context of a global crisis such as global change, the fact that they encompass dozens of state, which could be legally affected by a ruling in this matter, renders the issue worthy of consideration. Moreover, they have been set up exactly for the purpose of guarding rights of individuals in their regions. Although these human rights systems are not without flaws (their success resulted in surges of cases creating backlogs and

---

172 See e.g. Climate Case Ireland Judgment, *supra* note 49 and *Family Farmers*, *supra* note 44.

173 See "Appeal lodged in Climate Case Ireland" (22 November 2019), online (blog): *Friends of the Irish Environment* <https://www.friendsoftheirishenvironment.org/climate-case/17724-appeal-lodged-in-climate-case-ireland>.

174 See *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 (entered into force: 3 September 1953) [ECHR].

175 See *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) [*ACHR*].

176 See *African Charter on Human and Peoples' Rights*, 1 June 1981, 1520 UNTS 217 (entered into force 21 October 1986) [*ACHPR*].

177 On accomplishments of the regional systems, see e.g. Michael O'Boyle & John Darcy, "The European Court of Human Rights: Accomplishments, Predicaments and Challenges" (2009) 52 German YB Intl L 139; Ariel Dulitzky, "The Inter-American Human Rights System Fifty Years Later: Time for Changes" (2011) RQDI 127.

delays, and they can experience severe lack of resources and political support, among other challenges),[178] due to their supranational position and judicial character, as well as some recent developments in their jurisprudence on environmental matters it, is worth taking a closer look and evaluating whether potential cases brought before these regional tribunals could be successful. The next part of the paper looks at regional systems in Europe, the Americas and Africa to investigate what potential lays with human rights climate litigation at the supranational level.

3.1. The European systems

3.1.1. The system of the European Convention on Human Rights

The European system of human rights has been established through the organizational framework of the Council of Europe, an international organization of a regional scope, with the adoption of the European Convention on Human Rights in 1950. Currently, 47 European states adhere to the Convention and recognize the jurisdiction of the European Court of Human Rights – since 1998 a permanent judicial body adjudicating individual claims against alleged governmental breaches of fundamental rights guaranteed by the Convention. Arguably the most successful of all regional human rights bodies, the Court issues hundreds of judgments each year, creating an astonishing corpus of jurisprudence for the whole continent and securing its place in the constitutional laws of the European states.[179] Thus far no climate case has been brought before the tribunal. Recently however, a British non-governmental organization has started a crowdfunding campaign to raise money for a legal action against all 47 signatories to the European Convention, alleging their joint liability for violating the rights of Portuguese children affected by extreme weather attributed to the changing climate.[180] There is still little information available on the case itself and the legal arguments that would be made. Nonetheless, the Court's existing case law and practice provide some reasons to believe that such a potential case could stand a chance.

Although neither the European Convention, nor any of its additional protocols explicitly recognize any sort of environmental rights, the Court has consistently acknowledged that gross environmental degradation can bear negative consequences on numerous more traditional human rights, such as the right to life, the right to health, and, most importantly, the right to private and family life.[181] Under the Convention, states are not only obliged to refrain from

---

178 On short-comings and flaws of the regional human rights systems, see e.g. O'Boyle & Darcy, *supra* note 177; Jean-Paul Costa, "The Evolution and Current Challenges of the European Court of Human Rights" (2009) 1:1 Regent JL & Public Policy 17; Claudio Grossman, "The Inter-American System of Human Rights: Challenges for the Future" (2008) 83:4 Ind LJ 1267; Lea Shaver, "The Inter-American Human Rights System: An Effective Institution for Regional Rights Protection?" (2010) 9:4 Washington U Global Studies L Rev 639.

179 O'Boyle & Darcy, *supra* note 177 at 155.

180 Rachael Revesz "Portuguese children crowdfund European climate change case to sue 47 countries", *The Independent* (25 September 2017), online: <www.independent.co.uk/news/world/europe/portuguese-children-europe-climate-change-case-lawsuit-crowdfund-47-countries-global-warming-a7966231.html>.

