THE ADVENT OF INTERNATIONAL HUMAN RIGHTS LAW IN CLIMATE CHANGE LITIGATION

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ABSTRACT

Despite growing concerns over climate change and the proliferation of national climate laws, global greenhouse gas emissions keep rising, while the impacts of climate change are increasingly becoming an existential threat to many human communities around the globe. In response to failing governmental action, the affected communities and nongovernmental organizations (NGOs) have turned to national and regional courts, as well as regional and international quasi-judicial human rights treaty bodies (hereinafter treaty bodies), to argue that inadequate responses to climate change violate internationally recognized human rights. Following the first attempts to bring claims based on international or regional human rights law (hereinafter human rights law) in climate change litigation in the first decade of the twenty-first century, the use of human rights law in climate cases has been on the rise over the last several years. This article provides a comprehensive assessment of human rights claims and their viability in climate cases decided by national and regional courts, and international and regional treaty bodies as of January 1, 2021. So far, human rights law has been used with mixed success: while some courts and treaty bodies have explicitly acknowledged that inaction on climate change violates or can potentially violate human rights, others have been much more hesitant to take this approach. However, in the latter case, the courts' and treaty bodies' interpretations of the applicability of human rights law in the context of

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climate change and environmental degradation appear to be flexible and open to further development. Coupled with the growing number of such cases globally and their increasing internationalization, these positive developments are likely to lay the foundation for a greater chance of success in future litigation.

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INTRODUCTION

There is little doubt that resolving the global climate crisis[1] will require more than any single actor, be it a state or private corporation. However, the global response to this crisis lacks the level of ambition that is needed to avert the catastrophic impacts of climate change. Despite the multilevel governance response and the fact that the number of national climate laws across the globe has significantly increased,[2] no decisive results have been achieved so far.[3] Against this backdrop, the threat of climate change looms and the scientific community has frantically called for action as it observes extreme weather events and ever-rising levels of atmospheric greenhouse gases (GHGs).[4]

In light of failing governmental action, courts have been playing an important role in addressing climate change. Originally limited to the United States and Australia, the geographic landscape of climate change litigation has dramatically expanded over the last decade, reaching every continent.[5] Not only has litigation been on the rise in terms of the sheer number of cases, but plaintiffs have taken advantage of the variety of legal systems available to make novel legal claims.[6] One particularly interesting

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1 The rapid deterioration of the planet's climate has given rise to a number of terms used to describe the situation, including "climate crisis," "climate emergency," "extinction," and so forth.

2 *See* Michal Nachmany & Joana Setzer, *Global Trends in Climate Change Legislation and Litigation: 2018 Snapshot*, GRANTHAM RSCH. INST. CLIMATE CHANGE & ENV'T 2 (Apr. 30, 2018), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2018/04/Global-trends-in-climate-change-legislation-and-litigation-2018-snapshot-3.pdf [https://perma.cc/C3XT-7M3S]; Shaikh Eskander, Sam Fankhauser, & Joana Setzer, *Global Lessons from Climate Change Legislation and Litigation*, *in* ENVIRONMENTAL AND ENERGY POLICY AND THE ECONOMY (Matthew Kotchen, James H. Stock, & Catherine Wolfram eds., 2021).

3 Recent anthropogenic GHG emissions are the highest in history. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT, 44, (The Core Writing Team et al. eds., 2015) [hereinafter IPCC FIFTH ASSESSMENT REPORT]; UNITED NATIONS ENV'T PROGRAMME, EMISSIONS GAP REPORT 2020, 1 *passim* (2019).

4 *See* Univ. of Cal. San Diego, Carbon Dioxide Concentration reading at Mauna Loa Observatory, The Keeling Curve, https://keelingcurve.ucsd.edu/ [https://perma.cc/G7WV-VFSG] (last visited Jan. 30, 2021).

5 *See* Eskander et al., *supra* note 2, at 12; *see generally* Sabin Ctr. for Climate Change L. & Arnold & Porter Kaye Scholer LLP, CLIMATE CHANGE LITIG. DATABASE, http://climatecasechart.com [https://perma.cc/D5P6-GFH8] (last visited Jan. 30, 2021) (cataloguing climate change related litigation originating in the United States and internationally).

6 *See* Joana Setzer & Rebecca Byrnes, *Global Trends in Climate Change Litigation: 2020 Snapshot*, LONDON SCH. OF ECON. & POL. SCI. 1 (July 2020), https://www.lse.ac.uk/granthaminstitute/wp-content/uploads/2020/07/Global-trends-in-climate-change-litigation_2020-snapshot.pdf [https://perma.cc/N5QA-W6L2].

and bold strategy has been to invoke human rights law to challenge government climate change policies.

The application of human rights law to climate change litigation is predominantly a post-2010 phenomenon.[7] The viability of such claims, therefore, is still uncertain. This is in spite of climate science's undeniable progress in detecting and attributing certain types of harms to climate change[8] and the growing number of courts that look at climate change through the lens of human rights.[9] Could the plaintiffs' growing attention to human rights law and national courts' gradual acceptance of such claims demonstrate a long-term trend? If so, could this trend be considered the future of climate change litigation?

Some recent developments suggest that the answer to the first question is yes. One of the most notable examples is the successful lawsuit by an NGO, Urgenda, against the Dutch government, in which the courts emphasized the relevance of human rights law when considering national climate policy.[10] Whether this particular development is a harbinger of a human rights approach to climate change is still unclear, especially considering different jurisdictions' approaches to human rights law. One thing, however, is already clear: Urgenda's success has inspired similar litigation elsewhere.[11] As regional courts and international and regional treaty bodies converge in interpretating human rights law regarding environmental degradation, further litigation like Urgenda's could mean a decisive shift in jurisprudence.

This article explores the viability of this growing body of climate change litigation based on human rights law. While legal scholarship on climate change and human rights has developed rapidly over the last

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[7] Three cases in the 2000s applied human rights law to climate change litigation–two of them did not address climate change as a central issue. *See* discussion *infra* Part II.

[8] The body of scholarship addressing the role of developments in attribution science in climate change litigation has been growing over the last several years. *See* Sophie Marjanac & Lindene Patton, *Extreme Weather Event Attribution Science and Climate Change Litigation: An Essential Step in the Causal Chain?*, 36 J. ENERGY & NAT. RES. L. 265, 266, 273, 275, 276 (2018); Michael Burger, Jessica Wentz & Radley Horton, *The Law and Science of Climate Change Attribution*, 45 COLUM. J. ENV'T L. 57 (2020); MARIA L. BANDA, CLIMATE SCIENCE IN THE COURTS: A REVIEW OF U.S. AND INTERNATIONAL JUDICIAL PRONOUNCEMENTS (2020).

[9] *See* John H. Knox, Bringing Human Rights to Bear on Climate Change, 9 CLIMATE L. (SPECIAL ISSUE) 165, 167 (2019).

[10] *See infra* Part II.A.ii.

[11] *See infra* Part III.

decade,[12] the absence of systematic application of human rights law in climate cases and, until very recently, the lack of courts' and treaty bodies' decisions on the subject, have not allowed for any larger-scale comparative assessment of such cases. For the most part, the existing scholarship has focused on individual cases, most notably the *Urgenda* case.[13] Given the gradual accumulation of relevant jurisprudence, some recent scholarly works have started expanding the analysis of climate change litigation based on human rights law beyond discussing single cases.[14]

This article follows the latter approach and further expands on it by comprehensively assessing human rights claims and their viability in climate cases decided by both national and regional courts and international and regional treaty bodies. A brief explanation of this article's methodology and clarification of some terminology needs to be made here.

First, the phrase "human rights law" in this article refers to multilateral human rights treaties at the international and regional (supranational) levels. The phrase "human rights," accordingly, refers to rights recognized and protected by these treaties. The words "litigation" and "cases" cover not just court cases but also complaints addressed by the respective treaty bodies[15] as of January 1, 2021. Needless to say, these

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[12] *See, e.g.*, Joana Setzer & Lisa C. Vanhala, *Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance*, 10 WIRES CLIMATE CHANGE, e580 10-11 (2019).

[13] *See, e.g.*, Jolene Lin, *The First Successful Climate Negligence Case: A Comment on* Urgenda Foundation v. The State of the Netherlands (Ministry of Infrastructure and the Environment)*,* 5 CLIMATE L. 65 (2015); Josephine van Zeben, *Establishing a Governmental Duty of Care for Climate Change Mitigation: Will Urgenda Turn the Tide?*, 4 TRANSNAT'L ENV'T L., 339 (2015); Anne-Sophie Tabau & Christel Cournil, *New Perspectives for Climate Justice: District Court of The Hague*, 24 June 2015, *Urgenda Foundation versus the Netherlands*, 12 J. FOR EUR. ENV'T & PLAN. L., 221 (2015); Jesse Lambrecht & Claudia Ituarte-Lima, *Legal Innovation in National Courts for Planetary Challenges: Urgenda v State of the Netherlands*, 18 ENV'T L. REV., 57 (2016); Roger Cox, *A Climate Change Litigation Precedent: Urgenda Foundation v The State of the Netherlands*, 34 J. OF ENERGY & NAT. RES. L., 143 (2016); Patrícia Galvão Ferreira, "*Common but differentiated responsibilities" in the National Courts: Lessons from* Urgenda v. The Netherlands, 5 TRANSNAT'L ENV'T L., 329 (2016); Benoit Mayer, The State of the Netherlands v. Urgenda Foundation*: Ruling of the Court of Appeal of The Hague* (9 October 2018), 8 TRANSNAT'L ENV'T L., 167 (2019).

[14] *See, e.g.*, Jacqueline Peel & Hari M. Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNAT'L ENV'T L. 37 (2018).

[15] This article, therefore, does not address *constitutional* rights claims in climate change litigation. Notably, though, such claims often appear alongside human rights law in cases before national courts. For example, relevant constitutional provisions were invoked in all cases described in Part II.A.ii.

cases are quite different in terms of their procedural nature, yet all share one fundamental feature: they all raise the issue of climate change as a human rights threat before judicial or quasi-judicial treaty bodies, thus allowing the affected individuals to seek protection that is otherwise unavailable.[16]

Second, the phrases "climate change litigation" and "climate cases" refer to the abovementioned cases where climate change is the central issue, with the exception of two earlier cases which chiefly concerned air pollution.[17] This article uses climate change litigation databases from the Columbia University Sabin Center for Climate Change Law[18] and the London School of Economics and Political Science Grantham Research Institute on Climate Change and the Environment.[19] The article analyzes only those cases available in English. The article does not address the post-litigation stage—implementation of decisions or their (potential) policy impacts. Therefore, any reference to "viability" and "success" in such litigation indicates a court or treaty body decision that is favorable to the plaintiffs.

The structure of the article is as follows. Part I will discuss the rationale of using human rights law in climate change litigation as well as identify the main categories of rights claimed. It will then discuss the interpretation of these rights in the context of case law concerning other forms of environmental degradation in their respective jurisdictions. Part II will explore how national and regional courts and international and regional treaty bodies have dealt with climate claims based on human rights law. Finally, Part III will summarize the findings and reflect on the future.

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[16] *See* James R. May & Erin Daly, *Global Climate Constitutionalism and Justice in Courts*, *in* RESEARCH HANDBOOK ON GLOBAL CLIMATE CONSTITUTIONALISM, 235, 236 (Jordi Jaria-Manzano & Susana Borràs eds., 2019).

[17] Setzer & Byrnes, *supra* note 6 (discussing climate change as a central/peripheral issue in litigation).

[18] Sabin Ctr. for Climate Change L. & Arnold & Porter Kaye Scholer LLP, *supra* note 5 (choose "U.S. Climate Change Litigation"); *id.* (choose "Non-U.S. Climate Change Litigation").

[19] *Climate Change Laws of the World*, GRANTHAM RES. INST. CLIMATE CHANGE & ENV'T, https://climate-laws.org [https://perma.cc/4BJH-8K8X] (last visited Jan. 31, 2021).

I. CLIMATE CHANGE LITIGATION AND HUMAN RIGHTS LAW

The links between climate change and human rights have been discussed at the international level since 2000.[20] In 2015, the Paris Agreement became "the first legally binding climate instrument that refers to human rights,"[21] albeit only in its preamble and in reference to human rights aspects of response measures. The UN Human Rights Council and the Office of the High Commissioner for Human Rights have drafted a series of resolutions and reports, as well as carried out activities promoting a human rights approach to climate change.[22] Most recently, the first and second UN Special Rapporteurs on human rights and the environment, John Knox and David Boyd, prepared a series of reports addressing the issue of climate change and human rights.[23] These reports highlighted the following human rights that are being threatened and violated as a result of climate change[24]:

- the right to life
- the right to health
- the right to food
- the right to water and sanitation

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[20] *See* John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33 HARV. ENV'T L. REV. 477 (2009); Marc Limon, *The Politics of Human Rights, the Environment, and Climate Change at the Human Rights Council,* in THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 189, 189–214 (John H. Knox & Ramin Pejan eds., 2018); John H. Knox, *The United Nations Mandate on Human Rights and the Environment*, *in* HUMAN RIGHTS AND THE ENVIRONMENT: LEGALITY, INDIVISIBILITY, DIGNITY AND GEOGRAPHY 34 (James R. May & Erin Daly eds., 2019).

[21] Sam Adelman, *Human Rights in the Paris Agreement: Too Little, Too Late?,* 7 TRANSAT'L ENV'T L., 17, 23 (2018). This is true not only for the climate treaties, but also for any global environmental treaties.

[22] *See, e.g.*, Human Rights Council Res. 29/15 U.N. Doc. A/HRC/Res/29/15 (July 22, 2015).

[23] John H. Knox (Special Rapporteur on Human Rights and the Environment), *Rep. on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environmen*t, U.N. Doc. A/HRC/31/52 (Feb. 1, 2016) [hereinafter Report on Human Rights and Environment 2016]; John H. Knox (Special Rapporteur on Human Rights and the Environment), *Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018) [hereinafter Report on Human Rights and Environment 2018]; David Boyd (Special Rapporteur on Human Rights and the Environment), Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/74/ (July 15, 2019) [hereinafter Report on Safe Climate].

[24] Report on Safe Climate, *supra* note 23, ¶ 26.

- the right to a healthy environment
- the right to an adequate standard of living
- the right to housing
- the right to property
- the right to self-determination
- the right to development
- the right to culture

All of these human rights currently enjoy recognition and protection at the international or regional level, even though their degree of recognition and protection by states varies. The question is whether courts and treaty bodies are ready to interpret them as imposing concrete obligations on states with regard to climate change.

This Part will now discuss the use of human rights law in climate change litigation—specifically, the impacts of climate change on human communities, the relevance of human rights law to climate change, and the specific human rights that plaintiffs invoke in such litigation.

A. THE IMPACTS OF CLIMATE CHANGE ON HUMAN COMMUNITIES

The impacts of climate change on human communities all across the globe are well-documented. The Intergovernmental Panel on Climate Change (IPCC) Fifth Assessment Report concluded that climate-related extremes, including "heat waves, droughts, floods, cyclones, and wildfires, reveal significant vulnerability and exposure of some ecosystems and many human systems to current climate variability."[25] The above-mentioned climate-related extremes can impact human communities by changing the natural ecosystems, disrupting food production and water supply, damaging infrastructure and settlements, and increasing the levels of morbidity and mortality.[26]

A closer look at different climate change impacts reveals that each of them can be highly multifaceted, depending on the climate-related extremes they stem from. Every climate change impact affects a whole

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[25] IPCC FIFTH ASSESSMENT REPORT, *supra* note 3, at 8.

[26] *Id*. at 14.

spectrum of human interests. Health impacts are probably the most notable example. The three common health impacts—namely death, disease, and mental health disorders—can all be affected by different climate-related extremes.[27] For example, the health impacts relating to "more intense heat waves and fires, increased risks from foodborne and waterborne diseases and loss of work capacity and reduced labour productivity in vulnerable populations" can all contribute to a greater likelihood of death and injury.[28] Similarly, the very same climate-related extremes can cause numerous health disorders by increasing "risks from vector-borne diseases [that] are projected to generally increase with warming, due to the extension of the infection area and season."[29]

The impacts of climate change on food and water resources pose another formidable threat to human communities. Food impacts occur primarily with a decrease in agriculture, livestock, and fishery yields due to prolonged droughts or changes in ocean chemistry.[30] The quality and availability of fresh water can be critically affected by drought and heatwaves.[31] Last but definitely not least, social impacts, most notably economic and security-related, have been identified as having the potential to cause considerable disruption to society.[32] While it is impossible to attribute all these impacts on human communities solely to specific climate-related extremes,[33] the recent developments in attribution science have allowed us to estimate certain types of impacts, namely, excessive deaths during heatwaves, and link them to anthropogenic climate change.[34]

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[27] *See id.* at 53.

