paper

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Human Rights and Climate Change: Are States Violating the Right to Life by Not Cutting Emissions?

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Abstract

A new wave of climate change-related cases in the international and national courts involves citizens urging states to take more action on climate change. Violations of fundamental human rights such as the right to life set out in human rights treaties and legislation feature in the claims. This has led to unprecedented legal obligations on states to mitigate climate change, which might include bringing domestic legal commitments to cuts in emissions in line with those set out in international agreements such as the Paris Agreement. This is seen as a major step forward in climate litigation and in the fight against climate change. The success of some cases is now leading to a snowball effect of similar cases in which the right to life and climate action are inextricably linked. This suggests not only a rights turn in climate change litigation, but also a greening of existing human rights law. The appearance of new cases and their success demonstrate an increased receptivity to this framing in both the international and the domestic courts. This paper examines this new phenomenon and analyses the implications for future international human rights law and legal precedent.

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List of abbreviations

CJEU – Court of Justice of the European Union

ECJ – European Court of Justice

ECHR – Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention on Human Rights

ECtHR – European Court of Human Rights

EU – European Union

ICCPR – International Covenant on Civil and Political Rights

ICESR – International Covenant on Economic and Social Rights

NGO – Non-governmental organization

IPCC – Intergovernmental Panel on Climate Change

UN – United Nations

UNCRC – United Nations Committee on the Rights of the Child

UNHCR – United Nation High Commissioner for Refugees

UNFCCC – United Nation Framework Convention on Climate Change

OHCHR – Office of the High Commissioner for Human Rights (United Nations)

UNHRC – United Nations Human Rights Committee

Introduction

> *Environmental degradation, climate change and non-sustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life.*[1]

Human rights and climate change are inseparable. The consequences of climate change constitute a foreseeable threat to life as we know it, but the effects are also immediate, hugely dangerous and global. Nonetheless, there has been widespread political disagreement on accountability for climate change and its far-reaching consequences. The United Nations Conference on the Human Environment in 1972 agreed that the effects of environmental degradation and climate change would have detrimental ramifications for human ability to enjoy the right to life.[2] Yet, almost 50 years later, the emissions of most states are still rising, climate-related hazards are increasing, and the world is heating up even faster than expected.[3]

The ineffectiveness of states' actions on climate change, as well as states' inaction on climate change have led to the rise of a new global phenomenon, whereby citizens are adopting a rights-based approach to persuading governments that they have a duty to act on climate change in accordance with their international contractual obligations. The argument simply put is that when states sign international agreements that commit them to reducing greenhouse gas emissions and other drivers of climate change, they should be expected to adhere to their own promises and to take action to reduce these life-threatening emissions.

This trend is known as climate litigation and is sometimes characterized as a global 'rights turn'. In an increasing number of cases, citizens are relying on human rights claims and using judicial forums to question whether states are accountable for the consequences of climate change. Most of the applicants argue that by being aware of the consequences of climate change while still contributing to an intensification of the world's emissions and other triggers of global warming, states are responsible for both creating and prolonging this threat to the lives of their citizens. This puts fundamental human rights at the centre of this growing trend and questions of the international obligations of states in a wider context. The increased application of rights claims coupled with courts' growing receptiveness to this legal framing of human rights and states' climate change obligations means that there is now a perceived overlap

[1] United Nations Human Rights Committee (UNHRC), CCPRD/C/GC/36, 'General Comment No. 36 (2018) on article 6 of the ICCPR on the right to life', §65.
[2] Declaration of the United Nations Conference on the Human Environment, 17 June 1972, § 1 (preamble).
[3] See e.g. United Nations Office of the High Commissioner for Human Rights (OHCHR), A/74/161, 'Safe Climate: a report of the Special Rapporteur on Human Rights and the Environment' (2019), 14 at: https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf; and United Nations Environment Program (UNEP) *Emissions Gap Report* (Nairobi 2019) at: https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y

in the courts between human rights and environmental protections.[4] This has been described as a 'greening' of human rights, referring to how already universal human rights and legal frameworks around the world are in some ways being expanded and codified to include human relations to the environment and the consequences of climate change.[5]

In 2019, ground-breaking climate litigation in the Netherlands caused excitement among climate change and human rights activists and practitioners around the world. The *Urgenda* case proved to be a path-breaking example of a rights-based approach taken by an NGO. It resulted in the courts ordering the government of the Netherlands to reduce greenhouse gas emissions because climate change constitutes a threat to life for the citizens of the Netherlands. Since the decision of the Supreme Court was based on complying with international human rights treaties and conventions, the ruling has further strengthened the global rights-turn and the greening of human rights. This has created a precedent that other domestic, regional and international courts now consider in their judgements on climate change-related cases.

While the phenomenon of climate litigation has existed in some form for 20 years, earlier efforts were often unsuccessful at convincing the courts that a legally relevant failure of a state's climate change policies was connected to any rights of its citizens. Many of these new cases base much of their argumentation on the contractual obligations arising from the human rights provisions and international treaties on climate change, such as the 2015 Paris Agreement, that states have signed and therefore promised to adhere to. The success of this human rights framing, together with the receptivity of the courts to connecting human rights and states' climate action obligations, mean that there is a legally provable connection between human rights, environmental protection and state obligations. It also means that the courts and judiciary have had to adapt to relying on climate science in their rulings. Climate litigation has become an important part of climate action and will probably grow in significance as an effective tool in the future.

This paper explains the rise and spread the above-mentioned phenomenon. First, the link between human rights and climate change is discussed, and the right to life as an absolute, fundamental and universal human right is analysed alongside the legal obligations that arise under various conventions, courts and agreements. Next, the effects of the ground-breaking *Urgenda* case are outlined and how global climate litigation has multiplied in recent years. There has already been extensive research on past climate litigation. This paper discusses the current use and

[4] See e.g. Stephen J. Turner, 'Introduction. A brief history of environmental rights and the development of standards' in S. J. Turner et al. (eds) *Environmental Rights: The Development of Standards* (Oxford University Press, 2019) 1; and Sanja Bogojević and Rosemary Rayfuse (eds) *Environmental Rights in Europe and Beyond* (Hart Publishing Ltd, 2018).

[5] Sanja Bogojević, 'Human rights of minors and future generations: Global trend and EU environmental law particularities', *Review of European Comparative International Environmental Law* 1, vol. 29, no. 2 (2020), 193

institutionalization of this phenomenon and looks forward to reflect on the future of climate change-related litigation based on new precedents. Much of this paper therefore focuses on the implications of recent cases and their potential consequences. The paper concludes by contemplating what is needed for climate litigation to move forward and establish concrete legal precedents.

The inextricable link between human rights and climate change

International human rights constitute a globally acknowledged framework of rights that states have agreed on and accepted as basic rights inherent to human nature. These rights are protected in domestic law, the courts and constitutions, as well as by regional and international declarations, agreements and treaties. Most rights are protected through the United Nations (UN) system and stem from the Universal Declaration of Human Rights adopted by the General Assembly in 1948.[6] Together with the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESR),[7] they constitute the International Bill of Human Rights. Most human rights are based on these covenants. International human rights law has binding legal effects on the parties to these various treaties, agreements and instruments on human rights. The so-called global greening of human rights relies on the fact that these already globally acknowledged existing human rights can in themselves be expanded to include a protection against climate change.[8] This is fairly new practice that is rooted in the difficulty of creating a whole new framework of environmental rights that every state can agree on, which has proved virtually impossible over recent decades.