181 For an overview of the ECtHR's jurisprudence on human rights and environmental protection see ECtHR Press Unit, "Factsheet – Environment and the European Convention on Human Rights" (March

activities that might impede these fundamental rights, but they bear positive duties to *protect* and *fulfil*, which includes adopting substantial and procedural measures to prevent or avert these environmental risks in a prompt and timely manner.[182] They are required to mitigate threats posed by actions or omissions of private entities or non-state actors.[183] In the context of the climate crisis, where, as already discussed in part I, impacts often occur slowly and are more difficult to attribute to specific singular entity or action, this line of case law might be of assistance to determine governmental duty to mitigate or adapt to climate change and to establish a causal link between climate change and violations of the rights recognized by the Convention.

Second, as it has done in the past, the ECtHR could draw inspiration from national jurisdictions and the multitude of ongoing legal proceedings,[184] utilizing the innovative arguments on attributing liability, or proving causal link through scientific evidence referred to in the cases quoted in the paper. There is also existing case law in which the Court took international environmental principles, such as the precautionary principle, under consideration.[185] Third, the Court has previously recognized, although to a limited extent and not in environmental matters, possibility of attributing extraterritorial human rights obligations. There is also some existing jurisprudence on shared responsibility, in which multiple states are found liable for *not exercising positive duties.*[186]

Notwithstanding these promising developments, some hurdles of considerable importance still remain. One such obstacle is the procedural issue of inadmissibility. Generally, for a case to be admissible before the European Court, applicants have to: a. fulfil the requirement of exhaustion of remedies available in the respective member state and b. establish individual standing.[187] First of all, it would be virtually impossible to first exhaust the remedies available in all 47 states (in the potential case of Portuguese children) – to commence proceedings on multiple stages in dozens of jurisdictions would be extremely costly and time-consuming, and would go against the primary objective to initiate a joint action against multiple states. Fortunately, the Court recognizes this requirement as a golden rule rather than a strict

2019), online (pdf): *European Court of Human Rights* <www.echr.coe.int/Documents/FS_Environment_ENG.pdf>.

182 See e.g. *Lopez Ostra v Spain* (1994) 46 ECHR (Ser A) 46, 20 EHRR 277; *Marangopoulos Foundation for Human Rights v Greece*, No. 30/2005, [2007] ECSR*; Roche v United Kingdom***,** No 32555/96 (19 October 2005).

183 See e.g. *Guerra and Others v Italy* (1998), ECHR (Ser A) 7, 26 EHRR 357.

184 See Sumudu Atapattu, "Climate change under regional human rights systems" in Sebastien Duyck et al., eds, *The Routledge Handbook of Human Rights and Climate Governance* (Oxon: Routledge, 2018) 128 at 139.

185 See *Tatar v Romania,* No. 67021/01 (2009) ECHR 61

186 See Heta Heiskanen, "Climate change and the European Court of Human Rights. Future potentials" in Sebastien Duyck et al., eds, *The Routledge Handbook of Human Rights and Climate Governance* (Oxon: Routledge, 2018) at 319, 321; Maarten Den Heijer, "Issues of Shared Responsibility before the European Court of Human Rights" (2012) SHARES Research Paper 06, ACIL 2012–04 at 18–19.

187 On admissibility criteria see *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221 at 223 (entered into force 3 September 1953) [ECHR] at art. 35§ 1; Council of Europe, ECtHR, *Practical Guide on Admissibility Criteria* (updated on 31 December 2018) [*CoE, Practical Guide on Admissibility Criteria*].

condition, and has previously decided that its application can be limited if, for example, it "would be unreasonable in practice and would constitute a disproportionate obstacle".[188] This could be relied on by potential future plaintiffs.

Second procedural issue – standing – could prove to be more problematic, as it has been cited in many national cases. A case cannot be brought *in abstracto* and as *actio popularis*, meaning the litigants would have to prove direct and individual concern or harm suffered.[189] Again, the existing jurisprudence recognizes exceptions to this rule, in which a potential or future violation could be claimed, but a reasonable and convincing evidence of the probability of such infringement needs to be produced.[190] The strategy to compile a class-action from representatives of youth and rely on scientific evidence to establish causality or likelihood of potential violations might again prove to be helpful, but it remains to be seen whether such reasoning succeeds.