[28] *Id*. at 69.

[29] *Id*.

[30] *See id.* at 16, 53.

[31] *See id.* at 69.

[32] *Id.* at 73.

[33] *Id*. at 49.

[34] *See, e.g.*, Daniel Mitchell et al., *Attributing Human Mortality During Extreme Heat Waves to Anthropogenic Climate Change,* ENV'T. RSCH. LETTERS (July 8, 2016), https://iopscience.iop.org/article/10.1088/1748-9326/11/7/074006/pdf [https://perma.cc/3ANT-W4NP]; Daniel Mitchell et al., *Extreme Heat-Related Mortality Avoided under Paris Agreement Goals,* 8 NATURE CLIMATE CHANGE 551, 551–53 (2018); Y. T. Eunice Lo et al., *Increasing Mitigation Ambition to Meet the Paris Agreement's Temperature Goal Avoids Substantial Heat-Related Mortality in U.S. Cities*, 5 SCI. ADVANCES (June 5, 2019), https://advances.sciencemag.org/content/5/6/eaau4373/tab-pdf [https://perma.cc/9A6R-NTRS].

Another sinister aspect of climate change is its disproportionate effect on vulnerable human communities.[35] The IPCC Fifth Assessment Report underscored that "differences in vulnerability and exposure arise from non-climatic factors and from multidimensional inequalities often produced by uneven development processes" that ultimately "shape differential risks from climate change."[36] Many vulnerable communities, including "people who are socially, economically, culturally, politically, institutionally, or otherwise marginalized,"[37] lack the necessary capacity to adapt to the exacerbating impacts of climate change.[38] Finally, climate change mitigation measures themselves can also have an impact on human interests[39]—something that has to be given proper consideration when designing and implementing such measures.[40]

B. WHY HUMAN RIGHTS LAW?

Despite the exponential growth in the number of climate cases around the globe, "traditional" avenues of climate change litigation have one common limitation. These claims typically concern local pollution on a relatively small scale even when measured at the national level, whether they challenge the alleged failure of individual projects or practices to comply with the requirements of air quality, environmental impact assessment, biodiversity, or any other legislation.[41] Undeniably, local action remains of vital importance, as

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[35] *See* Carmen Gonzalez, *Human Rights, Environmental Justice, and the North-South Divide*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 449, 449–72 (Anna Grear & Louis J. Kotze eds., 2015); Louis J. Kotzé & Evadne Grant, *Environmental Rights in the Global South, in* RESEARCH HANDBOOK ON LAW, ENVIRONMENT AND THE GLOBAL SOUTH 86, 86–108 (Philippe Cullet & Sujith Koonan eds., 2019).

[36] IPCC FIFTH ASSESSMENT REPORT, *supra* note 3, at 54.

[37] *Id.*; *see also* Kirsten Davies et al., *The Declaration on Human Rights and Climate Change: A New Legal Tool for Global Policy Change*, 8 J. HUM. RTS. & ENV'T., 217, 222–30 (2017).

[38] IPCC FIFTH ASSESSMENT REPORT, *supra* note 3, at 96.

[39] *See* SUMUDU ATAPATTU & ANDREA SCHAPPER, HUMAN RIGHTS AND THE ENVIRONMENT: KEY ISSUES 266–73 (2019).

[40] *See, e.g.,* Conference of the Parties, Adoption of the Paris Agreement, pmbl., Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev/1 [hereinafter Paris Agreement] ("Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.").

[41] *See, e.g.,* Jacqueline Peel et. al., *Shaping the 'Next Generation' of Climate Change Litigation in Australia,* 41 MELB. U.L. REV. 793, 802–04 (2017). *E.g.*, Massachusetts v. EPA, 549 U.S. 497

no step is too small when it comes to climate change mitigation. Yet, climate change presents a problem that simply cannot be solved solely at the local level. It is therefore up to national governments to ensure that the fundamental goal of substantially reducing GHG emissions is properly set and achieved, as states have the unique ability to control their domestic emissions. As global emissions keep reaching new records, it is increasingly clear that states are not willing to take any decisive measures. The ongoing practice of rolling back climate protection standards in some major emitting countries exacerbates the problem even further.[42]

The question is how to challenge this persistent inaction. The effectiveness of non-legal strategies, such as the recent global phenomenon of large-scale protests by climate activists spearheaded by young people all around the globe, is still unclear in terms of their impact on governmental climate policies.[43] Routine legal tools such as air quality and environmental impact assessment legislation are of limited scope[44] and cannot be used to challenge the overall policy, as already mentioned above. Meanwhile, international policy under the UN climate regime remains "largely out of reach and irrelevant to most human beings seeking climate justice."[45]

(2007) (A groundbreaking case concerning regulation of GHG emissions from motor vehicles, is a notable exception, since at that time, the U.S. automobile sector accounted for about 6 percent of worldwide carbon dioxide emissions. The Court's decision was truly a historic moment: the highest court in the United States, a country traditionally known for its reluctance to adopt any concrete GHG emissions reduction measures, ruled in favor of plaintiffs who alleged that the U.S. Environmental Protection Agency had abdicated its responsibility under federal air quality legislation to regulate automobile GHG emissions. The Court quashed some of the most notorious challenges faced by climate plaintiffs, including scientific uncertainty and the global effects and the drop-in-the-ocean argument. The Court recognized the causal link between GHG emissions and climate change and the impact of climate change on the environment; and stated that the widely shared nature of such an injury does not diminish the interest of the concrete party. Moreover, the Court held that the fact that there are other major GHG emitters like China and India should not preclude the U.S. agency from its regulatory duty, even if the latter by itself is unable to solve the global problem, since "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere," *id.* at 526).

[42] *See, e.g.*, Noah M. Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?,* 46 ECOLOGY L.Q. 865, 867 (2019) (discussing the weakening of climate action in the United States, Brazil and Australia as well as the fact that many parties to the Paris Agreement have failed to achieve even modest voluntary emissions reduction).

[43] *See* Benjamin Richardson, *Climate Strikes to Extinction Rebellion: Environmental Activism Shaping our Future,* 11 J. HUM. RTS. & ENV'T 1 (2020).

[44] *See* Peel et al., *supra* note 41, at 802–03; *see also* Peel & Osofsky, *supra* note 14, at 39–40.

[45] May & Daly, *supra* note 16.

While the application of human rights law to climate change may have its own challenges,[46] human rights law is uniquely situated to deal with climate change for several reasons. First, its supranational scope gives any relevant action truly transnational significance, which reflects the transboundary nature of GHG emissions and climate change impacts.[47] Second, the nature of human rights law, enjoying apex recognition and protection at the international and regional levels, gives climate action the priority it deserves and requires.[48] Third, despite the procedural differences among national courts, regional courts, and regional and international treaty bodies, these institutions are commonly open to individual complaints.[49] All this adds to the general advantage of climate change litigation, which involves judicial or quasi-judicial bodies in the process of dealing with climate change, thus counterbalancing the gaps left by the legislative and executive branches of government,[50] as well as allowing victims to obtain redress.[51]

Most importantly, human rights law has already yielded some vital success,[52] despite its apparently pioneering nature. It is also safe

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[46] *See* ATAPATTU & SCHAPPER, *supra* note 39, at 63–84 (identifying the challenges related to causation, concrete States' obligations especially, with regard to mitigation measures, as potentially problematic aspects of human rights approaches to climate change). Karen Morrow, *The ECHR, Environment-Based Human Rights Claims and the Search for Standards, in* ENVIRONMENTAL RIGHTS: THE DEVELOPMENT OF STANDARDS 42 (Stephen J. Turner et al., eds., 2019).

[47] *See* John H. Knox, *The Global Pact for the Environment: At the Crossroads of Human Rights and the Environment,* 28 REV. EUR. COMPAR. & INT'T ENV'T L. 40, 40–47 (2019).

[48] *See* Anna Grear & Louis J. Kotzé, *An Invitation to Fellow Epistemic Travelers—Towards Future Worlds in Waiting: Human Rights and the Environment in the Twenty-First Century*, *in* RESCH. HANDBOOK ON HUM. RTS. & ENV'T 449, 449–72 (Anna Grear & Louis J. Kotzé eds., 2015); *see also* ATAPATTU & SCHAPPER, *supra* note 39, at 69–71.

[49] *See* Brian J. Preston, *The Contribution of the Courts in Tackling Climate Change,* 28 J. ENV'T L. 11, 12–13 (2016); Dinah Shelton, *Complexities and Uncertainties in Matters of Human Rights and the Environment: Identifying the Judicial Role, in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 97, 99–101, 104 (John H. Knox & Ramin Pejan eds., 2018) [hereinafter Complexities in Human Rights].

[50] *See, e.g.*, JACQUELINE PEEL & HARI M. OSOFSKY, CLIMATE CHANGE LITIGATION: REGULATORY PATHWAYS TO CLEANER ENERGY 38 (2015). Complexities in Human Rights, *supra* note 49, at 104.

[51] ATAPATTU & SCHAPPER, *supra* note 39, at 74.

[52] *See* Jonathan Watts, *Dutch Officials Reveal measures to Cut Emissions After Court Ruling*, (London) GUARDIAN (Apr. 24, 2020, 12:10 PM), https://www.theguardian.com/world/2020/apr/24/dutch-officials-reveal-measures-to-cut-emissions-after-court-ruling?CMP=twt_a-environment_b-gdneco [https://perma.cc/753W-MUJH].

to assume that the viability of climate cases based on human rights law will ultimately determine whether courts and treaty bodies can interpret human rights law in a way that would overcome the "small scale" limitation of traditional climate change litigation and make governments adopt more ambitious and comprehensive measures at the national level.

C. WHICH HUMAN RIGHTS?

Considering the magnitude of the problem, it is unsurprising that both the first and the second UN Special Rapporteurs on human rights and the environment have called for international recognition of the human right to a healthy environment.[53] Recognition of this right would result in a protection mechanism that comprehensively addresses the multiple threats posed by climate change.[54] This right is explicitly recognized and protected by many national constitutions.[55] It is also present in the regional African[56] and Inter-American[57] human rights protection systems,[58] including the 2017 Advisory Opinion of the Inter-American Court of Human Rights (IACtHR) on the environment and human rights

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[53] Report on Human Rights and Environment 2016, *supra* note 23; Report on Human Rights and Environment 2018, *supra* note 23; Report on Safe Climate, *supra* note 23; John H. Knox, *The Global Pact for the Environment: At the Crossroads of Human Rights and the Environment*, 28 REV. EUR. COMPAR. & INT'L ENV'T L. 40, 42–43 (2019); John H. Knox, *Constructing the Human Right to a Healthy Environment,* 16 ANN. REV. L. & SOC. SCI. 79, 79–95 (2020).

[54] DAVID R. BOYD, THE ENVIRONMENTAL RIGHTS REVOLUTION: A GLOBAL STUDY OF CONSTITUTIONS, HUMAN RIGHTS, AND THE ENVIRONMENT 13–14 (2012).

[55] *Id.* at 13, 61 fig.3.2, 63 tbl.3.2.; David R. Boyd, *Constitutions, Human Rights, and the Environment: National Approaches, in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 170, 170–99 (Anna Grear & Louis J. Kotzé eds., 2015). JAMES R. MAY & ERIN DALY, GLOBAL ENVIRONMENTAL CONSTITUTIONALISM (2015); David R. Boyd, *Catalyst for Change: Evaluating Forty Years of Experience in Implementing the Right to a Healthy Environment, in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 17, 17–41 (John H. Knox & Ramin Pejan eds., 2018).

[56] African Charter on Human and Peoples' Rights, art. 24, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5. ("All peoples shall have the right to a general satisfactory environment favorable to their development.").

[57] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, art. 11, Nov. 17, 1988, O.A.S.T.S. No. 69 ("1. Everyone shall have the right to live in a healthy environment and to have access to basic public services; 2. The States Parties shall promote the protection, preservation, and improvement of the environment.").

[58] Kotzé & Grant, *Environmental Rights in the Global South*, *supra* note 35, at 92–95.

(hereinafter 2017 Advisory Opinion).[59] The 2017 Advisory Opinion emphasized the "interdependence and indivisibility of human rights and environmental protection"[60] and made numerous references to climate change.[61] However, the right to a healthy environment has not yet been recognized at the international level.[62]

Climate change litigation based on human rights law typically alleges violation of several rights as the result of inaction or insufficient action on climate change, or alternatively, actions that contribute to climate change.[63] As discussed above, climate change already impacts a whole spectrum of human interests, including the most fundamental interests of life, health, and property.[64] These impacts are only expected to worsen in the future.[65] Hence, invoking the rights to life, health, housing, food, water, and so forth seems well-justified and self-evident. However, the application of these rights in the context of environmental pollution and degradation and climate change (that is, the recognition of them as "environmental human rights"),[66] may not always be explicit. So far, only three categories of rights have been

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[59] 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) in Relation to Articles 1(1) and 2 of the American Convention on Human Rights), Advisory Opinion OC-23/18, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017) [hereinafter 2017 Advisory Opinion].

[60] *Id.* ¶ 55. *See id.* ¶¶ 47, 54–57 (noting that the full enjoyment of all human rights depends on a favorable environment).

[61] *Id.* ¶ 47; *see* Christopher Campbell-Duruflé & Sumudu Atapattu, *The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law,* 8 CLIMATE L. 321 (2018) (discussing the 2017 Advisory Opinion in detail); and Monica Feria-Tinta & Simon C. Milnes, *The Rise of Environmental Law in International Dispute Resolution: The Inter-American Court of Human Rights Issues a Landmark Advisory Opinion on the Environment and Human Rights*, 27 Y.B. INT'L & ENV'T L. 64, 64–81 (2016);). In an earlier case, Kawas-Fernández v. Honduras, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 196, (Apr. 3, 2009), the Court made a similar observation by referring to both its and the ECtHR case law, confirming the existence of "an undeniable link between the protection of the environment and the enjoyment of other human rights," as well as the recognition of the "ways in which the environmental degradation and the adverse effects of the climate change have impaired the effective enjoyment of human rights in the continent," in the constitutions of many States in Latin America and at the UN level. *Id.* ¶ 148.

[62] *See* Sumudu Atapattu, *Environmental Rights and International Human Rights Covenants: What Standards Are Relevant?, in* THE DEVELOPMENT OF STANDARDS 21–22 (Stephen J. Turner et al., eds., 2019) (discussing the protection offered by treaty bodies).

[63] *See* Part III *infra*.

[64] *See* discussion *infra* Part I.C.

[65] IPCC FIFTH ASSESSMENT REPORT, *supra* note 3.

[66] *See* Knox, *Constructing the Human Right to a Healthy Environment*, *supra* note 53, at 81.

invoked systematically, most notably the rights to life and respect for private life (privacy), but also the right to health. Fortunately, as discussed below, regional human rights courts and treaty bodies are becoming increasingly protective of these rights against environmental threats.[67]

i. Right to Life

The right to life is the most common right invoked by plaintiffs in climate change litigation based on human rights law. Eight of the nine cases discussed in this article feature the right to life.[68] This should hardly be surprising: the right to life is universally protected by human rights law at both international and regional levels, and its application in the context of environmental degradation is undergoing constant development.[69]

At the international level, the right to life, enshrined in Article 6 of the International Covenant on Civil and Political Rights (ICCPR),[70] is commonly invoked in cases concerning environmental degradation and related threats brought before the UN Human Rights Committee,[71] even though the ICCPR contains no references to the environment.[72] While such cases have traditionally been unsuccessful,[73] recent developments clearly suggest that environmental degradation will be considered with greater attention in future cases brought under Article 6. Hence, during its 124th session in 2018, the UN Human Rights Committee adopted General Comment No. 36 on Article 6, which explicitly recognized environmental

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[67] *See* Evadne Grant, *International Courts, and Environmental Human Rights: Re-imagining Adjudicative Paradigms, in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND THE ENVIRONMENT 379 (Anna Grear & Louis J. Kotzé eds., 2015).

[68] *See* discussion *infra* Part II. The only exception was the early case in Greece, where climate change was not a central issue. *See* case cited *infra* note 218.

[69] G.A. Res. 14668 (I), International Covenant on Civil and Political Rights, at art. 6, 174, (Dec. 19, 1966) [hereinafter Covenant on Civil and Political Rights]; International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 [hereinafter ICCPR].