There is now considerable scientific evidence that the consequences of climate change constitute a direct threat to human life. For several decades, however, there was no legal connection between the right to life protected by a state and the threat that climate change poses to that right. This was in part due to the fact that states have long been resistant to creating any legal responsibilities on parties when drafting new treaties, mostly because of concern over what those obligations would entail. In the case of climate change, it has also been due to the fact that in most cases breaches of human rights have political, economic, and/or diplomatic consequences, which, in the light of the differentiated responsibilities of states for emissions, had been regarded as resulting in unfair or uneven responsibilities by some states for the activities of others. This is mostly linked to the long history of uneven emissions by states. These

[6] Universal Declaration of Human Rights, adopted 10 December 1948, UN General Assembly Res. 217 A(III)
[7] International Covenant on Civil and Political Rights (ICCPR), adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171; and International Covenant on Economic, Social and Cultural Rights (ICESR), adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3
[8] Karrie Wolfe, 'Greening the International Human Rights Sphere? Environmental Rights and the Draft Declaration of Principles on Human Rights and the Environment', in *Appeal: Review of Current Law and Law Reform*, vol. 9. (2003) 48

difficulties led parties to international climate agreements to depart from an aspiration to internationally regulate and justly distribute substantive 'top down' obligations, focused on attempts to build more on self-commitments, together with increased regional and local will to act.[9]

The Paris Agreement of 2015 essentially connects the climate threat to human rights. The UN Framework Convention on Climate Change (UNFCCC) is a universal treaty.[10] Together, the Paris Agreement and the UNFCCC are the core elements of the climate change governance framework.[11] The Paris Agreement aims to keep global temperature rise well within 2 degrees Celsius above preindustrial levels, with efforts to halt it at 1.5 degrees. In addition: 'Acknowledging that climate change is a common concern of humankind, parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights'.[12] This means that each state must make nationally determined contributions that 'reflect its highest possible ambition…' but also 'its common but differentiated responsibilities and respective capabilities'.[13] However, there are questions over whether the conclusion of the treaty, which is binding under international law, provides sufficient assurances in terms of standards of climate change mitigation or whether the adaption agreed on will ever be implemented, monitored or enforced. This is linked to its non-binding character and the discretionary formulation of some of its provisions. There also seems to be a lack of political commitment in respect of its implementation and enforcement.[14]

Science, however, has established indisputable facts. Many of the consequences of climate change present both direct and indirect threats to human life. Among the dire costs humanity is currently facing are: changes to natural eco-systems; increased prevalence and severity of drought, flooding, storms and wild fires; rising sea levels; increases in air pollution; dwindling freshwater supplies; and the spread of dangerous diseases and famine.[15] The UN special rapporteur on human rights and the environment has stated that air pollution causes the premature deaths of 7 million people each year, and environmental hazards around a further 8 million a year.[16] Some scientists put the expected number of deaths linked to climate change at up to 150 million if the Earth reaches 2°C of heating above preindustrial levels this century. We

[9] Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?', in *Transnational Environmental Law* 2020, vol. 9. no. 1. (Cambridge University 2020) 9, at https://doi.org/10.1017/S2047102519000396

[10] Except for the United States which is planning to rejoin under the new presidential administration, and some states either torn by conflict or part of OPEC, which have not ratified the agreement (Yemen, South Sudan, Eritrea, Libya, Iran, Iraq and Turkey). On the status of ratification see: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en

[11] Wegener (note 9) abstract

[12] United Nations Framework Convention on Climate Change (UNFCCC), Decision 1/CP.21, Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1.

[13] ibid., Article 4 (2) & (3)

[14] Wegener (no. 9) 18

[15] The Center for International Environmental Law, 'Climate Change & Human Rights: a primer' (23 May 2011), at: http://www.ciel.org/Publications/CC_HRE_23May11.pdf

[16] OHCHR press release, 'Air pollution: The silent killer that claims 7 million lives each year', Geneva, 4 March 2019, at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24248&LangID=E

are currently moving towards 3–4°C of heating.[17] It is clear that climate change is threatening some of our most basic human rights as they are codified in international law: but what exactly are the obligations that arise for states, and why?

Understanding international law: the right to life as a fundamental and absolute right

Some rights are fundamental. They are often universal, meaning that all states have protected these rights in some way either domestically and/or through international human rights mechanisms.[18] Some rights are also absolute, which means that they cannot be derogated from in any way. The right to life is protected almost universally through UN conventions and in domestic legal systems.[19] It is a fundamental, absolute and universal right from which all other rights stem and no derogation can be made. However, there is still a discussion on what precisely constitutes a threat to life, and the exact obligations that arise under the obligation to protect this right. Even if the international protection of this right is absolute, threats to or even violations of the right to life undoubtedly occur every day. States have obligations for which they may be held accountable for breaching. These can be divided into negative and positive obligations. Negative obligations are a duty to refrain from an action that would hinder the enjoyment of a right. Positive obligations, on the other hand, contain a responsibility on the state to the take the necessary measures to safeguard and ensure that the right can be enjoyed fully.[20]

What then are the obligations on states with regard to fairly evident and foreseeable threats such as the consequences of climate change? According to the UN Human Rights Committee, the positive obligations on states parties to respect and ensure the right to life extend: 'to reasonably foreseeable and life-threatening situations that can result in the loss of life', as well as threats that have not yet actually resulted in loss of life.[21] Furthermore, states should take appropriate measures to address the general conditions in society that may eventually give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity, *including* degradation of the environment. This is said to include the need for contingency plans regarding threats to life such as natural and human-induced disasters, as well as measures taken to protect the environment against harm,

[17] Umair Ifran, 'A major new climate report slams the door to wishful thinking' *Vox media*, 5 October 2018, at: https://www.vox.com/2018/10/5/17934174/climate-change-global-warming-un-ipcc-report-1-5-degrees

[18] These are, for example, the right self-determination, the right to liberty, the right to privacy, the right to due process of law and the rights to freedom from torture and slavery. These rights have a high degree of protection from infringement.

[19] The right to life is protected through the Universal Declaration on Human Rights, article 3, and the International Covenant on Civil and Political Rights (ICCPR), under article 6, which has been almost universally ratified. The rights to life and health are also protected by the Convention on the Rights of the Child, which has been universally ratified with the exception of the USA. Many states have incorporated it into domestic law.

[20] UNHRC (note 1) §70

[21] UNHRC (note 1) §7

pollution and climate change caused by public and private sector actors.[22]

These provisions are fairly extensive, but they are not legally binding. Instead, they are agreed on the basis that states *should* act and *consider their actions* in the light of agreed protections of rights. Even though the right to life is universally accepted, states will only face moral, political or diplomatic consequences if they do not follow through on their obligations to protect it.[23] Furthermore, the obligations placed on a state cannot impose an impossible or unreasonable burden, and must be conform with other priorities and resources. Finally, an increased risk of climate crisis is due to the emissions of all states. It has long been regarded as something that cannot be attributed to a single state.