Apart from procedural obstacles, some hurdles also remain in establishing state's liability for joint human rights violations in the context of climate change. Especially the territorial bias, under which a state has an obligation towards individuals only if they are under its jurisdiction, can prove to be complicated to overcome. Although extra-territorial or shared responsibility has been previously recognized, the case law is limited and inconsistent, and does not concern environmental matters.[191] There are also no well-established principles on how to allocate liability, and the ECtHR's jurisprudence on that matter varies.[192] If, however, litigants were able to overcome these hurdles, drawing from innovative strategies and arguments discussed national cases have employed, a case won before the European Court of Human Rights would be of great importance. It would be binding on all member states of the Council of Europe (among these are major polluters like all the states of the European Union and Russia[193]) and would advance judicial recognition of the fact that failure to fight climate change adequately constitutes a breach of protective human rights duties.

3.1.2. The system of the European Union

Apart from the institutions of the Council of Europe, the leading human rights system on the continent, it is also helpful to consider the potential of cases brought within the legal framework of the European Union. The community has its own human rights protection scheme rooted in its treaties and a binding Charter of Fundamental Rights. Citizens have access to an independent judicial body, the Court of Justice of the European Union (CJEU), whose decisions have legally binding character.[194] The Union has adopted a robust corpus of legal and political measures on fighting climate change which structures climate policies of all

188 *CoE, Practical Guide on Admissibility Criteria*, *supra* note 186, subsections I.A.2–3.

189 *Ibid*, subsection A.3.

190 *Ibid*, subsection A.3.d.

191 Den Heijer, *supra* note 186 at 4, 8–9.

192 *Ibid* at 43–46.

193 For detailed data on GHG emissions of each party to the UNFCCC, see "Greenhouse Gas Inventory Data - Detailed data by Party" (last visited 5 January 2020), online: *United Nations Framework Convention on Climate Change* <di.unfccc.int/detailed_data_by_party>.

194 On human rights system of the EU see e.g. Sionaidh Douglas-Scott & Nicholas Hatzis, eds, *Research Handbook on EU Law and Human Rights* (Cheltenham: Edward Elgar Publishing, 2017).

member states.[195] If a case were to be won, striking down current climate laws and obliging EU institutions to adopt more ambitious and powerful targets, it would bear legal consequences throughout the continent.

Of course, as seen by the example of the *People's Case*, referred to throughout this paper, legal action commenced by individual citizens does meet obstacles. Procedural rules on standing are demanding and the Court has so far interpreted them in a restrictive manner. However, there are arguments which could render the appeal or any potential case in the future more successful. Here, again, the Aarhus Convention might be of help, because, as it was already mentioned, the European Union is a party to the treaty. Although the Union adopted its own subsequent measures to implement these obligations in the Union's law,[196] treaty provisions on individual standing before the CJEU remained unchanged. A narrow interpretation of already stringent requirements for individual complaint against the Union's acts should be considered a breach of the Aarhus commitments, since it virtually does not allow for any possibility of public interest litigation in environmental issues. This is also an assessment made by the Aarhus Compliance Committee, which found the EU to be in breach of its obligations to guarantee access to justice to non-governmental organizations and the general public.[197] In response to Committee's report, the European Commission was asked to undertake a study considering necessary changes, and eventually, if appropriate in the view of the outcomes of the study, prepare a proposal for an amendment to the Union's law.[198]

These recent steps taken by the EU institutions indicate that in the future standing might not be an obstacle to bringing a similar claim before the CJEU, although the amendment process, if commenced, will take time.[199] It remains to be seen whether the CJEU itself changes its approach during the appeal in the already pending case. If it does, however, or when the law eventually changes, the European law and past jurisprudence of the Court in environmental and climate matters can provide some assistance in arguing the citizen's substantial claims. First of all, the constitutional framework of the Union[200] provides a fairly strong environmental protection. "Sustainable development" and "high level of protection and improvement of the quality of the environment" are enshrined in the Treaties as the aims of the EU together

---

195 On EU climate policy and laws see e.g. Jos Delbeke & Peter Vis, *EU Climate Policy Explained* (Oxon: Routledge, 2015); for an up-to-date overview see "Climate Action Policies" (last visited 8 July 2020), online: *European Commission* <ec.europa.eu/clima/index_en>.

196 For an overview of the EU legislation implementing the Aarhus Convention see "The EU & the Aarhus Convention: in the EU Member States, in the Community Institutions and Bodies" (last visited 8 July 2020), online: *European Commission* <ec.europa.eu/environment/aarhus/legislation.htm>.