[70] Covenant on Civil and Political Rights, *supra* note 69; ICCPR, *supra* note 69.

[71] Atapattu, *supra* note 62, at 22–23.

[72] ICCPR, *supra* note 69. Article 6(1) specifically states "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." Atapattu, *supra* note 62, at 22–23.

[73] *Id.* at 23.

degradation and climate change as factors "that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity,"[74] triggering positive obligations of the states:

> Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The obligations of States parties under international environmental law should thus inform the content of article 6 of the Covenant, and the obligation of States parties to respect and ensure the right to life should also inform their relevant obligations under international environmental law. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, provide notification to other States concerned about natural disasters and emergencies and cooperate with them, provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach.[75]

Subsequently, the Committee adopted two highly important decisions, interpreting the scope of Article 6 of the ICCPR in the context of local environmental pollution and climate change respectively, and confirming the applicability of the right to life. The first of these two cases concerned environmental pollution with toxic agrochemicals that resulted in death and health disorders in a small farming community in Paraguay.[76] The case was initially addressed by national courts, which ruled that the government violated the plaintiffs' human rights by not properly regulating environmental pollution, thus

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[74] Human Rights Committee [H.R.C.] Gen. Comment No. 36, art. 6, Right to Life, U.N. Doc. CCPR/C/GC/36, at ¶ 26 (Sept. 3, 2019). *Id.* ¶ 62 (describing environmental degradation and climate change as "serious threats . . . to enjoy the right to life").

[75] H.R.C. GC/36 Right to Life, *supra* note 74 ¶ 62. *See* Human Rights Committee, Toussaint v. Canada, Views Adopted by the Committee Under art. 5(4) of the Optional Protocol, Concerning Communication No. 2348/2014 (CCPR/C/123/D/2348/2014), ¶ 11.3 (Aug. 7, 2018).

[76] Human Rights Committee, Cáceres v. Paraguay, Views Adopted by the Committee Under art. 5 (4) of the Optional Protocol, Concerning Communication No. 2751/2016 (Sept. 20, 2019), available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F126%2FD%2F2751%2F2016&Lang=en [https://perma.cc/ZDH6-GNR4].

allowing various harms to the plaintiffs.[77] Unfortunately, the authorities did not take any steps to enforce this decision.[78] The plaintiffs subsequently petitioned the UN Human Rights Committee.[79] The Committee found that the government violated Article 6 and made the following observations regarding the right to life:

> [T]he Committee is of the view that heavily spraying the area in question with toxic agrochemicals – an action which has been amply documented – poses a reasonably foreseeable threat to the authors' lives given that such large-scale fumigation has contaminated the rivers in which the authors fish, the well water they drink and the fruit trees, crops and farm animals that are their source of food. The authors were hospitalized due to poisoning, and the State party has not adduced evidence of any kind to demonstrate that the results of the blood and urine tests were within the normal range, nor has an alternative explanation been given for the events in question. Furthermore, Mr. Portillo Cáceres died with no explanation from the State party, as an autopsy was never conducted. The Committee also observes that, for at least the five years preceding the events in this case, a number of government authorities had been alerted to the fumigations and to their impact on the inhabitants of Colonia Yerutí (para. 2.6). Despite these reports and complaints, the State party took no action. In addition, by imposing administrative sanctions on two of the producers (para. 4.5), the State party acknowledged that these activities posed a danger, a fact that is not affected by the stay in proceedings ordered in one of these cases on the grounds of formal errors in the action taken by the environmental authorities (para. 5.8). Furthermore, the Ministry of the Environment further acknowledged its responsibility for the lack of oversight. Finally, in granting the application for a writ of *amparo*, the District Court clearly stated that "the State failed to honour its obligation or discharge its duty to protect". Despite the foregoing, the fumigation continued. Consequently, in view of the acute poisoning suffered by the authors, as acknowledged in the *amparo* decision of 2011 (paras. 2.20 and 2.21), and of the death of Mr. Portillo Cáceres, which has never been explained by the State party, the Committee concludes that the information before it discloses a violation of article 6 of the Covenant in the cases of Mr. Portillo Cáceres and the authors of the present communication.[80]

The second case explicitly concerned climate change—namely, climate change-induced displacement of a person from the

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[77] *Id.* ¶¶ 2.20–2.22.
[78] *Id.* ¶ 2.23.
[79] *See id.*
[80] *Id.* ¶ 7.5.

Republic of Kiribati, who was subsequently denied refugee asylum in New Zealand.[81]

For their part, regional courts have also been developing jurisprudence addressing the right to life in the context of environmental degradation. For example, the European Court of Human Rights (ECtHR) has found violations of the right to life under Article 2 of the European Convention on Human Rights (ECHR)[82] in several cases. In each of these cases, authorities knew about the existing environmental threats that could lead to deaths but did not take adequate measures to prevent them.[83] The ECtHR emphasized that states have positive obligations to take all appropriate steps to safeguard the right to life under Article 2,[84] including instances where this right is threatened by hazardous industrial activities[85] or a natural disaster:

> [I]n connection with natural hazards, . . . the scope of the positive obligations imputable to the State in the particular circumstances would depend on the origin of the threat and the extent to which one or the other risk is susceptible to mitigation, and clearly affirmed that those obligations applied in so far as the circumstances of a particular case pointed to the imminence of a natural hazard that had been clearly identifiable, and especially where it concerned a recurring calamity affecting a distinct area developed for human habitation or use . . .

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[81] *See* UNHRC, Communication No. 2728/2016, Teitiota v. New Zealand, ¶ 9.11, U.N. Doc. .CCPR/C/127/D/2728/2016, available at https://www.refworld.org/cases,HRC,5e26f7134.html [https://perma.cc/UVX4-3D34] (The Committee held that lack of climate change adaptation measures may violate the ICCPR's Article 6 right to life). *See* discussion *infra* Part II.B.iv.

[82] European Council, Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, ETS 5 ("Everyone's right to life shall be protected by law.").

[83] *See* Öneryildiz v. Turkey, App. No. 48939/99, 2004-XII Eur. Ct. H.R. 79, ¶¶ 13–14, 71, 89–90, 118 (methane explosion at a municipal rubbish tip that resulted in deaths of local residents); *see also* Budayeva v. Russia, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02, 15343/02, 2008-II Eur. Ct. H.R. 267, ¶ 3, 128–130, 133, 154, 159 (mudslides that flooded residential areas, causing deaths of local residents); Kolyadenko v. Russia, App. Nos. 17423/05, 20534/05, 20678/05, 23263/05, 24283/05, 35673/05, ¶ 157, 180–87 (Feb. 28, 2012), http://hudoc.echr.coe.int/fre?i=001-109283 [https://perma.cc/SY7P-Y3SR] (flash flood caused by the authorities' opening of improperly operated water reservoir near residential areas during a heavy rainfall); Özel v. Turkey, App. Nos. 14350/05, 15245/05, 16051/05, ¶ 170–71, 200 (Nov. 17, 2015), http://hudoc.echr.coe.int/fre?i=001-158803 [https://perma.cc/5XYY-VEUE] (destruction of residential buildings during an earthquake that resulted in deaths of plaintiffs' relatives); Brincat v. Malta, App. Nos. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, ¶ 3, 79–80, 117 (July 24, 2014), http://hudoc.echr.coe.int/fre?i=001-145790 [https://perma.cc/AZ8D-M5RM#{%22itemid%22:[%22001-145790%22]}] (asbestos exposure and the resulting death).

[84] *See Öneryıldız*, App. No. 48939/99, ¶ 71; *see also Budayeva*, App. No. 15339/02, ¶ 128; *Kolyadenko*, App No. 17423/05, ¶¶ 157–58; *Brincat*, App. No. 60908/11, ¶ 79.

[85] *Brincat*, App. No. 60908/11, ¶ 80.

> Therefore, the applicability of Article 2 of the Convention and the State's responsibility have been recognised in cases of natural disasters causing major loss of life.[86]

The imminence of the threat, therefore, is not necessarily confined to a short period of time, as long as the authorities are aware that this risk will eventually materialize.[87] Furthermore, the ECtHR also stressed that the right to life under Article 2 is applicable "both where an individual has died . . . and where there was a serious risk of an ensuing death, even if the applicant was alive at the time of the application," including "a natural catastrophe which left no doubt as to the existence of a threat to the applicants' physical integrity."[88] Such an interpretation also justifies applying Article 2 to situations where there is a grave risk to human health and, accordingly, states have a positive obligation to prevent harm:

> The Court has stressed many times that, although the right to health – recognised in numerous international instruments – is not as such

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[86] *Özel*, App. No. 14350/05, ¶ 171; *see also Budayeva*, App. No. 15339/02, ¶ 137.

[87] *See Kolyadenko*, App. No. 17423/05, ¶¶ 165–66 (observing that

> in so far as the Government may be understood as having asserted that they could not have foreseen that it would be necessary to evacuate such a large quantity of water from the Pionerskoye reservoir on 7 August 2001, because such heavy rainfall as on that day had never occurred in that region before, the Court finds this argument unconvincing. Indeed, it is clear from the adduced materials that in the years preceding the flood, the authorities knew that it might be necessary urgently to release water from the reservoir . . . . Against this background, even if it is prepared to accept that the rain on 7 August 2001 was of an exceptional intensity, the Court is not persuaded that the authorities could claim to have been taken unaware by the rain in so far as the operation of the Pionerskoye reservoir was concerned. It considers that, irrespective of the weather conditions, they should have foreseen the likelihood as well as the potential consequences of releases of water from the reservoir. Overall, the Court finds that the authorities had positive obligations under Article 2 of the Convention to assess all the potential risks inherent in the operation of the reservoir, and to take practical measures to ensure the effective protection of those whose lives might be endangered by those risks.").

Similarly, in Brincat, concerning asbestos-related deaths, the Court examined the evidence concerning the Maltese government's knowledge of the dangers of asbestos in the early 1970s and concluded that "enacting specific legislation fifteen years after the time in the mid-1980s when the Government accept that they were aware of the risks can hardly be seen as an adequate response in terms of fulfilling a State's positive obligations." *See also* Brincat, App No. 60908/11, ¶¶ 105-06, 110.

[88] *See Brincat*, App. No. 60908/11, ¶ 82; *see also Budayeva*, App. No. 15339/02, ¶ 146; *Kolyadenko*, App. No. 17423/05, ¶ 155 ("[I]n the Court's opinion, these circumstances leave no doubt as to the existence of an imminent risk to the lives of the . . . applicants, which brings their complaint on that account within the scope of Article 2 of the Convention. The fact that they survived and sustained no injuries has no bearing on this conclusion.").

> among the rights guaranteed under the Convention and its Protocols . . . the [positive obligation to take appropriate steps to safeguard the lives of those within its jurisdiction] must be construed as applying in the context of any activity, whether public or not, in which the right to life may be at stake.[89]

The positive obligations of states to protect the right to life in situations where it is threatened by environmental degradation are also explicitly mentioned in other regional systems. For instance, when interpreting the right to life under Article 4 of the African Charter on Human and Peoples' Rights (ACHPR),[90] the African Commission on Human and Peoples' Rights (ACommHPR) stressed environmental concerns and disasters as factors that states should adequately consider in order to protect the right to life:

> [T]he Charter envisages the protection not only of life in a narrow sense, but of dignified life. This requires a broad interpretation of States' responsibilities to protect life. Such actions extend to preventive steps to preserve and protect the natural environment and humanitarian responses to natural disasters, famines, outbreaks of infectious diseases, or other emergencies. The State also has a responsibility to address more chronic yet pervasive threats to life, for example with respect to preventable maternal mortality, by establishing functioning health systems. Such an approach reflects the Charter's ambition to ensure a better life for all the people and peoples of Africa through its recognition of a wide range of rights, including the right to dignity, economic, social and cultural rights, and peoples' rights such as the right to existence and the right to peace. It is also rooted in widely shared communal values of the continent, according to which the value of one person's life is tied to the value of the lives of others.[91]

The concept of the right to life with dignity is also present in the Inter-American system and is especially relevant in the context of environmental degradation and climate change, particularly following the

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[89] Fernandes v. Portugal, App. No. 56080/13, ¶¶ 164–65 (Dec. 19, 2017), http://hudoc.echr.coe.int/fre?i=001-179556 (citing Vasileva v. Bulgaria, App. No. 23796/10, ¶ 63 (Mar. 17, 2016) and Câmpeanu v. Romania, App. No. 47848/08, ¶ 130 (July 17, 2014)).

[90] African Charter on Human and Peoples' Rights, *supra* note 56, at art. 4 ("Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.").

[91] African Charter on Human and Peoples' Rights, *General Comment 3: Article 4* (*The Right to Life*), ¶ 3, 57th Sess., adopted Nov. 2015, available at https://www.achpr.org/legalinstruments/detail?id=10 [https://perma.cc/6J5G-F76G].

2017 Advisory Opinion.[92] In this opinion, the IACtHR acknowledged that environmental degradation endangers a whole spectrum of human rights, explicitly referring to the Court's prior opinions as well as that of other international and regional courts and treaty bodies.[93] However, the fundamental issue it had to answer was the applicability of the American Convention on Human Rights' (ACHR) [94] Article 4(1) right to life[95] and Article 5(1) right to humane treatment[96] in the context of transnational environmental damage and state parties' related obligations.[97] The IACtHR discussed various obligations of states to protect the above-mentioned rights, including the duty to regulate and monitor dangerous polluting practices and establish adequate environmental impact assessment requirements,[98] and concluded that states have the obligation to prevent significant environmental damage within or outside their territory and that states also have other related duties.[99]

ii. Right to Respect for Private Life (Privacy)

The right to respect for private life, or the right to privacy, is present in all climate cases based on human rights law brought before European national courts, where plaintiffs invoke Article 8 of the ECHR.[100] While Article 8 makes no reference to environmental issues, it is very versatile (though not limitless, as shown below) and in the absence of a self-standing right to a healthy environment in the ECHR,[101] it is most frequently invoked in the ECtHR environmental

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[92] KOTZÉ & GRANT, *supra* note 35, at 80–82.

[93] *See* 2017 Advisory Opinion, *supra* note 59.

[94] *See* Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

[95] *Id.* art. 4 § 1 ("Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception.").

[96] *Id.* art. 5 § 1 ("Every person has the right to have his physical, mental, and moral integrity respected.").

[97] *See* 2017 Advisory Opinion, *supra* note 59.

[98] American Convention on Human Rights, *supra* note 94, at ¶¶ 127–74.

[99] *Id.* ¶ 242.

[100] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 82, art. 8 § 1 ("Everyone has the right to respect for his private and family life, his home and his correspondence.")

[101] *See* Hatton v. United Kingdom App. No. 36022/97, 2003-VIII Eur. Ct. H.R. 189. In one of the most prominent environmental cases arising under Article 8, the ECtHR emphasized that while "[t]here is no explicit right in the Convention to a clean and quiet environment [. . .], where an individual is directly and seriously affected by noise or other pollution, an issue may arise under

degradation cases.[102] The ECtHR has reiterated on various occasions that Article 8 is not triggered by environmental degradation alone, but by the effect of environmental degradation on a plaintiff,[103] and that such effect must be of a certain severity and be direct and immediate.[104] Nevertheless,

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Article 8." *Id*. ¶ 96. The ECtHR also reiterated its position in earlier cases, that "Article 8 could include a right to protection from severe environmental pollution, since such a problem might 'affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health.'" *Id.* (referring to López Ostra v. Spain, App. No. 16798/90, ¶ 51(Dec. 9, 1994), http://hudoc.echr.coe.int/fre?i=001-57905 [https://perma.cc/74QN-KUNG]).

[102] *See* Morrow, *supra* note 46, at 43.

[103] *See* Fadeyeva v. Russia, App. No. 55723/00, 2005-IV Eur. Ct. H.R 255, ¶ 68; *see also* Kyrtatos v. Greece, App. No. 41666/98, 2003-VI Eur. Ct. H.R. 257, ¶ 52. In *Kyrtatos,* the ECtHR made the following observation:

> [T]he crucial element which must be present in determining whether, in the circumstances of a case, environmental pollution has adversely affected one of the rights safeguarded by paragraph 1 of Article 8 is the existence of a harmful effect on a person's private or family sphere and not simply the general deterioration of the environment. Neither Article 8 nor any of the other Articles of the Convention are specifically designed to provide general protection of the environment as such; to that effect, other international instruments and domestic legislation are more pertinent in dealing with this particular aspect.