Many states are also bound by regional human rights mechanisms such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[24] the Inter-American Court on Human Rights and the African Commission on Human and Peoples' Rights. These all contain more rigid and specific protections of, as well as more comprehensive legal obligations on states to protect the right to life. The European Court of Human Rights (ECtHR), which oversees compliance with the ECHR, goes further than the UN conventions by concluding that the right to life is not limited to individuals but extends to society and the population as a whole. The obligation to protect the right to life also means incorporating this protection into domestic law, as well as taking preventive operational measures.[25] If it is clear that there is a real and imminent risk to people's lives or welfare, and the state is aware of that risk, there is no margin for discretion of states. While the rights in question are not permitted to result in an impossible or disproportionate burden being imposed on the state, these provisions do oblige states to take suitable measures to avert the imminent hazard as far as is reasonably possible.[26] Furthermore, national law must offer an effective legal remedy against a

[22] UNHRC (note 1) §§26, 62

[23] Some conventions provide for legal consequences through the International Court of Justice (ICJ). However, in most cases it is fairly rare for cases to make it to the court. Some conventions have an individual complaints mechanism, which gives individuals the right to proceed judicially against their respective states to the committees and/or to the ICJ. However, this is only possible if that state has willingly accepted and acceded to the relevant protocol or article.

[24] The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and its European Court of Human Rights (ECtHR) are part of a completely different legal system to the European Union. The European Convention and its Court are part of the Council of Europe, which has 47 member states including all the EU member states, the UK, Turkey and Russia. The European Court of Justice (ECJ) oversees compliance with EU law, while the ECtHR oversees state compliance with the convention. The ECtHR hears applications that a contracting state has breached one or more of the human rights enumerated in the ECHR or its optional protocols. The ECHR is the main human rights mechanism in Europe and is often seen as one of the most comprehensive international human rights mechanisms in the world. All the states that have ratified the jurisdiction of the court are bound by the precedent of ECtHR case law. The EU Charter of Fundamental Rights is in many ways based on the ECHR.

[25] ECtHR/Council of Europe, 'Guide on Article 2 of the European Convention on Human Rights: Right to life', 31 August 2020, 6

[26] The ECtHR is however also bound by certain parameters, such as striking a fair balance and assessing proportionality, and assessing consensus. Where states differ in their opinion, they enjoy a wider margin of discretion and it is most often up to the states themselves to decide on the issue at hand.

violation or imminent violation of those rights which are safeguarded in the ECHR.[27] This means that national courts must have the ability to decide whether the state has lived up to its obligations regarding the rights in the convention, as was the case in *Urgenda v. Netherlands* (see below).

In sum, under ECtHR case law, the extensive requisites of the right to life oblige the state to take appropriate measures if there is a real and immediate risk to life and the state in question is aware of that risk. The risk can be attributed to the population as a whole, and the protection also extends to risks that may only materialize in the long term.[28] The ECtHR has found that the right also includes obligations on a state to take appropriate steps to safeguard the lives of those within its jurisdiction, and applies in the context of any activity, either public or private, in which the right to life may be at stake.[29] As the most severe impacts of climate change lie in the future, this means that the right to life should extend to include protection by the state against forthcoming threats and consequences. However, this connection has proved hard to establish, and has not yet been decided as such by the ECtHR, since no case of that precise nature with those general consequences of climate impact and state accountability has been brought before the court.[30]

Climate change is a creeping, slow-onset crisis created by the acts of many with large consequences that are felt globally.[31] This has led to many difficulties attributing accountability and responsibility in international agreements and national climate change policies. Climate change litigation taking a human rights-based approach emerged from this responsibility deficit.[32] The conceptualization and application of human rights obligations to climate change-related cases has steadily increased worldwide. However, the question arises whether a conclusion of state negligence or even violation of the right to life can be drawn from a looming but potentially devastating crisis, where specific occurrences of rights infringements are not central, but it is rather the level of action or omission by the state that should be assessed. In the Urgenda case, the answer proved to be in the affirmative.

[27] Convention for the Protection of Human Rights and Fundamental Freedoms, European Convention on Human Rights, as amended, art. 13.
[28] As established by *Gorovenky and Bugara v. Ukraine,* ECtHR, 12 January 2012, no. 36146/05, §32; and *Tagayeva et al. v. Russia,* ECtHR. 13 April 2017, no. 26562/07, §482
[29] *Centre for legal Resources on behalf of Valentin Câmpeanu v. Romania*, ECtHR 2 October 2008, no. 47848/08, §130
[30] There is however a petition by six Portuguese youths on this issue that has been presented to the court (see below)
[31] Arjen Boin, Magnus Ekengren and Mark Rhinard, 'Hiding in Plain Sight: Conceptualizing the Creeping Crisis', in *Risk, Hazards & Crisis in Public Policy*, vol. 11, no. 2. (2020), 118, at: https://doi.org/10.1002/rhc3.12193
[32] Kristina Forsbacka, *See You in Court* (European Liberal Forum asbl., 2020) ix

The *Urgenda* case: a breakthrough in climate litigation

The case of the *Urgenda Foundation v. the Government of the Netherlands*[33] began in 2015 when the Urgenda Foundation, a non-governmental organization (NGO), and a group of 900 citizens sued the Dutch government in an effort to compel the state to reduce greenhouse gas emissions more aggressively. Although the case rested in some part on neglect of the duty of care under the Dutch civil code, the courts also considered United Nations and European Union (EU) climate agreements, as well as the ECtHR and its case law, and based much of its decision on established climate science which was considered a factual ground.[34]

The issue in the case was whether the Dutch state was obliged to reduce, by the end of 2020, the emission of greenhouse gases originating from Dutch soil by at least 25% compared to 1990 levels, and whether the courts could order the state to do so. Both the district court and the Court of Appeals ruled in the affirmative, the latter basing its argument on articles 2 and 8 of the ECHR. (Article 2 protects the right to life and article 8 stipulates the right to respect for private and family life.) The state argued that the courts had wrongly interpreted the obligations under the ECHR. It argued that states enjoy a margin of appreciation in the matter,[35] that the courts have no right to order political action and that there were no international legally binding obligations on the state to reduce its emissions.[36]

Such arguments made by states have in the past proved decisive, and it has been difficult to make the connection between climate impacts and international legal obligations on states. However, after taking into consideration the international community's consensus on the dangerous effects of climate change, and in the light of the state's previous statements on those dangers and the importance of reducing emissions, the court found the state's current action plan to be insufficient. What was crucial in the decision was that it connected duties that had already been established by the ECtHR, as described above, with new duties inherited by the signing of the Paris Agreement, reinforced by the UNFCCC and more recently confirmed in reports by the Intergovernmental Panel on Climate Change (IPCC). The court considered the science on the matter to be sufficiently clear to establish a known, real and imminent threat, and that there was a serious risk of the current generation of inhabitants of the Netherlands being confronted with loss of life, which the state has a duty to take reasonable measures to prevent.[37] The court

[33] Supreme Court of the Netherlands (*Urgenda v. Netherlands*), case 19/00135 (20 Dec. 2019) (Engl. transl.), Summary of the decision

[34] Environmental Law Alliance Worldwide (ELAW), 'Urgenda Foundation v. The State of the Netherlands' at: https://elaw.org/nl.urgenda.15 accessed 14 October 2020

[35] A legal term established in ECtHR case law which refers to the room for manoeuvre which the court gives national authorities in fulfilling their obligations under the convention

[36] Supreme Court of the Netherlands (note 34) §7.4.1–7.5.3.