197 See UNECEOR, 2017, 57th Mtg, UN Doc ECE/MP.PP/C.1/2017/7 (2017).

198 Council of the European Union, *Council Decision requesting the Commission to submit a study on the Union's options for addressing the findings of the Aarhus Convention Compliance Committee in case ACCC/C/2008/32 and, if appropriate in view of the outcomes of the study, a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1367/2006*, DGE.1.9422/18 (2018).

199 The deadline for a potential proposal was set to 20 September 2020.

200 The primary law of the EU is conveyed most of all in the *Treaty on the European Union*, 26 October 2012, OJ C 326 (consolidated version) [TEU] and the *Treaty on the Functioning of the European Unio*n, *supra* note 55.

with the promotion of social justice, intergenerational solidarity and protection of children.[201] The Treaties also establish a legal duty to integrate environmental protection into policies and activities of the EU.[202] Furthermore, combating climate change, as well as the role of environmental principles (precautionary principle, no-harm principle, polluter pays) and scientific and technical data in designing appropriate measures is explicitly incorporated into the Treaties.

This explicit recognition of legal duties in the context of climate change and their infusion with environmental principles and justice dogmas in the highest law of the Union is something that a lot of national jurisdictions do not provide. Establishing a legal positive duty to act more ambitiously, so crucial in the discussed climate litigation, could be, therefore, much easier and less complicated that in other cases. Additionally, the European Union acts on its own behalf in international environmental negotiations and as such has entered into the international framework of the UNFCCC, including the Kyoto Protocol and the Paris Accord, which bind not only its member states but its law- and policy-making institutions.[203] The CJEU's jurisprudence, encompassing hundreds of judgments and opinions on environmental and climate-related issues, proves that the Court has established itself as a key player in environmental issues in the Union.[204]

Environmental protection is, furthermore, enshrined in the Charter of Fundamental Rights (art. 37). This explicit recognition situates environmental protection within a human rights framework of the Union, rather than leaving it strictly in the field of policy-making, albeit with a limited justiciability.[205] So far there is still little case law on environmental *rights* in the Union legal system, notwithstanding the CJEU's jurisprudence in the field of environmental protection. Nonetheless, the provision of art. 37 has been previously used as interpretative tool, either strengthening justification for limiting other competing rights under the Charter, or validating stronger environmental protection.[206] In conjunction with the rest of primary law obligations, the ambiguous character of the right to the environment might not be the biggest obstacle for litigants. The EU system might, therefore, prove to be an important forum for climate rights litigation in the near future if only the procedural obstacles are removed.

3.2. The Inter-American system

---

201 TEU, *supra* note 200 art 3(3).

202 TFEU, art. 11 and art. 191.

203 On the EU's external policy on climate change, see "International action on climate change" (last visited 8 July 2020), online: *European Commission* <ec.europa.eu/clima/policies/international_en>.

204 See Francis Jacobs, "The Role of the European Court of Justice in the Protection of the Environment" (2006) 18:2 J Envtl L 185.

205 The environmental provision in the Charter is a principle not a right and thus has no direct judicial effect. The Charter differentiates between traditional fundamental rights and principles. Rights are granted to every individual under the Union's jurisdiction and are fully justiciable before the CJEU, whereas principles are more of guiding rules that ought to be incorporated into all policies of the EU and apply to both its institutions and member states when they implement European law. See *The Charter*, *supra* note 46 at art. 52; Sanja Bogojević, "EU Human Rights Law and Environmental Protection: The Beginning of a Beautiful Friendship?" in Sionaidh Douglas-Scott & Nicholas Hatzis, eds, *EU Human Rights Law* (Cheltenham: Edward Elgar Publishing, 2014) at 8–10.

206 Bogojević, *supra* note 205 at 11–15.

Outside Europe, the Inter-American system provides robust human rights protection mechanisms for individuals on a regional level. It was established within the framework of the Organization of American States and relies on the American Declaration on the Rights and Duties of Man (1948)[207] and the American Convention on Human Rights (1969)[208], as well as subsequent protocols. It comprises two interrelated bodies: a quasi-judicial Inter-American Commission on Human Rights that reviews individual applications as the first instance, and a permanent judicial body, Inter-American Court of Human Rights, that issues final binding decisions and advisory opinions. The system has its flaws and faces various challenges, like delays in issuing judgments or political hostility from some of the member states and lack of universal recognition of its jurisdiction. Nonetheless, since its establishment, its significance and influence has been growing and it has proved to be a crucial factor to democratization of the Latin America and the protection of fundamental rights on the continent.[209]