[104] *See Fadayeva*, App. No. 55723/00, ¶ 69 (citations omitted) ("[T]he adverse effects of environmental pollution must attain a certain minimum level if they are to fall within the scope of Article 8. The assessment of that minimum is relative and depends on all the circumstances of the case, such as the intensity and duration of the nuisance, and its physical or mental effects. The general context of the environment should also be taken into account."); *see also* Atanasov v. Bulgaria, App. No. 12853/03, ¶ 66 (Dec. 2, 2010), http://hudoc.echr.coe.int/fre?i=001-101958 [https://perma.cc/M6BB-28GU] ("The State's obligations under Article 8 come into play in that context only if there is a direct and immediate link between the impugned situation and the applicant's home or private or family life . . . [t]herefore, the first point for decision is whether the environmental pollution of which the applicant complains can be regarded as affecting adversely, to a sufficient extent, the enjoyment of the amenities of his home and the quality of his private and family life"); Udovičić v. Croatia, App. No. 27310/09, ¶ 139 (Apr. 24, 2014), http://hudoc.echr.coe.int/fre?i=001-142520 (holding that environmental risks might not necessarily materialize to trigger the application of Article 8, just like in the case of the right to life under Article 2); Di Sarno v. Italy, App. No. 30765/08, ¶ 108, ¶ 110 (Jan. 10, 2012), http://hudoc.echr.coe.int/fre?i=001-108480 [https://perma.cc/8C88-3UWH] ("Article 8 may be relied on even in the absence of any evidence of a serious danger to people's health." Since the ECtHR recognized that this particular case concerned dangerous activities, it held that "the State was under a positive obligation to take reasonable and adequate steps to protect the right of the people concerned to respect for their homes and their private life and, more generally, to live in a safe and healthy environment") (referring to Tătar v. Romania, App. No. 67021/01, (Jan. 27, 2009), http://hudoc.echr.coe.int/fre?i=001-83052 [https://perma.cc/MNC5-3CR6])); *see also* Jugheli v. Georgia, App. No. 38342/05, ¶ 63 (July 13, 2017), http://hudoc.echr.coe.int/fre?i=001-175153 [https://perma.cc/LX39-NYDD]. In *Jugheli*, the ECtHR described the assessment of the effects of environmental pollution on human rights: "It is often impossible to quantify the effects of serious industrial pollution in each individual case and to distinguish them from the influence of other relevant factors such as age, profession, or personal lifestyle. The same concerns possible

the ECtHR has also concluded on certain occasions that national authorities have violated Article 8 by failing to address environmental degradation or stop environmental pollution.[105] Notably, the ECtHR has also held that Article 8 may apply in environmental cases, both when the pollution is directly caused by the state and when the state fails to properly regulate the activities of the private sector.[106]

Similar to the right to life, the right to respect for private life is universally recognized. In the *Portillo Cáceres* case, the UN Human Rights Committee found that the defendants violated the plaintiffs' right to privacy under Article 17 of the ICCPR.[107] The Committee found that the plaintiffs "depend on their crops, fruit trees, livestock, fishing and water resources for their livelihoods" and that these elements "constitute components of the way of life of the authors, who have a special attachment to and dependency on the land."[108] Therefore, "these elements

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worsening of the quality of life caused by the industrial pollution. 'Quality of life' is a subjective characteristic which hardly lends itself to a precise definition . . . it follows that, taking into consideration the evidentiary difficulties involved, the Court will regard primarily, although not exclusively, to the findings of the domestic courts and other competent authorities in establishing the factual circumstances of the case. As a basis for the analysis it may use, among other things, individual decisions taken by the authorities, especially if they are obviously inconsistent or contradict each other. In such situations, it has to assess the evidence in its entirety."; Giacomelli v. Italy, App. No. 59909/00, 2006-XII Eur. Ct. H.R. 345, ¶ 83. In *Giacomelli*, the ECtHR explained how governments should take such an assessment into account when dealing with matters that concern the environment: "A governmental decision-making process concerning complex issues of environmental and economic policy must in the first place involve appropriate investigations and studies so that the effects of activities that might damage the environment and infringe individuals' rights may be predicted and evaluated in advance and a fair balance may accordingly be struck between the various conflicting interests at stake."

[105] *See* López Ostra v. Spain, App. No. 16798/90, ¶ 51, 58 (Dec. 9, 1994), http://hudoc.echr.coe.int/fre?i=001-57905 [https://perma.cc/UDG5-UBX9]; Guerra v. Italy App. No. 14967/89, ¶ 60 (Feb. 19, 1998), http://hudoc.echr.coe.int/fre?i=001-58135; [https://perma.cc/L8HL-SVFU]; *Fadayeva,* App No. 55723/00, ¶¶ 132–34; Ledyayeva v. Russia, App. Nos. 53157/99, 53247/99, 53695/00, 56850/00, ¶ 110 (Oct. 26, 2006), http://hudoc.echr.coe.int/fre?i=001-77688 [https://perma.cc/46N9-V2VN]; Dubetska v. Ukraine, App. Np. 30499/03, ¶¶ 151–56 (Feb. 10, 2011), http://hudoc.echr.coe.int/fre?i=001-103273 [https://perma.cc/D65D-M96H]; *Di Sarno*, App. No. 30765/08, ¶ 112; *Jugheli*, App. No. 38342/05, ¶¶ 76–78; Cordella v. Italy, App. No. 54414/13, 54264/15, ¶¶ 172–74 (Jan. 24, 2019), http://hudoc.echr.coe.int/fre?i=001-189421 [https://perma.cc/9NUJ-LT6Y].

[106] John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 171–72 (2009).

[107] *See Portillo Cáceres,* No. 2751/2016, ¶ 7.8; *see also* ICCPR*, supra* note 69, art. 17 § 1 ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."); *id.* § 2 ("Everyone has the right to the protection of the law against such interference or attacks.").

[108] *Id.*

can be considered to fall under the scope of protection of article 17."[109] Furthermore, the Committee emphasized that

> [A]rticle 17 should not be understood as being limited to the refraining from arbitrary interference, but rather as also covering the obligation of States parties to adopt positive measures that are needed to ensure the effective exercise of this right, in the light of interference by the State authorities and physical or legal persons. In the present case, the Committee observes that the State party did not place appropriate controls upon illegal activities that were creating pollution. The State party's failure to discharge its duty to protect, as acknowledged in the *amparo* decision (paras. 2.20 and 2.21), made it possible for large-scale fumigations to continue, in contravention of internal regulations, including the use of prohibited agrochemicals, which caused not only the pollution of well water in the authors' homes, as recognized by the Public Prosecution Service, but also the death of fish and livestock and the loss of crops and fruit trees on the land on which the authors live and grow crops, elements that constitute components of the authors' private life, family and home. The Committee observes that the State party has not provided any alternative explanation in that regard. When pollution has direct repercussions on the right to one's private and family life and home, and the adverse consequences of that pollution are serious because of its intensity or duration and the physical or mental harm that it does, then the degradation of the environment may adversely affect the well-being of individuals and constitute violations of private and family life and the home.[110]

iii. Right to Health

The third most frequently invoked right in climate cases based on human rights is the right to health. Once again, this is well-justified: the right to health enjoys global recognition and protection.[111] Even

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[109] *Id.*

[110] *Id.* In addition to Articles 6 and 17, the UN Human Rights Committee found violation of the right to an effective remedy under Article 2(3) of the ICCPR, "because an effective, appropriate, impartial and diligent investigation into the environmental pollution that poisoned the authors and led to the death of Mr. Portillo Cáceres was not carried out." This included: the failure to include the clinical histories of the authors and the results of their blood and urine tests into the case file; the fact that the suspects were not found guilty and the pollution continues, while those who committed the violations have not been subject to any criminal investigation; the lack of enforcement and rectification of the ongoing harm as well as the lack of any substantive progress in the investigation that would have led to the redress of the harm suffered by the authors. *Id.* ¶ 7.9.

[111] *See* Paul Hunt, *Interpreting the International Right to Health in a Human Rights-Based Approach to Health*, 18 HEALTH & HUMAN RIGHTS J. 109, 111–14 (2016); *see also* Alicia Ely Yamin, *The*

the notable absence of any explicit reference to it in the ECHR has not precluded the ECtHR from interpreting other provisions of the Convention, namely Articles 2 and 8, as protecting human health.[112] This position of the ECtHR reflects a certain blurring between the rights to life and health in human rights law. This is quite natural, given the interdependence and indivisibility of these rights, including in the context of environmental degradation, as emphasized by other regional courts and treaty bodies.[113]

At the international level, the right to health has also been interpreted in the context of environmental degradation. As early as 2000, in its comment on Article 12 of the International Covenant on Economic, Social and Cultural Rights,[114] the UN Committee on Economic, Social and Cultural Rights stressed that states should "refrain from unlawfully polluting air, water and soil, e.g., through industrial waste from State-owned facilities, from using or testing nuclear, biological or chemical weapons if such testing results in the release of substances harmful to human health."[115] The Committee further explained this by indicating that

> [s]tates are also required to adopt measures against environmental and occupational health hazards and against any other threats demonstrated by epidemiological data[;] for this purpose they should formulate and implement national policies aimed at reducing and eliminating pollution of air, water and soil, including pollution by heavy metals such as lead from gasoline.[116]

Right to Health, *in* RESEARCH HANDBOOK ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS AS HUMAN RIGHTS 159, 159–79 (Jackie Dugard et al. eds., 2020).

[112] *See infra* Parts I.C.i, I.C.ii.

[113] *See* 2017 Advisory Opinion, *supra* note 59; *see also* SERAC v. Nigeria (Ogoni case), Communication 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R], ¶¶ 51–52 (Oct. 27, 2001), https://www.achpr.org/public/Document/file/English/achpr30_155_96_eng.pdf [https://perma.cc/Z3PK-MNNX] (concerning environmental pollution caused by oil production operations by state-owned Nigerian National Petroleum Company, and the resulting negative health impacts on the local indigenous Ogoni people). For a discussion on *Ogoni* case, see Lilian Chenwi, *The Right to a Satisfactory, Healthy, and Sustainable Environment in the African Regional Human Rights System*, *in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 59, 59–85 (John H. Knox & Ramin Pejan eds., 2018).

[114] *See* International Covenant on Economic, Social, and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3.

[115] UNCESCR, *General Comment No. 14: Article 12 (The right to the highest attainable standard of health)*, ¶ 34, UN Doc. E/C.12/2000/4, adopted August 11, 2000.

[116] *Id.* ¶ 36.

The failure to enact or enforce laws to prevent such pollution by extractive and manufacturing industries, therefore, constitutes a violation of states' obligations to protect the right to health.[117]

II. CASE STUDIES

As Part I suggests, despite the absence of any reference to climate change, the mechanisms offered by human rights law can be used, at least to a certain extent, to address the human rights threats and violations that result from inadequate climate change mitigation and adaptation measures. Part II will now analyze those climate cases where plaintiffs have relied on human rights law to find out whether the mechanisms discussed in Part I can be instrumental.

In the first decade of the twenty-first century, climate change litigation was still very much in its infancy, with about a dozen cases, almost exclusively in the US, explicitly referring to climate change.[118] Given this fact, it is quite remarkable that the first climate cases based on human rights law date back to exactly this period, including the first attempts to bring such cases before treaty bodies.[119] Of course, upon closer examination, the framing of some of these early cases as "climate change litigation" is somewhat debatable. For example, the case brought before a national court in Nigeria[120] and the petition against Greece to the European Committee of Social Rights[121] challenged local effects of air pollution caused by the exploration of fossil fuels, while climate change was referred to as a mere by-product of such pollution.[122] Nevertheless, the very fact that these were the first attempts for the courts or treaty bodies to recognize that climate change, or activities explicitly recognized as contributing to climate change, violate human rights law was significant in itself and laid the foundation for subsequent actions.

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[117] *Id.* ¶ 51.

[118] The oldest cases date back to early 1990s. *See, e.g.*, City of Los Angeles v. Nat'l Highway Traffic Safety Admin., 912 F.2d 478 (D.C. Cir. 1990).

[119] The European Committee of Social Rights and the Inter-American Commission on Human Rights made these first attempts. *See* discussion *infra* Parts II.B.i, II.B.ii.

[120] *See infra* Part II.A.i.

[121] *See infra* Part II.B.i.

[122] *See infra* pp. 23, 33 and notes 123, 210.

This Part will discuss the respective courts' and treaty bodies' treatment of these rights-based claims, including the five cases addressed by national courts[123] and the four cases addressed by international and regional courts and treaty bodies.[124]

A. LITIGATION BEFORE NATIONAL COURTS

At the national level, the European courts have so far been the main forum for climate change litigation based on human rights law. In all such cases, plaintiffs have alleged violations of Articles 2 and 8 of the ECHR. However, even despite being limited to Europe and to the ECHR as the relevant human rights law mechanism, the decisions reached by courts in such cases demonstrate a considerable difference in the respective courts' assessment of the applicability of human rights law in the context of climate change.

i. Gbemre v. Shell Nigeria

The first, and for many years the only case that raised the issue of climate change in a national court in Africa, *Gbemre v. Shell Nigeria*,[125] has been thoroughly analyzed in legal scholarship.[126] In *Gbemre*, the plaintiff alleged that the oil production activities (namely, gas flaring[127]) of the defendants, Shell Petroleum Development Company of Nigeria Ltd.

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[123] These include cases in Nigeria, the Netherlands, Switzerland, Ireland, and Norway. *See infra* Part II.A.

[124] *See infra* Part II.B for a discussion of how the European Committee of Social Rights, the Inter-American Commission on Human Rights, the General Court of the EU, and the UN Human Rights Committee have treated rights-based environmental claims.

[125] Gbemre v. Shell Petroleum Dev. Corp. of Nigeria [2005] FHCLR 1.

[126] *See, e.g.*, James R. May & Tiwajopelo Dayo, *Dignity and Environmental Justice in Nigeria: The Case of* Gbemre v. Shell, 25 WIDENER L. REV. 269 *passim* (2019); Bukola Faturoti et al., *Environmental Protection in the Nigerian Oil and Gas Industry and* Jonah Gbemre v. Shell PDC Nigeria Limited*: Let the Plunder Continue?,* 27 AFR. J. INT'L & COMPAR. L. 225 *passim* (2019); Eferiekose Ukala, *Gas Flaring in Nigeria's Niger Delta: Failed Promises and Reviving Community Voices*, 2 WASH. & LEE J. ENERGY, CLIMATE, & ENV'T 97 *passim* (2010); Hari M. Osofsky, *Climate Change and Environmental Justice: Reflections on Litigation over Oil Extraction and Rights Violations in Nigeria*, 1 J. HUM. RTS. & ENV'T 189 *passim* (2010).

[127] *See generally* Ochuko Anomohanran, *Determination of Greenhouse Gas Emission Resulting from Gas Flaring Activities in Nigeria*, 45 ENERGY POL'Y 666 *passim* (2012) (discussing the practice of gas flaring in Nigeria and its impacts on the environment and human health, as well as its contribution to climate change).

and the Nigerian National Petroleum Corporation,[128] adversely affected his life and health as well as the local environment, thus violating his rights to life and dignity enshrined in the ACHPR.[129] Importantly, the claim did not revolve around climate change; rather, it only referred to carbon dioxide and methane emissions as contributing to "adverse climate change."[130]

The Federal High Court of Nigeria agreed with the plaintiff[131] and declared that the defendants' practice of gas flaring as well as the failure to carry out an environmental impact assessment of this practice on the affected communities violated the abovementioned rights,[132] while national legislation allowing such practice was inconsistent with the provisions of human rights law protecting these rights.[133] Remarkably, in holding for the plaintiff, the court not only departed from earlier Nigerian case law, which took a hard line on causation in such cases;[134] it also agreed that business activities of corporate entities, in this case, a Nigerian subsidiary of the multinational corporation Royal Dutch Shell PLC and a national corporation, can violate both national and regional human rights law.[135]

Unfortunately, though, the decision in *Gbemre* was not without flaws[136] and the plaintiffs' success in the court was overshadowed by the lack of enforcement.[137] Also, given the fact that the case predominantly concerned local pollution, it is questionable how the court would have decided it if the plaintiff had raised a purely climate change mitigation

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[128] The Attorney-General of the Federation was the third defendant in this case. *Gbemre*, [2005] FHCLR, at 1.

[129] *Id.* at 2.

[130] *Id.* at 5.

[131] *Id.* at 29–30.

[132] *Id*.

[133] *Id.* at 30. The third defendant–the Attorney-General–was accordingly ordered to initiate the necessary process of amending the legislation in question. *Id.* at 31.