[37] Chris Backes and Gerrit van der Veen, 'Urgenda: the Final Judgement of the Dutch Supreme Court', *Journal for European Environmental and Planning Law*, vol. 17, no. 3 (2020), 309, at: https://www.researchgate.net/deref/http%3A%2F%2Fdx.doi.org%2F10.1163%2F18760104-01703004

therefore ruled that the government must adopt a plan to reduce emissions by at least 25%, in line with the government's promises set out when it signed and ratified the Paris Agreement. This was considered more in line with meeting the requirements pursuant to articles 2 and 8 of the ECHR.

A key point of the *Urgenda* decision is that it was based on consensus. This is very important in the light of the effects it might have in the future. It establishes a European (and international) consensus on the urgency of climate change by adhering to the agreements, treaties and conventions on climate change which have, as noted above, been almost universally ratified. Establishing a consensus on the need for action to tackle climate change might not be difficult, since there are so many agreements, communications, political promises and treaties, as well as so much scientific evidence, that refer to the fact of its existence and effects. However, the legal importance is to establish a causal connectivity between the state in question and a violation or contractual obligation. In the *Urgenda* case, the court reasoned on the state's international contractual obligations:

> *The risk of dangerous climate change is global in nature: greenhouse gases are emitted not just from Dutch territory, but around the world. The consequences of those emissions are also experienced around the world. The Netherlands is a party to the UNFCCC. The objective of that convention is to keep the concentration of greenhouse gases in the atmosphere to a level at which disruption of the climate system through human action can be prevented. The UNFCCC is based on the premise that all states parties must take measures to prevent climate change, in accordance with their specific responsibilities and options. Each country is thus responsible for its own share. That means that a country cannot escape its own share of the responsibility to take measures by arguing that compared to the rest of the world, its own emissions are relatively limited in scope and that a reduction of its own emissions would have very little impact on a global scale. The state is therefore obliged to reduce greenhouse gas emissions from its territory in proportion to its share of the responsibility. The obligation of the state to do 'its part' is based on articles 2 and 8 of the ECHR, because there is a grave risk that dangerous climate change will occur that will endanger the lives and welfare of many people in the Netherlands.*[38]

The court continues:

> *While giving substance to the positive obligations imposed on the state pursuant to articles 2 and 8 of the ECHR, one must take into account broadly supported scientific insights and internationally accepted standards....All in all there is a great degree of consensus on the urgent necessity for Annex 1 countries to reduce greenhouse gas emissions by at least 25–40% in 2020. The consensus*

[38] Supreme Court of the Netherlands (note 34), summary of the decision

> *on this target must be taken into consideration when interpreting and applying articles 2 and 8 of the ECHR.*[39]

This adherence to international agreement on the climate and human rights has not been seen before. What is more, while issuing this judgement, the Dutch Supreme Court must have been aware of this fact. This is what makes the *Urgenda* decision unique in nature and historic in its ramifications.

The court deliberated extensively on the positive obligations of the state. While positive obligations are not always clear or specific, they can often be met in various ways through the discretion of the state. It is not for the court to consider the means for complying or fulfilling these obligations, but only whether the state's actions can be seen as proportionate in the present case. This is why the goal was set at 25% rather than 40%, which is the lower end of the range that the Paris Agreement, based on a 2007 IPCC report, recommends (25–40% reductions by 2020 for Annex 1 countries), and why it decided that the means of achieving those ends would be determined by the state. In this way, the court avoided arguments over the separation of powers. It cannot decide how the state complies with international agreements, but only test whether the state has lived up to its obligations.[40] The court ordered the least necessary action in order to fulfil its share of the responsibility to do its part. The court also noted, which is important in all cases concerning climate change, that postponement of reductions will only create greater risk of abrupt climate change occurring as the result of a tipping point being reached. [41]

Nonetheless, the victory has been celebrated with caution. There are several caveats that are important to mention. First, the Dutch legal system is monistic, which means that it effectively incorporates international law. This is in contrast to dualistic systems, which must transpose international law into domestic law, and test whether national law is in accordance with international law when applying national law. Thus, being monistic, the Dutch court must interpret the provisions of the ECHR to the same standards as the ECtHR would do, which means that even if there is no case law on similar issues, the Dutch courts could choose either to issue an advisory opinion or to rule as it would think is most in line with what the ECtHR would do.[42]

Second, there is no way of knowing whether the ECtHR would have ruled in the same way as the Dutch Supreme Court, and if case the case had gone against the Urgenda foundation, it would have appealed to the ECtHR. Third, there is some doubt over whether the case would have been dealt with by the ECtHR, since it could be seen as an *actio popularis*.[43] Fourth, the Dutch Supreme

[39] Supreme Court of the Netherlands (note 34), summary of the decision

[40] Ingrid Leijten, 'Human rights v. insufficient climate action: the Urgenda case', *Netherlands Quarterly of Human Rights* (NQHR), vol. 37, no. 2 (2019) 117

[41] Backes and van der Veen (note 38) 309

[42] In states that have adopted a monist system, national courts can directly apply international norms after a process of ratification. See e.g. James Crawford, *Principles of Public International Law*, 6th edn (Oxford University Press, 2003), 31–48

[43] *Actio popularis* is an action brought to a court by a member of the public in the interests of public order. Applicants need to prove a direct link or violation by the state of the ECHR and this responsibility can be difficult tp prove in regards to the climate. For further argument on this issue, see Leijten (note 41), 116.

Court could have requested an advisory opinion on the question of principle relating to the interpretation or application of the ECHR, but it stated that it considered the application of the ECHR sufficiently clear.[44] An advisory opinion has legal effect on all consensus and proportionality judgements in the national courts regarding the ECtHR's provisions. The possibility of an advisory opinion is fairly new and has not been used extensively. It is therefore difficult to predict whether the opinion would have been in line with that of the Dutch Supreme Court, or interpreted the ECHR as not including environmental protections or state obligations to reduce emissions. The latter would have been a big setback for climate litigation. However, shortly after the decision by the Supreme Court, the president of the ECtHR praised the decision and called it historic, which strongly implies that he considered the judgment to be not only correct, but in line with state obligations under the ECHR.[45]

The following sections highlight defining and guiding cases in the post-*Urgenda* sphere and consider the potential consequences. These cases demonstrate a continuous evolution in the norms and principles inherited from international human rights agreements. They take scientific insights and generally accepted standards into account and apply these to existing human rights provisions and responsibilities.