Two claims alleging violations of rights through general contribution to climate change and lack of proper climate policies filed before the Inter-American Commission thus far have not been very successful. The first one, brought by an Inuk woman against the government of the United States in 2005 was rejected – the Commission found that the claimants did not provide sufficient information that would allow, "at present", to establish whether facts cited in the petition could constitute violations of fundamental rights recognized in the American Declaration.[210] The second, filed on behalf of the Arctic Athabaskan Council against Canada in 2013, has been left unresolved.[211] Although bringing actions against Canada and the United States might make strategic sense, considering they are the biggest polluters among American states,[212] it will be difficult to hold them legally accountable, because neither of the countries are signatories to the American Convention nor accept the jurisdiction of the Inter-American Court.[213] Another hurdle for potential litigants is, again, the standing requirements. Individuals cannot file petitions directly before the Court but have to first apply to the Commission which can then refer the case to the higher body.[214] Furthermore, *actio popularis* and public interest litigation is not allowed in the proceedings – the victim needs to be identified and file the claim in its own name or through a non-governmental organization or other representative.[215] This

---

207 *American Declaration of the Rights and Duties of Man*, April 1948 (entered into force 2 May 1948).

208 *ACHR*, *supra* note 175.

209 On the Inter-American system, see e.g. Dulitzky, *supra* note 177 at 128–129; Grossman, *supra* note 178 at 128–129.

210 However, the Commission did hold a special hearing in which several legal questions have been discussed, *inter alia* on how to attribute responsibility and how to establish causality with specific actions or emissions. See Megan S. Chapman, "Climate Change and the Regional Human Rights Systems" (2010) 10 Sustainable Development L & Policy 37 at 38.

211 See "April 23 Petition", *supra* note 12. There seems to be no information available on why exactly the proceedings before the Commission have been stalled for so many years.

212 See *supra* note 193.

213 The Inter-American Commission in cases against these countries only issue non-binding recommendations based on the American Declaration. See Chapman, *supra* note 209 at 38.

214 *ACHR*, *supra* note 175 at art 61(1).

215 William J Aceves, "Actio Poplaris – The Class Action in International Law" (2003) 2003:1 U Chicago Legal F 353 at 384–385.

means a stronger causal link would need to be determined between the potential claimant and alleged harms.

There are, however, recent developments within the system in the field of environmental protection and its connection to human rights that could open gates for future climate litigation. First of all, the Inter-American Court has continuously acknowledged a healthy environment as necessary for the realization of traditional human rights, especially the protection of indigenous communities.[216] The right to a healthy environment has also been recognized in the San Salvador Protocol,[217] a document subsequent to the Convention, but until November 2017, there was no enforcement mechanism that could render it justiciable. That month, however, after receiving an application from the government of Colombia, the Inter-American Court issued a landmark advisory opinion, in which it interpreted the right to a healthy environment from the art. 26 of the American Convention (the right to progressive development) and confirmed its status of an autonomous right that could be invoked by individuals.[218] The assessments the Court has made in its ruling can be of crucial importance for a future potential case. The irrefutable relationship between human rights and environmental protection, and the interdependence and indivisibility of all rights has been confirmed and both individual and collective connotations, for all humankind and future generations, have been stressed. The decision has also reaffirmed procedural environmental rights.[219] Most importantly, the Court explicitly acknowledged the issue of climate change and its adverse impacts,[220] and established that states bear positive duties with regard to environmental protection both within and outside of their territories.[221] These innovative findings could assist potential claimants in establishing their standing (for example, representative of youth and future generations, or indigenous communities could claim infringements on their rights), attributing liability and establishing causal link between climate change and environmental degradation. The cautious assessment of the Commission in the 2005 case against the US, that no sufficient information to determine causality "*at present*" was provided, also offers some reason to hope that with recent scientific and legal developments in this field, a case brought in the near future could have a chance to succeed.

3.3. The African system

---

216 See e.g. *Mayagna (Sumo) Awas Tingni Community Case (Nicaragua)* (2001), Inter-Am Ct HR (Ser C) No 79; *Claude Reyes Case (Chile)* (2006), Inter-Am Ct HR (Ser C) No 151; *Yakye Axa Indigenous Community Case (Paraguay)* (2005), Inter-Am Ct HR (Ser C) No 125.