[134] Kaniye Ebeku, *Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria:* Gbemre v. Shell *Revisited*, 16 REV. EUR. CMTY. & INT'L ENV'T L. 312, 318 (2007).

[135] *Gbemre,* [2005] FHCLR, at 30–31. *See generally* Samvel Varvastian & Felicity Kalunga, *Transnational Corporate Liability for Environmental Damage and Climate Change: Reassessing Access to Justice after* Vedanta v. Lungowe, 9 TRANSNAT'L ENV'T L. 323–45 (2020) (discussing transnational liability of corporations for environmental harms and the resulting human rights violations).

[136] By way of example, some flaws included the Court's limited engagement with the evidence, failure to invite additional experts, and so forth. Ebeku, *supra* note 134, at 319.

[137] The decision was not enforced and did not halt the practice of gas flaring in Nigeria. *See* May & Dayo, *supra* note 126, at 270.

claim, as happened in other cases discussed below. Nevertheless, even despite its flaws and failure of enforcement, the decision in *Gbemre* marked the first time when a court determined that an activity explicitly recognized as contributing to climate change violates human rights law.

ii. Urgenda v. The Netherlands

With regard to its place in climate change litigation, *Urgenda v. The Netherlands* signaled a new era for climate change litigation in general, and for the use of human rights law in such cases in particular. The plaintiff–the Dutch NGO Urgenda–brought a claim against the national government, referring to the following facts: a) that global GHG emission levels, particularly CO_2 levels, lead to dangerous climate change with potentially catastrophic consequences; b) that the emissions in the Netherlands additionally contribute to global climate change, with the state being one of the major per capita emitters in the world; and c) as these emissions occur on the territory of the state, the latter has the capability to manage, control, and regulate them by developing adequate policies.[138] However, as the existing policies fell short of requiring the reduction of national annual emissions by 40 percent, or in any case at least 25 percent, compared to 1990; by the end of 2020, they allegedly breached Articles 2 and 8 of the ECHR.[139]

In a historic move in 2015, the Hague district court ruled in favor of the plaintiffs,[140] becoming the first ever court in the world to direct a government to reduce its GHG emissions.[141] The district court's interpretation of human rights law, though, was fairly limited. The court held that as a legal entity, Urgenda itself could not be identified as a direct or indirect victim of a violation of the abovementioned ECHR articles,[142] thus failing to meet the *ratione personae* requirement under Article 34 of

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[138] Gerechtshof (Hof) Haag 24 juni 2015, 7196 m.nt (Urgenda Found./State of the Neth.) ¶ 3.1–3.2.

[139] *Id.*

[140] *Id.* ¶ 5.1.

[141] The State defendant employed the traditional drop-in-the-ocean argument–a very common challenge in climate change litigation–contending that it could not be held liable for climate change, since its emissions formed but a tiny fraction of the global totals, as other countries contribute to climate change as well and to a greater extent. *Id.* ¶ 4.78. The court, however, dismissed this argument on the grounds of shared global responsibility for climate change. *Id.* ¶ 4.79.

[142] *Id.* ¶ 4.45.

the ECHR.[143] Importantly, however, the court recognized that "both articles [2 and 8] and their interpretation given by the ECtHR, particularly with respect to environmental right issues, can serve as a source of interpretation when detailing and implementing open private-law standards […], such as the unwritten standard of care in the Dutch Civil Code."[144] The court, accordingly, went on briefly to discuss the position of the ECtHR on the relevance of articles with regard to human rights' protection from environmental degradation.[145] In the end, even despite the rather brief engagement with human rights law, the decision was ground-breaking and attracted intense global attention, being referred to by courts in similar cases in the US, New Zealand, Norway, Switzerland, and Ireland.[146]

This was just the beginning of what was to become a seismic shift in terms of applying human rights law in climate change litigation. Following the decision of the district court, the Dutch government announced its plans to begin its implementation but also filed an appeal with the Hague Court of Appeal.[147] This appeal was not successful, as the Court of Appeal went even further in its interpretation of the human rights obligations of the state by reversing the district court's decision with regard to Urgenda's reliance on Articles 2 and 8 of the ECHR, holding that the *ratione personae* requirement under Article 34 applies only to the ECtHR but not to Dutch courts,[148] which rely on national legislation, granting NGOs access to justice in such cases.[149] Assessing the case on the merits, the Court of Appeal reiterated the position of the ECtHR that Articles 2 and 8 of the ECHR are also applicable in the context of environmental degradation and, in the present case, their relevance with regard to climate policy ambition stems from the dangerous nature of climate change:

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[143] *See generally* Samvel Varvastian, *Access to Justice in Climate Change Litigation from a Transnational Perspective: Private Party Standing in Recent Climate Cases*, *in* 4 PROCEDURAL ENVIRONMENTAL RIGHTS: PRINCIPLE X IN THEORY AND PRACTICE 481, 500–01 (Jerzy Jendrośka & Magdalena Bar eds., 2017) (discussing the challenges to Urgenda's standing on non-rights grounds).

[144] (Hof)24 juni 2015 (Urgenda Found.), ¶ 4.46.

[145] *Id.* ¶¶ 4.47–4.50.

[146] *See* discussion *infra* §§ 3.1.3, 3.1.4, 3.1.5, 3.2.2 & 3.2.4.

[147] *Cabinet Begins Implementation of* Urgenda *Ruling but Will File Appeal,* GOV'T OF THE NETH. (Sept. 1, 2016, 1 :38 PM), https://www.government.nl/latest/news/2015/09/01/cabinet-begins-implementation-of-urgenda-ruling-but-will-file-appeal [https://perma.cc/S2ZC-HWYC].

[148] HoF Haag 9 oktober 2018, NJ 2018, 2610 m.nt., ¶ 35 (State of the Neth./Urgenda Found.).

[149] *Id.* ¶¶ ¶36–38.

> [T]he State has a positive obligation to protect the lives of citizens within its jurisdiction under Article 2 ECHR, while Article 8 ECHR creates the obligation to protect the right to home and private life. This obligation applies to all activities, public and non-public, which could endanger the rights protected in these articles, and certainly in the face of industrial activities which by their very nature are dangerous. If the government knows that there is a real and imminent threat, the State must take precautionary measures to prevent infringement as far as possible.[150]

Delving into a page-long enumeration of climate change impacts,[151] the Court of Appeal concluded that "it is appropriate to speak of a real threat of dangerous climate change, resulting in the serious risk that the current generation of citizens will be confronted with loss of life and/or a disruption of family life."[152]

Ultimately, Urgenda's victory was cemented by the Supreme Court of the Netherlands,[153] and this time the court's interpretation of human rights law with regard to climate change was very elaborate. Over nearly ten pages, the Supreme Court meticulously discussed the rights and duties arising under the ECHR in the context of environmental pollution, providing extensive references to the ECtHR case law,[154] in order to answer the fundamental question–whether Articles 2 and 8 of the ECHR oblige the government "to offer protection from the genuine threat of dangerous climate change."[155] In the end, the Court deemed the answer "sufficiently clear," with no need to refer the matter to the ECtHR for an advisory opinion, as allowed under the recent protocol to the ECHR.[156] This answer, in the Court's view, stemmed from the fact that "[t]he obligation pursuant to Articles 2 and 8 ECHR to take appropriate steps to counter an imminent threat may encompass both mitigation measures (measures to prevent the threat from materializing) or adaptation measures (measures to lessen or soften the impact of that materialization)"[157] as well as the fact that the response to climate change has to be collective, as reflected in the UNFCCC, thus partial responsibility is in place–"each

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[150] *Id.* ¶ 43.

[151] *Id.* ¶ 44.

[152] *Id.* ¶ 45.

[153] *See* Hoge Raad der Nederlanden [HR] 20 decemeber 2019, Nederlandse Jurisprudentie [NJ] 2020, 19/00135 m.nt. (The State of the Neth./Urgenda Found.).

[154] *See id.* ¶¶ 5.1–6.6.

[155] *Id.* ¶ 5.1.

[156] *Id.* ¶ 5.6.4.

[157] *Id.* ¶ 5.3.2.

country is responsible for its part and can therefore be called to account in that respect."[158]

Accordingly, the Supreme Court rejected the government's invoked drop-in-the-ocean argument by demonstrating that "no reduction is negligible"[159]:

> Partly in view of the serious consequences of dangerous climate change as referred to in 4.2 above, the defence that a [S]tate does not have to take responsibility because other countries do not comply with their partial responsibility, cannot be accepted. Nor can the assertion that a country's own share in global greenhouse gas emissions is very small and that reducing emissions from one's own territory makes little difference on a global scale, be accepted as a defence. Indeed, acceptance of these defences would mean that a country could easily evade its partial responsibility by pointing out other countries or its own small share. If, on the other hand, this defence is ruled out, each country can be effectively called to account for its share of emissions and the chance of all countries actually making their contribution will be greatest, in accordance with the principles laid down in the preamble to the UNFCCC.[160]

With this determination, the Supreme Court concluded that "[i]n order to ensure adequate protection from the threat to [human] rights resulting from climate change, it should be possible to invoke those rights against individual states, also with regard to the aforementioned partial responsibility."[161] In other words, the Supreme Court interpreted Articles 2 and 8 of the ECHR as obliging the contracting states to do "their part" to counter the threats to human rights posed by climate change,[162] thus upholding the Court of Appeal's ruling.[163] Additionally, the Court rejected the arguments that such a decision violated the separation of powers principle, as the decision did not order the government to take any specific steps, leaving that to the government's discretion.[164]

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[158] *Id.* ¶ 5.7.5.
[159] *See id.* ¶ 5.7.8.
[160] *Id.* ¶ 5.7.7.
[161] *Id.* ¶ 5.7.7.
[162] *Id.* ¶ 5.8.
[163] *Id.* ¶ 5.9.1
[164] *See id.* ¶¶ 6.1–6.6.

iii. Verein KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications

The Swiss case *Verein KlimaSeniorinnen Schweiz v. Federal Department of the Environment, Transport, Energy and Communications*[165] in large part mirrored *Urgenda*: the plaintiffs challenged the national climate change policy, namely Article 3(1) of the Federal Act on the Reduction of CO_2 Emissions, which stipulated national emissions' reduction by 20 percent compared to 1990 as early as 2020.[166] The plaintiffs maintained that as an industrialized country, Switzerland must reduce its GHG emissions by 25 percent to 40 percent by 2020 as well as adopt a more stringent emissions reduction target for 2030 than the one proposed in the context of the legislative proceedings.[167] Similarly, the plaintiffs invoked Articles 2 and 8 of the ECHR.[168] However, there were also two significant differences from the *Urgenda* case: first, the plaintiffs in *KlimaSeniorinnen* were much more specific about their claim, requesting not only tightening of the national emissions reduction target, but also suggesting concrete protection measures, such as governmental promotion of electric vehicles and a carbon tax on motor fuels, as well as measures addressing building standards and the agricultural sector to ensure proper implementation of enhanced reduction targets.[169] Second, and even more important in the context of human rights claims, the plaintiffs–a group of elderly Swiss women–alleged that they were particularly vulnerable to the impacts of climate change, namely "the risks of heat-related death as well as impairment of health and well-being due to the more frequent occurrence of heat waves [that] are considerably

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[165] *Federal Administrative Court [of Switzerland], Section 1 Judgment A-2992/2017 of 27 November 2018 Verein KlimaSeniorinnen Schweiz et al. v. Federal Department of the Environment, Transport, Energy and Communications (DETEC) Ruling on Real Acts Relating to Climate Protection*, KLIMASENIORINNEN, available at https://klimaseniorinnen.ch/wp-content/uploads/2019/02/Judgment-FAC-2018-11-28-KlimaSeniorinnen-English.pdf [https://perma.cc/UZS4-DK67] (last visited Feb. 3, 2021) [hereinafter KlimaSeniorinnen I]; *see* Cordelia Christiane Bähr et al., *KlimaSeniorinnen: Lessons from the Swiss Senior Women's Case for Future Climate Litigation*, 9 J. HUM. RTS. & ENV'T 194, 195–221 (2018) (comparing the Swiss litigation to four other environmental and human rights cases).

[166] KlimaSeniorinnen I, *supra* note 165, ¶ 7.

[167] *Id.*

[168] *Id.* ¶ 7.1

[169] *See id.* ¶ 6.1. Notably, in *Urgenda*, the district court was also presented with documentation from both the plaintiffs and the government concerning the adoption of similar measures however, the plaintiffs did not ask the court to order the government to adopt them. *See* HR 19 December 2019 NJ, 2020 19/00135 (Urgenda), ¶ 4.7.

higher for older women over 75 years of age than for the rest of the population."[170]

The court, while acknowledging that both the prevailing doctrine and case law allow challenging "not only action by the authorities but also omission by the authorities to act,"[171] dismissed the claim concerning implementation and toughening of reduction measures as something within the competence of the Federal Council.[172] A more fundamental question, however, was whether the plaintiffs could bring a claim based on the fact that their rights were affected with a "certain intensity," which the court answered positively.[173] The court's analysis on this point, however, presented a remarkable level of ambiguity. First, the court agreed that the plaintiffs were affected by climate change impacts more strongly than the general public due to their age and health conditions.[174] Second, to determine the case's admissibility and distinction from *actio popularis*, the court deemed it necessary to examine "whether the extent to which the [plaintiffs] are affected goes beyond that of the general public."[175] In order to do that, the court limited itself to a one page-long enumeration of climate-related extremes and the associated impacts on human communities in Switzerland, based on the findings of both the IPCC Fifth Assessment Report and national reports,[176] only to conclude that "[a]lthough different groups are affected in different ways, ranging from economic interests to adverse health effects affecting the general public,'

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[170] *See* KlimaSeniorinnen I, *supra* note 165, ¶ 7.

[171] *Id.* ¶ 6.2.

[172] *Id.* ¶ 5.3.

[173] *Id.* ¶ 6.3.3 ("[I]t is sufficient that rights or obligations are affected and that there is therefore a certain intensity of being affected. If potential infringements of fundamental rights are involved, it is essentially a matter of the scope of the fundamental right whether the effect of the infringement is sufficient to assume that rights or obligations have been affected. This does not, however, presuppose an infringement of the protected fundamental right; the question whether such an infringement has occurred is a matter for the material assessment of the case.").

[174] *Id.* ¶ 7.1 ("The appellants derive from Art. 10 Const. as well as Art. 2 and 8 ECHR that they are entitled to positive [S]tate protection from an excessive global temperature increase. Appellants 2-5, they claim, are particularly affected by global warming and its consequences. Scientific studies of past summer heat waves had confirmed the statistical finding that in particular older women over 75 years of age were impacted most by summer heat waves in terms of mortality and adverse health effects. In addition, appellant 3 suffered from cardiovascular illness and appellants 4 and 5 from asthma, which exacerbated the health impacts. The appellants were thus more strongly impacted by the consequences of global warming in legal positions protected by (fundamental) rights than the general public, and for this reason had an interest worthy of protection in the issuance of a material ruling.").

[175] *Id.* ¶ 7.4.1.

[176] *Id.* ¶ 7.4.2.

'the group of women older than 75 years of age is not particularly affected by the impacts of climate change."[177]

In other words, by dismissing the case as *actio popularis*, the Swiss court followed a well-known line of reasoning frequently adopted by US courts that does not delve into the nature of rights and obligations arising from climate change and instead denies plaintiffs standing because climate change arguably affects everyone.[178] In light of this, it is even more remarkable that, in the present case, the court seemingly tried to justify its decision further by stating that the requested relief cannot "make a direct contribution toward reducing greenhouse gas emissions in Switzerland [as] this depends on the decisions of the legislators and regulators as well as of each individual."[179] Such an argument, however, has been refuted by other courts, namely by the US Supreme Court in *Massachusetts v. EPA*[180] and the Supreme Court of the Netherlands in *Urgenda*.[181]

The case was subsequently appealed to the Federal Supreme Court of Switzerland, which upheld the ruling of the lower court.[182] But the Supreme Court's decision was based on a very different kind of argumentation. Specifically, the Supreme Court delved into a rather specious discussion that the limits of "well below 2˚C" and even 1.5˚C global warming are "not expected to be exceeded in the near future,"[183] and any consequences of exceeding the limits of such global warming "shall only occur in the medium to more distant future."[184] Based on this,

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[177] *Id.* ¶ 7.4.3.

[178] For a detailed discussion of these cases, see generally Varvastian, *supra* note 143.

[179] *See* KlimaSeniorinnen I, *supra* note 165, ¶ 8.3.

[180] *See* Massachusetts v. EPA, 549 U.S. 497, 525–26 (2007) (ruling that the existence of other major GHG emitters such as China and India should not preclude the U.S. agency from its regulatory duty, because "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere").