The global rise of climate litigation

This section addresses developments in climate change litigation since the historic *Urgenda* case. Recent research has found that climate change litigation is being replicated in other jurisdictions, and is regarded as an effective tool for strengthening action by governments.[46] The report identified climate action lawsuits against governments and corporations on six continents, and in eight regional or international jurisdictions.[47] While the phenomenon has existed in some form since at least the mid-2000s, especially in the United States, earlier efforts had often been unsuccessful at convincing courts of a legally relevant failure of state climate policies.[48] As cases expand more broadly around the globe, a more rigid turn to human rights-based arguments and remedies can be observed, and several recent and ongoing cases illustrate that the courts have become more receptive to the relevance of human rights when discussing state action in this context. The research carried out for this report identified similar patterns and even more explicit cross-references in many cases in different jurisdictions. A large number of cases are attempting to follow the same route as the *Urgenda* litigation, as well as

[44] Forsbacka (note 33), 41
[45] Linos-Alexandre Sicilianos, 'Solemn Hearing on the occasion of the opening of the judicial year' (Council of Europe: Strasbourg, 31 January 2020)
[46] Joana Setzer and Rebecca Byrnes, 'Global trends in climate change litigation: 2020 snapshot' (London: Grantham Research Institute on Climate Change and the Environment, and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, 2020)
[47] ibid. 5
[48] Wegener (note 10), 21

referencing the court's judgement.[49] In addition to *Urgenda* and the above-mentioned cases, petitioners have raised similar rights-based claims in courts in Austria,[50] Canada,[51] the United States,[52] South Africa[53] and the Philippines.[54] The 'greening' of human rights—or the expansion of human rights such as the right to life to include environmental safeguarding, instead of creating a right to the protection of the environment as a right in itself—has proved a productive strategy for climate change campaigners and activists. This has been shown, among other things, in the Pakistan Supreme Court's recent expansive interpretation of the right to life to include environmental protection, which submitted that climate change is a serious threat to basic human needs such as water, food and energy security, and therefore infringes on the right to life. Environmental protection was thus concluded by the court to be fundamental to sustaining a *natural life*.[55] In Australia, a group of eight islanders from the Torres Straits Islands has filed a petition with the UN Human Rights Committee under the ICCPR, first and foremost relying on their right to life, to challenge the Australian government's failure to adequately act on climate threats to life on the island. This places the question of the protection of the right to life at the level of an international body.[56]

In *Sacchi et al. v. Argentina et al.*, 16 children, including the Swedish climate activist, Greta Thunberg, brought a communication to the UN Committee on the Rights of the Child (UNCRC) under the Convention on the Rights of the Child in September 2019, alleging that some of the world's biggest greenhouse gas emitters were making insufficient cuts to curb carbon pollution, therefore harming the children's rights under the Convention.[57] They are asking the UNCRC to declare that the respondents (Argentina, Brazil, France, Germany and Turkey) are violating their right to life, health and culture and have failed to make the best

[49] For references to these cases, see Wegener (note 10). For an update on all current climate litigation cases, see the Climate Case Chart at https://www.climatcasechart.com

[50] Third Runway at Vienna International Airport case, Case No. W109 2000179-1/291E, Federal Administrative Court, Austria, (2 Feb. 2017), an unofficial English translation of the decision is available at: http://wordpress2.ei.columbia.edu/climate-change-litigation/files/non-us-case-documents/2017/20170317_W109-2000179-1291E_decision.pdf

[51] ENVironnement JEUnesse v. Canada, No 500-06. Available at http://climatecasechart.com/non-us-case/environnement-jeunesse-v-canadian-government/

[52] *Juliana v. United States*, No. 6:15-cv-01517, (D.Or., 10 Nov. 2016) (Aiken, J.), 46 ELR 20175

[53] *Earthlife Africa Johannesburg v. Minister for Environmental Affairs & Others*, Case No. 65662/16, Judgment of High Court of South Africa, Gauteng Division, Pretoria, South Africa, 8 March 2017, available at: http://cer.org.za/wp-content/uploads/2017/03/Judgment-Earthlife-Thabametsi-Final-06-03-2017.pdf

[54] Greenpeace, 'Petition Requesting for Investigation of the Responsibility of the Carbon Majors for Human Rights Violations or Threats of Violations resulting from the Impacts of Climate Change', 21 April 2016. The full archive of documents relating to the case can be found at: https://www.greenpeace.org/philippines/the-climate-change-human-rights-inquiry-archive/

[55] *Ashgar Leghari v. Federation of Pakistan*, Case No W.P. No 25501/2015. Emphasis added.

[56] Katharine Murphy, 'Australia asks UN to dismiss Torres Strait Islanders' claim climate change affects their human rights' *The Guardian*, 13 August 2020

[57] United Nations Committee on the Rights of the Child (CRC), 'Communication to the Committee on the rights of the Child' (*Sacchi et al. v. Argentina et al.*), 23 Sep. 2019

interests of children a primary consideration by perpetuating climate change, and to recommend actions by the respondents to address climate change mitigation and adaption.[58] The case is under consideration but faces significant hurdles.[59]

Another internationally significant human rights institution is the UN Human Rights Committee (UNHRC), which is under the ICCPR. In connection with climate-related applications for asylum by refugees in New Zealand, it stated in January 2020 that human rights such as the right to life might be being violated in the context of the adverse effects of climate change and the impact of disasters.[60] While the committee did not oppose New Zealand's decision not to grant refugee status in this particular case, it stated that, in future cases, it may be unlawful under the ICCPR for governments to send people at risk back to countries where the effects of climate change could exposes them to either life-threatening risks or a real risk of facing cruel, inhuman or degrading treatment.[61] The committee referred to the need for robust national and international efforts to avoid the exposure of individuals to violations of their rights due to the effects of climate change. It further concluded that there may be incompatibility with the right to life with dignity even before the harshest threats are realized or materialize.[62]

While the number of cases being filed has grown in recent years, a number of countries are yet to experience climate change-related litigation. Moreover, truly successful cases and comprehensive judgements such as *Urgenda v. the Netherlands* are still rare. In Ireland in July 2020, in a judgement on the case *Friends of the Irish Environment v. Ireland*, the Irish Supreme Court ordered the Irish government to take more aggressive action on climate change. The outcome of the case is just as important as the Urgenda case: it compels a state to commit more urgently to reducing dangerous greenhouse gases. However, the unanimous decision was based on Irish national statutory law rather than international human rights treaties or the right to life.[63] Nonetheless, the decision was based on scientific consensus on the need for developed countries to reduce greenhouse gases, relying first and foremost on a report published by the IPCC.[64] For these reasons,

[58] ibid; see also the children's website regarding their case, Children vs. Climate Crisis, at: https://childrenvsclimatecrisis.org/

[59] Most importantly, it has not exhausted the domestic courts first.

[60] United Nation High Commission for Refugees (UNHCR), 'UN Human Rights Committee decision on climate change is a wake-up call, according to UNHCR' (statement), Geneva, 24 January 2020, at: https://www.unhcr.org/news/briefing/2020/1/5e2ab8a e4/un-human-rights-committee-decision-climate-change-wake-up-call-according.html , the communication can be found at: http://docstore.ohchr.org/SelfServices/FilesHandler.a shx?enc=6QkG1d%2fPPRiCAqhKb7yhsjvfIjqiI84ZFd1 DNP1S9EKG9gxBGj9kie9DBbOoeH5N3hhnsj%2fmXy yUMRGqAMBUPEmGiVv1l5ueyf40YfsDuodp9yZLW4j ePTIgYoyjbRLV1mhxrLmEomP8%2bgyRbPvKRQ%3d %3d

[61] ibid.