217 *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, 17 November 1988, OAS Treaty Series No 69 (entered into force 16 November 1999).

218 *The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights)* (*Colombia*) (2017), Advisory Opinion OC-23/18, Inter-Am Ct HR (Ser A) No 23 at para 62 [*Advisory Opinion OC-23/18*].

219 *Ibid*, s B.4.

220 Maria L Banda, "Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights" (2018) 22:6 ASIL Insights 1 at 5.

221 *Advisory Opinion OC-23/18*, *supra* note 218 at 244.2–5, 244.7.

The African system, based on the African Charter on Human and Peoples' Rights,[222] comprises of both a quasi-judicial commission and a fully judicial body – the African Court of Human Rights. It is the youngest of the three schemes, still in the development stage, struggling with issues such as no proper compliance mechanisms, lack of political support and extreme diversity amongst its members.[223] To this date no climate case *per se* has been brought before either the Commission or the Court. Nonetheless, a short consideration is still justified due to developments before some national tribunals and in the works of the Commission itself.

The African system was the first one among regional human rights schemes to recognize an autonomous right to a healthy environment explicitly in its Charter (art. 24). The wording of the provision ("*All peoples shall have the right to a general satisfactory environment favourable to their development*") underlines the collective character of the right. Furthermore, although of only quasi-judicial character, the Commission interprets the rules on entities allowed to file a claim very widely, giving *locus standi* to victims, their families or NGOs.[224] This could help in establishing a general and open standing in a potential climate case - a hurdle met by many previous claimants where *actio popularis* is not available. Additionally, the African Commission already officially recognizes the interdependence of climate and human rights. In its resolution adopted in 2016, the African Commission has acknowledged the challenges that climate change poses on the enjoyment of human rights on current and future generations, as well as on vulnerable groups, and called upon African states to do more.[225]

Furthermore, already established case law on environmental issues could also be utilized in constructing a future climate human rights claim. Especially in the famous *Ogoni v Nigeria*[226] case, the Commission reached several crucial conclusions. It interpreted the right to the environment as both substantial and procedural, and it underlined the interdependence of various protected rights, recognizing the deteriorating effect oil extraction has on the right to life, health, housing or water and food. Most importantly from the perspective of a future climate case, the Commission found the right to environment to create both negative and positive duties of a state that must *respect*, *protect, promote* and *fulfil* the right of its citizens, also from the acts of third or private parties.[227] As noted before, this positive aspect of the state's protective duties is of grave importance considering how difficult establishing the causal chain and liability is in discussed climate cases.

---

222 *ACHPR*, *supra* note 176.

223 See e.g. Lucinda Patrick-Patel, "The African Charter on Human and Peoples' Rights: How Effective Is This Tegal Instrument in Shaping a Continental Human Rights Culture in Africa?" (21 December 2014), online (blog): *Le Petit Juriste* <www.lepetitjuriste.fr/droit-compare/the-african-charter-on-human-and-peoples-rights-how-effective-is-this-legal-instrument-in-shaping-a-continental-human-rights-culture-in-africa/>.

224 Before the Commission which can then refer the case to the Court. See Celestine Nchekwube Ezennia, "Access to Justice Mechanisms for Individuals and Groups under the African Regional Human Rights System: An Appraisal" (2015) 8:1-2 African J Leg Studies 115 at 121–122.

225 African Commission on Human and Peoples' Rights, *Resolution on Climate Change and Human Rights in Africa*, 58th Ordinary Session, ACPHR/RES.342(LVIII) (2016).

226 African Commission on Human and Peoples' Rights, *155/96 Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria*, Decision on Communications, 30th Ordinary Session, 27 October 2001.

227 *Ibid* at 44.

Additionally, environmental cases brought before national courts show that the connection between environmentally hazardous activities, such as gas flaring, oil extraction, or land grabbing, and climate change, as well as its negative effect on the enjoyment of human rights has already been judicially noticed.[228] Although these claims seek mostly to stop certain activities, rather than incite more decisive climate action, they could in the future contribute to constructing a case similar to those considered in the paper.