[181] HR 19 december 2019 NJ, 2020 19/00135 (Urgenda Found.), ¶ 5.7.8 (ruling that "[t]he defence that a duty to reduce greenhouse gas emissions on the part of the individual [S]tates does not help because other countries will continue their emissions cannot be accepted . . . no reduction is negligible").

[182] *Federal Supreme Court [of Switzerland], Public Law Division I Judgment 1C_37/2019 of 5 May 2020 Verein KlimaSeniorinnen et al. V. Federal Department of the Environment, Transport, Energy and Communications (DETEC) Ruling on Real Acts Relating to Climate Protection Appeal Against the Judgment of the Federal Administrative Court, Section 1, of 27 November 2018 (A-2992/2017)*, KLIMASENIORINNEN, available at https://klimaseniorinnen.ch/wp-content/uploads/2020/06/Judgment-FSC-2020-05-05-KlimaSeniorinnen-English.pdf [https://perma.cc/QX2L-2588] (last visited Feb. 3, 2021) [hereinafter KlimaSeniorinnen II].

[183] *Id.* ¶ 5.3.

[184] *Id.* ¶ 5.4.

the Supreme Court maintained that the plaintiffs rights to life and respect for private life under Articles 2 and 8 of the ECHR "[do] not appear to be threatened by the alleged omissions to such an extent at the present time that one could speak of their own rights being affected . . . in a sufficient intensity,"[185] thus making the case inadmissible as *actio popularis*.[186] Following this decision, the plaintiffs filed a petition with the ECtHR.[187]

iv. Friends of the Irish Environment v. Ireland

Similar to their counterparts in *Urgenda* and *KlimaSeniorinnen*, the plaintiffs in the Irish case *Friends of the Irish Environment v. Ireland*[188] challenged the governmental policy on climate change. However, in this case, the contested issue was not any specific emissions reduction target by 2020, but rather the overall adequacy of the national mitigation plan, approved under the state's framework climate legislation and concerning emissions reduction up to 2050.[189] Once again, the plaintiffs alleged violation of Articles 2 and 8 of the ECHR.[190] The court briefly acknowledged the scientific information on the impacts of climate change on human communities[191] and the necessity to "achieve substantial emission reductions in the short term and that the State is failing to do

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[185] *Id.*

[186] *Id.* ¶ 5.5.

[187] *See* Letter from Rechtsanwältin, LLC to the European Court of Human Rights (Nov. 26, 2020), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201126_No.-A-29922017_application.pdf [https://perma.cc/48KC-9PWN]; *see also Swiss Federal Court Puts Human Rights Last in the Climate Crisis*, GREENPEACE (May 20, 2020), https://www.greenpeace.org/international/press-release/43390/swiss-federal-court-human-rights-climate-crisis-health/ [https://perma.cc/CK9P-J9MV].

[188] Friends of the Irish Env't CLG v. Gov't of Ireland [2019] IEHC 747, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2019/20190919_2017-No.-793-JR_judgment-2.pdf [https://perma.cc/DVD2-52FB].

[189] *Id.* ¶ 12 ("[T]he Plan does not specify any or any adequate measures to achieve the management of a reduction of greenhouse gas emissions in order to attain emission levels appropriate for furthering the achievement of the National Transition Objective as provided for and defined in s. 3 of the [Climate Action and Low Carbon Development Act, 2015]."); *see also id* ¶ 26.

[190] *See id.* ¶¶ 12, 26.

[191] *Id.* ¶ 6 ("there is a relationship between cumulative emissions, temperature rises and global risks to the environment, risk of death, of injury and health particularly in low-lying coastal zones and small island developing [S]tates due to storm surges, coastal flooding and sea level rises. There are also reported risks of mortality and morbidity during periods of extreme heat. Food systems may be at risk and there is a risk of loss of rural livelihoods and income.").

that."[192] However, the court's assessment of the human rights aspect of the claim was ultimately very limited. The court delved into a lengthy discussion on the claim's justiciability, referring to it as essentially a request by the applicant to have the court prescribe the way the government's national mitigation plan would lower emissions,[193] and to the case itself as being "complex" and "involving very difficult issues of law and science."[194]

This discussion led the court to refer to both the ECtHR[195] and national case law, observing that "[w]here fundamental rights are at stake, it may be that it is legitimate to consider the nature of the rights alleged to be affected and the nature of the duties and obligations being performed or discharged by the decision-making body."[196] Further to this observation, the court, while emphasizing the importance of the separation of powers, especially in the context of such complex cases,[197] articulated the circumstances where the judiciary has the power to interfere with existing policies–namely, when such intervention is needed to protect against a deliberate breach of constitutional rights and obligations by the government.[198] The articulation of these circumstances, however, did not prevent the court from stating that "even if the court concludes that a matter or issue is justiciable, nevertheless, because of the nature, extent and wording of a statutory obligation, it may be the case that a wide margin of discretion ought to be afforded to the Executive in discharging its obligations."[199]

The court deemed the latter scenario to be exactly the case on this occasion by holding that the national mitigation plan was consistent with climate legislation under which it was adopted.[200] The court's engagement with the rights claims was mostly limited to constitutional rights, but its overall conclusion was that the national mitigation plan did not put these

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[192] *Id.* ¶ 9.
[193] *Id.* ¶¶ 86–97.
[194] *Id.* ¶ 76.
[195] *Id.* ¶ 71.
[196] *Id.* ¶ 79.
[197] *Id.* ¶ 92 ("Courts are and should be reluctant to review decisions involving utilitarian calculations of social, economic and political preference, the latter being identifiable by the fact that they are not capable of being impugned by objective criteria that a court could apply.").
[198] *See id.* ¶¶ 88–91.
[199] *Id.* ¶ 94.
[200] *Id.* ¶¶ 112–13, 116–17.

rights at risk.[201] Curiously, after making this finding, the court dedicated nearly two pages of its decision to describe the decision of the Hague Court of Appeal in *Urgenda*, including the latter's interpretation of the state's obligations with regard to emissions reduction under Articles 2 and 8 of the ECHR,[202] albeit acknowledging limited knowledge "of the duty of care under Dutch tort law or how that is assessed."[203] Both this and the conclusion referred to above seemingly suggest that the court was not entirely convinced of its own arguments and made its decision simply based on the narrow interpretation of the fact that the contested national mitigation plan did not represent the entirety of the national climate policy. Whatever might be the case, the plaintiffs appealed the decision, and after receiving permission to leapfrog the Court of Appeal in February 2020, their appeal was brought before the Supreme Court of Ireland.[204]

This time, the plaintiffs prevailed, as after a careful analysis of the contested national mitigation plan, the Supreme Court was convinced that the plan "falls a long way short" of the statutorily required specificity,[205] as significant parts of its policies are "excessively vague or aspirational."[206] In the light of this, the Supreme Court held that the national mitigation plan should be quashed.[207] This victory, however, was somewhat diluted by the Irish Supreme Court's declaration that as a corporate entity, the plaintiffs did not have standing to maintain the rights claims, including those under the ECHR.[208] Notwithstanding this procedural setback, the Irish case marked the second legal victory in a high-profile climate case based on human rights law in the highest instance national European court after *Urgenda*.

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[201] *Id.* ¶ 133.

[202] *Id.* ¶¶ 135–38.

[203] *Id.* ¶ 137.

[204] *Friends of the Irish Env't CLG v. Ireland* [2020] IESCDET 13.

[205] *Friends of the Irish Env't CLG v. Ireland* [2020] IESC 49, ¶ 6.46.

[206] *Id.* ¶ 6.43.

[207] *Id.* ¶ 6.49.

[208] *See id.* ¶¶ 7.22–7.24; *see also id.* ¶¶ 5.27, 7.19–7.21 (stating that these claims were therefore brought *actio popularis*, a form of action that was restricted by the Irish Supreme Court's recent case law).

v. Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy

Unlike *Urgenda* and other human rights law-based climate cases addressed by the European national courts and concerning national policies, the Norwegian case *Greenpeace Nordic Association and Nature and Youth v. Ministry of Petroleum and Energy* revolved around a specific GHG polluting practice, namely the GHG emissions caused by the state by means of the licensing of offshore fossil fuel exploration and production activities, including emissions abroad that would occur as a result of fossil fuel exports from Norway.[209] The plaintiffs similarly alleged violation of Articles 2 and 8 of the ECHR, which, however, remained ignored by the district court, as its decision primarily revolved around the applicability and interpretation of the Article 112 of the national constitution, protecting the right to a healthy environment. The court found no violation of this constitutional provision and the plaintiffs appealed.

The Borgarting Court of Appeal addressed the potential violation of the ECHR more thoroughly, including by providing reference to the ECtHR case law.[210] However, its interpretation was quite passive: the court merely acknowledged that "[w]ith respect to the consequences of climate changes in Norway, it cannot be ruled out that these will result in loss of human life, for example through floods or slides in areas that are particularly exposed to this, [h]owever, the relationship between the production licences . . . and loss of human life does not clearly fulfil the requirement for a 'real and immediate' risk."[211] In particular, the Court favored the drop-in-the-ocean argument by alleging "that it is uncertain whether emissions will occur based on the [licensing] decision, and that

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[209] Oslo tingrett [OT] [Oslo Dist. Ct.] Jan. 4, 2018, Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy, [2018] 16-166674TVI-OTIR/06 (Nor.) *translated in* SABIN CENTER FOR CLIMATE CHANGE, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2018/20180104_HR-2020-846-J_judgment-2.pdf [https://perma.cc/8DTM-Q834] (last visited Feb. 3, 2021), §1.2-1.4 and 3.1.

[210] Borgarting Lagnannsrett [BGL] (Borgarting Ct. App.) Jan. 23, 2020, Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy, [2020] 18-060499ASD-BORG/03, § 4.2 (Nor.) *translated in* SABIN CENTER FOR CLIMATE CHANGE, available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200123_HR-2020-846-J_judgment.pdf [https://perma.cc/446M-E84W] (last visited Feb. 3, 2021).

[211] *Id.*

these will in any event be marginal when compared with total global emissions."[212]

Finally, when confronted with the relevance of the decision in *Urgenda*,[213] the Court of Appeal held that the allegedly different nature of the cases in the Netherlands and Norway renders the *Urgenda* ruling of little practical value:

> The [plaintiffs] have cited in particular the Urgenda case from the Netherlands, which is based on ECHR Articles 2 and 8. There is no doubt that the decision breaks new ground for the application of the ECHR. However, in the opinion of the Court of Appeal, the decision has little transfer value as it involved issues regarding general emissions targets and not, as in this case, specific future emissions from individual fields that might eventually be put into production in the future. There is no conflict between the result the Court of Appeal has arrived at in this case and the result in the Urgenda case.[214]

The plaintiffs subsequently appealed the decision to the Supreme Court of Norway. This time, they also got the support of the UN Special Rapporteurs on the human rights and the environment and the human rights and hazardous substances, David Boyd and Marcos Orellana, who submitted amicus curiae brief before the Supreme Court.[215] In their brief, the Special Rapporteurs argued that "new petroleum discoveries, intended for production and combustion, aggravate the existential risk posed by climate change to humanity," thus the issuance of oil exploration licenses in the Barents Sea violates Articles 2 and 8 of the ECHR.[216]

The Supreme Court's week-long hearing of the case took place in November 2020 and on December 22, the Supreme Court ruled in favor of the government.[217] The Supreme Court's engagement with Articles 2 and 8 of the ECHR was considerably more extensive than that of the lower

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[212] *Id.*

[213] *Id.* § 3.2. The case highlights a fundamental flaw with national court rulings: they are not binding on other nations.

[214] *Id.* § 4.2.

[215] Brief for Dr. David R. Boyd and Dr. Marcos A. Orellana as Amici Curiae Supporting Petitioners, Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy, [2020] 20-0510052SIV-HRET Norges Høyesterett [HR] (Supreme Court of Norway), available at https://www.klimasøksmål.no/wp-content/uploads/2020/10/Special-Rapporteurs-Amicus-Brief-Norway.pdf [https://perma.cc/FKN8-VY8B].

[216] *Id.* at 20.

[217] HR Dec. 22, 2020, Greenpeace Nordic Ass'n v. Ministry of Petroleum and Energy, [2020] 20-0510052SIV-HRET.

courts.[218] Like its Dutch counterpart, the Supreme Court acknowledged that the standing requirements under the Norwegian legislation allowed the environmental NGOs-plaintiffs to invoke the ECHR in the Norwegian courts.[219] However, the Supreme Court's interpretation of the applicability of Articles 2 and 8 was fundamentally different and followed the appeals court's line of reasoning. For instance, considering the Article 2 requirement for the risk to be real and immediate, the Supreme Court recognized that "[t]he consequences of climate changes in Norway will undoubtedly lead to loss of human life, for example through floods or landslides."[220] However, it held that the relationship between the production licenses and possible loss of human life is insufficient, because: a) it is uncertain whether or to what extent the decision will actually lead to emissions of GHGs, and b) while the threat of climate change is serious, the potential impact of these GHGs on the climate will be a long way off.[221] Similarly, the Supreme Court held that unlike local environmental damage, the effects of the possible future GHG emissions resulting from the licenses are not "direct and immediate," thus failing to qualify as a violation of Article 8 of the ECHR.[222] Finally, while referencing *Urgenda*, the Supreme Court agreed with the Court of Appeal that the different circumstances in that case rendered it to be of "little transfer value."[223] The Supreme Court thus upheld the decision of the Court of Appeal, declining to find violations of Articles 2 and 8 of the ECHR.

The Norwegian courts' interpretation of the applicability of human rights law in the context of climate change was much more restrictive than in other national European courts. True enough, the Norwegian case was quite different from the Dutch, Irish, and Swiss climate cases based on human rights law, because it focused on a specific decision that would lead to harmful activities. That said, however, the Court of Appeal's and the Supreme Court's seemingly dismissive approach to Norway's contribution to global GHG emissions abroad through the licensed fossil fuel exploration, and the potentially resulting loss of human life in Norway due to climate change, raises serious questions about the integrity of the decision.

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[218] *Id.* ¶¶ 164–76.
[219] *Id.* ¶ 165.
[220] *Id.* ¶ 167.
[221] *Id.* ¶¶ 167–68.
[222] *Id.* ¶¶ 170–71.
[223] *Id.* ¶¶ 172–73.

B. LITIGATION BEFORE INTERNATIONAL AND REGIONAL COURTS AND TREATY BODIES

Both international and regional courts and treaty bodies have already addressed the applicability of human rights law in the context of climate change. Compared to litigation at the national level, litigation at the regional and international levels has been much more diverse both in terms of geographical distribution and the human rights law mechanisms invoked before the respective courts and treaty bodies. But similar to their national counterparts, regional and international courts and treaty bodies have demonstrated diverging interpretations of human rights law when addressing the respective climate cases.

i. Marangopoulos Foundation for Human Rights v. Greece

Similar to *Gbemre*, climate change was not a central issue in *Marangopoulos Foundation for Human Rights v. Greece*,[224] which was brought under the European Social Charter[225] before the European Committee of Social Rights. The plaintiff alleged that by authorizing a private company to operate lignite mines and power stations fueled by lignite "without taking sufficient account of the environmental impact and without taking all necessary steps to reduce this impact," Greece failed to comply with its obligation to protect public health against air pollution, thus violating the right to health under Article 11 of the Charter.[226] The plaintiffs did not raise any specific claims with regard to climate change and even the reference to climate change itself was not explicit–rather, it was based on the fact that the plaintiff "criticise[d] the continued massive use of lignite as being quite incompatible with the Kyoto Protocol objectives and the associated lack of tangible progress towards fulfilling these objectives."[227] Accordingly, the Committee did not address climate

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[224] Marangopoulos Found. for Human Rights v. Greece, Complaint No. 30/2005, European Committee on Social Rights [Eur. Comm. S.R.], (Dec. 6, 2006), http://hudoc.esc.coe.int/eng/?i=cc-30-2005-dmerits-en [https://perma.cc/HM64-9VVG].

[225] European Social Charter, Oct. 18, 1961, E.T.S. No. 035, available at https://www.coe.int/en/web/european-social-charter [https://perma.cc/J8ZF-HF7C].

[226] *Marangopoulos,* No. 30/2005, Eur. Comm. S.R., ¶ 11.