[62] ibid.

[63] It is important to note that dualistic systems such as the Irish interpret their own statutory laws against ECtHR and CJEU precedent in order to establish legality. It is also crucial that both decisions were based on contractual obligations, rather than a violation per se of the right to life.

[64] Isabella Kaminski, 'Ireland forced to strengthen climate plan, in supreme court win for campaigners' *Climate Home News*, 31 July 2020, at: https://www.climatechangenews.com/2020/07/31/irel and-forced-strengthen-climate-plan-supreme-court-victory-campaigners/

while this is an important step in the right direction, the decision has not received as much attention as the *Urgenda* ruling.

The future looks brighter elsewhere in Europe. At the beginning of October 2020, the European Parliament voted in favour of a legally binding target for the EU to decrease its emissions to 60% of 1990 levels by 2030. This is more in line with the EU target of becoming climate neutral by 2050 and commitments made in the Paris Agreement. However, the decision requires unanimous support from all 27 EU member states.[65] According to some scholars, the trend for rights-driven litigation is also slowly emerging at the EU level.[66] The EU charter of fundamental rights has now codified a higher level of environmental protection as part of the EU's core fundamental freedoms and rights protection. Furthermore, if the ECtHR proves progressive in its interpretation that environmental protections fall under its jurisdiction, the EU is likely to be bound to follow. This originates in part from Article 52 (3) of the EU Charter, which stipulates that it grants the 'same meaning and scope' as rights protected under the ECHR and its jurisprudence. The Court of Justice of the European Union (CJEU), which hears cases under EU law, is heavily influenced by ECtHR case law.[67]

In May 2019, that is, before the *Urgenda* ruling, families across Europe, Kenya and Fiji had attempted to sue the EU to compel it to do more to tackle climate change. However, the CJEU ruled that the case was inadmissible, based on the argument that individuals do not have the right to challenge the EU's environmental plans.[68] The court further ruled that the families had no grounds for suing the EU because it had already committed to reduce emissions. However, in some contradictory remarks, the court also stated that every individual would be affected by climate change in some way. The plaintiffs are now seeking leave to appeal to the European Court of Justice (ECJ).[69]

On February 3rd, 2021, the Administrative Court of Paris issued a decision in the now famous case *Notre Affaire à Tous and Others v. France*, also called *the Case of the Century*, where it recognised that the government's inaction on climate change had caused ecological damage. The applicants had alleged that the French government's failure to take further action on climate change violated a statutory duty to act under both domestic and international law. Like other recent international cases, applicants pointed to obligations of the state to act on climate change to uphold the rights guaranteed under articles 2 and 8 of the ECHR, as well as obligations under international law, with focus on the

[65] Kate Abnett, 'EU's tussle over climate change ambition heats up after Parliament vote', Reuters, 7 October 2020, at: https://uk.reuters.com/article/us-climate-change-eu-target/european-parliament-backs-a-60-eu-emissions-cutting-target-for-2030-idUSKBN26S0ZB

[66] Bogojević (note 5)

[67] Bogojević (note 5), 195

[68] Case T-330/18 *Carvalho and Others v. Parliament and Council* [2019] CJEU. An online version of the order of the General Court can be found at: http://curia.europa.eu/juris/document/document.jsf;jsessionid=79D6FBC4A821F032E069B39EE271D9A3?text=&docid=214164&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=605329

[69] ibid.

provisions of the Paris Agreement.[70] The French state was found to be guilty of non-respect of its engagements aimed at combating global warming, and responsible for failing to fully meet its goals in reducing greenhouse gases. The judges held that the French state should be held liable for part of the ecological damages of the earth, if the state failed to meet its obligations to curb greenhouse gas emissions.[71] The case was brought by four environmental groups after a petition was signed by over 2,3 million people. While the ruling could be appealed to a higher instance, it has so far been hailed as historic, and it highlights the attention these climate related cases are now getting.[72]

While there has not yet been any specific climate change-related litigation at the ECtHR to test states' obligations to reduce climate change impacts in respect of the right to life, this could change in the near future. A group of six Portuguese youths aided by the Global Legal Action Network has filed a complaint with the ECtHR against 33 states under its jurisdiction,[73] alleging violation(s) of articles 2 and 8 of the ECHR.[74] The applicants claim that the states' contribution to the effects of climate change are a *current* impact on, and risk to, the lives and health of the applicants. Furthermore, on the basis of the projected trajectory of climate change, they are also a progressively *intensified threat* over the course of their lifetimes.[75] They further argue discrimination against children, in that any violation of their rights would potentially have a worse impact on their futures given that they will probably live longer than those in power who are currently maintaining the unsustainable status quo. Hearing the appeal is currently under consideration, but it faces many hurdles before it can be accepted and proceeded with at the ECtHR.[76] If it were to be accepted, it would be the biggest case in ECtHR history. If it ruled in favour of the applicants, the ECtHR would be encouraging all 47 domestic courts to make *Urgenda*-type orders.

[70] Information in English on the case can be found at: http://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-france/

[71] The press release administrated by the Administrative Court of Paris can be found at: http://paris.tribunal-administratif.fr/Actualites-du-Tribunal/Communiques-de-presse/L-affaire-du-siecle

[72] Kim Willsher, "Court convicts French State for failure to adress climate crisis", *The Guardian*, 3 Feb 2021, at: https://www.theguardian.com/environment/2021/feb/03/court-convicts-french-state-for-failure-to-address-climate-crisis

[73] The respondents' statements can be found at Youth for Climate Justice, at: https://youth4climatejustice.org/assets/images/Application_form+annex_(with_redactions)_for_website.pdf

[74] The applicants argue that the right to life imposes an obligation on states 'to put in place a legislative and administrative framework designed to provide effective deterrence against threats to the right to life', and that whenever a state authorises dangerous activities, it must ensure through a system of rules and through sufficient control that the risk is reduced to a reasonable minimum, referencing ECtHR cases *Öneryildiz v. Turkey*; App no 48939/99, ECtHR GC 30 Nov 2004, 89§, and *Mucibabic v. Serbia*; App no 34661/07, ECtHR 12 July 2016, 126§.

[75] Emphasis added for clarification.

[76] The case might not be heard because of the obligation to take the case through the domestic courts before appealing to the ECtHR. Furthermore, the court needs to accept a connection between the applicants and the 33 respondents. If all the states under the ECtHR were to oppose the case, there might not be enough evidence to argue anything other than the existence of a wide margin for discretion. The court can only rule on issues where states have given it jurisdiction to do so. On the other hand, if the court were to deem the case inadmissible on any of these grounds, it will probably face a lot of criticism.

This is a compelling basis for pursuing climate change-related claims before the ECtHR. There have already been important successes in domestic law, national action plans and the national courts, laying some of the groundwork for the current claim. Against this background, the next section looks forward to reflect on future prospects and the future of climate change-related litigation.