Judging from these already taken steps, although not as far reaching as in the other two regions, also the African scheme has potential for building a human rights climate case against states. It must be remembered, however, that the general flaws of this still young system, such as issues with non-binding character of the Commission's decisions, problems with implementation or lack of access of individuals to the judicial mechanism,[229] as well as usual difficulties every such case experiences might hinder the efforts. It would also be interesting to observe whether potential petitions focus on mitigation measures as much as the cases filed around the world so far. Considering that African countries are amongst the most vulnerable to climate-related impacts and contribute to the global warming relatively little, it might be that climate *adaptation* rather than mitigation would be in the center of any future climate litigation in that region.

4. THE POTENTIAL AND THE OUTSTANDING SHORT-COMINGS OF HUMAN RIGHTS CLIMATE LITIGATION

At this stage, it is still difficult to determine conclusively what effects on climate policy this emerging type of human rights climate litigation will have. Progressive and open interpretation of laws adopted by the courts in the few landmark cases shows there is potential in bottom-up public pressure exercised through legal measures. The more the positive trend in courts continues the more new cases we can expect. Already today, litigants rely on the precedents of *Urgenda*, *Leghari* or *Future Generations*, drawing inspiration from arguments made in them.[230] Developments in global academic and international debate and the transnational character of many elements of these disputes (such as scientific data, human rights, international environmental principles or climate justice postulates) can assist in transferring claims from one legal system to another.[231] It is also noteworthy that courts around the world seem to rely heavily on scientific findings and governmental recognition of the issue to establish the level of necessary protection, causal nexus and negligence, citing newest reports and research. Open standing and the recognition of state's *positive* duties towards citizens allow to shorten the causal link as there is no need to demonstrate individual harm or specific governmental undertaking that caused human rights violation. In such cases, it is enough to determine that climate change will adversely impact human well-being and that measures adopted thus far have been lacking - facts already widely confirmed by scientists *and politicians* around the

---

228 See analysis in Louis J Kotze & Anel du Plessis, "Putting Africa on the Stand: A Bird's Eye View of Climate Change Litigation on the Continent" (2019) U Or J Environmental L & Litigation.

229 See Ezennia, *supra* note 224 at 124–125.

230 See e.g. Bähr, *supra* note 55 at 196–198; "What Was the Inspiration for the Case" (last visited 8 July 2020), online: *Climate Case Ireland* <www.climatecaseireland.ie/climate-case/>.

231 For more on transferability of claims made in this new wave of litigation, see Giulio Corsi, "The New Wave of Climate Change Litigation: A Transferability Analysis" (2017) 59 ICCG Reflection.

globe. Developments on the national level could eventually lead to potentially successful legal actions before regional bodies, as they all draw from legislations and jurisprudence of their member states. Furthermore, recent advancements at the level of regional human rights protection create some room for future success. Especially the recognition of states' positive duties in the context of the environment, the courts' evident willingness to interpret them from other, more traditional rights embedded in regional conventions and the rising, officially expressed awareness of the climate change issue could help constructing a case similar to these already brought before national courts around the world. Elevating the issue to a higher level means that multiple states (or even supra-national organizations like the EU) could be held accountable for insufficient climate mitigation and adaptation. That would bear much bigger significance in the context of such a global problem, universalizing the issue even more and potentially enjoining whole groups of governments to take action. Moreover, regional human rights bodies and their jurisprudence highly influence legal systems of their member states. Potential climate litigation on supranational level could, therefore, draw from national case laws on the one hand, and impact future national climate cases on the other.

However, notwithstanding the potential human rights climate litigation shows, there are still hurdles that need to be overcome. Not all arguments made by applicants or recognized by court in one jurisdiction can be transferred or translated into another. Human rights are not directly justiciable before courts everywhere. Procedural pathways and legal doctrines vary across systems – solution resorted to in one country may be unavailable or only partially applicable in another jurisdiction. Future claimants might need, therefore, to look for alternative legal avenues that are suitable in their own courts, without relying on foreign examples already tested. In that sense, every first human rights climate case in a given country might be as difficult as any precedent or novel litigation strategy, regardless of the success achieved by others abroad.[232] Additionally, if successful cases from other countries can raise chances of a positive outcome, it might be possible that too many lost cases will deter potential litigants from approaching their courts.