[227] *Id.* ¶ 34.

change and merely observed that Greece is a party to the UN Framework Convention on Climate Change and the Kyoto Protocol.[228]

However, the Committee's interpretation of the right to health under Article 11 of the Charter is relevant to the application of human rights law to climate change litigation for several reasons. First, the Committee referred to the human right to a healthy environment addressed by other treaty bodies, both at the regional level (namely, the ECtHR and the African Commission on Human and Peoples' Rights) and at the international level (namely, the UN Committee on Economic, Social and Cultural Rights),[229] and drew a direct parallel between the above-mentioned Article 11 of the Charter and Article 2 of the ECHR.[230] And second, the Committee emphasized that while "overcoming pollution is an objective that can only be achieved gradually […], [S]tates party must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of the resources at their disposal,"[231] In the present case, the Committee concluded that Article 11 of the Charter was violated because even regardless of the margin of discretion granted to national authorities in such matters, the government had failed "to strike a reasonable balance between the interests of persons living in the lignite mining areas and the general interest."[232] In other words, very similar to *Gbemre*, but this time at the regional level, the decision in *Marangopoulos* marked the first time that a regional treaty body recognized that by failing to properly abate an activity identified as contributing to climate change, the government had violated its obligations under human rights law.

ii. The Inuit Petition

Probably the best-known early attempt to invoke human rights law in climate change litigation, the Inuit petition submitted to the Inter-American Commission on Human Rights against the US[233]

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[228] *Id.* ¶ 205.

[229] *Id.* ¶ 196.

[230] *Id.* ¶ 202.

[231] *Id.* ¶ 204.

[232] *Id.* ¶ 221.

[233] *See generally* Inuit Circumpolar Conf., 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 (Dec. 7, 2005), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2005/20051208_na_petition.pdf [https://perma.cc/5P63-BR2U].

represented a radically different approach from other early cases in a number of ways. First, and most fundamentally, unlike *Gbembre* and *Marangopoulos*, where the issue of climate change was not central, the petition focused entirely on climate change. By identifying the US as the then largest GHG emitter in the world, the petitioner–the Chair of the Inuit Circumpolar Conference, on behalf of herself, a group of other named individuals, and all Inuit of the Arctic regions of the US and Canada–alleged violations of numerous rights under the American Declaration, including the rights to life, health, property, movement, and other rights, resulting from the impacts of climate change on virtually every aspect of Inuit life and culture.[234] Therefore, the claim revolved around the high vulnerability of the human communities within the Arctic region to a range of climate-related extremes, as shown by extensive evidence provided in the petition.[235]

Second, the legal issues raised by the petition made its scope very broad: the petition addressed not a specific polluting practice such as lignite mining or gas flaring, but rather challenged the US climate policy in a sweeping and comprehensive way, including, for example, the lack of federal GHG emissions reduction targets and regulatory gaps with regard to major emissions sources such as power plants and vehicles, the alleged failure to cooperate with international efforts to reduce GHG emissions, and so on.[236] According to the petition, the alleged US climate policy failure violated not only human rights law, but also international environmental and climate change law, including the prohibition of transboundary environmental harm and the precautionary principle.[237]

Finally, and relatedly, the petition was of clearly transnational nature, as it was brought on behalf of communities not only in the US, but also in Canada, and revolved around the transboundary impacts of climate change, thus effectively becoming the first case of transnational climate change litigation.[238]

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[234] *Id.* at 74–95. *See also* Inter-Am. Comm'n H.R. [IACHR], *American Declaration of the Rights and Duties of Man* (May 2, 1948), https://www.oas.org/en/iachr/mandate/Basics/american-declaration-rights-duties-of-man.pdf [https://perma.cc/7YVM-LHML].

[235] *See* IACHR, *supra* note 234, at 35–67.

[236] *Id.* at 103–11.

[237] *Id.* at 97–103.

[238] This petition, at the same time, raised additional challenges, given the different nature of transnational obligations in human rights law, as opposed to those in international environmental law. *See* ATAPATTU & SCHAPPER, *supra* note 39, at 222, 295.

It was probably the combination of all these three factors that ultimately proved to be too much for a regional human rights treaty body to handle at this early stage of climate change litigation.[239] The petition was rejected on procedural grounds, as not providing the necessary information for the Commission "to determine whether the alleged facts would characterize a violation of rights protected by the American Declaration."[240] However, despite the fact that the petition was summarily dismissed,[241] it attracted considerable international attention to the problems faced by people living in polar regions. The petition also catalyzed further action,[242] including a special hearing on the links between climate change and human rights organized by the Commission, as well as subsequent legal developments in the region.[243] In other words, the Inuit petition's regulatory influence was indirect, namely, by "changing norms and values through increasing the public profile of Arctic climate change impacts"[244] and "giving climate change a human face."[245]

iii. Armando Carvalho v. the European Parliament and the Council of the European Union

The climate case against the European Union (EU), *Armando Carvalho v. the European Parliament and the Council of the European*

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[239] *See* Sumudu Anopama Atapattu, *Climate Change under Regional Human Rights Systems*, *in* THE ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 134–36 (Sébastien Duyck et al., eds., 2018).

[240] Letter from Ariel E. Dulitzky, Assistant Exec. Sec'y, Inter-Am. Comm'n H.R, to Paul Crowley, Legal Repr., INUIT CIRCUMPOLAR CONF. (Nov. 16, 2006), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf [https://perma.cc/4R7E-PLBV].

[241] Notably, though, the plaintiffs expected such an outcome, and "acknowledged how unlikely formal success was." *See* PEEL & OSOFSKY, *supra* note 50, at 50. *See also* Hari M. Osofsky, *Inuit Petition as a Bridge? Beyond Dialectics of Climate Change and Indigenous Peoples' Rights,* 31 AM. INDIAN U.L. REV. 675 (2007).

[242] John H. Knox, *The Past, Present, and Future of Human Rights and the Environment*, 53 WAKE FOREST L. REV. 649, 657–58 (2018).

[243] Jacqueline Peel & Hari M. Osofsky, *Climate Change Litigation's Regulatory Pathways: A Comparative Analysis of the United States and Australia*, 35 U. DENVER J.L. & POL'Y 150, 160 (2013); Christopher Campbell-Duruflé & Sumudu Anopama Atapattu, *The Inter-American Court's Environment and Human Rights Advisory Opinion: Implications for International Climate Law*, 8 CLIMATE L. 321, 325 (2018).

[244] Peel & Osofsky, *supra* note 243.

[245] ATAPATTU & SCHAPPER, *supra* note 39, at 66.

Union,[246] also known as "the People's climate case," presented an interesting combination of elements from the Inuit petition and the abovementioned cases against European governments. As a subject of international law with its own legal system (that can be described as a supranational sub-system of international law),[247] the EU is a member of the UN climate regime, having ratified both the Kyoto Protocol[248] and the Paris Agreement.[249] As a result of these international commitments, both the EU itself, and its member states, have adopted a comprehensive set of measures, including the world's largest GHG emissions trading scheme, effort sharing between member states, petrol and diesel fuels efficiency standards, targets for reducing GHG emissions from motor vehicles, accounting rules on GHG emissions, rules relating to land use, and forestry.[250] Overall, through this policy package, the EU is expected to meet the binding GHG emissions reduction target of at least 40 percent by 2030 compared to 1990 levels.[251]

This policy package was challenged by a group of families operating in the agricultural or tourism sectors and residing in various EU countries (including Germany, France, Italy, Portugal and Romania) and non-EU countries (Kenya and Fiji), as well as a Swedish NGO representing young indigenous Sami people.[252] The plaintiffs alleged that the level of the EU climate policy ambition is not sufficiently high with regard to reducing GHG emissions as the technical and economic capacity of the EU extends to reducing those emissions by 50 percent to 60 percent, which is why the legislative package must be annulled in so far as it will allow for emissions in 2030 at a level that is higher than 40 percent to 50 percent of 1990 levels.[253] According to the plaintiffs, such dangerous

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[246] Case T-330/18, Carvalho & Others v. European Parliament and Council of the European Union, ECLI:EU:T:2019:324 (May 15, 2019).

[247] On the nature of the EU law and its place in international law, see Bruno de Witte, *EU Law: Is It International Law?*, *in* EUROPEAN UNION LAW 177–97 (Catherine Barnard & Steve Peers eds., 2nd ed., 2017).

[248] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

[249] Paris Agreement, *supra* note 40.

[250] Kyoto Protocol, *supra* note 248, art. 2.

[251] Gerd Winter, *Armando Carvalho and Others v. EU: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation*, 9 TRANSNAT'L ENV'T L. 137, 140 (2020). *See id.* at 144–45 (discussing the international law aspects of the EU GHG emissions reduction commitments).

[252] *Id.* at 138.

[253] Case T-330/18, Carvalho and Others, ¶ 18.

emissions levels allow various harms from climate change that will only exacerbate in the future.[254] The plaintiffs particularly emphasized the impacts of heatwaves that are already causing damage to human health, in particular to children, and to persons whose professions are dependent on moderate temperatures, such as in the agriculture and tourism sectors.[255]

Ultimately, the plaintiffs claimed that the legislative package directly affects their legal situation, given that, by requiring an insufficient reduction in GHG emissions and thereby allocating and authorizing an excessive volume of such emissions, it infringes their fundamental rights as enshrined in the Charter of Fundamental Rights of the European Union,[256] namely the right to life (Article 2), the right to the integrity of the person (Article 3), the rights of the child (Article 24), the right to engage in work and to pursue a freely chosen or accepted occupation (Article 15), the freedom to conduct a business (Article 16), the right to property (Article 17) and the right to equal treatment (Articles 20 and 21).[257]

Both the Council and the Parliament challenged the admissibility of this action by claiming that the acts do not directly affect the applicants' legal situation and the contested provisions setting the target levels of GHG emissions are not, in themselves, capable of affecting the fundamental rights invoked by the applicants.[258] They stated that the legislative package does not "authorize" any person to emit GHGs, it just lays down the minimum requirements with which member states must comply in order to reduce emissions and, accordingly, combat climate change.[259] Furthermore, they claimed that the contested provisions are of a general nature and that they can be applied to any natural or legal person and apply to an indeterminate number of natural and legal persons; as a matter of fact, every person around the world is individually concerned by the legislative package.[260] However, suggesting that all persons are individually concerned by the contested acts would contradict the standing

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[254] *Id.* ¶ 24.
[255] *Id.*
[256] Charter of Fundamental Rights of the European Union, Oct. 26, 2012, 2012/C 326/02.
[257] Case T-330/18, Carvalho & Others v. European Parliament and Council of the European Union, ECLI:EU:T:2019:324 ¶ 30 (May 15, 2019).
[258] *Id.* ¶ 27.
[259] *Id.*
[260] *Id.* ¶ 28.

requirements set by the judgment in the *Plaumann* case, which requires the existence of genuine distinguishing features.[261]

The General Court of the EU was persuaded by the defendants' arguments and did not even address the potential violation of the rights claimed by the plaintiffs. Instead, it followed the line of reasoning almost identical to the one adopted by the Swiss court in *KlimaSeniorinnen*, that while "every individual is likely to be affected one way or another by climate change […], 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."[262] In the same vein, the court also seemed to succumb to the defendants' reference to the global nature of emissions and, therefore, the alleged inability of the EU to reduce the harms posed by climate change by reducing its emissions.[263] The plaintiffs appealed. On March 25, 2021, the European Court of Justice dismissed the plaintiffs' appeal on all grounds.[264]

iv. Ioane Teitiota v. New Zealand

The case *Ioane Teitiota v. New Zealand*, initially addressed by national immigration authorities and subsequently by the UN Human Rights Committee,[265] concerned a well-recognized and exceptionally difficult problem that was previously raised in the Inuit petition as well as

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[261] *Id.*

[262] *Id.* ¶ 50.

[263] *Id.* ¶ 60 ("[T]he Parliament argues that, without there being a need to rule on the legality of the legislative package and the question whether the alleged unlawfulness of that legislative package constitutes a sufficiently serious breach of a rule of law the purpose of which is to confer rights on individuals, there is no direct and specific link between the conduct of the Union legislature and the damage that the applicants claim to have suffered. In that connection, the Parliament remarks that climate change is global and that the Union, even by reducing all its emissions to zero, is not in a position to overcome climate change by itself. In addition, while it does not deny the reality of climate change, the extent to which the alleged damage is a result of that change (and not of other natural phenomena or other human activities not linked to climate change) has not been definitively established. Lastly, according to the Parliament, it is also not established that the alleged damage is a result of the alleged lack of efforts to mitigate greenhouse gas emissions, rather than the lack of efforts to adapt (which falls within the Member States' competences).")

[264] Case C-565/19 P, Carvalho & Others v. European Parliament and Council of the European Union, ECLI:EU:C:2021:252 (March 25, 2021).

[265] Human Rights Committee, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2728/2016, CCPR/C/127/D/2728/2016, (Jan. 7, 2020) [hereinafter HRC Views on Teitiota v. New Zealand].

the US case *Native Village of Kivalina v. ExxonMobil Corp*,[266] namely, the high vulnerability of specific human communities to climate change impacts and the unpreparedness of the international legal order to properly address it. In *Teitiota*, the plaintiff, a citizen of the Republic of Kiribati, sought refugee status in New Zealand, alleging multiple threats to him and his family posed by the ever-exacerbating impacts of climate change on their home country, namely sea level rise, that have caused the intrusion of saltwater, resulting in the lack of fresh water, and erosion of inhabitable land, resulting in a housing crisis.[267] The plaintiff maintained that removing him back to Kiribati would violate his right to life under Article 6 of the ICCPR.[268]

The national Immigration and Protection Tribunal, considering the plaintiffs' request under the 1951 Refugee Convention, observed that "while in many cases the effects of environmental change and natural disasters will not bring affected persons within the scope of the [Convention], no hard and fast rules or presumptions of nonapplicability exist [and] [c]are must be taken to examine the particular features of the case."[269] In determining the latter, the Tribunal concluded that the absence of any evidence of systematic housing or land disputes that the plaintiff would face or any evidence that the "environmental conditions that he […] would face on return were so perilous that his life would be jeopardized" indicated that he was not a "refugee" as defined by the Refugee Convention.[270] Overall, the Tribunal seemed to give more weight to political factors, namely to the active role of the government of Kiribati on the international stage with regard to climate change, rather than to environmental impacts of climate change on Kiribati itself: acknowledging the gravity of the situation in Kiribati but refusing to treat such a situation as falling "well short of the threshold required to establish substantial grounds for believing that [the plaintiff and his family] would

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[266] *See* Native Village of Kivalina v. ExxonMobil Corp., 696 F.3d 849 (9th Cir. 2012). In this well-known case, an Inupiat Eskimo village of Kivalina in Alaska sued a group of fossil fuel producers for their contribution to climate change, seeking to recover money damages related to the village's forced relocation due to the erosion of sea ice protecting it. The lawsuit was dismissed on procedural grounds.

[267] HRC Views on Teitiota v. New Zealand, *supra* note 265, ¶¶ 2.1-2.7.

[268] International Covenant on Civil and Political Rights art. 6, Dec. 16, 1966, 999 U.N.T.S. 171.

[269] HRC Views on Teitiota v. New Zealand, *supra* note 265, ¶ 2.8.

[270] *Id.*

be in danger of arbitrary deprivation of life within the scope of article 6 of the [ICCPR]."[271]

The case was subsequently addressed by the High Court and, ultimately, by the Supreme Court of New Zealand, which both agreed with the Tribunal that the plaintiff did not face "serious harm" upon his return to Kiribati.[272] At the same time, the Supreme Court noted that "both the Tribunal and the High Court emphasized their decisions did not mean that environmental degradation resulting from climate change or other natural disasters could never create a pathway into the Refugee Convention or protected person jurisdiction," and held that its "decision in this case should not be taken as ruling out that possibility in an appropriate case."[273]

Following this decision, the plaintiff submitted a petition to the UN Human Rights Committee, invoking the abovementioned Article 6 of the ICCPR. From the outset, the Committee reiterated its position that states should not "remove a person from their territory when there are substantial grounds for believing that there is a real risk of irreparable harm," including that to life under Article 6,[274] as the latter should not be "interpreted in a restrictive manner," and "the obligation of States parties to respect and ensure the right to life extends to reasonably foreseeable threats and life-threatening situations that can result in loss of life."[275] However, the Committee maintained that according to its practice, such risk "must be 'personal' and 'cannot derive merely from the general conditions in the receiving State, except in the most extreme cases, and that there is a high threshold for providing substantial grounds to establish that a real risk of irreparable harm exists.'"[276] The Committee also made a reference to its own recent decision in *Portillo Cáceres*[277] as well as to relevant case law of the regional human rights bodies with regard to environmental degradation and the right to life:

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[271] *Id.* ¶ 2.9.