Looking forward: significant impacts of increasingly successful climate litigation

A US database tracking climate change litigation contains the details of around 1700 current cases from around the world.[77] This number constitutes a huge breakthrough in the fight against climate change. A decade ago, litigation related to climate change beyond technical issues was more of a theoretical possibility than a feasible strategy. There were cases concerning climate change, but they either failed or concerned only minor issues with measurable consequences for only a few individuals. Climate-related litigation has since snowballed, and adjudication on liability in climate change matters has transcended the academic realm to become a transnational feature of contemporary practice across numerous jurisdictions.[78]

In addition to a growing number of courts being receptive to this line of argument, there are also underlying consequences of the use of international human rights law as a basis for persuasion. These are mainly based on the huge legal and normative effects it could produce. In cases such as the *Urgenda* case, which rely on international agreements, it is implicitly understood that every state that has signed or ratified these agreements has pledged to act in the same way. There is therefore enormous potential in using human rights-based arguments in a climate change litigation context, since it is likely to encourage similar cases in other jurisdictions.[79] This in itself facilitates the growing use of the same rights in other cases, since rights such as the right to life are universal. Moreover, human rights are particularly suitable as a basis for the development of transnational climate change jurisprudence, given the treaties' widespread adoption, as well as similarities in formulations of the rights on which they are based across different legal instruments, from human rights treaties to domestic, statutory or constitutional bills of rights, as well as regional or subnational constitutional provisions.[80]

However, as mentioned above, states are generally reluctant to put themselves under such obligations. For this reason, the Paris Agreement, for example, contains contractual obligations, but these are rarely tested under international law. One of the contributory factors to the uniqueness of the phenomenon of climate litigation is that is

[77] Climate Case Chart, updated monthly at: Climatcasechart.com
[78] Wegener (note 10)
[79] Jaqueline Peel and Hari M. Osofsky, 'A Rights Turn in Climate Change Litigation?', *Transnational Environmental Law*, vol. 7, no. 1 (Cambridge University Press, 2017), 40
[80] ibid., 40

has become available to informed citizens, small climate-focused NGOs and, in some cases, children. However, they are up against governments, corporations and sometimes even entire regions. While in earlier climate litigation cases, states have successfully counter-claimed or managed to escape responsibility, more and more states are being unsuccessful with the exact same lines of argument: something has changed. Applicants have arguably tapped into existing human rights mechanisms and used smart litigation and knowledge of the obligations and responsibilities contained in human rights and climate change-related treaties in their favour. The legal framework has always been there, but it seems that arguing responsibilities and contractual obligations under international law instead of violations by the state per se has made litigation more fruitful. States have also contributed to these trends themselves by becoming more climate action positive. Looking at the *Urgenda* case, the Dutch state agreed that more had to be done to tackle climate change and global warming, and that reductions had to be made, but did not agree on a timeline, which was necessary for the Urgenda foundation pledge. Both sides deemed it necessary to reduce emissions, but the court decided that it was essential to order the state to follow-up the commitments it made in the Paris Agreement. The agreement provides for a concrete timeline by which time reductions should have been made, and the Dutch state has pledged to meet this timeline by signing and ratifying the agreement. All the parties to the Paris Agreement have made the same commitment, but this has not yet been tested in court.

While a singular case in the Netherlands will perhaps not immediately affect the outcome of a different case in another jurisdiction on its own, it is the reasoning behind the case that is relevant. The arguments in *Urgenda*, as noted above, were based on well-established regional human rights mechanisms. The rights and obligations that the Dutch court found the Dutch state to be under are the *exact* same obligations that *all* European states are under. Furthermore, when basing its decision on scientific evidence on the dangerous effects of climate change, the court appealed to the IPCCC, the UNFCCC and the Paris Agreement, to which almost *all states* are parties.

While we cannot yet know the consequences of this new era of climate litigation, it is of crucial importance to highlight and determine what the consequences *might* be. This is especially true in the case of the EU and Europe more widely. The institutions are linked, which means that there will be an institutional ripple effect from each climate positive or negative treaty, case and agreement. The EU has been seeking for some time to carve out a role for itself as the global leader on climate action. This is partly because of its attempts to assume the role of a global soft power, but also because its own actions could motivate other major greenhouse gas emitters to issue similar pledges, thereby exporting climate change norms, standards and expertise from the EU.[81] While it is still unclear whether EU member states will provide, or even agree on, a comprehensive legal framework on greenhouse gas emissions, including sanctions, recent efforts point vaguely in this

[81] Bogojević (note 5), 195

direction. Putting these pieces of the puzzle together—increasingly effective climate litigation, EU policies on amplified goals for cutting emissions, more international treaties similar to the Paris Agreement and more alarming scientific evidence on the consequences of climate change— might put pressure on states to act faster. Thus, if they are based on international provisions, small cases starting in local courts can have institutional effects at the international level due to their inherently normative aspects and general claims.

Cases brought to international bodies such as United Nations committees for judgments for example, might not be legally binding but will still influence national and regional courts. Several national courts around the world are obliged to consider international treaties, conventions and the sources of international human rights law when considering domestic cases. In addition, they often canvass relevant foreign decisions. They are also becoming increasingly aware of the jurisprudence that other supreme courts are establishing, which means that momentum is likely to increase.[82] This means that a decision in the Netherlands can have an effect on the decisions made on similar legal issues in Canada.[83] Regional courts, such as the ECtHR and the African Commission on Human and Peoples' rights, must also consider international conventions and practices when issuing judgements. In some courts, international agreements can even be interpreted in contexts where a state is not a party to that treaty.[84] In this way, climate litigation—which has been ongoing for more than 20 years but is now adapting and developing at an even faster rate—can affect other courts and jurisdictions, and in turn other state's policies.

One of the contributory factors to this new wave is the constitutionalization of environmental protection on a global scale; that is, a recognition that the environment is a proper subject for protection in constitutional texts and the courts.[85] As discussed above, national apex and constitutional courts are showing a notable interest in both environmental rights and the 'greening' of existing human rights. It is worth noting that the climate actions that succeed in court (in so far as their pleas are upheld) tend to be claims that allow the court to apply its role as a balancing actor; that is, to apply or enforce laws that seem to have been overlooked by other branches of government. The role of the courts must avoid becoming too mixed up in the political sphere, or their rulings will not be upheld.[86] The courts cannot act above their standing, by for example specifying *how* states should decrease their emissions, since that is not their role. However, they can find whether the state has met its legal obligations and order it to do so.