Two issues seem to be most difficult to resolve. In some jurisdictions, especially where *actio popularis* is not available, proving standing seems to be one of the biggest obstacles, preventing the case from being considered on the merits. Even in *Urgenda*, where the foundation secured its open standing, the court refused to grant it to 800 individual co-claimants. Further developments in attribution science might assist in establishing a causal nexus between certain events and specific harms suffered to some extent. There is also potential in group claims based especially on the rights of future generations and youth, who cannot exercise their right to vote and could therefore claim they require a higher level of judicial protection. Nonetheless, due to the inherit complexity and universality of climate change, that will progressively affect more and more people, judges might still be hesitant to recognize sufficient individual and direct concern. Cases like *Swiss Seniors* or *People's Case* are prime examples of such difficulties that plaintiffs need to overcome.

Moreover, it seems not all courts are willing to follow the steps of the Dutch, Pakistani and Colombian benches and decisively limit governments' discretion with regards to designing climate policies and setting necessary targets. *Trias politica* functions as one of the main

[232] For example, duty of care recognized in the s.162 of the Dutch Civil Code does not exist in Switzerland and as such the case must be based on a different premise (Bähr, *supra* note 55 at 201).

arguments brought up by the defendants.[233] Some newest decisions, like those from Ireland and Germany, or the recent ruling in *Juliana*, show that courts might be rather timid in obliging governments to undertake specific policy steps, even while at the same time recognizing they might be insufficient in the fight against the warming of the planet.

Even if courts adopt a progressive approach and decide in favour of stricter and more ambitious measures, problems with implementation of their decisions pose questions about the actual effectiveness of human rights climate litigation. In the face of an issue in such dire need of a global and coordinated response, even a positive outcome of a national case that took years to complete is a drop in the ocean.[234] There are, of course, mechanisms to force governments to execute judicial decisions, if, for example, measures taken by them still do not comply with the level of protection deemed necessary. They, however, require additional material resources and take further time, so precious in this matter. In that sense, the line of defense resorted to by some governments – that their contribution is minimal and a change in their individual targets will not impact the global state of GHG emissions – makes sense not necessarily from a legal point of view, but on a more practical level. As the cases positively decided on thus far have been quite recent, it remains to be seen whether favourable judicial decision translate into actual practical changes. At the regional stage, on the other hand, implementation relies on interstate political pressure – even if usually judgments are respected, it might be much more difficult to achieve compliance if all countries together are found to be in breach of their duties.

5. CONCLUSION

To conclude, this new wave of strategic climate litigation is definitely worthy of attention, if only for the innovative ways it strives to tackle complicated global issues with the use of law. Any progress made before courts, be it on a national or regional level, will advance the discussion on the role traditional human rights and related concepts can play in environmental and climate protection. It will also further cement the premise that states have protective legal duties towards their citizens to preserve livable climate. The transferability of many of the arguments and strategies used can help this type of litigation become a global phenomenon that would mirror the transboundary nature of the crisis. Additionally, with its growing presence in the media, human rights climate litigation definitely shows some potential as a tool of political pressure. The growing number of cases filed only supports this claim.

Nonetheless, some crucial shortcomings of human rights climate litigation still remain. It seems that after the few first successful landmark cases, the tide has been less favourable to their followers. In some jurisdictions, the rigorist procedural rules or lack of recognition of suitable doctrines might make it extremely complicated to successfully develop such a multi-layered argument and win a case. In others, the principle of the separation of powers might prevent

---

233 See e.g. the governments' arguments in *Urgenda Foundation v the State of the Netherlands, Union of Swiss Senior Women for Climate Protection v Swiss Federal Council and Others* or *Friends of the Irish Environment v Ireland.*

234 For example, *Juliana v United States* has been in the pre-trial stage for 4,5 years now; *Klimaatzaak v Belgium*, filed in 2015, was stalled for 3 years because the parties could not agree on the language of the proceedings; the outcome of *Urgenda*, even though the case was won in the lower court, it contested by the government until it reached the Supreme Court where it was finally settled, 7 years after first steps have been taken by Urgenda.

courts from stepping in. Even in more "inviting" legal systems, litigation and enforcement of judicial decisions take time. When it comes to climate change, time is not on the litigants' side. Considering how dire and complex the climate crisis proves to be, litigation might not be, therefore, the perfect tool against the governments' apathy. Rather than a silver bullet, it should be treated as one of many cumulative elements of a bigger global movement. As such, human rights, and more specifically human rights climate litigation can play an important role in sending a strong and straightforward sign that more needs to be done to prevent the catastrophe the planet is heading for.