[272] *Teitiota v. The Chief Executive of the Ministry of Business, Innovation and Employment* [2015] NZSC 107 at [¶ 12] (N.Z.).

[273] *Id.* ¶ 13.

[274] HRC Views on Teitiota v. New Zealand, *supra* note 265, ¶ 9.3.

[275] *Id.* ¶ 9.4.

[276] *Id.* ¶ 9.3.

[277] *Id.* ¶ 9.4. *See also* Human Rights Committee, Views Adopted by the Committee Under Article 5(4) of the Optional Protocol, Concerning Communication No. 2751/2016, CCPR/C/126/D/2751/2016, (Sept. 20, 2019) [hereinafter HRC Views *Portillo Cáceres*].

> [T]he Committee recalls that environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life. The Committee also observes that it, in addition to regional human rights tribunals, have established that environmental degradation can compromise effective enjoyment of the right to life and that severe environmental degradation can adversely affect an individual's well-being and lead to a violation of the right to life.[278]

This statement, however, did not prevent the Committee from seemingly agreeing with the national immigration authorities and the Supreme Court that it is the political situation in the country and not the environmental one which triggers the application of Article 6:

> [T]he Committee considers that a general situation of violence is only of sufficient intensity to create a real risk of irreparable harm under articles 6 or 7 of the Covenant in the most extreme cases, where there is a real risk of harm simply by virtue of an individual being exposed to such violence on return, or where the individual in question is in a particularly vulnerable situation. In assessing the author's circumstances, the Committee notes the absence of a situation of general conflict in the Republic of Kiribati. It observes that the author refers to sporadic incidents of violence between land plaintiffs that have led to an unspecified number of casualties, and notes the author's statement before the domestic authorities that he had never been involved in such a land dispute. The Committee also notes the Tribunal's statement that the author appeared to accept that he was alleging not a risk of harm specific to him, but rather a general risk faced by all individuals in Kiribati.[279]

True enough, the Committee did engage in a discussion on whether the environmental conditions in Kiribati presented a grave danger to the plaintiff,[280] but ultimately, it determined that according to the existing information, "there was [no] real and reasonably foreseeable risk that he would be exposed to a situation of indigence, deprivation of food, and extreme precarity that could threaten his right to life, including his right to a life with dignity."[281]

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[278] HRC Views *Portillo Cáceres*, *supra* note 277, ¶¶ 9.4–9.5.

[279] *Id.* ¶ 9.7.

[280] *Id.* ¶ 9.8 (noting that "[w]hile recognizing the hardship that may be caused by water rationing . . . , the author has not provided sufficient information indicating that the supply of fresh water is inaccessible, insufficient or unsafe so as to produce a reasonably foreseeable threat of a health risk that would impair his right to enjoy a life with dignity or cause his unnatural or premature death").

[281] *Id.* ¶ 9.9.

And yet, despite these findings, arguably the most important potential implications of the case are present in the final paragraphs of the decision. First, the Committee made very strong references to the future situation in Kiribati and how it may affect similar applications in the future:

> [C]limate change-induced harm can occur through sudden-onset events and slow-onset processes. Reports indicate that sudden-onset events are discrete occurrences that have an immediate and obvious impact over a period of hours or days, while slow-onset effects may have a gradual, adverse impact on livelihoods and resources over a period of months to years. Both sudden-onset events (such as intense storms and flooding) and slow-onset processes (such as sea level rise, salinization, and land degradation) can propel cross-border movement of individuals seeking protection from climate change-related harm. The Committee is of the view that without robust national and international efforts, the effects of climate change in receiving [S]tates may expose individuals to a violation of their rights under articles 6 or 7 of the Covenant, thereby triggering the *non-refoulement* obligations of sending [S]tates. Furthermore, given that the risk of an entire country becoming submerged under water is such an extreme risk, the conditions of life in such a country may become incompatible with the right to life with dignity before the risk is realized.[282]

This finding clearly suggests that the Committee left the door open to further developments on the right to life in the context of climate change.

Second, the Committee's concluding paragraphs also addressed a very important aspect of states' responsibility to act on climate change, namely, by taking adequate adaptation measures:

> In the present case, the Committee accepts the author's claim that sea level rise is likely to render the Republic of Kiribati uninhabitable. However, it notes that the timeframe of 10 to 15 years, as suggested by the author, could allow for intervening acts by the Republic of Kiribati, with the assistance of the international community, to take affirmative measures to protect and, where necessary, relocate its population. The Committee notes that the State party's authorities thoroughly examined this issue and found that the Republic of Kiribati was taking adaptive measures to reduce existing vulnerabilities and build resilience to climate change-related harms. Based on the information made available to it, the Committee is not in a position to conclude that the assessment of the domestic authorities that the measures by taken by the Republic of Kiribati would suffice to protect the author's right

[282] *Id.* ¶ 9.11.

> to life under article 6 of the Covenant was clearly arbitrary or erroneous in this regard, or amounted to a denial of justice.[283]

This conclusion explicitly points out the fact that the lack of national or international climate change *adaptation* measures–as opposed to *mitigation* measures that were at issue in other cases discussed above–may indeed constitute violation of the right to life under Article 6 of the ICCPR. This finding is consistent with the existing case law of both the Committee and the regional human rights courts, emphasizing the positive obligations of states to take active precautionary measures to protect the human lives in the context of environmental hazards.[284] However, this finding does not eliminate the problematic aspect of the Committee's conclusion–that the state can take precautionary measures that will only postpone, and for very short period of time, the manifestation of such environmental hazards at its worst. The question, therefore, is what constitutes the threshold–the tipping point–that should prompt the states to take drastic measures, such as the evacuation of the entire country's population, to ensure that the right to life is properly secured? In the words of the Committee member Duncan Laki Muhumuza, who submitted an individual opinion, "[i]t would indeed be counterintuitive to the protection of life, to wait for deaths to be very frequent and considerable, in order to consider the threshold of risk as met."[285]

III. CONCLUDING REMARKS

The article leads to several important points of consideration with regard to the use of human rights law in climate change litigation and the viability of such claims.

First, while theoretically multiple human rights can be invoked in climate change litigation, in practice, only three categories of rights–namely, the rights to life, privacy, and health–have so far been invoked

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[283] *Id.* ¶ 9.12.

[284] *See* discussion *supra* Part I.C.i.

[285] HRC Views on *Teitiota v. New Zealand, supra* note 264, ¶ 5 (Muhumuza, J., dissenting). *See also id.* ¶ 6 ("[W]hile it is laudable that Kiribati is taking adaptive measures to reduce the existing vulnerabilities and address the evils of climate change, it is clear that the situation of life continues to be inconsistent with the standards of dignity for the author, as required under the Covenant. The fact that this is a reality for many others in the country, does not make it any more dignified for the persons living in such conditions. New Zealand's action is more like forcing a drowning person back into a sinking vessel, with the 'justification' that after all there are other voyagers on board. Even as Kiribati does what it takes to address the conditions; for as long as they remain dire, the life and dignity of persons remains at risk.").

systematically. As seen from the discussion in Part II, the use of these three categories of rights is fully justified in light of the developments at both international and regional levels, with courts and treaty bodies continuously moving towards greater recognition of the fact that failure to address environmental degradation violates human rights law. Although this does not automatically render any climate case where plaintiffs invoke these rights successful, it indicates that invoking such rights is a viable strategy.

Second, the viability of the human rights claims in climate change litigation is corroborated by the existing body of already decided cases, even though their overall number is still very small and almost all of them had different outcomes in terms of courts' and treaty bodies' interpretation of the applicability of human rights law. *Urgenda* resulted in a resounding victory. The Irish case also resulted in a victory, which excluded the applicability of human rights law from its success, but not from the consideration. The UN Human Rights Committee in *Teitiota* clearly left the door open for further developments. For their part, cases with a less successful outcome reveal that the defendants have no new arguments to offer; they employ the very same drop-in-the-ocean and the alleged lack of individual impact and concern (standing) arguments, refuted by courts in both non-human rights law-based climate cases[286] and the successful human rights law-based cases discussed in this article. The fact that some courts are still persuaded by such arguments reveals not the merit of such arguments, but rather the fact that courts have different understandings of the magnitude of anthropogenic climate change, its drivers, impacts, and socio-legal implications, including the judiciary's role and the applicability of the legal tools that plaintiffs invoke–in this case, human rights law.[287] This explains the radical difference in approaches to, for

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[286] *See generally* Varvastian, *supra* note 143. *See also* Gloucester Resources Limited v. Minister for Planning, [2019] NSWLEC 7, ¶ 699 (dismissing the appeal concerning the denial of the company's application to construct an open cut coal mine in New South Wales, and stressing that "the GHG emissions of the coal mine and its coal product will increase global total concentrations of GHGs at a time when what is now urgently needed, in order to meet generally agreed climate targets, is a rapid and deep decrease in GHG emissions"); Wildearth Guardians v. U.S. Bureau of Land Mgmt., 457 F. Supp. 3d 880 (D. Mont. 2020) (finding that the agency failed to consider the cumulative impacts of GHG emissions from individual projects on climate change when issuing oil and gas leases in Montana, and vacating these leases).

[287] *See* Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT'L L. 679, 681–82 (2020). *See also* Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations,* 9 TRANSNAT'L ENV'T L. 77, 97 (2020) (suggesting that national courts in the Global South may be more sympathetic to climate

example, standing. Of course, to a certain extent such a divergence can be ascribed to the existing differences between legal systems across national jurisdictions, especially the procedural aspects that can limit access to justice–for example, different approaches to *actio popularis*.[288] But even such differences can hardly explain the critically diverging interpretations of who can be the proper human rights holder.

At this point, therefore, making any concrete assumptions on whether human rights law may become a routinely successful pathway for future climate claims would be rather speculative. However, the judicial interpretation in virtually all these cases, including those that were dismissed, strongly suggests that the use of human rights law in such claims has merit. This is probably due at least in part to Urgenda's unprecedented success. After all, *Urgenda* has already produced a powerful international effect, becoming a point of reference for courts not only in the abovementioned cases in Europe, but also those in common law jurisdictions, including the US[289] and New Zealand.[290] As seen from the decision of the Norwegian courts in *Greenpeace Nordic*, being a point of reference may sometimes not be enough, yet that should not be discouraging.

The rapidly expanding climate change litigation based on human rights law is inevitably making its way into international and regional courts and treaty bodies, with plaintiffs increasingly invoking a broader spectrum of rights and human rights law mechanisms. At the time of writing, a considerable number of such cases are pending before international and regional courts and treaty bodies as well as before national courts.[291] The former include two cases that were filed with the

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plaintiffs bringing forward human rights claims, given both the higher vulnerability of local populations to the impacts of climate change and more limited adaptation capabilities).

[288] *Compare* discussion *supra* Part II.A.ii *with supra* Part II.A.iv (discussing different interpretations of the Dutch and Irish Supreme Courts in *Urgenda* and *Friends of the Irish Environment* respectively with regard to NGOs' human rights claims).

[289] *See* Juliana v. United States, 217 F. Supp. 3d 1224, 1269 (D. Or. 2016).

[290] *See Thomson v. Minister for Climate Change Issues* [2017] NZHC at [127–132] (N.Z.).

[291] These include the case *Klimaatzaak v. Kingdom of Belgium*, which similarly to the discussed cases in Europe concerns the alleged violation of Articles 2 and 8 of the ECHR, stemming from lack of governmental policy ambition on GHG emissions reduction, and is currently pending before Belgian national courts; the petition of Torres Strait islanders to the UN Human Rights Committee alleging violations of Article 6 as well as Articles 17 (the right to be free from arbitrary interference with privacy, family and home) and 27 (the right to culture) of the ICCPR stemming from Australia's inaction on climate change. *See* Sacchi v. Argentina, *pet. filed* (Sept. 23, 2019) (filed by a group of children to the UN Committee on the Rights of the Child against Argentina, Brazil, France, Germany and Turkey, alleging violation of their rights under the UN Convention on the

ECtHR in the fall of 2020: the abovementioned petition of the plaintiffs in the *KlimaSeniorinnen* case[292] and the unprecedented complaint brought by a group of Portuguese children against thirty-three European states, alleging that insufficient action on climate change violated their rights to life and to respect for private life under Articles 2 and 8 of the ECHR, as well as the prohibition of discrimination under Article 14.[293] The latter is the very first climate case filed with the ECtHR. Notably, the plaintiffs filed it directly with the regional court, arguing that the exhaustion of domestic remedies admissibility requirement should be waived given the specific nature of this case.[294] In late November, the ECtHR communicated the case to defendant countries, asking them to respond to the complaint.[295]

This development is highly interesting. The ECtHR normally considers only those complaints that were previously brought before national courts, as part of the exhaustion of domestic remedies admissibility criterion under Article 35(1) of the ECHR. In this case, however, the plaintiffs filed their complaint directly to the ECtHR without going through the typical route, that is, through Portuguese national courts first, similar to "the People's climate case" against the EU. The ECtHR's apparent unwillingness to immediately dismiss the case as inadmissible

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Rights of the Child by making insufficient GHG emissions reduction and failing to encourage the world's biggest emitters to curb such emissions); *see also* Corte Superior de Justicia de Lima [Superior Court of Justice of Lima] Dec. 10, 2019 Álvarez v. Peru, (Peru) (case alleging that the government has taken insufficient action to address climate change by failing to stop deforestation in the Amazon rainforest, thus violating their rights to life, water, health and healthy environment under various international and regional human rights protection mechanisms, including the Universal Declaration of Human Rights, the ICCPR and the IPESCR, and the American Convention on Human Rights and its Additional Protocol); *Rights of Indigenous in Addressing Climate-Forced Displacement,* UN Special Rapporteurs *complaint submitted* (Jan. 15, 2020) (alleging that the U.S. government has violated their human rights in failing to address climate displacement).

[292] Klimaseniorinnen v. Switzerland, *complaint filed* (Nov. 26, 2020), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201126_No.-A-29922017_application.pdf [https://perma.cc/3K6S-CM4C].

[293] Agostinho v. Portugal, App. No. 39371/20, ¶ 13 (Nov. 2020), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20200902_12109_complaint.pdf [https://perma.cc/PLT7-NATC].

[294] *Id.* ¶¶ 35–40.

[295] Agostinho v. Portugal, App. No. 39371/20, *Purpose of the Case & Questions* (Nov. 26, 2020), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2020/20201130_12109_na-1.pdf [https://perma.cc/2QS6-ZEG7].

suggests that the case has the potential to proceed on the merits. This is significant in itself, as only a small percentage of complaints to the ECtHR get to this stage.[296] Furthermore, the ECtHR also announced that it will deal with the case as a matter of priority according to Article 41 of the Rules of the Court.[297] Finally, it is noteworthy that in its communication, the ECtHR went beyond the complaint by requesting the defendant countries also provide information on the potential violations of the right not to be subjected to torture or to inhuman or degrading treatment under Article 3, and of the right to property under Article 1 of Protocol No. 1 of the ECHR.[298] While at the time of writing it is impossible to predict the outcome of this case, the abovementioned development is yet another clear signal, this time from a regional human rights court, of the advent of human rights law in climate change litigation and of the courts' and treaty bodies' ever-increasing scrutiny of states' human rights obligations with regard to climate change.

The courts' and treaty bodies' assessment of these and other such cases will undoubtedly contribute to defining the future trajectory of this type of climate change litigation and clarifying the scope of its application. What seems clear though is that the momentum produced by the existing cases will help boost the chances of new cases by giving courts and treaty bodies a more robust platform for substantial evaluation of such cases. The plaintiffs no longer have to resort to litigation merely to raise awareness about the impacts of climate change on human rights, as was the case with the Inuit petition in mid-2000s[299]–they have already proven that they can successfully challenge the system, and win.

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[296] *See Statistics 2019,* ECHR, https://www.echr.coe.int/Documents/Stats_annual_2019_ENG.pdf [https://perma.cc/Q55P-DADT] (last visited Feb. 3, 2021).

[297] *Rules of Court*, ECtHR, Rule 41 (Jan. 1, 2020), https://www.echr.coe.int/documents/rules_court_eng.pdf [https://perma.cc/A3BB-YE8W] ("In determining the order in which cases are to be dealt with, the Court shall have regard to the importance and urgency of the issues raised on the basis of criteria fixed by it. The Chamber, or its President, may, however, derogate from these criteria so as to give priority to a particular application.").

[298] Agostinho v. Portugal, App. No. 39371/20, at 4.

[299] *See* Jolene Lin, *Climate Change and the Courts,* 32 L. STUD. 35, 53–54 (2012).