[82] ibid.
[83] Karinne Lantz, 'What a Dutch Supreme Court decision on climate change and human rights means for Canada', *The Conversation*, 4 October 2020, at: https://theconversation.com/what-a-dutch-supreme-court-decision-on-climate-change-and-human-rights-means-for-canada-146383
[84] *Demir & Baykara v. Turkey* App no 34503/97, (ECtHR GC, 12 Nov 2008) §§85, 86
[85] James R. May and Erin Daly, *Global Environmental Constitutionalism* (Cambridge University Press 2015), 1
[86] Lord Carnwath, *Human Rights and the Environment* (Dublin, 20 June 2019); and Ceri Warnock, 'The Urgenda Decision: Balances constitutionalism in the face of climate change?' OUP Blog, 22 July 2015, at: https://blog.oup.com/2015/07/urgenda-netherlands-climate-change/

The *Urgenda* case highlights the ambiguity of signing international treaties and agreements since the 1970s that urge the need for action against climate change because of its dangers to all of the world's citizens while at the same time not providing adequate reasons for continuing to backtrack on promises to cut emissions. The Dutch government had earlier promised more significant cuts but then reduced its pledges without explanation. The court therefore declared that the state had failed to explain this, or why a smaller reduction was considered responsible in the EU context, in contrast to the 25–40% reduction in 2020: 'which is internationally broadly supported and is considered necessary'.[87] As noted above, even though the Paris Agreement does not contain any legal sanctions, it is a binding treaty under international law and will be considered in assessments of states' duties. Appealing to states' contractual obligations under international law, rather than arguing an infringement of the right per se, proved effective in the *Urgenda* case.

The arguments in the case of the six Portuguese youths use similar reasoning and refer-in great detail to the agreements that states have made, such as the collective goal of a less than 2°C temperature rise, and to national action plans that are consistent with the 'highest possible ambition'.[88] It emphasizes international treaty obligations:

> *Each of the respondents has known that global heating has threatened lives for decades. Since 1992, when they signed the Climate Change Convention, Argentina, Brazil, France, Germany, and Turkey have undertaken to protect children such as the petitioners from the foreseeable threats of climate change. It was clear then that every metric tonne of CO_2 that they emitted, or permitted, was adding to a life-threatening situation. In signing the 2015 Paris Agreement, each respondent further acknowledged the 'urgent threat' of climate change in its Preamble.…Knowing these consequences, each of the respondents has endangered and continues to endanger the lives of the petitioners by perpetuating and exacerbating climate change. Not one of the respondents is on an emissions pathway that is consistent with safe levels established by the best available scientific evidence.…*[89]

There is a consensus among climate scientists and scholars that the climate threat will almost certainly intensify. Despite the need and pledges to be more ambitious, the UN has warned that most states have sidestepped the commitments they made in the Paris Agreement. Most states have not succeeded in cutting emissions significantly, while some states' emissions are still increasing.[90] In 2021 several states are likely to be found to have inadequate climate action plans that are far from the goals

[87] Supreme Court of the Netherlands (note 34), summary of the decision
[88] UNFCC Paris Agreement (note 13), art. 4(3)
[89] CRC (note 58), §§255, 256

[90] UNEP, *Emissions Gap Report 2019*, Nairobi, 2019, xiii, at: https://wedocs.unep.org/bitstream/handle/20.500.11822/30797/EGR2019.pdf?sequence=1&isAllowed=y

agreed in Paris in 2015. These huge deficits are undoubtedly a big problem and will also inevitably be the cause of more climate litigation by frustrated citizens.

Conclusions

This paper has discussed how inaction on the climate crisis has caused a new global phenomenon, in which an increasing number of citizens are using a rights-based approach to question whether a state's inaction on climate change is in line with its international contractual obligations. It has shown how the climate issue has transcended judicial forums and put the question of accountability at the core. It also investigates the obligations that can be found in fundamentals rights, such as the right to life, and asked whether these obligations are extensive enough to include environmental protection against the effects of climate change. By putting legal obligations at the centre of this paper, the author sheds light on the more far-reaching consequences of this legal phenomenon and what is needed for it to flourish.

International obligations related to the universal right of life mean that states have an positive obligation to take effective measures to prevent and address the impacts of climate change, and to ensure effective adaptation to the climate crisis in line with the international consensus on climate mitigation measures. The promises made in international agreements with regard to action on climate change can now be proven to contain genuine, binding obligations. We are now at a tipping point in the global rise of climate litigation. As cases expand, both in number and geographically, a more rigid turn to human rights-based arguments and remedies can be observed, and several recent and ongoing cases illustrate that the courts have become more receptive to the relevance of human rights when discussing states' actions in this context. Similar patterns and even explicit cross-references are now observable in many different cases in different jurisdictions.

This paper has further demonstrated the potential for using human rights-based arguments in a climate change litigation context. Because of their universality, rights-based arguments are likely to encourage similar cases in other jurisdictions. Given the treaties' widespread adoption, and similarities in the formulation of rights across different legal instruments, human rights are particularly suitable as a basis for the development of transnational climate change jurisprudence. It is probable that the turn towards the use of human rights has been one of the most important factors in successful climate change-related litigation.

The growing number of climate litigation cases in numerous courts around the world highlights a new trend in both human rights and the fight against climate change. It is also a testament to the commitment of citizens to hold their governments accountable for their lack of concrete and effective action. While climate litigation has been around for quite some time, and experienced a breakthrough with the *Urgenda* case, it is only now that some of the effects of these cases can be seen. Nonetheless, we are yet to see the full implications of climate litigation. The spread

of these cases and their effects remain limited and pressure is not being put on states to act according to their human rights obligations. It is well known that states are reluctant to be forced to change their policies on human rights, and state sovereignty still an important feature of international politics. For climate litigation to be as effective as it can be, the key to future success is to learn from the winning arguments in landmark cases such as *Urgenda*, which highlight the importance of international consensus and establishing precedent step by step by bringing more cases to court on the threat of climate change to basic human rights. If such cases multiply, they could potentially start to become the norm. However, while we are now at a tipping point in climate litigation, it is still unclear what the future holds.

While the implications of successful climate litigation will at first be mainly for the human rights and judicial spheres, various parts of society could be affected in other ways. It is therefore important to understand the effects of using the existing judicial and legal provisions to compel climate action. The trend for seeking environmental justice through human rights instruments could diffuse to other aspects of society. This could have implications for international law and policy, from the local, national or regional courts and legislation, to worldwide institutions such as the United Nations. We are currently witnessing the consequences of decisions made in domestic courts. However, as argued above, by using a human rights-based approach, based on rights such as the right to life which are universal, there is an implication that the same environmental rights exist in all nations even if not all states incorporate them or accept the rights-based implications. These court cases may therefore eventually affect government policy, national action plans, corporations and individuals both in the litigators' countries and in other states. They could also affect UN committees and conventions, EU law, climate treaties, and the general norms and regulations on greenhouse gas emissions, since all these are linked. Ultimately, the whole of society could be affected.

It is entirely possible that the phenomenon of climate litigation will have these effects, but there is still a long way to go until it is probable. A greater effect from current and future cases can only be achieved through thorough and careful litigation, which puts the responsibility and accountability on the state to fulfil its promises at the core. The biggest hurdle on the road to fighting climate change remains that while the environmental wrongdoings of just one state can have a negative effect on the lives and health of all the people on this planet, it takes action by almost every state in the international community to significantly reduce the effects and consequences of climate change. A connection made by the UN Human Rights Committee on the relevance of the right to life in climate issues has important ramifications, but this is fundamentally different from a court identifying binding legal obligations and imposing compliance with those obligations on a specific state. That is a leap from theory to practice, and it has paved the way to significant results on the global mitigation of the climate crisis.

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